exemption by categories those agreements which, although concluded between two undertakings from one Member State, may nevertheless by way of exception significantly affect trade between Member States but which, in addition, satisfy all the conditions laid down in Article 1 of Regulation No 67/67.

In Case 63/75

Reference to the Court under Article 177 of the EEC Treaty by the Cour d'appel, Paris, (Fourth Chamber) for a preliminary ruling in the action pending before that court between

SA FONDERIES ROUBAIX-WATTRELOS,

and

(1) SOCIÉTÉ NOUVELLE DES FONDERIES A. ROUX,

(2) SOCIÉTÉ DES FONDERIES JOT,

on the interpretation of Article 4 (1) of Regulation No 17 of the Council of 6 February 1962 (OJ, English Special Edition 1959-1962, p. 87),

THE COURT

composed of: R. Lecourt, President, H. Kutscher (President of Chamber), A. M. Donner, J. Mertens de Wilmars, P. Pescatore, M. Sørensen and Lord Mackenzie Stuart, Judges,

Advocate-General: G. Reischl
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

The judgment making the order for reference and the written observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and procedure

By an agreement concluded on 29 June 1963 the German company Gontermann-Peipers (hereinafter referred to as 'Gopag') granted the French company Les Fonderies de Roubaix-Wattrelos (hereinafter referred to as 'Roubaix') the exclusive right to sell Gopag iron castings over the northern half of France. In 1964 a verbal agreement extended this concession to the whole of French territory. For its part, Roubaix agreed not to manufacture products similar to those which formed the subject-matter of the agreement or to work either directly or indirectly for any undertaking which was a competitor of Gopag. These agreements were recorded in a contract dated 16 March 1966, notified to the Commission on 8 September 1966.

By an agreement concluded on 6 October 1964 Roubaix in its turn granted the Fonderies A. Roux (hereinafter referred to as 'Roux') the exclusive right to resell Gopag products in 24 departments in the South of France. *Inter alia* this agreement specified that: 'As the rights of the Fonderies de Roubaix-Wattrelos arise under an agreement concluded with Gontermann-Peipers, the validity of the present agreement is bound to the existence of the former agreement'. Roux also undertook not to manufacture products similar to those which formed the subject-matter of that agreement and not to work either directly or indirectly for any undertaking which was a competitor of Gopag.

A purchase by Roux in March 1972 of castings of Swiss origin formed the basis of the dispute between Roubaix and Roux as a result of which Roubaix brought an action against Roux before the Tribunal de Commerce, Paris, for the payment of damages for breach of contract.

In its defence Roux maintained that the Roubaix-Gopag agreement was void on the ground that it was incompatible with Article 85 and that, as a result, its own agreement with Roubaix was also void. The Tribunal de Commerce accepted this view.

On an appeal from Roubaix, the Cour d'appel, Paris, reversed this decision by judgment of 5 July 1975 and declared that 'in accordance with the case-law of this court' the notification of the agreement to the Commission conferred upon it a provisional validity until the Commission had given a decision thereon.

As regards the agreement between Roubaix and Roux the Cour d'appel observes that, as this is an agreement between undertakings within one Member State for the resale of products within that State, under Article 1 (2) of Regulation No 67/67 of the Commission of 22 March 1967 (OJ English Special Edition 1967, p. 10) it falls outside the scope of Article 1 (1) which contains a general statement of the inapplicability of Article 85 (1) to certain categories of agreements. As a result, the Cour d'appel concluded that in order to determine whether, in the absence of notification, this agreement was valid under Article 85 of the Treaty, it was necessary to interpret Article 4 (2) of Regulation No 17 of the Council of 6 February 1962, so as to decide whether or not the agreement related 'either to imports or to exports between Member States' within the meaning of that provision.

