mandatory provisions directly affecting the validity or the content of contractual provisions or oblige the contracting parties to adapt the contents of their agreement but merely lays down conditions which, if they are satisfied, exclude certain contractual provisions from the prohibition and consequently from the automatic nullity provided for in Article 85 (1) of the EEC Treaty.

REPORT FOR THE HEARING
delivered in Case 10/86 *

I — Facts and procedure

1. VAG France SA is a subsidiary of the motor vehicle manufacturer Volkswagen AG. On behalf of the latter it imports into France motor vehicles and products bearing the VW and Audi marks and it entrusts to exclusive dealers in respect of defined areas the resale to the public of new VW and Audi vehicles and of spare parts, as well as the servicing of the vehicles. Since 1975 Établissements Magne SA has been the dealer responsible for various parts of the district of Angoulême.

Relations between VAG France and Établissements Magne were governed by agreements concluded each time for a fixed period of one year. The most recent dealership agreement between the two parties was concluded on 18 December 1984 for the period from 1 January 1985 until 31 December 1985, without the possibility of tacit renewal.

According to the conditions of such standard agreements the dealer undertook, *inter alia*, not to sell or distribute new vehicles or spare parts which competed with those to which the agreement related. The dealer was required to undertake servicing work, including guarantee work, on VW and Audi vehicles even if they were only temporarily in his area and even if they had not been sold by him. The dealer also undertook, in the light of the potential of his area and the sales targets fixed by VAG France, to sell a number of new vehicles corresponding to the quantitative sales targets set out in the annex to the agreement.

2. On 18 January 1985 Commission Regulation (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, adopted on the basis of Council Regulation No 19/65/EEC of 2 March 1965 on the application of Article 85 (3) of the Treaty to certain categories of agreements and concerted practices (Official Journal, English Special Edition 1965-66, p. 35), was published in the Official Journal (Official Journal 1985, L 15, p. 16). By that regulation the Commission declared that, subject to certain specific conditions, Article 85 (1) was not to apply to exclusive distri-

* Language of the Case: French.

bution agreements in the motor vehicle industry.

It is clear from the recitals in the preamble to the regulation that the Commission takes the view that exclusive motor vehicle distribution agreements involving restrictions on competition and the obligations referred to in Articles 1 to 4 of the regulation as a general rule satisfy the conditions of Article 85 (1) of the EEC Treaty but that such contractual provisions may, on certain conditions, be regarded as justified and indispensable in the motor vehicle industry since the agreements relate to a product which requires expert maintenance and repair at both regular intervals and at unexpected times and not always in the same place, for which cooperation between the manufacturer and a limited number of selected distributors and workshops is necessary.

Article 5 (2) (2) of the regulation provides that where the dealer has assumed certain obligations of the type included in the agreement in question for the improvement of distribution and servicing structures, the exemption for the obligations not to sell new motor vehicles other than those to which the contract programme relates or not to conclude distribution or servicing agreements in relation to goods other than those to which the agreement relates, is to apply provided that:

'the agreement is for a period of at least four years or, if for an indefinite period, the period of notice for regular termination of the agreement is at least one year for both parties, unless

(i) the supplier is obliged by law or by special agreement to pay appropriate compensation on termination of the agreement, or

(ii) the dealer is a new entrant to the distribution system and the period of the agreement, or the period of notice for regular termination of the agreement, is the first agreed by that dealer'.

Pursuant to Article 14, Regulation No 123/85 entered into force on 1 July 1985. According to Article 7, the inapplicability of Article 85 (1) of the EEC Treaty operates from the time at which the conditions of the regulation were fulfilled or, except for certain old agreements, from the date of notification, whichever is the later. Article 8 provides in the case of certain old agreements that if they are amended before 1 October 1985 so as to fulfil the conditions laid down and if the amendment is communicated to the Commission before 31 December 1985, the prohibition in Article 85 (1) is not to apply in respect of the period prior to the amendment.

3. By a letter dated 24 June 1985 VAG France informed Établissements Magne of its intention to submit to it a new agreement of indefinite duration from 1 January 1986. However, since there was a considerable shortfall in the sales effected by Établissements Magne which amounted on 30 April 1985 to only 46.4% of the target figures, VAG France made its offer conditional upon Etablissements Magne's attaining a proportion of the target sales figures equal at least to the proportion of sales effected by the network on a national basis, failing which no new agreement to follow the one expiring on 31 December 1985 would be submitted.

Établissements Magne disputed VAG France's right not to renew the contract for the reasons stated by it. It contended that the effect of Regulation No 123/85 was to extend the agreement for a period of four years subject to termination on notice and demanded that an addendum to that effect be sent to it.

On 25 September 1985 VAG France sent to Établissements Magne, subject to the reser-

vations and conditions previously formulated by it, the text of a new dealership agreement stated to be of indefinite duration and pointed out that the agreement had been drafted so as to conform to Regulation No 123/85 and that it should govern their relations with effect from 1 October 1985.

