OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER
delivered on 14 December 1995 *

1. The Tribunal de Commerce, Lyon, France, has requested a preliminary ruling in connection with civil proceedings [1] brought by Nissan France SA and a number of Nissan concessionaires — Serda SA, Lyon Vaise Auto SARL, Garage Gambetta SA and Lyon Automobiles SA — against Jean Luc Dupasquier, of Garage Sport Auto, [2] Star'Terre SARL and Aqueducs Automobiles SARL, which they accuse of unfair competition.

2. Specifically, the plaintiffs accuse the defendants of engaging in the business of importing and selling new motor vehicles outside the 'official' distribution network for them, without observing the Community rules they consider to be applicable, and of carrying out unlawful and misleading advertising: conduct amounting to unfair competition which has adversely affected them as 'exclusive importer' (Nissan France SA) or 'exclusive concessionaires' (the other four plaintiffs).

3. The Community measures at issue are Commission Regulation (EEC) 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 agreement [3] (hereinafter 'the Regulation') and Commission Notice 91/C 329/06 of 4 December 1991. [4]

4. The object of the legal proceedings before the French court is to prohibit the defendants from continuing (on the present basis) their business of selling new Nissan vehicles and to prevent them from advertising such sales. Damages are also sought from the defendants.

5. The Tribunal de Commerce, Lyon, considers that the decision to be given depends on a preliminary ruling from the Court of Justice on the interpretation of a number of

* Original language: Spanish.

1 — Originally there were three sets of civil proceedings, one against each defendant. The national court joined the cases when making its order for reference.

2 — In the proceedings before the Tribunal de Commerce, Lyon, it described itself as a private limited company, without any objection being raised by the plaintiffs.

3 — OJ 1985 L 15, p. 16.

4 — OJ 1991 C 329, p. 20.

provisions of the Regulation. Accordingly, it has submitted the following questions:

'1. May a parallel importer carry on the businesses of intermediary and of reseller of imported vehicles at the same time?

2. What are the criteria for differentiating between new and second-hand vehicles for the purposes of Community law?

After how many kilometres and how much time in circulation is a vehicle to be regarded as second-hand? Or is the answer in each case a matter for the national courts?'

The facts

6. Although not all the facts which might be relevant to the answer to be given to that question have been duly proved, it is nevertheless possible to work on the following assumptions, drawn from the submissions of the parties and the order for reference:

(a) None of the defendants is a concessionaire for motor-vehicle manufacturers or forms part of any of the 'official' distribution networks which those manufacturers have set up under the Regulation;

(b) Nevertheless, they carry on the business of buying and selling motor vehicles; in other words, they act as independent agents for sales of vehicles, obtained by way of parallel imports, through direct purchases abroad.

Submissions of the parties

7. The plaintiffs in the main proceedings claim that their contracts are in conformity with the Regulation. In their view, parallel imports are envisaged by the Regulation as an exception, subject to very strict conditions which the defendants have not observed. Those companies may only act as intermediaries for final consumers from whom they have prior written authorization,

and must not at the same time hold themselves out as resellers.

8. In their observations, the defendants contend that their business is lawful and does not constitute unfair competition. The business of independent car dealer is legal, as are parallel imports of the vehicles concerned. The Regulation does not purport to harmonize the vehicle distribution sector, which in any event is fragmented, involving as it does concessionaire networks, direct sales by the manufacturers themselves and independent dealers.

9. In the defendants' view, the Community rules guarantee the possibility of undertaking parallel imports as a means of favouring free competition. Finally, the distinction between new vehicles and second-hand vehicles is merely a question of fact, a matter for the national court.

10. Consequently, the defendants propose that the following answers be given to the national court:

(a) There is no definition of new vehicles in Community law, so that the distinction between new and second-hand vehicles is a matter of purely material fact. It is for the national court in each case to determine whether a vehicle is new or second-hand, taking account of when it was first used on the roads and whether it displays defects attributable to circumstances arising after it left the factory.

(b) By virtue of the principles of freedom of trade and the free movement of goods, and also the aim of consumer protection, obstacles must not be placed in the way of parallel imports and the markets must not be compartmentalized; no provision requires independent dealers to undertake parallel imports only as agents or prevents them from carrying on the business of importing vehicles.

