

3. The agreement referred to by the national court could not, in the absence of notification to the Commission in accordance with Article 4 (1) of Regulation No 17 of the Council of 6 February 1962, be the object of a declaration of inapplicability under Article 85 (3) of the Treaty.
4. Since the agreement referred to by the national court is not an agreement "to which only two undertakings are party" within the meaning of Article 1 (1) of Regulation No 19/65 of the Council of 2 March 1965 and of Regulation No 67/67 of the Commission of 22 March 1967, it does not come within the categories of agreements which, under the aforesaid regulations, may be exempted from the application of Article 85 (1) of the Treaty.

Mertens de Wilmars Pescatore Mackenzie Stuart O'Keefe Bosco
Touffait Due Everling Chloros

Delivered in open court in Luxembourg on 16 June 1981.

A. Van Houtte
Registrar

J. Mertens de Wilmars
President

OPINION OF MR ADVOCATE GENERAL REISCHL
DELIVERED ON 25 MARCH 1981 ¹

*Mr President,
Members of the Court,*

Mrs Maria Salonia is the proprietor of a retail business dealing in stationery, books, newspapers, perfumes and haberdashery in Ragusa. Since 23 February 1978, she has been in possession of the requisite licence issued by the authorities.

On 17 April 1978, and again on 20 April, she requested Mr Giorgio Poidomani and Mrs Franca Baglieri, née Giglio, as proprietors of warehouses for the supply newspapers and periodicals in Ragusa, to supply her with newspapers and periodicals but met with a refusal. On 21 September 1978, Mrs Salonia instituted

¹ — Translated from the German.

proceedings in order to obtain delivery of newspapers and periodicals as well as compensation for the damage suffered as a result of what she alleged was an instance of unfair competition within the meaning of Article 2598 of the Italian Civil Code.

The proprietors of the warehouses in question submitted in their defence that no dealer was obliged to supply publications of the press to retailers, including commercial retailers, on the ground that the distribution system for newspapers and periodicals was the subject of a national agreement dated 23 October 1974, concluded between the publishers' and newsagents' associations, which governed the distribution of daily newspapers and of periodicals.

According to Article 2 of this agreement "in communes with over 2 500 inhabitants, publishers ... may supply their publications for sale only to persons who are in possession of a licence authorizing them to pursue the occupation of newspaper retailer issued [formerly] by an Inter-Regional Joint Committee and now by the National Committee for the Distribution of Daily Newspapers and Periodicals".

Article 4 of the agreement states that:

"Retailers shall:

...

- (1) obtain and receive publications which they wish to offer for sale exclusively from the publishers or their distributors and any supplies derived from other sources shall not be permissible".

In order to ensure compliance with the obligations entered into by the retailers,

the agreement provides for the imposition, where appropriate, of various penalties, by the Inter-Regional Joint Committees (Article 11).

Furthermore, Article 1 of the Rules Governing the Functioning of the Inter-Regional Joint Committees for the Resale of Daily Newspapers and Periodicals, which are connected with the aforesaid agreement, stipulates that:

"The Inter-Regional Joint Committees provided for in Article 12 of the National Agreement Regulating the Resale of Daily Newspapers and Periodicals shall be responsible for:

...

- (c) issuing recipients of the concession to start a new independent sales outlet with a licence for the supply of publications of the press from the publishers or their distributors,

granting the proprietors of independent sales outlets authorization to operate any newly-created subsidiary sales outlets."

The issue of a licence for the supply of publications of the press is conditional, *inter alia*, on the payment of a sum of money, the details of which are set out in Article 7 of the Rules.

Since the plaintiff was not in possession of such a licence and had not entered into a "contractual relationship of a fiduciary nature" with the publishers, the proprietors of the warehouses in question, who are merely agents of the publishers but are not empowered to represent them, could not agree to the plaintiff's request in the absence of appropriate instructions from the publishers. In this connexion, the defendants refer to a letter dated 26 July 1974 from the publishers' association to the distributors in Ragusa from which they

deduce that the action should have been brought against the publishers.

