JUDGMENT OF THE COURT
of 28 February 1991 *

In Case C-234/89,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Oberlandesgericht (Higher Regional Court) Frankfurt am Main (Federal Republic of Germany) for a preliminary ruling in the proceedings pending before that court between

Stergios Delimitis

and

Henninger Bräu AG,

on the interpretation of Article 85 of the EEC Treaty and of Commission Regulation (EEC) No 1984/83 of 22 June 1983 on the application of Article 85(3) of the Treaty to categories of exclusive purchasing agreements (Official Journal 1983 L 173, p. 5, corrected by the Corrigendum in Official Journal 1983 L 281, p. 24),

THE COURT,

composed of: O. Due, President, G. F. Mancini, T. F. O'Higgins, J. C. Moitinho de Almeida and M. Díez de Velasco, Presidents of Chambers, F. A. Schockweiler, F. Grévisse, M. Zuleeg and P. J. G. Kapteyn, Judges,

Advocate General: W. Van Gerven,
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of

Stergios Delimitis, by Hans Thieme, of the Frankfurt am Main Bar,

* Language of the case: German.

Henninger Bräu AG, by Gerd Becht, of the Frankfurt am Main Bar,

the French Government, by Edwige Belliard, Deputy Director in the Directorate of Legal Affairs in the Ministry of Foreign Affairs, and by Mark Giacomini, Secretary for Foreign Affairs in the same Ministry, acting as Agents,

the Commission, by Norbert Koch, Legal Adviser, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Stergios Delimitis, of Henninger Bräu AG, represented by Frank Montag, of the Cologne Bar, and of the Commission at the hearing on 20 June 1990,

after hearing the opinion of the Advocate General at the sitting on 11 October 1990,

gives the following

Judgment

1 By an order of 13 July 1989, which was received at the Court on 27 July 1989, the Oberlandesgericht Frankfurt am Main referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty several questions on the interpretation of Article 85 of the EEC Treaty and of Commission Regulation (EEC) No 1984/83 of 22 June 1983 on the application of Article 85(3) of the Treaty to categories of exclusive purchasing agreements (Official Journal 1983 L 173, p. 5, corrected by the Corrigendum in Official Journal 1983 L 281, p. 24).

2 Those questions were raised in proceedings between Mr Stergios Delimitis, formerly the licensee of premises for the sale and consumption of drinks in Frankfurt am Main (hereinafter referred to as 'the publican') and the brewery

Henninger Bräu AG, established in Frankfurt (hereinafter referred to as 'the brewery'). The dispute relates to an amount claimed from the publican by the brewery following the termination at the publican's request of the contract entered into between them on 14 May 1985.

3 Under Clause 1 of that contract the brewery let to the publican a public house. Clause 6 of the contract required the publican to obtain supplies of draft, bottled and canned beer from the brewery, and soft drinks from the breweryüs subsidiaries. The range of products in question was determined on the basis of the current price lists of the brewery and its subsidiaries. However, the publican was permitted to purchase beers and soft drinks offered by undertakings established in other Member States.

4 Under Clause 6 the publican had to purchase a minimum quantity of 132 hectolitres of beer a year. If he bought less, he was required to pay a penalty for non-performance.

5 The contract was terminated by the publican on 31 December 1986. The brewery considered that he still owed it the sum of DM 6 032.15, comprising rent, a lump sum penalty for failure to observe the minimum purchasing requirement and miscellaneous costs. The brewery deducted that amount from the tenant's deposit which had been paid by the publican.

6 The publican challenged the deduction made by the brewery and brought proceedings against it before the Landgericht (Regional Court) Frankfurt am Main in order to recover the sum deducted. In support of his claim, he contended, *inter alia*, that the contract was automatically void by virtue of Article 85(2) of the EEC Treaty. By a judgment of 10 February 1988, the Landgericht dismissed the action. It considered that the contract did not affect trade between the Member States within the meaning of Article 85(1) on the ground, in particular, that it left the publican free to obtain supplies in other Member States; in the Landgericht's view, it was therefore immaterial that the contract in question did not observe the conditions for block exemption provided for in the abovementioned Regulation No 1984/83.

