

OPINION OF MR ADVOCATE GENERAL MISCHO
delivered on 27 November 1986 *

Mr President,
Members of the Court,

By a judgment dated 18 December 1985 the Tribunal de grande instance [Regional Court], Paris, requested 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 1984¹ 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 [the plaintiff in the main action] and Établissements Magne [the defendant in the main action], having regard to the submissions of those parties'.

Phrased in that manner the question amounts to a request to the Court to rule on the application of Community law to a particular case which it cannot do within the framework of the task assigned to it by Article 177 of the EEC Treaty.

But it is clear from the grounds of the judgment making the reference that the request in fact relates to the interpretation of the aforementioned regulation. The Tribunal de grande instance, Paris, in fact states 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.'

Under Article 5 (2) (2) of Regulation No 123/85, in certain cases where the dealer has assumed obligations referred to in Article 4 (1), the application of the exemption under Article 85 (3) to the obligations not to sell new motor vehicles other than those within the contract programme or not to conclude distribution or servicing agreements covering those vehicles is subject, *inter alia*, to the condition 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

* Translated from the French.

1 — Commission Regulation (EEC) No 123/85 of 12 December 1984 on the application of Article 85 (3) of the EEC Treaty to certain categories of motor vehicle distribution and servicing agreements (Official Journal 1985, L 15, p. 16).

- (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'.

Since 1975 relations between VAG France and Établissements Magne have been governed by agreements concluded each time for a fixed period of one year without the possibility of tacit renewal.

Since it considered that the agreement in force at the time did not conform to new Community rules, VAG France suggested to its dealer, Établissements Magne, the conclusion of a *new contract* of indefinite duration. However, having discovered a considerable shortfall in the sales effected by that dealer during the early months of the year, VAG France made its proposal conditional upon the attainment of certain sales targets.

Établissements Magne refused to sign the new contract since it took the view that Article 5 (2) (2) of Regulation No 123/85 obliged its supplier, VAG France, to transform the existing agreement, without altering its nature, into an agreement for a fixed term of four years and it therefore requested that that amendment should be confirmed by means of a simple addendum. In addition, it contested the right of VAG France to make its agreement dependent upon the said condition that sales targets be attained.

As a result of that difference of opinion all commercial relations between the two parties came to an end and each party wishes to show that the other was responsible for the breach of their agreement. They consider that, in the absence of an amendment to their agreement so as to bring it into conformity with the provisions of Regulation No 123/85 and in the absence of an individual

exemption under Regulation No 17 of the Council² or of exemption by category granted under Regulation No 19/65/EEC of the Council,³ Article 85 (2) of the EEC Treaty has the effect of rendering their agreement or, at the very least, those clauses which are incompatible with Article 85 (1) automatically void.

The request for the interpretation of Regulation No 123/85 therefore relates, more precisely, to the effect of the entry into force of that regulation on the validity of exclusive dealership agreements of the type before the Tribunal de grande instance, in particular on clauses dealing with their duration and the duties arising by virtue of its entry into force for the parties thereto.

In order to give the Tribunal de grande instance a helpful reply to the problem with which it is faced, it is necessary to recall first of all the scope of the exemptions by category.

1. As Article 85 (3) of the EEC Treaty expressly provides, the effect of any exemption, whether individual or by category, is to declare inapplicable the provisions of Article 85 (1) in relation to the agreement or category of agreements in question. In other words, the grant of exemption renders valid agreements which, in the absence of such exemption, would in principle be prohibited and therefore automatically void under Article 85 (2).

That is particularly the case in relation to the exemption granted by Regulation No 123/85. Agreements which satisfy the requirements of that regulation benefit from an exemption and are therefore to be regarded as valid with regard to Community competition law.

² — Regulation No 17 of the Council of 6 February 1962 (Official Journal, English Special Edition 1959-62, p. 87).

³ — Regulation No 19/65/EEC of the Council of 2 March 1965 on the application of Article 85 (3) to certain categories of agreements and concerted practices (Official Journal, English Special Edition 1965-66, p. 35).

It is for the national court to determine whether the requirements for exemption by category have been satisfied in a specific case and, if so, to declare the agreement before it valid.⁴

With regard to the date on which the exemption takes effect, the national court must make a distinction between agreements concluded after the entry into force of Regulation No 123/85 and those which were in effect prior to its entry into force.

The former, which need not be notified (see the 28th recital in the preamble to the regulation), are exempt *ab initio*.

With regard to the latter, Articles 7 and 8 give retroactive effect to their exemption which varies according to whether they are 'old' agreements (that is to say existing prior to Regulation No 17) which have been notified in good time or agreements the only parties to which are undertakings from one Member State, which do not relate to imports or to exports between Member States and which in principle do not need to be notified (under point 1 of Article 4 (2) of Regulation No 17) or are 'new' notified agreements (that is to say concluded subsequent to Regulation No 17).

