OPINION OF MR ADVOCATE-GENERAL LAGRANGE DELIVERED ON 27 FEBRUARY 1962[1]

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Mr President,
Members of the Court,

This case — the first submitted to you under the provisions of Article 177 of the Treaty establishing the European Economic Community — is of importance under that head alone, since it involves the working of a procedure for the submission of preliminary questions which is apparently designed to play a central part in the application of the Treaty. The progressive integration of the Treaty into the legal, social and economic life of the Member States must involve more and more frequently the application and, when the occasion arises, the interpretation of the Treaty in municipal litigation, whether public or private, and not only the provisions of the Treaty itself but also those of the Regulations adopted for its implementation will give rise to questions of interpretation and indeed of legality. Applied judiciously — one is tempted to say loyally — the provisions of Article 177 must lead to a real and fruitful collaboration between the municipal courts and the Court of Justice of the Communities with mutual regard for their respective jurisdictions. It is in this spirit that each side must solve the sometimes delicate problems which may arise in all systems of preliminary procedure, and which are necessarily made more difficult in this case by the differences in the legal systems of the Member States as regards this type of procedure.

The present case is important in another respect. It bears on the interpretation of Articles 85, 86, 87 and 88 of the Treaty, a task which at best is not easy,

1 — Translated from the French.

since it affects one of the most sensitive elements of the Common Market and one in respect of which it is particularly necessary to reconcile the public good with legal certainty. Nevertheless, the public good with legal certainty. Nevertheless, the publication in the Official Journal of 21 February 1962 of the First Regulation Implementing Articles 85 and 86 put an end to the period of transition, and accordingly some of the most controversial questions raised during that period no longer have to be answered, while the solution of others is to a fairly considerable extent made easier. It may well be regretted that the Court never had the opportunity of resolving the legal uncertainties which were particularly evident during the transitional period, and which, sustained by the differing attitudes of the Member States, seriously prejudiced the early working of the anti-cartel law contained in the Treaty. However, the task of this Court and of the national courts will be simpler.

I — Facts

Here is a brief summary of the facts.

Robert Bosch GmbH, a company incorporated under German law, maker of refrigerators in Stuttgart, takes care to include in all sales contracts which it makes with its national buyers a clause under which 'Bosch products may not be exported abroad either directly or indirectly except with the permission of Bosch'. This provision is chiefly aimed at protecting the sole agency right which the Bosch Company grants for the sale of its products abroad. For the Netherlands this sole agency right has been, since 1903, in the hands of the van Rijn Company.

In the years 1959 and 1960 the Dutch company de Geus imported from Germany Bosch refrigerators which it bought from German undertakings who had bound themselves to Bosch not to export these products. On this ground, Bosch and van Rijn brought an action before the Rotterdam Court against de Geus, in which they sought to have such activities on the part of de Geus declared illegal. However, de Geus, defendant in this action, contended *inter alia* that the agreement on which the plaintiffs relied was in conflict with the EEC Treaty, and was void by virtue of Article 85 (2) of this Treaty, since this agreement had the object or effect of preventing, restricting or distorting competition within the Common Market. The Court was of opinion that in the present stage in the setting up of the Common Market, Article 85 did not have the effect of nullifying any agreements in conflict with its provisions. The Court therefore upheld the contention of the plaintiffs.

On 8 November 1969 de Geus appealed against this judgment. Its contention again was that the agreement was void by virtue of Article 85 (2) of the EEC Treaty. The respondents, Bosch and van Rijn, disputed this contention and the Court of Appeal of The Hague, considering that a question had arisen involving the interpretation of the EEC Treaty, on which a decision was necessary, decided in its judgment of 30 June 1961 to ask the Court of Justice of the EEC, under Article 177 of the Treaty, 'to give a ruling on the question whether the prohibition on export imposed by R. Bosch GmbH, established in Stuttgart, on its customers and accepted by them by way of contract, is void by virtue of Article 85 (2) of the EEC Treaty as far as exports to the Netherlands are concerned.'

On 10 July 1961 notice of this judgment was given to the Court of Justice by the Registrar of the Court of Appeal of The Hague. However, on 21 September 1961 Bosch and van Rijn lodged a petition in cassation against the same judgment, pleading that the Court of Appeal of The Hague was in error in referring the question to the Court of Justice of the European Communities. Official notice of this appeal, registered

with the Court of Appeal of The Hague, was given by a notice from the Registrar of that court to the Court of Justice on 10 October 1961.

After the petition in cassation had been lodged, counsel for Bosch and van Rijn, in an exchange of correspondence with the Registrar of the Court of Justice of the European Communities, expressed his view that the Court of Justice, before deciding on the question submitted by the Court of Appeal of The Hague, should await the outcome of the proceedings in cassation since, under the final paragraph of Article 398 of the Dutch Code of Civil Procedure, the execution of a judgment given on appeal is suspended by a petition in cassation.

Counsel for de Geus, on the other hand, expressed the view that the petition in cassation had no effect on the case pending before the Court of Justice of the European Communities, and also that under Dutch law, the judgment of the Court of Appeal of The Hague was a preparatory decision within the meaning of Article 46 (2) of the Code of Civil Procedure, to which Article 398 thereof was not applicable, since no appeal or petition in cassation can be lodged against such preparatory decisions or judgments before the final decision or judgment is given.