11. The Commission, in its observations, considers, first, that the Regulation does not prohibit vehicle manufacturers from selling vehicles otherwise than through exclusive distribution networks and, secondly, it does not prevent unilateral activities or agreements distinct from those covered by the exempting regulations.

12. The answer to the first question should therefore be that the Regulation does not prohibit an independent dealer from engaging simultaneously in the business of

authorized intermediary and independent reseller, provided that there is no resultant confusion between the two businesses.

13. As regards the second question, since the Regulation does not prevent undertakings from engaging in the business of selling new vehicles outside a distribution network, and since it has never been disputed that the Regulation applies to second-hand vehicles, the Commission considers it unnecessary to give an answer to the national court regarding the distinction between the latter and new vehicles.

14. The French Government considers, first, that the Regulation does not in itself prevent an independent reseller from importing and selling new vehicles outside the official distribution network, even if he is not an agent within the meaning of Article 3(11). As regards the possibility of acting as both an agent and an independent dealer, the French Government also considers this to be a question not calling for the interpretation of any Community provision: the legality of such conduct is therefore a question to be decided by the national court in accordance with the criteria laid down in its own legal system.

15. For the French Government, in the absence of any Community-law definition of the terms 'new vehicle' and 'second-hand vehicle', those terms are to be defined by the national courts in accordance with their own internal law.

16. Finally, the Greek government takes the view, in its observations, that the Regulation does not prohibit the sale of new vehicles to independent dealers. On the basis of that conclusion, the Greek Government believes that it is sufficient to answer the first question and that the second does not need to be answered.

Community provisions on vehicle distribution

17. The Regulation defines a category of agreements for which the conditions laid down by Regulation No 19/65/EEC of the Council of 2 March 1965 [5] may be considered satisfied, so that the otherwise unavoidable prohibition which it imposes is inoperative. It comprises agreements for a definite or an indefinite period, by which the supplying undertaking entrusts to another party the task of promoting the distribution and servicing of the products; thus, one party (the manufacturer or, in general, the supplier) entrusts to the other (the distributor or concessionaire) the task of promoting within a specific territory the distribution, sale and

5 — OJ, English Special Edition 1965-1966, p. 35.

after-sales servicing of certain products of the motor vehicle industry. Under such agreements, the supplier gives an undertaking to the distributor that it will supply the contract goods for resale within the contract territory only to the dealer, or only to a limited number of undertakings within the distribution network.

18. In principle, such agreements would be void, since they generally have the object or effect of preventing, restricting or distorting competition in the common market and may, in general terms, affect trade between Member States. Nevertheless, the prohibition of such agreements, which would follow directly from Article 85(1) of the EC Treaty, is the subject of an exemption under Article 85(3) where it is expressly declared inapplicable to such agreements, albeit only in limited circumstances, by means of a specific measure such as the Regulation.

19. As far as these proceedings are concerned, it is precisely the subjective scope of the Regulation which raises the problems involved. Although there is no doubt as to the validity of the distribution system as such (limited in time until 30 September 1995, its expiry date, and renewed by Commission Regulation (EC) No 1475/95 of 28 June 1995), [6] the national court does have doubts as to its scope in relation to other traders involved in the marketing of motor vehicles.

20. Specifically, Article 3(11) of the Regulation allows agreements of this kind to contain clauses under which the distributor or concessionaire undertakes:

'to sell motor vehicles within the contract programme or corresponding goods to final consumers using the services of an intermediary only if that intermediary has prior written authority to purchase a specified motor vehicle and, as the case may be, to accept delivery thereof on their behalf'.

21. In other words, a distributor may refuse to sell vehicles to unauthorized intermediaries unless the latter, for their part, have received written authority from the final consumers to buy the vehicles on their behalf and at their expense, this constituting an exception to the principle that distribution is to be limited to the network.

22. Article 3(10) of the Regulation enables agreements of this kind to include clauses under which the concessionaire or distributor agrees 'to supply to a reseller ... contract

6 — OJ 1995 L 145, p. 25.

goods or corresponding goods only where the reseller is an undertaking within the distribution system ...'.

