follows therefore that the simple acknowledgment of a request for a negative clearance or of notification for the purposes of obtaining exemption under Article 85 (3) of the Treaty cannot be considered as initiating a procedure under Articles 2, 3 or 6 of Regulation No 17.

3. Due notification of a standard contract is to be considered as due notification of all contracts in the same terms, even prior ones, entered into by the same undertaking.

4. A declaration of nullity under Article 85 (2) is of retroactive effect.

In Case 48/72

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

SA BRASSERIE DE HAECHT, whose registered office is situated at Boortmeerbeek

and

the spouses WILKIN-JANSSEN, both resident at Esneux,

on the interpretation of Article 85 of the EEC Treaty and Articles 2, 3, 4, 5, 6 and 9 of Regulation No 17 of the Council of 6 February 1962, First Regulation implementing Articles 85 and 86 of the EEC Treaty, OJ 1972, pp. 204/62 et seq.,

THE COURT

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

Advocate-General: K. Roemer
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts and procedure

The facts of the main action and the procedure may be summarized as follows:

In 1963 SA Brasserie de Haecht entered into three brewery contracts with the defendants in the main action. Under the terms of these contracts the spouses Wilkin-Janssen undertook to obtain supplies of beer, liquors and soft drinks exclusively from de Haecht. In consideration of this the de Haecht brewery made them a loan of furniture for the cafe and a sum of money. When the spouses Wilkin-Janssen failed to keep the exclusive purchase obligation, Brasserie de Haecht on 9 September 1966 brought an action before the Tribunal de Commerce of Liège for repayment of the loans, the return of the furniture and the payment of damages. By judgment dated 8 May 1967, the Tribunal de Commerce of Liège referred a preliminary question on the interpretation of Article 85 of the EEC Treaty, to which the Court of Justice replied in its judgment of 12 December 1967 in Case 23/67 de Haecht/Wilkin-Janssen, Recueil 1967, pp. 525 et seq.

On 23 January 1969, Brasserie de Haecht notified to the Commission a standard brewery contract containing the same clauses as the disputed contracts entered into in 1963.

Brasserie de Haecht now maintains that the effect of notification of the standard brewery contract on 23 January 1969 was to initiate a procedure by the Commission within the meaning of Article 9 (3) of Regulation No 17, and that, in the absence of a prohibitive decision by the Commission on the basis of Article 85, the contracts in dispute are provisionally valid.

It therefore requested the Tribunal de Commerce to give judgement pursuant to its writ of 9 September 1966.

The Tribunal de Commerce considered that first of all some points relating to Community law should be clarified and referred to the Court three preliminary questions:

1. 'Must a procedure under Articles 2, 3 and 6 of Regulation No 17 be considered to be initiated by the Commission from the moment when it acknowledges receipt of a request for a negative clearance or of notification for the purposes of obtaining exemption under Article 85 (3) of the EEC Treaty?'

2. 'Can notification of a standard contract referring to legal arrangements made in 1968 be considered as notification of a similar contract entered into during 1963?'

3. Is the nullity of contracts exempted from notification to be deemed to take effect from the date when one of the contracting parties duly brings an action for it or merely from the date of the judgment or the decision of the Commission which establishes it?'

The judgment dated 27 June 1972 referring the matter was received at the Court Registry on 11 July 1972.

Brasserie de Haecht, represented by Maître Laine and Maître Helm, the spouses Wilkin-Janssen, represented by Maître Materne, the Government of the Federal Republic of Germany, the Government of the French Republic and the Commission, represented by its Legal Advisers Thiesing and Dubois, submitted their written observations in accordance with Article 20 of the Statute of the Court of Justice of the EEC.

After hearing the report of the Judge-Rapporteur and the opinion of the Advocate-General, the Court decided to proceed without a preparatory inquiry.

The oral observations of Brasserie de Haecht, the spouses Wilkin-Janssen and the Commission were made at the hearing on 21 November 1972.

The Advocate-General presented his opinion at the hearing on 13 December 1972.

