

In Case 10/69

Reference to the Court under Article 177 of the EEC Treaty by the Tribunal de Commerce, Brussels, for a preliminary ruling in the case pending before the said court between

SA PORTELANGE, whose registered office is in Koekelberg, Brussels,

and

SA SMITH CORONA MARCHANT INTERNATIONAL, whose registered office is in Lausanne,

SCM INTERNATIONAL GMBH, subsidiary of SCM Corporation, Zurich, whose registered office is in Frankfurt-on-Main,

SCM CORPORATION, a company incorporated under American law, whose registered office is in New York, and

SA SCM BELGIUM, whose registered office is in Brussels,

on the interpretation of Article 85 of the EEC Treaty and its implementing regulations,

THE COURT

composed of: R. Lecourt, President, A. Trabucchi and J. Mertens de Wilmars, Presidents of Chambers, A. M. Donner, W. Strauß, R. Monaco (Rapporteur) and P. Pescatore, Judges,

Advocate-General: K. Roemer

Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Summary of facts and procedure

On 1 July 1961, SA Smith Corona Marchant entered into an agreement

with SA Portelange whereby Smith Corona granted to Portelange the exclusive right to sell and distribute in Belgium and the Grand Duchy of Luxembourg the products mentioned in the list

included in the contract, namely Marchant and Hamann calculating machines and Smith Corona typewriters. When Smith Corona subsequently made or distributed electric copying machines (Electrostatic), the parties by implication included these machines in the said list without formally amending the contract to this effect.

On 6 October 1966, Smith Corona repudiated the contract, giving 90 days' notice solely with regard to the electric copying machines. Portelange, relying on the Belgian Law of 27 July 1961 on unilateral repudiation of exclusive sales concessions granted for an indefinite period, commenced an action for damages before the Tribunal de Commerce, Brussels. This action was directed not only against Smith Corona but also against three other companies whom the plaintiff considered to have taken part in the performance of the contract and to have 'destroyed its exclusiveness'. The Court, however, considered that the action against SA, SCM Belgium on this point was unfounded.

The defendants pleaded *inter alia* that the agreement in question was void under Article 85(1) of the EEC Treaty. SA Portelange, on the other hand, maintained that, even if it was contrary to that article, the agreement enjoyed 'provisional validity' since it had been duly notified to the EEC Commission within the time-limit laid down by Regulation No 17/62 and the Commission had not yet taken a decision under Article 85(3). The Tribunal de Commerce held that although the concept of 'provisional validity' was no longer open to discussion, neither the Treaty nor Regulation No 17/62 laid down precisely the effects, as a matter of private law, of agreements notified so long as the Commission had made no decision on them regarding the applicability of Article 85(3), and that different views existed on this point in the six Member States, both in case-law and in legal literature.

One school of thought held that an agreement notified must enjoy its full effect as long as the Commission had not made any decision to the contrary, whilst another limited itself to recognizing that an agreement of this kind can only be the subject of provisional measures of execution. Holding that the solution of the problem must be sought at the Community level, the Tribunal de Commerce decided, by judgment dated 18 February 1969, to suspend judgment on this point until the Court of Justice of the European Communities had given a ruling under Article 177 of the EEC Treaty on the following preliminary question:

'How are Article 85 of the EEC Treaty and the implementing regulations adopted under it to be interpreted as regards the effects of the provisional validity acknowledged in the case of agreements which have been notified in due time to the Commission of the European Communities, before the commencement by the latter of the procedure provided for in Article 9 of Regulation No 17?'

This judgment was received at the Court Registry on 25 February 1969.

Written observations under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC were submitted by SA Portelange on 12 May 1969, and by the Commission of the European Communities on 15 May 1969.

On hearing the report of the Judge-Rapporteur and the views of the Advocate-General, the Court decided not to make any preparatory inquiry. SA Portelange, SA, SCM International (Lausanne), SCM International GmbH (Frankfurt-on-Main), SCM Corporation (New York) and the Commission of the European Communities presented oral argument at the hearing on 10 June 1969.

The Advocate-General delivered his opinion at the hearing on 24 June 1969.

II — Observations submitted under Article 20 of the Statute

The written and oral observations submitted to the Court may be summarized as follows.

A — *Observations submitted by SA Portelange*

(a) SA Portelange recalled the various solutions put forward in legal literature and in case-law with regard to the concept of 'provisional validity' and subscribed to the view that agreements falling under Article 85(1) and duly notified are 'completely valid' so long as the Commission has made no decision on them.

