# JUDGMENT OF THE COURT (Sixth Chamber)
16 June 1994 *

In Case C-322/93 P,

**Automobiles Peugeot SA and Peugeot SA**, companies incorporated under French law whose registered offices are in Paris, represented by X. de Roux of the Paris Bar, with an address for service in Luxembourg at the chambers of G. Loesch, 11 Rue Goethe,

appellants,

APPEAL against the judgment of the Court of First Instance of the European Communities (Second Chamber) of 22 April 1993 in Case T-9/92 between Automobiles Peugeot SA and Peugeot SA, on the one hand, and the Commission, on the other, seeking to have that judgment set aside,

the other party to the proceedings being:

**Commission of the European Communities**, represented by G. Marenco, Legal Adviser, acting as Agent, and F. Herbert, of the Brussels Bar, with an address for service in Luxembourg at the office of G. Kremlis of the Legal Service, Wagner Centre, Kirchberg, contending that the appeal should be dismissed in its entirety,

supported by

* Language of the case: French.

**Eco System SA**, a company incorporated under French law whose registered office is in Rouen (France), represented by R. Collin, of the Paris Bar, and N. Decker, of the Luxembourg Bar, with an address for service in Luxembourg at the latter's chambers, 16 Avenue Marie-Thérèse,

and by

**Bureau Européen des Unions de Consommateurs (BEUC)**, an association governed by Belgian law, established in Brussels, represented by P. Bentley, Barrister, and K. Adamantopoulos, of the Athens Bar, with an address for service in Luxembourg at the chambers of A. Kronshagen, 12 Boulevard de la Foire,

interveners,

THE COURT (Sixth Chamber),

composed of: G. F. Mancini, President of the Chamber, M. Diez de Velasco, C. N. Kakouris, F. A. Schockweiler (Rapporteur) and P. J. G. Kapteyn, Judges,

Advocate General: C. O. Lenz,
Registrar: R. Grass,

having regard to the Report for the Hearing,

after hearing the Opinion of the Advocate General at the sitting on 21 April 1994,

gives the following

## Judgment

1 By application lodged at the registry of the Court of Justice on 22 June 1993, Automobiles Peugeot SA and Peugeot SA (hereinafter 'Peugeot') brought an appeal pursuant to Article 49 of the Protocol on the Statute of the Court of Justice of the EEC against the judgment of 22 April 1993 in Case T-9/92 *Automobiles Peugeot SA and Peugeot SA* v *Commission* [1993] ECR II-493, in which the Court of First Instance dismissed Peugeot's application for the annulment of the Commission decision of 4 December 1991 relating to a proceeding under Article 85 of the EEC Treaty (Case IV/33.157 — Eco System/Peugeot, OJ 1992 L 66, p. 1, hereinafter 'the 1991 decision').

2 It is apparent from the findings made by the Court of First Instance in the contested judgment (paragraphs 3 and 7) that:

'On 9 May 1989, as a measure to protect its distribution system, which is agreed to fall within the scope of 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 (OJ 1985 L 15, p. 16, hereinafter "Regulation No 123/85"), Automobiles Peugeot SA distributed, via its subsidiaries to all the agents making up the Peugeot distribution network in Belgium, France and Luxembourg, a circular from Peugeot SA instructing distributors and approved dealers in those three countries to suspend their deliveries to Eco System and not to accept any further orders for new Peugeot vehicles from that company, whether acting on its own behalf or on behalf of its principals. The circular stated that the same instructions applied to any other organisation acting in similar circumstances. A draft of that circular had been sent on 25 April 1989 to the Commission's Directorate General for Competition but had not been formally notified to it.

In the 1991 decision the Commission found that the despatch of the circular of 9 May 1989 by Peugeot to its dealers in France, Belgium and Luxembourg and

its implementation by them, which brought to a halt supplies of Peugeot vehicles to Eco System, constituted an agreement or at least a concerted practice prohibited by Article 85(1) of the EEC Treaty (Article 1 of the decision). The reason given in the decision for that finding is, in particular, that the agreement "has as its object and effect the restriction of competition within the common market, within the meaning of Article 85(1). Since it is implemented by all undertakings in the Peugeot network in the countries concerned, it is designed to prevent, and generally does prevent, the export to France of Peugeot vehicles purchased in Belgium or Luxembourg by French consumers using the services of Eco System. The sensitive nature of this restriction derives from the Peugeot make's important position on the Community market. Since the agreement, by definition, relates to cross-border trade, it is likely to affect trade between Member States ..." The decision also states that "the agreement in question, as it results from the said circular, does not qualify for the block exemption provided for in Regulation (EEC) No 123/85, since the clauses prohibiting the import or export of cars are not included in the competition-restricting obligations allowed by the regulation", nor could the agreement qualify for individual exemption, primarily because it had not been notified.'