7 The publican lodged an appeal against the Landgericht's judgment with the Oberlandesgericht Frankfurt am Main which considered that it was necessary to ask the Court of Justice for a preliminary ruling on the compatibility of the beer supply agreements with Community competition rules and accordingly referred the following questions to it:

'A — (1) Can an individual beer supply agreement containing an exclusive purchasing clause, such as the agreement between the parties, be such as to affect, to an *appreciable* degree, trade between Member States within the meaning of Article 85(1) of the EEC Treaty because it forms part of a "bundle" of similar beer supply agreements in that Member State — no matter which brewery is involved — and the capacity to produce adverse effects on trade between States is to be assessed according to the effects on the market of that "*bundle of agreements*"?

(2) If Question 1 is answered in the affirmative:

How high must the proportion of tied outlets in a Member State be for there to exist an *appreciable* effect on international trade; would the figure of some 60% accepted by the Commission of the European Communities for the proportion of tied outlets in the Federal Republic of Germany be sufficient for that purpose?

(3) If Question 1 is answered in the negative:

Are the cumulative effects on the market of the *totality of the beer supply agreements in the Federal Republic of Germany* involving exclusive ties and/or the contributory role of the extant network of agreements to be ascertained by a comprehensive examination of the *respective circumstances*; if so, what are the criteria for such an examination and does special importance attach to any of the following factors:

— the size of the brewery making the tied-outlet agreement,

— the volume of trade affected by a single agreement,

— the volume of trade covered by the whole "bundle" of agreements,

— the number of existing agreements, their duration, the volume of goods affected and their importance in comparison with the trade of sellers not subject to such ties,

— the contractual commitment imposed on the publican by the brewery, the drinks supplier or the landlord in the tenancy agreement,

— the volume of supplies to premises used for the sale and consumption of drinks, by independent wholesalers not subject to ties,

— the extent of ties to foreign producers,

— the density of tied outlets in particular geographical areas,

— a comparison with sales outside premises for the sale and consumption of drinks, and sales trends in this field,

— the possibility of setting up or purchasing new outlets?

(4) If Question 1 or Question 3 is answered in the affirmative:

Is a beer-purchasing agreement which explicitly leaves the publican at liberty to purchase beer from other Member States (an "access clause') in principle incapable of affecting trade between Member States or does the answer depend partly on whether — and to what extent — a minimum supply is agreed and on the rights (as to damages, notice of termination, etc.) accruing to the brewery in the event of insufficient purchases?

B — (1) Are the conditions laid down in Articles 1 and 6(1) of Regulation (EEC) No 1984/83 on block exemptions satisfied if the drinks covered by the purchase commitment are not listed in the text of the contract, but it is

agreed that the range will be as set out in the brewery's price list as amended from time to time?

(2) Does a beer-supply agreement as a whole cease to be exempted by Regulation No 1984/83 from the prohibition in Article 85(1) of the EEC Treaty if it contains a commitment to buy soft drinks *without* including a "more-favourable-conditions" clause as envisaged by Article 8(2)(b) of Regulation No 1984/83, as might be inferred from Article 2(1) thereof, read in conjunction with paragraph 17 of the Commission Notice concerning Commission Regulations (EEC) No 1983/83 and No 1984/83 of 22 June 1983, or does this mean that only *this particular* commitment under the purchasing agreement is void by virtue of Article 85(2) of the EEC Treaty because it is in itself permissible under Article 2(1) of Regulation No 1984/83?

C — Does a beer-purchasing agreement which falls under Article 85 of the EEC Treaty and does not meet the conditions under Regulation No 1984/83 on block exemptions always require a specific exemption or does the national court have power to treat the agreement as valid where there is a minor divergence from the aforesaid regulation?'