As it therefore considered it necessary to have recourse to Article 177 of the Treaty the Cour d'appel requested the Court of Justice to give a preliminary ruling: 'on the interpretation of the provisions of Article 4 (2) (1) of Regulation No 17 ... and to state whether or not a contract which is concluded between two undertakings from one Member State for the purpose of 'selling at least expense' a product which is imported from another Member State by one of the parties using the warehouses and distribution network

of the other party must be considered to 'relate to' imports and for this reason be subject to the notification provided for in Article 4 (1) of the abovementioned regulation'.

The judgment making the reference was lodged at the Court Registry on 16 July 1975. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate-General the Court decided that it was unnecessary to hold any preparatory inquiry.

The plaintiff in the main action and the Commission of the European Communities submitted written observations.

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

A — Observations submitted by the plaintiff in the main action

The Fonderies de Roubaix-Wattrelos maintains principally that:

(1) Although its agreements with the Fonderies A. Roux depended upon its agreements with the German undertaking Gontermann, they always remained independent in law and at no time was there any legal relationship between Gontermann and the Fonderies A. Roux;

(2) The Fonderies A. Roux is only one of its regional distributors in France and the business done with that company only involves a part of the products purchased from Gontermann;

(3) Deliveries to the Fonderies A. Roux were always made out of products already imported and available in France, either from Roubaix's warehouses or from the Paris area;

(4) It is therefore clear that its sales to the Fonderies A. Roux have only partly influenced its imports of Gontermann products from Germany;

(5) It is clear that the Gontermann products sold by it to the Fonderies A. Roux have always been intended for local consumers and have therefore not been involved in exports;

(6) It is therefore clear that the agreements in dispute were not such as to affect trade between the Member States and that, in accordance with the views expressed by the Commission and the case-law of the Court of Justice, in particular the judgments of 12 December 1967 *(Brasserie de Haecht,* Case 23/67, [1967] ECR 407) and 18 March 1970 *Brauerei Bilger Söhne,* Case 43/69 [1969] 127) they are not subject to notification.

The Fonderies Roubaix-Wattrelos suggests, therefore, that the reply to be given to the question must be that the types of agreements referred to by the national court do not relate either to imports or to exports between Member States and, therefore, that under Article 4 (2) (1) of Regulation No 17 they are not subject to notification.

B — Observations submitted by the Commission

The Commission maintains that in order to determine the scope of the question put by the national court it is necessary to distinguish between three different situations, as in each one the question takes a different form.

1. The first situation occurs where the agreement of the type in dispute does not come within the provisions of Article 85 (1). In such a case the question whether this type of agreement must be notified in order, where appropriate, to receive the benefit of the exemption contained in Article 85 (3) becomes irrelevant and the task of the national court is thereby made easier.
2. The second situation occurs where this type of agreement does in fact come within the provisions of Article

85 (1). In such a case, the decisive question is whether these agreements require notification in order to benefit from the exemption in Article 85 (3) or whether, on the other hand, they can benefit therefrom even without notification by virtue of the dispensation contained in Article 4 (2) of Regulation No 17.

In fact, if notification is necessary in order to benefit from the exemption set out in Article 85 (3), this means that the national court is only empowered to find that these agreements are inconsistent with Article 85 (1), but cannot, where appropriate, extend to them the benefit of Article 85 (3), as the power to do so is reserved solely to the Commission.

3. On the other hand, where — and this is the third situation to be taken into consideration — the agreements clearly fall within the provisions of Article 85 (1) but, under Article 4 (2) of Regulation No 17 do not require notification in order to benefit from Article 85 (3), the national court could, in the opinion of the Commission — which, in this respect, refers to the judgment of the Court of 6 February 1973 (Case 48/72, *Haecht II,* [1973] ECR 77) — uphold the validity of such agreements on the ground that as they differ from those enjoying the general exemption in Regulation No 67/67 only in that they were concluded between two undertakings in the same Member State, the Commission, if required to decide on their validity, could not arrive at any other conclusion but that they were entitled to the automatic exemption accorded by Regulation No 67/67 to identical agreements made between undertakings in different Member States.

