

such an appraisal to verifying whether the relevant procedural rules have been complied with, whether the statement of the reasons for the decision is adequate, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or misuse of powers.

5. Where an exemption from the prohibition of restrictive agreements is being applied for under Article 85 (3) of the Treaty it is in the first place for the undertakings concerned to present to the Commission the evidence intended to establish the economic justification for an exemption.

## OPINION OF MR ADVOCATE GENERAL LENZ

Delivered on 14 May 1985 \*

*Mr President,  
Members of the Court,*

A. I am giving my Opinion today on a case which raises the question to what extent restrictions on competition are compatible with Community law where they are laid down in agreements for the transfer of undertakings.

1. In order to explain the circumstances which led to the agreements of 1979 and 1980 containing the restrictions on competition, it is necessary to go back to events in 1974. In that year the Verenigde Bedrijven Nutricia NV (hereinafter referred to as 'Nutricia'), a manufacturer of health foods and baby foods, purchased two undertakings:

First, Remia BV (hereinafter referred to as 'Remia'), which was principally a manufacturer of sauces, margarine and products for the baking industry;

Second, Luycks Produkten BV (hereinafter referred to as 'Luycks'), likewise a manufacturer of sauces and also of pickles and condiments, especially vinegar and mustard.

Following its acquisition of Remia and Luycks, Nutricia centralized their sales functions, although it initially retained their existing production facilities. Those sales functions were distributed among four sales divisions within the Nutricia group:

The Nutricia sales division continued to sell Nutricia's traditional products, namely health and baby foods;

The Luycks sales division sold all Luycks's products as well as sauces manufactured by Remia;

The Nutremia sales division was responsible for the sale of condensed milk, chocolate-flavoured milk and margarine;

The Remia sales division was in charge of sales of oils and fats and exports of Remia's products but its operation did not cover sales of sauces.

Luycks and Remia began to make operating losses from 1977 and 1978 onwards. On the advice of a firm of consultants Nutricia decided to restructure its production

\* Translated from the German.

facilities by concentrating sauce production at Remia while leaving Luycks with the production of pickles and condiments. Nutricia undertook that reorganization partly in the hope of making it easier to find buyers for Remia and Luycks since it wished to concentrate on the core of its business, which was health foods and baby foods. The reorganization was begun in 1979, but it was not established in the course of the proceedings before the Court whether it was completed before or after October 1979.

right to use the trademark Luycks for the listed sauces. That right covered sales to the hotel and catering trade and was to run for two years ending on 1 October 1981.

Under clause 7 of the sauce agreement Mr de Rooij, Remia and its subsidiaries were granted an option together with a right of pre-emption, expiring on 1 July 1980, on the sauce production facilities at Diemen (where Luycks had its registered office). That option was never exercised.

2. By an agreement dated 31 August 1979, Remia was sold to Mr de Rooij. That agreement (hereinafter referred to as 'the sauce agreement') provided that on 1 October 1979, Nutricia was to transfer its shares in Remia to Mr de Rooij together with the exclusive right to sell consumer products manufactured by or on behalf of Remia and the exclusive right to sell sauces manufactured by or on behalf of Luycks on the Netherlands market. Luycks's compliance with that last clause was guaranteed by Nutricia. The sauces referred to were sauce for chips, mayonnaise, salad dressing, garnishing sauce, paprika sauce, saté sauce, tomato ketchup, curry sauce, fricadelle sauce, barbecue sauce and blends of those sauces. Under clause 5 of the sauce agreement Nutricia undertook to refrain from engaging directly or indirectly in the production or sale of sauces on the Netherlands market until 30 September 1989 and to ensure that Luycks also complied with that restriction. None the less Luycks retained the right, for a transitional period expiring on 1 July 1980, to manufacture and sell sauces for export and for the Netherlands market, provided they were not sold through Remia.

Subsequently a number of the staff of the Luycks and Nutremia sales divisions moved to Remia. Customer lists were not transferred to Remia.

3. By an agreement dated 6 June 1980 (hereinafter referred to as 'the pickles agreement'), Nutricia sold Luycks with effect from 4 July 1980 to Zuid-Hollandse Conservefabriek BV (hereinafter referred to as 'Zuid'), a subsidiary of the Campbell Group. By clause V (1) (f) of the pickles agreement, Zuid agreed to be bound by the obligations imposed on Luycks in the sauce agreement. Those obligations were set out in greater detail in Annex XXIII to the pickles agreement. Nevertheless it was provided that only Luycks and its subsidiaries and not other undertakings controlled by Zuid were subject to those obligations.

Under clause 6 of the sauce agreement Remia and its subsidiaries and associated companies were granted a non-exclusive

Clause IX (1) of the pickles agreement required Nutricia not to engage directly or indirectly in the production or sale of pickles or condiments in 'European countries' for a period of five years.

4. In June and July 1981, Nutricia notified the agreements of 31 August 1979 and 6 June 1980 to the Commission of the European Communities under Article 4 of Regulation No 17 and requested it to exempt them, pursuant to Article 85 (3) of the EEC Treaty, from the prohibition on agreements restricting competition contained in Article 85 (1).

5.(a) On 12 December 1983, the Commission adopted a decision, Articles 1 to 5 of which provide as follows:

Article 1: The non-competition clause laid down in clause 5 of the Agreement of 31 August 1979 between NV Verenigde Bedrijven Nutricia and Drs F. A. de Rooij constitutes from 1 October 1983 an infringement of Article 85 (1) of the EEC Treaty.

Article 2: The non-competition clause laid down in clauses IX1 and VI1 of the Agreement of 6 June 1980 between NV Verenigde Bedrijven Nutricia and Zuid-Hollandse Conservenfabriek BV, constitutes from 4 July 1982 an infringement of Article 85 (1) of the EEC Treaty. The same clause constitutes from the date of its stipulation an infringement of Article 85 (1) of the EEC Treaty in so far as it applies to a geographical area larger than the Belgian, Dutch and German markets.

Article 3: The applications for exemption under Article 85 (3) of the EEC Treaty in respect of the agreements referred to in Articles 1 and 2 are hereby refused.

Article 4: NV Verenigde Bedrijven Nutricia, Drs F. A. de Rooij, Remia BV, Zuid-Hollandse Conservenfabriek BV and Luycks Producten BV shall cease forthwith to apply the clauses referred to in Articles 1 and 2.