8 Reference is made to the Report for the Hearing for a fuller account of the facts and the background to the main proceedings, the course of the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

9 In Questions A(1), (2) and (3), the national court seeks to ascertain the criteria to be applied in examining whether a beer supply agreement is compatible with Article 85(1) of the EEC Treaty. In Question A(4), the national court is essentially asking whether those criteria differ where the beer supply agreement contains an access clause which expressly allows the publican to obtain supplies in other Member States. Questions B(1) and (2) relate to the interpretation of Regulation

No 1984/83, and in particular Articles 6 and 8 thereof. Question C concerns the jurisdiction of a national court to apply Article 85 of the EEC Treaty to a beer supply agreement which does not fulfil the conditions for exemption laid down in Regulation No 1984/83.

The compatibility of beer supply agreements with Article 85(1) of the Treaty

10 Under the terms of beer supply agreements, the supplier generally affords the reseller certain economic and financial benefits, such as the grant of loans on favourable terms, the letting of premises for the operation of a public house and the provision of technical installations, furniture and other equipment necessary for its operation. In consideration for those benefits, the reseller normally undertakes, for a predetermined period, to obtain supplies of the products covered by the contract only from the supplier. That exclusive purchasing obligation is generally backed by a prohibition on selling competing products in the public house let by the supplier.

11 Such contracts entail for the supplier the advantage of guaranteed outlets, since, as a result of his exclusive purchasing obligation and the prohibition on competition, the reseller concentrates his sales efforts on the distribution of the contract goods. The supply agreements, moreover, lead to cooperation with the reseller, allowing the supplier to plan his sales over the duration of the agreement and to organize production and distribution effectively.

12 Beer supply agreements also have advantages for the reseller, inasmuch as they enable him to gain access under favourable conditions and with the guarantee of supplies to the beer distribution market. The reseller's and supplier's shared interest in promoting sales of the contract goods likewise secures for the reseller the benefit of the supplier's assistance in guaranteeing product quality and customer service.

13 If such agreements do not have the object of restricting competition within the meaning of Article 85(1), it is nevertheless necessary to ascertain whether they have the effect of preventing, restricting or distorting competition.

14 In its judgment in Case 23/67 *Brasserie De Haecht* v *Wilkin* [1967] ECR 407, the Court held that the effects of such an agreement had to be assessed in the context in which they occur and where they might combine with others to have a cumulative effect on competition. It also follows from that judgment that the cumulative effect of several similar agreements constitutes one factor amongst others in ascertaining whether, by way of a possible alteration of competition, trade between Member States is capable of being affected.

15 Consequently, in the present case it is necessary to analyse the effects of a beer supply agreement, taken together with other contracts of the same type, on the opportunities of national competitors or those from other Member States, to gain access to the market for beer consumption or to increase their market share and, accordingly, the effects on the range of products offered to consumers.

16 In making that analysis, the relevant market must first be determined. The relevant market is primarily defined on the basis of the nature of the economic activity in question, in this case the sale of beer. Beer is sold through both retail channels and premises for the sale and consumption of drinks. From the consumer's point of view, the latter sector, comprising in particular public houses and restaurants, may be distinguished from the retail sector on the grounds that the sale of beer in public houses does not solely consist of the purchase of a product but is also linked with the provision of services, and that beer consumption in public houses is not essentially dependent on economic considerations. The specific nature of the public house trade is borne out by the fact that the breweries organize specific distribution systems for this sector which require special installations, and that the prices charged in that sector are generally higher than retail prices.

17 It follows that in the present case the reference market is that for the distribution of beer in premises for the sale and consumption of drinks. That finding is not

affected by the fact that there is a certain overlap between the two distribution networks, namely inasmuch as retail sales allow new competitors to make their brands known and to use their reputation in order to gain access to the market constituted by premises for the sale and consumption of drinks.

