II

*(Acts whose publication is not obligatory)*

# COMMISSION

## COMMISSION 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)**

**(Only the English and French texts are authentic)**

(88/501/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty [1], as last amended by the Act of Accession of Spain and Portugal, and in particular Article 3 (1) thereof,

Having regard to 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 [2], as amended by the Act of Accession of Spain and Portugal, and in particular Article 9 thereof,

Having regard to the applications dated 27 September 1983 and 23 and 26 June 1986 made to the Commission pursuant to Article 3 of Regulation No 17 by the Elopak Group to find that the Tetra Pak Group had infringed Articles 85 and 86,

Having regard to the Commission Decision of 24 February 1987 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission, in accordance with Article 19 (1) of Regulation No 17 and with Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Council Regulation No 17 [3],

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas :

### A. THE FACTS

### (a) The parties

*Tetra Pak Group of companies*

(1) The Tetra Pak Group of companies (Tetra) is one of the world leaders in the field of cartons for liquid foods (especially milk), and the equipment and technology for filling these cartons. In 1985 it had a worldwide turnover of around 2 000 million ECU, nearly half of which was in the EEC. Tetra makes cartons for packing both fresh and aseptic liquids. It also has its own technology for both fresh and aseptic filling machines, which it manufactures itself. In addition it distributes machines for certain fresh filling machine manufacturers. Its position in UHT machines is particularly strong since it was one of the first companies to develop the technology in the field of aseptically packed liquids and to produce and sell such products. Tetra has in fact supplied aseptic packaging equipment since 1961 and its aseptic 'Brick' system since 1969.

[1] OJ No 13, 21. 2. 1962, p. 204/62.
[2] OJ No L 219, 16. 8. 1984, p. 15.
[3] OJ No 127, 20. 8. 1963, p. 2268/63.

(2) Tetra, originally Swedish, now has worldwide interests. Group policy is coordinated by Tetra Pak Rausing SA (Pully), Switzerland. In the EEC, Tetra has extensive manufacturing or distribution subsidiaries in all Member States except Greece and Luxembourg. Tetra has acquired the Liquipak Group of companies and had the consent of the British Technology Group to have assigned to it the licence between the National Research and Development Council and Liquipak International BV (see below).

*Elopak Group of companies*

(3) The Elopak Group of companies (Elopak) is Norwegian in origin and is engaged primarily in Europe, but also in Africa and the Middle East, in the manufacture and sale of cartons for use in packaging and distribution in the dairy and food industries. It also supplies and installs systems for filling, packaging and handling these cartons. In 1987 it had a worldwide turnover of around 300 million ECU. Until recently Elopak did not manufacture the filling machines themselves but acted as a distributor for certain filling-machine manufacturers (including amongst others Liquipak). It recently acquired Purepak, the packaging-machine division of Ex-cello (USA), for which it acted as a distributor for its fresh filling machines. Purepak has also been trying to develop aseptic packaging machines. Although Elopak supplies primarily cartons for fresh milk, it had entered into a distribution agreement with Liquipak for machines capable of aseptically filling UHT-treated milk.

*British Technology Group (BTG)*

(4) BTG is a self-financing public undertaking whose main task of relevance to the current proceedings is licensing for commercial exploitation the results of public research to industry in the United Kingdom and elsewhere. In respect of these functions, it has taken over the activities of the National Research and Development Council (NRDC) which was the licensor of the licence which is the object of the present case. BTG operates on a commercial basis.

*Liquipak Group of companies*

(5) The Liquipak Group specializes in the development and manufacture of filling equipment for liquid food products and was owned or controlled directly or indirectly by the Allpak Group (Canada) and a private individual, both active in packaging in general. In 1986 Tetra acquired Liquipak International Inc (St. Paul, Minnesota, USA) which carried out manufacturing and marketing of machines for filling cartons. In this transaction Tetra also acquired (a) Liquipak International BV (Netherlands) (with branches in Switzerland and England), which deals with research and development associated with filling equipment for liquid food products and which was assigned the licence in question in 1983, and (b) Pak Center Limited (United Kingdom) which is principally concerned with technical services to the Liquipak Group. Tetra did not acquire Novus Corp NV (Netherlands Antilles) which had been part of the Liquipak Group and was the original holder of the licence from the NRDC, which is the object of the current proceeding. Novus Corp had however assigned in 1983 its licence to the companies which Tetra subsequently acquired.

(b) **The licence, take-over and assignment**

(6) With effect from 27 August 1981, the NRDC granted a licence to Novus Corp (a member of the Liquipak group) for the patents and know-how relevant to the filling process described below. The licence is valid in countries where patents have been obtained for the duration of the patents on which it is based. Patents (due to expire in 2000) have so far been granted in Ireland, Spain and Belgium within the EEC, as well as Australia, Canada, India, Japan and the United States of America outside. A patent application is pending in Italy. No patents have been sought in Denmark, Luxembourg, Portugal or Greece. Application had also been filed under the European Patent Convention Treaty for the United Kingdom, Australia, France, West Germany, the Netherlands, Switzerland and Sweden. Although the patent is under opposition, the Patent Office has not yet heard the case. The US and Japanese applications have, however, already been examined and granted. Accordingly, BTG considers the prospects for upholding the European patent application to be good. The licence from the NRDC is exclusive until 27 August 1988. However, it was agreed that the licensor would regard sympathetically a request for continuation of the period of exclusivity provided the licensee had made its best endeavours to meet demand and that such extension did not infringe Article 85. The NRDC retained the right to review the terms of the licence in the event of a take-over of the licensee that could operate against the public interest. The licence gave the right to grant sub-licences. Royalties of 1,05 % are to be

paid on a licensed product sold, with a fixed minimum payable each year. A lower fixed minimum is payable during any non-exclusive period. If this minimum is not paid the licensor may terminate the licence.

(7) By letter of 3 October 1986 BTG, as successor to the NRDC, raised no objections to the transfer of the licence to Tetra following its acquisition of Liquipak International. As a result of this letter, Tetra was able to finalize the take-over described above. This same letter also announced that discussion would take place *inter alia* on the continuation of the exclusivity of the licence after its expiry in 1988 (1).

(8) By letter of 26 November 1987, that is after communication of a statement of objections by the Commission (3 March 1987) and after the hearing (25 July 1987), Tetra announced to the Commission that it had decided to abandon all claims to this exclusivity in the licence under consideration with BTG and that no further exclusivity would be negotiated beyond 27 August 1988. By letter of 22 April 1988, BTG announced that it was entering into negotiations with both Elopak and Tetra with a view to granting non-exclusive licences. Both Tetra and BTG however stated that this willingness to renounce the exclusive licence was not the preferred course of action and both would have preferred an exclusive licence. It was made clear that the change was only a result of the position taken by the Commission in the Statement of Objections. In addition Tetra still considered that it did not hold a dominant position, had committed no abuses under Article 86, had not infringed Article 85 (1) and could benefit from the Article 85 (3) exemption accorded under Regulation (EEC) No 2349/84 (see legal analysis below).

### (c) The technological background

(9) The NRDC patented technology concerns a sterilization process which is described below (point 13). Under the terms of the licence, Tetra was effectively licensed on an exclusive basis to exploit and develop the technology for the purposes of making, filling, sealing, using, selling or otherwise disposing of paper-based and/or paper-board based laminate aseptic packs (hereinafter cartons) for milk or fruit juices or any other foodstuffs or drink (2).

(10) Since milk accounts for the major part of liquids or foodstuffs packed into cartons (around 90 % of cartons are for milk products), the description of the product market and technology involved will concentrate on the situation as regards milk. Where the product or technology for other liquids, notably fruit juice, or foodstuffs are materially different, mention will be made of this. Milk (in cartons) is normally sold in one of two ways, either pasteurized (fresh) or UHT-treated (that is aseptic), and these are described below. A description of the two types is necessary both to understand the technology in question and for a definition of the relevant market. Cartons in both cases are made from paper-based boards of different weights and thickness depending on the specification required. It should be noted that the carton is usually less than 10 % of the retail price of milk in cartons and even less for most other liquids which are packed in cartons and which generally have a higher value than milk.

