The second question

5. An import or export transaction cannot as such come within the prohibition imposed by Article 85(1) of the Treaty.

Lecourt Mertens de Wilmars Kutscher

Donner Trabucchi Monaco Pescatore

Delivered in open court in Luxembourg on 25 November 1971.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL DUTHEILLET DE LAMOTHE DELIVERED ON 28 OCTOBER 1971[1]

Mr President,
Members of the Court,

The Béguelin Company is a Belgian import/export company.
On 1 March 1967 it entered into a contract with the Japanese firm Oshawa under which it was appointed exclusive representative in France and Belgium for the sale of gas cigarette-lighters manufactured by the Japanese firm under the trade-mark 'WIN'.
A few days later the Béguelin/Belgium company set up in France a subsidiary, Béguelin/France, which was wholly under its control and Oshawa's exclusive dealership for France was then transferred by contract of 25 March 1967 to the Béguelin/France company.
Shortly afterwards, the exclusive dealership for the Federal Republic of Germany in the WIN trade-mark was granted by the Oshawa company to the Marbach company, a German firm.

In 1969, a French import/export company the G.L. Import Export, Nice, purchased from the Marbach firm a consignment of 18 000 WIN lighters, which were the property of Marbach but which the latter firm had left in bond at the customs in Hamburg; after having taken delivery of them in France, the G.L. Import Export company began to distribute the lighters on the French market.
The Béguelin/Belgium and Béguelin/France companies heard of this and thereupon commenced proceedings before the Tribunal de Commerce, Nice, against the G.L. Import Export Company, Nice, and the German firm of Marbach in which they sought
— first, an injunction against the sale, on pain of a penalty, on French territory of lighters acquired by G.L. Import and bearing the WIN trade-mark and
— secondly, an order that the French

1 — Translated from the French.

firm and the German firm should pay the two Béguelin companies compensation for unlawful and unfair competition.

The Béguelin companies based their application in essence on the exclusive dealing contracts granted them by Oshawa.

But the defendant firms in the main action pleaded before the Tribunal de Commerce that the agreements referred to were absolutely void under Article 85 of the EEC Treaty.

It is in these circumstances that, in accordance with the provisions of Article 177 of the Treaty, the Tribunal de Commerce, Nice, has referred to you the present questions.

These questions call for two preliminary comments on my part.

1. It is somewhat unfortunate that, in the preliminary decision to refer to this Court, the Tribunal de Commerce, Nice, which is alone competent to give such a ruling, did not rule whether the contracts in question contained a clause giving absolute territorial protection.

This has been the subject of argument in this Court between the parties.

The representative of the G.L. Import Export firm and the agent of the Commission maintain that Articles 9(b) of the contracts in question constitute a clause giving absolute territorial protection, whereas the representative of the Béguelin companies obviously takes the contrary view.

It is not for this Court to decide that particular point.

Nevertheless it is, in my view, for this Court to frame the reply which it will give to the Nice court in such a way as to make abundantly clear whether the provisions of the disputed contracts constitute absolute territorial protection for the dealer.

2. In a wholly commendable attempt to explain the situation fully for your benefit, the Nice court has in the operative part of its judgment confused questions of fact and of law.

The representatives of some of the parties to the main action have taken advantage of this to raise issues concerning the facts which appear to me to have no relevance to the questions you are called upon to consider.

It was, in particular, argued that the fact that the transaction in dispute was effected in the form of exports to French customs territory from a free German zone and not from the customs territory of the Federal Republic of Germany has a conclusive bearing on the conditions in which, in this case, Article 85 of the Treaty is applied.

I think this argument should be dismissed *in limine*.

Article 85 of the Treaty and the regulations implementing it, the only texts which you are called upon to interpret in this case, do not cover import or export transactions taken in isolation or even collectively, but refer to an agreement between undertakings, decisions by associations of undertakings and concerted practices which give rise to and constitute the legal basis of such transactions.

