On those grounds,

THE COURT

in answer to the questions referred to it by the Hof van Beroep, Ghent, hereby rules:

Agreements to which only two undertakings from one Member State only are party, under which one party agrees with the other to purchase only from that other certain goods for resale and which do not display the features set out in Article 3 of Regulation No 67/67 of the Commission, qualify for the exemption by category provided for in that regulation if, failing exemption, they would fall under the prohibition contained in Article 85 (1) of the EEC Treaty.

Kutscher Donner Pescatore Mertens de Wilmars Sørensen

Mackenzie Stuart O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 1 February 1977.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE-GENERAL MAYRAS DELIVERED ON 7 DECEMBER 1976 [1]

Mr President,
Members of the Court,

This case raises once again the whole question of the assessment of the so-called 'brewery' contracts in terms of Article 85 (1) and the relationship between the Community authorities and the national judicial authorities in the application of that article to those agreements.

The facts are as follows:

On 7 April 1966 the Concordia brewery of Geraardsbergen (Belgium) concluded a contract with a couple running a café under which they received the loan, at a rate of 5 % per annum, of a sum of FB 300 000 repayable in ten years. The café owners undertook, in exchange, not to sell in the course of their business any drinks other than those from the brewery

1 — Translated from the French.

in question or supplied by it with effect from 1 May 1966 and for a period of 25 years thereafter. They further undertook, in the case of a transfer of their property, to pass on this obligation to their successors in title. It should be noted that, even if the loan in connexion with which this undertaking had been given had been repaid in full, the obligation not to obtain supplies from competitors was to continue in force until 1 May 1991, even though there would, strictly speaking, no longer have been any consideration on the part of the brewery except the undertaking to supply the tenants.

On 9 February 1973, the premises in question were made over to Mr and Mrs de Norre. Although they had taken over, in their entirety, the conditions accepted by the original retailers, the new tenants sold drinks other than those from the brewery. In consequence, the brewery brought proceedings before the Court of First Instance at Oudenaarde which, by (interlocutory) judgment of 18 October 1973, ordered them, without however making the order immediately enforceable, to pay the sum of FB 25 000 as damages to the Concordia company, reserving the decision on the final amount of the damages.

On appeal, Mr and Mrs de Norre claimed *inter alia* that the contested contract relied upon by the brewery was prohibited and void by virtue of Article 85 of the EEC Treaty. It was in these circumstances that the Hof van Beroep, Ghent, decided, by interlocutory judgment of 26 May 1976, to stay the proceedings and to refer to the Court of Justice a number of questions on which I am called to advise.

It will be recalled that under Belgian law a 'brewery contract' must be taken as meaning a contract whereby a brewer or a dealer in beer retains, *inter alia,* the exclusive right to supply one or more or all of the beverages sold or offered for sale by a retailer. It will also be recalled that this type of contract has been, in Belgium, the subject of a series of regulations, beginning with the Royal Decree of 28 November 1961, which has since been periodically re-enacted with certain changes, on the last occasion by the Royal Decree of 29 December 1972. These decrees, in their own words, 'are in response to an application concerning brewery obligation' submitted pursuant to Royal Decree No 62 of 3 January 1935, which authorized the introduction of economic regulations concerning production and distribution. These regulations were on each occasion adopted at the request of an 'undoubted' majority of brewers, dealers and retailers and 'no' objection was raised. It imposed on all concerned, until a given date, a number of standard obligation 'freely' undertaken by the members of associations or organizations of producers and distributors in the industry.

It is not for this court to pronounce on the legal effect of the brewery contract in question. But, for the purpose of giving an effective answer to the court which has made the reference and of defining the scope of the questions submitted, I may perhaps be allowed to make it clear that we are concerned with an agreement which, to use the current terminology, is 'new', since it was concluded after 13 March 1962; the only parties to it are undertakings from a single Member State and it does not, strictly speaking, concern imports or exports between Member States. Because of this, notification was not required and it was not notified to the Commission. Moreover, it has not been the subject of a 'complaint' to the Commission by the café owners concerned pursuant to Article 3 of Regulation No 17, of an application for negative clearance within the meaning of Article 2 of Regulation No 17, of an application for individual exemption under Article 85 (3) or, finally, of a procedure initiated of its own accord by the Commission under Article 85 (1). Nevertheless, on 9 October 1969, the Commission decided to set in motion a

general investigation into the brewing industry (JO C 148 of 19. 11. 1969, p. 3), in accordance with Article 12 of Regulation No 17/62 of the Council and, on 18 June 1971, it addressed three individual decisions to two French breweries and a Belgian brewery requesting information pursuant to Article 11 (5) of Regulation No 17, in particular regarding the 'contracts containing an obligation to supply beer' concluded by those breweries (JO L 161 of 19. 7. 1971, p. 2 to 13).

The Court has already, on several occasions, been called upon to give a ruling on the conditions in which the articles of the Treaty of Rome governing competition are applicable to such contracts.

Without having the temerity to, so to speak, computerize the relevant case-law of this Court, I shall first of all endeavour to outline its essential features, at least to the extent to which it is relevant and applicable to a case such as the one with which we are concerned and I propose to do so by analysing the cases in chronological order.