18 Secondly, the relevant market is delimited from a geographical point of view. It should be noted that most beer supply agreements are still entered into at a national level. It follows that, in applying the Community competition rules, account is to be taken of the national market for beer distribution in premises for the sale and consumption of drinks.

19 In order to assess whether the existence of several beer supply agreements impedes access to the market as so defined, it is further necessary to examine the nature and extent of those agreements in their totality, comprising all similar contracts tying a large number of points of sale to several national producers (judgment in Case 43/69 *Bilger* v *Jehle* [1970] ECR 127). The effect of those networks of contracts on access to the market depends specifically on the number of outlets thus tied to national producers in relation to the number of public houses which are not so tied, the duration of the commitments entered into, the quantities of beer to which those commitments relate, and on the proportion between those quantities and the quantities sold by free distributors.

20 The existence of a bundle of similar contracts, even if it has a considerable effect on the opportunities for gaining access to the market, is not, however, sufficient in itself to support a finding that the relevant market is inaccessible, inasmuch as it is only one factor, amongst others, pertaining to the economic and legal context in which an agreement must be appraised (Case 23/67 *Brasserie De Haecht*, cited above). The other factors to be taken into account are, in the first instance, those also relating to opportunities for access.

21 In that connection it is necessary to examine whether there are real concrete possibilities for a new competitor to penetrate the bundle of contracts by acquiring a brewery already established on the market together with its network of sales outlets, or to circumvent the bundle of contracts by opening new public houses. For that purpose it is necessary to have regard to the legal rules and agreements on

the acquisition of companies and the establishment of outlets, and to the minimum number of outlets necessary for the economic operation of a distribution system. The presence of beer wholesalers not tied to producers who are active on the market is also a factor capable of facilitating a new producerüs access to that market since he can make use of those wholesalersü sales networks to distribute his own beer.

22 Secondly, account must be taken of the conditions under which competitive forces operate on the relevant market. In that connection it is necessary to know not only the number and the size of producers present on the market, but also the degree of saturation of that market and customer fidelity to existing brands, for it is generally more difficult to penetrate a saturated market in which customers are loyal to a small number of large producers than a market in full expansion in which a large number of small producers are operating without any strong brand names. The trend in beer sales in the retail trade provides useful information on the development of demand and thus an indication of the degree of saturation of the beer market as a whole. The analysis of that trend is, moreover, of interest in evaluating brand loyalty. A steady increase in sales of beer under new brand names may confer on the owners of those brand names a reputation which they may turn to account in gaining access to the public-house market.

23 If an examination of all similar contracts entered into on the relevant market and the other factors relevant to the economic and legal context in which the contract must be examined shows that those agreements do not have the cumulative effect of denying access to that market to new national and foreign competitors, the individual agreements comprising the bundle of agreements cannot be held to restrict competition within the meaning of Article 85(1) of the Treaty. They do not, therefore, fall under the prohibition laid down in that provision.

24 If, on the other hand, such examination reveals that it is difficult to gain access to the relevant market, it is necessary to assess the extent to which the agreements entered into by the brewery in question contribute to the cumulative effect produced in that respect by the totality of the similar contracts found on that market. Under the Community rules on competition, responsibility for such an

effect of closing off the market must be attributed to the breweries which make an appreciable contribution thereto. Beer supply agreements entered into by breweries whose contribution to the cumulative effect is insignificant do not therefore fall under the prohibition under Article 85(1).

25 In order to assess the extent of the contribution of the beer supply agreements entered into by a brewery to the cumulative sealing-off effect mentioned above, the market position of the contracting parties must be taken into consideration. That position is not determined solely by the market share held by the brewery and any group to which it may belong, but also by the number of outlets tied to it or to its group, in relation to the total number of premises for the sale and consumption of drinks found in the relevant market.

