JUDGMENT OF THE COURT OF 1 OCTOBER 1975 [1]

Van Vliet Kwasten- en Ladderfabriek NV v Fratelli Dalle Crode (preliminary ruling requested by the Gerechtshof Arnhem)

Case 25/75

Summary

Competition — Restrictive practices — Exclusive dealing agreements — Exemption — Categories of agreements — Inapplicability
(Regulation No 67/67 of the Commission, Article 3)

An exclusive sales agreement between a manufacturer in one of the Member States and a dealer established elsewhere in the common market falls within Article 3 of Regulation No 67/67 of the Commission where it prescribes an obligation on the part of the manufacturer to prohibit intermediaries and consumers established in his State from exporting or causing to be exported the goods in question to the territory covered by the contract and where it has the effect of rendering it impossible for intermediaries and consumers established in that territory to acquire directly from the manufacturer's State an appreciable quantity of the said goods.

Such an agreement falls within the provisions of Article 3 of Regulation No 67/67 even if the intermediaries and consumers established in the territory covered by the contract enjoy real possibilities — whether or not they take advantage thereof — of acquiring the products to which the contract relates in the common market outside the manufacturer's state.

In Case 25/75

Reference to the Court under Article 177 of the EEC Treaty by the Gerechtshof, Arnhem (First Civil Chamber), for a preliminary ruling in the action pending before that court between

VAN VLIET KWASTEN- EN LADDERFABRIEK NV, Nijmegen (Netherlands),

and

FRATELLI DALLE CRODE, Conegliano (Italy),

1 — Language of the Case: Dutch.

on the interpretation of Regulation No 67/67/EEC of the Commission of 22 March 1967 concerning the application of Article 85 (3) of the Treaty to certain categories of exclusive dealing agreements (OJ 1967, No 57) especially Articles 1 and 3 thereof.

THE COURT

composed of: R. Lecourt, President, J. Mertens de Wilmars and A. J. Mackenzie Stuart, Presidents of Chambers, A. M. Donner, R. Monaco (Rapporteur), P. Pescatore, M. Sørensen and A. O'Keeffe, Judges,

Advocate-General: G. Reischl
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

The order making the references and the written observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows.

I — Facts and written procedure

1. By a contract for sale entered into on 25 February 1968, Fratelli Dalle Crode, (hereinafter referred to as 'Dalle Crode'), a company incorporated under Italian law granted to Van Vliet Kwasten- en Ladderfabriek NV, (hereinafter referred to as 'Van Vliet'), a company incorporated under Netherlands law, the exclusive agency for the Benelux territory in respect of all brushes with plastic handles manufactured by it and of all parts necessary for the manufacture of brushes.

Paragraphs 4 and 5 of the said contract read as follows:

'Paragraph 4:

Dalle Crode Bros guarantee that:
(a) the brushes with plastic handles,
(b) the mountings and plastic accessories for brushes,
(c) everything connected with the plastic brushes,

which they shall deliver to their customers established in Italy, wholesalers or manufacturers etc., shall not pursuant to our mutual agreement be intended for export to the Benelux countries'.

'Paragraph 5:

The conditions mentioned under Paragraph 4 above concerning delivery to customers of Dalle Crode in Italy, shall be notified by Dalle Crode to their said customers by brochures or equivalent means, by mentioning them in all their

offers, price lists and invoices and, in any event, by disclosing before or during the preparation of the contracts of sale in question.

Sales in Italy shall satisfy the following conditions:

Dalle Crode shall deliver the branded articles and in connexion therewith it shall specifically require the buyer not to export or cause exports to be made to the Benelux countries. If the said buyer shall fail to comply with these terms then he shall be liable to the buyer (sic). [1]

Any infringement committed by him or by third parties may constitute the basis of a claim for damages on the part of Dalle Crode'.

After Dalle Crode had rescinded this agreement on 28 September 1969, Van Vliet considered, when certain deliveries took place, that its obligation to pay the price was suspended by reason of this rescission. Dalle Crode sued Van Vliet before the court of first instance at Arnhem, requesting payment of the sums due in respect of the said delivery. By way of counter-claim Van Vliet for its part required payment of compensation by Dalle Crode for failure to observe the agreement which had been made.

