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TECHNOLOGY LICENSING IN THE EUROPEAN UNION

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I. The Prohibition of Restrictive Agreements

Intellectual property law creates monopolies; antitrust law condemns them. The reconciliation of these two bodies of law presents endless difficulties for both judges and lawmakers. This article examines the recent efforts of the legislators of the European Union to balance these opposing interests through the enactment of a coherent set of rules on certain categories of technology transfer agreements. These rules are known as the Commission Regulation on the Application of Article 85(3) of the Treaty establishing the European Community to Certain Categories of Technology Transfer Agreements. n1

We begin by exploring how the antitrust or competition rules are applied in the European Union. Article 85(1) of the Treaty establishing the European Community (the EC Treaty) n2 prohibits agreements between undertakings which may affect trade between member states and which have as their object or effect the prevention, restriction, or distortion of trade. However, under Article 85(3) of the EC Treaty, the provisions of Article 85(1) may be declared inapplicable in the case of agreements or categories of agreements between undertakings when certain conditions are fulfilled. A declaration of inapplicability is made by the Commission of the European Communities and the arrangements for exempting categories of agreements, as distinct from individual or specific

[*140] agreements, take the form of so-called "block exemption" regulations. In other words, an agreement such as a technology transfer license may or may not restrict competition, and if such an agreement does restrict competition, it may or may not qualify for exemption. These are matters on which the Commission rules, n3 and from which there is a right of appeal to the Court of Justice of the European Communities (or, since 1988, to the Court of First Instance). n4 The establishment of a block exemption for patent licenses n5 took many years to achieve and the establishment of such an exemption for know-how licenses took even longer. n6 Patent licenses, know-how licenses, and licenses with mixed elements, including those that contain clauses on trademark and copyright licensing, are currently covered by the new block exemption regulation on Technology Transfer Agreements. n7

II. Exemption of Categories of Agreements ("Block Exemptions")

Before discussing the content of Commission Regulation 240/96, it is helpful to explain how a block exemption regulation eases the burden on licensors, licensees, and their advisers. Without block exemptions, only individual exemptions can be granted by the Commission under Article 85(3) of the EC Treaty, and the process of obtaining an individual exemption can be slow and hazardous. The process tends to be slow because of the large backlog of individual cases being investigated at any given time by the Commission. The process tends to be hazardous because its quasi-judicial character allows for objections by third parties, hearings, and even the interjection of political considerations. n8 By contrast, a block exemption is essentially automatic. If a licensing agreement satisfies the terms of the block exemption regulation, no further formalities need be followed. The parties save time and trouble,

[*141] and the Commission does not become bogged down in individual proceedings.
n9

III. The New Technology Licensing Regulation

Commission Regulation 240/96 seeks to: 1) combine the earlier regulations on patent licensing and know-how licensing into a single regulation, 2) allow for a certain amount of overlap between industrial property rights, and 3) simplify the previous law. n10 Whether the third objective is being achieved remains to be seen. Although industrial interests have generally welcomed Commission Regulation 240/96, there is some skepticism.

In combining patent and know-how licensing in a single regulation, the Commission has created three categories of license agreements: "pure" patent licensing agreements, "pure" know-how licensing agreements, and "mixed" agreements that, according to the Commission, are playing an increasingly important role in the transfer of technology. n11 Both pure and mixed agreements may contain provisions for licensing other intellectual property rights, such as trademarks, design rights, copyright, and software protection. These provisions are covered by the regulation to the extent that they contribute to the licensing of technology and are only ancillary provisions. n12 However, the regulation does not cover what may be described in antitrust parlance as "horizontal" agreements. n13

Over the years, block exemption regulations have tended to conform to a fairly recognizable pattern. Essentially, the scheme of Commission Regulation 240/96 is as follows: Article 1(1) declares that Article 85(1) of the EC Treaty-the prohibition on restrictive agreements-shall not apply to certain categories of agreements that

