JUDGMENT OF THE COURT
1 FEBRUARY 1977 [1]

Alexis de Norre and his wife Martine, née de Clercq v NV Brouwerij Concordia (preliminary ruling requested by the Hof van Beroep of Ghent)

Case 47/76

1. *Competition — Agreements — Exclusive purchase agreements concluded between two undertakings in a single Member State — Characteristics set out in Article 3 of Regulation No 67/67 — Absence — Adverse effect on trade between Member States — Prohibition — Exemption by category*
   (Regulation No 67/67 of the Commission, Article 1 (2))

2. *Competition — Network of agreements — Cumulative effect — Regulation No 67/67 — Applicability*

1. Agreements to which only two undertakings from one Member State only are party, under which one party agrees with the other to purchase only from that other certain goods for resale and which do not display the features set out in Article 3 of Regulation No 67/67 of the Commission, qualify for the exemption by category provided for in that regulation if, failing exemption, they would fall under the prohibition contained in Article 85 (1) of the EEC Treaty.
2. Neither the spirit nor the objectives of Regulation No 67/67 are opposed to the applicability of that regulation to agreements which fall under the prohibition contained in Article 85 only because of the cumulative effect produced by the existence of one or more networks of similar agreements.

In Case 47/76,

Reference to the Court under Article 177 of the EEC Treaty by the Hof van Beroep (Court of Appeal) Ghent, for a preliminary ruling in the action pending before that court between

ALEXIS DE NORRE and his wife MARTINE, NÉE DE CLERCQ, Grammont (Belgium),

and

NV BROUWERIJ CONCORDIA, Grammont,

1 — Language of the Case: Dutch.

on the interpretation of Article 85 of the said Treaty, Article 4 (2) (1) of Regulation No 17 of the Council of 6 February 1962 ('First Regulation implementing Articles 85 and 86 of the Treaty', OJ English Special Edition 1959-1962, p. 87) and Regulation No 67/67 EEC of the Commission of 22 March 1967 on the application of Article 85 (3) of the Treaty to certain categories of exclusive dealing agreements (OJ English Special Edition 1967, p. 10),

THE COURT

composed of: H. Kutscher, President, A. M. Donner and P. Pescatore, Presidents of Chambers, J. Mertens de Wilmars, M. Sørensen, Lord Mackenzie Stuart, A. O'Keeffe, G. Bosco and A. Touffait, Judges,

Advocate-General: H. Mayras
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

The facts and the arguments developed by the parties during the written procedure may be summarized as follows:

I — Facts and procedure

1. On 7 April 1966, NV Brouwerij Concordia, plaintiff in the main action and respondent to the appeal, hereinafter referred to as 'Concordia', entered into a contract with Mr and Mrs Detant, owners of a café, under which:

— it lent to them, at a rate of interest of 5 % per annum, the sum of FB 300 000, repayable within ten years;

— the said spouses undertook, 'as consideration for the loan, not to stock or to sell beverages of any kind whatever other than those of the Concordia brewery or supplied by it, with effect from 1 May 1966 and for 25 years thereafter ... in their business' and to 'pass on [this obligation] to any successors in title'.

On 9 February 1973, Mr and Mrs de Norre, defendants in the main action and appellants in the appeal, bought the café from Mr and Mrs Detant. Under the terms of the contract of sale, 'the purchasers declare that they are fully cognizant [of the aforementioned

provisions of the contract of 1966], all the conditions of which contract the purchasers ... declare that they have taken over in so far as those conditions are still in force'.

Since Mr and Mrs de Norre sold beverages in the café other than those of Concordia, the latter brought proceedings before the Oudenaarde Court of First Instance with, by interlocutory judgment of 18 October 1973, ordered the said spouses to pay on account to Concordia, as damages, FB 25 000, reserving its final decision on the amount of damages.

Mr and Mrs de Norre lodged an appeal against this judgment before the Hof van Beroep, Ghent, contending, *inter alia*, that they were not bound by the contested contract because it was prohibited and void under Article 85 of the EEC Treaty; in support of this contention they relied on the case-law of the Court of Justice and an inquiry instituted by the Commission of the European Communities.

2. By interlocutory judgment of 26 May 1976, the Hof van Beroep, Ghent, decided to stay the proceedings and to refer the following questions to the Court of Justice:

1. What, in appropriate cases, are the additional criteria, apart from the cumulative effect of similar exclusive dealing agreements in the brewery sector, which should be taken into consideration in judging the applicability of Article 85 (1) of the EEC Treaty to an exclusive dealing agreement between two undertakings in a single Member State?
2. May it be deduced by analogy with the judgment in *Fonderies de Roubaix* that the exemption by category laid down by Regulation No 67/67 of the Commission is applicable to all exclusive dealing agreements of the type at issue, concluded between undertakings in a single Member State?
3. May the said agreements be regarded as not being subject to the duty to notify, pursuant to Article 4 (2) (1) of Regulation No 17/62 of the Council, although in fact they amount to a direct prohibition on imports in respect of one of the parties?
4. Can a relatively unimportant exclusive dealing agreement, to which Article 85 (1) could only be applicable on account of the cumulative effect of all agreements of the same type, avoid annulment pursuant to Article 85 (2), and if so, according to which criteria?
5. Are the national courts under a duty to suspend proceedings where exemption pursuant to Article 85 (3) is possible?
   If the suspension of proceedings merely constitutes an option, is the national court permitted, in its consideration of Article 85, to decide that Article 85 (3) is not applicable?
6. Should a new agreement, the fate of which is not immediately settled, be regarded as provisionally void or provisionally valid?
   On this last hypothesis what meaning should be given to the concept of provisional validity?
7. What are the criteria for the interpretation of Community law on the basis of which Belgian courts can decide whether the provisions of the said Royal Decree of 25 September 1964 (Belgisch Staatsblad 21 October 1964, p. 11,127) are compatible with Community law?

In the grounds for the judgment, the questions were stated to have arisen out of the following considerations:

General

Since the terms of the contested contract are in general use in the brewing industry, the possibility cannot be excluded that, taken as a whole, contracts of this kind have a significant adverse effect on competition and intra-Community trade.

Question 1

In its judgment of 12 December 1967 in *De Haecht* (Case 23/67 hereinafter referred to as 'Haecht I'), the Court held that, in order to assess whether a contract such as that in the present case is caught by the prohibition contained in Article 85 (1) of the Treaty, 'the existence of similar contracts is a circumstances which, *together with others*' must be taken into account *(ibid.* 416). It is desirable that the 'other' circumstances referred to by the Court should be identified.

Question 2

In the light of the judgment of the Court of 3 February 1976 in *Roubaix-Wattrelos* (Case 63/75 [1976] ECR 111), the questions arises whether contracts of the type in question are covered by the exemption provided for by Regulation No 67/67, notwithstanding the fact that, as a general rule, they define no area within the meaning of Article 1 (1) of the regulation.

Question 3

It is settled law that exclusive dealing agreements between undertakings in the same Member State are exempt from the obligation to notify so long as their execution does not require the goods in question to cross national frontiers. Nevertheless, the question arises whether this decision continues to apply where the effect of such a contract is directly to prohibit one of the parties to effect imports from other Member States.

Question 4

Legal opinion appears to be undecided on this point.

Question 5

The question arises whether, in the circumstances referred to, the national courts are merely empowered to stay the proceedings or whether they are under a duty to do so except in cases where the adverse effect on competition and on trade between Member States is not appreciable or where the application of Article 85 is not in doubt. In this latter eventuality, the question arises whether the said courts can assume the right to find against the applicability of Article 85 (3).

Question 6

The judgment of the Court of 6 February 1973 in Case 48/72 ('Haecht II' [1973] ECR 77) does not give a clear answer to this question. Legal opinion is divided between the alternative of provisional nullity and that of provisional validity. If the latter alternative were correct it would be further necessary to ascertain, first, whether this constitutes full provisional validity within the meaning of the judgment of the Court of 9 July 1969 *(Portelange* v *Marchant,* Case 10/69 [1969] ECR 309) or whether, in the light of the Haecht II judgment, the parties must be regarded as being entitled to carry out the agreement as they wish, but not to call for its enforcement and, secondly, whether the national courts are or are not empowered to adopt temporary measures in the meantime.

Question 7

The Belgian legislature has moderated the unduly stringent provisions frequently included by brewers and beer merchants in contracts of the type in question. Thus, under the Royal Decree of 25 September 1964, which applies in the present case, the penalties provided for in these agreements in case of an infringement followed by a breach of the contract may not exceed 25 % of the amount of the loan multiplied by the number of years still to run from the dissolution of the contract to its agreed term, subject to a maximum of 100 %.

However, it is not impossible that the abovementioned decree is incompatible with Articles 85 and 86 of the Treaty, in which case the latter prevail. As regards the considerations to be taken into account in determining whether such incompatibility exists, reference is made to the judgment of the Court of 17 December 1970 *(Scheer,* Case 30/70 [1971] ECR 1197).

3. The judgment making the reference was entered at the Court Registry on 4 June 1976.

Written observations were submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC by Concordia, the Belgian Government and the Commission.

On hearing the report of the Judge-Rapporteur and the views of the Advocate-General, the Court decided to open the oral procedure without any preparatory inquiry.

II — Written observations submitted before the Court

General

Concordia states that, in Belgium, brewery contracts have been the subject of a series of Royal Decrees. By virtue of the latter, regulations submitted by the relevant trade association may be declared binding on all concerned; nevertheless, these decrees prescribe maximum limits concerning the scope and duration of the exclusive purchase obligation and the penalty clauses to be applied. The contested contract is governed by the Royal Decree of 25 September 1964 and complies with it.

