Member States. Where such a contract relates to some 10% of exports of the goods in question to the Federal Republic of Germany from France, it is capable of affecting trade between Member States appreciably.

2. The automatic nullity decreed by Article 85 (2) of the EEC Treaty applies only to those contractual provisions which are incompatible with Article 85 (1). The consequences of such nullity for other parts of the agreement, and for any orders and deliveries made on the basis of the agreement, and the resulting financial obligations are not a matter for Community law. Such consequences are to be determined by the national court according to its own law.

In Case 319/82

REFERENCE to the Court under Article 177 of the EEC Treaty by the Oberlandesgericht (Higher Regional Court) Saarbrücken for a preliminary ruling in the action pending before that court between

SOCIÉTÉ DE VENTE DE CIMENTS ET BÉTONS DE L'EST SA

and

KERPEN & KERPEN GMBH & CO. KG

on the interpretation of Article 85 of the EEC Treaty,

THE COURT (Fourth Chamber)

composed of: T. Koopmans, President of Chamber, K. Bahlmann, P. Pescatore, A. O'Keeffe and G. Bosco, Judges,

Advocate General: P. VerLoren van Themaat
Registrar: P. Heim

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and written procedure

The plaintiff is an undertaking established in France which formerly sold cement. It is at present in the process of liquidation. The defendant's head offices are in the Federal Republic of Germany.

In March 1978 the parties concluded a contract for the annual delivery of some 40 000 tonnes of cement for a period of five years. In the contract the defendant undertook:

Not to sell the cement obtained from the plaintiff in the Saarland; and

In the event of deliveries in the Karlsruhe area, to have regard to the interests of the works in Wössingen, Germany, partly owned by the plaintiff.

The contract further provided that, if for reasons of price policy the basis on which either of the parties contracted ceased to exist, it was to be terminated by mutual agreement.

The defendant took delivery of part of the 40 000 tonnes agreed for 1971, for which payment was made in cash. Between 21 August 1978 and 31 October 1978 the defendant took delivery of a further 6 051.29 tonnes of cement, the price of which amounted to DM 392 224.42. The plaintiff is claiming that sum in the proceedings before the Oberlandesgericht Saarbrücken. It bases its claim on the fact it delivered the quantity of cement in question under the contract of 30 March 1978. The defendant contends that the contract is void for infringement of Article 85 of the Treaty.

By order of 1 December 1982 the Oberlandesgericht Saarbrücken, before which the matter came on appeal, submited the following questions to the Court pursuant to Article 177 of the Treaty:

1. Is Article 85 of the EEC Treaty to be interpreted as meaning that a five-year agreement for annual deliveries of approximately 40 000 tonnes of cement must be considered void where an undertaking established in the Federal Republic of Germany agrees with an undertaking established in France and engaged in the sale of cement not to deliver the cement which it receives to the Saarland, and in the case of deliveries in the Karlsruhe area to have regard to the French undertaking's part-ownership of works in Wössingen (Germany) and on each occasion to consult the French undertaking before soliciting business there?

2. If the above-mentioned agreement is to be regarded as a basic contract and if it is void under Article 85 (2) of the EEC Treaty, are individual contracts of sale made in performance of that contract likewise to be regarded as void?

3. If Question 1 is answered in the affirmative: Is Article 85 (2) of the EEC Treaty to be interpreted as meaning that the nullity which it stipulates is such as to affect physical transactions made in performance of obligations under the contract of sale, so that a supplier is not to be permitted, in so far as he has made deliveries, to claim recovery of his assets (on the basis of the rules governing unjust enrichment in force in the Federal Republic of Germany) under the void contract of sale?

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were lodged by the plaintiff in the main action, represented by Mr Radü, Rechtsanwalt practising at the Landgericht Freiburg and the Oberlandesgericht Karlsruhe, and by the Commission of the European Communities, represented by Norbert Koch, Legal Adviser, acting as Agent, assisted by Ingolf Pernice, a member of its Legal Department.

Upon 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. By order of 22 January 1983, the Court, pursuant to Article 95 (1) and (2) of the Rules of Procedure decided to refer the case to the Fourth Chamber.

