OPINION OF MR ADVOCATE-GENERAL REISCHL DELIVERED ON 17 SEPTEMBER 1975 [1]

Mr President,
Members of the Court,

In the case referred for a preliminary ruling on which I am giving my opinion today, the Court is concerned with the interpretation of Regulation No 67/67 of the Commission of 22 March 1967 on the application of Article 85 (3) of the EEC Treaty to certain categories of exclusive dealing agreements (OJ 1967, No 57).

This regulation was made on the basis of Regulation No 19/65 of the Council of 2 March 1965 on the application of Article 85 (3) of the Treaty to certain categories of agreements and concerted practices (OJ 1965, No 36). In Article 1 thereof it provides that in accordance with Article 85 (3) of the Treaty, Article 85 (1) shall under the conditions set out in the regulation be declared not to apply to agreements to which only two undertakings are party and whereby one party agrees with the other to supply only to that other certain goods for resale within a defined area of the common market. Under the provisions of Article 3 of this Regulation, Article 1 (1) shall not however apply where:

'.....

(b) the contracting parties make it difficult for intermediaries or consumers to obtain the goods to which the contract relates from other dealers within the common market, in particular where the contracting parties

.....

(2) exercise other rights or take other measures to prevent dealers or consumers from obtaining from elsewhere goods to which the contract relates or from selling them in the territory covered by the contract.'

The following observations should be made on the main action:

Fratelli Dalle Crode, established in Conegliano (Italy) entered on 25 February 1968 into an exclusive dealing agreement with Van Vliet Kwasten- and Ladderfabriek of Nijmegen (Netherlands). Under the provisions of this contract Fratelli Dalle Crode granted to Van Vliet as from 1 March 1968 the sole representation for the territory of the Benelux countries in respect of brushes with plastic handles manufactured by Dalle Crode as well as all plastic parts required in connexion with brushes manufactured by Dalle Crode. The agreement further provided that Dalle Crode would ensure that deliveries of such goods to customers in Italy (wholesalers and manufacturers) would not be used for the purpose of export to the Benelux countries. In this respect there were laid down appropriate notices on the part of Dalle Crode to its customers in Italy, specific instructions at the time of delivery, as well as certain sanctions. After the contract had run for a short period it was on 28 September 1969 rescinded by Dalle Crode for reasons which are of no further interest in these proceedings.

There ensued legal proceedings in which the contract was relevant since Dalle Crode sued Van Vliet for payment of the purchase price in respect of deliveries which had taken place. In these proceedings which in the first instance came before the Arrondissementsrechtbank, Arnhem, Van Vliet argued that Dalle Crode had placed on the market in the Netherlands throw-away brushes with plastic handles without participation on the part of Van Vliet. Van Vliet argued that this amounted to a breach of contract and that for this

1 — Translated from the German.

reason Dalle Crode was liable to Van Vliet for payment of compensation.

The Arrondissementsrechtbank gave judgment against Van Vliet for payment and rejected its counterclaim for compensation. The court took the view that the contract for the breach of which Van Vliet had claimed compensation, was void under Community law and could not therefore form a legal basis for a claim to compensation on the ground of breach of contract.

Van Vliet appealed against this decision to the Gerechtshof, Arnhem. It takes the view that Article 85 (1) of the EEC Treaty and Regulation No 67/67 of the Commission, above referred to, were incorrectly applied; that in fact the agreement which it had entered into with Dalle Crode did indeed fall within the scope of this regulation, for the sole deciding factor in this connexion was the fact that customers in the Benelux countries were able to purchase from customers of Dalle Crode in France and in Western Germany, that is to say, that not all competition had been prevented. Finally Van Vliet takes the view that the court of first instance disregarded a notice of the Commission of 27 May 1970 on 'agreements of minor importance which do not come under the provisions of Article 85 (1) of the Treaty establishing the European Economic Community' (OJ 1970, No C 64).