In the operative part of its judgment of 12 December 1967 in *De Haecht* (Case 23/67 [1967] ECR 416-7), the Court held that agreements whereby an undertaking agrees to obtain its supplies from one undertaking to the exclusion of all others [in the case in question a brewery contract] where, taken either in isolation or together with others, they have either as their object or effect the prevention, restriction or distortion of competition, exhibit the elements constituting incompatibilty with the common market as referred to in Article 85 (1) of the Treaty.

The question to be determined is therefore whether, in the light of a combination of objective factual or legal circumstances, the agreement is capable of having some influence, direct or indirect, on trade between Member States, of being conducive to a partitioning of the market and of hampering the economic inter-penetration sought by the Treaty. The effect of such a contract must be viewed in the economic and legal context in which the contract may, *together with others,* produce a cumulative effect on competition.

The Court added that the existence of similar contracts is a circumstance which, *together with others,* is capable of being a factor in the economic and legal context within which the contract must be judged and that, when this point is considered, the agreement cannot therefore be isolated from *all the others* of which it is one.

That judgment appears to me to be in line with the judgment of 30 June 1966 in *La Technique Minière* (Case 56/65 [1966] ECR), in particular the grounds set out on pages 249 and 250 and the operative part of the judgment.

Secondly, when called upon to decide whether 'a contract for the supply of beer concluded *before 13 March 1962* between two undertakings within one Member State relate [s] to imports or to exports between Member States within the meaning of Article 4 (2) (1) of Regulation No 17' and, in addition, whether 'such an agreement [must] be notified in accordance with Article 5 (1) and (2) in conjunction with Article 4 (2) (1) of Regulation No 17', the Court in its judgment of 18 March 1970 in *Bilger* (Case 43/69 [1970] ECR from page 135) held: 'Although when considered as part of a *group* of similar contracts which bind a considerable number of retailers within one State to certain producers established in the the same State such a contract [whether concluded before or after 13 March 1962] *may,* in given cases, *affect* trade between Member States, nevertheless under the terms of Article 4 (2) of Regulation No 17 *these arrangements* are exempt from notification provided that they do not

relate either to imports or to exports between Member States'.

The operative part of the judgment declared that a contract which is concluded between a producer and an independent retailer by which the latter undertakes to obtain his supplies solely from the said producer who is established in the same Member State and the execution of which does not require the goods in question to cross national frontiers does not relate either to imports or to exports between Member States, within the meaning of Article 4 (2) (1) of Regulation No 17 and is, therefore, exempt from the notification provided for in the relevant paragraphs of Articles 4 and 5 of that regulation.

On the question whether the national court has *jurisdiction to make a decision* on the basis of Community law *on the invalidity* of an agreement which, although it is covered by Article 85 (1) of the Treaty, is exempt from notification and has not been notified, the Court held that 'agreements conluded before or after 13 March 1962, which are exempt from notification under Regulation No 17 itself, cannot become void retroactively if they have subsequently to be regarded as subject to Article 85 (1) and (2).' In other words, 'an agreement which is exempt from notification and which has not been notified is fully effective for so long as it has not been found to be void.' This is the condition known as 'provisional validity'.

This was directly in line with the judgment of 9 July 1969 in *Portelange* (Case 10/69 [1969] ECR 316) in which the Court held, *inter alia,* that 'in the absence of an explicit finding that the *individual agreement* in question not only contains all the factors mentioned in Article 85 (1) but does not qualify for the exemption provided for by Article 85 (3) ... every agreement duly notified [or, let me add, exempt from notification] must be considered valid', at least 'so long as the Commission has made no decision under Article 85 (3) and the provisions of the said regulation [Article 15 (6) of Regulation No 17]'.

Meanwhile, on 23 January 1969, the De Haecht brewery had *notified* the Commission of a standard brewery contract (which contained all the clauses of the contested agreements).

It contended that, as a result of this notification, the procedure before the Commission under Articles 2, 3, or 6 of Regulation No 17 had been initiated with the result that, in accordance with Article 9 (3) of the said regulation, the Commission *alone* could decide whether or not the contested agreements complied with the Treaty. In consequence, it claimed that *pending* its decision, the agreements must be regarded as *valid.*

The Tribunal de Commerce, Liège, which was aware of the Court's judgment of 12 December 1967, was, however, reluctant to hold that a procedure had been 'initiated' within the meaning of Article 9 (3) and raised the question whether this did not require, *in addition,* a positive act on the part of the Commission indicating its intention of carrying out that procedure.

Furthermore, as the plaintiff was asking the Tribunal de Commerce to take a decision *forthwith* on the substance of its case, claiming that the contested exclusive supply obligations ought to have been fulfilled, the Tribunal de Commerce, which did not feel that the Court's judgment of 12 December 1967 had removed all doubt about the matter, submitted fresh questions to the Court on 27 June 1972, one of which was whether the nullity of agreements exempted from notification is to be deemed to take effect from the date when one of the contracting parties duly brings an action for it, from the date of the judgment or, finally, from the date of the Commission's decision establishing it.