By letter dated 19 October 1961 the Registrar of the Court of Justice of the European Communities informed the parties that in the view of the Court the fact that a petition in cassation had been lodged against the judgment of the Court of Appeal of The Hague dated 30 June 1961 did not automatically involve a suspension of the proceedings pending before the Court of Justice. These proceedings thus continued in accordance with the special provisions of Article 20 of the Protocol on the Statute of the Court of Justice of the European Economic Community and Article 103 of the Rules of Procedure. The parties in the main action, the Commission of the EEC, and four of the Governments of the Member States, namely the Dutch, German, French and Belgian Governments, submitted observations, and the case was argued orally.

II — Legal Analysis

I propose to examine the following three questions: 1. Is the Court of Justice properly seised of the case in such conditions that it can give judgment forthwith? 2. Has the Court jurisdiction to decide the question or questions put to it, and if so, to what extent? 3. If it has jurisdiction, what answers should it give?

A — *Is the Court of Justice properly seised of the case so that it can give judgment forthwith?*

It is not in doubt, nor has it been disputed, that the Court of Justice was properly seised of the case by the Court of Appeal of The Hague. But there remains the question whether the petition in cassation subsequently lodged by one of the parties against the judgment referring this matter has the effect of staying the decision of our Court until such time as the Court of Cassation of the Netherlands, the Hoge Raad, has given judgment. Of course the question is not affected by the decision of our Court, taken in a sense as a matter of internal procedure, that the proceedings should be allowed to continue; in fact the Court could decide otherwise only by issuing a formal judgment, because such a decision would have involved a matter of substance, whereas by allowing the proceedings to continue, the Court has enabled this question also to be left open.

(a) In the first place, it is open to question whether the matter is not settled by Article 20 of the Protocol on the Statute of the Court of Justice of the European Economic Community, whereby:

'In the cases governed by Article 177

of this Treaty, the decision of the court or tribunal of a Member State which *suspends its proceedings* and refers a case to the Court shall be notified to the Court by the court or tribunal concerned.'

It has been suggested that by virtue of this provision, *all proceedings in the national legal system,* including normal appellate proceedings (appeal, cassation, etc.) are automatically suspended by the very fact of the reference to the Court of Justice.

I am unable to agree. The text refers to '*the decision of the court or tribunal of a Member State* which suspends its proceedings and refers a case to the Court . . .' This can refer, in my view, only to the suspension of proceedings *before that particular court or tribunal of a Member State,* the words 'which suspends its proceedings' being equivalent to the words 'which stays its decision'. No court can have the power of deciding even provisionally to suspend the right of appeal. Moreover, as we shall see in a moment, in the municipal legal systems of those Member States where a procedure for obtaining preliminary judgments exists, it is the rule — or at least a common practice — that ordinary appellate procedure is available against judgments or orders staying proceedings. 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. The view which I am unable to accept would therefore rest on the implicit acceptance of an established principle so that we would in effect have to read the words of Article 20 of the Protocol ('the decision of the court or tribunal of a Member State which suspends its proceedings') as meaning 'the decision of the court *by virtue of which all domestic proceedings* are suspended', which is quite different. Moreover, it cannot be the task of our Court, particularly at this stage of the case, to decide such a question, since it would amount to a decision on the admissibility of a petition in cassation in the Netherlands, of which clearly the Hoge Raad is the sole judge. It is possible that that Court would be able, or even bound, to refer to us a question on the interpretation of Article 20 in this connection, but at present we are seised only by the Court of Appeal of The Hague, which is not consulting us at all on that question.

(b) We must, therefore, examine the problem in a wider context and, in accordance with the practice of this Court, we must take account of the general principles contained in the municipal law of the Member States. In particular, I wish to refer to the law of France and the law of Germany, in both of which countries the system of preliminary rulings is well established.

In France the basic principle to be followed is that each of the courts of different degree should respect the powers of the other. As concerns the procedure in the main action, the judgment containing the stay suspends only proceedings in the court which has ordered the stay; the normal means of appeal against the judgment (appeal or cassation) are not barred.

As regards procedure before the court to which reference of the preliminary question is made, the basic principle is that that court must decide as to its own jurisdiction, and no more. Thus, it cannot enquire into whether the reference was justifiable, as to whether it was essential to judgment in the main action etc.; by so doing it would trespass upon the jurisdiction of the original court.

At the same time the course of the proceedings in the original jurisdiction cannot be ignored altogether, because the court cannot give judgment unless it possesses a good 'legal title' to do so. Thus for example, if the original court loses patience and gives judgment on the

merits without awaiting the preliminary ruling, the court to which reference for the latter is made is obliged to decline to give judgment.[1] The same principle applies where the judgment which refers the question for preliminary ruling is itself quashed by the court of cassation.[2] On the other hand, if the judgment referring the question for a preliminary ruling becomes final, then the preliminary ruling must be given without awaiting further proceedings, *even though a petition in cassation has been entered against the original judgment,* since such a petition 'cannot suspend the effects' of the judgment.[3]

All these solutions are based on the need to maintain procedural consistency and to avoid confusion, while respecting the boundaries between different jurisdictions.

In Germany, it appears that the same rules govern most cases staying proceedings. In particular it is a principle that judgments staying proceedings are subject to ordinary appellate procedure (§.252, ZPO). However, there is an important exception in respect of stays made under Article 100 of the Basic Law, by virtue of which the ordinary courts are bound to refer to the Constitutional Court every case which they consider to turn on a legal provision which they regard as unconstitutional, or which necessitates a decision as to whether a particular rule of public international law is part of German law and is directly binding on the parties. According to the majority of learned authors and, it appears, according to the unanimous view of the courts of appeal, the judgment ordering the stay is not, in this instance, subject to appeal ('Beschwerde'). This view is based in particular on the exclusive jurisdiction of the Constitutional Court.

