

JUDGMENT OF THE COURT OF FIRST INSTANCE

10 July 1990 *

In Case T-51/89

Tetra Pak Rausing SA, whose registered office is at Pully-Lausanne (Switzerland), represented by Michel Waelbroeck, of the Brussels Bar, and Christopher W. Bellamy QC, barrister of Gray's Inn, having an address for service in Luxembourg at the Chambers of Ernest Arendt, 34 rue Philippe-II,

applicant,

v

Commission of the European Communities, represented initially by Luis Miguel Antunes and Adam Blomefield and subsequently by Julian Currall and Adam Blomefield, all members of its Legal Department, having an address for service at the office of Georgios Kremis, also a member of the Commission's Legal Department, Wagner Centre, Kirchberg,

defendant,

APPLICATION for a declaration that Commission Decision 88/501/EEC of 26 July 1988 (Official Journal 1988 L 272, p. 27) relating to a proceeding under Articles 85 and 86 of the EEC Treaty (IV/31.043 — Tetra Pak I (BTG licence)) is void,

THE COURT OF FIRST INSTANCE

composed of: J. L. Cruz Vilaça, President, D. Barrington, A. Saggio, D. A. O. Edward (Presidents of Chambers), C. Yeraris, R. Schintgen, C. P. Briët, B. Vesterdorf, R. García-Valdecasas, J. Biancarelli and K. Lenaerts, Judges,

* Language of the case: English.

Advocate General: H. Kirschner
Registrar: H. Jung

having regard to the written procedure and further to the hearing on 14 December 1989,

after hearing the Opinion of the Advocate General delivered at the sitting on 21 February 1990,

gives the following

Judgment

Facts and procedure

- 1 By decision of 26 July 1988 (Official Journal 1988 L 272, p. 27) ('the Decision') the Commission found that, by acquiring, through its purchase of the Liquipak Group, the exclusivity of the patent licence granted on 27 August 1981 by the National Research and Development Council to Novus Corp., a company in the Liquipak group, Tetra Pak Rausing SA was in breach of Article 86 of the EEC Treaty from the date of that acquisition until the exclusivity came to an end.
- 2 The Decision involves the sector concerned with the packaging of liquid foods, especially milk, in cartons. There are two distinct types of such packaging. Ultra-high-temperature(UHT)-treated milk is filled by special machines into cartons which are sterilized, then sealed immediately after filling, by the machines under strictly aseptic conditions. The packaging of fresh pasteurized milk does not require the same degree of sterility and so calls for less sophisticated equipment.
- 3 The company to which the Decision is addressed, Tetra Pak Rausing SA ('Tetra Pak'), whose registered office is in Switzerland, coordinates the policy of a group of companies world-wide specializing mainly in equipment for the packaging of milk in cartons. Tetra Pak's activities cover the sector concerned with the

packaging of fresh and UHT-treated milk. They consist essentially of manufacturing cartons and carton-filling machines using the group's own technology. In the field of aseptic packaging, Tetra Pak supplies the 'Tetrabrik' system. In the field of fresh products, it also distributes machines made by a number of other manufacturers.

In 1985 the group, which has manufacturing and distribution subsidiaries in all EEC Member States except Luxembourg and Greece, had nearly half its total turnover — amounting to approximately ECU 2 000 million — in the European Economic Community. In the same year the group's share of the Community market was approximately 90% in the field of aseptic packaging and 50% in fresh milk packaging.

- 4 Before it was taken over by Tetra Pak, the Liquipak group was owned or controlled by the Allpak group of Canada and a private individual. It specializes in the development and manufacture of filling equipment for liquid food products.

- 5 The Elopak group is Norwegian in origin and is mainly engaged in Europe. In 1987, it had a turnover of around ECU 300 million. Although its activities are essentially in the fresh milk sector, particularly in the supply of 'gable-top' cartons where its main competitor is Tetra Pak, Elopak was also Liquipak's exclusive distributor for its machines for pasteurized milk and also for any machine to be developed for UHT-treated milk. Elopak helped Liquipak in its efforts to develop a new packaging machine incorporating the process protected by the exclusive licence at issue in this case.

