5. Even if it does not involve an abuse of a dominant position, an exclusive dealing agreement may affect trade between Member States and at the same time have as its object or effect the prevention, restriction or distortion of competition, and thus fall under the prohibition in Article 85 (1).

6. The intention of Article 184 of the EEC Treaty is not to allow a party to contest at will the applicability of any regulations in support of any application. The regulation of which the legality is called in question must be applicable, directly or indirectly, to the issue with which the application is concerned.

In Case 32/65

GOVERNMENT OF THE ITALIAN REPUBLIC, represented by Adolfo Maresca, Minister plenipotentiary, and deputy head of the Legal Department of the Ministry of Foreign Affairs, acting as Agent, assisted by Pietro Peronaci, Deputy State Advocate-General, with an address for service in Luxembourg at the Italian Embassy,

applicant,

v

1. COUNCIL OF THE EUROPEAN ECONOMIC COMMUNITY, represented by Dr Raffaello Fornasier, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the offices of Jacques Leclerc, Secretary of the Councils of the European Communities,

defendant,

2. COMMISSION OF THE EUROPEAN ECONOMIC COMMUNITY, represented by Alberto Sciolla-Lagrange, Legal Adviser, acting as Agent, with an address for service at the offices of Mr Henri Manzanarès, Secretary of the Legal Department of the European Executives,

defendant,

Application for:

1. The annulment of the first and subsequent Articles of Regulation No 19/65 EEC of the Council of the EEC, dated 2 March 1965 (Official Journal No 36 of 6 March 1965, p. 533/65) (English Special Edition, 1965–1966, p. 35), concerning the application of Article 85 (3) of the Treaty to categories of agreements and concerted practices;

2. A declaration that the following are inapplicable (under Article 184 of the EEC Treaty): subparagraph (2)(a) and (b) of Article 4 (2) and Article 5 (2) of

Regulation No 17/62 of the Council of the EEC, dated 6 February 1962 (Official Journal No 13 of 21 February 1962, p. 204/62) (English Special Edition, 1959–1962, p. 87); and

3. In addition a declaration that the following is inapplicable (under Article 184 of the EEC Treaty): Regulation No 153/62 of the Commission of the EEC, dated 21 December 1962 (Official Journal No 139 of 24 December 1962, p. 2918/62);

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

By Regulation No 17/62 of 6 February 1962, the Council provided that where parties to an agreement wish to avail themselves of the exemption from prohibition under Article 85 (3) that agreement must be notified to the Commission. However Article 4 (2) thereof provides that certain types of agreements therein described shall be exempt from this formality.

By Regulation No 153/62 of 21 December 1962 the Commission introduced a simplified notification procedure for certain so-called exclusive dealing agreements.

Finally by Regulation No 19/65 of 2 March 1965 the Council conferred upon the Commission the power to declare by regulation that the exemptions in Article 85 (3) shall apply to whole categories of agreements.

On 31 May 1965 the Government of the Italian Republic lodged with the Court an application against the Council and, in so far as necessary, against the Commission of the ECC requesting a declaration annulling Regulation No 19/65 of the Council, and a declaration, under Article 184 of the Treaty, that Articles 4 and 5 of Regulation No 17/62 of the Council and Regulation No 153/62 of the Commission are inapplicable.

II — Conclusions of the parties

In its application the Government of the Italian Republic claims that the Court should:

'Entertain the present application and annul Regulation No 19/65/EEC of the Council of the EEC dated 2 March 1965 (Official Journal No 36 of 6 March 1965, p. 533/65) (English Special Edition, 1965–1966, p. 35), mentioned in the introductory statement of the claim, should it be considered that the present dispute calls in question the regulations mentioned at points 2 and 3 of the introductory statement of the claim relating to the present application, or any other connected or similar regulations;

declare these regulations inapplicable in accordance with Article 184 of the Treaty;

make an order for costs in accordance with the law.'

In its pleading dated 5 July 1965 the Commission of the EEC contends that the Court should:

'Give a preliminary ruling under Article 91 of the Rules of Procedure on the admissibility of the application as regards the claim that Regulation No 153/62 of the Commission should be declared inapplicable;

declare the application inadmissible and accordingly dismiss it as regards the claim that Regulation No 153/62 of the Commission should be declared inapplicable;

order the applicant to bear the costs of the proceedings.'

In its statement of defence dated 28 July 1965 the Council of the EEC contends that the Court should:

'Declare that the applicant's conclusions concerning the annulment of Regulation No 19/65 of the Council are unfounded;

declare that the following are inadmissible and, secondly, unfounded: the conclusions of the applicant concerning the annulment of Article 4 (2) and Article 5 (2) of Regulation No 17/62, and the provisions of Regulation No 153/62 of the Commission;

order the applicant to bear the costs.'

In its first reply, dated 15 November 1965, in answer to the submissions of inadmissibility raised by the defendants, the Italian Government, standing by its previous conclusions, opposes the proposition that the defence submissions put forward by the Commission and the Council concerning the admissibility of the application should be dealt with in a preliminary ruling.

Further to an order of the Court dated 18 November 1965, joining the Commission's defence of inadmissibility to the main action, the Commission contended, in its statement of defence dated 20 December 1965, that the Court should:

'Declare that the application of the Government of the Italian Republic is inadmissible as regards the claim that Regulation No 153/62 of the Commission should be declared inapplicable, on the grounds that the conditions required for applying Article 184 of the Treaty are not fulfilled;

secondly, dismiss as unfounded the application of the Government of the Italian Republic, in the unlikely event of its being declared admissible, as regards the claim for a declaration that Regulation No 153/62 of the Commission is inapplicable;

order the applicant to bear the costs of the proceedings.'

In its reply, lodged on 18 January 1966, the Italian Government in answer to the Commission's statement of defence, claimed that the Court should:

'Declare the application admissible;

declare that within the meaning and for the purposes of Article 184 of the EEC Treaty the regulations mentioned at Nos 2 and 3 of the introduction to our application are inapplicable (namely subparagraphs (2) (a) and (b) of Article 4 (2) and Article 5 (2) of Regulation No 17/62 of the Council of the EEC, and Regulation No 153/62 of the Commission of the EEC);

annul Regulation No 19/65 of the Council of the EEC of 2 March 1962;

make an order for costs in accordance with the law.'

In its rejoinder dated 11 February 1966 the Commission 'stands by all the conclusions put forward in its statement of 20 December 1965.'

In its rejoinder dated 15 February 1966 the Council 'refers to all the conclusions which it has already put forward in its statement of defence.'

At the hearing on 1 March 1966 the parties maintained these conclusions.

III — Submissions of the parties

A — *As to the main head of the application: that Regulation No 19/65 of the Council should be annulled*

1. First submission, that Article 85 (1) and (3) and Article 86 of the Treaty have been infringed

The *Government of the Italian Republic* argues that Regulation No 19/65 has not been conceived in accordance with the principle that everything which is not forbidden is permitted, but as if 'everything which is not permitted is forbidden'. In prohibiting certain agreements incompatible with the Common Market, Article 85 (1) logically renders it necessary for Regulation No 19/65 to define the scope of this prohibition before defining all the exemptions

provided for by Article 85 (3). Instead of doing this the regulation assumes that everything 'is in general terms forbidden by the rule', even though Article 87 (1) requires the adoption of further provisions for applying the principles set out in the whole of Article 85. Thus in giving rulings on the exception without first defining the general rule to which the exception is made Regulation No 19/65 is diametrically opposed to the meaning of Article 85 and 87.

