products from being imported from other Member States into the protected area and from being distributed therein by persons other than the exclusive dealer or his customers.

(c) In order to determine whether this is the position, account must be taken not only of the rights and obligations arising from the clauses of the agreement, but also of the economic and legal conditions under which it operates and particularly of the existence of any similar agreements entered into by the same producer with exclusive dealers established in other Member States.

3. (a) An exclusive dealing agreement is liable to affect trade between Member States, and may have the effect of impeding competition if, owing to the combined effects of the agreement and of national legislation on unfair competition, the dealer is able to prevent parallel imports from other Member States from entering the territory covered by the agreement.

(b) The dealer may, therefore, rely on such legislation only if the alleged unfairness of his competitors' behaviour arises from factors other than their having effected parallel imports.

4. To come within the prohibition imposed by Article 85 an agreement must affect trade between Member States and the free play competition to an appreciable extent. In order to establish whether such is the case, these factors must be considered in the light of the situation which would have existed but for the agreement in question.

5. The combined effect of the provisions of Articles 1 and 2 of Regulation No 67/67 of the Commission is that the collective exemption conferred by that regulation does not apply to an agreement prohibiting the exclusive dealer from re-exporting the products in question to other Member States.

6. Since the nullity referred to in Article 85(2) is absolute, an agreement which is null and void by virtue of this provision has no effect as between the contracting parties and cannot be set up against third parties.

7. An import or export transaction has not as such the object or effect of interfering with competition within the meaning of Article 85.

In Case 22/71

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

1. BÉGUELIN IMPORT CO., Brussels,
2. S.A. BÉGUELIN IMPORT CO. FRANCE, Paris,

and

1. S.A.G.L. IMPORT EXPORT, Nice,
2. KARL MARBACH, Hamburg,
3. FRITZ MARBACH, Hamburg,
4. GEBRÜDER MARBACH GMBH, Hamburg,

on the interpretation of

— Article 85 of the said Treaty; and

— Regulation No 67/67/EEC of the Commission of 22 March 1967 on the application of Article 85(3) of the Treaty to certain categories of exclusive dealing agreements (OJ No 57, p. 849; OJ (English Special Edition) 1967, p. 10)

THE COURT

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

Advocate-General: A. Dutheillet de Lamothe
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts and procedure

The facts and procedure may be summarized as follows:

1. On 1 March 1967 the Belgian company, Béguelin Co., hereinafter referred to as 'Béguelin/Belgium' entered into an agreement with the Japanese firm Oshawa whereby the latter appointed it exclusive distributor for Belgium and France of pocket gas cigarette-lighters bearing the trade-mark 'WIN' and made by the Japanese firm. Since 18 March 1967 the Béguelin Import Co. France, hereinafter called 'Béguelin/France', a subsidiary company of Béguelin/Belgium and entirely dependent on the latter economically has been the exclusive dealer for France; on 25 March 1967 it entered into an agreement with Oshawa to this effect. The agreements have not been notified to the Commission.

The undertaking Gebrüder Marbach has a similar exclusive dealing agreement in respect of German territory.

In 1969 the undertaking G.L. Import Export, Nice, imported about 18 000 WIN lighters into France. These had first of all been despatched to Hamburg for Gebrüder Marbach, and had there remained in bond; afterwards they were forwarded and cleared through customs in France. The actions brought by the Béguelin companies before the Tribunal de Commerce, Nice, sought to have G.L. Import Export and Gebrüder Marbach prohibited, on pain of a penalty, from selling the products in question on French territory, and to obtain damages from these firms for unlawful and unfair competition. The defendants contend that, because Béguelin/France is merely a subsidiary of Béguelin/Belgium and they have common economic interests, the exclusive dealing agreement relating to French territory is null and void as being contrary to Article 85 of the Treaty and as constituting a restriction on freedom of trade within the Community.

