

5. There is no basis in Article 3(11) of Regulation No 123/85 on the application of Article 85(3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements for allowing the members of a car distribution network to refuse, on the ground that the intermediary is acting in a professional capacity, to sell motor vehicles within the contract programme or corresponding vehicles to final consumers using the services of an intermediary who proves, by means of a prior written authority, that he is acting on behalf and for account of those consumers. Provided that the intermediary does not exceed the authority given to him by the final consumer to purchase and, if necessary, take delivery of a specified motor vehicle, a distributor's refusal to sell to the intermediary is contrary to Regulation No 123/85.

JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)
22 April 1993 *

In Case T-9/92,

Automobiles Peugeot SA and Peugeot SA, companies incorporated under French law, whose registered offices are in Paris, represented by Xavier de Roux, of the Paris Bar, with an address for service in Luxembourg at the office of Guy Loesch, 8 Rue Zithe,

applicants,

v

Commission of the European Communities, represented by Giuliano Marenco, Legal Adviser, acting as Agent, assisted by Francis Herbert, of the Brussels Bar, with an address for service in Luxembourg at the office of Nicola Anecchino, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: French.

supported by

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

and by

European Bureau of Consumers' Unions, an association governed by Belgian law, whose registered office is in Brussels, represented by Philip Bentley, Barrister, of Lincoln's Inn, and Konstantinos Adamantopoulos, of the Athens Bar, with an address for service in Luxembourg at the Chambers of Arsène Kronshagen, 12 Boulevard de la Foire,

interveners,

APPLICATION for the annulment of the Commission Decision 92/154/EEC of 4 December 1991 relating to a proceeding under Article 85 of the EEC Treaty (IV/33.157 — Eco System/Peugeot),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Second Chamber),

composed of: J. L. Cruz Vilaça, President, D. P. M. Barrington, J. Biancarelli, A. Saggio and C. Briët, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 16 December 1992,

gives the following

Judgment

The facts

- 1 The contested decision of the Commission, of 4 December 1991, (92/154/EEC) relating to a proceeding under Article 85 of the EEC Treaty (IV/33.157 — Eco System/Peugeot, OJ 1991 L 66 p. 1) was adopted following a complaint submitted to the Commission by Eco System on 19 April 1989 against Automobiles Peugeot SA and three of its approved resellers in Belgium on the ground that, since March 1989, they had been obstructing parallel imports of vehicles by Eco System in its activity as an agent acting on behalf of French final consumers wishing to purchase Peugeot or Talbot vehicles. In its complaint Eco System also asked the Commission to adopt provisional measures putting an end to the serious and irreparable damage caused to it by the abovementioned obstruction.

- 2 The object of Eco System is to offer final consumers a service consisting in purchasing vehicles in countries where the price is most advantageous. It does not offer a guarantee service or after-sales service, it does not take its customers' used cars in part-exchange and it does not keep a stock of cars owned by it. In practice, Eco System collects nationally, in particular through active advertising in all the media, written authorizations from interested French final consumers and merely displays in its showrooms cars already sold and awaiting delivery.

- 3 In order to protect its distribution network, which, it is common ground, is covered by 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 (OJ 1985 L 15 p. 16), Automobiles Peugeot SA distributed, on 9 May 1989, through its subsidiary companies, a circular, issued by Peugeot SA, to all agents forming the Peugeot distribution network in Belgium, France and Luxembourg, giving instructions to approved dealers and resellers in

those three countries to suspend deliveries to Eco System and no longer to register orders for new Peugeot vehicles from Eco System whether on its own account or on behalf of its principals. The circular added that the same instructions would be applicable to any other organization acting under similar conditions. A draft of the circular had been sent to the Commission's Directorate General for Competition on 25 April 1989, but had not been formally notified.

- 4 On 27 November 1989 the Commission initiated against Automobiles Peugeot SA and Peugeot SA the procedure provided for by Article 3 of Regulation No 17 of the Council of 6 February 1962, the First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87).
- 5 By decision of 26 March 1990 the Commission, by way of provisional measures, ordered Automobiles Peugeot SA and Peugeot SA, on pain of periodic penalty payments, to send within two weeks to all their dealers and agents a letter suspending the operation of the circular of 9 May 1989 until a final decision had been adopted in the main proceedings. It also fixed a quota (1 211 vehicles a year subject to a monthly maximum of 150 vehicles) for the transactions which Eco System might conduct on behalf of its customers on the basis of a prior written authority with the Peugeot network, to which the applicants could not object.
- 6 By application received at the Registry of the Court of First Instance on 24 April 1990, Automobiles Peugeot SA and Peugeot SA (hereinafter 'Peugeot') brought an action for the annulment of that decision (Case T-23/90). Simultaneously, the applicants lodged an application for interim relief, seeking suspension of the operation of the decision. By order of 21 May 1990, the President of the Court of First Instance dismissed that application. The Court of First Instance, by judgment in Case T-23/90 *Peugeot v Commission* 1991 ECR II-653, hereinafter 'Peugeot I', dismissed the application for annulment. On 12 September 1991 the applicants lodged an appeal against that judgment with the Court of Justice (Case C-229/91P).
- 7 By the contested decision of 4 December 1991, the Commission found that the sending of the circular of 9 May 1989 by Peugeot to its dealers in France, Belgium and Luxembourg and its implementation by the latter, which had the effect of halt-

ing the supplies of Peugeot vehicles to Eco System, constituted an agreement or at least a concerted practice prohibited by Article 85(1) of the EEC Treaty (Article 1 of the decision). In support of that finding the decision observes, *inter alia*, that the agreement 'has as its object and effect the restriction of competition within the common market within the meaning of Article 85(1). Since it is implemented by all undertakings in the Peugeot network in the countries concerned, it is designed to prevent, and generally does prevent, the export to France of new Peugeot vehicles purchased in Belgium or Luxembourg by French consumers using the services of Eco System. The sensitive nature of this restriction derives from the Peugeot make's prominence on the Community market. Since the agreement, by definition relates to cross-border trade, it is likely to affect trade between Member States'. The decision adds, on the one hand, that 'the agreement in question, as it results from the said circular, does not qualify for the block exemption provided for in Regulation (EEC) No 123/85 since the clauses prohibiting the import or export of cars are not included in the competition-restricting obligations allowed by the regulation' and, secondly, that the agreement in question could not qualify for individual exemption either, mainly because it had not been notified.

