# OPINION OF ADVOCATE GENERAL LENZ
delivered on 21 April 1994 *

*Mr President,*
*Members of the Court,*

## A — Facts

1. These proceedings concern the appeal by Automobiles Peugeot SA and Peugeot SA against the judgment of the Court of First Instance of 22 April 1993 in Case T-9/92. [1] In that judgment the Court of First Instance dismissed an action brought by those two undertakings under Article 173 of the EC Treaty contesting the Commission decision of 4 December 1991 in the *Eco System/ Peugeot* case. [2]

2. The Commission decision had been adopted following a complaint by Eco System. That company is an undertaking established in France, which procures motor vehicles for its customers. According to the findings of the Court of First Instance it offers its services in France to consumers who are interested in acquiring a motor vehicle, and advertises those services in the media. Eco System requires each interested purchaser to grant it a written authority to acquire a particular motor vehicle. The contract of sale is made in each case between the motor vehicle dealer, on the one hand, and the consumer (represented by Eco System), on the other.

When the motor vehicle is purchased, Eco System exploits in the interest of its customer the price differences which exist in the individual Member States. The collection of the vehicle purchased in another Member State and the completion of the formalities necessary for its importation are carried out by Eco System. The remuneration for those services consists of a commission calculated on the basis of the purchase price.

Motor vehicles under the Peugeot and Talbot trade mark, which are manufactured and sold by the Peugeot group of companies, make up a significant proportion of the vehicles obtained by Eco System for its customers.

3. Automobiles Peugeot SA, a subsidiary of Peugeot SA, sells its motor vehicles in the Community through authorized dealers. That distribution system complies with the requirements of Commission Regulation

* Original language: German.
1 — *Peugeot* v *Commission* [1993] ECR II-493.
2 — OJ 1992 L 66, p. 1.

(EEC) No 123/85 of 12 December 1984 on the application of Article 85(3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements [3] and is accordingly exempt from the prohibition in Article 85(1) of the EC Treaty.

4. On 9 May 1989 Peugeot SA sent a circular to all authorized dealers in France, Belgium and Luxembourg, in which it required them to stop their deliveries to Eco System and not to accept any further orders for new Peugeot or Talbot vehicles from that company. The text of that circular had been sent to the Commission a short time previously.

5. The Commission then initiated a proceeding under Article 85 of the Treaty. In the course of that proceeding the Commission adopted provisional measures against Automobiles Peugeot SA and Peugeot SA on 26 March 1990. The action brought against that decision was dismissed by the Court of First Instance on 12 July 1991. [4]

6. On 4 December 1991 the Commission adopted its definitive decision in that case. It came to the conclusion that the sending of the above circular and the resultant cessation of deliveries to Eco System infringed Article 85(1) (since it constituted an agreement or a concerted practice) and was not covered by Regulation No 123/85 (Article 1 of the Decision). The Commission required Peugeot SA and Automobiles Peugeot SA to send, within two months, a new circular cancelling that of 9 May 1989 and thereafter to refrain from any such infringements against Article 85 (Article 2 of the Decision). If the parties concerned failed to comply with that obligation, the benefit of the application of Regulation No 123/85 would be withdrawn from the distribution system (Article 3 of the Decision).

7. On 10 February 1992 Peugeot Automobiles SA and Peugeot SA brought an action before the Court of First Instance contesting that Commission decision. In their application the applicants asked the Court to annul the decision and to declare that the circular of 9 May 1989 was compatible with Regulation No 123/85 and with a notice relating to it (Commission Notice concerning Regulation (EEC) No 123/85 of 12 December 1984, [5] hereinafter 'the Notice'). The judgment of 22 April 1993 dismissing that application forms the subject-matter of this appeal.

8. The appellants claim that the Court of Justice should set aside the contested judgment and declare that the circular of 9 May 1989 is compatible with Regulation No 123/85 and the Notice.

3 — OJ 1985 L 15, p. 16.

4 — Case T-23/90 *Peugeot* v *Commission* [1991] ECR II-653.

5 — OJ 1985 C 17, p. 4.

9. The Commission contends that the Court of Justice should dismiss the appeal and order the appellants to pay the costs of the proceedings.