In this notice the Commission takes the view — and perhaps I might mention this at this stage — that:

'agreements between undertakings concerned with the manufacture or distribution of products do not come under the prohibition of Article 85 (1) of the Treaty establishing the European Economic Community

- where the goods affected by the agreements represent in that part of the common market where the agreement takes effect, not more than 5 % of the turnover achieved with goods that are identical and are considered by the consumer to be similar by reason of their characteristics, their price and their use, and
- where the total yearly turnover achieved by the undertakings that participate in the agreement does not exceed 15 million u.a. or, in the case of agreements between commercial undertakings, 20 million u.a.'.

In considering this argument the appellate court arrived at the conclusion that there could be no question of an incorrect application of Article 85 (1) of the EEC Treaty and of the aforementioned notice of the Commission of 27 May 1970. As regards the interpretation of Article 3 of Regulation No 67/67 of the Commission, the Gerechtshof, Arnhem, did however consider that there was a problem, particularly having regard to the arguments advanced by Dalle Crode that as regards customers in the Benelux countries there were only theoretical possibilities of purchasing in France and in the Federal Republic of Germany since Dalle Crode did not effect deliveries to EEC countries other than the Benelux countries.

By order of 18 February 1975 the said court decided to stay the proceedings and referred the following questions for a preliminary ruling under Article 177 of the EEC Treaty:

1. Do the agreements which by Article 3 are excluded from exemption include also exclusive dealing agreements between a manufacturer in one of the Member States and an exclusive dealer elsewhere in the common market which contain provisions upon compliance with which only manufacturers and dealers in Member States of the contracting party/manufacturer are prevented from disposing of the goods to which the contract relates to the territory covered by the contract whilst dealers and consumers in the territory

covered by the contract are only prevented from acquiring goods to which the contract relates from a Member State of the contracting party/manufacturer?

2. In answering the question under (1) would it make any difference:
   (a) if dealers and consumers in the territory covered by the contract do – or do not – in practice continue to be able to obtain goods to which the contract relates from elsewhere in the common market outside the territory covered by the contract and from outside a Member State of the contracting party/manufacturer; and
   (b) if, to the extent to which such possibility continues to exist in practice, dealers and consumers in the territory covered by the contract do – or do not – in complying with the provisions of the contract referred to under (1) above, refrain to a noticeable degree from making use of that possibility?

Before I go into these questions it seems to me appropriate to show in a few sentences that part of Van Vliet's submissions in the course of the proceedings is irrelevant for the purposes of the preliminary ruling.

In the first place this applies to its observation that since Dalle Crode did not manufacture brushes, it was in practice, in the main plastic handles for brushes and other plastic parts required in the manufacture of this product which ought to be treated as the relevant goods to which the exclusive dealing agreement related. Clearly this falls within the area of the application of the law to an individual case and must therefore only be dealt with in the main action. On the other hand, at the present moment we are only concerned with the interpretation of a general provision of competition law and for this purpose the specific features of the individual case, such as those referred to, are surely without importance.

The same applies to the observation that the agreement in question did not restrict competition from other Italian undertakings manufacturing or dealing in plastic handles for brushes, and in this connexion Van Vliet was clearly not thinking of Dalle Crode's customers. Whether such competition does exist is of no importance, for Regulation No 67/67, the regulation exempting certain categories, is only concerned with the restriction of competition by concentrating sales in a particular area on one exclusive dealer, and with the question whether the exempting regulation requires that there should be competition within the class of goods produced or distributed by the grantor of the concession and indeed also within the contract territory of the dealer.

Finally, similar considerations apply to Van Vliet's reference to the modest size of the parties to the contract, to the size of their yearly turnover and the share in the market enjoyed by the product to which the contract relates within the area covered thereby, which in Van Vliet's view ought also to be decided by taking into account similar products that might amount to a substituted competition. These are clearly questions of a factual nature which in the first instance fall to be dealt with as part of the national proceedings. Besides they clearly relate to the beforementioned notice of the Commission of 27 May 1970. It is not however this but only the category exempting Regulation No 67/67 which is the subject matter of the request for interpretation and therefore the criterion for the court making the reference.