[*142] include one or more of the obligations set out in the Article. In other words, Article 1 both defines the agreements in question and exempts them. Article 2(1) allows the exemption to apply to agreements notwithstanding the presence of certain clauses that are generally not restrictive of competition and which are set out in the Article. Article 2 is intended to clarify the status of certain provisions that may appear restrictive but are regarded by the Commission as acceptable. Article 3 lists the circumstances, including the presence of certain clauses in an agreement, that will ensure that the licensing agreement does not qualify for exemption under the regulation. Finally, Commission Regulation 240/96 contains Articles providing for exclusions, special cases, and the withdrawal of exemption in certain circumstances. n14

IV. Definition and Exemption: Article 1

Following the pattern noted above, Article 1 of the regulation defines the agreements and exempts them. n15 The definition has three parts: 1) the broad description of the types of agreements concerned, 2) the condition that only two undertakings are party to the agreement, and 3) the list of obligations, the inclusion of one or more of which brings the agreement within the scope of the regulation.

The types of agreements concerned are pure patent or know-how licensing agreements and mixed patent and know-how licensing agreements. These agreements include those that contain ancillary provisions relating to intellectual property rights other than patents or know-how. The limitation to agreements to which only two undertakings are a party has been mentioned. n16 However, it should be noted that the case law of the Court of Justice of the European Communities has much to say on what constitutes an undertaking. It may be a person or a company (a natural or legal person, in continental law) and may include a variety of entities, including public bodies if, in this context, they are carrying out an economic function. n17

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There are eight qualifying obligations:

1. an obligation on the licensor not to license other undertakings to exploit a licensed technology in a licensed territory;

2. an obligation on the licensor not to exploit a licensed technology in a licensed territory;

3. an obligation on the licensee not to exploit a licensed technology in a territory of the licensor within the common market;

4. an obligation on the licensee not to manufacture or use a licensed product, or use a licensed process in territories within the common market that are licensed to other licensees;

5. an obligation on the licensee not to pursue an active policy of putting a licensed product on the market in territories within the common market that are licensed to other licensees, and in particular not to engage in advertising specifically aimed at those territories or to establish any branch or maintain any distribution depot there;

6. an obligation on the licensee not to put a licensed product on the market in territories licensed to other licensees within the common market in response to unsolicited orders;

7. an obligation on the licensee to use only the licensor's trademark or trade dress to distinguish a licensed product during the term of the agreement, provided the licensee is not prevented from identifying itself as the manufacturer of the licensed products; and

8. an obligation on the licensee to limit production of a licensed product to the quantities required in manufacturing the licensee's products and to sell the licensed product only as an integral part of or a replacement part for the licensee's own products or otherwise in connection with the sale of these products, provided that such quantities are freely determined by the licensee. n18

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The rules are concerned with the question of territoriality, not purely for reasons of competition. This is because one of the main objects of the EC Treaty was to create a single market without barriers to interstate trade. If intellectual property rights are given absolute territorial protection in the member states, the principle of free movement of goods throughout the Community would be jeopardized. In any event, the Court of Justice ruled in 1982 that absolute territorial protection could not be exempted, and the original block exemption regulation on patent licensing agreements was drafted with the Court's ruling in mind. n19

V. Permitted Clauses: Article 2

Article 2 deals with permitted clauses in agreements covered by the regulation. There is an oddity in the wording of Article 2, which provides that the exemption applies to agreements "notwithstanding" the presence of the clauses listed in the Article. This gives the impression that the clauses are accepted on sufferance. But Article 2 goes on to describe the clauses as ones "which are not generally restrictive of competition." This suggests that the list is there simply *ex abundanti cautela* (from an abundance of caution), but the Article is clearly more important than a simple declaration of what is not regarded as objectionable.

