JUDGMENT OF THE COURT
14 DECEMBER 1977 [1]

Éts. A. De Bloos, S.p.r.l. v Société en Commandite par Actions Bouyer (preliminary ruling requested by the Cour d'Appel, Mons)

'Old agreements which have been notified'

Case 59/77

Competition — Agreements — Old agreement duly notified or exempted from notification — Calling in question before a national court — Position during the period between notification and the date of the Commission's decision

During the period between notification and the date on which the Commission takes a decision, courts before which proceedings are brought relating to an old agreement duly notified or exempted from notification must give such an agreement the legal effects attributed thereto under the law applicable to the contract, and those effects cannot be called in question by any objection which may be raised concerning its compatibility with Article 85 (1).

In Case 59/77,

Reference to the Court under Article 177 of the EEC Treaty by the Cour d'Appel, Mons, for a preliminary ruling in the action pending before that court between

ÉTABLISSEMENTS A. DE BLOOS, S.P.R.L., Leuze (Belgium),

and

BOUYER, SOCIÉTÉ EN COMMANDITE PAR ACTIONS (partnership limited by shares), Tomblaine (France),

on the interpretation of Articles 173 and 177 of the EEC Treaty and of Regulation No 67/67/EEC of the Commission and on the validity of a communication from the Commission declaring, in application of Regulation No 67/67/EEC, exemption from the prohibition laid down in Article 85 (1) of the Treaty,

1 — Language of the Case: French.

THE COURT,

composed of: H. Kutscher, President, M. Sørensen and G. Bosco, Presidents of Chambers, A. M. Donner, J. Mertens de Wilmars, P. Pescatore and A. O'Keeffe, Judges,

Advocate-General: H. Mayras
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and issues

The judgment making the reference and the written observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, may be summarized as follows:

I — Facts and procedure

1. On 24 October 1959 Établissements Bouyer S.A. (hereinafter referred to as 'Bouyer') concluded a contract with Établissements De Bloos S.p.r.l. (hereinafter referred to as 'De Bloos') granting De Bloos the exclusive right to sell products bearing the 'Bouyer' mark for Belgium, the Grand Duchy of Luxembourg and the Belgian Congo (now the Republic of Zaire). The contract was concluded for a term of three years and renewed by tacit agreement until 1973. On 30 January 1963 it was notified to the Commission, pursuant to Articles 4 and 5 of Regulation No 17 of the Council of 6 February 1962 (OJ, English Special Edition 1959-1962, p. 87). On 29 April 1969 the Commission stated in a letter addressed to De Bloos that, in application of Regulation No 67/67 of the Commission of 22 March 1967 (OJ, English Special Edition 1967, p. 10), providing for the exemption of certain categories of exclusive dealing agreements, the Commission had decided on 17 July 1968 to take no action ['décidé ... de classer'] regarding the notification of exclusive dealing agreements which did not, to its knowledge, provide for absolute territorial protection, and that it emerged from the initial examination of the notification of the agreement between Bouyer and De Bloos that it fulfilled that condition.

2. An action between De Bloos and Bouyer alleging Bouyer's breach of its contractual obligations as defined by the Belgian Law of 27 July 1961 on the unilateral revocation of contracts granting exclusive sales concessions of indefinite duration was brought before the Tribunal de Commerce, Tournai, in April 1973, and then before the Cour d'Appel, Mons. Before the Cour d'Appel, Bouyer submitted primarily that under the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27 September 1968 the Belgian courts did

not have jurisdiction to hear the case, and in the alternative that, contrary to the Commission's opinion, the agreement at issue, which was concluded in 1959, did provide for absolute territorial protection, so that it could not be exempted from the prohibition in Article 85 (1) and must be declared null and void. Pursuant to Article 177 of the EEC Treaty, the Cour d'Appel, Mons, by a judgment of 9 December 1975 referred to the Court of Justice a request for an interpretation of certain provisions of the Brussels Convention.