Article 5: This Decision is addressed to:

- NV Verenigde Bedrijven Nutricia, Zoetermeer,
- Drs F. A. de Rooij, Den Dolder,
- Remia BV, Den Dolder,
- Zuid-Hollandse Conservenfabriek BV, Zundert, and
- Luycks Producten BV, Diemen.<sup>1</sup>

(b) In the preamble to its decision, the Commission first sets out the facts regarding the markets involved, trade between Member States and the market positions of Remia and Luycks. I do not propose to repeat its statement of facts because the complete text thereof contains details which are business secrets and not for publication. Nevertheless I would refer to paragraphs 6 to 15 and 37 and 38 of the preamble to the decision, which have been made available in full to the Court and to the parties.

In its legal assessment, the Commission begins by stating that Article 85 (1) prohibits as incompatible with the common market all agreements between undertakings, decisions by associations of undertakings and concerted practices 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. Nevertheless, in the Commission's view not every restriction on competition imposed in connection with the sale of an undertaking came within the scope of that prohibition.

It had held once before, in its Decision No 76/43/EEC of 26 July 1976 (Reuter/BASF)<sup>2</sup>, that when the sale of a

1 — OJ 1983, L 376, p. 22.

2 — OJ 1976, L 254, p. 40.

business involved the transfer not only of material assets but also of goodwill and *clientèle*, it might be necessary to impose contractual restrictions of competition on the seller. The contractual restriction upon competition by the seller was then a legitimate means of ensuring the performance of the seller's obligation to transfer the full commercial value of the business.

However, the protection accorded to the purchaser could not be unlimited. It must be kept to the minimum that was objectively necessary for the purchaser to assume by active competitive behaviour the place in the market previously occupied by the seller. It was not possible to lay down a specific period as being a universally applicable period of protection. Relevant criteria for determining the time which might be said to be objectively necessary for such restrictions included:

- (a) the time it would take the purchaser of a business to build up a *clientèle*;
- (b) how frequently consumers in the relevant market changed brands and type;
- (c) how long it took before new products entering the market or new trademarks were accepted by the consumer;
- (d) for how long after the sale of the business the seller would be able, in the absence of a restrictive clause, to make

a successful comeback on the market and regain his old customers.

The duration of accompanying arrangements such as the temporary right for the purchaser to use the seller's trademarks or sales forces might also constitute a useful pointer to the sort of period required for all the seller's goodwill and *clientèle* to be transferred to the purchaser.

In the Commission's view, the geographical scope of a non-competition clause must in addition be limited to the extent which was objectively necessary to achieve the above-mentioned goal. As a rule, it should therefore only cover the markets where the products concerned were manufactured or sold at the time of the agreements.

In its assessment of the restrictions contained in the sauce agreement, the Commission states that it took account of the fact that the manufacture of the products concerned did not involve high technology. The parties evidently thought that two years would be a long enough period for Remia to use the Luycks trademark while introducing its own mark and gaining customer loyalty. Since, however, that new customer loyalty might readily be undermined if Nutricia (Luycks-Zuid) were able to re-enter the market after an absence of only two years, using the Luycks mark, a further two-year period seemed objectively necessary to enable Remia to consolidate its hold on its new *clientèle*. In those circumstances it seemed that four years represented the maximum legally permissible period for the restriction of competition. It was certain that a 10 year period was not objectively necessary.

In so far as part of the goodwill that was being transferred was represented by the trade connections of the sales staff who were not transferred to Remia, that part was renounced and protection could not be claimed for it.

The extension to Luycks-Zuid of Nutricia's 10 year restriction could not stand if the restriction could not stand in regard to Nutricia. Although the extension of the clause could be said to protect a relatively small undertaking against the subsidiary of a large group (the Campbell group), that group did not have a predominant position anywhere in the relevant sauce market while Remia had the largest single share of the Netherlands market.

The prohibitions of competition referred to above affected or at least were likely to affect trade between Member States within the meaning of Article 85 (1). The undertaking not to engage in the production of sauces in the Netherlands had an effect on intra-Community trade because it excluded Luycks-Zuid from the cross-border sauce trade with Germany from 1 July 1980. Furthermore, that restriction would prevent the Campbell group from using its subsidiary in the Netherlands as an importer for sauces made elsewhere in the EEC. The restriction was likely to affect trade between Member States at the latest when the trademark Luycks again became exclusively available to Luycks-Zuid as a trademark for sauces on 1 October 1981.

By virtue of Article 85 (3) of the EEC Treaty the prohibition contained in Article 85 (1) might be declared inapplicable in the cases specified in Article 85 (3). However, if the restrictions on competition went beyond

what was objectively necessary in order to transfer the full commercial value of the business sold, an exemption under Article 85 (3) of the EEC Treaty could only be considered in special circumstances. In particular it must be shown that the clauses were indispensable to guarantee the attainment of objectives other than the mere need of the purchaser further to consolidate his acquisition.

In this case the parties had failed to make out a case for applying Article 85 (3) to the two notified agreements. Furthermore, the Commission failed to see what advantage the inclusion of the two clauses restricting competition for a term and/or geographical area in excess of the maximum necessary for the transfer of the full commercial value of the businesses sold could have in improving the production or distribution of goods or promoting technical or economic progress while allowing consumers a fair share of the resulting benefit. The contractual restrictions on competition described above provided no appreciable objective advantages to offset the serious disadvantages for competition in the relevant markets. For those reasons an exemption under Article 85 (3) could not be considered.

6. On 16 February 1984 Remia, Mr de Rooij and Nutricia brought an action against that decision of the Commission. The *applicants* claim that the Court should:

- (a) Declare that the contested decision is wrongly addressed to Mr de Rooij;
- (b) Declare the decision to be void and declare that the non-competition clause

referred to in Article 1 of the decision does not infringe Article 85 (1) of the EEC Treaty and in any case not as from 1 October 1983;

*In the alternative:* declare that the Commission wrongly failed to apply Article 85 (3); and

(c) Order the Commission to pay the costs.