Consequently, the fact that the imports which are the subject of the main action were effected from a free zone might have some relevance if you were dealing with a question concerning diversion of trade but it is, on the contrary, of no relevance in a case where the only question submitted to you is concerned with application of Article 85 and the provisions adopted to implement it.

In the light of these two preliminary comments, I suggest that the Tribunal de Commerce, Nice, really meant to submit the following five questions for consideration:

1. Is the action of a company, whose registered office is in one Member State, in setting up a subsidiary company in another Member State in order to take advantage, in the second State, of an exclusive dealing contract which was originally granted to the parent company,

caught by the provisions of Article 85 of the Treaty, in particular when the subsidiary is wholly controlled by the parent company?

2. In what circumstances, in particular when it includes a clause conferring absolute territorial protection, is an exclusive dealing contract concluded between a firm having its registered office in one Member State and another firm with its registered office in a third country, prohibited or void under Article 85 of the Treaty?
3. In what circumstances is it possible, until 1 January 1973, for a contract of this description which is caught by Article 85 of the Treaty, to escape the aforementioned prohibition or nullity by virtue of Regulation No 67/67?
4. How are provisions of national law designed to protect traders against unfair competition reconciled with the provisions of Article 85 of the Treaty?
5. Does the nullity provided for under Article 85(2) of the Treaty in the case of the contracts referred to under Article 85(1) affect only the position as between the parties or is it capable of affecting third parties?

As the Court will be aware, except in the case of Questions 1, 4 and 5, the majority of the issues raised by these questions have been very largely resolved by its previous decisions.

I

With regard to the first question, I submit that it should be answered in terms somewhat similar to those suggested by the Commission.

In common with the Commission, I believe that the action of an undertaking in one Member State in setting up, in another Member State, a subsidiary which is wholly under its control, mainly for the purpose of taking advantage of the grant of an exclusive dealership which the parent company originally owned in respect of both Member States does not come within the ambit of Article 85 of the Treaty.

If, in fact, regard is paid to the different stages by which such a transaction is carried out, I believe it would be found that there is no real 'agreement between undertakings' or a decision to form an association of undertakings which is capable of affecting competition.

(1) Even if, to satisfy the requirements of national law, the formation of a company implies an inter-company agreement in which several parties are involved, this does not *per se* constitute an agreement between undertakings if the parent company holds all or almost all the capital assets and is wholly responsible for its management. It could not be otherwise, except in a case where the subsidiary company was set up by firms which had hitherto been in competition with each other for the precise purpose of regulating that competition. It would not be a case of a subsidiary being wholly controlled by a single parent company but of the execution by private arrangement of an agreement between undertakings which would, accordingly, call for attention under Article 85.

As is very clearly shown by the facts as set out in the decision of the Tribunal de Commerce, the question does not arise and in my view there is, therefore, no need for any reference to it in your reply.

In such circumstances the formation of a subsidy does not *per se* come within the ambit of Article 85.

(2) In my opinion, this also applies to the second stage of the transaction being carried out: the assignment to the subsidiary of an exclusive right of sale hitherto exercised by the parent company.

It must first of all be pointed out that in the present case the evidence on the file does not enable us to state that this phase of the transaction was effected through an agreement between the parent company and the subsidiary, as, for

example, occurred in a number of cases which the Commission was called upon to investigate in the exercise of the powers conferred on it under Article 85(3) of the Treaty. It seems to have been effected by means of a direct contract between Béguelin/France and the Japanese firm.

However, this is not in my view *per se* a decisive consideration because the object of the contract between Béguelin/France and the Japanese firm was to transfer to Béguelin/France rights which previously belonged to Béguelin/Belgium and it was evidently necessary to secure the agreement of the latter company, so that Béguelin/Belgium could be regarded as having been, at least by implication, partly to the contract between Béguelin/France and Oshawa.

In any case, as the Commission points out, the transfer by a parent company to a subsidiary wholly controlled by it, or the authorization of the transfer to that subsidiary, of rights held by the parent company does not constitute an agreement between undertakings within the meaning of Article 85(1) of the Treaty if the subsidiary is wholly controlled. What in these circumstances it constitutes is, in fact, not an agreement between undertakings but an internal reorganization of the parent undertaking.