(11) *Pasteurized or fresh milk*

In this case the cartons are lined with polyethylene. Most pasteurized milk in cartons is sold in the 'gable-top' carton which can be easily opened, a process which produces a pouring spout. Some pasteurized milk is also sold in 'brick' containers (see below for a description). The filling machine forms the individual flattened carton blanks, fills them with the pasteurized milk (3) and seals the carton. Tetra's brick containers are supplied in continuous rolls rather than individual carton blanks. Tetra is also developing its Rex range of gable-top cartons to be delivered in continuous rolls like its Tetrabrik (see below). Whilst cleanliness is obviously important, the same degree of aseptic conditions and pre-sterility of the cartons are not required as for UHT milk. The pasteurized milk filled in this way has a shelf life of several days.

(1) Elopak was granted two sub-licences in 1982 by Novus in order to permit the use of the patented process on the Liquipak machines that Elopak was distributing. There is some dispute between Tetra and Elopak as to whether these sub-licences have actually been terminated along with distribution agreements between Liquipak and Elopak. This aspect is not relevant to the case in point and has no effect on Tetra's exclusivity, since these sub-licences only covered use of BTG technology, and not the manufacture of machines by means of that technology.

(2) The NRDC did not license its technology for sterilization of other materials or for other uses, which may be developed. To date, however, the technology has been principally used to sterilize paper-based cartons for liquid foodstuffs.

(3) Pasteurised milk is heated to 70 °C (for 15 seconds) and then cooled. This destroys much harmful bacteria but leaves the taste and cream line unaffected.

(12) *UHT treated and aseptic packaged milk*

In this case the carton is lined additionally with an aluminium foil. The milk is UHT treated, which involves very rapid heating to a high temperature (around 140 °C) and then rapid cooling. This kills all harmful bacteria. The milk is immediately filled by special machines under strict aseptic conditions into cartons, which must be sterilized by this machine immediately prior to filling, before sealing. The UHT milk in such packages has a shelf life of several months. Failure to maintain strictly aseptic conditions or to sterilize effectively the cartons prior to filling would result in a spoilt or even dangerous product as a result of bacterial growth.

(13) Apart from the technology licensed by BTG and which was being developed, commercially available machines achieved the sterilization of cartons for milk by a combination of concentrated hydrogen peroxide ($H_2O_2$) and heat — the concentrated hydrogen peroxide sterilizing the cartons, with heat both drying the cartons of any peroxide residue and maintaining aseptic conditions. Only Tetra and PKL (a subsidiary of the German group Rheinmetall AG) have developed technically acceptable machines which are commercially available on any scale in the EEC for packing milk, liquids or foodstuffs aseptically into cartons. Certain other companies are developing machines for aseptically packing milk in cartons which are all based on similar sterilization technology. These machines are either prototypes requiring further technological development or are not suitable for milk or for various other reasons are not commercially available in the EEC.

(14) Most UHT milk is distributed in 'brick' style cartons which usually have to be cut open and which are not as easy to use as gable tops [1]. Tetrapak 'brick' style cartons (Tetrabrik) are supplied in continuous rolls. The carton is only formed and sealed on all sides at the same time as it is filled with milk (a patented process). This means that the sterilization of the carton takes place when the carton is still composed of only a flat surface which makes drying of the residual hydrogen peroxide easy. The PKL 'brick' (Combibloc) carton, like the gable-top cartons for pasteurized milk, is supplied as an individual flattened preformed blank only requiring sealing after filling. Sterilization must take place once the blank has been formed into its basic shape with only the top open. This enclosed carton form gives rise to greater difficulty of drying the hydrogen peroxide than in the case of the opened and flattened Tetrabrik rolls. In the EEC most long-life fruit juices are also UHT treated and packed aseptically. Because of their higher natural acidity and the fact that fruit juices contain less natural bacteria in their raw state than milk, it is easier to achieve the degree of sterility in the cartons required to package aseptically UHT-treated fruit juices than for milk and still give a shelf life of several months. Thus a sterilization technology and a carton-packaging machine may be capable of producing long shelf life fruit juices without being adequate for long shelf life milk. Both Tetra and PKL sterilizing techniques and machines are suitable for milk and fruit juices. Some packaging machines for UHT liquids being developed or currently available are not suitable for milk but may be adequate for fruit juices [2].

(15) *BTG technology*

The technology which was the object of the licence by BTG to Novus (subsequently assigned to Tetra since its acquisition of the Liquipak Group) is based on the synergy of ultra violet light (UVL) and hydrogen peroxide. The process is patented (expiry 2000). Because UVL enhances greatly the sterilizing properties of the hydrogen peroxide, the patent claims that much less peroxide is necessary to achieve the same sterilizing effects than with concentrated hydrogen peroxide on its own. The fact that only a weak solution of hydrogen peroxide is used makes this new BTG technology ideally suited to sterilizing preformed cartons such as Elopak's gable top or PKL's Combiblock because the drying process is not as crucial as it is with concentrated hydrogen peroxide.

[1] Tetra is starting to market 'brick' cartons with pull tabs to avoid having to cut them open.

[2] Fruit juice with a shelf life of several months can also be packaged in cartons with aluminium lining by a 'hot-fill' process. The juice is heated, but to a temperature lower than for UHT milk, and filled directly into cartons. A complete sterilization of the cartons is not necessary and a shelf life of several months is obtained by a combination of the hot-fill process and the natural acidity and preservation quality of fruit juices. This process does not require an aseptic filling machine. Know-how to make hot-fill machines does not allow a machine maker to make aseptic milk-packaging machines. Milk with a long shelf life cannot be obtained from this hot-fill process.

(16) Once the technology for the basic sterilization process of cartons is acquired, whether concentrated hydrogen peroxide or weak hydrogen peroxide plus UVL, much development on both the filling machine and carton will still be necessary in order to be able to produce a reliable machine that can exploit the technology and fill and seal specific cartons with satisfactory results in the conditions encountered in dairies. The development of such machines and cartons involves not only considerable know-how, but may give rise to further intellectual property rights, both for the machines and for the cartons that can be filled on them. In the case of the Liquipak aseptic machine, which is for gable-top cartons (1), patents exist not only for the basic sterilization process licensed by BTG, but Liquipak has also obtained patents both for the machines and for the cartons. Tetra is now the owner of these patents for machines and cartons.

(17) Although at the time of its licence from NRDC Liquipak was a successful producer of machines for filling cartons with pasteurized milk, it was not capable of immediately producing an acceptable aseptic packaging machine incorporating this new technology. Liquipak has in fact spent considerable sums of money and several years in trying to develop an acceptable machine. Elopak, which was the exclusive distributor of Liquipak in the EEC for its machines for pasteurized milk (and also any machines to be developed for UHT milk), has also contributed over a considerable period of time to the development of an aseptic machine for UHT milk. This support took the form of putting filling machines at the disposal of dairies, with reduced or even no charges for cartons, together with other support services. Liquipak in fact installed several aseptic packaging machines in the EEC — the 820A — through Elopak, its distributor. Elopak was apparently satisfied with the BTG sterilization technology and considered that it was capable of allowing milk to be sold through an unchilled distribution channel whilst still achieving a reasonable shelf life. Elopak maintains that the BTG sterilization technology offers a viable alternative to the PKL Combibloc system in terms of aseptic performance. Futhermore, Elopak considered that the BTG technology with its low concentration of hydrogen peroxide is ideally suited to its preformed gable-top carton (in which it has most know-how and has concentrated its development efforts) since there is less risk of residual hydrogen peroxide. This is the reason that Elopak was willing to assist in the development of an acceptable aseptic Liquipak filling machine.

(18) Although Elopak was satisfied with the sterilization achieved by the BTG technology incorporated into the Liquipak 820A, it considered that further refinements were necessary to certain mechanical functions of the machine in order to improve the reliability under normal operating conditions. An updated version of the 820A designed to iron out these mechanical weaknesses was developed to be shown at the 1986 Paris Dairy Exhibition ready for commercial distribution. This updated version has not been extensively tried out under dairy conditions because, just before the aforesaid Dairy Exhibition, Tetra announced its takeover of Liquipak. In these circumstances, Elopak was unwilling to sell and give the necessary technical and logistical support to machines that were known to belong to its main competitor, Tetra.