2. By judgment of 8 February 1971 the Tribunal de Commerce, Nice, decided to refer the following questions to the Court:

'(1) Do two separate commercial companies, each having its registered office in one of two countries of the European Community (Belgium, France), contravene the provisions of the Treaty of Rome, especially Article 85 of the said Treaty, where it is established that, although constituting distinct legal persons, they trade, in their common economic interest, in pursuance of the exclusive right to distribute manufactured products from Japan (which is not a member of the European Community), in execution of an exclusive dealing agreement covering French territory granted to one of them (Béguelin/France) if, first, the concession to (Béguelin/France) covering French territory has been substituted for that originally granted to one of them (Béguelin/Belgium) to be exercised in respect of the territories of both countries of the Community, whereas that for Belgium remained with the Belgian company; and, if, secondly, it is established that the French company is a subsidiary of the Belgian company? Does not a situation in which economic interests have, under cover of two distinct legal entities, been merged in this way, constitute an infringement of the principle of free competition in that it consists of a *de facto* monopoly between them, capable of affecting trade between the Member States and of restricting or distorting competition within the common market contrary to Article 85 of the Treaty of Rome?

If the reply to this question is in the affirmative, what must be the consequences of such an infringement of the said Treaty on the validity of the exclusive dealing agreement, and on the question whether this agreement may be set up against third parties?

(2) Where a third party has imported into its country, France, the same products, manufactured in Japan, as those which the French company has the exclusive right to distribute in France, and this has been done by making use of the parallel right enjoyed by the exclusive distributor in Hamburg appointed by the same Japanese firm for the Federal Republic of Germany, that exclusive distributor having received the goods in transit, re-directed them to the third party in France, and then had them cleared through the customs at Marseilles, is such an import procedure contrary to the provisions of the Treaty of Rome? Or must it be regarded as in accordance with the provisions of the regulation of the Commission of 22 March 1967, which applies to contracts entered into between two undertakings which contain a clause for exclusive purchase or for reciprocal exclusiveness, provided that the distributor is not prohibited from re-exporting, and that there is no prohibition of parallel imports by third parties?'

3. The judgment making the reference was entered at the Court Registry on 29 April 1971. In accordance with Article 20 of the Statute of the Court of Justice of the EEC, the plaintiffs in the main action and the Commission of the European Communities submitted written observations; the defendants in the main action submitted to the Court an opinion of Professor Farjat of the Faculty of Law and Economic Sciences of Nice, and expressed the wish to enlarge upon this opinion at the hearing.

After hearing the report of the Judge-Raporteur and the views of the Advocate-General, the Court decided to proceed without any preparatory inquiry. However, it invited the parties to the main action to indicate at the hearing whether the agreements entered into

respectively between the Oshawa company on the one hand, and the Béguelin/Belgium, Béguelin/France and Gebrüder Marbach undertakings, on the other hand, prohibit Oshawa's distributors from re-exporting to other Member States of the EEC the WIN lighters supplied to them by Oshawa. The parties were also invited to state whether they agreed with the figures supplied by the Commission concerning the extent in the Community of the market in WIN lighters.

The oral observations of the parties to the main action and of the Commission were submitted at the hearing on 6 October 1971. The plaintiffs in the main action were represented by Jean Weill, Advocate at the Cour d'Appel, Paris, assisted by Ernest Arendt of the Luxembourg Bar. The defendants in the main action were represented by Mr Chahouar, of the Nice Bar. The Commission was represented by its Legal Adviser, Erich Zimmermann, assisted by Jean-Pierre Dubois, of the Legal Department.

The Advocate-General delivered his opinion at the hearing on 28 October 1971.

II — Observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC

The observations submitted under Article 20 of the Protocol on the Statute of the Court may be summarized as follows:

1. *First question*

The *plaintiffs in the main action* contend that a 'situation d'intérêts économiques confondus', (situation in which there has been a merger of economic interests) such as there is between the Béguelin/Belgium and Béguelin/France companies, does not come under Article 85(1). In such a situation there can in fact be no question of independent action on the part of the subsidiary: indeed there can be no agreement in circumstances where only one economic entity is involved. To hold otherwise would be to prevent subsidiaries from being set up in other countries of the Community and that would be to act contrary to one of the main objectives of the Treaty, namely, 'the abolition, as between Member States, of obstacles to freedom of movement for persons, services and capital' (Article 3(c)).