3 It is apparent from paragraphs 19 and 20 of the judgment of the Court of First Instance that Peugeot claimed in substance that:

'... in authorizing the dealer to sell vehicles within the contract programme or corresponding goods to final consumers using the services of an unauthorized intermediary only if those consumers have given prior written authority to an intermediary to purchase a specified motor vehicle in their name and on their behalf, Article 3(11) of Regulation No 123/85 constitutes an exception to the principle of selective and exclusive distribution. However, that provision does not constitute a necessary condition for the existence of a selective distribution system, but, on the contrary, a means whereby the manufacturer may protect his distribution system by requiring the intermediary to comply with certain requirements.

... by indicating in its notice of 12 December 1984 (concerning Regulation No 123/85, OJ 1985 C 17, p. 4, hereinafter "the 1984 notice") that "undertakings within the distribution system can be obliged not to supply new motor vehicles within the contract programme ... to or through a third party who represents himself as an authorized reseller of new vehicles within the contract programme ... or carries on an activity equivalent to that of a reseller", the Commission has restricted the scope of the derogation made by Article 3(11) of Regulation No 123/85 to the principle, established by that regulation, of exclusive distribution within the distribution system. It is on the basis of that restrictive interpretation of Article 3(11) of Regulation No 123/85 that the applicants sent to the dealers in the Peugeot network the circular of 9 May 1989, which was intended to protect their selective distribution system from Eco System carrying on an activity equivalent to that of a reseller. The phrase "activity equivalent to that of a reseller" is not a legal concept, but relates to an activity which has the same economic effects as resale.'

4 Peugeot also claimed before the Court of First Instance that Eco System's business activities went beyond those of a provider of services, since it assumed, in particular, a number of risks which are not usual for a mere authorized agent, but are characteristic of the activity of a reseller.

5 It is also apparent from the judgment of the Court of First Instance (paragraphs 65 and 66) that Peugeot claimed that:

'... in order to justify the difference between the contested decision and the interpretation which the Commission had itself given to Article 3(11) of Regulation No 123/85 in the 1984 notice, the Commission intended to adopt on 4 December 1991, that is to say on the same date as that of the contested decision, a new notice interpreting Regulation No 123/85 (hereinafter "the 1991 notice"). That notice, by setting forth new criteria defining the concept of intermediary, had deprived the phrase "activity equivalent to that of a reseller" of any meaning. The

Commission had thereby frustrated Peugeot's legitimate expectations regarding the maintenance of the rules applicable to it.

... the Commission also infringed the principle that Community measures do not have retroactive effect, since that new interpretation of Regulation No 123/85 had been applied retroactively by the Commission to an act by Peugeot (the circular of 9 May 1989) which ought to be covered by the previous interpretation of that regulation. In any event, legal uncertainty arises from the fact that the Commission has never given a clear and precise definition of the phrase "activity equivalent to that of a reseller".'

6 Peugeot's application for the annulment of the 1991 decision was dismissed by the contested judgment.

## The first plea

7 The first plea is based on the failure by the Court of First Instance to take into account the 1984 notice and, consequently, to recognize that the Commission infringed the principle of legal certainty by departing in its 1991 decision from the interpretation of Article 3(11) of Regulation No 123/85 which it gave in the 1984 notice, and by adopting the 1991 notice.

8 With regard to the first limb of the plea alleging failure to take into account the 1984 notice, this Court notes that the starting point of the Court of First Instance was its finding that any derogation from the prohibition of agreements, decisions or concerted practices, such as that provided for by Regulation No 123/85, ought to be narrowly interpreted.

9 It found initially that the effect of an interpretative document, such as the 1984 notice, could not be to amend the mandatory rules of the regulation (paragraph 44 of the contested judgment).

10 It went on to state that the Commission was legally entitled to lay down in the 1984 notice the conditions which an authorized intermediary has to satisfy in order to comply with the requirements of Article 3(11) of Regulation No 123/85 (paragraph 46 of the contested judgment).

11 As a result, the Court of First Instance concluded that it ought to consider whether Eco System had placed itself outside the scope of that article by assuming risks which were characteristic of a reseller, rather than of an intermediary (paragraph 47 of the contested judgment).

12 It follows from the above that Peugeot is wrong to criticize the contested judgment on the ground that it failed to take into consideration the 1984 notice, since the Court of First Instance expressly referred to it in defining the concept of intermediary in Article 3(11) of Regulation No 123/85.