That exclusive licence relates to a new UHT milk-packaging process involving the use of ultra-violet light which makes it possible to use a weak solution of hydrogen peroxide in combination with heat, as opposed to the processes hitherto applied in the Community which use a combination of concentrated hydrogen peroxide and heat. Unlike the processes used in the aseptic packaging machines currently on the market, this technique for use in carton-filling machines can be adapted for both 'brick' and 'gable-top' cartons. The current machines are not suitable for use with

gable-top cartons on which, as the Decision says, Elopak has concentrated its development efforts and for which it has the most know-how.

- 6 The exclusive licence at issue was granted, with effect from 27 August 1981, to Novus Corp. by the National Research and Development Council, whose activities have been taken over by the British Technology Group ('BTG'). The licence relates to the patents covering BTG's new sterilization technique and the relevant know-how. Within the Community, patents have been granted in Ireland, Spain and Belgium. A patent application is pending in Italy and an application has been filed under the European Patent Convention for *inter alia* the United Kingdom, France, the Federal Republic of Germany and the Netherlands.

The exclusive licence qualified for block exemption under Commission Regulation (EEC) No 2349/84 of 23 July 1984 on the application of Article 85(3) of the Treaty to certain categories of patent licensing agreements (Official Journal 1984 L 219, p. 15), subject always to Article 9 of that regulation, which provides that the Commission may withdraw exemption where the conditions laid down in Article 85(3) of the Treaty are not fulfilled.

In 1986 Tetra Pak acquired the United States company Lquipak International Inc. As part of the same transaction, it also acquired the companies in the Lquipak group to which Novus Corp. had in 1983 assigned the BTG licence. At the time of Lquipak's takeover by Tetra Pak, the new version of the machine incorporating the BTG process, developed by Lquipak with the assistance of Elopak, had not yet been tested in practice. Following the announcement of Tetra Pak's takeover of Lquipak, Elopak brought its collaboration to an end. Elopak considered that the machine was very nearly operational. Tetra Pak considered that further major and costly research was required before the BTG technique could be exploited.

- 7 As regards the companies' position on the market, it appears from the Decision that at the material time only two undertakings — Tetra Pak and PKL, a subsidiary of the German group Rheinmetall AG — were to any significant extent in a position to market aseptic milk-packaging machines in the Community. For the technical reasons mentioned above and also because, in practice, the manufac-

turers of aseptic machines also manufacture the cartons for their own machines, possession of an aseptic-filling technique is the key to market entry both for packaging equipment and for cartons.

- 8 On 26 June 1986, the Elopak group made a complaint to the Commission pursuant to Article 3 of Regulation No 17 of the Council of 6 February 1962, the first regulation implementing Articles 85 and 86 of the Treaty (Official Journal, English Special Edition 1959-62, p. 87), with a view to establishing that Tetra Pak had infringed Articles 85 and 86 of the EEC Treaty. After service of a statement of objections by the Commission on 3 March 1987 and a hearing on 25 July 1987, Tetra Pak informed the Commission by letter of 26 November 1987 that it was abandoning all claims to exclusivity in the BTG licence. Although the infringement to which objection had been taken was brought to an end in the course of the administrative procedure, the Commission considered that a finding of infringement should be made by formal decision with a view, *inter alia*, to clarifying its position on the relevant point of law. But since the point raised was unprecedented, no fine was imposed on Tetra Pak.

In its Decision, the Commission considers in turn the application of Article 86 and of Article 85. With regard to Article 85, the Commission sets out the reasons which would have entitled it to withdraw the benefit of exemption from the exclusive licence for so long as there was an infringement of Article 86.

At the end of its discussion of Article 86, the Commission concludes that 'Tetra abused its dominant position by the acquisition of [the BTG] exclusive licence which had the effect of strengthening its already dominant position, further weakening existing competition and rendering even more difficult the entry of any new competition' (point 60 of the Decision).

- 9 These are the circumstances in which, by application lodged at the Registry of the Court of Justice on 11 November 1988, Tetra Pak has sought annulment of the Decision. The written procedure took place entirely before the Court of Justice.

Pursuant to Articles 3(1) and 14 of the Council Decision of 24 October 1988 establishing a Court of First Instance of the European Communities, the Court of Justice referred the case to the Court of First Instance by order of 15 November

1989. On 16 November 1989 the Court of First Instance decided that the case should be heard in plenary session. Under the third paragraph of Article 2 of the aforesaid Council decision, the President of the Court of First Instance appointed an Advocate General.

