JUDGMENT OF THE COURT (Third Chamber)

7 September 2006 *

In Case C-125/05,

REFERENCE for a preliminary ruling under Article 234 EC, from the Østre Landsret (Denmark), made by decision of 15 March 2005, received at the Court on 17 March 2005, in the proceedings

VW-Audi Forhandlerforeningen, acting on behalf of **Vulcan Silkeborg A/S,**

v

Skandinavisk Motor Co. A/S,

THE COURT (Third Chamber),

composed of A. Rosas, President of Chamber, J.-P. Puissochet, S. von Bahr, U. Lõhmus and A. Ó Caoimh (Rapporteur), Judges,

* Language of the case: Danish

Advocate General: L.A. Geelhoed,
Registrar: H. von Holstein, Deputy Registrar,

having regard to the written procedure and further to the hearing on 16 February 2006,

after considering the observations submitted on behalf of:

— VW-Audi Forhandlerforeningen, acting on behalf of Vulcan Silkeborg A/S, by M. Goeskjær and P. Gregersen, advokater,

— Skandinavisk Motor Co. A/S, by C. Karhula Lauridsen, T. Ryhl and J. Ørskov Rasmussen, advokater,

— the Commission of the European Communities, by N.B. Rasmussen and A. Whelan, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 27 April 2006,

gives the following

Judgment

1 The reference for a preliminary ruling relates to the interpretation of Article 5(3) of Commission Regulation (EC) No 1475/95 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 That application was made in proceedings between VW-Audi Forhandlerforeningen (an association of Volkswagen and Audi dealers), acting on behalf of Vulcan Silkeborg A/S ('VS'), and Skandinavisk Motor Co. A/S ('SMC') relating to the validity of the termination by the latter, with one year's prior notice, of the agreement entered into by it with VS for the distribution of Audi vehicles in Denmark.

Legal framework

3 The 19th recital in the preamble to Regulation No 1475/95 states:

'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. ...'

4 Article 1 of Regulation No 1475/95 exempts from the prohibition laid down under Article 81(1) EC agreements by which a supplier makes an authorised reseller responsible for promoting the distribution of the contract goods within a defined territory and agrees to reserve the supply of vehicles and spare parts, within that territory, to that dealer.

5 Article 4(1) of the regulation provides that the exemption is to apply notwithstanding any obligation by which the dealer undertakes to comply, in distribution, sales and after-sales servicing, with minimum standards regarding, in particular, the equipment of the business premises or the repair and maintenance of contract goods.

6 Article 5(2) and (3) of the regulation states:

'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:

...

(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; ...

...

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,

...

In each case, the parties must, in the event of disagreement, accept a system for the quick resolution of the dispute, such as recourse to an expert third party or an arbitrator, without prejudice to the parties' right to apply to a competent court in conformity with the provisions of national law.'

7 In its explanatory brochure relating to Regulation No 1475/95, the Commission of the European Communities states as follows in reply to question 16(a), headed 'Are there any possibilities for early termination of the agreement?':

'The 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 network. Whether it is necessary to reorganise is established between the parties by agreement or at the dealer's request by an expert third party or an arbitrator. Recourse to an expert third party or an arbitrator does not affect the right of either party to apply to a national court under national law (Article 5(3)). Where the supplier provides for himself in the contract unilateral rights of termination exceeding the limits set by the regulation, he automatically loses the benefit of the block exemption (Article 6(1)(5) ...).

This possibility for early termination has been introduced to provide the manufacturer with an instrument for flexible adaptation to changes in distribution structures (recital 19). A need for reorganising may arise due to the behaviour of competitors or due to other economic developments, irrespective of whether these are motivated by internal decisions of a manufacturer or external influences, e.g. the closure of a company employing a large workforce in a specific area. In view of the wide variety of situations which may arise, it would be unrealistic to list all the possible reasons.

Whether or not a "substantial part" of the network is affected, must be decided in the light of the specific organisation of a manufacturer's network in each case. "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. The manufacturer has to reach an agreement — either with or without the intermediation of an expert third party or arbitrator — with the dealer, whose distribution agreement will be terminated, but not with other dealers (who are only indirectly affected by an early termination).'

