JUDGMENT OF THE COURT (Third Chamber)

18 January 2007 *

In Case C-421/05,

REFERENCE for a preliminary ruling under Article 234 EC from the Rechtbank van Koophandel te Brussel (Belgium), made by decision of 21 November 2005, received at the Court on 29 November 2005, in the proceedings

City Motors Groep NV

v

Citroën Belux NV,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, J.N. Cunha Rodrigues and A. Ó Caoimh (Rapporteur), Judges,

Advocate General: L.A. Geelhoed,
Registrar: J. Swedenborg, Administrator,

* Language of the case: Dutch.

having regard to the written procedure and further to the hearing on 26 October 2006,

after considering the observations submitted on behalf of:

— City Motors Groep NV, by A. Tallon and Y. Lemense, advocaten,

— Citroën Belux NV, by J. Verbist and B. van de Walle de Ghelcke, advocaten,

— the Commission of the European Communities, by A. Bouquet and A. Whelan, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 3(6) of Commission Regulation (EC) No 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector (OJ L 203, p. 30).

2 The reference has been made in the context of proceedings between City Motors Groep NV ('CMG') and Citroën Belux NV ('Citroën') concerning the validity of the latter's termination of the agreement which it had concluded with CMG to distribute motor vehicles of the Citroën brand in Belgium.

Legal context

Community legislation

3 Article 5(3) of Commission Regulation (EC) No 1475/95 of 28 June 1995 on the application of Article [81](3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements (OJ L 145, p. 25) provided:

'The conditions for exemption laid down in (1) and (2) shall not affect:

...

— the right of one party to terminate the agreement for cause where the other party fails to perform one of its basic obligations.

In each case, the parties must, in the event of disagreement, accept a system for the quick resolution of the dispute, such as recourse to an expert third party or an arbitrator, without prejudice to the parties' right to apply to a competent court in conformity with the provisions of national law.'

4 From 1 October 2002, Regulation No 1475/95 was replaced by Commission Regulation No 1400/2002.

5 According to recitals 9 and 11 in the preamble to Regulation No 1400/2002:

'(9) In order to prevent a supplier from terminating an agreement because a distributor or a repairer engages in pro-competitive behaviour, such as active or passive sales to foreign consumers, multi-branding or subcontracting of repair and maintenance services, every notice of termination must clearly set out in writing the reasons, which must be objective and transparent. Furthermore, in order to strengthen the independence of distributors and repairers from their suppliers, minimum periods of notice should be provided for the non-renewal of agreements concluded for a limited duration and for the termination of agreements of unlimited duration.

...

(11) In order to favour the quick resolution of disputes which arise between the parties to a distribution agreement and which might otherwise hamper effective competition, agreements should only benefit from exemption if they provide for each party to have a right of recourse to an independent expert or arbitrator, in particular where notice is given to terminate an agreement.'

6 Article 2 of Regulation No 1400/2002, under the heading 'Scope', provides in the first paragraph of Article 2(1):

'Pursuant to Article 81(3) of the Treaty and subject to the provisions of this Regulation, it is hereby declared that the provisions of Article 81(1) shall not apply to vertical agreements where they relate to the conditions under which the parties may purchase, sell or resell new motor vehicles, spare parts for motor vehicles or repair and maintenance services for motor vehicles.'

7 Article 3 of Regulation No 1400/2002, under the heading 'General conditions', provides in Article 3(4) and (6):

'4. The exemption shall apply on condition that the vertical agreement concluded with a distributor or repairer provides that a supplier who wishes to give notice of termination of an agreement must give such notice in writing and must include detailed, objective and transparent reasons for the termination, in order to prevent a supplier from ending a vertical agreement with a distributor or repairer because of practices which may not be restricted under this Regulation.

...

6. The exemption shall apply on condition that the vertical agreement provides for each of the parties the right to refer disputes concerning the fulfilment of their contractual obligations to an independent expert or arbitrator. Such disputes may relate, inter alia, to any of the following:

...

(g) the issue whether the termination of an agreement is justified by the reasons given in the notice.

The right referred to in the first sentence is without prejudice to each party's right to make an application to a national court.'