The meaning of the judgment delivered by the Court on 6 February 1973 in the second *De Haecht* case (Case 48/72 [1973] ECR from p. 85) can, I think, be broken down into the following elements.

Apart from the possible intervention of the Commission by virtue of the regulations and directives referred to in Article 87, the national *judiciary,* by virtue of the *direct effect* of Article 85 (2), is competent to rule against prohibited agreements and decisions by declaring them automatically void.

It is necessary, therefore, to determine the lines on which the application *by the courts* of Article 85 (2) should be reconciled with respect for the general principle of legal certainty.

To this end, a distinction must be drawn between agreements existing before the implementation of Article 85 by Regulation No 17 ('old agreements') and agreements entered into after that date ('new agreements').

In the case of the former, the principle of contractual certainty requires, particularly when the agreement has been notified in accordance with the provisions of Regulation No 17, that the court may declare it to be automatically void only after the Commission has taken a decision by virtue of that regulation (suspensive effect of notification).

As regards the latter, a notification made under Article 4 (1) of Regulation No 17 (and, *a fortiori,* it should be added, the absence of notification) does not have suspensive effect and the agreement can be implemented only at the parties' own risk.

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

These considerations refer particularly to agreements which must be notified in accordance with Article 4 ('agreements which are generally more harmful'), but they apply equally to agreements exempted from notification, such exemption merely constituting an *inconclusive indication* that the agreements referred to are generally 'less harmful' to the smooth functioning of the common market. In consequence, even if the latter are exempted from notification they may be notified since they may, at least indirectly, relate to imports or exports between Member States.

The nullity provided for in Article 85 (2) is capable of having a bearing on *all* the effects, either past or future, of the agreement and is of *retroactive effect.*

The way for the Court's judgment in the second *De Haecht* case had been prepared by its judgment of 25 November 1971 in *Béguelin* (Case 22/71, ECR 949) in which it was held (in ground of judgment No 26) that 'an agreement falling under Article 85 (1) which has not been declared inapplicable under Article 85 (3) as an agreement or a category of agreements *becomes null and void* in so far as its object or effect is incompatible with the prohibition in Article 85 (1)' and (ground No 29) that 'since the nullity referred to in Article 85 (2) is absolute, an agreement which is null and void by virtue of this provision has no effect as between the contracting parties and cannot be set up against third parties'.

At the same time, that judgment extended the case-law which the Court had developed concerning the 'cumulative effect' of brewery contracts to

exclusive territorial agreements entered into by two or more undertakings from different Member States or from a Member State and a third country. In ground of judgment No 13, the Court held that 'account must be taken not only of the rights and obligations arising from the clauses of the agreement but also of the *economic and legal conditions* under which it operates and particularly of the existence of any *similar agreements* entered into by the same producer with exclusive dealers established in other Member States'.

And again (in ground No 18), in order to determine whether a contract has an appreciable effect on trade between Member States and on competition and is therefore caught by Article 85 (1), 'account must be taken in particular of the nature and quantity, restricted or otherwise, of the products covered by the agreement; the *standing* of the grantor and of the grantee on the market in the products concerned; whether the agreement stands alone or is one of a series of agreements; the stringency of the clauses designed to protect the exclusive right or, on the other hand, the extent to which any openings are left for other dealings in the products concerned in the form of re-exports or parallel imports'.

However, according to information received from the registry of the Tribunal de Commerce, Liège, after the Court had delivered its second *De Haecht* judgment of 6 February 1973, 'no further pleading has been put in' before that court. But in its judgment of 30 January 1974 *(BRT* v *SABAM,* Case 127/73 [1974] ECR 51) the Court reaffirmed that Articles 85 (1) and 86 created direct rights in respect of the individuals concerned which the national courts must safeguard, especially in disputes governed by private law brought before them in which abuse of a dominant position or the admissibility of an agreement are invoked on an indirect basis.

If the Commission has initiated a procedure in application of Article 3 of Regulation No 17 (on the basis either of Article 85 (1) or of Article 86) the national court may, if it considers it necessary for reasons of legal certainty, stay the proceedings before it while awaiting the outcome of the Commission's action or allow the proceedings before it to continue when it decides either that the behaviour in dispute is clearly not capable of having an appreciable effect on competition or on trade between Member States, or that *there is no doubt* of the incompatibility of that behaviour with Article 86 (or with Article 85).

Finally, the Hof van Beroep, Ghent, refers to the judgment delivered by the Court on 3 February 1976 in *Fonderies de Roubaix* (Case 63/75 [1976] ECR from p. 116).

That case raised the question whether a contract involving the exclusive right to sell in one Member State goods imported from another Member State, concluded between two undertakings from the first State, must be considered to 'relate to' imports and for this reason by subject to the notification provided for in Article 4 (1) of Regulation No 17 of the Council.

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

The Court held that Article 4 (1) of Regulation No 17 provides that agreements of the kind described in Article 85 (1) of the Treaty which come into existence after 13 March 1962 (the

date of entry into force of Regulation No 17) must have been notified to the Commission in order to benefit from the provisions of Article 85 (3) but that, under the terms of subparagraph (2) (1) of the same article, this notification is not necessary as regards agreements where the only parties thereto are undertakings from one Member State *and* these agreements do not relate either to imports or to exports between Member States.