The *Belgian Government* states that approximately 40 to 50 % of café owners are estimated to have concluded individual sales contracts with their beer suppliers (brewers or beer merchants) in which, almost invariably, the obligation is imposed on them to purchase beer intended for resale from the said suppliers in exchange for certain concessions (obligation to supply on the part of the suppliers, insurance cover in respect of tenancy, sales equipment, loans of money or assets, etc.). However, as the Belgian Government explains in detail, there are wide variations between these contracts as regards the question whether the café owner is obliged to obtain his supplies exclusively or only up to a certain quantity from the other party to the contract.

The introductory statement of the *Commission* may be summarized as follows:

Information on the brewing industry in the Community

The Commission produces figures giving the volume of beer production in each of the Member States for the year 1974; in the specific case of Belgium, production amounted to 14 004 000 hl.

The structure of the industry in question differs appreciably from one State to another both on the production and on the consumption side. The Commission describes in detail the position in each Member State; in the case of Belgium, it draws particular attention to the facts that:

- it has 185 breweries;
- the Stella Artois group accounts for 53 % of total production; 36 % of that total is spread over five other groups or companies, while the remaining 11 % comes from a large number of small-scale undertakings;
- in particular, Concordia is a small brewery producing approximately 75 000 hl per year or 0·5 % of Belgian production; according to the Commission's information, that production is sold mainly in the Grammont region in the form of cask beer, largely on the basis of exclusive agreements and for use in the so-called 'Horeca' sector, which

includes consumption in hotels, restaurants and cafés and accounts for 60 % of Belgian consumption.

A statistical table submitted by the Commission shows that the trade in beer between the Member States is limited. This is first of all due to certain obstacles of a 'technical' nature (differences between the quality standards imposed by each Member State, etc.) which, however, are not insurmountable. But the basic reason is the fact that a large number of establishments in the 'Horeca' sector, in fact, the more important of them, are either bound by exclusive purchase contracts to breweries in their respective countries or are actually owned by such breweries. In these circumstances, producers who wish to enter the market in another Member State have either to create new sales outlets, which calls for substantial investment, or, the most common solution, to associate with their local competitors in their attempts to penetrate the market by way of a partnership or 'joint venture', which considerably reduces the competitive impact of the operation.

Some general issues raised by the questions submitted

The object of the fifth and sixth questions is to obtain a decision on the question whether the national court is entitled to rule on the possibility or even the probability of Article 85 (3) being individually applied by the Commission to a particular agreement.

The problems arising from the coexistence of the powers conferred respectively on the Community institutions and on the national courts in connexion with the application of Articles 85 and 86 of the Treaty have already been broached by the Court in its judgment in Haecht II and in the judgment delivered on 30 January 1974 in *BRT* v *Sabam* (Case 127/73 [1974] ECR 51); the fact that the latter judgment referred to Article 86 and not to Article 85 is of no matter in the present case.

Nevertheless, these decisions did not settle all the issues raised in the present case, which is to be distinguished from *BRT* v *Sabam* in that:

— the present case is concerned with establishing the view to be taken by the national court when a procedure for the grant of an exemption (based therefore on Article 6 of Regulation No 17) can still be or has already been set in motion; on the other hand, the judgment in *BRT* v *Sabam* was concerned only with the case where a procedure has been initiated pursuant to Article 3 of the regulation and therefore with a view to the adoption of a finding that there has been an infringement of Article 85 or 86;

— the questions put by the Hof van Beroep, Ghent, are concerned with individual contracts which, in themselves, are not caught by the provisions of Article 85 (1) but which fall under the prohibition contained in that article on account of the cumulative effect of the networks of exclusive agreements existing in the industry concerned.

In cases such as the present one, the applicability of the first as well as of the third paragraph of Article 85 depends on considerations which lie outside the specific agreement submitted to the national court and of which the contracting parties have no knowledge. In these circumstances it is better that the decision should be taken by the Commission rather than by the national court. While the latter is necessarily called upon to hear witnesses or experts the Commission has at its disposal either the requisite information anywhere in the Community. It is thus in a position to take individual decisions relating to concrete cases and, in the course of time, rules derived from those decisions will apply with equal force to future cases and

help the national courts in reviewing them.

To date, the Commission has not yet set in motion a procedure either against Concordia or against other breweries, Belgian or otherwise, which have made agreements of the type in question. During the period 1970 to 1972 it conducted an inquiry into the brewing industry and eventually adopted a decision requiring certain undertakings to supply information (JO L 161 of 19. 7. 1971, from p. 2). The results of the inquiry were included in a study carried out by a French expert which formed the basis of discussions conducted with the national authorities at the end of 1975. Since then the Commission has not seen fit to take any decisions on the subject of particular agreements or groups of agreements.

In these circumstances the Commission can only adopt a theoretical approach to the questions raised. Although it is prepared to indicate certain quantitative limitations, they cannot have any absolute value and must be regarded as no more than pointers.

First question

Concordia states that this question can be answered by reference to previous decisions of the Court, in particular the judgment of 9 July 1969 in *Völk* v *Vervaecke* (Case 5/69 [1969] ECR 295) in which it was held (in grounds Nos, 5 to 7 of the judgment, *ibid.*, p. 302)

— that, for an agreement to be capable of affecting trade between Member States it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States in such a way that it might hinder the attainment of the objectives of a single market between States;

— that neither this condition, nor the condition that the agreement should have the effect of obstructing competition, is fulfilled when the agreement 'has only 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'.

It may be concluded from this that where, as in the present case, a single local agreement is not such as by its nature to produce the said effects, it is prohibited only if it produces them because of the structure of the market.

It is, in terms of theory, difficult to lay down more precise criteria because they can be established only in respect of a particular market. It is, accordingly, important to make it clear at once that, according to recent decisions of the Court, proof of the restrictive effect on competition in such a market, which presupposes the delineation of the market in the products in question, and of the effect on trade between Member States must be furnished on the basis of concrete and well-established factors of law and of fact (judgment of 14 May 1975 in *Kali,* Joined Cases 19 and 20/74 [1975] ECR 499; judgment of 15 May 1975 in *Frubo,* Case 71/74 [1975] ECR 563; and judgment of 26 November 1975 in *Papiers Peints,* Case 73/74 [1975] ECR 1491).

The salient features of the production and sale of beer in Belgium are indicated by the following information:

— It appears that, in Belgium and Luxembourg, there are about 200 breweries, comprising large, medium-size and small-scale undertakings. Concordia's share of the market amounts to 0·48 % of national output and that of the largest Belgian group amounts to just 35 %. The structure of the Belgian market is therefore scarcely that of a monopoly.

— Belgian exports to other Member States and imports from the latter

have, in recent years, shown a marked increase; Concordia supplies figures on this point. The volume of this trade would be even greater if it were not obstructed by a number of external factors such as differences between national law governing the manufacture of beer, the habits of consumers, etc.

— According to estimates, the proportion of café and restaurant-owners bound by exclusive contracts is between 40 and 50 %, a figure which is lower than that in other Member States where there are contracts of the same type. In Belgium, these contracts are mainly used by breweries whose business is largely local because they help to retain the loyalty of customers in the immediate vicinity and therefore enable them to compete with the bigger breweries.

— Far from affecting trade between Member States the existence of the said contracts has made it possible for Belgian breweries to enter the Netherlands and French markets.

In all the circumstances the reply to the present question should be as follows:

If the facts are that the Belgian market does not have a monopolistic structure and that, moreover, a large part of it, 50 % or more for example, consists of café owners and restaurant proprietors who are not bound by agreements or that supply contracts increase the competitiveness of brewers whose business is mainly local; or if the facts are that, taking account of factors which have a restrictive effect, such as differences in national laws, consumer habits, customs, and high transport costs, Belgian trade with other Member States is maintained at a reasonable level or is even increasing, or that supply contracts are a means of entering the market in other Member States, there is no reason to suppose that an isolated exclusive purchase agreement at national level is caught by the prohibition contained in Article 85 (1).

The *Belgian Government* explains that the majority of the agreements in question are of minor importance and do not, therefore, in themselves fulfil the conditions provided for in Article 85 (1).

Without first going into the matter in some depth, it is impossible to indicate, in abstract terms, all the 'additional criteria' referred to in the present question. In this connexion a distinction must be drawn between:

— on the one hand, criteria which may be described as intrinsic, including, in particular, the nationality, reputation, importance and productive capacity of the parties; the type, quality and quantity of the beer covered by the agreement; the exclusive or non-exclusive character of the clauses relating to purchase; any provision made for the supply of other products (beverages and otherwise) or services; the obligations on the supplier; the ancillary clauses in the agreement, such as those concerning its duration, the right to determine the contract, the freedom (if any) of the retailer to import beer for sale in places other than those covered by the agreement; and finally, the penalties laid down for failure to fulfil the obligations contracted for;

and

— on the other hand, certain factors extraneous to the contracts in question taken as a whole, such as the possible existence of non-exclusive brewery agreements and their consequences; non-contractual conditions concerning retail sales; agreements concluded at the production and wholesale stages; the structure of undertakings and their position on the market; the type and volume of supply and demand, prices, transport, state of national legislation etc.

As regards, in particular, the cumulative effect of agreements of the same kind, the date on which they were concluded

is important. It cannot conceivably be fair for 'a prohibitive decision to be taken solely in respect of an earlier agreement of the same kind which is in itself compatible with the Common Market'. If it subsequently transpires that the agreements concluded produce, as a whole, effects contrary to Article 85, this means either that action must be taken in respect of new agreements of the same type or that both the old and the new agreements should be treated, if not as a whole, at least by groups.

The Belgian Government suggests that the question should be answered in accordance with the foregoing considerations.

The *Commission* states that the additional criteria referred to in the present question are of two kinds, one quantitative and the other qualitative.