II — Written observations submitted to the Court

First question

The *plaintiff in the main action* takes the view that the contract in issue is not caught by the prohibition in Article 85 because it has only an insignificant effect upon the market by reason of the weak position of the parties on the market in the products in question. The quantity of 40 000 tonnes with which this case is concerned is very much lower than the amounts specified by the Commission in its notice of 27 May 1970 concerning agreements of minor importance which do not fall under Article 85 (1) of the Treaty (Journal Officiel 1970, C 64, p. 1).

According to the plaintiff's information concerning the volume of business done in the areas concerned in the present case, the threshold of 25% specified in that notice would not appear to have been approached. In 1982 the amount of business in Rheinland-Pfalz amounted to some 2.6 million tonnes and in Bad-Württemberg to some 5.2 million tonnes. During 1982 some 330 000 tonnes were nevertheless imported from France into the Federal Republic of Germany. In 1978 the figures had tended to be even higher.

As a result the 40 000 tonnes provided for in the contract is so small that it cannot affect the market.

Furthermore, the agreement does not have as its object or effect the prevention, restriction or distortion of competition within the common market.

The defendant in the main action bought a total of only 14 195.44 tonnes of cement in 1978. Consequently, it is not possible to say that the contract had any real effect within the common market. Moreover, the contract was not intended to affect competition within the common market. The plaintiff wished to establish commercial relations with the defendant.

There is nothing in the contract capable of affecting trade between Member States. Cooperation between undertakings which distorts competition falls within the prohibition contained in Article 85 (1) only if at the same time it may affect trade between Member States. Article 85 (1) is not intended to protect competition for its own sake or to guarantee the freedom of the interested parties but, by means of competition, to abolish barriers to trade. Article 85 (1) is inapplicable in this case since it can in no way be said that complete performance of the contract would adversely affect the "proper functioning of the common market".

Moreover, the examples given in Article 85 (1) (a) to (e) are also inapplicable.

Under the contract in issue the defendant undertook not to sell the cement in the Saarland. There are no grounds for objecting to the supplier of goods agreeing with the purchaser that the purchaser should not sell the goods in the area hitherto supplied by the supplier. The obligation "to have regard to the interests" of the plaintiff in the main action in the works in Wössingen is very vague and cannot be understood as an unlawful territorial agreement.

The clause in the contract under which the defendant must have regard to the said interests contains no declaration of any legal significance and provides no sanction in the event of breach.

The *Commission* observes first of all that in proceedings under Article 177 the Court cannot rule on the nullity of a specific agreement. It may nevertheless provide the national court with the criteria for assessing the agreement in issue in the light of Article 85.

Article 85 provides that all agreements between undertakings which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market are prohibited as incompatible with the common market.

Clauses in contracts of sale restricting the freedom of the purchaser to use the goods referred to in the contract without having regard to the interests of third parties and in accordance with his own economic interests so far as allowed by law, in particular the freedom to decide whether, to whom and where he should resell the goods, are restrictions on competition within the meaning of Article 85 of the Treaty. The Court so held expressly in connection with restrictions on resale to certain commercial groups (judgment of 17. 10. 1972 in Case 8/72 *Cementhandelaren* [1972] ECR 977) and by implication in relation to ter-

ritorial restrictions (judgment of 16. 2. 1975 in Case 43/73 *Suiker Unie* [1975] ECR 1663). The same must apply *a fortiori* to agreements which impose a general restriction on the freedom of the purchaser to resell the goods referred to in the contract, since they prevent him from engaging in any form of commercial competition.

Article 85 applies only to agreements which may affect trade between Member States. According to the established case-law of the Court, to satisfy that condition the agreement in question must

"on the basis of a set of objective factors of law or of fact" make it "possible to foresee with a sufficient degree of probability that the agreement in question may have an influence, direct or indirect, actual or potential (that is to say, appreciable), on the pattern of trade between Member States" (judgment of 11. 12. 1980 in Case 31/80 *L'Oréal* v *De Nieuwe AMCK* [1980] ECR 3775, paragraph 18 at p. 3791).

An agreement relating to the supply of goods from France to the Federal Republic of Germany may affect trade between Member States. As the Court has held, the agreement must moreover affect trade

"in such a way that it might hinder the attainment of the objectives of a single market between States" (judgment of 6. 5. 1971 in Case 1/71 *Cadillon* v *Höss* [1971] ECR 351).