23. The difficulty of interpreting the terms 'intermediary' and 'reseller' prompted the Commission to issue two Notices, one dated 12 December 1984 [7] and the one dated 4 December 1991, mentioned earlier, which sought to clarify certain aspects of the Regulation in question.

24. Specifically, the 1991 Notice sought to 'clarify the scope of the activities of the intermediaries mentioned in that Regulation', defining them as providers of services acting for the account of a purchaser and final user, without assuming risks normally associated with ownership, and being given prior written authority by an identified principal.

25. In the Commission's view, although an intermediary is entitled freely to organize his business, use by him of a network of undertakings with common emblems or other distinctive signs should not give the impression that he has an authorized distribution system. The function of the intermediary must be entirely transparent as regards the services offered and the payment required for them. His advertising must not create in potential purchasers' minds any confusion between him and resellers or undertakings belonging to the distribution network of the manufacturer or manufacturers of the vehicles in question. Finally, with regard to supplies, he may not maintain with authorized concessionaires a privileged relationship contrary to the contractual obligations accepted by the latter in accordance with the Regulation.

26. According to the Notice, if the activities of an intermediary do not conform to those guidelines and criteria, he may be deemed to be 'acting beyond the limits set by Article 3(11) of Regulation No 123/85, or creating confusion in the mind of the public ... by giving the impression that he is a reseller'.

The position of independent traders outside the vehicle distribution networks

27. Dealers independent from the distribution networks operating in the motor vehicle sector may be either independent resellers of vehicles outside the 'official' network or else simply intermediaries authorized by final consumers.

7 — OJ 1984 C 17, p. 4.

28. It is quite possible that an undertaking habitually engaged in the business of marketing new vehicles is an 'authorized intermediary' within the meaning of the Regulation, without factors such as the existence of a large number of vehicles in stock, a substantial turnover, the charging of commission, the granting of credit to customers to buy vehicles, advertising to promote services and other similar operations in themselves undermining that legal classification.

29. In that connection, particular importance is to be attached to the considerations set out in the judgment of the Court of First Instance of 22 April 1993, [8] in an action for annulment brought by Automobiles Peugeot and Peugeot SA against the Commission Decision of 4 December 1991, according to which a circular sent by Automobiles Peugeot SA to its concessionaires, asking them to suspend deliveries of vehicles to an undertaking which acted as an intermediary on behalf of final purchasers, was contrary to Article 85(1) of the Treaty.

30. The judgment of the Court of Justice of 16 June 1994 in *Peugeot* v *Commission*, [9] dismissing an appeal against the abovementioned judgment of the Court of First Instance, stated:

'... the existence of a written authorization is the only condition which, according to the actual wording of Article 3(11) of Regulation No 123/85, a person must satisfy in order to be characterized as an intermediary.

... As to the argument concerning the alleged failure to take into account the *Binon* judgment [Case 243/83 [1985] ECR 2015], the Court of First Instance was right in holding that that judgment, which concerns the application of Article 85 of the Treaty to relations between an undertaking and a commercial agent, did not apply to the case of an agent acting on behalf of a final consumer and that the number of authorizations received by a professional intermediary was not the sole factor determining the change in the nature of the intermediary's involvement'.

31. It is also possible that a dealer may habitually engage in the business not of an intermediary but rather that of an independent reseller, because it initially acquires ownership of the goods which it later sells on and because it assumes the risks associated with resellers rather than those associated with intermediaries, and the related guarantee obligations: then we have a situation which falls outside the objective scope of the Regulation, since in principle

8 — Case T-9/92 *Peugeot* v *Commission* [1993] ECR II-493.

9 — Case C-322/93 P [1994] ECR I-2727.

the latter does not envisage the existence of professional traders who, outside the 'official distribution networks', habitually engage in the marketing of new vehicles.

32. However, Community law does not regard such traders as acting improperly. To do so would be to undermine the meaning and purpose of the Regulation, which does not seek to harmonize or impose binding rules on the vehicle distribution sector, but merely to lay down the conditions under which certain anti-competitive agreements, which in principle are unlawful, may, exceptionally, be regarded as acceptable. [10]

33. In other words, the Regulation confines itself — by means of the legal device of block exemptions, which in this case applies more particularly to sectors of economic activity — to removing the nullity which would otherwise invalidate certain distribution agreements between manufacturers and distributors of motor vehicles — they would be intrinsically void as inimical to free competition — but the Regulation does not seek to lay down binding guidelines for all traders in the sector.