Quantitative aspect

In order to assess the cumulative effect of brewery contracts, it is first necessary to define the market affected by it. In the Commission's view, these contracts must be viewed in a somewhat restricted context, which is to say, limited not only to beer to the exclusion of other beverages (alcoholic or otherwise), but more specifically to retailers operating in the 'Horeca' sector and therefore to the exclusion, in particular, of grocers and supermarkets. Purchases and resales made by establishments in the said sector display characteristics which are absent from domestic consumption: the resale of beer also implies a service; the beer is for the most part purchased by the barrel and, consequently, in large quantities; resale calls for special equipment and requires a degree of technical expertise; beer sold by the glass in the 'Horeca' sector is markedly dearer than that intended for domestic consumption; and so on.

Again, the market to be taken into account must also be defined in geographical terms. In this respect it is important to note that, in the majority of cases, the networks of brewery contracts at present in force cover only national markets or parts of national markets. Each network of contracts denies competitors access to the sales outlets involved. Consideration must first be given, therefore, to the cumulative effect of all these networks.

Access to the market becomes more difficult as the number of sales outlets bound by contract grows, on account both of the extent of a given network and of the overall extent of several networks. In each case there is a noticeable reduction in both the number and the commercial attraction of the sales outlets which are free to choose their suppliers. This impedes not only the penetration of the market by suppliers from other Member States but also the extension of that part of the market which belongs to undertakings already established there.

Accordingly, in respect of the present case, the conclusion is inevitable that the exclusive network formed by Concordia has an effect on the Belgian market, the character of which is indicated by the information set out above and, moreover, by the fact that approximately 65 % of the national output, that is to say almost 9 000 000 hl, is disposed of under exclusive agreements.

In the light of the factors which have just been described, it is possible to base an assessment on the following criteria:

In all probability an extensive network of exclusive agreements set up by a large brewery is in any case itself caught by Article 85 (1). The probability becomes a virtual certainty when, in a given market, there are several large-scale networks.

On the other hand, it seems reasonable to take a more favourable view of small networks created by fairly small-scale producers. The Court has laid down the

rule that agreements which have only an insignificant effect on competition fall outside the prohibition contained in Article 85. The same considerations apply in the case of agreements which, in themselves, cannot be considered as exercising any effect whatever on competition and which, in consequence, come within the ambit of Article 85 only by reason of the cumulative effect created by the sum total of agreements of the same type. In other words, a distinction must be drawn according to whether the contribution made by a given undertaking to this cumulative effect is insignificant or substantial.

In the brewing industry there is no great difficulty in drawing this distinction.

The criteria relating to the relative volume of products covered by the agreement and the turnover achieved by the contracting undertakings, laid down under paragraph II of the Notification of the Commission concerning agreements of minor importance (JO C 64 of 2. 6. 1970, p. 1) seem scarcely applicable in this industry. In view of the fact that there are, in Germany, a very large number of small-scale breweries, to apply these criteria in that Member State would mean that a very high proportion of brewery contracts would not be caught by the prohibition contained in Article 85 although, taken as a whole, the breweries concerned take a substantial share of the market. For reasons which the Commission sets out in detail, the most acceptable solution would be to retain, subject to exceptions in one direction or another, the principle that a network of exclusive purchase agreements does not fall under Article 85 so long as it covers transactions involving no more than an aggregate of 100 000 hl of beer.

Qualitative aspect

The effect of agreements of the type in dispute depends also on the nature of the relationships which they create: the obligation to obtain supplies exclusively from the supplier concerned or an obligation limited to a minimum quantity; duration of the obligation; where applicable, the duration of the loan constituting consideration for the obligation, etc. Nevertheless, Community law does not require conditions to be imposed on small-scale suppliers relating to the contents of agreements forming part of the network which they have established (see the judgment in *Völk* and the judgment of 6 May 1971 in *Cadillon,* Case 1/71, Recueil, p. 351). Inside such a network, even clauses more restrictive than is required for the attainment of the objectives contained in Article 85 (3) might be tolerated.

This view is also justified on the ground that such clauses militate against a deterioration in the structure of competition, which might occur if, by means of appropriate price reductions, which might be incompatible with Article 86, the large breweries endeavoured to eliminate the small-scale undertakings operating in the same industry. It would be better to avoid such a situation by a reasonable application of Article 85.

To sum up, the Commission proposes that the answer should be as follows:

The application of Article 85 (1) of the EEC Treaty to exclusive purchase agreements concluded between an undertaking producing, importing or engaged in the wholesale distribution of beer and undertakings selling draught beer requires an appraisal of the extent to which access to the demand from these latter undertakings remains free.

In this connexion, account must be taken of the extent of the networks of agreements of the same nature and the stringency of the conditions laying down the exclusive rights and obligations.

In cases where one or more large networks of exclusive contracts have

deprived a supplier of freedom of choice regarding access to a substantial part of the demand involved, certain networks of secondary importance may not be caught by the prohibition contained in Article 85 (1).

Assessment of these factors in actual cases must be carried out in the light of the practice followed by the Commission in its decisions or of other information of comparable weight supplied by that institution, subject to review by the Court of Justice.

Second question

This question is, in Concordia's view, of paramount importance because, if it is answered in the affirmative, there is no need to answer the other questions.

In order to determine whether contracts such as that under consideration qualify for the exemption by categories provided for in Regulation No 67/67, reference must be made to the first and second paragraphs of Article 1 of the regulation. Under the said paragraph (1) (b) as amended by Regulation No 2591/72 of the Commission of 8 December 1972 (OJ English Special Edition 1972 (9 to 28 December), p. 7) 'until 31 December 1982 Article 85 (1) of the Treaty shall not apply to agreements to which only two undertakings are party and whereby ... one party agrees with the other to purchase only from that other certain goods for resale'. These conditions are satisfied in the present case. However, under paragraph (2) of Article 1 of the regulation, paragraph (1) of the article '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'. Since this applies in the case of the contested contract it would not, *prima facie,* seem to qualify for exemption. But such a conclusion would be incorrect since, in its judgment in *Roubaix-Wattrelos (loc. cit.,* p. 119 to 120, grounds of judgment 18 and 19) the Court held that 'The effect of paragraph (2) is thus to exclude from the scope of Article 85 (1) and, therefore, from Regulation No 67/67, exclusive dealing agreements which are purely domestic in nature and are not capable of significantly affecting trade between Member States' but that the purpose of the said paragraph (2) 'is not to exclude from the benefit of the exemption by categories those agreements which, although concluded between two undertakings from one Member State, may nevertheless by way of exception significantly affect trade between Member States but which, in addition, satisfy all the conditions laid down in Article 1 of Regulation No 67/67'. It would, accordingly, be unreasonable to withhold the benefit of exemption by categories from an agreement solely on the ground that, in principle, such an agreement is not capable of significantly affecting trade between Member States.

The court making the reference was wrong to entertain doubts concerning the applicability of the exemption to contracts of the contested type when it referred to the provision in Article 1 (1) (a) of Regulation No 67/67, which covers *agreements granting exclusive sales concessions* and makes their exemption subject to the condition that they have 'defined' the area of the common market within which resale can and must take place. This provision does not in fact apply to *exclusive purchase agreements,* which are covered by subparagraph (b) of Article 1 (1) and which are involved in this case. This arises, in the first place, from the fact that subparagraph (b) does not repeat the said condition and, in the second place, from the nature of the agreements referred to respectively in subparagraphs (a) and (b). Whereas, therefore, it is necessary, in the case of exclusive sales agreements, to define the territory in order to limit the exclusive right of sale, this does not apply to an exclusive purchase undertaking since the latter is, by its very nature, territorially limited, that is to say, restricted to the premises of the purchaser.

The disputed contract was concluded at a date before Regulation No 67/67 came into force. The notification of exclusive dealing agreements was at that time governed by Article 4 (2) (a) of Regulation No 27 of the Commission of 3 May 1962 (OJ English Special Edition 1959 to 1962, p. 132), which was inserted into the regulation pursuant to Regulation No 153 of the Commission of 21 December 1962 (JO 1962, p. 2918) and provided for a simpler method of notification. Paragraph (2) (a), which was rendered otiose by the entry into force of Regulation No 67/67, was repealed by Article 7 of that regulation. The effect of Article 4 (2) of Regulation No 67/67 is that the exemption by categories laid down in Article 1 of that regulation 'shall have retroactive effect' in respect of agreements concluded between 13 March 1962 and the date of the entry into force of the regulation and which had been notified before this latter date. It would be reasonable to allow the same retroactive effect to be applied to agreements which, like that in the present case, were concluded during the aforementioned period but which were not notified because they were not subject to the obligation to notify (see below the observations of Concordia concerning the third question).

Accordingly, this question should be answered in the affirmative.

The *Belgian Government,* which refers to, *inter alia,* the fourth paragraph of the preamble to Regulation No 67/67, also believes that, as is made clear by the judgment in *Roubaix-Wattrelos,* that regulation is concerned only with 'national' agreements which, being only in exceptional cases capable of significantly affecting trade between Member States, satisfy the conditions laid down in Articles 1 to 3 of the regulation.

The cumulative effect which may be produced by the sum total of similar agreements does not affect the application of the regulation.

Finally, the Belgian Government suggests that the answer should be as follows:

Subject to the fulfilment of the conditions laid down in Regulation No 67/67, the exemption by categories for which it provides is applicable to all exclusive purchase agreements concluded in the brewing industry between two undertakings from the same Member State and which may by way of exception significantly affect trade between Member States. Such exemption does not, therefore, apply to brewery agreements having a purely national character, nor does it apply to other brewery agreements which do not satisfy the conditions required by the said Regulation No 67/67, even though both cases involve agreements concluded between two undertakings from the same Member State.

The *Commission* states that the question should be answered in the negative.