The Commission therefore suggests that the *status questionis* must be formulated as follows:

(a) Does an exclusive agreement such as that concluded between Roubaix-Wattrelos and Roux fall within the provisions of Article 85 (1)?

(b) If so, does such an agreement benefit from the exemption from notification laid down by Article 4 (2) (1) of Regulation No 17, that is, in spite of its relationship with the agreement between Gopag and Roubaix-Wattrelos may it be considered not to relate 'either to imports or to exports between Member States'?

Before suggesting a possible reply to these two questions the Commission makes the preliminary observation that although the goods which form the subject-matter of the contract are iron castings they are governed by the EEC Treaty rather than by the ECSC Treaty. It also observes that as the Gontermann-Roubaix agreement is of the type governed by the general exemption contained in Regulation No 67/67 it does not require notification, which by virtue of the general exemption becomes irrelevant.

As a result of the foregoing the Commission considers that the agreement at issue between Roubaix and Roux belongs to a type of agreement which falls under the provisions of Article 85 (1). It restricts competition and may affect trade between Member States, since the undertaking which received the exclusive right to sell (A. Roux) is prevented from obtaining its supplies directly from the undertaking situated in the third State (Gontermann).

It cannot benefit from the exemption from notification because, although it is concluded between two undertakings within a single Member State, it concerns imports between Member States as it is the direct extension of an exclusive sales agreement involving imports from the Federal Republic.

The wording of Article 1 (2) of Regulation No 67/67 prevents it from benefiting from the general exemption.

The Commission considers this solution to be inevitable but acknowledges that it is quite unsatisfactory in that it brings about the paradoxical result that in this instance the Gontermann-Roubaix agreement is valid and benefits from the general exemption while the Roubaix-Roux contract, which is only an extension of it, is automatically void.

During the oral procedure held on 2 December 1975 the applicant in the main action, represented by R. Faure, of the Paris Bar, the defendant in the main action, Société Nouvelle des Fonderies A. Roux, represented by Mr Bonsirven, of the Lyon Bar, and the Commission, represented by its Agent, J. P. Dubois, developed the arguments put forward during the written procedure.

In reply to questions raised by the Court the Commission gave its opinion as to the attitude to be adopted by a national court which is confronted with an agreement which does not require notification and satisfies the conditions for the application of Article 85 (1). Four possible situations arise:

(1) Where the national court finds that the agreement has no perceptible effect on competition or trade between the Member States and that, therefore, Article 85 (1) is inapplicable.

(2) Where the national court finds a clear incompatibility with Article 85 and declares the agreement void.

(3) Where, on the basis of Community regulations which are directly applicable in the Member States, the national court finds that the conditions for the application of the general exemption are satisfied and draws the consequences as regards the validity of the agreement. It will, therefore, by implication give a ruling on the conditions for exemption laid down in Article 85 (3) with regard to certain agreements to which Article 85 (1) is applicable and which are exempted from notification.

(4) Where the national court is uncertain as to the validity of the agreement. The court suspends the procedure in order to obtain the Commission's view on this point.

The Advocate-General delivered his opinion at the hearing on 14 January 1976.

Law

1 By judgment of 5 July 1975 received at the Court Registry on 16 July 1975 the Cour d'appel, Paris, referred to the Court under Article 177 of the EEC Treaty a question on the interpretation of Article 4 (2) (1) of Regulation No 17 of the Council of 6 February 1962 implementing Articles 85 and 86 of the Treaty (OJ English Special Edition 1959 — 1962, p. 87).

2 In this question the Court is asked to state whether 'a contract which is concluded between two undertakings from one Member State for the purpose of "Selling at least expense" a product which is imported from another Member State by one of the parties using the warehouses and distribution network of the other party must be considered to "relate to" imports and for

this reason be subject to the notification provided for in Article 4 (1) of the abovementioned regulation'.

