SUPPLEMENTARY OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 24 JUNE 1980 [1]

Mr President,
Members of the Court,

On 22 November 1979 I delivered my opinions in Joined Cases 253/78 and 1 to 3/79 (Guerlain, Rochas, Lanvin, Nina Ricci) as also in Case 37/79 (Estée Lauder) and Case 99/79 (Lancôme). By order of 16 January 1980 the Court re-opened the oral procedure and put the following questions to the parties to the main actions, the Member States, the Council and the Commission for their views:

"If:

(a) the national court considers that the agreements concerned come within the scope of Article 85 (1);

(b) the agreements at issue in Joined Cases 253/78 and 1 to 3/79 and in Case 99/79 must be regarded as "old agreements" protected by "provisional validity";

(c) the letters sent by the Commission to the various manufacturers to inform them that the files on their cases had been closed are not to be regarded as decisions of exemption under Article 8 of Regulation No 17 or negative clearance certificates within the meaning of Article 2 of the regulation;

(d) it is improbable that such decisions will be adopted by the Commission in the foreseeable future;

1. Does the protection given to "old agreements" duly notified or exempted from notification prevent the application to such agreements of provisions of the national law of a Member State which may in certain respects be more rigorous than Community law?

2. Do the grounds put forward hitherto in favour of the provisional protection given to "old agreements" justify, in the circumstances mentioned above, maintaining indefinitely that protection against the application by a national court of the provisions of Article 85 (1) and (2) of the Treaty?

3. How is the case of "new agreements" notified or exempted from notification in the situations envisaged in Questions 1 and 2 above to be resolved?"

To complete my opinions of 22 November 1979, to which I also refer, my views on those questions are as follows:

I — The first question

On this question the accused in the main proceedings in Joined Cases 253/78 and 1 to 3/79 and the defendant in the main action in Case 37/79 are of the opinion that the provisional protection given to

1 — Translated from the German.

so-called "old agreements" prevents the application of provisions of the national law of a Member State which may be more rigorous than Community law since, under Article 7 of Regulation No 17, the Commission may at any time decide with retroactive effect that the agreement does not fall within Article 85 (1) of the EEC Treaty or that it should be exempted under Article 85 (3). That provisional protection is even more justified in cases such as the present ones in which the undertakings concerned have amended their agreements on the basis of the Commission's proposals.

On the other hand, the plaintiffs claiming damages in the main proceedings in Cases 1 to 3/79, the defendants in the main action in Case 99/79, the Governments of the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the French Republic, the Kingdom of the Netherlands, the United Kingdom of Great Britain and Northern Ireland and the Commission consider, albeit for different reasons, that the more far-reaching national competition law is applicable in the present cases.

The plaintiffs claiming damages in the main proceedings in Cases 1 to 3/79, the defendants in the main action in Case 99/79, the Federal German Government and the Commission are of the view that that is so only in cases in which the Commission has ordered that the file on the case should be closed since in those cases it is no longer likely that the Commission will issue a negative clearance certificate under Article 85 or a decision granting exemption under Article 85 (3) unless circumstances alter decisively. Thus in such cases the risk that the application of more rigorous national law might jeopardize the aims of the Treaty in the area of competition law no longer exists.

On the other hand, the British, French, Danish, Belgian and Netherlands Governments are of the opinion that the provisional validity of old agreements *per se* can in no way prevent the application of more rigorous provisions of national competition law. According to the British Government, that readily follows from the consideration that a contract may be void under provisions of national law which have nothing whatever to do with competition law. No reason may be discerned for drawing a distinction in this respect between provisions relating to competition law and other provisions of the national law. The French Government stresses this, citing the judgment of 14 December 1977 in Case 59/77 *De Bloos* v. *Bouyer* [1977] ECR 2359 which, in regard to the legal effects of an old agreement which has been notified or has been exempted from notification, refers to the national law applying thereto. In this connexion, the Danish Government points out that even a negative clearance certificate or decision by the Commission granting exemption does not prevent the application of national competition law, so that this must apply *a fortiori* in the case of the provisional validity of an agreement with regard to which the Commission has not taken a decision as to whether it is compatible with Article 85. Finally, the Belgian Government draws attention to the fact that the competition law of the Community pursues different objectives from those of national competition law. The provisional validity of an agreement under Community law therefore prevents the national court only from applying Article 85 (1) and (2) of the EEC Treaty for so

long as the Commission has not initiated a procedure but not, on the other hand, from applying any farther-reaching national provisions. If, as is generally acknowledged, national authorities and courts may declare void under national law agreements in respect of which the Commission has issued a negative clearance certificate, it is illogical for them to be unable to act likewise as regards agreements which infringe Article 85 (1) but have been exempted by the Commission under Article 85 (3), although the latter endanger competition more than the former.

