OPINION OF ADVOCATE GENERAL TESAURO

delivered on 6 November 1997 *

1. In a selective distribution contract which concluded between a supplier and a distributor, both of whom are established in the Community; and covers the territory of a non-member country, is a clause prohibiting the distributor from selling, either directly or by reimportation from the non-member country, the contractual products in any other territory, and therefore *inter alia* in the territory of the Member States, contrary to Article 85(1) of the Treaty? If such a clause is to be regarded as incompatible with Article 85(1), does that also apply where the supplier markets his own products in the Community territory through a selective distribution network covered by a Commission exemption decision under Article 85(3)?

Those, essentially, are the questions asked by the Cour d'Appel (Court of Appeal), Versailles (France) (hereinafter 'the national court'), which provide the Court of Justice with an opportunity to rule on the compatibility with Community competition rules of export clauses and prohibitions of reimports contained in distribution contracts. In the present case, the commercial distribution system displays the particular feature of involving both a Community selective distribution system, duly exempted by the Commission, and distribution contracts for non-member countries embodying destination clauses, in the form both of an obligation to export and an obligation not to reimport.

The facts and the questions referred

2. The events giving rise to the dispute before the national court are fairly straightforward. The context is the distribution of luxury cosmetic products, quality articles which are marketed at high prices under prestigious brand names. An operator in that sector is Yves St Laurent Parfums SA, established in France (hereinafter 'YSLP'), which distributes its products in the common market through a selective distribution network which was granted a Commission exemption under Article 85(3) by decision of 16 December 1991. [1]

1 — Decision 92/33/EEC relating to a proceeding under Article 85 of the EEC Treaty (IV/33.242 — Yves Saint Laurent Parfums) (OJ 1992 L 12, p. 24). That decision was the subject of a judgment of the Court of First Instance of 12 December 1996 in Case T-19/92 *Leclerc* v *Commission* [1996] ECR II-1851, which declared it void but only as regards the part establishing that a provision authorising YSLP to discourage applications for admission from resellers whose perfumery business does not constitute their main activity does not fall within the scope of Article 85(1) of the Treaty. Essentially, and particularly so far as is relevant to this case, the Court of First Instance upheld the validity of the exemption granted.

* Original language: Italian.

YSLP also concluded in respect of the East European markets two distribution contracts, one for the territory of the Russian Republic and Ukraine, and the other for Slovenia, with Javico International AG (hereinafter 'Javico'). Javico is established in Germany and specialises in commercial distribution in the markets of Eastern Europe. It should be noted that Javico does not belong to the network of distributors of YSLP products for the common market.

3. The contract concluded in February 1992 covering distribution in Russia and Ukraine contains the following two clauses:

'1. Our products are intended for sale solely in the territory of the Republics of Russia and Ukraine.

In no circumstances may they leave the territory of the Republics of Russia and Ukraine.

2. Your company promises and guarantees that the final destination of the products will be in the territory of the Republics of Russia and Ukraine, and that it will sell the products only to traders situated in the territory of the Republics of Russia and Ukraine. Consequently, your company will provide the addresses of the distribution points of the products in the territory of the Republics of Russia and Ukraine and details of the products by distribution point'.

There are further clauses intended to underpin Javico's obligation to guarantee that the products go to no destination outside the territories specified in the contract. [2] In fact, nearly all the provisions of the contracts between the parties are devoted to the obligation to sell the goods at specified locations and to penalties for any breach of that obligation.

The May 1992 contract for distribution in Slovenia contains the following clause:

'In order to protect the high quality of the distribution of the products in other countries of the world, the Distributor agrees not to sell the products outside the Territory or to unauthorised dealers in the Territory'.

It is common ground that the distribution contracts concluded by YSLP and Javico do not enjoy any individual exemption and have not in fact been notified to the Commission.

