submitted its 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 Arrondissementsrechtbank, Rotterdam, the decision on costs is a matter for that court.

On those grounds,

Having regard to the state of the procedure;
Having regard to the Order of the Court of 3 June 1969;
Having regard to the letter from the Registrar of the Arrondissementsrechtbank received at the Registry of the Court on 12 June 1970;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the opinion of the Advocate-General;
Having regard to Article 177 of the EEC Treaty;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities,

THE COURT

hereby orders:

Case 31/68 is removed from the Register of the Court.

Luxembourg, 16 June 1970.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 20 MAY 1969[1]

Mr President,
Members of the Court,

The following are the facts concerning the question of competition law which has been referred to us by the civil court of first instance in Rotterdam.
The applicant in the main proceedings, the limited liability company Chanel, SA, manufacturers perfume and like products. According to its evidence it sells its branded goods through sales organizations which it maintains in all the Common Market countries as well as in many third countries. The organization for the Federal Republic of Germany (including West Berlin) was first set up on the basis of contracts made in 1954. They provided for deliveries to five

1 — Translated from the German.

importers who had undertaken to take supplies solely from the applicant. In return, they were to have the right to be exclusive suppliers for selected retailers within a certain territory. After 1 April 1967 the importers were also allowed—under certain modifications to their contracts—to make deliveries outside their agreed sales territory, both in the Federal Republic and in other countries of the Economic Community.

The exclusive dealing arrangement with the importer covering the Netherlands (a company with registered offices at The Hague) is—as we have also heard from the applicant—governed by a contract made in 1963. This dealer, also, benefited from modifications to its contract in 1967 permitting supplies to be made to other Member States.

In 1963 the abovementioned exclusive dealing agreements and the corresponding agreements made with dealers in other Member States were notified by the applicant to the Commission in accordance with the provisions of Regulation No 17. When Regulation No 67/67 came into force the applicant also notified the Commission of the alterations made to the agreements in order to comply with the requirements of that regulation.

In 1967 the applicant concluded three agreements with Cepeha, a company with registered offices in Rotterdam which did not have exclusive dealing rights for the Netherlands. According to the applicant's statements these agreements provided for the supply of certain products from its production range to a named client in Indonesia and granted Cepeha commission rights. Contrary to the written assurance given by that undertaking that the products were intended for sale in Indonesia, and although the applicant had received a photocopy of a bill of lading purporting to certify that the products had indeed been despatched to Indonesia, the products in question were sold in the Federal Republic. On learing this, Chanel informed the company in Rotterdam in January 1968 that it should not expect to receive further supplies. It brought criminal proceedings (leading to the arrest and conviction of an official of the Rotterdam company) and it also brought a civil action on 24 February 1968 for damages for breach of contract before the Arrondissementsrechtbank, Rotterdam. In the civil proceedings, the defendant company submitted, *inter alia*, that the conduct of the plaintiff 'in concluding agreements prohibiting parallel imports of Chanel products, *inter alia* into Germany', was contrary to Article 85 of the EEC Treaty and therefore void.

The court in Rotterdam considered that this objection was of central importance to the solution of the case and that it raised a problem of interpretation of Community competition law. For this reason, in its judgment of 3 December 1968, it decided to stay proceedings and request the Court of Justice to give a preliminary ruling under Article 177 of the EEC Treaty on the following two questions:

'1. Does the Treaty establishing the European Economic Community (including the regulations in implementation thereof adopted by the Council or the Commission of the EEC) prohibit as from the spring of 1967 the inclusion, in agreements relating to the purchase of branded products concluded between the manufacturer of such articles established in a Member State and a trader established in another Member State, of conditions which effectively prohibit export to or resale in other Member States of the articles purchased?

2. Does the same apply where the manufacturer in question has established, in one of those other Member States, a sales organization based on an agreement authorized under Regulation No 67/67/EEC of the EEC Commission which provides, *inter alia*, for the appointment of a sole representative or agent in that country and where the manufacturer includes the said conditions in the abovementioned sales contracts with a view to protecting the sales organization?'

The request for a preliminary ruling, received by the Court of Justice on 13 December 1968, was communicated under Article 20 of the Statute of the Court of Justice of the EEC to the parties to the main action,

to the Member States and to the Commission to give them an opportunity of submitting their observations on the matter. Within the two months laid down for that purpose, the registrar of the court making the reference informed the Registrar of the Court of Justice by letter of 29 January that the plaintiff had appealed to the Gerechtshof, The Hague, on 23 January 1969 against the judgment making the reference and that, in the words of that letter, 'as a result execution of the judgment is deferred'. After that date written observations were submitted by the plaintiff in the main action, by the French Government and by the Commission of the European Communities.