As a guide to patentees and their legal advisers on the clauses that are permitted in technology transfer licensing agreements, the following list from Article 2 is invaluable:

1. an obligation on the licensee not to divulge the know-how communicated by the licensor (the licensee may be held to this obligation after the agreement has expired);
2. an obligation on the licensee not to grant sublicenses or to assign the license;
3. an obligation on the licensee not to exploit licensed know-how or patents after termination of an agreement as long as the know-how is still secret or the patents are still in force;

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4. an obligation on the licensee to grant to the licensor a license in respect of improvements to or new applications of the licensed technology, provided that: (a) in the case of severable improvements, such a license is not exclusive, so that the licensee is free to use the improvements or to license them to third parties, insofar as such licensing does not involve disclosure of the know-how communicated by the licensor that is still secret; and (b) the licensor undertakes to grant an exclusive or non-exclusive license of improvements to the licensee;

5. an obligation on the licensee to observe minimum quality specifications, including technical specifications, for a licensed product or to procure goods or services from an undertaking designated by the licensor, insofar as these quality specifications, products or services are necessary for a technically proper exploitation of the licensed technology, or for ensuring that the product of the licensee conforms to the minimum quality specifications that are applicable to the licensor and other licensees, and to allow the licensor to carry out related checks;

6. an obligation to inform the licensor of misappropriation of know-how, infringement of licensed patents, or to take or assist the licensor in instituting legal action against such misappropriation or infringement;

7. an obligation on the licensee to continue paying royalties: (a) until the end of the agreement in the amounts, for the periods, and according to the methods freely determined by the parties, in the event of the know-how becoming publicly known other than by action of the licensor, without prejudice to the payment of any additional damages in the event of the know-how becoming publicly known by the action of the licensee in breach of the agreement; or (b) over a period going beyond the duration of the licensed patents, in order to facilitate payment;

8. an obligation on the licensee to restrict exploitation of the licensed technology to one or more technical fields of application covered by the licensed technology or to one or more product markets;

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9. an obligation on the licensee to pay a minimum royalty, to produce a minimum quantity of a licensed product, or to carry out a minimum number of operations exploiting the licensed technology;

10. an obligation on the licensor to grant to the licensee any more favorable terms that the licensor may grant to another undertaking after the agreement is entered into;

11. an obligation on the licensee to mark a licensed product with an indication of the licensor's name or of the licensed patent;

12. an obligation on the licensee not to use the licensor's technology to construct facilities for third parties (this is without prejudice to the right of the licensee to increase the capacity of its own facilities or to set up additional facilities for use on normal commercial terms, including the payment of additional royalties);

13. an obligation on the licensee to supply only a limited quantity of a licensed product to a particular customer, where the license was granted so that the customer might have a second source of supply inside the licensed territory (this provision shall also apply where the customer is the licensee and the license that was granted in order to provide a second source of supply provides that the customer is to manufacture the licensed products itself or have them manufactured by a subcontractor);

14. a reservation by the licensor of the right to exercise the rights conferred by a patent to oppose the exploitation of the technology by the licensee outside the licensed territory;

15. a reservation by the licensor of the right to terminate the agreement if the licensee contests the secret or substantial nature of licensed know-how or challenges the validity of licensed patents within the common market belonging to the licensor or undertakings connected with it;

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16. a reservation by the licensor of the right to terminate a patent license agreement if the licensee raises the claim that such a patent is not necessary; n20

17. an obligation on the licensee to use best efforts to manufacture and market a licensed product; and

18. a reservation by the licensor of the right to terminate the exclusivity granted to the licensee and to stop licensing improvements to licensee when the licensee enters into competition within the common market with the licensor, with undertakings connected with the licensor or with other undertakings in respect of research and development, production, use or distribution of competing products, and to require the licensee to prove that the licensed know-how is not being used for the production of products and the provision of services other than those licensed. n21

As the opening words of Article 2 suggest, there are occasions when the clauses listed above are restrictive of competition. In these circumstances, they are exempted, even if they are not accompanied by any of the obligations exempted by Article 1. n22 The rationale is that when clauses are acceptable and not restrictive of competition, they fall squarely within Article 2. However, when clauses are restrictive of competition but are nevertheless acceptable, they are more in the nature of qualifying clauses typical of those listed in Article 1. Clauses similar to those listed in Article 2 but having a more limited scope are also exempted on the same terms. n23

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VI. Exemption Not Applied: Article 3

Article 2 is referred to by some lawyers as the "white list," while Article 3 is known as the "black list." Articles 1 and 2 pave the way for exemption, whereas Article 3 sets out the circumstances where no exemption applies. The circumstances covered by Article 3 are those in which:

1. one party is restricted in the determination of prices, components of prices, or discounts for the licensed products;
2. one party is restricted from competing within the common market with the other party, with undertakings connected with the other party or with other undertakings in respect of research and development, production, use, or distribution of competing products; n24
3. one or both of the parties are required, without any objectively justified reason, to:
(a) refuse to meet orders from users or resellers in their respective territories who would market products in other territories within the common market, or (b) make it difficult for users or resellers to obtain the products from other resellers within the common market, and in particular to exercise intellectual property rights or take measures so as to prevent users or resellers from obtaining outside products, or from putting on the market, in the licensed territory, products which have been lawfully put on the market, within the common market, by the licensor or with the licensor's consent, or (c) do so as a result of a concerted practice between them;
4. the parties were already competing manufacturers before the grant of the license and one of them is restricted, within the same technical field of use or within the same product market, as to the customers it may serve, in particular by being prohibited from supplying certain classes of users, employing certain forms of distribution, or with the aim of sharing customers, using certain types of packaging for the products n25

[*149] 5. the quality of the licensed products one party may manufacture or sell, or the number of operations exploiting a licensed technology the party may carry out, are subject to limitations; n26

6. the licensee is obliged to assign, in whole or in part, to the licensor, rights to improvements to or new applications of a licensed technology; or

7. the licensor is prohibited (whether in separate agreements or through automatic extension of an agreement's initial duration for a period exceeding the length in Article 1(2) and (3)) from licensing other undertakings to exploit a licensed technology in the licensed territory, or from exploiting a licensed technology in the other party's territory, or other licensees' territories. n27

Heading this list is the question of price-fixing, which is anathema to the Commission. There are few cases in which the Commission or Court has approved price restrictions. n28 It is not surprising that the inclusion of a clause on price restriction rules out the chance that the agreement will be covered by the block exemption regulation. Nor is it surprising that the inclusion of a non-competition clause should have the same effect. A refusal-to-supply clause is subject to an objectively justified reason, but field-of-use restrictions are viewed more strictly. As for improvements in a licensed technology, the Commission has always tended to support the rights of the licensee as against those of the licensor. n29 Clauses favoring the licensor, by way of an obligation to assign

[*150] rights to improvements, take the agreement out of the scope of the exemption.
n30

VII. The Opposition Procedure

It does not require a great feat of imagination to conceive of agreements which nearly comply with the terms of Commission Regulation 240/96, but fall just outside its scope because they contain obligations restrictive of competition that are not explicitly covered by Articles 1 and 2, and not expressly ruled out under Article 3. Under Article 4, these agreements are subject to an opposition procedure. n31 The Commission must be notified of the agreements, but unless the Commission formally opposes exemption within a period of four months, the agreements will be "automatically" exempted. n32 If an agreement is opposed, it is open to the parties either to show that the conditions of Article 85(3) of the EC Treaty are satisfied, or to amend the agreement in such a way as to persuade the Commission that the conditions of Article 85(3) are satisfied. n33

VIII. Exclusions

Article 5 of Commission Regulation 240/96 specifies the types of agreements excluded from the scope of the regulation because of the circumstances in which these agreements are made. Broadly, these are horizontal agreements involving the pooling of technologies, the activities of joint ventures, reciprocal licensing and the like. There are provisions in this Article for de minimis principles to apply, so that some agreements of these types may be automatically exempted. For example, if the products and services covered by the agreement do not account for more than a given share of the market, the agreement is exempted from the regulation. n34

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IX. Circumstances Similar to Exclusive Licensing

Given the similarity between sales and exclusive licensing, and the danger that the requirements of Commission Regulation 240/96 might be avoided by presenting exclusive licenses as assignments, Article 6 applies the exemption to agreements concerning the assignment and acquisition of patents or know-how where the risk associated with exploitation remains with the assignor. Article 6 also applies to licensing agreements where the licensor is not the holder of a patent or know-how but is authorized by the holder to grant the license (as in the case of sublicenses) and to licensing agreements in which the parties' rights or obligations are assumed by connected undertakings. n35