Following the judgment of the Court of Justice of 6 October 1976 (Case 14/76, *De Bloos* [1976] ECR 1497) the Cour d'Appel found that the Belgian courts did have jurisdiction *ratione loci,* and held that it should examine the validity of the 1959 agreement in relation to Article 85 (1) of the EEC Treaty. Taking into account the Commission's decision to take no action regarding the notification made in January 1963, the Cour d'Appel held that it was necessary to refer the following questions on interpretation and validity to the Court of Justice of the European Communities:

'I. Where a party to proceedings is out of time pursuant to Article 173 of the Treaty establishing the European Economic Community for the purposes of instituting proceedings before the Court of Justice of the European Communities contesting the validity of an act of an institution of the European Economic Community, can a national court submit a preliminary question in that connexion?

II. On the assumption that a preliminary question may be referred to the Court of Justice in connexion with the validity of an act of an institution of the European Economic Community, notwithstanding the fact that the party contesting the validity of that act is out of time, is the decision adopted by the Commission on 29 April 1969 to take no action with regard to the exclusive agreement in accordance with the Treaty establishing the European Economic Community and the regulations adopted in implementation thereof?

III. Can an exclusive agreement which fulfils the conditions of Regulation No 67/67/EEC of the Commission of 22 March 1967 continue to benefit after 31 December 1972 from the declaration of inapplicability of Article 85 (1) of the Treaty of the European Economic Community?

IV. Is it at all events possible to recognize as provisionally valid, so long as the Commission has not adopted a decision with regard to it, an exclusive agreement which, as in the present case, was concluded before 22 March 1967 but which was notified before 1 February 1963?

The order of 3 May 1977 making the reference was registered at the Court Registry on 11 May 1977.

The Commission of the European Economic Communities and De Bloos submitted written observations pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC.

After hearing the report of the Judge-Rapporteur and the views of the Advocate-General, the Court decided to open the oral procedure without any preparatory inquiry.

II — Observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC

A — Observations submitted by the Commission

The first question

The Commission observes that the first question raises the difficult question of

the examination under Article 177 of the Treaty of the validity of individual acts of Community institutions by a national court in proceedings before it, where the act was addressed to the parties to those proceedings who would have been entitled to challenge it by an action for annulment under Article 173 but who have failed to do so within the prescribed period.

The essential legal argument for answering the question in the affirmative is based on the nature of proceedings under Article 177, which must be regarded as a matter of public policy. The matter is brought before the Court of Justice by the national court not by the parties, and its decision does not depend on the action or inaction of the parties. The interest which the national court purposes to protect by means of a question on validity referred to the Court of Justice for a preliminary ruling goes beyond individual interests as is emphasized by the power of the Member States and of the Commission to submit observations pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC.

On the other hand, the main argument for answering the question in the negative lies in the fact that the inapplicability and the nullity of an individual act are almost identical. A request for a declaration of invalidity is so close to proceedings for annulment that it could be regarded as amounting to a right of action free from any limitation period.

The Commission submits that analysis of the legal systems of the Member States does not provide any decisive arguments making it possible to resolve the question, but makes it possible to conclude that those systems will allow of an answer which is not completely negative. Stating its position in the light of these considerations, the Commission observes that the first point to be determined is whether an individual act can be referred to the Court for a preliminary ruling concerning validity. In its view, such an application should not be dismissed as inadmissible on account of the fact that the parties to the proceedings before the national court are out of time for the purposes of proceedings for annulment under Article 173, because that would amount to making the exercise of a function which the Treaty intended expressly to reserve to the court dependent upon the procedural conduct of one of the parties, and it would be excessively harsh to give legal certainty precedence in all cases over the requirement of compliance with the rule of law. Therefore it would be unwise to exclude, *a priori,* the power or the duty to refer a matter to the Court of Justice for a preliminary ruling on the basis of criteria defined by the capacity of the parties to the proceedings before the national court or by the nature of the arguments which might be advanced. However, such an affirmative answer leaves open the question whether, in particular when the parties to the proceedings before the national court are out of time for the purposes of proceedings for annulment, the Court of Justice can lay down limits to the extent or the effects of its examination as to validity. In so far as the invalidity of the act would benefit the persons to whom it is addressed or to whom it is of direct and individual concern, the fundamental requirement of compliance with the rule of law applies in different terms. If such persons do not make use of proceedings for annulment within the mandatory limitation period laid down by the Treaty, there is no difficulty in taking the view that concern to guarantee legal certainty should take precedence over the need to ensure observance of the rule of law. Since a declaration that the act at issue is invalid may have practical effects very close to those of annulment for the persons to whom the act was addressed, the question arises whether they should not be denied the use of all means enabling them to break the narrow framework within which Article 173

allows the act to be challenged and thus giving them a sort of perpetual 'right of appeal' *sui generis.* However, even in such a case, the public policy aspect which characterizes proceedings for a preliminary ruling on validity makes it impossible to prevent the persons to whom the act was addressed and who are out of time for the purposes of proceedings for annulment, from also being able to benefit from the effects of a preliminary ruling establishing the invalidity of the act at issue where the nature and the seriousness of the defects vitiating such act patently and irreparably entail its nullity. However, such is not the case in this instance.

