granting the exclusive dealership, the nature and quantity of the products covered by the agreement, the position of the grantor and of the concessionnaire on the market for the products in question and the number of parties to the agreement or, where applicable, to other agreements forming part of the same system.

In reply to the second question

The absolute nullity imposed by Article 85 (2) applies to all provisions of the contract which are incompatible with Article 85 (1).

The consequences of this nullity for all other aspects of the agreement are not the concern of Community law.

It is for the Cour d'Appel, Paris, to make an order as to the costs of the present proceedings.

Hammes Delvaux Donner

Trabucchi Lecourt

Delivered in open court in Luxembourg on 30 June 1966.

A. Van Houtte — Registrar

Ch. L. Hammes — President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 23 MARCH 1966[1]

Mr President,
Members of the Court,

This is a case pending before the Cour d'Appel, Paris, which has raised questions relating to EEC cartel law which have been referred to you for a preliminary ruling. The facts may be summarized as follows:
On 7 April 1961 an agreement described as an 'export agreement' was made between Maschinenbau Ulm, a limited company incorporated under German law, which is a producer of equipment used by public utilities, and the French company known as La Technique Minière. The purpose of the agreement was the sale of this kind of equipment in France. Subsequently the agreement was amended and additional points were added (on 13 December 1961). Under the terms of this agreement Technique Minière undertook, for a period of two years with effect from 1 January 1962, to buy a certain number (37) of graders of a given type at a fixed price, to further the interests of the seller generally, to organize a repairs service, to maintain an adequate stock of spare parts, to meet the whole of demand in the contract territory and, finally, not to sell competitors' products without the consent of the vendor. In return it was granted the exclusive right to sell the machines in question in France and its overseas possessions. The agreement was tacitly renewable upon the expiry of the term laid down, subject to the right of either party to terminate it on six months' notice. After

1 — Translated from the French version.

the contract had been partly performed difficulties arose. According to the explanations given by Technique Minière, they were due to the fact that the machines specified in the agreement were not popular on the French market. Bills of exchange forwarded in payment by the concessionnaire were not honoured, and therefore Maschinenbau Ulm found it necessary to bring an action before the Tribunal de Commerce de la Seine. This was an action for rescission of the contract, on the ground of Technique Minière's wilful failure to perform it, and for damages against the latter. The proceedings (during which an expert's report was ordered on whether the machines were suitable for French needs, a report which came to conclusions favourable to the plaintiff) at first led to a judgment in favour of Maschinenbau Ulm, the plaintiff; but Technique Minière then appealed to the Cour d'Appel, Paris.

As it had already done at first instance, the appellant cited in support of its position *inter alia* certain provisions of French law relating to competition (Decree of 30 June 1945), as well as Common Market cartel law, according to which the contract made with Maschinenbau Ulm was, it claimed, void for infringement of Article 85 (1) of the EEC Treaty and for failure to notify the agreement to the EEC Commission.

The national court thus found itself required to interpret and apply Community law on competition, and it did not wish to do so itself. It preferred to give a judgment, delivered on 7 July 1965, which accepted an alternative submission of Technique Minière and suspended the proceedings. The judgment referred to the European Court of Justice the following questions of interpretation:

'1. What interpretation should be given to Article 85 (1) of the Treaty of Rome and to the Community regulations adopted in implementation thereof with regard to agreements which have not been notified and which, whilst granting an "exclusive right of sale",
   — do not prohibit the concessionnaire from re-exporting to any other markets of the EEC the goods which he has acquired from the grantor;
   — do not include an undertaking by the grantor to prohibit his concessionnaires in other countries of the Common Market from selling his products in the territory which is the primary responsibility of the concessionnaire with whom the agreement is made;
   — do not fetter the right of dealers and consumers in the country of the concessionnaire to obtain supplies through parallel imports from concessionnaires or suppliers in other countries of the Common Market,
   — require the concessionnaire to obtain the consent of the grantor before selling machines likely to compete with the goods with which the concession is concerned?

2. Does the expression "automatically void" in Article 85 (2) of the Treaty of Rome mean that the whole of an agreement containing a clause prohibited by Article 85 (1) is void, or is it possible for the nullity to be limited to the prohibited clause alone?'