The agreement may have that effect even if it "encourages an increase, even a large one, in the volume of trade between States", if it also contains restrictions on the freedom of the purchaser or third parties which affect trade between Member States (Joined Cases 56 and 58/64 *Consten* and *Grundig* v *Commission* [1966] ECR 299).

It is for the national court to consider how far the obligations imposed on the defendant in the main action were likely to have that effect. In doing so it should in particular take account of the following:

The obligation on the defendant to use the goods for its own needs might even have the effect of completely preventing re-export of the goods covered by the contract;

The prohibition on resale in the Saarland prevents any re-export of the goods covered by the contract from that area to France;

The obligation to acquire the cement intended to be sold in the Karlsruhe area from the German works partly owned by the plaintiff after giving it prior notice thereof could have at least an indirect influence on the volume or route of imports from France.

The national court must consider whether those obstacles, if indeed they are obstacles, are significant. In that respect the decisive factor is whether, having regard to the position of the parties on the market in the products in question, the quantities which may be affected by the restriction and the existence of any similar agreements made with other purchasers, the agreement in question is likely to hinder the attainment of the objective of a single market between the Member States (judgment of 5. 6. 1971 in Case 1/71 *Cadillon* v *Höss* [1971] ECR 351; judgment of 9. 7. 1969 in Case 5/69 *Franz Völk* v *Etablissements J. Vervaecke* [1969] ECR 295 and judgment of 25. 11. 1971 in Case 22/71 *Béguelin Import Co. and Others* v *SAGL Import-Export and Others* [1971] ECR 949). For that

purpose it is not necessary to establish that the agreement in issue has in fact appreciably affected trade; it is sufficient that it is capable of doing so (judgment of 1. 2. 1978 in Case 19/77 *Miller International Schallplatten GmbH* v *Commission* [1978] ECR 131.

The second question

The *plaintiff* queries whether the second question, or indeed the third question, must be answered by the Court, because it is generally recognized that the question of the effects of nullity is a matter for national law and not Community law.

It considers that individual contracts of sale made in performance of a basic contract should not be regarded as null. If individual orders are treated as individual contracts of sale they will be independent, so that if the basic contract is declared void it will not affect them. Pursuant to the principles governing successive contracts, any nullity under Article 85 (2) should not in principle be regarded as affecting contracts of performance or successive contracts.

The *Commission* contends that, in a contract for the supply of goods from one Member State to another, the only clauses or parts of the agreement which may in principle be void under Article 85 (2) are those which contain a restriction on competition contrary to Article 85 (1) (judgment of 30. 6. 1966 in Case 56/65 *Société Technique Minière* v *Maschinenbau Ulm GmbH* [1966] ECR 235; judgment of 30. 6. 1966 in Joined Cases 56 and 58/64 *Etablissements Consten Sàrl and Grundig-Verkaufs-GmbH* v *Commission* [1966] ECR 299). The extent to which the nullity of unlawful clauses in an agreement leads to the nullity of the whole agreement or even invalidates any contracts which are made in performance of the agreement and which do not contain such clauses is a matter for national law and not for the Court.

Third question

The *plaintiff* claims that the nullity stipulated in Article 85 (2) of the EEC Treaty does not affect physical transactions made in performance of obligations under the contract of sale and therefore does not prevent the supplier, in so far as he has made deliveries, from claiming recovery of his assets under the void contract of sale. In the present case the plaintiff is claiming neither more nor less than settlement of the sum due to it for goods which have been long since delivered and which the defendant does not deny having received. In view of the fact that it is not possible to return the goods which have been delivered, it would be inequitable if the defendant did not have to pay for the cement which it has received.

The *Commission* considers that the question of the effects of the (partial) nullity of an agreement on the legal relations between the parties, including transactions which have already taken place in performance of the agreement, is a matter for national law and not for the Court.

III — Oral procedure

At the sitting on 5 October 1983 oral argument was presented by the follow-

ing: Friedrich Radü, Rechtsanwalt practising at the Landgericht Freiburg and the Oberlandesgericht Karlsruhe, for the Société de Vente de Ciments et Bétons de l'Est, SA; Heinz Rowedder, Rechtsanwalt practising at the Oberlandesgericht Karlsruhe, for Kerpen & Kerpen GmbH & Co. KG; and Norbert Koch, Legal Adviser, acting as Agent, assisted by Ingolf Pernice, a member of the Commission's Legal Department, for the Commission of the European Communities.

