THE COURT

in answer to the questions referred to it by the Tribunal de Commerce of Liège in accordance with the judgment given by that court dated 27 June 1962, hereby rules:

1. **The simple acknowledgment of a request for a negative clearance or of a notification for the purposes of obtaining exemption under Article 85 (3) of the EEC Treaty does not constitute the initiation of a procedure under Articles 2, 3 or 6 of Regulation No 17.**

2. **Due notification of one standard contract is to be considered as due notification of all contracts in the same terms, even prior ones, entered into by the same undertaking.**

3. **The nullity provided for in Article 85 (2) is of retroactive effect.**

Delivered in open court in Luxembourg on 6 February 1973.

Lecourt Monaco Pescatore

Donner Mertens de Wilmars

A. Van Houtte — Registrar

R. Lecourt — President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 13 DECEMBER 1972 [1]

Mr President,

Members of the Court,

The Commercial Court of Liège, in the proceedings brought before it by the brewery company de Haecht against the café proprietors Wilkin and Janssen, has asked a second time for a preliminary ruling under Article 177 of the EEC Treaty. The Court would now like to have answers to the following questions:

1. 'Must a procedure under Articles 2, 3 and 6 of Regulation No 17 be considered to be initiated by the Commission from the moment when it acknowledges receipt of a request

1 — Translated from the German.

for a negative clearance or of notification for the purposes of obtaining exemption under Article 85 (3) of the EEC Treaty?'

2. 'Can notification of a standard contract referring to legal arrangements made in 1968 be considered as notification of a similar contract entered into during 1963?'

3. 'Is the nullity of contracts exempted from notification to be deemed to take effect from the date when one of the contracting parties duly brings an action for it or merely from the date of the judgment or the decision of the Commission which establishes it?'

It is not necessary to say much in the present connection about the background to the proceedings in the national court. The substance is already well known from the report already published of Case 23/67 (Rec. 1967, p. 525). In particular it can be recalled that several agreements were made between the de Haecht brewery company, whose principal office is in Belgium, and the café proprietors Wilkin and Janssen, whose business is also carried on in Belgium, in April, July and August 1963. These deal, on the one hand, with the grant of loans and the supply of furniture to the café proprietors and, on the other hand, with the obligation on the proprietors to order drinks exclusively from the Haecht brewery company. Because the last-mentioned obligation was not adhered to, the de Haecht company brought an action in the Liège Commercial Court with the object of obtaining the dissolution of the agreements to the prejudice of the defendants, the return of the furniture and the payment of stipulated damages. The defendants, on the other hand, have invoked Article 85 of the EEC Treaty and submitted that the agreements mentioned could not be considered valid because they were contrary to this provision. This defence caused the Liège Commercial Court to stay the proceedings and, by a judgment of 8 May 1967, to seek a clarification of a definite problem arising from Article 85 of the EEC Treaty. The desired clarification was given, after I had delivered my opinion, in a preliminary ruling of 12 December 1967. In view of an observation at the end of that opinion, (where I said that in such a case it was to be recommended that the proceedings before the Court should be adjourned and the parties be allowed to obtain a clarification from the Commission of the matter at issue according to anti-trust law), the de Haecht business apparently decided to place the matter also before the Commission. This was done in the form of a notification of a similar standard form contract with the aim of obtaining a declaration regarding the non-applicability of Article 85 (1) and the grant of a negative clearance. The receipt of this notification, dated 13 January 1969, was acknowledged by the Commission on 27 January 1969. Still in the same year, the Commission, by a decision of 9 October 1969, ordered an inquiry of a general nature into the brewery sector under Article 12 of Regulation No 17. It is moreover significant that, also in that year, two further relevant preliminary rulings were given. The first was on 9 July 1969 in Case 10/69, the Portelange judgment (Rec. 1969, p. 309), which dealt with the question of the validity of notified agreements. The other, on 18 March 1970, Case 43/69 (Bilger v Jehle, Rec. 1970, p. 127), established that a contract for the supply of beer between two undertakings of one and the same Member State did not need to be notified and was valid until its nullity was expressly determined.

