OPINION OF ADVOCATE GENERAL LENZ

delivered on 8 July 1993 *

Mr President,
Members of the Court,

A — Introduction

1. Correia, Simões & Companhia, Limitada, (hereinafter 'Correia') operates a service station in Portugal. On 17 May 1982 it concluded a contract with the undertaking Petróleos de Portugal, EP — Petrogal in which it undertook to procure and to sell exclusively fuels and lubricants of its brand. [1] The contract was concluded initially for a duration of 15 years.

2. In 1990 Correia sought to extricate itself from this contract. Petróleos de Portugal — Petrogal SA (hereinafter 'Petrogal'), the successor in title to the original supplier, brought an action against Correia before the competent Portuguese court for breach of contract. In the ensuing proceedings Correia argued that the contract infringed Community competition law and was therefore void. These proceedings raise, among other things, the question of the compatibility of the contract with Commission Regulation (EEC) No 1984/83 of 22 June 1983 on the application of Article 85(3) of the Treaty to categories of exclusive purchasing agreements. [2]

3. Accordingly, the Tribunal Cível da Comarca (Civil Court of First Instance), Lisbon, has referred the following question to the Court for a preliminary ruling:

'Where, in breach of Article 12(1)(c) of Regulation (EEC) No 1984/83 of 22 June 1983, it is provided in a service-station agreement as contemplated in Article 10 of the regulation that the said agreement is concluded for an indefinite duration or for a period of more than 10 years, does this, by virtue of Article 85(2) of the Treaty, render the agreement void in its entirety or is it possible, on the ground that the nullity affects only that point, to abridge the agreement by making it apply for a period of 10 years, the maximum permitted by the regulation?'

B — Opinion

4. It appears from the grounds of the order for reference that the national court bases itself on two premises which are important for a proper understanding of the question referred for a preliminary ruling. First, the national court assumes that the contract at issue does not satisfy (in part) the requirements of Regulation No 1984/83 and therefore does not qualify for the exemption

* Original language: German.

1 — The second defendant in the main proceedings, Correia, Sousa & Crisótomo Limitada, acted as guarantor for the fulfilment of these obligations.

2 — OJ 1983 L 173, p. 5.

provided for therein from the prohibition laid down in Article 85(1) of the EEC Treaty. In the result, that view may be correct (but not as far as its reasoning is concerned). Secondly, the national court considers that the non-applicability of Regulation No 1984/83 means that the contract of 17 May 1982 infringes Article 85(1) of the EEC Treaty and is therefore wholly or partly void under Article 85(2). As I shall show, that view is incorrect.

Regulation No 1984/83

5. Regulation No 1984/83 exempts certain groups of exclusive purchasing agreements from the prohibition set out in Article 85(1) of the EEC Treaty pursuant to Article 85(3) of the Treaty. Title III of the regulation (Article 10 et seq.) sets out specific provisions relating to service-station agreements. Article 10 of the regulation provides that exemption is to apply, subject to the conditions set out therein, to agreements between two undertakings in which one party to the contract ('the reseller') undertakes *vis-à-vis* the other ('the supplier') to purchase certain motor-vehicle and other fuels for resale in a service station only from the supplier (or a connected undertaking).

However, according to Article 12(1)(c), Article 10 shall not apply, apart from the cases specified in Article 12(2), where the agreement is concluded for an indefinite duration or for a period of more than 10 years.

6. Regulation No 1984/83 entered into force on 1 July 1983 and is valid until 31 December 1997 (Article 19). Article 15(3) of the regulation contains a transitional provision for agreements of the type referred to in Article 10 which were already in force on 1 July 1982, and expire after 31 December 1988.

In so far as such agreements satisfied the requirements of Regulation No 1984/83, they unquestionably qualified for the benefit of exemption under that regulation. However, if that was not the case, such an agreement could still qualify for exemption from the prohibition set out in Article 85(1) of the EEC Treaty for the period from 1 January 1989 until the expiry of the agreement or at the latest the expiry of the regulation itself. This was conditional on its having been amended before 1 January 1989 to the effect that the supplier released the reseller from all the obligations which, under Titles II and III of the regulation, precluded exemption.

Under Article 15(4), those provisions also apply to service-station agreements in force on the date of accession of the Portuguese Republic to the European Communities which, as a result of accession, fall within the scope of Article 85(1) of the EEC Treaty.

7. As I have already mentioned, the exemption provided for by Article 10 of the regulation is not applicable if the agreement was concluded for a period of more than 10 years. Manifestly, the national court

inferred from this that an obligation extending beyond the permissible 10-year term is among those obligations from which the supplier must release the reseller in order to obtain the benefit of the transitional arrangement provided for in Article 15(3) of the regulation. On that view, the agreement would have been exempted from the prohibition set out in Article 85(1) of the EEC Treaty only if the parties had agreed before 1 January 1989 to reduce the term to the maximum permissible one of 10 years (to end, therefore, on 16 May 1992) or to a shorter period. According to the information provided by the national court, no such amendment was made. At the hearing before the Court, however, Petrogal's representative asserted that Correia had been released — possibly tacitly — from the obligations precluding the application of Regulation No 1984/83. The national court will have to determine whether that assertion is correct.

