9. Agreements and decisions which fall under the prohibition of Article 85(1), which were in existence at the time of entry into force of the First Regulation Implementing Articles 85 and 86 of the Treaty, and which do not fall under the terms of Article 5(2) of this Regulation, but were not notified within the time limit specified in Article 5(1), are automatically void from the time of entry into force of the Reguiation.

In Case 13/61

Reference to the Court under Article 177 of the EEC Treaty by the Court of Appeal of The Hague, Second Chamber, for a preliminary ruling in the action pending before that Court between:

KLEDINGVERKOOPBEDRIJF DE GEUS EN UITDENBOGERD, of Rotterdam, represented by P. H. Hoogenbergh, appellant,

and

(1) ROBERT BOSCH GMBH of Stuttgart, a company incorporated under German law; (2) NV MAATSCHAPPIJ TOT VOORTZETTING VAN DE ZAKEN DER FIRMA WILLEM VAN RIJN, of Amsterdam, represented by J. F. A. Verzijl, respondents,

on the question whether the prohibition on export imposed by Robert Bosch GmbH, of Stuttgart, on its customers and accepted by them by way of contract, is void by virtue of Article 85(2) of the EEC Treaty as far as exports to the Netherlands are concerned,

THE COURT

composed of: A. M. Donner, President, O. Riese and J. Rueff (Presidents of Chambers), L. Delvaux and Ch. L. Hammes, Judges,

Advocate-General: M. Lagrange
Registrar: A. Van Houtte

gives the following

JUDGMENT

I — Facts

The facts may be summarized as follows:

In 1903 the Bosch Company gave the van Rijn Company an exclusive right of sale of all its products on the Netherlands market. For the protection of the exclusive right of sale both of van Rijn and of all other agents bound by similar agreements, Bosch concluded with each national purchaser, within the framework of a sales contract, the following agreement: 'Except with our written permission, Bosch products may not be exported abroad either directly or indirectly'.

During 1959 and 1960 the de Geus

Company imported Bosch refrigerators into the Netherlands from Germany. The German companies from which these refrigerators had been purchased were bound by the undertaking required by Bosch not to export them abroad.

As a result Bosch and van Rijn brought an action in the Rotterdam Court against de Geus applying for a declaration that these dealings by de Geus were illegal, an injunction requiring their immediate cessation, and, by way of compensation, damages in a sum to be fixed according to law.

The defence of de Geus in this action was, *inter alia,* that the agreement referred to by the plaintiffs was contrary to the EEC Treaty and the company argued in particular that it was void under Article 85(2) of this Treaty since it had the object or effect of restricting or distorting competition within the Common Market.

The court however held that at the stage then reached in the setting up of the Common Market, Article 85 was not effective to annul agreements contrary to its provisions. The application of the plaintiffs, Bosch and van Rijn, was accordingly granted.

On 8 November 1960 de Geus appealed against this judgment. Its contention again was that the agreement was void by virtue of Article 85(2) of the EEC Treaty. The respondents, Bosch and van Rijn, disputed this contention, and the Court of Appeal of The Hague, in a judgment dated 30 June 1961, considering that a question had arisen involving the interpretation of the EEC Treaty, decided to ask 'the Court of Justice of the EEC' (meaning the Court of Justice of the European Communities) under Article 177 of the Treaty, 'to give a ruling on the question whether the prohibition on export, imposed by R. Bosch GmbH, of Stuttgart, on its customers and accepted by them by way of contract, is void by virtue of Article 85(2) of the EEC Treaty as far as exports to the Netherlands are concerned.' On 10 July 1961 this question was referred to the Court of Justice.

In its judgment, the Court of Appeal set out the following considerations affecting the question of the interpretation and applicability of the provisions of the EEC Treaty:

'The second ground of appeal is to the effect that the court of first instance was wrong in deciding that Articles 85 to 90 of the EEC Treaty are not applicable to the prohibitions on export.

No decision in these terms occurs in the judgment of the court below, but it is clear from the appellant's explanation that its objection is directed against that court's decision that at the present time the agreement is not nullified by Article 85(2) of the EEC Treaty, a decision based by the court on the view that the Common Market was not brought into being by the mere fact of the coming into force of the EEC Treaty, but on the contrary is referred to within the context of the provisions of the Treaty as being still *in statu nascendi.*

The appellant replies that the scheme of the EEC Treaty is that the agreements referred to in Article 85(1) are *eo ipso* void, that by virtue of Article 88 the national authorities are provisionally empowered to rule on the admissibility of agreements, decisions and concerted practices but by the German law applicable here the agreements in question are void so long as no approval has been granted under Article 88.

