between Member States but which, in addition, satisfy all the conditions laid down in Article 1 of Regulation No 67/67.

Lecourt	Monaco	Kutscher

Donner	Mertens de Wilmars	Sørensen	Mackenzie Stuart

Delivered in open court in Luxembourg on 3 February 1976.

A. Van Houtte	R. Lecourt
Registrar	President

OPINION OF MR ADVOCATE-GENERAL REISCHL DELIVERED ON 14 JANUARY 1976 [1]

Mr President,
Members of the Court,

Under Article 4 (1) of Regulation No 17 of the Council of 6 February 1962 (OJ 204/62 of 21. 2. 1962 English Special Edition 1959-1962 p. 87) agreements, decisions and concerted practices of the kind described in Article 85 (1) of the EEC Treaty which come into existence after the entry into force of that regulation and in respect of which the parties seek application of Article 85 (3) must be notified to the Commission. Until they have been notified, no decision in application of Article 85 (3) may be taken. Under Article 4 (2) of Regulation No 17 the said paragraph (1) does not apply *inter alia* to agreements where the only parties thereto are undertakings from *one* Member State and the agreements do not relate either to imports or to exports between Member States.

The reference for a preliminary ruling which has been made by the Cour d'appel, Paris, and in respect of which I have to give an opinion today is mainly concerned with the interpretation of the lastmentioned provision.

SA Fonderies de Roubaix Wattrelos, the plaintiff in the main action, concluded a contract in June 1963 with the German undertaking Gontermann-Peipers under which the plaintiff had the exclusive right to sell over the northern half of France Gopac castings manufactured by Gontermann-Peipers according to a secret process. In addition the plaintiff was not allowed to sell any competing products. A verbal agreement at the beginning of 1964 is said to have extended this contract to the whole of France. After the contract had been re-drafted and signed on 16 March 1966 it was notified to the Commission on 8 September 1966 for the purpose of

1 — Translated from the German.

possible exemption under Article 85 (3) of the EEC Treaty.

For its part the plaintiff on 6 October 1964 concluded an exclusive dealing agreement with the French undertaking Fonderies A. Roux whose registered office is in Lyon. According to this Fonderies A. Roux had the exclusive right to sell Gopag castings in twenty-four French departments, that is to say the plaintiff could make direct sales, for which particular prices were to apply, in the said area only to Fonderies A. Roux. The contract bound the latter company not to manufacture products similar to those covered by the contract and not to work for competitors of Gontermann-Peipers. It was further expressly provided that the validity of the said contract was made dependent on the existence of the contract concluded between the plaintiff and Gontermann-Peipers.

Difficulties seem to have arisen between the parties in the working of the contract concluded with Fonderies A. Roux; similar contracts of a local nature existed with a number of other French undertakings. Fonderies A. Roux is alleged not to have respected the competition clause and to have bought castings from Switzerland for sale in the area covered by the concession. When the plaintiff learnt of this it considered itself entitled to limit the area of the concession. Fonderies A. Roux reacted to this in the spring of 1973 by saying that it considered the agreement to be at an end.

This caused the plaintiff to bring an action for compensation against Fonderies A. Roux and its subsidiary Société des Fonderies JOL, before the Tribunal de Commerce, Paris. The Tribunal de Commerce however, did not accede to the claim. In its view the exclusive dealing agreement concluded between the parties was void on the ground that the basic agreement with the German undertaking Gontermann-Peipers was void because it had not been notified to the Commission which had not exempted it in accordance with Article 85 (1) of the EEC Treaty.