X. Withdrawal of the Benefit of the Regulation

Where the Commission finds that an agreement exempted by Commission Regulation 240/96 nevertheless has certain effects which are incompatible with the conditions laid down in Article 85(3), the Commission may withdraw the benefit of the Regulation. These are factual, economic effects of actual circumstances which may vitiate an otherwise acceptable agreement. Article 6, which sets out these circumstances in general terms, also refers to four specific circumstances that are likely to persuade the Commission to withdraw the benefit of the Commission Regulation 240/96. One refers to cases in which the effect of the agreement is to prevent a licensed product from being exposed, in a licensed territory, to effective competition from identical goods or services, or from goods or services considered by users as interchangeable in view of their characteristics, price, and intended use. This condition is especially apt to occur where the licensee's market share exceeds forty percent. Originally, the Commission wanted to make the forty percent market share a basic test of whether the Regulation should apply to certain agreements at all, but this was vigorously opposed, so the Commission had to make do with a reference to market share in subsidiary provisions of the regulation. Nevertheless, the inclusion of this provision in the withdrawal Article is a warning to parties to technology licensing agreements that the Commission, impressed by the ability of some powerful operators to manipulate the market by means of licensing

[*152] agreements, will in certain cases pay close attention to market shares and the potential domination of the market. n36

XI. Definitions

Most of the remaining provisions of Commission Regulation 240/96 are concerned with definitions. Article 8, for example, includes a number of rights related to patents. Thus, patent applications, utility models, applications for registration of utility models, topographies of semi-conductor products, certificats d'utilit and certificats d'addition under French law, as well as applications for those certificates, supplementary protection certificates, and plant breeders' certificates, are all deemed to be patents for the purposes of the regulation. n37

Of the seventeen definitions set out in Article 10 of Commission Regulation 240/96, those concerned with the meaning of "know-how" are among the most important. Under the Article, "know-how" itself means a body of technical information that is secret, substantial and identified in any appropriate form. "Secret" means that a know-how package in the precise configuration and assembly of its components is not generally known or easily accessible. It is not limited to the narrow sense that each individual component of the know-how should be totally unknown or unobtainable outside the licensor's business. "Substantial" means that know-how includes information that must be useful, i.e., can reasonably be expected at the date of conclusion of the agreement to be capable of improving the competitive position of the licensee. For example, know-how could enable the licensee to enter a new market or provide an advantage in competition. "Identified" is defined as the manner in which the know-how is described or recorded, to make it possible to verify that it satisfies the criteria of secrecy and substantiality, and to ensure that the licensee is not unduly restricted in exploiting the technology. To be identified, know-how can either be set out in the licensing agreement, in a

[*153] separate document, or recorded in any other appropriate form, no later than shortly after the know-how is transferred, provided that the separate document or other record can be made available if the need arises. n38

Article 10 also defines the terms "necessary patents" and "parallel patents," which appear in paragraphs (2) and (3) of Article 1, that govern the periods to which an exemption applies. "Necessary patents" are those in which the patent is necessary for utilizing a licensed technology where, in the absence of such license, the realization of the licensed technology would not be possible, or would be possible only to a lesser extent, or in more difficult or costly conditions. Such patents must therefore be of technical, legal or economic interest to the licensee. "Parallel patents," on the other hand, are patents that, in spite of the absence of national rule unification concerning industrial property, protect the same invention in various Member States.

XII. Miscellaneous Provisions

Article 9 provides for confidentiality. n39 Article 11 provides for the expiration of the earlier Commission Regulations 2349/84 on patents, and 556/89 on know-how. Article 12 provides for review of Commission Regulation 240/96. Article 13 provides that the regulation is in force from April 1, 1996, to March 31, 2006.