The Tribunale Civile, Ragusa, hearing the action at first instance, takes the view, on the basis of Judgment No 2387 of the Court of Cassation of 4 September 1962, that an agreement of the kind at issue is not contrary to national law since it takes the form of a contract for the supply of goods on sale or return within a specified period ("contratto estimatorio") which is governed by the principle of freedom of contract. In its opinion, however, the agreement may come within the scope of Articles 85 and 86 of the EEC Treaty and it has accordingly referred to the Court of Justice pursuant to Article 177 the following questions:

1. Does this "agreement" constitute a national agreement protecting the market in the distribution and sale of all types of newspapers, national and foreign, is it an infringement of the prohibition on agreements laid down by Article 85 of the Treaty, and, having regard to the special provisions governing admission to the newspaper trade, the minimum requirements, the obligations and penalties imposed upon retailers, does the agreement lead to a distortion of the conditions of competition?
2. Is not the said agreement incompatible with and does it not therefore come within the prohibition laid down by Article 85 (1) of the Treaty to the extent to which it creates discrimination against retailers, in spite of the proper licence for the sale of newspapers issued to them by the competent administrative authority, merely because they do not agree to obtain a licence to engage in the retail trade, the issue of which is, under the provisions of the said agreement, left to the discretion of

the Inter-Regional Joint Committees (and now the National Committee for the Distribution of Daily Newspapers and Periodicals)?

3. Does not the agreement interfere with freedom of competition, in which the choice expressed by consumers determines the number of sales outlets for newspapers, in the same way as the rules regulating the market applied by The Netherlands Association of Dealers in Bicycles and Related Goods, which contain principles and restrictions similar to those of the agreement on daily newspapers and which were prohibited by the Commission (Decision of 2 December 1977, Official Journal L 20 of 25 January 1978)?
4. May the clauses prohibiting supply for sale, contained in Article 2 of the agreement in question and Article 1 of the Rules Governing the Functioning of the Inter-Regional Joint Committees, be regarded as satisfying objective criteria such as to preclude any abuse and may they be exempted under Article 85 (3) even if they were laid down for the purpose of contributing to an improvement in distribution?
5. Does the fact that supplies are cut off from retailers who, like Mrs Salonia, have not obtained the licence required by the said agreement, thus preventing such categories of persons from obtaining the products for sale in another way, preclude reliance upon the exemption provided for in Regulations 19 (Regulation No 19/65/EEC of the Council of 2 March 1965, Official Journal, English Special Edition 1965-1966, p. 35) and 67 (Regulation No 67/67 EEC of the Commission of 22 March 1967, Official Journal, English Special

Edition 1967, p. 10) and, if such exemption has been granted, does that fact not lead to an assumption that the benefit thereof has been revoked?

6. Does not the conduct laid down in and governed by the agreement in question constitute an abuse of a dominant position?

My opinion on these questions is as follows:

To begin with, it should be noted that the questions as drafted go far beyond the examination that can be undertaken and the answers that can be given under the procedure provided for in Article 177 of the EEC Treaty. In my opinion, moreover, the facts of the case as I shall presently explain in detail, have only very partially been elucidated. Thus, for example, the Italian Federation of Newspaper Publishers which is directly concerned should have been heard by the national court in order to establish which agreements were actually in force at the time in question. Therefore, I can attempt to answer the questions only from the point of view of Community law and the answer cannot but be incomplete in the absence of a fuller knowledge of the facts of the case.

1. First of all, it is necessary to recall that only restrictions of competition which may *affect* trade *between Member States* come within the prohibition contained in Article 85 (1).

If, according to the consistent case-law of the Court (judgment of 12 December 1967 in Case 23/67 *De Haecht* [1967] ECR 407 at 415, judgment of 9 July 1969 in Case 5/69 *Völk* [1969] ECR 295 at 302 and judgment of 6 May 1971 in Case 1/71 *Cadillon* [1971] ECR 351 at 356), an agreement is to be capable of

affecting trade between Member States, it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States in such a way that it might hinder the attainment of the objectives of a single market between States (paragraph 5/7 of the decision in the *Völk* case).

Furthermore, the agreement must have an *appreciable* effect on trade between Member States: "... an agreement falls outside the prohibition in Article 85 when it has only an insignificant effect on the market, taking into account the weak position which the persons concerned have on the market of the product in question." (paragraph 5/7 of the decision in the *Völk* case).