Finally, the oral procedure in this case was opened on 29 April in accordance with an order of the Court of 23 March 1969, despite the request made by the plaintiff in its memorandum of 21 February 1969 for a stay of proceedings on the reference until the appeal court of The Hague had given its decision. The plaintiff in the main action and the Commission presented observations at the hearing. The defendant was not represented.

It is now for me, in the context of the above oral procedure, to formulate my opinion on the request made by the Rotterdam court.

Legal consideration

1. The first question which arises is how the jurisdiction of the Court of Justice or, generally, its procedure, is affected by the fact, that an appeal has been lodged against the decision to make the reference. That question has not yet been decided, for the fact of opening the oral procedure after receipt of the communication from the registrar in Rotterdam is really no more than a procedural, and therefore provisional, measure.

This Court has already found itself faced with a similar situation in Case 13/61 ([1962] ECR 49 et seq.). In that case, as you remember, an appeal was lodged with the Hoge Raad of the Netherlands against the order making the reference for a preliminary ruling. I think it is of importance that the Court on that occasion held that the admissibility of this form of action should be judged according to internal law, and that the Treaty does not in any event prohibit a decision on the action. It did indeed give judgment after hearing the exhaustive comparative legal study of analogous situations in national law made by Advocate-General Lagrange and his conclusion that 'In the absence of clear words it would be unreasonable to suppose that the authors of the Treaty intended to change such an important rule and one which relates to the internal working of the national judicial system' ([1962] ECR 59). One can indeed imagine an order making a reference for a preliminary ruling being disputed on grounds which have nothing to do with Community law and over which, consequently, it could not be said that the European Court of Justice has exclusive jurisdiction when seised of the matter. Such could be the case when a dispute arises as to the importance for the solution of the case of a question put to the Court, on the grounds that the issues can be decided solely on the basis of internal law. To illustrate this let me mention the protective measure taken by Germany in 1963, under the scheme for the common organization of the market in cereals, against imports of maize from France, the approval of which by the Commission was the subject matter of Cases 106 and 107/63. That measure was susceptible to annulment by a German court, the Verwaltungsgericht, Frankfurt, for violation of German law without its being necessary to invoke the substantive conditions of Regulation No 19, because the measure in question was not promulgated in the form of a regulation (cf. Judgment of 20 March 1964). If the Court had been presented at the time with a request for interpretation of Community law, an appeal against that reference in the internal legal system could, in application of *German* law, have deprived the reference to this Court of its basis.

Since the judgment of the Hoge Raad of 18 May 1962 there is no longer any doubt that under Netherlands law orders staying proceedings and making references for preliminary rulings may be the subject of appeal. Consequently the only question which arises is what *effects* are produced by such appeals under national law and whether

the Court should take them into account in the context of the reference proceedings. In my opinion the question cannot be simply dismissed on the pretext that the jurisdiction of this Court depends solely on a request for interpretation having been *referred* and that it is not necessary, under the provisions of Community law, that the order making the request should have *legal force*. Admittedly, the request addressed to the Court must be *valid*, and just as it can be void *ab initio*, so it is totally or partially voidable on the basis of subsequent events (withdrawal by the plaintiff, settlement between the parties, etc.). And it seems that this applies in Netherlands law (according to the statements of the plaintiff) in cases of appeal against a judgment making reference for a preliminary ruling. According to Article 350 (1) of the Netherlands Code of Civil Procedure, an appeal brought against a judgment suspends execution thereof. According to the case-law (cf. the judgment of the Hoge Raad of 21 June 1918) this must not be understood as merely a suspension of 'exécution forcée' but also suspension of 'exécution par suite d'instance'. Legal doctrine[2] explains this idea by maintaining that *no executory act* is possible, not even those which may be undertaken without the intervention of the parties (inspection of the place or thing in question, taking of oral testimony or swearing in of witnesses, experts' reports). Applied to the reference procedure for preliminary rulings, this means that in certain cases the national court would not be in a position to communicate supplementary information to the Court of Justice. Doubtless it would also be forbidden to make use of the interpretation given by the Court in deciding the case before it until a decision had been given on the appeal.

But if that is so, if—in other words—the reference order against which appeal has been brought may not, temporarily, produce any legal effect, the European Court of Justice cannot simply ignore the situation. The recourse to the Court is without effect, since its mission is not to give a legal opinion in the abstract but to give its help in a concrete manner in reaching a decision. The necessary result must be a stay of proceedings on the reference until a decision has been given at the national level with regard to whether the interpretation requested is of importance in deciding the case or not. A stay appears advisable at least where—as in the present instance—the case has been brought before a higher court *on a point of fact* and it could be that that court's appreciation of the facts will make the questions of Community law irrelevant, or require them to be formulated in another way.

