OPINION OF MR ADVOCATE-GENERAL GAND DELIVERED ON 5 FEBRUARY 1970[1]

Mr President,
Members of the Court,

A contract for the supply of beer similar to that which you have already dealt with in the *de Haecht* case, (Case 23/67, 12 December 1967, [1967] E.C.R. 407), has given rise to the request for interpretation referred to you by the Oberlandesgericht Karlsruhe. As we shall see, however, the questions submitted to you regarding Article 85 of the Treaty and Regulation No 17 are very general in nature and go beyond this type of contract.

I

The facts may be summarized as follows: On 7 January 1950 the Bilger brewery, whose registered place of business is at Gottmadingen, concluded with Mr and Mrs Jehle, who are restaurant proprietors, a contract by which the latter undertook to run in a proper manner and on a permanent basis two establishments undertaking the sale of beer at Friedrichshafen, and to obtain their supplies of beer exclusively from the other party to the contract. They also undertook to assign their liabilities to their successors in title of such parties. For their part the Bilger brewery provided Mr and Mrs Jehle with chattels to be used in running the licensed premises and granted them various loans. Under the contract the restaurant proprietors were bound until at least 1 October 1975 and if necessary after that date, as long as they were indebted to the brewery, or the brewery was accountable on their behalf for any debt. By a special arrangement which the parties drew up before the court on 22 September 1960 this contract was extended for three years until 1 October 1978.

The Commission did not receive notification of this contract after the entry into force of Regulation No 17.

In 1962, Mr and Mrs Jehle leased one of their premises, while continuing to run the other one themselves. From that date, in addition to the beer produced by the Bilger brewery both establishments sold special beer supplied by other breweries. On the other hand, the loans granted were repaid and most of the chattels made available to Mr and Mrs Jehle were returned to the brewery concerned.

The Bilger brewery instituted legal proceedings before the German courts in which they sought an order that, in the undertaking which is under their management and until the date of expiration of the contract, Mr and Mrs Jehle refrain from purchasing or selling beer for consumption on or off the premises other than that produced by the applicant. In addition, it claimed compensation for the damage suffered, both as a result of the action of Mr and Mrs Jehle and of their lessees.

The case went as far as the Bundesgerichtshof which, seised of further appeals by both parties, referred it back to the Oberlandesgericht Karlsruhe.

It was then for the first time that the defendants argued in a statement dated 2 July 1968 that the contract for the supply of beer was void under Article 85 (1) of the EEC Treaty. In fact, approximately 80% of German innkeepers were bound by contracts of supply and 60% of all the output of German breweries was sold under exclusive dealing contracts. This results in a restriction on trade between the Member States, since the breweries of the other States of the Community are now scarcely able to find purchasers in the Federal Republic. To support their argument Mr and Mrs Jehle referred to your judgment in the *de Haecht* case. In accordance with this judgment, which requests the national courts to consider each brewery contract to determine whether, 'on the basis of a set of objective factors of law or of fact', it is capable of falling within Article 85 (1), the Oberlandesgericht submitted to the parties an impressive series of questions which dealt in particular with the production, the sale and

1 — Translated from the French.

the consumption of beer in Germany. It was only after the parties had declared themselves unable to reply to the majority of these questions that the Oberlandesgericht referred to you the two questions with which I shall now deal.

II

The German court asks first of all whether a contract for the supply of beer concluded between two undertakings in a Member State before 13 March 1962 relates to imports and to exports between Member States within the meaning of Article 4 (2) (1) of Regulation No 17, where the exclusive dealing clause is worded as follows: 'The innkeeper undertakes to purchase exclusively from the brewery (established in the same Member State) all the beer which he requires for his establishment', and whether such a contract requires notification in accordance with Article 5 (1) and (2), in conjunction with Article 4 (2) (1) of the above-mentioned regulation.

Although the German court is unduly concerned to quote the exact wording of the exclusive dealing clause which appears in the contract whose validity is questioned before it, the real purpose of its question is to define, within the context of this action, the concept of an agreement which does not relate either to imports or to exports between Member States, as referred to in Article 4 (2) (1) of Regulation No 17. The question therefore concerns the interpretation of a provision of Community law, which it is for you to give, but which may leave aside all considerations concerning the economic utility or the harmfulness of contracts for the supply of beer which were put forward during the written or oral procedure.

Regulation No 17 lays down the principle that the agreements referred to in Article 85 (1) of the Treaty, in respect of which the parties seek the application of Article 85 (3), must be notified to the Commission and cannot form the subject of a decision taken in application of Article 85 (3) until such notification has taken place. This is so whether these agreements were concluded before or after the entry into force of the regulation. However, as the features of certain such agreements may make them appear less prejudicial to the development of the common market, this regulation exempts certain categories from the obligation contained therein, including those to which the only parties are undertakings from one Member State and which do not relate either to imports or to exports between Member States (cf. Article 4 (2) (1) as regards new agreements, Article 5 (2) as regards agreements in existence on the entry into force of the regulation).

