1. Cf. para. 2, summary, Case 6/64 [1964] E.C.R. 585f.
2. Cf. para. 1, summary, Case 6/64 [1964] E.C.R. 585f.
3. Article 85 (1) of the EEC Treaty is based on an economic assessment of the effects of an agreement and cannot therefore be interpreted as introducing any kind of advance judgment with regard to a category of agreements determined by their legal nature.
4. The fact that an agreement is not notified to the Commission pursuant to Regulations Nos 17/62 and 153/62 cannot make an agreement automatically void. It can only have an effect as regards exemption under Article 83 (3) if it is later established that this agreement is one which falls within the prohibition laid down in Article 85 (1).
5. The prohibition of an agreement depends on one question alone, namely whether, taking into account the circumstances of the case, the agreement, objectively considered, contains the elements constituting the said prohibition, set out in Article 85 (1).
6. Cf. para. 3, summary, Case 32/65 [1966] E.C.R.
7. In order that an agreement may affect 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. The influence thus foreseeable must give rise to a fear that the realization of a single market between Member States might be impeded. In this respect, it is necessary to consider in particular whether the agreement is capable of bringing about a partitioning of the market in certain products between Member States.
8. In considering whether an agreement has as its object the interference with competition within the Common Market it is necessary first to consider the precise purpose of the agreement in the economic context in which it is to be applied. The interference with competition referred to in Article 85 (1) must result from all or some of the clauses of the agreement itself.
   Where an analysis of the said clauses does not reveal the effect on competition to be sufficiently deleterious, the consequences of the agreement should then be considered, and for it to be caught by the prohibition it is then necessary to find that those factors are present which show that competition has in fact been prevented or restricted or distorted to an appreciable extent. The competition must be understood within the actual context in which it would occur in the absence of the agreement in dispute.
9. The automatic nullity of an agreement within the meaning of Article 85 (2) of the EEC Treaty only applies to those parts of the agreement affected by the prohibition, or to the agreement as a whole if it appears that those parts are not severable from the agreement itself. Any other contractual provisions which are not affected by the prohibition fall outside Community law.
10. An exclusive dealing agreement may fall under the prohibition in Article 85 (1) by reason of a particular factual situation or of the severity of the clauses protecting the exclusive dealership.
    Cf. para. 5, summary, Case 32/65 [1966] E.C.R.

In Case 56/65

Reference to the Court under Article 177 of the Treaty establishing the European Economic Community by the Cour d'Appel (First Chamber), Paris, for a preliminary ruling in the action pending before that court between

SOCIÉTÉ TECHNIQUE MINIÈRE

and

MASCHINENBAU ULM GMBH

on the interpretation of:

1. Article 85 (1) of the EEC Treaty and of certain regulations adopted in implementation thereof;
2. Article 85 (2) of the said Treaty,

THE COURT

composed of: Ch. L. Hammes, President, L. Delvaux, President of Chamber, A. M. Donner, A. Trabucchi and R. Lecourt (Rapporteur), Judges,

Advocate-General: K. Roemer
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts and procedure

By an agreement made on 7 April 1961 Technique Minière (hereinafter referred to by the initials 'T.M.'), a French company incorporated with the object of selling public works equipment both on its own behalf and on behalf of others agreed to take delivery of thirty-seven graders over a period of two years from the German undertaking Maschinenbau Ulm (hereinafter referred to by the initials 'M.B.U.'). Under the terms of this contract M.B.U. granted T.M. 'the exclusive right to sell' these graders 'in French territory'. The parties also agreed that 'the delivery of machines which compete with those mentioned in the first clause [the exclusive dealership clause] shall only be carried out with the consent of M.B.U.'. T.M. undertook 'to ensure that a repairs service functions properly and to build up a good stock of spare parts'. Finally it was stipulated that 'without the written consent of M.B.U.' T.M. 'may not assign the rights and obligations of this agreement to a third party'.

According to the Cour d'Appel, Paris, there is no doubt that T.M. retained the right to re-export the equipment acquired from M.B.U. to places outside the contract territory. Furthermore any potential French buyer may make his purchases in other countries of the Common Market by means of parallel imports.

After M.B.U. had delivered six graders to T.M. and corresponding bills of exchange maturing on 12 July 1962 had been accepted, an interlocutory order made on 24 July 1962 upon a motion by T.M. appointed a receiver of the said bills. The order also appointed an expert to examine 'whether the machines were unsuitable for the use for

which they were intended and incapable of sale to French customers'. The expert found that they were in conformity with 'the terms of the order' and 'perfectly capable of being sold on the French market'. The Tribunal de Commerce de la Seine then declared by a judgment given on 8 January 1964 in an action brought by M.B.U. that the contract, in so far as it remained unexecuted, was annulled and that T.M. must bear the liability. The same judgment also rejected two objections of inadmissibility raised by T.M., one of which was based on the Treaty establishing the EEC.

Upon appeal by T.M. against this judgment the said company requested the Cour d'Appel, Paris, to declare that the agreement was 'absolutely void' as being contrary to Article 85 (1) of the EEC Treaty, or, alternatively, that it should suspend proceedings until the Court of Justice of the European Communities had given a ruling on the interpretation of the said Article, and the regulations adopted in implementation thereof, upon a reference under Article 177. M.B.U. then argued that notification to the Commission of the EEC was not compulsory for agreements not prohibited by Article 85 (1) and that only an exclusive dealing agreement which divides up the market completely could come within the scope of this article, whereas in the case of the agreement at issue competition can take place in France both by means of parallel imports and because T.M. can export the graders in question.