8 From 1 October 2002, Regulation No 1475/95 was replaced by 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 (OJ 2002 L 203 p. 30).

9 Article 4(1) of that regulation, headed 'Hardcore restrictions', provides that the exemption is not to apply to vertical agreements which have certain restrictions set out in that provision as their object.

10 Article 10 of the regulation states:

'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.'

11 The Commission's explanatory brochure relating to Regulation No 1400/2002, includes the following statement in reply to question 20, headed 'How can termination of contracts which comply with Regulation No 1475/95 be effected during the transitional period?':

'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 nonetheless decide to substantially reorganise its network. To comply with Regulation No 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.'

12 In addition, in relation to question 68, headed 'Does the Regulation provide for minimum periods of notice?', the brochure states, in the fourth paragraph of the reply to that question, as regards termination on one year's notice:

'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 re-organisation 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.'

The main proceedings and the questions referred

13 On 21 September 1996, SMC entered into a new distribution agreement for Audi vehicles in Denmark with VS, a company dealing since 1975 in that Member State.

14 Clause 19(1) of that agreement, headed 'Termination on reduced notice', provides:

'... the supplier is entitled to terminate this agreement by written notification by registered letter and on 12 months' notice where a radical reorganisation of the whole or a part of the supplier's sales organisation proves necessary'.

15 On 16 May 2002, Audi AG ('Audi') approved a reorganisation plan for its distribution network in Denmark, which determined inter alia the number of dealers which would allow the financial objectives proposed for that Member State to be achieved.

16 On 2 September 2002, SMC sent the following letter to the 28 Audi dealers in Denmark, including VS:

'In the light of the new Community exemption for categories of vertical agreements and concerted practices in the motor vehicle sector, which enters into force on 1 October 2002, we are compelled to restructure our dealer network within a period of one year and to adapt our dealership contracts to the new block exemption regulation.

Therefore, with reference to the necessary reorganisation we must, pursuant to Clause 19(1) of the dealership agreement, give 12 months' notice of termination of your Audi passenger car contract, expiring on 30 September 2003.'

17 On the same date, SMC sent a separate letter to VS, in which it stated that it would, within the next few months, clarify Audi's future requirements for individual dealers, stating that it was too early to assess fully the consequences for the current Audi dealer network.

18 By letter of 3 October 2002, SMC informed VS of the fact that, in order to respond to future market demand, the existing dealers' network would be reduced from 28 to 14 dealers and that a new dealership agreement would not be offered to VS.

19 Accordingly, VW-Audi Forhandlerforeningen brought proceedings before the national court, in the name and on behalf of the Audi dealers having a dealership agreement which was terminated, claiming that the period of notice should have been one of 24 months.

20 As it took the view that the present dispute raises questions of Community law, the Østre Landsret (Eastern Regional Court) (Denmark) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is Article 5(3) of ... Regulation No 1475/95 ... to be interpreted as meaning that reasons must be stated for a supplier's termination of an agreement with a dealer on one year's notice which go beyond the supplier's reference to that provision?

(2) If Question 1 is answered in the affirmative:

What requirement may be placed under Community law on the content of such a statement of reasons and when must such a statement be provided?

(3) What are the consequences of not providing a proper or timeous statement of reasons?

(4) Is Article 5(3) of ... Regulation No 1475/95 to be interpreted as requiring that the termination of an agreement with a dealer on one year's notice must be effected on the basis of a reorganisation plan already drawn up by the supplier?

(5) If Question 4 is answered in the affirmative:

What requirement can be placed under Community law on the content and form of a reorganisation plan drawn up by the supplier and when must the reorganisation plan be submitted?

(6) If Question 4 is answered in the affirmative:

Must the supplier inform the dealer whose contract has been terminated of the content of the reorganisation plan, and when and in what form must notification to the dealer be effected in a particular case?

(7) If Question 4 is answered in the affirmative:

What is the consequence of a reorganisation plan not fulfilling the requirement which may be placed on the form and content of such a plan?