In accordance with Article 20 of the Statute of the Court of Justice of the EEC, that judgment was notified to the parties to the proceedings before the national court, to the Member States, to the Council and to the Commission. Only the parties to the action pending before the French court and the EEC Commission have submitted written and oral observations. Their suggested interpretations, set out with great care and in great detail, reveal considerable differences of opinion. They show clearly that both from the legal and economic angle the problem before us is an important one, and that the solution must be found by taking many points of view into account.

I shall now attempt to find a reply to the questions asked. First, however, I must examine two preliminary questions which were raised by Technique Minière. Only after this examination shall I be able to proceed to the interpretation properly so-called (following the order adopted by the court which referred the questions at issue) to see which of the different stand-points submitted to the Court can be seen to be correct.

Reply to be given to the questions

I — *Preliminary questions*

1. Do the questions submitted require the law to be applied to the case being heard in the main action?

Technique Minière has stated both in writing and orally that first and foremost it is unhappy about the way in which the Cour d'Appel, Paris, has drafted the questions calling for an interpretation. The wording might force the European Court of Justice to go beyond giving an interpretation and to apply the law to a particular case.
Certainly that would not be permitted (the Court particularly stressed this in Case 20/64). In other words in the context of subparagraphs (a) and (b) of the first paragraph of Article 177 this Court does not have authority to say that a concrete factual situation (in this instance, an agreement made between undertakings) satisfies the conditions set out in Article 85 (1), and that therefore certain legal consequences follow. All that this Court may do is to define the scope of the letter and spirit of Article 85 (1) by laying down general supplementary rules, while remaining on the level of generalizations, even though on this occasion the Court's task is limited to one aspect or to certain aspects of a larger body of questions, by reason of the particular way in which the reference is made.
But the truth is that in the case which we are now considering, the Cour d'Appel, Paris, does not ask anything more of this Court, if the questions which it has referred here be correctly understood. This is a fact which appears from the abstract form in which they are drafted. They are drawn up in terms similar to those of certain regulations on cartels (Regulation No 153/62 of the Commission, Regulation No 19/65 of the Council), and no-one can deny their general, legislative character. Once the reply has been given, the national court may consider it still necessary to make other findings or assessments of facts. This shows that it is indeed the national court which is called upon to apply the law, and not this Court. As a matter of fact this would have still been the position even if the national court had put the questions more concretely, for instance by referring to this Court the problem calling for a solution in the case before it. Even in a case such as this, the European Court of Justice is not required to dismiss the request for a preliminary ruling. It may (and has already done so several times) extract from the concrete form of the questions asked the abstract questions which it has jurisdiction to answer.
Thus the way in which the questions referred for a preliminary ruling have been drafted is not open to any criticism.

2. Is it necessary for the European Court of Justice to alter the drafting of the questions submitted?

In setting out the facts I made it clear that the Cour d'Appel, Paris, has defined several aspects of the type of agreement concerning which an interpretation of EEC cartel law is required. In particular it emphasized that agreements of the type to be considdere do not prohibit the concessionnaire from exporting the goods and do not exclude parallel imports into the contrast territory.
On this point Technique Minière has said that, if the agreement which it has made with Maschinenbau Ulm is interpreted in accordance with commercial usage, it then appears that the parties are under an implied obligation to ensure territorial protection, that is to say, to guarantee a sales monopoly ('Absatzmonopol') to the exclusive dealer ('Alleinvertreter'). Therefore Technique Minière considers that it must be admitted that the concessionnaire must refrain from making export sales outside the territory granted to him and that the grantor must prevent the concessionnaires whom he has appointed in other territories from making imports into the territory granted to Technique Minière. It is alleged that these are the facts which the Court of Justice should take into account in interpreting Article 85 (1), and in clarifying the regulations of the Community with regard to the law on cartels.
However, once again I do not think the opinion put forward by Technique Minière is correct. The interpretation of the agreement made between the parties to the proceedings before the national court belongs

exclusively to that court. If this interpretation leads it to conclude that only certain clearly defined matters need to be considered, this Court must abide by that decision and it is not for us to alter the form of the questions asked on the basis of those conclusions. So, in the attempted interpretation which follows, I shall only take into account those characteristics of an exclusive dealing agreement which the Cour d'Appel, Paris, has mentioned.