At the present stage of the EEC's development, there is nothing to warrant a requirement that a foreign manufacturer may not enter into contracts for the distribution of his goods unless they cover all the Member States. On the contrary, a territorial division of the concessions meets the producer's legitimate concern for commercial and financial safeguards. It is clear from precedents set by the Court of Justice than an agreement by which a producer entrusts a single distributor with the sale of his products in a particular area does not automatically come within the prohibition in Article 85, but does so only if certain additional considerations are satisfied (Judgment of 30 June 1966 in Case 56/65, *Société Technique Minière* v *Maschinenbau Ulm* [1966] ECR 249 *et seq.* and Judgment of 9 July 1969 in Case 5/69 *Völk* v *Vervaecke* [1969] ECR 295). In the present case the following considerations and facts made the provision quoted inapplicable.

— Agreements of the type in question do not prevent wholesalers in a Member State from getting supplies from importers established in another Member State or from reselling the goods to retailers in all countries of the Community. There is therefore free competition in the large wholesale, medium wholesale and retail business.

Importers, who must not be confused with wholesalers, are completely free to import and distribute makes which

compete with those covered by an exclusive dealing agreement.

— Legitimate concern to protect a trade-mark and thus ensure that industrial property right is protected, must not be overlooked. Admittedly, it is not easy to establish the point at which such protection comes oppressive. But in any case, some partitioning of distribution may be justified by the need to ensure that the trade-mark concerned is put to good use and that its reputation is maintained. For this reason, in the present case, very special importance must be attached to the establishment of an after-sales service, agreed between the producer and his exclusive dealers, and based on forms of guarantee enclosed with the goods. Following this line of thought, the plaintiffs in the main action declare that they argued before the French court on the basis of unfair competition again on account of the fact that the G.L. Import Export firm sold the products in dispute with vouchers of this type which were intended to be honoured by the service set up by the Béguelin/France company.

All these considerations indicate that there was nothing in the situation described by the Tribunal de Commerce, Nice, which constituted a *de facto* monopoly capable of affecting trade between Member States to an extent which would justify the application of Article 85. The agreements in dispute are, therefore, valid and can be invoked against third parties.

The *defendants in the main action* contend that what must be taken into account is not the connexion between the two Béguelin companies but the exclusive distribution system set up by the Japanese firm. The fact that the latter is not a Community undertaking is of no importance; it suffices to establish that competition within the territory of the Community suffered and that the agreements in question affected trade between Member States.

The present case is on all fours with that which was the subject of the judgment of the Court on 13 July 1966 (Joined Cases 56 and 58/74, *Consten and Grundig* v *Commission* [1966] ECR 299), which condemned absolute territorial protection. This principle was restated in Regulation No 67/67, the effect of which is that an exclusive dealing agreement is valid without being notified only on condition that it does not prohibit 'parallel exports' even as between the parties. A German concessionnaire cannot therefore be prevented from meeting an order from a French wholesaler. The principle upheld by the Court in its judgment of 30 June 1970 (Case 1/70 *Parfums Marcel Rochas Vertriebs- GmbH* v *Helmut Bitsch* [1970] ECR 523)—to the effect that a clause prohibiting exports, imposed on retailers who are in any case prohibited from exporting the goods which they receive, does not affect the validity of the agreement—cannot be applied in a case involving exclusive import clauses. In its judgment in *Völk* v *Vervaecke*, the Court was content to hold that an exclusive agreement guaranteeing absolute territorial protection 'may' escape the prohibition in Article 85 having regard to the weak position of the persons concerned on the market in the products in in question. Accordingly, the agreement does not necessarily escape the prohibition; moreover, the judgment left open the question whether, in even these circumstances, such an agreement can be set up against third parties.