8. The national court's view that the agreement of a duration of a contract exceeding what is permitted under Article 12 is among the obligations from which the reseller must be released in order for Article 15(3) to apply is, however, incorrect in any event. It is clear even from the wording of Article 15(3) that that transitional provision is designed also to allow agreements concluded for a period of more than 10 years to benefit by block exemption. [3] Of course, this is conditional on the supplier's having released the reseller from all other obligations precluding exemption under the regulation. That interpretation is confirmed by statements made by the Commission in a notice relating to the regulation. [4]

9. Consequently, the applicability of Regulation No 1984/83 to the contract at issue would have to fail for some other reason. It may be inferred from the documents produced to the Court that the purchasing obligation to which Correia was subject was not confined to fuels but also covered lubricants. However, according to Article 12(1)(a), the exemption granted by Article 10 of the regulation is not applicable where the reseller is subject to exclusive purchasing obligations for goods other than motor-vehicle and other fuels.

Admittedly, Article 11(b) allows the reseller to be subjected to the obligation not to 'use' lubricants supplied by other undertakings within the service station designated in the agreement where the supplier or a connected undertaking has made available to the reseller or financed a lubrication bay or other motor-vehicle lubrication equipment. However, that provision relates in any case only to the *use* of lubricants, not to their *resale*. [5] In contrast, the contract of 17 May

3 — The provision covers agreements which were already in force on *1 July 1983* and provides for exemption until no later than *31 December 1997* (the date on which the regulation expires).

4 — Commission Notice concerning Commission Regulations (EEC) No 1983/83 and (EEC) No 1984/83 of 22 June 1983 on the application of Article 85(3) of the Treaty to categories of exclusive distribution and exclusive purchasing agreements (OJ 1984 C 101, p. 2, at point 64 et seq.).

5 — See point 61 of the Commission's notice, cited in footnote 4.

1982 provides that Correia may neither use nor sell lubricants other than lubricants supplied by Petrogal in its service station. [6]

Petrogal's representative questioned this interpretation at the hearing before the Court but did not put across any convincing arguments in this regard. He did, however, rightly point out that it is for the national court and not the Court of Justice to clarify this question.

Article 85(1) of the EEC Treaty

10. The fact that the contract at issue does not fulfil the requirements of Regulation No 1984/83, and hence does not qualify for exemption thereunder, does not necessarily mean that it infringes Article 85(1) of the EEC Treaty.

11. The fact that an agreement does not qualify under a particular block exemption does not necessarily mean that it must be void under Article 85(2). [7] Instead it must first be determined whether such an agreement infringes Article 85(1). Consequently, the national court will have to examine whether the agreement at issue may affect trade between Member States and has as its object or effect the prevention, restriction or distortion of competition within the common market.

In doing so, regard must be had to the fact that the effects of such an agreement have to be assessed in the economic and legal 'context in which they occur and where they might combine with others to have a cumulative effect on competition'. [8] Consequently, the Court's case-law on such agreements, in particular the judgment in *Delimitis*, may be used to answer the questions raised in this case.

12. It must not be ignored that the national court's task of determining whether the requirements of Article 85(1) of the EEC Treaty are satisfied may be fraught with substantial difficulties. It therefore appears useful to refer in this connection to the Commission's recently published notice on cooperation between national courts and the Commission in applying Articles 85 and 86 of the EEC Treaty. [9] According to that notice, national courts may consult the Commission, *inter alia*, on points of law where the application of Article 85(1) or Article 86 causes them particular difficulties. [10] The answers given by the Commission are not binding on the courts which have requested them, but, as the Commission rightly points out, give them 'useful guidance for resolving disputes'. [11]

6 — See clause 5 of the General Conditions appended to the contract, which by virtue of Article 5 of contract constitute an integral part of the contract.

7 — Case 10/86 *VAG France* v *Magne* [1986] ECR 4071, paragraph 12.

8 — Case C-234/89 *Delimitis* v *Henninger Bräu* [1991] ECR I-935, paragraph 14. See as long ago as the judgment of 12 December 1967 in Case 23/67 *Brasserie De Haecht* v *Wilkin* [1967] ECR 407, at 415.

9 — OJ 1993 C 39, p. 6.

10 — Notice cited in footnote 9, point 38.

11 — Notice cited in footnote 9, point 39.

In addition, the national court may, of course, refer a further question to the Court for a preliminary ruling pursuant to Article 177 of the EEC Treaty.

13. Should the national court's inquiries conclude that the agreement at issue is caught by the prohibition set out in Article 85(1), it will have to consider in a second stage whether the agreement is or may be exempted from that prohibition. There are two possibilities for such exemption: the agreement may satisfy the requirements of another exemption regulation or it may be exempted by the Commission by an individual decision. [12]

The Court does not need to go into the issues arising in that connection in these proceedings, since they have not been raised in the national court's question. It seems to me, however, to be both appropriate and useful briefly to explore the questions arising in connection with the possibility of an exempting decision given by the Commission.

