The Group Exemption and Exclusive Distributorships in the Common Market - Procedural Technicalities

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Most discussions of the substantive antitrust aspects of exclusive distributorship agreements slight the significant procedural and institutional complexities unique to the Common Market scene, complexities to which these enforcement activities are subject and with which American advisors will have to live for the foreseeable future. The primary purpose of this brief note is to emphasize the latter problem.

Pressures of the organization's own making—the enormous number of agreements submitted to it by virtue of the review scheme promulgated in the original Regulation No. 17 of the Council of Ministers—forced the Council to adopt a system whereby there was delegated to the Commission the right to promulgate group exemptions from the otherwise applicable antitrust provisions of the treaty as an aid to lighten the work involved in individual adjudication. This was

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3 For a critical analysis of the path to this device and of its potential shortcomings, see Buxbaum, Patent Licensing: A Case Study on Antitrust Regulation Within the European Economic Community, 9 Antitr. Bull. 101, 111-14, 121-23, 144-44b (1964).
achieved with the passage of Regulation No. 19/65 of the Council of Ministers which essentially called for promulgation of Commission regulations of the mentioned sort in two major fields: two-party restrictive distribution arrangements and two-party licenses or other agreements involving industrial property (in particular, patents and trademarks). Almost one and one-half years went by before the Commission responded with its first draft regulation aimed at the first of these two subject fields. The delay, from March 1965 to August 1966, is explained by the wait for the ruling of the Court of Justice in the *Grundig* case, which cut across most of the substantive law aimed at in this regulation. In addition problems of jurisdiction, and particularly the somewhat conceptual problem whether group exemptions could only be issued for practices which were subject to article 85(1) in the first place or could cover practices which might in time be found not to violate article 85 at all, were not decided until one of the companion cases to *Grundig, Italy*

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4 Regulation No. 19/65, March 2, 1965, 8 J. O. 533 (1965); English translation in 1 CCH Common Mkt. Rptr. ¶2717.


COMMON MARKET GROUP EXEMPTIONS

v. EEC Council,\(^8\) was handed down. I mention this interim draft because of an important procedural problem that remains unresolved. In this original proposal it was provided that the group exemption would apply only if certain substantive conditions, essentially those of article 6 of the definitive regulation, were met. Left open, however, in that first draft was the question of who would decide whether these conditions were in fact met in any given case.\(^9\)

The definitive regulation\(^10\) sets out two types of substantive conditions which must be met before an agreement typologically fitting under the regulation (i.e., a two-party exclusive distributorship agreement that does not include certain additional restrictive clauses\(^11\)) actually can enjoy the group exemption promulgated by this regulation. The first type, contained in article 6, precludes application of the exemption to goods for which significant interbrand competition is lacking at the producer level; to situations in which competitive producers find it impossible to distribute their product in the relevant territory at the level of the exclusive dealerships bound up in the agreements to be

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\(^9\) Article 2 of Draft Regulation, supra note 6.


\(^11\) Cohen's statement, supra note 1 at 390, that the exempt distributorship agreement may contain a prohibition on sales outside the exclusive territory is in error. Under article 2 of the Regulation the agreement may prohibit advertising or branch establishments outside the territory, but no more; to allow more would contradict the entire scheme of article 3, discussed below.
reviewed; and to cases of misuse of position by the exclusive
distributor through unjustified refusals to serve groups of
customers in his territory, who are dependent upon him for
these goods, or by reselling the goods at unreasonably high
prices. This factual list, which is specified not to be all-
inclusive, is geared to and dependent upon article 7 of the
1965 Council Regulation, which provides that if the Commis-
sion, sua sponte or upon complaint of a state, or persons who
have a legitimate interest therein, determines that in an
individual situation agreements or collusive practices which
otherwise fall under the group exemption nevertheless have
effects incompatible with the criteria laid down in article
85(3) for procurement of an exemption, it may declare that
the practices do not enjoy the benefit of the group exemption.
The legal consequence of such a deprivation is to permit the
Commission to proceed under article 6 of the original Regu-
lation No. 17, and to issue a declaration that an individual
exemption under article 85(3) shall not be available.