The reply to the question must be unreservedly negative; to take the opposite view would amount to 'sanctioning a *de facto* situation of "dirigisme privé" (state monopoly under private control)' and, for reasons explained in detail by the dependant in the main action, to creating a system devoid of legal certainty. The agreement could be invoked against third parties only if the concessionnaire had had to incur abnormally high expenditure and if it

had been notified. However, it remains an open question whether, even in these circumstances, there is any real need to invoke it against third parties, since it is for the persons granting the concessions to choose concessionnaires who honour their commitments and to provide sanctions for those who do not.
It seems that it is only under French case-law that third parties are treated with severity and that the other Member States do not recognize the principle that such agreements prevail against third parties; indeed it is all the more necessary to ensure that there is uniformity in the application of the Community rules on competition.
The *Commission* takes the view that the question before the Court should be recast as follows:

> 'Does Article 85 (1) of the Treaty apply in a case where a commercial company situate on the territory of one Member State and which, for that territory, is the sole distributor of a product manufactured by an undertaking in a third country, sets up in another Member State a subsidiary, which is wholly dependant upon it, for the purpose of ensuring exclusive distribution of that product in that other Member State and so of turning to account within that State the exclusive concession covering the two Member States which was originally conferred on the parent company?'

Since agreements, such as that concluded between Béguelin/Belgium and Béguelin/France do not constitute 'agreements between undertakings' within the meaning of the provision quoted, the reply to this question must be in the negative. Indeed, even if agreements between undertakings were involved, the prohibition contained in the provision would not apply because the subsidiary is not free to act independently of the parent company. This was the attitude taken by the Commission in its decision in *Christiani & Nielsen* of 5 July 1969 (OJ L 165, pp. 12 and 14). All that matters is the nature of the exclusive relationship between the producer on the one hand and the concessionnaire or concessionnaires on the other.

2. *Second question*

According to *the plaintiffs in the main action* it must be borne in mind that the G.L. Import Export company effected the imports in dispute with the concurrence of the Gebrüder Marbach undertaking, which was the concessionnaire for Germany of the products concerned and acted solely as forwarding agent. Those concerned were therefore making use of a channel of distribution set up by the manufacturer himself but improperly extended by a transit operation. Such an operation must not be confused with re-exportation. Consequently, the German concessionnaire cannot plead the absence of a clause prohibiting re-exports of which he takes advantage, either because there is no reference to the subject in the dealing agreement or under the legislation of his own country, nor can he rely on the German legal concept of 'exhaustion' of the rights appertaining to a trademark. Nor, finally, is such conduct covered by Regulation No 67/67.
Nor can the defendant in the main action avail itself of the principle laid down by the Court in its judgment of 18 February 1971 (Case 40/70 *Sirena* v *Novimpex and Others* [1971] ECR 69 *et seq.*) That judgment declared Article 85 to be applicable 'to the extent to which trade-mark rights are invoked so as to prevent imports of products which originate in different Member States ...'; the importation in dispute was concerned with goods which could not be held to be of German origin.
Despite the fact that the products brought into France by the G.L. Import Export company bore the same trademark as products distributed by Béguelin/France they were 'pirated' goods. This is clear even from the statements made before the French court by the defendants in the main action, according to which, 'the dispute is not

concerned with the use of forms of guarantee as the defendants have never made use of them and the plaintiffs have produced no evidence to the contrary'. On the assumption that this statement is correct, it reveals that the identity of the product was compromised because it thereby lost an essential and costly element of its make-up, namely the after-sales service to be rendered on presentation of the said forms. Such conduct distorts competition and is therefore contrary to the Treaty.

The *defendants in the main action* did not advance any argument with particular reference to the second question.

The *Commission* believes that the question should be recast in the following terms:

> 'In the case of an agreement, concluded between a manufacturing company situate in a third country and an undertaking situate within the common market, whereby the undertaking situate in the third country agrees with the other undertaking to deliver certain products only to the latter for re-sale in a prescribed area of Common Market territory, does the agreement fall within the prohibition in Article 85(1) of the Treaty if the exclusive dealer objects to third parties importing the products concerned into the territory for which he has been granted the concession?'