(19) Tetra on the other hand maintains that further research is necessary on the application of the BTG technology in order to improve its sterilization properties so making it capable of producting long shelf life milk free from any harmful bacteria. This further development on the basic technology will, Tetra states, require a considerable financial investment on its part.

(20) In addition to the sterilization technology currently used by Tetra and PKL and that developed by BTG, there are many other methods of sterilization currently used to produce long shelf life (UHT) food or drink products in a variety of containers (e.g. plastic pouches, cups and bottles). Most of these methods of sterilization are for technical reasons unsuitable or impractical for paper-based cartons. Other methods of sterilization that technically might possibly be adaptable to paper-based cartons have either not been developed beyond prototypes or remain mere theoretical possibilities.

(21) The only technically acceptable aseptic carton packaging machines commercially available in the EEC for UHT treated milk are the Tetra and PKL machines both based on similar sterilization methods. The machine developed by Liquipak incorporating the new BTG sterilization method was developed to the stage where Elopak

(1) Machines developed to seal gable-top cartons cannot normally seal brick cartons. Even for a gable top machine or a brick machine the cartons must be adapted to fit the particular machine.

considered it could be commercially exploited. The other machines capable of packing aseptically UHT milk are either not available in the EEC (1) and/or are no more than prototypes not effectively commercially exploited. In any case, most of these other machines are based on the same sterilization method used by Tetra and PKL which Elopak considers may well be adequate for cartons supplied in continuous rolls (such as the Tetra 'brick') but are less suited to gable-top cartons such as those in which Elopak has expertise.

### (d) Position of Parties on the market

(22) Only Tetrapak and PKL therefore have effective aseptic milk carton packaging machines that are currently being commercially exploited to any extent in the EEC. However, given that the BTG technology with Liquipak know-how may allow Tetra in particular to adapt its gable-top cartons (Tetra Rex, which are currently only fresh filled) to aseptic filling for UHT-treated liquids, an advantage not currently possessed by its competitors, Tetra's market position can only be strengthened. Estimates of Tetra's market share for machines and cartons are given in Tables 1 and 2 in the Annex, along with the comparisons of freshly packed milk. It should be noted that Tetrapak's market share for both machines and cartons for aseptically packed liquids is very high (91,8 % and 89,1 %, respectively, in the EEC) and strong in every Member State. Even this simple market-share figure may underestimate its strength. Because of certain technical advantages, described above, of the Tetrapak process (supplying of cartons in continuous rolls giving rise to ease of drying of hydrogen peroxide), PKL's sales (2) have generally been confined to its 'home' market of Germany, or limited to 'speciality' packs (e.g. fruit juices or small packs of 20 cl) or packs where the value of the contents is such that the cost of the packaging becomes very small.

(23) As far as the Commission is aware, only Tetra supplies cartons for its own machines and there are no companies, at least in the EEC supplying cartons for Tetra aseptic packaging machines. Similarly, only PKL or its licensees supply cartons for its aseptic packaging machines. It should be noted that the main revenue and profits are earned from supplying cartons for a machine and not in the supply of the packaging machines themselves. A packaging machine could be excpected to have a life of several years during which time it would process tens of millions of cartons. The main technical barriers to entry into the market are however in the production and maintenance of the aseptic packaging machines. This requires not only an adequate sterilization technology for the cartons, but also considerable know-how and expertise. This technology and know-how are necessary to produce a reliable machine capable of both operating continuously and maintaining an aseptic environment under dairy conditions. Only such machines will produce packaged liquids of the necessary quality and shelf life. Even though the basic sterilization technology used by Tetra and PKL is no longer patented, it is still difficult for a milk packaging machine producer to produce commercially acceptable aseptic packaging machines. Even Liquipak, with its wide experience from its fresh packaging machines business, was obliged to devote considerable financial resources and many years to trying to develop a mechanically acceptable aseptic packaging machine incorporating the new BTG sterilization technology. Some companies (in particular those outside the EEC) are trying to develop aseptic packaging machines. In addition to the technical barriers to such development, it may well be difficult for these companies to avoid infringing certain patents held by Tetra and PKL in the EEC in this field, particularly for 'brick' style cartons (3).

(24) The technical barriers to producing cartons for aseptically packed liquids are less than those for producing aseptic packaging machines, although some know-how is in fact needed. The main barriers to entry into this market are created by the fact that the aseptic machine producers are believed to tie the sale of machines and cartons. In addition, there may well be effective patent protection in the EEC for any cartons that can be filled on aseptic

(1) It is possible that some of these machines or the cartons they process would infringe Tetra's patents in the EEC. The process by which Tetra and PKL machines 'fold' the brick-style carton to form a top or bottom is patented by both Tetra and PKL. This process for the top appears to be almost identical for both Tetra and PKL — see agreements between Tetra and PKL of 17 May 1978 and 16 December 1985.

(2) PKL's licensee (Bowater) is taken into account in Table 1.

(3) This is true even though the basic sterilization method employed by Tetra and PKL is no longer patented.

machines supplied by Tetra and PKL. Finally, it should be mentioned that dairies, even when given a totally free choice, would often prefer the packaging-machine distributor to supply the cartons also, so that breakdowns or malfunctioning (which can be extremely costly in terms of spoilt product) do not give rise to a dispute about responsibility between different machine and carton producers.

(25) From the above, it may be concluded that the key to entering the market for supplying cartons for long shelf life food products lies in the ability to supply aseptic packaging machines for these cartons. The technical barriers to entry are much higher for machines than for cartons, since a machine producer must not only have an adequate sterilization technique for the cartons, but must also be able to incorporate this technique into a reliable filling machine capable not only of working continuously and reliably at high speeds but also of maintaining an aseptic-sterile environment in dairy conditions. Only in these circumstances can the packaged products have the required shelf life and be free from harmful bacteria.

## B. LEGAL ASSESSMENT

### I. Summary of the legal scope of this Decision

(26) This Decision concerns the licence between the NRDC (now BTG) and Novus Corp (later assigned to Liquipak International BV) in so far as, as a result of the agreement between BTG and Tetra in 1986, this licence was transferred to Tetra. This transfer permitted Tetra to finalize the takeover of the Liquipak Group which includes Liquipak International BV.

(27) It is considered that the Tetrapak Group abused within the meaning of Article 86 its dominant position in the market for the machines and technology for filling board cartons under aseptic conditions with UHT treated liquids, including especially milk. It did so through its acquisition of Liquipak which allowed it to benefit exclusively from the technology licensed from BTG, which in turn prevented, or at least substantially delayed, Elopak from entering the aseptic packaging market. At the same time, Tetra strengthened its own position in this market. This is because the exclusivity to BTG technology which Tetra acquired is one of the few alternatives suitable for use with cartons for the sterilization techniques used by Tetra. Such a sterilization technique is a vital if not sufficient element for the production of aseptic packaging machines. This abuse lasted from the time Tetra acquired the exclusive licence at least until the date that it renounced this exclusivitiy.

(28) It is also considered that, at least from the time of the takeover by Tetra of the Liquipak Group and the transfer of the exclusive licence until Tetra renounced this exclusivity, the exclusivity of the licence fell within the scope of Article 85 (1). Since the licence in question in this period did not contain any restrictions going beyond those described in Articles 1 and 2 of 2349/84, the exemption automatically provided for in that Regulation applied during this period. However, it is considered that the conditions of Article 85 (3) were not fulfilled for this exclusive licence. Consequently, had not Tetra renounced all exclusivity, the Commission would have withdrawn this exemption and declared the exclusivity of the licence in question an infringement of Article 85 (1).

### II. The relevant market

A definition of the relevant market is necessary not only for an appreciation of Article 86 but also to analyse the exclusive licence with respect to Article 85 (1) and especially as to whether the conditions of Article 85 (3) are fulfilled.

(29) The relevant markets on which Tetra competes are, firstly, for the supply of machines incorporating technology for sterilizing cartons that can then be used for filling these cartons under aseptic conditions with UHT-treated liquids, and secondly, for the supply of cartons for these machines. For the reasons set out in section A, the facts, the market for the supply of machines has the higher barriers to entry and is the key to entry into the market for cartons. The bulk of cartons (nearly 90 %) whether for aseptic or fresh liquids, are used for milk or milk-based products. The question of both how far aseptic milk cartons and fresh-milk cartons and their associated packing machines are substitutable for each other and how far other forms of milk packaging and their associated machines (only glass and plastic bottles are of any importance) can replace them must be examined in order to verify that the relevant market has been correctly defined.