II — Observations submitted under Article 20 of the Statute of the Court of Justice

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

1. *On the first question*

Brasserie de Haecht submits that according to the judgment of the Court of 9 July 1969 (Case 10/69, Portelange/Smith, Corona Marchant International, Recueil 1969, pp. 316 et seq.) notified agreements must be considered valid so long as the Commission has not taken a decision as to exemption under Article 85 (3). Inasmuch as it is expressly stated in that judgment that 'any' agreement must be considered valid, there is no difference between agreements exempted from notification and those which are not so exempted.

Therefore, it follows from the above-mentioned judgment that agreements not subject to notification, but notified nevertheless, must be treated as valid so long as the Commission has not decided on the question of exemption.

Following the judgment of the Court of 18 March 1970 (Case 43/69, Bilger/Jehle, Recueil 1970, pp. 127 et seq.), agreements exempted from notification and not having been notified can be declared void without taking the possibility of exemption into account, but only with future effect. If one of the interested parties wishes to avoid this result, it must inform the Commission of its contract and request the exemption provided for in Article 85 (3). When the party itself has done everything possible to obtain a declaration that Article 85 (1) does not apply, such a contract cannot be treated less favourably than any other agreement.

The first question therefore gives no reason to interpret what is meant by a procedure being 'initiated' within the meaning of Article 9 (3) of Regulation No 17, because the reason why the national authorities and courts cannot declare void agreements exempted from notification but nevertheless notified is primarily that, according to Article 9 (1) of the same regulation, only the Commission is competent to grant the exemption requested.

Brasserie de Haecht suggests the following answer to the first question:

'An agreement within the meaning of Article 85 (1) of the Treaty, exempted from notification, but nevertheless having been notified in accordance with Regulation No 17, is completely valid until the Commission has given a decision under Article 85 (3) and the provisions of Regulation No 17.'

If the Court does not accept this proposition, Brasserie de Haecht submits that a procedure must be considered to be 'initiated' within the meaning of Article 9 (3) of Regulation No 17 at the moment when the Commission acknowledges receipt of the notification. Such a conclusion is supported by the fact that notification on Form A/B contains official requests; it cannot be supposed that the Commission would receive them without beginning to deal with them.

Brasserie de Haecht advances two further arguments in support of this contention:

1. It is in accordance with the principle of legal certainty, because in a great

number of cases, acknowledgment of receipt is the sole reaction by the Commission to notification;

2. by notification the contracting parties have done all that is required of them to obtain the desired decision of inapplicability. It is not logical that national authorities and courts should always be able to declare notified agreements void, without the undertakings concerned having the opportunity of influencing the progress of the procedure pending before the Commission.

The question could therefore be answered as follows:

'The Commission has initiated a procedure within the meaning of Article 9 (3) of Regulation No 17 if it acknowledges receipt of notification in accordance with that Regulation.'

If the Court has also to reject this second possibility, Brasserie de Haecht further contends that the Commission has initiated a procedure by its decision of 9 October 1969 to carry out an inquiry within the meaning of Article 12 of Regulation No 17 in the sector of breweries. There is an obvious relationship between the judgment of the Court of 12 December 1967 and that inquiry.

Further, it follows from the observations of the Commission in the above-mentioned case that it had detailed information on the economic and legal position in the sector of breweries. It must therefore be supposed that it initiated the appropriate procedure.

The Government of the *Federal Republic of Germany* and the *Commission* consider that the question should be answered in the negative. They advance the following arguments:

1. It is in conformity with the letter and spirit of Article 9 (3) of Regulation No 17 that the Commission should show in a positive manner its intention to take a decision on a notification so that procedures parallel to those pending before national authorities may be avoided.

2. In its judgments of 14 July 1972 (Cases 48 and 49/69 and 51-56/69, ICI and others v Commission (Dyestuffs), not yet published), the Court implicitly confirmed the necessity for that opening decision for the procedure to be initiated.