The *Council of the EEC* objects first that it was not necessary for Regulation No 19/65 to reiterate the prohibition clearly stated in Article 85 (1), the legal effectiveness of which can no longer be doubted since Regulation No 17/62 entered into force, as the Court has already decided (Judgment in Case 13/61, *Bosch*). Furthermore whilst Regulation No 17/62 authorizes the Commission to grant exemptions by individual decisions, Regulation No 19/65 empowers it to adopt regulations exempting whole categories of agreements 'in so far as they come within the scope of Article 85 (1).'

Therefore Regulation No 19/65 has not enlarged the field of application of the prohibitions in Article 85, but has instead created the necessary procedural methods for exempting categories of agreements. Moreover this Regulation has no more defined the exception than the rule in Article 85, but has set up 'a framework within which the Commission must state both the rules ... and the exceptions.'

The complaints made against the regulations of the Council are in reality complaints about the Treaty itself, the scheme of which consists not in eliminating certain abuses of agreements acceptable in principle, but in prohibiting agreements exhibiting certain features, whilst at the same time providing for exemptions. It can even be said that 'everything is permitted except the agreements ... which fall within the prohibition in Article 85 (1).' Therefore in authorizing the Commission to exempt categories of agreements fulfilling certain conditions, Regulation No 19/65 did not forbid all the others. These others are permissible if they fall outside the descriptions set out in Article 85 (1). In the converse case they are forbidden not by Regulation No 19/65, but by Article 85 of the Treaty.

Finally the claim that Regulation No 19/65 should have made provision for the possible exemption of all other agreements would limit the discretionary power which Article 87 gives to the Council in a way which is not in accordance with the Treaty.

The *Government of the Italian Republic* asks whether Article 87 should really be applied rather to Article 85 (3) than to Article 85 (1).

The applicant opposes the Council's argument that Regulation No 17/62 has already defined the scope of Article 85 (1). Regulation No 19/65 did not give any supplementary clarifications on Article 85 (3) any more than it did on Article 85 (1). In reality this Regulation introduced a 'set of legal rules' based on Article 85 (3), although the scope of Article 85 (1) remains obscure. This situation is all the more contrary to Articles 85 and 87 in so far as the Council now holds that Article 85 (1) does not need any clarification.

The Government of the Italian Republic considers it sufficient to note the contrary opinion according to which 'everything is permitted, except that which is forbidden' and refers to its observations on the second submission. However it observes that this principle cannot be a justification for not investigating whether Regulation No 19/65 was not based on intentions contrary to those of the Treaty, or does not lead through a misuse of powers to results contrary thereto.

Finally the applicant does not dispute the Council's discretionary power in applying Article 87. However it argues that the use of this power cannot permit the disregard to the text which occurs when provisions concerning the exceptions are made before the rule is defined. The true meaning of Article 85 requires that the characteristics which go to make up the prohibitions laid down in Article 85 (1) must be defined first, and the further characteristics which may give rise to an exemption from this prohibition must be defined thereafter. To proceed the other way round is to disregard Article 85 especially since Article 87 makes it clear that regulations to implement the principles in Article 85 are needed, without distinction between these principles.

By reason of the importance of Article 85, business concerns have a right to know

precisely what agreements they must avoid. Uncertainty would be so harmful to trade that Article 87 has recognized the necessity of removing it within a short period.

The *Council of the EEC* is of the opinion that the applicant has not advanced any new arguments and gives 'the impression of wishing in fact, under cover of an application against Regulation No 19/65, to attack the action of the Commission in this matter.' The purpose of Regulation No 19/65 is to set limits within which the Commission is impowered to bring in implementing regulations which must state clearly the conditions which agreements must and must not satisfy in order to benefit from an exemption given to a category of agreements. However, Regulation No 19/65 does not contain any indication as to what clauses must or must not be included in the agreements described therein in order to benefit from such an exemption. Accordingly, all the applicant's observations on the attitude of the Commission as regards the agreements in question are irrelevant in the present dispute.

Examining the first submission more particularly, the Council denies that Regulation No 19/65 has defined the exceptions provided for by Article 85 (3). The applicant's assertion that this Regulation establishes 'a legal discipline' governing Article 85 (3) is ambiguous. If the applicant means by this expression that the Regulation contains a 'specification of the legislative content' of Article 85 (3), this assertion is mistaken, for the said Regulation does not in any way state the conditions to be fulfilled in order to obtain the exemption. But if by 'legal discipline' is meant 'the establishment of a procedure for applying Article 85 (3)', the expression is appropriate.

In this case it would follow that Regulation No 17/62, to which Regulation No 19/65 does not make exceptions, contains a 'legal discipline' governing Article 85 (1), namely the very rule which the Council is accused of not having brought into operation before the exception.

2. Second submission, that there have been infringements of Articles 2 and 3 (f) of the Treaty and also of Articles 87 and 85 (1) and (3) and that there has also been a misuse of powers

The *Government of the Italian Republic* points out the contradiction between the Council's position on the one hand and the liberal philosophy of the Treaty and the objectives defined in Article 2 and 3 (f) on the other.

In defining the exempted cases provided for in Article 85 (3), Regulation No 19/65 of the Council not only wrongly supposes that the agreements therein defined all come under Article 85, but also casts an ominous presumption over agreements of the same category between more than two undertakings, or agreements limited to two undertakings which nevertheless do not fulfil all the specified conditions.

Article 1 (2), interpreted in the light of Article 1 (1) of the said Regulation together with the fifth and the last recitals in the preamble thereto, shows that, if the agreements coming under the categories mentioned in it do not fulfil the conditions which it lays down for the benefits of Article 85 (3) to be applied, these agreements must therefore fall under the prohibition in Article 85 (3) to be applied, these agreements must therefore fall under the prohibition in Article 85 (1) and be void in law. Such a measure is illegal because, whilst declaring that categories of agreements may be exempted, the regulation might on the contrary catch important categories of agreements which are perfectly compatible with the objectives of the Treaty, and even indispensable to the attainment of them.

For the various reasons given above, Articles 2 and 3 (f) of the Treaty together with Articles 87 and 85 (1) and (3) have been infringed, and the Council has thus committed a misuse of powers.

The *Council of the EEC* advances the view that Regulation No 19/65 has not changed the position of exclusive dealing agreements in any way as regards the requirements of Article 85 (1) of the Treaty. Article 1 of this Regulation authorizes the Commission to declare Article 85 (1) inapplicable to agreements of this type if they satisfy certain conditions, but 'without prejudice to the application of Regulation No 17/62 of the Council', Therefore an exclusive dealing

agreement which does not fit the descriptions in Article 85 (1) remains legal, and the parties retain the right to show that because of this they need no exemption from a prohibition which does not apply to their agreement.