There is clearly a certain analogy between this rule and the position under Article 177, both on account of the strong element of *public policy* which affects both procedures and because Article 177 is also in part a matter of constitutional law. It is quite possible that the German courts, when the case arises, will see the analogy and will regard a reference to the Court of Justice as effectively suspending all appellate proceedings against the judgment containing the reference, and not merely the proceedings in the court which ordered the reference. This is clearly a matter, however, for the German courts alone.

Lastly, it may be noted that in Italy the legislature has intervened. Law No 204 of 13 March 1958 which ratifies the Protocols on Privileges and Immunities and on the Statute of the Court of Justice, by Article 3 provides as follows: 'In applying Article 150 of the Euratom Treaty, Article 21 of the Protocol on the Statute of the Court of the EAEC, Article 177 of the EEC Treaty, and Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, courts of ordinary or special jurisdiction shall make an order stating the terms and effect of the request for a preliminary ruling and directing the immediate despatch of the record to the Court of Justice and *suspending the action in question.* The registry shall ensure that a copy of the said order on ordinary unstamped paper shall be sent to the Registry of the Court of Justice at the same time as the record by registered letter with acknowledgment of receipt.'

Can the use of the words 'suspending the action in question' rather than '*the procedure*' be taken to mean that the Italian legislature intended to provide that appeals should be impeded by the issuing of the judgment containing the reference? Again, the national courts alone have jurisdiction to decide this question. However, it may well be that

1 — Conseil d'Etat, Reynaud, 9 May 1913. Rec. des arrêts du Conseil d'Etat, p. 52.
2 — Conseil d'Etat, Ministre de la Justice, 13 April 1907, Rec. des arrêts du Conseil d'Etat, p. 354.
3 — Conseil d'Etat, Elections d'Yholdy, 16 November 1923, Rec. des arrêts du Conseil d'Etat, p. 732.

such a provision was unnecessary if it is remembered that the reference is made by simple order and that appellate proceedings in a case of this nature would be automatically suspended under Italian law.

The Court will no doubt appreciate from this survey that the practice of the six Member States of the Community discloses no incontestable rule of law which prescribes the automatic suspension of a right of appeal against judgments ordering proceedings to be stayed pending the decision of a preliminary question, and which would mean that the Court of Justice would be able to dispense with any examination of the domestic proceedings. In particular, no such rule appears to exist in the Netherlands. On the other hand, we have seen that no such provision is to be found in the Treaty, Article 20 of the Protocol on the Statute of the Court being incapable in my view of bearing this interpretation.

It therefore seems necessary to consider whether, at the time when the Court is called upon to give judgment, it has a good 'title' enabling it to do so.

I set aside the argument that the judgment of the Court of The Hague was only a preparatory, and not an interlocutory, judgment, and accordingly could not be subject to proceedings in cassation under the combined provisions of Articles 336 and 399 of the Netherlands Code of Civil Procedure. This question clearly relates to the admissibility of proceedings started before the Court of Cassation of the Netherlands and is clearly a matter solely for that court's jurisdiction. We can do no more than take cognizance of the petition and discover whether it has the effect of automatically suspending the order of the Court of Appeal concerning the seisin of our Court.

The difficulty arises from the terms of Article 389 of the Code of Dutch Civil Procedure:

'except in cases where the judge orders provisional execution, the petition in cassation shall have a suspensory effect'.

I do not think, however, that the reference to the Court of Justice of a question for a preliminary ruling under Article 177 of the Treaty can be considered as 'a measure of execution' in the procedural sense of this term, that is, as affecting the parties. The collaboration of the parties is not required, and the action remains as it is. Furthermore, there could be no question of provisional execution in such a case. The procedure is one which is largely governed by considerations of public policy; it operates without the active participation of the parties and does not affect their property or legal relations. Moreover, even were there is doubt, this Court would not be in a position to decide a question of national law. It can apply rules of national law only when they are clear and incontrovertible. In the present case, this Court has been properly seised and is bound to make a decision, once it recognizes the question as one within its jurisdiction. It is only if the judgment of the Court of Appeal of The Hague should be quashed, and consequently retroactively annulled, that this Court would have to abstain, because in that event the 'title' which it requires in order to deliver a decision, namely the judgment referring the matter, would no longer exist.

There is undoubtedly a risk that this might occur after this Court has given its judgment, which would accordingly be without legal effect as to the judgment in the main action. This is a risk, however, which ought in my opinion to be taken, particularly in a case like the present one when the principles underlying the interpretation which is sought from this Court are of an importance which far exceeds the interests of the parties to the action, whose rights are moreover quite adequately safeguarded by the national procedure and by the jurisdiction of the national courts.

B — *Has the Court jurisdiction to decide the question or questions referred to it, and if so, to what extent?*

I refer once more to the words used by the Court of Appeal of The Hague in its judgment:

'Requests the Court of Justice of the EEC to give a ruling on the question whether the prohibition on export imposed by R. Bosch GmbH of Stuttgart on its customers and accepted by them, by way of contract, is void by virtue of Article 85 (2) of the EEC Treaty as far as exports to the Netherlands are concerned.'

If this request were read literally there can be no doubt that this Court would have to declare itself without jurisdiction to give a decision.

It will be remembered that Article 85 (2) provides that:

'Any agreements or decisions prohibited pursuant to this Article shall be automatically void.'

The question therefore is whether or not the contracts in question come within the prohibition imposed by Article 85 (1). There is no text conferring jurisdiction over such a question on the Court of Justice.