Substitutability by other forms of packaging and their associated packing machines for liquids other than milk which are packed in cartons (principally wine, water and fruit juices) must also be examined to verify that the relevant market has been correctly defined.

*Milk packaging*

(30) Glass bottles, plastic bottles, plastic bags, aseptic milk cartons and fresh milk cartons all may be said to be part of the wide milk-packaging market. Each form of packaging and its associated packing machine, often with its own distinct technology, however, may form a separate market with its own supply-and-demand conditions. The markets for aseptic milk-packaging machine and cartons to go with these machines are relevant from the point of view of competition policy (analysis under both Articles 85 and 86) because it can be shown that only other producers of these products can in the short term provide any effective competition. Producers of aseptic milk-packaging machines and the cartons to go with them have no brake on their market power from either :

— demand substitution (consumers do not switch indifferently from UHT aseptically packed milk to other forms of milk [1]), or

— supply substitution (producers of different milk-packaging machines cannot readily enter the market for aseptic packing machines and cartons [2]).

As will be shown, the lack of demand-and-supply substitution is reflected in the fact that a small but significant rise in the price of aseptic packages (or machines) will neither bring about a large and immediate reduction in demand for that package (or machine), with a corresponding increase in demand for the other packages (or machine), nor will it encourage immediate entry by new producers. This lack of price sensitivity on either the demand side or supply side for aseptic cartons and machines allows producers of these products to act independently of either consumers or producers of other packaging materials and machines. In these circumstances, only producers of other aseptic cartons and machines can possibly provide any really effective brake on the substantial economic power that any such individual producers would otherwise enjoy. The test of price elasticity synthesises the many factors that determine the extent of a relevant market (e.g. physically or technically substitutable products, consumer preferences, ease of new firms or products to enter market, etc.). If a producer or group of producers dominate(s) a relevant market so defined, they may be said toenjoy economic power unfettered by the threat of real or effective competition. The Court has always stressed that it is the degree to which economic freedom may be enjoyed that determines dominance [3]. The test of price elasticity, is in the circumstances of this case therefore, a pertinent one for the rules of competition since it is closely and logically linked to determining whether dominance exists. The reasons that lead to the conclusion that dominance does exist may be summarized as follows.

1. Lack of demand substitution

— The different types of milk packages and their associated machines only account for a small proportion of the cost of the retail price of milk,

— The different types of packages and the different milks with which they are generally associated have different characteristics which leads consumers to regard them as less than perfect substitutes.

2. Lack of supply substitution

— There are different supply conditions for each type of package and its associated packaging machinery. There is no real possibility for a supplier of one type of package or packaging machinery to switch easily to production of another type of package or packaging machinery [4],

— Expensive re-equipment would be necessary in the dairies and the distribution systems to change from one type of milk and carton to another.

[1] In United Brands (United Brands *v.* Commission Case No 27/76 (1978) ECR 207) the Court recognized that the extent of the possibiity of substitution in the demand for different forms of fruit was important in determining the relevant market from the point of view of the rules of competition.

[2] In Continental Can (Europemballagé Corporation and Continental Can Compnay NV *v.* Commission (Case No 6/72) (1973) ECR 215) the Court recognized that the extent of the possibility of supply substitution coming from either captive producers or producers of other types of can was important in determining the relevant market from the point of view of the rules of competition.

[3] See for example United Brands *v.* Commission (OP CIT).

[4] Note that producers of cartons fro fresh milk could from a technical point of view, probably relatively easily produce cartons for UHT milk and *vice-versa* (see following for explanation and implications).

LACK OF DEMAND SUBSTITUTION

*Packages and their associated machines only represent a small proportion of the price of milk*

(31) All types of milk package except returnable glass bottles, e.g. aseptic milk cartons, fresh-milk cartonsl and plastic bottles, only for a relatively small proportion of the cost of the retail price of milk — under 10 %. The same applies to returnable glass bottles when amortized over the large number of times they can expect to be reused. Therefore even significant changes in the relative price of these milk packages (± 10 %) will not cause any appreciable difference in the retail price for the customer (± 1 %). It follows that, unless the consumer regards the different packages and their contents as perfectly substitutable (which is not the case — see below), even significant changes in the price of the packages are unlikely to cause any appreciable change in final demand. Although no precise figures have been made available, it is reasonable to assume that the costs packaging machine must constitute a much smaller proportion of the retail price of milk than do the cartons themselves due to their life expectancy and the conditions under which they are supplied to the user. Consequently, even very large changes in the price of machines would have no short- or medium-term discernable impact on the price of milk to consumers.

*Different types of milk and their associated packages not regarded by consumers as perfect substitutes*

(32) There are three different ways of treating milk: pasteurization (for fresh milk), UHT and sterilization (for aseptically packed milk) (1). Each type of milk has a different taste and preservation qualities. Fresh milk is normally more expensive than the other types of milk because it cannot be stored for any lenght of time. It therefore needs a very rapid and regular distribution system and there is always the risk of waste. It is, however, generally regarded by consumers as halving a superior taste.

Preserved milks (UHT and sterilized) can be produced during the seasons when milk is cheaper and available in greater quantities for consumption later when fresh milk (the raw material) is more expensive. Sterilized milk can be stored longer than UHT and is usually cheaper than UHT milk, but is generally regarded as having an inferior taste. Thus, whilst each type of milk may technically be an adequate or acceptable substitute for the other types, in that lit is a liquid with certain nutritional properties, consumers do not regard them as perfectly interchangeable because of different tastes and preservation qualities. Most consumers have preferences for a certain type of milk and this preference would normally only change as a result either of changing habits or significant shifts in the relative retail prices of the different types of milk. Thus, even if different types of milk were to compete to the extent that they could be considered as being in the same relevant market (which is not certain), this would not mean that the different packages were in the same relevant market. Small but significant changes in the relative price of the different packages would not be sufficient to trigger off shifts between the different types of milk with which they are associated because the substitution of different milks is less than perfect.

(33) Each type of milk is associated with different types of packaging: glass bottles and gable-top cartons and, to a lesser extent, brick-style cartons for fresh milk, brick-style cartons for UHT milk, and plastic bottles and, to a lesser extent, glass bottles for sterilized milk. Just as there is less than perfect substitution between the different types of milk, the substitution between the same type of milk in different packages is also less than perfect.

1. Fresh milk.

Because glass bottles have to be returnable to be economical, a special distribution system (usually doorstep deliveries) is normally necessary with such packaging. Gable-top cartons are principally reserved for shop-distributed fresh milk and do not normally compete directly with glass bottles (2). Small changes in the relative price of bottled milk to milk in cartons would not cause huge and immediate changes from one type to the other because of the special and regular service associated with doorstep deliveries. Since cartons and bottles are only a small part of the relative price of milk, it would take massive changes in the relative prices of cartons to bottles to bring about any significant price changes in the retail price of milk. Consequently, bottles and

(1) Sterilization of milk involves treating the milk to a temperature inferior to that used for UHT for a much longer time (around 120 °C for 30 minutes). The resulting preservation qualities of the milk are somewhat longer than for UHT, but it is generally recognised as affecting the flavour more the UHT treatment. Sterilization can only be carried out in the already sealed package. For technical reasons sterilization cannot be carried out in cartons (see following).

(2) In certain areas, e.g. Italy, glass bottles are virtually unknown for fresh milk because the distribution infrastructure does not exist.

cartons cannot be said to be perfect substitutes. Fresh milk can also be packed in plastic bottles or plastic bags, but is not done to any appreciable extent. Such packaging is not generally regarded by consumers in most Member States as acceptable for fresh milk. The French and German markets should be distinguished for special reasons in that in France aboutl one third of fresh milk is distributed in plastic bottles and in Germany about 20 % in plastic bags (1). Whilst these plastic bottles and bags are distributed alongside cartons in supermarkets this does not mean that a small increase in the price of cartons relative to either plastic bottles or bags would cause consumers particularly in other Member States to switch from milk in cartons to bottles or bags.