Regulation No 19/65 has not created a more 'disturbing' situation for any agreement than that created by Article 85 (1) of the Treaty. All the kinds of agreements mentioned in Article 1 (1) (a) and (b) of the Regulation, whether they fulfil the conditions to be determined by the Commission or not, only fall within the prohibition if they fit the descriptions in Article 85 (1). They could be notified notwithstanding the fact that the said Article might not apply.

The only difference in treatment between exclusive dealing agreements which can or cannot benefit from the exemption granted by categories may be analysed as a favourable group assessment as regards the former and an individual assessment as regards the latter, both kinds of assessment leading either to the inapplicability of the prohibition (Article 85 (1)) or to the exemption (Article 85 (3)). The easing of the formalities required for certain agreements does not in any way pre-judge the result of the individual examination of the other agreements.

Thus Regulation No 19/65 has not provided that all the agreements coming under the categories mentioned therein fall within Article 85 (1) or (3) of the Treaty.

The *Government of the Italian Republic* stresses that great care is necessary to discover the misuse of powers from a consideration of the explicit objectives and the results indirectly attained. It sees in the fifth recital in the preamble to Regulation No 19/65 an indication of a punitive intent. It also sees in the seventh recital and in Article 4 (1) of the said Regulation an indication of a restrictive tendency as regards the agreements mentioned in Article 1 (1) (a) and (b); this tendency is confirmed by the statement in the last recital according to which 'there can be no exemption if the conditions set out in Article 85 (3) are not satisfied.'

To complete this collection of indications of a misuse of powers there is the express mention of Regulation No 153/62 made in the fifth recital to Regulation No 19/65, seeing that 'under the camouflage of mere administrative simplification' Regulation No 153/62 has 'indirectly begun to submit the agreements therein mentioned progressively to the vigour of Article 85 (1), except for some of them which benefit from the exemption in Article 85 (3)'.

Furthermore owing to a misuse of powers, Regulation No 19/65 again infringes Article 87 by catching vast categories of agreements which are nevertheless compatible with the objectives of the Treaty.

For the same reason Articles 2 and 3 (f) of the Treaty have also been infringed.

The *Council of the EEC* says that the misuse of powers referred to by the applicant 'would lie in bringing within the sphere of application of Article 85 agreements which do not come within it'.

However, agreements which do not fit the descriptions in Article 85 (1) are not covered by Regulation No 19/65. Thus they are neither exempted, nor indirectly subjected to the prohibition.

The interpretation given by the applicant of the intentions of the Council with reference to the fifth, the seventh and the last recitals and to Article 4 (1) of Regulation No 19/65 is not correct. In reality this Regulation consists of a mere easing of the procedure for exemption. The agreements not affected by this easing of procedure are definitely not, as the applicant would have it, 'all the agreements belonging to the categories mentioned in Regulation No 19/65 which do not fulfil the conditions laid down by the Commission in its implementing regulations but, on the contrary, all the agreements fitting the descriptions in Article 85 (1) for which the procedure for exemption has not been eased'.

Finally the Council expresses the view that 'the agreements which do not fit the descriptions in Article 85 (1) simply do not come into the picture'.

3. Third submission, that Articles 85, 86 and 222 of the Treaty have been infringed

   (a) *Article 1 (1) (a) of Regulation No 19/65*

The *Government of the Italian Republic* thinks that the Court has done no more than

admit the possibility and not the certainty of the application of Article 85 of the Treaty to 'vertical agreements' (Judgment in Case 13/61, *Bosch*, of 6 April 1962).

This Article in fact covers dealings between persons trading on the horizontal level, whereas Article 86 governs the relationships between persons trading at successive stages, vertically. Thus in an agreement of this latter type, containing an exclusive dealing clause, the two parties are outside Article 85 since they are not competitors. Where a vertical agreement produces results which are unfavourable to trade between Member States, it ceases to be legal not by virtue of Article 85 but of Article 86 which prohibits the abuse of dominant positions. Article 85 was not intended to protect the parties but was motivated by the desire to promote competition 'for third party' consumers as well. Accordingly there is no purpose in taking note of any particular phrase in subparagraphs (d) and (e) of Article 85 (1), since the wording of them is similar, indeed identical, to the wording of subparagraphs (c) and (d) of Article 86. Thus the abovementioned two subparagraphs in Article 85 should not be considered by themselves but related to the fundamental provision of Article 85 (1), just as the abovementioned two subparagraphs in Article 86 cannot be considered in isolation, but must be related to Article 86 (1) of which they are part.

The *Council of the EEC* says first that the application is vague in its reasons why Article 85 should not be applied to vertical agreements. The Council argues that the supposed legality of vertical agreements which distort competition, supported by the allegation that these agreements do not constitute an abuse of a dominant position, is contrary to Articles 2 and 3 (f), which require 'that competition in the Common Market is not distorted'. Furthermore this line of reasoning would lead to the proposition that Article 85 does not apply to horizontal agreements, because they come within the purview of Article 86. Besides, the Court has already decided that Article 85 can apply to vertical agreements (Judgment in Case 13/61). The application calls for a distinction between horizontal and vertical agreements, which the Treaty does not make.

In excluding vertical agreements from Article 85 under the mistaken pretext that the parties to them cannot be competitors with each other the applicant contradicts another of its asserrtions: the one where Article 85 is presented as 'not intended to protect parties to commercial agreements, but to ensure competition and to prevent the harmful effects which would also result for third party dealings because the free play of market forces had become distorted'. It is precisely as regards third parties (wholesalers and buyers on the market) that a vertical agreement could distort competition.

The proposition that Article 85 (1) does not apply to vertical agreements should be supported by evidence that such agreements either cannot affect trade between Member States or cannot distort competition in the Common Market. The Council says that it is all the more impossible to produce such evidence because agreements with an exclusive dealing clause, and also indeed the kinds of agreements described in Article 1 (1) (b) of Regulation No 19/56, can perfectly well restrict competition.

Finally the Council expresses doubts on the strength of the arguments in the application based on subparagraphs (d) and (e) of Article 85 (1). Whilst admitting that these provisions are similar to, indeed identical with, subparagraphs (c) and (d) of Article 86, it draws from this the conclusion that an agreement is forbidden when it fits the criteria stated not just on any one point in Article 85 (1) considered in isolation, but in Article 85 (1) as a whole.

The *Government of the Italian Republic* replies that Article 1 (1) of Regulation No 19/65 is directed at the relationship between a producer and an exclusive dealer. Yet any producer tends to penetrate the market as much as possible and thus to act in accordance with the aims of Article 2 of the Treaty. The means of this penetration depend on its sales organization. This organization may either be part of the producer's own undertaking (particularly if the undertaking is large) or take the form of granting a concession to someone else (as often happens with small undertakings). The choice depends on numerous factors which cannot be covered by any general

rule. Thus the distinction between these two methods cannot be of importance as regards the application of Article 85.

These considerations are clearer still as regards the exclusive dealing clause. When an undertaking distributes its own products itself, it organizes the supplies to its various outlets and prevents the activities of one of them from interfering with the activities of others. The applicant says that this situation is perfectly legal, and that it does not see why it should be any the less so where concessionnaires are used. For the needs are one and the same; they are for a rational sales organization which may take the form of a concession containing an exclusive sales area clause. Accordingly, no repressive intent can justifiably be read into such clauses.