8 Article 4 of Regulation No 1400/2002, under the heading 'Hardcore restrictions', provides, in Article 4(1), that the exemption is not to apply to vertical agreements which have as their object the restrictions set out in that provision.

9 Article 5 of the same regulation, under the heading 'Specific conditions', provides that the exemption is not to apply to the obligations listed thereunder which are contained in vertical agreements.

National legislation

10 Under Article 1184 of the Belgian Civil Code:

'A termination clause is always implied in synallagmatic contracts in the event of one of the two parties failing to perform its contractual obligations.

In that situation, the contract is not terminated as of right. The party to which the obligation is owed can choose whether to compel the other party to perform the agreement where that is possible or to request termination of the agreement with damages and interest.

Termination must be requested by court application, and the defendant may be granted a period in which to comply depending on the circumstances.'

11 By providing for an express termination clause, the parties can however mutually agree to place themselves outside the scope of Article 1184 and set out the circumstances in which a breach is sufficiently serious to warrant termination of the agreement as of right without a court's intervention.

The dispute in the main proceedings and the question referred for a preliminary ruling

12 Since 1992, CMG has been distributing vehicles of the Citroën brand in Belgium under sale concession agreements concluded with Citroën. The last of those agreements on the sale of new motor vehicles was concluded on 13 May 2003 for an unlimited duration, with effect from 1 October 2003 ('the concession agreement').

13 Under Article XVIII of the concession agreement, Citroën can terminate the agreement immediately as of right and without giving formal notice, inter alia 'in the event of resale, contrary to the provisions of Articles V and XIV(9), of one or more new cars [of the Citroën brand], or cars of that brand which have been registered for less than three months, and/or of equipment and accessories to a reseller who is not a member of the official [Citroën] distribution network, authorised as a reseller and established in the territory of the European Economic Area or in Switzerland'.

14 In addition, Article XXI of the concession agreement stipulates:

'... In the event of a dispute relating to performance of this agreement and in order to reach an amicable settlement, each party can call on the services of an expert, appointed by the President of the Brussels Commercial Court at the request of the more prompt party.

This provision shall not have any effect on the right of either party to apply to the courts in the event of a dispute concerning the performance of the agreement ...'

15 On 1 June 2004, Citroën terminated the agreement under Article XVIII thereof owing to CMG's sale of cars to the company Interlease NV.

16 CMG summoned Citroën to appear before the Rechtbank van Koophandel te Brussel (Brussels Commercial Court) with a view to obtaining damages for unlawful breach of the concession agreement. In this connection, it claims, inter alia, that the express termination clause under that agreement is contrary to Regulation No 1400/2002.

17 In interlocutory proceedings, the president of that court ordered Citroën, on pain of incurring a periodic penalty payment, to continue existing relations with CMG until judgment was given in the main proceedings. The appeal brought by Citroën against that order before the Hof van Beroep te Brussel (Brussels Court of Appeal) was dismissed.

18 As regards the substance of the case, the referring court, adopting as its own the considerations of the Hof van Beroep te Brussel, considers that Article 3(6)(g) of Regulation No 1400/2002 appears to require to be interpreted as meaning that the agreement must stay in force until the dispute has been resolved. It follows that an express termination clause, whereby the prior intervention of an expert, arbitrator or court is circumvented, cannot lawfully exist if the situation is one listed in Article 3(6). Article XVIII of the concession agreement is therefore, at first sight, incompatible with Regulation No 1400/2002.

19 In those circumstances, the Rechtbank van Koophandel te Brussel decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Is Article 3(6) of ... Regulation ... No 1400/2002 ... to be interpreted as precluding an express termination clause in a motor vehicle concession agreement which is intended to benefit from the exemption [provided for in Article 2(1) of that regulation]?'

The question referred

20 By its question, the referring court asks in essence whether Article 3(6) of Regulation No 1400/2002 must be interpreted as meaning that the block exemption provided for in Article 2(1) thereof does not apply to agreements which fall within its scope if they contain an express termination clause, such as that at issue in the main proceedings, under which an agreement can be terminated by the supplier without notice and as of right in the event of a breach by the distributor of one of the contractual obligations referred to in that clause.