Again, Article 85(1) of the Treaty is applicable only when an agreement between undertakings may affect competition. Clearly, as between a parent company and a wholly controlled subsidiary, there could be no competition which could be effected by an agreement between these two entities which, while legally distinct, form one and the same economic unit.

Finally, in practice, to bring within the ambit of Article 85 a decision taken by a parent company established in one Member State to give its sales office in another Member State the legal form of a company would be to create unnecessary complication and would seem to go far further than was intended when Article 85 was drafted. To sum up, my view is that the first question should be answered as follows:

> The action of an undertaking established in one Member State in setting up in another Member State a subsidiary which has no economic independence, in order to take advantage, in the second Member State, of the exclusive right of sale of a product originally held by the parent company for both Member States does not come within the ambit of the provisions of Article 85(1) of the Treaty.

II

As regards the second question, which seeks to ascertain to what extent an exclusive dealing contract like those which the Béguelin companies complained of before the Tribunal de Commerce, Nice, comes within the ambit of Article 85 of the Treaty, there are ample precedents in your decisions regarding the general principles to be applied.

(1) Contracts conferring an exclusive right of sale do not, in themselves, necessarily come within the ambit of Article 85 (1) of the Treaty.

(2) Such agreements, particularly those which include clauses giving absolute territorial protection, may nevertheless be caught by the provision cited above if, looked at in isolation or together with parallel contracts they may, first, affect trade between Member States and, secondly, have as their object or effect the prevention, restriction or distortion to an appreciable extent of competition within the common market.

The Tribunal de Commerce, Nice, appears to be aware of these principles but seems to have found two difficulties in applying them.

A — The Court will not take long to dispose of the first of them.

The Nice court appears to be asking in effect whether Article 85 of the Treaty is capable of being applied to a contract one of whose signatories is a firm with its registered office in a third country. So long as the agreement in question is

operative within the common market this has no effect on the application of Article 85(1) of the Treaty. In my opinion, this emerges very clearly from your judgment in *Sirena* in which you recognized that the national court needed to consider the question whether Article 85(1) applies to contracts binding an American firm to undertakings in the common market.

B — The second difficulty is a very serious one. You can help the national court to get over it but you cannot put yourself in its place in order to do so.

The question here is whether the contract in question is not one of those agreements of such minor importance that they are both incapable of affecting trade between the Member States and of having any appreciable effect on competition within the common market.

The problem here is one of great delicacy.

On one hand, if we ignored the characteristic features of the market, the comparatively small sums involved in the transactions, and the medium, even small, size of the undertakings concerned, at all events of those in the Community, might lead to the conclusion that the agreements in question are really agreements of minor importance. On the other hand, the special peculiarities of the lighter market in the Community are such as to give rise to the question whether contracts which, on other markets, would be of little importance do not assume an entirely different character on the European market in lighters. The national court alone can answer that question. You can only provide it with guidance by reminding it of the considerations you have already identified as relevant to the way in which the assessment should be made.

On this point however, I should like to make two comments.

1. The representative of the Béguelin company drew attention, in this context, to a Communication of 27 May 1970 by which the Commission tried to give some indication as to what constitutes an agreement of minor importance.

In my view this line of argument is without force for three reasons:

(a) As the communication itself makes it clear, it is only in the nature of guidance; it lays down no legislative rules which bind the national court or even the Commission or on which the parties could rely.

(b) As was pointed out by the Agent of the Commission it is doubtful whether the present case fits any of the examples considered in this communication.

(c) Finally, as I said a short time ago, and as I took the liberty of pointing out to you during the *Cadillon* case it is perfectly possible for an agreement, even one which affects small quantities of products or one which is made between medium or small undertakings, to be caught by Article 85 of the Treaty because of the peculiarities of the market in the products concerned.

2. My second comment is directed to the suggestion that you should draw the attention of the Tribunal de Commerce to the need for it to take account, in its assessment, of the special character of the market in the products concerned.