Except when necessary, brewery agreements do not contain a clause defining the territory where they are applicable. Yet it is clear from the structure of Article 1 (1) of Regulation No 67/67 and, moreover, from the sixth recital of its preamble that that regulation refers only to agreements containing such a clause, regardless of whether they come under subparagraphs (a), (b) or (c) of the said paragraph.

Furthermore the scope of the regulation was limited by the subject-matter of the agreements which it covers so as to enable undertakings to decide for themselves whether the agreements which they have concluded are or are not elegible for exemption by categories. There can be no such discretion in respect of agreements which may be incompatible with Article 85 solely on the basis of external factors, of which the parties are unaware, such as the existence of networks of agreements of the same type.

Finally, brewery agreements frequently contain oppressive clauses which are more restrictive than is necessary for the attainment of objectives capable of justifying exemption by categories, with the result that exemption by categories cannot be applied to them, despite the fact that Article 2 of Regulation No 67/67 contains nothing which enables the benefit of such exemption to be withheld from those clauses on the basis of the application, by analogy, of that article.

Third question

Concordia explains that the statement of the grounds in the judgment making the reference relates to certain elements of the judgment of the Court of Justice of 18 March 1970 in *Bilger* (Case 43/69 [1970] ECR 127) to the effect that:

- Although a contract of the type under consideration, in that and the present case, 'when considered as part of a group of similar contracts which bind a considerable number of retailers within one State to certain producers established in the same State such a contract may, in given cases, affect trade between Member States, nevertheless under the terms of Article 4 (2) of Regulation No 17 these arrangements are exempt from notification provided that they do not relate either to imports or to exports between Member States' *(ibid.,* p. 135, ground of judgment 5);
- 'Exclusive supply agreements, the execution of which does not require the goods in question to cross national frontiers, clearly do not relate to imports or to exports' *(ibid.,* ground 6).

In referring the question whether this interpretation also applies where the contract at issue '[amounts] to a direct prohibition on imports in respect of one of the parties', the Hof van Beroep, Ghent, could have had one or other of the following possibilities in mind:

Either

- it wished to draw attention to the fact that an undertaking such as that involved here necessarily means that the café proprietor concerned cannot obtain his supplies from breweries established in other Member States. This situation is the same as that in the *Bilger* case, which means that, in giving the interpretation which has just been quoted, the Court certainly took this circumstance into account;

or

- the court making the reference is suggesting that, because of the existence of a large number of similar agreements between retailers and brewers from the same Member State, imports from one Member State to another are liable to be particularly affected. As is clear from the passages quoted from the judgment in *Bilger,* this factor was expressly taken into account by the Court of Justice; in any case its only importance is in the interpretation of the words 'affect trade between Member States' within the meaning of Article 85 of the Treaty;

or

- (as a final and most likely alternative), the national court wished to know whether the answer varies if the exclusive purchase clause also forbids the supply of beer of foreign origin imported from another Member State by breweries excluded on account of the clause. On this point, too, the Court of Justice has given an express ruling, namely in the judgment in *Roubaix-Wattrelos,* in which it is stated that Article 4 (2) (1) of Regulation No 17 extends 'to agreements granting exclusive sales concessions in relation to the marketing of goods, where the marketing envisaged by the agreement takes place solely within the territory of the Member State to whose law the undertakings are subject, even if the goods in question have at a former stage been imported from another Member State' *(loc. cit.,*

p. 120, paragraph (1) of the operative part of the judgment).

In these circumstances, the reply to this question must be in the affirmative, in justification of which it is sufficient to refer to the previous decisions of the Court.

It is the view of the *Belgian Government* also that the judgment in *Bilger* leaves no room for doubt that the type of agreement in dispute cannot, despite the prohibition on imports which, by implication, it involves, be regarded as relating 'either to imports or to exports between Member States' within the meaning of Article 4 (2) (1) of Regulation No 17 and it is not therefore subject to the obligation to notify. Although the said judgment was concerned only with contracts 'between a producer and an independent retailer' (see paragraph (1) of the operative part of the judgment), the ruling which it contains also applies when the retailer's co-contractor is not a producer acting in that capacity but a producer acting simultaneously as a wholesale trader selling beer manufactured by other national or foreign producers.

Moreover, agreements coming under Regulation No 67/67 do not need to be notified. If, having been concluded before the entry into force of that regulation, they satisfied the requirements of Articles 4 and 5 thereof, they were exempted *en bloc* on account of its entry into force.

In these circumstances the reply should be as follows:

Only those brewery agreements, concluded between two undertakings, which are purely national in character, that is to say, agreements between, on the one hand, a producer or supplier of home-produced beer and, on the other hand, a retailer established in the same Member State, for the resale of beer in that State, are not required to be notified in accordance with Article 4 (2) of Regulation No 17.

The *Commission* is of the opinion that, in view of the judgments in *Bilger* and *Roubaix-Wattrelos,* the question must be answered in the affirmative. Viewed in isolation, brewery agreements undoubtedly fall within the category of agreements defined in Article 4 (2) (1) of Regulation No 17. The fact that, as the result of the cumulative effect produced by a number of networks of exclusive contracts, they may nevertheless be caught by Article 85 (1) is, for those engaged in trade and industry, a criterion which is too vague to justify imposing on them an obligation to notify. The truth of this is reinforced by the fact that exemption from notification does not constitute any obstacle to the application of Article 85 (3) but, on the contrary, confirms the possibility of retroactive exemption from the prohibiting provision, as provided for under Article 6 (2) of Regulation No 17.

Fourth question

According to *Concordia,* this question is closely connected with the first question since the provision for nullity contained in paragraph (2) of Article 85 applies only to agreements prohibited under paragraph (1) but, subject to the application of paragraph (3), it applies to them all.

However, when an agreement, harmless in itself, is, exceptionally, caught by the prohibition owing to the cumulative effect produced by other agreements of the same kind, the automatic application of the said paragraph (2) has an effect which is arbitrary and, in any case, unsatisfactory.

When the number of 'tied' retailers in a Member State reaches a certain level the question arises whether all contracts subsequently entered into are automatically null and void or whether, in those circumstances, certain contracts

concluded earlier, for example, the more important ones (whatever meaning should be given to those words), are thereby suddenly rendered nugatory.

Neither of these alternatives accords with the principle of legal certainty. This confirms the view that the best way of settling the status of the agreements in question is to apply the system of exemption by categories or the system of exemption from the obligation to notify. The latter alternative, however, would provide a satisfactory solution only if, at the request of those concerned and pursuant to Article 85 (3) of the Treaty, the Commission were to grant them individual exemption with retroactive effect. On the other hand, if the Commission refuses such exemption, the nullity which results from such a decision itself has that effect (see judgment in *Haecht II;* grounds of judgment Nos 24 to 27). Finally, the most satisfactory way of answering the question whether agreements such as that in dispute are or are not valid would, therefore, be to regard the exemption by categories provided for under Regulation No 67/67 as applicable to such agreements.

According to the *Belgian Government,* the words 'cumulative effect' must be interpreted in the light of all the agreements referred to in the said Government's comments on the first question and not, therefore, by taking account only of the agreement involved in each case under review and of other agreements 'of the same type'.

In so far as, owing to their cumulative effect, all these agreements are caught by Article 85 (1), fairness demands that they should be the subject of a single decision. Because of the structure of Community regulations this is not, however, always feasible, with the result that, on occasion, it is justifiable to take decisions in individual cases pursuant to Article 85 (3) and as the result of a notification. This applies in cases involving agreements which do not relate to imports or exports but which, owing to their cumulative effect, significantly affect trade between Member States and competition.

On the other hand, in so far as agreements which are not purely national come under the prohibition contained in Article 85 (1) and fulfil the conditions for exemption laid down in Regulation No 67/67, that regulation provides the right answer, since it prevents those agreements from being rendered void under the provisions of Article 85 (2).

The answer to this question should therefore be as follows:

Exclusive purchase agreements of comparatively minor importance, to which Article 85 (1) applies only on account of the cumulative effect of all agreements of the same type may avoid annulment pursuant to Article 85 (2), by virtue of Article 85 (3). The application of Regulation No 67/67 may be claimed, with the same consequences, only in respect of agreements other than those of a purely national character concluded between two undertakings, provided that the conditions required by that regulation are fulfilled.

The *Commission* states that the answer to this question is contained in the comments made on the first. Only agreements which form part of a small-scale network avoid being caught by Article 85 (1).

If, however, the combined effect of all the existing networks is to restrict access to the market to a certain extent, anything which further aggravates this situation, even only slightly, is caught by the prohibition.

Similarly, it is not possible, in the big networks, to draw a distinction between contracts according to the extent to which each contributes towards restricting access to the market. 'The

general notion of the cumulative effect of a given number of exclusive agreements depends on a generalization of the analysis. If an attempt is made to avoid this generalized analysis, the whole argument urging the ascendancy of economic reality over legal form becomes meaningless. In fact the cumulative effect of exclusive agreements largely arises from the industrial power of the big breweries which are parties to the agreements in question. This industrial power is the very reason why the networks of agreements are, individually and collectively, so influential and important. That is why the commercial importance of the co-contractor and, consequently, the volume of trade connected with each contract, justifiably remain secondary considerations'.

This approach also holds good in the case of an application of Article 85 (3). In a further reference to 'The general the fifth and sixth questions, the Commission states that, in that context again, it is not possible, within a given network, to draw a distinction based on the quantitative dimensions of the various agreements which form part of it.

In the light of these observations the Commission suggests that the answer should be as follows:

The validity of the agreements referred to in the first question, which in themselves are of minor importance, depends on the validity of the network of which they form part.