On the report of the Judge-Rapporteur, the Court decided to open the oral procedure without any preparatory inquiry. The parties presented oral argument at the hearing on 14 December 1989 and the Advocate General delivered his opinion at the sitting on 21 February 1990.

Conclusions of the parties

10 The applicant, Tetra Pak, claims that the Court should

(1) annul the Commission's decision of 26 July 1988 relating to a proceeding under Articles 85 and 86 of the EEC Treaty (IV/31.043 — Tetra Pak I (BTG licence));

(2) order the Commission to pay the costs.

The defendant, the Commission of the European Communities, contends that the Court should

(1) dismiss the application as unfounded;

(2) order the applicant to pay the costs.

Delimitation of the legal scope of the application

11 Before developing the arguments in support of the conclusions, the application limits the scope of the dispute. In a preliminary section, before presenting the sole ground of action, the applicant says that since it has voluntarily renounced the exclusivity of the licence 'there would be little interest in pursuing before the Court in this case its detailed arguments on the existence of dominance and the insignificance of the Liquepak technology...'. The application confines itself to contesting the Commission's Decision of 26 July 1988 solely on the question of

law as to whether Article 86 can be applied where exemption has been granted under Article 85(3). Furthermore, the applicant expressly confirmed at the hearing that the application is intended solely to resolve a question of law and that it is therefore unnecessary, given that delimitation of the scope of the dispute, to go into the facts underlying the finding in the Decision that the applicant abused a dominant position.

12 The defendant has acted on the basis of the applicant's delimitation of the legal scope of the dispute.

13 Accordingly, it is for this Court to review the legality of the decision solely in the light of the issues raised by Tetra Pak in its application. The sole ground of action is the alleged infringement of Article 85(3) and Article 86 by the Commission in applying Article 86 to an agreement exempt under Article 85(3). The Court will therefore deal only with the arguments advanced in support of the applicant's ground of action, as described above, and will not enter upon any examination of the correctness of the Commission's analysis of the facts of the case leading it to find a breach of Article 86. Since the applicant has not challenged the substantive aspects of the stated reasons for the Decision, they are not in issue in these proceedings.

The sole ground of action: infringement of Article 85(3) and of Article 86 of the Treaty

14 Tetra Pak challenges the Decision on the ground that it is contrary to Article 85(3) and Article 86 that the Commission should treat an agreement enjoying block exemption under Article 85(3) as prohibited under Article 86. The challenge is developed under three heads. The applicant relies, first, on a schematic analysis of the relevant rules of the Treaty and secondary sources; second, on the principle of legal certainty; and third, on the principle of the uniform application of Community law.

(a) *Schematic analysis of Articles 85 and 86 of the Treaty and of secondary legislation*

- 15 The applicant maintains that the Commission cannot apply Article 86 to behaviour exempt under Article 85(3) because Articles 85 and 86 both pursue the same objective. The applicant relies on the judgment of the Court of Justice in *Continental Can* where it was stated that 'Articles 85 and 86 cannot be interpreted in such a way that they contradict each other, because they serve to achieve the same aim' (Case 6/72 *Europemballage and Continental Can v Commission* [1973] ECR 215, paragraph 25). Conduct cannot both be expressly authorized under Article 85(3) and prohibited under Article 86 since exemption involves 'positive action', as the Court put it in Case 14/68 *Walt Wilhelm v Bundeskartellamt* [1969] ECR 1, paragraph 5, though that case was concerned with the relationship between Article 85(3) and national rules on competition.
- 16 In support of that argument, the applicant claims that the finding against it in the Decision relates essentially to the exclusivity granted by the licensing agreement. The applicant goes on to argue that the Commission based the application of Article 86 on a distinction, for which there is no justification in competition law, between an exclusive licence enjoying block exemption on the one hand and, on the other, acquisition of the exclusivity afforded by the licence through takeover of a competing company (in this case *Liquipak*), such acquisition having been held in the Decision to constitute infringement of Article 86. Both, according to the applicant, have the same restrictive effects on competition.
- 17 The applicant further argued at the hearing that since, on this view, Article 86 cannot be applied to an agreement enjoying exemption under Article 85(3), the fact that an undertaking in a dominant position becomes party to an agreement enjoying such exemption cannot constitute an abuse within the meaning of Article 86 unless a supplementary element, extrinsic to the agreement and attributable to the undertaking, is present. The applicant relied in this connection on *Ahmed Saeed* where the Court of Justice said that there may be abuse of a dominant position where, in particular, an undertaking in a dominant position succeeds in imposing unfair contractual conditions on competitors or customers (Case 66/86 *Ahmed Saeed Flugreisen and Another v Zentrale zur Bekämpfung unlauteren Wettbewerbs* [1989] ECR 803, in particular paragraphs 37, 42 and 46).
- 18 The applicant points out that the inapplicability of Article 86 to an exempt agreement does not jeopardize achievement of the objectives of Article 86 since it