26 The contribution of the individual contracts entered into by a brewery to the sealing-off of that market also depends on their duration. If the duration is manifestly excessive in relation to the average duration of beer supply agreements generally entered into on the relevant market, the individual contract falls under the prohibition under Article 85(1). A brewery with a relatively small market share which ties its sales outlets for many years may make as significant a contribution to a sealing-off of the market as a brewery in a relatively strong market position which regularly releases sales outlets at shorter intervals.

27 The reply to be given to the first three questions is therefore that a beer supply agreement is prohibited by Article 85(1) of the EEC Treaty, if two cumulative conditions are met. The first is that, having regard to the economic and legal context of the agreement at issue, it is difficult for competitors who could enter the market or increase their market share to gain access to the national market for the distribution of beer in premises for the sale and consumption of drinks. The fact that, in that market, the agreement in issue is one of a number of similar agreements having a cumulative effect on competition constitutes only one factor amongst others in assessing whether access to that market is indeed difficult. The second condition is that the agreement in question must make a significant contribution to the sealing-off effect brought about by the totality of those agreements in their economic and legal context. The extent of the contribution made by the individual agreement depends on the position of the contracting parties in the relevant market and on the duration of the agreement.

The compatibility with Article 85(1) of a beer supply agreement containing an access clause

28 A beer supply agreement containing an access clause differs from the other beer supply agreements normally entered into inasmuch as it authorizes the reseller to purchase beer from other Member States. Such access mitigates, in favour of the beers of other Member States, the scope of the prohibition on competition which in a classic beer supply agreement is coupled with the exclusive purchasing obligation. The scope of the access clause must be assessed in the light of its wording and its economic and legal context.

29 As far as its wording is concerned, it should be noted that the clause affords only very limited access if it is regarded as solely authorizing the reseller himself to purchase competing beers in other Member States. However, the degree of access is greater if it also permits the reseller to sell beers imported from other Member States by other undertakings.

30 As far as its economic and legal context is concerned, it should be pointed out that where, as in this case, one of the other clauses stipulates that a minimum quantity of the beers envisaged in the agreement must be purchased, it is necessary to examine what that quantity represents in relation to the sales of beer normally achieved in the public house in question. If it appears that the stipulated quantity is relatively large, the access clause ceases to have any economic significance and the prohibition on selling competing beers regains its full force, particularly when under the agreement the obligation to purchase minimum quantities is backed by penalties.

31 If the interpretation of the wording of the access clause or an examination of the specific effect of the contractual clauses as a whole in their economic and legal context shows that the limitation on the scope of the prohibition on competition is merely hypothetical or without economic significance, the agreement in question must be treated in the same way as a classic beer supply agreement. Accordingly, it must be assessed under Article 85(1) of the Treaty in the same way as beer supply agreements in general.

32 The position is different where the access clause gives a national or foreign supplier of beers from other Member States a real possibility of supplying the sales outlet in question. An agreement containing such a clause is not in principle capable of affecting trade between Member States within the meaning of Article 85(1), with the result that it escapes the prohibition laid down in that provision.

33 The reply to the Oberlandesgericht's fourth question should therefore be that a beer supply agreement which permits the reseller to buy beer from other Member States is not such as to affect trade between States provided that the permission corresponds to a real possibility for a national or foreign supplier to supply the reseller with beers from other Member States.

Interpretation of Article 6(1) of Regulation No 1984/83

34 In Question B(1), the national court essentially seeks to ascertain whether a beer supply agreement falls within the block exemption under Regulation No 1984/83, in particular Article 6(1) thereof, when the range of products subject to the exclusive purchasing obligation imposed on the reseller is not specified in the text of the agreement itself, but is contained in the stock and price lists drawn up at regular intervals by the supplier.

35 Regulation No 1984/83 contains special rules on block exemption for beer supply agreements. Those rules, which differ from the general provisions applicable to exclusive purchase agreements, are contained in Articles 6, 7 and 8 of that regulation.