(a) It is first of all necessary to establish whether such an agreement is liable to affect trade between Member States. For this purpose reference must be made to the judgment delivered by the Court in *Völk* v *Vervaecke*, quoted above, and to its judgment of 6 May 1971 in Case 1/71, *Cadillon* v *Höss, Maschinenbau KG* [1971] ECR 351.

The fact that the undertaking which has granted the concession is outside the common market is of no importance (cf. Commission Decision of 1 June 1964 in *Bendix-Mertens & Straet,* JO No 92, p. 1426).

(b) In accordance with the interpretation placed by the Court on Article 85(1) in its judgment in *Technique Minière* v *Maschinenbau Ulm,* quoted above, the next step must be to consider what conditions the agreements in question have as their object or effect the prevention, restriction or distortion 'to an appreciable extent' of competition within the common market. The Commission identifies the principles laid down for this purpose in the judgment in *Völk* v *Vervaecke* and *Cadillon* v *Höss* as the need to look at the actual context of the agreement and the possibility that, in view of the weak position of the parties on the market in the products in question, the prohibition may not apply.

In addition, the Communication from the Commission of 27 May 1970 (JO C 64, p. 1) concerning agreements of minor importance and intended to give a precise indication of the extent to which, under the criterion laid down, competition is restricted, may provide some guidance. However, Article 85(1) may apply even in cases where the upper limits given in that communication (expressed in terms of turnover and share of the market in the case of the undertakings which are parties to the agreement) are not reached; in fact, in such cases, restriction of competition may be appreciable. In the present case, the following facts and circumstances must be taken into account:

— The total annual turnover of the Oshawa firm and all its distributor undertakings is probably greater than the upper limit laid down in the notification referred to above.

— a feature of the European market in cigarette lighters is its rather oligopolistic structure, in which a few European undertakings control a substantial proportion of the market concerned and in which competition from North American producers of cigarette lighters and, above all, from the Japanese is particularly marked. Competition from Japanese producers is especially strong in the German and

Netherlands markets. Japanese producers export more cigarette lighters than those of any other country to all the countries of the common market amounting, in 1969, to approximately 741 metric tons.

— A feature of the French market in cigarette lighters is its rather oligopolistic structure; here Japanese competition has so far had less impact. French producers have a remarkably high level of export trade with the other countries of the common market, which, in 1969, reached 202 metric tons.

(c) Even if the agreements made between the Oshawa company and its concessionnaires did not have to contain the clauses prohibiting exports to countries outside the territory covered by them, the agreement concluded between Oshawa and Béguelin/France might come within the prohibition laid down in Article 85 because, if one of the exclusive dealers brings proceedings against other importers, this has the same effect as such a clause.

(d) If, in the light of the foregoing considerations, there is justification for holding that Article 85(1) applies, it would then be for the French court to consider the extent to which an agreement of the type in question was affected by Regulation No 67/67 of the Commission. In reality, the agreement between Oshawa and Béguelin/France falls within the categories of agreement entitled to the exemption provided for under Article 1(1) of the regulation; the fact that the grantor of the concession is established outside the common market is, here again, of no moment.

The effect of this provision is that Article 85(1) of the Treaty does not apply to the said agreement because it fulfils the conditions laid down under Articles 2 and 4 of the regulation. In this connexion, particular attention must be paid to Article 3(b) of the regulation, which states that the abovementioned exemption shall not apply where:

'the contracting parties make it difficult for intermediaries or consumers to obtain the goods to which the contract relates from other dealers with the common market, in particular where the contracting parties:

(1) exercise industrial property rights to prevent . . . ;

(2) exercise other rights or *take other measures* to prevent dealers or consumers from obtaining from elsewhere goods to which the contract relates or from selling them in the territory covered by the contract.'

The action brought by Béguelin/France is just such a measure and discloses conduct which those who drew up Regulation No 67/67 sought to counter when they referred in the ninth and tenth recitals in the preamble to the regulation the need to ensure, 'the possibility of parallel imports', and indicated that it was not possible to allow 'industrial property rights and other rights to be exercised in an abusive manner in order to create absolute territorial protection'.