(8) According to the Danish version of Article 5(3) of ... Regulation No 1475/95, the supplier's termination of an agreement with a dealer on one year's notice presupposes that "...it is necessary to reorganise radically the whole or part of the network ...". The word "necessary" appears in all the language versions of Regulation No 1475/95 but the word "radically" appears only in the Danish version.

In this context:

What requirement may be placed on the nature of the reorganisation so that the supplier is able to terminate the dealer's contract on one year's notice under Article 5(3) of ... Regulation No 1475/95?

(9) In assessing whether the conditions for the supplier to be able to terminate the agreement on one year's notice under Article 5(3) of ... Regulation No 1475/95 are satisfied, is it of importance what the economic consequences would be for the supplier if it had terminated the dealer's contract on two years' notice?

(10) Who bears the burden of proving that the conditions for the supplier being able to terminate the agreement on one year's notice under Article 5(3) of ... Regulation No 1475/95 are satisfied, and how can such a burden of proof be lifted?

(11) Is Article 5(3) of ... Regulation No 1475/95 to be interpreted as meaning that the conditions for the supplier to be able to terminate the agreement on one year's notice under that provision can be satisfied simply on the grounds that the implementation of Regulation No 1400/2002 in itself could have necessitated a radical reorganisation of the supplier's dealer network?'

The questions referred

21 By its questions, the national court essentially asks for guidance as to the scope of the supplier's right under the first indent of Article 5(3) of Regulation No 1475/95 to terminate an agreement by giving one year's notice where it is necessary to reorganise the whole or a substantial part of the network.

22 As the Commission and SMC stated at the hearing, the questions referred by the national court essentially seek to establish the substantive conditions to which the exercise of such a right of termination is subject (Questions 8 and 9). In that context, the question also arises as to which party bears the burden of proving that those conditions are satisfied and the way in which such proof falls to be established (Question 10). In addition, the national court asks whether such a right of termination is also subject to compliance with a number of formal conditions as regards the reasons for the termination and the requirement for a reorganisation

plan (Questions 1 to 7). Lastly, the national court essentially asks whether the entry into force of Regulation No 1400/2002 was, of itself, sufficient to make a reorganisation of the dealership network within the meaning of Article 5(3) of Regulation No 1475/95 necessary (Question 11).

Questions 8 and 9

23 By these questions, which should be considered together, the national court essentially asks what substantive conditions must be satisfied in order for the first indent of Article 5(3) of Regulation No 1475/95 to apply.

24 Article 5(2)(2) of Regulation No 1475/95 provides that, where the dealer assumes certain obligations for the improvement of distribution and servicing structures, the exemption laid down under the regulation will apply if the agreement is for an indefinite period, provided that the period of notice for regular termination is, as a rule, at least two years for both parties.

25 However, the first indent of Article 5(3) provides that the conditions for exemption laid down under that article are without prejudice to the supplier's right to terminate an agreement by giving one year's notice where it is necessary to reorganise the whole or a substantial part of the network.

26 It is clear from the 19th recital in the preamble to Regulation No 1475/95 that, notwithstanding the investments made by dealers to improve the distribution and servicing of contract goods, the development of flexible and efficient distribution structures must not be obstructed. Thus, the same recital provides that the supplier

is to be entitled to terminate the agreement where there is a need to reorganise all or a substantial part of the network.

27 It follows from the above that the first indent of Article 5(3) of the regulation lays down a derogation which must, as such, be strictly interpreted.

28 In that regard, the wording itself of that provision shows that the right of termination laid down under it is subject to two conditions being satisfied, namely, first, that there must be a reorganisation of the whole or a substantial part of the dealership network of the supplier concerned and, secondly, that such a reorganisation must be necessary.

29 As regards the first condition, the wording of the provision makes it clear that it requires, first of all, that there be a 'reorganisation' of the network of the supplier concerned. Such a reorganisation necessarily implies a change to that supplier's distribution structure, which may relate, inter alia, to the nature or form of those structures, their subject-matter, the allocation of internal duties within those structures, the manner in which the goods and services in question are supplied, the number or quality of the participants in those structures, or their geographical coverage.

