3. Article 88 of the EEC Treaty refers to national rules on jurisdiction and procedure, with the result that the phrase 'authorities in Member States' which appears both in this provision and in Article 9 (3) of Regulation No 17 includes national courts.

4. The acknowledged power of the authorities in Member States to apply Article 85 (1) of the EEC Treaty implies the power to apply paragraph (2) of that article.

5. An agreement between undertakings 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.

In Case 43/69

Reference to the Court under Article 177 of the EEC Treaty by the Oberlandesgericht Karlsruhe (9th Civil Senate, sitting in Freiburg im Breisgau) for a preliminary ruling in the action pending before that court between

BRAUEREI A. BILGER SÖHNE GMBH, Gottmadingen,

and

HEINRICH JEHLE, innkeeper and butcher, and MARTA JEHLE, both residing at Friedrichshafen,

on the interpretation of Article 85 of the EEC Treaty and of Regulation No 17 of the Council of the EEC of 6 February 1962 (OJ, Special Edition 1959–1962, p. 87),

THE COURT

composed of: R. Lecourt, President, R. Monaco and P. Pescatore, Presidents of Chambers, A. M. Donner, A. Trabucchi, W. Strauß (Rapporteur) and J. Mertens de Wilmars, Judges,

Advocate-General: J. Gand
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts

According to the statement made by the Oberlandesgericht Karlsruhe (Karlsruhe Higher Regional Court), the reference to the Court is based essentially on the following facts:

1. In 1950 the parties to the action, hereinafter referred to as the 'Bilger brewery' and 'Mr and Mrs Jehle' concluded a contract by which Mr and Mrs Jehle undertook, for a period of 25 years and at least until 1 October 1975, 'to run in a proper manner and on a permanent basis an establishment for the retail sale of beer' situated on certain premises at Friedrichshafen 'and to purchase exclusively (from the Bilger brewery) the beer required by the said business'. The contract was to continue in force after 1 October 1975 as long as Mr and Mrs Jehle 'shall be indebted to the brewery, either by virtue of a loan or of a contract of sale or of any other commercial transaction, or for so long as the brewery shall be accountable on their behalf for any debt'. Moreover, Mr and Mrs Jehle undertook to assign their liabilities to such lessees and successors in title as they may have in the future, and to the successors in title of such parties.

For its part, the Bilger brewery granted several loans to Mr and Mrs Jehle and made certain chattels available to them. In addition, it stood security for a debt resulting from a purchase.

The contract was not notified to the Commission of the European Communities.

Since the spring of 1962 Mr and Mrs Jehle have leased one of their establishments, whilst continuing to run the other one themselves. Since March 1962, apart from the beers from the Bilger brewery, special beers from other breweries have also been retailed in the two restaurants by Mr and Mrs Jehle or by the lessees, acting with their consent.

2. On 30 June 1962, the Bilger brewery brought an action against Mr and Mrs Jehle and asked the court:

'(1) to order the defendants

(a) to refrain from purchasing or from selling for consumption on or off the premises of the 'Café Grill-Room am Hafen' beers other than those supplied by the Bilger brewery until 1 October 1978 and thereafter, for so long as they shall be in possession of the chattels lent to them by the plaintiff;

(b) to state what types and quantities of beers they have purchased from other breweries since 1 January 1962;

(2) to declare that the defendants are obliged:

(a) to pay compensation to the plaintiff for the damage suffered by it, calculated on the basis of the information given;

(b) to pay damages on the ground that the lessee of the premises known as the 'Goldener Adler' purchases and sells for consumption on or off the said premises beers other than those of the plaintiff.'

For their part, Mr and Mrs Jehle maintained that the contract in dispute was void on the ground that the obligations which it imposed on them were excessive, and that they were entitled to sell special beers for consumption on the premises.