After all this the de Haecht brewery company came to the conclusion that it could now be argued that the agreement made between it and the café proprietors Wilkin and Janssen was fully valid, and its action on it could be successful. However, an application to that effect was not successful in the Commercial Court of Liège. Considering several objections of the defendants, which

rested on technical arguments, the Court took the view that there were still unresolved problems of Community law in the pending proceedings. Because of this the Court, by an order of 27 June 1972, renewed the stay of proceedings and referred the questions already cited for a preliminary ruling.

We shall now see how these questions are to be answered.

1. The first question — it will be remembered — deals with the problem of whether a procedure under Articles 2, 3 and 6 of Regulation No 17 is initiated by the Commission from the time of the receipt of an application for the grant of a negative clearance or of a notification with the aim of obtaining exemption under Article 85 (3) of the Treaty. The question seeks an interpretation of Article 9 (3) of Regulation No 17, in which it is staded: 'As long as the Commission has not initiated any procedure under Articles 2, 3 or 6, the authorities of the Member States shall remain competent to apply Article 85 (1) ... notwithstanding that the time limits specified in Article 5 (1) and in Article 7 (2) relating to notification have not expired'.

We cannot, however, turn to the clarification of this question immediately, because the plaintiff in the main action has raised the preliminary objection that the question is irrelevant for the resolution of the dispute; in truth what is important is only that the plaintiff *notified* the disputed agreement to the Commission. This can be deduced from the Portelange judgment (Case 10/69), but the fundamental reasoning of that case shows that agreements notified to the Commission (apparently independently of the need for notification) are valid and continue to be valid until a ruling on the applicability of Article 85 (3) is given by the Commission, which alone is competent to give it. According to such a view of the situation an agreement could therefore not be declared void by the national courts because of the tenor of the Bilger decision, and so the question whether proceedings have been initiated by the Commission under Regulation No 17 must seem in fact to be irrelevant.

It is now definitely established that the Court does not generally, in preliminary ruling cases, examine closely such problems of whether the question is relevant for a decision (for this is really what is involved here) and that in the Salgoil judgment (Rec. 1968, p. 672) an exception is suggested only in the case of an obviously erroneous reference to Community law. Because in the case under discussion the relevance of the question to a decision can only be judged on the strength of consideration of Community law, it might appear arguable that the restraint suggested should be relinquished. Let us therefore look at the position regarding the plaintiff's objection. We must first of all assume (because a clarification of the matter can be given only in connection with the second question) that the disputed agreement was properly notified to the Commission.

According to the plaintiff's contentions, the question at issue is the true scope of the Portelange judgment. It has therefore to be ascertained whether in fact old agreements (those which were already in existence when Regulation No 17 came into force) and new agreements (those which were made after the coming into force of Regulation No 17) are affected without distinction.

If the grounds for the preliminary ruling are alone considered, one would doubtless be inclined to give an affirmative answer to this question. What is said in the ruling is in general terms: 'The question whether such an agreement is in fact prohibited depends on the appraisal of economic and legal factors which cannot be assumed to be present in the absence of an explicit finding that the individual agreement in question not only contains all the factors mentioned in Article 85 (1), but does not qualify for the exemption provided by Article 85 (3). So long as such a finding

has not been made, every agreement duly notified must be considered valid.' It is also said that it would be contrary to the general principle of legal certainty 'to conclude that, because agreements notifed are not finally valid so long as the Commission has made no decision on them under Article 85 (3) of the Treaty, they are not completely efficacious.'