14. First, it should be observed that, according to the Court's case-law, so-called 'old agreements' are to be treated by the national courts as effective until such time as the Commission has taken a decision on them. [13] These are agreements which were already in existence at the time when Regulation No 17 [14] entered into force and were notified to the Commission in time or were exempted from the notification obligation under Article 5(2) (in conjunction with Article 4(2)) of the regulation. This case-law is probably also applicable *mutatis mutandis* to 'accession cartels' (agreements which were already in existence at the time of the accession of a new Member State and therefore came within the scope of Article 85 of the EEC Treaty by reason of accession). [15]

The national court may have to decide whether the agreement at issue is to be regarded as provisionally valid on the basis of that case-law. [16]

15. As the Court held in the judgment in *BRT* v *SABAM*, [17] the provisions of Articles 85(1) and 86 are directly applicable and hence are applicable by the national courts. However, the power to declare the prohibition laid down by Article 85(1) inapplicable in a given case pursuant to Article 85(3) is reserved to the Commission under Article 9(1) of Regulation No 17. Exemption may be granted only if the agreement was previously notified to the Commission, unless it falls

12 — Cf. the judgment in *VAG France* v *Magne*, cited in footnote 7, paragraph 13.

13 — See, in particular, the judgment in Case 48/72 *Brasserie de Haecht II* [1973] ECR 77, paragraph 9.

14 — OJ, English Special Edition 1959-62, p. 57.

15 — See Article 25 of Regulation No 17 and H. Schröter in H. von der Groeben/J. Thiesing/C. D. Ehlermann (eds), *Kommentar zum EWG-Vertrag*, fourth edition, Baden-Baden, 1991, Article 85, section 175. and L. Ritter/F. Rawlinson/W. D. Braun, *EEC Competition Law*, Deventer/Boston, 1991, p. 713 et seq.

16 — Section 15 below relates to agreements which do not benefit by provisional validity.

17 — Case 127/73 *BRT* v *SABAM* [1974] ECR 51, paragraphs 15 to 17, at 62 and 63.

within the categories of agreements mentioned in Article 4(2) of the regulation.

In its judgment in *Delimitis*, the Court of Justice gave some indications as to how a national court should proceed in such cases. [18] If the agreement's incompatibility with Article 85(1) is beyond doubt and, regard being had to the block exemption regulations and the Commission's previous decisions, the agreement may on no account be the subject of an exemption decision under Article 85(3), the national court may continue the proceedings and rule on the agreement in issue. If, in contrast, the national court finds that the contract at issue satisfies the formal requirements for exemption and considers that the agreement may be the subject of an exemption decision by the Commission, it should take steps to avoid the risk of conflicting decisions. In the Court's view, in such cases the national court may perhaps stay the proceedings in order to ascertain the Commission's view or to seek information from the Commission on the state of any procedure which it may have set in motion. In this connection, attention is drawn once again to the Commission's notice describing details of this collaboration between the national courts and the Commission. [19]

Of course, the national court remains at liberty to suspend the proceedings and seek a further preliminary ruling from the Court pursuant to Article 177 of the EEC Treaty.

Article 85(2) of the EEC Treaty

16. Should it prove that the agreement at issue infringes Article 85(1) and cannot be exempted from the prohibition set out therein pursuant to Article 85(3), it should be borne in mind that the nullity ensuing from Article 85(2) is confined to those parts of the agreement which are covered by the prohibition. The agreement as a whole will only be void where 'those parts are not severable from the agreement itself'. [20] It is the task of the national court to determine the consequences of the nullity of individual contractual provisions on the effectiveness of the contract as a whole under the relevant national law. [21]

C — Conclusion

17. I therefore propose that the Court should reply to the question referred by the Tribunal Cível da Comarca, Lisbon, as follows:

18 — Cited in footnote 8, paragraphs 50 to 54

19 — Cited in footnote 9.

20 — Case 56/65 *Société Technique Minière* v *Maschinenbau Ulm* [1966] ECR 235, at 250.

21 — Case 319/82 *Société de Vente de Ciments et Bétons* v *Kerpen & Kerpen* [1983] ECR 4173, paragraph 12, and *VAG France* v *Magne*, cited in footnote 7, paragraph 15.

(1) In the case of an agreement relating to a service station within the meaning of Article 10 of Regulation (EEC) No 1984/83 of 22 June 1983 on the application of Article 85(3) of the Treaty to categories of exclusive purchasing agreements which are of indefinite duration or of a duration of more than 10 years contrary to Article 12 of that regulation, that regulation does not apply to the agreement if the requirements of Article 15(3) of that regulation are not fulfilled.

(2) Such an agreement infringes Article 85(1) of the EEC Treaty where the requirements of that provision are satisfied.

(3) The nullity ensuing from Article 85(2) of the EEC Treaty is confined to those parts of an agreement which infringe the prohibition laid down in Article 85(1) of the EEC Treaty. It is the task of the national court to determine the consequences of the nullity of the remaining parts of the contract under its national legal provisions.