The Commission suggests that the first question should be answered as follows:

'The special function peculiar to proceedings for assessment of validity under Article 177 of the EEC Treaty, which is to ensure that the rule of law is observed in the Community legal order, allows the national courts to request the Court of Justice to give a preliminary ruling on the validity of an act of a Community institution, even where the question of validity is raised before them by a party who is out of time for the purpose of instituting proceedings for annulment under Article 173 of the EEC Treaty, if those courts consider that a case pending before them raises questions which they have to settle involving an assessment of the validity of the act at issue.'

The second question

The Commission argues that, contrary to what the national court appears to accept, the decision to take no action regarding the notification, mentioned in the letter of 29 April 1969, is in no wise a 'decision' within the meaning of Article 173 of the Treaty. The notification of an agreement does not necessarily lead to the Commission's initiating any procedure within the meaning of Article 9 (3) of Regulation No 17. *A fortiori,* notification does not necessarily lead to a decision terminating such procedure by way of a decision finding that there is an infringement (Article 3 of Regulation No 17), of negative clearance (Article 2), or of individual exemption (Articles 6 to 8). By way of a communication or a regulation granting collective exemption the Commission can specify the conditions under which an agreement is not caught by Article 85 (1), or benefits from a collective exemption. In the normal course, where there has been such a communication or regulation granting collective exemption, undertakings which have concluded an agreement fulfilling the said conditions cease to have any interest in having their legal situation established by the Commission by way of an individual decision of negative clearance or of exemption. In such circumstances the Commission, by means of a letter of standard form, informs the parties to an agreement which they have notified that it intends to take no action regarding the matter.

The Commission submits that such a decision to take no action does not exhibit the characteristics of a 'decision' within the meaning of Article 173 of the EEC Treaty, as interpreted in particular by the judgment of 15 March 1967 (Joined Cases 8 to 11/66, *Cimenteries* [1967] ECR 75). The decision to take no action does not have any legal effects affecting the interests of the undertakings concerned, because the possibility of the grant of a negative clearance or a retroactive individual exemption remains unchanged. The legal effect of exemption arises directly from Regulation No 67/67 and not from the decision to take no action. Nor are the undertakings concerned bound to accept the decision to take no action because they can at any time request the Commission to take an individual decision relating to the agreement notified. Therefore the decision to take no action does not affect the right of the parties to institute proceedings for annulment against any decision which has been taken or

proceedings for failure to act against the Commission, if the Commission refrains from adopting a decision. Moreover the letter at issue expressly requests the interested parties to state whether the adoption of an individual decision by the Commission is considered desirable.

The third recital of Regulation No 67/67 states that that regulation does not conflict with the application of Regulation No 17, and that consequently it does not affect the right of undertakings to request the Commission, on an individual basis, for a declaration under Article 85 (3) of the Treaty.

The decision to take no action, of which the parties were informed by the Commission's letter of 29 April 1969, is only an internal measure of the Commission and not a decision within the meaning of Article 173 of the Treaty. Consequently, the question of the compatibility of such a decision with the provisions of the Treaty does not arise.

However, the national court's second question expresses its doubts regarding the Commission's assessment of the agreement in dispute, in particular as to whether the agreement brings about absolute territorial protection. In these circumstances, the Court's answer should indicate the courses which are open to national courts presented with an agreement which has been notified to the Commission but about which the Commission has not adopted any decision, when the national courts consider that such agreement may be caught by the prohibition in Article 85.

The answer to these questions can be found in the judgments of 6 February 1973 (Case 48/72, *Haecht* [1973] ECR 77) and of 3 February 1976 (Case 63/75, *Fonderies Roubaix-Wattrelos* [1976] ECR 111).