The Landgericht (Regional Court) upheld the application. On appeal by Mr and Mrs Jehle the Oberlandesgericht varied the contested judgment by limiting to October 1968 the period during which they were obliged to refrain from selling other beers; for the rest, it dismissed the appeal. This judgment acquired the force of *res judicata* as regards the request for information submitted by the plaintiff. For the remainder this judgment was set aside by the Bundesgerichtshof (Federal Court of Justice). The case was subsequently referred to the Oberlandesgericht Karlsruhe.

3. Mr and Mrs Jehle are maintaining for the first time before that court that the brewery contract in dispute is void under Article 85

(1) of the EEC Treaty. They maintain that approximately 80% of German innkeepers are bound by such contracts and that, thus, approximately 60% of the output of the German breweries is sold under this system, which restricts the trade in beer between Member States as the breweries in the other countries of the Community now find scarcely any buyers in Germany.
In favour of their argument Mr and Mrs Jehle refer to the judgment of the Court of 12 December 1967 (*Brasserie De Haecht* v *Wilkin and Wilkin* Case 23/67 [1967] E.C.R. 407 et seq.).

4. The Oberlandesgericht based its view on the terms of this judgment, according to which it is in each case for the national court to consider, 'on the basis of a set of objective factors of law or of fact', whether a specific brewery contract is likely to produce the effects referred to in Article 85 of the Treaty, and by order of 10 October 1968 it requested the parties to reply to various questions of act which concerned in particular the production, sale and consumption of beer in Germany and in the Community. The parties stated that they were not in a position to reply to a large number of these questions.

II — Terms of the order of reference

On 31 July 1969 the Oberlandesgericht Karlsruhe decided to submit to the Court of Justice the following questions under Article 177 of the EEC Treaty:

'(1) Does a contract for the supply of beer concluded before 13 March 1962 between two undertakings within one Member State relate to imports or to exports between Member States within the meaning of Article 4 (2) (1) of Regulation No 17 [of the Council of the EEC] of 6 February 1962, where the exclusive dealing clause is worded as follows: "The innkeeper undertakes to purchase all the beer which he requires for his establishment exclusively from the brewery (established in the same Member State)"?
Must such a contract be notified in accordance with Article 5 (1) and (2), in conjunction with Article 4 (2) (1) [of Regulation No 17]?
If necessary
(2) What interpretation must be given to Article 85 (2) of the EEC Treaty as regards agreements which are exempt from notification, having regard to the possible retroactive effect of an exempting decision taken by the Commission under Article 85 (3) of the EEC Treaty and Article 6 of Regulation No 17?
Is an agreement which is exempt from notification provisionally valid?'

III — Procedure

The order for reference was received at the Court Registry on 24 September 1969.
The written observations provided for by Article 20 of the Protocol on the Statute of the Court of Justice of the EEC were submitted by the Bilger brewery and the Commission of the European Communities.
Upon hearing the report of the Judge-Rapporteur and the views of the Advocate-General, the Court decided to open the oral procedure without any preparatory inquiry.
The Bilger Brewery, Mr and Mrs Jehle and the Commission of the European Communities presented oral argument at the hearing on 21 January 1970. The Advocate-General delivered his opinion at the hearing on 5 February 1970.
The Bilger brewery was represented and assisted by Messrs Gleiss, Lutz, Hootz, Hirsch, Kleinmann and Helm and also by Mr Kemmler, all of the Stuttgart Bar. Mr and Mrs Jehle were represented by Mr Glöckner of the Düsseldorf Bar. The Commission was represented by its Legal Adviser, Mr Thiesing.

IV — Summary of the observations of the parties

A — *Facts*

The *Bilger brewery* maintains principally that the contract in dispute is only of limited importance from an economic point of view. The establishments run by Mr and Mrs Jehle only sold 135.13 and 135.56 hl. of

beer during the years 1966–1967 and 1967–1968 respectively. This brewery is only one of 1 908 German breweries and its share in the market is approximately 0.3 %.

