

# Case T-51/89

## Tetra Pak Rausing SA

v

## Commission of the European Communities

(Competition — Relationship between Articles 85 and 86  
— Block exemption and applicability of Article 86)

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### Summary of the Judgment

1. *Competition — Dominant position — Abuse — Meaning — Acquisition of an exclusive patent licence by an undertaking in a dominant position — Assessment criteria (EEC Treaty, Art. 86)*
2. *Competition — Dominant position — Abuse — Prohibition — Exemption under Article 85(3) — Prohibition not thereby rendered inapplicable (EEC Treaty, Arts 85(3) and 86)*
3. *Competition — Dominant position — Abuse — Prohibition — Taking into account exemption under Article 85(3) — Distinction between individual exemption and block exemption (EEC Treaty, Arts 85(3) and 86)*
4. *Competition — Dominant position — Abuse — Prohibition — Legal certainty secured by a block exemption under Article 85(3) — Limits — Impunity of infringements of Article 86 — None (EEC Treaty, Arts 85(3) and 86)*
5. *Competition — Dominant position — Abuse — Prohibition — Direct effect — Application by national court — Exemption under Article 85(3) — Lack of effect (EEC Treaty, Arts 85(3) and 86)*

1. The mere fact that an undertaking in a dominant position acquires an exclusive patent licence does not *per se* constitute abuse within the meaning of Article 86 of the Treaty. 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.

The acquisition by an undertaking in a dominant position of an exclusive patent licence for a new industrial process constitutes an abuse of a dominant position where it has the effect of strengthening the undertakings's already very considerable dominance of a market where very little competition is found and of preventing, or at least considerably delaying, the entry of a new competitor into that market, since it has the practical effect of precluding all competition in the relevant market.

2. It follows both from the wording of Article 85(3) and from the general scheme of Articles 85 and 86 that 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. Whereas 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, by reason of its very subject-matter (abuse),

precludes any possible exception to the prohibition it lays down.

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.

3. Since where an individual exemption decision has been taken, certain characteristics of the agreement which would also be relevant in applying Article 86 may be taken to have been established, the Commission, in applying Article 86, must take account, unless the factual and legal circumstances have altered, of the earlier findings made when exemption was granted under Article 85(3).

On the other hand, 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 and 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, the effects of block exemption on the applicability of Article 86 must be assessed solely in the context of the scheme of Article 86.

4. Apart from considerations of administrative simplification, one of the 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.

Such an undertaking therefore cannot rely on the principle of legal certainty to argue that the grant of exemption from the prohibition of agreements, decisions and concerted practices, coupled with the Commission's power to withdraw the benefit of the exemption, gives undertakings a legitimate expectation that they

will not be found guilty of any infringement of Article 86 so long as the Commission has not taken a decision to withdraw the exemption.

5. The prohibitions of Article 86 have a direct effect and confer on interested parties rights which the national courts must safeguard. Consequently, 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, since the application of Article 86 does not call into question the principles of the primacy and uniformity of Community law.