This exempting regulation must be interpreted – and here I come to the real crux of the present proceedings – in relation to an agreement under which the exclusive representation in respect of certain goods in a specific area, that is to say, the Benelux countries, was

transferred to *one* undertaking and under which the grantor of the concession, established in Italy, undertook to ensure that its Italian customers (wholesalers and manufacturers, but not consumers) would not effect exports to the Benelux countries whilst it apparently remained free to deliver the goods to which the contract related in other countries of the Community and to arrange for them to reach the Benelux countries from there.

On this point Van Vliet takes the view that there can be no question of a prevention within the meaning of the proviso constituted by Article 3 of Regulation No 67/67, since Dalle Crode had the possibility of marketing its products in the Benelux countries via undertakings in France or the Federal Republic of Germany. Nor is this to be regarded as an action making it difficult to obtain the goods to which the contract relates since marketing via France and the Federal Republic of Germany gives rise to no additional costs, requires no additional stages in trading and the same distances apply. Besides, for the purposes of the exempting regulation, what must be treated as decisive is whether there was a *possibility* of effecting parallel imports. On the other hand the *actual absence* of trade flowing from Italy to France and into the Federal Republic of Germany, is not decisive.

The Commission on the other hand takes the view — and in the course of the oral proceedings this view was adopted by Dalle Crode — that what is conclusive is the fact that the exclusive dealing agreement excluded direct parallel imports from Italy to the Benelux countries. This in itself constitutes compliance with the conditions of Article 3 of Regulation No 67/67, that the contracting parties had made it difficult for intermediaries or consumers to obtain the goods to which the contract relates from other dealers within the common market, that they had taken measures to prevent dealers or consumers from obtaining from elsewhere within the common market goods to which the contract relates. On the other hand the question whether there was in fact a possibility of acquiring them outside Italy or whether in fact such trade exemption. is of no importance for the purposes of applying the said provision.

We ought in considering this argument first of all to look at Article 2 of Regulation No 67/67. In this respect it was argued that Article 2 exhaustively listed all the restrictions that might exist in exclusive dealing agreements without this resulting in the loss of exemption. It makes no mention of prohibition of exports of the kind relevant in the present case and thus it is clear that agreements containing such elements are not covered by the exempting regulation.

However, I find these arguments dubious. Relying on the wording of Article 2 one might object that it only contains statements as to which restrictions on competition may be imposed on the exclusive dealer and which obligations can be imposed on him without excluding the application of Article 1. On the other hand Article 2 does not refer to limitations on the freedom of action of the grantor of the concession and at any rate it is not all that clear that the enumeration in Article 2 is intended to be exhaustive also as regards this party to the contract.

For this reason it is from Article 3 of Regulation No 67/67 that I prefer to obtain the answer to the question what limitations on the freedom of action of the grantor of exclusive dealing rights are acceptable. In other words I consider it more sensible in the course of my examination of the problems of interest in this case, to concentrate on this provision and in particular on subparagraph (b).

In this provision, an introductory sentence — which I do not now need to read verbatim — contains a reference to

making it difficult to obtain the goods to which the contract relates from other dealers within the common market; in the example cited under (2) reference is further made to preventing goods to which the contract relates from being obtained from elsewhere within the common market.

The description of the points of view of the parties to the proceedings has already shown that Van Vliet clearly places the emphasis on the lastmentioned example and on the word 'prevent'. Above all it thus arrives at the view that in the case of customers in the Benelux countries, the exclusion of supplies from *one* Member State does not amount to preventing the acquisition of goods to which the contract relates from elsewhere within the common market; accordingly the acquisition of supplies from elsewhere has not been rendered impossible and the exclusive dealer has no absolute territorial protection; for that reason the proviso constituted by Article 3 of Regulation No 67/67 does not apply.