It is therefore necessary to consider whether an agreement by which one undertaking undertakes to purchase certain products exclusively from another undertaking in the same Member State *relates to* imports or exports between Member States within the meaning of Article 4 (2) (1).

In my opinion the reply to this question must be in the negative. The obligation to obtain supplies exclusively from the other party to a contract who is established within the same State of course excludes the possibility of obtaining supplies from another supplier, whether he be established in that State or in another Member State, and to this extent it is possible for the agreement to have an effect on imports or exports. However, these do not form the subject of the exclusive supply contract; it can only be said that the contract *relates to* them, a phrase which in my opinion is stronger than the words '*to affect*' used in Article 85 of the Treaty, and its possible influence on them is only indirect and is, moreover, difficult to evaluate as the contracting parties can hardly assess the indirect consequences of the agreements which they conclude and such consequences may change according to the circumstances. In my opinion, therefore, this factor need not be taken into account.

On the other hand, if it were accepted that all the exclusive dealing agreements concluded between undertakings established within the same Member State relate to imports or to exports, the provision in Article 4 (2) (1) of Regulation No 17 would in practice become irrelevant.

Thus, if a slight amendment is made to the question submitted by the German court the following reply might be given: contracts concluded between two undertakings

from the same State by which one of the parties undertakes to purchase solely from the other party certain products which it resells in the territory of this same State do not relate to imports or to exports between Member States within the meaning of Article 4 of Regulation No 17 and thus do not require notification.

III

The Oberlandesgericht then asks you what interpretation must be given to Article 85 (2) of the EEC Treaty as regards agreements which are exempt from notification, taking into account the possible retroactive effect of an exempting decision taken by the Commission under Article 85 (3) of the Treaty and Article 6 of Regulation No 17, and whether an agreement which is exempt from notification is provisionally valid.

Article 85 (2) provides that any agreements prohibited pursuant to this article shall be automatically void. You were very soon required to deal with the question of the significance to be attached to this provision as regards agreements in existence on the entry into force of Regulation No 17 and you replied to it in your judgment of 6 April 1962 in *de Geus* v *Bosch* (Case 13/61, [1962] E.C.R. 45). You considered in that case that such agreements were not automatically invalid simply because they were covered by the provisions of Article 85 (1), since they might be exempted from the prohibition set out in this paragraph by virtue of the provisions of paragraph (3) of that article. On this point let me quote a passage from your judgment which is worded as follows: '... such agreements and decisions must be considered valid in so far as they fall within Article 5 (2) of the regulation;' (the agreements in question are those which do not require notification) 'they must be considered as provisionally valid when, although not excepted by operation of that provision, they are notified in time to the Commission in accordance with Article 5 (1) of the said regulation'. However, this validity is not final and the Commission may subsequently refuse to grant the exemption provided for in Article 85 (3).

It was still necessary to define this provisional validity and to establish its effects in detail.

Your judgment given in 1962 gave rise, both in national case-law and in academic legal writing, to a whole series of solutions, ranging from extremely restrictive to extremely liberal, which were set out exhaustively by Mr Advocate-General Roemer in his opinion in the judgment in the *Portelange* case of 9 July 1969 (Case 10/69, Rec. 1969, p. 309). The case concerned an agreement concluded before the entry into force of Regulation No 17 which required and had in fact received notification.

In the observations which it submitted to you the Commission took the view, founded on the proposition that the prohibition set out in Article 85 (1) continues in existence, even where there is notification, until the Commission has itself come to a decision on the agreement, that it is incompatible with the Treaty that, during the period before such decision is taken, a cartel may be regarded as valid without restriction from the point of view of civil law. Thus, although the Commission accepted that during this waiting period certain bonds existed between the parties, such as the obligation to cooperate in order to obtain the exemption provided for in Article 85 (3) and to refrain from taking any action which might jeopardize this exemption, it considered that these parties could not rely on the agreement in order to invoke a right to have the contract performed before the national courts.

You have dismissed this argument in its entirety. The question whether a notified agreement is actually prohibited in fact depends on an assessment of various factors which cannot be assumed to exist without an express finding that the case in question falls not only within the framework of Article 85 (1) but does not justify the exception provided for in paragraph (3). As long as no such finding has been made any agreement which has been properly notified must be regarded as valid and the general principle of legal certainty requires that it be fully effective for so long as the Commission has taken no decision on the matter.

Must this solution also apply to agreements which do not require notification and which in fact have not been notified?