In its oral observations, the defendant in the main action stated that it shared the opinion of the Commission on the first question. It first pointed out that in 1979 the turnover of the Société de Vente de Ciments et de Béton de l'Est was FF 475 000 000. It further contended that the question of competition cannot be approached purely on a quantitative basis but must also be considered from the point of view of quality. If it were merely a question of 40 000 tonnes of cement per year, that would imply that the French cement industry, which is productive but has few outlets, supplies only limited quantities to the Federal Republic of Germany. It is necessary to ask why insignificant quantities should be stipulated in a contract which was subsequently cancelled, because the cement was not used by the purchaser but was resold by it. That amounts to a restriction on the use of the cement. Fundamental problems exist in the cement industry when an undertaking is capable of walling off the market for its own benefit by means of agreements involving small quantities.

It was submitted that the second and third questions can be decided on the basis of national law.

The Advocate General delivered his opinion at the sitting on 16 November 1983.

Decision

1 By order of 1 December 1982, which was received at the Court Registry on 15 December 1982, the Oberlandesgericht [Higher Regional Court] Saarbrücken referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty three questions on the interpretation of Article 85 of the Treaty, in order to enable it to assess the compatibility with that provision of a contract of sale and the consequences if that contract should be void.

2 Those questions arose in the course of a dispute between the Société de Vente de Ciments et Bétons de l'Est, SA, the plaintiff in the main action, a company established in France which sells cement, and Kerpen & Kerpen GmbH & Co. KG, the defendant in the main action, which is established in

the Federal Republic of Germany, concerning a contract concluded on 30 March 1978 for the annual delivery of approximately 40 000 tonnes of cement for a period of five years.

3 Under the terms of that contract, the defendant in the main action, which was described as sole importer into the Federal Republic of Germany, agreed:

To use the cement supplied principally to cover its own requirements;

Not to sell the cement obtained from the plaintiff in the Saarland; and

In the event of deliveries in the Karlsruhe area, to have regard to the interests of the works in Wössingen (Germany), partly owned by the plaintiff, and to consult the plaintiff before soliciting business there.

4 After the defendant had taken delivery of and paid for part of the quantity agreed for 1978, it received, but failed to pay for, a further 6 051.29 tonnes of cement, to the value of DM 392 224.42, between August and October 1978. On 31 October 1978, the plaintiff terminated the contract of 30 March 1978 and claimed the above-mentioned sum of DM 392 244.42. In addition to pleading a set off in respect of certain claims arising from the termination of the contract, the defendant contended that the contract was void for infringement of Article 85 of the Treaty.

5 The Landgericht [Regional Court] Saarbrücken gave judgment in favour of the plaintiff and the defendant lodged an appeal. Considering that the outcome depended upon the interpretation of Community law, the Oberlandesgericht Saarbrücken referred the following questions to the Court for a preliminary ruling:

"1. Is Article 85 of the EEC Treaty to be interpreted as meaning that a five-year agreement for annual deliveries of approximately 40 000 tonnes of cement must be considered void where an undertaking established in the Federal Republic of Germany agrees with an undertaking established in France and engaged in the sale of cement not to deliver the cement which it receives to the Saarland, and in the case of deliveries in the Karlsruhe area to have regard to the French undertaking's part-ownership of works in Wössingen (Germany) and on each occasion to consult the French undertaking before soliciting business there?

2. If the above-mentioned agreement is to be regarded as a basic contract and if it is void under Article 85 (2) of the EEC Treaty, are individual contracts of sale made in performance of that contract likewise to be regarded as void?

3. If Question 1 is answered in the affirmative: Is Article 85 (2) of the EEC Treaty to be interpreted as meaning that the nullity which it stipulates is such as to affect physical transactions made in performance of obligations under the contract of sale, so that a supplier is not to be permitted, in so far as he has made deliveries, to claim recovery of his assets (on the basis of the rules governing unjust enrichment in the Federal Republic of Germany) under the void contract of sale?"