I do not see any further prior questions to be settled, and hence I am now in a position to devote my energies to the reply to be given to the main questions.

II — *The questions referred to the Court*

1. First question

There is no need for me to repeat the wording of the first question: I have already given it when describing the facts, and you have it in mind.

In order to reply to it, I think that we should be well advised to begin by looking at the extreme opinion put forward by Technique Minière; I think in fact that the extremely formalistic nature of the arguments which the company uses renders it possible to make a reasonably swift and simple examination of them.

Technique Minière justifies its point of view by referring to Regulation No 153/62 of the Commission which introduces a simplified notification procedure for certain agreements. Reference is also made to the contents of form B 1 introduced for this purpose. According to Technique Minière, the regulation and the form show the following: that they apply to agreements of the very kind described in the questions put by the Cour d'Appel, Paris, and that the Commission has made it compulsory to notify such agreements. The remainder of its reasoning then amounts to this: if an agreement must be notified, it is an agreement prohibited by Article 85 (1) of the Treaty. Far from being able to consider the merits of a particular case, the national courts are compelled, so Technique Minière says, to find that the agreements in question are void whenever there has been a failure to notify. It is further argued that the Commission is itself bound by this official interpretation which it has itself given to the EEC law on cartels so long as the legality of its Regulation No 153/62 is not called in question.

Now my impression is that there is no justification for Technique Minière's point of view. This is not merely because the Commission itself, namely the 'legislator' of Regulation No 153/62, does not share it, but also for compelling objective reasons.

In reality it is Regulation No 17/62 of the Council on which one must rely, that is to say, the first implementing regulation concerning the cartel law of the EEC Treaty. Article 9 (3) of this regulation expressly provides that the authorities of the Member States shall remain competent to apply the provisions of Article 85 (1) of the Treaty as long as the Commission has not initiated any procedure under Articles 2, 3 or 6 of the said regulation. Thus it recognizes that the national authorities, and accordingly national courts and tribunals also, have the right to consider and to examine whether Article 85 (1) applies. It seems only natural to allow the national authorities to have this power of assessment because generally speaking, as was emphasized in the defence put forward by Maschinenbau Ulm, they are able to make an enquiry from a position much closer to the facts than the Commission and have no less knowledge of them than the latter.

However, the application of Article 85 (3) is reserved to the Commission. It was to this end that Articles 4 and 5 of Regulation No 17 introduced a notification procedure and it is only in this context that Article 24 thereof has given the Commission power to adopt implementing provisions concerning the form, content and other details of notification. Accordingly Regulation No 153 does not mean that it establishes an absolute obligation to notify. It is based on the idea, which goes without saying, that there is only an obligation to notify when Article 85 (1) is applicable in principle and when, therefore, the possibility of an exemption under Article 85 (3) may arise.

In the present proceedings it is a fact that in accordance with this idea (which by the way is also stressed by means of a reservation contained in form B 1), the Commission has not excluded the right of national courts or

tribunals to consider whether, from the point of view of the criteria in Article 85 (1), the law on cartels should be applied to a particular case. Notwithstanding, this fact it is impossible to accuse the Commission of deviating from Regulation No 153 and of introducing new criteria for considering exclusive dealing agreements. In reality it has confined itself to interpreting Regulation No 153 in a way which is objectively in line with Article 85 of the Treaty and with Regulation No 17/62 of the Council.

Therefore it is clear that it would be a mistake to tell the Cour d'Appel, Paris, to assess the exclusive dealing agreement made between Technique Minière and Maschinenbau Ulm solely from the formal viewpoint that the agreement was not notified. The task which falls to this Court is to devote itself to a basic interpretation of the various elements of Article 85 (1). This will enable the national court to perform its duty of deciding whether in the case before it the agreement does or does not fall within the prohibition in that article. In order to give an interpretation of the said article there are (as I have already stressed in Case 32/65) three criteria which must be particularly taken into account:

— What are agreements between undertakings?
— In what circumstances may it be said that they have as their object or effect the restriction of competition?
— What is meant by 'which may affect trade between Member States'?

In the case of *Italian Government* v *Council of the EEC* I have explained in detail the *principles* to be applied in answering the above questions with reference to exclusive dealing agreements.