2. On the second question

Brasserie de Haecht and the Government of the *Federal Republic of Germany* and the *Commission* are in agreement as to the reply to be given to the second question. In the light of the judgment of the Court in Case 1/70, it must be concluded that notification of a standard contract in January 1969, referring to legal measures which came into force in 1968, is to be considered as notification of similar agreements entered into in 1963 between Brasserie de Haecht and the spouses Wilkin-Janssen.

Brasserie de Haecht further makes the observation that notification given in 1969 does not have retroactive effect for 1963, since the contracts in question were exempted from notification.

3. On the third question

Brasserie de Haecht considers that this question has already been answered to a large extent by the judgment in Case 43/69 according to which a declaration of nullity of contracts exempted from notification has merely future, and not past, effect. The point which the Tribunal de Commerce de Liège alludes to, namely that the spouses Wilkin-Janssen have already been claiming for years that their contracts are void, raises nothing new in relation to the facts of Case 43/69.

It follows from the grounds of judgment in Case 43/69 that the institutions of the Community granted a sort of limited exemption to certain

types of contracts by exempting them from notification in Regulation No 17.
This preferential treatment can only be overruled by a finding that Article 85 has been infringed and not merely by one of the parties claiming that such an infringement exists.

Any contrary opinion goes against the meaning of the European competition rules, as the protection of free trade within the Community cannot be dependent upon one of the undertakings which is a party to a contract restricting competition claiming at any moment that it is void.

The only difference from Case 43/69 is that Brasserie de Haecht notified its contracts to the Commission although it was not obliged to do so, while Case 43/69 dealt merely with agreements exempted from notification and 'not having been notified'.

That agreements exempted from notification can only be held to be void *ex nunc* does not depend on the fact that they are not notified, but on the preferential treatment accorded to them by Regulation No 17. Consequently, it is obvious that voluntary notification cannot affect unfavourably the legal position of a contract which is not subject to notification.

It follows from the viewpoint adopted on the first question that the Commission alone is competent to take the decisions referred to in Article 85 of the EEC Treaty. However, it is not entitled to declare contracts exempted from notification void with retroactive effect. That such agreements are unassailable for the past arises from the exemption from notification and does not depend on the nature of the authorities who find them to be void. When entering into a contract with the characteristics referred to in Article 4 (2) of Regulation No 17, one can expect that that agreement can only be held to be void with future effect; it is clear that it makes no difference whether it is the Commission or a national authority which makes the decision.

The third question, therefore, should be answered as follows:

'An agreement exempted from notification, but having been notified, is void pursuant to Article 85 (2) of the Treaty only with effect from the date when it was held to be void by the Commission, even if an undertaking which is a party to the contract has previously claimed that the agreement is void.'

Further, Brasserie de Haecht submits that there is no necessity to examine the principles established by the jurisprudence of the Court in this matter. Such a procedure, which would go beyond the limits set by the national court, is contrary to the principles of Article 177 of the EEC Treaty. However, the plaintiff in the main action expresses its views on the objections raised principally against the judgment in Case 43/69.

The contention that that judgment is inconsistent with the principles developed by the Court in Cases 13/61 (judgment of 6 April 1962, De Gens, Uitdenbogerd/Bosch, Recueil 1962, p. 89 et seq.) and 10/69 must be rejected as being inapplicable. A comparison of the three judgments demonstrates the logic of the system established by the Court.

The allegation that the decisions of the Court are contrary to the terms of several provisions of Regulation No 17 is also invalid. Such a criticism clings too much to the letter of Regulation No 17 and ignores realities.

One must also reject the complaint that by the judgment in Case 43/69 the application of the Community competition rules is put in jeopardy. Community law arrives at identical results to those of German law on competition. This judgment has been shown in practice to be in no way a drawback to the Community competition policy.

