in Article 85(1) and which was entered into after the coming into force of Regulation No 67/67 may, even where there has been a failure to give notice to the Commission, obtain the benefit of the block exemption laid down in Article 1 thereof if it satisfies the conditions prescribed by Articles 1 to 3 of the said regulation.

In Case 1/71

Reference to the Court under Article 177 of the EEC Treaty by the Tribunal de Commerce, Lyon, for a preliminary ruling in the action pending before that court between

SOCIÉTÉ ANONYME CADILLON, whose registered office is at Charolles (71),

and

FIRMA HÖSS, MASCHINENBAU KG, whose registered office is at Roding (8495),

on the interpretation of Article 85 of the EEC Treaty and the implementing regulation issued thereunder,

THE COURT

composed of: R. Lecourt, President, A. M. Donner and A. Trabucchi (Rapporteur), Presidents of Chambers, R. Monaco, J. Mertens de Wilmars, P. Pescatore and H. Kutscher, Judges,

Advocate-General: A. Dutheillet de Lamothe
Registrar: A. Van Houtte

gives the following

## JUDGMENT

## Issues of fact and of law

I — Summary of facts and procedure

The facts which form the basis of the action and the procedure may be summarized as follows:

On 19 March 1967, Firma Höss of Roding (Germany) granted Société Anonyme Cadillon of Charolles (France) the exclusive licence to sell its products, namely hoppers and concrete-transporting containers, in France.

After some differences of opinion between the parties, caused by the fact that Cadillon had not sold any of Höss's products during the following months and when Cadillon had passed on orders to Höss for six machines towards the end of 1967, a new agreement was entered into dated 30 January 1968 which basically provided:

— that Cadillon would be granted an exclusive right of sale for four years from 1 January 1968 to 31 December 1971;
— that at the end of this term the contract would be renewed by tacit agreement from year to year, unless one or other of the parties gave three months' notice terminating the contract;
— that the licensee undertook to sell 24 machines during 1968 and 30 during each of the following years;
— terms as to price and payment.

On 5 February 1968, the proprietor of Firma Höss sent back the German version of this contract to Société Anonyme Cadillon signed, but on the following 23 February he repudiated the contract. Société Anonyme Cadillon then brought before the Tribunal de Commerce, Lyon, the action which gave rise to the reference to the Court of Justice of the European Communities by that court pursuant to a decision based on Article 177 of the EEC Treaty. By its decision given on 24 September 1970, a copy of which was received in the Court Registry on 6 January 1971, the French court seeks the interpretation of Article 85 of the said Treaty (EEC) and of the implementing regulations issued thereunder, in the action pending before this court between Société Anonyme Cadillon and Firma Höss, as it relates to 'the validity of the contract' of which Société Anonyme Cadillon claims there has been a breach.

It follows from the file relating to the case deposited by the Tribunal de Commerce, Lyon, that the only mention made before that court of Article 85 of the EEC Treaty is contained in the supplementary conclusions submitted by Firma Höss on 23 February 1970, where it is stated without any explanation that 'the defendant respectfully draws the attention of this court to Article 85(1) and (2) which prohibits exclusive dealing agreements and to the case-law of the courts on this subject'. The French court referred the case to the Court without specifying its question in more detail.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the European Economic Community, written observations were submitted by the parties to the main action and by the Commission of the European Communities.

The Court, having heard the report of the Judge-Rapporteur and the views of the Advocate-General, decided to open the oral procedure without a preparatory inquiry.

At the hearing on 28 April 1971 the parties to the main action and the Commission presented oral argument.

For the procedure before the Court, the plaintiff in the main action was represented by A. de Caluwe, Advocate of the Brussels Bar, the defendant in the main action by E. Grafmeyer, Advocate of the Lyon Bar, and E. Arendt and T. Scheifer, Advocates of the Luxembourg Bar, and the Commission by its Legal Adviser J. Thiesing and by its Adviser J. P. Dubois.

The Advocate-General delivered his opinion at the hearing on 4 May 1971.

