JUDGMENT OF THE COURT (Second Chamber)
15 February 1996 *

In Case C-226/94,

REFERENCE to the Court under Article 177 of the EC Treaty by the Tribunal de Commerce, Albi (France), for a preliminary ruling in the proceedings pending before that court between

Grand Garage Albigeois SA,

Établissements Marlaud SA,

Rossi Automobiles SA,

Albi Automobiles SA,

Garage Maurel & Fils SA,

Sud Auto SA,

Grands Garages de Castres,

Garage Pirola SA,

Grand Garage de la Gare,

Mazametaine Automobile SA,

Établissements Capmartin SA,

* Language of the case: French.

Graulhet Automobiles SA,

and

Garage Massol SARL,

on the interpretation of Commission Regulation (EEC) No 123/85 of 12 December 1984 on the application of Article 85(3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements (OJ 1985 L 15, p. 16),

THE COURT (Second Chamber),

composed of: G. Hirsch, President of the Chamber, G. F. Mancini and F. A. Schockweiler, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— the plaintiffs in the main proceedings, by Jean-Pierre Doury, of the Poitiers Bar,

— the French Government, represented by Catherine de Salins, Deputy Director, Directorate of Legal Matters, Ministry of Foreign Affairs, and Jean-Marc Belorgey, Secretary for Foreign Affairs in the same directorate and ministry, acting as Agents,

— the Greek Government, represented by Fokion Georgakopoulos, Assistant Legal Adviser, State Legal Service, and Maria Basdeiki, a representative of the same service, acting as Agents,

— the Commission of the European Communities, by Francisco Enrique González Díaz, of its Legal Service, and Géraud de Bergues, a national civil servant seconded to the Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the plaintiffs in the main proceedings, represented by Jean-Pierre Doury, the French Government, represented by Jean-Marc Belorgey, the Greek Government, represented by Fokion Georgakopoulos, and the Commission, represented by Francisco Enrique González Díaz and Guy Charrier, a national civil servant seconded to the Commission's Legal Service, at the hearing on 16 November 1995,

after hearing the Opinion of the Advocate General at the sitting on 14 December 1995,

gives the following

Judgment

1 By judgment of 22 July 1994, received at the Court Registry on 2 August 1994, the Tribunal de Commerce (Commercial Court), Albi, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of Commission Regulation (EEC) No 123/85 of 12 December 1984 on the application of Article 85(3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements (OJ 1985 L 15, p. 16).

2 That question was raised in proceedings brought by Grand Garage Albigeois SA, Établissements Marlaud SA, Rossi Automobiles SA, Albi Automobiles SA, Garage Maurel & Fils SA, Sud Auto SA, Grands Garages de Castres, Garage Pirola SA, Grand Garage de la Gare, Mazametaine Automobile SA, Établissements Capmartin SA and Graulhet Automobiles SA (hereinafter 'the plaintiffs') against Garage Massol SARL, in which the former allege unfair competition against them by the latter.

3 The plaintiffs, established in the French *département* of the Tarn, are sole concessionaires for Citröen, Ford, Honda, Peugeot and Renault vehicles.

4 Garage Massol, established in Albi in the same *département*, resells, as an independent dealer, new vehicles of various makes registered less than three months earlier or having completed less than 3 000 kilometres. It holds a stock of such cars and undertakes advertising to promote sales of them.

5 Considering that Garage Massol, which does not belong to any car manufacturer's distribution network and is not an authorized intermediary within the meaning of Article 3(11) of Regulation No 123/85, had engaged in unfair competitive practices against the concessionaires, the plaintiffs instituted proceedings on 17 March 1994 before the Tribunal de Commerce, Albi, seeking an order that Garage Massol SARL desist from its activities and pay them damages to compensate for the loss suffered by them as a result of the poaching of their customers, disruption of the network and the discounts that they were obliged to grant to avoid losing customers.

6 The plaintiffs submitted that the activity carried on by Garage Massol was unlawful in that it contravened both the exclusive concession agreements concluded between the manufacturers and their concessionaires and the Community rules.

Under those agreements, the concessionaires had an exclusive right to set up business, trade in and sell new vehicles, directly or through agents, in a specified sector. Consequently, a reseller of cars who did not belong to any distribution network for a particular make of car could not, in their view, carry on the business of an authorized intermediary within the meaning of Article 3(11) of Regulation No 123/85 and under the conditions specified by Commission Notice 91/C 329/06 of 4 December 1991 entitled 'Clarification of the activities of motor vehicle intermediaries' (OJ 1991 C 329, p. 20). In particular, they considered that an intermediary should confine himself to acting for buyers who were final consumers and was prohibited from holding stock and from misleading the public, in particular in his advertising, by giving the impression of being a reseller. Finally, the supply of new vehicles to independent resellers was, they claimed, always unlawful.

7 Garage Massol, for its part, considered that the business of an independent reseller was lawful. Concessionaires could not claim exclusive sales rights until such time as car distribution networks were so watertight that deliveries of new vehicles of a particular make to such resellers were no longer possible. However, 40% of production was being sold by manufacturers outside their concessionaire networks. Moreover, in view of the principle, in the French Civil Code, of the circumscribed effect of contracts, exclusive concession contracts were binding only on the parties to them and could not be relied on against third parties who were not prohibited by any legal provision from selling at a profit new vehicles which they had acquired lawfully. Finally, it contended that concessionaires could not rely on the derogating provisions of Regulation No 123/85 since the exclusive concession contracts did not comply with the conditions laid down by that regulation.