2. However, if this approach is thought inadvisable, on the grounds that in Netherlands law the effects inherent in the bringing of an appeal are not altogether clear and that in such a case it is not for this Court to interpret national law, or else because by reason of the importance of the questions posed it is thought better to accept the risk of delivering a superfluous judgment than to slow down the reference proceedings, it is then necessary to make the following remarks with regard to the content of the questions put before the Court:

(a) You will recall that the substance of the first question is whether the EEC Treaty prohibits the inclusion in a sales agreement concluded between a manufacturer in one Member State and a trader in another Member State of a clause prohibiting export to other Member States.

On this point the plaintiff in the main action has submitted, in particular, that the question does not relate to the facts which are the subject of the national proceedings. One ought in fact to assume that it envisaged sales to a country situated outside the Economic Community, in which the Netherlands trader defending the action was only to act as an intermediary on commission and to ensure transit through the Netherlands of articles coming from France and destined for Indonesia. That is what seems to emerge from the contents of the memoranda and documents which the plaintiff has communicated to the court making the reference, to the European Court of Justice and to the national court of appeal. If this

1 — cf. Star Busman, Hoofdstukken van Burgerlijke Rechtsvordering, 1955, p. 422.

elucidation is taken into account in replying to the first question—and the Court has already adopted this approach on several occasions in the course of reference proceedings—it is quite clear that the intricacy of the problems of cartel law is lessened.

I am not, in fact, thinking here of the communication from the Commission published in the Official Journal of 24 December 1962 to which the plaintiff refers, relating to exclusive dealing agreements concluded with commercial agents; this, as you know, expresses the view that the prohibition set out in Article 85 (1) does not apply to agreements concluded with such agents who negotiate or conclude business on behalf of another undertaking over a given part of the territory of the Common Market. The statements of the plaintiff justify the conclusive dealing agreements concluded with commercial agents; this, as you know, expresses the view that the prohibition set out in Article 85 (1) does not apply to agreements concluded with such agents who negotiate or conclude business on behalf of another undertaking over a given part of the territory of the Common Market. The statements of the plaintiff justify the conclusion that the defendant acted as commission agent for an Indonesian purchaser, that is, on his behalf. But the Commission's communication mentions only those acting on behalf of the vendor and certainly does not apply to the present situation. On the other hand, one might accept the following arguments, also advanced by the plaintiff: since, according to the express will of the parties, there was, without question, a sale via an intermediary to a commercial partner established outside the Economic Community, with a precise destination well away from the Common Market, for purely practical reasons there was no need to include a condition prohibiting reimportation. Consequently, all that the Netherlands court had to consider was a simple sales agreement with no supplementary conditions, that is to say, a situation which in no way involves competition law and to which, therefore, there is no reason to apply Article 85 (1). One could even go a little further and say that the result would not be different even supposing the contract had contained a tacit prohibition of reimportation. Indeed, if one considers the facts of the case there is a clear analogy with the *Grosfillex* case. As you know, the Commission then gave negative clearance, that is, it declared that there were no grounds for it to intervene under Article 85 (1) with regard to the exclusive dealing agreement, which included a prohibition against reimportation, concluded between a French manufacturer of plastic articles and a Swiss trader. If one examines that decision closely, particularly what was said on the price structure and the actual likelihood of reimportation (I refer to the Official Journal, 1964, p. 915) it is difficult to see how any other conclusion could be justified in this instance.

However, such a radical alteration to the questions referred by the national court may be considered impossible, since in proceedings brought under Article 177 the Court is not concerned to give judgment on the actual facts or to apply national law. If, consequently, the Court feels bound, in interpreting the Treaty, by the description which the court making the reference has given of the agreements in question, the only relevant question is how to regard a contract of sale concluded by a manufacturer situated in one Member State with a trader situated in another Member State which contains a prohibition against export to the territory of another Member State.

On that question, several interested parties have justly remarked during the proceedings that having regard to the criteria set out in Article 85 (1) it is impossible to give a precise answer which will be generally valid if one is not in possession of all the facts. Referring to the well-known *Bosch* case ([1962] ECR 45). I can say, first, that it is not impossible that such export prohibitions should correspond to a 'definition contained in Article 85 (1)'. In fact, the prohibitions in question do prevent a certain quantity of goods from entering a member country of the Community and to that extent restrict competition and affect trade between Member States. However, it must also be remembered that at an early stage the Court approved the argument of the Commission that Article 85 (1) applies only to *appreciable* restrictions on competition and effects on trade. In order properly to judge the validity of prohibitions on exportation,

account must be taken of all the circumstances of the actual case, as has been emphasized in other cases relating to cartels. In particular, the fact may be relevant that only a few supply contracts, involving a small volume of trade, are concerned. Account should be taken of the market in the branded products in question in the Member State covered by the prohibition on exportation, including any substitution products, and the number of manufacturers and traders which carry on their activities there must be ascertained, and it must be determined, particularly in the light of the price structure, whether competition on that market is sufficiently intensive for it not to be substantially affected by the conditions of sale under discussion. It is only after this has been done that it is possible to decide finally whether the prohibitory provisions of Article 85 (1) are applicable or not. On the other hand, as regards the first question, the period at which the agreements in question were concluded does not seem relevant. In view of the provisions of Regulation No 67/67, it is clear that this factor is relevant only to the second question.