is always within the discretion of the Commission to withdraw the exemption. In support of its view that the application of Article 86 is conditional on the prior withdrawal of exemption, Tetra Pak cites Article 7(2) of Council Regulation (EEC) No 3976/87 of 14 December 1987 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector (Official Journal 1987 L 374, p. 9) and Article 8(2) of Council Regulation (EEC) No 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport (Official Journal 1986 L 378, p. 4). Under these regulations, where an agreement enjoying block exemption nevertheless has effects prohibited by Article 86, the Commission may withdraw the benefit of the exemption and take all appropriate steps to bring the infringement of Article 86 to an end.

19 The applicant 'accepts that there is no express exemption for the prohibition under Article 86' (reply, Section III). But, in support of its view that Article 86 is inapplicable to conduct exempt under Article 85(3), it puts forward an interpretation of the conditions for applying Article 86 based on the general scheme of Article 85. This interpretation leads in reality to accepting that there can be an implied exemption in respect of abuse of a dominant position. In determining whether conduct constitutes an abuse, one must, the applicant argues, 'impliedly undertake the two-stage process which is made explicit in Article 85, namely . . . ask does the conduct have the object or effect of preventing, restricting or distorting competition within the common market, and, if so, does the conduct nevertheless have overall a pro-competitive effect because it contributes to promoting technical or economic progress?'

20 In reply to this schematic analysis developed by Tetra Pak, the Commission deploys an argument based on a different interpretation of Articles 85 and 86. In particular, referring to the Advocate General's Opinion in *Abmed Saeed*, the Commission argues that since no abuse can be authorized in a Community governed by the rule of law, there can be no derogation from the prohibition of abuse of a dominant position (first Opinion, delivered on 28 April 1988 [1989] ECR 818, paragraph 41). The Commission points out that in the judgment in that case the Court of Justice expressly stated that no exemption may be granted in respect of an abuse of a dominant position (judgment in Case 66/86 *Abmed Saeed*, cited above, paragraph 32). It concludes that the applicant's argument, that Article 86 is inapplicable to an agreement exempt under Article 85(3) so long as the Commission has not withdrawn the exemption, cannot be accepted since that

would be tantamount to recognizing the existence of exemption for abuse of a dominant position, withdrawal of exemption being effective only *ex nunc*.

21 This Court notes at the outset that the problem of reconciling application of Article 86 with enjoyment of block exemption, which is the crux of the present case and arises because of the need for logical coherence in the implementation of Articles 85 and 86, has not yet been expressly determined by the Community Court. However, it must be borne in mind that the relationship between Articles 85 and 86 has, to an extent, been clarified by the Court of Justice, in that the Court has expressly said that the applicability to an agreement of Article 85 does not preclude application of Article 86. The Court held that in such a case the Commission may apply either of the two provisions to the act in question: 'the fact that agreements . . . might fall within Article 85 and in particular within paragraph 3 thereof does not preclude the application of Article 86 . . . so that in such cases the Commission is entitled, taking into account the nature of the reciprocal undertakings entered into and the competitive position of the various contracting parties on the market or markets on which they operate, to proceed on the basis of Article 85 or Article 86' (Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461, paragraph 116). The Court of Justice confirmed that position in *Ahmed Saeed* where it said that, in certain circumstances, 'the possibility that Articles 85 and 86 may both be applicable cannot be ruled out' (judgment in Case 66/86, cited above, paragraph 37). But the problem raised in *Ahmed Saeed*, as far as the relationship between Articles 85 and 86 is concerned, was the question of principle as to whether implementation of an agreement capable of falling under Article 85(1) can also constitute abuse of a dominant position (paragraph 34). The relationship between exemption under Article 85(3) and the applicability of Article 86 was not at issue.