I submit, accordingly that the second question should be answered as follows:

(a) Though a contract conferring an exclusive right of sale does not, of itself, come within the ambit of Article 85(1) of the Treaty, such an agreement, especially when it contains clauses conferring absolute territorial protection, may nevertheless be caught by the provisions of Article 85(1) prohibiting and avoiding an agreement if, first, it may affect trade between the Member States in a way which might hinder the attainment of the objectives of a single market between States and if, secondly, it has as its object or effect the prevention, restriction or distortion of competition within the common market.

(b) In order to determine whether these two conditions are fulfilled, account

must be taken of the actual conditions under which the agreement operates, with special reference to parallel agreements which may subsist between the supplier and other distributors, the peculiarities of the market in the product in question or in similar products and the position of those concerned on the said market.

III

The third question (the relevance, if any, of Regulation No 67/67 to the present case) calls for only brief comment from me.

1. The Commission contends that the agreement between Oshawa and Béguelin/France is unable to benefit from the provisions of Article 1 of Regulation No 67/67 because it does not fulfil the conditions laid down by Article 3 of the regulation. Under Article 3 exclusive dealing contracts are, in fact, excluded from the exception provided for under Article 1 'where . . . (b) the contracting parties make it difficult for intermediaries or consumers to obtain the goods to which the contract relates from other dealers within the common market . . .'. The Commission maintains that this applies to the contract in question Article 9 of which introduces an arrangement for absolute territorial protection.

In terms of law, the Commission's view is perfectly correct. However, although the answer seems obvious, the Court cannot put itself in the place of the national court and ascertain the meaning of Article 9 of the contract in dispute.

In my view, therefore, your reply must be couched in more abstract terms than those suggested by the Commission.

2. The Commission has also used the argument but, after becoming aware of the contracts entered into between Oshawa and the Béguelin companies, without attaching the same importance to it as to the first argument, that the companies could not in any case avail themselves of the provisions of Regulation No 67/67 after they initiated proceedings in the main action against the G.L. Import Export firm of Nice and the German firm of Marbach. Article 3(b) of Regulation No 67/67 states, in fact, that Article 1(1) of the regulation shall not apply where, *inter alia*, 'the contracting parties . . . (2) . . . take other *measures* to prevent dealers or consumers from: obtaining from elsewhere [in the common market] goods to which the contract relates or from selling them in the territory covered by the contract.' In the Commission's view the action brought by Béguelin/France comes into the category of 'measures' which, once adopted, make it impossible for those concerned to avail themselves of the provisions of Article 1 of Regulation No 67/67.

I hesitate to advise adoption of the Commission's view on this point.

An action based on unfair competition can, of course, in fact be founded upon a number of grounds. As you were informed at the hearing, this is true in the present case, where although an exclusive contract was the subject of complaint, it was also alleged that, in some cases, the Nice firm had not removed from the lighter containers printed slips guaranteeing the purchaser the benefit of the Béguelin/France after-sales service.

In these circumstances, it seems to me dangerous to accept that the mere fact that the grounds for an action against unfair competition include a submission based on infringement of an exclusive contract is, on its own, enough to constitute one of the 'measures' covered by Article 3(b)(2) of Regulation No 67/67 and to take the said contract outside the ambit of Article 1 of the regulation, even though, apart from this, the contract fulfils the other conditions laid down in Articles 2 and 3.

The question should not really be looked at, if I may say so, through a microscope, by which I mean that this should

not be done by trying to establish whether bringing an action alleging unfair competition before the Court constitutes one of the measures covered by Article 3(b)(2) of the regulation but, as I shall do in a moment, by putting the question in the wider context of the relationship between Article 85 of the Treaty and national rules designed to protect traders against unfair competition. In view of this and because, as its Counsel explained at the hearing, the Commission advanced the second argument on a wholly subsidiary basis, I submit that the Court should, in its reply to the third question which, it seems to me, the Nice court is asking it to settle, confine itself to ruling as follows:

> An agreement by which a producer undertakes to protect an exclusive dealer in a Member State against supplies from a third party being sent into that State and has bound the dealer, first, not to sell competing products and secondly, not to sell outside the territory accorded to him is, by virtue of Article 3 of Regulation No 67/67, put outside the ambit of Article 1 of the regulation.