The spouses *Wilkin-Janssen* submit that the reply to the third question cannot, without more, be derived from the judgments in Cases 10/69 and 43/69. Whilst these judgments hold that agreements exempted from notification

must have effect for as long as they have not been held to be void, they do not define what is meant by 'held to be void'. The Tribunal de Commerce rightly indicates that judgments have in principle declaratory effect. This principle must be applied to a judgment declaring an agreement void as contravening Article 85 of the EEC Treaty. Since the nullity of the agreement is admitted by the judgment, its effect should revert to the date when the plea of nullity was raised.

Any other solution is inadmissible, for if one considers that notified agreements or agreements exempted from notification must be recognized by the courts to be valid as long as the Commission has not taken a decision refusing to accord the benefit of Article 85 (3), one ends up by taking away from the courts and authorities of the Member States the competence which they are recognized to have by Article 9 (3) of Regulation No 17. If one considers that nullity should take effect only from the date of judgment, the result is that the person who is under an obligation cannot take advantage of the nullity. The declaratory nature of a decision holding an agreement void implies equally that the party who is under the obligation which is declared void may free himself from that obligation from the moment when he raised the plea of nullity. Such a solution avoids the risk, for legal certainty, of allowing the party who benefits from the agreement postponing at will the effective date of nullity by delaying the proceedings.

From the moment when the defendant alleged that the contract was void as infringing Article 85 (1), the plaintiff was warned that it might be declared void by the court. Therefore the consideration of legal certainty on which the Court takes its stand for refusing to allow retroactive effect no longer comes into play. The solution suggested has the advantage of placing the two parties in the same situation, however long the proceedings last, without the principle of legal certainty being compromised.

The spouses Wilkin-Janssen suggest the following reply to the third question:

'The nullity of contracts exempted from notification, whether they are notified or not, is deemed to take effect from the date when one of the parties duly claims it and not merely from the date of the judgment which rules on the claim or plea of nullity.'

The Government of the *Federal Republic of Germany* makes the observation that the Tribunal de Commerce of Liège started with the idea that the Court had, by its judgment in Case 43/69, established the principle that the decisions of the Commission refusing to issue a negative clearance or to grant exemption under Article 85 (3) do not have retroactive effect.

This is the reason why that court restricts itself to asking whether nullity only takes effect at the date either of the decision of the Commission or of the judgment of the national court which holds it, or whether that nullity does not rather take effect from the moment 'when one of the contracting parties duly pleads it'.

However, the Federal Government points out, in a more general way, the consequences arising from the generalized rejection of the theory of 'retroactive nullity' for the competition rules of the Common Market. It advances the following argument on this point. Under the terms of Article 85 (2) of the EEC Treaty as well as of Article 1 of Regulation No 17, agreements prohibited by Article 85 (1) are 'automatically void' *ab initio*. The nullity therefore exists directly 'ex lege', so that agreements so prohibited can at no time give rise to legal obligations or have legal effect.

Consequently, a decision of the Commission refusing to issue a negative clearance or to grant exemption under Article 85 (3) cannot itself have legal effect as to the nullity of an agreement.

According to general legal principles, the question of the effect *ex tunc* or *ex nunc*

of decisions finding agreements void can only be asked in cases where such decisions have legal effect. Declaratory legal acts have effect neither for the past nor the future.

If it must be admitted that agreements prohibited by Article 85 (1) become void only at the date when the Commission finds them to be void, this implies that that finding has the effect of an act constitutive of and creating law. Therefore the principle of prohibition laid down by Article 85 (1) and (2) is abandoned in favour of the principle of intervention only in the case of abuse. Neither in primary Community law nor in secondary Community law can one find anything to justify such an assimilation. On the contrary it follows from the terms and general scheme of Regulation No 17 that agreements prohibited by Article 85 (1) are automatically void *ab initio*, even when they are exempted from notification. The Federal Government advances the following arguments in support of its contention:

(a) Article 6 of Regulation No 17 provides that exemption can equally be granted with retroactive effect. Such a possibility would only have any meaning if the agreements were void *ab initio*.

(b) Article 15 (5) and (6) of Regulation No 17 are superfluous and illogical if the agreements nevertheless are provisionally valid.