34. That view was set out in the judgment of the Court of Justice in *VAG France*, [11] in the following terms:

'12. ... Regulation No 123/85, as a regulation applying Article 85(3) of the EEC Treaty, 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. However, the provisions of Regulation No 123/85 do not compel economic agents to make use of those possibilities. Nor do those provisions have the effect of amending the content of such an agreement or of rendering it void where all the conditions laid down in the Regulation are not satisfied.

...

16. ... Regulation (EEC) No 123/85 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 lays down conditions which, if they are satisfied, exclude certain contractual provisions from the prohibition and consequently from the automatic nullity provided for in Article 85(1) and (2) of the EEC Treaty ...'.

10 — Regarding the need not to adopt an extensive interpretation of the exceptions contained in the Regulation, see the judgments in Case C-266/93 *Volkswagen* [1995] ECR I-3477 and Case C-70/93 *Bayerische Motorenwerke* [1995] ECR I-3439.

11 — Case 10/86 [1986] ECR 4071, paragraphs 12 and 16.

35. It is clear from those considerations that if an undertaking operates outside the 'official' distribution network and engages on its own account in the purchase and sale of cars, whether new or used, no objection thereto can be based on the Regulation.

36. That conclusion makes it unnecessary — as some of the parties have claimed in the course of the proceedings — for the Court of Justice to accede to the national court's request that it 'define' the terms 'new vehicle' and 'second-hand vehicle'. In both cases, the business of the independent dealer has the same features, from the point of view of the Regulation, and the question whether the vehicle is new or used does not affect the possibility of its being sold by traders outside the network.

Parallel imports undertaken by agents and resellers

37. Neither the national court nor the plaintiffs appear to have any doubts as to the lawfulness, in principle, of imports from other Member States by independent dealers. In other words, the intrinsic validity of parallel imports is not disputed — the only issue is whether the parallel importer may be both an agent and reseller of the vehicles concerned.

38. The considerations put forward regarding the position of independent dealers provides a basis for an answer to that question. The independent dealer, unconnected with the network, is not bound by the agreements of third parties, with the result that relations or contracts between the manufacturers and their concessionaires have nothing to do with him. He can therefore buy and sell any kind of vehicle (new or used, bought at home or imported from abroad) without any limitations other than those generally imposed by his national law, and without his independent selling preventing him, in principle, from acting at the same time as an intermediary with authority from final consumers or buyers.

39. It is true, however, that the business of authorized intermediary has a very precise meaning under the Regulation. Accordingly, in order to give the national court an answer which is as helpful as possible, it is appropriate to consider to what extent the desire of an independent dealer to be both a reseller and an intermediary may, as a result of the attitude of manufacturers or concessionaires who refuse to accept him as an intermediary, be frustrated.

40. This calls for an examination, first, of the general rules concerning the enforceability of concession contracts against third parties and, secondly, determination of the conditions under which an intermediary is required to carry on his business, thereby ensuring that he cannot be lawfully rejected by undertakings forming part of the distribution networks.

41. As far as the general perspective of the Regulation is concerned, I have already expressed the view that distribution contracts signed between manufacturers and concessionaires or 'official' distributors of vehicles do not in any way affect, and cannot be relied on to prevent, the pursuit of a business such as the one mentioned. That independent activity of buying and selling cannot be prohibited under the Regulation, since the latter does not impose binding guidelines for the competitive behaviour of undertakings not parties to the agreements, but merely lifts the prohibition of certain anti-competitive conduct on the part of the parties to those agreements.

42. This does not mean, however, that distribution agreements between the manufacturers of vehicles and concessionaires have no effect on third parties whatsoever: they have very specific effects, stemming for example from the power to use such contracts to refuse to supply to undertakings outside the authorized distribution network vehicles, components or spare parts. Such a refusal would be lawful, in so far as the Regulation allows an exception to be made for such a practice, which is in itself contrary to the rules governing freedom of competition.

