OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 22 MARCH 1966[1]

Summary

Mr President,
Members of the Court,

Amongst the cases concerning competition law which are at present before the Court, we have today to deal with an application brought by the Government of the Italian Republic against the Council of Ministers and the Commission of the European Economic Community. It is mainly concerned with solving a legal question of principle, and not just with applying Community competition law to a particular case. For this reason it will be seen that this application should logically be considered before the other cases of this sort.

My preliminary observations on this case will be relatively brief. We know that as regards the provisions of the EEC Treaty concerning competition, the Council on 6 February 1962 adopted an implementing regulation provided for by Article 87 of the Treaty, after very intensive preparatory work. This introduced detailed rules governing competition law (Kartellrecht) coming under Article 85 of the Treaty (to use an abbreviation for the contents of this provision) and also governing the matters

1 — Translated from the German.

coming under Article 86, which covers undertakings having a dominant position in the market. In particular, the rules include provisions on the notifying of agreements for which exemption under Article 85 (3) is claimed. Amonst these provisions, the ones which are of outstanding interest to us are those to which the applicant refers in its arguments, especially Article 4 (2) and Article 5 (2). By virtue of these provisions the obligation to notify does not apply to certain agreements (inexistence when Regulation No 17 came into force or concluded after it came into force) where not more than two parties are involved, and whether either they contain clauses which restrict the resale of goods supplied by one of the parties to the agreement, or where they impose restrictions concerning the use of industrial property rights on the assignee or user of these rights.

During the course of the subsequent development of competition law, and I do not intend to set out all the details here, the Commission used the authority granted to it by Article 24 of Regulation No 17, and adopted implementing Regulation No 27 on 3 May 1962 (Official Journal 1962, p. 1118) (English Special Edition, 1959–1962, p. 132). This regulation contains the details governing the notification of agreements, and *inter alia* provides that form B is to be used for notifications made in accordance with Articles 4 and 5 of Regulation No 17. Later, on 21 December 1962 (Official Journal, 1962, p. 2918), the Commission adopted supplementary Regulation No 153 which took into consideration the large number of so-called exclusive dealing agreements and introduced a simplified form B 1 for notifying these agreements provided that two undertakings at most are parties to them, and that they comply with certain stated conditions.

Finally, in view of the large number of notifications received, the European institutions concerned were induced to seek out a procedure which would allow quicker 'treatment of requests for exemptions under Article 85 (3) of the EEC Treaty. The result of these efforts was Regulation No 19/65 of the Council (Official Journal, 1965, p. 533) (English Special Edition, 1965–1966, p. 35), adopted on 2 March 1965 in accordance with Article 87 of the Treaty and on a proposal from the Commission. The intention of this regulation is to permit the Commission to make regulations exempting whole categories of agreements (a possibility which in principle Article 85 (3) of the Treaty already provides for). It applies in particular to agreements made between two undertakings and imposing on the parties clauses for the exclusive supply or the exclusive purchase of goods, or containing restrictions concerning the acquisition of industrial property rights. It is provided that the Commission shall state in detail in its regulations the provisions which the agreements must not contain, as well as those which they must contain if the exemption is to be effective.

It is against this Regulation No 19/65 of the Council that the Government of the Italian Republic has brought an application. For reasons which we shall examine later on, the Government asks for it to be annulled. The applicant also asks, in accordance with Article 184 of the EEC Treaty, that subparagraph (2) (a) and (b) of Article 4 (2) and Article 5 (2) of Regulation No 17/62 of the Council of 6 February 1962 be declared inapplicable, and that Regulation No 153/62 of the Commission of 21 December 1962 be declared inapplicable as well.

The defendant Council of Ministers is of the opinion that the conclusions of the applicant are not well founded in so far as they relate to the annulment of Regulation No 19/65. Furthermore it is of the opinion that the conclusions calling for a declaration as to the inapplicability of the other two regulations are inadmissible. As for the defendant Commission, it says that the only conclusions which involve it, namely those concerning Regulation No 153/62, are inadmissible. The Commission has even asked the Court for a preliminary ruling on this point pursuant to Article 91 of the Rules of Procedure. However the Court has not acceded to this request.

Legal discussion

When I now attempt to analyse the substance of the case, it is clear from the conclusions of the parties which I have just outlined that first of all I shall have to consider certain

procedural questions and to do so from several angles.