22 Resolution of the problem of reconciling application of Article 86 with exemption under Article 85(3) must therefore start from the Treaty system for the protection of competition, in particular as laid down by those two articles of the Treaty and their implementing regulations. Articles 85 and 86 are complementary inasmuch as they pursue a common general objective, set out in Article 3(f) of the Treaty, which provides that the activities of the Community are to include 'the institution of a system ensuring that competition in the common market is not distorted'. But they none the less constitute, in the scheme of the Treaty, two independent legal instruments addressing different situations. This was emphasized by the Court of

Justice in *Continental Can* where, having said that 'Article 85 concerns agreements between undertakings, decisions of associations of undertakings and concerted practices, while Article 86 concerns unilateral activity of one or more undertakings', the Court held that 'Articles 85 and 86 seek to achieve the same aim on different levels, namely, the maintenance of effective competition within the common market' (judgment in Case 6/72, cited above, paragraph 25).

- 23 Turning to the specific nature of the conduct whose compatibility with Article 86 is considered in the Decision, this Court holds that the mere fact that an undertaking in a dominant position acquires an exclusive licence does not *per se* constitute abuse within the meaning of Article 86. For the purpose of applying Article 86, the circumstances surrounding the acquisition, and in particular its effects on the structure of competition in the relevant market, must be taken into account. This interpretation is borne out by the case-law of the Court of Justice, in which the concept of abuse is defined as 'an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition' (judgment in Case 85/76 *Hoffmann-La Roche*, cited above, paragraph 91). So, here, the Commission was right not to put in issue the exclusive licence as such, but rather to object specifically under Article 86 to the anti-competitive effect of its being acquired by the applicant. It is plain from the reasoning and conclusions of the Decision that the infringement of Article 86 found by the Commission stemmed precisely from Tetra Pak's acquisition of the exclusive licence 'in the specific circumstances of this case'. The specific context to which the Commission refers is expressly characterized as being the fact that acquisition of the exclusivity of the licence not only 'strengthened Tetra's very considerable dominance but also had the effect of preventing, or at the very least considerably delaying, the entry of a new competitor into a market where very little if any competition is found' (point 45 of the Decision; see also point 60). The decisive factor in the finding that acquisition of the exclusive licence constituted an abuse therefore lay quite specifically in the applicant's position in the relevant market and in particular, as appears from the Decision (point 27), in the fact that at the material time the right to use the process protected by the BTG licence was alone capable of giving an undertaking the means of competing effectively with the applicant in the field of the aseptic packaging of milk. The takeover of Liquipak was no more than the means—to which the Commission has attached no

particular significance in applying Article 86 — by which the applicant acquired the exclusivity of the BTG licence, the effect of which was to deprive other undertakings of the means of competing with the applicant.

24 Similarly, the applicant's argument that there must be a supplementary element, external to the agreement, cannot be accepted. In this connection, it is relevant to note that in *Abmed Saeed*, to which the applicant refers, the Court of Justice held that 'the application of tariffs for scheduled flights on the basis of bilateral or multilateral agreements may, in certain circumstances, constitute an abuse of a dominant position on the market in question, in particular where an undertaking in a dominant position has succeeded in imposing on other carriers the application of excessively high or excessively low tariffs or the exclusive application of only one tariff on a given route' (judgment in Case 66/86, cited above, paragraph 46). It is true that the Court of Justice justified the concurrent application of Articles 85 and 86 to the tariff agreements there at issue by referring to the existence of a supplementary element, which in that case took the form of pressure brought to bear by the undertaking on its competitors. But the Decision in the present case does refer to the additional element that constituted an abuse within the meaning of Article 86 and justified its application. The additional element lies in the very context of the case — in the fact that Tetra Pak's acquisition of the exclusive licence had the practical effect of precluding all competition in the relevant market. This was emphasized in the Decision and was not put in issue by the applicant.