IV

With regard to the fourth question (relationship between Article 85 of the Treaty and the provisions of national law governing unfair competition) I suggest that your reply should recall the principles already established in your recent judgments in *Sirena* and *Deutsche Grammophon*.

It is true that the facts which led to those two judgments were concerned with the more specific question of the combined effect of the provisions of Article 85 of the Treaty and national law on trade-marks or national law affording protection similar to copyright.

In my view, the principles established on the subject of trade-marks and intellectual property are equally valid in the more general field of the protection of a trader against acts amounting to unfair competition.

Is not the essential aim of national legislation on trade-marks or intellectual property to provide special protection against a certain form of competition judged to be unfair?

On the basis of the same considerations which you took as your guide, I believe it important to bear in mind that the rules of national law on the subject of unfair competition should not be diverted from their proper purpose or used for purposes which conflict with the general objectives of the common market and that this places a corresponding limit or restriction on the exercise of the rights to which, in this field, national rules give rise.

It is for this reason that I suggest that the answer to be given to the fourth question should in terms closely resembling those in your judgment in *Deutsche Grammophon* by giving the Tribunal de Commerce, Nice, the following ruling:

> The exercise of the rights accorded in a Member State to dealers to protect them against acts constituting unfair competition comes within the prohibition contained in Article 85(1) of the Treaty whenever such exercise appears to be the object, the means of implementation or the consequence of an agreement which, by prohibiting imports from other Member States of products lawfully marketed in those States, has the effect of partitioning off the market in a manner which is liable to affect trade between the Member States.

V

The precedents established by this Court do not yet provide an answer to the fifth and last question.

Article 85(2) of the Treaty provides that agreements covered by Article 85(1) shall be 'automatically void'. In my view it has been possible, at least since Article 85 of the Treaty became directly applicable, for such nullity to be

relied upon by the contracting parties as well as by third parties and its consequences are the same for both.

Finally, I submit that the various questions which seem to me to emerge from the judgment of the Tribunal de Commerce, Nice, should be answered in the following terms:

1. The action of an undertaking established in one Member State in setting up in another Member State a subsidiary which has no economic independence, in order to take advantage, in the second Member State, of the exclusive right of sale of a product originally held by parent company for both Member States does not come within the ambit of the provisions of Article 85(1) of the Treaty.

2. (a) Though a contract conferring an exclusive right of sale does not, of itself, come within the ambit of Article 85(1) of the Treaty, such an agreement, especially when it contains clauses conferring absolute territorial protection, may nevertheless be caught by the provisions of Article 85(1) prohibiting and avoiding an agreement if, first, it may affect trade between the Member States in a way which might hinder the attainment of the objectives of a single market between the States and if, secondly, it has as its object or effect the prevention, restriction or distortion of competition within the common market.

   (b) In order to determine whether these two conditions are fulfilled, account must be taken of the actual conditions in which the agreement operates, with special reference to parallel agreements which may subsist between the supplier and other distributors, peculiarities of the market in the product in question or in similar products and the position of those concerned on the said market.

3. An agreement by which a producer undertakes to protect an exclusive dealer in a Member State against supplies from a third party being sent into that State and has bound the dealer, first, not to sell competing products and secondly, not to sell outside the territory accorded to him is, by virtue of Article 3 of Regulation No 67/67, put outside the ambit of Article 1 of the regulation.

4. The exercise of the rights accorded in a Member State to dealers to protect them against acts constituting unfair competition comes within the prohibtion contained in Article 85(1) of the Treaty whenever such exercise appears to be the object, the means of implementation or consequence of an agreement which, by prohibiting imports from other Member States of

products lawfully marketed in those States, has the effect of partitioning off the market in a manner which is liable to affect trade between the Member States.

5. The provision in Article 85(2) for automatic avoidance is applicable to third parties as well as to the parties to the contract.