It follows from the judgment in *Haecht* that the national court has jurisdiction to rule on the question whether or not an agreement is caught by the prohibition laid down by Article 85 (1) of the Treaty. It may among other things reach a finding that the agreement does not have any perceptible effect on competition or trade between Member States. The Commission points out that, even if an exclusive sales contract provides for absolute territorial protection, it may fall outside the scope of Article 85 where the position of the parties on the market is particularly weak (judgment of the Court of Justice of 9 July 1969, Case 5/69, *Völk* v *Vervaecke* [1969] ECR 295).

If, on the other hand, the national court finds that the agreement is caught by the prohibition in Article 85 (1), it must consider whether the agreement can benefit from the exemption by categories provided for by Regulation No 67/67, and, if so, apply that regulation (judgment in *Roubaix-Wattrelos,* aforementioned). If in doubt, the national court must have recourse to the procedure for a preliminary ruling provided for in Article 177 of the EEC Treaty. It may also suspend proceedings in order to allow the parties to obtain the Commission's standpoint.

If the court finds that the agreement is caught by Article 85 (1) and does not fulfil the conditions for exemption by categories, it has to distinguish, as emerges from the judgment in *Haecht,* between agreements existing before the implementation of Article 85 by Regulation No 17 — 'old agreements' — and those concluded after that date. In the case of the former, the court may only declare an agreement which has been notified to be automatically void after the Commission has taken a decision by virtue of that regulation (paragraph 9 of the Decision in *Haecht).* In the case of the latter, it devolves on the court to judge, subject to the possible application of Article 177, 'whether there is cause to suspend proceedings in order to allow the parties to obtain the Commission's standpoint, unless it establishes either that the agreement

does not have any perceptible effect on competition or trade between Member States or that there is no doubt that the agreement is incompatible with Article 85' (paragraph 12 of the Decision in *Haecht).*

In the present case, the agreement is an 'old agreement' which has been notified. If it had contained any provisions creating absolute territorial protection, the national court should have declared it to be automatically void only after the Commission had taken a decision by virtue of Regulation No 17. However, examination of the wording of the agreement indicates that it does not contain any factor from which it can be inferred that there is such territorial protection. The Commission submits that, in the present case, the doubts of the national court can only originate in factors resulting neither from the wording of the agreement nor from the information supplied in the notification. If any factors of this kind were present, the agreement in dispute should be judged according to the different treatment laid down by the Court of Justice for old and for new agreements. In the absence of details on this point, it is submitted that the general answer to be given to the second question should be the following:

'The decision to take no action of which the parties to the agreement were informed by the Commission's letter of 29 April 1969 does not have any legal effects affecting the interests of the undertakings concerned, and they are not bound to accept it. Consequently it is not a decision within the meaning of Article 173 of the Treaty. Therefore the question whether a decision by the Commission is in accordance with the EEC Treaty has no purpose. Where it has been pleaded before a national court that an agreement between undertakings is automatically void, and the national court finds — in spite of the fact that the Commission has decided to take no action regarding the notification of the agreement because it considers it to be covered by an exemption by categories — that the agreement does not fulfil the conditions laid down by the regulation granting such exemption, the national court may, in the case of an agreement existing before the implementation of Article 85 of the EEC Treaty by Regulation No 17, declare it to be automatically void only after the Commission has taken a decision by virtue of Regulation No 17.

On the other hand, in the case of an agreement entered into after the implementation of Article 85 by Regulation No 17, it devolves on the court to judge, subject to the possible application of Article 177, whether there is cause to suspend proceedings in order to allow the parties to obtain the Commission's standpoint, unless it establishes either that the agreement does not have any perceptible effect on competition or trade between Member States or that there is no doubt that the agreement is incompatible with Article 85.

An agreement concluded before the implementation of Article 85 by Regulation No 17 and notified within the period laid down by Article 5 (1) of that regulation, but which no longer fulfils the conditions to benefit from exemption by categories on account of provisions of the agreement entered into after notification, is to be considered as an agreement entered into after the date of the implementation of Article 85 by Regulation No 1.'

