
1.1 The scope of art. 85 and 86 (now 81 and 82) of the Treaty of Rome: Articles 81 and 82 of the treaty are the main instruments of competition law in the European Union.

1.2 Article 85 deals with “agreements or concerted practices” between undertakings. This includes both “horizontal” agreements amongst competitors and “vertical” agreements between operators at different distribution levels of the market (e.g. supplier – wholesaler or wholesaler – distributor agreements). The main prerequisite for the application of art. 85 is that there has to be an agreement or a concerted practice. Article 86, on the other hand condemns abusive unilateral behavior by dominant firms.

1.3 The structure of article 85 has given grounds for criticism on the way that it was drafted:
- Under paragraph 1 of this article, all agreements or concerted practices that may affect trade between member states and have as their object or effect the restriction of competition in a substantial part of the common market are prohibited.
- Under paragraph 2, all such agreements are proclaimed as automatically void.
- The only way to “salvage” these agreements was to notify them to the Commission and hope for an “exemption”, i.e. a decision declaring that although the agreements violated art. 85.1, they were exempt from nullity under 85.2 because they were found beneficial to the market or the consumer for one of the reasons mentioned in art. 85.3. Alternatively, the Commission, instead of an “exemption” would issue a “negative clearance”, stating that the agreement and its terms did not violate 85.1.

1.4 This structure caused a lot of problems to the market operators. Due to the fact that there was no way of being certain beforehand which agreements violated 85.1, the Commission was flooded with notifications of all kinds of agreements. 20 or fewer decisions were issued per year. This meant that all notified agreements remained in an uncertain state of validity for many years, after which the Commission could declare them valid or invalid. On the other hand, not notifying bore the risk of heavy fines. Even agreements that contained provisions that made absolute commercial sense (in protecting, for example, the retailer and his investment from “free-riders” / parallel importers that would take advantage of his efforts to promote the product) were deemed to fall under 85.1 and had to be notified.

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1 I.e. a coordinated behaviour that can be attributed to common understanding between the parties involved without reaching the formal status of an “agreement”.
2 The concept of “dominance” has been defined essentially as “power over price”, i.e. the power of one firm to determine its behaviour in the market independently of the actions of its competitors.
1.5 As mentioned above, vertical agreements between a supplier and a retailer would fall under the 85.1 rule if they contained any provision restricting the retailers’ freedom to dispose of the goods as he saw fit. Thus, territorial exclusivity, sales bans, minimum supply terms, resale price maintenance etc. would render an agreement “provisionally invalid”, unless notified and exempted by the Commission.

1.6 In its effort to ease some of the pressure, the Commission began issuing “block exemption” regulations for certain categories of agreements. The regulations would provide that certain kinds of agreements would not need to be notified despite the fact that they would contain a number of restrictive terms (“white list”) unless they also contained other terms (“black list”) that were suspect and needed commission scrutiny. The Commission issued a number of such block exemption regulations. Furthermore, the Court established the rule that the adverse effect of restrictive agreements on the market had to be “appreciable”, meaning that agreements among undertakings with small market shares would wholly escape art. 85.

1.7 The practice of issuing “block exemptions” was not without drawbacks. Due to the fact that the regulations had different “black” and “white” lists, it was possible for certain agreements to be disguised as something else in order to fall under a different block exemption when the proper block exemption would not allow some of their terms. On the other hand, agreements falling under more than one category could not take advantage any block exemption and still needed to be notified. Furthermore, similar agreements would be treated differently just because they fell under one and not the other block exemption. The approach of block exemptions was accused of being formalistic and not market oriented. It divided agreements into categories where, in reality, no categories existed.

1.8 Theorists were also heavy in their criticisms of the Commissions’ practices to consider some restrictions placed in vertical agreements as infringing art. 85.1. They convincingly argued that in markets where competition amongst different brands was heavy, these restrictions (exclusivity, for example) were necessary in order to protect the local dealers and improve competitiveness of the product against other products; thus they were beneficial to the market and to consumers. In other words, these restrictions were “ancillary” to a pro-competitive transaction.