In a judgment delivered on 7 July 1965, after Mr Advocate-General Toubas had delivered his opinion, the Cour d'Appel, Paris, (First Chamber) observed in the first place that the following question had been brought before it: with reference to Article 85 (1) of the Treaty, to Regulation No 17 of the Council and to Regulation No 153 of the Commission of the EEC, must all exclusive dealing agreements which have to be notified pursuant to these regulations be considered as automatically falling under the prohibition in Article 85 (1) except when they have been 'validated' under Article 85 (3) as applied by Regulation No 17?

With regard to this the Cour d'Appel, Paris, noted first that Article 4 of Regulation No 17 states that no decision in application of Article 85 (3) may be taken in respect of agreements of the kind described in Article 85 (1) until they have been notified. Secondly it notes that Regulation No 153 introduces a simplified notification procedure for exclusive dealing agreements which are made between only two undertakings and whereby one party gives an undertaking to the other that he will not deliver certain products to any person but that other person with a view to their re-sale within a given part of the Common Market, or whereby the undertaking is not to buy certain products except from the other party with a view to their re-sale.

The Cour d'Appel, Paris, observes that the provisions of Regulations Nos 17 and 153 'do not seem to have authority to add anything to the prohibitions laid down by Article 85 (1) of the Treaty' and that Article 1 of Regulation No 19 provides that, without prejudice to the application of Regulation No 17, the Commission may by regulation and in accordance with Article 85 (3) of the Treaty declare that Article 85 (1) shall not apply 'to categories of agreements such as those described in Regulation No 153'.

Faced with these two regulations, 'the scope of which is disputed', the Cour d'Appel, Paris, took the view that 'the rule which should result from reading them together does not emerge with clarity', and referred the following first question to the Court of Justice for a preliminary ruling:

'What interpretation should be given to Article 85 (1) of the Treaty of Rome and to the Community regulations adopted in implementation thereof with regard to agreements which have not been notified and which, whilst granting an "exclusive right of sale",

— do not prohibit the concessionnaire from re-exporting to any other markets of the EEC the goods which he has acquired from the grantor;
— do not include an undertaking by the grantor to prohibit his concessionnaires in other countries of the Common Market from selling his products in the territory which is the primary responsibility of the concessionnaire with whom the agreement is made;
— do not fetter the right of dealers and con-

sumers in the country of the consessionnaire to obtain supplies through parallel imports from concessionnaires or suppliers in other countries of the Common Market;

— require the concessionnaire to obtain the consent of the grantor before selling machines likely to compete with the goods with which the concession is concerned?'

Secondly, taking the view that the extent of the provision in Article 85 (2) of the Treaty rendering agreements automatically void needs to be interpreted and clarified, the Cour d'Appel, Paris, refers the following second question to the Court of Justice for a preliminary ruling:

'Does the expression "automatically void" in Article 85 (2) of the Treaty of Rome mean that the whole of an agreement containing a clause prohibited by Article 85 (1) is void, or is it possible for the nullity to be limited to the prohibited clause alone?'

The official copy of the judgment of the Cour d'Appel, Paris, delivered on 7 July 1965, was received by the President of the Court of Justice on 19 November 1965. As provided for under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, the parties to the main action and the Commission of the EEC submitted written observations.

Oral arguments were presented at the hearing on 2 March 1966.

The Advocate-General delivered his reasoned oral opinion at the hearing on 23 March 1966.

II — Observations submitted pursuant to Article 20 of the Statute

A — *The jurisdiction of the Court of Justice*

According to T.M., when the jurisdiction of the Court of Justice is based on Article 177 of the EEC Treaty, it is strictly limited to the interpretation of Community law and cannot extend to applying that law to a particular case. When the wording of the first of the questions referred for a preliminary ruling by the Cour d'Appel, Paris, is considered, one cannot help observing that under the guise of a problem of interpretation a question of application in fact lies hidden. The interpretation of Article 85 and of the regulations adopted in implementation thereof with reference to a certain type of exclusive dealing agreement and to certain circumstances has no other purpose than to apply the aforesaid provisions to that particular agreement. Having regard to the facts of the matter and to the judgment of the Cour d'Appel, Paris, and taking into account what was stated in the judgment in Case 13/61, the Court of Justice can only:

'properly deliver a judgment simply stating that a provision may be applicable when the problem before it is not one on which the Court can reach a decision with absolute conviction, and when, in delivering such a judgment, it goes beyond its rôle of strict interpretation.'

The *Commission* notes that, according to its case-law, the Court may not apply the Treaty to a particular case.

B — *The first question: Interpretation of Article 85 (1)*

The *Commission*, in endeavouring to establish the scope of Article 85 of the Treaty and of Regulation No 17 in the light of the facts referred by the national court, considers that according to those facts the agreement at issue is a so-called exclusive dealing agreement made between two undertakings established in two different Member States. It submits that this kind of agreement connotes the obligation of one undertaking not to supply certain products to any person other than a sole concessionnaire who carries on business in another Member State, its being understood that this exclusive dealership is not absolute because concessionnaires outside that State can theoretically introduce these same products into the territory of that Member State, and because the concessionnaire can re-export the products delivered to him by the grantor. Furthermore this kind of agreement includes an exclusive purchase commitment on the part of the concessionnaire, except when the grantor authorizes otherwise, and supplementary stipulations concerning stock, guarantees etc.