The vague but real risk to which exclusive distributorship
agreements in borderline cases are thus exposed will be dis-
cussed below; here I wish rather to point to a procedural
problem. Article 6 is not the only article through which this
kind of exemption revocation can occur. Article 3 of the final
Regulation provides that the group exemption “is not appli-
cable” in situations in which the dealership is a disguised
arrangement between parties at the same competitive level,
or in which the parties to these arrangements make it difficult
for other levels of distributors or for consumers to obtain the
products involved in the arrangement from other distributors
within the Common Market (especially if the contracting par-
ties utilize industrial property rights to prevent such “inter-
state” commerce of goods which were legitimately brought
into commerce at the original point of sale), or in which they
exercise other rights or take measures to prevent other dis-
tributors or consumers from obtaining these goods elsewhere
in the Common Market or from selling them in the territory
covered by the exclusive distributorship agreement. This
provision, which obviously is a resumé of the *Grundig* case, or at least of the philosophy underlying *Grundig*, and which is essentially designed to prevent territorial limitations, unlike article 6 is not limited to enforcement activity by the Commission. Instead, it provides an automatic non-applicability of the group exemption. Thus it is not within the hierarchy of delegated powers running from article 7 of the Council Regulation of 1965, but is rather part and parcel of the initial primary definition of covered agreements and should really be read as a qualification of articles 1 and 2 of Commission Regulation 67/67.

The consequence of this distinction is to leave open a basic jurisdictional issue—who is to determine that article 3 is violated? Obviously the Commission can make such a determination, but that is not startling. Startling, or rather unsettling to the regulatory scheme, is the possibility, which I believe to be a real one, that national administrative agencies and more to the point, national courts seized of private litigation, may make this determination themselves. Private litigation presumably will be a frequent occurrence in this field, since it comports with prior experience that maverick distribution efforts will occur, and that "legitimate" distributors or possibly the manufacturers themselves will sue under unfair competition or other tort principles to prevent these distribution efforts. Against such a suit a charge that the distribution arrangement violates article 3 of Regulation 67/67 may well be a common practice. At this point old problems concerning the competence of the national tribunal to make its own determination, or alternatively to suspend proceedings pending a determination by the Commission whether article 3 is violated, arise again. Again there arise equally well-known though complicated problems concerning suspen-

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13 See Buxbaum, Incomplete Federalism: Jurisdiction Over Antitrust Matters in the European Economic Community, 52 Calif. L. Rev. 56 (1964).
sion of proceedings by national tribunals in order to procure a preliminary opinion interpreting this regulation from the Court of Justice under Treaty article 177.\textsuperscript{14} Indeed, it is conceivable that the question of jurisdiction just posed would itself be brought to the Court of Justice as a problem of interpretation. The point is not to predict how these problems will be ironed out, but to indicate that the effort to shortcut individual treatment of cases probably will be unsuccessful. Whether through complaints made directly to the Commission under article 6 or through complaints involving article 3, individual treatment and disposition of these exclusive distributorship agreements remains the normal order of events.

The problem is complicated by the lack of harmony between the substantive criteria of article 3 and of article 6. The specificity of article 6 is not concerning matters that are totally within the general provisions of article 3 but in part involves items going beyond those there covered. For example, whether there is ample interbrand competition has nothing to do with the efforts of the contracting parties to hinder the availability of intrabrand competition; the possibility that competitive producers will not find other dealers, again a problem of interbrand competition, is unrelated to the use of industrial property rights against intrabrand competitive imports; and the use of distribution agreements to cloak a producers' cartel is of course no more reached by the Commission's power of review under article 6 than is a dealer's abuse of resale power by the more open definitional limits of article 3. On the other hand, an easy division of the two articles on the intrabrand—interbrand scale is also not available, since each article covers each type of competition to some extent. In short, a significant number of factual issues, determining the initial applicability of the group exemption to a particular set of agreements, are available in future dispute situations that in turn may be heard not before the Commission but before other decisional bodies.