The respondents on the other hand contend, first, that Articles 85 to 90 of the EEC Treaty are not directly applicable to nationals of signatory States and, furthermore, that even if a direct obligation is assumed, the arrangements incorporating the prohibition on export are still valid, on the grounds set out in the above judgment of the court.

It is apparent from the above that a question arises regarding the interpretation of the EEC Treaty, on

which a decision is necessary, and the court will therefore, before considering further the grounds of appeal, ask the Court of Justice of the EEC, under Article 177 of the Treaty, to give a ruling on this question.'

On 21 September 1961 Bosch and van Rijn entered a petition in cassation against this judgment, claiming that the Court of Appeal of The Hague was in error in referring the question to the Court of Justice of the European Communities. After entering this petition, Bosch and van Rijn submitted that the Court of Justice should await the outcome of the cassation proceedings before giving a ruling on the question referred to it by the Court of Appeal, since by Article 398(5) of the Dutch Code of Civil Procedure the execution of a judgment given on appeal is suspended by a petition in cassation.

De Geus replied that the petition in cassation had no effect on the case pending before the Court of Justice, since by Article 20 of the Protocol on the Statute of the Court of Justice of the European Economic Community the proceedings before the Court of Appeal of The Hague were suspended by the Oral arguments were presented at the very fact that this Court had submitted its request to the Court of Justice of the European Communities.

II — Procedure

By paragraph 2 of Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, statements of case were submitted by the parties and written observations were submitted by the Commission of the EEC, the Government of the Federal Republic of Germany, the Government of the French Republic, the Government of the Kingdom of Belgium and the Government of the Kingdom of the Netherlands.

public hearing on 25 January 1962, at which Bosch was represented by its advocate before the Court of Appeal and by Dr K. Scheving of the Stuttgart Bar, and the Commission of the EEC was represented by its Agent J. Thiesing, assisted by R. C. Fischer both Legal Advisers of the Commission. The Member States were given notice to attend, but did not appear at the hearing.

Grounds of judgment

A — Jurisdiction of the Court

Both plaintiffs in the proceedings in the Netherlands, Bosch and van Rijn, as well as the Government of the French Republic, cast doubt on the question whether a preliminary ruling may be given at the request of the Court of Appeal of The Hague, in view of the fact that a petition in cassation has been lodged against the judgment in which the request was made.

This doubt has resulted from an interpretation of Article 177 of the Treaty. The argument is that a request to this Court under Article 177 cannot be made unless the judgment or the ruling of the national court containing the reference to this Court has the force of *res judicata*. This interpretation of Article 177 is not only *not* suggested by the literal meaning of the wording, but rests also on a failure to appreciate that the municipal law of any Member

State, whose courts request a preliminary ruling from this Court, and Community law constitute two separate and distinct legal orders.

Just as the Treaty does not prevent the national Court of Cassation from taking cognizance of the petition but leaves the determination of its admissibility to the national law and the decision of the national judge, so the Treaty makes the jurisdiction of this Court dependent solely on the existence of a request for a preliminary ruling within the meaning of Article 177. And it does so without requiring this Court to discover whether the decision of the national judge has acquired the force of *res judicata* under the national law.

The parties Bosch and van Rijn and the Government of the French Republic further submit that the request of the Court of Appeal of The Hague could not be the proper subject of a preliminary ruling inasmuch as the request is not restricted to a mere question of interpretation within the meaning of Article 177, but on the contrary, as the wording of the request discloses, calls on this Court to decide on the application of the Treaty to an actual case.

However, the Treaty neither expressly nor by implication prescribes a particular form in which a national court must present its request for a preliminary ruling. Moreover, since the question what is meant in Article 177 by 'the interpretation of this Treaty' may itself be a matter of interpretation, it is permissible for the national court to formulate its request in a simple and direct way leaving to this Court the duty of rendering a decision on that request only in so far as it has jurisdiction to do so, that is to say, only in so far as the decision relates to the interpretation of the Treaty. The direct form in which the request in the present case has been drawn up enables this Court to abstract from it without difficulty the questions of interpretation which it contains.

The Government of the French Republic further contends that so long as the Regulations envisaged by Article 87 of the Treaty have not been promulgated, this Court is incapable of giving an interpretation on the meaning of Article 85, the application of which is, during the interim period before such promulgation, a matter for the national authorities. This argument cannot be accepted.