In fact, during the transitional period prior to the promulgation of the Implementing Regulation, the only proceedings which the Court could entertain were those impugning a reasoned decision of the Commission, made in pursuance of Article 89 (2) of the Treaty, and allegedly made in breach of the 'principles laid down in Articles 85 and 86', and after an investigation made at the request of a Member State or of its own motion. This was the only power conferred on the Community Executive, and accordingly on the Court by virtue of general jurisdiction to review the legality of acts of the Commission under Article 173.

It is the function of the Regulation adopted in pursuance of Article 87:

'to define the respective functions of the Commission and of the Court of Justice in applying the provisions laid down in this paragraph'; (subparagraph (d)), and also,

'to determine the relationship between national laws and the provisions contained in this Section or adopted pursuant to this Article'. (subparagraph (e))

The Regulation confers no particular power on the Court beyond the general power of review of the legality of acts of the Commission. The powers of the latter under Article 85 consist first, of giving 'negative clearance' (Art. 2 of the Regulation):

'Upon application by the undertakings or associations of undertakings concerned, the Commission may certify that, on the basis of the facts in its possession, there are no grounds under Article 85 (1) or Article 86 of the Treaty for action on its part in respect of an agreement, decision or practice; secondly the Commission is empowered to give decisions, on request or of its own motion, on infringements of Articles 85 and 86; and thirdly, it has an exclusive power to declare the prohibitions contained in Articles 85 and 86 inapplicable by virtue of Article 85 (3).'

I shall examine the question whether, and if so how far, the national courts retain their jurisdiction after the promulgation of the Regulation to decide as to the prohibitions contained in Article 85 (1), and as to the effects of automatic annulment which these prohibitions involve under paragraph (2). It is, however, abundantly clear that the Court of Justice is without jurisdiction in these matters unless it is seised of an action against a decision of the Commision.

This was the point taken on behalf of the French Government in its observations on this case when it urged the Court to find itself lacking in jurisdiction for these reasons.

Even if this Court is plainly without jurisdiction to give a decision on the request which emerges from the terms of the judgment in the present case, interpreted literally, it is nonetheless competent by virtue of Article 177 to give decisions on questions of interpretation of the Treaty. There thus arises the problem whether this Court ought first of all to examine and interpret the judgment containing the reference in order to extract from it what is within this Court's competence, namely, a question of the *abstract* interpretation of the Treaty, and which, emerging from the case in hand, underlies the request. In my view, such an examination can and should be made. The grounds on which the judgment is based clearly disclose the questions of abstract interpretation on which the Court of Appeal of The Hague required guidance. The reasoning must be given *in extenso:*

'The second ground of appeal is to the effect that the court of first instance was wrong in deciding that Articles 85 to 90 of the EEC Treaty are not applicable to the prohibitions on exporting.

No decision in these terms occurs in the judgment of the court below, but it is clear from the appellant's explanation that its objection is directed against that court's decision that at the present time the agreement is not nullified by Article 85 (2) of the EEC Treaty, a decision based by the Court on the view that the Common Market was not brought into being by the mere fact of the coming into force of the EEC Treaty, but on the contrary is referred to within the context of the provisions of the Treaty as being still *in statu nascendi.*

The appelant replies that the scheme of the EEC Treaty is that the agreements referred to in Article 85 (1) are *eo ipso* void, that by virtue of Article 88 the national authorities are provisionally empowered to rule on the admissibility of agreements, decisions and concerted practices but by the German law applicable here the agreements in question are void so long as no approval has been granted under Article 88.

The respondents on the other hand contend first, that Articles 85 to 90 of the EEC Treaty are not directly applicable to nationals of signatory States and, furthermore, that even if a direct obligation is assumed, the arrangements incorporating the prohibition on export are still valid, on the grounds set out in the judgment of the court.

It is apparent from the above that a question arises regarding the interpretation of the EEC Treaty, on which a decision is necessary, and the court will therefore, before considering further the grounds of appeal, ask the Court of Justice of the EEC, under Article 177 of the Treaty, to give a ruling on this question.'

It seems that from this reasoning there emerge two questions relating to the interpretation of the Treaty: first, the question of its applicability *ratione temporis;* are the provisions of Articles 85 to 90 directly applicable to subjects of the Member States, at least at the present time? The second question concerns the effects of the nullity imposed by Article 85 (2); is this nullity effective so long as authorization has not been given under Article 85 (3) or rather, to quote the text more accurately, so long as the prohibition imposed by Article 85 (1) has not been 'declared inapplicable' as provided in Article 85 (3)?

These two questions must be answered, and the answers must take account of the provisions of the Implementing Regulation, which is now in force, and which lays down rules of jurisdiction and procedure which come into force immediately and even in respect of pending cases in which judgment has not been given.

On the other hand, it is much more doubtful whether this Court should answer a third question which has arisen from the arguments, namely,

whether the clauses restricting export come within the ambit of the prohibition contained in Article 85 (1) and more particularly, whether they 'may affect trade between Member States'. It is more doubtful for two reasons: first, because the question in the wording of the judgment containing the reference is put in an entirely concrete form, and unlike the other questions, does not appear in the reasoning; secondly, because it may be doubted whether it is possible to answer it in an entirely abstract way, as an interpretation of the Treaty. However, I shall make an effort to do so, since that is the only way of finding out whether a distinction can be drawn between abstract interpretation of the Treaty and application of its terms to the facts of this case.

