OPINION OF ADVOCATE GENERAL GEELHOED

delivered on 28 September 2006 [1]

1. Central to this case once more are the difficulties associated with the consequences of the expiry of the old and the entry into force of a new block exemption in the motor vehicle sector. What is at issue in this case too is whether the entry into force of the new block exemption can justify the termination of existing distribution agreements on a reduced period of notice. The question of invalidity is also relevant here.

I — Legal framework

2. Recital 19 in the preamble to Regulation (EC) No 1475/95 [2] provides as follows:

'Article 5(2)(2) and (3) and Article 5(3) lay down minimum requirements for exemption concerning the duration and termination of the distribution and servicing agreement, because the combined effect of the investments the dealer makes in order to improve the distribution and servicing of contract goods and a short-term agreement or one terminable at short notice is greatly to increase the dealer's dependence on the supplier. In order to avoid obstructing the development of flexible and efficient distribution structures, however, the supplier should be entitled to terminate the agreement where there is a need to reorganise all or a substantial part of the network. ...'

3. Article 5(2) and Article 5(3) of Regulation No 1475/95 read as follows:

'2. Where the dealer has, in accordance with Article 4(1), assumed obligations for the improvement of distribution and servicing structures, the exemption shall apply provided that:

...

1 — Original language: Dutch.

2 — Commission Regulation 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 1995 L 145, p. 25).

(2) the agreement is for a period of at least five years or, if for an indefinite period, the period of notice for regular termination of the agreement is at least two years for both parties; this period is reduced to at least one year where:

...

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

— the right of the supplier to terminate the agreement subject to at least one year's notice in a case where it is necessary to reorganise the whole or a substantial part of the network,

...'

4. In its explanatory brochure clarifying that regulation, the Commission again deals specifically with this issue in its answer to question 16(a) which relates to the early termination of the dealership agreement. In brief, it states that a motor vehicle manufacturer has the right to terminate the agreement early (on one year's notice) where it needs to restructure the whole or a substantial part of the distribution network; that this possibility of early termination has been introduced to provide the manufacturer with an instrument for flexible adaptation to changes in distribution structures; that a need for reorganisation may arise for various reasons, for example, the behaviour of competitors or other economic developments, and that whether or not a 'substantial' part of the network is affected must be decided having regard to the specific organisation of a manufacturer's sales network, and furthermore that 'substantial' implies both an economic and a geographical aspect, which may be limited to the network, or a part of it, in a given Member State.

5. Regulation No 1475/95, which in accordance with Article 13 remained in force up to and including 30 September 2002, was replaced with effect from 1 October 2002 by Regulation (EC) No 1400/2002. [3]

6. Recital 12 in the preamble to Regulation No 1400/2002 reads as follows:

'Irrespective of the market share of the undertakings concerned, this Regulation does not cover vertical agreements contain-

3 — Commission Regulation 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 2002 L 203, p. 30).

ing certain types of severely anti-competitive restraints (hardcore restrictions) which in general appreciably restrict competition even at low market shares and which are not indispensable to the attainment of the positive effects mentioned above. This concerns in particular vertical agreements containing restraints such as minimum or fixed resale prices and, with certain exceptions, restrictions of the territory into which, or of the customers to whom, a distributor or repairer may sell the contract goods or services. Such agreements should not benefit from the exemption.'

7. Further detail is contained in Article 4 of the regulation which states that the exemption shall not apply to vertical agreements which have as their object the restrictions specifically mentioned in this provision (13 in total), known as the 'hardcore restrictions'.

8. Article 10 of this new regulation, a transitional provision, reads as follows:

'The prohibition laid down in Article 81(1) shall not apply during the period from 1 October 2002 to 30 September 2003 in respect of agreements already in force on 30 September 2002 which do not satisfy the conditions for exemption provided for in this Regulation but which satisfy the conditions for exemption provided for in Regulation (EC) No 1475/95.'