25 In these circumstances, this Court holds that in the scheme for the protection of competition established by the Treaty the grant of exemption, whether individual or block exemption, under Article 85(3) cannot be such as to render inapplicable the prohibition set out in Article 86. This principle follows both from the wording of Article 85(3) which permits derogation, through a declaration of inapplicability, only from the prohibition of agreements, decisions and concerted practices set out in Article 85(1), and also from the general scheme of Articles 85 and 86 which, as noted above, are independent and complementary provisions designed, in general, to regulate distinct situations by different rules. Application of Article 85 involves two stages: a finding that Article 85(1) has been infringed followed, where appropriate, by exemption from that prohibition if the agreement, decision or concerted practice in question satisfies the conditions laid down in Article 85(3). Article 86, on the other hand, by reason of its very subject-matter (abuse), precludes any possible exception to the prohibition it lays down (see the judgment in Case 66/86

Abmed Saeed, cited above, paragraph 32). If the Commission were required in every case to take a decision withdrawing exemption before applying Article 86, this would be tantamount, in view of the non-retroactive nature of the withdrawal of exemption, to accepting that an exemption under Article 85(3) operates in reality as a concurrent exemption from the prohibition of abuse of a dominant position. For the reasons just given, that would not be consistent with the very nature of the infringement prohibited by Article 86. Moreover, in view of the principles governing the hierarchical relationship of legal rules, grant of exemption under secondary legislation could not, in the absence of any enabling provision in the Treaty, derogate from a provision of the Treaty, in this case Article 86.

- 26 Having established that, in principle, the grant of exemption cannot preclude application of Article 86, the question remains whether, in practice, findings made with a view to the grant of exemption under Article 85(3) preclude application of Article 86.
- 27 Under Article 85(3), the prohibition laid down in Article 85(1) may be declared inapplicable to agreements, decisions or concerted practices, or to categories thereof, which fulfil the conditions set out in Article 85(3). Article 85(3) provides *inter alia* that the agreement must not afford the undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.
- 28 The way in which the question of exemption arises may in practice be different depending on whether an individual or block exemption is involved. The grant of individual exemption presupposes that the Commission has found that the agreement in question complies with the conditions set out in Article 85(3). So, where an individual exemption decision has been taken, characteristics of the agreement which would also be relevant in applying Article 86 may be taken to have been established. Consequently, in applying Article 86, the Commission must take account, unless the factual and legal circumstances have altered, of the earlier findings made when exemption was granted under Article 85(3).

- 29 Now it is true that regulations granting block exemption, like individual exemption decisions, apply only to agreements which, in principle, satisfy the conditions set out in Article 85(3). But unlike individual exemptions, block exemptions are, by definition, not dependent on a case-by-case examination to establish that the conditions for exemption laid down in the Treaty are in fact satisfied. In order to qualify for a block exemption, an agreement has only to satisfy the criteria laid down in the relevant block-exemption regulation. The agreement itself is not subject to any positive assessment with regard to the conditions set out in Article 85(3). So a block exemption cannot, generally speaking, be construed as having effects similar to negative clearance in relation to Article 86. The result is that, where agreements to which undertakings in a dominant position are parties fall within the scope of a block-exemption regulation (that is, where the regulation is unlimited in scope), the effects of block exemption on the applicability of Article 86 must be assessed solely in the context of the scheme of Article 86.
- 30 Lastly, the possibility of applying Article 86 to an agreement covered by a block exemption is confirmed by analysis of the scheme of the block-exemption regulations. First, those regulations do not, in principle, exclude undertakings in a dominant position from qualifying for exemption and therefore do not take account of the position on the relevant markets of the parties to any given agreement. That is particularly so in the case of Regulation No 2349/84 on exemptions in respect of patent licensing agreements (cited above) which is relevant in this case. Second, the possibility of applying Article 85(3) and Article 86 concurrently is expressly confirmed by certain of the block-exemption regulations where it is provided that enjoyment of block exemption does not preclude application of Article 86 — in particular, the three block-exemption regulations in the field of air transport adopted by the Commission on 26 July 1988, each of which states expressly in the preamble that group exemption does not preclude the application of Article 86. (The relevant regulations are Regulation (EEC) No 2671/88 on the application of Article 85(3) of the Treaty to certain categories of agreements between undertakings, decisions of associations of undertakings and concerted practices concerning joint planning and coordination of capacity, sharing of revenue and consultations on tariffs on scheduled air services and slot allocation at airports, Regulation (EEC) No 2672/88 on the application of Article 85(3) of the Treaty to certain categories of agreements between undertakings relating to computer reservation systems for air transport services and Regulation (EEC) No 2673/88 on the application of Article 85(3) of the Treaty to certain categories of agreements between undertakings, decisions of associations of under-