However, according to the judgment of the Court of Justice of 17 October 1972 in Case 8/72 *Cementhandelaren* [1972] ECR 997 at 991, paragraph 29 of the decision, "an agreement extending over the whole of the territory of a Member State by its very nature has the effect of reinforcing the compartmentalization of markets on a national basis, thereby holding up the economic interpenetration which the Treaty is designed to bring about and protecting domestic production".

2. Taking these criteria as a basis, the Commission finds, in the first place, that Italian publishers do not market any foreign press publications. The collective rules in question monopolized, formally at least, only the distribution and sale of domestic publications. Its application was therefore restricted to the national territory of a Member State. Accordingly, it was not even notified to the Commission in accordance with

Regulation No 17 of the Council of 6 February 1962.

number of copies usually intended for resale by them.

The Commission states that no agreement exists between Italian and foreign publishers and that the latter have never complained about the manner in which the distribution of publications of the press is organized in Italy but it acknowledges that restrictions on competition of this kind — affecting exclusively the internal trade of a Member State — *cannot fail* to influence, indirectly at least, trade between Member States. Although in the present case the “relevant market” is to be understood as meaning the market in foreign publications of the press, that is, those originating in the Member States of the Community and sold in Italy, the system of distributing Italian publications of the press through a closed circuit of undertakings undeniably has an impact on the distribution of foreign publications of the press since the latter can be circulated only through the normal distribution network which is already in existence. Although officially the agreement covers only Italian publications of the press which are in circulation in Italy, it inevitably affects the distribution and sale of foreign publications of the press in that country.

The national court has itself established that those rules established between associations concerned applied to domestic publications of the press as well as to those appearing in the other Member States of the Community and permitted the Italian Federation of Newspaper Publishers in the event of new “impermissible” sales outlets being started, to impose an obligation on the distributors restraining them from increasing under any circumstances the

The Commission therefore concludes that the agreement at issue is a “typical reciprocal exclusive trading agreement whereby producers undertake to supply only certain categories of purchasers who for their part undertake to obtain their supplies exclusively from those producers”. This type of agreement formed, incidentally, the subject-matter of the first decision prohibiting an agreement ever taken by the Commission pursuant to Article 85 (“Recommendation” of 24 July 1963 on the “Convention Faïence”).

Next the Commission examines whether this agreement which *affects* trade between Member States does so to an *appreciable* extent. The Commission points out that, in order to give a specific meaning to the concept of appreciable effect, it informed undertakings in its Notice of 27 May 1970 on agreements, decisions and concerted practices of minor importance which do not fall under Article 85 (1) of the Treaty (Official Journal C 64 of 2 June 1970, p. 1), which is only for guidance, “that agreements between undertakings do not fall under the prohibition of Article 85 (1) of the EEC Treaty if the products which they cover do not account, in the part of the common market in which the agreement takes effect, for more than 5 % of the volume of business and if the aggregate annual turnover of the participating undertakings does not exceed 15 million units of account or, in the case of agreements between commercial undertakings, 20 million units of account” (emphasis added). This communication was replaced by the Commission Notice of 19 December 1977 (Official Journal

C 313 of 29 December 1977, p. 3) which, *inter alia*, increases these amounts to 50 million units of account.

On the basis of the statistics which were at its disposal in July 1980, the Commission estimates the value of sales of foreign newspapers at scarcely more than 7% of the turnover for Italian publications of the press which in 1978 amounted to LIT 1 109 000 million.

In my opinion, it is questionable whether the above-mentioned Commission Notices can be applied without qualification to the case in point, particularly since the Commission states that it is unable to establish whether the above-mentioned agreement has only a negligible effect on trade between Member States.

The Court requested the plaintiff in the main action and the Commission to produce figures, in the oral proceedings, for Italian imports of newspapers and periodicals from other Member States between 1972 and 1977 and for the turnover of Italian publishers over the same period. The Commission stated that between 1972 and 1978, the turnover of Italian publishers and Italian imports of newspapers and periodicals from other Member States, calculated at constant values, have remained practically unchanged in relation to imports from other countries.