The Commission states that by virtue of Article 85 and of Regulation No 17 the prohibition on agreements exhibiting certain

features automatically applies to this type of agreement (Article 85 (1)), with a possibility of the grant of exemption (Article 85 (3)), and that if the prohibition is disregarded the result is that the agreement concerned is void (Article 85 (2)) and that fines and periodic penalty payments may be imposed (Regulation No 17, Articles 15 and 16). The Commission adds that 'notwithstanding the fact that the Commission has sole power to apply Article 85 (3), Article 85 (1) can nevertheless be applied both by the Commission and by the national authorities as long as the Commission has not initiated any procedure (Regulation No 17, Article 9)'.

In this context and taking into account the type of agreement under consideration the study of the wording of Article 85 (1) should be centred on three principal points: the concept of an agreement between undertakings, the problem of competition and the problem of trade between Member States.

According to the Commission, the type of agreement under consideration constitutes an 'agreement between undertakings'. It submits that Article 85 does not distinguish between vertical and horizontal agreements, nor does it distinguish between restrictions on competition between the parties or restrictions concerning third parties. The wording of Article 85 (1) proves, it is claimed, first that there is a restriction on competition within the meaning of that provision when the freedom of action of the contracting parties is limited and when the position on the market of a third party is adversely affected. Secondly such a restriction may occur at any level of the economic process whatever, including any stage at which distribution takes place, which presupposes that the agreement may be horizontal or vertical.

However restriction on competition is not a purely theoretical concept; the position of the parties to an agreement or of third parties on the market must be altered to an appreciable extent, without this meaning that the test is a quantitative one. The existence of restriction suffices. As regards the type of agreement under consideration, competition is restricted at the level of distribution. For in reality all dealers and consumers can only obtain supplies from the concessionnaire who alone receives the goods directly from the grantor. Furthermore, the concessionnaire may not purchase or sell competing products. Restriction on competition is particularly appreciable when the products in question are different from others of their kind because of special attributes. It is usually for the national court to decide whether the restriction on competition is appreciable.

Again according to the Commission, the wording of Article 85 (1) shows that agreements restricting competition which only concern trade within one State alone or only affect trade between a Member State and third states do not fall under the prohibition. The expression 'which may affect ...' proves, it is claimed, that the alteration to trade must appear directly from the facts or must be reasonably foreseeable and that the influence on trade must be of some importance. This does not necessarily mean accepting a quantitative test, a percentage for example, or a finding that trade between States has decreased, for the competition rules of the Treaty are not aimed solely at increasing trade, and at certain points the Treaty sacrifices the volume of trade to the maintenance of certain rules.

The system of which Article 85 (1) forms a part is designed to prevent competition from being 'distorted' or, according to the opinion of the Advocate-General in Case 13/61, to prevent a restriction on competition leading to 'the diversion of trade from its normal and natural routes'. The Commission concludes from this that the type of agreement under consideration determines the conditions under which the products of the grantor are imported from one Member State to another. Accordingly, trade between Member States develops otherwise than it would without these restrictions on competition. It is for the national court to decide whether these restrictions 'are of some importance' when it is faced with a concrete case. Upon its being finally established that through an agreement of the type under consideration an appreciable restriction on competition exists and that its influence on trade between Member States is of some importance, the prohibition in Article 85 (1) of the Treaty applies. Since the question referred by the Cour d'Appel

states that the Commission has not been notified, and since the exemption from notification provided for by Article 4 (2) of Regulation No 17 does not concern the type of agreement in question, such an agreement is, in the circumstances, prohibited.

M.B.U. argues that the agreement at issue relates to a sector in which competition between similar products is particularly intense and that its influence on the market is therefore only very limited. Furthermore, it is alleged that since there is no prohibition on exports and re-exports the activities of parallel suppliers and importers are permitted, and that therefore the agreement prevents the partitioning of the Common Market and is in line with the attitude adopted by the Commission when giving negative clearance. As such an agreement is not one which may affect trade between Member States, or restrict or distort competition, it is submitted that it is not therefore incompatible with the Common Market, which means that it is not incompatible with a real and complete fusion of the six separate markets; hence the parties are under no obligation to notify.

According to M.B.U., a decision under Article 85 (3) that Article 85 (1) is inapplicable can only be reached when an agreement falls within the ambit of Article 85 (1). There is no obligation on the parties to an agreement of the type in question to notify; they are simply entitled to request the Commission to give a negative clearance if they wish to avoid the possibility of its being void. So long as the Commission has not instituted proceedings, the national courts and tribunals retain jurisdiction to decide whether such an agreement is valid when the question is put to them.

M.B.U. further claims that an exclusive dealing agreement presupposes an undertaking to sell and an undertaking to purchase. An undertaking to sell is an undertaking by the grantor to sell only to the sole dealer within the contract territory, and an undertaking to purchase is an undertaking by the dealer not to sell machines which might compete with the goods covered by the agreement without first obtaining the consent of the grantor. This exclusive dealership system is widely used in international commerce to open up new markets to producers and to render a rational sales organization possible. The theory that a producer might confine his activities simply to production and then wait for demand to make itself felt runs diametrically counter to all business experience. With regard to small and medium-sized concerns in particular, the exclusive dealership system often offers the undertaking concerned the only opportunity of participating in foreign trade and of thereby adapting itself to the demands of a larger market, because as a general rule such concerns do not have sufficient financial resources to set up their own sales organization in countries other than their own. Thus there is less and less opposition to the view that exclusive dealing agreements of the kind at issue are perfectly compatible with the general objectives of the Common Market. This is also true even as regards the particular aims of rules or competition. Where this view is opposed, the opposition is centred on the means necessary for reaching an objective agreed by all.