The action brought by the plaintiffs in the main action is therefore incompatible with the very purpose of Regulation No 67/67. This conclusion is confirmed by the recent decisions of the Court in its judgments in *Sirena* v *Novimpex* and the judgment of 8 June 1971 in Case 78/70 *Deutsche Grammophon Gesellschaft* v *Metro-SB-Großmärkte*. In these decisions, the Court held that industrial and commercial property rights cannot be used to impair the free movement of goods within the common market; this applies with even greater force in a case, such as the present, where the national law on which the dealer replies does not give him any specific protection.

It accordingly follows that the answer to be given to the national court is as follows:

'Article 85(1) of the Treaty is applicable in cases where national law concerning unfair competition is used to prevent imports from being effected

by persons reselling on the territory granted under the agreement, products covered by an exclusive dealing agreement concluded for resale of the products in a Member State between an undertaking manufacturing the product and situate in a third country and an undertaking situate inside the common market. The exemption provided for certain categories of exclusive dealing agreement under Regulation No 67/67 cannot be relied upon.

Such an agreement is null and void and cannot be invoked against third parties.'

Grounds of judgment

1 By judgment of 8 Febuary 1971 received at the Court Registry on 29 April 1971, the Tribunal de Commerce, Nice, has referred to the Court two questions concerning the interpretation of Article 85 of the EEC Treaty and Regulation No 67/67 of the Commission (OJ of 25 March 1967, p. 849; OJ (English Special Edition) 1967, p. 10).

First question

2 The first question refers to agreements which have not been notified to the Commission and under which a producer established in a third country grants to an undertaking subject to the law of a Member State the exclusive right to distribute his products on the territory of that State.

3 The Court is, in particular, asked to give a ruling whether the validity of such agreements and the extent to which they may be set up against third parties are affected by the fact that the holder of the concession, though a legal person, is merely the subsidiary, without any economic independence of its own, of an undertaking established in another Member State which has itself acquired from the same producer a similar exclusive right for the territory of that State.

4 In addition, the question seeks to establish the other conditions to which the validity of the said agreements and the extent to which they may be set up against third parties are subject under the Community rules.

1. *Applicability of Article 85(1) of the Treaty*

5 A — The first question first seeks to establish whether, when a parent company established in a Member State and holder of an exclusive concession granted to it in respect of two Member States, grants to its subsidiary or allows it to acquire the exclusive concession in the second Member State, the prohibition in Article 85(1) applies in so far as the exclusive concession covers the territory of the said State.

[6] If the answer is in the affirmative, the question then seeks to establish what would be consequences of infringement of the Treaty on the validity of the concession granted to the said subsidiary.

[7] Article 85(1) prohibits agreements which have as their object or effect an impediment to competition.

[8] This is not the position in the case of an exclusive sales agreement when in fact the concession granted under that agreement is in part transferred from the parent company to a subsidiary which, although having separate legal personality, enjoys no economic independence.

[9] Accordingly the relationship between the companies cannot be taken into account in determining the validity of an exclusive dealing agreement entered into between the subsidiary and a third party.

[10] B — To be incompatible with the common market and prohibited under Article 85, an agreement must be one which 'may affect trade between Member States' and have 'as [its] object or effect' an impediment to 'competition within the common market'.

[11] The fact that one of the undertakings which are parties to the agreement is situate in a third country does not prevent application of that provision since the agreement is operative on the territory of the common market.

[12] An exclusive dealing agreement entered into between a producer who is subject to the law of a third country and a distributor established in the common market fulfils the two aforementioned conditions when, *de jure* or *de facto*, it prevents the distributor from re-exporting the products in question to other Member States or prevents the products from being imported from other Member States into the protected area and from being distributed therein by persons other than the exclusive dealer or his customers.

[13] In order to determine whether this is the position, account must be taken not only of the rights and obligations arising from the clauses of the agreement but also of the economic and legal conditions under which it operates and particularly of the existence of any similar agreements entered into by the same producer with exclusive dealers established in other Member States.