1.9 In 1999, the Commission listened: It issued regulation 2790/1999 which replaced most of the individual block exemption regulations and applies to all “vertical agreements” regarding goods or services. This regulation contains a “black list” plus a 30% market share threshold. This means (in general terms) that all “vertical agreements” between parties having less that a 30% market share would fall under the block exemption unless containing a blacklisted clause. In this manner the Commission decided that there must be a uniform approach to all vertical agreements and (except where really “nasty” clauses were involved) that, if market share was under 30%, vertical arrangements did not concern competition law.

3 For example: 1983/83 [Exclusive dealing], 1984/83 [Exclusive Purchasing], 2349/84 and 240/96 [Patent Licensing], 123/85 [Motor vehicle distribution and servicing], 417/85 [Specialization agreements], 418/85 [R&D Agreements], 4087/88 [Franchising], 556/89 [Know-how licensing] to name just a few.
4 The “de minimis” rule.
5 The “ancillary restraints” doctrine. This doctrine is similar to the “rule of reason” doctrine applied vastly in United States antitrust jurisprudence.
1.10 Regarding industrial and intellectual property rights, however, regulation 2790/1999 applies only insofar as the transfer or licensing of said rights are not the primary object of said agreements but rather a necessary accompaniment of the use, sale or resale of the goods or the services by the purchaser or his clients. This means that some IP rights are still governed by block exemption 240/1996 on the transfer of technology (patents, know-how etc.) and some (such as copyright) are not covered by any block exemption at all.

1.11 In its evaluation report of regulation 240/96, the commission suggests that a new approach to agreements related to Industrial and Intellectual Property transfers is needed. The Commission argues for a more market oriented and less formalistic approach, similar to that of regulation 2790/1999. More on the Commission’s evaluation can be found at 4, below.

2. Regulation 240/1996 (Patent Licensing Block Exemption)

2.1 Regulation 240/1996 applies to “primary” patent licensing and technology transfer agreements.

2.2 Article 1 of the regulation is the “white list”, containing agreement terms that would be caught by art. 85(1) but are exempt under 85(3). Article 2 is a further “white list”, containing provisions that are deemed not even to infringe art. 85(1). Article 3 is the “black list”: if the agreement contains one of these terms, it cannot fall under the block exemption.

2.3 No more need be said on this block exemption; the Commission’s evaluation report clearly indicates that if copyright is to be included this shall only happen in a wholly new legal instrument, with a totally different approach than the current regulation in force.

3. The status of Copyright Agreements under EU Competition Law

3.1 Thus far, agreements concerned exclusively or mainly with the licensing or transfer of copyright and related rights have had no special treatment under competition law in terms of a block exemption regulation. This means that said agreements could not contain restrictive terms and, at the same time, enjoy the block exemption relief. In principle, therefore, the “old” notification procedure had to be followed.

3.2 On the other hand, very few such agreements were indeed notified to the Commission. This is probably because most such agreements do not involve significant market power. It is also established that a copyright licensing agreement promotes competition (because it ensures that the creator receives royalties – an incentive for new creation to the ultimate benefit of consumers) 6. As long as it contains only restrictions necessary to make the license agreement viable, the agreement may be deemed as falling wholly outside the scope of art. 85(1) of the Rome Treaty because the restrictions can be considered as ancillary to a pro-competitive transaction and need not be notified.

3.3 The Commission is also not very active in defining its position as regards copyright licensing both as regards competition principles, as well as regards

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6 Well established principle by the European Court of Justice in cases 62/79 and 262/81 (Coditel I and II), regarding copyright licensing of films and the powers conferred thereby to prevent others from showing the film in the licensed territory.
treatment of copyright in the same manner as other IP rights. The Commission will condemn export bans, no-challenge clauses, non-competition clauses, unjust royalties (i.e. royalties for products not protected by copyright) and clauses requiring the licensee to transfer to the licensor title to any improvements made on the licensed products. However this cannot lead to the conclusion that the Commission has firmly decided to apply to copyright the same rules as it applies to other IP rights (patents, trademarks, know-how).

3.4 As mentioned above, the Court has set the principle (also mentioned in the Commission’s Evaluation Report 20.12.2001) that a distinction must be made between the existence and the exercise of a copyright. The former involves the “core package of rights that make up the IPR itself” that can never infringe art 85. The Court has further proceeded to rule that exclusivity and the power conferred thereby (to prohibit others from exploiting the same right), as well as the right to receive royalties, are part of this “core package” and do not, in principle, infringe art. 85(1) because they are ancillary to a pro-competitive transaction, unless they may prove disproportionate to the need to protect the creator's incentive in creating the work and to receive fair compensation, whereby abusive exercise of the right shall be found.