9. In its explanatory brochure relating to this regulation, the Commission states as follows in reply to question 20:

'... The expiry of Regulation No 1475/95 on 30 September 2002 and its replacement by a new regulation does not in itself imply that there should be a reorganisation of the network. After the entry into force of the regulation, a vehicle manufacturer may none the less decide to substantially reorganise its network. To comply with Regulation 1475/95 and, thus, to benefit from the transitional period, notices of regular contract termination should thus be given two years in advance unless a reorganisation is decided upon or if there is an obligation to pay compensation.'

In the fourth paragraph of the reply to question 68, the brochure states:

'The question as to whether or not it is necessary to reorganise the network is an objective one, and the fact that the supplier deems such a reorganisation to be necessary

does not settle the matter in case of dispute. In such a case it shall be for the national judge or arbitrator to determine the matter with reference to the circumstances.'

II — The facts, the questions referred and the proceedings before the Court

A — *The facts of the case in the main proceedings*

10. In 1996 A. Brünsteiner GmbH ('Brünsteiner') and Autohaus Hilgert GmbH ('Hilgert') each concluded a dealership agreement with Bayerische Motorenwerke AG ('BMW').

11. Under clause 11.3, BMW may terminate the agreement on 24 months' notice. Clause 11.6 deals with the issue of termination of the agreement due to reorganisation of the distribution network. The latter provision reads as follows:

'Where it is necessary for BMW to reorganise the whole or a substantial part of its network it may terminate the contract on 12 months' notice.

The above shall apply also where the general legal situation of the contract changes in essential respects.'

12. In September 2002 BMW terminated all its dealership agreements within its European network with effect from 30 September 2003. The reason it gave was that the entry into force of Regulation No 1400/2002 on 1 October 2002 brought about considerable legal and structural changes to the motor industry, which obliged BMW to reorganise its distribution network.

13. With most of its existing dealers at that time BMW subsequently concluded, with effect from 1 October 2003, new agreements in conformity with the requirements of Regulation No 1400/2002.

14. However, new agreements were not concluded with, among others, Brünsteiner and Hilgert. They then challenged the validity of the notice period before the national court, claiming that the two-year notice period ought to have been observed.

Consequently, they brought an action for a declaration that their contractual relations under the dealership agreement continued to exist beyond 30 September 2003 and until 30 September 2004 at the latest.

15. The court hearing the appeal, the Oberlandesgericht München (Higher Regional Court, Munich), dismissed the action. It held that the changes brought about by Regulation No 1400/2002 necessitated the reorganisation of BMW's distribution network. A series of provisions restrictive of competition which until then were exempted by Regulation No 1475/95 would in future constitute hardcore restrictions within the meaning of Article 4 of the new regulation so that, even without the termination as of 30 September 2003, the exemption for all of the clauses restrictive of competition contained in BMW's dealership agreements would cease to apply as from 1 October 2003. According to the court, BMW could not be required to accept — even if only until 30 September 2004, when the notice period for regular termination expired — that the position in law was that there was either an agreement without any terms restrictive of competition or no contract at all because the existing agreement had to be considered invalid.

16. Brünsteiner and Hilgert have appealed against this decision on a point of law to the Bundesgerichtshof (Federal Court of Justice), thereby pursuing their claim for a declaration.

17. The Bundesgerichtshof (Cartel Chamber) has then considered it necessary to refer two questions for a preliminary ruling. In so doing, it stated that although on a narrower interpretation, based on the Commission's explanatory brochures, the need to reorganise cannot be justified by the mere entry into force of Regulation No 1400/2002, but only by economic circumstances, it is nevertheless the case that the entry into force of the new block exemption does have consequences for the structure of distribution systems in the motor vehicle sector, so that not only economic circumstances but also legal circumstances could necessitate a reorganisation of the systems.

18. It is noted in this regard that Regulation No 1400/2002 brought about a hitherto unknown need for change in the distribution systems in this sector, since the previously widespread combination of exclusive and selective distribution is no longer exempt. Manufacturers must therefore choose one of those systems. In addition, in order to continue to qualify for the block exemption, sales and servicing, which until then had to be combined, must be separated and the concept of brand exclusivity will also disappear in due course.