A — Points of procedure

I — *Is the application really directed against the Commission of the EEC*

The Commission initially doubted whether the applicant really intended to make it a party to these proceedings. Its doubts were based partly on the different forms of words used in the heading to the application ('contro' as regards the Council, 'nonché nei confronti' as regards the Commission), and partly on the fact that no request for annulment had been put forward as far as the Commission was concerned: there was simply a request calling for a declaration that Regulation No 153 was inapplicable, and that was only requested 'in so far as it may be held that the dispute involves the validity of the regulation'. This is a form of words which, according to the Commission, expresses nothing more than a reservation. However these doubts were later removed not only because in its reply the applicant also used the word 'contro' as regards the Commission, but mainly because it made express declarations from which it must be deduced that it really was making the Commission a party to these proceedings. Thus there was no occasion simply to *inform* the Commission that the application had been lodged, in accordance with the newly introduced provision in Article 3 (4) of the Instructions to the Registrar, to enable it to intervene in the proceedings *voluntarily*. On the contrary, the right course was followed when in accordance with Article 39 of the Rules of Procedure the application was served on the Commission as a party to the proceedings, and when in accordance with the general provisions in force it was invited to submit its defence.

II — *Is the application against the Commission admissible?*

It is clear that the above observations do not lead to any conclusion as to the *admissibility* of the application, which depends entirely on the observance of objective rules, and not on the will of the parties. As regards this, the Commission holds that objections can be made from different angles:

— first the applicant has not clearly stated whether the declaration as to the inapplicability of Regulation No 153/62 is necessary for the solution of the dispute; in any case no reasons have been given in support of such a view;

— secondly the conditions contained in Article 184 of the Treaty, which lay down objective criteria and which must be fulfilled before it can be pleaded that the regulation at issue is illegal, are not fulfilled in this case.

1. Formal aspect

First as regards the question of form, there is no doubt that it is a part of the problems relating to admissibility, and as such it can be decided prior to the main issue.

In taking a decision on this question, we must remember that the applicant has only asked for Regulation No 153 to be declared inapplicable if it is held that the dispute involves its validity. Thus strictly speaking it is a request made contingent upon its becoming relevant. However there is no room for doubt on this point because in other cases the Court has held that in certain circumstances an application was admissible even though drafted with the reservation 'in so far as necessary'.

We must however consider carefully the Commission's argument that the applicant has not stated sufficiently clearly why it considers that Regulation No 153 must be declared illegal in order to solve the dispute. For there certainly is an obligation to state such reasons. Without doubt, this requirement cannot be satisfied by a general reference to the submissions raised in support of the request that Regulation No 19/65 be annulled because these submissions concern the *substance* of the problem (the legality or illegality of Regulation No 153), but do not succeed in explaining how far a declaration that this regulation is illegal is thought to be essential for solving the dispute.

However, in view of the fact that the application is not without certain admittedly fairly vague allusions to the importance which Regulation No 153 is thought to have as

regards solving the dispute, and that in later pleadings the applicant completes these allusions with detailed arguments, my opinion is that the application against the Commission should not be declared inadmissible for reasons of form.

2. Are the conditions for the application of Article 184 of the Treaty present?

As regards the question whether the validity of Commission Regulation No 153 is really important for solving the dispute, one might hesitate to consider it under the heading of the admissibility of the *application*. It might seem more natural to speak of the admissibility of a given *submission in the application* and therefore to examine it jointly with the questions of substance. However it must be admitted that as regards the Commission the only relevant part of the case is the question whether Regulation No 153/62 is inapplicable. Therefore it would seem reasonable to take a prior decision on the question whether the declaration of inapplicability is of importance for solving the dispute and thus to treat it in some sense as a problem of admissibility (for example from the standpoint of an interest in the case).

In doing so I shall not delay in investigating the question (which the Commission alone raises) whether Article 184 also applies to *Member States* which have a right to bring cases before the Court. I think it would be sufficient to refer to the very general wording used by the provision in question ('any party'), and to the recognition of the fact that Member States may certainly have an interest, which should be protected, in putting forward an objection of inadmissibility. This is because the defects appertaining to a general regulation often do not clearly emerge until the regulation is applied to a particular case. Similarly, in matters covered by the ECSC Treaty, there has never been any doubt concerning the analogous Articles 33 and 36.

However, it seems more important to examine the question what interpretation should be put on Article 184, especially the sentence 'in which a regulation of the Council or of the Commission is in issue'. Here, there are two conflicting opinions: the opinion of the Commission that the regulation of which the illegality is being pleaded must constitute the *legal basis* of the measure which is being primarily contested and the applicant's opinion that it is enough for a regulation which is only indirectly contested to be based on the *same legal conception* as the measure directly attacked (something which for example can be shown by references from the one to the other). Where a regulation is so based there must be a danger that in some circumstances a judgment of the Court declaring a measure void would be difficult to execute so long as the regulation contested in reliance on Article 184 was retained in force.

