JUDGMENT OF THE COURT
9 JULY 1969[1]

Franz Völk
v Établissements J. Vervaecke[2]
(Reference for a preliminary ruling by the Oberlandesgericht, Munich)

Case 5/69

Summary

1. *Procedure — Preliminary ruling — Jurisdiction of the Court of Justice — Limits (EEC Treaty, Article 177)*

2. *Policy of the EEC — Rules on competition between undertakings — Agreements which may affect trade between Member States — Concept (EEC Treaty, Article 85)*

3. *Policy of the EEC — Rules on competition between undertaknigs — Exclusive dealing arrangements with absolute territorial protection — Prohibition — Possibility of avoiding such prohibition by reason of the weak position of the parties concerned on the market in the products in question (EEC Treaty, Article 85)*

1. The Court is not entitled within the framework of Article 177 to apply the Treaty to a particular case. It may however derive from the wording of the decision referring the matter the questions which relate exclusively to the interpretation of the Treaty.

2. If 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 realization of the objectives of a single market between States.

3. An exclusive dealing agreement, even with absolute territorial protection, may, having regard to the weak position of the persons concerned on the market in the products in question in the area covered by the absolute protection, escape the prohibition laid down in Article 85(1).

In Case 5/69

Reference to the Court under Article 177 of the Treaty establishing the European Economic Community by the Oberlandesgericht, Munich, for a preliminary ruling in the action pending before that court between

1 — Language of the Case: German.
2 — C.M.L.R.

FRANZ VÖLK, merchant, Kempten (Germany),

and

ÉTABLISSEMENTS J. VERVAECKE (Société de Personnes à Responsabilité Limitée), Brussels,

on the interpretation of Article 85(1) of the said Treaty,

THE COURT

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

Advocate-General: J. Gand
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — History of the case

According to the order bringing the matter before the Court together with the judgment given on 29 June 1967 by the court of first instance, the Landgericht (Regional Court), Kempten, the facts which form the basis of the main action are as follows:

A — Mr Völk trades under the name 'Maison Josef Erd & Co.' (hereinafter referred to as 'Erd & Co.'), an undertaking manufacturing washing-machines under the trademark 'Konstant'. Établissements J. Vervaecke (hereinafter referred to as 'Vervaecke') is a private limited company incorporated under Belgian law (Société de Personnes à Responsabilité Limitée de droit belge) and is an undertaking distributing household electrical appliances.

On 15 September 1963 the two undertakings concluded a contract in writing containing *inter alia* the following clauses:

'(1) ... Erd & Co. grants to Vervaecke ... the exclusive right of sale of its products in the European territories of Belgium and in Luxembourg.

. . . . . .

(4) (a) Vervaecke undertakes to order approximately 80 appliances monthly from Erd & Co.

. . . . . .

(c) The abovementioned number of appliances shall be attained by the end of an initial period fixed at six months from the date of signature of the contract.

. . . . . .

(8) (a) Erd & Co. undertake to 'protect' Vervaecke in the exclusive sales sector guaranteed to it.

(b) If Vervaecke is unable to dispose of the appliances from Erd & Co.'s range the latter shall be entitled to supply another importer.

(c) Erd & Co. shall be obliged to offer any new appliances which they produce to Vervaecke and only after the latter has refused to distribute them may they be offered to another importer.

(9) Vervaecke undertakes not to sell competing appliances with features similar to the appliances of Erd & Co.'

Several times during 1964 this contract was supplemented by additional clauses in writing dealing *inter alia* with the following points:

— the initial period provided for in Article 4(c) was extended until 31 April 1964 with the option of a further extension to 31 December 1964;

— it was agreed that 'taking into account the expansion of sales in 1964, a new minimum number of appliances to be delivered monthly to Vervaecke (would) be finally fixed in January 1965 on the basis of accounting factors (sales figures)'.

Mr Völk states that on 19 November 1964 the two undertakings (verbally) concluded another agreement the tenor of which is as follows:

(a) From 1 February 1965 Vervaecke shall order from Erd & Co. 50 washing-machines every two months until a total of 600 appliances is reached.

(b) The price is fixed at DM 578 per appliance. Vervaecke undertakes to deliver free of charge to Erd & Co., on the delivery of each consignment of 50 appliances, a bill of exchange accepted for the amount of the purchase price and payable in four months.

(c) When Vervaecke fulfils the undertaking to deliver a total of 600 washing-machines in all, it shall be released from its obligations under the contract of 15 September 1963.