Even on the assumption that the application of Articles 85 et seq. of the Treaty is a matter for the national authorities, it is nonetheless clear that Article 177, relating to the interpretation of the Treaty, remains applicable, so that the national court is empowered, or obliged — as the case may be —

to request a preliminary ruling. This reasoning is supported as much by the letter as by the spirit of Article 177, for, while this Article contains no reservations relative to Articles 85 et seq., a harmonizing of interpretation — which is the purpose of Article 177 — is of particular importance in cases in which the application of the Treaty is entrusted to national authorities.

Thus the Court has jurisdiction to pronounce on the present request for a preliminary ruling under Article 177 of the Treaty.

B — On the substance of the case

The judgment of the Court of Appeal of The Hague raises the question whether Article 85 has been applicable from the time of entry into force of the Treaty. The answer to this question must in principle be in the affirmative. Articles 88 and 89 of the Treaty, which confer powers on the national authorities and on the Commission respectively for the application of Article 85, presuppose its applicability from the time of entry into force of the Treaty.

Articles 88 and 89 are, however, not of such a nature as to ensure a complete and consistent application of Article 85 so that their mere existence would permit the assumption that Article 85 had been fully effective from the date of entry into force of the Treaty and in particular that the annulment envisaged by Article 85 (2) would have taken effect in all those cases falling under the definition of Article 85 (1) and in respect of which a declaration under Article 85 (3) had not yet been made.

In fact, Article 88 envisages a decision by the authorities of Member States on the admissibility of agreements only when the latter are submitted for their approval within the framework of the laws relating to competition in their respective countries. Article 89, while conferring on the Commission a general power of surveillance and control, enables it to take note only of possible violations of Article 85 and 86 without clothing the Commission with power to grant declarations in the sense of Article 85 (3). Neither of these two Articles, moreover, contains transitional provisions dealing with agreements existing at the moment the Treaty came into force. It may be noted, furthermore, that the authors of the First Regulation Implementing Articles 85 and 86 of the Treaty (OJ 204/62) took the same view.

The combined effect of Article 6 (2) and Article 5(1) of this Regulation is that the Commission, first, is able to make declarations under Article 85 (3) in respect of agreements subsisting at the time of entry into force of the said Regulation; and secondly is empowered, to give such declarations a

retroactive effect, even to a date prior to that on which a particular agreement has been notified to the Commission.

It follows that the authors of the Regulation seem to have envisaged also that at the date of its entry into force there would be subsisting agreements to which Article 85 (1) applied but in respect of which decisions under Article 85 (3) had not yet been taken, without such agreements thereby being automatically void.

The opposite interpretation would lead to the inadmissible result that some agreements would already have been automatically void for several years without having been so declared by any authority, and even though they might ultimately be validated subsequently with retroactive effect. In general it would be contrary to the general principle of legal certainty — a rule of law to be upheld in the application of the Treaty — to render agreements automatically void before it is even possible to tell which are the agreements to which Article 85 as a whole applies.

Moreover, in accordance with the text of Article 85 (2), which in referring to agreements or decisions 'prohibited pursuant to this Article' seems to regard Articles 85 (1) and (3) as forming an indivisible whole, this Court is bound to admit that up to the time of entry into force of the First Regulation Implementing Articles 85 and 86, the nullifying provisions had operated only in respect of agreements and decisions which the authorities of the Member States, on the basis of Article 88, have expressly held to fall under Article 85 (1), and not to qualify for exemption under 85 (3), or in respect of which the Commission has taken the decision envisaged by Article 89 (2).

As the Court of Appeal of The Hague was not able to state precisely in its reference to this Court the relevant date to be taken in order to determine the possible nullity of the agreement in question, it is necessary also to examine this question in respect of the period following the entry into force of the Regulation.

Agreements and decisions in existence at the date of entry into force of this Regulation are not annulled automatically by the mere fact that they fall within the ambit of Article 85 (1). Such agreements and decisions must be considered valid insofar as they fall within Article 5(2) of the Regulation; they must be considered as provisionally valid when, although not excepted by operation of that provision, they are notified in time to the Commission in accordance with Article 5 (1) of the said Regulation.

This validity is not definitive since Article 85 (2) operates to make agreements automatically void when the authorities of Member States exercise the powers conferred on them by Article 88 of the Treaty, and maintained under Article 9 of the Regulation, to apply Article 85 (1), and to declare certain agreements and decisions to be prohibited.