Etablissements Magne refused to sign the new dealership agreement and repeated its request to be sent an addendum to the existing agreement in conformity with Article 5 of Regulation No 123/85. That request went unanswered.

There have been no commercial relations between VAG France and Établissements Magne since 1 January 1986.

4. During the dispute with regard to their contractual relationship VAG France brought an action against Etablissements Magne before the Tribunal de grande instance, Paris.

In the course of that action VAG France maintained in particular that by refusing the offer of a contract of indefinite duration Établissements Magne itself precluded the continuance of any commercial relations and that it could not claim a new dealership agreement if it did not achieve sales in accordance with the contractual targets. Établissements Magne, on the other hand, claimed that the dealership agreement had to be brought into conformity with Regulation No 123/85 by the retroactive adaptation of the clause laying down a fixed term of four years and maintained that VAG France was not entitled to impose a new agreement of a different nature, that is to say an agreement of indefinite duration, or to rely on conditions concerning sales targets contrary to Regulation No 123/85.

By judgment of 18 December 1985 the Tribunal de grande instance, Paris, decided to request the Court of Justice under Article 177 of the EEC Treaty to rule 'on the application of Regulation (EEC) No 123/85 of 12 December 1984 to the agreement concluded on 18 December 1984 for a period of one year from 1 January 1985 until 31 December 1985, without tacit renewal, between VAG France and Etablissements Magne, having regard to the submissions of those parties'.

With regard to the parties' submissions, the Tribunal de grande instance stated as follows:

'The dispute between the parties turns essentially on the question whether that regulation, from its entry into force on 1 July 1985, requires them to amend the existing agreement between them in order to bring it into conformity *inter alia* with the requirements of Article 5 (2) (2) of the regulation regarding the duration of the agreement by extending the duration to four years from the entry into force of the fixed-term agreement, as is maintained by Établissements Magne, or whether it merely has the effect of rendering void the exclusivity and no-competition clauses and, conceivably, the whole of the agreement in view of the fact that such clauses go to the essence of the agreement and constitute the motivating reason for it, until the expiry of the agreement or at least until the contracting parties have concluded a new agreement which is in conformity with the Community rules, as is argued by VAG France.'

5. The judgment of the Tribunal de grande instance, Paris, was registered at the Court on 16 January 1986.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by VAG France, represented by Yann François, of the Paris Bar, by Établissements Magne, represented by Jean Threard, of the Paris Bar, and by the

Commission of the European Communities, represented by its Legal Adviser, Norbert Koch.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry and, in accordance with Article 95 (1) of the Rules of Procedure, it assigned the case to the Third Chamber.

II — Written observations

1. *Observations submitted by VAG France*

VAG France points out that after the publication of Regulation No 123/85 the resulting changes for its dealership agreements were the subject of consultation with the Association of Dealers for its network which informed the dealers thereof. In contrast to the position in relation to agreements concluded for a period of one year VAG France has to have the possibility in the future of requiring dealers to produce satisfactory results as a condition for the continuance of the relationship. Since even the former agreement permitted exclusivity to be withdrawn if the results were unsatisfactory, Établissements Magne has in any event lost its territorial exclusivity. It was legitimate and merely constituted the maintenance of that provision of the former agreement to require efficient work in return for the dealer's territorial monopoly by laying down sales targets in its letter of 25 June 1985.

VAG France was under no obligation under Regulation No 123/85 to submit to Établissements Magne an agreement for a fixed term of four years instead of a contract of indefinite duration. Both possibilities are provided for in the regulation and the contract of indefinite duration subject to termination on one year's notice is, in any event, more favourable for the dealer than the previous position, namely a fixed term of one year. It is for the national court to find that Établissements Magne had wrongfully refused to accept its offer, independently of the fact that it had not satisfied the conditions concerning the attainment of sales targets.

Regulation No 123/85 does not affect the strictly consensual nature of the relationship between suppliers and dealers. It is capable of affecting the original contractual balance and therefore has the effect of requiring that agreements existing at the time of its entry into force be completely renegotiated. To that end, it threatens the parties with the potential total or partial nullity of their current agreements: either the parties come to an agreement to bring their contract into conformity with the conditions laid down by the regulation or their contract becomes void under Article 85 (2) of the EEC Treaty subject to individual exemption. That approach, which is characteristic of regulations providing for exemption by category, leaves intact the system of individual exemptions whilst considerably reducing the scope of such exemptions.

Since several of the provisions of Regulation No 123/85 lay down a requirement of non-discriminatory conduct on the part of the supplier *vis-à-vis* the whole of his dealers, there can be no individual discussions on the terms of the proposed agreement which is intended to ensure equitable and identical treatment for the whole of the distributor's network.

VAG France therefore claims that the Court should rule that in the absence of an agreement between the parties on the continuance of contractual relations the agreement signed on 18 December 1984 is void in so far as it infringes Article 5 (2) (2)

of Regulation No 123/85; that such nullity affects only those contractual provisions which are not in conformity with the regulation; that it is for the national court to determine the extent and consequences of that nullity according to national law; and that Regulation No 123/85 does not impose any particular duty on the supplier, who is free to propose such provisions as bring the dealership agreement into conformity with the regulation without incurring liability for breach of the agreement if the dealer does not accept the offer.