19. If, before the expiry of the transitional period, the existing agreements are not adapted or terminated and replaced by new agreements, the clauses restrictive of com-

petition are invalidated. This could result in there being two different legal regimes within a single distribution system, with those dealers which would not be prepared to agree to the alterations enjoying more freedom than the other dealers in the network. The referring court is in agreement with the appeal court that this is an undesirable situation.

20. On the other hand, the referring court is faced with the problem that if, regardless of the effectiveness or the effective date of the termination, the dealership agreement cannot in any case continue after the expiry of the transitional period, then the first question referred for a preliminary ruling is in fact no longer relevant. The following question would therefore arise:

— must Article 4 of the new regulation be interpreted so strictly as far as its operation is concerned that agreements which are not terminated in time or are not adapted become invalid by definition after the expiry of the transitional period on 1 October 2003;

— or is it possible that agreements which are not terminated in time retain their validity even after the entry into force of the new regulation until the two-year notice period has expired?

B — *The questions referred*

21. The Bundesgerichtshof referred the following questions to the Court for a preliminary ruling:

'(1) Is the first indent of Article 5(3) of ... Regulation ... No 1475/95 ... to be so interpreted that the need to reorganise the whole or a substantial part of the network and the resulting right of the supplier to terminate agreements with dealers in its distribution network, on one year's notice, can also arise because the entry into force of ... Regulation ... No 1400/2002 ... required far-reaching changes to the distribution systems previously used by suppliers and their dealers under Regulation (EC) No 1475/95 which were exempted under that regulation?

(2) If the first question is to be answered in the negative:

Is Article 4 of Regulation ... No 1400/2002 to be so interpreted that, exceptionally, the existence of agreements which are restrictive of competition in a motor vehicle dealership agreement which constitute hardcore restrictions ("black list" of prohibited terms) under that regulation did not, on expiry of the one-year transitional period on 30 September 2003, laid down in Article 10 of the regulation, cause the lapse of the exemption from the prohibition under Article 81(1) EC for all agreements restrictive of competition in the dealership agreement, if that agreement was concluded when Regulation ... No 1475/95 was still applicable, in accordance with the requirements of that regulation and exempted by that regulation?

Is this still the case where the invalidity under Community law of all contractual provisions restrictive of competition leads in national law to the invalidity of the contract in its entirety?'

C — *The proceedings before the Court*

22. Brünsteiner, Hilgert and BMW, and also the Commission, have submitted written observations. At the hearing of 7 September 2006, they further developed their points of view.

III — Assessment

A — *The first question*

23. With regard to this first question, I can be brief. This question corresponds to the 11th question in the *Vulcan Silkeborg* case in which I delivered my Opinion on 27 April 2006 and in which the Court has recently delivered its judgment. [4]

24. For the answer to the first question, I refer to paragraphs 53 to 66 inclusive of the judgment.

25. Briefly, it makes the following points:

— the new block exemption introduced substantial amendments with regard to

4 — Judgment of 7 September 2006 in Case C-125/05 [2006] ECR I-7637.

its predecessor, it is more stringent than its predecessor;

— however, there is no requirement whatsoever on suppliers to include clauses restricting competition in their agreements, they are merely given the opportunity to do so;

— the entry into force of the new block exemption does not in itself necessitate the reorganisation of the distribution network;

— however, having regard to the substantial amendments to the new scheme for exemption, suppliers may be led to adapt their agreements in order to ensure that the agreements can continue to benefit from the new exemption regulation. This applies in particular to clauses which were exempt under Regulation No 1475/95, but which now under Article 4 of Regulation No 1400/2002 are considered to be 'hardcore';

— it is also precisely because of these substantial amendments that Regulation No 1400/2002 provides for a transitional period in Article 10;

— the manufacturer can therefore adapt the agreements, but there will also be situations where amendments will be required that are so comprehensive that they must be truly considered as constituting a reorganisation within the meaning of Article 5(3) of Regulation No 1475/95. Such a reorganisation might for example be needed where, in order to continue to benefit from the new block exemption, a supplier which had combined selective distribution and exclusive distribution chooses to keep either a selective or an exclusive distribution system.