10. Eco System and the Bureau Européen des Unions de Consommateurs, a group of consumer associations (hereinafter 'BEUC') have intervened in the proceedings in support of the Commission as they did at first instance. The interveners adopt the forms of order sought by the Commission and moreover contend that the Court of Justice should also order the appellants to pay the costs resulting from their intervention.

**B — Analysis**

*Preliminary point*

11. Under Article 113 of the Rules of Procedure of the Court of Justice, an appeal is to seek, apart from the setting aside (in whole or in part) of the contested judgment, the same form of order (in whole or in part) as that sought at first instance. In this case the appellants claimed that the Court of First Instance should annul the Commission decision and declare the circular in question to be lawful. However, in their appeal the appellants now merely claim that the Court of Justice should (in addition to setting aside the contested judgment) declare that the circular is compatible with the abovementioned provisions of Community law.

12. It is quite clear that, as BEUC has correctly pointed out, in proceedings under Article 173 of the EC Treaty a declaration cannot be made to the effect that a particular measure taken by an undertaking is lawful. That of course also applies with regard to the Court of Justice when it has to decide on an appeal against a judgment which was given in respect of an application under Article 173. The question thus arises of the consequences of the fact that, alongside the application to have the contested judgment set aside, the appellants have sought only an inadmissible form of order.

13. As far as I am aware, the Court of Justice has never been called on to decide that question. In my opinion it would be entirely justified in such a case to dismiss the appeal without more. If the appellants had sought *that* form of order at first instance, the Court of First Instance would have had to dismiss the application as inadmissible. An appeal against such a judgment of the Court of First Instance would have to be regarded as clearly unfounded within the meaning of Article 119 of the Rules of Procedure of the Court of Justice.

14. One possibility for consideration might nevertheless be whether the Court of Justice could not remedy the abovementioned defect by way of interpretation, because it is clear from the appeal that the appellants continue to seek (also) the annulment of the Commission decision of 4 December 1991. However, in my opinion that question does not need to be examined further in this case. Since the problem does not yet appear to have been

dealt with by the Court of Justice and the Commission has moreover raised no objection in that respect, it would not be appropriate to cause the appeal to fail as a result of that defect alone. Moreover, it should be observed that the appeal is in any case unfounded, as I shall demonstrate.

*Legal background*

15. Before I consider the individual grounds of appeal, it is appropriate to set out the relevant provisions in this case. Article 3(10) of Regulation No 123/85 permits the distribution agreement to impose an obligation on the dealer to sell the vehicles concerned only to such resellers who are within the distribution system.

The same applies under Article 3(11) with regard to the obligation on a dealer:

'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'.

It is clear from the fifth recital in the preamble to Regulation No 123/85 that in that way it is to be made possible for the manufacturer to protect his selective distribution system.

16. In the Notice the Commission states, at I.3 under the heading 'Intermediaries', that the consumer must be able to make use of the services of individuals or undertakings to assist in purchasing a new vehicle in another Member State. However, the dealer can be obliged not to supply to or through such an intermediary,

'who represents himself as an authorized reseller of new vehicles within the contract programme or corresponding vehicles or carries on an activity equivalent to that of a reseller'.

In each case, it is for the intermediary or the final consumer to give the dealer documentary evidence that the intermediary is acting on behalf of and for the account of the consumer.

*The taking into account of the Notice and the principle of legal certainty*

17. In their first plea, the appellants complain that when the Court of First Instance

considered the matter it failed to take the Notice into account and ascribed no legal value to it. The failure to take that Notice into account prejudices legal certainty.

18. That ground of appeal can be rejected immediately. The Commission and Eco System correctly point out that the Court of First Instance did take the Notice into account.

19. It cannot therefore be said that the Court of First Instance failed to take the Notice into account or to attribute any legal significance to it. The appellants also admit this when they state in their appeal (on page 13) that the Court, after declining to take the Notice into account, considered Regulation No 123/85 together with the Notice, but failed to draw the (in the appellants' view) necessary inferences therefrom. Ultimately, the appellants' complaint therefore amounts to an allegation that the Court did not correctly interpret the relevant provisions. That question must be considered in conjunction with the second plea in this appeal.