B — *The first question*

The arguments put forward on this point by the *Bilger brewery* may be summarized as follows:

The reply to this question must logically be as follows:

'An agreement, to which only two undertakings in one Member State are parties and which obliges one of them to obtain its supplies exclusively from the other, does not relate either to imports or to exports between Member States and thus does not require notification to the Commission, in accordance with Article 4 (2) (1) of Regulation No 17 (in conjunction, where appropriate, with Article 5 (2) of this same Regulation).'

According to Article 5 (2) of Regulation No 17, taken in conjunction with Article 4 (2) (1), the obligation to notify an agreement of the type concerned in the present case depends on whether such agreement 'relates to imports or to exports between Member States'. However, in cases such as the present this condition is not satisfied for the following reasons:

— the agreement in dispute does not concern imports or exports and does not seek to lay down detailed rules governing these matters. It deals with the supply of beer of excellent quality to an innkeeper and consumers and, like all such agreements, it is the result of technical and commercial considerations which are compelling for both parties. The Bilger brewery has put forward detailed observations on this point. As regards the fact that the agreement excludes supply, not only by all the other German breweries, but also by the breweries of the other Member States, this is merely an indirect consequence of the agreement.

— In the same way, the Commission maintains in the 'Practical Guide to Articles 85 and 86 of the Treaty establishing the EEC, and their implementing regulations' with reference to Article 4 (2) (1) of Regulation No 17 that 'purely regional ... exclusive dealing agreements within one Member State, which only indirectly concern imports or exports,' do not require notification.

— The use of the verb 'to relate' in the above-mentioned provision means that the agreement must concern imports or exports between Member States. The authors of the regulation intentionally employed a term which is different from those used in Article 85 of the Treaty, that is: 'to affect', 'to have as their object' or 'to have as their effect'.

— If an indirect effect on imports or exports were sufficient to establish the obligation to give notification of the agreement, the provision in the above-mentioned Article 4 would be meaningless, since the criteria laid down therein would be a duplication of those in Article 85 (1) of the Treaty.

— This interpretation is also supported by the principle of legal certainty. It is necessary for undertakings to have confidence in the 'Practical Guide' published by the Commission and, in addition, they must be in a position to determine with certainty whether their agreement requires notification. Generally speaking, they could never acquire such certainty if they were also required to assess the indirect effects of the agreements which they wished to conclude, *a fortiori* where these effects were solely the result of the parallel existence of several agreements of the same type. Moreover, such effects may be subject to continual change according to the fluctuations in competition.

— The Commission has the power to initiate at any time a procedure which is also concerned with agreements which do not require notification. Thus, the limitation on the obligation to notify an agreement does not restrict the scope of Article 85 of the EEC Treaty.

— The exemption from notification in respect of exclusive dealing agreements concluded within a Member State is perfectly reasonable, in view of the fact that such agreements are not generally capable of affecting trade between Member States (cf. to this effect the preamble to Regulation No 67/67/EEC

of the Commission of 22 March 1967, OJ, Special Edition 1967, p. 10).

Secondly, according to the Bilger brewery it must be noted that the Community legislature also used the verb 'to concern' in the wording of Article 1 (2) of Regulation No 67/67/EEC. If this provision were to be understood to refer also to indirect effects on imports or exports it would be 'largely irrelevant', since there would then be no exclusive dealing agreements 'which concern (only) the resale of products within this Member State'. In this case, all the agreements containing an exclusive supply clause would be exempt from the prohibition in Article 85 (1) and, therefore, would not require notification.

For their part, *Mr and Mrs Jehle* put forward the following arguments:

Agreements which are concluded between two undertakings in the same Member State and which concern the exclusive right to supply beer are not governed by Articles 5 (2) and 4 (2) (1) of Regulation No 17 and, for this reason, do not require notification. If a different interpretation were to be given to this regulation it would be contrary to the principles and objectives of Articles 85 et seq. of the EEC Treaty and, for this reason, would have no basis in law.