In this regard, I should like to observe that it would be necessary above all to know the extent of circulation expressed

in figures, which foreign publications of the press might reach in Italy in the absence of such an agreement, in other words if "the economic interpenetration which the Treaty is designed to bring about" and the "single market between States" were achieved in this sector. Only the national court can clarify this matter.

Counsel for Mrs Baglieri, the plaintiff in the main action, stated in the oral proceedings, reiterating a point which he raised before the national court, that the Agreement of 23 October 1974 between the United Federation of Trade Unions of Newsagents and the Italian Federation of Newspaper Publishers lapsed on 31 October 1976 following its repudiation by the national newsagents' associations and was replaced on 15 December 1976 by a new agreement the contents of which are no more known to the Court of Justice than they are to the national court. Counsel for Mrs Baglieri has also contended that the latter agreement was, for its part, terminated on 31 March 1977. The Commission added that on 13 March 1980 a new agreement was concluded between the publishers' and the newsagents' associations which came into force on 1 April 1980. The text of this agreement is not available to the Court but the Commission maintains that it no longer contains the restrictive clauses incorporated in the 1974 agreement. However, the Court is unable to say whether the 1974 agreement continued to be applied as a concerted practice, in Sicily at least, when the facts of the case occurred.

As I see it, the national court should first of all ascertain whether, at the time when Mrs Salonia requested delivery, the proprietors of the warehouses to whom she addressed herself could base their

refusal on an agreement which was still in force. If this question is answered in the affirmative, the national court should re-examine the case taking into account the statistics produced by the Commission to this Court.

3. Although, in the light of the oral explanations furnished by the Commission, this question is no doubt now only of academic interest, it is still necessary to consider whether Article 85 (3) and Regulation No 67/67 of the Commission of 22 March 1976 are applicable.

In this connexion, the Commission observes that the question whether the agreement qualifies for exemption under Article 85 (3) does not arise on the ground that it has never been notified. From the formal point of view this opinion is correct but it is legitimate to wonder whether there were grounds for notifying the agreement since, once again from a formal point of view, it was concerned only with Italian publications of the press.

Moreover, the Commission maintains that the specific criteria for selective distribution was *in no way* suitable as standards of reference for the mere resale of newspapers and that the final consumer is *in any event certainly incapable of deriving* any advantage from a system of this kind. These contentions are in my opinion a little too dogmatic and succinct. They in no way tackle the problem of storage and the taking-back of unsold publications which, under the contract concluded between the distributors and the publishers for supply of goods on sale or return within a specified period, constitutes the reciprocal service provided by the publishers.

In the event of the agreement's coming within the prohibition laid down in Article 85 (1) without qualifying for exemption under Article 85 (3), the national court asks, lastly, to what extent Regulation No 67/67 of the Commission, which provides for block exemption from the prohibition for certain categories of exclusive dealing agreements, has a bearing on an agreement of the kind at issue in this case.

This question has already been answered with great precision by the Court of Justice in the above-mentioned *Cadillon* judgment in which it held, in paragraph 15 of the decision, that "it follows from Article 7 (2) of that regulation that such agreements, where they would fall within the prohibition contained in Article 85 (1), may obtain the benefit of the block exemption in spite of failure to notify them to the Commission, provided that they satisfy the specific conditions laid down in Articles 1 to 3 of the said regulation."

On that basis, it seems to me quite out of the question that Regulation No 67/67 can apply to an agreement of the kind at issue in this case. In the first place, one of the preconditions which an agreement must satisfy, in order to qualify for block exemption under that regulation and under Regulation No 19/65 of the Council, is that it must be an agreement between *two* undertakings. In the case in point, this precondition has clearly not been met. Secondly, the agreement adversely affects trade between the Member States, although formally it is an agreement to which only undertakings from *one* Member State are parties. However, the Agent for the Commission has submitted in the oral proceedings that the agreement has by no means had an *appreciable* effect on the circulation in Italy of publications of the press from the rest of the Community.

In conclusion, I propose that the Court should rule that an agreement concerning the resale of goods in *one* Member State and to which only undertakings from *that* Member State are party is capable of having an appreciable effect on trade between Member States in so far as the currents of trade between the national territory of the other Member States of the common market and the national territory of the Member State in question might, in the absence of the agreement, evolve differently and in a manner other than detrimental to the attainment of a single market between the Member States.