8 Considering that the decision in the case depended on an interpretation of Community law, the Tribunal de Commerce, Albi, stayed the proceedings pending a preliminary ruling from the Court of Justice on the following question:

'May the contracts of French concessionaires (for Peugeot, Renault, Citröen, Ford and Honda) be relied on as against third-party traders in the general context of

European law, which is one of freedom, and, in particular, if an independent reseller lawfully succeeds in obtaining new vehicles within a network, does Regulation No 123/85 or the case-law of the European Court of Justice provide justification for the manufacturer or his importer or a member of a network in a Member State to seek to prevent that reseller from importing them and reselling them in a Member State solely because it is not an approved reseller or is not an authorized intermediary?'

9 By that question the national court seeks essentially to determine whether Regulation No 123/85 must be interpreted as preventing a trader who is neither an approved reseller within the distribution network of the manufacturer of a particular make of car nor an authorized intermediary within the meaning of Article 3(11) of that regulation, from carrying on business as an independent reseller of new vehicles of that make.

10 In answering that question, it should be borne in mind at the outset that under Article 85(1) of the Treaty 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 are in principle incompatible with the common market and are prohibited. Pursuant to Article 85(2) such agreements are automatically void unless the provisions of Article 85(1) have been declared inapplicable by the Commission pursuant to Article 85(3).

11 Such a declaration of inapplicability may be made by the Commission either in the form of an individual decision for a specific agreement under Council Regulation No 17 of the Council of 6 February 1962, First regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87), or by

means of an exempting regulation for certain categories of agreement under Regulation No 19/65/EEC of the Council of 2 March 1965 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices (OJ, English Special Edition 1965-66, p. 35). In such exempting regulations, the Commission lays down the conditions under which Article 85(1) is inapplicable to an agreement even though its terms are such that it would otherwise be caught by that prohibition.

12 The object of Regulation No 123/85, adopted by the Commission on the basis of Regulation No 19/65, is to authorize certain agreements, which would otherwise be prohibited, for the distribution, sale and after-sale servicing of motor vehicles.

13 Pursuant to Article 85(3), Regulation No 123/85 declared Article 85(1) inapplicable, under the conditions exhaustively set out in that regulation, to agreements whereby a supplier entrusts an approved reseller with promoting, in a particular territory, the distribution and sales and after-sale servicing of motor vehicles and undertakes to reserve delivery of the contract goods within that territory to that reseller.

14 That regulation thus exempts from the application of Article 85(1), in particular, the obligation imposed by the supplier on the authorized distributor not to sell contract goods to resellers who do not belong to the distribution network (Article 3(10)) unless they are intermediaries, that is to say traders who act for final consumers and are given written authority for that purpose (Article 3(11)).

15 As the Court has held, Regulation No 123/85, as a regulation applying Article 85(3) of the Treaty, does not lay down any mandatory provisions directly affecting

the validity or the content of contractual provisions or oblige the contracting parties to adapt the content of their agreement but merely is limited to providing economic agents in the motor vehicle industry with certain possibilities enabling them to remove their distribution and servicing agreements from the scope of the prohibition contained in Article 85(1) despite the inclusion in those agreements of certain types of exclusivity and no-competition clauses (Case 10/86 *VAG France* [1986] ECR 4071, paragraphs 12 and 16).

16 Regulation No 123/85, in accordance with the function thus assigned to it in relation to the application of Article 85 of the Treaty, concerns only contractual relations between suppliers and their approved distributors and specifies the conditions under which certain agreements between them are lawful having regard to the competition rules of the Treaty.

17 It is thus concerned only with the content of agreements which parties tied to a distribution network for a specified product may lawfully conclude having regard to the rules of the Treaty prohibiting restrictions affecting normal competition within the common market.

18 Since, therefore, it confines itself to stating what the parties to such agreements may or may not undertake to do in relations with third parties, that regulation does not, in contrast, serve to regulate the activities of such third parties, who may operate in the market outside the framework of distribution agreements.

19 Thus, the provisions of that exempting regulation cannot affect the rights and obligations of third parties in relation to contracts concluded between

vehicle manufacturers and their concessionaires, in particular those of independent dealers.

20 It follows that Regulation No 123/85 cannot be interpreted as prohibiting a trader who is outside the official distribution network for a given make of motor vehicle and is not an authorized intermediary within the meaning of that regulation from independently carrying on the business of marketing new vehicles of that make.

21 As regards, finally, the abovementioned Commission Notice 91/C 329/06 referred to by the plaintiffs, its purpose is merely to clarify certain terms used in the regulation and it cannot therefore alter the scope of the regulation.

22 The answer to be given to the national court must therefore be that Regulation No 123/85 must be interpreted as not preventing a trader who is neither an approved reseller in the distribution network of a manufacturer of a particular make of motor vehicle nor an authorized intermediary within the meaning of Article 3(11) of that regulation from carrying on an independent business reselling new vehicles of that make.

Costs

23 The costs incurred by the French and Greek Governments and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Second Chamber)

in answer to the question referred to it by the Tribunal de Commerce, Albi, by judgment of 22 July 1994, hereby rules:

Commission Regulation No 123/85 of 12 December 1984 on the application of Article 85(3) of the EEC Treaty to certain categories of motor vehicle distribution and servicing agreements must be interpreted as not preventing a trader who is neither an approved reseller in the distribution network of a manufacturer of a particular make of motor vehicle nor an authorized intermediary within the meaning of Article 3(11) of that regulation, from carrying on an independent business reselling new vehicles of that make.

Hirsch Mancini Schockweiler

Delivered in open court in Luxembourg on 15 February 1996.

R. Grass G. Hirsch

Registrar President of the Second Chamber