This solution is not based on expediency but on the need to avoid injustice. Its rejection would mean that any provisionally valid agreements could be infringed with impunity since the courts entrusted with enforcing it could not intervene so long as the Commission had made no decision on it.

This would give rise to real legal uncertainty and in many cases it would be inevitable that injury, sometimes considerable, would be occasioned the persons concerned and in practice it would be impossible subsequently to make good those injuries.

(b) SA Portelange then observes that the question before the Court was only put because the court making the reference wrongly considered that the contract in dispute came under Article 85(1) of the Treaty. Although this contract guarantees SA Portelange the exclusive right of supplies from the producer, it neither prohibits re-exports nor contains any provision intended to prevent parallel imports. It does not therefore result in the partitioning of the markets.

Strictly speaking, doubts may arise over the clauses providing for payment of a commission by foreign concessionnaires

who sold the products in question in the zone granted to SA Portelange. But, according to the case-law of the Court, even in that case the sanction of nullity which might be contemplated would not be imposed on the contract as a whole, but merely on the relevant provisions. These are in fact of secondary importance as they have remained virtually unimplemented and are not of the essence of the contract (Cf. judgment in Joined Cases 56 to 58/64).

The Tribunal de Commerce appears to have adopted the principle whereby the exclusive character of an agreement is *ipso facto* synonymous with illegality within the meaning of Article 85(1) of the Treaty. It has thus failed to observe the judgment in Case 56/65, whereby the Court formally recognized that exclusive dealing agreements are not as such incompatible with the said article.

B — *Observations submitted by the Commission of the European Communities*

(a) The Commission first of all considers the problem whether SA Portelange may in this case rely on the provisional validity of the agreement in dispute. In this connexion it recognizes that the contract of 1 July 1961 concerning the exclusive right granted to SA Portelange to sell the appliances of Marchant, Smith Corona and Hamann was notified to the Commission in accordance with Regulation No 17/62 and that it is consequently provisionally valid.

Nevertheless the Commission states that the agreement concerning the sale of electrical copying machines, which was moreover verbal, was drawn up after the entry into force of the above-mentioned regulation and was never notified to the Commission.

Article 4(1) of this regulation applies to the agreement in question since by limiting the opportunities for marketing the products in question and the choice of

consumers it may have as its effect the restriction of competition.

Furthermore it cannot be held that the agreement may be covered by the notification of the contract of 1 July 1961. In the first place the market for electrocopying machines constitutes a special market distinct from that of typewriters and calculating machines; moreover, it is clear from the contract itself, particularly from Part II thereof, that when the grantor laid down the exclusive dealership it did not automatically grant the concessionnaire an exclusive right to market the products which the former manufactured or distributed. More precisely, it seems from the legal point of view that the agreement extending the exclusive right of sale to products other than those referred to in the standard-form contract of 1 July 1961 constitutes a separate and independent agreement, even if it is also subject to the provisions of that contract.

The independence of this agreement in relation to the contract is further confirmed by the very behaviour of the parties: the grantor has in fact only repudiated the agreement relating to the electrocopying machines, and SA Portelange only initiated proceedings before the Belgian court in respect of that repudiation, whilst the agreement of 1 July 1961 relating to the typewriters and calculating machines at present remains in force between the parties.

It follows that in the present circumstances the procedure for the grant of the declaration provided for in Article 85(3) of the Treaty or of the negative clearance referred to in Article 2 of Regulation No 17/62 may only be initiated if the agreement in dispute is subsequently notified in accordance with the provisions of Regulation No 27/62. If it is assumed that the agreement falls within Article 85(1) but may be covered by Article 85(3), the date of the exemption cannot, under Article 6(1) of Regulation No 17/62, be earlier than the date of notification. Since this has

not yet occurred, no decision may be taken granting exemption with retroactive effect from the repudiation of the agreement (6 October 1966).

This is also the case if the agreement satisfies the conditions set out in Regulation No 67/67. An express decision in implementation of Article 85(3) would undoubtedly be futile, but since the agreement in question was already in existence at the time of the entry into force of this regulation (1 May 1967) it is governed by Article 4(2) thereof so that the exemption by which it is covered may only come into existence at the earliest from the date of its notification.