Finally, it may be thought that yet another question is raised by the judgment containing the reference, that of the applicability of German law. The Court of Justice's lack of jurisdiction seems quite plain as far as this question is concerned, whether it is a question of the actual application of German law or of its applicability to the facts of the case, that is to say, a problem of conflict of laws. No question of interpretation of the Treaty seems to arise here.

C — *What answers should the Court give?*

(i) Are the provisions of Articles 85 et seq. directly applicable, at least at the present time, to nationals of Member States?

It will be recalled that two main objections have been made to the principle of direct applicability; the first was that the anti-cartel provisions of the Treaty could not be applied until the Common Market had become a reality, that that was not yet the case, since the stages of implementation that were envisaged are still far from being entirely achieved, despite various means of 'acceleration'. This was the view of the Rotterdam Court in this case, and accordingly deserves mention. It is not, in my opinion, the right view. The application of Articles 85 to 90 is not only a necessary factor, but one of the most important ones, in the gradual establishment of the Common Market, rather than merely one of the ways in which it functions. Moreover, the actual provisions of the Treaty leave no room for doubt as to this; the only problem relates — or rather related — to the transitional period which ran from the entry into force of the Treaty to the publication of the first Implementing Regulation. It is purely technical legal problem, well known in national law, of discovering whether a statute (in this instance the Treaty) has any effect before the executive regulations for which it provides have been made. This problem is now historical; Community legislation, since the promulgation of the Regulation, and taking into consideration the transitional provisions of the Regulation, is now applicable in its entirety. Thus the first objection is unfounded and the second has now become pointless.

As far as the Netherlands is concerned, an obstacle peculiar to that country has now been removed. This was the effect of the law of 5 December 1957, which made the application of Articles 85 and 86 subject to the preliminary intervention of the authorities competent under national law; Article 2 of this statute provides, in effect, that

it (the statute) shall be deemed to be repealed from such time as there shall enter into force provisions promulgated by virtue of Article 87.

This has now come about.

(ii) Is the 'automatic nullity' referred to in Article 85 (2), with regard to agreements prohibited by Article 85 (1), effective whenever the exemption provided for in Article 85 (3) does not operate?

We have already seen that the Treaty

confers no special powers on the Court of Justice in this matter, and that the Court only has its ordinary power of reviewing the legality of decisions of the executive. Thus, insofar as Article 85 (1) applies, the national courts have jurisdiction to determine the validity of contracts under its provisions, and to determine the effect of the nullity affecting prohibited agreements. Moreover, Article 1 of the Regulation makes it clear that the prohibition under Article 85 (1) operates automatically 'no prior decision to that effect being required'.

Since the Treaty, by virtue of its ratification, is incorporated into the national law, it is the function of national courts to apply its provisions, except when powers are expressly conferred on Community organs. In the present context no such provision is to be found in the text of the Treaty.

Such provisions are to be found, it is true, in the Regulation. The first emerges from Article 9 (1), and relates to exemption from prohibition under Article 85 (3):

'Subject to review of its decision by the Court of Justice, the Commission shall have sole power to declare Article 85 (1) inapplicable pursuant to Article 85 (3) of the Treaty.'

Here the situation is plain; if the Commission has sole power then national courts must necessarily be without jurisdiction. Such a measure is, moreover, clearly within the very wide limits within which delegation under the Regulation is permitted by Article 87.

On the other hand, the Regulation confers no exclusive powers for the application of Article 85 (1). This results in two problems, one arising from the existence of *concurrent jurisdiction*, and the other relating to the *interaction* between the application of Article 85 (1) and (3), not to mention Article 86 on dominant positions.

Problems arising from concurrent jurisdiction

I have already mentioned that the Regulation confers three powers on the Commission — (1) to give a negative clearance in the sense of Article 85 (1) or of Article 86; (2) to determine infringements of Article 85 or Article 86; and (3) to decide on the application of Article 85 (3).

I shall leave on one side the last of these three, which is the sole power I have just mentioned.

As far as negative clearances are concerned, the way in which the text is drafted (' . . the Commission may certify that, on the basis of the facts in its possession, there are no grounds under Article 85 (1) or Article 86 of the Treaty for action on its part in respect of an agreement, decision or practice') leaves the inference that a negative clearance does not prevent national courts from exercising their powers of determining the compatibility of an agreement with Article 85 (1) (or the existence of a dominant position for purposes of Article 86).

As regards the power of determining an infringement, there is a real concurrent jurisdiction with the resultant danger of conflicting decisions of the national courts and of the Commission (or, ultimately, of the Court of Justice when seised of an application to quash a decision of the Commission).

The Regulation has, it is true, sought to avoid such a result by the following provision, in Article 9 (3):

'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) and Article 86 in accordance with Article 88 of the Treaty; they shall remain competent in this respect notwithstanding that the time limits specified in Article 5 (1) and Article 7 (2) relating to notification have not expired.'

Can one infer from this text, *a contrario*, that once the Commission has 'initiated a procedure under Articles 2, 3 or 6', the 'authorities of the Member States', *including their judicial authorities*, no longer have jurisdiction? This is certainly the case as regards Article 6, which concerns the Commission's sole power to apply Article 85 (3). It is not the case, in my view, as regards Article 2, which concerns negative clearance. It is very desirable, but rather doubtful, as regards Article 3, which relates to termination of infringements. One thing is quite clear in all these cases, that a national court which is seised of a case concerning the application of Article 85 (1) or Article 86 suspends proceedings if it learns that the Commission, perhaps on hearing of the case, on its own account has initiated one of the procedures referred to in Article 9 (3) of the Regulation. The granting or withholding of negative clearance would be an important factor for such a court to take into account. A decision on infringement, particularly if it has been the subject of a judgment of the Court of Justice, would be binding on such a court — legally so, if the principle of *res judicata* be admitted in respect of the same facts — or at least morally so. I feel, however, that it is unnecessary to decide this question in the present case.