M.B.U. submits that, according to the Commission, exclusive dealing agreements of the type under discussion are presumed illegal, so that they can then be given a general exemption. It observes that the Italian Government's opinion is that Article 85 (1) should not be applied to such agreements and that, according to the German Federal Government, the prohibition contained in Article 85 (1) is only applicable in certain strictly limited circumstances. It submits that between these three standpoints a choice must be made based on a study of the two basic conditions which form the basis of Article 85 (1).

The first basic condition (restriction on competition) must be examined first from the point of view of the undertaking to sell and then from that of the undertaking to purchase. M.B.U. submits that, according to the position which the Commission has defended up till now, the grant of exclusive rights of sale is in principle of itself a restriction on competition within the meaning of Article 85 (1), even without its being tied to a supplementary guarantee in the form of a prohibition on exports. It argues that this position is contrary to the whole point of an exclusive dealership and, therefore, is er-

roneous in its initial economic conception. In M.B.U.'s view the undeniable facts are that the object of a system of exclusive dealership is to open up new outlets to the producer beyond national frontiers, and to do so in the most effective way possible, notwithstanding the efforts of competitors already established there. Therefore, when an exclusive dealing agreement is made, the objective sought is certainly not a restriction on competition, but on the contrary an attempt to provide extra competition by offering another source of supply for the goods on the given market. Thus the system of exclusive dealing tends to favour competition and to increase its intensity.

It submits that the grant of an exclusive right of sale does not have the effect of preventing, restricting or distorting competition. In the first place the prohibition contained in Article 85 (1) does not protect dealers' individual freedom of action, but is intended to maintain competition at the international level in the interests of an economic system based on the concept of a market. In fact, without exclusive dealing agreements the goods of a producer could only be bought from him, so that there would only be one seller, the producer himself. Once such agreements are accepted, the producer ceases to act as seller and his place is taken by the exclusive dealer, who is the only seller for the products covered by the agreement. This analysis proves that, whilst an exclusive dealing agreement substitutes one seller for another, it does not alter the seller's rôle and does not bring about a change in the conditions prevailing on the market by reducing a source of supply. Thus Article 85 (1) is not applicable to the granting of an exclusive dealership.

Secondly, and contrary to the assertion of the Commission that competition is particularly important at the commercial level, the exclusive dealer is not, in M.B.U.'s opinion, on the same commercial level as the wholesaler or the retailer. It argues that his relationship with these is that of a supplier whose function is to make the goods available to the successive commercial levels, instead of the producer himself.

Thirdly, the application of Article 85 (1) to exclusive dealing agreements of the type under discussion leads to undesirable results from the point of view of legal policy and means that the various forms of the system of exclusive dealership are treated differently according to whether the dealership was in the hands of an employee of the producer, an agent or intermediary, an exclusive dealer, a commission agent or a dealer in business on his own account.

According to M.B.U., the Commission, in an opinion of 24 December 1962, has already accepted the inapplicability of Article 85 (1) to exclusive dealing agreements made with agents and commission agents.

The reasons given on that occasion can equally apply to dealers in business on their own account. Since the economic objectives and the effects as regards competition are the same, a discriminatory application of cartel law does not seem justified and would mean that for no serious reason in terms of economics changes to private contracts would have to be made for the sole purpose of avoiding the consequences of the prohibition. This would be to the advantage of the larger undertakings, capable of having their own sales system.

Fourthly, should the Court reject the above arguments, M.B.U. submits that its proper course would then be to examine the circumstances in which the prohibition in Article 85 (1) is applicable to exclusive dealing agreements. In doing so, the market to take into consideration is the market in all similar products. Agreements like the one at issue fall outside the field of application of Article 85 (1), so soon as it appears that effective horizontal competition exists. Thus as regards the machines covered by the agreement at issue, M.B.U. claims that it accounts for less than 1% of the French market and between 3% and 4% of the German market.

With regard to the second aspect of restriction on competition, namely the exclusive dealer's undertaking to purchase, M.B.U. argues that this commitment is the essential consideration, on an economic level, for the grant of exclusive sales rights. The producer can only grant an exclusive right to sell when he knows that the grantee must look after his interests effectively and do what a sales organization run by himself would have done, so that a desirable division of work between production and distribution

is achieved. On this point the Commission's opinion resulting from its decision in the 'Jallatte' Case is not satisfactory because it departs from the rules of law and fails to adhere to the only test which is decisive, namely whether competition on the market, and not access to the market, is prevented, restricted or distorted. The Commission does not give due weight to the fact that the exclusive dealer is on the same level in the market as the other producers, so far as the distribution of the products covered by the agreement is concerned, and accordingly the agreement cannot impose any restriction on competition as between the producers. Finally, if in interpreting Article 85 (1) the test was whether an agreement makes access to the market more difficult for competitors, this would mean that any purchase agreement of whatever kind could come under the prohibition, in view of the obstacle such an agreement presents to the sales opportunities of competitors, especially where a long-term delivery agreement or an agreement for the supply of large quantities is involved.

With regard to the second basic condition for prohibition contained in Article 85 (1) (obstacles to trade between Member States), M.B.U. argues that exclusive dealing agreements of the type under discussion cannot affect trade between Member States any more than they introduce restriction on competition. It submits that on this topic it is enough to remember the intrinsic objectives of the system which it has described in its observations on the first basic condition for prohibition. On the question whether it is enough for the Commission, in order to apply Article 85 (1), that an obstacle to competition has the result of making trade between Member States develop differently from the way in which it would have developed without that obstacle, and of thus influencing to an important extent the conditions prevailing on the market, M.B.U. submits that there can be no doubt as to this from the German, Dutch and Italian texts of the Treaty. The prohibition is in fact directed only against unfavourable effects on trade between Member States. This interpretation is confirmed by the meaning and the objectives of the Treaty as a whole, and in particular by Article 2 thereof. Further, the Commission's interpretation would in practice make the two basic conditions contained in Article 85 (1) identical, which would be illogical.