I have no doubt that the opinion put forward by the Commission is the only correct one. Obviously the reason for the objection of illegality based on Article 184 is that it makes it possible to prove that the contested measure has no *foundation in law*, which means that there is no proper legal *basis* for it. May I remind you of previous cases on Article 36 of the ECSC Treaty, particularly Case 9/56 in which it was expressly stated that the concept developed under Article 36 of the ECSC Treaty also applies to Article 184 of the EEC Treaty. Let me also remind you of the case of *Wöhrmann and Lütticke* v *EEC Commission* (Joined Cases 31 and 33/62) in which the Court declared that Article 184 can only be relied on if a measure directly contested must be considered as one which *implements in a particular case* the general provision which is alleged to be illegal.

Only in such circumstances can one accept the existence of an interest in contesting a legal provision other than the one which is contested directly and not when parallel measures with the same basic concept are involved. In this latter case there is no reason why the Court could not pass judgment on the validity of one measure amongst several. Even so, where a measure has been annulled for stated reasons, it may sometimes happen that the executive must withdraw certain previous measures springing from a similar legal concept.

In putting in this way the question whether in this case the abovementioned conditions, necessary for applying Article 184, are present, there can be no difficulty in

replying: clearly the Commission regulation is not the legal basis for Regulation No 19/65. The opposite view would not merely be incomprehensible because the relationship between the Council and the Commission is such that regulations adopted by the former take precedence over those adopted by the latter. Such a view would also be seen to be wrong when the content of Regulation No 153 is looked at. All this regulation does is to provide for a simplified notification procedure for certain specified agreements. If the Court were to state that it was illegal, the only consequence in law would be that in the cases covered by Regulation No 153 the general procedure for notification laid down in Regulation No 27/62 would apply. However, such a statement would be no help at all for assessing the validity of Regulation No 19/65 which concerns the exemption of categories of agreements and is clearly based directly on the Treaty.

Therefore, notwithstanding the fact that Regulation No 19/65 contains several references to Regulation 153/62, and that no other meaning can be given to these than that they emphasize the identity of the legal concept which underlies them, I am bound to say that it is inadmissible for the purpose of contesting Regulation No 19/65 to assert that Regulation No 153/62 is illegal. Any other conclusion would be tantamount to getting round the time-limits laid down in Article 173 within which measures taken by Community institutions must be contested. As the application against the Commission has no other object than the one which I have just stated, it must be rejected as inadmissible.

III — *Admissibility of the objection that Regulation No 17/62 is illegal*

I think that at the same time it would be expedient to examine the analogous defence raised by the Council against the applicant's request for a declaration that Regulation No 17/62 is inapplicable and this although acceptance of the Council's view does not imply that the application against it is inadmissible as a whole, since this application really has another purpose.

In fact as regards Regulation No 17/62 of the Council the arguments of the parties tell us that the problems which they raise are not different from those which I have just discussed. In particular it does not matter that the objection of illegality concerning the Council should refer to an earlier regulation of the *Council* because Article 184 of the Treaty clearly does not allow for a different interpretation of this point.

Therefore it matters little whether Regulation No 19/65, which is directly contested, refers to Regulation No 17/62, or whether, as regards Articles 4 and 5 thereof, the only ones which interest us here, the latter is based on the same concepts as Regulation No 19/65. The only point which does matter is whether Regulation No 17/62 was the *legal basis* for Regulation No 19/65. That was certainly not the case. Above all it is not true that during these proceedings the Council defended Regulation No 19/65 with legal arguments which essentially were derived from Regulation No 17/62. It appears from the statement of the facts that Articles 4 and 5 of Regulation No 17/62 deal exclusively with the notification of agreements which, in accordance with Article 85 (3) of the Treaty, the undertakings concerned wish to have exempted from the prohibition on agreements. If paragraph (2) of each of these Articles were to be declared illegal, the voluntary notification procedure in use up to now for certain agreements would be replaced by the general provisions applicable to the notification of agreements. But obviously this would be no reason for annulling Regulation No 19/65 which authorizes the exemption of categories of agreements. Since the contents of Regulation No 17 do not constitute the legal basis for Regulation No 19/65, the applicant cannot be allowed to contest Regulation No 17 through the medium of Article 184. The finding enables us henceforth to ignore all the arguments put forward concerning Regulation No 17/62.

B — Substance

After these indispensable observations on the problems of admissibility and other questions of procedure, I am now able to examine the arguments which have been put directly forward as to the validity of Regulation No 19/65. There are in fact three

arguments about it. Admittedly the legal arguments put forward have not always been defined with all the clarity which could be wished for, and this will make it somewhat difficult to examine them. However, let us now examine them in turn under the heads used by the applicant.