The applicant asserts that Article 85 (1) corroborates this point of view; the expressions 'agreements between undertakings' and 'competition' which it uses should be considered as going hand in hand and linked with the objective sought in line with Article 3 (f) of the Treaty.

Given this interpretation, a contract between a producer and a concessionnaire is not an 'agreement between undertakings' within the meaning of Article 85, because all the producer has done is to transfer to the concessionnaire powers which are his own and which he could exercise himself. At the other end the concessionnaire carries out a function in the economy which is not substantially different from that of any other distributor. The instructions which the producer gives to the concessionnaire are not materially different from those which he would have given to his own employees if he had been distributing his goods himself. Therefore it is not the intention of Article 85 to attack this function of the economy.

The above analysis is confirmed by the concept of 'competition' in this Article. The supplier and the concessionnaire are not competitors as between each other, any more than the concessionnaire is a competitor with other concessionnaires of the same producer. The competition mentioned in Article 85 implies a legal power to take competitive measures, and this cannot therefore include the concessionnaire because the person giving him the concession has not transferred any such power to him. Competition between various concessionnaires of the same undertaking is inconceivable.

Furthermore the exclusive dealing agreement does not have as its object or its effect the creation of a situation on the market which is unfavourable to trade between Member States, or which distorts competition. The objective of the person granting the concession is to penetrate the market and thus to stimulate competition. If in penetrating the market he falls into wrongful practices, he can be called to order not under Article 85, but under Article 86. In such a case he has used a perfectly legal means of penetrating the market for a wrongful purpose.

The *Council of the EEC* is is the opinion that exclusive dealing agreements may come within Article 85 without asserting that 'all of them necessarily do so'. On the contrary the Council is opposed to the applicant's proposition that all these agreements 'necessarily do not do so'.

The Council complains that the Government of the Italian Republic has still not made it clear whether it is saying that the inapplicability of Article 85 to exclusive dealing agreements is because of their nature, or because of the fact that Article 86 could be applied to them. The Council also observes that Article 85 is not directed at agreements between 'competing' undertakings, but at agreements 'which have as their object or effect the prevention, restriction or distortion of competition within the Common Market.' The Council takes it that the applicant is not denying that exclusive dealing agreements are made between undertakings, but is saying that they are not 'agreements between undertakings' within the meaning of Article 85. However the applicant has not shown that exclusive dealing agreements, whatever their provisions may be, have no effect on the economy at large, and spend their force between the parties.

With a view to proving that an exclusive dealing agreement can never have an effect on competition between the parties, the applicant asserts that the parties cannot compete with each other by virtue of this agreement. This means referring to the con-

tent of the contract itself in order to prove that there is no competition between the parties, whereas in fact the right course is to prove that there is no competitive situation which the agreement can affect.
Competition between the parties is certainly conceivable, as is competition between them and third parties, or again between third parties themselves. Each of these instances of competition can be affected by exclusive dealing agreements.
Finally, the Council asserts that the applicant is in error first in replacing the concept of an exclusive dealing agreement by the concept of the 'internal relationship of the sale organization' and secondly in supposing that this type of agreement may come under either Article 86 or Article 85, but not under both.

(b) *Article 1 (1) (b) of Regulation No 19/65*

The *Government of the Italian Republic* feels all the more fortified in its interpretation of Articles 85 and 86 because as regards agreements relating to the use of industrial property rights Article 222 of the Treaty provides that the rules in Member States governing the system of property ownership shall in no way be prejudiced. The idea that Article 85 might apply should therefore be discarded in favour of the application of Article 86, because, whilst the latter Article lays down rules concerning the abuse of a dominant position, it does not take account of the cause giving rise to the abuse, and prohibits the abuse as such, without interfering in agreements transferring property rights. Accordingly, Regulation No 19/65 of the Council is in conflict with Articles 85, 86 and 222 of the Treaty.
The *Council of the EEC* observes that the said regulation in no way prejudices the rules in Member States governing the system of property ownership notwithstanding the fact that subject to certain conditions it provides that the prohibition may be lifted as regards agreements 'which include restrictions imposed in relation to the acquisition or use of industrial property rights'. If Article 222 were to interfere with the application of Article 85, it would similarly interfere with Article 86, although the applicant accepts the proposition that the latter applies to vertical agreements.
The *Government of the Italian Republic* says that the reasoning which it has elaborated with reference to Article 1 (1) (a) of Regulation No 19/65 also applies to Article 1 (1) (b), subject however to one important addition.
In transferring goods with the industrial property rights attached thereto, the transferor is in fact using property rights which are guaranteed to him by the Member States and by Article 222 of the Treaty. Thus it is inconceivable that Regulation No 19/65 can invite the Commission to regulate the use of industrial property rights, which are inalienable. It is equally inconceivable that an agreement relating to these same rights, to be valid, has need of the use of the special exemption in Article 85 (3) and that it can be declared void by virtue of Article 85 (1).
Accordingly Article 85 does not cover business agreements of this type, and the argument of the Council, seeking to equate Articles 85 and 86 as regards industrial property rights, should be discarded as inaccurate. For the effect of Article 85 is to void the agreement itself, whereas Article 86 is not directed at the contract itself, which remains valid, but at measures intended to eliminate a given undesirable situation.
The *Council of the EEC* stands by its arguments and adds that 'any discussion about the scope of Article 222 is not relevant to this case because Regulation No 19/65 does not have either as its object or effect the regulation of industrial property rights'.

B — *As to the alternative head of the application, that Regulation No 17/62 of the Council is inapplicable*

1. The object of the application

The *Government of the Italian Republic* observes that Article 4 (2) of Regulation No 17/62 exempts certain kinds of agreements from notification, and thus establishes rules which automatically and totally exclude certain agreements from the prohibition set out in Article 85 (1) of the Treaty. Nevertheless this does not mean that any kind of agreement not described in the said Article 4 (2) must necessarily fall within the prohibition laid down by Article 85 (1) of the Treaty. Nor does it mean that if any such

kind of agreement does fall within the said prohibition, then no declaration of inapplicability under Article 85 (3) may be made. This interpretation is supported first by Articles 2, 4 and 5 of Regulation No 17/62, secondly by the recitals in the preamble to the said Regulation, especially the fifth, and finally by point IV of form B annexed to Regulation No 27/62 of the Commission, which permits precautionary notification, whilst at the same time authorizing the making of a declaration, after an investigation, that Article 85 (1) does not apply.

Thus by virtue of Article 184 of the Treaty, subparagraph (2) (a) and (b) of Article 4 (2) and Article 5 (2) of Regulation No 17/61 of the Council should be declared inapplicable, should the present dispute call the said Regulation in question.