In support of its action and in order to prove that its rescission of the contract was well founded Dalle Crode relied on the aforesaid paragraphs 4 and 5 of the contract, alleging that these provisions were null and void because they were in conflict with Article 85 (1) of the EEC Treaty and could not benefit from the exemption in respect of categories referred to by Regulation No 67/67 of the Commission of 22 March 1967 (OJ 1967 No 57) concerning the application of Article 85 (3) of the Treaty. By judgment of 3 February 1972 the court of first instance at Arnhem gave judgment in favour of Dalle Crode, ordered Van Vliet to pay the amount claimed and declared the latter's claim to be inadmissible. Van Vliet thereupon appealed against this judgment to the Gerechtshof (Court of Appeal), Arnhem.

The Gerechtshof, Arnhem, considering that the aforementioned clauses of the contract in question contravene Article 85 (1) of the Treaty, examined whether, in accordance with the argument relied on by Van Vliet, this contract does not by virtue of the provisions of Regulation No 67/67 of the Commission of 22 March 1967 benefit from a declaration of inapplicability within the meaning of Article 85 (3).

The court found that the solution to this problem is bound up with the interpretation of Article 3 of the said Regulation, especially the term 'make it difficult' considered in the light of the word 'prevent' and by order of 18 February 1975 decided to stay the proceedings and, pursuant to Article 177 of the EEC Treaty, to refer the following questions to the Court of Justice for a preliminary ruling.

'1. Do the agreements which by Article 3 are excluded from exemption include also exclusive dealing agreements between a manufacturer in one of the Member States and an exclusive dealer elsewhere within the common market which contain provisions upon compliance with which only manufacturers and dealers in the Member State of the contracting party/manufacturer are prevented from disposing of the goods to which the contract relates, to the territory covered by the contract whilst dealers and consumers in the territory covered by the contract are only prevented from acquiring goods to which the contract relates from Member State of the contracting party/manufacturer?

2. In answering the first question, would it make any difference: (a) if dealers and consumers in the territory

1 — Translator's note: presumably 'seller' (i.e. Dalle Crode) was meant.

covered by the contract do — or do not — in practice continue to be able to obtain goods to which the contract relates from elsewhere in the common market outside the territory covered by the contract and from outside the Member State of the contracting party/manufacturer; and (b) if, to the extent to which such a possibility continues to exist in practice, dealers and consumers in the territory covered by the contract do — or do not — in complying with the provisions in the contract referred to under 1, refrain to a noticeable degree from making use of that possibility?'

2. A copy of the order referring the matter reached the Court on 7 March 1975.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by Van Vliet Kwasten- en Ladderfabriek NV, represented by V. M. Phijffer, Advocate at Nijmegen and by the Commission of the European Communities, represented by its legal adviser Bastiaan van der Esch, acting as Agent.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate-General, the Court decided to open the oral procedure without any preparatory enquiry.

II — Observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice

A — Observations submitted by Van Vliet Kwasten- en Ladderfabriek NV

1. After stating that the product referred to in the contract in question was in fact a plastic sleeve of various sizes, shapes and colours, for brushes, Van Vliet denies that paragraphs 4 and 5 of the said contract have the effect of restricting within the Benelux market the competition from other Italian undertakings (manufacturer or intermediaries) in selling the product in question.

This contract, made between *one* Netherlands licensee and *one* Italian manufacturer in no way created a closed system, preventing the Italian manufacturers or dealers from having access to the Benelux market. Whilst the contract prohibited Dalle Crode from marketing its products on the said market through its Italian buyers, it nevertheless did not obstruct the marketing of these products by manufacturers or intermediaries established in France or in Germany.

2. The fact that potential customers established within the Benelux market experience difficulties in obtaining supplies — since, to the extent to which they do not obtain these from Van Vliet, they are obliged to turn to undertakings established in France or in West Germany which imported the product in question from Italy — cannot be considered as conclusive in the present case. It did not involve an obstacle to intra-Community trade, bearing in mind the present development of such trade and the abolition of customs barriers between Member States, so that no additional cost or levy affects imports of the product in question. Besides, the purchase of these products by way of a trader established in France or West Germany, other than Van Vliet, does not in the case of potential customers of the Benelux countries amount to an additional link in the chain of trade: the distance covered by the products in question is the same in the two cases; only the stages through which they pass are different.

One might object that parallel imports via France or West Germany are theoretical rather than real but the question in the present case is essentially whether such a possibility exists or not.