## II — Written observations submitted to the Court

The observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice may be summarized as follows:

*Société Anonyme Cadillon*, the plaintiff in the main action, considers that the following questions may be deduced from the wording of the decision referring the matter:

1. Does an exclusive sales agreement which has been entered into between two undertakings in the Common Market come *per se* within Article 85(1) of the Treaty?
2. Does failure to notify an exclusive sales agreement which has been entered into before Regulation No 67/67/EEC of the Commission came into operation automatically make such an agreement void?
3. Does an exclusive sales agreement, under Regulation No 67/67/EEC mentioned above belong to a category granted exemption from notification, fulfil the conditions of Article 85(1) of the Treaty for this reason alone?
4. Does an exclusive sales agreement fall within the application of Article 85(1) of the Treaty when:
   (a) it does not contain any exclusive supply clause,
   (b) it does not contain any clause prohibiting re-exportation or parallel imports,
   (c) it does not contain any restriction with regard to prices,
   (d) the parties to the agreement occupy a weak position on the market in the products in question,
   (e) it promotes the development of a new market which is inaccessible or not easily accessible without such an agreement?
5. What would be the effects of nullity of such an exclusive sales agreement which had not been notified:
   (a) if it were an agreement entered into before Regulation No 67/67,
   (b) if it were an agreement entered into after Regulation No 67/67, which has been granted block exemption?

(a) Société Anonyme Cadillon replies to the first question in the negative and refers in particular to the judgments given in Cases 56/65 and 23/67.

(b) It claims that in the case of failure to notify an agreement, the court hearing the main action is competent to settle the question of its validity with regard to Article 85(1) of the Treaty.

(c) The exclusive dealing agreement which was entered into on 30 and 31 January 1968 automatically obtains the benefit of Regulation No 67/67.

(d) The question whether Article 85(1) is applicable must be considered in each particular case in the legal and economic context of the agreement. Most of the concessions granted do not come within Article 85(1). An agreement which has an insignificant effect on the market is not capable of affecting trade between Member States. An agreement which only provides for an exclusive right of sale does not have as its object the prevention, restriction or distortion of competition in the Common Market. Finally, agreements which allow competition on the part of the licensee without prohibiting either re-exportation by the licensee or parallel imports in the market for which the licence has been granted cannot produce effects which conflict with the Community rules on competition.

(e) On the assumption that the prohibition is applicable, agreements drawn up prior to the entry into force of Regulation No 67/67 are void *ex tunc*, whilst agreements drawn up after this regulation came into force are fully effective so long as they have not been held to be void, in accordance with the judgment of the Court in Case 43/69 (*Firma Brauerei A. Bilger Söhne GmbH* v *Jehle and Jehle* [1970] ECR).

*Firma Höss*, the defendant in the main action, explains the reasons underlying its repudiation of the contract of 30 January 1968 and observes that this agreement and the one which preceded it fulfil the definition laid down in Article 85(1) of the EEC Treaty. In particular, Société Anonyme Cadillon occupies a privileged economic position compared with all other importers of Höss's products because of these agreements and this distorts 'perfect competition'. Since, moreover, consumers do not

obtain any advantage from this situation, the agreements in question cannot be the subject of an exemption from the prohibition within the meaning of Article 85(3).

The *Commission* suggests that the question raised by the Tribunal de Commerce, Lyon, be reworded as follows:

> 'Do agreements which have not been notified and which have been entered into between two undertakings situated in different Member States, whereby one undertakes to supply certain products only to the other for resale within a Member State of the EEC fall within the prohibition contained in Article 85(1)?'

For this purpose, the question must be examined whether the conditions for the application of this article are satisfied, especially in view of the judgment of the Court of 9 July 1969 in the *Völk-Vervaecke* case and of the Commission's communication on cases of minor importance (OJ, 1970, C 64, p. 1).

If it were decided that the prohibition contained in Article 85(1) applied to these agreements, they would be able to benefit from the application of Article 85(3) in the circumstances laid down by Regulation No 67/67 of the Commission of 22 March 1967 on the application of the exemption to certain categories of exclusive dealing agreements. An agreement of the type referred to in Article 1 of this regulation, which was entered into after the regulation came into force, automatically benefits from the exemption without any prior notification. This is the case with the agreement entered into on 30 January 1968.

On the other hand, as regards the agreement of 19 March 1967, if it were held that it comes within Article 85(1), the automatic exemption contained in Regulation No 67/67 could only be applicable to it from 1 May 1967, the date on which the regulation came into force. The agreement must be automatically void in respect of the previous period.

The Commission rules out an interpretation of Article 4 of the abovementioned regulation whereby agreements which were entered into before that regulation and which have not been notified may not benefit from the exemption even in respect of the period after the regulation came into force. It claims that this interpretation runs contrary to the objective of Regulation No 67/67 which aims at precluding large numbers of notifications of agreements which can clearly benefit from the application of Article 85(3) from overburdening the departments of the Commission.

## Grounds of judgment

[1] By decision of 24 September 1970, received at the Court Registry on 6 January 1971, the Tribunal de Commerce, Lyon, has requested the interpretation of Article 85 of the EEC Treaty and of the implementing regulations issued thereunder in the action pending before that court between Société Anonyme Cadillon and Firma Höss.