In the case of a contract which is subject to the requirement of notification it is also necessary to verify whether the contract in question is identical to a standard contract which has been duly notified.

In its judgment of 30 June 1970 in Case 1/70⁵ the Court ruled as follows:

⁴ — Judgment of 3 February 1976 in Case 63/75 *SA Fonderies Roubaix v Société nouvelle des fonderies A. Roux* [1976] ECR 111, in particular paragraph 11.

⁵ — Case 1/70 *Parfums Marcel Rochas Vertriebs-GmbH v Bitsch* [1970] ECR 515.

'Agreements concluded after the entry into force of Regulation No 17/62, which are exact reproductions of a standard contract previously concluded and duly notified, qualify for the same system of provisional validity as the latter'.

2. If the national court were to find that the conditions for exemption were not satisfied in this case, what conclusions should it draw with regard to the validity of the agreement?

Since the purpose of decisions adopted under Article 85 (3) is to declare inapplicable the provisions of Article 85 (1), it might be supposed that the agreements which benefit from such a declaration always fall within the prohibition contained in Article 85 (1).

Although that is in fact the case in relation to agreements which benefit from individual exemption, it is not necessarily the case in relation to a specific agreement falling within an exempted category. In its judgment of 13 July 1966 in Case 32/65⁶ the Court stated that 'to define a category is only to make a classification and does not mean that the agreements which come within it all fall within the prohibition'. It went on to state as follows: '*Nor does it mean that an agreement within the exempted category, but not exhibiting all the features of the said definition, must necessarily fall within the prohibition*' (at p. 406).

In such a case it is for the national court, subject to the application of Article 177 of the EEC Treaty, to verify whether the

⁶ — Case 32/65 *Italy v Council and Commission* [1966] ECR 389.

conditions of the prohibition contained in Article 85 (1) are in fact satisfied and, where appropriate, to declare the agreement before it void under Article 85 (2).⁷

In that connection it may be led to 'suspend proceedings in order to allow the parties to obtain the Commission's standpoint',⁸ and in order, possibly, for an individual exemption to be granted since Regulation No 123/85 does not affect the parties' right to request such a decision pursuant to Regulation No 17 (see the 29th recital in the preamble to the regulation).

It will also be necessary to verify whether the agreement benefits from any other exemption by category; in this case the exemptions provided for in Commission Regulations Nos 1983/83⁹ and 1984/83¹⁰ come into consideration (see the 24th and 29th recitals in the preamble to Regulation No 123/85 and point 3 of Article 6 of that regulation).

Consequently, the effect of a regulation providing for exemption by category is not to render automatically void an agreement which does not satisfy the requirements for exemption. Such an agreement is, if it does not benefit from some other exemption, whether individual or by category, void only if the requirements of Article 85 (1) are in fact satisfied. More specifically, it follows that the fact that the agreement in question is probably not in conformity with Article 5

(2) (2) of Regulation No 123/85 does not necessarily prove that it is void but merely deprives it of the benefit of the exemption provided for by that regulation.

3. If the national court is finally led to find that the requirements of Article 85 (1) are satisfied, it must be pointed out that the automatic nullity which that involves by virtue of Article 85 (2) 'only applies to those parts of the agreement affected by the prohibition contained in Article 85(1), or to the agreement as a whole if it appears that those parts are not severable from the agreement itself' and that consequently 'any other contractual provisions which are not affected by the prohibition, and which therefore do not involve the application of the Treaty, fall outside Community law'.¹¹

In Joined Cases 56 and 58/64¹² the Court therefore concluded that the Commission should 'either [confine] itself in the operative part of the contested decision to declaring that an infringement [lies] in those parts only of the agreement which [come] within the prohibition, or else it should... set out in the preamble to the decision the reasons why those parts [do] not appear to it to be severable from the whole agreement'.

In this case that task is one for the national court should it come to find that one or more provisions of the agreement are incompatible with Community competition law.

4. It follows from the foregoing that it is also for the national court to determine, in accordance with its own national law, the possible consequences of a partial nullity for

7 — Judgment of 11 December 1980 in Case 31/80 *L'Oréal v De Nieuwe AMCK* [1980] ECR 3775, in particular paragraph 13.

8 — Judgment of 6 February 1973 in Case 48/72 *Brasserie de Haecht v Wilkin-Janssen* [1973] ECR 77, in particular paragraph 12 of the grounds of judgment.

9 — Commission Regulation (EEC) No 1983/83 of 22 June 1983 on the application of Article 85 (3) of the Treaty to categories of exclusive distribution agreements (Official Journal 1983, L 173, p. 1).

10 — Commission Regulation (EEC) No 1984/83 of 22 June 1983 on the application of Article 85 (3) of the Treaty to categories of exclusive distribution agreements (Official Journal L 173, p. 5).