However, a closer examination leads one to doubt whether the Court really wished to lay down a proposition of general application. On this point it is important that the question under discussion — as emerges from the arguments regarding the jurisdiction of the Court — only related to so-called old agreements. Taking this circumstance into account. and having regard to the fact that preliminary rulings, especially if they involve complex problems with unpredictable ramifications, are in principle limited to pronouncements which are absolutely necessary, it can hardly be thought that the Court in the Portelange case intended to lay down a proposition of such far-reaching significance without good cause. In support of the correctness of this assumption it is only necessary to refer to the operative part of the Portelange judgment, which begins with the words, 'Agreements ... duly notified under Regulation No 17/62 ...' Since requirements of form were not the subject of discussion in the case (and thus in the judgment no reference to the rules of the Commission relating to questions of form can be found) it can in fact only be assumed that 'duly' refers to the time limit for notification in Article 5 of Regulation No 17. It is therefore certain that the judgment has validity only for old agreements. Finally, a further indication of the correctness of this deduction may be found in the Bilger judgment (Case 43/69). At the conclusion of its penultimate paragraph, it refers to like effects to those of 'notified agreements dating from *before 13 March 1962*', that is, it refers to old agreements. This qualification appears to be particularly instructive. If in fact it was established by the case law that what was said in the Portelange judgment extended also to new agreements, thereby making them too of full effect from the date of notification to the Commission, then the qualification at the end of the Bilger judgment could have been omitted and instead of it there could have been a general statement of the effects of *notified* agreements. That this qualification is found at the end of the Bilger judgment can only be understood as a clarification of the Portelange judgment. I would therefore like to give it as my opinion that the relevance of the first question to a decision cannot be contested by an appeal to the scope of the Portelange judgment.

It might moreover be added that an extension of the principles of the Portelange case to so-called new agreements, which many critics have advocated, in fact arouses substantial doubts. I shall not deal with this aspect in detail at present as no question has been asked about it, but I should like to be allowed at least to put forward some reflections on it.

In my opinion it is clear that the thesis that notified new agreements are completely valid until a decision is made as to whether or not they can be exempted, and are to be treated accordingly by the national courts, is inconsistent with the scheme of the Treaty. This scheme rests unequivocally on the principle that restrictive agreements contrary to Article 85 (1) are prohibited and are null and void without specific declaration. A generalization of the reasoning of the Portelange judgment would turn the system of prohibition with a reserved power to license envisaged by the Treaty into a system of control of abuses, simply because the invalidity of an agreement would be established only by a decision of the Commission under Article 85 (3). That this view is not tenable already follows from the clear wording of Article 1 of Regulation No 17. This can also be

inferred from Article 6 of Regulation No 17, whereby the Commission indicates the point in time from which a declaration under Article 85 (3) becomes effective. This provision would in fact be otiose if notified agreements were treated as valid until a decision was made under Article 85 (3). A similar deduction can be made from the provisions regarding penalties in Article 15 of Regulation No 17. Section 5, whereby fines may not be imposed for actions performed after the notification of agreements to the Commission and before a decision of the Commission under Article 85 (3), would be equally superfluous if it could be assumed that notified agreements were wholly effective in any case. I am convinced that it cannot be assumed that the Court of Justice would approve of such an extensive transformation of the system to the detriment of the principles of competition law when in another connection it has always underlined the great importance of the precise observance of the rules of competition for the functioning of the Common Market. In particular, no support for such a metamorphosis — let me say yet again — can be derived from a reference to the long duration of anti-trust proceedings before the Commission or from reliance on the principles of legal certainty (considerations which were put forward in the Portelange judgment to justify a particular transitional rule relative to old agreements). To see this, it is only necessary to recall the possibilities open to the parties in this connection (whether by actions for failure to act or by claims for damages) if the Commission fails in its duty, which is particulary emphasized by the Court, to come to a decision under Article 85 (3) 'within a reasonable time'.