2 — In order to ensure distribution in the territories of Russia and Ukraine, Javico must forward to YSLP, before delivery and if possible as soon as the order is placed, all documents proving the actual existence of a market for the products in question in the contractual territories. Javico is also required to ensure that local dealers intend selling only within the territories of Russia and Ukraine. There is even a penalty clause, backed by a bank guarantee, to cover cases where any of the products delivered are redispatched outside the territories of Russia and Ukraine and, more generally, the Eastern countries.

4. Shortly after the contracts in question were concluded, YSLP detected within Community territory (particularly in the United Kingdom, Belgium and the Netherlands) products sold to Javico for distribution in Russia, Ukraine and Slovenia. The contract was then terminated and proceedings were brought by YSLP before the Tribunal de Commerce (Commercial Court), Nanterre, for *inter alia* compensation for the damage suffered. The action was successful at first instance and the German companies appealed to the Cour d'Appel, Versailles, contending, first, that the contractual clauses infringed were void, being contrary to Article 85(1) of the Treaty, and, second, that the exemption decision of 16 December 1991 was irrelevant.

5. To enable it to give judgment in the proceedings before it, the national court considered that a preliminary ruling should be obtained from the Court of Justice on the interpretation of Article 85(1) of the Treaty. More particularly, it referred the following questions to the Court:

'(1) Where an undertaking (the supplier) situated in a Member State of the European Union by contract entrusts another undertaking (the distributor) situated in another Member State with the distribution of its products in a territory outside the Union, must Article 85(1) of the Treaty establishing the European Community be interpreted as prohibiting provisions in that contract which preclude the distributor from effecting any sales in a territory other than the contractual territory, and hence any sale in the Union, either by direct marketing or by re-exportation from the contractual territory?

(2) In the event that the said Article 85(1) prohibits such contractual provisions, must it be interpreted as not being applicable where the supplier otherwise distributes his products on the territory of the Union by means of a selective distribution network which has been the subject of an exemption decision under Article 85(3)?'

The first question

6. The disputed clauses impose two separate obligations on the distributor, which are closely linked and are reciprocal in operation. The contract imposes an obligation to export the products, in the sense that the distributor is required to export them to the non-member countries specified in the contract; there is also a prohibition of marketing outside the contractual territory. The latter prohibition excludes both direct sales to

resellers located outside that territory and reimportation of products from that territory.

7. According to YSLP, the export obligation does not fall within the scope of Article 85 of the Treaty because the contract relates only to organisation of trade in the products in non-member countries, without reference to trade between Member States. Even if it were conceded that Article 85 was applicable, it would have to be acknowledged that the damage was not appreciable and that, in any event, the disputed contracts fell within the category of exclusive distribution contracts to which, by virtue of Regulation No 1983/83, [3] Article 85(1) is not applicable. As regards the prohibition of re-exportation to the Community, YSLP recognises — as does the Commission — that such a condition may fall within the prohibition laid down in Article 85(1) of the Treaty, but only where imports are economically feasible and trade between Member States is adversely affected; those conditions are not in their view fulfilled in this case, having regard to the structure of the market and the obstacles which the goods would encounter when actually being reimported into the common market. In Javico's view, on the other hand, the contracts in question are designed specifically to restrict competition within the common market and, in any event, adversely affect competition, with the result that they are certainly contrary to Article 85(1).

The irrelevance of Regulation No 1983/83

8. First of all, I shall briefly examine the claim that Regulation No 1983/83 is applicable to the agreements at issue. The lack of any connection between that regulation and the present case is clear from its scope, as described in Article 1. The block exemption provided for by the regulation relates in fact to agreements 'whereby one party agrees with the other to supply certain goods for resale within *the whole or a defined area of the common market only to that other*'. [4] An essential precondition for applicability is therefore that the exclusive territory be a part or the whole of the common market. [5] The contracts between YSLP and Javico, however, are for distribution of the former's products solely in the territory of non-member countries. It follows that the agreements at issue do not fall within the scope of the block exemption provided for by Regulation No 1983/83.