\textsuperscript{14} \textit{Id.} at 61 ff.
The handling of abuse procedures under the aforemen-
tioned article 6, while more clearly stated than the article 3
operation, is complicated enough. If the Commission decides
that the borderlines spelled out there are violated,\(^\text{15}\) it may
withdraw the group exemption status from the particular
agreement or set of agreements. Then, according to article 7
of the enabling Council Regulation of 1965, it may make a
declaration under the original Regulation No. 17 of 1962,
either granting or denying an individual exemption directly,
or granting such an exemption under certain conditions or
qualifications. In either event, says article 7, it may act even
though the Commission had not been notified of the particular
agreement pursuant to article 4(1) of the 1962 Regulation.
That article involved only new agreements; i.e., agreements
entered into after the effective date (March 13, 1962) of
Regulation No. 17. It does not specifically require that such
new agreements are to be submitted by any particular time,
though it does say they are to be submitted to the Commis-
sion; it does, however, preclude their exemption under 85(3)
unless and until the notification has occurred.\(^\text{16}\)

By excusing agreements from this requirement, article 7
of the 1965 Regulation seems to suggest that unsubmitted

\(^{15}\) Cohen assumes with most other commentators that most agree-
ments containing only the formal language legitimated by Regulation
No. 67/67 and no more normally will run no risk of falling afoul of
article 6 or for that matter article 3. See Cohen, supra note 1, at
403 ff. Indeed the Commission itself, in the preamble to the Regula-
tion states (as quoted in Cohen, supra note 1, at 403): “Since compe-
tition at the distribution stage is ensured by the possibility of parallel
imports, the exclusive dealing agreements subject to this regulation
will not, as a rule, make it possible to eliminate competition for a sub-
stantial part of the products concerned.”

Since these critical articles, however, in part use the economic con-
text of the parties, in part highly factual and subjective definitions of
the parties’ conduct, as the criteria for withdrawing the group exemp-
tion, I believe the assumption that borderline problems will be rare
to be highly optimistic. Further, as discussed in detail below, the
Commission’s restraint in originally applying them on its own motion
will not be the end of the problem.

\(^{16}\) See Buxbaum, supra note 13, at 71.
“new” agreements which after 1967 chose to ride under the group exemption can if improperly positioned thereunder be “re-immunized” on an individual basis, even if with regulatory conditions. But Commission Regulation 67/67, in its operative article, article 4, authorizes “new” agreements which were submitted to the Commission before May 1, 1967 to enjoy the benefits of the group exemption declaration (and that retroactively only to the date of notification). Thus the Commission Regulation at first glance does not seem to have taken advantage of the opportunity article 7 of Regulation 19/65 provides, and seems to make that latter provision meaningless in the context of restrictive distribution arrangements.

In fact the issue is a bit more complicated. Article 4 of the original Regulation No. 17 divided restrictive new agreements into two types. The “stringent” restrictive agreements, it has been shown above, had to be submitted to the Commission, though the only sanction compelling this was their exclusion from an 85(3) exemption unless and until submitted. There is, however, a second, mild type of restrictive agreement defined in article 4(2); here, for our purposes, is included the unilateral distribution arrangement restricting only the dealer, in his freedom to set prices or other conditions of resale of the distributed goods. These contracts, one might say, are presumptively exemptable under 85(3); a true exemption even for them was not available until they were in fact submitted, but they are distinguished from the stringent type in that their exemption, once granted, could be retroactive to a date prior to their notification. Except for this benefit they do not differ from the stringent type of restrictive agreement in any particular. For example, when article 15 of the 1962 Regulation subjects respondents to significant civil fines for violations of article 85 it precludes fines for the period after submission of an agreement for an 85(3) exemption and before denial thereof. Article 4(2) agreements, if not in fact submitted, cannot enjoy this interim
immunity if after eventual review they were later found to violate 85(1) and not to deserve the 85(3) exemption.\textsuperscript{17}

By analogy, in the case of the group exemption, the implied retroactive provision of article 7 of the Council Regulation could be read to mean that if these agreements had in fact been submitted to the Commission by May 1, 1967, as required by article 4 of the 1967 Regulation, then after their use of the group exemption had been challenged under article 6 thereof, and after the Commission had decided to grant an unconditional or conditional individual exemption, the individual exemption could be retroactive beyond the date of notification. In other words, if one assumes that the 1967 Commission Regulation requires prior notification, and yet wishes to reconcile it with article 7 of the 1965 Council Regulation, one can do so by reading the "no notification" language of article 7 as bearing on retroactivity only. Without article 7 the submitted agreements, after being transferred to the individual exemption request category, could be exempted retroactively to date of submission only; now with article 7, a more extended retroactivity is available without an earlier notification than the one in fact made. Available for 4(1) agreements, that is; under the 1962 Regulation the mild 4(2) agreements can be exempted to a date prior to their notification anyway. Under this reading article 4 of the 1967 Regulation could be read narrowly and exclusively and still reconciled with article 7.\textsuperscript{17a}

This is, however, a strained interpretation. A more generous reading is the more likely one. The preamble to the

\textsuperscript{17} See Deringer, \textit{supra} note 5, at 343. It would be rare that a mild, 4(2) agreement would be non-exemptable, but it is entirely possible; a company with a significant market share might well run afoul of the 85(3) requirement that it not eliminate competition for a substantial part of the products concerned. But see note 15, \textit{supra}.