The Bilger brewery puts forward several

reasons for giving an affirmative answer to this question. First of all, it recalls the judgment in the *Bosch* case according to which the treatment given to this category of agreements cannot be less favourable than that which is given to those requiring notification under Regulation No 17. If such agreements have been exempted from this obligation it is because, as is stated in the recitals of the regulation, they are 'less prejudicial' than others to the development of the common market; at the least, therefore, they must be capable of as wide an application. Secondly, Article 6 (2) of Regulation No 17 provides that they may be exempted retroactively from the prohibition contained in Article 85 (1). It would thus be illogical to regard them as provisionally invalid or deprived of all real effect as long as the Commission has taken no decision on them. If, in order to become effective, they required notification—as is possible under Article 5 (2) of the regulation—any conscientious undertaking would in practice be compelled to carry out this formality; however, to abolish in this way the distinction between the agreements which require notification and those which are exempt therefrom would be to ignore the intention of the authors of the regulation and the Commission would have to deal with an influx of notifications. Finally, the requirement of legal certainty applies as strongly to these agreements as to those referred to in the *Portelange* judgment and the slowness with which the Commission proceeds before taking an exempting decision is equally prejudicial to them.

The Commission's point of view is very different. As regards agreements which are exempt from notification it puts forward a restrictive concept of provisional validity which it had put forward without success in respect of agreements which require notification. In order to justify this view it relies on reasons which it considers to have formed the basis of the judgment in the *Portelange* case: the absence of means open to the parties concerned to accelerate the adoption of a decision under Article 85(3) and the requirements of legal certainty—the possibility, which notification opens to the Commission, of putting an end to a temporary situation by refusing the exemption or by resorting to Article 15 (6) of the regulation. Once the undertakings concerned have been informed that after preliminary examination the Commission considers that Article 85 (3) is inapplicable, they may only proceed to carry out the agreement at their own risk and peril.

The position was quite different as regards unnotified agreements. In fact, undertakings are always entitled to give voluntary notification and thus to remove the uncertain legal situation in which they find themselves. As regards the Commission, which is generally informed of the existence of such agreements after long delay, this institution has no means of initiating quickly one of the procedures provided for in Regulation No 17 in relation to the parties concerned. Finally, it refers to Article 15 (2) and maintains that to recognize that the agreements which do not require notification have the legal consequences defined in the *Portelange* judgment would risk creating a conflict between the civil duty to perform the contract and the obligation to observe the rules on competition laid down in the Treaty which is supported by a sanction under public law. It does not deny that the contract has created ties and obligations between the parties; it considers that the parties concerned should undertake nothing which conflicts with an exemption and that in particular they should conclude no contracts which might prevent the performance of an agreement which is provisionally valid. However, the consequence of this validity should not be such as to enable one contracting party, before any decision has been taken by the Commission, to ask the other party to fulfil his obligation or to claim damages on the grounds of a failure to fulfil it. In the opinion of the Commission the reply given to the question submitted by the German court should be along these lines.

These arguments are not without force and certain arguments based on the text may appear to support them. However, it must be observed that most of the reasons given in the *Portelange* judgment for recognizing that the agreements which require notification are fully effective are also valid in the case before us today: this applies in particular to the legal uncertainty affecting

these contracts. If the proposed solution, that is, the voluntary notification of agreements, were made a *necessary* requirement for such agreements, were made a *necessary* requirement for such agreements to come into full effect, it would be likely to lead to a much greater influx of notifications than was envisaged by the Commission. Moreover, this solution certainly conflicts with the idea of the authors of the regulation when they exempted from this formality the categories of agreements listed in Article 5 (2), which are not merely those to which the only parties are undertakings from one Member State and which do not relate either to imports or to exports between Member States. The exemption is based on the concept that these agreements are less prejudicial to the development of the common market: it must therefore be assumed that although they actually fall within the scope of Article 85 (1) they have every chance of being able to benefit from a measure adopted pursuant to paragraph (3) of that article and there is no great danger in recognizing provisionally that they have a large degree of efficacity. Finally, in my opinion the possibility of conflict between an obligation under civil law and the duty which is supported by a sanction in public law to which the Commission refers is even less to be feared than was stated in the oral procedure as, in such a situation, the Commission would be unlikely to impose a fine. Thus, in my opinion the argument put forward by this institution is rather unrealistic; I see no urgent reason to regard the provisional validity of the agreements which are exempt from notification under the combined provisions of Articles 4(2) (1) and 5 (2) as more limited in scope than that of agreements which have been notified, and the reply to the German court might *mutatis mutandis* be drafted in similar terms to those of the *Portelange* judgment.

In my opinion, the answer to be given to the second question submitted by the Oberlandesgericht Karlsruhe must be that the agreements referred to in Article 85 (1) of the Treaty, which are exempt from notification by Article 5 (2) of Regulation No 17, are fully effective as long as the Commission has made no decision under Article 85 (3) and the provisions of the said regulation.