3.5 Furthermore, copyright, being a right to property, falls within the ambit of national law, not EU law (art. 295 [ex 222] of the Rome Treaty). This does not mean that, if copyright is exercised in an abusive manner, it shall not be caught by the provisions of EU competition law, esp. art. 82. However, given the proprietary nature of copyright, the Court has said that the circumstances for application of art. 82 must be “exceptional”\(^7\). Such circumstances may exist when the owner of the copyright exercises this right to inhibit the appearance of a new product or indeed the emergence of a new market, different from the one he is active in. In Magill, the Court found abusive behavior to exist, because television stations, monopoly owners of copyright to their scheduled telecasts, were refusing to grant license to periodicals (TV Guide) to publish said schedules. The court reasoned that said copyrighted material constituted an “essential facility” for the development of a new product in another, distinct market. Recently, the Commission has attempted to expand the Magill principle to enterprises doing business in the same market\(^8\). The case is still pending before the Court; however, thus far, the interim judgments issues suggest that the court shall not be favorable to the Commission’s attempt. In a judgment handed down on 26 October 2001, the Court has suspended an order of the Commission against IMS ordering the latter to license its intellectual property to competitors, arguing that Magill is to be interpreted strictly and that it applies only when two distinct markets are involved. It is hoped that in its final judgment the court will not only confirm the stance that it has thus far taken, but also that it shall include wording that would clearly signify that the exercise of copyright in order to gain a competitive advantage in one’s “home” market should be regarded as a benefit going to the very “existence” of such right and can thus never constitute an abuse. After all, the exclusive right to exploitation that copyright confers to the creator is the most important incentive in creating the work.

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\(^7\) Cases C-241/91 P and C-242/91 RTE and ITP v. Commission (Magill v. TV Guide).
\(^8\) Case T-184/01, Commission v. INS Health (INS)

4.1 It is very interesting to note that the Commission admits failure in dealing with IPR licensing agreements, as well as dissatisfaction amongst economic actors (recital 112) on the way that the formalistic approach that the block exemptions have taken preclude certain types of agreements from falling under their scope.

4.2 The Commission struggles with the issue of copyright licensing under recital 115. The focus is placed mainly on software licensing; no mention is made of books or other artistic or literary works. However, recital 83 clearly sets out the unique problems posed by licensing literary and artistic works and mentions the two opinions that have evolved: to include the licensing of said rights in the block exemption (albeit with a flexible approach) or not to include them.

4.3 In recital 178, the Commission continues to ponder on the idea of including copyright in a wide, umbrella-type block exemption regulation for IP rights. It does not seem that the Commission is swayed either to one or the other side.

4.4 In its conclusions, the Commission seems firmly resolved that the current block exemption regulation needs a thorough review and suggests a broader “market based” approach. In recitals 184-6, the Commission sets out the rules that might apply in licensing agreements between non-competitors: clauses that to not relate to the exploitation of the licensed IPR shall be treated in the same manner as in Regulation 2790/1999; clauses that relate to the exploitation of the licensed IPR shall be treated even more liberally. Recital 187 deals with what the Commission proposed to do with licenses between competitors. In general, the commission seems to take a liberal approach to the block exemption.

5. The position of GESAC

5.1 GESAC is of the position that the proposed reform of the block exemption regulation should not include copyright licensing other than in software.

5.2 GESAC argues against including the licensing of literary and artistic works in the block exemption regulation for a number of reasons, to be summarised as follows: a) literary and artistic works are by nature very different than products protected by patents or know-how, and have a unique cultural dimension that must be taken into account, b) copyright licensing agreements are very different than patent and know-how licensing agreements raising different purposes and posing distinct policy issues, c) literary and artistic works are not substitutable products and thus their relation is not one of competition; market share is impossible to calculate, d) copyright licensing in software is wholly different than copyright licensing in literary and artistic works and closely resembles patent and know-how licensing, e) that the Commission has no competence, at the moment, to issue a block exemption concerning copyright but must be so enabled by the Council.