Vervaecke disputes the existence of such an agreement. In the course of inquiries made by the court before whom the proceedings took place, the following declarations were obtained concerning the scope which the parties to the contract attributed to the term 'territorial protection' on which they had agreed:

(a) Mrs Greta Vervaecke makes *inter alia* the following statement: Mr Völk apointed Vervaecke as his sole representative in Belgium and in Luxembourg and undertook that no-one else would be allowed to sell there the washing-machines manufactured by Erd & Co. Vervaecke attached a great deal of importance to this factor and without it would not have undertaken to accept delivery of a minimum number of appliances. Mr Völk gave an assurance that he could prevent third parties from importing his appliances into Belgium after they had left Germany or another country. Moreover Mr Völk required Vervaecke to

restrict its sales to Belgium and Luxembourg.

(b) Mr Oskar Völk stated in particular:

— that Mr and Mrs Vervaecke made conclusion of the contract conditional on Vervaecke having the sole right of sale in those two countries;

— that he himself promised Mr and Mrs Vervaecke that he would prevent all deliveries to other Belgian clients and deliveries by other German firms which might come to the attention of Erd & Co.;

— that nevertheless, far from requiring that Vervaecke should supply only Belgium and Luxembourg, he also allowed it to supply countries in which Erd & Co. were not then represented.

B — Mr Völk considered that Vervaecke had failed to respect its contractual obligations and brought it before the Landgericht, Kempten. In its judgment of 29 June 1967 the Landgericht in essentials found for for Mr Völk. Vervaecke appealed against this judgment to the Oberlandesgericht (Higher Regional Court), Munich.

Vervaecke submitted before those two courts that according to Article 85 of the EEC Treaty the disputed provisions were automatically void because its undertaking was guaranteed 'absolute territorial protection'. Mr Völk on the other hand considered that those provisions were valid because the proportion of the market which he had acquired in Belgium and in Luxembourg and that which he had in fact endeavoured to acquire was extremely small. In that connexion, he stated that his production of washing and drying machines was:

in 1963, 2361 appliances,
in 1964, 2066 appliances,
in 1965, 1652 appliances,
in 1966, 821 appliances.

II — Tenor and reasoning of the order making the reference

On 5 December 1968 the Oberlandesgericht, Munich, decided to ask the Court, under Article 177 of the EEC Treaty, to give a ruling on the following question:

'In determining whether the disputed contract of 15 December 1963, as amended on 1 January 1964 and 11 March 1964, falls within the prohibition set out in Article 85(1) of the EEC Treaty, must regard be had to the proportion of the market which the plaintiff in fact acquired or ultimately endeavoured to acquire in the Member States of the European Economic Community, in particular in Belgium and in Luxembourg, the sales sector for which the defendant enjoys "absolute protection"?'

This court states as the reasons for its order that, in order to settle the dispute before it, it must decide whether the contract concluded between the parties to the main action is automatically void.

III — Procedure

The order referring the matter was received at the Court Registry on 28 January 1969.

Vervaecke and the Commission of the European Communities submitted statements of case pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the European Economic Community and the Commission put forward oral observations at the hearing on 7 May 1969.

The Advocate-General delivered his opinion at the hearing on 3 June 1969.

Vervaecke was represented by Mr Ledoux of the Brussels Bar, and the Commission by its Legal Adviser, Mr Zimmermann.

IV — Summary of the observations submitted by the parties concerned pursuant to Article 20 of the Statute of the Court of Justice of the EEC

With particular reference to Articles 1, 4 and 8 of the agreement in dispute, *Vervaecke* declares that it constitutes what is known as an exclusive distribution contract.

Vervaecke sets out the following argument:

— Article 8(a) of the contract is incompatible with Article 85 of the EEC Treaty together with the regulations adopted by the Commission in implementation thereof. This clause provides for a 'complete and watertight exclusive dealing arrangement', because it binds Erd & Co., not only to refrain from supplying other purchasers in Belgium and in Luxembourg, but in addition to take measures to prevent parallel deliveries in those countries.

— Furthermore the contract binds Vervaecke to accept a minimum of 80 appliances per month, which it would have been initially unable to do if another undertaking had been distributing the same appliances in the protected sector. Consequently it would not have undertaken to order a minimum quantity without the guarantee of the territorial protection in question. It is thus not only Article 8(a) of the disputed contract but the entire contract which is automatically void.