2. *Observations submitted by Établissements Magne*

According to Établissements Magne, it is a necessary condition for the continuance of exclusive dealership agreements that they be brought into conformity, in accordance with Articles 7 and 8 of Regulation No 123/85, with the requirements of the regulation before 1 July or 1 October 1985, as the case may be. According to Article 5, the contractual provisions must not be discriminatory and must compensate for the dealer's economic dependence. Since the obligations to which the dealer must submit under Article 5 (1) were already included in the contractual provisions in this case, the obligation to amend the agreement within the period laid down by the regulation rested solely with VAG France, which refused to render the agreement compatible with the regulation in that manner.

Since the agreement between the parties was for a fixed term, its minimum duration is four years according to Article 5 (2) (2). The contract could not be exempted after 1 July 1985 unless VAG France had agreed to include a provision extending its duration to four years.

It was with full knowledge of the facts that in December 1984 VAG France concluded an agreement for a fixed term whereas it could have opted for an agreement of indefinite duration. It had, like all European manufacturers, taken part in discussions with the Commission prior to the drafting of Regulation No 123/85 and from that it was aware of the manner in which the regulation applied when it signed the agreement on 18 December 1984. It was not therefore entitled to impose on its dealers, unilaterally and in breach of the principle of the freedom of contract, an agreement of another type and another nature, namely an agreement of indefinite duration.

Since the exclusive dealership agreement between the parties was not amended within the period laid down it is void. In this case the continuance of the exclusive dealership is dependent upon the amendment of the contractual provision concerning the duration of the agreement; Établissements Magne requested, moreover, that the agreement should be brought into conformity with all the conditions laid down in Article 5 of Regulation No 123/85. Since those conditions were not satisfied, exemption should be refused in respect of the whole of the agreement.

The automatic nullity of the agreement resulting from the failure to bring it into line with the regulation is the consequence of the unilateral conduct of VAG France which had the opportunity to avoid it by a simple addendum to the agreement.

Établissements Magne therefore concludes that the entry into force of Regulation No 123/85 obliged the supplier to amend the provisions of the current agreement without altering their nature in order to bring the agreement into line with the requirements of the regulation and in particular the condition concerning the duration of agreements. By refusing to make such an amendment VAG France intentionally removed the agreement from the scope of the exemption provided for in Article 85 (3) of the EEC Treaty with the result that the whole of the agreement became auto-

matically void on 1 July 1985. The regulation did not have the effect of rendering ineffective the contract which was in force at the time and therefore did not justify the conclusion of a different contract.

3. *Observations submitted by the Commission*

The Commission points out that in no case did Regulation No 123/85 lead to the amendment of an agreement by virtue of the regulation itself. It merely set out the conditions which must be satisfied before the exemption can come into operation and did not interfere directly with the terms of an agreement. The contractual rights of a party which are mentioned in subparagraph (1) to (3) of Article 5 (2) and which constitute a condition that must be satisfied before the exemption can take effect, can only be created by consensus between the parties and a contractual arrangement between them.

Regulation No 123/85 does not deal exclusively with the possibilities for exempting exclusive and selective motor vehicle distribution agreements. It merely makes available to undertakings a framework for the automatic exemption of certain agreements. It does not, however, exclude either the application of Regulations Nos 1983/83 and 1984/84 or individual exemption in respect of contractual provisions which restrict competition to a greater extent.

Regulation No 123/85 does not grant one party to an agreement the right to require the other party to amend the agreement so as to bring it into conformity with the terms of the regulation. It is for the undertakings to decide on the content of their agreements and to choose between the different possibilities for exempting agreements which restrict competition. The Commission cannot apply the penalties for breach of the prohibition contained in Article 85 (1) unless it is minded not to tolerate the harmful effects of a restriction on competition having regard to the particular circumstances of the case. The objective of the provisions of Regulation No 123/85 is to maintain effective competition and not to protect the dealer, who cannot therefore infer from the regulation any direct guarantee of protection against the supplier. The question whether a contracting party has a right, *vis-à-vis* the other party, to have the contract amended in the light of the conditions for exemption or whether he may seek damages for breach of contract where such amendment is refused, is to be decided acccording to the domestic private law of the Member States. That law may impose an obligation on one party to produce necessary authorizations even if these are not referred to in the agreement.

Regulation No 123/85 does not prevent the manufacturer or supplier of vehicles from imposing different contractual requirements or from replacing an agreement with one of a different nature. In that regard Article 86 of the EEC Treaty comes into consideration only if the manufacturer or supplier thereby abuses a dominant position in relation to the dealer. In addition, national provisions protecting the dealer may apply.

Regulation No 123/85 applies only to agreements comprising exclusive obligations within the meaning of Article 1 thereof and that constitutes an indispensable condition for the application of exemption by category.

U. Everling
Judge-Rapporteur