5.3 In my view, all the above arguments, except argument (c), are correct. However they do not necessarily lead to the conclusion that it is not desirable for copyright to be included in a block exemption regulation, if all particularities of copyright in literary and artistic works are taken into account.

5.4 Furthermore, I disagree with argument (c) (the notion that no book is in competition with any other book): some books may be unique for some readers who will purchase them at any price, but other books are not unique for other readers who will buy something else, instead, if they find the price too high.
may also pose dangers: if a book is only in competition with itself then the relevant market is the market for that one book alone, the publisher of the book is a monopolist in that market, etc.

6. Copyright under a block exemption regulation?

6.1. As mentioned above (3.1.), copyright licensing was, thus far, unprotected by a block exemption regulation. This meant that an agreement with terms restrictive enough and a market share large enough to attract the Commission’s attention would be considered invalid unless notified and exempted.

6.2. Thus, as a matter of principle, it is my opinion that it would be desirable for copyright licensing agreements to be included in a block exemption regulation. Firstly, because the block exemption shall relieve many agreements from the obligation to notify and the risk of fines if no notification is made. Secondly, because the block exemption shall serve as a guide as to what kinds of license terms shall come under Commission scrutiny (“blacklisted”) and enable appropriate drafting of the relevant agreements.

6.3. It is true that most copyright licensing agreements have not been notified to the Commission thus far, despite the absence of a block exemption. This is because such agreements are characterized neither by market power nor by overly restrictive terms, beyond what is necessary for the licensor and the licensee to receive a fair return and protection for their efforts and investment. Thus, most such agreements would fall altogether outside art. 85(1) either because they had no “appreciable effect” (see above, 1.6) or/and because their terms would be considered ancillary to a pro-competitive transaction (see above, 3.4). This does not mean, however, that other, larger or more restrictive agreements need not have been notified and do not risk fines.

6.4. It is absolutely clear from the evaluation report of the Commission that a new block exemption regulation including copyright shall not influence agreements that, up until now have been considered to fall outside the scope of EU competition law. It is evident that the Commission is prepared to take a market-oriented approach, similar to that of regulation 2790/1999. To that effect, agreements that involve small market shares and common, not overly restrictive terms shall come under the regulation and shall need no notification. What is more, the regulation shall provide increased legal certainty as to the market share and the contractual terms that shall be required to be placed in agreements in order for the latter to come under the regulation.

6.5. Furthermore, the Commission seems prepared to exempt a number of other terms even though they do not relate to the licensing per se, but rather to the marketing of the finished product, barring a high market share (see recital 184 of the Commission’s evaluation report).

6.6. Indeed, careful inclusion of copyright in a block exemption scheme would provide certainty to even large market participants as to what may or may not be included in licensing contracts and as to the need to notify an agreement or not. This, in place of the legal uncertainty of whether or not to notify which is, today, the governing regime for (large market share) copyright licensing agreements.
6.7. GESAC’s correct remarks on the particularities of copyright and copyright licenses for literary and artistic works, the cultural aspect of books and the socio-cultural nature of licensing agreements should not lead to a negative stance as to the inclusion of copyright licensing for literary works in a block exemption regulation. Instead, in my view, it is absolutely vital that they be taken into account in the new regulation. One may go so far as to suggest that (based on the reasoning of the Rothley report) it would be a good chance to lobby for the inclusion, in the block exemption regulation, of a provision allowing Fixed Book Price provisions even in cross-border licensing contracts. If this is not feasible, the regulation should at least take into account that even non-selling books deserve a place in the market; thus booksellers and publishers must be allowed additional protection in their licensing contracts in order to be able to invest and market books of cultural value.

6.8. Market definition should also be a concern but in an opposite direction than the one GESAC suggests. One must make sure that the regulation recognizes that when defining relevant markets for purposes of calculating market shares, the book market is defined broadly (reason: see above 5.4.)

7. Conclusion

7.1. Provided that any revision of IP block exemption regulations takes into account the issues raised in chapter 6, above, it is my opinion that the inclusion of copyright licensing for books in the scope of such a regulation may prove beneficial to publishers because it shall increase legal certainty regarding the validity of said licenses as regards EU competition rules.

July 30th, 2002
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