21 According to CMG, an express termination clause must be regarded as distorting competition in so far as it places the supplier in a commanding position by limiting the national court's discretion in the event of a dispute. If there is such a clause, the court dealing with the case must confine itself to considering whether the conditions governing its application are met and whether the termination constitutes misuse of the law. The anti-competitive character of that clause is, furthermore, confirmed by the fact that, unlike Regulation No 1475/95, Regulation No 1400/2002 no longer provides for the possibility of terminating the agreement for cause on account of failure to perform one of the basic obligations of the contract.

22 It must first of all be noted that, as Citroën has rightly observed, neither Article 4 nor Article 5 of Regulation No 1400/2002, which provide an exhaustive list of the hardcore restrictions and specific conditions precluding application of the block exemption provided for by that regulation, refers to express termination clauses.

23 Admittedly, as CMG observes in its written observations, Regulation No 1400/2002, unlike Article 5(3) of Regulation No 1475/95, no longer expressly states that the conditions for the block exemption 'shall not affect ... the right of one party to

terminate the agreement for cause where the other party fails to perform one of its basic obligations'.

24 However, it cannot be inferred from that omission that express termination clauses are now prohibited in so far as they constitute a restriction on competition within the meaning of Article 81(1) EC. Article 5(3) of Regulation No 1475/95 was not in any way intended to grant a block exemption to certain restrictions on competition within the meaning of Article 81(1) EC, but simply introduced a possibility which did not restrict the contractual freedom of the parties, as exercised under the applicable national law (see, to that effect, Case C-125/05 *Vulcan Silkeborg* [2006] ECR I-7637, paragraph 47).

25 In its decision to refer, the Rechtbank van Koophandel te Brussel wishes to ascertain, however, whether an express termination clause, in so far as it enables the prior intervention of an expert, arbitrator or court to be circumvented, is not contrary to Article 3(6) of Regulation No 1400/2002. Compliance with that provision would seem indeed to require that an agreement which has been terminated remain in force pending the final outcome of a dispute concerning the validity of that termination.

26 It must be pointed out that Article 3(6) of Regulation No 1400/2002 does not prohibit any contractual clause, but merely requires, as a condition for the application of block exemption, that the agreement with a distributor should give each party a contractual right, without prejudice to their right to make an application to a national court, to refer to an independent expert or arbitrator any contractual disputes concerning, inter alia, under paragraph (g) of that provision, whether the termination of the agreement is justified by the reasons given in the notice.

27 Therefore, in order to comply with the condition governing application of the block exemption, it suffices, under Article 3(6) of Regulation No 1400/2002 and as follows from recital 11 in the preamble thereto, that the agreement contain a clause providing for such a contractual right. Since the list of contractual disputes given in that provision is not exhaustive, that must be the case whether termination takes place with or without notice. On the other hand, that provision does not require, any more than any other provision in the regulation, in respect of application of block exemption, that the intervention of an expert, arbitrator or court should precede termination being put into effect or that the effects of termination should be suspended until a decision is adopted as to its validity.

28 It thus follows from the foregoing that no provision in Regulation No 1400/2002 prohibits the parties to an agreement falling within the scope of that regulation from providing for an express termination clause such as that at issue in the main proceedings (see, to that effect, Case C-230/96 *Cabour* [1998] ECR I-2055, paragraph 37). Accordingly, the validity of such a clause is governed in principle not by the regulation but by national law alone.

29 However, as regards termination of an agreement falling within the scope of Regulation No 1400/2002, account must be taken of the fact that, pursuant to the very terms of Article 3(4) thereof, the block exemption is to apply solely on condition that the agreement provides that a supplier who wishes to give notice of termination of an agreement must give such notice in writing and must include detailed, objective and transparent reasons for the termination, in order to prevent a supplier from ending an agreement because of practices which may not be restricted under that regulation. That would be the case, according to recital 9 in the preamble to the regulation, if a supplier terminated an agreement because a distributor engaged in pro-competitive behaviour, such as active or passive sales to foreign consumers.