The plaintiff appealed against this judgment to the Cour d'appel, Paris. In its judgment of 5 July 1975 the latter held the contract concluded between the plaintiff and Gontermann-Peipers as provisionally valid from the date of its notification to the Commission. Judgment on the validity of the exclusive dealing agreement concluded between the plaintiff and Fonderies A. Roux depends in the view of the Cour d'appel on the answer to the question whether the agreement is exempted from notification under Article 4 (2) (1) of Regulation No 17. Therefore by judgment dated 5 July 1975 the Cour d'appel stayed the proceedings and referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty the question:

'whether a contract which is concluded between two undertakings from one Member State for the purpose of "selling at least expense" a product which is imported from another Member State by one of the parties using the warehouses and distribution network of the other party must be considered to "relate to" imports and for this reason be subject to the notification provided for in Article 4 (1) of Regulation No 17'.

My opinion on this is as follows:

1. First of all it should be mentioned that the court making the reference has probably rightly referred to the provisions on competition contained in the EEC Treaty and not those of the ECSC Treaty. The criterion is the kind of products dealt with by the agreement. Only products which come within the description in Annex I to the ECSC Treaty come under that Treaty. This is only the case for castings if they are intended to be remelted in foundries and not on the other hand if they are to be

further processed in another way. Since in the present case, however, it is apparently not disputed that it is a question of castings of the latter kind, it may be assumed that agreements relating thereto are to be judged according to the provisions of the EEC law.

2. So far as concerns the interpretation sought of Article 4 (2) (1) of Regulation No 17, it is quite clear under the system of competition law under the EEC Treaty — Article 85 in conjunction with Regulation No 17 — that the phrase 'relate either to imports or to exports' has a narrower meaning than the criterion 'which may affect trade between Member States'. Otherwise the said provision would be meaningless. The system of the competition law of the EEC assumes that there are agreements which do not relate either to imports or to exports but which may affect trade between Member States. The Court has already referred to this in the judgment in Case 43/69 *Brauerei A. Bilger Söhne GmbH* v *Jehle and Jehle* ([1970] ECR 127).

How the phrase 'relate either to imports or to exports' is to be precisely defined seems difficult however. On this several definitions are used differently in academic writings and in practice. Some authors take the view that the said phrase requires that the measures covered by it *expressly* regulate import or export or are concerned with them (Gleiss-Hirsch: *EWG-Kartellrecht,* second edition, Note to Article 4 (2) (1) of Regulation No 17; Schumacher: *Wirtschaft und Wettbewerb* 1962, p. 480; Dörinkel: *Wirtschaft und Wettbewerb* 1966, p. 560). Others speak in this connexion of conscious and intentional *effects* on imports and exports or that the measures in question are directed to imports and exports (Deringer: *Das Wettbewerbsrecht der Europäischen Wirtschaftsgemeinschaft,* Note to Article 4 (2) (1) of Regulation No 17; Kaul: *Außenwirtschaftsdienst des Betriebsberaters* 1962, p. 156). Many require — and this seems to be the generally recognized *minimum requirement* — that at least indirect effects are excluded and that trade must be directly involved and that trade must be *directly affected* (Judgment of the Oberlandesgericht Karlsruhe of 23. April 1968, Wirtschaft und Wettbewerb 1969, p. 263).

My basic view on this is that Article 4 (2) of Regulation No 17 must not have too wide an interpretation since it is a provision constituting an exception. Further I wonder whether an attempt should and can be made to define the general wording used in Article 4 (2) (1) in a comprehensive formula. It is probably more reasonable to arrive at a precise definition gradually by means of actual cases in practice. It should in any event be possible in relation to facts such as those in the main action to obtain usable criteria having regard to the principle of interpretation I have proposed and having regard to the findings which may already be deduced from the case-law.

It was found in the judgment in Case 43/69 that exclusive supply agreements, the execution of which did not require the goods in question to cross national frontiers, did not relate either to imports or to exports. From this it may be inferred, and this is the view of some of the academic writers (Mestmaecker: *Europäisches Wettbewerbsrecht* 1974, p. 273), that agreements relate to import and export if the goods in question have to cross national frontiers for the purpose of executing the contract. I should think that this may also be said with regard to purely national exclusive dealing agreements which are concluded for the purpose of executing an exclusive dealing agreement requiring goods to cross national frontiers, that is which represent instruments for the logical execution of exclusive dealing contracts requiring goods to cross national frontiers. Since they apply only to imported goods, since the grantor of the concession, to be able to fulfil his obligations, must first import, there is probably here the direct

connexion with imports which must at least exist for Article 4 (2) (1) of Regulation No 17.