If, on the other hand, it is presumed that the agreement does not fall within Article 85(1), thereby rendering superfluous a declaration pursuant to Article 85(3), negative clearance may be granted under Article 2 of Regulation No 17/62. But since the issue of this certificate presumes that an application therefor has been submitted by the party concerned the agreement in question must be notified in accordance with Article 4 of that regulation.

The Commission thus deduces from this that so long as notification of the agreement has not taken place the preliminary factors required to initiate the procedure either for issuing the declaration provided for by Article 85(3) of the Treaty or a certificate of negative clearance pursuant to Article 2 of Regulation No 17/62 are not present.

For those reasons the problem of the provisional validity of agreements duly notified is irrelevant to the present case. In fact, in the present circumstances as set out above, there are only two possibilities:

— either the agreement in dispute falls within Article 85(1) of the Treaty and, since in this case a declaration pursuant to Article 85(3) cannot take effect before the date of notification, because the agreement was repudiated before notification was made it cannot

provide a valid legal ground for a claim for damages based on its repudiation;

- or the agreement in dispute does not fall within Article 85(1) and in that case, since it must be regarded as valid from the outset, its repudiation may provide grounds for an action for compensation under national law.

(b) The Commission thus declares that it considers the said problem only in so far as is relevant. It disputes the view that the concept of provisional validity implies that the parties to the contract may proceed against each other with a view to enforcing the contract (or in the case of failure to do so to obtain compensation) and against third parties, enforcing their rights through the national courts.

Such a view is incompatible with the system established by Article 85 of the Treaty and by Regulations Nos 17/62, 19/65 and 67/67, from which it is clear that the prohibition laid down in Article 85(1) continues, even when notification has been made, until the Commission has taken a decision with regard to the agreement in question.

Taking into account this principle, it is therefore contrary to the Treaty to admit that an agreement may be regarded from the point of view of civil law as having unrestricted validity in the period before the said decision.

Furthermore this view means that throughout the unavoidably long period until the Commission issues its decision the parties may indulge unhampered in restriction of competition although this is incompatible with Article 85(1) and is not covered by the exemption provided for by Article 85(3). This would be particularly pernicious in the case of such agreements as attain their objects quickly.

The Commission concludes by stating that if during the said period prior to the decision there already exist between the parties certain connexions (such as the obligation to collaborate in order to obtain the exemption provided for by Article 85(3) and to refrain from any action which might result in the withholding of this exemption), nevertheless it cannot be admitted that they may base their position on an agreement which is only provisionally valid in order to rely on the right of implementation or to compensation against a party alleging that the agreement is void under Article 85 of the Treaty.

C — *Oral observations submitted by SA Smith Corona Marchant International (Lausanne), Smith Corona Marchant GmbH (Frankfurt am Main) and Smith Corona Marchant Corporation (New York) at the hearing on 10 June 1969*

The defendant companies in the main action expressed their anxiety lest the Court should be induced to give a ruling in the present case on the substance of the main dispute. SA Portelange and above all the Commission of the European Communities in fact introduced such matters into the oral proceedings that if the Court were to follow in that direction it would exceed the limits which Article 177 of the Treaty lays down in respect of its jurisdiction and would trespass on a sphere reserved to the national court.

After giving this warning the said companies gave their view on the question put by the Tribunal de Commerce, Brussels, rejecting that of SA Portelange and concurring with that put forward by the Commission.

Grounds of judgment

- ¹ By judgment dated 18 February 1969, received at the Court on 25 February 1969, the Tribunal de Commerce, Brussels, has raised, under Article 177 of

the Treaty establishing the EEC, a question seeking interpretation of Article 85 of the Treaty and the implementing regulations.

- 2 The interpretation requested concerns 'the effects of the provisional validity acknowledged in the case of agreements which have been notified in due time to the Commission of the European Economic Community, before the commencement by the latter of the procedure provided for in Article 9 of Regulation No 17'.

The jurisdiction of the Court

- 3 The Commission points out that in the present case a first agreement concerning the distribution and sale of office typewriters and calculating machines, entered into on 1 July 1961 between Portelange and Smith Corona Marchant International of Lausanne, was notified in accordance with Article 5 of Regulation No 17.
- 4 As the supplementary agreement, entered into at a later date for the distribution and sale of electric copying machines, which forms an independent agreement distinct from the prior contract, has not been notified, the Commission states that the question submitted to the Court by the Tribunal de Commerce, Brussels, does not arise in the present case, and is hence inadmissible.
- 5 Article 177 of the Treaty, which is based on a clear separation of functions between national courts and the Court of Justice, does not permit the latter either to take cognizance of the facts of the case, or to pass judgment on the reasons for requests for interpretation.
- 6 The question whether the provisions or concepts of Community law, whose interpretation is requested, are in fact applicable to the case in question lies outside the jurisdiction of the Court of Justice and falls within the jurisdiction of the national court.
- 7 When a court or tribunal requests the interpretation of a Community provision or of a legal concept connected with it, it must be assumed that that court considers such interpretation necessary to the solution of the dispute before it.
- 8 The objection raised by the Commission cannot, therefore, be sustained.