The observations of the *Commission of the European Communities* may be summarized as follows:

(a) The following facts should be noted:
— The disputed contract and its amendments were not notified to the Commission.
— The total production of washing-machines in the Common Market was 2 997 000 units in 1963 and 4 179 000 units in 1966. The total production in the Federal Republic of Germany amounted to 1 036 000 units in 1963 and to 1 482 000 units in 1966. For 1963 Erd & Co.'s production (2 361 units) thus represents 0.08% of the total production of the Common Market and 0.2% of the production in the Federal Republic. In Belgium, the production of washing-machines was 121 000 units in 1963 and 63 000 units in 1966. In 1966, the total number of appliances distributed in Belgium and in Luxembourg was 163 000; the annual number of appliances (960) which the disputed contract bound Vervaecke to distribute thus represents 0.6% of the total sales in this sector.

(b) As it has been formulated, the question put by the Oberlandesgericht, Münich, amounts to asking the Court to apply the Treaty to a particular case, which falls outside its jurisdiction under Article 177. Nevertheless it is simple to deduce from this the real question of interpretation, which is whether regard must be had to the proportion of the market controlled by the manufacturer who has concluded with a distributor an exclusive dealing contract containing 'absolute territorial protection', in determining whether Article 85(1) is applicable.

(c) Neither the decision of the Commission of 23 September 1964 (Official Journal of 20 October 1964, p. 2545 et seq.), nor the judgment of 13 July 1966 whereby the Court confirmed that decision in its essentials (Joined Cases 56 and

58/64, *Grundig-Consten* v *Commission,* [1966] E.C.R. 299) enables it to be concluded that *all* contracts displaying the above characteristics fall within the prohibition set out in Article 85.

(d) The Commission refers to certain regulations which either provide that it is obligatory to notify agreements or grant exemption or exempt from the prohibition certain categories of agreements:

— Regulation No 17/62 of the Council (Official Journal of 21 February 1962, p. 204 et seq.);

— Regulation No 153/62 of the Commission (Official Journal of 24 December 1962, p. 2918 et seq.);

— Regulation No 19/65/EEC of the Council (Official Journal of 6 March 1965, p. 533 et seq.);

— Regulation No 67/67/EEC of the Commission (Official Journal of 25 March 1967, p. 849 et seq.).

The Commission declares that those regulations do not constitute a mandatory ruling on whether a specific agreement is caught by the prohibition (cf. also the judgment of the Court of 13 July 1966: *Italy* v *Council and Commission,* Case 32/65, [1966] E.C.R. 389, paragraph 2 of the summary). Nor can the fact that an agreement is not notified render it automatically void (judgment of the Court of 30 June 1966: *Technique Minière* v *Maschinenbau, Ulm,* Case 56/65, [1966] E.C.R. 235; paragraph 4 of the summary).

For the most part the clauses in the disputed contract satisfy the conditions for exemption for categories of agreements listed in Regulation No 67/67; apart from the lack of notification the factor which, under Article 3(b) of that regulation excludes its application, is that Erd & Co. undertook to 'protect' Vervaecke in the sales sector which was guaranteed to it. The considerations set forth above, however, show that the question before the Court does not turn on this point; the disputed contract must be considered independently of the abovementioned regulations.

(e) The contract in question, continues the Commission, constitutes an 'agreement between undertakings' within the meaning of Article 85(1).

It explains why, in its view, agreements like the present one have as their object the prevention, restriction or distortion of competition. Nevertheless, it adds that, according to the case-law of the Court and the practice followed by the Commission itself in adopting its decisions, in order for the prohibition set out in Article 85 to come into play it is insufficient that the agreement has as its objective the purely theoretical restriction of competition. Where regard must be had to the *object* of the agreement, it must show 'the effect on competition to be sufficiently deleterious' ('hinreichende Beeinträchtigung'); when regard must be had to its *effects,* the Court requires that the agreement restrict competition 'to an appreciable extent' ('spürbar') (judgment in Case 56/65, loc. cit., p. 249).

It is true that the Court has stated in its judgment in Joined Cases 56 and 58/64 (loc. cit., p. 342) that 'there is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition'. The Commission, however, states that this declaration must be understood in the context of the particular facts which formed the basis of that judgment and there may not be attributed to it a general scope amounting to an inference that when it is established that an agreement has as its object the disturbance of competition it is no longer necessary to have

regard to the seriousness of its effects. Moreover, it would be incompatible with the rationale of Article 85 to have recourse to different criteria depending on whether the object or the effect of the agreement under consideration was envisaged.