36 It is clear from Article 6(1) of that regulation that the exclusive purchasing obligation on the part of the reseller relates solely to certain beers or to certain beers and drinks specified in the agreement. The purpose of requiring that they be so specified is to prevent the supplier from unilaterally extending the scope of the exclusive purchasing obligation. A beer supply agreement which refers, as regards the products covered by the exclusive purchasing agreement, to a list of products which may be unilaterally altered by the supplier does not satisfy that requirement and thus does not enjoy the protection of Article 6(1).

37 Consequently, the reply to Question B(1) must be that the conditions for the application of Article 6(1) of Regulation No 1984/83 are not satisfied if the drinks covered by the exclusive purchasing terms are not listed in the text of the agreement itself but are stated to be those set out in the price list of the brewery or its subsidiaries, as amended from time to time.

Interpretation of Article 8(2)(b) of Regulation No 1984/83

38 Article 8(2)(b) of Regulation No 1984/83 provides, *inter alia*, that, where the beer supply agreement relates to premises which the supplier lets to the reseller, or allows the reseller to occupy on some other basis, the agreement must provide for the reseller to have the right to obtain drinks, except beer, supplied under the agreement from other undertakings where these undertakings offer them on more favourable conditions which the supplier does not meet. In Question B(2) the national court seeks to ascertain whether an agreement not satisfying that requirement as a whole ceases to enjoy the block exemption under the regulation or whether the consequences of that incompatibility with the abovementioned provision are confined to the clause in the agreement prohibiting the reseller from purchasing drinks other than beer from other undertakings.

39 The reply to that question is given by the terms of Article 8 of Regulation No 1984/83. Article 8(1) expressly provides that the block exemption for beer supply agreements is not applicable when certain clauses restrict the reseller's freedom of action and the duration of the agreement is excessive. Article 8(2) adds special provisions for agreements concerning the letting or provision of premises for the sale and consumption of drinks. The block exemption for beer supply agreements provided for in Article 6(1) of the regulation therefore ceases to be applicable in its entirety if those conditions are not met.

40 However, the fact that a beer supply agreement does not satisfy the conditions for block exemption does not necessarily mean that the whole of the contract is void under Article 85(2) of the Treaty. It is only those aspects of the agreement which are prohibited by Article 85(1) that are void. The agreement as a whole is void only if those parts of the agreement are not severable from the agreement itself (judgment in Case 56//65 *Société Technique Minière* v *Maschinenbau Ulm* [1966] ECR 235).

41 Moreover, it should be pointed out that the parties to an agreement which does not enjoy the protection of a block exemption regulation may always request the Commission to grant an individual exemption, or may claim that the conditions of another exemption regulation for other categories of agreements are fulfilled (judgment in Case 10/86 *VAG France* v *Magne* [1986] ECR 4071).

42 The reply to Question B(2) should therefore be that the block exemption provided for in Regulation No 1984/83 does not apply to a beer supply agreement relating to premises used for the sale and consumption of drinks leased or made available to the reseller by the supplier which entails a purchasing obligation for drinks other than beer where that agreement does not meet the requirement laid down in Article 8(2)(b) of that regulation.

The jurisdiction of the national court to apply Article 85 to an agreement not enjoying the protection of an exemption regulation

43 In its final question the national court asks what assessment it is to make under Community competition rules in regard to an agreement which does not satisfy the conditions for the application of Regulation No 1984/83. That question raises a general problem of a procedural nature concerning the respective powers of the Commission and national courts in the application of those rules.

44 In that respect it should be stressed, first of all, that the Commission is responsible for the implementation and orientation of Community competition policy. It is for the Commission to adopt, subject to review by the Court of First Instance and the Court of Justice, individual decisions in accordance with the procedural rules in force and to adopt exemption regulations. The performance of that task necessarily entails complex economic assessments, in particular in order to assess whether an agreement falls under Article 85(3). Pursuant to Article 9(1) of Regulation No 17 of the Council of 6 February 1962, First regulation implementing Articles 85 and 86 of the EEC Treaty (Official Journal, English Special Edition 1959-62, p. 87), the Commission has exclusive competence to adopt decisions in implementation of Article 85(3).