There are two further circumstances which may be of significance in this connexion and which are likewise referred to in the literature (Mestmaecker: *ibid;* Groeben-Boeckh-Thiesing: *Kommentar zum EWG-Vertrag,* Second Edition, Volume 1, p. 863 *et seq.;* Kaul *ibid).* The first of these is a prohibition preventing the concessionnaire from competing, covering also the import of similar products. The second is an obligation on the connessionnaire not to make deliveries outside the area of his concession. If such clauses are to be understood as aiming at making the import of foreign products impossible and at impeding export deliveries across frontiers which would otherwise be possible, then these are factors which are relevant for the application of Article 4 (2) (1) of Regulation No 17.

If this criterion is adopted then the answer to the question referred to the Court appears to be that the agreement challenged in the main action does not come within the scope of the exceptions provided for in Article 4 (2) of Regulation No 17.

3. This of course does not necessarily mean that the legal validity of such agreements is dependent on notification to the Commission for the purpose of exemption. This is made clear by additional considerations indispensable for a meaningful aid to decision, one of which at least basically allows the observation that it is irrelevant how Article 4 (2) (1) of Regulation No 17 is to be defined precisely.

(a) It was therefore rightly stressed in the proceedings that the basic condition for notification to and exemption by the Commission is that the agreement in question comes within Article 85 (1) of the EEC Treaty. A court must first clarify this if nullity under Article 85 is alleged in proceedings.

In considering this we cannot limit ourselves to a finding that competition is restricted because a contract limits the concessionnaire to supplies from the grantor of the concession and that the agreement also affects trade between States because direct supply from the foreign producer is excluded.

The inquiry must go further, for, according to the relevant practice of the Commission and the case-law, agreements do not come within the scope of Article 85 (1) where they have only insignificant effects on the conditions of competition and trade between States, that is to say where the restriction on competition and the effects on trade between Member States effected are not *appreciable.* In this respect I refer to the judgment in Case 56/65 *Société Technique Minière* v *Maschinenbau Ulm GmbH* ([1966] ECR 250) according to which in respect of agreements granting an exclusive right of sale it is appropriate to take into account the nature and quantity of the products covered by the agreement and the position and importance of the grantor and the concessionnaire on the market for the products concerned. The judgment in Case 5/69 *Franz Völk* v *Éts. J. Vervaecke sprl* ([1969] ECR 302) is on the same lines when it stresses that an insignificant effect on the market, taking into account the weak position which the persons concerned have on the market of the product in question, is irrelevant for the purposes of Article 85. Further I may refer to the Communication of the Commission of 27 May 1970 on agreements of minor importance which do not come under the provisions of Article 85 (1) of the EEC Treaty. It is likewise stated there that Article 85 (1) does not apply where trade is affected only to a small extent and where no noticeable effects may be discerned on market conditions. In this respect it depends on what share of the turnover

the products subject to the agreement have in the area of the common market where the agreement applies and the size of the turnover of the undertakings which are parties to the agreement.

It is possible that the court making the reference, in examining these questions, may come to the conclusion that Article 85 (1) of the EEC Treaty does not apply. In these circumstances no exemption by the Commission would be required and then too the question of notification to the Commission would be quite irrelevant in judging the validity of the agreement in question.

(b) The second additional observation relates to Regulation No 67/67 of the Commission of 22 March 1967 (OJ English Special Edition 1967, p. 10) which was issued on the basis of Regulation No 19/65 of the Council of 2 March 1965 (OJ English Special Edition 1965-1966, p. 35) on the application of Article 85 (3) of the Treaty to certain categories of agreements and concerted practices.