(b) *Problems arising from the interaction of Article 85 (1) and Article 85 (3)*

This concerns a basic fault in the system brought about by Articles 85 et seq. of the Treaty, namely, the unsuitability of the administrative provisions for the application of the substantive rules.

Underlying the substantive law is a clear connection between the rules defining the types of prohibited agreement, in Article 85 (1), and those which enumerate the conditions in which the prohibition may be declared inapplicable, in Article 85 (3); this emerges clearly from a reading of subparagraphs (a) and (b) of paragraph (3). Logically, the same authorities or courts, in the course of the same proceedings, should have jurisdiction to decree in respect of one particular agreement, both on the compatibility of the agreement with Article 85 (1) and on the declaration of inapplicability of the prohibition under Article 85 (3). Moreover, the existence of this connecting link, and its presence in the minds of the authors of the Treaty, is clearly demonstrated by the terms of Article 88, which provide that, during the period of transition, relevant municipal legislation shall apply concurrently with the Treaty legislation contained in Articles 85 and 86, since the text underlines the necessity in this concurrent application of paying due regard to Article 85 (3) in particular. Furthermore, it would have been contrary to the most elementary considerations of justice to allow the application of the prohibition contained in Article 85 (1), with the sanction of automatic nullity which attaches to it, with all the consequences which the courts could, and perhaps should, have drawn therefrom, without allowing the enterprises concerned to avail themselves of the provisions of Article 85 (3).

It is for this reason that the doctrine known as *'de l'exception légale'*, a basic principle of French law, was particularly well suited to the needs of the application of the Treaty, even during the transitional period. It would, in fact, ensure that the question of prohibition and that of any possible exemption from prohibition would be examined at the same time by the same authority, and if necessary by the same court; there would then be no difficulty in respect of the effects of the automatic nullity.

The same doctrine, in my view, was the only one capable of justifying the immediate application of Article 85 in countries which otherwise have no anti-cartel law; the ordinary law courts must be as competent to apply Article

85 (3) as they are to apply Article 85 (1). According to the opposite point of view, i.e. that which would require a decision having constitutive effect for the application of Article 85 (3) — which has been particularly current in Germany and has always been the view of the Commission —, it was clear that the immediate application of Article 85 was impossible as long as the competent national authorities were not empowered to take the decisions required, according to this theory, to give effect to Article 85 (3). This is the argument put forward by the German Government in paragraph IV of its written observations:

'In accordance with Article 88 of the Treaty, the application of Article 85 (3) is entrusted provisionally to the authorities of Member States of the European Economic Community. This being the case, the national law of each State must decide which is the competent authority.'

It was thus for Member States which had no appropriate legislation to set up the necessary procedures themselves, but when this was not done, there could be no question, according to this theory, of applying Article 85 in the transitional period in such States, since the operation of Article 85 (1) without the corresponding operation of paragraph (3) is inconceivable. It has even been said that the impossibility of applying this part of the Treaty in those Member States which have no appropriate laws makes it impossible to apply it in the Community at all; this, however, seems to me to go too far. The principle most in conformity with the spirit of the Treaty is that it should come into operation, as and when possible, at the same time as the national legislation.

In fact, the controversy is now over since the Regulation has given the second theory the force of law, and it must be recognized that this accords best with the text of Article 85 (3). 'The provisions of paragraph (1) may however be declared inapplicable in the case of any agreement, etc.'.

The theory depending on *'l'exception légale'* would have required a different text, for example: 'The provisions of paragraph (1) shall be deemed not to apply . . .' or simply 'shall not apply . . .'

It cannot be contended that the Regulation is illegal as being contrary to the Treaty in this respect; to declare such a Regulation illegal would be a step of such gravity that this Court, in my view, ought not to contemplate it except when the illegality is quite plain, which in this case is far from being so.

Nonetheless, the paradox to which I have drawn attention remains, since, unlike the position under Article 65 of the ECSC Treaty, exclusive power is given only in respect of the exemption from prohibition, and not in respect of the decision as to the incompatibility of agreements with the Treaty and their consequent nullity.

It is for this reason that the Regulation has laid down a series of provisions designed to ensure that Article 85 and 86 are applied as a whole and as consistently as possible. The key to the system is the obligation on the part of undertakings wishing to obtain a declaration of inapplicability under Article 85 (3), to notify the Commission of their agreements. The Commission may make a favourable decision with an effect retroactive to the date of notification; Article 4 (1) and Article 6 (1). 'Notification' in this instance comes close to 'request for authorization', and 'declaration of inapplicability' to 'authorization'. (The provisions of paragraph (1) *may be* declared inapplicable . . .'.); despite different terminology, the system plainly draws inspiration from Article 65 (2) of the ECSC Treaty.

Under this system — I have been speaking up to now only of the definitive system applying to agreements made

after the entry into force of the Regulation, and of the system under the national law, since there is both a transitional system and a more flexible system designed to favour certain types of agreement — the consistency of application seems to be adequately safeguarded. Nullity of an agreement which is contrary to Article 85 (1) may always be pleaded before national courts, and, even if a 'notification' is in progress, the courts can rule on the compatibility of the agreement with Article 85 (1), and if necessary, can characterize it as automatically void, at least for the period prior to notification, since it is quite plain that a subsequent 'declaration of inapplicability' can never be retroactive beyond that date. Nonetheless, the national court would do well to await the result of the proceedings before the Commission in order to ascertain whether or not the nullity might be effective after the date of notification.