13 With regard to the second limb of the plea concerning the failure of the Court of First Instance to penalize the infringement of the principle of legal certainty, which the Commission is alleged to have committed by departing in the 1991 decision from the 1984 notice and adopting the 1991 notice, this Court points out that the Court of First Instance held that the 1991 decision was not based on the 1991 notice.

14 In reply to the argument that in the 1991 decision the Commission departed from its own interpretation of Article 3(11) of Regulation No 123/85, as set out in the 1984 notice, the Court of First Instance observed that the phrase 'activity equivalent to that of a reseller' within the meaning of that notice could not be interpreted in such a way as to restrict the scope of the concept of intermediary

with prior written authority in Article 3(11) of Regulation No 123/85. It added that, in a letter sent to the applicants in 1987, the Commission had explained that the phrase 'activity equivalent to that of a reseller' did not apply to an undertaking providing services such as Eco System (paragraphs 71, 72 and 73 of the contested judgment).

15 As to the merits of the arguments put forward by Peugeot in this appeal, this Court finds that the Court of First Instance was correct in holding that the Commission did not infringe the principle of legal certainty. As the Court of First Instance emphasized, the 1991 decision could not legally be based on the 1991 notice. Moreover, as the Court of First Instance also held, since 1987 the Commission had informed Peugeot of its interpretation of the phrase 'activity equivalent to that of a reseller' within the meaning of the 1984 notice, which it applied in defining the concept of intermediary in Article 3(11) of Regulation No 123/85, and it had not departed from that interpretation in the 1991 decision.

16 It follows from the foregoing that both limbs of the first plea must be rejected.

## The second plea

17 In its second plea Peugeot claims that the Court of First Instance misinterpreted the concept of intermediary within the meaning of Article 3(11) of Regulation No 123/85. Peugeot relies on four arguments:

— The aim of Regulation No 123/85 is to protect the selective distribution system against intermediaries as well. Accordingly, that concept has economic implications and refers to any activity whose effect is equivalent, in economic terms, to that of a reseller.

— The Court of First Instance accepts that the concept of intermediary has an economic dimension, but is wrong in holding that the requirement of written authorization is the only means of protection accorded to a motor vehicle manufacturer.

— The Court of First Instance refused to take into account the judgment of the Court of Justice in Case 243/83 *Binon* v *AMP* [1985] ECR 2015, from which it follows that an intermediary authorized by a large number of principals is an independent trader.

— Finally the Court of First Instance did not deal with Peugeot's arguments to the effect that Eco System carries on an activity equivalent to that of a reseller, in particular by assuming the risks associated with the transport and storage of the vehicle before delivery, a customer failing to take delivery of the vehicle, a loan to an insolvent purchaser, and the economic risk of fluctuations in the exchange rates or an increase in the purchase price of the vehicle. The Court also failed to draw conclusions from the fact that Eco System advertised, published prices, displayed the vehicles offered and obtained loans for purchasers, showing that it operated as a reseller.

18 The Court of First Instance pointed out that the aim of Article 3(11) of Regulation No 123/85 was to make it possible for an intermediary to continue to act, provided that there was a direct contractual link between the dealer and the final consumer (paragraph 40 of the contested judgment).

19 Since the production of written authorization was the only condition imposed on the intermediary, he could not be excluded from the scope of Article 3(11) of Regulation No 123/85 on the ground that he was acting on a professional basis, without depriving that provision of any practical effect. To act as an intermediary on a professional basis could involve advertising to the public and acceptance of the risks inherent in any business involving the provision of services (paragraphs 41 and 43 of the contested judgment).

20 The Court of First Instance also found that the passage in the 1984 notice relating to the phrase 'activity equivalent to that of a reseller' sought to interpret not only Article 3(11), but also Article 3(10) of Regulation No 123/85, and that in order to ensure the effectiveness of Article 3(10), namely effective protection of the distribution system against the activities of unauthorized third parties, the Commission was lawfully entitled to set out the conditions which an authorized intermediary had to satisfy in order to meet the requirements of Article 3(11) (paragraph 46 of the contested judgment).

21 The Court of First Instance went on to consider whether Eco System had assumed the risks associated with a reseller rather than those associated with an intermediary.

22 First, the Court of First Instance observed that Eco System had acted as a representative of the final consumer, was not a party to the sale contract concluded with a reseller belonging to the vehicle distribution network, and had never owned the vehicle forming the subject-matter of the transaction (paragraphs 47 and 48 of the contested judgment).

