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.

washing and drying machines sold under the trade-mark 'Konstant'. Its share in the market of those appliances is very small since it amounted to 2361 units in 1963 and 861 in 1966, that is approximately 0.2% and 0.5% respectively of the production in the Federal Republic.

On 15 September 1963 it concluded a contract with Établissements Vervaecke, which sells domestic electric appliances in Belgium, whereby it granted to the latter the exclusive right of sale of its appliances in Belgium and in Luxembourg. The contract was concluded for a period of three years and it was understood that it would be automatically extended for two years unless notification were given at least nine months before the date of its expiry.

Amongst the clauses of the contract the following may be noted:

— Erd & Co. granted the exclusive right of sale of its products for Belgium and Luxembourg to Vervaecke. Erd & Co. only reserved the right to supply these appliances to others if Vervaecke failed to sell various appliances from Erd & Co.'s range of products.

— Vervaecke undertook to accept delivery, after an initial period of six months of a monthly total of appliances (80, according to the contract) and undertook not to sell competing appliances with features similar to those of Erd & Co.

— The grantor undertook to protect Vervaecke in the exclusive sales sector guaranteed to them; it appears however that the dealer was authorized to supply zones where Erd & Co. was not yet represented, and in particular to establish a network of representatives in the Netherlands, but that this authorization was not acted upon.

Neither the contract of 15 September 1963 nor the amendments made to it were notified to the Commission. It was, moreover, only partially implemented since in one year only 200 washing-machines were sold in Belgium. Erd & Co. then claimed from Vervaecke payment of DM 11 560 for delivery of 20 washing-machines and in addition requested compensation for the costs incurred in the fruitless delivery of 50 washing-machines.

Before the German court the problem of the validity of the contract was raised in connexion with Article 85 of the Treaty of Rome, which has led the Oberlandesgericht, Munich, to put the following question to you:

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 for 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'?

II

You must of course ignore the fact that the court making the reference would like you to express a view on the application of the rules of the Treaty to the contract the validity of which is disputed before it, but subject to that reservation the question is clearly put.

1. Contrary to what has sometimes been said, the *Grundig* case does not seem to me to imply that the grant of an exclusive right together with absolute territorial protection necessarily falls within the prohibition laid down by Article 85(1). The case which you were required to settle was too exceptional to deduce such sweeping conclusions from it.

Nor do the implementing provisions of the Treaty provide any solution. Indeed, neither the fact that a contract was not notified nor that it does not fulfil the conditions required for an exemption (such as those provided for example for

certain categories by Regulation No 67/67 of the Commission) are not conclusive when they relate to whether or not a contract is caught by Article 85(1). As is stated in the judgment in *Government of the Republic of Italy* v *Council and Commission of the EEC* (Case 32/65, 13 July 1966, [1966] E.C.R. 389), 'to define a category is only to make a classification and it does not mean that the agreements which come within it all fall within the prohibition. Nor does it mean that an agreement within the exempted category, but not exhibiting all the features of the said definition, must necessarily fall within the prohibition'.

2. We should therefore return to the terms of Article 85(1) which states 'The following shall be prohibited as incompatible with the common market: all agreements between undertakings . . . which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market'.

The passage therefore requires the conjunction of two conditions which the Commission, in its observations, considered in the light of your case-law, commencing with that which subordinates the incompatibility of the agreement with the Common Market to the finding that it has as its object or effect the distortion of competition. This is in principle the precise *object* of an exclusive dealing agreement with a clause giving absolute territorial protection. In fact, if in the protected zone sales by other traders are rendered more difficult or excluded and if the consumers in that zone can only obtain the same products from the exclusive dealer and thus suffer a restriction in choice at the distribution level, these are exactly the results which the agreement sought to bring about.

Is this acceptable? You have certainly stated in the judgment in the *Grundig* case that for the purposes of the application of Article 85(1) there is no need to take into account the concrete effects of an agreement when it has as its object the prevention, restriction or distortion of competition, which might imply a negative reply to the question put; but it appears that the scope of this declaration must be restricted to the facts which form the basis of the judgment. In fact, according to the judgment in the *Technique Minière* case even the object of the agreement must be considered 'in the economic context in which it is to be applied', and for Article 85(1) to be applicable this examination must reveal a 'sufficiently deleterious effect' with regard to competition. In sum, this amounts to saying that the change in competition must not be merely theoretical, but must be fairly widespread, and this is therefore not far removed from the 'appreciable' restriction which this same judgment requires when the agreement is no longer considered with regard to its object but with regard to its effects.