The third question

The Commission argues that this question proceeds from a material error: the period of validity of the exemption by categories granted by Regulation No 67/67 was extended to 31 December 1982 by Regulation (EEC) No 2591/72 of the Commission of 8 December 1972 amending Regulation No 67/67 (OJ, English Special Edition 1972 (9-28 December), p. 7). Consequently the

Commission proposes the following answer:

'By virtue of the extension by Regulation (EEC) No 2591/72 of the Commission of 8 December 1972 of the period during which Regulation No 67/67 declared Article 85 (1) of the EEC Treaty inapplicable to certain categories of exclusive dealing agreements pursuant to Article 85 (3), an exclusive dealing agreement which fulfils the conditions of the said Regulation No 67/67 may continue to benefit after 31 December 1972 and until 31 December 1982 from the declaration of inapplicability of Article 85 (1) of the EEC Treaty.'

The fourth question

In substance, the fourth question asks whether 'it is at all events possible to recognize as provisionally valid, so long as the Commission has not adopted a decision with regard to it', an old agreement which was notified before 1 February 1963. The Commission argues that, in so far as the fourth question starts from the mistaken assumption that the collective exemption introduced by Regulation No 67/67 has no longer been in force since 31 December 1972, it becomes purposeless by reason of the fact that the exemption by categories was extended by Regulation No 2591/72. However, the question is still of interest if the agreement in dispute does not fulfil the conditions for an exemption by categories, because in such a case it is necessary to define what is meant by the expression 'provisionally valid' according to the judgment in *Haecht.* The Commission submits that the expression can only refer to a national court's duty not to declare an old agreement which has been duly notified within the period laid down by Article 5 (1) of Regulation No 17 to be void so long as the Commission has not adopted a decision under Regulation No 17.

Such 'provisional validity' is to protect the opportunity for the parties to benefit in respect of old agreements from a retroactive exemption or from an *ex post facto* legalization under Articles 6 or 7 of Regulation No 17. If, however, the Commission states, by way of decision, that the agreement cannot be exempted retroactively or legalized *ex post facto,* the agreement is void *ab initio.*

Therefore it is submitted that the answer to the fourth question should be the following:

'An agreement caught by the prohibition laid down in Article 85 (2) and not covered by an exemption by categories, which existed at the date of the entry into force of Regulation No 17 and which was notified within the period laid down in Article 5 (1) of the said regulation, may benefit from the Commission's power under Articles 6 (2) and 7 of the said regulation to limit the period during which the prohibition concerned applies by adopting a decision regarding the said agreement. However, that power is inapplicable if the agreement is caught by the prohibition laid down in Article 85 (2) or cannot benefit from an exemption by categories because of provisions of the agreement which have not been notified whether they were entered into before or after the date of notification.'

B — Observations submitted by De Bloos

The first question

De Bloos observes that the concept of the validity of an act merges with that of legality within the meaning of Article 173 of the EEC Treaty. Therefore all the grounds of illegality listed in Article 173 may be pleaded in a review of validity pursuant to Article 177. The fact that the parties to the main action were not competent to challenge the act in dispute directly by means of proceedings for annulment does not prevent the Court of Justice from examining the validity of such act in proceedings for a preliminary ruling.

The second question

The agreement concluded on 24 October 1959 between Bouyer and De Bloos fulfils the conditions laid down by Regulation No 67/67 and is an open exclusive dealing agreement, that is to say that the distributor is protected only against sales carried out by the grantor within the area under consideration.

The third question

On the assumption that the effects of Regulation No 67/67 come to an end on 31 December 1972, as an open dealing agreement the agreement in dispute may in any case benefit from an individual exemption decision. It is submitted that such a decision can only be made to apply for a limited period, and furthermore is revocable, but only in so far as actual circumstances change in relation to an essential factor of the decision.

The fourth question

Referring to the judgments of 9 July 1969 (Case 10/69, *Portelange* [1969] ECR 309), 18 March 1970 (Case 43/69, *Bilger* [1970] ECR 127) and 30 June 1970 (Case 1/70, *Rochas* [1970] ECR 515), De Bloos argues that when an agreement has been notified and the Commission has initiated a procedure, the national court must regard the agreement as provisionally valid and cannot terminate its provisional validity, since under Article 9 (3) of Regulation No 17 it is no longer competent to apply Article 85 (1). Any subsequent finding that an exclusive dealing agreement is void cannot have retroactive effect, whether the agreement has been notified or not.

De Bloos also goes on to analyse the Belgian legislation concerning the unilateral revocation of sales concessions, and deduces therefrom that open exclusive dealing agreements enjoy legal protection by the same right as closed exclusive dealing agreements.