For all that, I have the impression that, fundamentally, the debate turns on whether and to what extent the previous case-law of the Court, namely, on the one hand, the judgment of 13 February 1969 in Case 14/68 *Walt Wilhelm and Others* v *Bundeskartellamt* [1969] ECR 1 and, on the other hand, the judgments on the provisional validity of so-called old agreements delivered on 6 February 1973 in Case 48/72 *S.A. Brasserie de Haecht II* [1973] ECR 77 and on 14 December 1977 in Case 59/77 *De Bloos* v *Bouyer* [1977] ECR 2359, should be modified or supplemented.

I am persuaded that the relevant principles of the judgment delivered in Case 14/68, the *Walt Wilhelm* case, which concerns *the relationship between national and Community competition law,* should not be disturbed. According to that judgment, the application of national law can only be allowed in so far as it does not prejudice the full and uniform application of Community law on cartels throughout the common market or the full effects of measures taken or to be taken to implement it. It is also recalled in the judgment that Community law permits the Community authorities to carry out certain positive, though indirect, action with a view to promoting a harmonious development of economic activity within the whole Community, in accordance with Article 2 of the EEC Treaty, which is no doubt intended as a reference to the possibility of taking decisions granting exemption under Article 85 (3) of the EEC Treaty. Finally, it is further pointed out that it is for the national authorities to take appropriate measures where it appears possible, during national proceedings, that the decision to be taken by the Commission at the culmination of a procedure still in progress concerning the same agreement may conflict with the effects of the decision of the national authorities.

It is certainly not possible to reconcile with those principles the argument that the provisional validity of old agreements does not prevent a far-ranging application of national law even where that law must be classified as coming within the field of competition law and thus has aims and concerns similar to those of Community competition law. Nor may this be justified by the argument that, in view of the fact that some of its aims are different or in view of the separate sphere of action and the geographically restricted validity of national decisions such parallel application is harmless. It should nevertheless not be overlooked in the present case that the collapse, through the operation of national law, of a distribution system in *one* Member State must also effect its existence in other Member States. Likewise, in this connexion, it does not appear to me to be sufficient to point to

the duty — taken into account by the Danish Government — to amend national decisions following the issue of subsequently delivered decisions granting exemption under Article 85 (3) since an adverse national decision certainly sets aside the effect under Community law of provisional validity and it is not possible to perceive how, upon the subsequent issue of a decision under Article 85 (3), an appropriate retroactive adjustment of the situation under national law is to be achieved.

On the other hand, in regard to the case-law on the *provisional validity of so-called old agreements* — which, as is well-known, according to both the aforementioned judgments in Case 48/72 (*Brasserie de Haecht II)* and Case 59/77 *(De Bloos)* is to be presumed until the issue of a decision by the Commission — I would consider it untenable to depart therefrom now on the ground that the transitional period which was originally contemplated has in the meantime expired. Such resoning would certainly already have been conceivable at the time when the judgment in Case 59/77 (14 December 1977) was given but it was apparently not taken into consideration. Were it now suddenly to be adopted the principle of legal certainty, which is repeatedly emphasized in those very decisions, would be in jeopardy. Nor may it be overlooked that a complete resolution of all legal problems by means of the practice adopted by the Commission in its decisions and judicially decided cases has not yet occurred and thus the parties to an agreement have not been able to adjust thereto in good time. Rather, it has been learned from the Commission that some cases with regard to which application with retroactive effect of Articles 6 and 7 of Regulation No 17 is conceivable are still under examination. The adoption of contrary national decisions — I recall the principles stated in the judgment in Case 14/68 *(Walt Wilhelm)* — would not be compatible with that.