I — *First argument: infringement of Article 87 and Article 85 (1) and (3) of the Treaty*

When summarized, the first argument of the applicant amounts to this: Article 87 of the Treaty provides that implementing regulations on the law relating to agreements shall be adopted. Up till now there have been no definitive provisions relating to the prohibitions mentioned in Article 85 (1) although the fact that Article 85 (2) renders them void makes such implementing regulations all the more necessary. Having regard to this situation, it is legislatively unsound to define the exceptions permissible under Article 85 (3) before the general rule in Article 85 (1).

Let us consider this argument in detail.

The wording of Article 87 of the Treaty imposes no absolute obligation on the Council to take implementing measures relating to Article 85 (1) in particular. As appears from the wording of Article 87 (1) ('zweckdienlich' – 'appropriate'), the Community's legislature, the Council, enjoys rather a discretionary power. Furthermore the examples set out in Article 87 (2) show what matters in the opinion of the authors of the Treaty should primarily be covered by an implementing regulation: questions such as making provision for fines and periodic penalty payments, or laying down detailed rules for the application of Article 85 (3) but certainly not a closer definition of Article 85 (1).

The answer to the question whether, having regard to the text, the prohibition in Article 85 (1) inescapably needs supplementary definitions in the form of implementing regulations will not be affirmative either. For the Court has already emphasized in the *Bosch* case that these provisions are 'self-executing', at least since the adoption of Regulation No 17/62, which has indeed clarified certain aspects of the prohibition in Article 85 (1). But the Court has let it be known that further clarification of the criteria contained in Article 85 (1) may be left to administrative practice, which is constantly developing.

Thus the only question which could be asked is whether it is 'unsound' or 'bad' to bring in legislation giving a clearer picture of what the exemptions in Article 85 (3) comprise before giving *by means of legislation* an amplifying definition of the prohibition concerning agreements. Nevertheless this question might immediately give rise to the objection that an 'inadequate' legislative practice does not necessarily mean that the provisions resulting from it are illegal. My view is that on this point also the applicant cannot succeed. It is important not to lose sight of the fact that Regulation No 19/65 does not constitute anything more than an *authorization* given to the Commission. It follows that before using this authorization in order to exempt a category of agreements the Commission must decide whether the agreements which are to be exempted fall within the scope of Article 85 (1), which means that a legislative definition of at least some of the situations dealt with by Article 85 (1) must also be given. Now it is not permissible to criticize the fact that a legislative definition of Article 85 only initially covers a part of all the conceivable situations. For any one who knows the difficulties of the law relating to agreements, it soon becomes clear that this is an area which does not lend itself at all to using legislative means to find a complete and comprehensive solution for all the problems which may occur. Therefore the institutions empowered to deal with these matters are acting rightly in proceeding by stages. In proceeding thus they are also acting rightly in directing their attention first to cases, such as exclusive dealing agreements, where relatively harmless restrictions on competition are involved and which, because of their number, call for a set of rules whereby they can be dealt with speedily in the interests of simplifying administration. Although it is not possible to avoid some initial uncertainty as regards various agreements not covered by Regulation No 19/65 until decisions about them are taken individually, it must be admitted that difficul-

ties of this sort are inevitable in the very complex matter of the law relating to agreements particularly at the beginning of its evolution.

However from another standpoint, these difficulties can be attenuated by the fact that, in case of notification in good and due form, exemptions may be granted with retroactive effect.

Therefore none of the lines of reasoning put forward in connexion with the first argument seems to me sound enough to justify the annulment of Regulation No 19/65.

II — *Second argument: infringement of Article 87 in conjunction with Article 85 (1) and (3) and Articles 2 and 3 (f) of the Treaty; misuse of powers*

In a second argument the applicant asserts that Regulation No 19/65 infringes certain general principles of the Treaty, because as regards law relating to agreements it introduces, at least so it appears, the principle whereby everything is forbidden which is not expressly authorized.

Since by virtue of Article 4 (2) of Regulation No 17 certain agreements (to which only two undertakings are parties) are automatically excluded from the application of Article 85 (1), serious uncertainty is created by Regulation No 19/65 as regards similar agreements, so far as these are not expressly mentioned in Article 1 thereof because it may be thought that by virtue of Article 85 (1) they fail as being absolutely void.

It seems to me that this argument is erroneous as are the various conlcusions which follow from it.