Application of Article 85(1) of the Treaty

9. Turning to the importance of Article 85(1) of the Treaty for the purpose of appraising the agreements at issue, I would point out first of all that, in order to establish whether an agreement falls within the scope of that provision of the Treaty, it is necessary, by

3 — Commission Regulation (EEC) No 1983/83 of 22 June 1983 on the application of Article 85(3) of the Treaty to categories of exclusive distribution agreements (OJ 1983 L 173, p. 1).

4 — Emphasis added.

5 — See Case 170/83 *Hydrotherm* [1984] ECR 2999, paragraphs 13 to 16.

virtue of settled case-law, first to check whether, by virtue of its subject, the agreement embodies a restriction of competition. [6] That examination involves considering the aims which the parties pursued by concluding the agreement, having regard to the economic context.

The present case is concerned with a contractual mechanism which, first, requires a Community distributor to export the contractual products to specified non-member countries, and second, prohibits that distributor from marketing them outside the territory of the non-member countries specified in the contract, whether by means of direct sales or by means of reimportation from the non-member country.

10. As the national court points out in its order for reference, since the prohibition of marketing outside the contractual territory relates to any State whatsoever, whether or not in the Community, what is particularly (if not exclusively) important is the prohibition of bringing or reintroducing YSLP products into the territory of the Community. The contract is almost entirely devoted to detailed rules prohibiting marketing of the products outside the contractual territory and it cannot be denied that the intention of the parties was specifically to prevent the distribution in the common market of the products sold to Javico. That allows YSLP to oppose parallel imports into the common market, where it operates through a selective distribution whose efficacy might be undermined by the presence on the market of products distributed by resellers not belonging to the network. [7]

I am therefore of the opinion that the export clauses and the prohibition of reimports in the contract between the parties pursue an essentially anti-competitive aim. Moreover, those clauses are not in fact necessary to ensure that the distribution contract fulfils the economic function assigned to it: that of facilitating penetration of YSLP products into the East European market.

The export clauses must therefore in principle be regarded as prohibited as far as their purpose is concerned.

11. The foregoing observation is consistent with the judgment of the Court in which it was observed, in relation to a clause similar to the one at issue here, that the obligation imposed by the distributor to export prod-

6 — Appraisal of compatibility in successive stages, first by reference to the subject-matter and thereafter to the effects of the agreement, is an established procedure in the case-law of the Court: see my Opinion in Case C-250/92 *DLG* [1994] I-5644, point 16; see also the judgment in Case C-234/89 *Delimitis* [1991] ECR I-935, paragraph 11. It need hardly be pointed out that Article 85(1) does not require, to be applicable, that the agreement have an anti-competitive object *and* effect, the two requirements being alternatives: see Case C-219/95 P *Ferriere Nord* [1997] ECR I-4411, paragraphs 14 and 15.

7 — Indicative of the fact that the disputed clauses are essentially intended to preclude distribution of the contractual products in the common market is the penalty clause to which Javico is subject only if the products are found outside the territory of the 'Eastern countries', it therefore being irrelevant that the products might go to a final destination outside the contractual territory but remain within Eastern Europe.

ucts to a non-member country was 'essentially designed to prevent the re-export of the goods to the country of production', so as to restrict competition in the common market [8] and maintain a different level of prices.