First question

6 It is clear from previous judgments of the Court that clauses in contracts of sale restricting the buyer's freedom to use the goods supplied in accordance with his own economic interests are restrictions on competition within the meaning of Article 85 of the Treaty. A contract which imposes upon the buyer an obligation to use the goods supplied for his own needs, not to resell the goods in a specified area and to consult the seller before soliciting business in another specified area has as its object the prevention of competition within the common market.

7 Such contract is therefore prohibited by Article 85 (1) if it is capable of affecting trade between Member States.

8 The plaintiff in the main action claims that, in this case, the contract does not fall within the prohibition imposed by Article 85 by reason of the weak position of the parties on the market in the products in question. In that regard, it was stated in the course of the proceedings, without contradiction, that French exports of cement to the Federal Republic of Germany at the material time amounted to about 350 000 tonnes per year. The quantity covered by the contract at issue therefore represented more than 10% of French exports to Germany. Under those circumstances, it is impossible to take the view that such a contract could not appreciably affect trade between Member States.

9 The answer to the first question must therefore be that provisions in a contract made between a French exporter and an importer established in the Federal Republic of Germany imposing on the buyer, described in the contract as sole importer, an obligation to use the goods supplied for his own needs, not to resell the goods in a specified area, and to consult the seller before soliciting business in another specified area, both areas being in the Federal Republic of Germany, have as their object the prevention, restriction or distortion of trade within the common market. They are therefore contrary to Article 85 (1) of the Treaty and are void when the contract is capable of affecting trade between Member States. Where such a contract relates to some 10% of exports of the goods in question to the Federal Republic of Germany from France, it is capable of affecting trade between Member States appreciably.

Second and third questions

10 In the second and third questions the national court asks what are the consequences of the nullity of such a contract under Article 85 (2) of the Treaty, in particular in relation to orders and deliveries made on the basis of the contract.

11 In its judgment of 25 November 1971 in Case 22/71 *(Béguelin Import Company and Others* v *SAGL Import-Export and Others* [1971] ECR 949), the Court ruled that an agreement falling under the prohibition imposed by

Article 85 (1) of the Treaty is void and that, since the nullity is absolute, the agreement has no effect as between the contracting parties. It also follows from previous judgments of the Court, and in particular from the judgment of 30 June 1966 in Case 56/65 *(Société Technique Minière* v *Maschinenbau Ulm* [1966] ECR 235), that the automatic nullity decreed by Article 85 (2) applies only to those contractual provisions which are incompatible with Article 85 (1). The consequences of such nullity for other parts of the agreement are not a matter for Community law. The same applies to any orders and deliveries made on the basis of such an agreement and to the resulting financial obligations.

12 The answer to the second and third questions must therefore be that the automatic nullity decreed by Article 85 (2) of the Treaty applies only to those contractual provisions which are incompatible with Article 85 (1). The consequences of such nullity for other parts of the agreement, and for any orders and deliveries made on the basis of the agreement, and the resulting financial obligations are not a matter for Community law. Those consequences are to be determined by the national court according to its own law.

Costs

13 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action before the national court, costs are a matter for that court.

On those grounds,

THE COURT (Fourth Chamber),

in answer to the questions submitted to it by the Oberlandesgericht Saarbrücken by order of 1 December 1982, hereby rules:

1. Provisions in a contract concluded between a French exporter and an importer established in the Federal Republic of Germany imposing on the buyer, described in the contract as sole importer, an obligation to use the goods supplied for his own needs, not to resell the goods in a specified area and to consult the seller before soliciting business in another specified area, both areas being in the Federal Republic of Germany, have as their object the prevention, restriction or distortion of competition within the common market. They are therefore contrary to Article 85 (1) of the Treaty and void when the contract is capable of affecting trade between Member States. Where such a contract relates to some 10% of exports of the goods in question to the Federal Republic of Germany from France, it is capable of affecting trade between Member States appreciably.

2. The automatic nullity decreed by Article 85 (2) of the Treaty applies only to those contractual provisions which are incompatible with Article 85 (1). The consequences of such nullity for other parts of the agreement, and for any orders and deliveries made on the basis of the agreement, and the resulting financial obligations are not a matter for Community law. Such consequences are to be determined by the national court according to its own law.

Koopmans Bahlmann

Pescatore O'Keeffe Bosco

Delivered in open court in Luxembourg on 14 December 1983.

For the Registrar

H. A. Rühl

Principal Administrator

T. Koopmans

President of the Fourth Chamber