At first sight these arguments seem very attractive. After hearing in the course of the proceedings the considerations put forward and inferences drawn by the Commission, I am left with the impression, however, that Van Vliet's point of view is not unassailable and invulnerable.

In saying this I am not so much thinking of the Commission's reference to other language versions of the provision which in my view, taken together, yield the same meaning and hardly compel the conclusion that 'making it difficult' and 'prevent' essentially amount to the same thing. Rather it is the reference to the construction of the legislation which is of importance in the first place. It follows from this that the introductory sentence to subparagraph (b) of Article 3 contains the statement of principle whereas (2) merely sets out an example. In interpreting the matter it is therefore the first part which must be given the greater weight, or at least no binding criterion can be derived from the example. Since however the introductory sentence only refers to 'making it difficult' this does indeed suggest the interpretation that Article 3 itself causes situations in which only the purchase from *one* Member State is excluded. In fact, in a case of prevention of all parallel imports one cannot really speak of *making difficult,* for this would then make it *impossible* to obtain goods to which the contract relates from other dealers within the common market.

In addition to this first part of a line of argument which, looked at by itself, might not perhaps — as is argued by the Commission — be regarded as wholly persuasive, there are however other considerations which, taken as a whole, suggest that the Commission's point of view is correct.

In this respect it seems useful to recall that in the framework of the exempting regulation issued pursuant to Article 85 (3) of the Treaty, Article 3 of the regulation has the purpose of making it clear that the agreement in question — as is said in Article 85 (3) — must not contain any restrictions which are not indispensable for the achievement of the objectives mentioned in Article 85 (3) and that they must not open up the possibility of excluding competition in respect of an appreciable part of the relevant goods. Since one is here dealing with an important reservation one is forced to the conclusion that provisions which were made for its implementation must be interpreted strictly.

I am further reinforced in taking this view by the recitals to Regulation No 67/67 and by the history of that regulation.

As regards the statement of the reasons for the regulation it is noteworthy that this specifically emphasizes — and clearly this must relate to Article 3 — that there must be a possibility of parallel

imports which ensure competition at the distribution stage. To refer to parallel imports suggests immediately that one ought to think in terms of direct imports from the Member State of the grantor of the concession.

At any rate it is significant that the recital to the regulation refers to parallel imports *simpliciter,* so that one cannot in this respect discern any permissible limitations or differentiations. In this connexion I am also thinking of the relevant case-law of this Court — for instance in Case 22/71, Judgment of 25 November 1971, *Béguelin Import Co and Others* v *SAGL Import Export and Others* ([1971] ECR) — which emphasized the importance of parallel imports where it states that there must be no impediment to goods from other Member States being imported into the protected territory, and that there must be no possibility of preventing parallel imports. This doubtless suggests that provisions concerning such actions must be interpreted strictly. In support of this view there is also the fact that in this connexion the text-books (e.g. Mestmäcker ,Europäisches Wettbewerbsrecht, p. 242) state that it is general concept of European competition law that there must be no limitations on access to the market, that parallel imports from other Member States must not be prevented, for it is only in this way that one can achieve a correction of the price and marketing policy of undertakings which continues to relate to individual national markets and which operates prices which are differentiated according to the various markets.