However, in the unlikely event that, in France and Germany fresh milk in cartons and plastic bottles or bags were almost perfect substitutes for consumers, such substitution would be limited to these countries where they are acceptable to consumers for fresh milk. It could not make cartons and plastic bottles and bags form part of the same relevant market in other Member States. As such the market shares of different producers given above for cartons for fresh milk would not change appreciably and would not in any case change Tetra's share of the market for cartons and technology for UHT milk (2).

2. UHT milk.

Nearly all UHT milk is packaged in 'brick' style cartons. The technology for this of milk packaging, developed initially by Tetrapak, is ideally suited for UHT milk. Gable-top cartons can be used for UHT milk, but Tetrapak and PKL who make brick cartons have not yet adapted their respective UHT packaging machines for gable tops (3). Elopak, which is principally a gable-top carton producer, did not until its distribution agreement with Liquipak have any acceptable UHT technology with which to try to develop this market.

(1) In France only about one third of milk consumed is fresh compared with two-thirds in the Community as a whole. In Germany about 60 % of milk is fresh.

(2) Plastic bags in Germany account for under 3 % of total fresh milk in the EEC and under 6 % of the fresh milk sold in cartons. The figures for French consumption of fresh milk in plastic bottles are less.

(3) Tetra apparently intends to use the BTG technology and Liquipak machines for its gable-top cartons (Tetra Rex), which hitherto have been limited to fresh liquid packaging.

3. Sterilized milk.

Because the sterilization process takes place in the packaging only, glass or plastic bottles can be used (4). The rigidity of cartons would be adversely affected by the necessary pörolonged exposure to the heat treatment, which precludes their use for this type of milk.

*Conclusion for demand substitution*

(34) In view of the above it may concluded that the different types of milk are not perfect substitutes. Each of these non-perfectly substitutable types of milk, for technical and consumer acceptance reasons, tends to be associated with certain types of packaging. In the case of UHT milk only one form of packaging is found. Even if different types of milk are in the same relevant market, very small changes in the retail price of one type of milk would not cause radical shifts in consumption patterns. Because packages are a small part of the retail price of milk, a small but significant relative price change in packages would not appreciably alter the retail price of milk, and consequently would not be sufficient to trigger off a change in the relative consumption patterns of milk. This is all the more true for changes in the relative prices of milk-packaging machines. Therefore the cross-elasticity of demand for different types of milk packages and packaging machines is low. Consequently, from the demand side, the different milk packages and their technologies constitute separate relevant markets. The price and resulting demand for such packaging and machines is not highly dependent on the price of other packaging.

(35) The fact that there are underlying changes in the trends for preferences for certain types of packaging because of changing habits (e.g. more purchases from supermarkets which favour certain packages for handling and storing reasons or a change to the convenience of long-life milk or growing conviction in the superior taste and quantities of fresh milk) is not inconsistent with the view that the different package types can be considered to be in different markets. In a mature market such as milk (i.e. where overall demand is relatively stable), if the demand for one form of packaging and the specific type of milk it contains increases, then there must be a corresponding decline in another type of packaging. Because of both historical reasons and national

(4) Metal cans are also used for sterilized concentrated milk, where the sterilization can take place in the can.

differences in habits, tastes and preferences, structural trends in the demand for the various types of packages may be different in different Member States. For example, in the United Kingdom, fresh milk has traditionally been delivered in glass bottles to each house. Whilst this form of delivery and packaging still predominates it has suffered a relative decline in favour of milk sold in cartons in supermarkets. In Italy, although it remains one of the Member States where UHT milk in cartons has one of the most important shares of the market, there has been a growth of fresh milk sales in cartons at the expense of UHT milk. For the reasons explained above, any such observed changes cannot to any appreciable extent be the result of small but significant relative price changes between the different packaging, but only the result of underlying structural trends in the market. The different forms of packaging are not substituted on the basis of relative price changes. Each type of packaging's price changes are largely independent of the price of other packaging. These changes in demand, made as a result of structural trends, and which are not caused by short-term relative price changes, do not show the different types of packaging to be part of the same relevant market.

LACK OF SUPPLY SUBSTITUTION

*Different supply conditions for each type of package and machine*

(36) Each type of milk packaging — glass bottles, plastic bags, plastic bottles, and cartons — is produced by different companies with different technologies. The different producers cannot, without acquiring new equipment and know-how, change from one form of packaging to the other. This is also true for producers of packaging and filling equipment. In addition, the barriers to entry for the technology for UHT carton filling machines are high. However, producers of cartons for fresh milk would find it relatively easy to produce cartons for UHT milk if appropriate filling machines were available. The converse is also true in that UHT carton producers can and do easily produce cartons for fresh milk ; similary, a UHT machine producer has no significant technical barriers to producing fresh milk filling machines. However, because of technological and patent barriers, a fresh milk filling machine producer could not easily produce UHT malchines. This, coupled with the practice of UHT machine producers of tying the sales of machines and cartons, makes it difficult fro fresh carton producers to enter the UHT carton market. In any event, independent producers of cartons that could be used on Tetra or PKL aseptic machines (currently the only aseptic machines commercially available in the EEC) would probably infringe Tetra or PKL patents.

*Re-equipment necessary by dairies to change type of packaging*

(37) The choice for a dairy of the type of packaging system it will use is an important investment decision. Not only must packaging or filling machinery specific to the type of packaging be employed but also other expensive milk-treating and package-handling and storing equipment has to be adapted to the choice of package. For glass bottles, a highly developed and specific distribution system is necessary to ensure the re-use of bottles, which also require special cleaning equipment. Once a dairy has perceived the demand by consumers for different types of milk it will choose the equipment and packaging designed to suit that perception. Such packaging equipment could be expected to have an economic and technical life of at least 10 years. Even if a dairy has several different types of packaging systems for the different forms of milk, changes in the relative prices of the different forms of milk, changes in the relative prices of the different packages will not cause dairies to run the resulting cheaper system more intensively at the expense of the resulting dearer system. The production of milk in the short and medium term is demand led and, for the reason given above, consumers do not regard the different types of milk and their associated packaging as perfect enough substitutes to cause them to change their demand as a result of the effect on the retail price of milk of small but significant changes in the price of packaging or machines.

*Conclusion for supply substitution*

(38) In view of the above, it can be concluded that the market for milk packages and associated packing machines is divided into several distinct and relevant markets which only compete in the short and medium term to a limited extent. Likewise, the markets for machines for packaging fresh milk and UHT milk into cartons must be regarded as separate. On the one hand, access to technology and know-how to build fresh milk machines does not permit entry into the UHT machine packaging market where technology is particularly difficult to master and is covered partially by patents. In fact the barriers to entry to the market for aseptic packaging machines are particularly high as is demonstrated by the lengthy and costly attempts of Liquipak and the attempts of other fresh packaging machine producers to develop acceptable products. On the other hand, it would be relatively easy for a UHT packaging machine manufacturer to enter the fresh packaging machine market because there are no new unsurmountable technical barriers to master.

*Liquids other than milk*

(39) A small proportion of cartons (a little over 10 %) is used to package liquids or semi-liquids other than milk — mostly fruit juices but also wine, water, etc. These other liquids or semi-liquids are packaged predominantly in forms of packaging other than cartons, for example wine is retailed principally in glass bottles but is also retailed to a lesser extent in plastic bottles, 'boxes' and barrels as well as cartons (1). The variety of liquids and semi-liquids, the differences in preservation qualities required for them and the variety of packages (with their associated filling machines) in which they are distributed, as well as the different market conditions on the relevant markets for each of these products, makes it difficult to generalize about the degree of substitutability between the different packages and the different packaging machines. However, the Commission sees no reason why similar factors as those discussed above for milk packaging could not apply to other liquids, with the consequence that for these other liquids the different forms of packaging and filling machines compete even for non-milk products on different relevant markets. This is all the more likely in view of the fact that, for liquids other than milk, the carton forms an even smaller part of the retail price of the product. In the unlikely event, and contrary to milk packaging, that for liquids other than milk, fresh and UHT cartons and their associated filling technologies were readily substitutable between themselves as well as with other forms of packing this would have no appreciable effect on the above conclusions. Because milk accounts both for most carton sales and the use of carton-filling machines it is the supply-and-demand situation on this market that is predominant and it follows that this is the market which is relevant for purposes of application of the rules of competition.