The applicants put forward the following arguments in support of their application:

The Commission did not provide adequate reasons for restricting the duration of the non-competition clause to four years and failed to take sufficient account of the specific circumstances of the case. The 10 year restriction on competition was necessary in order that Remia might secure the market share previously held by Remia and Luycks. If Luycks and Remia had retained their previous production and marketing structure both undertakings would have been forced out of business. The non-competition clause was intended to ensure *inter alia* that at least the continued employment of the approximately 230 to 250 employees of Remia was assured. Moreover it was necessary to bear in mind that only a portion of the Luycks sales division was transferred to Remia while the remainder of the sales staff, which were responsible for the sauce market, remained with Luycks and continued to work in the pickles market, a closely related field. Furthermore, Remia was only permitted to use the well-established Luycks mark for two years; if the Luycks trademark were used after a short interval for sauces manufactured by Luycks itself that must inevitably threaten Remia's market position.

In 1981 Luycks obstructed Remia's attempt to launch its own 'McMillan' trademark. In

1982 Luycks mounted a large publicity campaign for sauces under the Luycks trademark and Remia was compelled to take legal action against it.

It was already foreseeable at the time when the agreement was concluded that Luycks might be sold to a much stronger trade competitor, as indeed happened in June 1980.

The non-competition clause did not restrict trade between Member States. Luycks-Zuid was not prohibited from importing or exporting sauces into or out of the Netherlands. It was only prohibited from using the Luycks trademark. For the rest, Remia was willing to agree to an interpretation of clause 5 of the sauce agreement which was compatible with Article 85 of the EEC Treaty.

An exemption under Article 85 (3) of the EEC Treaty was wrongly refused. In that context the Commission should also have taken into account the respective financial and economic situations of Remia and Luycks. It should have taken account of the fact that between about 230 and 250 jobs were protected by the agreement. The concentration of sauce manufacture at Remia strengthened its knowhow in the matter of sauce production. The production and marketing of sauces was improved whilst maintaining optimum conditions of competition. Moreover, the agreement contributed to an improvement in the structure of competition since it enabled at least one of the small undertakings to survive in an oligopolistic market.

Finally, the decision was wrongly addressed to Mr de Rooij. Mr de Rooij signed the sauce agreement, which covered several separate businesses, merely as the future proprietor of Remia. Mr de Rooij could not be regarded as an 'undertaking' within the meaning of Article 85 (1) of the EEC Treaty.

The defendant claims that the action should be dismissed with costs.

defendant, also claims that the action should be dismissed with costs.

In the first place it takes the view that the applicants have not made sufficiently clear the grounds on which their application is based. Their case revolves round the allegation that the Commission's statement of the reasons for its decision was inadequate and contradictory. In effect, however, that contention relates to an alleged misapplication of Article 85 of the EEC Treaty. As it is not put forward in support of the appropriate ground of claim it cannot therefore be taken into account. For that reason the Commission examines those arguments solely in the alternative.

The Commission considers that the plaintiffs' contention that it did not adequately state the reasons for its decision is unfounded. The requirement of a statement of reasons is satisfied if it sets out sufficiently clearly the factual circumstances justifying the decision and the considerations which led to its adoption.

For the rest, the Commission repeats in substance the arguments already contained in its decision. It adds that agreements which restrict competition do not escape from the scope of Article 85 (1) of the EEC Treaty merely because they are introduced in order to protect a loss-making undertaking.

Finally, it argues that its decision was properly addressed to Mr de Rooij. Mr de Rooij participated in the conclusion of the sauce agreement as a manufacturer. He was granted separate rights besides the rights of Remia and its subsidiaries.

The undertaking Sluyck BV (the present designation of the former Luycks undertaking), which *intervened* in support of the

It maintains that it has incurred considerable losses since its sale to Zuid. Its continued existence is at risk if it cannot return to the sauce market. For that purpose, it also requires its Luycks trademark, which it had been using for more than a hundred years; if it cannot use the trademark there is no point in its carrying on business in the sauce market. Furthermore, it must be able to supply the Netherlands market because a business activity confined to the export market would be economically unjustifiable.

7. In reply to questions put to them by the Court of Justice, the applicants have provided further particulars of the basis of their conclusions. The Commission has cleared up a number of points with regard to the dates referred to in Article 2 of its decision.

The applicants argue that their conclusions are primarily directed against the finding in Article 1 of the decision that the non-competition clause which the sauce agreement imposes on Luycks constitutes an infringement of Article 85 (1) of the EEC Treaty from 1 October 1983. No express claim is made for a declaration that the finding contained in Article 2 of the Commission decision is void. Nevertheless, because the non-competition clause referred to in Article 2 merely extends the non-competition clause in the sauce agreement to the purchaser of Luycks, there is a close factual connection between the two clauses. In the alternative, however, the applicants claim that Article 2 of the decision should be declared void.

The Commission has admitted that an obvious error was committed in the drafting of Article 2. The date referred to in Article 2 — 4 July 1982 — applies to the non-competition provision imposed on Nutricia, so far as the pickles and condiments sectors

are concerned, by clause IX (1) of the pickles agreement; clause V (1) (f), which extends to Zuid the non-competition clause imposed on Luycks in the sauce sector, constitutes an infringement of Article 85 (1) only from 1 October 1983.

B. My views on this application are as follows:

1. (a) Despite the clarifications offered by the parties with regard to the scope of the applicants' conclusions and the effect of the Commission's decision, I think it would be appropriate to make another attempt to define the precise subject-matter of the dispute in this case. The reason for this is, first, that the terms in which the applicants formulated their conclusions are not altogether clear, and, secondly, that Article 2 of the decision contains an unhappy conflation of two different non-competition clauses and is not in itself readily comprehensible despite the clarification supplied by the Commission.

Article 2 of the decision refers to 'the non-competition clause laid down in clauses IX.1 and V.1.f of the Agreement of 6 June 1980.' Those clauses do not in fact contain a single unitary restriction on competition; instead, clause V extends the terms of the sauce agreement prohibiting competition in the sauce sector to Zuid, while clause IX contains Nutricia's undertaking to Zuid to accept a restriction on its competition in the pickles market. Furthermore, it is unclear which of those restrictions on competition is meant in the second sentence of Article 2, which begins, without making any differentiation, with the words 'the same clause.' That sentence states that a prohibition on competition is unlawful in so far as it relates to a geographical area larger than the Belgian, Netherlands and German markets. Paragraph 38 of the decision also refers to those three markets in connection with Nutricia's undertaking to Zuid to accept a

prohibition on competition applying to the production and marketing of pickles. For that reason I take the view that that sentence must in fact be taken to refer to clause IX of the pickles agreement.