Now, as regards the history of the origin of Regulation No 67/67, it can easily be demonstrated that in interpreting Article 3 in relation to the exclusion of parallel imports from a single Member State, it allows no fundamental view other than that just referred to. In this respect Regulation No 153/62 of the Commission of 3 May 1962 (OJ 1962, No 139) is of importance. It provides for simplified notification formalities in respect of exclusive dealing agreements to which only two undertakings are a party and by which one party undertakes with the other to supply only to the latter particular goods intended for resale within a defined area of the common market. It is important, however — and this can be inferred from the relevant form — that the fact that the declarant states that the transfer of exclusive representation does not make it more difficult for intermediaries or consumers to acquire the product to which the contract relates from another dealer or from some intermediary within the common market. The basic Regulation No 19/65 of the Council on the application of Article 85 (3) to certain categories of agreements expressly refers to this regulation with its far-reaching concept of 'making difficult' which does indeed remind one of the introductory sentence in Article 3 (b) of Regulation No 67/67. In the recitals to this regulation it is stated that the Commission has by its practice, especially by Regulation No 153/62, made it known that in connexion with certain groups of agreements which are particularly likely to distort competition in the common market, no relaxation can be considered of the procedure laid down by Regulation No 17/62 (OJ 1962, No 139). From this one may very well draw the conclusion — as was done by the Commission — that Regulation No 67/67 is intended to fulfil the function of safeguarding continuity in dealing with and assessing exclusive dealing agreements, and this also involves a strict construction of clauses concerning parallel imports.

Finally, against the background of these basic findings which are important for the purpose of interpreting Regulation No 67/67, one can still set the following further consideration.

If an exclusive dealing agreement only provides for the exclusion of parallel imports from *one* Member State into the

territory covered by the contract and if there is no reference to the other Member States then there can really be only two possible interpretations.

It is conceivable that in fact only the market of the excluded Member State can be considered for the purposes of possible parallel acquisitions and that therefore there was no real need for mentioning other possibilities of acquisition which did not exist. On this assumption the exclusive dealing agreement with its limited prohibition on exports, in conjunction with all the accompanying circumstances which, when considering it, have to be taken into account, that is to say, in conjunction with the conduct of the grantor of the concession, does indeed result in the exclusive dealer's enjoying absolute territorial protection.

If on the other hand there are actual possibilities of also obtaining supplies in other Member States then it must be assumed that the limitation of the export prohibitions to one Member State is because the conditions on its market are of particular interest in regard to parallel imports. This seems particularly likely if the excluded Member State happens to be the territory in which the grantor of the concession is established. After all, the grantor will be especially concerned with the market in his immediate vicinity; probably it is there that his main customers are established (indeed, as we have heard this was so in the case of Dalle Crode); and here the conditions of competition will ensure market conditions that would render parallel purchases into the area covered by the concession particularly attractive; at any rate generally rather more attractive than such purchases from a Member State where the exclusive dealer exercises a more limited sales activity.

In both cases it cannot be lightly denied that the clause in the exclusive dealing agreement prohibiting exports to the Member State of the grantor of the concession can be of particular importance for conditions of competition. There can therefore be no question of tolerating such limitations within the framework of the regulation which exempts categories, and which is really intended for essentially harmless restrictions of competition.

In my view all this forces one, when interpreting Article 3 of Regulation No 67/67 to side with the Commission and to treat the exclusion of parallel imports from the Member State of the grantor of the concession, even where such exclusion does not apply to other Member States, as preventing or making difficult the acquisition of goods. In this context it is clearly also irrelevant – and this covers the other constituent parts of the question referred – whether there is an actual possibility of purchasing in other Member States and whether effective use is made thereof.

Accordingly the request for a preliminary ruling made by the Gerechtshof, Arnhem, ought to be answered as follows:

Exclusive dealing agreements entered into between a manufacturer in one of the Member States and an exclusive dealer in another Member State which contained provisions to the effect that purchasers in the Member State in which the manufacturer is established are prevented from exporting the goods to which the contract relates into the territory covered by the contract are

included amongst the agreements which under Article 3 of Regulation No 67/67 of the Commission are excluded from exemption. In considering such agreements it makes no difference that customers in the territory covered by the contract are in fact able to obtain the goods to which the contract relates from elsewhere in the common market outside the Member State in which the manufacturer is established and that use is made of such possibility.