Finally, M.B.U. argues that since exclusive dealing agreements of the type under consideration are designed with the objective of making effective international trade possible for the products which they cover, and since they allow the exclusive dealer to sell the said products outside the contract territory, it is impossible for trade between Member States to be placed in more unfavourable circumstances because of them. For all the above reasons M.B.U. concludes that the prohibition contained in Article 85 (1) is not applicable to an agreement such as the one at issue.

T.M. first describes the nature and content of an exclusive dealing agreement such as the one at issue. It states that the intention behind exclusive dealing agreements is to organize distribution networks within a commercial market so as to ensure that supplies reach the market while competition is eliminated and fixed profit margins are guaranteed. Such agreements constitute sales monopolies at the various levels of distribution held by the exclusive dealers within the territory granted to them. The existence of such business monopolies is the only reason for entering into exclusive dealing agreements and for the very concept of a sole dealership. The parties are bound by implication by the obligation to respect such monopolies, as is required by commercial custom and practice, and the parties are under the reciprocal obligation to guarantee them by foregoing any activity which might jeopardize them.

Thus T.M. further argues that, when a market is divided up geographically into concession areas, each concessionnaire is required to confine his activities to his own territory so as not to undermine the exclusive rights of a concessionnaire in an adjoining territory by any sales exports which he might be able to make. Furthermore the common grantor of the dealership network is under an obligation to ensure that the exclusive dealership granted to each of his concessionnaires is properly protected, by refraining from selling directly, or preventing the various concessionnaires from sell-

ing, in territories granted to others. Thus the prohibition on re-exports and on parallel imports constitutes the pre-condition for the existence of an exclusive dealership, and the parties are bound by them without its being necessary to state them expressly. Such is the rule for any exclusive dealing agreement which is to be effective and any exceptions to that rule must be clearly stated. It must be ensured that such exceptions are actually observed and that they are not in fact belied by hidden agreements. It is also important to make sure that such parallel imports as may be allowed do in practice give purchasers a real freedom of choice and that their prices are competitive, even though two sets of transport costs and of customs duties both have to be paid. For the truth is that it is not the judicial interpretation of the clauses of an exclusive dealing agreement or of any respects in which it is silent which can ensure that, when performed, that agreement does not affect trade between the States of the Community, does not restrict competition and does not run counter to the economic unity of the European market. These are pure questions of fact which must be investigated in each particular case.

T.M. submits that this is indeed how the Commission has understood the matter in its decisions given in application of Article 85 and in the wording of Regulation No 153. For this regulation to be applied, it is not sufficient for the exclusive dealing agreement not to contain any express prohibition. The parties must also sign a declaration stating in particular that no reciprocal exclusive dealership has been set up in the distribution of competing products manufactured both by the grantor and the concessionnaire. This declaration is not even mentioned in the agreement in dispute, as described in brief by the Cour d'Appel, Paris, so that, even if the said agreement corresponded to this description, it is not certain that it can benefit from the provisions of Regulation No 153.

T.M. adds that the Cour d'Appel, Paris, has treated the agreement at issue as if it were a standard form agreement by drawing subjective inferences from the silence of the parties to it, and that this is proved by the purely negative way in which the characteristics of the standard form contract are described. This description takes no account of the obligations established by commercial usage. The Cour d'Appel, Paris, has deducted that exclusive dealing agreements have consequences which they do not necessarily have and which are even contrary to their nature, and in so doing has 'stripped them of their meaning and sense'.

On the basis of the above arguments T.M. suggests a reply to the 'true question' with which, in its opinion, the Cour d'Appel should be concerned and which is contained by implication in the request for interpretation.

This question is whether a national court or tribunal, entitled to take decisions on the application of Article 85 (1) of the Treaty by virtue of Article 9 of Regulation No 17, has jurisdiction to rule on the validity of an exclusive dealing agreement which does not contain any of the prohibitions listed in the preliminary question, or whether the validity of such an agreement can only be decided under Article 85 (3), which can only be applied by the Commission of the Communities. If the second point of view is correct, the agreement in question has not been notified as required by the regulations, and therefore the national court must apply the sanctions laid down by Community law.

Since the Cour d'Appel, Paris, has not raised any dispute as to the legality of the implementing regulations, all that has to be done, according to T.M., is to interpret Article 9 of Regulation No 17. When this is done it will be found that national courts or tribunals may take decisions having the force of a negative clearance within the meaning of Article 2 of the said regulation, but must refrain from any decision amounting to a declaration of inapplicability within the meaning of Article 5 [*sic*]. The test to be applied in deciding whether agreements may be given a negative clearance can only be 'objective and fixed in advance' so that the parties can clearly understand what they may and may not do.

T.M. further argues that any agreement covered by Article 85 (1) must be presumed to be prohibited until the prohibition is lifted after notification and a declaration of inapplicability. Article 85 (1) catches all

agreements which produce, no matter to how small an extent, any one of the results listed therein. The only agreements which can be given negative clearance are those which do not produce those results to the slightest extent whatsoever. Despite the inconvenience of compulsory notification of agreements which might qualify for negative clearance, this interpretation is the only one which allows for an objective test and effective control.