45 On the other hand, the Commission does not have exclusive competence to apply Articles 85(1) and 86. It shares that competence with the national courts. As the Court stated in its judgment in Case 127/73 (*BRT* v *SABAM* [1974] ECR 51), Articles 85(1) and 86 produce direct effect in relations between individuals and create rights directly in respect of the individuals concerned which the national courts must safeguard.

46 The same is true of the provisions of the exemption regulation (judgment in Case 63/75, *Fonderies Roubaix* [1976] ECR 111). The direct applicability of those provisions may not, however, lead the national courts to modify the scope of the exemption regulations by extending their sphere of application to agreements not covered by them. Any such extension, whatever its scope, would affect the manner in which the Commission exercises its legislative competence.

47 It now falls to examine the consequences of that division of competence as regards the specific application of the Community competition rules by national courts. Account should here be taken of the risk of national courts taking decisions which conflict with those taken or envisaged by the Commission in the implementation of Articles 85(1) and 86, and also of Article 85(3). Such conflicting decisions would be contrary to the general principle of legal certainty and must, therefore, be avoided when national courts give decisions on agreements or practices which may subsequently be the subject of a decision by the Commission.

48 As the Court has consistently held, national courts may not, where the Commission has given no decision under Regulation No 17, declare automatically void under Article 85(2) agreements which were in existence prior to 13 March 1962, when that regulation came into force, and have been duly notified (judgment in Case 48/72 *Brasserie De Haecht* v *Wilkin Jansen* [1973] ECR 77; and judgment in Case 59/77 *De Bloos* v *Bouyer* [1977] ECR 2359). Those agreements in fact enjoy provisional validity until the Commission has given a decision (judgment in Case 99/79 *Lancôme* v *Etos* [1980] ECR 2511).

49 The contract at issue in the main proceedings was entered into on 14 May 1985 and there is nothing in the file to indicate that that contract represents an exact reproduction of a standard contract concluded before 13 March 1962 and duly notified (judgment in Case 1/70 *Rochas* [1970] ECR 515). The contract would not therefore appear to enjoy provisional validity. Nevertheless, in order to reconcile the need to avoid conflicting decisions with the national court's duty to rule on the claims of a party to the proceedings that the agreement is automatically void, the national court may have regard to the following considerations in applying Article 85.

50 If the conditions for the application of Article 85(1) are clearly not satisfied and there is, consequently, scarcely any risk of the Commission taking a different decision, the national court may continue the proceedings and rule on the agreement in issue. It may do the same if the agreement's incompatibility with Article 85(1) is beyond doubt and, regard being had to the exemption regulations and the Commission's previous decisions, the agreement may on no account be the subject of an exemption decision under Article 85(3).

51 In that connection it should be borne in mind that such a decision may only be taken in respect of an agreement which has been notified or is exempt from having to be notified. Under Article 4(2) of Regulation No 17, an agreement is exempt from the notification obligation when only undertakings from a single Member State are parties to it and it does not relate to imports or exports between Member States. A beer supply agreement may satisfy those conditions, even if it forms an integral part of a series of similar contracts (judgment in *Bilger* v *Jehle*, cited above).

52 If the national court finds that the contract in issue satisfies those formal requirements and if it considers in the light of the Commission's rules and decision-making practices, that that agreement may be the subject of an exemption decision, the national court may decide to stay the proceedings or to adopt interim measures pursuant to its national rules of procedure. A stay of proceedings or the adoption of interim measures should also be envisaged where there is a risk of conflicting decisions in the context of the application of Articles 85(1) and 86.