\textsuperscript{17a} Another reading would be that the Commission, in this the first but presumably not only group exemption under the 1965 "enabling act," simply chose not to avail itself of the "non-notification" possibility opened up by article 7 of the latter. This does not wash, however: article 6 of Regulation 67/67 is specific in harnessing the entire procedure into article 7.
1967 Commission regulation states that "agreements which meet the conditions of this regulation need no longer be submitted." While the Parliamentary discussions and Commission Bulletins reveal nothing either way, commentators, when they have considered the matter at all, have assumed that the group exemption is a substitute even for notification. Technically this works as follows: Article 4 of the 1967 Regulation simply provides that new agreements which were in fact earlier submitted can be retroactively exempted to the date of notification; other, unsubmitted ones (whether mild or stringent) are not, but are exempt only from the operative date of the regulation.

Article 7 of the 1965 Council Regulation, which provides the scheme for individual exemptions of agreements challenged by the Commission, merely means to excuse such agreements from a prior notification.

Interestingly, one can read this preamble statement more narrowly—post-1967 agreements need not be submitted—rather than broadly—already existing as well as future "new" agreements need no longer be submitted. I doubt, however, that such a meaningless middle position was intended.

The Commission's draft proposal for a Council Regulation, submitted to the Council on February 28, 1964, speaks in its explanation of already submitted agreements; and its proposed article 7 made no mention of the excuse from notification now contained therein. See Supplement to Bulletin of the European Economic Community, No. 4—1964, 8, 9, 11. The consultative review by the European Parliament of May 13, 1964, to the extent it sheds any light on the subject, hints at the need for pre-existing notification. See 7 J. O. 1275 (1964). The later position of the Economic and Social Committee, dated May 27, 1964, is equally of little help, but mentions as a main purpose of group exemptions the Commission's need thus to dispose of a large number of already submitted applications. 7 J. O. 3318, 3321 (1964).

See, e.g., Baardman, supra note 6, at 587; Mailänder, supra note 10, at 51, 52, 43, 58; Tessin, supra note 10, at 1164.

The issue cannot be settled by looking to the ratio legis alone: why should submission continue if they are no longer individually judged. The Commission might well wish to use them as data for deciding on extensions or modifications of group exemption declaration.

May 1, 1967, pursuant to article 9 of the Regulation. I have omitted from this elaboration the system, now no longer available, of redrafting overly restrictive agreements by August 2, 1967 to bring them within the confines of the regulation. Article 5.
cation requirement if, after the attack, the Commission decides to grant an individual, probably qualified, exemption. This was necessary since otherwise those parties risking non-notification in mistaken reliance on the group exemption might have been ineligible, were one to read the 1965 Regulation as creating an exclusive approach, to obtain an individual exemption even though the Commission favored one. The added sentence, thus, is part and parcel of the general effort to assure availability of the parallel individual exemption channel. The other element distinguishing mild from stringent agreements, however, the longer retroactivity of the former if individually exempted under Regulation No. 17, remains operative by necessary implication. In other words, 4(1) agreements that have gone through this mill can only be exempted individually to the date of notification; if none was effected, perhaps to May 1, 1967 or to the date of the Commission’s decision of withdrawal of the group and substitution of the individual exemption. 4(2) agreements in that posture can be exempted retroactively to the date of their making. All in all, this basic opinion that the exemption is available to unsubmitted agreements obtains some additional slight support from article 4 of the 1965 Council Regulation. Paragraph (1) thereof provides a chance for the revision of agreements to meet the standards of any future group exemption, in analogy to the correction scheme of Regulation No. 17. Paragraph (2) permits this in the case of old agreements only if they had in fact been timely submitted to the Commission (by February 1, 1963); thus there exists a weak negative inference that for new agreements no notification is required. It is weak because for new agreements no such corrective process was foreseen even in Regulation No. 17.