*Demand differences between Member States and the relevant geographical market*

(40) The demand for milk varies considerably between Member States not only in terms of consumption *per capita* but also in the type of milk (pasteurized), UHT or sterilized) and packaging (glass or plastic bottles and cartons). These variations are not the result of differences in relative prices of the packaging but are rather due to differences in traditions and tastes. In the United Kingdom, for example, mostly pasteurized milk is consumed and there is a tradition of door-step deliveries so that most milk is distributed in glass bottles. In Italy only about half of the milk is pasteurized, and both pasteurized and UHT milk are distributed almost exclusively in cartons, normally via normal food retailers. As shown above, changing structural trends caused by changing habits and traditions in different Member States govern demand, rather than small but significant relative price changes of different forms of packaging.

(41) Even if there exist the differing demand conditions between Member States, the EEC is the relevant geographical market for the cartons and machines under discussion. In the first place, even despite these different demand conditions in each Member State, both as to the type of milk and type of carton, all types of carton and machine are found to a significant extent in all Member States. Secondly transport costs for both machines and cartons are not significant. In fact carton packaging machinery supplied to dairies in the EEC comes from producers all over the world (from the EEC, from the USA and from Japan).

(1) Fruit juice is probably the only exception in that cartons form a large proportion of the packaging used, with glass jars being the only other packaging.

However, local distribution units are necessary in each Member State to carry out installation, maintenance and repairs of carton packaging machinery. This must be arranged either directly or via specialist distributors or local producers of cartons. The barriers to entry for machine producers (particularly UHT machines) are technical rather than geographical. Similarly the transport costs for carton blanks or rolls are not such as to preclude a producer of such cartons supplying most if not all areas of the EEC from relatively few production centres and shipping them over considerable distances.

## III. Article 86

(42) Under Article 86 of the EEC Treaty any abuse by one or more undertakings of a dominant position within the common market or in a substantial part thereof is prohibited as incompatible with the common market in so far as it may affect trade between Member States.

(a) *Undertakings*

(43) Tetra is an undertaking within the meaning of Article 86. Tetra acquired the Liquipak Group and negotiated directly with BTG for the transfer of the licence in question and is now the new exploiter of this licence.

(b) *Dominance*

(44) The position of Tetra on the relevant market has been described above. From this situation and the other conditions found on the market in question, it can be concluded that Tetra holds a dominant position. The factors that lead to this conclusion are the following:

1. Tetrapak has 91,8 % of the EEC market for machines capable of filling cartons by an aseptic process with UHT-treated liquids. Apart from Tetra, only PKL has a technology available in the EEC capable of carrying out this process. PKL's process cannot be as automated as Tetra's because this latter supplies cartons in continuous rolls whereas PKL only supplies individual flattened blanks. Current Tetra technology may well therefore be already superior to its only competitor. Furthermore, acquisition by Tetra of the exclusive licence from BTG for a competitive technology eliminates totally any new potential competitors from using this technology to enter an already very highly concentrated market.

2. Tetra is the leader in aseptic filling on a world scale not only in the EEC. It was the first to develop the technology and has vast experience in machines, process and cartons both for aseptic and fresh filling. Its technology and machines are partially protected by patents as are those acquired as a result of the take-over.

3. The barriers to entry to produce aseptic packaging machines are particularly high, which severely limits the entry of new competitors. The take-over of the exclusive licence thus further reduced the possibility of a new entrant on this market.

4. With exclusivity to the BTG technology which could well have significant technical advantages over current sterilization methods by using only dilute hydrogen peroxide, Tetra's technical position *vis-à-vis* other potential competitors would be reinforced which would further reduce the possibility for effective competition.

5. The milk market is mature with little or no room for overall expansion. Dairies are already equipped with packaging machinery, which under normal circumstances has an economic and technical life in excess of 10 years. This makes it difficult for newcomers to enter since in order to sell their products they must either compete in the limited market for renewing old equipment or persuade dairies to replace existing equipment.

Consequently, in these circumstances, the position enjoyed by Tetra fulfills the tests laid down by the Court for dominance to be established.

(c) *Abuse*

(45) Tetra committed an abuse of its dominant position when, through the purchase of the Liquipak Group, it acquired the exlusive licence from BTG. In the specific circumstances of this case the acquisition of this exclusive element of the licence constitutes an abuse of a dominant position. This acquisition 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. The abuse therefore lasted until Tetra renounced the exlusivity.

(46) In its Continental Can judgment the Court specifically held that Article 86 was aimed not only at practices or behaviour which may cause damage to consumers directly, but also those which are detrimental to them through their impact on the structure of effective competition (ground 26). Abuse may occur if any undertaking in a dominant position strengthens such position in such a way that the degree of dominance reached substantially fetters competition (ground 26). The strengthening of the position of an undertaking may be an abuse and prohibited under Article 86 of the Treaty regardless of the means and procedure by which it is achieved if it has the effects mentioned above (ground 27).

(47) In the present case these conditions are fulfilled. The abuse which is the object of the current Decision consists of the acquisition of an exclusive licence which was acquired when Tetra took over Liquipak. In this case the acquisition of the exclusive licence is the tangible effect in the common market of the take-over. Furthermore, it can be considered as equivalent in effect on this market to a take-over. This acquisition not only strengthened Tetra's dominant position but had the very real effect of preventing or delaying the entry of a new competitor onto the market.

1. There were several other undertakings which are competitors with both Tetra and Liquipak for fresh milk machines. However, only Liquipak had the exclusive licence for BTG sterilization technology, the acquisition of which led to Tetra strengthening its previously preponderant dominant position in the market for aseptic machines to the extent that any competition remaining is substantially fettered or practically rendered impossible. Technology is the key to entering the market for aseptic milk packaging machines. Technology for the sterilization of cartons (which is the object of the BTG patent) is a vital element of the technology necessary to produce aseptic milk packaging machines. The acquisition therefore strengthened Tetra's dominance of the existing competition by reinforcing its technical advantages *vis-à-vis* the minimal competition that remains. This will be particularly so if the BTG technology proves to have technical advantages over the currently employed method of sterilization based on concentrated hydrogen peroxide.

2. The impact of this acquisition on the market was not hypothetical but very real. The effect in the circumstances of this case was to preclude the possibility of any new competition (in particular from Elopak, which was on the verge of trying to enter the market). Tetra thereby raised considerably or even insurmountably the barriers to entry. The effect of blocking or delaying the entry of a new competitor is all the more serious in a market such as the present one already dominated by Tetra because a new entrant is virtually the only way at the present time in which Tetra's power over the market could be challenged.

3. Consequently, the acquisition of the exclusive licence not only strengthened Tetra's already considerable dominant position but also had the effect of reducing even further the possibility of any effective competition. This behaviour therefore constitutes an abuse of its dominant position. This abuse continued as long as Tetra had the exclusivity to the licence in question.

(d) *Effect on trade between Member States*

(48) The acquisition by Tetra of the exclusive licence to exploit BTG technology in nearly the whole of the EEC has a very substantial impact on the structure of competition throughout the common market. Potential competitors, in particular Elopak, were excluded from entering the market since they were precluded from using BTG technology unless Tetra decided to grant a sublicence. Consequently, the flow of trade would have developed along appreciably different lines than in the absence of the exclusivity provisions, and potential licensees were prevented from doing business from one Member State to another. Where, as in the present case, there are hardly any competing technologies and Tetra has over 90 % of the market, this effect on trade and the structure of competition was particularly serious. It should be noted that the flows of products between Member States are very substantial. Tetra supplies machines to the whole EEC from its Swedish production plant and its Italian assembly plant. It has carton-producing units in Germany, France, the United Kingdom, Italy, the Netherlands, Portugal and Spain to supply the EEC. PKL, along with its United Kingdom licensee, supplies the EEC from plants in Germany and the United Kingdom. Elopak, in the fresh milk market, distributes imported machines all over the EEC and supplies cartons for the whole EEC from a smaller number of unites than Tetra (e. g. Elopak supplies the whole Italian market with imports from other Member States).