Fifth question

Concordia relies on previous decisions of the Court to the following effect:

(as regards agreements made after 13 May 1962)

— 'Whilst the principle of legal certainty requires that, in applying the prohibitions of Article 85, the sometimes considerable delays by the Commission in exercising its powers should be taken into account, this cannot, however, absolve the court from the obligation of deciding on the claims of interested parties who invoke the automatic nullity.
In such a case it devolves on the court to judge ... whether there is cause to suspend proceedings in order to allow the parties to obtain the Commission's standpoint, unless it establishes either that the agreement does not have any perceptible effect on competition or trade between Member States or that there is no doubt that the agreement is incompatible with Article 85' (judgment in *Haecht II, loc. cit.*, grounds of judgment 11 and 12);

— 'The fact that the expression 'authorities of the Member States' appearing in Article 9 (3) of Regulation No 17 covers such courts', namely, 'courts especially entrusted with the task of applying domestic legislation on competition or that of ensuring the legality of that application by the administrative authorities', 'cannot exempt a court before which the direct effect of Article 86 is pleaded from giving judgment. Nevertheless, if the Commission initiates a procedure in application of Article 3 of Regulation No 17 such a court may, if it considers it necessary for reasons of legal certainty, stay the proceedings before it while awaiting the outcome of the Commission's action. On the other hand, the national court should generally allow proceedings before it to continue when it decides either that the behaviour in dispute is clearly not capable of having any appreciable effect on competition or on trade between Member States, or that there is no doubt of the incompatibility of that behaviour with Article 86' (judgment in *BRT-I, loc. cit.*, grounds of judgment 19 to 22).

These findings, which are perfectly clear, can be analysed as follows:

If it is not to be guilty of denying justice, the national court is obliged to give a ruling on the validity of the agreement submitted to it and, in consequence, on its compatibility with Articles 85 and 86. It has nevertheless the right, but not the obligation, to stay the proceedings in accordance with the national rules of procedure pending a decision of the Commission except when it obvious that the agreement is or is not compatible with Article 85 or Article 86.

It exercises this right whenever legal certainty or procedural considerations so require. This would occur if the immediate continuation of proceedings could give rise to contradictory decisions given, respectively, by the national court and the Commission, a situation which could arise, especially when the agreement in question has been notified to the Commission or when there is still time for this to be done.

In raising the further question whether the national court is permitted to 'decide that Article 85 (3) is not applicable', the Hof van Beroep, Ghent, is clearly asking whether the said court is not already in the course of applying that provision (a task which is expressly reserved to the Commission under Article 9 (1) of Regulation No 17) if it refuses to suspend judgment on the ground that it considers the agreement submitted for review to be manifestly incompatible with Article 85, with the implication that no exemption would be granted by the Commission pursuant to Article 85 (3) although it was still within its power to do so.

Put in this way, the question must be answered in the negative. If the national court were to refuse to suspend judgment for the agreement from the prohibition laid down in Article 85 (1), which is a decision for the Commission alone, as is made clear by Article 9 (1) of Regulation No 17, but for the very different reason that it regards it as being likely that the Commission will refuse such exemption. In so doing, it would not be encroaching on the powers of the Commission, which could later rule as anticipated. In any case, the national court is well advised to refuse to suspend judgment only when it is virtually certain of the tenor of the decision to be taken by the Commission, when, for example the agreement submitted to it is identical with one which, in the past, was the subject of a negative decision by the Commission.

Moreover, it follows from grounds of judgment 9 to 11 in *Roubaix-Wattrelos* that there is another case in which the national court is empowered to give an indirect ruling on the applicability of Article 85 (3), namely when the issue is one of deciding whether, despite the absence of notification, a contract may benefit from the exemption by categories provided for in Regulation No 67/67.

The *Belgian Government* observes that, as is clear from Article 9 (3) of Regulation No 17, a national court has no jurisdiction to find in favour of exemption pursuant to Article 85 (3) but only to decide the question whether paragraph (1) of the article is applicable to the contested agreement. It is, in any case, unlikely that a national court would take such a decision in respect of an agreement such as that referred to in the fourth question and which is caught by the prohibition only on account of the cumulative effect of a group of agreements of which it forms part.

On the other hand, the said court could rule on the applicability of Regulation No 67/67.

Nevertheless, for considerations of legal certainty, national courts will, if there is any doubt about the compatibility of an agreement with Community law, stay the proceedings in order to enable the parties to obtain a decision from the Commission. The Belgian Government also refers to the judgment in *Haecht II,* especially grounds 9, 10 and 12, in which the Court drew a distinction between old and new agreements. The reasons

contained therein are equally applicable to agreements which need not be notified.

Accordingly the reply should be as follows:

National courts are not empowered to apply Article 85 (3). For reasons of general legal certainty, they have a duty to stay the proceedings when they involve considerations of old agreements which have been notified; on the other hand, as far as new agreements are concerned, they are under no obligation to suspend judgment if they are able to decide without difficulty either that the agreements do not come under Article 85 or that they are incompatible with the common market.

The *Commission* states that the terms of reference to be borne in mind are to be found in the judgments in *Haecht II* and *BRT-I.*

The situation described by the national court, namely, 'where exemption pursuant to Article 85 (3) is possible' may occur, in the first place, when proceedings have not yet been instituted and, in the second place, when proceedings have been instituted pursuant to Article 6 of Regulation No 17, which could result in the grant of an exemption within the meaning of Article 85 (3).

The answer to be given to the present question should place the emphasis on legal certainty.

The way in which the jurisdiction of the courts is exercised should be designed, principally, to reduce to the minimum the risk of contradictory decisions. The national court must first consider the practice followed by the Commission, which is not only to be found in decisions but also in information supplied in other ways, for example in observations submitted by the Commission in the course of proceedings for a preliminary ruling. If this practice has not been contradicted by decisions of the Court of Justice, and it provides the national court with a sufficiently clear guideline, the latter can decide the case submitted to it without suspending judgment.

On the other hand, such suspension is desirable when the court is faced with questions of interpretation or of application in respect of which neither the Commission nor the Court of Justice has yet given a ruling. Uncertainty may arise not only when the practical significance of an agreement is being determined but, in view of Article 6 (2) of Regulation No 17, also in connexion with the retroactive effect which the Commission might give to an exemption, especially in the case of an agreement exempted from notification.

The danger of contradictory decisions is especially marked when the Commission has initiated a procedure pursuant to the said Article 6, which it normally does at the time when it decides to carry out the publication provided for in Article 19 (3) of Regulation No 17. That indicates that the agreement in question is *a priori* and taken as a whole, not incompatible with Article 85 (1) of the Treaty. But it often happens that, in the course of the procedure, the Commission proposes alterations in the agreement which are accepted by those concerned. It can happen that the dispute submitted to the national court is concerned with clauses other than those which present difficulty for the Commission.

As regards the second part of the question, the national court must be permitted to 'decide that Article 85 (3) is not applicable'. The possibility of contradictory decisions in this field is less great than it was because, in recent years, the Commission has delivered a sufficiently large number of decisions refusing the exemption applied for to enable the national court to take this into account in reaching a decision.

These considerations also apply to agreements which, because they need not be notified may, by virtue of paragraph (2) of Article 6 of Regulation No 17, benefit from exemption with retroactive effect to the date when they were concluded. It is true that the danger of contradictory decisions is in this case greater than in the case of agreements caught by paragraph (1) of that article. But in practice the parties can be relied upon to be sufficiently alert to ask the Commission to pronounce on the future of their agreement. If the parties do not take advantage of this opportunity and if the Commission takes no action of its own accord, there would nevertheless be no reason for holding up the proceedings pending before the national court.

When applied to the brewing industry, the foregoing considerations lead to the conclusion that, even if they are not required to be notified, agreements forming part of a large network are caught by the prohibition contained in Article 85 (1) and they are unlikely to be able to benefit from exemption so long as

(i) the exclusive dealing clause is effective for a comparatively long period of time and especially, where it constitutes consideration for a loan, for a period longer than the actual duration of the loan, the possibility being also borne in mind that the latter may be repaid before time;
(ii) the agreements relate to drinks other than draught beer.

If these requirements are fulfilled, the possibility of obtaining an exemption depends on the stringency of the exclusive arrangement agreed. In view of the extent to which demand is at present tied to large networks of agreements, the competition required by the Treaty cannot exist unless, in each network, retailers continue to have the freedom to choose between the various suppliers for a proportion of their supplies constituting between a half and a third of sales over a reference period of reasonable length.

The Commission proposes accordingly that the reply should be as follows:

A national court called upon to rule on the validity of an exclusive purchase agreement concluded between an undertaking producing, importing or engaged in the wholesale distribution of beer and undertakings selling draught beer may, out of considerations of legal certainty, suspend judgment to enable the Commission to adopt a decision.

The decision of the national court must take into account the practice followed by the Commission in its decisions and other information of comparable weight supplied by that institution concerning the questions of fact and of law arising in the case concerned.

In these circumstances, a national court may rule either that Article 85 (3) is inapplicable or that it is likely that the Commission will give retroactive effect to a subsequent application of that provision to the case in question.

Sixth question

Concordia believes that this question was submitted in the light of the statement which appears in ground No 10 of the judgment in *Haecht II,* which reads: 'In the case of new agreements, as the regulation assumes that so long as the Commission has not taken a decision the agreement can only be implemented at the parties' own risk, it follows that notifications in accordance with Article 4 (1) of Regulation No 17 do not have suspensive effect'.

Legal opinion has it that 'provisional nullity' means that, while the parties are not entitled to withdraw from the agreement and remain bound to act in conjunction to obtain a definite decision from the Commission, they cannot have the agreement enforced by legal process or set it up against third parties. This would, however, conflict with the decision of the Court in *Bosch* (judgment

of 6 April 1962 in Case 13/61 [1962] ECR 45) that it would be contrary to the general principle of legal certainty ... to render agreements automatically void before it is even possible to tell which are the agreements to which Article 85 as a whole applies'. In other words, it would be incompatible with the said principle to hold that an agreement has no validity solely on the basis of Article 85 (1) while the possibility still exists that the Commission may declare that provision inapplicable by virtue of Article 85 (3); such an agreement would, therefore, have provisional effect.