30 It follows, as CMG and the Commission of the European Communities submit and as Citroën itself indeed concedes, that where a supplier terminates an agreement

under an express termination clause, compliance with the conditions for application of the block exemption introduced by Regulation No 1400/2002 requires not only that that supplier indicate in writing the reasons for termination but also that the independent expert, arbitrator or national court to whom the distributor has the right, under Article 3(6) of that regulation, to refer a challenge to the validity of that termination should be in a position to exercise an effective review of those reasons.

31 It is for the national court to verify that such effective review is ensured by the national law applicable where an agreement is terminated by a supplier under such an express termination clause.

32 In the light of the objective of Article 3(4) of Regulation No 1400/2002, the effectiveness of such review requires, at the very least, that the independent expert, arbitrator or court is in a position to verify that the termination by the supplier was not motivated by practices on the part of the distributor falling under the hardcore restrictions referred to in Article 4 of that regulation.

33 Furthermore, in the event of a breach by a supplier of the condition for application of the block exemption set out in Article 3(4) of Regulation No 1400/2002, the national court must be in a position to draw all the necessary inferences, in accordance with national law, concerning both the validity of the agreement at issue with regard to Article 81 EC and compensation for any harm suffered by the distributor where there is a causal relationship between that harm and an agreement or practice prohibited under Article 81 EC (see, to that effect, Case C-453/99

Courage and Crehan [2001] ECR I-6297, paragraph 26, and Joined Cases C-295/04 to C-298/04 *Manfredi and Others* [2006] ECR I-6619, paragraphs 60, 61 and 90).

34 As to whether the intervention of an independent expert, arbitrator or national court should precede termination or whether the effects of that termination should be suspended pending a decision as to its validity, it must be pointed out that, in the absence of Community rules governing the matter, and since there is no provision in Regulation No 1400/2002 containing such a requirement, as follows from paragraph 27 of this judgment, it is for the legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness) (see, inter alia, *Courage and Crehan*, paragraph 29, and *Manfredi and Others*, paragraphs 62 and 71).

35 In accordance with the principle of equivalence, an independent expert, arbitrator or national court entrusted with assessing, in the light of Community competition law, the validity of a termination effected pursuant to an express termination clause cannot be required to intervene prior to that termination if, as is clear from the order for reference and as the parties to the dispute in the main proceedings in essence stated at the hearing in response to the Court's questions, no such prior intervention is required where the validity of such a termination is examined with regard to similar provisions of domestic law. Likewise, it does not appear that the conditions under which a court hearing applications for interlocutory relief in the context of actions founded on the Community competition rules would intervene are less favourable than those applicable to similar actions founded on domestic law; this is, however, a point which should nevertheless be checked by the national court.

36 So far as the principle of effectiveness is concerned, since the validity, with regard to Regulation No 1400/2002, of the grounds for a termination effected pursuant to an express termination clause must be subject to review which satisfies the conditions set out in paragraphs 29 to 33 of this judgment, the fact that such a clause has the effect of precluding the prior intervention of an independent expert, arbitrator or national court and that the effects of such termination are not suspended pending a decision as to its validity cannot be considered to render practically impossible or excessively difficult the exercise of the rights conferred by that regulation.

37 Consequently, in answer to the question referred for a preliminary ruling, Article 3(6) of Regulation No 1400/2002 is to be interpreted as meaning that the mere fact that an agreement falling within the scope of that regulation contains an express termination clause, such as that at issue in the main proceedings, under which such an agreement can be terminated by the supplier as of right and without notice in the event of a breach by the distributor of one of the contractual obligations referred to in that clause, does not have the effect of rendering the block exemption provided for in Article 2(1) of that regulation inapplicable to that agreement.

Costs

38 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

Article 3(6) of Commission Regulation (EC) No 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector is to be interpreted as meaning that the mere fact that an agreement falling within the scope of that regulation contains an express termination clause, such as that at issue in the main proceedings, under which such an agreement can be terminated by the supplier as of right and without notice in the event of a breach by the distributor of one of the contractual obligations referred to in that clause, does not have the effect of rendering the block exemption provided for in Article 2(1) of that regulation inapplicable to that agreement.

[Signatures]