Moreover, the fact that the formal subject-matter of the distribution contract was the promotion of sales in a non-member country does not in itself mean that clauses contained in it were not essentially intended to affect competition within the common market [9] and that, therefore, they do not fall within the prohibition contained in Article 85(1). [10]

12. Although of the opinion that the agreements at issue pursue an anti-competitive purpose and, as such, are prohibited by Article 85(1), I nevertheless consider it necessary to examine in addition the effects which the agreement is actually capable of having on competition in the common market. [11] The case-law of the Court of Justice, it need hardly be pointed out, requires that any effects not reconcilable with proper competition reach an 'appreciability' threshold, thereby excluding from the scope of Article 85(1) all agreements whose harmful effect is insignificant. [12]

13. Assessment of the anti-competitive effect must take account of a number of factual circumstances such as the level of competition existing in the market, regardless of the agreement at issue, and the economic and legislative context in which the agreement is to operate, so as to identify any specific possibility that competition in the common market might be affected. With regard to destination clauses, over the years the Commission has been developing an approach

8 — See Joined Cases 29/83 and 30/83 *Cram and Rheinzink* v *Commission* [1984] ECR 1679, paragraphs 24 to 31. In the contested decision, the Commission observed that 'a restriction of competition which results from the obligation to resell in a specific country may itself affect trade between Member States to an appreciable degree owing to the fact that the subsequent seller is established in the common market, within which he must remain free to sell the goods where he wishes depending on the circumstances and *inter alia* on the prices quoted to him': see Commission Decision 82/866/EEC of 14 December 1982 relating to a proceeding under Article 85 of the EEC Treaty (IV/29.629 — Rolled zinc products and zinc alloys), OJ 1982 L 362, p. 40.

9 — To that effect, see Commission Decision 68/376 of 6 November 1968, Rieckermann/AEG (OJ 1968 L 276, p. 25).

10 — On page 364, the *21st Report on Competition Policy* 1991 refers to the case of Iqbal, in which the Commission considered that a contract whereby the reseller of pharmaceutical products was required to market them only in a specified non-member country was not contrary to Article 85(1), the purpose of that rule not being 'to prohibit vertical agreements which restrict intra-brand competition between the Community as a whole and third countries in order to enable the manufacturer to have an independent price policy adapted to the conditions prevailing on those third countries' markets'. It would appear that in that specific case the use of the export clauses was unconnected with any action specifically designed to prevent trade between Member States. Unless particular significance is attached to the latter comment, and subject to all reservations owing to the lack of information available to me, the Iqbal solution, which moreover was not recorded in the decision but, it seems, only in an Article 6 letter, seems to me to be difficult to reconcile with the approach underlying the *CRAM* judgment just referred to. For a similar assessment, see I. Van Bael and F. Bellis, *Il Diritto della Concorrenza nella Comunità Europea*, Turin, 1995, p. 126, in particular note 24.

11 — See Case 56/65 *Société Technique Minière* v *Maschinenbau Ulm* [1966] ECR 235, Case 23/67 *Brassiere de Haecht* v *Wilkin* [1967] ECR 407, and *Delimitis*, cited in footnote 6.

12 — This is the well-known *de minimis* rule first enunciated by the Court (in Case 5/69 *Völk* v *Vervaecke* [1969] ECR 295, paragraph 7) and then codified by the Commission in its notice of 3 September 1986 on agreements of minor importance which do not fall under Article 85(1) of the Treaty establishing the European Economic Community (OJ 1986 C 231, p. 2), since updated (OJ 1994 C 368, p. 20).

which, although not unequivocal, has highlighted the factors to be taken into account in assessing anti-competitive effect. Particular importance is attached to the impact of the customs duties which must be paid on the product upon reimportation into Community territory; [13] the existence of a difference between the prices charged within Community territory and in the non-member country, which must be sufficiently large to cover the greater costs of transport and the profit margins of those involved in reimportation and distribution within Community territory; [14] and the level of inter-brand competition in the Community.

Where it is considered on the basis of the factors just mentioned that reimportation of the contractual products into Community territory from the non-member country is economically possible or even probable, the agreement must be regarded as having an anti-competitive effect since in the absence of the prohibition parallel imports of the contractual products into the Member States, being economically advantageous, would have taken place.