(e) *No objective justification*

(49) In the circumstances of this case, it cannot be considered that the exclusivity provisions of the licence in question are objectively justified. In this case, the little protection that may be necessary to encourage Tetra to bear any technical and commercial risks associated with the development and dissemination of new technology is not sufficient to overcome the extremely serious disadvantages created by the loss of competition entailed by this exclusivity. In addition, in the circumstances of this case, where the licensee is dominant, there is less need for exclusive protection since there is no obligation for the licensee to grant back any improvements in the technology to the licensor. Consequently, the licensee can keep exclusively all improvements and modifications.

(50) Limited commercial risks

Tetra is the dominant company in the field of activity which is the object of the licence and where the barriers to entry are particularly high. It has been supplying aseptic milk packaging equipment since 1961 and selling its aseptic 'Brik' system since 1969. The needs of all the consumers and markets in the relatively mature milk-packaging market are well known to Tetra. Even with the spread of aseptic carton based packaging to speciality products or foods or to the use of an aseptic system with its gable-top Tetra Rex, Tetra has enough commercial experience as worldwide leader for an exclusive licence not to be essential for it to bear any limited commercial risks it may have in marketing machines incorporating the new BTG technology. Other companies would prabably, however, have certain commercial risks in marketing this new product because of their lack of familiarity in this field.

(51) Technical risks overcome

When the NRDC licensed the new aseptic process to the Liquipak Group, the latter only had experience in the field of machines for packaging fresh liquids in cartons. Considerable R & D, with the support of Elopak, was necessary to try to produce a machine capable of performing satisfactorily in a dairy. This work, with its attendant risks and costs, had produced the improved 820 A when Tetra made the take-over. Thus, even if, as Tetra maintains, further development is necessary on the BTG sterilization process, much know-how has been acquired by Liquipak during its pasta development work. This know-how is now available to Tetra which would give it a substantial advantage in lead time over any other future licensee that would perhaps start development work on BTG technology were any other licences possible. In view of this substantial lead time and the fact that much development work has already been undertaken, even if there are some technical risks remaining for Tetra they are not enough to justify an exclusive licence with its extremely negative impact on competition. In addition Tetra itself has a long and vast experience of making aseptic machines and so is familiar with and has experience of the types of technical difficulties likely to be encountered even in applying the new BTG sterilization process. Furthermore, in this case Tetra has no need of protection from the licensor which could never exploit the patented technology since its role is limited to disseminating technology. Neither does Tetra need protection from other potential licensees (if such other licensees were permitted) because, apart from PLK, no company possesses any significant practical experience of machines for filling cartons by an aseptic process.

(52) In the context of whether the protection afforded by exclusivity is really necessary to encourage licensees to bear any further commercial or technical risk, it should be noted that Elopak was willing to accept a non-exclusive licence.Elopak maintains that the BTG sterilization technology is adequate and that it could also overcome without too many difficulties the problem of incorporating this technology in a reliable machine. Elopak itself considered the Liquipak improved 820 A ready for at least limited commercial exploitation.

## IV. Article 85 (1) and the withdrawal of the exemption provided for in Regulation (EEC) No 2349/84

(53) The Commission considers, for the reasons set out below, that the exclusivity of the licence from the date of its acquisition by Tetra until the renouncing by Tetra of this exclusivity fell within the scope of Article 85 (1). Since the exclusive licence did not contain any restrictions going beyond those described in Articles 1 and 2 of Regulation (EEC) No 2349/84, the exemption automatically provided for in that Regulation would, subject to the provisions of Article 9 thereof, have applied during the period of exclusi-

vity. However, because the Commission considers that, after the acquisition by Tetra, the conditions of Article 85 (3) were no longer fulfilled for the exclusive licence, it would for the reasons explained below have been its intention to withdraw this exemption pursuant to Article 9 of the abovementioned Regulation if the exclusivity had not been abandoned. Tetra has now, following the intervention of the Commission, renounced all exclusivity to the licence in question, and BTG has indicated that it is willing to consider non-exclusive licences. Any withdrawal of the exemption could only have taken effect from the date of the decision of the Commission. Nevertheless, for the sake of a better understanding of this case and the position of the Commission with regard thereto, it is necessary to give the reasons why the exclusivity fell within the scope of Article 85 (1) and the reasons for the inapplicability of Article 85 (3).

(a) *Article 85 (1)*

(54) Both Tetra and BTG are undertakings within the meaning of Article 85 (1). Furthermore, the exclusivity provisions of the licence fell within the scope of Article 85 (1) since they prevented BTG either from exploiting itself the technology or from offering licences to other firms that might be interested in this technology. This is a very serious threat to competition, both because of the highly concentrated structure of the market and because of the fact that the ability to build an acceptable machine (for which a sterilization technique is essential) is the key to entering this market where the barriers to entry are particularly high. In fact, the acquisition of Liquipak and the licence has at the very least seriously delayed Elopak's attempts to enter the market.

(55) The circumstances of this case are not comparable to those involving hybrid maize seed where the Court ruled that an open exclusive licence may not fall within the scope of Article 85 (1) if concerned with the introduction and protection of new technology in a contract territory where the technology is not known [1]. In that case, the licensee did not previously produce the product and needed protection from the experienced licensor if he was to undertake the substantial technical and commercial risks necessary to exploit the licensed product. In the present case Tetra is a dominant company and it is inconceivable that BTG could even envisage exploiting the technology in question.

Furthermore, any protection that Tetra claims is necessary to bear the technical and commercial risks associated with the dissemination of new technology is not sufficient to overcome the disadvantages created by the loss of competition. In fact, the limited extent of the commercial and technical risks born by Tetra has been described above.

(56) In addition, in the maize seed case an important element in the Court's reasoning taking the open exclusive licence outside the scope of Article 85 (1) was the fact that such protection was necessary to stimulate both inter- and intra-brand competition. In the circumstances of the present case, where Tetra is a dominant company and the barriers to entry are particularly high, the effect of the exclusivity provision is not to encourage but rather to prevent the emergence of both inter- and intra-brand competition. Inter-brand competition is damaged because competitors to Tetra (in particular Elopak) are prevented from using the technology to enter the market. Intra-brand competition is damaged because no other licences can be granted and the licensor cannot himself produce the product which makes parallel imports impossible.

(57) Thus the very competition which the Court sought to encourage by taking open exclusive licences outside the scope of Article 85 (1) are in fact damaged by the exclusivity provisions of this case, where the tendency is in fact to eliminate competition. Thus, in market circumstances where exclusivity is necessary to encourage competition, this exclusivity may fall outside Article 85 (1) but in other market circumstances where it is detrimental to competition it must fall within the scope of Article 85 (1) [2]. Finally there is a substantial effect on trade between Member States (see point 48 above).

[1] Nungesser *v.* Commisson, Case 258/78 (1982) ECR 2015.

[2] This line of reasoning is consistent with the Court's rulings in other fields, eg. selective distribution (SABA I and II — Metro *v.* Commission, Case No 26/76 (1977) ECR p. 1875, and Metro-SG-Großmärkte GmbH & Co KG, Case 75/84 Judgment of 22 October 1986, neither of which has yet been published in the Official Journal) where in certain market circumstances selective distribution falls outside the scopoe of Article 85 (1) but in other circumstances selective distribution may fall within the scope of Article 85 (1).

(b) *Article 85 (3)*

(58) The Commission may withdraw the benefit of the exemption provided for by Regulation (EEC) No 2349/84 where the conditions of Article 85 (3) are not fulfilled, and in particular where the licensed products or services provided using a licensed process are not exposed to effective competition in the licensed territory from identical products or services, or products or services considered by users as equivalent in view of their characteristics, price and intended use. In this case, the dominance of Tetra described above, and in particular its market share for aseptic milk packing machines and cartons, gives Tetra the possibility of eliminating competition in respect of a substantial part of the products in question.