The Court began by considering Article 3(11) of Regulation No 123/85 (paragraphs 37 to 43 of the contested judgment). It then went on to examine the Notice. In that examination the Court found initially that a notice which was intended to assist interpretation of a regulation could not amend the mandatory rules of that regulation (paragraph 44). In paragraph 46 the Court expressed the view that the Notice could not restrict the scope of application of the regulation. It was rather the case that the Notice set out in more detail the conditions which a person had to satisfy in order to be regarded as an intermediary within the meaning of Article 3(11) of Regulation No 123/85. As a result, the Court concluded that it ought to consider whether Eco System had placed itself outside the scope of Article 3(11) of Regulation No 123/85 by assuming risks which were characteristic of a reseller and accordingly no longer provided services, but carried on an activity equivalent to that of a reseller. That examination formed the subject-matter of the Court's subsequent remarks (paragraphs 47 et seq.).

20. I am also not convinced by the appellants' contention that the principle of legal certainty was infringed. The appellants obviously assume that the interpretation of Article 3(11) contended for by them (according to which Eco System cannot be considered to be an 'intermediary') followed directly and obviously from the Commission's Notice. However, that is not the case. Even if one were to adopt the view that the case in point depended upon whether Eco system carried on 'an activity equivalent to that of a reseller' within the meaning of that Notice, it would still first need to be established that that was actually the case. The Commission and Eco System are correct in pointing out that, in that context, the appellants are wrong to rely on a letter sent to them by the Commission on 15 July 1987. In that letter the Commission quite clearly stated that it did not share the appellants' view regarding

the question of how Eco System's activity was to be categorized. [6]

21. In their arguments regarding the question whether there has been an infringement of the principle of legal certainty the appellants refer to the fact that it was only in July 1989 when the Commission sent them its preliminary view on the circular of 9 May 1989, which had been brought to the Commission's attention as early as 28 April 1989. There is hardly any need to point out that such an unofficial notification, made a few days before the despatch of the circular, and the fact that the Commission did not immediately react to it, could not give rise to any justified expectation that the Commission considered the appellants' behaviour to be lawful.

22. As the appellants have pointed out, the Commission published with its decision of 4 December 1991 a 'Clarification of the activities of motor vehicle intermediaries', which was intended to supplement the Notice. [7] In the Commission's own words, the aim of that document was 'to clarify the scope of the activities of the intermediaries mentioned in [the] regulation'. The content of that 'clarification' is based essentially on the decision of 4 December 1991. It is however not necessary to consider the terms of that document in more detail here. The Court of First Instance pointed out quite correctly that the Commission decision of 4 December 1991 was not based on that new notice and the appellants cannot contest the lawfulness of the former by referring to the latter. [8]

*Interpretation of Article 3(11) of Regulation No 123/85*

23. The appellants' second ground of appeal is in substance that the Court of First Instance wrongly interpreted the concept of 'intermediary' within the meaning of Regulation No 123/85. It is true that the appellants refer directly only to the wording in the Notice which states that the intermediary may not carry on 'an activity equivalent to that of a reseller'. However, as the Court of First Instance correctly noted, there is no doubt that the provisions of a *regulation* cannot be amended by a *notice*. It is therefore not necessary to deal in more detail with the question how such notices are to be legally classified. The arguments to that effect contained in the appellants' pleadings are therefore irrelevant to this case.

24. BEUC's argument that the concept of 'activity equivalent to that of a reseller' ought to be rejected since there is no legal basis for it, is basically justified, but goes too far. The Notice may quite properly be used

6 — Cf. judgment in Case T-23/90, cited above, (note 4), paragraph 48.

7 — OJ 1991 C 329, p. 20.

8 — Paragraph 71 of the contested judgment.

to interpret the regulation where it is compatible with the regulation.

25. The Court of First Instance came to the correct conclusion here too. It first pointed out that provisions of a regulation which exempt particular agreements from the prohibition laid down in Article 85(1) of the EC Treaty are exceptions which cannot be given a wide interpretation which would conflict with the aim of those provisions (paragraph 37 of the contested judgment). As the Court found (paragraph 40), the aim of Article 3(11) of Regulation No 123/85 is to make it possible for an intermediary to continue to act, provided that there is a direct contractual link between the dealer and the final consumer. [9]

The Court of First Instance then pointed out that Article 3(11) merely required the intermediary to produce written authorization for the purchase (and as appropriate, collection of the vehicle). It was therefore apparent from the wording of the provision that an intermediary in possession of appropriate authorization could not be excluded from the scope of that provision solely on the basis that he was acting on a professional basis (paragraph 41). Otherwise that provision would cease to have any practical effect (paragraph 42). To act as an intermediary on a professional basis could however indeed involve advertising and the acceptance of risks inherent in any business involving the provision of services (paragraph 43).