takings and concerted practices concerning ground handling services (Official Journal 1988 L 239, pp. 9, 13 and 17, respectively.) Similarly, Article 8(1) of Council Regulation No 4056/86, cited above, states expressly that abuse of a dominant position within the meaning of Article 86 is prohibited, no prior decision to that effect being required.

31 It follows from all the foregoing considerations that the first head of argument in support of the sole ground of action, based on a schematic analysis of Article 85(3) and Article 86, is unfounded.

(b) *The principle of legal certainty*

32 In support of its analysis of the relationship between Article 85(3) and Article 86 which seeks to show that application of Article 86 to an agreement exempt under Article 85(3) is inconceivable in principle, the applicant invokes the principle of legal certainty. The argument is that, interpreted in the light of the principle of legal certainty, Articles 85 and 86 require that conduct exempt under Article 85(3) cannot be prohibited under Article 86. The balance between guaranteeing legal certainty for undertakings and maintaining effective competition is secured, on this argument, by the Commission's power to withdraw the benefit of the exemption.

33 In that connection the applicant stresses that the grant of exemption, coupled with the Commission's power to withdraw the benefit of the exemption, gives undertakings a legitimate expectation that they will not be found to have infringed Articles 85 and 86 so long as the Commission has not taken a decision to withdraw the exemption.

34 The applicant considers, contrary to the Commission, that legal certainty cannot be secured by the undertaking applying for negative clearance. The need to make such an application would undermine the efficacy of the block exemption, one of whose primary functions is to enable undertakings to conclude and implement

agreements without consulting the Commission. The fact that negative clearance does not afford the same degree of certainty as exemption is shown by the inclusion amongst agreements exempted under Regulation No 2349/84, cited above, of certain agreements which would not normally fall within Article 85(1). The Commission justified that solution on the ground of the need for legal certainty for the undertakings concerned (paragraph 18 of the preamble and Article 2 of the regulation). More specifically the applicant points out that an application for negative clearance does not preclude the imposition of a fine in respect of conduct subsequent to the application but prior to the decision finding the infringement (Commission Decision 85/79/EEC of 14 December 1984, *John Deere*, Official Journal 1985 L 35, p. 58, point 38). Furthermore, the applicant continues, the agreement may be unenforceable in national courts pending the Commission's investigation. Finally, negative clearance is not binding on national courts.

- 35 The Commission argues, to the contrary, that the block-exemption system, including the rules prompted by considerations of legal certainty for undertakings, is concerned only with application of Article 85. Article 86 establishes a prohibition which applies from the date on which the infringement is committed and, as the Court pointed out in *Hoffmann-La Roche* (Case 85/76, cited above, paragraph 134), legal certainty can be ensured as regards the application of that provision by an application for negative clearance under Article 2 of Regulation No 17, cited above.
- 36 The Court of Justice has consistently endorsed the principles of legal certainty and legitimate expectation, by virtue of which the effect of Community legislation must be clear and predictable for those who are subject to it (Joined Cases 212/80 to 217/80 *Amministrazione delle finanze dello Stato v Salumi* [1981] ECR 2735, paragraph 10; with regard more specifically to competition law see, in particular, Case 13/61 *De Geus v Bosch & van Rijn* [1962] ECR 45, at p. 52, and Joined Cases 209/84 to 213/84 *Ministère public v Asjes and Others ('Nowvelles Frontières')* [1986] ECR 1425, paragraph 64).
- 37 The question therefore is whether the application of Article 86 becomes unpredictable whenever an agreement fulfils the conditions for block exemption. This Court accepts that, apart from considerations of administrative simplification, one of the main purposes of block exemption is to secure legal certainty for the parties to an agreement as regards the validity of that agreement under Article 85 so long as the Commission has not withdrawn the benefit of block exemption. But that

does not discharge undertakings in a dominant position from the obligation to comply with Article 86. On the contrary, the Court of Justice held in Case 322/81 *Michelin v Commission* [1983] ECR 3461 that any undertaking in a dominant position has 'a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market' (paragraph 57). Accordingly, an undertaking cannot rely on the alleged unpredictability of the application of Article 86 in order to escape the prohibition there laid down.