On that interpretation, a revised version of Article 2 of the decision would read as follows:

The non-competition clause laid down in clause V1f of the Agreement of 6 June 1980 constitutes an infringement of Article 85 (1) of the EEC Treaty from 1 October 1983.

The non-competition clause laid down for the pickles sector by clause IX.1 of the Agreement of 6 June 1980 constitutes an infringement of Article 85 (1) of the EEC Treaty from 4 July 1982 (that is to say, two years after the Agreement of 6 June 1980 came into effect on 4 July 1980). In so far as that clause applies to a geographical area larger than the Belgian, Netherlands and German markets, it constitutes an infringement of Article 85 (1) of the EEC Treaty as from the date on which it came into effect.

In their conclusions in the application, the applicants seek on the one hand a declaration that the Commission decision is void but also on the other hand a declaration that the decision was wrongly addressed to Mr de Rooij and that the non-competition clause referred to in the decision was not contrary to Article 85 (1) of the EEC Treaty as from 1 October 1983 or at least that the Commission wrongly failed to apply Article 85 (3).

My understanding of the applicants' claims having regard to their written and oral contentions (including the clarifications they supplied in answer to questions put to them



by the Court), and also having regard to their own interests, is that they ask for the following to be declared void:

Article 1 of the decision with regard to the non-competition clause contained in the sauce agreement, in so far as it relates to the period after 1 October 1983;

Article 2 of the decision, in so far as it relates to the extension of the non-competition clause in the sauce agreement to Zuid for the period after 1 October 1983;

Article 3 of the decision, in so far as it contains a refusal to apply Article 85 (3) to the non-competition clause in the sauce agreement and to its extension to Zuid for the period after 1 October 1983;

Article 4 of the decision, in so far as it relates to the non-competition clause in the sauce agreement and to its extension to Zuid;

Article 5, in so far as Mr de Rooij is referred to as an addressee of the decision.

In my view this dispute does not concern the clause referred to in Article 2 of the decision, whereby Nutricia undertook not to compete with Zuid on the pickles market. In the first place, the applicants have not said anything which might be understood as meaning that their application is also directed against the part of the decision relating to that non-competition clause. Secondly, none of them, and particularly not Nutricia, would appear to have any interest in having that part of the Commission decision declared void, since it expands their freedom of activity in relation to clause IX of the pickles agreement. Only the intervener supporting the Commission, the Sluyck undertaking, would be likely to have an interest in maintaining that non-competition clause in force; as an intervener on the defendant's side, however, it may not

formulate conclusions to that effect because Article 37 of the Protocol on the Statute of the Court of Justice of the EEC limits it to supporting that party's conclusions.

(b) Having circumscribed the object of this dispute I will now briefly indicate in what order I propose to examine the legal issues raised.

After a remark on a procedural objection by the defendant I shall consider whether the non-competition clauses at issue in fact fall within the prohibition in Article 85 of the EEC Treaty. If the answer to that is positive the next question will be whether the particular features of the set of contractual arrangements with which this case is concerned — the non-competition clauses are all contained in agreements for the transfer of undertakings — nevertheless make it necessary to exclude the applicability of Article 85 (1) of the EEC Treaty at least for a limited period. It will then remain to be examined, in the last place, to what extent an exemption under Article 85 (3) from the prohibition of restrictive agreements falls to be considered.

2. Before I go into the substance of the parties' arguments, I must first deal briefly with the Commission's procedural objection that the applicants put forward their arguments about a misapplication of Article 85 of the EEC Treaty on the basis of a submission which related to an inadequate statement of the reasons on which the Commission decision was based. Because the submission as framed is inappropriate the arguments based on it are said to be inadmissible.

It may be conceded in the Commission's favour that the applicants' argument is not always immediately clear. In places it is not immediately apparent whether they are saying that Article 85 of the EEC Treaty is inapplicable in principle in the case of agreements for the transfer of undertakings, or that the factual requirements of Article

85 (1) are not met, or again that the factual requirements for an exemption under Article 85 (3) are satisfied.

Nevertheless the applicants' main contention may be quite readily inferred from its general context. That is enough to satisfy the requirements stipulated by the Court for an applicant's statement of the grounds of his action. The Court does not require the applicant expressly to bring the defect of which he complains within one of the four grounds of action contained in Article 173 of the EEC Treaty. 'It may be sufficient for the grounds for instituting the proceedings to be expressed in terms of their substance rather than of their legal classification provided, however, that it is sufficiently clear from the application which of the grounds referred to in the Treaty is being invoked.'<sup>3</sup> The applicants' submissions satisfy those requirements because they enable the ground on which they are based to be identified. It is therefore appropriate for the applicants' case to be considered in its entirety.

3. The question whether the facts of the case are covered by Article 85 (1) of the EEC Treaty may be dealt with fairly quickly. Article 85 of the EEC Treaty prohibits as being incompatible with the Common Market all agreements between undertakings 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.

(a) The non-competition clause laid down in clause 5 of the sauce agreement prohibits Nutricia and Luycks from any form of activity on the sauce market in the

Netherlands for a period of 10 years. In the course of the oral procedure the applicants' legal representative confirmed that that clause was intended to cover not only any activity under Luycks's trademark or trade name but any activity under any trademark or trade name whatsoever.

There can be no doubt that a total ban on competition, that is to say an undertaking not to act directly or indirectly on a certain market for a specified period, must be seen as an agreement which has as its object or effect a restriction of competition. Indeed this is not in issue between the parties in these proceedings. Furthermore, the parties to both agreements were undertakings, namely Nutricia, Remia and others as regards the sauce agreement of 31 August 1979 and Nutricia and Zuid as regards the pickles agreement of 6 June 1980. In this regard the only point in dispute between the parties is whether Mr de Rooij is to be regarded as an 'undertaking' for the purposes of the sauce agreement, to which he is a party.

I would answer that question in the affirmative, for two reasons.