30 Furthermore, by virtue of the first indent of Article 5(3) of Regulation No 1475/95, in all of the language versions apart from the Danish version, that reorganisation must involve 'the whole' or 'a substantial part' of the supplier's network. Accordingly, the change to the distribution structures in question must be significant, both substantively and geographically.

31 It is for the national courts and arbitrators to determine, in the light of all of the evidence in the case before them and, especially, the actual organisation of the distribution network of the supplier concerned, whether such a reorganisation of the network has in fact taken place.

32 In that regard, as the Commission has observed and as the Advocate General noted at points 15 to 26 of his Opinion, the fact that the Danish version of the first indent of Article 5(3) of Regulation No 1475/95, unlike all the other language versions of that provision, refers to the need for a 'radical' ('*gennemgribende*') reorganisation of the distribution network is not of fundamental importance, since the word adds nothing to the requirement for a significant change which arises from the condition, set out in all the other language versions, that there be a reorganisation of the whole or a substantial part of the network of the supplier concerned.

33 As regards the second condition, the Commission and SMC argue that it is for the supplier alone to determine, at its entire discretion, whether there is a need to reorganise its distribution network. Regulation No 1475/95 does not require courts or arbitrators to enquire into the commercial concerns of a supplier in a reorganisation of that kind. Moreover, the regulation contains no restrictions whatsoever on the supplier's freedom to set the number of its distributors. In order for that condition to be satisfied, it is therefore sufficient for there to be a causal link between the termination and the reorganisation of the network concerned.

34 Such an analysis, which, in the Commission's case, differs from that adopted by it in its answer to question 68 in the explanatory brochure to Regulation No 1400/2002, cannot be accepted.

35 It is true that it is not for the national courts or arbitrators, in a dispute relating to the validity of the termination of an agreement with a reduced notice period under the conditions laid down in the first indent of Article 5(3) of Regulation No 1475/95, to call into question the economic and commercial considerations governing the supplier's decision to reorganise its distribution network.

36 However, the need for such a reorganisation cannot, without depriving dealers of all effective legal protection in the matter, be a matter for the supplier's discretion, since the first indent of Article 5(3) of Regulation No 1475/95 provides that it is that need which allows the supplier, while retaining the benefit of the block exemption laid down under that regulation pursuant to Article 81(3) EC, to terminate an agreement without being required to comply with the regular period of notice of two years laid down by Article 5(2)(2).

37 Having regard both to the purpose and the derogatory nature of the first indent of Article 5(3) of Regulation No 1475/95, the need for a reorganisation for the purposes of the exercise of the right to terminate with one month's notice must, accordingly, be capable of being convincingly justified on grounds of economic effectiveness based on objective circumstances internal or external to the supplier's undertaking which, failing a swift reorganisation of the distribution network, would be liable, having regard to the competitive environment in which the supplier carries on business, to prejudice the effectiveness of the existing structures of the network.

38 Accordingly, the mere fact that the supplier considers, on the basis of a subjective commercial appraisal of the position in which its distribution network finds itself, that a reorganisation of that network is necessary is not, of itself, sufficient to establish the need for such a reorganisation for the purposes of the first indent of Article 5(3) of Regulation No 1475/95. By contrast, any adverse economic

consequences which would be liable to affect a supplier in the event that it were to terminate the distribution agreement with a two years' notice period are relevant in that regard.

39 It is for the national courts and arbitrators to determine, having regard to all the evidence in the case before them, whether the need for such a reorganisation is objectively justified.