26. The Court concluded its reasoning with the following ruling:

'... the entry into force of ... Regulation (EC) No 1400/2002 ... did not, of itself, require the reorganisation of the distribution network of a supplier within the meaning of the first indent of Article 5(3) of Regulation No 1475/95. However, that entry into force may, in the light of the particular nature of the distribution network of each supplier, have required changes that were so significant that they must be truly considered as representing a reorganisation within the meaning of that provision. It is for the national courts or arbitrators to determine, in the light of all the evidence in the case before them, whether that is the position.'

27. In my opinion, it clearly follows from this ruling that it is for the national court to determine whether the economic consequences of the entry into force of the new regulation are of such a nature that the need to reorganise the dealership network is to be ascribed to the entry into force of the regulation as such. Furthermore, the criterion laid down in Article 5(3) of Regulation No 1475/95 for the termination of the agreement with a reduced period of notice remains wholly valid. This means that a prima facie case must be made that it is indeed necessary to reorganise the whole or a substantial part of the network. In addition, a further question that may arise is whether a reorganisation during which the dealership agreement is renewed with approximately 90% of the existing dealers can in fact be considered to be a reorganisation of the whole or a substantial part of the distribution network. It is naturally the prerogative of the national court to establish whether the factual conditions for the application of that provision are satisfied.

B — *The second question*

28. The second question is, in essence, what the consequences are if an existing agreement, not adapted or not terminated in time, contains hardcore restrictions within the meaning of Article 4 of Regulation No 1400/2002, particularly because under national law the result is, presumably, that the entire dealership agreement is rendered invalid.

29. All the parties to the proceedings are of the opinion that an agreement which contains 'Article 4 restrictions' cannot, at the end of the transitional period, benefit from the block exemption. Brünsteiner and Hilgert, however, are of the opinion that the invalidity of these 'Article 4 restrictions' does not automatically result in the invalidity of the entire agreement. It is certainly possible to have a distribution agreement without clauses that restrict competition. According to them, in keeping with an interpretation in conformity with Community law, an agreement can be considered to be invalid in its entirety under national law only if the supplier had tried to adapt the agreement to the new legal situation and the other party had rejected it without good cause.

30. I share the view that if an agreement which qualifies under the old block exemption of Regulation No 1475/95, but which after the expiry of the transitional period under Article 10 of Regulation No 1400/2002 still contains provisions which under Article 4 of the new block exemption are characterised as hardcore, the agreement as a whole cannot benefit from the block exemption.

31. The wording of Article 4 is clear in this respect. In contrast with, for example, Article 5 of Regulation No 1400/2002, which stipulates that the exemption 'shall not apply to any of the following obligations contained in vertical agreements', Article 4 stipulates that '[t]he exemption shall not apply to vertical agreements which, ...'.

32. The wording of Article 10 of Regulation No 1400/2002 is also clear. The transitional period is one year. Up to this time, that is, up to and including 30 September 2003, existing agreements which satisfied the exemption conditions under Regulation No 1475/95, including any restrictions which might be contained therein, and which are now characterised as hardcore restrictions, could still benefit from the exception to the prohibition contained in Article 81(1) EC, but not thereafter.

33. Until then, market operators had been, as it were, given time, if they wished to benefit from the new exemption, to adapt their agreements and/or to implement their reorganisations.

34. Whether in this case there was indeed a reorganisation of the distribution network or of a substantial part thereof, with its applicable notice period of one year, is, as is already apparent from the answer to the first question, for the national court to decide. If it should become evident that the conditions for the application of the shorter notice period under Regulation No 1475/95 were not satisfied, and that therefore a notice period of two years should have been given, it is for the national court to determine the consequences for the dealership agreements that continued to exist.

35. In no circumstances can the provisions of Regulation No 1400/2002 be interpreted so that, exceptionally, there can be an additional year of exemption, over and above the transitional period of one year.

36. This agreement will therefore not be able to benefit from the block exemption, and the clauses restrictive of competition that it contains will have to be tested against Article 81 EC.