We can, then, after this digression, which the objection of the plaintiff in the main action made necessary, take it as established that the relevance of the first question to the referring Court's decision is not in doubt, but when we turn to answering the question itself, it is clear that the diversity of opinions expressed does not exactly facilitate dealing with it. The plaintiff in the main action is known to take the view that a procedure under Article 9 of Regulation No 17 is in principle to be considered as already initiated by the Commission when receipt of an application under Article 2 of Regulation No 17 or a notification within the meaning of Article 6 of the Regulation is acknowledged. This view is vehemently refuted by the other parties to the proceedings, the Government of the Federal Republic, the French Government and the defendants in the main action. The first two require a positive expression of intention on the part of the Commission to give a decision under Article 2, 3 or 6 of Regulation No 17 or, more precisely, the issue of a formal notice that a procedure has been initiated. The defendants in the main action are of the opinion that the Commission must at least have undertaken some measure of investigation. The plaintiff adopts this view as a subsidiary point, arguing that in fact, in October 1969, the Commission ordered an investigation into the brewery sector under Article 12 of Regulation No 17. Let us now see what can be deduced from all this.

Starting from the wording of Article 9 of Regulation No 17, it seems to me to be of the utmost importance to draw a clear distinction between the *notification* of an agreement and the *initiation* of a procedure which takes away their competence from the authorities of the Member States. This would certainly not be done if the notification or the submission of an application were of themselves to be seen as the initiation of a procedure. (This was seemingly the object — as Deringer observes in his commentary on EEC competition law — of an earlier proposal of the Commission which was not accepted by the Council). Then the choice of the word 'einleiten' (initiate) (with the French version 'engager', perhaps even stronger,) is also significant. It in fact suggests more than the passive receipt of applications, which is automatically followed by the

allotment of a registration number, the issue of an acknowledgment of receipt and, as provided for in Article 10 of Regulation No 17, the immediate transmission of a copy to the Member States. Correctly understood, 'initiate' ('engager') has an active meaning; the clear connotation of this word is that the Commission must have taken definite action with a view to dealing with a case. Moreover the meaning and purpose of the provision support this view: it is to avoid the duplication of proceedings, by the Commission on the one hand, and by the national authorities on the other. But, without doubt, such a danger can arise only when the Commission has taken definite steps to deal with a case.

Accordingly, the first question should be answered, without seeking to go beyond its wording, by saying that a procedure under Articles 2, 3 and 6 of Regulation No 17 is not initiated by the Commission from the moment the receipt of an application for grant of a negative clearance or a notification with a view to obtaining exemption under Article 85 (3) of the Treaty is acknowledged.

If, however, it is desired to take up a positive position on the problem posed, and specify when a procedure under Article 9 is initiated, (perhaps as soon as an investigation is ordered, or perhaps not until the issue of a formal notice that a procedure is being initiated, which is served on the Member States,) the following observations arise.

It must no doubt be admitted that a formal initiation of proceedings and its notification to the Member States has the advantage of absolute clarity as to the application of Article 9 of Regulation No 17. But, on the other hand, it must be recognized that such an arrangement is not required or imposed as a condition either in Article 9 or in other provisions of Regulation No 17. Also — contrary to the view of the Commission — it cannot be said that the judgment in Case 48/49 (ICI v Commission, Rec. 1972, p. 619) has impliedly confirmed the necessity of a notice of initiation of procedure. Leaving aside the fact that in that case the Commission initiated the procedure of its own motion, it is beyond all doubt that a problem of the type now before us did not arise there and that the Court had no occasion to demand a formal notice for the initiation of the procedure. If, on the other hand, the sense and purpose of the Regulation are considered, as they have been outlined, above, it must appear arguable that a procedure under Article 9 is to be taken as initiated when an unequivocal and overt step has been taken towards dealing with the case. Among such steps can be included the institution of a precise investigation. As regards the case before us, this means that it can be assumed — as the plaintiff in the main action considers correct — that with the decision of the Commission to carry out an investigation of the brewery sector a procedure within the meaning of Article 9 has been initiated. It is not disputed that this is a *general* investigation of a whole sector of the economy. However, it must not be forgotten that in the first de Haecht decision it was expressly held that the appraisal of such agreements depends on the *whole* of the attendant circumstances. Consequently, in this sphere, quite general investigations of the kind undertaken are indispensable for a conclusive evaluation of particular cases. Moreover it can be taken from the memorandum submitted by the plaintiff on a conference between representatives of the Directorate-General for Competition of the Commission and representatives of the working community of brewers of the Common Market (Communauté de Travail des Brasseurs du Marché Commun), 'eu égard à l'affaire Haecht/Wilkin et à l'arrêt rendu à ce sujet par la Cour de Luxembourg' (because of the judgment of the Court in Luxembourg in Brasserie de Haecht v Wilkin) it is... 'indispensable de procéder à une enquête portant sur le contrat de brasserie afin de déterminer