26. The Court of First Instance then turned to the relevant section of the Notice, which in its opinion related not only to Article 3(11) but also to Article 3(10) of Regulation No 123/85. It expressed the view that in order to ensure the effectiveness of Article 3(10) — that is in order to protect the distribution system against unauthorized third parties — the Commission was entitled to set out the conditions which an authorized intermediary had to satisfy in order to fulfil the requirements of Article 3(11) (paragraph 46 of the contested judgment).

The Court of First Instance then examined whether Eco System had assumed risks associated with the activity of a reseller, so that it could be considered to have carried on an activity equivalent to that of a reseller (paragraph 47). The Court first found that Eco System acted merely as a representative. In each case, the contracts of sale were made between the dealer and the customer. Eco System also never acquired ownership of the vehicles purchased through it (paragraph 48). It had not taken on any obligation under a guarantee to the customer (paragraph 49). Since Eco System had not become owner of the vehicles, it had not borne the risk normally assumed by a reseller of having to sell the goods elsewhere if the customer were to withdraw from the transaction (paragraph 50).

9 — As held earlier in the judgment in Case T-23/90, cited above (footnote 4), paragraph 33.

By first paying the purchase price and expenses incurred and then recovering them from the customers, Eco System had indeed granted them a short-term loan. Although such a loan was not inherent in the nature of the authority given, it nevertheless did not affect the legal characterization of the business relationship (paragraph 51). With regard to the risk of the customer's insolvency, the Court of First Instance pointed out that in such a case Eco System did not have the option normally available to a reseller of immediately disposing of the vehicle (and therefore without having to take any particular legal measures) (paragraph 52). With regard to the risk associated with the exchange rate, the Court found *inter alia* that it had not been proven that Eco System bore that risk (paragraph 53). If Eco System was obliged to pay compensation to the customers in the event of the loss or damage to a vehicle in its possession, that was not unusual (paragraph 54). The means of calculating Eco System's remuneration was also normal for an agency contract of the type in question in this case (paragraph 55).

27. On the basis of those considerations, the Court of First Instance concluded that Eco System had not assumed any risk characteristic of the activity of a reseller. It then examined the question whether Eco System had in practice exceeded the limits set by the customers' authorization, and held that this had not occurred (paragraphs 57 to 60). Finally, the Court found that the fact that Eco System had been acting for a large number of customers did not alter the fact that the undertaking was to be regarded as an intermediary within the meaning of Article 3(11) or Regulation No 123/85 (paragraph 61).

28. I can detect no error of law in the reasoning of the Court of First Instance. It is moreover not particularly easy to identify what complaints the appellants have in that respect. Eco System has correctly pointed out that the appeal does not identify with precision those findings of the contested judgment against which the appeal is directed. However, I believe that all material objections are covered by the following observations.

29. The appellants' claim first that the Court of First Instance considers the existence of a written authority to be the only requirement which must be satisfied for a person to be regarded as an intermediary. The arguments of the Court of First Instance, set out above, show that that objection is unfounded. The Court correctly points out that that criterion is the only one which may be deduced from the wording of Article 3(11), and that Eco System satisfied that requirement in each case. However, it went on to examine most thoroughly whether it could nevertheless be assumed, on the basis of other factors, that Eco System could not be regarded as an intermediary within the meaning of that provision.

30. It is not entirely clear from the appeal whether the appellants wish to argue that, since Eco System carried out its activities on *a professional basis*, it could not be regarded as an intermediary within the meaning of Regulation No 123/85. It seems to follow from a comment in the reply that the appellants do not consider that factor to be deci-

sive. [10] If I should be mistaken in that impression, the appellants' argument could not be accepted. In paragraph 42 of its judgment the Court of First Instance stated, entirely correctly, that Article 3(11) would be deprived of any practical effect if undertakings acting on a professional basis were not to be accepted as intermediaries.

The protection of a selective distribution system in the motor vehicle sector, which Regulation No 123/85 permits by exempting certain obligations, is intended to assist in achieving the economic advantages expected from such distribution systems. [11] Experience shows that such protection can however also have detrimental effects on price competition. The sometimes considerable differences in prices between the individual Member States [12] are not least attributable to those distribution systems. In those circumstances the opportunity for a consumer to acquire a motor vehicle in another Member State becomes particularly important.