14. Appraisal of the relevance of Article 85(1) is a matter for the national court, which will refer to the factors just mentioned, which derive from the case-law of the Court of Justice. The order from the national court does not allow us to go into further detail, in that it does not examine important factual details which are disclosed only by

13 — See Commission Decision 64/233/EEC of 11 March 1964 on an application for negative clearance submitted under Article 2 of Council Regulation No 17 (IV/A-00061 — Grosfillex/Fillistorf, JO 9 April 1964, p. 915). The importance of customs duties as a necessary factor in assessing the probability of reimportation emerges from the Commission decisions in which account is taken of the existence of free trade agreements: see Decision 76/159/EEC of 15 December 1975 relating to a proceeding under Article 85 of the EEC Treaty (IV/847 — SABA, OJ 1976 L 28, p. 19), in which the prohibition of exports to third countries and reimports from such countries is regarded as not covered by Article 85(1) in view of the two-fold levy of customs duties and the fact that the products are not sold in the third countries at lower prices than those charged in the Member States. That prohibition was, however, allowed only until 1 July 1977, precisely because it was envisaged that from that date the customs duties on trade with EFTA countries would be abolished. To the same effect, see Decision 77/100/EEC of 21 December 1976 relating to a procedure under Article 85 of the EEC Treaty (IV/5715 — Junghans, OJ 1977 L 30, p. 10) and Decision 78/253/EEC of 23 December 1977 relating to proceedings under Article 85 of the EEC Treaty (IV/171 et seq. — Campari, OJ 1978 L 70, p. 69). More recently, the conclusion of free-trade agreements between the Community and non-member countries, with the resultant elimination of customs duties and other obstacles to the crossing of frontiers, has prompted the Commission to require distribution agreements not to contain prohibitions on concessionaires from exporting to such countries: see the Commission Notice under Article 19(3) of Regulation No 17 in the Chanel case (OJ 1994 C 334, p. 11).

14 — See the abovementioned decision in Grosfillex-Fillistorf, in which the Commission concedes that a limitation of competition would arise if the prices charged by the producer on the Swiss market were lower than those charged by him in the common market. See also the abovementioned *SABA* decision and the decision of 19 December 1974, 75/94/EEC *Goodyear Italiana* (OJ 1975 L 38, p. 10), in which resale in the Community territory of the reimported product was deemed unlikely since 'there are not, nor ... are there likely to be in the foreseeable future, such differences in price ... between the EEC and other countries as to allow such additional charges to be absorbed'. Regarding the importance of the difference in prices in assessing the probability of re-export from non-member countries, see also Decision 94/987/EEC Tretorn (OJ 1994 L 378, p. 45).

the parties, and then in a contradictory manner, in the observations submitted by them to the Court of Justice. Nevertheless, I think it may be noted that, in this case, the possibility and economic advantage of reimporting the contractual products is not in doubt, if only because reimportation has in fact occurred. It is undisputed that large volumes of the contractual products are present on the market in the United Kingdom, Belgium and the Netherlands, and are being distributed at significantly lower prices by resellers outside the YSLP distribution system, a fact which clearly indicates the advantageousness, and therefore the possibility, of parallel imports.

15. The application of Article 85(1) is subject to a further condition: an adverse impact on trade between Member States. According to settled case-law, to be capable of having an adverse effect, an agreement must make it possible to foresee with a sufficient degree of probability, on the basis of a set of objective elements of law or fact, that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States such as to give rise to the fear that it is capable of hindering the attainment of the single market. That influence must also not be insignificant, [15] without it thereby being necessary to prove actual harm: it is sufficient if the nature of the agreement is such that such an effect might be caused. [16]

On this point it should be emphasised that the very elements used to identify a restriction of competition, in particular the presence of significant differences between the prices charged in the common market and on the market of the non-member country, have also been relied on in support of the view that it is improbable that reimportation into the Community might be followed by further exportation to another Member State. On that basis, it has even been stated that there is no damage to intra-Community trade. [17]