s'il tombe sous le coup de l'article 85, par. 1er, du Traité de la CEE . . .' (indispensable to proceed to an inquiry relating to the brewery contract to determine whether it falls under Article 85 (1) of the EEC Treaty). If therefore, it is assumed that Article 9 (3) of Regulation No 17 also applies to the courts of the Member States (which is not universally agreed to be correct) this would completely justify the opinion that from the moment of the institution of the investigation mentioned, which moreover involved further concrete requests for information directed to particular breweries, the Court which put the matter before us was no longer competent to apply Article 85 (1) to the agreement concluded between the parties to the main action.

With this I have said everything needed within the bounds of the first question as an aid to interpretation for the Court which has referred the matter.

2. By its second question the Court which has referred the matter wishes to know whether the notification of a standard form contract can count as notification of a similar earlier agreement.

There is not much to be observed on this. It is well known that all parties to the proceedings have proposed an affirmative reply to this question and we will associate ourselves completely with this view.

In this connection it is particularly necessary to refer to the judgment in Case 1/70 (Parfums Marcel Rochas v Bitsch, Rec. 1970, p. 515). At that time the Court said, in reply to a similar question and as a reason for an affirmative answer, that the Commission had the power, under Article 24 of Regulation No 17, to make implementing provisions regarding the details of notification. The provisions of the Regulations subsequently issued, Nos 27/62 and 1133/68, as well as the appended forms, were to the effect that in the case of standard form contracts the enclosure of a standard form would suffice and the names and addresses of the undertakings parties to the agreement could be omitted. This appeared to be perfectly acceptable in view of the necessity of simplifying the administrative procedure. Any misgivings on the matter could be allayed by the reflection that the attention of the Commission would also be sufficiently directed to all relevant accompanying circumstances and the Commission would still be free to procure any necessary additional knowledge through requests for information.

It is true that this decision related to a case in which the standard form contract was concluded and notified earlier than the contract in similar form which was the subject of debate in the main action. It is reasonable, however, to accept that the same should apply in the converse case, that is, where the facts are that the notification of a standard form contract did not take place until after the conclusion of the particular contract in dispute. This can be said because the considerations put forward in Judgment 1/70 (easing of the administrative procedure with sufficient possibilities of obtaining information open to the Commission) also apply here, and the sense and purpose of a notification will therefore be satisfied by limitation to a standard form contract.

In view of the arguments of the plaintiff in the main action, it is also to be noted that the validity of a notification is not of course impaired by the fact that, with the notification, reference was made to the legal position obtaining in Belgium since 1968 regarding agreements of the same kind, a legal position which apparently changes from time to time (every three years) after negotiations between the economic groupings involved, and which was different from that in the year 1963 (that is, the time of the conclusion of the disputed agreements). Such a reference could appear thoroughly appropriate because the standard form contract says nothing about the duration of the exclusive duty

to take from a particular supplier, which depends rather on the Royal Decrees (Arrêtés royaux) in force at the time and is ascertained according to the amount of the loan. In truth, the reference made represents nothing more than the completion of the notification in respect of one fundamental element, that is, the provision of information which would make it possible for the Commission, by reference to the appropriate Royal Decrees, to determine precisely the tenor of the contracts affected by them.