In the first place, Mr de Rooij is a party to the sauce agreement. That agreement refers to him principally as a purchaser. The applicants' statements to the effect that the sauce agreement covers a whole series of business entities which are not to be treated as a single unit must admittedly be accepted in so far as besides the actual agreement for the sale of the undertaking the agreement also in fact contains other clauses. Yet Mr de Rooij is a party to those clauses as well because he derives rights under them. For example, clause 7 (2) of the agreement gives him the right of preemption in respect of Luycks's production facilities. Furthermore, he is to be regarded as a beneficiary of all

3 — Judgment of 15 December 1961 in Joined Cases 19/60, 21/60, 2/61 and 3/61, *Société Fives Lille Cail and Others v High Authority of the ECSC*, [1961] ECR 281 at p. 295.

the vendor's contractual obligations, as the agreement does not expressly refer to any immediate beneficiary; in such a case the vendor is under a contractual obligation to all the other parties to the agreement. This applies particularly to clause 5 of the agreement whereby Nutricia undertakes not to engage directly or indirectly in the production or sale in the Netherlands of the sauces referred to in clause 4 except by agreement with the *purchaser* (Mr de Rooij).

Thus Mr de Rooij's role is not confined to that of being merely the future proprietor of Remia; the sauce agreement grants him in addition a number of powers and dispositive rights which appear to justify his being regarded as an independent commercial entity.

(b) Another disputed point is whether the non-competition clause in the sauce agreement is of such a nature as to affect trade between Member States.

In this connection it should be borne in mind that the non-competition clause in the sauce agreement applies to the whole of the Netherlands. Where an agreement covers the entire national territory of a Member State it is inherently capable of affecting intra-Community trade because it contributes towards the partitioning of national markets within the Community, thereby holding up the economic interpenetration which the Treaty is designed to bring about.<sup>4</sup> The clause prohibiting Nutricia from engaging directly or indirectly in the production or sale of sauces on the Netherlands market covers not only production for the home market but also imports from other Member States. That prohibition is therefore likely to have an

influence, 'direct or indirect, actual or potential'<sup>5</sup> on the pattern of trade between Member States.

(c) The non-competition clause contained in the sauce agreement of 31 August 1979 therefore fulfils all the factual conditions necessary to bring it within the scope of the prohibition in Article 85 (1) of the EEC Treaty.

(d) Finally it should be pointed out that the non-competition provision contained in clause 5 of the sauce agreement applies not only to Nutricia but also to Luycks, on behalf of which Nutricia acted. Consequently Luycks is itself directly bound by clause 5 of the sauce agreement, and it may therefore be wondered whether clause V (1) (f) of the pickles agreement of 6 June 1980 should be regarded as constituting a distinct non-competition clause. By clause V of the pickles agreement Zuid guarantees to Nutricia that Luycks will not act in breach of the undertakings contained in the sauce agreement. My interpretation of that clause is that Zuid first acknowledges the obligations imposed on Luycks and secondly gives to Nutricia an undertaking that it will ensure Luycks's compliance with those obligations. As regards its content, the non-competition clause applicable to Luycks is merely a repetition of the same terms in declaratory form; on the other hand, the class of beneficiaries who may require compliance with that non-competition clause is expanded to include Nutricia, and in that regard clause V of the pickles agreement has a significance of its own.

4. Although the factual requirements of Article 85 (1) of the EEC Treaty are thus met, the Commission takes the view that the non-competition clause falls outside the scope of that provision of the EEC Treaty for a four-year period ending on 31 October 1983. Whilst the Commission based

4 — Judgment of 17 October 1972 in Case 8/72, *Vereeniging van Cementhandelaren v Commission of the European Communities*, [1972] ECR 977, at p. 991.

5 — See judgment of 29 October 1980 in Joined Cases 209 to 215 and 218/78, *Van Landewyck and Others v Commission*, [1980] ECR 3125 at p. 3274.

its view on a previous decision,<sup>6</sup> it did not, however, grant an exemption under Article 85 (3) of the EEC Treaty from the prohibition of restrictive agreements.

tual agreements and in legislation, for instance in the case of commercial agents, partners and members of the boards of companies.

I now turn to the question whether it is possible for the prohibition in Article 85 (1) not to be applied to agreements in restraint of competition which in theory fall within its scope without adopting the exemption procedure under Article 85 (3). If the answer to that question is positive it will then remain to be examined what rules of law must apply in the case of such a 'non-application' of Article 85 (1) of the EEC Treaty. While an answer to that question is of no importance for the period ending on 31 October 1983 it is crucial as regards the period for which the defendant held Article 85 (1) to be applicable, that is, the period from October 1983 to October 1989.

However, where the applicability of the competition rules in the EEC Treaty is concerned it can make no difference whether prohibitions of competition are created by contractual agreement or by legislation. While it is true that the rules on competition 'are concerned with the conduct of undertakings and not with national legislation, Member States are none the less obliged under the second paragraph of Article 5 of the Treaty not to detract, by means of national legislation, from the full and uniform application of Community law...; nor may they introduce or maintain in force measures, even of a legislative nature, which may render ineffective the competition rules applicable to undertakings.'<sup>9</sup>

To my knowledge the Court of Justice has not had to deal with a non-application of Article 85 (1) of the EEC Treaty outside the context of the exemption procedure under Article 85 (3). Although the non-application of Article 85 (1) finds no immediate support in the Treaty its permissibility is accepted in academic writings, in particular in the case of agreements for the transfer of undertakings.<sup>7</sup> Such exceptions to the prohibition of restrictive agreements are also to be found in national competition law.<sup>8</sup>

It follows that a non-application of Article 85 (1) to the agreements at issue in this case can only be justified by reference to principles of Community law.

In the national field certain prohibitions of competition are common both in contrac-

In academic writings on Community law it is argued that, taken in the abstract, restrictions on competition agreed in the context of agreements for the transfer of undertakings may in principle be regarded as satisfying the factual criteria contained in Article 85 (1) of the EEC Treaty.

6 — Decision No 76/743/EEC (Reuter/BASF), OJ 1976, L 254, p. 40.

7 — See Ch. Bail, Note 171 f. on Article 85 of the EEC Treaty, in Groeben, Boeckh, Thiesing and Ehlermann, Kommentar Zum EWGV; M. Waelbroeck, in *Mégret et al.*, 'Le Droit de la Communauté Economique Européenne', vol. 4, 'Concurrence', p. 10 f. Doubtful, N. Koch, Note 39 on Article 85, in Grabitz, Kommentar Zum EWGV.