The Court referred to Article 4 of Regulation No 17 'and its aim of simplifying administrative procedure, which it pursues by not requiring undertakings to notify agreements which, whilst they may be covered by Article 85 (1), appear in general, by reason of their peculiar characteristics, to be *less harmful* ... and which are therefore *very likely to be entitled* to the benefit of Article 85 (3)'.

That is as fair a summary as I can provide of the Court's decisions and, in accordance with a sound principle for the administration of justice, I shall be guided by the more recent of them. All that remains to be done is to apply them to the case pending before the national court in answering the question which it has referred.

I — In its first question, the national court asks what criteria, *other than* the cumulative effect which may be produced as a result of all the exlusive purchase agreements in the sector concerned, should be taken into account in deciding whether the particular agreement which it is called upon to consider is prohibited under Article 85 (1).

In my opinion, this question distorts somewhat the case-law of this Court, which has held that the agreement in question must be viewed in conjunction with 'all others' in order to strike a sort of 'economic balance' or, to use the words of the Belgian legislature, 'to establish whether, in fact, the regulations in question, taken as a whole, tend to maintain the conditions necessary to encourage *fair* competition between producers and between distributors'. It is this overall appraisal which makes it possible to pass judgment on a particular agreement. The Court did not say that criteria other than the cumulative effect of such agreements must be taken into account. In so far as those criteria, which the Belgian court asks this Court to identify, are not associated with the aforesaid cumulative effect they may be canvassed only if that effect, when established, is insufficient to demonstrate that the agreement possesses features which bring it within the prohibition of Article 85 (1).

Consequently, in order to assess the effect produced by the network of brewery contracts, the national court must establish the type and volume of beer distributed on the basis of such contracts and the extent to which the 'tied' retailer can obtain supplies of foreign beer; in order to do this, it must determine how stringent the clauses of the contract are.

In so doing, regard must be paid not only to agreements linking the same brewery, considered in isolation, to other retailers, *but also* to the entire group of agreements which bind *all* the breweries of the Member State concerned to the retailers of that State.

One can understand that such a prospect has little attraction for a national court, which is scarcely equipped to establish whether, over and above a single contract, *considered in isolation,* between producer X and distributor Y, there exists a *concerted practice* which has the effect, at least indirectly, of preventing trade in the common market from being carried on in fully competitive conditions.

In order to get over this difficulty, the Commission, in its written observations, suggests that 'a distinction should be

drawn between the *minor* contributions to the cumulative effect referred to and *major* contributions to it ... there is a marked difference between minor obstacles obstructing access to the market and major ones ... it is possible to establish whether the closing of the market is largely attributable to an accumulation of minor obstacles or to the cumulative effect of more serious obstructions'. The Commission adds that to draw this distinction 'does not present any insuperable difficulty'. Finally, it proposes, though with considerable reservations, certain 'quantitative guidelines' which, in the absence of any 'body of administrative decisions', it would like the Court to accept in the case of this reference for a preliminary ruling, namely that all brewery contract networks covering less than 100 000 hl. per year (which applies in the case of the Concordia brewery) *should* fall outside the prohibition contained in Article 85 (1).

This is perhaps the essence of the plan which, in other cases, the Commission intends to develop with a view to the adoption of positive legislative measures relating to brewery contracts.

But I cannot see how the Court can, in the context of the present proceedings, take up this invitation from the Commission, which is a tiresome reminder of the notion of 'minor' abuses of a dominant position for which it contended before you on another occasion.

In the first place, practices restrictive of competition which, compared with more striking ones, are of minor importance nevertheless remain, by definition, 'restrictive'. The question is not one of establishing the relative contributions made by the effect of minor obstacles and more serious restrictions towards the closing of the market and of assessing whether an agreement may help to close it even more firmly. The question is whether the market is, in fact, open or closed and whether the situation represents the combined result of all the impediments, both great and small, considered as a whole.

Whether the contribution to the 'cumulative effect' is great or small, it helps to produce that effect.

In any case, and this is the second consideration, it would in my opinion be extremely difficult to fix the quantitative level above which a contribution to the restraint of competition must be regarded as prohibited, even if the Court were competent to do so. It is not part of the Court's function, 'in the context of judicial cooperation', to fix 'percentages' on the basis of statistical data (varying somewhat, moreover, according to the source) which were disputed before the Court and which seem to me to be open to challenge.