Thus it can be observed, by way of recapitulation, in reply to the second question, that for the purposes of Regulation No 17 the notification of a standard form contract is sufficient, even taking into consideration the special circumstances of the present case.

3. By its third question, the Court referring the matter would finally like to know whether the nullity of agreements exempted from notification is to be taken as established from the moment one of the contracting parties pleads it in proper form, or only from the moment of the decision of the Court or of the Commission which establishes it.

This question obviously relates to the Bilger judgment already mentioned (Case 43/69), and it is thus desirable first to call to mind its subject matter. As is known, in that case (as also in the present main action) there was a question of an agreement concluded for the supply of beer between two undertakings situated in one Member State, with an exclusive duty placed upon the café proprietors regarding the source of supply. There, primarily, it was recognized that such agreements are exempted from notification under Article 4 (2) of Regulation No 17 (a fact which was also not questioned in relation to the de Haecht/Wilkin/Janssen agreement). Moreover — and this is especially important — it was said that it could not be assumed that agreements exempted from notification would become null and void restrospectively if national courts should hold that Article 85 (1) was applicable, with the effect specified in Article 85 (2). Such agreements on the contrary were 'exposed to the risk of nullity, at the most, with effect from the date the nullity is established'; they were 'completely valid so long ... as their nullity is not established'.

The purport of this decision is, in my opinion, perfectly clear: It lays down the principle that when a national court holds that an agreement falls under Article 85 (1), the nullity of the agreement arises solely *ex nunc* (from then on). Viewed in this light, it is also clear that the question referred to us aims not only at a more precise clarification of the Bilger judgment but, if need be, at its modification in view of the argument adduced by the defendants in the main action that it is necessary, taking into consideration the need for legal certainty, a general principle of law, to assume that the nullity of such agreements takes effect from the date when one of the parties to the agreement *alleges* the nullity. We must therefore ask ourselves whether this can be accepted, indeed we must even ask whether, considering the positions taken by other parties, we should not go even further and take it that the nullity is retrospective to the date the agreement was concluded. This is known to be the position of the French and German Governments, while the Commission, which otherwise takes its stand on the Bilger judgment, advocates such a conclusion only for the as yet undecided case where a decision of the Commission establishes the applicability of Article 85 (1).

We will now see what view should be taken of this wide-ranging difference of opinion.

In the first place it must be conceded that it does not seem incomprehensible that the thesis of the Bilger judgment should give rise to criticism. In fact it results, for the special case of agreements which do not need to be notified, in the system of prohibition being replaced by

a system of control of abuses, after the manner of the regulation governing certain matters in German cartel law. Against this view it is useful to refer to the points I have already mentioned in connection with the discussion of the Portelange judgment, which relate particularly to the form of the first two paragraphs of Article 85, and the reiteration of this principle in Article 1 of Regulation No 17. Similarly, the indications discernible — as already shown — in Article 6 and 15 of Regulation No 17 cannot be disregarded. Moreover it is worth bearing in mind that only in Article 7 of Regulation No 17 is there to be found a qualification of the principle of nullity for particular old agreements exempted from notification, and that Article 9 (1) of Regulation No 17 is obviously based on the declaratory effect of a decision that an agreement falls under Article 85 (1).

However, all these arguments are not new. They were from the very beginning within the framework and scope of the discussion of aspects of cartel law which interest us now, and therefore it cannot be asserted that the Court had not considered them when it gave the Bilger judgment. That the Court in that case came to its well-known conclusion can only be explained by recognizing that the whole system of Community cartel law, as can be shown from diverse provisions, is not wholly free from contradictions, omissions and obscurities. In the face of this situation, the Court obviously felt called on to produce a creative decision for the clarification and development of the system. In doing this, the Court also took into consideration the fact that exemption from notification, provided within the framework of a system that even provided for complete exemption from the prohibition of Article 85 (1), could, bearing in mind the reflection that agreements exempted from notification were 'unlikely to affect trade between Member States', and considering the need for legal certainty, only have the consequence that the nullity took effect merely from the date of the finding that Article 85 (1) was applicable.