(c) The derogation contained in Article 7 (1) of Regulation No 17 admits of the conclusion *a contrario* that, in all other cases, the definitive refusal of exemption causes definitive nullity of the agreement in question, even for the entire period.

(d) According to Article 9 (1) of Regulation No 17, the Commission shall have sole power 'to declare Article 85 (1) inapplicable pursuant to Article 85 (3) of the Treaty'. That the power of the Commission to declare a contract void under Article 85 (1) and (2) is not mentioned, is merely because the authors of the Regulation considered that the finding of nullity had in any event only a declaratory effect.

It follows from the abovementioned arguments that the reply to the third question must be that, far from taking effect only from the date of the decision of the national court or even from the moment it is pleaded, nullity already exists *ab initio*.

The Government of the *French Republic* submits that the wording of the question is imprecise. One must merely determine the extent in time of the prohibition of an agreement which falls within Article 85 (1). By virtue of Article 85 (2) the result is that the agreement is automatically void.

In the case of agreements duly notified or agreements exempted from notification, prohibition presupposes that the benefit of Article 85 (3) has been refused by a decision of the Commission. The question is whether such a decision has merely future effect or whether it reverts to the moment when the conditions for prohibition were first present.

According to the French Government, the last solution is the only one compatible with the declaratory character of the prohibition under Article 85 which is confirmed in Article 1 of Regulation No 17.

Another argument can be drawn from Article 7 of Regulation No 17. Only in the cases provided for by this provision does the Commission have the power to take an express decision reducing the duration of the prohibition.

As the exemption from notification does not have any effect on the main issue, agreements exempted from notification are not placed in a different situation.

Although the fourth consideration of the Preamble to Regulation No 17 states in respect of contracts exempted from notification that 'some of them have special features which may make them

less prejudicial to the development of the common market', this is merely an affirmation which in no way prejudges the validity of those agreements, or even their possible harmfulness. If a departure from the general system of prohibition with retroactive effect had been compatible with the EEC Treaty, and desired by the authors of Regulation No 17, it would have been the subject of an express provision, which is not the case.

The French Government concludes that declaration of the automatic nullity laid down by Article 85 (2) belongs exclusively to the competence of the authorities of the Member States. It is for the national courts, when presented with a case, to recognize all the legal consequences of the prohibition, sanctioned by nullity.

The *Commission* considers that the question is in three parts.

(a) 'Must a new agreement (that is, concluded after the entry into force of Regulation No 17), exempted from notification but nevertheless having been notified, be considered provisionally valid until the national authorities, and thus the national courts, declare it to be void?'

Referring to the judgment in Case 43/69, the Commission considers that the Court has already ruled on the question of the provisional validity of new agreements not notified and exempted from notification. *A fortiori* it must be thought to be the same for new agreements exempted from notification but nevertheless notified.

(b) 'From when does this nullity, if it is established by the national courts, take effect?'

On this point the Commission is of the opinion that it follows from the jurisprudence of the Court that as long as the Commission has initiated no procedure, the Court can put an end to the provisional validity of a new agreement exempted from notification but nevertheless notified, by finding it to be void by reason of Article 85 (1) and (2). The finding of this nullity is not of retroactive effect but, on the contrary, the nullity is deemed to be found at the date of the judgment delivered by the national court.

(c) 'From when does it take effect, if it is found by the Commission?'

The Commission submits that, as the Court did not refer to the powers of the Commission in its judgment of 18 March 1970, the question is still wide open. It supports the theory that a finding by it that an agreement falls within the provisions of Article 85 (1), and cannot take advantage of the provisions of Article 85 (3), has retroactive effect of the moment when the agreement in question was concluded, both in respect of agreements which are not subject to notification and of those which are. A different interpretation would be incompatible with the system set up by Article 85 of the Treaty and by Regulation No 17, particularly Articles 5, 6 and 7 thereof.