I presume that all such agreements can even now be submitted to the Commission with a request for an individual exemption under 85(3).\textsuperscript{21} Under that approach, however, they

\textsuperscript{21} Accord: Mailänder, \textit{supra} note 10, at 54; Tessin, \textit{supra} note 10, at 1164. The preamble to the 1966 Draft Regulation stated explicitly
require individual disposition by the Commission. I also do not discuss here the important question whether agreements challenged under article 6 of the group exemption regulation will often survive the challenge, or will fall and at best obtain individual treatment. I expect the latter but defer stating my reasons until later.

We turn, then, to the disposition of factual problems posed by the borderline group of new agreements, both stringent ones and those falling under 4(2) of Regulation No. 17, and old agreements (which by definition had to be submitted to the Commission long before this 1967 Regulation became effective). The reference in article 7 of Regulation 19/65 to articles 6 and 8 of the original 1962 Regulation has already been mentioned. If the declaration is in favor of an unconditional or conditional individual 85(3) exemption, this exemption may be retroactive, not only to the day of notification but in the case of new 4(2) agreements beyond to the date the agreement was signed, and in the case of old agreements to March 1962. There exists a doctrinal dispute about the formulation of a combined withdrawal of a retroactive group exemption and grant of a retroactive individual exemption but it is, thank goodness, not essential to this already complicated description. There is no jurisdictional bar to such an individual application and approval. Nothing in the group exemption system makes it exclusive. Substantively, too, an opening for such an exemption conceptually still exists, in that the two positive and two negative criteria of 85(3) are not coextensive with the criteria of article 6. In fact, how-

that the right of an enterprise to request a decision of the Commission under article 85(3) in an individual case remained in effect.

9 J. O. 2863.

22 Article 5, Regulation No. 17, required old agreements of the 4(1) variety to be submitted by November 1, 1962 to be eligible for an exemption. See also article 7 concerning modification of old agreements of both types if necessary (see supra, note 17). On the frequency of "borderline" occurrences, see supra note 15.

23 Compare, Kirschstein, supra note 5, at 368, with Deringer, supra note 5, at 399.
ever, it is hardly conceivable that an agreement running afoul of article 6 will not also be found to fall short of meeting these criteria. At best the possible exemption foreseen by article 7 of the Council Regulation will be limited to conditioned or qualified approvals pursuant to article 8 of the 1962 Regulation. While technically these could be retroactive as above stated, they would not likely include this benefit. In this sense such approvals are thus vulnerable, at least for the interim period of their illegal past, to the dangers next discussed.

Denial of the exemption, the more likely prospect, brings both administrative and more general private sanctions into play. The administrative ones are those spelled out in article 15 of Regulation No. 17 of 1962. The civil fines of $1,000 to $1,000,000 or more cannot be imposed (for violation of articles 85(1) or 86) for a violation during the time period after an agreement was submitted to the Commission and before the (negative) decision concerning an 85(3) exemption was rendered, or before the Commission after preliminary inquiry notifies the parties that they will probably fail in their exemption request.\textsuperscript{24} It remains to be seen whether these fines can indeed be imposed for a prior period of illegality, or whether a mistaken and innocent assumption that an agreement fell under the group exemption will immunize the prior period. An individual exemption can be withdrawn if abused, and it can be argued that an article 15 fine could be imposed concurrently therewith for the period of abuse; the analogy may well hold for the group exemption, especially as abuse is a major triggering factor of the article 6 revocation proceeding. Even if Commission-ignored sanctions, however, are only prospectively applicable, other sanctioning authorities are not bound by this limitation, if the

\textsuperscript{24} This preliminary inquiry and notification have now been subjected to procedural due process requirements that make the continued use of the “blue letter” notification problematical. \textit{Société anonyme Cimenteries C. B. R. Cementsbedrijven N. V. v. Commission de la C. E. E.,} 13 Rec. Jur. 75 (1967); English translation in 6 Com. Mkt. Rptr. 77 (1967).
prior period in fact was not within the exemption. And more importantly, other authorities may have an independent ground to challenge the availability of the group exemption in the first place, by using the factual criteria listed in the previously mentioned article 3 of the 1967 Regulation. It is appropriate, therefore, finally to turn to the uncertainties created by the Commission's regulatory competitors; again not in terms of likely substantive results but in terms of the procedure.