At any rate one must not lose sight of the fact that the clauses in the contract do not stand in the way of such a possibility and that at a commercial level Dalle Crode needed an intermediary and in particular a manufacturer of paint brushes in order to enable its product to reach customers established in the Benelux territory. Whether such intermediary or such manufacturer was established within or outside the protected territory was of no importance in the context of the free movement of goods within the Common Market.

3. After stating that much of the damage which had been sustained in this case had been caused by the direct deliveries by Dalle Crode to other customers established within the protected territory, Van Vliet recalls that in accordance with the criteria laid down by the Commission in its communication of 27 May 1970 an exclusive sales agreement is not incompatible with the Treaty if the undertakings which participate therein are of so modest a size that even an absolute protection (of which there is no question in the present case) does not appreciably affect competition on the market where the agreement produces its effects. It is quite inaccurate in this respect to state that by reason of the contract in question the proportion of the market in the products in question which the two parties have in the Benelux territory is in the present case in excess of 5 %, for a correct calculation of this proportion ought also to take into account substitute products. To the contrary, the fact is that the annual turnover of the undertakings participating in the agreement is substantially lower than 15 million u.a. (Fl. 55 million at that time).

On the basis of these observations Van Vliet concludes that the sales agreement in question left the other Italian manufacturers and dealers in plastic handles for paint brushes with the possibility of directly marketing their products — just as the products to which the contract relates — in the territory in which the agreement produces its effects. The only restriction which results from the agreement is that it is impossible for Italian manufacturers and dealers who have bought plastic handles from Dalle Crode to re-sell them directly in the protected territory. Under the agreement it was possible for Dalle Crode itself to bring about parallel imports by delivering the goods in question to manufacturers or traders established in France or in West Germany, whom it was not obliged to prohibit from re-selling the products in the Benelux countries.

B — Observations submitted by the Commission of the European Communities

The Commission refers at the outset to the provisions of Regulation No 67/67 of 22 March 1967 (OJ 1967 No 57), made pursuant to Regulation No 90/65 of the Council of 2 March 1965 (OJ 1965 No 36), concerning the application of Article 85 (3) of the Treaty to certain categories of exclusive dealing agreements and concerted practices within the meaning of Article 85 (3).

It draws attention to Articles 1, 2 and 3 of that regulation and deduces from these articles that a certain degree of exclusiveness is considered compatible with the Treaty subject nevertheless to one specific condition, that is to say, that the market affected by the agreement should remain open to the products in question, which are available elsewhere in the Community. In the absence of this condition the agreement cannot benefit from the exemption under Regulation No 67/67 but comes within Article 85 (1) of the Treaty. Having formulated these considerations, the Commission examines the two questions and makes the following observations:

(a) On the first question

An agreement such as that described in the first question falls within the

provisions of Article 3 (b) of Regulation No 67/67 and consequently cannot be the subject of an exemption provided by that regulation. Whilst it is true that in the present case the parallel imports into the Benelux countries might be made from Member States other than Italy, it nevertheless remains a fact that no parallel import is possible from that particular State. Thus the agreement under consideration has the effect of restricting the possibility of marketing or of buying the products in question elsewhere within the common market, since on the one hand the intermediaries or consumers in the Benelux countries cannot obtain the products in question from buyers from Dalle Crode established in Italy and on the other hand the same buyers are prohibited from marketing the said products in the Benelux countries. For that very reason the contract in question also violates the principle of the free movement of goods within the Community, which underlies Article 85 of the Treaty, for although trade in the products at issue remains free within the other Member States it is, in so far as these states and Italy are concerned, subject to the restrictive condition in question.

(b) On the second question

The hypotheses formulated in the second question have no effect as regards the answer given to the first question.

In fact assuming that the products in question may be imported into the Benelux countries from the other Member States, the fact nevertheless remains that an agreement such as that referred to in the present case impedes the free movement within the common market of the products available in Italy, since direct imports from that country are excluded by the exclusive dealing agreement. Moreover, there is nothing to exclude the possibility that whilst making use of the possibility of acquiring the goods to which the agreement relates in other Member States of the Community, the intermediaries or users established in the Benelux countries might not none the less have preferred to import them directly from Italy. At any rate part of the common market is thus closed off by reason of the exclusive agreement in question.

The Commission concludes by suggesting that the questions be answered as follows:

'1. Exclusive selling agreements entered into between a manufacturer in one of the Member States and an exclusive dealer established elsewhere in the common market which provide that the buyers in the manufacturer's Member State shall be prevented from selling the products to which the contract relates to the territory covered by the contract are included amongst the agreements which under Article 3 of Regulation No 67/67 do not benefit from the exemption.