In the present case, the lower prices charged on the markets of non-member countries mean that the hypothesis of re-exportation to another Member State cannot be entirely ruled out. In any event, therefore, it may also be true in the case of YSLP products that, in view of the commercial policy of large groups which obtain products by buying throughout the European market, there is necessarily a harmful effect on trade between Member States. [18]

16. In short, I consider that the answer to the first question from the national court must be that Article 85(1) of the Treaty must be interpreted as prohibiting a clause which, in a contract for the distribution of products in a territory outside the European Union,

15 — See Joined Cases 56/64 and 58/64 *Consten and Grundig* [1966] ECR 299, and the more recent judgments of the Court of First Instance in Case T-77/92 *Parker Pen* [1994] ECR II-549, paragraph 39, and Case T-77/94 *VGB and Others* v *Commission* [1997] ECR II-759, paragraph 132.

16 — See most recently *Ferriere Nord* (cited in footnote 6).

17 — See Commission Decision 70/332/EEC of 30 June 1970 relating to a proceeding under Article 85 of the EEC Treaty, Kodak (OJ 1970 L 147, p. 24).

18 — See Commission Decision 93/252/EEC of 10 November 1992 relating to a proceeding under Articles 85 and 86 of the EEC Treaty, Warner Lambert/Gillette (OJ 1993 L 116, p. 21).

requires the distributor to guarantee that there will be no reimports into Community territory — that, of course, being the case where the conditions laid down by the provision in question are met, namely where there is an anti-competitive object or effect and an adverse impact on trade between Member States.

The second question

17. By its second question, the national court seeks to ascertain, in the event that the disputed clauses fall within the scope of Article 85(1), what importance is to be attached to the fact that the producer has a selective distribution system within the Community for which the Community has granted an exemption under Article 85(3). In other words, the national court is asking whether the inapplicability of Article 85(1) to the disputed destination clauses may be inferred from the exemption granted to the selective distribution system for the area of the Community.

18. As a preliminary point, I would observe that to assert that Article 85(1) is inapplicable to the contracts in question by virtue of the existence of a selective distribution system enjoying an exemption granted by the Commission means, essentially, that that system must be hermetically sealed, preventing any form of parallel imports, at least from the non-member countries concerned. That would make it impossible for operators to take advantage of the economic opportunities deriving from the differing prices charged by YSLP, with the further risk of certain compartmentalisation of the markets within the common market and the sealing of the latter as a whole.

It must then be borne in mind that the imperviousness of a selective distribution system is not an essential condition for it to be lawful in the light of Article 85, *inter alia* because that would lead to 'the paradoxical result that the most inflexible and most tightly sealed distribution systems would be treated more favourably under Article 85(1) than distribution systems that are more flexible and more open to parallel transactions'. [19] Moreover, such a characteristic likewise cannot be justified by the requirement of effective protection of competition. As I have had occasion to observe in the past, [20] according to settled case-law of the Court of Justice, the possibility of sales outside the network may even be beneficial, by keeping a certain part of the market available to parallel transactions, thus tempering excess rigidity of the system, particularly as regards prices. Obviously, the existence of parallel trade may have disbenefits for the selective distribution system, but those are merely consequences, in the last analysis, of choices made by the producer, who will be able to appraise their effects through cost-benefit analysis and, if appropriate, either to opt for a free distribution system or restructure the specialised distribution system, or else make changes to prices, by standardising them, and therefore eliminating 'upstream' the sole

19 — Case C-376/92 *Metro SB-Großmärkte* v *Cartier* [1994] ECR I-15, paragraph 26.

20 — See my Opinion in *Cartier* (cited in the foregoing footnote), points 21 and 22.

reason for the existence of parallel channels of distribution.

In other words parallel trade — far from being the result of a sort of perverse economic opportunism, still less unlawful opportunism, as many tend maliciously to depict it — is a guarantee of the overall vitality of the distribution system which, alongside selective networks, ultimately is beneficial to the final consumer, whose interests are in any event (at least) one of the objectives of Article 85(1) and (3).