The basic issue can only be posed, not answered: Will national courts and agencies take, will the Court of Justice agree they can take, an independent role in denying the availability of the group exemption declaration in a given case by review of the threshold barriers raised in article 3 of the 1967 Regulation? The results under either view do not differ greatly, for even if the power is granted, its exercise eventually channels the case into the Commission's procedures. An illustrative case will demonstrate this to be so. Assume a manufacturer suing a maverick distributor, either one who violates his own restrictive agreement or poaches upon a restrictive system putatively legitimate under the 1967 Regulation. Assume further a defense that the agreement directly or indirectly sued upon violates 85(1) because the complainant is violating article 3 and thus cannot claim a group exemption for the agreement. Even if the court agrees, complainant may still have available his original notification, which he can now use to apply for an individual exemption. But—and this is the crucial point toward which this entire technical discussion has been moving—he faces the Commission after another tribunal has made findings that practically if not conceptually leave him little opportunity to procure a different result from the Commission. Technically the 85(3) criteria might be satisfied though the article 3 criteria are not; practically and in a sense politically this seems dubious. Even worse is the situation when the party,

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24a But see article 4(3), Regulation No. 19/65; see Deringer, supra note 5, at 395-96.
relying upon the group exemption, failed to notify the Commission of the agreement.25

To complete the discussion, and to revert to a basic question previously stated, will this practical situation be treated differently if national tribunals do not have this competence but must refer article 3 issues to the Commission? It will be recalled that this resembles that set of situations in which the Commission, upon private complaint rather than sua sponte, undertakes an article 6 review. The criteria being applied may differ but in my opinion the judgmental problem is the same; to wit, any time a maverick rationally and economically decides to take the trouble to outflank an orderly distribution channel, the Commission or any supervisory authority will be strongly impelled to find the group and the individual exemption unavailable.26 The fact of attack more likely than not will be evidence of the legitimacy of the attack and of the concomitant illegitimacy of the attacked distribution practice. The availability of a conditioned individual exemption pursuant to article 8 of Regulation No. 17 does not qualify this conclusion in any important way. First, such a result still leaves the period prior thereto in a state of illegality, with all the aggressive and defensive consequences thereof; secondly, who can judge in advance the degree to which the Commission might see fit to utilize this power? I

25 In that event, where is the notification that can serve as the request for an individual exemption? If it is an old, pre-1962 agreement, there was one by definition for otherwise the group exemption was not available in the first place. If it is a new, unsubmitted agreement, the last sentence of article 7 of the 1965 Council Regulation, dispensing with a submission, is apparently meant as a dispensation from the requirement. It cannot conjure up a period of potential retroactivity for the individual exemption, however, and that is the crucial point here.

conclude, therefore, that whether a prior judicial finding of illegality exists or not, a challenged restrictive distribution agreement will not derive much benefit from its original and only putative location inside the haven of the group exemption.

If that be so, the question of what to do can now be raised. I said at the outset that the motive behind this entire awkward regulatory scheme was to lighten the Commission's workload, no more. I now stress that the group exemption in no way relieves the business advisor of the need to weigh whether in the competitive world relevant to his client the actual distribution system is likely to be vulnerable in its exemption claim; indeed, is likely to be challenged in regard thereto. If so, caution would seem to dictate the pursuit of an individual exemption request in advance of challenge and before the adversary context throws the clearance request out of control. I suspect that the result of such advisory evaluations will be to reinstate a good deal of the Commission's workload and thus vitiate in part even its own goal of relief, but that has always seemed inevitable to me, given the undeniably factual moments which the Rome Treaty purposely built into the exemption concept of article 85(3).27

If an outsider may be permitted a tentative judgment on this entire enforcement mechanism, I would argue that the present scheme has not resolved the Commission's basic technical problem—how to reduce the energy expenditures of regulation to a politically acceptable level without slipping into a formal and toothless control mechanism.28

27 See Buxbaum, supra note 12, at 129-34.
28 Id. at 143-44. Compare Holderbaum, Chancen für Eine Europäische Kartellbehörde?, 2 Europarecht 116, 118-19 (1967).