37. I should like to point out here, perhaps unnecessarily, that it is Regulation (EC) No 1/2003 [5] which currently applies. This means that where an agreement cannot benefit from a block exemption, the court would be competent to determine whether, in an individual case, the conditions laid down in Article 81(3) EC have been satisfied. A block exemption presents market operators with a 'safe haven', but it does not mean that, if the conditions for a block exemption are not satisfied, the agreement could never satisfy the conditions of Article 81(3) EC. Given the underlying intention of explicitly excluding from the block exemption those agreements which contain certain clauses, it is not likely that the national court would, in its ruling, reach a different conclusion, even if it were just a matter of one year. This means that these clauses are invalid by virtue of Article 81(2) EC. That assessment, on the basis of Article 81(3) EC, might be different with

5 — Council Regulation of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1).

regard to those clauses restrictive of competition which are not explicitly excluded from the block exemption. In any event, none of the parties has requested such a ruling from the national court. BMW did not do so because it saw the new block exemption as an occasion to reorganise its network. The two applicants did not do so because they demand the continuation of the contractual relationship, if need be without any clauses restrictive of competition. There does not seem to be any difference of opinion as to whether an individual exemption might be taken into consideration.

38. It might be possible in the context of the main proceedings that Brünsteiner and Hilgert are the parties that have suffered damage, if the agreement was wrongfully terminated on the basis of the shorter notice period.

39. Naturally BMW is entitled to (re)organise its distribution network and to determine how and with whom it wishes to conclude dealership agreements, but the termination of existing agreements which precedes this must take place in accordance with the provisions of Article 5(2) and Article 5(3) of Regulation No 1475/95. [6]

40. If it must be accepted, on the assumption that the agreements were terminated too late (because there appears to be no question of any reorganisation), that the provisions they contain which are contrary to Article 4 of Regulation No 1400/2002 are invalid, and that because of this the agreements are also null and void under national law, then there are in principle two possible solutions to mitigate the harm suffered by the injured dealers. Either BMW could still decide to conclude a new agreement which satisfies the conditions of the new regulation, or the dealers, in this case Brünsteiner and Hilgert, could be compensated for the termination based on too short a period of notice. This too is for the national court to decide in accordance with national law.

41. I also mention in passing that the claim made by BMW in its written observations and at the hearing that the Commission has no power to include in its block exemptions a provision regarding the notice periods to be observed cannot succeed, because this claim is directed against the validity of a provision of the exemption regulations. Since the referring court seeks only the interpretation of those provisions, the parties are not entitled, in the context of proceedings for a preliminary ruling, to dispute the validity of the provisions concerned. [7]

6 — If BMW's decision to reorganise comes only later, it will naturally have to take into account the provision of Article 3(5) of Regulation No 1400/2002.

7 — See the judgment in Case 44/65 *Singer* [1965] ECR 965. See, for example, the judgments in Case C-402/98 *ATB and Others* [2000] ECR I-5501 and Case C-236/02 *Slob* [2004] ECR I-1861.

IV — Conclusion

42. In view of the above, I propose that the Court answer the questions referred for a preliminary ruling by the Bundesgerichtshof as follows:

— The entry into force 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 did not, of itself, require the reorganisation of the distribution network of a supplier within the meaning of the first indent of Article 5(3) of Commission Regulation (EC) No 1475/95 of 28 June 1995 on the application of Article 85(3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements. However, that entry into force may, in the light of the particular nature of the distribution network of each supplier, have required changes that were so significant that they must be truly considered as representing a reorganisation within the meaning of that provision. It is for the national courts or arbitrators to determine, in the light of all the evidence in the case before them, whether that is the position.

— The provisions in agreements which have not been terminated in time which are incompatible with Regulation No 1400/2002 lapse in any event after the transitional period and are invalid. Whether this results in the invalidity of the entire dealership agreement is a question for national law. In no circumstances, however, can it be accepted that an agreement which was terminated late under Article 5(3) of Regulation No 1475/95 should retain its validity after the expiry of the transitional period.