The café owners in the main action, who are bound to the Concordia brewery by an exclusive contract for twenty-five years in connexion with the loan of FB 300 000 and, let us not forget, the clients of those café owners, who would like to obtain beer other than that from that brewery, would be at a loss to understand why, by applying the 100 000 hl. rule suggested by the Commission, a brewery contract could be validly enforced against them on the ground that the brewery concerned sells no more than 75 000 hl. per year through its network of contracts, whereas by the application of the same rule the café owners in dispute with the De Haecht brewery, who had contracted for a loan of FB 52 000 and had accepted an exclusive sales concession for only five years, could validly object that the brewery contract in their case was incompatible. Nor does it make any difference that De Haecht is responsible for about 7 % of Belgian beer production and, through its network of contracts, markets more than 100 000 hl. Both should be entitled to ask the national courts to protect the rights conferred on them by Article 85 (1). The very smallest

'body of administrative decisions' of the Commission would be of more value than all the observations submitted in connexion with a request for interpretation and, since the contract involved in the *De Haecht* case was notified to it, it is difficult to understand why the Commission did not take a decision, one way or the other, on the contract in the present case.

In the preliminary opinion which I gave in the *SABAM* v *BRT* case, I suggested that, at least in circumstances where the Commission had initiated a procedure under Articles 2, 3 or 6 of Regulation No 17, the Court should rule that the national court was bound to suspend judgment. But, apart from the fact that the Commission has not yet initiated *any* procedure within the meaning of Article 9 (3) of the regulation — according to the judgment of the Court of 6 February 1973, the general inquiry which it initiated in October 1969, pursuant to Article 12 of Regulation No 17, cannot take the place of such a procedure — the inescapable outcome of the recent decisions of this Court is that the national courts are under an *obligation* directly to apply Article 85 (1).

In particular, there can be no question of their being able to order that proceedings shall be stayed in order to enable the parties to obtain a decision from the Commission (a course which you still held to be possible in your judgment of 6 February 1973) since the contested agreement has not even been notified and even the initiation of a procedure by the Commission does not automatically exempt the national court from taking a decision.

Subject to a reference under Article 177, therefore, the national courts remain competent to give a ruling on the basis of the considerations which I have described.

The remaining questions submitted by the Hof van Beroep, Ghent, are designed to find a way out of this dilemma by means of an exemption by category or by individual exemption and it is to these possibilities that I must now turn.

II — In its second question, the Hof van Beroep, Ghent, asks whether a declaration that Article 85 (1) is inapplicable, in other words 'the exemption by category' established until 31 December 1982 by Article 1 (1) of Regulation No 67/67 (EEC) of the Commission of 22 March 1967, can and must operate solely in favour of agreements to which only two undertakings from different Member States are party, under which one party agrees to purchase only from the other for resale within a defined area of the common market.

As the brewery contract in question binds only two undertakings which belong to one and the same Member State and does not define any territory within the meaning of that provision, there is, by definition, no question of exemption or of prohibition.

In my opinion an agreement of the type in dispute is covered by Article 1 (1) (b) of Regulation No 67/67. This subparagraph refers only to an agreement by one party to purchase (for resale) only from the other, without specifying that resale must take place 'within a defined area of the common market'. But it is clear that a brewery contract provides for the exclusive purchase for resale in a clearly identified form of 'trade' 'within a Member State', which is in fact the same as saying 'within a defined area of the common market'.

The absence of any specific definition of an area of the common market is not conclusive.

But it remains to be seen whether the decision of this Court in *Fonderies de Roubaix* may be applied to standard exclusive purchase agreements in the brewing industry concluded between

undertakings from the same Member State.

In this connexion the question submitted asks in effect whether the agreement in dispute, which did not have to be notified, could automatically benefit from exemption by category or whether the fact that it was not obligatory for it to be notified does not completely preclude the possibility of its being denied such exemption.

The agreement in question was made after 13 March 1962 between only two undertakings from the same Member State, but although it does not directly relate to either imports or exports between Member States the Ghent court itself states that 'the possibility cannot be excluded that *through the cumulative effect* of contracts of this type ... trade between Member States could be adversely affected to a substantial degree', and that although the execution of exclusive purchase agreements between undertakings in the same Member State does not render it necessary to cross frontiers, it is still possible that 'such agreements in fact amount to a *direct* prohibition on the importation of goods from other Member States'. Such agreements are not subject to notification. But there is nothing to stop the undertakings concerned from taking steps to notify, with the concomitant advantages of such action. They must shoulder their responsibilities in this respect.

As this Court has itself stated, it is possible that these agreements are 'capable of benefiting from Article 85 (3)'. But the absence of any obligation to notify cannot be used as an argument in favour of *automatic* exemption by category nor does it pre-empt the *possibility* of individual exemption being denied. Nor does the mere fact that the product which is the subject of the agreement in question is home-produced — it is always, of course, possible that the beer supplied by the brewery is in fact imported from another Member State — lead to the conclusion that a group of *practices* 'binding a large number of retailers to a few producers in the same State', together with similar practices in other Member States, including, accordingly, the agreement in question, must be regarded as not being liable to affect trade between Member States. This is what was, in fact, stated in the judgment of the Oberlandesgericht Karlsruhe of 22 July 1971 which was delivered in the light of the judgment of this Court in *Bilger*.