Is the court legally bound to do so? In my view this cannot be the case in the absence of clear provision. In particular, Article 9 (3) of the Regulation, cited above, seems not to allow such a conclusion. Moreover, there is a strong case for leaving such a decision to the discretion of the national judge, since it is not hard to imagine cases where it is clear that Article 85 (3) is not applicable, and where, after the discovery of the facts and the commencement of the action, 'notification' is made purely with a view to delay. From a legal point of view, the real difficulty would occur when the national court decides that an agreement is prohibited under Article 85 (1) while the Commission (or, possibly, this Court), giving a later decision, takes a different view and as a result regards a declaration of inapplicability under Article 85 (3) as being without object and thus nugatory. This, however, is an inevitable result of a system of concurrent jurisdictions.

As regards those agreements which benefit from the specially favourable system provided for by Article 4 (2) of the Regulation, the national court should show particular caution when the Commission has been notified; a declaration of inapplicability under Article 85 (3) by the Commission in respect of these agreements may be made retroactive to any date at the discretion of the Commission, and accordingly it may antedate the notification (Article 6 (2) of the Regulation).

We are left with those agreements which were in existence at the date of entry into force of the Regulation, for which special provision was made in Articles 5 and 7. Provided they are notified before 1 August 1962 (or 1 January 1964 in the case of agreements benefiting from Article 4), 'the prohibition contained in Article 85 (1) shall apply only for a period fixed by the Commission' to such agreements, provided that the undertakings concerned put an end to agreements 'or modify them in such manner that they no longer fall within the prohibition contained in Article 85 (1) or that they satisfy the requirements of Article 85 (3)'. This means that the Commission's decision may deprive the prohibition of any retroactive effect, preserving the full effect of the agreement in the past, and even in the future, if the parties are given time to bring their agreement within the law; in such a case, the provisions with regard to nullity, which ordinarily have a retroactive effect (*ex tunc*) are completely ineffective.

Here again, no express provision of the Treaty or of the Regulation requires the court to stay proceedings even when notification has taken place, or takes place during the proceedings, but clearly in such cases national courts would have to show great caution in view of the possible consequences of a subsequent favourable decision on the Commission's part. However, national

courts are required to take account of the following provision of the Regulation (Article 7 (1) *in fine*) should such a case arise:

'A decision by the Commission pursuant to the foregoing sentence shall not apply as against undertakings and associations of undertakings which did not expressly consent to the notification.'

This, then, is the way in which, in my submission, the concurrent jurisdiction of the national courts and the Commission in the application of Article 85 (1) and (2), and the exclusive jurisdiction of the Commission in respect of Article 85 (3) must be interpreted. No doubt the result is not altogether satisfactory, but that is the consequence of the double legal compromise which underlies the Treaty, as I interpret it: (i) A compromise between the doctrine of *'l'exception légale'*, which is the only one wholly compatible with the principle of automatic nullity contained in Article 85 (2), and the doctrine of 'constitutive effect' which as in German law, should logically be accompanied by a power given to the cartel authorites to 'declare ineffective' ('für unwirksam erklären') agreements contrary to the law — which involve a concept very different from automatic nullity; (ii) A compromise on jurisdiction, which the Treaty does not settle and which the Regulation, either by design or from supposed lack of power, did not confer exclusively on the Community authorities and Court as is done in the ECSC Treaty.

The Regulation made a great attempt to minimize the difficulties arising from this double compromise. The remaining problems, like those surrounding the system of preliminary rulings, can, I feel, most easily be solved by the growth of a spirit of collaboration between the national courts and the Community authorities. This spirit of cooperation is, as we all realize, a precondition for the success of the Treaty of Rome, and the text in fact at every stage calls for it. I have no doubt that it will be achieved in the judicial sphere just as it has been in the political, economic and social spheres, in public relations as in private contacts. The life of a community could hardly be conceived in other terms.

(iii) Are export restriction clauses prohibited by Article 85 (1)?

This question will be examined shortly and subject to the reservations which have already been made. Care must be taken to avoid taking up a position with regard to the actual case before us, the decision of which, within the framework of our present procedure, is outside the jurisdiction of this Court.

The first point which seems clear, and does not seem to have been contested in the main action, is that Article 85 refers as much to 'vertical' as to 'horizontal' agreements — in other words as much to agreements made exclusively for the benefit of one seller as to those made by several sellers or manufacturers in furtherance of a common interest. Paragraph I of the written observations of the German Government seems to me very much in point. Under German legislation, which is very complete and detailed, vertical agreements are caught by the law, though they are subject to special, less stringent rules. Such rules do not exist in the EEC Treaty legislation, but it is clear that the special features of vertical contracts must be taken into account — in particular insofar as they affect competition — in finally deciding whether such contracts can benefit from the provisions of Article 85 (3).

The Regulation appears to proceed on the assumption that agreements containing export restrictions are caught by Article 85, insofar as Article 4 (2) sets up favourable rules in respect of 'agreements, decisions and concerted practices where: (i) the only parties thereto are undertakings from one Member State and the agreements,

decisions or practices do not relate *either to imports or to exports between Member States'*; and this would seem to be in harmony with the Treaty, which sets up a Common Market, the first condition of which is the removal of obstacles to trade between Member States.