8 — See e.g. the judgment of the Bundesgerichtshof of 3 November 1981, Az. KZR 33/80, reported in *Neue Juristische Wochenschrift*, 1982, p. 2011.

Nevertheless, it is argued, they must be seen in the light of their commercial context since they may be necessary in order to enable certain economic assets to be

9 — Judgment of 10 January 1985 in Case 229/83, *Leclerc v Au Blé Vert*, [1985] ECR 17, at paragraph 14.

transferred in the first place. That is so particularly in cases where there is a transfer of *clientèle*, other forms of goodwill and knowhow, which often represent a significant proportion of the assets of an undertaking. Since undertakings constitute a kind of property which may be the subject-matter of a contract of sale, some restrictions on competition agreed in connection with the transfer of an undertaking must to some extent be accepted. Even where such an agreement does not contain an express term to that effect its meaning and purpose are such that the vendor must be under an obligation not to compete with the purchaser for a reasonable period. A vendor who has transferred his custom for value cannot be allowed to attract it back to himself or exert a decisive influence on it by direct competition immediately afterwards. For that reason a prohibition of competition which is indispensable to the sale of an undertaking cannot be unlawful although it may not go beyond the limits of what is strictly necessary in terms of geographical scope, duration and subject-matter.

I, too, agree that an exception, to the extent described above, to the prohibition of restrictive agreements laid down in Article 85 (1) of the EEC Treaty is both conceivable and practicable. Although such prohibitions of competition, which form an inherent part in any takeover, are not expressly referred to in Article 85 (3), they may be permissible in so far as the purchaser of an undertaking is to be protected from the competition of the vendor who might otherwise deprive the purchaser of his part of the bargain and thereby defeat the purpose of the agreement for sale. Just as Article 85 (3) provides for an exemption in the case of restrictions on competition which are indispensable to the attainment of the positive aims referred to in that paragraph, I think that a non-application of the prohibition of restrictive agreements is possible where the restrictions are indispensable to the attainment of legally permissible contractual aims, such as the

performance of an agreement for the sale of an undertaking.

Such a non-application of Article 85 (1) of the EEC Treaty outside the terms of Article 85 (3) must in my view be governed by criteria similar to those contained in Article 85 (3). In this case I would have no hesitation in applying by analogy the provisions adopted pursuant to Article 87 of the EEC Treaty.

That would mean *inter alia* that on the basis of Article 8 of Regulation No. 17 a decision not to apply Article 85 (1) should be granted for a specified period.

If this is right and the principles regarding exemption from the prohibition of restrictive agreements may be applied to this case by analogy, a further consequence will follow regarding the scope for judicial review of the Commission's decision. Since the conditions for an exemption are outlined only in a general manner, the Commission enjoys a wide discretion even in the case of a straightforward application of Article 85 (3). The Court of Justice has recognized that Article 85 (3) necessarily implies complex assessments of economic matters. Similarly, where such assessments are made in the case of prohibitions of competition agreed in connection with transfers of undertakings, the judicial review must take that fact into account and therefore confine itself to determining the correctness of the facts on which the assessments are based and the applicability to those facts of the relevant legal principles. As the Court of Justice has stated, judicial review must in the first place be carried out in respect of the reasons given for the Commission's decision, which must set out the facts and considerations on which the said assessments are based.<sup>10</sup>

10 — See judgment of 12 July 1966 in Joined Cases 56 and 58/64, *Consten Sàrl and Gründig-Verkaufs-GmbH v Commission*, [1966] ECR 299, at p. 347.

If then I examine the defendant's decision in the light of those principles I come to the conclusion that Article 1 of the decision is not open to objection.

The defendant has acknowledged in principle that it may be necessary to impose on the vendor contractual restrictions on competition. It also stated that that protection cannot be unlimited but must be restricted to the minimum that will enable the purchaser to assume the place in the market previously occupied by the seller by means of active competitive behaviour. Finally, it found that it was not possible to prescribe any length of time as being universally suitable as a period of protection and then to set out the criteria which it regarded as relevant.

If it is borne in mind that Remia was initially licensed to use Luycks's established trademark for two years, that the production of the products in question did not require high *technology*, and also that at least some of Nutricia's sales staff were transferred to Remia, the Commission cannot be criticized for having limited the duration of the non-competition clause for two further years. At all events I am unable to see why a period of four years (two years under the Luycks trademark and two years without Luycks as a competitor) should not have enabled Remia to assume the place in the market previously occupied by the seller by means of active competition. In particular the applicants' contention that, in determining whether Article 85 (1) is applicable, the Commission should have taken account of the financial position of the undertakings concerned and the fact that the non-competition clause enabled jobs to be preserved, is not a sufficient argument for invalidating the principal point of the Commission's decision, namely that Article 85 (1) of the EEC Treaty became

applicable to the non-competition clause after four years.

If we accept the proposition — which is tenable — that the non-application of the prohibition of restrictive agreements in the case of agreements for the sale of undertakings is justified for the reason stated above, namely that the purchaser must be assured of the acquisition of an undertaking he has purchased in order to be able to assume the place in the market previously occupied by the seller by means of active competition, it then becomes necessary to examine precisely what Mr de Rooij actually acquired from Nutricia.

He did acquire: the Remia undertaking, the right to sell consumer products manufactured by or on behalf of Remia for an unlimited period, and the right to sell sauces manufactured by or on behalf of Luycks for a limited period.

He did not acquire: the Luycks undertaking, or the Luycks trademark or Luycks's production facilities for sauces, although Mr de Rooij was granted an option for a limited period to purchase those production facilities.

Considering the fact that Mr de Rooij effectively acquired the Remia undertaking and its manufacturing operation together with the 'inactivity' of the Luycks undertaking in the sauce sector, to which must be added the fact that Luycks was unable to sell its production facilities for sauces to Mr de Rooij, I think that the Commission has already made a substantial concession to the applicants; for it has accepted the principle that the purchaser must be put in a position to assume the place in the market previously occupied by the seller despite the fact that de Rooij has taken over only a part of the production facilities, leaving the other part

with the seller, who is nevertheless prevented from using them for their existing purpose.