The same viewpoint is reflected in one of the grounds of the judgment of this Court of 6 March 1974 in *Commercial Solvents* (Joined Cases 6 and 7/73 [1974] ECR 252) where it was stated that consideration must be given to 'all the consequences of the conduct complained of for the competitive *structure* in the Common Market without distinguishing between production intended for sale within the market and that intended for export'. While it is true that the practical effect of brewery contracts is usually to create a closer contractual relationship between the brewer and the café owner bound under its provisions, reference must also be made to an argument used in Belgium in 1956 against the adoption, at the time in question, of a draft law providing for the supervision of brewery contracts. 'The final argument of the brewers is based on the practice in all the other beer-producing countries (England, Germany, The Netherlands, France and Luxembourg) where exclusive agreements are the rule, with the result that it is extremely difficult to export to those countries, where distribution is entirely monopolized by the producers. According to the brewers, the effect of the regulations which it is planned to introduce in our country will be to make it easier to import foreign beers, whereas all our neighbours' doors will remain firmly closed against our own. There is even greater danger of this just at a moment when customs barriers between these countries are about to be abolished'

(Yves Ranscelot, Les contrats de brasserie et leur réglementation, in *Annales de la Faculté de Droit de Liège,* 1957, p. 197).

Before the judgment in *Fonderies de Roubaix* can be applicable by analogy the national court must establish that the brewery contract in question, viewed alongside all the others, is not capable of affecting trade between Member States. But the Hof van Beroep, Ghent, does not wish to go so far as that and merely asks whether the agreement may not be treated *as if* it had in fact been notified. Quite clearly it may not.

The question can, of course, be asked whether, in its judgment in *Fonderies de Roubaix* (ground No 15), the Court did not intend to give a formal ruling comprehensively and finally exempting from Article 85 (1) the category of agreements to which undertakings from one Member State only are party and which concern the resale of goods within that Member State (Article 1 (2) of Regulation No 67/67), on the ground that the fourth recital of Regulation No 67/67 states that 'since it is only *in exceptional cases* that exclusive dealing agreements concluded within a Member State affect trade between Member States, there is no need to include them in this Regulation'. . . .

I doubt it because:

1. The Commission itself has not expressly *exempted* this category of agreements although it alone has the power to do so by virtue of the provisions of Article 85 (3), taken together with Article 87 of the Treaty and Article 1 of Regulation No 19/65 of 2 March 1965;
2. Such a conclusion would be contrary to all the previous decisions of this Court concerning 'cumulative effect', especially of so-called brewery contracts;
3. This Court has itself declared (in ground No 19, [1976] ECR 119) that the purpose of paragraph (2) of Article 1 of Regulation No 67/67 is not to exclude from the benefit of the exemption by categories (or, therefore, to exclude from the application of Article 85 (1) and, in consequence, from that of Regulation No 67/67) those agreements which, although concluded between two undertakings from one Member State, may nevertheless *by way of exception* significantly affect trade between Member States but which, in addition, satisfy all the conditions laid down in Article 1 of Regulation No 67/67. An exemption by category is always a possibility in the case of such agreements but it can be expressly promulgated only by the Commission.

III — Since, under Article 1 (2) of Regulation No 67/67, 'Paragraph 1 shall not apply to agreements to which undertakings from one Member State only are party and which concern the resale of goods within that Member State' and on the assumption that brewery contracts, which answer to this description, clearly fall outside Article 85 (1) and are *automatically* exempt from the prohibition contained in that article, without any limitation as to time and without its being necessary for them to satisfy 'the conditions of this Regulation', the national court asks this Court, in its third question, whether the exemption from the obligation to notify within the meaning of Article 4 (2) (1) of Regulation No 17 benefits such agreements if they in fact amount to a *direct* prohibition on imports from other Member States.

This is a restatement of the problem of the overall economic appraisal to which I referred earlier. I have nothing further to add except to say that undertakings are in no way prohibited from notifying such agreements to the Commission; on the contrary, at the end of Article 4 of Regulation No 17 it is provided that 'These agreements ... may be notified to the Commission'. That is the preliminary step which must be taken in order to obtain individual exemption for 'new' agreements. It is also open to them to

apply to the Commission for negative clearance as provided for under Article 2 of Regulation No 17.

It is, therefore, for the undertakings to act on their own initiative, to assess the 'harmfulness' of their contracts and, if appropriate, to procure for themselves the benefit of a preventative notification.

IV — The Court of Justice has declared that, if such agreements fall under the prohibition contained in Article 85 (1), they are automatically void (Article 85 (2)). But the Hof van Beroep appears to be somewhat confused by the decisions of the Court of Justice on this subject.

In its fourth question, which thus refers back to the first, it asks whether, notwithstanding 'the cumulative effect of all agreements of the same type', *one* exclusive dealing agreement, *in itself relatively unimportant,* can avoid annulment pursuant to Article 85 (2) and, if so, according to which criteria, or whether *all* agreements the cumulative effect of which is harmful are automatically void.