XIII. Comment

Given the complexity of the subject, the hostility of industrial interests to earlier drafts of the regulation, the difficulty of reconciling the need to restrict licenses to the extent required to make investment worthwhile, n40 and the need to ensure that restrictions are consistent with competitive trade, the Commission has done an unenviable task well. Many more patent licensing and other technology licensing agreements will be covered by the automatic exemption implicit in Commission

[*154] Regulation 240/96. This is largely due to the broadening of the base of the Regulation. Relatively few patent licenses have proven to be "pure" patent licenses. Many agreements in the past had failed to fit into a precise mold. n41

Industrial interests still have some reservations about Commission Regulation 240/96 - specifically about the market share principle. A great deal depends on how far the Commission takes advantage of the opposition procedure, and of the right to withdraw the benefit of the Regulation. In other words, we shall have to wait and see how well Commission Regulation 240/96 operates in practice. This may be hard to judge, since the very nature of automatic exemption under the block exemption regulation is that it is invisible. n42 The Commission may have to publicly assess the application of Commission Regulation 240/96, probably in its annual reports on competition policy. The first of these assessments will be awaited with interest.

n1 Commission Regulation 240/96 of 31 January 1996, on the Application of Article 85(3) of the Treaty Establishing the European Community, to Certain Categories of Technology Transfer Agreements, 1996 O.J. (L 31) 2.

n2 Treaty Establishing the European Community, Feb. 7, 1992, 1 C.M.L.R. 573 (1992) incorporating changes made by TREATY ON EUROPEAN UNION, Feb. 7, 1992 O.J. (C 224) 1 (1992), [1992] 1 C.M.L.R. 719 (1992).

n3 EC Treaty art. 155.

n4 EC Treaty art. 173.

n5 Commission Regulation 2349/84, 1984 O.J. (L 219) 15 (now superseded by Commission Regulation 240/96).

n6 Commission Regulation 556/89, 1989 O.J. (L 61) 1 (now superseded by Commission Regulation 240/96).

n7 Commission Regulation 240/96, supra note 1.

n8 Council Regulation 17/62/EEC, art. 19, 1962 O.J. (L 13), see generally, Commission Regulation 99/63/EEC, 1963 O.J. (L 127).

n9 There is a direct correlation between the introduction of block exemption regulations in various areas of EC competition law and the marked decline in the Commission's backlog of individual cases. See, e.g., Commission of the European Communities, XXVIth Report on Competition Policy 1996 (published by the Office for Official Publications of the European Communities, Luxembourg, 1997) (statistics showing the declining backlog).

n10 Commission Regulation 240/96, supra note 1, rec. 3.

n11 Commission Regulation 240/96, supra note 1, art. 1(1), rec. 4.

n12 Pure trademark licenses and pure copyright licenses are not covered by the regulation. However, there is helpful guidance on the permissible contents of trademark

licenses. See Commission Decision, *Moosehead/Whitbread*, 1990 O.J. (L 100) 32, 4 C.M.L.R. 391 (1991).

n13 Commission Regulation 240/96, *supra* note 1, art. 5, rec. 8.

n14 See Council Regulation 19/65/EEC, 1965-1966 O.J. Spec. Ed. 36 (block exemption regulations are made by the Commission under powers delegated by the Council).

n15 Article 1 is explained and justified by Recitals 10 and 12-16. Recitals are essential to the regulation, under Article 190 of the EC Treaty, and may be cited in proceedings.

n16 Commission Regulation 240/96, *supra* note 1, art. 1(1).

n17 See Case C-41/90, *Hofner v. Macrotron GmbH*, 1991 E.C.R. I-1979, 4 C.M.L.R. 306 (1993).

n18 Commission Regulation 240/96, *supra* note 1, art. 1(1).

n19 Case 258/78, *Nungesser v. Commission*, 1982 E.C.R. 2015, 1 C.M.L.R. 278 (1983) (sometimes referred to as the *Maize Seed case*).

n20 If a licensee claims that a patent is not necessary, perhaps because the substantial part of the design or process is in the public domain, or covered by know-how, the licensor of that patent may terminate the licensing agreement. This right to terminate the licensing agreement is not considered to be restrictive of competition. If it turns out that the licensee is wrong in claiming that the patent is unnecessary, he may expose himself to patent infringement proceedings. Also in this case, the licensor or other party pursuing infringement proceedings, would not be in breach of the rules on competition.