For these reasons I take the view that the four-year period laid down by the defendant for the non-application of the prohibition of restrictive agreements laid down in Article 85 (1) of the EEC Treaty is reasonable. At all events I can see no legally compelling reason for extending the duration of such a non-application of Article 85 (1), for which there is no express provision in the EEC Treaty, in the case of prohibitions of competition which are connected with agreements for the sale of undertakings.

My provisional conclusion is as follows:

If it is accepted that it is possible for the general competition rules of the EEC Treaty not to be applied, for a limited period, to prohibitions of competition agreed in connection with the sale of an undertaking, Article 1 of the Commission's decision may be upheld because a four-year exception to the prohibition of restrictive agreements laid down in Article 85 of the EEC Treaty would be sufficient to permit the attainment of the lawful purposes of the transfer of the undertaking. If that possibility is not accepted the result is the same. In that case the non-competition clauses admittedly infringed Article 85 (1) from the outset, but the period prior to 1 October 1983 is not in issue in these proceedings because it lies outside the scope of the Commission decision. Only if the Court comes to the view that a prohibition of competition is required on grounds, as described above, inherent in the nature of agreements for the sale of undertakings and that it is necessary and permissible in *this case* for a period subsequent to 1 October 1983, need it adopt a position in regard to the question of principle which would then

arise. In my view, for the reasons stated above, that is unnecessary because it seems to me that a four-year period was the most that it was possible to allow on the assumption that the non-competition clauses at issue in this case could be exempted from the prohibition of restrictive agreements for a limited period. If nevertheless the Court of Justice should take a different view, I would request it to inform me accordingly. In such a case it would seem to me that further inquiries would be necessary in order to ascertain whether such exceptions to the general competition rules are known to the legal systems of the Member States or at least those of a sufficient number of them, and thereby enable an analogous principle to be established as a principle of Community law.

5. If, then, the general competition rules of the EEC Treaty are applicable to the two non-competition clauses at issue from 1 October 1983, the applicability of Article 85 (3) of the EEC Treaty must also be considered. In *this* connection it is necessary to appraise the applicants' arguments relating not to the inherent necessity of a prohibition of competition in the case of the sale of an undertaking but to *other* considerations.

As regards the applicability of Article 85 (3) of the EEC Treaty the Commission has stated as follows, and I cite it word for word and in full quite intentionally:

'Article 85 (3) provides that Article 85 (1) may be declared inapplicable in the case of any agreement which contributes to improving production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; nor

- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

If the non-competition clauses go beyond what is objectively necessary for a transfer of the full commercial value of the business sold, an exemption can only be considered under special circumstances. In particular it must be shown that the clauses are indispensable to guarantee the attainment of objectives, other than the mere need of the purchaser further to consolidate his purchase, which may legitimately be pursued under Article 85 (3).

In the present case, the parties have failed to make out a case for applying Article 85 (3) to the two notified agreements. The Commission, too, fails to see what advantage inclusion of the two clauses restricting competition for a term and/or geographical area in excess of the maximum necessary for a transfer of the full commercial value of the businesses sold could have in terms of improving the production or distribution of goods or promoting technical or economic progress while allowing consumers a fair share of the resulting benefit. The two abovementioned major contractual restrictions of competition provide no appreciable objective advantages to offset the serious disadvantages for competition in the relevant markets. For these reasons, an exemption under Article 85 (3) cannot be considered.<sup>1</sup>

In this section of its decision, the Commission begins by correctly pointing out that for it to be possible to grant an exemption under Article 85 (3) of the EEC Treaty there must be reasons which go beyond the mere need of the purchaser to consolidate his purchase. I have already discussed that point in connection with the question whether Article 85 (1) is applicable

to prohibitions of competition agreed in connection with the sale of undertakings. In examining the matter from the point of view of Article 85 (3), however, it is necessary to consider those of the applicants' arguments which do not specifically relate to the fact that the prohibition of competition arose in connection with sales of undertakings. In that regard the applicants have put forward the following points, albeit in very summary fashion:

- (a) Remia and Luycks were in a precarious financial situation;
- (b) Between approximately 230 and 250 jobs have been preserved;
- (c) The small-sized undertakings were trying to survive in an oligopolistic market structure, and one of them has in fact survived until now;
- (d) Knowhow in the field of sauce production was enhanced as a result of the concentration of sauce production at Remia.

I am unable to ascertain from the preamble to the Commission's decision whether the Commission addressed itself to those arguments. In my view, at least the argument with regard to the safeguarding of jobs and the reference to the structure of the market called for a more detailed discussion. At all events, if the Commission did give consideration to those arguments it gives no sign of having done so in the preamble to its decision. The Commission merely states that the parties have failed to make out a case for applying Article 85 (3) to the two notified agreements. In what



follows it essentially confines itself to reproducing *verbatim* extracts from Article 85 (3) and goes on to conclude apodictically that the two contractual restrictions of competition provide no appreciable objective advantages to offset the serious disadvantages for competition in the relevant markets.

That laconic 'statement of reasons' does not satisfy the requirements of Article 190 of the EEC Treaty, which provides that 'decisions . . . of the Commission shall state the reasons on which they are based'. The extent of the duty to provide a statement of reasons prescribed in Article 190 of the Treaty depends on the nature of the measure in question.<sup>11</sup> Although the Commission is bound to mention the factual and legal considerations which led it to adopt its decision, it is not required to discuss all the issues of fact and law raised by every party during the administrative proceedings.<sup>12</sup> As early as 4 July 1963 the Court of Justice made the following comprehensive statement on this matter in a judgment delivered on that date:

'In imposing upon the Commission the obligation to state reasons for its decisions, Article 190 is not taking mere formal considerations into account but seeks to give an opportunity to the parties of defending their rights, to the Court of exercising its supervisory functions and to Member States and to all interested nationals of ascertaining the circumstances in which the Commission has applied the Treaty.

To attain these objectives, it is sufficient for the Decision to set out in a concise but

clear and relevant manner, the principal issues of law and of fact upon which it is based and which are necessary in order that the reasoning which has led the Commission to its Decision may be understood.'<sup>13</sup>

The Commission has not satisfied those criteria in this case. It is true that its statement of reasons for not applying Article 85 (3) is concise but I do not find that it is clear or relevant.