19. It is in that light therefore that the impact of the decision exempting YSLP's distribution system on the relations between the latter and Javico, a distributor outside the network, must be considered.

The exemption decision is not capable of guaranteeing 'cover' for distribution agreements not subject to examination by the Commission and not expressly exempted by it. In the first place, since exemptions constitute a derogation from the prohibition in Article 85(1), the provision containing the fundamental rule concerning agreements restricting competition, exemption decisions, be they individual or block exemptions, can only be interpreted restrictively and cannot be applied to cases other than those expressly contemplated. That principle is justified not only by a clear rule of interpretation but also by the need not to encroach upon the exclusive powers of the Commission to apply Article 85(3). [21]

In deciding whether to grant an exemption, under the power conferred exclusively on it by Article 9(1) of Regulation No 17, [22] the Commission must be able to assess whether the agreement meets the requirements of Article 85(3). To extend the scope of an exemption decision to agreements not covered by it would, in some measure, mean allowing the national court to apply Article 85(3) directly, whereas that power relates only to Article 85(1). [23] Of course, the agreement at issue could clearly have been submitted for assessment by the Commission together with an application for exemption and the Commission would thus have been able to assess the claim that it served to preserve the selective distribution system within the Community; but it was not so submitted. Since that agreement cannot be exempted, in the absence of notification to the Commission, [24] the national court has no alternative

21 — See *Delimitis* (cited in footnote 6), paragraphs 44 to 46. Specifically with regard to the need for a restrictive interpretation, see Case T-9/92 *Peugeot* [1993] ECR II-493, paragraph 37, and Case C-266/93 *Volkswagen* [1995] ECR I-3477, paragraph 33.

22 — Council Regulation No 17 of 6 February 1992, First regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-62, p. 87).

23 — Regarding the direct applicability by the national court of Articles 85(1) and 86 of the Treaty, see Case 127/73 *BRT* [1974] ECR 51 and *Delimitis* (cited at footnote 6), paragraphs 45 to 47. Regarding the exclusive power of the Commission to adopt decisions applying Article 85(3), see the last-mentioned judgment, paragraph 44. The case-law referred to was 'codified' in the Commission Notice on cooperation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty (OJ 1993 C 39, p. 6).

24 — For agreements postdating 13 March 1962, the date of entry into force of Regulation No 17, exemption is conditional on prior notification, with the exception of agreements exempted from the obligation of notification under Article 4(2) of the same regulation, but the agreements concluded between YSLP and Javico do not fall into the category.

but to apply, where the relevant conditions are met, Article 85(1).

I therefore consider that the answer to the second question from the national court must be that Article 85(1) of the Treaty must be applied to the disputed clauses even where the supplier markets his own products within Community territory through a selective distribution network for which an exemption decision has been granted.

Conclusion

20. In the light of the foregoing considerations, I therefore suggest that the Court give the following answers to the questions submitted by the Cour d'Appel, Versailles:

(1) Article 85(1) of the Treaty is to be interpreted as being applicable to a clause in a contract for marketing operations in specified non-member countries between a supplier established in one Member State and a distributor established in another Member State, which prohibits the distributor from making any sale in a territory other than that covered by the contract and therefore any sale with Community territory, either by direct marketing or by re-exportation from the contractual territory. It is for the national court to verify, on the basis of the factual circumstances of the case, in particular the possibility, the extent and the advantageousness of reimportation into the common market, and any adverse effect on trade between Member States, whether such a clause is contrary to Article 85(1) of the Treaty and is therefore void.

(2) Where Article 85(1) of the Treaty prohibits such clauses, it must be interpreted as likewise applying where the supplier markets his products in Community territory through a selective distribution network which has been the subject of an exemption decision under Article 85(3).