n21 Commission Regulation 240/96, *supra* note 1, art. 2(1).

n22 Commission Regulation 240/96, *supra* note 1, art. 2(2).

n23 Commission Regulation 240/96, *supra* note 1, art. 2(3).

n24 This is without prejudice to the last two clauses contained in the "white list."

n25 Except as provided in point 7 of Article 1(1) and point 13 of Article 2(1) of Commission Regulation 240/96.

n26 Except as provided in point 9 of Article 1(1) and point 13 of Article 2(1) of Commission Regulation 240/96.

n27 Commission Regulation 240/96, *supra* note 1, art. 3.

n28 One of the most recent cases in this field is Case 137/95, *Vereniging van Samenwerkende Prijsregelende Organisaties in de Bouwnijverheid v. Commission* (not yet reported). Rather appropriately, the appellant's name is the Union of Cooperative Price-Regulating Organizations in the Building Industry; an antitrust official's nightmare. It should be noted that while recommended prices have been accepted, directly or indirectly, fixed prices have not. See, e.g., Case 164/84 *Pronuptia de Paris GmbH v. Schillgalis*, 1986 E.C.R. 353, 1 C.M.L.R. 414 (1986). Price fixing is treated under Article 85(1) of the EC Treaty as restrictive of competition.

n29 There is a certain amount of case law on pricing, non-competition clauses, refusal-to-supply, field-of-use restrictions, and improvements in technology, but for the most part this case law antedates the 1984 and 1989 regulations. In recent years the Commission has tended to apply somewhat different, and perhaps more pragmatic, principles to its handling of the cases in this field. For these reasons, the case law is not quoted extensively, and, indeed, readers are advised to cite them with considerable caution, given the changed circumstances.

n30 Commission Regulation 240/96, *supra* note 1, art. 3, recs. 11, 17, 19-21, 23 and 24.

n31 Commission Regulation 240/96, *supra* note 1, art. 4(5).

n32 Commission Regulation 240/96, *supra* note 1, art. 4(1).

n33 Commission Regulation 240/96, *supra* note 1, art. 4(7) and (8), rec. 25.

n34 Commission Regulation 240/96, *supra* note 1, art. 5(2) and (3), rec. 8.

n35 Commission Regulation 240/96, *supra* note 1, art. 6, rec. 9.

n36 Commission Regulation 240/96, *supra* note 1, rec. 26. It is understood that the Commission was strongly influenced by the importance of the respective parties' market shares in Case T-83/91, *Tetra Pak Int'l SA v. Commission*, 1994 E.C.R. II-755, 4 C.M.L.R. 726 (Ct. First Instance 1997), *aff'd*, Case C-333/94P, 4 C.M.L.R. 662 (1997), in which technology licensing was the instrument by which a dominant position in the market was abused.

n37 Utility models are covered by the Paris Convention for The Protection of Industrial Property, March 20, 1883, as last revised at Stockholm, July 14, 1967, 21 *U.S.T.* 1583, 828 U.N.T.S. 305, and they are the subject of The Protection of Utility Models in the Single Market: Green Paper from the Commission of the European Council, COM(95)370 final, proposing legislation on utility models at European Union level.

n38 Commission Regulation 240/96, *supra* note 1, art. 10, rec. 4. See also, a case antedating the know-how block exemption regulation of 1989, Commission Decision 87/123/EEC of 15 December 1986, *Boussois/Interpane*, 1987 O.J. (L 50) 30, 4 C.M.L.R. 124 (1988) (explaining Commission's thinking in the subsequent drafting of the regulation).

n39 This provision adds to the general requirement of confidentiality contained in EC Treaty art. 214.

n40 The investment factor influenced the Court of Justice in *Nungesser*, 1982 E.C.R. at 2015, 1 C.M.L.R. at 278.

n41 Commission Regulation 240/96, *supra* note 1, art. 5(2) and (3).

n42 As the cases covered by the regulation do not have to be tracked, the Commission has no statistics of the numbers of agreements automatically exempted.