According to the judgment of the Court in the *Bosch* case, agreements which require notification but which are not notified are void as from the day of the entry into force of the above-mentioned Regulation No 17. It follows that the question whether or not a specific agreement requires notification is at the same time of decisive importance with regard to the nullity or the validity of the agreement. In these circumstances, it is not possible to dispense with notification for those agreements which are a danger to the Common Market.

Contracts for the supply of beer such as that which is involved in the present case present such a danger. Mr and Mrs Jehle argue this point in detail. They maintain in particular that in the Federal Republic of Germany 80% of innkeepers are bound by such contracts, which are also in frequent use in the other Member States. This generally results in a substantial obstacle to the supply of beer from one country of the Community to another such country.

In the conclusion to its observations and also, to some extent, in the statement of reasons contained therein the *Commission* puts forward a view which is identical to that of the Bilger brewery. According to the Commission, agreements of the type concerned in the present case have only an indirect effect on imports and exports between Member States and thus do not 'relate to' them within the meaning of Article 4 (2) (1) of Regulation No 17. In this context it also maintains that Article 4 (1) and Article 5 (1) of Regulation No 17 are in any case only applicable to the agreements referred to in Article 85 (1) of the EEC Treaty.

C — *The second question*

The *Bilger brewery* maintains that this question must logically receive the following reply:

'An agreement within the meaning of Article 85 (1) of the EEC Treaty which does not require notification to the Commission and which therefore has not been notified is fully effective for as long as the Commission shall have made no decision on it under Article 85 (3) of the Treaty and the provisions of Regulation No 17.'

In its judgment of 6 April 1962 in Case 13/61 (*De Geus en Uitdenbogerd* v *Bosch and Van Rijn*, [1962] E.C.R. 45 et seq.), hereinafter referred to as the 'Bosch judgment', the Court laid down that agreements which do not require notification and which were already in existence on the entry into force of Regulation No 17 are 'valid' and not merely 'provisionally valid'. Such agreements are thus fully effective until the Commission has taken a decision on them in accordance with Article 85 (3) of the EEC Treaty.

This view is confirmed by the judgment of the Court of 9 July 1969 (*Portelange* v *Smith Corona and Others*, Case 10/69, Rec. 1969, p. 316 et seq.), hereinafter referred to as the 'Portelange judgment'. If, as a result, even those agreements which require notification and which according to the Bosch judgment are only 'provisionally valid' must be regarded as fully valid until the Commission has taken a decision on them, the same must apply *a fortiori* to agreements which do

not require notification and which the Bosch judgment describes as 'valid'.

As is apparent from the preamble to Regulation No 17, this view also derives from the fact that the Council considered that the agreements which did not require notification were 'less dangerous'.

Moreover, a contrary interpretation goes against the very purpose of Article 4 (2) of Regulation No 17, for if agreements which did not require notification were only provisionally valid on condition that they were notified, every conscientious undertaking would in practice be compelled to notify their existence. There would thus be no difference between those agreements which required notification and those which did not and the Commission would have to have to face an influx of notifications.

Article 6 (2) of Regulation No 17 provides that agreements which do not require notification may be exempted retroactively from the prohibition in Article 85 (1). It is thus illogical to regard them, pending the Commission's decision on them, as void absolutely or conditionally.

Finally, the Bilger brewery maintains that the requirement of legal certainty also supports this view. The agreements referred to in Article 4 (2) of Regulation No 17 are acknowledged and indispensable instruments of economic life. As, in general, a long period is required before an exempting decision is taken under Article 85 (3) of the EEC Treaty, they could not be regarded in the meantime as provisionally invalid.

As the Court held in the *Portelange* judgment, agreements which do not require notification may give rise to an action to terminate the infringement and for damages. Otherwise they would be entirely valid in practice. This view does not form an obstacle to the proper application of the European law on cartels, since various means of review are open to the Commission. In particular, it may at any moment initiate a certain procedure, in which it takes a decision on the applicability of Article 85 (3).