2. It is not possible to take a different view of such an agreement according to whether the intermediaries and consumers established in the territory covered by the contract do or do not have a real possibility of acquiring the goods covered by the contract elsewhere in the common market but outside the manufacturer's Member State. Equally it is immaterial whether the intermediaries and consumers do or do not make use of such possibility.'

III — Oral procedure

At the hearing on 9 July 1975 the parties to the main action and the Commission of the European Communities presented oral argument.

On that occasion Fratelli Dalle Crode, represented by Mr Teixeira de Mattos, Advocate of Amsterdam, argued in particular as follows:

— the restriction in question imposed on Dalle Crode does not appear

amongst those exhaustively listed in Article 2 of Regulation No 67/67. This is not a restriction imposed on the exclusive dealer since it affects the producer. Besides, it also affects third parties, since it amounts to a prohibition on exporting to the Benelux countries imposed on Italian traders who buy from Dalle Crode the products to which the contract relates.

— As regards the possibility of importing these products into the Benelux countries via France or Germany, this is purely theoretical since the attempts in this respect made by Dalle Crode have failed.

— The agreement in question refers not only to plastic handles and plastic parts for paint brushes but also to brushes with plastic sleeves. In the Netherlands and in the Benelux countries (sic) it was sought to avoid competition from Italian traders who had bought the last-mentioned product from Dalle Crode, since Van Vliet itself also manufactured the paint brushes from separate parts. Moreover, these traders represent approximately one-half of the Italian market for the products in question.

— Dalle Crode strenuously denies Van Vliet's allegation that it effected direct deliveries of the products in question within the protected territory. This allegation is moreover immaterial in the present case.

On the same occasion Van Vliet Kwasten- en Ladderfabriek NV, represented by M. V. Phjiffer, made the following points:

— the solution to the problem referred by the national court must be sought by taking into account the facts and the real situation in the present case.

— the application of Article 3 of Regulation No 67/67 is bound up with the existence of two factors. It presupposes that the contracting parties 'make it difficult to obtain supplies' of the goods referred to in the agreement and 'in particular' that they exercise rights or take measures 'to prevent [dealers or consumers] from obtaining' these goods.

— the agreement in question does not come within the said Article 3 since the goods in question are available in other Member States of the Community and can easily be imported into the Benelux countries from these States. This agreement moreover applies to an indefinite period and it can be rescinded on simple notice.

The Advocate-General delivered his opinion on 17 September 1975.

Law

1 By judgment of 18 February 1975 which reached the Court Registry on 7 March 1975, the Gerechtshof (Court of Appeal), Arnhem, referred to the Court two questions concerning the interpretation of Article 85 of the EEC Treaty and of Article 3 of Regulation No 67/67 of the Commission of 22 March, 1967 (OJ 1967, No 57).

2 These questions are concerned with the compatibility with Community law in the field of competition of exclusive sales agreements between a manufacturer and a dealer, established in different Member States under the provisions of which the manufacturer undertakes to prohibit intermediaries

and consumers established in his State from selling the products to which the contract relates into the territory covered by the contract.

3 The first question asks whether such contracts fall within the provisions of Article 3 of Regulation No 67/67 and are therefore excluded from the declaration of inapplicability under Article 85 (1) of the Treaty from which certain categories of contract benefit by virtue of Article 1 of Regulation No 67/67.

4 The second question asks whether the reply to the first question may differ according to whether the intermediaries and consumers established in the territory covered by the contract do or do not have a real possibility of acquiring the products in question elsewhere in the common market, outside the Member State where the manufacturer is established and according to whether they do or do not make use of such a possibility.

5 By reason of the connexion between these two questions they ought to be considered together.

6 Article 1 of Regulation No 67/67 of the Commission of 22 March 1967 on the application of Article 85 (3) of the Treaty to certain categories of exclusive dealing agreements, stipulates the agreements to which the provisions of Article 85 (1) of the Treaty apply.

7 As is shown by the sixth and seventh recitals to the regulation, the inapplicability of Article 85 (1) of the Treaty to exclusive dealing agreements falling within the category thus laid down finds its justification in the advantages which in the present state of trade such agreements afford for the improvement and the continuity of supplies as well as the continuance of the competition system to the benefit of particular small and medium-size undertakings.