Thus, having regard to the judgment of the Court in Case 13/61, it must be accepted that, since exclusive dealing agreements may be prohibited '*in specie*' by Article 85 (1), none of them, '*ut singuli*', can be exempted from the requirement to notify. This would still be the position even if an examination of the particular facts showed that this exemption was permissible, a point which follows directly from the fact that this indispensable examination presupposes the application of Article 85 (3).

T.M. submits that an analysis of the effects produced by exclusive dealing agreements shows that in the majority of the cases they are caught by Article 85 (1). It is alleged that this has been confirmed by previous decisions of the Court with regard to cartels and by Regulation No 153, the validity of which is not called in question.

This regulation introduces a simplified notification procedure for exclusive dealing agreements which fulfil the conditions to which the Cour d'Appel, Paris, expressly refers in its question. Amongst these conditions is the consent of the grantor which the concessionnaire must obtain before delivering machines likely to compete with the products covered by the agreement. It is submitted that this consent restricts freedom of trade and of competition and justifies the application of Article 85 (1).

Finally, T.M. submits that, since the authorities of the Community have decided through regulations which have the force of law in every Member State that exclusive dealing agreements are to be under their control, it is not desirable for national courts and tribunals to have the power, by means of their jurisdiction as regards the application of Article 85 (1), to take decisions which disregard those regulations, block the procedures which they establish and evade the sanctions which they lay down.

C — *The second question: Interpretation o Article 85 (2)*

According to the *Commission*, the possibility of an agreement being automatically void as provided for by Article 85 (2) is a matter which only requires consideration of the expression 'agreements' in order to be understood.

In referring to legal writing, it asserts that the expression 'agreement' covers not only clauses which restrict competition and affect trade between Member States but also 'other stipulations which do not matter from the point of view of competition'. It is further asserted that this interpretation is reinforced by the use of the word 'agreement' in Regulation No 19/65 of the Council, the terminology used by the parties, by the Advocate-General, by the Cour d'Appel, Paris, in the present proceedings, by the practice used for notifications, the practice of the Commission and the case-law of the Court (Judgment in Case 66/63).

It follows from this interpretation that in principle it is the agreement itself which is prohibited 'when either in the agreement as a whole' or in certain of its provisions the elements mentioned in Article 85 (1) are found'. In setting out the consequences which follow in civil law when an agreement is prohibited, Article 85 (2) guards against a diversity of solutions resulting from the various 'more or less absolute' concepts of nullity in national law. 'The nullity imposed by Article 85 (2) constitutes a Community concept'.

The Commission further submits that, since Article 85 (1) does not state that the nullity must be governed by the rules which are to be followed for applying the prohibition, in determining the extent of the civil sanction laid down by Article 85 (2) one must refer to the purpose of the rules on competition on the basis of an interpretation founded on the objectives of Community law. In ensuring that these objectives are pursued and that Articles 85 (1) and 85 (3) are observed, it is not necessary for the sanctions of civil law to strike out those parts of the agreement which are not contrary to the said

Article. It is for the appropriate national law to decide what may subsist. No undesirable consequence for Community law results from this because 'after the nullity imposed by Community law has struck out the contractual terms which run counter to the functioning of the Common Market, there is nothing unusual in leaving the national legal system to decide the fate of the rest of the agreement'. Furthermore the national legal systems treat the rest of the agreement in much the same way. Finally the system under which that part of an agreement which is contrary to Community rules is void is a Community system, and this is what matters.

In short the Commission proposes that 'in an agreement containing a clause which is contrary to Article 85 (1) of the EEC Treaty this clause is necessarily automatically void under Article 85 (2)' but that 'the validity of the other provisions of the agreement are to be determined in accordance with the rules of the national law applicable to the particular case'.

M.B.U. recalls that it has argued before the Cour d'Appel, Paris, that the contract at issue escapes the application of Article 85 (1) and (2) and that in addition, although the Cour d'Appel, Paris, has asked the Court of Justice of the European Communities to rule on the scope of Article 85 (2), it cannot have asked the Court to apply this provision.

As an alternative argument M.B.U. asserts that in any event the nullity can only apply to the clause in the agreement containing the undertaking that the dealership is to be exclusive. It is said that cases on Article 1172 of the French Civil Code have decided that the nullity of a clause in an agreement only renders the agreement itself void if this clause is one which is decisive for agreement between the parties.

Thus the Court's task is not to decide whether the clause at issue is a fundamental or an ancillary term of the agreement, but to decide whether or not it is compatible with the Common Market.

M.B.U. states that possible nullity might not only be governed by the national legal order, but, where applicable, by the Community legal order itself. In this latter case one must have recourse to the uniform legal principles of the Member States, the legislation and the case-law of which accept the possibility of maintaining agreements when this result is in accordance with the presumed intentions of the parties or with what is fair and reasonable when the interests of the parties are weighed up. The recognition of these uniform legal principles by the Court binds the courts and tribunals of the Member States.

Thus in the case contemplated by the question referred, the agreement at issue would become a non-exclusive agreement for the supply of goods.

T.M. argues that since the agreement at issue has not been notified it should be regarded as prohibited by Article 85 (1) and automatically void under Article 85 (2), because of Articles 5 and 6 of Regulation No 17.

It is asserted that the judgment in Case 13/61 supports this line of reasoning, and that in accordance with this reasoning the agreement should be declared void as from 13 March 1962.

T.M. considers that the wording of Article 85 (2) is clear and precise and that the whole agreement is void, as such nullity is a penalty the efficacy of which requires that it be not limited in its effects. Further one might wonder what would be left of an exclusive dealing agreement if the clauses containing its objectives were struck out.