53 It should be noted in this context that it is always open to a national court, within the limits of the applicable national procedural rules and subject to Article 214 of the Treaty, to seek information from the Commission on the state of any procedure which the Commission may have set in motion and as to the likelihood of its giving an official ruling on the agreement in issue pursuant to Regulation No 17. Under the same conditions, the national court may contact the Commission where the concrete application of Article 85(1) or of Article 86 raises particular difficulties, in order to obtain the economic and legal information which that institution can supply to it. Under Article 5 of the Treaty, the Commission is bound by a duty of sincere cooperation with the judicial authorities of the Member State, who are responsible for ensuring that Community law is applied and respected in the national legal system (Order of 13 July 1990 in Case C-2/88, *Zwartveld* [1990] ECR I-3365, paragraph 18).

54 Finally, the national court may in any event, stay the proceedings and make a reference to the Court for a preliminary ruling under Article 177 of the Treaty.

55 The reply to the Oberlandesgericht's last question should therefore be that a national court may not extend the scope of Regulation No 1984/83 to beer supply agreements which do not explicitly meet the conditions for exemption laid down in that regulation. Nor may a national court declare Article 85(1) of the Treaty inapplicable to such an agreement under Article 85(3). It may, however, declare the agreement void under Article 85(2) if it is certain that the agreement could not be the subject of an exemption decision under Article 85(3).

Costs

56 The costs incurred by the French Government and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since 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 national court, the decision on cost is a matter for that court.

On those grounds,

THE COURT

in answer to the questions submitted to it by the Oberlandesgericht Frankfurt am Main, by order of 13 July 1989, hereby rules:

(1) A beer supply agreement is prohibited by Article 85(1) of the EEC Treaty if two cumulative conditions are met. The first is that, having regard to the economic and legal context of the agreement at issue, it is difficult for competitors who could enter the market or increase their market share to gain access to the national market for the distribution of beer in premises for the sale and consumption of drinks. The fact that, in that market, the agreement in issue is one of a number of similar agreements having a cumulative effect on competition constitutes only one factor amongst others in assessing whether access to that market is indeed difficult. The second condition is that the agreement in issue must make a significant contribution to the sealing-off effect brought about by the totality of those agreements in their economic and legal context. The extent of the contribution made by the individual agreement depends on the position of the contracting parties in the relevant market and on the duration of the agreement.

(2) A beer supply agreement which permits the reseller to buy beer from other Member States is not such as to affect trade between States, provided that the permission corresponds to a real possibility for a national or foreign supplier to supply the reseller with beers from other Member States.

(3) The conditions for the application of Article 6(1) of Commission Regulation (EEC) No 1984/83 of 22 June 1983 on the application of Article 85(3) of the Treaty to categories of exclusive purchasing agreements are not satisfied if the drinks covered by the exclusive purchasing terms are not listed in the text of the agreement itself but are stated to be those set out in the price list of the brewery or its subsidiaries, as amended from time to time.

(4) The block exemption under Regulation (EEC) No 1984/83 does not apply to a beer supply agreement relating to premises used for the sale and consumption of drinks leased or made available to the reseller by the supplier which entails a purchasing obligation for drinks other than beer where that agreement does not meet the requirement laid down in Article 8(2)(b) of that regulation.

(5) A national court may not extend the scope of Regulation (EEC) No 1984/83 to beer supply agreements which do not explicitly meet the conditions for exemption laid down in that regulation. Nor may the national court declare Article 85(1) of the Treaty inapplicable to such an agreement under Article 85(3). It may, however, declare the agreement void under Article 85(2) if it is certain that the agreement could not be the subject of an exemption decision under Article 85(3).

Due Mancini O'Higgins Moitinho de Almeida

Díez de Velasco Schockweiler Grévisse Zuleeg Kapteyn

Delivered in open court in Luxembourg on 28 February 1991.

J.-G. Giraud
Registrar

O. Due
President