Grounds of judgment

1 By judgment dated 27 June 1972, received at the Registry of the Court on 11 July 1972, the Tribunal de Commerce of Liège referred three questions to the Court of Justice, under Article 177 of the Treaty, on the interpretation of Article 85 of the Treaty and of Regulation No 17 of the Council of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (OJ 1962, No 13).

General considerations with regard to the questions

2 By Article 85 (2), the Treaty has, from its entry into force, rendered any agreements or decision prohibited pursuant to this Article automatically void.

3 Although the prohibition set out in Article 85 (1) is modified by the power of granting exemptions provided for in Article 85 (3), the Treaty does not however contain any transitional provision as to the effects of Article 85 (2) on agreements and decisions existing at the date of the entry into force of either the Treaty or of Regulation No 17.

4 This omission leads to a situation all the more ambiguous from the fact that, apart from the possible intervention by the Commission by virtue of the Regulations and directives referred to in Article 87, the judiciary, by virtue of the direct effect of Article 85 (2), is competent to rule against prohibited agreements and decisions by declaring them automatically void.

5 While the first course offers the necessary flexibility to take the peculiarities of each case into account, Article 85 (2), the intention of which is to attach severe sanctions to a serious prohibition, does not of its very nature allow the court the power to intervene with the same flexibility.

6 Whilst, in defining the powers of the Commission, Regulation No 17, and in particular Article 7 thereof, enabled the Commission to take into account the general principle of legal certainty, it did not modify — as indeed it could not — the effects of Article 85 (2), but, on the contrary, by Article 1 thereof, it confirmed that, without prejudice to Articles 6, 7 and 23 thereof, agreements, decisions and concerted practices of the kind described in Article 85 (1) shall be prohibited, no prior decision to that effect being required.

7 Thus it was left entirely to the judgment of the courts to determine the lines on which the legal application of Article 85 (2) should be reconciled with respect for the said general principle of legal certainty.

8 There is, therefore, room for distinction, in applying Article 85 (2), between agreements and decisions existing before the implementation of Article 85 by Regulation No 17, hereinafter called old agreements, and agreements and decisions entered into after that date, hereinafter called new agreements.

9 In the case of old agreements, the general principle of contractual certainty requires, particularly when the agreement has been notified in accordance

with the provisions of Regulation No 17, that the court may only declare it to be automatically void after the Commission has taken a decision by virtue of that Regulation.

10 In the case of new agreements, as the Regulation assumes that so long as the Commission has not taken a decision the agreement can only be implemented at the parties' own risk, it follows that notifications in accordance with Article 4 (1) of Regulation No 17 do not have suspensive effect.

11 Whilst the principle of legal certainty requires that, in applying the prohibitions of Article 85, the sometimes considerable delays by the Commission in exercising its powers should be taken into account, this cannot, however, absolve the court from the obligation of deciding on the claims of interested parties who invoke the automatic nullity.

12 In such a case it devolves on the court to judge, subject to the possible application of Article 177, whether there is cause to suspend proceedings in order to allow the parties to obtain the Commission's standpoint, unless it establishes either that the agreement does not have any perceptible effect on competition or trade between Member States or that there is no doubt that the agreement is incompatible with Article 85.

13 Whilst these considerations refer particularly to agreements which must be notified in accordance with Article 4 of the Regulation, they apply equally to agreements exempted from notification, such exemption merely constituting an inconclusive indication that the agreements referred to are generally less harmful to the smooth functioning of the Comon Market.

On the first question

14 The first question asks whether the procedure under Articles 2, 3 and 6 of Regulation No 17 must be considered to be initiated by the Commission from the moment it acknowledges receipt of a request for a negative clearance or of a notification for the purposes of obtaining exemption as provided for by Article 85 (3) of the Treaty.

15 The question obviously concerns the provisions of Article 9 (3) of the Regulation, under the terms of which 'as long as the Commission has not initiated any procedure under Articles 2, 3 or 6, the authorities of the Member States shall remain competent to apply Article 85 (1) in accordance with Article 88 of the Treaty'.