Mr and Mrs Jehle concur in the opinion of the Commission in the conclusions to their observations and, as regards the essential points, in the reasons for their conclusions.

The Commission declares that a reply to this question must be based on the principles laid down by the Court in the *Portelange* judgment. This judgment is based above all on the following considerations:

'— In view of the absence of any effective legal means enabling the persons concerned to accelerate the adoption of a decision under Article 85 (3) ... it would be contrary to the general principle of legal certainty to conclude that, because agreements notified are not finally valid so long as the Commission has made no decision on them under Article 85 (3) of the Treaty, they are not completely efficacious.

— On the other hand, notification enables the Commission to put an end to this situation by refusing to grant an exemption or by applying Article 15 (6) of Regulation No 17 since, if the persons concerned continued to implement their agreement in defiance of a decision taken on the basis of this provision, they would run the risk of being fined by the Commission under Article 15 (2) of the above-mentioned Regulation.'

These considerations are not valid in the case of unnotified agreements since the undertakings which are parties to such agreements have the power to notify the Commission voluntarily and, therefore, to obtain the advantages which result from such notification. If they choose not to exercise this power they accept voluntarily the legal uncertainty inherent in such conduct. Moreover, normally in such a situation the Commission is never informed of the existence of the agreement, or it is only informed of it much later. Unlike the procedure in respect of notified agreements it is thus not in a poistion to undertake an immediate inquiry or to take action, if need be, against the persons concerned pursuant to the provisions of Regulation No 17. On these grounds alone there is no justification for granting to agreements which do not require notification and which have not been notified the benefit of the advantages which result from notification.

The Commission maintains, furthermore, that the following factor also supports this solution. By notifying their agreement to the Commission the parties concerned obtain an advantage, in that until it has given a

ruling on the application of Article 85 (3) of the EEC Treaty the Commission cannot impose a fine to penalize the activities described in the notification document (Article 15 (5) of Regulation No 17). On the other hand, the undertakings which take part in an unnotified restriction of competition risk the impostion of fines under Article 15 (2) of Regulation No 17 if, intentionally or negligently, they have infringed the prohibition set out in Article 85 (1). If the legal consequences described in the *Portelange* judgment were attached to agreements exempt from notification and unnotified, which satisfy the conditions set out in Article 85 (1) of the EEC Treaty, an undertaking which is a party to such an agreement might require its performance by another undertaking which is also a party to that agreement, although in this way the latter undertaking risks the imposition of a fine. In the opinion of the Commission, therefore, the reply to the second question must be as follows:

'An agreement which is exempt from notification and which has not been notified of the type listed in Article 85 (1) of the EEC Treaty is provisionally valid until the Commission has made a decision thereon. However, the provisional validity of such agreement cannot authorize a contracting party to require another party to perform the agreement, nor to claim from such party damages for non-performance before the Commission has made a decision thereon.'

Grounds of judgment

1 By order of 31 July 1969, received at the Court Registry on 24 September 1969, the Oberlandesgericht Karlsruhe has submitted to the Court, under Article 177 of the Treaty establishing the EEC, several questions concerning the interpretation of Article 85 of the Treaty and of Regulation No 17 of the Council of 6 February 1962 (OJ, Special Edition 1959–1962, p. 87), which came into force on 13 March 1962.

The first question

2 The Court is invited to state first of all 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, where the exclusive dealing clause is worded as follows: "The innkeeper undertakes to purchase all the beer which he requires for his establishment exclusively from the brewery (established in the same Member State)".'

In addition, the Court is asked to decide whether such an agreement must be notified [to the Commission], in accordance with Article 5 (1) and (2) in conjunction with 4 (2) (1) of Regulation No 17.

3 The sole purpose of these questions is thus to discover whether a contract concluded between a producer and an independent retailer by which the latter undertakes to obtain his supplies solely from the producer in question who is established in the same Member State falls within the categories of agreements which are exempt

from notification under Regulation No 17, without regard to the question whether or not such a contract, alone or in conjunction with others, may be covered by the provisions of Article 85 (1).