(59) Furthermore, because of this elimination of competition in respect of a substantial part of the products in question, it is difficult to see how consumers will be allowed a fair, or any, share of the resulting benefits. Moreover, there is a possibility that the concentration of market power in Tetra's hands will be detrimental to the improvement of production and distribution and may hinder promotion of technical and economic progress : conditions which normally thrive best in a competitive environment. In addition, in the circumstances of this case it is difficult to see how the exclusive licence is indispensable to the attainment of any objective advantage. Finally, as noted above (points 49 to 52) there is no objective justification for exclusivity in this case.

## V. Conclusions

*Article 86*

(60) The Commission considers that, at the time of the acquisition of the Liquipak group and the assignment of the licence to it, Tetra occupied a dominant position in the EEC market for the production of machines incorporating technology for sterilizing cartons, used for filling under aseptic conditions board cartons with UHT-treated liquids, including in particular milk. Tetra abused its dominant position by the acquisition of this exclusive licence which hqad the effect of strengthening its already dominant position, further weakening existing competition and rendering even more difficult the entry of any new competition. This abuse lasted until Tetra renounced all claims to this exclusivity.

*Article 85 (1)*

(61) On the basis of the reasons set out above the Commission considers that the exclusivity provisions, as far as they have effects in the common market, contained in the licence between NRDC and Novus Corp. of 27 August 1981 fell within the scope of Article 85 (1) at least from the date of the agreement to assign this licence to Tetra until Tetra renounced all claims to this exclusivity. Had not Tetra renounced all claims to this exclusivity the Commission would, in accordance with Article 9 of Regulation (EEC) No 2349/84, have withdrawn the benefit of the exemption provided under this Regulation, because the conditions necessary for an exemption under Article 85 (3) were not fulfilled.

## VI. Termination of infringement and reservation of right to take further action

(62) Although Tetra has renounced all exclusivity to the licence in question and BTG has announced that it is negotiating with both Tetra and Elopak to grant non-exclusive licences, the Commission considers for the reasons set out below that it has an obligation to take a decision in this case [1].

1. Tetra committed a serious abuse of Article 86 and in conjunction with BTG infringed Article 85 (1) in a way that could not have been exempted under Article 85 (3). These contraventions of the rules of competition were only terminated when Tetra changed its attitude following the intervention of the Commission during the course of its official investigation.

2. Were it not for the fact that the contraventions of the rules of competition were relatively novel, the Commission would have sought to impose a fine on Tetra for its behaviour. The Commission feels that a formal decision will clarify its position on this topic and formally warn not only Tetra of its attitude but also other firms who may undertake similar lines of conduct.

3. Even though willing to renounce exclusivity Tetra still denies that it holds a dominant position or has committed any abuse or has infringed Article 85 (1) in any way that is not exemptable. In addition, BTG has stated it

[1] See Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL) *v.* CEC, Case No 7/82 (1983) ECR p. 483.

would still prefer to grant an exclusive licence. A decision is therefore necessary to ensure that the exclusivity is not reinvoked by the parties and also to indicate the clear position of the Commission towards other similar behaviour.

4. Furthermore, the Commission cannot overlook the legitimate interest of Elopak which made an application to the Commission pursuant to Article 3 of Regulation No 17. Other potential competitors also have an interest in the legal security which might result from such a public declaration by the Commission.

(63) In addition, the Commission reserves the right to continue its investigations into Tetra's wider commercal behaviour on the markets for milk cartons (both fresh and aseptic) and packaging machines (both fresh and aseptic) in order to determine whether Tetra has committed any further infrigements of either Article 85 or Article 86,

HAS ADOPTED THIS DECISION :

*Article 1*

The acquisition by or on behalf of Tetra Pak Rausing SA of the exclusivity of the licence between NRDC and Novus Corp. of 27 August 1981 through the purchase of the Liquipak Group in so far as it has effects in the EEC constituted an infringement of Article 86 from the date of acquisition until this exclusivity effectively came to an end.

*Article 2*

This Decision is addressed to :

Tetra Pak Rausing SA
70 avenue Général Guisan,
PO Box 181,
CH-1009 PULLY/LAUSANNE ;

c/o Tetra Pak Italiana SpA,
Via Delfini 1, I-41100, MODENA.

Done at Brussels, 26 July 1988.

*For the Commission*
Peter SUTHERLAND
*Member of the Commission*

*ANNEX*

**Table 1**

**Cartons sold 1985**

*(millions of packages)*

| | Aseptic | | Non aseptic | |
|---|---|---|---|---|
| | Tetra | Others | Tetra | Others |
| Belgium/Luxembourg | 502 | 100 | 21 | 50 |
| *(%)* | *(83,4)* | *(16,6)* | *(29,6)* | *(70,4)* |
| Denmark | 237 | — | 343 | 650 |
| *(%)* | *(100,0)* | | *(34,5)* | *(65,5)* |
| France | 2 916 | 200 | 253 | 200 |
| *(%)* | *(93,6)* | *(6,4)* | *(55,8)* | *(44,2)* |
| Federal Republic of Germany | 3 262 | 750 | 793 | 1 100 |
| *(%)* | *(81,3)* | *(18,7)* | *(41,9)* | *(58,1)* |
| Greece | 66 | 50 | 10 | 50 |
| *(%)* | *(56,9)* | *(43,1)* | *(16,7)* | *(88,3)* |
| Ireland | 15 | 50 | 337 | 150 |
| *(%)* | *(23,1)* | *(76,9)* | *(69,2)* | *(30,8)* |
| Italy | 2 756 | 50 | 1 288 | 400 |
| *(%)* | *(98,2)* | *(1,8)* | *(76,3)* | *(23,7)* |
| Netherlands | 269 | 200 | 379 | 800 |
| *(%)* | *(57,4)* | *(42,6)* | *(32,1)* | *(67,9)* |
| Portugal | 539 | — | 20 | — |
| *(%)* | *(100,0)* | | *(100,0)* | |
| Spain | 1 408 | — | 127 | 100 |
| *(%)* | *(100,0)* | | *(55,9)* | *(44,1)* |
| United Kingdom | 1 108 | 200 | 821 | 1 200 |
| *(%)* | *(84,7)* | *(15,3)* | *(40,6)* | *(59,4)* |
| Total EEC | 13 078 | 1 600 | 4 392 | 4 700 |
| *(%)* | *(89,1)* | *(10,9)* | *(48,3)* | *(52,7)* |

*Source:* Tetra

**Table 2**

**Packaging machines leased or sold and still operating at end 1985 per Member State**

| | Aseptic | | Non aseptic | |
|---|---|---|---|---|
| | Tetra | Others | Tetra | Others |
| Belgium/Luxembourg | 58 | 5 | 9 | 3 |
| *(%)* | *(92,1)* | *(7,9)* | *(75,0)* | *(25,0)* |
| Denmark | 48 | — | 54 | 101 |
| *(%)* | *(100,0)* | | *(34,8)* | *(65,2)* |
| France | 276 | 14 | 29 | 48 |
| *(%)* | *(95,2)* | *(4,8)* | *(37,7)* | *(62,3)* |
| Federal Republic of Germany | 332 | 73 | 116 | 150 |
| *(%)* | *(82,0)* | *(18,0)* | *(43,6)* | *(56,4)* |
| Greece | 10 | 2 | 4 | 5 |
| *(%)* | *(83,3)* | *(16,6)* | *(44,4)* | *(55,6)* |
| Ireland | 4 | — | 61 | 27 |
| *(%)* | *(100,0)* | | *(69,3)* | *(30,7)* |
| Italy | 428 | 6 | 328 | 96 |
| *(%)* | *(98,6)* | *(1,4)* | *(77,4)* | *(22,6)* |
| Netherlands | 42 | 31 | 30 | 50 |
| *(%)* | *(57,5)* | *(42,5)* | *(37,5)* | *(62,5)* |
| Portugal | 52 | — | 4 | 1 |
| *(%)* | *(100,0)* | | *(80,0)* | *(20,0)* |
| Spain | 172 | — | 50 | 57 |
| *(%)* | *(100,0)* | | *(46,7)* | *(53,3)* |
| United Kingdom | 148 | 10 | 122 | 215 |
| *(%)* | *(93,7)* | *(6,3)* | *(36,2)* | *(63,8)* |
| Total EEC | 1 570 | 141 | 807 | 753 |
| *(%)* | *(91,8)* | *(8,2)* | *(51,7)* | *(48,3)* |

*Source:* Tetra