In my opinion, the phrase used in both of the aforementioned judgments "the date on which the Commission takes a decision" may accordingly be understood if need be, as not necessarily involving *formal* decisions; decisions to close the file on the case, such as those in the present cases, suffice. In its judgments the Court of Justice has in fact apparently proceeded upon the view that, at least in the case of duly notified agreements concerning competition, a decision by the Commission is issued in every instance. It has now become clear that — because of the extraordinary number of cases — that does not match reality. In many cases in which, following upon amendments prompted by the Commission to the agreements, Article 85 (1) in the Commission's opinion no longer applies, no formal decisions to the effect of negative clearances were issued since that, because of the somewhat ponderous procedure, would have overburdened the Commission and diverted its relatively small administrative machinery for competition questions from more important tasks. In many cases, matters were left with a decision signed by a superior Commission official to close the file on the case, such as one has become familiar with in the present cases. In such a situation it appears to me to be wholly tenable to focus not only on formal Commission decisions in connexion with the provisional validity of old agreements. Rather, the adoption by the Commission of a viewpoint which is approximately equivalent in its effect to a negative clearance certificate may be regarded as sufficient, especially since that is binding on the Commission to a certain extent in that it permits the sub-

sequent exercise of Community powers only upon a change in factual circumstances and then only with *ex nunc* effect. Where such a viewpoint has been adopted, but, for reasons of legal certainly, *only* then — mere failure to act on the part of the Commission should not be regarded as the *tacit* grant of negative clearance — can one proceed upon the basis that such an agreement is valid from the standpoint of Community law and also that the issue of a Commission decision granting exemption under Article 85 (3) or of a formal certificate of negative clearance is no longer likely. The way is thus open for the application of national law even where it may be more rigorous.

Therefore, in the cases with which the main proceedings are concerned, since the Commission has stated, even though not in formal decisions, that following amendment of the agreements Article 85 (1) of the EEC Treaty does not apply, there can be no objection whatever to, say, the French court's applying the rules governing "refus de vente" [refusal to sell] if that may yet be justified having regard to the latest development in the case-law in the perfume sector. That approach appears even freer from risk in that it is not in fact likely that at least the French court — different considerations appear to apply to the reference from the Netherlands — will apply Article 85 (1) to the cases before it, contrary to the opinion of the Commission which, as a rule, has more effective sources of information available to it and a better general view. But should the national court regard the ingredients of Article 85 (1) as present, then, for the application of national law, the same should be assumed were the national court to come to that conclusion having regard to the fact that the agreements have been altered, namely, formulated more narrowly, since in such a situation it could no longer be assumed that a provisionally valid *old* agreement was involved.

II — The second question

The accused in the main proceedings in Joined Cases 253/78 and 1 to 3/79, the defendant in the main action in Case 37/79 and also the British and French Governments are of the view that the provisional protection of so-called "old agreements" should continue to be maintained without restriction. In justification of that view the accused and the defendants in the said main actions refer to Article 7 of Regulation No 17. The British Government entertains doubts as to the reference to that provision but considers that the maintenance of the provisional protection of old agreements is justified because the Treaty contains no transitional provisions for Article 85 (2) in respect of these old agreements and considerable delays have occurred in the processing of individual cases by the Commission. According to the French Government, paragraphs (1) and (3) of Article 85 of the EEC Treaty form an indivisible whole with the result that only the Commission is in a position to test the conditions for the validity of old agreements. Consequently, individuals may not call that validity in question so long as the Commission has not taken a decision on it.

On the other hand, the Belgian, Danish and German Governments, the Commission and the defendant in the main action in Case 99/79 are of the view that

the maintenance of the provisional validity of old agreements may no longer be justified. The Danish Government is of the opinion that the further maintenance of the protection of old agreements amounts in the result to a denial of justice to those who may expect to be adversely affected by reason of the old agreements. Article 85 (1) of the EEC Treaty is directly applicable and the procedure for obtaining a preliminary ruling under Article 177 ensures the uniform application of Community law. Moreover, the parties to old agreements have had sufficient time to adapt those agreements to the provisions of Community law.

According to the Belgian Government, notified old agreements which are neither the subject of a prohibition nor of an individual or block exemption are to be treated just like agreements for which negative clearance has been granted. Just as the Commission may at any time, by reason of economic or legal developments, issue for the future a prohibition decision under Article 85 (1) of the EEC Treaty the authorities or courts of a Member State may also do likewise.

The German Government is of the opinion that the maintenance of the provisional validity of old agreements is no longer justified where the Commission lets it be known that it will not take any decision granting exemption under Article 85 (83).

According to the Commission, the provisional validity of old agreements lasts only from notification until the date on which the Commission takes a decision. As from the date at which it is established — as in cases where the file is closed — that the Commission will adopt no decision granting exemption, the maintenance of the provisional protection is no longer justified. In such a case old agreements may be treated just like notified new agreements (cf. paragraphs 11 and 12 of the decision in the judgment of 6 February 1973 in Case 48/72 *Brasserie de Haecht II* [1973] ECR 77). In such a case the national court may declare the agreement void in accordance with Article 85 (2) of the EEC Treaty if the incompatibility of the agreement with Article 85 (1) is beyond doubt.