I think it is not possible for me to give a more precise answer to the first question. However, the preceding considerations show clearly enough that Article 85 (1) scarcely covers the prohibition upon which the court making the reference has to give judgment.

(b) In its second question, the Rotterdam court asks whether Article 85 (1) does not in any case apply when the prohibition on exportation in question is designed to protect a sales organization in another Member State and when the sales organization has been set up in accordance with Regulation No 67/67.

Several interested parties consider that this question, too, needs to be amended, inasmuch as the plaintiff maintains a sales organization not only in the Member State to which the product has been exported in contravention of the agreement, but also over the whole of the territory of the Common Market, and so also in the Netherlands; that is to say, in the country in which the party contracting with the plaintiff is established and to which the product was delivered in the first place, albeit only in transit. Taking this amendment into account and supposing also that the sales organization in question is legal under the conditions of Regulation No 67/67, the reply to be given to the second question raises no difficulties. As you know, in Regulation No 67/67 the Commission affirmed as a general rule that in accordance with Article 85 (3) of the Treaty Article 85 (1) was not applicable to agreements to which only two undertakings are party, those undertakings being subject, for purposes of resale, to mutual obligations in respect of exclusive supply and purchase within the meaning of Article 1 (a) and (b) of Regulation No 67/67. That exemption applies on condition that no absolute territorial protection is given to any exclusive purchaser. Thus parallel imports should be possible, or, more precisely, retailers in the Member State in question should not be prevented from buying the articles in question from wholesalers established in other sales territories. Commerce has thus been given an important tool for encouraging the effective marketing of branded products and permitting a certain control to be exercised over sales outlets. But the *modus operandi* of these sales organizations makes it perfectly clear that there is no question of manufacturers supplying other purchasers situated in the respective sales territories. That would not be compatible with the obligation as to exclusive supply. The lawfulness of the distribution system therefore implies the lawfulness of the sales prohibitions imposed on purchasers outside the distribution system. From the point of view of cartel law, this is justified by the fact that sufficient competition is ensured by the possibility given to purchasers bound by the agreement, of supplying interested persons established outside the territory conceded to them and thus entering into competition with the authorized exclusive dealer in the territory in question. On the other hand, the sales prohibition which is applied to purchasers outside the distribution system represents no additional, substantial restriction of competition, or else it is accepted under Article 85 (3). Supposing that the conditions laid down in Regulation No

67/67 are met, the reply to the second question should therefore be as follows: Article 85 (1) does not apply to the prohibition on exportation in dispute.
As for the question whether the conditions laid down in Regulation No 67/67 *are* in fact met, that is not for us to judge. The plaintiff insists that this is so in view of the alteration of the sales agreements which took place in 1967. During the oral procedure, the Commission, to whom the agreements and their amendments were notified, expressed certain reservations. It mentioned an investigation currently in progress, and manifested some doubts, inasmuch as the process of selecting authorized *retailers* was not dictated by objective criteria so much as by the desire to limit their number. One can indeed consider such factors to go beyond what can be considered as a permissible restriction under Article 2 of Regulation No 67/67. This has to be considered in detail by the referring court. If the latter reaches the conclusion that Regulation No 67/67 is not applicable it can then judge the present case only on the basis of the reply to be given to the first question.

3. I now come to summarize my opinion.

In the first place, I propose that the Court issue an order declaring that for the moment it cannot give a ruling on the questions submitted to it; it may only do so when the Court of Appeal of The Hague has given judgment on the appeal brought against the decision to make the reference.

However, if the Court considers it proper to give a ruling immediately on the request for interpretation it should reply as follows, leaving aside any reformulation of the questions:

Article 85 (1) of the Treaty may cover sales prohibitions agreed, with regard to exports, between a manufacturer situated in one Member State and a trader situated in another Member State in respect of the territory of a third Member State, when the circumstances of the case in issue are such that competition and trade between the Member States are thereby appreciably affected.

When there exist in the countries of the Common Market sales organizations which meet the conditions laid down by Regulation No 67/67, sales prohibitions imposed on traders not included in exclusive distribution systems do not constitute an appreciable restriction of competition.

As for the costs of the proceedings, which the plaintiff submits should be awarded against the defendant in the main action, these are, according to the unvarying case-law of this Court, a matter to be decided in the main action.