In order to avoid the necessity of repeating my arguments, I trust that it will be enough to refer you to what I said there, and to confine myself to reminding you of the conclusions which I reached. These are as follows:

— It is certain that exclusive dealing agreements made by a producer with persons in business in their own right, by which I mean dealers working on their own account and at their own risk, are 'agreements between undertakings' within the meaning of Article 85 (1); (at this stage it is not yet necessary to consider whether the word 'agreement' means the whole of the agreement, or only some of its clauses, namely the ones which matter from the point of view of competition law).
— In view of the fact that the EEC Treaty is based on a wide concept of competition and does not distinguish between horizontal and vertical agreements, the interference with competition which may result from agreements of the latter kind must also be taken into consideration as regards the application of Article 85. Such interference with competition may result from the exclusive dealing agreements which have been described to us because of the exclusive delivery and purchase clauses. This is true even if no prohibition on exports are imposed on the other concessionnaires and even if the holder of the exclusive dealership has the right to make sales outside the contract territory.
— Trade between Member States must only be considered as affected if it is *unfavourably* influenced. As regards this it is definitely not enough to prove that there has been a quantitative increase in trade in the products concerned in order to be able to deny that trade has been adversely affected. Since the object of exclusive dealing agreements is to canalize trade between Member States by concentrating it on one sales network, they may (compared with what should be considered the normal position at a given stage of integration) also be seen to have an effect on trade.

But whereas Technique Minière, in its secondary observations (I have already said what I think of the main part of its argument) says that it is not necessary to take things any further than this, in other words that when the considerations put forward up till now justify the assumption that competition has been adversely affected, then an undesirable monopoly has come into existence because, as with liability in tort, under Article 85 (1) even the slightest interference with competition must be subjected to the law, the Commission and Maschinenbau Ulm have another approach. They both attempt, each to a different extent, to avoid

a formal and rigid consideration of the facts. Thus the Commission is of the opinion that a theoretical interference with competition is not enough: it must be possible to discern a *perceptible* interference. Maschinenbau Ulm even goes as far as to exclude the application of Article 85 (1) in all cases where competition remains *in existence* notwithstanding the presence of the agreement.

These attempts certainly deserve sympathy because it would be going too far to allow the least interference with competition to fall under the strict prohibition in Article 85 (1), whether it arose from an agreement having that object or from an agreement which simply had that effect, and to grant exemptions for such infringements in the context of Article 85 (3). There may be some point in reflecting on the following fact: one of the strictest European legal systems concerning cartels, which is the German Law relating to restraint of competition (Gesetz gegen Wettbewerkbeschränkungen), accepts, in paragraph 18 thereof, the proposition that in principle there is nothing to be said against exclusive dealing agreements. The said Law only authorizes the Cartel Office to intervene when, for example, there is an *important* interference with competition on the market in a particular product or commercial activity.

Nor is it possible to object as against the Commission and Maschinenbau Ulm, as Technique Minière attempts to do, that the introduction of such a 'rule of reason' (let us give it this name) brings with it the risk of divergences in the development of the law in the various Member States and even within one and the same state, because of the fact that its application is often confided to the national court. For is it not the case that Article 177 of the Treaty (and the present reference exemplifies this) gives us an excellent means of preventing these risks from arising through the progressive elaboration of interpretative criteria by the European Court of Justice?

However, it is certain that it will not be easy adequately to define the principle which I have just put forward. Nor will it be easy to show just how far the national court may go in overlooking minor interferences with competition. In my opinion, it would be going too far to agree with Maschinenbau Ulm that Article 85 (1) must be ignored every time that competition continues *to exist*, because it is obvious that such considerations only come into their own when the question is whether Article 85 (3) should be applied (see subparagraph (b)). At the other extreme the Commission's point of view seems to be *too narrow* because, in order to decide whether competition is affected to an 'appreciable' extent, it is content with presumptions or declarations made by the parties to the proceedings before the national court or tribunal, without requiring the national court to take an objective look at the actual state of the market. The correct balance is to be found halfway between these two conceptions, which means that in order to apply Article 85 (1) the required standard must be a *real* interference with the conditions of competition. Either this interference must actually exist, or there must be concrete facts indicating that it will take place.