According to the consistent case-law of the Court of Justice, so-called old agreements which existed when Regulation No 17 came into force on 13 March 1962 and were duly notified are fully valid (cf. judgment of 14 December 1977 in Case 59/77 — *De Bloos* v *Bouyer* [1977] ECR 2359). As I have already stated in my opinions of 22 November 1975 a national court may only make a decision as to the invalidity of such agreements under Article 85 when the Commission has reached a decision on the basis of Regulation No 17.

I do not regard the giving up of the doctrine of provisional validity more or less by reason of the passage of time as justified and I also regard as inappropriate a simple approximation of the rules for old and new agreements as respects which fundamentally varying starting positions and different legal effects apply (See Articles 6 and 7 of Regulation No 17). I likewise have misgivings over declaring an old agreement void only *ex nunc* where an examination of it leads to the result that it is — without any change in

circumstances — incompatible with Article 85 (1).

In regard to the application by the national courts of Article 85 (1) it must not be forgotten that in cases such as the present, in which the Commission was of the view that *paragraph (1)* did not apply, an examination under *paragraph (3)* of Article 85 was not undertaken at all. If it should now prove, possibly after guidance by the Court on Article 85 (1), that the Commission's approach to Article 85 (1) is not correct, it is still conceivable that it may reach a decision under Article 85 (3) since applications for such a decision have been made on which the Commission itself has not yet decided. Moreover, in a decision under Article 7 of Regulation No 17 the Commission may request amendments to the agreements so that they are no longer cought in any way by Article 85 (1) and it is possible for that to be done with retroactive effect.

The crucial question for the national court is consequently whether such acts are likely. In that matter the practice hitherto adopted by the Commission in giving decisions, the decisions of the Court and, not least, the guidance on the interpretation of Article 85 (3) to be given in the present case may be of assistance to it. If, having regard to those factors, the national court should come to the view that neither an exemption nor negative clearance is likely and that there is no reasonable doubt as to the incompatibility of an agreement with Article 85 (1) it may then declare that agreement void under Article 85 (2). If the Court entertains no doubt that under current practice an agreement may be exempted, that excludes the application of Article 85 (2) since the agreement must then be regarded as valid. If, however, since not all problems concerning Article 85 (3), not even those concerning selective distribution having regard to quantitative criteria, have been resolved, the national court is left with doubts and misgivings, then — as in such a case involving new agreements — it must decide to stay the proceedings before it so that an opinion of the Commission on Article 85 (3) may be obtained by one of the parties.

III — The third question

In the opinion of the accused in the main proceedings in Joined Cases 253/78 and 1 to 3/79 and the defendant in the main action in Case 37/79, new agreements which have been notified should be treated in exactly the same way as so-called old agreements since they too may at any time form the subject-matter of a retroactive exemption by the Commission.

According to the British, Danish, Belgian, French and German Governments, national competition law, which may be more rigorous, may also be applied to new agreements which have been notified. The British, Danish and German Governments refer to the judgment of 6 February 1973 in Case 48/72 *Brasserie de Haecht II* [1973] ECR 77 according to which new agreements do not enjoy any particular protection whatsoever. According to the French Government, there should be at least a certain degree of protection for new agreements in the shape of a "presumption of validity" until any decision by the Commission. The Belgian Government is of the opinion that a national court may apply Article 85 (1) to new agreements so long as the Commission, has not initiated a

procedure. According to the Commission, a national court should first examine whether the agreement in question may not be valid by reason either of a block exemption or an individual exemption. If that is the case, then from the viewpoint of Community law the agreement is to be regarded as conclusively valid. If that is not the case, the national judge may declare the agreement to be void if its incompatibility with Article 85 (1) is beyond doubt and it is established that the requirements of Article 85 (3) are not satisfied. If the national court is unable to resolve its doubts concerning the compatibility of the agreement with Article 85 it is open to it to stay the proceedings before it in order to give the parties an opportunity to obtain an opinion from the Commission which may then serve as the basis of its decision. The national court may always apply more rigorous national law if the agreement is void under Community law. If, on the other hand, it reaches the conclusion that the agreement is conclusively valid, it is prevented from applying more rigorous national competition law.