8 Nevertheless the ninth and tenth recitals to that regulation state that 'any exemption must be subject to certain conditions' with a view to ensuring that consumers shall obtain the advantages which result from exclusive dealing and with a view to ensuring competition at the distribution stage.

9 To this end, Article 3 of the regulation provides that the provisions of Article 1 (1) shall not apply where

'.....

(b) the contracting parties make it difficult for intermediaries or consumers to obtain the goods to which the contract relates from other dealers within the common market, in particular where the contracting parties

1. .....

2. ... take other measures to prevent dealers or consumers from obtaining from elsewhere goods to which the contract relates or from selling them in the territory covered by the contract.'

10 It follows from this provision that Regulation No 67/67, whilst admitting that Article 85 (1) of the Treaty does not apply to certain categories of exclusive dealing agreements relating to trade between Member States, nevertheless requires that such agreements shall not have the effect of making it difficult to obtain supplies of the goods in question within the Community and shall not result in the partitioning of markets contrary to the fundamental principles of the common market.

11 Under the abovementioned provision the conditions which justify the inapplicability of Article 85 (1) are only present where the exclusive dealing agreement does not obstruct the possibility of parallel imports.

12 It is apparent from the decision referring the matter that the exclusive sales agreement in question imposes upon the manufacturer an obligation to prohibit dealers and consumers established in his State from exporting or causing to be exported the products in question to the territory covered by the contract.

13 This contract, stipulating as it does that one of the parties must take measures with a view to preventing the sale of the products in question in the territory covered by the contract by dealers and consumers established in the Member State of the manufacturer, falls under one of the cases mentioned in the second subparagraph of Article 3 (b) of Regulation No 67/67.

14 Such a stipulation, which entails an encroachment on the freedom of action of third parties, goes beyond the restrictions which may be imposed within the framework of an exclusive dealing agreement capable of escaping the prohibition contained in Article 85 (1) of the Treaty.

15 By excluding the possibility of parallel imports, this obligation has the effect of preventing intermediaries and consumers established in the territory covered by the contract from obtaining supplies.

16 Even assuming that the intermediaries and consumers established in the territory covered by the contract have real possibilities — whether or not they take advantage thereof — of obtaining the products in question within the common market outside the manufacturer's State, the absence, by reason of the said restriction, of parallel imports in respect of a considerable quantity of such products brings the exclusive dealing agreement within the provisions of Article 3 of the beforementioned regulation.

17 Consequently an exclusive sales agreement made between the manufacturer established in a Member State and a dealer established elsewhere in the common market falls within Article 3 of Regulation No 67/67 of the Commission where it prescribes an obligation on the part of the manufacturer to prohibit intermediaries and consumers established in his State from exporting or causing to be exported the goods in question to the territory covered by the contract and where it has the effect of rendering it impossible for intermediaries and consumers established in that territory to acquire directly from the manufacturer's State an appreciable quantity of the said goods.

18 Such an agreement falls within the provisions of Article 3 of Regulation No 67/67 even if the intermediaries and the consumers established in the territory covered by the contract enjoy real possibilities — whether or not they take advantage thereof — of acquiring the products to which the contract relates in the common market outside the manufacturer's State.

Costs

19 The costs incurred by the Commission of the European Communities which submitted observation to the Court are not recoverable and since these

proceedings are, in so far as the parties to the main action are concerned, 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

in answer to the questions referred to it by the Gerechtshof, Arnhem, by judgment dated 18 February 1975, hereby rules:

1. **An exclusive sales agreement between a manufacturer in one of the Member States and a dealer established elsewhere in the common market falls within Article 3 of Regulation No 67/67 of the Commission where it prescribes an obligation on the part of the manufacturer to prohibit intermediaries and consumers established in his State from exporting or causing to be exported the goods in question to the territory covered by the contract and where it has the effect of rendering it impossible for intermediaries and consumers established in that territory to acquire directly from the manufacturer's State an appreciable quantity of the said goods.**

2. **Such an agreement falls within the provisions of Article 3 of Regulation No 67/67 even if the intermediaries and consumers established in the territory covered by the contract enjoy real possibilities — whether or not they take advantage thereof — of acquiring the products to which the contract relates in the common market outside the manufacturer's State.**

Lecourt Mertens de Wilmars Mackenzie Stuart Donner Monaco

Pescatore Kutscher Sørensen O'Keeffe

Delivered in open court in Luxembourg on 1 October 1975.

A. Van Houtte
Registrar

R. Lecourt
President