38 In any event, as far as the present case is concerned, although the requirements of legal certainty could not prevent Article 86 being applied to the applicant's acquisition of the exclusive licence, they did none the less prompt the Commission to mitigate the consequences of the infringement for the applicant. The Commission took into account 'the fact that the contraventions . . . were relatively novel' by not imposing a fine on the applicant (paragraph 2 of point 62 of the Decision).

39 For all of those reasons the second head of the applicant's argument is unfounded.

(c) *The principle of the uniform application of Community law*

40 Thirdly, the applicant bases its case on the principle of the uniform application of Community law. The applicant points out that if Article 86 were to apply to conduct enjoying block exemption then, applying the principle of the direct effect of Article 86 confirmed by the Court of Justice in Case 127/73 *BRT v Sabam* [1974] ECR 51, national courts would have jurisdiction to prohibit under Article 86 conduct exempted by the Commission. Such a situation would, in the applicant's submission, prejudice the uniform application of Community law whose importance the Court of Justice emphasized in Case 14/68 *Walt Wilhelm v Bundeskartellamt*, cited above, paragraph 9. The applicant therefore argues that the only interpretation of the relationship between Article 85(3) and Article 86 which is consistent with the principle of the uniform application of Community law is to hold that application of Article 86 is incompatible with exemption.

- 41 The Commission observes that the argument relating to the uniform application of Community law is really based on Tetra Pak's main claim that Article 86 cannot apply to behaviour covered by an exemption and accordingly that the applicant's premiss is unsound. Further, the application of Community law by national authorities is a secondary consideration and purely hypothetical in the present case. In any event, the uniform implementation of Community law can be ensured, where there is a block exemption, by recourse to Article 177 of the Treaty.
- 42 On this question, the Court finds a consistent line of case-law to the effect that 'the prohibitions of Article 86 have a direct effect and confer on interested parties rights which the national courts must safeguard' (Case 155/73 *Sacchi* [1974] ECR 409, paragraph 18; see also Case 127/73 *BRT v Sabam*, cited above, paragraph 16, and Case 66/86 *Abmed Saeed*, cited above, paragraph 32 *in fine*). If Community law allows Article 86 to be applied in respect of an agreement exempt under Article 85(3), there is nothing to justify limiting the power of national courts to apply Article 86 on the ground that the practice in question has been granted exemption under Article 85(3). Unlike the case of *Walt Wilhelm* on which the applicant relies, the application of Article 86 with respect to conduct covered by an exemption under Article 85(3) does not call into question the principles of the primacy and uniformity of Community law. On the contrary, when applying Article 86, in particular to conduct exempt under Article 85(3), the national courts are acting as Community courts of general jurisdiction. They will merely be applying — as they are bound to do by virtue of the primacy and direct effect of the Community rules on competition — the principles of Community law governing the relationship between Article 85(3) and Article 86. Accordingly, where a national court applies Article 86 to conduct enjoying exemption under Article 85(3), the uniform application of Community law — in this case, Article 85(3), the provisions implementing it, and Article 86 — is fully guaranteed by the procedure for reference of questions of interpretation for a preliminary ruling under Article 177 of the Treaty.
- 43 Consequently, the third head of the applicant's argument is unfounded.
- 44 In the light of all of the foregoing considerations, the application must be dismissed.

Costs

45 Under Article 69(2) of the Rules of Procedure of the Court of Justice, which under the third paragraph of Article 11 of the Council Decision of 24 October 1988, cited above, are applicable *mutatis mutandis* to the procedure before the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleading. Since the applicant has failed in its sole ground of action, it must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE

hereby:

- (1) Dismisses the application;**
- (2) Orders the applicant to pay the costs.**

Cruz Vilaça

Barrington

Saggio

Edward

Yeraris Schintgen Briet Vesterdorf García-Valdecasas Biancarelli Lenaerts

Delivered in open court in Luxembourg on 10 July 1990.

H. Jung

Registrar

J. L. Cruz Vilaça

President