Substance

- 9 Article 85 of the Treaty is arranged in the form of a rule imposing a prohibition (paragraph (1)) with a statement of its effects (paragraph (2)) mitigated by the exercise of a power to grant exceptions to that rule (paragraph (3)).

- ¹⁰ To treat a given agreement, or certain of its clauses, as automatically void presupposes that that agreement falls within the prohibition of paragraph (1) of the said article and that it may not benefit from the provisions of paragraph (3).
- ¹¹ In order to permit the parties to invoke the provisions of Article 85(3), Regulation No 17 lays down that the agreements or decisions mentioned in Article 85(1) must be notified to the Commission.
- ¹² In the case of an agreement notified under Regulation No 17, the mere fact of its notification cannot imply that the agreement falls under the prohibition imposed by Article 85(1).
- ¹³ The question whether such an agreement is in fact prohibited depends on the appraisal of economic and legal factors which cannot be assumed to be present in the absence of an explicit finding that the individual agreement in question not only contains all the factors mentioned in Article 85(1), but does not qualify for the exemption provided by Article 85(3).
- ¹⁴ So long as such a finding has not been made, every agreement duly notified must be considered valid.
- ¹⁵ In view of the absence of any effective legal means enabling the persons concerned to accelerate the adoption of a decision under Article 85(3) — the consequences of which are all the more serious the longer such a decision is delayed — it would be contrary to the general principle of legal certainty to conclude that, because agreements notified are not finally valid so long as the Commission has made no decision on them under Article 85(3) of the Treaty, they are not completely efficacious.
- ¹⁶ Although the fact that such agreements are fully valid may possibly give rise to practical disadvantages, the difficulties which might arise from uncertainty in legal relationships based on the agreements notified would be still more harmful.
- ¹⁷ If the Commission considers that the implementation of an agreement notified infringes the competition rules, it is open to it to adopt, within the appropriate time, a decision either under Article 85(3) of the Treaty or under Article 15(6) of Regulation No 17.
- ¹⁸ Where Article 15(6) abovementioned has been applied, the persons concerned are put on notice that the Commission considers that the conditions for the application of Article 85(1) are fulfilled and that the application of Article 85(3) is not justified.
- ¹⁹ Hence, any parties who proceed, from then on, with the implementation of the agreement do so at their own risk.

- ²⁰ It must therefore be concluded that the agreements mentioned in Article 85(1) of the Treaty, duly notified in accordance with Regulation No 17, are of full effect so long as the Commission has made no decision under Article 85(3) and the provisions of the said regulation.

Costs

- ²¹ The costs incurred by the Commission of the European Communities, which has submitted its observations to the Court, are not recoverable.
- ²² 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 pending before the Tribunal de Commerce, Brussels, the decision on costs is a matter for that court.

On those grounds,

Upon reading the pleadings;

Upon hearing the report of the Judge-Rapporteur;

Upon hearing the oral observations of the parties to the main action and the Commission of the European Communities;

Upon hearing the opinion of the Advocate-General;

Having regard to the Treaty establishing the European Economic Community, especially Articles 85 and 177;

Having regard to Regulation No 17 of the Council of 6 February 1962;

Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community, especially Article 20;

Having regard to the Rules of Procedure of the Court of Justice of the European Communities,

THE COURT

in answer to the question referred to it for a preliminary ruling by the Tribunal de Commerce, Brussels, in accordance with its judgment dated 18 February 1969, hereby rules:

Agreements referred to in Article 85(1) of the Treaty, which have been duly notified under Regulation No 17/62, are fully valid so long as the Commission has made no decision under Article 85(3) and the provisions of the said regulation.

Lecourt

Trabucchi

Mertens de Wilmars

Donner

Strauß

Monaco

Pescatore

Delivered in open court in Luxembourg on 9 July 1969.

A. Van Houtte

Registrar

R. Lecourt

President