First of all let me make it clear that the object of Article 4 (2) of Regulation No 17 is not to declare that the agreements which it defines are not covered in any way by Article 85 (1). On the contrary the wording of Article 4 shows that it is intended to grant exemptions from *compulsory notification*. Furthermore since the article expressly states that the agreements mentioned in it may be notified voluntarily, it is obvious that in the opinion of the Council of Ministers they may come within the scope of Article 85 (1) because otherwise there would be no point in notifying them.

Further, I am in no doubt that the sole object of Regulation No 19/65 is to facilitate the *procedure* for exemptions by giving the Commission a power to make regulations as regards certain categories of agreements. Indeed this power can be exercised in relation to what are termed as old agreements and with retroactive effect. As I have already said, the Commission, in using this power, must decide whether the categories of agreements defined by it come under Article 85 (1) at all. Therefore I do not see how the applicant can believe that the object of Regulation No 19/65 is to extend the prohibition in Article 85 (1) to matters which did not previously come within it. Neither the recitals nor the various provisions of the regulations to which the applicant refers justify this conclusion. For example, the fifth recital of the preamble to Regulation No 19 only says that the Commission has acted correctly in not making provision for as implification of the *notification* procedure for certain categories of agreements, but this does not say anything definite about whether the features prohibited by Article 85 (1) are present. The seventh and the last recitals refer to the possibility of bringing about, by means of regulations or individual decisions modifications to agreements so as to make them comply with the conditions set out in Article 85 (3). Clearly this can only apply to agreements which fall within the prohibition in Article 85 (1). Finally, when Article 4 (3) states than an exemption for a category of agreements may not be claimed in actions pending at the date of entry into force of a regulation of the Commission granting such an exemption, this does not necessarily mean that such agreements are *void* because in any event an individual exemption may, if asked for within the prescribed period, be effective in accordance with the general provisions in force.

Therefore it is reasonable to suppose that at least as regards all the agreements not specified in Regulation No 19/65 the principle that they may be investigated individually is applicable. This investigation may establish either that Article 85 (1) is not applicable, or that exemption should be granted in accordance with Article 85 (3) even though Article 85 (1) does apply, or again that the exemption should be refused because the conditions set out in Article 85

(3) are not fulfilled. Whilst it may be true that therefore the persons concerned are placed in some uncertainty until a final decision on a case is given, this, as I have already said, cannot be wholly avoided at present. Furthermore it is obvious that there would be no less uncertainty if the Council had not adopted a regulation on the exemption of categories of agreements.

Thus, the second argument, the other aspects of which I shall examine in connexion with the third argument, do not advance the applicant's claim.

III — *Third argument: infringement of Article 85 (1), (2) and (3) and of Articles 86 and 222 of the Treaty*

The third argument is the main one in this case, and it faces us with the problem of the interpretation of Article 85 (1). Briefly, the line of reasoning put forward by the applicant on this point is that Regulation No 19/65 mistakenly brings certain vertical agreements within Article 85, although they come within Article 86 or other provisions of the Treaty. In so far as Regulation No 19/65 concerns agreements relating to industrial property rights, it also infringes Article 222, which provides that the Treaty shall in no way prejudice the rules in Member States governing the system of property ownership.

Before we look at this argument, it seems to me useful to stress once again the essential characteristics of the agreements mentioned in Regulation No 19/65. It mentions, and I quote, agreements between two undertakings:

'(a) — whereby one party agrees with the other to supply only to that other certain goods for re-sale within a defined area of the Common Market; or

— whereby one party agrees with the other to purchase only from that other certain goods for re-sale; or

— whereby the two undertakings have entered into obligations, as in the two preceding subparagraphs, with each other in respect of exclusive supply and purchase for re-sale;'

(hereafter I shall use the expression 'exclusive dealing agreements' as regards the above); and it also mentions agreements made between two undertakings:

'(b) which include restrictions imposed in relation to the acquisition or use of industrial property rights—in particular of patents, utility models, designs or trade marks—or to the rights arising out of contracts for assignment of, or the right to use, a method of manufacture or knowledge relating to the use or to the application of industrial processes.'

(as regards these, I shall use the abbreviated expression 'licensing agreements').

In following the arguments used by the applicant I shall in the first place examine exclusive dealing agreements, and then go on to consider licensing agreements. It seems to me logical also to take into account arguments drawn from other cases, without which a review of this sort would not be complete.

(a) Exclusive dealing agreements

In examining the question whether exclusive dealing agreements may come within Article 85 (1) we must consider three criteria more closely:

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

1. As regards the first question I do not see any special difficulties, and in particular the concept of an agreement should not present any problems because it certainly covers contracts in the widest sense under civil law. As regards the concept of an undertaking, the definitions found in ECSC law and in national law relating to agreements may help us. Thus, apart from legal form or the purpose of gain, undertakings are natural or legal persons which take part actively and independently in business and are not therefore engaged in a purely private activity (cf. note 2 to paragraph 1 in the 'Kommentar zum Gesetz gegen Wettbewerbsbeschränkungen' by Müller-Henneberg-Schwartz, 2nd edition).