T.M. remarks finally that in general terms the question whether or not a prohibited clause renders the whole agreement void, depending on whether the clause is a fundamental and decisive term of the agreement, hinges on the intention of the parties the evaluation of which is solely for the courts having jurisdiction.

Grounds of judgment

By a judgment of 7 July 1965, forwarded to the Court of Justice of the European Communities on the following 19 November, the Cour d'Appel, Paris, (First Chamber) has duly referred to the Community Court under Article 177 of the EEC Treaty certain questions relating to the interpretation of Article 85 of the said Treaty.

The questions are worded as follows:

'1. What interpretation should be given to Article 85 (1) of the Treaty of Rome and to the Community regulations adopted in implementation thereof with regard to agreements which have not been notified and which, whilst granting an "exclusive right of sale",
   — do not prohibit the concessionnaire from re-exporting to any other markets of the EEC the goods which he has acquired from the grantor;
   — do not include an undertaking by the grantor to prohibit his concessionnaires in other countries of the Common Market from selling his products in the territory which is the primary responsibility of the concessionnaire with whom the agreement is made;
   — do not fetter the right of dealers and consumers in the country of the concessionnairs to obtain supplies through parallel imports from concessionnaires or suppliers in other countries of the Common Market;
   — require the concessionnaire to obtain the consent of the grantor before selling machines likely to compete with the goods with which the concession is concerned?
2. Does the expression "automatically void" in Article 85 (2) of the Treaty of Rome mean that the whole of an agreement containing a clause prohibited by Article 85 (1) is void, or is it possible for the nullity to be limited to the prohibited clause alone?'

The jurisdiction of the Court of Justice

Société Technique Minière, a party to the proceedings before the Cour d'Appel, Paris, objects that, whilst seemingly asking questions of interpretation, the Cour d'Appel is in fact asking questions of application which fall solely within the jurisdiction of national courts.

Under the terms of Article 177 of the Treaty the Court of Justice has jurisdiction to give preliminary rulings on the interpretation and the validity of Community measures. The same article provides that any court or tribunal of a Member State may request the Court to give a ruling on such a question 'if it considers that a decision on the question is necessary to enable it to give judgment'. Therefore the Court cannot involve itself in assessing the reasons for which the national

court or tribunal has considered this to be necessary. Although the Court has no jurisdiction to take cognizance of the application of the Treaty to a specific case, it may extract from the elements of the case those questions of interpretation or validity which alone fall within its jurisdiction. Moreover the need to reach a serviceable interpretation of the provisions at issue justifies the national court in setting out the legal context in which the requested interpretation is to be placed. The Court may, therefore, draw from the elements of law described by the Cour d'Appel, Paris, the data necessary for an understanding of the questions put and for the preparation of an appropriate answer.

The first question relating to the interpretation of Article 85 (1)

The Court is requested to interpret Article 85 (1) with reference to 'agreements which have not been notified' and which, subject to certain conditions, have granted an 'exclusive right of sale'.

Failure to notify

In order to be prohibited as being incompatible with the Common Market under Article 85 (1) of the Treaty, an agreement between undertakings must fulfil certain conditions depending less on the legal nature of the agreement than on its effects on 'trade between Member States' and its effects on 'competition'.

Thus as Article 85 (1) is based on an assessment of the effects of an agreement from two angles of economic evaluation, it cannot be interpreted as introducing any kind of advance judgment with regard to a category of agreements determined by their legal nature. Therefore an agreement whereby a producer entrusts the sale of his products in a given area to a sole distributor cannot automatically fall under the prohibition in Article 85 (1). But such an agreement may contain the elements set out in that provision, by reason of a particular factual situation or of the severity of the clauses protecting the exclusive dealership.

Since Regulations Nos 17/62 and 153/62 cannot have widened in any way the prohibitions imposed by Article 85 (1), the fact that an agreement is not notified to the Commission, as provided for in those regulations, cannot make an agreement automatically void. It can only have an effect as regards exemption under Article 85 (3) if it is later established that this agreement is one which falls within the prohibition laid down in Article 85 (1). The prohibition of such an agreement depends on one question alone, namely whether, taking into account the circumstances of the case, the agreement, objectively considered, contains the elements constituting the said prohibition as set out in Article 85 (1).

The necessity for an agreement 'between undertakings'

In order to fall within this prohibition, an agreement must have been made between

undertakings. Article 85 (1) makes no dinstinction as to whether the parties are at the same level in the economy (so-called 'horizontal' agreements), or at different levels (so-called 'vertical' agreements). Therefore an agreement containing a clause 'granting an exclusive right of sale' may fulfil this condition.

The effects on trade between Member States

The agreement must also be one which 'may affect trade between Member States'.

This provision, clarified by the introductory words of Article 85 which refers to agreements in so far as they are 'incompatible with the Common Market', is directed to determining the field of application of the prohibition by laying down the condition that it may be assumed that there is a possibility that the realization of a single market between Member States might be impeded. It is in fact to the extent that the agreement may affect trade between Member States that the interference with competition caused by that agreement is caught by the prohibitions in Community law found in Article 85, whilst in the converse case it escapes those prohibitions. For this requirement to be fulfilled 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. Therefore, in order to determine whether an agreement which contains a clause 'granting an exclusive right of sale' comes within the field of application of Article 85, it is necessary to consider in particular whether it is capable of bringing about a partitioning of the market in certain products between Member States and thus rendering more difficult the interpenetration of trade which the Treaty is intended to create.

The effects of the agreement on competition

Finally, for the agreement at issue to be caught by the prohibition contained in Article 85 (1) it must have as its 'object or effect the prevention, restriction or distortion of competition within the Common Market'.