40 Accordingly, the answer to Questions 8 and 9 must be that the first indent of Article 5(3) of Regulation No 1475/95 is to be interpreted as meaning that in order for it to be 'necessary to reorganise the whole or a substantial part of the network' there must be a significant change, both substantively and geographically, to the distribution structures of the supplier concerned, which must be convincingly justified on grounds of economic effectiveness based on objective circumstances internal or external to the supplier's undertaking which, failing a swift reorganisation of the distribution network, would be liable, having regard to the competitive environment in which the supplier carries on business, to prejudice the effectiveness of the existing structures of the network. Any adverse economic consequences which would be liable to affect a supplier in the event that it were to terminate the distribution agreement with a two years' notice period are relevant in that regard. It is a matter for the national courts and arbitrators to determine, having regard to all the evidence in the case before them, whether those conditions are satisfied.

Question 10

41 By its tenth question, the national court asks which party bears the burden of proving that a right to terminate with a reduced notice period of one year exists, as provided for under the first indent of Article 5(3) of Regulation No 1475/95, and how such proof is to be established.

42 The Court has already held that it is a matter for the undertaking which seeks the benefit of an individual exemption to establish that the conditions laid down under Article 81(3) EC are satisfied (see, to that effect, Joined Cases 43/82 and 63/82 *VBVB and VBBB* v *Commission* [1984] ECR 19, paragraph 52). Similarly, having regard to the derogatory nature of the period for termination laid down by the first indent of Article 5(3) of Regulation No 1475/95, as compared with the regular period of notice specified in Article 5(2)(2), where a dealer challenges the validity of a termination effected by one year's notice before the national courts or arbitrators, it is for the supplier who seeks to rely on the right so to terminate to prove that the conditions laid down under that provision are satisfied.

43 As Regulation No 1475/95 lays down no provisions in that regard, the procedure for establishing such proof is a matter for national law.

44 The answer to Question 10 must therefore be that the first indent of Article 5(3) of Regulation No 1475/95 is to be interpreted as meaning that, where the validity of a termination with one year's notice is challenged before the national courts or arbitrators, is to beit is for the supplier to prove that the conditions laid down under that provision for the exercise of the right to terminate on one year's notice are satisfied. The procedure for establishing such proof is a matter for national law.

Questions 1 to 7

45 By Questions 1 to 7, the national court essentially asks whether the first indent of Article 5(3) of Regulation No 1475/95 is to be interpreted as meaning that it requires

a supplier which terminates a distribution agreement pursuant to that provision, first, to set out formal reasons for the decision to terminate, and, secondly, to draw up a reorganisation plan prior to that decision being taken.

46 VS contends that the purpose of that provision, namely to guarantee effective competition between the distribution networks by reducing dealers' dependence, requires that dealers' activities should not be constrained by a threat of termination. Accordingly, the supplier is under an obligation to state in writing, at the latest when the notice of termination is given, the objective and clear reasons on which it is based. Furthermore, the prior existence of a reorganisation plan is an essential part of the requirement to state reasons. The Commission adopted the same approach in an opinion notified to the Danish competition authorities, as is shown by a letter sent by them on 20 December 2002 to VW-Audi Forhandlerforeningen.

47 However, inasmuch as the first indent of Article 5(3) of Regulation No 1475/95 indicates that the conditions for exemption laid down under that regulation 'shall not affect' the right of the supplier to terminate an agreement subject to at least one year's notice where it is necessary to reorganise the whole or a substantial part of the network, it simply introduces into that regulation, as the Commission rightly argues in its observations, a possibility which, subject to compliance with the conditions for application set out in that provision, does not restrict the contractual freedom of the parties, as exercised under the applicable national law.

48 While the first indent of Article 5(3) of Regulation No 1475/95 is worded so as to allow a supplier to terminate an agreement under such a reduced period of notice where it is necessary to reorganise its network, it does not impose on it any specific obligation to provide formal reasoning for the termination and as regards the form

or the substance of the reorganisation. Moreover, there is no other provision in the regulation which lays down obligations of that kind.

49 That being so, as the Commission rightly contends in this case, the question whether the termination of an agreement with one year's notice pursuant to the first indent of Article 5(3) of Regulation No 1475/95 must contain a formal statement of reasons or whether the supplier must have drawn up a reorganisation plan prior to serving notice of termination is a matter for national law alone.