Despite the brevity of the Commission's reasoning on this point it contains a further error of law in its treatment of the applicants' request for an exemption.

With regard to that request, the Commission states as follows:

'In particular it must be *shown* [bewiesen] that the clauses are indispensable to guarantee the attainment of objectives . . . '.

Again,

'In the present case, the parties have failed to *make out a case* [nachgewiesen] for applying Article 85 (3) to the two notified agreements'.

Here the Commission has imported into the proceeding elements of the burden of proof where they do not belong. A proceeding for an exemption under Article 85 (3), unlike a proceeding for the grant of negative clearance, is governed by the principle of official determination of the facts.<sup>14</sup> The Commission must examine whether the

11 — Judgment of 30 November 1978 in Case 87/78, *Welding and Co. v Hauptzollamt Hamburg-Waltershof*, [1978] ECR 2457 at p. 2467.

12 — Judgment of 29 October 1980 in Joined Cases 209 to 215 and 218/78, *Van Landuyck and Others v Commission*, [1980] ECR 3125 at p. 3244.

13 — Judgment of 4 July 1963 in Case 24/62, *Federal Republic of Germany v Commission*, [1963] ECR 63 at p. 69.

14 — See in this regard the comments of H. Schröter, Note 137 a on Article 85 (3), in Groeben, Boeckh, Thiesing and Ehlermann, *Kommentar zum EWGV*.

information set out in the notification is true and complete and, where necessary, undertake further investigations. It is true that the undertakings concerned are under a duty to provide information but the Commission is not entitled to place upon them the burden of proving that the conditions for an exemption are met. The Court of Justice established this in its judgment in the *Consten and Grundig* case, in which it held:

‘The undertakings are entitled to an appropriate examination by the Commission of their requests for Article 85 (3) to be applied. For this purpose the Commission may not confine itself to requiring from undertakings proof of the fulfilment of the requirements for the grant of the exemption but must, as a matter of good administration, play its part, using the means available to it, in ascertaining the relevant facts and circumstances.’<sup>15</sup>

In this connection I have to point out in addition that the Dutch text of the decision, which is the only authentic text, also leaves much to be desired as far as linguistic clarity is concerned. The relevant passage in paragraph 40 is: ‘Vooral moet worden aangetoond...’, and that in paragraph 41 is: ‘In het onderhavige geval zijn de partijen er niet in geslaagd gronden aan te voeren...’. It may be that the German translation of the decision goes a little too far in using the words ‘beweisen’ and ‘nachweisen’ in rendering the two passages. In the first passage an expression such as ‘zeigen, darlegen, dartun, beweisen’ would have been appropriate, and a literal translation of the second passage would read roughly as follows: ‘im vorliegenden Fall waren die Parteien nicht in der Lage, Gründe anzuführen...’

At all events, the decision does not make it fully clear whether the Commission means to impose upon the applicants the entire burden of proof that the requirements for an exemption are satisfied. That would conflict with the Court’s judgment which I have just cited. However, the other rendering, namely that the parties were unable to make out a case, is not consistent with the facts. The applicants did set out the facts and explain why they believed that they were covered by Article 85 (3). With those reasons before it the Commission should have undertaken further investigations. It is not sufficient for the Commission to state that it fails to see that the conditions laid down by Article 85 (3) of the EEC Treaty are fulfilled.

For that reason I shall be concluding my Opinion with the proposal that the Commission decision should be declared void in so far as it concerns the request for an exemption under Article 85 (3). The Commission must accordingly be given the opportunity to consider that point afresh.

In the course of its reconsideration the Commission will need to address itself, amongst other things, to the applicants’ contention that the prohibition of competition agreed upon contributed to the preservation of jobs. That point must be taken into account in connection with Article 85 (3), as the Court has already held in its *Metro* judgment, where it states that the provision of employment comes within the framework of the objectives to which reference may be had pursuant to Article 85 (3) as improving the general conditions of production, especially when market conditions are unfavourable.<sup>16</sup> In doing so, however, the Commission should take

15 — Judgment of 13 July 1966 in Joined Cases 56 and 58/64, *Consten Sàrl and Grundig-Verkaufs-GmbH v Commission*, [1966] ECR 299, at p. 347.

16 — Judgment of 25 October 1977 in Case 26/76, *Metro SB-Großmärkte GmbH & Co. KG v Commission*, [1977] ECR 1875 at p. 1915.

account of the future of jobs at Luycks, an undertaking whose continued viability has been contested in these proceedings. On the one hand Luycks or its legal successor Sluyck is said to be in the process of being wound up for economic reasons, while on the other hand it is said to have made quite substantial investments in order to re-establish itself on the sauce market. Finally, the Commission should, if the question arises, consider whether an exemption under Article 8 of Regulation No. 17 may be granted for a period shorter than the 10 years provided for in the agreement.

C. To sum up, these are my conclusions:

Article 1 of the Commission decision of 12 December 1983 is valid in law. The Commission cannot be criticized for having initially excepted the contractually agreed prohibition of competition from the scope of Article 85 (1) of the EEC Treaty for the period up to 1 October 1983 for reasons connected with the special nature of sales of

undertakings and applying to it the general provisions of Article 85 only from that date.

Article 2 of the decision in the corrected version supplied by the Commission is also valid in law in so far as it was challenged. It amounts to no more than a consequence of Article 1 of the decision.

Article 3 of the decision should be declared void in so far as it relates to the prohibitions of competition contained in the sauce agreement and its extension in the pickles agreement.

Article 4 of the decision should therefore also be declared void in the same respects.

Article 5 is valid in law.

For the rest, the case should be referred to the Commission for reconsideration of the decision.

Finally, the decision as to costs should be governed by the first subparagraph of Article 69 (3) of the Rules of Procedure.

D. In conclusion I propose that:

- (1) Articles 3 and 4 of Commission Decision No. 83/670/EEC of 12 December 1983 should be declared void in so far as they relate to the prohibitions of competition contained in clause 5 of the agreement of 31 August 1979 and in clause V (1) (f) taken in conjunction with Annex XXIII of the agreement of 6 July 1980;
- (2) The case should be referred back to the Commission;
- (3) For the rest, the application should be dismissed;
- (4) The parties should be ordered to bear their own costs.