But, if such be the case, I cannot conceive that the Court, on the basis of the considerations brought to light in the present proceedings, will be induced to alter its point of view which — as must be emphasized again and again — applies only in the case of agreements exempted from notification.

This is all the less to be expected when the Council, after the Bilger judgment had been given and in the knowledge of the legal opinion contained therein, has provided for further exemptions from the duty to notify. In fact — it may be said — this would not have happened if the Council had taken the opinion of the Court to be absolutely contrary to the system.

One further point in particular can now be made, that the argument is of no avail that findings by national courts have, by virtue of a general legal principle, a purely declaratory effect, that is an *ex tunc* effect, and consequently the assumption that the effect of nullity starts only when judgment is given implies a breach of the system, namely, the attribution of a *law-making* authority to the national courts. In truth the force of this argument is merely apparent. What is important is that the Court, by evolving a principle creative of law, obtains for agreements which do not need to be notified a preferential treatment in substantive law. When in this connection, as in the view of the Court is required by the system, the impact of nullity is made conditional on an authoritative finding, there are no acts formative of law, even in the case of pronouncements by the courts, but only findings as to content, that is, that the conditions of Article 85 (1) are fulfilled. Then there follows, as a *reflex effect*, the nullity directly brought about by European law. Therefore the nature of such a judicial act, which the Court itself has not said is aimed at effecting annulment, is not altered in any way.

Furthermore, it cannot be assumed, after all that has been said up to now, that the Court approves the thesis of the defendants in the main action, according to which the nullity should take effect from the time when one of the parties *alleges* it. Apart from the fact that in the Bilger case there was a similar set of facts and yet the Court did not draw the conclusions suggested by the defendants, the defendants in the present proceedings could not show that the principle put forward by them has validity in the law of the Member States. Moreover it is also decisive that a retrospective effect limited to such a degree would itself mean a disregard of the essential principle of legal certainty, simply because the impact of nullity would not depend solely on an authoritative finding, but also on a subjective assessment by a party to the argreement and his assertion thereof — often not capable of being reliably proved.

The only remaining question, then, is whether *Commission* decisions finding agreements exempted from notification to be void have, as the Commission thinks, a different effect, namely, that the nullity is retrospective. It could certainly be said of this problem, which was not dealt with in the Bilger judgment, that its relevance to the decision of the referring court is doubtful because the main action is obviously concerned only with a *judicial* decision. However, if it is nevertheless desired that the problem be dealt with, it is my firm opinion that the only answer is that in fact there is no cause for making the differentiation advocated by the Commission. This can be said, although the legal position is not completely consistent, not primarily because the Commission also delivers a judgment under Article 85 (3). This detail is not fundamental, but rather — as the Bilger judgment clearly shows — the necessity for legal certainty is the first consideration, and the fact that agreements exempted from notification are generally harmless with regard to competition law. Considering the kind of agreements which are the subject of discussion, it must consequently be recognized also that Commission decisions finding that the conditions of Article 85 (1) are fulfilled only take effect *ex nunc*.

The third question may thus be taken to be sufficiently answered.

4. Let me now sum up my views for the purpose of this opinion. The questions laid before the Court by the Commercial Court of Liège must in my view be answered as follows:

(a) A procedure under Articles 2, 3 and 6 of Regulation No 17 is not to be taken as initiated by the Commission from the moment it acknowledges receipt of an application for the grant of a negative clearance or a notification with a view to obtaining exemption under Article 85 (3) of the Treaty. On the contrary, it is at the very least necessary that the Commission institute some measure of investigation.

(b) The notification of a standard form contract amounts to notification of an agreement which was concluded earlier and had the same content.

(c) The nullity of agreements exempted from notification takes effect from the moment a decision establishing the nullity is made by a court or by the Commission.