50 Contrary to what VS contends, dealers are not, as such, deprived of all legal remedies since, as is clear from paragraphs 42 and 44 of this judgment, where a dealer challenges the validity of a termination with one year's notice before the national courts or arbitrators, it is for the supplier to justify that termination by showing that the substantive conditions required for that provision to apply are properly satisfied.

51 The answer to Questions 1 to 7 must accordingly be that the first indent of Article 5(3) of Regulation No 1475/95 is to be interpreted as meaning that it does not require a supplier which terminates a distribution agreement pursuant to that provision to provide a formal statement of the reasons for the decision to terminate nor does it require the supplier to draw up a reorganisation plan prior to taking such a decision.

Question 11

52 By this question, the national court essentially asks whether the entry into force of Regulation No 1400/2002 was, of itself, sufficient to render the reorganisation of the distribution network of a supplier necessary within the meaning of the first indent of Article 5(3) of Regulation No 1475/1995.

53 The Commission and SMC essentially argue that the entry into force of Regulation No 1400/2002 could, of itself, make it necessary that a distribution network be reorganised. According to the Commission, it is not open to a national court or arbitrator to dispense with an appraisal of such a necessity on the supplier's part. SMC maintains that, in the present case, the entry into force of that regulation of itself gave rise to a need for a substantial reorganisation of its distribution network in Denmark by reason, in particular, of the transition from a system of exclusive distribution with territorial protection to one of selective distribution without any such protection and of the right of repair shops to gain authorisation subject to satisfying qualitative criteria.

54 It must be observed in that regard that, as the Commission noted in its explanatory brochure relating to Regulation No 1400/2002, that regulation introduced substantial amendments to the block exemption scheme established under Regulation No 1475/95, by laying down more stringent rules than those under the latter regulation for exemption from a number of restrictions on competition subject to the prohibition laid down under Article 81(1) EC.

55 In particular, Regulation No 1400/2002 does not grant a block exemption in respect of active and passive sales by the members of a selective distribution system (Article 4(1)(b)(i) and (iii) and (d) and (e)), thereby prohibiting, in the context of block exemption, the combination of exclusive distribution and selective distribution exempted by Regulation No 1475/95 (Article 3(8) to (10)).

56 However, there was no requirement whatsoever on suppliers, in order to benefit from the block exemption laid down under Regulation No 1475/95, to include such restrictions on competition within the meaning of Article 81(1) EC in their distribution agreements. Like Regulation No 1400/2002, that regulation, as a regulation implementing Article 81(3) EC, merely gives economic operators in the sector concerned a number of opportunities of avoiding the prohibition laid down under Article 81(1) EC, notwithstanding the presence of certain types of clauses restricting competition in their distribution and servicing agreements. Those

regulations do not, however, require economic operators to make use of those opportunities by laying down binding obligations which directly affect the validity or content of contractual provisions or requiring the contracting parties to amend the content of their contract (see, to that effect, Case 10/86 *VAG France* [1986] ECR 4071, paragraphs 12 and 16, Case C-41/96 *VAG* [1997] ECR I-3123, paragraph 16, and Case C-230/96 *Cabour* [1998] ECR I-2055, paragraph 47).

57 Thus, even though, as SMC has pointed out, block exemption under Regulation No 1475/95 applied only where the dealer undertook to provide repair and maintenance services and vehicle-recall work (Articles 4(1)(1) and (6) and 5(1)), whereas Regulation No 1400/2002 does not accord block exemption to the restriction on the dealer's ability to subcontract the provision of repair and maintenance services to authorised repairers or on the ability of the latter to limit themselves to such activities (Article 4(1)(g) and (h)), Regulation No 1400/2002 contains no prohibition whatsoever on a dealer continuing to provide such services on its own behalf as an authorised repairer in the framework of the exclusive or selective distribution system set up by the supplier.

58 It follows that, as the Commission essentially stated in its reply to question 20 in its explanatory brochure relating to Regulation No 1400/2002, the entry into force of that regulation did not in any way make the reorganisation of the distribution network of a supplier necessary for the purposes of the first indent of Article 5(3) of Regulation No 1475/95.