However, a consumer will only rarely be in a position to go to another Member State and make use of that opportunity. The Court of First Instance correctly points to the practical difficulties which hinder such activity. It is therefore of fundamental importance for a consumer to be able to call on the assistance of intermediaries in order to acquire a vehicle. Article 3(11) of Regulation No 123/85 recognizes the significance of the role of intermediaries in that area. If undertakings, whose professional activity is to assist consumers in acquiring motor vehicles from abroad, were not to be included as intermediaries within the meaning of Article 3(11), that provision would largely be deprived on any effect.

31. That argument also basically undermines the appellants' argument that an undertaking cannot be regarded as an intermediary within the meaning of Regulation No 123/85 if it operates on behalf of a large number of consumers. It is quite natural for a professional intermediary to act for a large number of consumers. The success of an undertaking such as Eco System shows moreover that there is considerable demand from consumers for services of that type.

In order to justify their view, the appellants refer to the opinion of the Advocate General and the judgment of the Court of Justice in the *Binon* case. [13] The appellants conclude

10 — The appellants state there that it is not disputed that the mere performance of an agency contract on a professional basis is not an activity equivalent to that of a reseller; that latter activity must, rather, first be defined.

11 — With regard to those advantages, cf. the fourth recital in the preamble to Regulation No 123/85.

12 — Cf. the press release of the Commission of 1 July 1993 concerning motor vehicle prices in the EC (IP (93) 545).

13 — Case 243/83 [1985] ECR 2015.

from that judgment that an intermediary which acts for a large number of principals is to be regarded as an independent undertaking. However, as the Court of First Instance correctly decided, that case cannot be applied to the case in point. In the *Binon* case and in similar cases [14] the issue was whether Article 85 was applicable to the relations between an undertaking and a commercial agent. According to the case-law, that is not so if the commercial agent is to be regarded as an auxiliary organ forming an integral part of the principal's undertaking. [15] That question is wholly irrelevant to the case in point. Here the question is rather whether Eco System acted as an intermediary. That is to be answered in the affirmative. The fact that Eco System was able to attract a large number of customers for itself is irrelevant in that regard.

32. The appellants claim that Eco System assumed risks which corresponded to those of a reseller and were incompatible with the role of a mere intermediary. It is only in the reply that this objection is put in more concrete terms. The appellants refer there to the fact that Eco System had to compensate its customers in the event of the loss of or damage to the vehicle. In addition, Eco System is stated to to bear the risk of a customer becoming insolvent. The judgment of the Court of First Instance convincingly demonstrates that those risks are in no way unusual for an intermediary. [16] The appellants have presented no new arguments which could cast doubt on that assessment, but have merely asserted that Eco System clearly ('*manifestement*') carries on an activity equivalent to that of a reseller. It would therefore be pointless to deal with the above-mentioned circumstances in more detail.

This same applies — although for another reason — to the appellants' argument that Eco System bears the risk arising out of any change in the exchange rates. It is argued that in its brochure Eco System guarantees maximum prices for a period of three months from its appointment as agent. It can suffice for me to say here that in its judgment the Court of First Instance found that it had not been proven that Eco System bore the exchange rate risk. [17] The appellants' objection therefore contests a finding of fact by the Court of First Instance. That objection is thus inadmissible (see the first sentence of Article 168(a)(i) of the EC Treaty).

33. The appellants also apparently wish to use as an argument in their favour the point made by the Court of First Instance that, although the (short-term) credit granted to the customers of Eco System was not an inherent part of an agent's activities, that

14 — Cf. in particular the judgment in Case 311/85 *Vlaamse Reisbureaus* [1987] ECR 3801, paragraph 20.

15 — Judgment in Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraph 542; judgment in Case 311/85 *Vlaamse Reisbureaus*, cited above (footnote 14), paragraph 20.

16 — Paragraphs 52 and 54 of the contested judgment; cf. in that regard point 26 above.

17 — Paragraph 53 of the contested judgment; cf. point 26 above.

nevertheless did not alter the legal nature of their business relationship. Such an argument would be wrong. An obligation on the agent initially to bear certain expenses itself and then to require reimbursement from the principal for those expenses is — as a glance at the legal systems of the individual Member States shows — entirely compatible with the inherent nature of an agency contract and the activity of an intermediary.