2. Admissibiliy

The *Council of the EEC* first of all denies that the Government of the Italian Republic may rely on Article 814 in order to request a declaration that Article 4 (2) and Article 5 (2) of Regulation No 17/62 are inapplicable. For such a request to be admissible it would be necessary, in accordance with the judgments in Case 9/56 and Joined Cases 31 and 33/62 for this Regulation to constitute the 'legal basis' for Regulation No 19/65 since it is the request for the annulment of the latter which is the main issue in the present proceedings. Yet this is certainly not the position, because the said Regulation No 19/65 is 'directly based' on the Treaty.

Furthermore the intentions behind Regulation No 19/65 have no connexion with Articles 4 and 5 of Regulation No 17/62 since the said Regulation No 19/65 removes the prohibition in Article 85 (1) from certain categories of agreements, and Regulation No 17/62 introduces an obligation to notify. The fact that these two Regulations both assume the same interpretation of Article 85 (1) namely that it is applicable to vertical agreements, cannot be enough to allow recourse to Article 184. There is no sufficient relation between the two regulations at issue for the possible inapplicability of Regulation No 17/62 to have any other result than the abolition of all exemptions from the obligation to notify agreements.

The *Government of the Italian Republic* denies that this defence lends itself to a preliminary ruling and says that in reality it is a matter of substance.

The applicant sets up Article 184 against all arguments based on the existence of regulations prior to Regulation No 19/65, and not hitherto contested. The decision whether or not the present dispute involves Regulation No 17/62 is for the Court.

The Council has already agreed in its statement of defence that the three regulations with which these proceedings are concerned are based on the same interpretation of Article 85. Therefore the illegality of one of these cannot but affect the others.

Finally since the Council refers to Regulation No 17/62 in support of its submissions in favour of Regulation No 19/65, it has recognized the close relationship between these two regulations.

3. Substance

The *Council of the EEC* argues alternatively and as a matter of substance that Article 4 (2) of the said regulation does not have the objective alleged in the application. The intention of this provision is to exempt certain kinds of agreement from the obligation to notify laid down in Article 4 (1), and it does not purport to decide whether Article 85 (1) of the Treaty applies or not. The last sentence of Article 4 (1) makes this point clear.

On the other hand any agreement not described in Article 4 (1) of the regulation but fitting the descriptions in Article 85 (1) must be notified. This is particularly so as regards all exclusive dealing agreements, whose effects go beyond merely restricting the freedom to fix prices, or determine the terms of business of one of the undertakings upon the resale of goods acquired from the other.

The *Government of the Italian Republic* takes the view that this interpretation of Regulation No 17/62 by the Council does not lead to excluding certain agreements from the prohibition in Article 85 (1) automatically, but only to making notification of them not compulsory. The said agreements may nevertheless be voided at any time.

C — *As to the alternative head of the application, that Regulation No 153/62 of the Commission is inapplicable*

1. The object of the application

The *Government of the Italian Republic* considers that the Commission, by introducing a simplified procedure in Article 1 of its Regulation No 153/62, appears to have adopted a course which naturally leads to subjecting exclusive dealing agreements to Article 85 (1) or (3) whilst reserving to itself the right to declare that no action on its part is called for, either under Article 85 (1) or under Article 86. This situation constitutes an infringement of Article 87 and of Article 85 (1) and (3) together with an infringement of Articles 2 and 3 (f) of the Treaty, and constitutes a misuse of powers. Accordingly, under Article 184 of the Treaty, Regulation No 153/62 of the Commission is inapplicable if it becomes an issue in the present dispute.
Finally, it is argued that Regulation No 153/62 is illegal for the same reasons as those advanced against Regulation No 19/65 of the Council.

2. Admissibility

(a) *First objection of the Commission: its capacity as a defendant*

The *Commission* calls in question the service of the application on it by the Registry under Article 39 of the Rules fo Procedure, thus making it a defendant, and doubts whether the Government of the Italian Republic really intended making it a defendant. This doubt is inferred from the heading of the application which is directed not against it but against the Council 'and also as regards' the Commission.
This doubt is confirmed by the fact that the Commission is not concerned by the first two heads of the application which call for the annulment of two regulations of the Council. The final reason for the doubt is that the inapplicability of the regulation may be called in question when the dispute is examined. Thus the Government of the Italian Republic has not clearly made the Commission a party to the action. It has only reserved the right to join it at a later stage of the proceedings.
The Commission accepts the proposition of the Italian Government that when the main dispute is between parties not including the institution which has promulgated the regulation in issue within the meaning of Article 184, that institution must be joined as a party to the proceedings. Nevertheless since no principal head of the application is brought against it, the Commission denies that it is properly a defendant.
Finally, although the Commission states that 'it has only raised a single objection' on the subject of admissibility because the conditions for the application of Article 184 are not fulfilled, it adds nevertheless that it would be 'inaccurate to say' as the applicant does that 'the first defence of inadmissibility seems to have been overtaken and to have been dropped' in so far as the early doubt raised by the Commission as to whether it is properly a party to the proceedings may have been removed.
Although the Commission admits that when the main dispute is between two parties neither of which is the institution which has promulgated the regulation 'in issue within the meaning of Article 184', this institution must be joined as a party to the proceedings, this is admitted subject to the express reservation that 'the conditions for applying Article 184 must be fulfilled both in fact and in law'. The Commission asserts that the burden of proving that these conditions are fulfilled is on the applicant. Thus in this case it is not enough that the dispute may concern Regulation No 153/62. The applicant must also prove a causal connexion in law between this regulation and the regulation which is the main head of the application.
The *Government of the Italian Republic* replies that it cannot be denied, for two reasons, that the Commission is the defendant.
First, a ruling on the inapplicability of a regulation sought under Article 184 may concern a measure which was not introduced by the institution which is the defendant to the main head of the action, but by a different one. Thus the institution responsible for the regulation in issue under Article 184 cannot be kept out of the present

proceedings and consequently there is no point in complaining that the applicant has put the Commission into a situation in which it can state its position on one of its own regulations which is claimed to be inapplicable.

The second reason is that, although the Commission is only joined as a defendant in the alternative, it is undeniably a defendant because a request under Article 184 for a declaration that a regulation is inapplicable may be made not only on an interlocutory basis but also as an alternative argument in the main action. This is why the applicant uses expressions intended to bring out this distinction without giving the Commission the opportunity to deny that it is a defendant as regards this part of the application.

(b) *Second defence of the Commission: inadmissibility*

The *Commission* expresses doubts as to whether a Member State can use Article 184 which is intended to protect individuals, and also reminds the Court that the Italian Government has not exercised its right to bring an application against the regulation in question within the prescribed period; the Commission also contends that there is no sufficient connexion between Regulations Nos 153/62 and 19/65.

The first of these regulations is about the simplified notification procedure which 'may' be used for certain exclusive dealing agreements, and notification does not consist of anything other than a duty imposed by Regulation No 17/62. The second is directed at another matter in that it empowers the Commission to apply the exemption in Article 85 (3) to whole categories of agreements. Therefore 'no bond of interdependence recognizable at law' exists between these two measures.

When the period within which an application must be lodged has expired, the illegality of a measure may only be argued in reliance on Article 184 if this measure constitutes the 'legal basis of the application'. The case-law resulting from the judgments in Case 9/56 and Joined Cases 31 and 33/62 requires a 'genuine bond recognizable at law' between the two measures. Yet, according to the Commission, the Government of the Italian Republic nowhere asserts that Regulation No 19/65 is 'based' on Regulation No 153/62. Furthermore it is inconceivable that the latter might constitute 'the legal source' of the former.