59 However, having regard to the substantial amendments to the scheme for exemption introduced by Regulation No 1400/2002, the entry into force of that regulation may have led certain suppliers to make changes to their distribution agreements, in order

to be certain that they would continue to benefit from the block exemption laid down under that regulation. Such may have been the case, in particular, if the agreements entered into under the scheme laid down under Regulation No 1475/95, while complying with that regulation, contained 'hardcore' restrictions within the meaning of Article 4(1) of Regulation No 1400/2002.

60 It is precisely because of the substantial amendments introduced by Regulation No 1400/2002 that Article 10 of that regulation provided that the prohibition laid down in Article 81(1) EC was not to apply during the period from 1 October 2002 to 30 September 2003 to agreements already in force on 30 September 2002 which did not satisfy the conditions for exemption provided for in Regulation No 1475/95.

61 It is clear from the 36th recital in the preamble to Regulation No 1400/2002 that the changes which might be made by suppliers to their distribution network following the entry into force of Regulation No 1400/2002 could, having regard to the derogatory nature of the first indent of Article 5(3) of Regulation No 1475/95, be introduced simply by adapting the agreements in force on the date on which the latter regulation ceased to apply, during the transitional period provided for that purpose, without, as VS rightly argued at the hearing, such an adaptation automatically entailing the need, under the applicable national law, for those agreements to be terminated or, in any event, for the whole or a substantial part of the distribution network to be reorganised.

62 It must however be acknowledged that, even if the entry into force of Regulation No 1400/2002 did not automatically give rise to a need to reorganise distribution networks, the particular nature of the distribution network of each supplier may, in some cases, have required changes that were so significant that they must be truly

considered as constituting a reorganisation within the meaning of the first indent of Article 5(3) of Regulation No 1475/95.

63 Thus, such a reorganisation might in particular be needed, within the meaning of that provision, where, in order to continue to benefit from the block exemption, a supplier which by combining, prior to the entry into force of Regulation No 1400/2002, exclusive distribution and selective distribution, elected to organise its distribution network on the basis only of a system of selective distribution or decided to retain a system of exclusive distribution only for sales services, while introducing a selective distribution system for after-sales services by authorised repairers.

64 It is, however, for the national courts or arbitrators, by reference to the matters set out in paragraphs 28 to 38 of this judgment, to determine, in the light of all the evidence in the case before them, and, in particular, the evidence provided for that purpose by the supplier, whether the changes made by the latter constitute such a reorganisation of its distribution network and whether that reorganisation was made necessary by the entry into force of Regulation No 1400/2002.

65 The answer to Question 11 must accordingly be that the entry into force of Regulation 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.

Costs

66 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

The first indent of Article 5(3) of Commission Regulation (EC) No 1475/95 of 28 June 1995 on the application of Article [81](3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements is to be interpreted as meaning that:

— **in order for it to be 'necessary to reorganise the whole or a substantial part of the network' there must be a significant change, both substantively and geographically, to the distribution structures of the supplier concerned, which must be convincingly justified on grounds of economic effectiveness based on objective circumstances internal or external to the supplier's undertaking which, failing a swift reorganisation of the distribution network, would be liable, having regard to the competitive environment in which the supplier carries on business, to prejudice the effectiveness of the existing structures of the network. Any adverse economic consequences which would be liable to affect a supplier in the event that it were to**

terminate the distribution agreement with a two years' notice period are relevant in that regard. It is for the national courts and arbitrators to determine, having regard to all the evidence in the case before them, whether those conditions are satisfied.

— **where the validity of a termination with one year's notice is challenged before the national courts or arbitrators, it is for the supplier to prove that the conditions laid down under that provision for the exercise of the right to terminate on one year's notice are satisfied. The procedure for establishing such proof is a matter for national law.**

— **it does not require a supplier which terminates a distribution agreement pursuant to that provision to provide a formal statement of the reasons for the decision to terminate nor does it require the supplier to draw up a reorganisation plan prior to taking such a decision.**

— **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 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.**

[Signatures]