3 The file shows that the action involves two undertakings, both subject to French law, and questions the validity in relation to Article 85 of the Treaty of a contract by which one undertaking grants to the other, as regards a part of French territory, a concession for the distribution and sale of iron castings of German origin, in respect of which the grantor undertaking possesses the exclusive sales concession over the whole of the territory by virtue of a contract binding it to the German producer.

4 It raises the question whether, assuming that this sub-concession agreement is covered by the prohibition in Article 85 (1) and does not benefit from the exemption applying to certain categories of agreements contained in Article 1 of Regulation No 67/67 of the Commission of 22 March 1967 (OJ No 57 of 25. 3. 1967, English Special Edition 1967, p. 10) it requires preliminary notification in order to benefit under Article 85 (3) from an individual exemption from prohibition.

5 Article 4 (1) of Regulation No 17 provides that agreements of the kind described in Article 85 (1) of the Treaty which come into existence after 13 March 1962 — the date of entry into force of Regulation No 17 — must have been notified to the Commission in order to benefit from the provisions of Article 85 (3); however, under the terms of subparagraph (2) (1) of the same article, this notification is not necessary as regards agreements where the only parties thereto are undertakings from one Member State and these agreements do not relate either to imports or to exports between Member States.

6 This second condition must be interpreted with reference to the structure of Article 4 and its aim of simplifying administrative procedure, which it pursues by not requiring undertakings to notify agreements which, whilst they may be covered by Article 85 (1), appear in general, by reason of their peculiar characteristics, to be less harmful from the point of view of the objectives of this provision and which are therefore very likely to be entitled to the benefit of Article 85 (3).

7 In the majority of cases, agreements between two undertakings from one Member State will be so entitled if they grant exclusive sales concessions in relation to the marketing of goods, where the marketing envisaged by the

agreement takes place solely within the territory of the Member State to whose law the undertakings are subject, even if the goods in question have at a former stage been imported from another Member State.

8 Therefore, the fact that the products involved in such agreements have previously been imported from another Member State does not by itself mean that these agreements must be regarded as relating to imports within the meaning of Article 4 (2) of Regulation No 17.

9 In order that an adequate reply may be given to the national court it is necessary to determine who is responsible for establishing whether or not the agreements thus exempt from notification are covered by the provisions of Article 85 (1) and, if so, whether they benefit from the exemption contained in Article 85 (3).

10 It is for the national courts before which an action relating to the validity of such agreements is brought to assess, subject to the possible application of Article 177, whether such agreements may significantly affect trade between Member States.

11 Assuming this to be the case, these courts have also jurisdiction to find that in spite of the absence of notification contracts of the type referred to by the question benefit from the exemption relating to categories of agreements provided for in Regulation No 67/67 of the Commission in pursuance of Article 85 (3).

12 In fact, under Article 1 (1) of that regulation and subject to the terms of Article 3 thereof, agreements to which only two undertakings from different Member States are party and whereby:

'(a) one party agrees with the other to supply only to that other certain goods for resale within a defined area of the common Market; or

(b) one party agrees with the other to purchase only from that other certain goods for resale; or

(c) the two undertakings have entered into obligations, as in (a) and (b) above, with each other in respect of exclusive supply and purchase for resale'

benefit by virtue of a general provision from the exemption set out in Article 85 (3) and are therefore by reason of this fact alone also exempt from the duty of notification.

13 There is no reason based on the objectives of Regulation No 67/67 for failing to allow agreements of an identical nature concluded between two undertakings belonging to the same Member State to benefit from this general exemption.

14 On the contrary, the reasons militating in favour of an exemption by categories in the case of agreements between two undertakings from different Member States are also valid in the case of similar agreements concluded between two undertakings in a single Member State.