The fact that these are not cumulative but alternative requirements, indicated by the conjunction 'or', leads first to the need to consider the precise purpose of the agreement, in the economic context in which it is to be applied. This interference with competition referred to in Article 85 (1) must result from all or some of the clauses of the agreement itself. Where, however, an analysis of the said clauses does not reveal the effect on competition to be sufficiently deleterious, the consequences of the agreement should then be considered and for it to be caught by the prohibition it is then necessary to find that those factors are present which show that competition has in fact been prevented or restricted or distorted to an appreciable extent.

The competition in question must be understood within the actual context in which it would occur in the absence of the agreement in dispute. In particular it may be doubted whether there is an interference with competition if the said agreement seems really necessary for the penetration of a new area by an undertaking. Therefore, in order to decide whether an agreement containing a clause 'granting an exclusive right of sale' is to be considered as prohibited by reason of its object or of its effect, it is appropriate to take into account in particular the nature and quantity, limited or otherwise, of the products covered by the agreement, the position and importance of the grantor and the concessionnaire on the market for the products concerned, the isolated nature of the disputed agreement or, alternatively, its position in a series of agreements, the severity of the clauses intended to protect the exclusive dealership or, alternatively, the opportunities allowed for other commercial competitors in the same products by way of parallel re-exportation and importation.

The second question relating to the interpretation of Article 85 (2)

Article 85 (2) provides that 'Any agreements or decisions prohibited pursuant to this Article shall be automatically void'.

This provision, which is intended to ensure compliance with the Treaty, can only be interpreted with reference to its purpose in Community law, and it must be limited to this context. The automatic nullity in question only applies to those parts of the agreement affected by the prohibition, or to the agreement as a whole if it appears that those parts are not severable from the agreement itself. Consequently any other contractual provisions which are not affected by the prohibition, and which therefore do not involve the application of the Treaty, fall outside Community law.

Costs

The costs incurred by the Commission of the European Economic Community which has submitted its observations to the Court are not recoverable, and as these proceedings are, in so far as the parties appearing before the Cour d'Appel, Paris, are concerned, a step in the action pending before that court, the decision as to costs is a matter for the Cour d'Appel.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the observations of the parties to the main action and of the Commission of the European Economic Community;
Upon hearing the opinion of the Advocate-General;

Having regard to Articles 85 and 177 of the Treaty establishing the European Economic Community;
Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities,

THE COURT

in answer to the questions referred to it by the Cour d'Appel, Paris, by judgment of that court dated 7 July 1965, hereby rules:

In reply to the first question

Agreements containing a clause 'granting an exclusive right of sale' do not of their very nature necessarily contain the elements incompatible with the Common Market as set out in Article 85 (1) of the Treaty

Nevertheless an agreement of this type may, when considered on its own, contain these elements by reason of a particular factual situation or of particular clauses when the following conditions are met:

1. **The agreement containing a clause 'granting an exclusive right of sale' must have been concluded between undertakings whatever their respective positions in the economic process may be.**

2. **If the agreement is to come within the field of application of Article 85 it must be of such a nature that, on the basis of a set of objective factors of law or of fact and having regard to what can reasonably be foreseen, it is to be feared that it might have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States capable of preventing the realization of a single market between the said States.**

In this respect special attention should be given to whether the agreement is capable of partitioning the market in certain products between Member States.

3. **The agreement must have as its object of effect the prevention, restriction or distortion of competition.**

When the object of the exclusive dealing agreement is considered, this finding must result from all or some of the clauses of the agreement considered in themselves.

In the absence of these conditions' being met, the consequences of the agreement must then be examined and must justify the conclusion either that the agreement prevents or that it restricts or distorts competition to an appreciable extent.

In this respect special attention should be given to the severity of the clauses

granting the exclusive dealership, the nature and quantity of the products covered by the agreement, the position of the grantor and of the concessionnaire on the market for the products in question and the number of parties to the agreement or, where applicable, to other agreements forming part of the same system.

In reply to the second question

The absolute nullity imposed by Article 85 (2) applies to all provisions of the contract which are incompatible with Article 85 (1).

The consequences of this nullity for all other aspects of the agreement are not the concern of Community law.

It is for the Cour d'Appel, Paris, to make an order as to the costs of the present proceedings.

Hammes Delvaux Donner

Trabucchi Lecourt

Delivered in open court in Luxembourg on 30 June 1966.

A. Van Houtte — Registrar

Ch. L. Hammes — President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 23 MARCH 1966[1]

Mr President,
Members of the Court,

This is a case pending before the Cour d'Appel, Paris, which has raised questions relating to EEC cartel law which have been referred to you for a preliminary ruling. The facts may be summarized as follows:
On 7 April 1961 an agreement described as an 'export agreement' was made between Maschinenbau Ulm, a limited company incorporated under German law, which is a producer of equipment used by public utilities, and the French company known as La Technique Minière. The purpose of the agreement was the sale of this kind of equipment in France. Subsequently the agreement was amended and additional points were added (on 13 December 1961). Under the terms of this agreement Technique Minière undertook, for a period of two years with effect from 1 January 1962, to buy a certain number (37) of graders of a given type at a fixed price, to further the interests of the seller generally, to organize a repairs service, to maintain an adequate stock of spare parts, to meet the whole of demand in the contract territory and, finally, not to sell competitors' products without the consent of the vendor. In return it was granted the exclusive right to sell the machines in question in France and its overseas possessions. The agreement was tacitly renewable upon the expiry of the term laid down, subject to the right of either party to terminate it on six months' notice. After

1 — Translated from the French version.