It is easy to see that this definition also covers exclusive dealers trading on their own account and that the definition covers them independently of the fact that their economic importance corresponds to that of the producer, the other party to the agreement, so long as there is no complete domination of the one party by the other. Thus exclusive dealers are clearly in a class apart from branch offices, distribution agents or employees of producers, for none of these have any commercial autonomy. Therefore exclusive dealing agreements are 'agreements between undertakings'—and in any event it seems mistaken to claim, as the applicant does, that all the producer does is unilaterally to assign his rights.

2. It is, however, more difficult to define the meaning of the form of words 'agreements ... which have as their object or effect ... the restriction of competition'.

In my opinion, one must start with the principle that the Treaty uses the concept of competition in a very wide sense, which does not only include the activities of producers. On the contrary, in considering competition and the restrictions from which it might suffer, it is necessary to think of commerce also, and of the various stages of distribution. As the Commission rightly points out, distribution costs form a considerable part of the total costs of many goods. Therefore, effective competition at a commercial level may be such as to rationalize distribution considerably, and this must not be overlooked in considering the efforts to promote a harmonious development of economic activities, which Article 2 of the Treaty calls for.

I think I should also say that Article 85 of the Treaty does not make an express distinction between vertical and horizontal agreements. In fact, contrary to the implications of paragraph 1 of the German law on restriction of competition (Gesetz gegen Wettbewerbsbeschränkungen), Article 85 does not include the words 'for a common purpose' from which it can be concluded that in principle agreements of every kind are covered. Certain examples of restrictions on competition given in Article 85 (1) (d) and (e) are even open to the interpretation that this Article expressly includes vertical agreements as well, since in these examples the influence on the competitive position of third parties is taken into account, although the latter are not parties to an agreement and are in business at a different commercial level. The fact that Article 86 contains analogous examples does not constitute an argument to the contrary, but simply emphasizes the fact that restrictions on competition such as those to which I have referred may be caused just as much by dominant positions in the market as by agreements.

It is true that all this does not yet enable me to express a definite opinion on exclusive dealing agreements, which are the only ones that concern us here. Furthermore it seems doubtful whether such an opinion can be arrived at by relying only on general theoretical considerations and efforts at interpreting the text, without considering the actual repercussions on the market. This is true of the conclusions in favour of the Council which one might reach on the basis of Regulation No 17 (Article 4 (2)), since the Regulation was clearly not adopted with a view to determining the *practical field of application* of Article 85 (1) in a definitive way. This applies equally to the applicant's argument, against which one may advance the judgment of the Court in the *Bosch* case. In that case the Court declared that for the consideration in the light of Article 85 (1) of prohibitions on exports, that is to say, on clauses which are to be found in many exclusive dealing agreements, an exact knowledge of *all the elements* of the agreement is necessary; this amounts to saying that abstract and general answers to such questions cannot be given solely on the basis of an interpretation of the provisions of the EEC Treaty. Therefore it is necessary to examine what the particular effects of exclusive dealing agreements may be, and whether they are important from the point of view of Article 85 (1) of the Treaty.

Mention must be made here of the exclusive *supply clause* by virtue of which the only person who may be given supplies with a view to re-sale in a given area is the concessionnaire. This stops other traders in this area from receiving supplies directly from the producer, and also prevents them from getting the benefit of the sale terms which go with the direct relationship with him. The

clause also prohibits direct deliveries by the producer to the consumer. It goes without saying that in this way the concessionnaire is protected from potential competitors dealing in these products. In dealings in similar imports it is wholly impossible in some cases to offset the advantage which this protection confers because of national laws ('opposabilité aux tiers' in French law) and in others it can be offset only within the narrow limits imposed by transport costs, customs duties and the intervention of other middlemen.

As regards the undertaking to take supplies from a single source referred to in Article 1 (1) (a) of Regulation No 19, that is to say, an agreement not to sell any competing products and to buy only from one producer, this can also constitute an obstacle to competition because it affects adversely the access of other producers to the market, and so their competitive position, and quite obviously does so in a different way from an individual sale contract. In particular, in the case of highly specialized products, the distribution of which can only be maintained by experts, an undertaking of this sort may exercise a considerable influence over the conditions in which competition takes place.

Accordingly, it does not seem unthinkable that the exclusive dealing agreements covered by Regulation No 19/65 might constitute obstacles to competition.