These conclusions hold good despite the passages quoted above from the judgment in *Haecht II.* On the contrary, although (in ground No 10) the Court held that an agreement on which the Commission has not taken a decision 'can only be implemented at the parties' own risk', this means that such an agreement is provisionally valid in the sense that, if the agreement proves later to be void, the party for whose benefit it was executed must (at his own cost and, if necessary, by means of compensation) restore the situation existing prior to its execution. The subsequent passage in ground No 10 stating that 'notifications ... do not have suspensive effect' must be read in conjunction with ground No 11 which states that, notwithstanding the principle of legal certainty, the court cannot be absolved 'from the obligation of deciding on the claims of interested parties who invoke the automatic nullity'. It does, of course, follow from this that notification does not automatically deprive those concerned of the right to invoke the nullity of the agreement; but it is clear from ground No 12 that it devolves on the court to judge whether there is cause to suspend proceedings pending a decision of the Commission, in other words, to decide whether the nullity has immediate effect, which would be the exception, or whether its effect is suspended, in which case the agreement would remain provisionally valid.

As regards the interpretation to be placed on provisional validity, reference must be made to the operative part of the judgment in *Portelange* which reads: 'Agreements referred to in Article 85 (1) of the Treaty, which have been duly notified under Regulation No 17/62, are fully valid so long as the Commission has made no decision under Article 85 (3) and the provisions of the said regulation'. This applies *a fortiori* in the case of agreements which are not subject to the obligation to notify.

If the judgment in *Portelange* is regarded as referring only to 'old' agreements, the answer to be given to the national court is that, in the case of 'new' agreements, the effect of provisional validity is that the courts can grant the parties to the contract only such interim measures as are provided for under national law.

In the view of the *Belgian Government,* the question covers agreements which were concluded after the entry into force of Regulation No 17, which come under Article 85 (1), and have either been notified with a view to exemption from the prohibition provided for in that article or have been released from the duty to notify pursuant to Article 4 (2) of the said regulation. In these circumstances, it is enough to refer to the judgment in *Portelange* in which it is stated that it would be contrary to the general principle of legal certainty to conclude that, because agreements notified are not finally valid so long as the Commission has made no decision on them under Article 85 (3) of the Treaty, they are not completely efficacious *(loc. cit.,* ground No 15). The fact that, under that judgment, those agreements remain completely valid means that they can also be enforced by all legal means. This principle is not impaired by the judgment in *Haecht II,* which merely states that the Commission can take a decision to refuse exemption and thus render the agreement void with retroactive effect.

The *Commission* states that the reply which should be given is to a large extent to be found in its statement on the fifth question.

The sixth question must be taken to refer to new brewery agreements added to an existing network. An assessment of such agreements depends on an assessment of the network to which they belong. Agreements forming part of a large distribution network which does not fulfil the conditions set out at the end of the said statement, must be regarded as void not only because they are caught by the prohibition in Article 85 (1) but also because they cannot be granted exemption.

If the reverse were true, to prevent the national court from upholding the validity of the contested agreement and the network of which it forms part would be to attach too much importance to form. A decision of this kind would not amount to an exemption under Article 85 (3) — which can be granted only by the Commission — because it is not effective *erga omnes* and is not binding on the Commission. It ought to be regarded simply as a finding that there is an agreement and that administrative confirmation of its validity is likely to be forthcoming at a later date. This is not the same thing as the provisional validity which the Court has accepted in relation to old agreements. As regards agreements which are not subject to notification and have not been the subject of a procedure, the power which the national court has to give such an anticipatory decision supplements the powers of the Commission in a way that does not seriously endanger the uniform application in all its aspects, of Article 85.

The Commission submits that the answer should be as follows:

The validity of a new exclusive purchase agreement is determined by the validity of the network of which it forms part.

Seventh question

Concordia contends that the wording of this question makes it impossible to give a clear answer. In any case the Royal Decree in question cannot be incompatible with Articles 85, 86 or 90 of the Treaty, which are concerned only with acts of private or public undertakings.

The *Belgian Government* submits as an annex to its observations the text of the aforementioned Decree and of all the Royal Decrees subsequently adopted to the same end. It explains the subject-matter, the object and the contents of the Decree of 25 September 1964 and emphasizes that, for the protection of retailers, it contains a prohibition against the inclusion in brewery contracts of certain especially restrictive clauses. The Decree, which moreover makes no distinction on the basis of the nationality of the parties or of the origin of the beer, in no way affects the freedom to conclude or not to conclude such contracts.

In these circumstances it would appear that none of the provisions of the Decree are incompatible with the EEC Treaty nor, more particularly, with Articles 5 and 7 thereof or with its provisions relating to the free movement of goods.

The Belgian Government proposes that the question should be answered as follows:

In order to determine whether the Royal Decree of 25 September 1964, in which, in essence, the Belgian Government set the maximum duration and maximum penalties applicable to small-scale brewery contracts, is contrary to Community law, the national court may have regard to the basic provisions of the Treaty, in particular, Articles 5 and 7 thereof and to the provisions addressed to the Member States relating to the abolition of quantitative restrictions between them.

According to the *Commission,* the prohibitions imposed by the Decree on the contracting parties do not mitigate the adverse effect which the Belgian networks of exclusive dealing agreements has on competition within the common market. In any case, they do not impair the uniform application of Article 85, and the question should be answered to this effect.

III — Oral procedure

During the oral procedure, which took place on 16 November 1976, Concordia, represented by Walter Van Gerven, Advocate of the Brussels Bar, and the Commission, represented by its Legal Adviser, Bastiaan Van der Esch, expanded the arguments developed during the written procedure and submitted, in particular, the following new considerations.

General

Concordia states that the Stella Artois group is responsible for 35 % of Belgian production and not 53 % as stated by the Commission. Furthermore, the figures supplied by the Commission are incomplete since they contain no information either about the structure of the market in beer in Italy or in the United Kingdom, about intra-Community trade in the years before 1975 or about exports from Ireland to the other countries of the Common Market.

Concordia submits a digest of statistical information relating to the production and marketing of beer within the Community.

The *Commission* replies that its estimate of Stella Artois's share of the market is based on the consumption of raw materials by that firm and on an investigation conducted by a firm of specialists.

In reply to questions from the Court, the Commission explains that a number of breweries notified standard form contracts. As a result of these notifications the Commission began an investigation into the brewing industry in the six original Member States. In 1973 this investigation resulted in a detailed report from which the Commission drew the statistical information set out in its statement. Up to the present, breweries do not appear to have made any attempt to obtain decisions granting them exemption under Article 85 (3). Finally, no decision has yet been taken in an individual case in the brewing industry.

First question

According to *Concordia* the Commission abused the preliminary ruling procedure when it asked the Court to rule that a network of agreements is caught by Article 85 when the transactions involved therein reach a certain order of magnitude. If it did this, the Court would, so to speak, be laying down a regulation in the form of a judgment by promulgating a rule of law which it is for the Council or the Commission to adopt.

This approach is especially open to criticism, in that the figures submitted by the Commission are either incomplete or unreliable. In this connexion, Concordia takes particular exception to the statement of the Commission that 65 % of Belgian production, or nearly 9 million hectolitres, is sold under exclusive dealing agreements. These figures conflict with the statement of the Commission that 60 % of the total Belgian consumption takes place in the 'Horeca' sector. This figure produces the result that only two-thirds of 'Horeca' consumption, or about 5 600 000 are sold by means of such contracts. The *Commission* corrected its previous statements and accepted a figure of 5 500 000 hl.

Concordia goes on to state that, in replying to this question, it must be borne in mind that the Community provisions concerning agreements are

not in the first place designed to protect the freedom of action of those engaged in trade or industry but to ensure that the market has a structure which is free from distortions of competition.

The criteria suggested by the Commission are open to question, especially in that the Commission endeavours to add a 'network of agreements' as a fourth form of association to the three covered by Article 85 (agreements, decisions and concerted practices). According to the contention of the Commission, ten networks each covering 1 000 000 hl. are prohibited but a hundred networks each covering 100 000 hl. would not be, although in the latter case the adverse effect on the market could be appreciably greater. Moreover, the contentions of the Commission tend to obscure the dividing line between the fields to which Articles 85 and 86 respectively apply.

Contrary to the Commission's statements, the market to be taken into account cannot be limited to the 'Horeca' sector to the exclusion of beer sold in, for example, grocers' shops. A genuinely different market exists only in the case of a product which, in technical terms, is clearly distinguishable from other similar products; moreover, the manufacturers of those other products must be unable to adapt the conditions under which the latter are sold to the conditions under which the first product is sold. This does not apply in the present case since beer sold in establishments in the 'Horeca' sector and that drunk at home are fairly interchangeable; for example, the consumer's decision to drink his beer at home or in a café may depend upon whether or not he has a television set. In fact, 'Horeca' consumption is tending to slacken off in favour of consumption in the home.

Exclusive dealing agreements are illegal only if, first, they cover a substantial part of the market and, secondly, they exclude foreign competition from that part of the market. This does not appear to apply to the Belgian market in beer. Foreign producers can, in any case, market their beer through large stores and supermarkets.

Agreements of the type in dispute expire on different dates.

It is, accordingly, always open to foreign competitors to take over retail outlets. Moreover, it frequently happens that a licencee changes his supplier while an agreement is in force, paying back the rest of the loan to his former supplier.

The Commission itself acknowledges the existence of a number of important factors which are unconnected with brewery contracts but are such as to be in restraint of intra-Community trade. For example, certain draught beers cannot be kept fresh for very long with the result that, in the United States, they are considered to be 'local by nature' (that is to say by their nature reserved for local consumption).