On this point I would refer the Court to what I said earlier. I need only add that, in this field, the need for legal certainty seems to make it highly desirable, if not essential, for the Commission either to prohibit or to exempt all brewery agreements as a body, or to authorize them subject to certain conditions based on their duration and the quantities involved; in order to do this, however, the Commission needs information and this is the purpose of notification and of an inquiry such as it finally decided to undertake in 1969 but which has not yet led to any concrete measure. Under Article 8 of Regulation No 17 the Commission can, moreover, reconsider its decision and make it subject to conditions; if, despite the fact that an agreement is exempt from notification, it is, in fact, notified, the Commission may declare Article 85 (3) to be applicable and specify the date from which its decision shall take effect. This date may be earlier than its decision and may go back to the date of notification; indeed, in certain circumstances, especially in the case of agreements exempted from notification, the effective date of the decision can go back as far as the date on which the agreements were concluded (Article 6 (2)).

But the case-law of this Court leaves the national court with only the absolute remedy of automatic nullity. It is faced with the following dilemma: either it must apply Article 85 (1) or, because its subject-matter is different, it must conclude that the agreement does not come under Article 85 (1), without there being any need to apply Article 85 (3), although it may of course suspend judgment, provided always that a procedure has been initiated by the Commission. Here again, it is understandable that the national court is somewhat embarrassed by the responsibility placed upon it.

The judgment of the Court of 30 June 1966 in *Société Technique Minière* (Case 56/65 [1966] ECR 235) appears to have settled one thing: automatic nullity applies only to those parts of the agreement affected by the prohibition, or to the agreement as a whole if it appears that those parts are not severable from the agreement itself; *any other* contractual provisions which are not affected by the prohibition, and which therefore do not involve the application of the Treaty, fall outside Community law.

But this answer will not satisfy the national court. In the light of certain statements in the judgments of this Court, it demands to know whether it may conclude that an agreement may, in view of the *weak position* of those concerned on the market in the products in question, have only an insignificant effect on the market and escape the prohibition contained in Article 85 (1). For this purpose *the agreement would*

have to be considered on its own, divorced from similar practices existing anywhere else in the territory of the common market *(Bilger,* Case 43/69 [1970] ECR 135) and its effect examined 'apart from the body of effects, whether convergent or not, surrounding their implementation' (judgment in *De Haecht* No 1, Case 23/67 [1967] ECR 415). This seems to me to be a perfectly tenable viewpoint and it is one which, in its judgment in *Béguelin,* this Court adopted in the case of contracts binding undertakings belonging to different Member States and affecting trade between Member States.

The appraisal which, in accordance with your judgment of 12 December 1967, the national court was under a duty to make must, however, observe the principles which this Court laid down in its judgment of 9 September 1969 in *Völk,* relating to exclusive dealing agreements with absolute territorial protection binding undertakings in different Member States and which are as follows:

'An exclusive dealing agreement, even with absolute territorial protection, may, *having regard to the weak position* of the persons concerned on the market in the products in question, escape the prohibition laid down in Article 85 (1)' (Case 5/69 [1969] ECR 302).

But this is on condition that there is substantial trade between Member States and that the contracts, even when taken together with others of the same kind, have only an insignificant effect on that trade. However, if account is taken of the relative position or size of the firms concerned in respect of products in which trade is insignificant or weak, this will undermine the long-established view of this Court concerning cumulative effects and I do not wish to be responsible for suggesting that it should be so revised in the case of brewery contracts.

V — In the fifth question, the national court asks whether it has a duty or a right to suspend judgment while an exemption pursuant to Article 85 (3) is still possible. There can be no doubt that it would welcome a reply which left it some discretion in this connexion. In my view, however, the question received a clear answer in your judgment in *BRT* v *SABAM.* It was, indeed, conceivable that if there had been an application for exemption by one or both parties to the agreement or, at least, a procedure had actually been initiated by the Commission, the court before which the contract had been challenged would have been under a duty to suspend judgment until the Commission had itself taken a decision on the application for exemption or until the procedure initiated by it had resulted in one conclusion or another. This Court did not see fit to adopt this view, so the national court has the right to suspend judgment but only when a procedure has been initiated by the Commission. In my opinion, the same solution holds good in circumstances where an application for exemption has been submitted on which the Commisson has to take a decision.

But the fact that exemption under Article 85 (3) is still, in theory, a future possibility, dependent upon an application which is merely contingent, does not excuse the national court from taking a decision.

Furthermore, as the Court stated *obiter* in its judgment of 6 February 1973, the national court may not order the suspension of proceedings in order to obtain a decision from the Commission. Nor can it give a ruling on the applicability of Article 85 (3) since such action falls within the powers reserved to the Commission by Article 9 (1) of Regulation No 17. By virtue of the direct effect of Article 85 (1), the national court is *bound* to take a decision subject only to the possible use of Article 177. It has the choice of only two solutions: either to declare that the agreement is manifestly contrary to Article 85 (1) or to declare that the agreement manifestly

does not come within the ambit of Article 85 (1). This restores, in favour of the national courts, and in striking fashion, the theory of the 'acte clair', based on the principle of decentralization and of legal certainty, with all the risks of conflicting decisions which that theory involves.

In these circumstances, there is no need to reply to the second part of the fifth question referred by the national court. Since a national court is *bound* to take a decision only in relation to the provisions of Article 85 (1), it cannot, to use the words of the judgment of the Hof van Beroep, Ghent, 'decide that Article 85 (3) is not applicable'.