[2] As appears from that decision, Société Anonyme Cadillon sued Firma Höss before that court for the payment of FF 533 000 damages following the unilateral breach of the contracts of 19 March 1967 and 30 January 1968 granting exclusive rights of sale.

[3] Firma Höss opposed this claim and maintained *inter alia* that the agreement of 30 January 1968 is void on the ground that Article 85 prohibits exclusive dealing arrangements.

[4] Although the request for interpretation has not been made in the form of a precise question, it can be deduced from the wording of the decision that the court wishes to be informed whether agreements granting exclusive rights of sale which have not been notified to the Commission but were entered into between two undertakings situated in different Member States and relate to transactions to be carried out within the Common Market fall within the prohibtion contained in Article 85(1) of the EEC Treaty.

[5] First of all, for Article 85 of the Treaty to apply to an agreement, that agreement must be capable of affecting trade between Member States.

[6] This condition is fulfilled if the agreement, on the basis of all the objective factors of law or of fact, makes it possible to foresee with a sufficient degree of probability that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States in such a way that it might hinder the attainment of the objectives of a single market between States.

[7] Moreover, the prohibition in Article 85 (1) is applicable only if the agreement has as its object or effect the prevention, restriction or distortion of competition within the Common Market.

[8] Those conditions must be understood by reference to the actual circumstances of the agreement.

[9] An exclusive dealing agreement may escape the prohibition laid down in Article 85(1) because, in view of the weak position of the parties on the market in the products in question in the territory covered by the exclusive dealing arrangement, it is not capable of hindering the attainment of the objectives of a single market between States, even if it creates absolute territorial protection.

[10] This is even more the case when such an agreement does not prohibit third parties from effecting parallel imports into the territory covered by the agreement or the licensee from re-exporting the products covered by the agreement.

[11] However it falls to the national court to examine whether these conditions are fulfilled in each case.

12 Where the agreement falls within the prohibition contained in Article 85(1) the possible effect of Regulation No 67/67 of the Commission which provides for block exemption for exclusive dealing arrangements must also be examined with regard to agreements of this type which have not been notified.

13 It follows from the decision making the reference that the objection that the agreement is illegal, which is based on Article 85 of the Treaty, only relates to the contract dated 30 January 1968.

14 Therefore Regulation No 67/67 need only be examined with regard to agreements entered into after its entry into force.

15 It follows from Article 7(2) of that regulation that such agreements, where they would fall within the prohibition contained in Article 85(1), may obtain the benefit of the block exemption in spite of failure to notify them to the Commission, provided that they satisfy the specific conditions laid down in Articles 1 to 3 of the said regulation.

## Costs

16 The costs incurred by the Commission, which has submitted its observations to the Court, are not recoverable and since 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,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the oral observations of the parties to the main action and the Commission of the European Communities;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community, especially Articles 85 and 177;
Having regard to Regulation No 67/67/EEC of the Commission of 22 March 1967;
Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities,

THE COURT

in answer to the question referred to it by the Tribunal de Commerce, Lyon, pursuant to the judgment given by that court on 24 September 1970, hereby rules:

1. **An exclusive dealing agreement entered into between parties which occupy a weak position on the market in the products covered by the agreement may escape the prohibition in Article 85(1) especially when it does not create absolute territorial protection.**

2. **An exclusive dealing agreement which falls within the prohibition contained in Article 85(1) and which was entered into after Regulation No 67/67 came into force may, even where there has been a failure to notify it to the Commission, obtain the benefit of the block exemption laid down in Article 1 of that regulation if it fulfils the conditions prescribed by Articles 1 to 3 of the said regulation.**

Lecourt Donner Trabucchi

Monaco Mertens de Wilmars Pescatore Kutscher

Delivered in open court in Luxembourg on 6 May 1971.

A. Van Houtte
Registrar

R. Lecourt
President

## OPINION OF MR ADVOCATE-GENERAL DUTHEILLET DE LAMOTHE DELIVERED ON 4 MAY 1971[1]

*Mr President,*
*Members of the Court,*

Société Anonyme Cadillon is a French limited company based in the Lyon area which sells various machines and equipment intended for public works and in particular machines for the manufacture of concrete.

In 1967 it entered into a sole agency agreement for France with a German undertaking which manufactures machinery of that type, Firma Höss, whose registered office is in Roding.
This agreement was terminated from 31 December 1967.
However a new agreement was entered into on either 30 January or 5 February 1968.

1 — Translated from the French.