As regards this whole question, it is necessary to take into account the fact that in reality it is often impossible for small undertakings to get a foot-hold in a foreign market without concentrating their sales capacity in the hands of a single dealer, especially when their products have to be assembled before being sold and when it appears necessary to run a repairs service and to maintain a stock of spare parts. In cases of this sort a comparison with the situation which would prevail on the market without the exclusive dealership may lead to the conclusion that the absence of such an agreement leads directly to a decrease in competition, because it goes together with a reduction in what is offered. If, as in the case with which we are at present concerned, the exclusive dealer has not even succeeded in finding outlets on the market for the products which he has undertaken to sell, it is very probable that the situation for these products would scarcely be better if a larger number of persons were entrusted with the task of selling them.

Then it must be said that usually the exclusive purchase undertaking given by the concessionnaire (this means the prohibition to sell competitors' products), contained in the type of agreement which has been re-

ferred to us, does not present any dangers to competition, because it is only in rare cases that the only efficient means of introducing certain products to the market is through a single available dealer.

Still within the context of what the national court or tribunal should consider, one should also take into account the fact that the exclusive sales agreements of the kind which have been referred to the Court do not prevent parallel imports into the contract territory. Thus the exclusive dealer is at least to a certain extent in competition with dealers offering the same product. Finally, competition in *similar* products must not be forgotten and has to be taken into account. This applies not only (contrary to what the Commission thinks) to bulk goods, but also to machines of a highly technical nature which are sold under a given trade-mark and which up to a point may be preferred by consumers. This is tantamount to saying that a realistic look at the market can clearly show that, as regards this type of competition also, the products of different producers are competing fiercely with each other, which means that the elimination of competition between the products *of just one* producer should be seen to be of no importance. As regards this point, the information given by Maschinenbau Ulm on the number and importance of 'suppliers' present on the French market and on the percentage of that market represented by the results which it has attempted to obtain thereon may be of useful assistance for the case at issue.

If it appears, after such a realistic look at the market has been made (and far from asking too much, it is perfectly reasonable to expect national courts or tribunals to carry out such an examination of the market, for otherwise Article 9 of Regulation No 17 would lose all meaning), that on the whole, notwithstanding the existence of agreements having an interference with competition as their object or effect, the circumstances in which competition takes place are only influenced to a negligible extent, then exclusive dealing agreements which may in principle fall under the prohibition in Article 85 (1) should not be subjected to the effects of that provision.

For the sake of completeness, let me say that the same is true of the question whether the agreement may 'affect trade between Member States'. Here too, it is impossible to confine oneself to a theoretical view and simply examine the clauses of an agreement, which is what Technique Minière sees fit to do when it asserts that *as a general rule* exclusive dealing agreements affect trade between Member States. On the contrary, it should rather be said that, when trade is only affected to a slight extent, such slight effects are of no importance. This is also the opinion of the Commission, but it must be admitted that the Commission does not recognize all the consequences flowing from such opinion. In reality these consequences consist in requiring that the market be examined with this second factor in mind also, that is, comparing the situation on the market before the making of the agreement with the situation after it has been made. I should stress that this comparison is not an excessive requirement when it is not agreements to be carried out in the future which are to be considered, but agreements which have already come into existence in the past, because in this case what has happened in the past is a guide-line to what is likely to happen in the future.

It may happen that this comparison will lead to the conclusion that in a given situation and at a given stage of integration it is none other than exclusive dealing agreements which make trade possible between Member States in a given product (for example, in the case of small concerns with little capital attempting to gain access to a foreign market in the teeth of tough competition). Or again, the fact that an exclusive dealing agreement does not prohibit parallel imports may compel the finding that the concentration of the trade between Member States which it was intended to bring about with the help of a sole concessionnaire is so greatly compensated by other imports that it is no longer possible to say that international commercial relations have been seriously distorted. And if such be the situation it would be artificial to say that Article 85 (1) can apply and not to give relief except through Article 85 (3) by granting an exemption.

It does not seem to me that the European Court of Justice can go any further in the

general interpretation of the law which it is required to give on the question referred to it, if it wishes to avoid the criticism that it is itself applying the law in the place of the national court. But the methods of approach which I have mentioned should be enough for the court which has referred the question here to assess the facts on which it must give judgment.