4 Articles 4 and 5 of Regulation No 17 free from notification *inter alia* all agreements—whether concluded before or after 13 March 1962—to which the only parties are undertakings from one Member State, provided that such agreements 'do not relate either to imports or to exports between Member States'. The reply sought by the national court thus depends on the question whether the agreements to which it refers 'do not relate either to imports or to exports between Member States', within the meaning of Article 4 (2) (1) of Regulation No 17.

5 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 same State such a contract 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. It seems possible, therefore, that a single agreement, although it does not 'relate either to imports or to exports between Member States' within the meaning of this provision, 'may affect trade between Member States' within the meaning of Article 85 (1) of the Treaty. The meaning of the phrase to 'relate to imports or exports' is thus narrower than the phrase to 'affect trade between Member States'.

6 Exclusive supply agreements, the execution of which does not require the goods in question to cross national frontiers clearly do not relate to imports or to exports. In these circumstances, such agreements are governed by Article 4 (2) (1) of Regulation No 17 and are thus exempt from the notification provided for in the first paragraphs of Articles 4 and 5 of this regulation.

The second question

7 Should the foregoing questions receive a negative reply, the national court requests the Court to state: 'What interpretation must be given to Article 85 (2) of the EEC Treaty as regards agreements which are exempt from notification, having regard to the possible retroactive effect of an exempting decision taken by the Commission under Article 85 (3) of the EEC Treaty and Article 6 of Regulation No 17' and, in particular, to state whether an agreement which is exempt from notification is provisionally valid.

8 The purpose of these questions, considered within the legal context of the main action, is to discover 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.

9 Under Article 9 (3) of Regulation No 17: 'As long as the Commission has not initiated any procedure under Articles 2, 3 or 6' of the regulation, 'the authorities of the Member States shall remain competent to apply Article 85 (1) ... in accordance with Article 88 of the Treaty'. The above-mentioned Article 88 refers to national rules on jurisdiction and procedure, with the result that the concept of 'authorities in Member States' includes national courts. On the other hand, the power to apply Article 85 (1) necessarily implies the power to apply paragraph (2) of that article which renders void 'any agreements ... prohibited pursuant to this Article'.

10 Article 88 of the Treaty and Article 9 (3) of Regulation No 17 give no indication as to the length of the period within which the national courts may make such a finding of nullity. However, agreements concluded 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).

11 If, under the conditions laid down in Article 85 (3), the institutions of the Communities may exempt agreements entirely from prohibition and nullity under Article 85, it follows that by exempting certain agreements by means of Regulation No 17 from all notification they have been able to accept that such agreements remain subject to the risk of being found void only with effect from the day on which such a finding is made. Moreover, a different solution would seriously endanger legal certainty to the detriment of parties who, having concluded an agreement which is exempt from notification on the ground that it is unlikely to affect trade between Member States, could reasonably expect this agreement to have, in this respect, at least the same effect as notified agreements dating from before 13 March 1962.

12 For all these reasons the reply to the national court should be that 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.

Costs

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

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the oral observations of the Bilger Brewery, Mr and Mrs Jehle and the Commission of the European Communities;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community, especially Articles 85, 88 and 177;
Having regard to Regulation No 17 of the Council of 6 February 1962, especially Articles 4, 5 and 9;
Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community, especially Article 20;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities,

THE COURT

in answer to the questions referred to it by the Oberlandesgericht Karlsruhe, by order of that court dated 31 July 1969, hereby rules:

1. **On the first question**

   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 notification;

2. **On the second question**

   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.

Lecourt Monaco Pescatore

Donner Trabucchi Strauß Mertens de Wilmars

Delivered in open court in Luxembourg on 18 March 1970.

A. Van Houtte — Registrar

R. Lecourt — President