Finally the Commission argues that the application only invokes Article 184 'simply so as to obtain the extension of the effects of the supposed nullity of a measure to all the earlier measures showing the same characteristics', in other words to circumvent the time-limit laid down in Article 173. Whilst agreeing that if Regulation No 19/65 of the Council were to be declared null and void, this could have practical consequences as regards Regulation No 153/62, the Commission stresses that this point has nothing to do with the application of Article 184. It concludes from this that 'the conditions under which an application may be made are not present in this case and therefore the request may not be presented'.

The *Government of the Italian Republic* says that this submission in defence is not in fact an objection of inadmissibility. For the question whether or not the dispute calls Regulation No 153/62 in issue cannot be decided separately from the investigation of Regulation No 19/65, particularly since the defendants have admitted that the three regulations with which these proceddings are concerned are based on the same interpretation of Article 85 (1).

(c) *Objection of inadmissibility raised by the Council*

The *Council* argues against the admissibility of this head of the application for the same lack of a connexion with Regulation No 19/65 as has already been argued in the case of Regulation No 17/62.

Regulation No 153/62 is all the more unassailable under Article 184 because Regulation No 19/65 of the Council is directly based on the Treaty, whilst Regulation No 153/62 of the Commission is based only on another regulation; Regulation No 19/65 of the Council thus constitutes 'a higher order of legislation, which therefore cannot in any circumstances be based on the aforesaid regulation of the Commission'.

The *Government of the Italian Republic* denies that this submission in defence lends

itself to any preliminary ruling, and asserts that it involves questions of substance.

The applicant applies to Regulation No 153/62 the argument already put forward concerning the admissibility of its conclusions against Regulation No 17/62. However it adds that, since the fifth recital of Regulation No 19/65 uses arguments based on Regulation No 153/62, to annul the first could hardly go without consequences for the second.

3. Substance

The *Council of the EEC*, in reply to the applicant's arguments observes that in its view Regulation No 153/62 has no other object than to simplify, as regards certain exclusive dealing agreements, the notification procedure introduced by Regulation No 17/62 whilst the other agreements of this type remain subject to the procedure which continues unchanged with reference to the provisions of Article 85 (1) of the Treaty.

At all events undertakings may, upon notifying an agreement whether under the simplified or unsimplified procedure, assert that Article 85 (1) of the Treaty does not apply.

The *Commission* takes the submissions of the Italian Government in support of the proposition that Regulation No 19/65 is illegal as applying to Regulation No 153/62 as well, for the said submissions state that both of these measures are illegal for precisely the same reasons.

First the argument to the effect that Articles 87 and 85 have been infringed does not apply to Regulation No 153/62. All this regulation does is to introduce a simplified type of form for the notification prescribed by Regulation No 17/62 of the Council. Even though the adoption of a simplified procedure takes place within a given system, this cannot in itself infringe the Articles of the Treaty which the said system is applying wrongly.

Secondly the argument that there has been a supposed misuse of powers is just as unsound with regard to Regulation No 153/62 as to Regulation No 19/65. To adopt a simplified procedure does not in itself mean extending the application of Article 85 (1) to all exclusive dealing agreements.

Thirdly the argument according to which vertical agreements do not come under Article 85 cannot be made to apply to Regulation No 154/62. On this subject the judgment of the Court of Justice in Case 13/61 on the applicability of Article 85 to vertical agreements could be invoked, as could the argument already developed by the Council.

Finally, Regulation No 153/62 introduces a limited set of rules fitting into a more general system, and it has not been shown that this system is illegal.

The *Government of the Italian Republic* replies first that one of the recitals in the preamble to Regulation No 19/65 which refers to Regulation No 153/62 proves that the latter is not innocuous and is not limited to introducing a simplified form. It constitutes the regulation by which the Commission, with the aid of Regulation No 19/65 of the Council, began progressively to subject exclusive dealing agreements to the provisions of Article 85 (1).

The final introductory recital to Regulation No 153/62 reveals the intention to upset the scheme of Article 85. This intention also appears from the first paragraph of Article 1 of the same regulation, and from the elements linking this with Regulation No 17/62, especially Article 4 thereof. All these factors involve a disregard for Articles 87 and 85 of the Treaty.

Further, a misuse of powers can very clearly be seen in the succession of regulations which preceded Regulation No 19/35. They are all based on the same line of thinking, and their real purpose only became clear after Regulation No 19/65 had been adopted, even though prior to that their apparent purpose was only administrative simplification.

Finally, it is asserted that the Commission has itself agreed that Regulation No 153/62 has 'partly created a system of control' as regards exclusive dealing agreements coming within the scheme of Article 85 (1). Thus Regulation No 153/62 forms part of the general illegal activity of extending Article 85 to exclusive dealing agreements. Furthermore the judgment in Case 13/61 has not decided this general question.

The *Commission* says first that it has always denied that the principle that everything

which is not authorized is forbidden has been applied. Notwithstanding what has been asserted to the contrary, the easing of the procedures provided for by Regulation No 17/62 is only justified for the kinds of agreements to which Regulation No 19/65 refers, and not for others. However these other kinds of agreements definitely do not include all the exclusive dealing agreements, to which Regulation No 19/65 does not apply; they only include the ones which fit the descriptions in Article 85 (1), and which do not come within the categories for which the notification procedure has been eased. Regulation No 153/62 cannot have had the effect of bringing under Article 85 (1) agreements which, but for this regulation, would have been beyond the reach of Article 85.

The Commission is of the opinion that it has proved that the legal relationships within a sales organization between persons in business at upper and lower levels come within the scope of Article 85, because in these relationships it is possible to find the factors which constitute the situations envisaged in this article. Another and better approach is simply to consider whether the agreement has or has not produced effects 'on competition within the Common Market.'

The fact that Article 85 applies cannot preclude the application of Article 86.

IV — Procedure

The application of the Government of the Italian Republic was lodged at the Court Registry under No 18,361 on 31 May 1965.

The Council of Ministers of the EEC lodged its statement of defence on 28 July 1965.

On 5 July 1965 the Commission of the EEC lodged a submission pursuant to Article 91 of the Rules of Procedure, in which it set out its conclusion that the application of the Government of the Italian Republic was inadmissible in so far as it claimed that the Court should declare that Regulation No 153/62 was inapplicable.

In its submission lodged on 15 November 1965, the Government of the Italian Republic opposed the request lodged by the Commission, and replied to the Council.

By order dated 18 November 1965, the Court reserved its decision on the request presented by the Commission for the final judgment.

The Commission lodged its statement of defence on 21 December 1965, and the Italian Government lodged its reply on 18 January 1966.

The rejoinders of the Council and of the Commission were lodged on 15 February and 11 February 1966 respectively.

The President of the Court allocated the case to the First Chamber for the purposes of such measures of inquiry as might appear necessary, and designated Mr Robert Lecourt as the Judge-Rapporteur.