11 — Judgment of 30 June 1966 in Case 56/65 *Société technique minière v Maschinenbau Ulm* [1966] ECR 235, especially at p. 250.

12 — Judgment of 13 July 1966 *Établissements Consten and Grundig-Verkaufs-GmbH v Commission* [1966] ECR 299.

the other parts of the agreement¹³ and, *a fortiori*, the possible consequences partial or total nullity may have in a general manner with regard to the relations between the parties governed by private law and in particular with regard to their liability on breach of their contractual relations.

Apart from its function of declaring the prohibition contained in Article 85 (1) inapplicable to agreements which satisfy specific conditions, a regulation providing for exemption by category has neither the object nor the effect of granting to one of the parties to such an agreement the right to require the other party to accept amendments to an existing contract in the light of those conditions or of preventing one of them from proposing to the other conditions which are not connected with those 'which must be satisfied' (11th recital in the preamble to Regulation No 123/85) or 'which must not be contained in the agreements' (21st recital).

In that connection I would, however, point out, for what it is worth, since the question appears to have some importance in the main action, that, according to Article 4 (1) (3) of Regulation No 123/85, the exemption also applies where the dealer undertakes to 'endeavour to sell, within the contract territory and within a specified period, such minimum quantity of contract goods as may be determined by agreement between the parties or, in the absence of such agreement, by the supplier on the basis of estimates of the dealer's potential sales'. I would also draw attention to the fact that it would have been possible, according to Article 1 (1) of Regulation No 27 of the Commission of 3 May 1962,¹⁴ for *either* of

the two parties seeking to rely on the provisions of Article 85 (3) to notify the existing agreement to the Commission and to request individual exemption.

Consequently, Regulation No 123/85 neither imposes obligations on nor grants rights to one of the contracting parties vis-à-vis the other. It merely extends the benefit of exemption to any agreement concluded between contracting parties provided it satisfies the prescribed requirements.

Those requirements were not laid down in order to protect one or other of the contracting parties but to place a maximum limit on the restrictions on free competition which are normally the object or effect of contracts of the type in question (see the second recital in the preamble to Regulation No 123/85).

Nevertheless, that does not prevent the national law applicable to the contract from restricting the contractual freedom of one or other of the parties in certain cases. It follows that the questions whether it is permissible for one of the parties to require the replacement of an existing contract by a new contract, whether it is permissible to make the amendment or renewal of an exclusive dealership agreement conditional upon the attainment of satisfactory sales targets by the other party or whether it is permissible to change the fixed or indefinite duration of such an agreement are to be considered in the light of national law.

In that connection the Tribunal de grande instance, Paris, may find it necessary to consider which of the two possibilities put forward by Regulation No 123/85 is closest to the agreement concluded by the parties,

13 — Judgment of 14 December 1983 in Case 319/82 *Société de vente de ciments et bétons de l'Est v Kerpen & Kerpen* [1983] ECR 4173.

14 — First regulation implementing Council Regulation No 17 (Official Journal, English Special Edition 1959-62, p. 132).

which was an agreement for a fixed term of one year incapable of tacit renewal: is it an agreement for a fixed term of at least four years or an agreement of indefinite duration capable of termination on at least one year's notice?

5. In the light of all the foregoing considerations I propose that the Court should reply to the question posed by the Tribunal de grande instance, Paris, as follows:

1. The sole effect of Commission Regulation (EEC) No 123/85 of 12 December 1984 on the application of Article 85 (3) of the EEC Treaty to certain categories of motor vehicle distribution and servicing agreements is to declare Article 85 (1) of the EEC Treaty inapplicable to agreements which satisfy the requirements laid down by that regulation.
2. Consequently, Regulation No 123/85 does not confer on one contracting party any right to require the other party to amend the clauses of an exclusive motor vehicle dealership agreement in accordance with the provisions of the regulation and in particular those of Article 5 (2) (2) concerning the duration of an agreement.

Furthermore, the regulation does not grant one contracting party a right to require the other party to replace an existing contract with a new contract.

3. Conversely, Regulation No 123/85 does not prevent a supplier of motor vehicles from requesting the replacement of an existing contract with a new contract of a different type as regards its duration or from submitting new contractual provisions.

Such requirements on the part of the supplier are to be assessed by the national court in the light of its own law.

4. If the national court is led to make a finding that an agreement of the type to which Regulation No 123/85 relates is, or specific provisions of such an agreement are, void, the consequences of such nullity and in particular the determination of the parties' liability with regard thereto, are not governed by Community law but must be determined by the national court in the light of its own law.

The costs incurred by the Commission, which submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, a step in the proceedings pending before the Tribunal de grande instance, Paris, the costs are a matter for that court.