23 The Court of First Instance also found that Eco System had not taken on any obligation to offer a guarantee to the final consumer, but that that obligation had been assumed by the undertakings belonging to the distribution network, which were bound directly to the final consumer (paragraph 49 of the contested judgment).

24 The Court of First Instance therefore concluded that the intermediary did not bear any risk normally resulting from the twofold transfer of ownership involved in purchase and resale, and in particular the risk of having to dispose of the vehicle in the event of the final consumer's withdrawal from the transaction (paragraph 50 of the contested judgment).

25 Second, the Court of First Instance considered that the credit granted by Eco System to customers, equivalent to an advance made to a customer between the cash

purchase from a reseller belonging to the distribution network and delivery to the purchaser who repays the advance, did not affect the legal characterization of the authorization (paragraph 51 of the contest judgment). As protection against the risk of a customer's insolvency, Eco System did not have any of the means available to an authorized reseller, namely the right to treat the sale as null and void and to dispose of the vehicle, but only the classical legal remedies available to agents, namely the exercise of a right of retention and the bringing of legal proceedings for the seizure and sale of goods belonging to a third party (paragraph 52 of the contested judgment).

26 Third, the Court of First Instance found that Peugeot had in no way shown that the risk associated with the exchange rate had been assumed by Eco System. The risk associated with the obligation to pay compensation to the principal for any loss of or damage to the vehicle during storage, even if that risk were established, was normal in a transaction of that type and was different from the risks connected with ownership (paragraphs 53 and 54 of the contested judgment).

27 Finally, the Court of First Instance found that the commission paid to Eco System by way of consideration for its services was a form of remuneration characteristic of an agency contract of that type (paragraph 55 of the contested judgment).

28 The Court of First Instance considered that, in the light of those considerations, Eco System had not assumed any legal or economic risk characteristic of purchase and resale, and had not exceeded the terms of its written authorizations (paragraphs 56 and 60 of the contested judgment).

29 Furthermore, the Court of First Instance did not accept that the existence of an advertising brochure could have misled the public, since the precise nature of Eco System's activity was clearly indicated in it. In any event, the action taken by Peugeot to stop distribution of that brochure was manifestly excessive (paragraph 59 of the contested judgment).

30 Finally, the Court of First Instance considered that the *Binon* judgment, cited above, could not be applied to the case of an agent acting in the name and on behalf of a final consumer and that a purely quantitative test based on the number of authorizations received by a professional intermediary did not support the conclusion that it was not an intermediary within the meaning of Article 3(11) of Regulation No 123/85 (paragraph 61 of the contested judgment).

31 As to the merits of this plea, it should be noted that Peugeot's first two arguments are similar, in that in substance the complaint is that the Court of First Instance preferred a legal definition of intermediary, based on the formal existence of authorization, to an economic definition based on the effect of the intermediary's activity on the distribution system.

32 In that respect the Court of First Instance was right in pointing out that 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.

33 Furthermore, the Court of First Instance did not confine itself to making that finding, but proceeded to carry out a thorough analysis of the circumstances in which Eco System's activities took place, and concluded that they were not equivalent to those of a reseller.

34 As to the argument concerning the alleged failure to take into account the *Binon* judgment, cited above, 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.

35 The argument that the Court of First Instance failed to examine whether Eco System was in fact carrying on an activity equivalent to that of a reseller, since it took on a risk associated with the exchange rate, amounts to a criticism of that court's finding of fact that it had not been shown that Eco System had assumed that risk. Consequently, the plea is inadmissible in that respect.

36 With regard to the other arguments, the Court of First Instance undertook a detailed analysis of the various risks assumed by Eco System and reasoned convincingly that those risks were in no way unusual for an intermediary and were not of such a kind as to turn the intermediary's activity into an activity equivalent to that of a reseller. In so doing, the Court did not exceed the bounds of its power to assess the facts or wrongly characterize in law the concept of intermediary with written authority set out in Article 3(11) of Regulation No 123/85.

37 The second plea must therefore be declared inadmissible in part and, for the rest, rejected.

38 Since neither plea has been successful, the appeal must be dismissed in its entirety.

## Costs

39 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the appellants have been unsuccessful, they must be ordered to pay the costs of these proceedings including those of the interveners, Eco System and BEUC.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. **Dismisses the appeal;**

2. **Orders Automobiles Peugeot SA and Peugeot SA to pay the whole of the costs.**

Mancini Diez de Velasco Kakouris

Schockweiler Kapteyn

Delivered in open court in Luxembourg on 16 June 1994.

R. Grass

Registrar

G. F. Mancini

President of the Sixth Chamber