2. Second question

The second question, which I shall not read out again here either, only has relevance for the national court if the examination which it must carry out reveals that at least some clauses of the exclusive dealing agreement made between Maschinenbau Ulm and Technique Minière are incompatible with Article 85 (1).

Let me make it clear straight away that the question only asks whether the potential nullity is limited to the undertakings given in the field of competition and no more, or whether it strikes down the agreement in its entirety. Therefore we do not have to concern ourselves with the limitation of the nullity *in time* (Technique Minière spoke of this), and in particular we do not have to turn our minds to deciding the very moment at which the nullity can have begun.

As regards the second question also, the opinions expressed are very diverse, at least as between Technique Minière on the one side and Maschinenbau Ulm and the Commission on the other (although the latter's point of view is not always perfectly clear, or free of contradictions).

In my opinion the reply to this question does not raise any special difficulties if the objectives of the Treaty are kept in mind. It is necessary to start with the idea that the Treaty only prohibits anything which might run counter to the implementation of its principles. This means in the present case obstacles of an international character placed in the way of competition and of a certain magnitude. Other factors which may be found alongside these obstacles do not matter in the eyes of the Treaty, or at any rate they do not matter for Article 85. Thus it seems to be established in principle that the only parts of an agreement which can be struck down by the nullity imposed by Article 85 (2) are those which bring about a restriction on competition and which must be considered as the decisive causes of an interference with competition. I do not think the acceptance of wider effects would be justified, particularly since it is often only by chance that at the same time as causing a restriction on competition the parties enter into other commitments and include them in the same agreement. In particular it would be a mistake to agree with Technique Minière that the total nullity of the agreement is justified by the idea of penalizing undertakings which infringe the principle of competition. National competition law does not go along with such ideas either. These ideas cannot be justified in any way where agreements made *before* the adoption of Regulation No 17 are concerned. The fact that, when an agreement is notified with a view to obtaining an exemption under Article 85 (3), it may be necessary to submit the whole of the contents of the agreement so that it can be judged on balance as between the clauses which are of a kind favourable to competition and those which interfere with it obviously does not lead to a different result either, precisely because an examination based on Article 85 (3) and an examination as to whether the factors justifying the application of Article 85 (1) have arisen are two different things. Nor, finally, do I see insurmountable difficulties in the fact that to decide which are the clauses that matter from the point of view of a restriction on competition may sometimes be a delicate task, especially when this only results from a combination of several clauses. The difficulties are not insurmountable because once the principle of conferring on the national court the power to decide whether the factor justifying the application of Article 85 (1) have arisen is accepted (and that is only right), it may also be entrusted with the duty of carrying out the severance of the agreement of which I have made mention above. It may particularly be entrusted with this duty thanks to the existence of Article 177 of the EEC Treaty, which can, where necessary, render assistance through the preliminary rulings of this Court.

Accordingly, let me say that in principle the competition law of the Treaty only covers those parts of an agreement which come

within the province of that law. For the rest it is not necessary, in my opinion, to resolve the question of the effects of the partial nullity of an agreement on the remaining commitments included in that agreement at the level of Community law, by which I mean uniformly for all the Member States. This is a question which the relevant national law may lay claim to dispose of (it must be determined in accordance with the rules of private international law), and in this case it is Article 1172 of the French Civil Code which might be applicable.

III — *Recapitulation*

To sum up, here are the replies which should be given to the questions which have been referred to you:

1. Exclusive dealing agreements having the characteristics described by the Cour d'Appel, Paris, may fall under the prohibition in Article 85 (1) of the Treaty. However, as in order to be able to apply Article 85 it is not enough to find that from a purely theoretical point of view the requirements which the said article lays down are met, it is for the national court or tribunal to take into account the real or reasonably foreseeable repercussions of the agreement on the market, and to examine whether in the particular case before it there is an interference with competition to a real extent and whether trade between Member States is affected. If that court or tribunal comes to the conclusion that this is so, and if no notification has taken place within the period laid down by Article 5 of Regulation No 17, then in every such case the agreement concerned is void.

2. In the aforesaid cases the nullity does not strike down the agreements in their entirety. As a matter of principle the nullity only applies to the clauses which come within the province of competition law. For the rest, the agreement should be judged in accordance with national law.