[14] More especially, an exclusive dealing agreement is liable to affect trade between Member States and may have the effect of impeding competition if, owing to the combined effects of the agreement and of national legislation on unfair competition, the dealer is able to prevent parallel imports from other Member States into territory covered by the agreement.

15 The dealer may, therefore, rely on such legislaton only if the alleged unfairness of his competitors' behaviour arises from factors other than their having effected parallel imports.

16 C — Finally, in order to come within the prohibition imposed by Article 85, the agreement must affect trade between Member States and the free play of competition to an appreciable extent.

17 In order to establish whether this is the case, these factors must be considered in the light of the situation which would have existed but for the agreement in question.

18 It follows that, in order to determine whether a contract which contains a clause conferring an exclusive right of sale is caught by that article, account must be taken in particular of the nature and quantity, restricted or otherwise, of the products covered by the agreement; the standing of the grantor and of the grantee of the concession on the market in the products concerned; whether the agreement stands alone or is one of a series of agreements; the stringency of the clauses designed to protect the exclusive right or on the other hand, the extent to which any openings are left for other dealings in the products concerned in the form of re-exports or parallel imports.

2. Applicability of Regulation No 67/67

19 Under Article 1(1) of Regulation No 67/67, 'it is hereby declared that until 31 December 1972 Article 85(1) of the Treaty shall not apply to agreements to which only two undertakings are party' and in which an obligation is entered into between the parties in respect of exclusive supply or of exclusive purchase, or both, 'for resale'.

20 Under Article 2(1) of the regulation, no restrictions on competition are to be imposed on the exclusive dealer other than those specified therein and these do not include a prohibition on re-exporting the products in question to other Member States.

21 Article 2(2) of the regulation provides that 'Article 1(1) shall apply notwithstanding that the exclusive dealer undertakes' certain obligations listed in Article 2(2) which, again, makes no reference to a prohibition on re-exporting.

22 The collective exemption conferred by Regulation No 67/67 does not, therefore, apply when an agreement prohibits the exclusive dealer from re-exporting the products in question to other Member States.

23 Moreover, in cases where the agreement does not contain a clause prohibiting re-export, it is to be noted that, under the terms of Article 3 of the regulation, such an agreement is likewise ineligible for the said exemption where the contracting parties 'make it difficult for intermediaries or consumers to obtain the goods to which the contract relates from other dealers within the common market', in particular, where they 'exercise other rights or take other measures to prevent dealers or consumers from obtaining from elsewhere goods to which the contract relates or from selling them in the territory covered by the contract'.

24 Consequently, the exercise of such rights also deprives the agreement between the grantor of an exclusive right and the grantee of the benefit of the exemption provided for under Article 1(1) of Regulation No 67/67.

3. *Applicability of Article 85(2) of the Treaty*

25 Article 85(2) of the Treaty reads: 'Any agreements or decisions prohibited pursuant to this article shall be automatically void'.

26 Accordingly, an agreement falling under Article 85(1) which has not been declared inapplicable under Article 85(3) as an agreement or a category of agreements becomes null and void in so far as its object or effect is incompatible with the prohibition in Article 85(1).

27 Though such an agreement, which has not been notified to the Commission, but is exempt from notification under Article 4(2) of Regulation No 17 of the Council, (OJ of 21 February 1962, (English Special Edition) 1959-1962, p. 87 *et seq.*) remain fully effective until it has been declared null and void, this exemption extends only to certain agreements where 'the only parties thereto are undertakings from one Member State' or to agreements whose sole object or effect is that defined in Article 4(2).

28 The agreements in the present case satisfy neither of these conditions because one of the contracting parties is subject to the law of a third State and the object or effect of the agreement differs from those referred to in the aforementioned provisions.

29 Since the nullity referred to in Article 85(2) is absolute, an agreement which

is null and void by virtue of this provision has no effect as between the contracting parties and cannot be set up against third parties.