VI — In its sixth question, the national court seeks to establish the status of a new agreement 'the fate of which is not immediately settled'. I assume that, in using these words, the court is referring to an agreement which, taken in isolation or together with 'all others' of the same type, may have an appreciable effect on competition or trade but which, notwithstanding this, may conceivably benefit from the application of Article 85 (3). In that case, the 'status' of the agreement in question must be settled by the final decision of the Commission, subject to a possible appeal to the Court of Justice. But this is on the assumption that a 'procedure' under Regulation No 17 has been initiated either by the Commission (procedure on its own initiative) or by the parties to the agreement (notification accompanied by an application for negative clearance or exemption, 'complaint'). If this does not apply, the 'status' of the agreement depends on a 'judicial' appraisal of it in the light of Article 85 (1).

Of course, the fact that the Commission has addressed individual decisions on its own initiative to three specific undertakings may represent an attitude prejudicial to the brewery contracts concluded by those three undertakings or on their behalf, but it cannot prejudge the validity or otherwise of other brewery agreements. Moreover, the fact that an undertaking has sent in a notification or, in particular, an application for exemption, to a certain extent transfers responsibility for the state of affairs to the Commission, which must take it into account in its final decision; meanwhile, however, this has no bearing on the appraisal of the agreement by the courts.

It seems to me that, since the judgment of this Court of February 1973, there can no longer be any question of provisional validity or nullity but merely of absolute validity or nullity, which means that the national court is entitled to order final measures subject to any later decision to the contrary by the Commission. In consequence, the notification or exemption from notification of a new agreement does not prevent an indirect declaration by a national court that such an agreement is valid or null and void from having retroactive effect.

VII — In its last question the Hof van Beroep, Ghent, asks the Court to provide it with the criteria for the interpretation of *Community* law which will enable it to decide whether the provisions of the *Belgian* regulations governing brewery contracts are compatible with Community law.

In my opinion the Court of Justice manifestly has no jurisdiction under Article 177 to answer such a question.

In its judgment of 9 July 1969 (in *Portelange,* Case 10/69 [1969] ECR 315), the Court did indeed declare: 'Article 177 of the Treaty, which is based on a clear separation of functions between national courts and the Court of Justice, does not permit the latter either to take cognizance of the facts of the case, or to pass judgment on the reasons for requests for interpretation.

The question whether the provisons or concepts of Community law, whose interpretation is requested, are in fact

applicable to the case in question lies outside the jurisdiction of the Court of Justice and falls within the jurisdiction of the national court.

When a court or tribunal requests the interpretation of a Community provision or of a legal concept connected with it, it must be assumed that that court considers such interpretation necessary to the solution of the dispute before it.' But in its judgment of 13 October 1976 in *Saieva* (Case 32/76) the Court has recalled: 'However, the Court is not required to rule within the context of a request for a preliminary ruling under Article 177 of the Treaty on the meaning and scope of national legislative provisions but must restrict itself to the interpretation of the provisons of Community law in question.'

The brewery contract in question forms part of a network of contracts of like effect in several Member States. This may well involve a number of practices which are not only concerted as amongst those concerned but are also the result of the application of legislative measures or national regulations, despite the fact that those provisons prohibit certain oppressive stipulations which would make it difficult to ensure fair competition. This is not a new situation. It is for the national court to make up its mind, in the light of Community measures and of the decisions of this Court, to give direct effect to those provisions of the Treaty which are directly applicable.

I need do no more than recall that an exclusive purchase contract may affect trade between Member States and impede competition if, as the combined result of that contract and the effect of national law relating to unfair competition, the supplier can prevent the entry of parallel imports from other Member States into a part of the common market.

Moreover, this Court has no jurisdiction in the present case to give a ruling on the merits of the Belgian regulations; the only means available for this purpose is an action for failure to fulfil an obligation under Article 169.

It is, in my view, important to confine the scope of the reply to be given to the Hof van Beroep, Ghent, to brewery contracts, and to take care not to extend it to the whole range of contracts between undertakings in the same Member State which contain an exclusive right of sale or of supply in respect of any goods whatsoever.

To sum up, the Court should rule as follows:

Since this is a contract for the supply of beer, made subsequent to 13 March 1962, that is to say, an agreement which, although exempted from notification, could have been but has not been notified, and has not been the subject of a formal procedure initiated by the Commission, there is evidence, which is not conclusive, that the agreement in question could, generally speaking, prejudice the working of the common market.

If, in proceedings before a national court, it is sought, in an indirect manner, to have such an agreement declared void, that court is bound to take a decision and to declare either that the agreement manifestly does not come under Article 85 (1) or that there is no doubt that it is incompatible with that provisions.

To this end it must ascertain whether, over and above the agreement in question, there are one or more concerted practices between certain producers and certain distributors which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market.

If the Court finds that these practices are manifestly not capable of having that effect, the agreement is wholly valid, subject to a later application by the Commission of Article 6 of Regulation No 17.

If it finds that there is no doubt that these practices and the agreement are incompatible with Article 85 (1), the agreement is, subject to the same reservation, void from the date when it was concluded.