34. The applicants claim that Eco System's commercial conduct made it appear in the eyes of consumers to be a reseller or in any case an undertaking which competed with resellers, and thereby caused confusion. In particular they refer to the fact that Eco System advertised its services, published its rates of remuneration, exhibited vehicles and granted credit to its customers.

With regard to any confusion by consumers regarding Eco System's role, the Court of First Instance observed in its judgment that there was only one brochure which could give rise to objections. However, it held that the precise nature of Eco System's activity was clearly described in it. That appraisal of the facts by the Court cannot be contested in an appeal and the appellants also do not appear to want to raise any objection in that respect.

35. However, that does not alter the fact that consumers may have regarded Eco System as an undertaking which competed with dealers. That is also not contested by the Commission. It argues instead that that fact merely reflects the balance of interests underlying Regulation No 123/85. The activity of the professional intermediary is an essential guarantee for the consumer that he may purchase a vehicle in another Member State.

I agree with the Commission in that respect. As I have already observed, the possibility for consumers to purchase a vehicle in another Member State through an intermediary would exist essentially only on paper, if they were not permitted to engage professional intermediaries. The activity of those undertakings as such is therefore entirely legitimate and also to be welcomed for the reasons already mentioned. It is therefore not apparent why such an undertaking should be forbidden to advertise its services. Informing consumers about the possibilities of purchasing a motor vehicle in another Member State at a lower price may be irritating for many manufacturers and authorized dealers; it is however in no way unlawful or incompatible with the role of an intermediary.

When Eco System advertises its services *inter alia* by exhibiting a particular motor vehicle, that is one means of advertising which such an intermediary may adopt. At least that is the case where the vehicle concerned is one which Eco System has acquired for a customer who has agreed to it being (temporarily) put on show, which the Commission argued in the proceedings before the Court of First Instance [18] and which the appellants have not disputed in these proceedings.

36. The appellants' contention that Eco System's intentions must also be taken into account when appraising its activities must similarly be considered in that context. Even if Eco System (as may be presumed) intends to compete with dealers through the services offered by it, that would not alter the fact that Eco System performs the role of an intermediary which does not have to bear the risks which are typical for a reseller. Article 3(11) does not require the intermediary to act for altruistic reasons. It is quite natural that manufacturers and authorized dealers will consider its activities to constitute competition.

37. Ultimately the appellants' view would amount to claiming that only a person who is acceptable to the manufacturers and its dealers could be regarded as an intermediary within the meaning of Article 3(11). The appellants have also expressed that view with most refreshing candour in their appeal. [19] There can be no doubt that such a view is incorrect.

38. Finally, the appellants' argument based on the wording of the fifth recital in the preamble to Regulation No 123/85 must be addressed. It is stated there that measures taken by the manufacturer or authorized dealers with the object of protecting the selective distribution system are compatible with the regulation, 'in particular' an obligation on the dealer to sell vehicles to a final consumer using the services of an intermediary only where the consumer has authorized the intermediary to act as his agent. The appellants conclude from the wording adopted that the regulation permits the manufacturer to take measures other than those provided for in Article 3(11) to protect his distribution system. However, in order to be compatible with the exemption, such protective measures must be authorized in the *provisions* of the regulation. However, of those provisions, only Article 3(11) deals with the question of the requirements which may be set for the activity of intermediaries. The appellants' view would therefore mean that a manufacturer could apply criteria for the activity of intermediaries which are not men-

18 — Cf. paragraph 29 of the contested judgment.

19 — On page 16 of the appeal it is stated that the appraisal of the concept of activity equivalent to that of a reseller is one of an exclusively economic nature, which is a matter for the owner of the distribution network (*'une appréciation dépendant exclusivement du contexte économique et qui reste à l'appréciation du propriétaire du réseau'*).

tioned in that provision. That view should not be adopted, if it is wished to avoid granting the manufacturers and their authorized dealers *carte blanche* to obstruct the activity of intermediaries.

39. The appeal must therefore be dismissed. The decision as to costs follows from Article 122, 118 and 69 of the Rules of Procedure of the Court of Justice.

## C — Conclusion

40. I therefore propose that the Court should dismiss the appeal and order the appellants to pay the costs of the proceedings.