If in reply to this we are assured that the main object of exclusive dealing agreements is to *open up and to penetrate new markets* and that these activities are linked to increasing and intensifying competition, these assertions cannot in principle be disputed. It is a fact that in order to introduce a new product to the market the exclusive dealing agreement can in some cases and for a certain period constitute a great advantage or even a necessity. However, it must be admitted that in such a case the restriction of competition constitutes one of the objectives, and it certainly cannot be accepted that without this restriction on competition the market opportunities could not be grasped, generally and in every case.

Similarly it would be quite wrong to accept in any instance objections of the following sort: there is no restriction on competition because in the nature of the case there is no competition between a producer and his concessionnaires, or between the different concessionnaires of one and the same producer; an exclusive dealer cannot be compared with other wholesale dealers since, tied as he is to one producer, his only function is to compete with other producers; or again: the elimination of an exclusive dealing agreement cannot possibly alter the situation on a given market, because in such a case the exclusive dealer as sole offeror is replaced by the producer as sole offeror.

It is possible that the last argument outlined above is true in some cases, or even in many; logically, however, it will not always be so. As regards the relationship between an exclusive dealer and other distributors, it is enough to note that, even without taking other wholesalers into account, the circumstances in which competition takes place may be altered by the different way in which the boundaries of the sales areas of the various exclusive dealers are determined.

As regards the relationships between concessionnaire and producer and between concessionnaire and concessionnaire, we must look at the legal situation existing *after* the agreement has been concluded rather than surmise how the conditions of competition might have evolved *without* the agreement.

Finally, I do not agree with the view that the exclusive dealers may simply be considered as agents of producers, having regard to the similarity of their economic functions within a sales organization. Treating them as the same in this way would amount to saying that agreements with concessionnaires are just as irrelevant to competition law as are agreements made with agents acting exclusively on behalf of another party and who 'manage the business dealings of another party'. On the contrary, it should be stated that considerable differences, both legal and commercial, exist between them. Here, I take the opportunity of referring you to the announcement of the Commission in the Official Journal, 1962, p. 2627, which outlines the special functions of an exclusive dealer. Regard should be had in particular to the different degrees of economic dependence or to the different margins of profit, taking into account the allocation of the

risks. Furthermore, these differences also give rise to legal consequences in other areas of law as the Commission has shown by references to the ECSC Treaty (Article 63) and to national laws (revenue law, bankruptcy law, etc.). I do not see any compelling reason for ignoring them in competition law.

Therefore, speaking generally, the applicant's assertion that exclusive dealing agreements can *never* fulfil the conditions for treatment as an obstacle to competition is not founded.

3. As regards the question when an agreement may, in the words of Article 85 (1), 'affect trade between Member States', I could be brief, because the applicant has not put forward any special arguments about it. Nevertheless, let us look at the question more closely.

First of all, consideration should be given to what is meant by '*may* effect trade'. The reply to this question will not be difficult. Clearly by this form of words the Treaty does not require agreements actually to have an influence on international trade. It is enough that such an influence appears *possible*, if not as a pure conjecture, at least as a reasonably foreseeable consequence.

Let us then note that, notwithstanding a widespread opinion, this concept is certainly a separate one, not identical with the concept of the restriction of competition. For if, in using the words 'affect trade between Member States', the intention was only to state the fact that restrictions on competition covered by Article 85 (1) should produce their effects beyond national frontiers, no doubt a less precise form of words would have been chosen, rather than one which is so clearly out of accord with the first criterion (the restriction of competition).

Similarly, I do not consider the view tenable that it is enough that the agreement restricting competition has an *influence* of some sort on trade between Member States and that, to use the Commission's expression, this trade evolves differently because of the agreement. The German, Italian, and Dutch texts of the Treaty clearly show the contrary, when they speak of an *unfavourable* injurious influence and force me to the conclusion that in this instance the French word 'affecter', which in itself often has a neutral meaning but often also a negative one, must be interpreted as meaning the same.

Starting off with these considerations—and, as the Commission points out, they should exclude all purely quantitative criteria—I am bound to conclude that exclusive dealing agreements may very well exercise a negative influence on the trading relationships between Member States. In reserving the distribution of certain products to an exclusive dealer in another Member State, they seek to regulate international trading relations, and in a given situation this may be considered as an undesirable departure from the normal conduct of trade between Member States. Here again, it would be quite wrong to accept the argument that, in a *general way* the opening up of a foreign market and, therefore, the creation of the conditions necessary for inter-state trade would not be possible without agreements of this kind.