15 It must not be forgotten that Article 1 (2) of Regulation No 67/67 provides that: 'Paragraph (1) shall not apply to agreements to which undertakings from one Member State only are party and which concern the resale of goods within that Member State'.

16 However, the effect of this provision cannot be to exclude agreements concluded between two undertakings from one Member State.

17 In fact, the fourth recital in the preamble to Regulation No 67/67 shows that the Commission considers that: 'Since it is only in exceptional cases that exclusive dealing agreements concluded within a Member State affect trade between Member States, there is no need to include them in this regulation'.

18 The effect of paragraph (2) is thus to exclude from the scope of Article 85 (1) and, therefore, from Regulation No 67/67, exclusive dealing agreements which are purely domestic in nature and are not capable of significantly affecting between Member States.

19 On the other hand, its purpose is not to exclude from the benefit of the exemption by categories those agreements which, although concluded between two undertakings from one Member State, may nevertheless by way

of exception significantly affect trade between Member States but which, in addition, satisfy all the conditions laid down in Article 1 of Regulation No 67/67.

Costs

20/21 The costs incurred by the Commission of the European Communities which has submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, the decision as to costs is a matter for that court.

On those grounds,

THE COURT

in answer to the question referred to it by the Cour d'appel, Paris, by judgment of 5 July 1975, hereby rules:

(1) To the extent to which it exempts from notification agreements which do not relate either to imports or to exports, Article 4 (2) (1) of Regulation No 17 of the Council must be interpreted as extending to agreements granting exclusive sales concessions in relation to the marketing of goods, where the marketing envisaged by the agreement takes place solely within the territory of the Member State to whose law the undertakings are subject, even if the goods in question have at a former stage been imported from another Member State.

(2) Article 1 (2) of Regulation No 67/67 of the Commission, whose effect is to exclude from the scope of Article 85 (1) and, therefore, from Regulation No 67/67, exclusive dealing agreements which are purely domestic in nature and are not capable of significantly affecting trade between Member States, is not intended to exclude from the benefit of exemption by categories those agreements which, although concluded between two undertakings from one Member State, may nevertheless by way of exception significantly affect trade

between Member States but which, in addition, satisfy all the conditions laid down in Article 1 of Regulation No 67/67.

Lecourt Monaco Kutscher

Donner Mertens de Wilmars Sørensen Mackenzie Stuart

Delivered in open court in Luxembourg on 3 February 1976.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL REISCHL DELIVERED ON 14 JANUARY 1976 [1]

Mr President,
Members of the Court,

Under Article 4 (1) of Regulation No 17 of the Council of 6 February 1962 (OJ 204/62 of 21. 2. 1962 English Special Edition 1959-1962 p. 87) agreements, decisions and concerted practices of the kind described in Article 85 (1) of the EEC Treaty which come into existence after the entry into force of that regulation and in respect of which the parties seek application of Article 85 (3) must be notified to the Commission. Until they have been notified, no decision in application of Article 85 (3) may be taken. Under Article 4 (2) of Regulation No 17 the said paragraph (1) does not apply *inter alia* to agreements where the only parties thereto are undertakings from *one* Member State and the agreements do not relate either to imports or to exports between Member States.

The reference for a preliminary ruling which has been made by the Cour d'appel, Paris, and in respect of which I have to give an opinion today is mainly concerned with the interpretation of the lastmentioned provision.

SA Fonderies de Roubaix Wattrelos, the plaintiff in the main action, concluded a contract in June 1963 with the German undertaking Gontermann-Peipers under which the plaintiff had the exclusive right to sell over the northern half of France Gopac castings manufactured by Gontermann-Peipers according to a secret process. In addition the plaintiff was not allowed to sell any competing products. A verbal agreement at the beginning of 1964 is said to have extended this contract to the whole of France. After the contract had been re-drafted and signed on 16 March 1966 it was notified to the Commission on 8 September 1966 for the purpose of

1 — Translated from the German.