This regulation declares Article 85 (1) not to be applicable to certain categories of agreements. In this respect no notification is required. This is clear indirectly from the system of the regulation in conjunction with Regulation No 17 but also from the preamble to the regulation. This is obviously important with regard to the agreement concluded between the plaintiff and Gontermann-Peipers. This relates to a contract to which only two undertakings are party and whereby one party agrees with the other to supply only to that other certain goods for resale within a defined area of the common market. Further, the conditions of Article 2 of Regulation No 67/67 must be fulfilled.

The conclusion is obvious that the position can be no different with a similar purely national agreement which represents an instrument for implementing the main agreement. Like the basic agreement, because the sales activity can be concentrated it results in an improvement in distribution and at the same time it involves advantages for the consumer. There is moreover less danger for the common market than with similar agreements which apply across frontiers.

This conclusion is not excluded by Article 1 (2) of Regulation No 67/67. It is there stated: 'Paragraph (1) shall not apply to agreements to which undertakings from one Member State only are party and which concern the resale of goods within that Member State'. A literal interpretation of the provision quoted might lead to the assumption that exemption for purely national exclusive dealing agreements does not come into consideration by reason of the regulation exempting certain categories. Such an interpretation, however, is quite untenable since it would produce a completely unsatisfactory result. It would include the absurd consequence that the Commission would be flooded with notifications of numerous purely national exclusive dealing agreements for the purpose of individual exemption — and cautious undertakings would, certainly take this course in view of the uncertain criteria of definition applying to exceptions from the obligation to notify.

In my opinion such a result may be avoided if regard is had to the meaning of the regulation quoted. We heard from the Commission during the course of the proceedings that the explanation for the provision was that during the drafting of Regulation No 67/67 the view was taken that purely national exclusive dealing agreements were not caught by Article 85 (1) at all and that they did not come within the sphere of limitations on competition to be judged according to Community law but were to be judged solely on the basis of national competition law. This is so stated in the preamble to Regulation No 67/67: 'Since it is only in exceptional cases that

exclusive dealing agreements concluded within a Member State affect trade between Member States, there is no need to include them in this regulation'.

When it is shown in practice that in rare exceptional cases such agreements are nevertheless caught by article 85 (1), the only reasonable manner of judging them is by way of an *a fortiori* argument. With regard to national exclusive dealing agreements which remain below what is declared permissible under Regulation No 67/67 and the effects of which on trade between States is less serious than the effects of corresponding agreements which apply across frontiers, there can be no other judgment than that established in Regulation No 67/67. It may clearly be said that they come within the intent to exempt them just like exclusive dealing agreements which apply *across* frontiers. The facts inescapably require at least an analogous application of the law.

In this way no excessive violence is done to the wording of the provision, the repeal of which the Commission is in any event seeking, but at the same time it is ensured that the assessment of interests recognizable according to Regulation No 67/67 is satisfactorily undertaken.

Finally, assuming that the national agreement with which the main action is concerned comes under Article 85 (1) at all then the exemption expressed in Regulation No 67/67 applies, because the conditions of the said regulation are obviously likewise fulfilled, and here too without any necessity for notification to the Commission. The decision in the main action does not therefore depend on the interpretation of Article 4 (2) (1) of Regulation No 17 and the court making the reference may assume the validity of the agreement in question on the basis of Regulation No 67/67.

4. The reference for a preliminary ruling by the Cour d'appel, Paris, should accordingly be answered as follows:

An agreement which is concluded between two undertakings from one Member State under which a party receives in respect of a part of the Member State in question the exclusive right to resell goods which the other party imports from another Member State is, in so far as it comes under Articles 85 (1) of the EEC Treaty, exempt under Article 85 (3) without notification to the Commission in the same way as similar exclusive dealing agreements applying across frontiers, which satisfy the conditions of Regulation No 67/67.