At the hearing on 9 November 1977, the plaintiff in the main action, represented by F. Moulart of the Tournai Bar, and the Commission, represented by its Agent, A. Marchini Camia, expanded upon the arguments put forward in the written procedure.

The defendant in the main action, Bouyer, represented by D. Noël of the Nancy Bar, points out in relation to the first question that Article 177 is a provision of public policy, that it does not lay down any limitation period, and that it is stated therein that the national court has sole jurisdiction to refer a question concerning the interpretation or validity of a regulation to the Court of Justice for a preliminary ruling. Bouyer infers from this that the first question should be answered in the affirmative.

As regards the second question, Bouyer submits that the decision of 29 April 1969 to take no action constitutes a provisional, not a definitive, decision.

The third and fourth questions result from a material error and there is therefore no need to answer them.

The Advocate-General delivered his opinion at the hearing on 29 November 1977.

Decision

1 By a judgment of 3 May 1977, received at the Court Registry on 11 May 1977, the Cour d'Appel, Mons, has referred to the Court under Article 177 of the

EEC Treaty: (a) three questions concerning the interpretation of Articles 173 and 177 of the Treaty (first question), of Article 85 (1) and (3) of the Treaty and of Regulation No 67/67 of the Commission of 22 March 1967 on the application of Article 85 (3) of the Treaty to certain categories of exclusive dealing agreements (OJ, English Special Edition 1967, p. 10) (third question), and of Article 85 of the Treaty in conjunction with Regulation No 17 of the Council of 6 February 1962 (OJ, English Special Edition 1959-1962, p. 87) which entered into force on 13 March 1962 (fourth question), and in addition (b) one question concerning the validity of the letter of 29 April 1969 from the Commission (Directorate-General for Competition) whereby the Commission informed the parties to the main action that, in application of Regulation No 67/67 and pursuant to its decision of 17 July 1968 to take no action regarding the notification of exclusive dealing agreements which, did not, to its knowledge, provide for absolute territorial protection, it had decided to take no action regarding the notification which the two parties had given before 1 February 1963 of an exclusive sales agreement concluded between them in 1959 (second question).

2 Those questions are referred to the Court in the context of proceedings instituted by the grantee of an exclusive concession for the sale of power-driven cultivators and similar devices in particular in Belgium and the Grand Duchy of Luxembourg (De Bloos) against the grantor of the concession (Bouyer) for the dissolution of the contract and an order for the payment of damages for non-performance of the contract granting the concession, in which the grantor pleads in its defence that the contract in dispute is void for incompatibility with Article 85 of the Treaty.

3 For this purpose, Bouyer is challenging the Commission's assessment of that contract in its letter of 29 April 1969, according to which the contract is an exclusive dealing agreement capable of benefiting from exemption by categories under Regulation No 67/67.

4 In substance, the first question is designed to ascertain whether the validity of an individual decision of a Community institution, the legality of which is disputed by a party who is out of time for instituting proceedings for annulment against that decision under Article 173, can be called in question before a national court by recourse to Article 177 of the Treaty. The second question is designed to ascertain, in the event of the Court's answering the first question in the affirmative, whether the Commission's decision to take no action with regard to the notification of the agreement now in dispute

between the parties to the main action is valid for the purposes of Article 177 of the Treaty.

5 The third question concerns the effects of Regulation No 67/67 after 31 December 1972.

6 In the fourth question, the national court, on the supposition that the Commission did make a mistake in 1969 in taking the view that the agreement in dispute could benefit from exemption by categories, asks whether it is possible to recognize such agreement as provisionally valid by virtue of the fact that it has been notified, and what the effects of such validity are.

7 It follows from the foregoing considerations that the fourth question should be answered first, since such answer may affect the need for an answer to the first two questions.

The fourth question

8 The Court has already ruled, in particular in its judgment of 6 February 1973 (Case 48/72, *Brasserie de Haecht* [1973] ECR at p. 86) that in the case of old agreements, that is to say — according to the distinction drawn in Articles 4 and 5 of Regulation No 17 — agreements existing before 13 March 1962, 'the general principle of contractual certainty requires, particularly when the agreement has been notified in accordance with the provisions of Regulation No 17, that the court may only declare it to be automatically void after the Commission has taken a decision by virtue of that regulation'.