With the help of statistics Concordia claims that, in recent years, the trade in beer between Member States has increased five times faster than total production in the Community. It must also be borne in mind that, nowadays, a considerable quantity of beer is manufactured under licence from producers based in other Member States.

The absence of any adverse effects on intra-Community trade as the result of brewery contracts is especially well demonstrated by the fact that, in the first place, certain Member States in which these contracts are customary (France, Belgium, Luxembourg, Italy, the United Kingdom and the Netherlands) import a lot of beer and, secondly, the Horeca sector, where these contracts are a prominent feature, sells much more foreign beer than do the shops.

In reply, the *Commission* states that it was not expecting a decision which

would serve as a regulation; all it did was to marshal a set of facts the knowledge of which was essential for the purpose of replying to the question of the national court.

Even granting that trade between Member States has increased, the situation on the market in beer is not entirely satisfactory.

With supporting arguments, the Commission maintains its contention that the only market to be taken into account is that of the Horeca sector, which is not in competition with that of home consumption, since the products marketed in these sectors are not interchangeable. In particular, a consumer who wishes to drink beer in a restaurant and finds it full or shut does not go to a grocer's shop or a supermarket to buy beer.

The Commission has no intention whatever of abolishing all exclusive dealing agreements but is merely trying to produce a larger measure of flexibility in the market in question. The network of contracts concluded by a small brewery like Concordia does not come under Article 85; difficulties arise only in the case of the big networks.

It is impossible to ignore the fact that the latter appreciably distort competition and constitute a fatal obstacle to the interpenetration of the markets. This is especially true where the sales outlets which have remained 'free' are remote from the location of foreign producers, with the result that any deliveries are burdened with substantial transport costs.

A great deal of the intra-Community trade in beer is based on cooperation between undertakings and, accordingly, takes place in conditions which are scarcely competitive.

Second question

Concordia rejects the Commission's contention that Article 1 (1) of Regulation No 67/67 refers, even in subparagraph (b), exclusively to agreements which define the territory in which they are to apply. This contention conflicts both with the clear wording of the said paragraph (1) and with the fact that a definition of the area to which it is to apply is not essential for the application of an exclusive purchase contract, whereas it is essential in the case of the exclusive supply contracts referred to in Article 1 (1) (a).

The Commission's argument that Regulation No 67/67 cannot apply to agreements which may be incompatible with Article 85 owing to factors unknown to the parties is tantamount to saying that exemption by categories ceases to apply in the very field where the need for legal certainty is particularly marked.

The *Commission* replies that Regulation No 67/67 was not intended to cover exclusive purchase undertakings entered into by retailers but was intended to apply only to exclusive agreements which are territorially limited. To take a contrary view is to assume that all exclusive purchase agreements come under Article 85 and such a conclusion is out of the question. This view is supported by the judgment in *Haecht I.*

The contention that the regulation is concerned only with agreements which prescribe the territory to which they are to apply is corroborated by Articles 1 (1) (a), 2 (1) (b), 3 and 6, which refer to the territory covered.

In any case, Article 1 (2) of the regulation provides that such agreements as are described in Article 1 (1), but to which undertakings from one Member State only are party and which concern the resale of goods within that Member State, do not qualify for the exemption by categories provided for by the regulation.

The principle, embodied in ground No 14 of the judgment in *Roubaix-*

Wattrelos, that the exemption by categories provided for in Regulation No 67/67 is also valid in the case of 'similar' agreements concluded between two undertakings in a single Member State cannot apply to brewery contracts, since the latter have an entirely different character from that of contracts entered into by intermediaries operating within a particular area.

Fifth question

Concordia recalls that, according to its own statements, the Commission has never initiated a procedure against brewery contracts concluded by Concordia or against any of the networks of exclusive dealing agreements concluded in Belgium or elsewhere. The national court is entitled to conclude from this that such contracts are not incompatible with Article 85 (1) of the Treaty and the need to suspend judgment does not therefore arise.

The *Commission* states that, in a case where Community practice and case-law leave no reasonable doubt that a particular agreement is entitled to benefit from an exemption under Article 85 (3), the national court is entitled to dismiss an objection of nullity raised by one of the parties and, as a result of such rejection, the agreement becomes enforceable ('afdwingbaar') as between the parties. It can then also be set up against third parties although it is clear that, in those circumstances, there must be an even greater degree of certainty that the provision cited is applicable. The national court must in any case proceed with the greatest circumspection in view particularly of the fact that the applicability of Article 85 (3) depends on the appraisal of complex economic facts.

For some time, the Commission has been holding discussions with the Member States with a view to stepping up the exchange of information concerning procedures initiated in connexion with agreements. This activity may help to prevent a national court from wrongly assuming that exemption is likely to be granted.

Sixth question

The *Commission* notes that, in its statement, it interpreted the words 'new' agreement in this question as referring to fresh brewery contracts added to an existing network. But the question arises whether the Hof van Beroep, Ghent, did not use these words to refer to contracts concluded after the entry into force of Regulation No 67/67.

Viewed from this standpoint, the question cannot be answered in the way suggested by Concordia, which concludes from the character of the provision in Article 85 (2) prohibiting such agreements that, if the Commission has not yet expressly refused to grant an exemption under Article 85 (3), that provision is inapplicable. The real purpose of the provision is in fact not to provide for a penalty but to safeguard the public policy of the Community. The danger that agreements may operate to the detriment of that public policy is too great for those concerned to be allowed to offend against it while the question whether the agreement involved may or may not be judged compatible with Community law is still the subject of consideration by a public authority. If those concerned want to be certain about the future of an agreement, they can notify it to the Commission.

The provisions of Articles 6 and 15 (5) of Regulation No 17 leave no doubt that the Community legislature took into account the possibility that a notified agreement might be put into effect before the Commission had ruled on the applicability of Article 85 (3) of the Treaty. But the action of putting it into effect in anticipation of exemption must be viewed separately from the agreement as such and cannot be regarded as *ipso facto* forming part of the agreement. Thus, as is, moreover, clear from the case-law of the Court, an agreement the

fate of which the Commission has not yet decided is put into effect at the parties' own risk. It is only when a national court considers that an exemption appears likely to be granted that it is possible to refer to the provisional validity of the agreement in question. But this is clearly distinguishable from the 'provisional validity' conceded in certain judgments of the Court in connexion with 'old' agreements, which does not depend on a decision taken by a national court.

This conclusion accords with the principle of legal certainty, since it means that undertakings run scarcely any risk in carrying out an agreement when, in the light of Community practice, they can count on the probability of its being the subject of an exemption decision.

It follows from this that, if the national court decides to suspend judgment, the agreement must continue to be regarded as void. Consequently, the court cannot at one and the same time suspend judgment and adopt measures whereby the agreement is granted the benefit of provisional validity.

Apart from all that, it is important to point out that the case-law of the Court on the subject of standard contracts (judgment of 30 June 1970 in *Rochas,* Case 1/70 ECR 515) has no application on the subject of brewery contracts since the question whether such a contract is or is not compatible with Article 85 may depend on external factors.

The Advocate-General delivered his opinion at the hearing on 7 December 1976.

Law

1 By interlocutory judgment of 26 May 1976, received at the Court Registry on 4 June 1976, the Hof van Beroep, Ghent, referred to the Court under Article 177 of the EEC Treaty a series of questions on the interpretation of Article 85 of the Treaty, of Regulation No 17 of the Council of 6 February 1962 implementing Articles 85 and 86 of the Treaty (OJ English Special Edition 1959-1962, p. 87), and of Regulation No 67/67/EEG of the Commission of 22 March 1967 on the application of Article 85 (3) of the Treaty to certain categories of exclusive dealing agreements (OJ English Special Edition 1967, p. 10).

2 The file discloses that the parties to the main action are a brewery, which accounts for about 0.5 % of Belgian beer production, and the owners of a café at Grammont, Belgium, and that it concerns the validity, in the light of Article 85 of the Treaty, of a contract under which, in consideration for a long-term loan, the café owners undertook with the said brewery 'not to stock or sell beverages of any kind whatever other than those of [that brewery] or supplied by it ... in their business'.

3 Consideration must first be given to the second question from the national court.

Second question

4 This question calls for the interpretation of Regulation No 67/67, which was adopted under Article 85 (3) of the Treaty, and of Regulation No 19/65/EEC of the Council of 2 March 1965 on the application of Article 85 (3) of the Treaty to certain categories of agreements and concerted practices (OJ, English Special Edition 1965-1966, p. 35).

5 More specifically, it is asked whether it may be deduced by analogy with the judgment of the Court of 3 February 1976 in *Fonderies de Roubaix* (Case 63/75 [1976] ECR 111) that the group exemption provided for by Regulation No 67/67 in favour of certain categories of agreements 'is applicable to all exclusive dealing agreements of the type at issue, concluded between undertakings in a single Member State'.

6 (1) By its nature and purpose, that regulation applies only to agreements which, in the absence of exemption, fall under the prohibition contained in Article 85 (1) of the Treaty.

7 On the other hand, as the Court declared in its judgment of 12 December 1967 in *Brasseries de Haecht* v *Wilkin* (Case 23/67 [1967] ECR 407), 'Agreements whereby an undertaking agrees to obtain its supplies from one undertaking to the exclusion of all others do not by their very nature necessarily include all the elements constituting incompatibility with the common market' but may exhibit them 'where, taken either in isolation or together with others, and in the economic and legal context in which they are made' (in particular, the existence of similar contracts and the cumulative effect produced by all those contracts), they 'may affect trade between Member States and where they have either as their object or effect the prevention, restriction or distortion of competition'.

8 In these circumstances, this question must be understood as asking whether, on the assumption that, owing to the cumulative effect of all similar agreements, agreements such as that at issue fall under the prohibition contained in Article 85 (1), they benefit from the exemption by categories provided for in Regulation No 67/67.