The refusal of the Commission, moreover, to issue a declaration under Article 85 (3), in respect of agreements and decisions falling within that Article, involves their automatic nullity as from the date of entry into force of the said Regulation.

Nonetheless, even if the agreement or decision does not qualify for exemption under Article 85 (3), the Commission is given a discretion under Article 7 of the Regulation to declare the prohibition, imposed by Article 85 — that is to say, the automatic nullity — operative only until such time as the parties may withdraw or amend such agreement or decision.

This provision of Article 7 of the Regulation can be understood only on the basis that agreements and decisions shall not be automatically void as long as the Commission has not reached a decision with regard to them, or unless the authorities of Member States have decided that Article 85 is applicable.

The request from the Court of Appeal of The Hague is concerned with the question whether the restriction on export imposed by the plaintiff, Robert Bosch GmbH of Stuttgart, on and accepted by its customers, falls under Article 85 (1) of the Treaty. This question cannot be considered as a pure question of interpretation of the Treaty, since the document in which this summarily described restriction on export appears has not been laid before this Court. This Court can accordingly make no decision without a preliminary investigation of the facts, and the Court has no jurisdiction to conduct such an investigation when proceeding under Article 177 of the Treaty.

In these circumstances this Court must confine itself to recording its opinion that it cannot exclude the possibility that the restrictions on export referred to by the Court of Appeal of The Hague come within the definition of Article 85 (1), and, more particularly, within the words 'agreements . . . which may affect trade between Member States'.

Moreover, if these restrictions fall under Article 85 (1), it cannot be admitted without further enquiry that Article 4 (2) of the First Regulation Implement-

ing Articles 85 and 86 of the Treaty is applicable to them in such a way that they may be exempted from notification under Article 5 (2) and should therefore be held valid.

According to Article 4 (2) (1) of the Regulation, agreements relating to imports or exports between Member States cannot in fact qualify for exemption from notification while a restriction on export has effects other than those referred to by Article 4 (2) (3).

C — Costs

The costs incurred by the EEC Commission and by the Governments of Member States which have submitted their observations to this Court are not recoverable. With regard to the parties, the proceedings in this case are a step in the action pending before the Court of Appeal of The Hague. The decision as to costs is therefore a matter for that Court.

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur,
Upon hearing the oral observations of the Commission of the EEC and of the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to Articles 85, 87, 88, 89 and 177 of the Treaty establishing the EEC;
Having regard to the Protocol on the Statute of the Court of Justice of the EEC;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities,

THE COURT,

in answer to the request for a preliminary ruling under Article 177 of the EEC Treaty, submitted by the Court of Appeal of The Hague by letter dated 10 July 1961, hereby rules:

1. **Until the entry into force of the Regulation envisaged by Article 87 together with Article 85 (3) of the Treaty, Article 85 (2) is applicable only to those agreements and decisions which the authorities of the Member States, acting under Article 88 of the Treaty, have expressly declared to come within Article 85 (1) and to be ineligible for exemption under Article 85 (3), or to those agreements which the Commission, by decision under Article 89 (2), has held to be contrary to Article 85.**

2. **Other agreements and decisions which fall within the prohibition of Aarticle 85 (1) and which were in existence at the time of entry into force of the First Regulation Implementing Articles 85 and 86 of the Treaty are not to be considered automatically void provided they were notified to the Commission within the time limit specified in Article 5 of that Regulation except in so far as the Commission decides that they cannot be made the subject either of a decision referred to in Article 85 (3) or of an application of Article 7 (1) of the Regulation, or except in so far as the authorities of Member States decide to exercise the powers conferred on them by Article 88 of the Treaty together with Article 9 of the said Regulation.**

3. **Agreements and decisions prohibited by Article 85 (1), which were in existence at the time of entry into force of the First Regulation Implementing Articles 85 and 86 of the Treaty but did not fall under Article 5 (2) and were not notified to the Commission within the time limit specified in Article 5 (1) of that Regulation, are automatically void from the time of entry into force of that Regulation.**

4. **The remainder of the request cannot be the subject of a preliminary ruling.**

5. **Costs are a matter for the Court of Appeal of The Hague.**

Donner Riese Rueff
Delvaux Hammes

Delivered in open court in Luxembourg on 6 April 1962.

A. Van Houtte
Registrar

A. M. Donner
President