Thus the Council's principles, as expressed in Regulation No 19/65, are justified and the application of the criteria in Article 85 (1) to exclusive dealing agreements, declared possible by the authorization given to the Commission, cannot be challenged. This is also the prevailing legal theory on the subject.[1]

It is only out of a desire to be thorough that I shall examine two more arguments put forward by the applicant as incidental to its main one. As I understand it, the applicant is much concerned that the useful part played by exclusive dealing agreements in the economy as a whole might be paralysed by time-consuming procedures for the authorization of agreements, and that these procedures might also result in certain exclusive dealing agreements being declared void, whereas an application of Article 86 would leave such agreements untouched and prevent abuses. This situation, particularly the different treatment given to agents on the one hand, and independent concession-

1 — See for example the references made by Sölter, 'Vertriebsbindungen im Gemeinsamen Markt', 1962, p. 63.

naires on the other, might bring about the entirely undesirable result that henceforth producers would set up their own distribution outlets, to the exclusion of dealers in business on their own account.

It seems to me that these worries are ill founded. They do not take into account the fact that obviously the attitude of the competent authorities is not in favour of the elimination of systems of contract for exclusive sale but rather of helping to legalize exclusive dealing agreements through the medium of Article 85 (3), and in so doing they even envisage exempting categories of agreements without prior notification by the interested parties. In effect therefore it seems to me that exclusive dealing agreements remain just as secure as they would be if Article 86 were applied.

As regards the procedural objections prompted by the cumbersomeness of the procedure concerning agreements, it is precisely these which will altogether fall to the ground so soon as the exemption of categories of agreements becomes possible. Referring to another aspect, I ought to remind you, as I have already done on another occasion, that the Commission's overriding power of decision clearly does not relieve it of the duty to make a conscientious investigation of the economic facts before giving an exemption to agreements which cannot come under the prohibition in Article 85 (1). As regards this point I should like to remind you of a decision of the Supreme Court of the United States of America ('White Motor') on 4 March 1963 which criticizes the ruling on a system of exclusive dealings given by the Court of first instance (District Court). The judgment declares that no reliable opinion can be formed on the acceptability of such a system prior to an *exhaustive investigation* of its economic importance and of its factual repercussions on competition.[1]

Whether the Commission is already in a position to form such an opinion on the basis of the simplified notifications provided for by Regulation No 153/62 is a question for the Commission itself to answer.

(b) Licensing Agreements

Since Regulation No 19/65 also covers so-called licensing agreements, our inquiries are not yet finished.

However my observations on this matter will be fairly brief, because the applicant claims only infringement of Article 222 of the Treaty, clearly starting from the correct premise that one cannot absolutely exclude the possibility that licensing agreements may bring about restrictions on competition and injuriously affect trade between Member States.

Therefore we shall have to examine the one question whether Regulation No 19/65 authorizes interference with industrial property rights which, according to the principles in the Treaty, must not be prejudiced.

I do not see any such infringement of the Treaty. For Regulation No 19/65 is not open to criticism even if it be admitted that Article 222 not only contains a prohibition on adopting legislative measures affecting property ownership in a Member State, weakening or undermining the system, but also that it prohibits any infringement of *individual* property rights.

As the Council rightly declares, the examination of licensing and similar agreements under the law relating to agreements, in accordance with Regulation No 19/65, does not constitute in any way an infringement of the *exercise* of these rights; what rather is involved is bringing within Article 85 (1) only *restrictions appertaining to* the acquisition and use of industrial property rights, in so far as they are based on agreements. The Community institutions are certainly not forbidden to take such measures by Article 222 of the Treaty, precisely because such measures do not affect licensing agreements in principle, a fact which, be it added, the applicant accepts without difficulty as regards the field of application of Article 86. Thus in principle Regulation No 19/65 follows the line fixed by the Commission in its communications of the year 1962 (Official Journal 1962, p. 2628 et seq.) on the application of Article 85 (1) and (3).

1 — Cf. Beier, 'Die kartellrechtliche Beurteilung von Alleinvertriebsverträgen im Gemeinsamen Markt und USA, Gewerblicher Rechtsschutz und Urheberrecht', 1964, p. 84 et seq.

Therefore the complaint raised against Article 1 (1) (b) of Regulation No 19 would not appear to be well founded either. Thus the third argument of the applicant is wholly unfounded. The legality of the regulation of the Council is thus confirmed.

C — Conclusion

Following from all the above, my conclusion is as follows: in so far as the application of the Italian Government is directed against the Commission of the EEC it is inadmissible; in so far as it is directed against the Council of Ministers of the EEC it should be dismissed as unfounded. As to costs, the decision follows logically from Article 69 (2) of the Rules of Procedure.