9 (2) Under Article 1 (1) of that regulation, as that provision was amended by Regulation (EEC) No 2591/72 of the Commission of 8 December 1972 (OJ L 276 p. 15), 'it is hereby declared that until 31 December 1982 Article 85 (1) of the Treaty shall not apply to agreements to which only two undertakings are

party and whereby ... (b) one party agrees with the other to purchase only from that other certain goods for resale'.

10 It is impossible to accept the contention of the Commission that, despite its wording, this provision does not apply to agreements such as that involved in this case since they do not define the area of the common market within which resale of the products concerned is to take place.

11 The fact that the inclusion of such a territorial stipulation in the agreement is an express condition of the application of Article 1 (1) (a) of Regulation No 67/67, which relates to agreements embodying an untertaking for exclusive *supply,* is explained by the fact that, in the case of such agreements, the definition of the area to which they are to apply is inherent in this type of contract.

12 On the other hand, in the case of exclusive *purchase* agreements, an express definition of the area to which they apply is generally unnecessary, in particular in the case of brewery contracts such as that in question since, necessarily, it is only on his own premises that the café owner sells beverages covered by the contract.

13 Consequently, agreements such as that in question fulfil the conditions laid down in Article 1 (1) (b) of Regulation No 67/67.

14 However, paragraph (2) of that article reads: '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'.

15 Since the wording of this provision covers agreements such as that involved in the present case, the question arises whether those agreements may nevertheless benefit from group exemption in so far as they fall under the prohibition contained in Article 85 (1) of the Treaty.

16 In the judgment of this Court in *Roubaix-Wattrelos,* referred to by the national court, it was held that the effect of the said Article 1 (2) 'is to exclude from the scope of Article 85 (1) and, therefore, from Regulation No 67/67, exclusive dealing agreements which are purely domestic in nature and are not capable of significantly affecting trade between Member States' but that, on the other hand, it 'is not intended to exclude from the benefit of exemption

by categories those agreements which, although concluded between two undertakings from one Member State, may nevertheless by way of exception significantly affect trade between Member States but which, in addition, satisfy all the conditions laid down in Article 1 of Regulation No 67/67'.

17 That decision is based on the fourth recital of the preamble to the regulation which states that 'since it is only in exceptional cases that exclusive dealing agreements [of the kind covered by the regulation] concluded within a Member State affect trade between Member States, there is no need to include them in this Regulation'.

18 The fact that under paragraph (2) of Article 1 of the regulation, group exemption is withheld from purely domestic agreements is explained by the fact that, under that article, they are considered, as a rule, to have so little effect on trade between Member States that there is no need for them to be exempted from a prohibition which applies to them only by way of exception.

19 In consequence, Article 1 (2) must be interpreted to mean that such agreements benefit from the exemption when, by way of exception, they are caught by the prohibition contained in Article 85 (1) of the Treaty since this interpretation alone makes it possible to avoid the absurd result that purely domestic agreements of a particular type are treated less favourably than multi-national agreements of the same type although, as a general rule, the latter seem more likely to prejudice the working of the common market.

20 The said interpretation applies not only to exclusive *supply* agreements but also to exclusive *purchase* agreements.

21 The foregoing considerations lead to the conclusion that agreements covered by Article 1 (1) (b) of Regulation No 67/67, concluded between two undertakings from one Member State, fulfil the conditions for the application of Article 1 in so far as they fall under the prohibition contained in Article 85 (1) of the Treaty.

22 In order that an agreement may benefit from group exemption, it must, in addition, satisfy the conditions laid down in Articles 2 and 3 of the said regulation.

23 Article 2 is concerned only with exclusive supply agreements whereas Article 3 covers circumstances which manifestly do not apply to brewery contracts of the type referred to by the national court.

24 (3) Although the foregoing considerations suggest that the questions raised by that court should be answered in the affirmative, it nevertheless remains to be determined whether such a reply would not conflict with certain objections raised during the proceedings.

25 (a) It has been contended that a ruling in which Regulation No 67/67 was held to be applicable to agreements such as those in question would be inconsistent with previous decisions of the Court to the effect that, although, taken in isolation, exclusive supply or purchase agreements do not fall under the prohibition contained in Article 85, they may nevertheless do so if they form part of a series of similar agreements which, considered as a whole, may significantly affect trade between Member States and competition within the common market.

26 The case-law referred to was concerned only with the question whether, and if so in what circumstances, the abovementioned agreements are prohibited under Article 85 (1) of the Treaty and not with the conditions in which, in those circumstances, they benefit or may benefit from group or individual exemption under the third paragraph of that article.

27 The only judgment of the Court which dealt with an issue similar to that to be decided in the present case, namely the judgment in *Roubaix-Wattrelos,* supports the conclusion that the question should be answered in the affirmative, as is clear from the considerations set out above.

28 It cannot be argued that it would be contrary to the spirit and objectives of Regulation No 67/67 to hold that it applies to agreements which fall under the prohibition contained in Article 85 only because of the cumulative effect produced by the existence of one or more networks of similar agreements.

29 On the contrary, apart from the fact that there is nothing in the text of the regulation to justify this contention, its result would be, to a large extent, to deprive the regulation of any purpose, since it specifically relates to categories of agreements which are often part of such networks.

30 This view is confirmed by the fact that Regulation No 67/67 is designed to promote legal certainty for the benefit of parties concerned and to make it easier to apply the Community provisions on competition.

31 There is, in fact, every reason for extending, in so far as the Treaty so permits, a group exemption to agreements which come within the scope of the prohibition contained in Article 85 only because of the cumulative effect produced by the existence of one or more networks of similar agreements, that is, because of factors unconnected with the agreement in question, of which, in consequence, the contracting parties would generally have no specific knowledge and an appraisal of which requires the consideration of circumstances so numerous and complicated that a national court would be placed in a position of extreme difficulty.

32 If the Commission were to consider that the cumulative effect of all the agreements involved is so restrictive that group exemption did not appear justified, it would have the right and the duty to use the powers conferred on it by Article 7 of Regulation No 19/65, which states: 'Where the Commission ... finds that in any particular cases agreements ... to which a regulation adopted pursuant to Article 1 [that is, a regulation providing for exemption by categories] of this Regulation applies have nevertheless certain effects which are incompatible with the conditions laid down in Article 85 (3) of the Treaty, it may withdraw the benefit of application of that regulation and issue a decision in accordance with Articles 6 and 8 of Regulation No 17, without any notification under Article 4 (1) of Regulation No 17 being required'.

33 In this connexion it must be borne in mind that, as the statements of the Commission themselves make clear, the latter has, in the first place, been notified of a series of brewery contracts without having, up to the present, taken a decision thereon and, in the second place, has conducted an inquiry within the meaning of Article 12 of Regulation No 17 into the brewing industry which was, however, restricted to the six original Member States and has not yet itself produced a decision.

34 (b) Finally, the applicability of Regulation No 67/67 to agreements such as that in question cannot be challenged on the ground that, as they come under Article 4 (2) (1) of Regulation No 17, they are exempt from notification, although Regulation No 67/67 makes no provision governing the status of agreements which are the subject of such exemption.

35 It would be unreasonable to exclude from the benefit of group exemption agreements which are not subject to the obligation to notify (and, accordingly, considered as a general rule to be less harmful to the functioning of the common market) when, although fulfilling the conditions for the application of Regulation No 67/67, they fall under the prohibition in Article 85 of the Treaty.

36 The truth of this is confirmed in that in the penultimate recital of the preamble to Regulation No 67/67 it is expressly stated that even agreements which it is possible to notify under Regulation No 17, but which come within the ambit of Regulation No 67/67, 'need no longer be notified'.

37 Accordingly, the answer which should be given to the Hof van Beroep, Ghent, is that agreements to which only two undertakings from one Member State only are party, under which one party agrees with the other to purchase only from that other certain goods for resale and which do not display the features set out in Article 3 of Regulation No 67/67, qualify for the exemption by category provided for in that regulation if, failing exemption, they would fall under the prohibition contained in Article 85 (1) of the EEC Treaty.

The other questions

38 From the answer which has been given to the second question it follows that agreements such as those defined by the national court are valid either because they fall outside the scope of the prohibition contained in Article 85 (1) of the Treaty directly or because they benefit from the group exemption provided for in Regulation No 67/67.

39 In these circumstances, there is no need to answer the other questions raised by that court.

Costs

40 The costs incurred by the Belgian Government and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable and as these proceedings are, in so far as the parties to the main action are concerned, a step in the action pending before the national court, the decision as to costs is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the Hof van Beroep, Ghent, hereby rules:

Agreements to which only two undertakings from one Member State only are party, under which one party agrees with the other to purchase only from that other certain goods for resale and which do not display the features set out in Article 3 of Regulation No 67/67 of the Commission, qualify for the exemption by category provided for in that regulation if, failing exemption, they would fall under the prohibition contained in Article 85 (1) of the EEC Treaty.

Kutscher Donner Pescatore Mertens de Wilmars Sørensen

Mackenzie Stuart O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 1 February 1977.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE-GENERAL MAYRAS DELIVERED ON 7 DECEMBER 1976 [1]

Mr President,
Members of the Court,

This case raises once again the whole question of the assessment of the so-called 'brewery' contracts in terms of Article 85 (1) and the relationship between the Community authorities and the national judicial authorities in the application of that article to those agreements.

The facts are as follows:

On 7 April 1966 the Concordia brewery of Geraardsbergen (Belgium) concluded a contract with a couple running a café under which they received the loan, at a rate of 5 % per annum, of a sum of FB 300 000 repayable in ten years. The café owners undertook, in exchange, not to sell in the course of their business any drinks other than those from the brewery

1 — Translated from the French.