Moreover competition must be understood in the actual context in which it would occur in the absence of the agreement. The consequences of this for the other undertakings or consumers may be very different depending on the proportion of the market which the manufacturer controls or endeavours to obtain. At this point the question put by the German court is again encountered.

You have already referred to this aspect of the problem when you considered under what conditions an exclusive dealing contract must be considered as prohibited. You listed a whole series of factors which must be taken into account. As well as the severity of the clauses intended to protect the exclusive dealership or on the other hand the opportunities allowed for other commercial competitors, and whether the agreement is an isolated one or part of a series, you particularly mentioned the nature and the quantity, limited or otherwise, of the products covered by the agreement together with the position of

the grantor and of the dealer on the market in the products concerned. It is this last point which must be emphasized.

If the manufacturer controls a relatively important part of the market and is in a strong position with regard to the products subject to the agreement, there are definite grounds for the view that competition is appreciably affected at the distribution level by an exclusive dealership guaranteed by absolute territorial protection. On the other hand, one cannot be so positive when the producer's position is very weak. A contract of the same type may allow him to bring his products into a sales zone, without appreciably diminishing either the consumers' choice or the sales opportunities of other traders. I do not wish to express myself within the framework of Article 177 on the case put forward by the German court, but it may be thought for example that the production figures which I have just quoted only represent a drop in the ocean in relation to the total production of the Federal Republic and the Belgian and Luxembourg markets.

To close on this point it will be recalled that the *Grundig* judgment took particular account of the fact that that brand was *extremely widespread* in appraising the influence on competition in the Common Market of the agreement which aimed at isolating the French market for this brand of products and artificially maintaining separate markets. It may be deduced from this that an agreement of the same type relating to almost unknown brands would not lead you to make the same decision and to employ the same severity.

3. In concluding its observations the Commission adds that in order for an agreement to be considered as affecting trade between Member States—another condition provided for by Article 85(1) —it must be such as to threaten the freedom of trade between those States by hindering the realization of a single international market, which assumes that the effect on trade attains considerable proportions. The two conditions tend thus to merge with each other and it is in fact difficult to distinguish them one from the other.

It may however be wondered whether it would not be profitable to consider this aspect first; for knowing whether an agreement may affect trade between Member States is not merely a necessary condition for the prohibition of the agreement under Article 85(1), it is a condition precedent. As is stated in the *Technique Minière* judgment, 'it is in fact to the extent that the agreement may affect trade between Member States that the interference with competition caused by that agreement is caught by the prohibitions in Community law found in Article 85, whilst in the converse case it escapes those prohibitions'.

In this connexion one can do no better than to refer to the clarifications in this judgment. It analyses the disputed provision as establishing a foreseeable condition based on the possibility of an obstacle to the realization of a single market. In general, if the exclusive dealing agreement is to come within the field of application of Article 85(1), it must be of such a nature that, on the basis of a set of objective factors of law or of fact, and having regard to what can reasonably be foreseen, it is to be feared that it might have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States. More precisely, special attention should be given to whether the agreement is capable of partitioning the market in certain products.

Whatever its real object may be, a contract drawn up by a producer who only has a very small part of the market cannot prevent the realization of a single international market; the weakness of the grantor's position precludes his having any real influence on the market. A realistic view of matters thus gives rise to the view that trade between Member

States cannot be 'affected' by an agreement made in such a situation as that contract which caused the reference by the Oberlandesgericht, Münich.

Finally, the reply to be given to that court should be as follows:

— Although a contract of exclusive dealership containing a clause granting absolute territorial protection is normally caught by the prohibitions in Article 85(1), it falls outside those prohibitions when it is incapable of affecting trade between Member States or of appreciably preventing, restricting or distorting competition at Common Market level.

— In order to decide whether this is so account must be taken, where necessary, of the position which the grantor occupies or may hope to acquire on the market of the products in question.

— If this proportion of the market is insignificant and if the quantity guaranteed to the dealer only represents a very small part of the quantity of similar products sold by all the traders in that zone, it may be presumed that the agreement falls outside the restrictive provisions of Article 85 of the Treaty.

Such is my opinion, and I am further of the opinion that the decision as to costs is a matter for the Oberlandesgericht, München.