1. In regard, first, to the application of *national law*, the principles elaborated in the judgment of 13 February 1969 in Case 14/68 *Walt Wilhelm and Others* v *Bundeskartellamt* [1969] ECR 1 should also be adhered to in this connexion. It must therefore remain the case that the application of national law is only permissible "in so far as it does not prejudice the uniform application throughout the common market of the Community rules on cartels and of the full effect of the measures adopted in implementation of those rules". In regard to national competition law in its widest sense, it is not possible to proceed upon the view that it concerns only the national aspects of a case.

However, in cases such as the present, in which, following an investigation, the Commission issued a decision with approximately the same effect as a negative clearance certificate, there is in fact nothing which points against a national court applying its own, in certain circumstances, more rigorous national law. Since the relevant Community authorities have expressed the view — even when their judgment does not bind the national court — that, following upon amendment of the agreements, Community law no longer affects them, the national court may, in such a case, proceed upon the basis that the uniform application of Community rules on cartels is not prejudiced. Nor, in such cases, can the full effect of the measures adopted in implementation of Community rules be adversely affected since such a measure is certainly not involved in the case of a communication which informs the parties concerned of the Commission's view that Community law does not apply in their case. Further, because it is unlikely that the Commission will terminate the procedure with a decision the effects of which may be prejudiced by a national decision, there is no ground in such cases for taking "appropriate measures" within the meaning of the judgment in Case 14/68, namely, staying proceedings with a view to a possible decision granting exemption with retroactive effect.

2. So far as concerns, on the other hand, the application by national courts of Article 85 (1) and (2) in cases in which the Commission has already considered the application of those provisions and has reached a negative conclusion expressed in a decision to close the file on the case, that conclusion

does not, in my opinion, present any obstacle to the application of Article 85 by a national court, national courts are in no way bound by such decisions; on the other hand, no obstacles arise from Article 9 of Regulation No 17 in regard to which I refer, first, to the judgment of 30 January 1974 in Case 127/73 *Belgische Radio en Televisie and Société Belge des Auteurs, Compositeurs et Editeurs* v *SV SABAM and NV Fonior*, [1974] ECR 51 and, secondly, to the fact that — so far as initiated — procedures before the Commission have been terminated by the above-mentioned decisions.

In such cases, where differing decisions as to the applicability of Article 85 (1) are possible, the national courts' assessment of whether an exemption under Article 85 (3) may be possible becomes crucial simply because the Commission saw no reason to consider the possibility of granting such an exemption. If in making that assessment — in which, as already stated, the Commission's decision-making practice and the cases decided by the Court of Justice may provide some assistance — the national court comes to accept that an exemption is likely, it must then regard the agreement as valid, whereupon more rigorous provisions of national law, which would affect the substance of a possible exemption of that kind, may not, of course, be applied. If, on the other hand, the national court considers that there is no prospect whatever of a decision granting an exemption being adopted and therefore entertains no doubt as to an agreement's incompatibility with Community rules on competition, then — as was laid down in the judgment in Case 48/72 *Brasserie de Haecht II* [1973] ECR 77 — it may certainly apply Article 85 (1) and (2) and that not only with *ex nunc* effect. If, however, such incompatibility is in doubt, the only appropriate solution is to stay the proceedings in order to obtain an opinion from the Commission which will clarify whether the decision to close the file on the case will continue to hold good or whether — if appropriate, after the Court has pointed out further aspects of the interpretation of Article 85 (1) and (3) — the agreements are to be regarded differently.

3. Thus, in summary, the following views — which involve a certain modification to the answers suggested in the opinions referred to at the outset — may be adopted in regard to the additional issues raised by the list of questions of 16 January 1980.

(a) In the case of so-called old agreements duly notified to the Commission or exempted from notification as respects which the Commission, after having carried out an investigation, has issued neither a negative clearance certificate nor a decision granting exemption but has stated in an administrative letter that it sees no ground for taking action under Article 85 (1), there is no objection to the application of provisions of national law which may, in certain respects, be more rigorous, if there is

no likelihood of the Commission's subsequently adopting a decision granting exemption.

(b) In such a case a national court may hold such agreements void pursuant to Article 85 (1) and (2).

(c) In the case of new agreements which have been notified or exempted from notification as respects which the Commission, after investigation, has issued neither a negative clearance certificate nor a decision granting exemption but has stated that there is no ground for taking action against them under Article 85 (1), there is no objection to national law being applied to those agreements or to their being held by a national court to be void pursuant to Article 85 (1) and (2), if a decision granting exemption is unlikely.