However, it would be difficult to consider the question in isolation from other clauses of the agreements concerned, for example, in this case, those which in principle reserve sales on the internal market to buyers who themselves are bound not to export; and also the clause conferring sole agency on some buyers for distribution in foreign countries, such as van Rijn in the Netherlands; in such cases a whole distribution organization is involved. But there we trespass on a particular case out of our jurisdiction.

Another point which was argued in the main action relates to the meaning of the words 'which may affect trade between the Member States'. Bosch submitted that its distribution system could only increase the trade in refrigerators between Member States, and consequently did not 'affect' trade. Here an abstract question of the interpretation of the Treaty does arise; what meaning is to be given to the word 'affect'? It is clear that in French the word *'affecter'* means 'influence', 'have an effect upon'; the effect might be good or bad; the word does not necessarily carry a pejorative meaning.

However, perceptible nuances exist in the terms employed in the other languages: in Italian *'pregiudicare'* is scarcely more pejorative than *'affecter'*; in German, *'beeinträchtigen'* seems to connote a more unfavourable effect, while in the Dutch text we find *'ongunstig beinvloeden'* which means to exercise an unfavourable influence. As you know, all four languages are authentic, which means that no single one of them is authentic. In such a case, just as when obscurities or contradictions arise in the interpretation of a text in municipal law, we must look to its 'context' or 'spirit'.

I myself am tempted to follow once more the argument of the German Federal Government, developed in paragraph VI-2 of its memorandum submitted to the Court:

'A literal interpretation does not shed any light, but this may be obtained from the sense and purpose of Article 85. This provision is based on the principle laid down in Article 3 (f) of the Treaty, whereby the Community must institute a system ensuring that competition in the Common Market is not distorted. Article 85 then is intended to protect the free play of competition. This principle is violated or (and this is sufficient for the purposes of Article 85) endangered when a restriction on competition within the meaning of Article 85 (1) leads to the diversion of trade from its normal and natural routes, since the increase of trade by one route must normally lead to an unfavourable change in respect of another route. For this reason, every factor which affects trade, even though to no great extent, constitutes an obstacle in the sense of Article 85 (1). Further, this provision does not depend on the obstacles *actually* affecting trade between Member States; it is enough that it 'may' do so. Thus, every obstacle to competition which may have effects of any moment at all on the economy of the Member States may affect trade adversely.

As a result, when asking whether restriction on competition within the Common Market may create an obstacle to trade between the Member States, no guidance can be obtained from the distinction between 'harmful' and 'beneficial' effects, since 'beneficial' effects are normally accompanied by 'harmful' effects. *It is only in the context* of Article 85 (3) of the EEC Treaty that it can be judged whether the favourable effects so outweigh the unfavourable ones as to justify exemption from the prohibition contained in Article 85 (1).

Whether every restriction on competition affecting the economic relations of Member States — however small — may amount to an obstacle to inter-State commerce, or whether this assumption applies only when the restriction attains certain proportions, is a matter of controversy. However, it seems that there must be such a quantitative element. It is true that it does not necessarily follow from the text of Article 85 (1) of the EEC Treaty that the danger of an obstacle to inter-State commerce only exists when the restriction on competition concerns an essential part of the actual or potential trade concerned. However, a restriction on competition would only be likely to hinder trade between Member States if its effect on the market was of some significance.'

This elaboration is, in my submission, a reasonable interpretation of the words, 'which may affect trade between the Member States' as they appear in Article 85 (1). It may be given in the abstract, quite independently of the facts of any case.

Nonetheless, I cannot propose that this Court adopt it, since as I have already suggested, this question is not really raised by the judgment referring the case for preliminary rulings.

The other questions of interpretation of Article 85 which might arise from the action are inseparable from the trial of the case itself, and in any case, have not been the subject of a request for interpretation on the part of the Court of Appeal of The Hague.

The matter of costs remains. It is a difficult one, when it is borne in mind that this Court does not hear 'parties' in the strict sense of the word, as a term of civil procedure, the procedure under Article 177 being entirely within the realm of public policy.

In these circumstances various paths lie open: one could draw the logical conclusion of the fact that this procedure is a matter of public policy by deciding that the whole costs should be borne by the funds of this Court; it would be possible to order the costs to be borne by the party which eventually loses the case (though I hardly see the possibility of subjecting the taxation of costs before this Court to the results of proceedings to be resumed before the national courts); alternatively, it could be decided that the parties whose contentions fail before this Court, in the present instance Bosch and van Rijn, should be condemned in costs. Finally, it would be possible for each party to pay its own costs. In my view this last solution is to be preferred.

III — Conclusions

I am of the opinion:

— that in view of the observations which have been laid before the Court, Article 85 of the EEC Treaty should be interpreted as follows:

1. The provisions of Article 85 of the Treaty are fully and directly applicable in the Member States at least from the entry into force of the Implementing Regulation made by virtue of Article 87;

2. The automatic nullity imposed by Article 85 (2) on agreements or decisions prohibited by Article 85 (1) is operative so long as the provisions of that paragraph have not been declared inapplicable by the Commission, on

which exclusive powers have been conferred in such matters by Article 9 of the Regulation subject only to review by the Court of Justice, or so long as the Commission does not avail itself of its powers under Article 7 of the Regulation in respect of agreements, decisions or concerted practices existing at the date of entry into force of the said Regulation;

— that the Court ought to declare itself without jurisdiction to pass judgment on the remainder of the request submitted by the Court of Appeal of The Hague;

— and that each party be ordered to bear its own costs.