The oral arguments were presented at the hearing on 1 March 1966.

The Advocate-General delivered his reasoned oral opinion at the hearing on 22 March 1966.

Grounds of judgment

The Italian Government has brought an application against the Council of the EEC and, in so far as necessary, against the Commission. The application is mainly for the annulment of Regulation No 19/65 of the Council, dated 2 March 1965, relating to the application of Article 85 (3) of the Treaty establishing the EEC to categories of agreements and concerted practices.

The application also asks, in reliance on Article 184 of the said Treaty, for a declaration that the following measures are inapplicable: subparagraph (2)(a) and (b) of Article 4 (2) and Article 5 (2) of Regulation No 17/62 of the Council, dated 6 February 1962, providing for the notification of agreements in favour of which interested parties wish to claim the benefit of Article 85 (3).

Finally, and again relying on Article 184 of the EEC Treaty, the application asks for a declaration that Regulation No 153/62 of the Commission, dated 21 December 1962, introducing simplified methods for notifying certain agreements known as exclusive dealing agreements, is inapplicable.

The main relief asked for, that Regulation No 19/65 of the Council be annulled

Under Regulation No 19/65, adopted by virtue of Article 87 of the Treaty, the Council conferred upon the Commission the power to grant, by means of regulations and subject to certain conditions, the benefit of the exemption contained in Article 85 (3) to certain categories of agreements to which only two undertakings are parties.

The application for the annulment of the said Regulation, which is made in due form, claims that the Regulation was adopted in breach of Articles 2, 3 (f), 85, 86, 87 and 222 of the Treaty, and that it amounts to a misuse of powers.

The first submission, that Article 87 has been infringed

The first argument used against Regulation No 19/65 is that it lays down provisions concerning the exemptions in Article 85 (3) withouth aving first defined the scope of the prohibition imposed by Article 85 (1) and that in defining the exception before having explicitly stated the rule to which the exception is made, the said regulation has disregarded Article 87 and infringed the principle according to which everything is permitted which has not been forbidden, and replaced it by the converse principle under which everything is forbidden which has not been authorized.

By Article 87 of the Treaty the Council 'shall... adopt any appropriate regulations or directives to give effect to the principles set out in Articles 85 and 86'.

It is for the Council to decide whether a particular regulation is 'appropriate' and it may come to such a decision on a given point without having to deal exhaustively with the whole of Articles 85 and 86; it may therefore apply the exemption set out in Article 85 (3) by means of a regulation if it thinks fit. It does not follow from this that everything which has not been exempted is to be presumed to be forbidden.

Furthermore Article 85 (3) of the Treaty provides that the exemption in question may be granted to categories of agreements. The need of undertakings to know their legal position with certainty could justify giving priority to the use of this power, which does not require the Council to adopt rules simultaneously for applying the other provisions of the said article. Thus, without disregarding

Article 87, the Council was entitled to rely on Article 85 (3) as its authority for adopting a regulation covering the exemption of categories of agreements. It was in a position to do this without bringing about any alteration in the principles set out in Article 85 (1) and without foregoing its right to make any further regulation applying any other provision of the said Article 85 to agreements not provided for by the regulation at issue.

The second submission, that there has been both an infringement of Article 85 and a misuse of powers

It is argued against Regulation No 19/65 first that it infringes Article 85 (1) and (3) and at the same time Articles 2 and 3 (f) of the Treaty; secondly that the regulation constitutes a misuse of powers in assuming that all the agreements coming within the exempted categories properly fall within the absolute prohibition in Article 85 (1), and thus in regarding the descriptions set out in Article 85 (1) as properly met not only by the categories exempted by the said regulation, but also by all agreements of the kind mentioned in the said categories made between more than two undertakings, or between two undertakings but without fitting one of the descriptions laid down in Article 1 of the said regulation.

Article 85 lays down the rules on competition applicable to undertakings in Part Three of the Treaty which covers the 'policy of the Community'. It aims at bringing about the 'activities of the Community' mentioned in Article 3 and in particular 'the institution of a system ensuring that competition in the Common Market is not distorted', and this is in order to arrive at 'establishing a Common Market' which is one of the fundamental objectives set out in Article 2.

Article 85 as a whole should be read in the context of the provisions of the preamble to the Treaty which clarify it and reference should particularly be made to those relating to 'the elimination of barriers' and to 'fair competition' both of which are necessary for bringing about a single market.

Article 85 is arranged in the form of a rule imposing a prohibition (paragraph (1)) with a statement of its effects (paragraph (2)) mitigated by the declaration of the power to grant exceptions to this rule, with provision for exemptions for categories of agreements (paragraph (3)).

Whether an agreement is caught by Article 85 (1) and whether it benefits from the exemption in Article 85 (3) are questions which do not depend on the same conditions or have the same consequences. It is therefore of interest to undertakings to see limits set to the scope of each of these two provisions by such regulations as may be made.

Whilst it is true that to grant the benefit of Article 85 (3) to a given agreement

presupposes that this agreement falls within the prohibition imposed by Article 85 (1), the authorization in Article 85 (3) to grant this same benefit to categories of agreements does not imply that because a particular agreement comes within these categories it necessarily fits the descriptions set out in Article 85 (1).

In empowering the Council to authorize exemptions to categories of agreements 85 (3) only requires it to exercise this power as regards categories of agreements which fit descriptions in Article 85 (1). A Council regulation would indeed have no purpose if the agreements in the categories defined by it could not fit the said descriptions. However, to define a category is only to make a classification and it does not mean that the agreements which come within it all fall within the prohibition. Nor does it mean that an agreement within the exempted category, but not exhibiting all the features of the said definition, must necessarily fall within the prohibition. Therefore to grant exemptions by categories cannot amount, even by implication, to passing any pre-conceived judgment on any agreement considered individually.

Regulation No 19/65 does not contravene these principles. Article 1 (1) of the said Regulation provides that the Commission may 'by regulation declare that Article 85 (1) shall not apply to categories of agreements to which only two undertakings are party' and which contain certain provisions found in exclusive dealing agreements. By paragraph (2) of the same Article the regulation which the Commission is to adopt 'shall define the categories of agreements to which it applies and shall specify in particular: (a) the restrictions or clauses which must not be contained in the agreements; (b) the clauses which must be contained in the agreements, or the other conditions which must be satisfied'.

Thus the said regulation limits itself to outlining the action which the Commission is to take, while leaving it to the latter to make clear what conditions an agreement must fulfil in order to benefit from an exemption given to a category of agreements.

The Regulation is made under Article 85 (3) and not Article 85 (1) as appears from the heading and the recitals in the preamble. Therefore it does not create any presumption of law concerning the interpretation to be given to Article 85 (1). Since the intention of the said regulation is to exempt from prohibition categories of agreements and concerted practices, it cannot have the effect, even by implication, of bringing under the prohibition in Article 85 (1) categories for which it proposes favoured treatment or of assuming to the detriment of any particular agreement that the terms of the said Article are properly applicable. Thus the regulation in dispute could not alter the requirements to be satisfied before there can be a finding in each case, considered separately, that the characteristics leading to the prohibition in Article 85 (1) are present. Thus the doubts, expressed by the applicant, which might arise from the drafting of Regulation No 19/65 are not such as to establish that the system set up by Article 85 has been wrongly applied.