(f) In deciding whether an agreement has an appreciable effect on the market, in the case of exclusive dealing agreements the situation arising from the agreement for third party undertakings and consumers must be compared with that which would obtain if that agreement did not exist (judgment in Case 56/65, loc. cit., p. 250). It is true that in this connexion account must be taken of the proportion of the market which a manufacturer controls or endeavours to acquire within the Common Market or in a 'protected' sales sector. The Commission declares that it is in accordance with this concept that the judgment in Case 56/65 (loc. cit., p. 252) requires that there be taken into consideration 'the nature and quantity of the products covered by the agreement' together with 'the position of the grantor and of the concessionnaire on the market for the products in question'. Consideration of the present case in terms of those criteria leads to the following findings:

— The brand of washing-machines manufactured by Erd & Co. remains almost unknown and is in competition with similar products of many other manufacturers who have penetrated the market much more successfully.

— Erd & Co's production and the proportion of the market which it occupies are very small whether the entire Common Market, the Federal Republic or the sales sector of Belgium and Luxembourg are considered.

— In these circumstances it must be admitted that even when an agreement guaranteeing strict 'territorial protection' is concluded, the manufacturer does not appreciably restrict competition.

(g) The Commission declares that the the same reasons preclude recognizing that the agreement in dispute 'may affect trade between Member States' (Article 85(1)). In order for such a deleterious effect to be found it is necessary that it should be fairly widespread.

Grounds of judgment

1 By an order of 5 December 1968, which was received at the Court Registry on 28 January 1969, the Oberlandesgericht, Munich, under Article 177 of the Treaty establishing the EEC referred to the Court of Justice the question whether in order to decide whether the disputed contract falls within the prohibition set out in Article 85(1) of the EEC Treaty regard must be had to the proportion of the market which the plaintiff has actually acquired or which he has endeavoured to acquire in the Member States of the EEC, in particular in Belgium and in Luxembourg, the sales zone within which the defendant enjoys absolute protection.

2/4 Although the Court is not entitled within the framework of sub-paragraph (a) of the first paragraph of Article 177 to apply the Treaty to a particular case, it may nevertheless derive from the wording of the decision referring the

matter the questions which relate exclusively to the interpretation of the Treaty. The question raised relates to agreements which are characterized by the fact that a producer who has granted a distributor the exclusive right of sale of his products for certain countries in the Common Market has undertaken to protect the distributor against deliveries which might be made in those countries by third parties and has obtained from the distributor an undertaking not to sell competing products. The question is thus reduced to whether, in deciding whether such agreements fall within the prohibition set out in Article 85(1) of the Treaty, regard must be had to the proportion of the market which the grantor controls or endeavours to obtain in the territory ceded.

5/7 If 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. Moreover the prohibition in Article 85(1) is applicable only if the agreement in question also has as its object or effect the prevention, restriction or distortion of competition within the Common Market. Those conditions must be understood by reference to the actual circumstances of the agreement. Consequently an agreement falls outside the prohibition in Article 85 when it has only an insignificant effect on the markets, taking into account the weak position which the persons concerned have on the market of the product in question. Thus an exclusive dealing agreement, even with absolute territorial protection, may, having regard to the weak position of the persons concerned on the market in the products in question in the area covered by the absolute protection, escape the prohibition laid down in Article 85(1).

8/9 The costs incurred by the Commission of the European Communities which submitted its observations to the Court are not recoverable. As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the Oberlandesgericht, Munich, the decision on costs is a matter for that court;

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the oral observations of the Commission of the European Communities;

Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community, especially Articles 85(1) and 177;
Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community, especially Article 20;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities,

THE COURT

in answer to the questions referred to it by the Oberlandesgericht, Munich, by order of that court of 5 December 1968, hereby rules:

An exclusive dealing agreement, even with absolute territorial protection, may, having regard to the weak position of the persons concerned on the market in the products in question, escape the prohibition laid down in Article 85(1).

Lecourt Trabucchi Mertens de Wilmars

Donner Strauß Monaco Pescatore

Delivered in open court in Luxembourg on 9 July 1969.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL GAND DELIVERED ON 3 JUNE 1969[1]

Mr President,
Members of the Court,

The reference made by the Oberlandesgericht, Munich, for interpretation of Article 85 of the Treaty of Rome presents you with an opportunity to clarify the case-law arising from your judgment in the *Société Technique Minière* case of 30 June 1966 (Case 56/65, [1966] E.C.R. 235) and in the *Grundig* case of 13 July 1966 (Joined Cases 56 and 58/64, [1966] E.C.R. 299), in particular with regard to exclusive dealing contracts with absolute territorial protection.

I

I shall first of all review the facts of the case so far as is necessary to understand the question put.
The German firm Josef Erd & Co., owned by Mr Völk, manufactures

1 — Translated from the French.