16 Without the necessity of reexamining the question whether by the words 'authorities of the Member States' Article 9 also refers to the national courts acting pursuant to Article 85 (2) of the Treaty, it is sufficient in this case to establish that Article 9, when referring to the initiation of a procedure under Articles 2, 3 or 6, obviously concerns an authoritative act of the Commission, evidencing its intention of taking a decision under the said Articles.

17 A simple acknowledgment of receipt, far from being evidence of intention, constitutes merely an administrative action and cannot be considered as such an authoritative act.

18 Consequently, the simple acknowledgment of receipt of a request for a negative clearance or of a notification for the purposes of obtaining exemption under Article 85 (3) of the Treaty cannot be considered as initiating a procedure under Articles 2, 3 or 6 of Regulation No 17.

On the second question

19 This question is concerned with whether notification in 1969 of a standard contract can be considered as notification of a similar contract entered into during 1963.

20 It follows from Regulation 27/62 of the Commission of 3 May 1962 (OJ 1962, p. 1118) and the forms annexed thereto that the Commission considered that, while it lightens the administrative load, notification of a standard contract is sufficient to allow efficient surveillance of contracts capable of contravening Article 85.

21 By the mere notification of a standard contract, therefore, the purposes of notification are achieved in respect of contracts in identical terms entered into by the same undertaking.

22 However, it is evident from these general considerations that notification given in 1969, and therefore outside the time limits laid down by Articles 5 (1) and 7 (2) of Regulation No 17, is not such as to make notified standard contracts, even if they existed before the entry into force of that Regulation, old agreements.

23 It follows from the foregoing that due notification of one standard contract is to be considered as due notification of all contracts in the same terms, including prior ones, entered into by the same undertaking.

On the third question

24 This question is concerned with whether nullity by virtue of Article 85 (2) of agreements exempted from notification is deemed to take effect from the date when one of the contracting parties duly claimed it merely from the date of the judgment or the decision of the Commission establishing it.

25 It follows from the general considerations above that Article 85 (2) renders agreements and decisions prohibited pursuant to that Article automatically void.

26 Such nullity is therefore capable of having a bearing on all the effects, either past or future, of the agreement or decision.

27 Consequently, the nullity provided for in Article 85 (2) is of retroactive effect.

Costs

28 The costs incurred by the Commission, the Government of the Federal Republic of Germany and the Government of the French Republic, which have submitted their observations to the Court, are not recoverable, and as these proceedings are, insofar 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 observations of the parties in 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 17 of the Council of 6 February 1962 (OJ 1962, pp. 204/62 et seq.), especially Articles 2, 3, 4, 5, 6, 7 and 9;
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 questions referred to it by the Tribunal de Commerce of Liège in accordance with the judgment given by that court dated 27 June 1962, hereby rules:

1. **The simple acknowledgment of a request for a negative clearance or of a notification for the purposes of obtaining exemption under Article 85 (3) of the EEC Treaty does not constitute the initiation of a procedure under Articles 2, 3 or 6 of Regulation No 17.**

2. **Due notification of one standard contract is to be considered as due notification of all contracts in the same terms, even prior ones, entered into by the same undertaking.**

3. **The nullity provided for in Article 85 (2) is of retroactive effect.**

Delivered in open court in Luxembourg on 6 February 1973.

Lecourt Monaco Pescatore

Donner Mertens de Wilmars

A. Van Houtte — Registrar

R. Lecourt — President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 13 DECEMBER 1972 [1]

Mr President,

Members of the Court,

The Commercial Court of Liège, in the proceedings brought before it by the brewery company de Haecht against the café proprietors Wilkin and Janssen, has asked a second time for a preliminary ruling under Article 177 of the EEC Treaty. The Court would now like to have answers to the following questions:

1. 'Must a procedure under Articles 2, 3 and 6 of Regulation No 17 be considered to be initiated by the Commission from the moment when it acknowledges receipt of a request

1 — Translated from the German.