Second question

30 In the second question, the Court is asked to rule whether an 'import procedure' such as that described by the national court, is incompatible with Article 85 of the Treaty or whether it comes within the exemption conferred under Regulation No 67/67.

31 Under Article 85(1) of the Treaty, the prohibition imposed by that provision is concerned with 'agreements between undertakings', 'decisions by associations of undertakings' and 'concerted practices' only in so far as such agreements, decisions or practices affect trade between Member States and have as their object or effect the discouragement of competition.

32 An import or export transaction has not as such the object or effect of interfering with competition within the meaning of Article 85.

Costs

33 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable.

34 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, Nice, the decision as to 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 Commission of the European Communities and of the parties to the main action;
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, especially Article 4, of the Council implementing Articles 85 and 86 of the Treaty;
Having regard to Regulation No 67/67 of the Commission on the application of Article 85(3) of the Treaty to certain categories of exclusive dealing agreements;

Having regard to the Protocol on the Statute of the Court of Justice of the European Communities, 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 questions referred to it by the Tribunal de Commerce, Nice, by order of that court dated 8 February 1971,

hereby rules:

The first question

1. **The relationship between two companies one of which is economically wholly dependant upon the other cannot be taken into account in determining the validity of an exclusive dealing agreement entered into between the subsidiary and a third party.**

2. **An exclusive dealing agreement entered into between a producer who is subject to the law of a third country and a distributor established in the common market comes within the prohibition imposed under Article 85 of the Treaty in cases when, *de jure* or *de facto* it prevents the distributor from re-exporting the products in question to other Member States or prevents the products from being imported from other Member States into the protected area and from being distributed therein by persons other than the exclusive dealer or his customers.**
   The latter condition is satisfied in particular in cases where, owing to the combined effects of the agreement and of national legislation on unfair competition, the exclusive dealer is able to prevent parallel imports from other Member States into the territory covered by the agreement.

3. **The collective exemption conferred on certain categories of agreement by Regulation No 67/67 does not apply when an agreement prohibits the exclusive dealer from re-exporting the products in question to other Member States.**

4. **Since the nullity for which Article 85(2) of the Treaty provides is absolute, the agreement concerned has no effect as between the contracting parties and cannot be set up against third parties.**

The second question

5. An import or export transaction cannot as such come within the prohibition imposed by Article 85(1) of the Treaty.

Lecourt Mertens de Wilmars Kutscher

Donner Trabucchi Monaco Pescatore

Delivered in open court in Luxembourg on 25 November 1971.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL DUTHEILLET DE LAMOTHE DELIVERED ON 28 OCTOBER 1971[1]

Mr President,
Members of the Court,

The Béguelin Company is a Belgian import/export company.
On 1 March 1967 it entered into a contract with the Japanese firm Oshawa under which it was appointed exclusive representative in France and Belgium for the sale of gas cigarette-lighters manufactured by the Japanese firm under the trade-mark 'WIN'.
A few days later the Béguelin/Belgium company set up in France a subsidiary, Béguelin/France, which was wholly under its control and Oshawa's exclusive dealership for France was then transferred by contract of 25 March 1967 to the Béguelin/France company.
Shortly afterwards, the exclusive dealership for the Federal Republic of Germany in the WIN trade-mark was granted by the Oshawa company to the Marbach company, a German firm.

In 1969, a French import/export company the G.L. Import Export, Nice, purchased from the Marbach firm a consignment of 18 000 WIN lighters, which were the property of Marbach but which the latter firm had left in bond at the customs in Hamburg; after having taken delivery of them in France, the G.L. Import Export company began to distribute the lighters on the French market.
The Béguelin/Belgium and Béguelin/France companies heard of this and thereupon commenced proceedings before the Tribunal de Commerce, Nice, against the G.L. Import Export Company, Nice, and the German firm of Marbach in which they sought
— first, an injunction against the sale, on pain of a penalty, on French territory of lighters acquired by G.L. Import and bearing the WIN trade-mark and
— secondly, an order that the French

1 — Translated from the French.