43. The Court of Justice has upheld the validity of a refusal to supply undertakings outside distribution networks not only with products but also with services, such as the provision of guarantees. In *Cartier*, [12] it stated:

'32. In that regard, it should be noted that a contractual obligation to restrict the guarantee to dealers within the network and to refuse to grant it in respect of goods sold by third parties leads to the same result and has the same effect as contractual terms which reserve the right to sell to members of the network. Like such terms, the restriction of the guarantee is a means whereby the manufacturer can prevent persons outside the network from marketing products covered by the system.

33. Where contractual terms whereby the manufacturer undertakes to sell only through authorized dealers and whereby those dealers themselves undertake to resell only to other authorized dealers or to consumers are lawful, there are no grounds for

12 — Case C-376/92 [1994] ECR I-15, paragraphs 32 and 33.

applying stricter treatment to arrangements for restricting the guarantee by contract to products sold through authorized dealers.'.

44. The lawfulness of refusals of that kind is thus a first and important effect on third parties, deriving from the agreements entered into between manufacturers and their approved concessionaires in the vehicle sector, both being entitled under the Regulation to enforce such agreements as a way of defending their own distribution network.

45. As an immediate consequence of that fact, the same legal process operates in reverse, so that the effect on third parties extends also to the possibility of validly using such contracts as a defence against accusations by third parties who accuse the parties to the contracts of anti-competitive practices. That is an example of the 'defensive' aspect of the effect of agreements, which can be relied upon against undertakings outside the distribution network seeking to obtain free access, as resellers, to products within the network.

46. That consequence was expressly envisaged in the judgment of the Court of Justice in *L'Oréal*, [13] which dealt specifically with the enforceability against third parties of the exemptions granted by the Commission under Article 85(3) of the Treaty. In it, the Court stated that:

'... decisions to grant exemption under Article 85(3) of the EEC Treaty give rise to rights in the sense that the parties to an agreement which has been the subject of a decision may rely on that decision against third parties who claim that the agreement is void on the basis of Article 85(2) ...'.

47. To summarize, distribution agreements signed under the Regulation render lawful, vis-à-vis third parties, a refusal by the signatories to provide other undertakings outside the distribution network with products or services covered by such agreements; they also provide a basis for the signatories to resist claims or complaints from third parties who allege that the agreements are void by virtue of the general principle of freedom of competition. But they cannot be relied upon to prohibit third parties outside the distribution network from engaging in the independent business of buying and selling new vehicles outside that network.

13 — Case 31/80 [1980] ECR 3775, paragraph 23.

48. The Regulation treats as valid commitments by distributors to distribute their vehicles to final consumers having recourse to the services of intermediaries only where such final consumers have given authority to the intermediaries for that purpose (Article 11(3)). In the latter case, that is to say if the intermediary produces a power of attorney from the final consumer, the distributor has no legal right to refuse to sell the vehicle. And there is nothing in the Regulation to preclude the intermediary's entrepreneurial activity (which, in fact, links the customer with the distributor by means of an intermediate contract) from coexisting with his business, likewise of an entrepreneurial nature, of reselling motor vehicles.

49. The only condition that may be imposed for the simultaneous conduct of that independent business and that of intermediary with authority from a final buyer is that the undertaking in question must not try to mislead his potential customers, either by giving the false impression of belonging to an official distribution network or by concealing from those customers the differences between his roles of independent reseller and authorized intermediary. It is of course for the national courts to determine whether or not, in any given case, such intended confusion has arisen.

Conclusion

50. In view of the foregoing considerations, I suggest that the Court of Justice give the following answers to the questions referred to it by the Tribunal de Commerce, Lyon:

1. Commission Regulation (EEC) 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 does not prevent undertakings outside the distribution network, even those not acting for final consumers as 'authorized intermediaries', from freely engaging in the independent business of buying and selling vehicles, whether new or used, outside that network.

2. Nor does that Regulation prohibit such undertakings from carrying on the business of independent sellers of motor vehicles and at the same time that of

intermediaries with authorization from final consumers, provided that both businesses are carried on so as not to mislead potential customers. In either case, such business may be carried on with respect to both motor vehicles acquired in their own country and those from other Member States.