Regulation No 19/65 limits itself to authorizing the Commission to lift the prohibition from the agreements described therein in advance and by categories. It does so only in so far as the said agreements may possibly fall within the prohibition contained in Article 85 (1), and in doing so it neither infringes Article 85 (2) nor Article 3 (f) of the Treaty, nor does it give rise to a misuse of powers.

The third submission, that Articles 86 and 222 of the Treaty have been infringed

A first series of complaints is brought against the contested regulation in that by Article 1 (1)(a) thereof it treats exclusive dealing agreements as falling not under Article 86 on the abuse of a dominant position, but under Article 85, this latter Article being applicable only to agreements between businesses acting at the same level ('horizontal agreements') whilst agreements between businesses operating at successive levels ('vertical agreements') come only under Article 86, which has thus been disregarded along with Article 85.

Neither the wording of Article 85 nor that of Article 86 justifies interpreting either of these Articles with reference to the level in the economy at which the undertakings carry on business. Neither of these provisons makes a distinction between businesses operating in competition with each other at the same level or between businesses not competing with each other and operating at different levels. It is not possible to make a dinstiction where the Treaty does not make one.

It is not possible either to argue that Article 85 can never apply to an exclusive dealing agreement on the ground that the grantor and grantee thereof do not compete with each other. For the competition mentioned in Article 85 (1) means not only any possible competition between the parties to the agreement, but also any possible competition between one of them and third parties. This must all the more be the case since the parties to such an agreement could attempt, by preventing or limiting the competition of third parties in the product, to set up or preserve to their gain an unjustified advantage detrimental to the consumer or the user, contrary to the general objectives of Article 85. Therefore even if it does not involve an abuse of a dominant position, an agreement between businesses operating at different levels may affect trade between Member States and at the same time have as its object or effect the prevention, restriction or distortion of competition and thus fall under the prohibition in Article 85 (1). Thus each of Articles 85 and 86 has its own objective and so soon as the particular features of either of them are present they apply indifferently to various types of agreements.

Finally, there is no point in making a comparison between the situation, falling under Article 85, of the producer linked by an exclusive dealing agreement to the distributor of his products and the situation of the producer incorporating by some means the distribution of his products in his own organization, for example by means of commercial agents and so circumventing Article 85. These situations

are legally distinct. Furthermore they give different results, for two methods of distribution, one of which is incorporated into the producer's business whereas the other is not, are not necessarily equally efficient. It is admittedly true that the wording of Article 85 makes the prohibition applicable, subject to the presence of the other factors described, to an agreement between a number of undertakings, and therefore excludes the case of a single undertaking which incorporates as part of its activities its own distribution network. However this does not mean that by a mere business analogy, which anyhow is incomplete and contradicts the wording in question, the contractual situation arising from an agreement between a producer undertaking and a distributor undertaking must be considered legal.

Moreover, as regards the position of a single undertaking as described above, the intention in Article 85 of the Treaty is to respect the internal organization of an undertaking and only to question it, by way of Article 86, if it reaches a point where it amounts to an abuse of a dominant position. But the Treaty cannot have the same reservations about barriers to competition resulting from an agreement made between two different undertakings, which it is normally sufficient to prohibit.

Thus it cannot be denied that an agreemtnt between a producer undertaking and a distributor undertaking is an example of 'agreements between undertakings'.

An agreement between producer and distributor intended to restore national partitioning in trade between Member States could be such as to run counter to the most fundamental objectives of the Community. The preamble to and the body of the Treaty are aimed at removing barriers between States and in many provisions the Treaty firmly opposes their re-appearance. It could not allow undertakings to recreate such barriers.

Article 85 (1) is in accord with this objective even where undertakings situated at different levels in the economic process are concerned.

Thus none of the provisions mentioned in this first set of complaints has been infringed.

In a second set of complaints the Italian Republic claims that Article 1 (1)(b) of the contested regulation has infringed Article 222 of the Treaty, inasmuch as it has improperly interfered with the exercise of industrial property rights.

Article 222 provides only that the 'Treaty shall in no way prejudice the rules in Member States governing the system of property ownership'.

Article 1 (1)(b) of Regulation No 19/65 authorizes the Commission to grant exemptions from the prohibition by categories to agreements coming within the

said categories 'which include restrictions imposed in relation to the acquisition or use of industrial property rights'. In doing so, in so far as Article 222 might be concerned, the regulation has not prejudiced in any way the rules in Member States governing the system of property ownership.

In making the provisions therein contained the disputed measure has, without infringing Article 222, correctly relied on the generality of the wording of Article 85 which covers 'all agreements between undertakings' to enable it to exempt from the prohibition agreements containing restrictions relating to industrial property rights.

It follows from all the above considerations that the application for the annulment of Regulation No 19/65 must be dismissed.

The subsidiary heads of the application, concerning the arguments that Regulations Nos 17/62 of the Council and 153/62 of the Commission are inapplicable

Relying on Article 184 of the Treaty, the Government of the Italian Republic has, in the same application, requested that certain provisions of Regulations Nos 17/62 of the Council and 153/62 of the Commission be declared inapplicable.

The Council and the Commission have raised an objection of inadmissibility against this part of the application, arguing in particular that these regulations do not constitute the legal basis for Regulation No 19/65, the annulment of which is requested under the principal head of the application and cannot therefore be the subject of proceedings as provided for in Article 184 of the Treaty.

This article provides that any party may, in proceedings in which a regulation is in issue, plead the grounds specified in the first paragraph of Article 173, in order to invoke the inapplicability of that regulation. The intention of the said article is not to allow a party to contest at will the applicability of any regulation in support of an application. The regulation of which the legality is called in question must be applicable, directly or indirectly, to the issue with which the application is concerned.

There is no necessary connexion between Regulation No 19/65 and the contested provisions of the two regulations the inapplicability of which is invoked because Regulation No 19/65 is directed towards exempting certain categories of agreements from the prohibition in Article 85 (1), whereas Regulation No 17/62 imposes an obligation to notify and Regulation No 153/62 introduces a simplified notification procedure in certain circumstances.

So far as the present dispute is concerned Regulation No 19/65 is not sufficiently

related to the other two regulations for the possible inapplicability of the latter to have any repercussions on its legality. Furthermore if the said regulation which is the subject of the main application were annulled, this would not necessarily involve the inapplicability of the others.

Finally, since the main application has been declared unfounded, the requests for declarations of inapplicability which are based on it have no purpose.

Therefore the said requests are inadmissible.

Costs

The applicant has failed in its application.

Under Article 69 (2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community, especially Articles 2, 3, 85, 86, 87, 173, 184 and 222;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities, especially Article 69,

THE COURT

hereby:

1. **Dismisses Application 32/65;**
2. **Orders the applicant to bear the costs of the proceedings.**

Hammes Delvaux Donner

Trabucchi Lecourt

Delivered in open court in Luxembourg on 13 July 1966.

A. Van Houtte — Registrar

Ch. L. Hammes — President