9 Similarly it had already been held in the judgment of 9 July 1969 (Case 10/69, *Portelange* [1969] ECR at p. 316) that: 'In view of the absence of any effective legal means enabling the persons concerned to accelerate the adoption of a decision under Article 85 (3) — the consequences of which are all the more serious the longer such a decision is delayed — it would be contrary to the general principle of legal certainty to conclude that, because agreements notified are not finally valid so long as the Commission has made no decision on them under Article 85 (3) of the Treaty, they are not completely efficacious'.

10 Although the fact that such agreements are fully valid may possibly give rise to practical disadvantages, the difficulties which might arise from uncertainty in legal relationships based on the argeements notified or exempted from notification would be still more harmful.

11 The legal consequences stated above result from the indivisibility of the prohibition laid down in Article 85 (1) and the possibility of exemption provided for in Article 85 (3) as implemented by Regulation No 17.

12 These considerations are confirmed by the effects attributed to notification and to exemption from notification of old agreements under Articles 6 (2) and 7 of the said regulation.

13 Not only may such agreements benefit from an exemption extending retroactively even to the period before their notification, but such of their provisions as are incompatible with Article 85 (1) and not capable of benefiting from Article 85 (3) may also be regularized retroactively on condition that they are amended with respect to the future at the request of the Commission.

14 Such system is inconsistent with jurisdiction on the part of the courts to make a finding of nullity during the period between notification and the date on which the Commission takes a decision.

15 It follows that, during that period, courts before which proceedings are brought relating to an old agreement duly notified or exempted from notification must give such an agreement the legal effects attributed thereto under the law applicable to the contract, and those effects cannot be called in question by any objection which may be raised concerning its compatibility with Article 85 (1).

16 The fourth question should be answered accordingly.

The first and second questions

17 It follows from the answer given to the fourth question that even if an old agreement duly notified or exempted from notification had been wrongly

considered by the Commission as benefiting from an exemption by categories under Regulation No 67/67 and as therefore not requiring an individual decision exempting it, it continues to have effect until such time as the Commission has taken a decision on the basis of Article 85 and Regulation No 17.

18 It follows that, since the compatibility of such agreement with Article 85 cannot be called in question before national courts during that period, the first two questions do not require an answer.

The third question

19 For the reasons given above, the third question has also become purposeless.

20 However, it should be pointed out in any event that the effects of Regulation No 67/67 — namely the exemption by categories of agreements fulfilling the conditions laid down by that regulation — have been extended until 31 December 1982 by Regulation No 2591/72 of the Commission of 8 December 1972 (OJ, English Special Edition 1972 (9-28 December), p. 7).

Costs

21 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable.

22 As these proceedings are, in so far as the parties to the main action are concerned, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the Cour d'Appel, Mons, by a judgment of 3 May 1977, hereby rules:

During the period between notification and the date on which the Commission takes a decision, courts before which

proceedings are brought relating to an old agreement duly notified or exempted from notification must give such an agreement the legal effects attributed thereto under the law applicable to the contract, and those effects cannot be called in question by any objection which may be raised concerning its compatibility with Article 85 (1).

Kutscher Sørensen Bosco

Donner Mertens de Wilmars Pescatore O'Keeffe

Delivered in open court in Luxembourg on 14 December 1977.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE-GENERAL MAYRAS DELIVERED ON 29 NOVEMBER 1977 [1]

Mr President,
Members of the Court,

The dispute between Établissements De Bloos and Bouyer Société en Commandite par Actions which has already been before the Court of Justice on points concerning the application of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters in the field of exclusive sales concessions (Case 14/76) comes before the Court again, this time in relation to the application of the rules of the Treaty on competition.

The main issue in the first case was whether, for the purpose of applying Article 5 (1) of the Convention, the compensation provided for by Article 2 of the Belgian law of 27 July 1961 (as amended on 13 April 1971) on exclusive sales concessions and, should the case arise, the additional compensation provided for by Article 3 of that Law should be considered as constituting independent obligations arising from the unilateral revocation of an exclusive concession of indefinite duration, or whether on the contrary they were merely ancillary obligations compensating for the non-performance or the expiry of the grantor's main obligation.

In its judgment of 6 October 1976 ([1976] ECR 1497), the Court held that: 'In the case of actions for the payment of

1 – Translated from the French.