- 8 In these circumstances, the Commission, by the contested decision, ordered Peugeot to put an end to the infringement by sending its dealers, within two months of the notification of the decision, a new circular cancelling that of 9 May 1989, and in future to refrain from any behaviour which would perpetuate the effects of the circular complained of (Article 2). In addition, the Commission, pursuant to Article 10 of Regulation No 123/85, withdrew the benefit of the application of that regulation from the standard contract for the distribution of Peugeot vehicles in Belgium and Luxembourg with effect from the date on which the said two-month period expired, unless the parties concerned complied in good time with the requirements set out in the decision (Article 3).
- 9 Following the decision of 4 December 1991, the applicants withdrew the appeal which they had lodged against the said judgment of the Court of First Instance in *Peugeot I*. By order of 6 April 1992 the President of the Court of Justice ordered the case to be removed from the register.

Procedure

- 10 In those circumstances the applicants, by application received at the Registry of the Court of First Instance on 10 February 1992, brought this action for annulment pursuant to Article 173 of the EEC Treaty.
- 11 By orders of the President of the Second Chamber of the Court of First Instance of 9 July 1992, Eco System and the European Bureau of Consumers' Unions (hereinafter 'the European Bureau') were granted leave to intervene in support of the form of order sought by the defendant.
- 12 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance decided to open the oral procedure without any preparatory inquiry. However, by way of measures of organization of procedure, the Court requested the intervener Eco System to produce a copy of the standard form of authority used by it. The parties presented oral argument to the Court and gave their replies to the Court's questions at the hearing on 16 December 1992. On request by the Court at the hearing, the parties agreed that the documents produced in the annex to the file in the said case *Peugeot I* be taken into consideration in this case. At the end of the hearing the President declared the oral procedure closed.
- 13 The applicants claim that the Court should:
- annul the Commission's decision of 4 December 1991 on the ground that it contradicts Article 85(3) of the EEC Treaty, Regulation No 123/85 of 12 December 1984 and the Commission's notice 85/C 17/03 of 12 December 1984 concerning Regulation No 123/85 (OJ 1985 C 17, p. 4), (hereinafter 'the notice of 12 December');
 - declare that the circular of 9 May 1989 sent by Peugeot to its network in France, Belgium and Luxembourg is compatible with the combined provisions of Regulation No 123/85 and the notice of 12 December.

14 The Commission contends that the Court should:

- dismiss the application as unfounded;
- order the applicants to pay the costs.

15 The intervener Eco System contends that the Court should:

- dismiss the application as unfounded;
- order the applicants to pay the costs, including those occasioned by Eco System's intervention.

16 The intervener European Bureau contends that the Court should:

- dismiss the application as unfounded;
- order the applicants to pay the costs, including those occasioned by European Bureau's intervention.

Substance

17 In support of their claims, the applicants rely on two grounds of annulment. In the first, they allege in essence that the contested decision infringes Article 3(11) of Regulation No 123/85 in conjunction with the Commission's notice of 12 December. In the second, they argue that the contested decision infringes the principle of legal certainty.

The plea concerning infringement of Article 3(11) of Regulation No 123/85 in conjunction with the notice of 12 December

— The parties' arguments

- 18 The applicants first observe that a dealer bound by an exclusive and selective distribution agreement concluded in the motor vehicle sector, which is exempted by Regulation No 123/85 from the application of Article 85(1) of the Treaty, has a monopoly of resale which authorizes him to refuse to supply any reseller who is not an approved member of the distribution network.
- 19 According to applicants, Article 3(11) of Regulation No 123/85, in so far as it authorizes the dealer to sell motor vehicles within the contract programme or corresponding goods to final consumers using the services of non-approved intermediaries on condition that the intermediary has prior written authority from them to purchase a specified motor vehicle on their behalf, is an exception to the principle of exclusive and selective distribution. However, that provision is not an essential *quid pro quo* for the existence of a selective distribution network but, on the contrary, a means of enabling the manufacturer to protect his distribution network by requiring the intermediary to comply with certain conditions.
- 20 The applicants go on to say that the Commission, by indicating in its notice of 12 December that 'undertakings within the distribution network can be obliged not to supply new motor vehicles within the contract programme ... to or through a third party who represents himself as an authorized reseller of new vehicles within the contract programme or carried on an activity equivalent to that of a reseller', limited the ambit of the derogation provided for by Article 3(11) of Regulation No 123/85 to the principle of exclusive distribution within the distribution network established by that regulation. The applicants state that on the basis of that restrictive interpretation of Article 3(11) they sent to dealers in the Peugeot network the circular of 9 May 1989, which was intended to protect their selective distribution system from the activity equivalent to that of a reseller carried on by Eco System. The concept of 'activity equivalent to that of a reseller' is not a legal concept, but refers rather to an activity which, in the economic context, produces the same effects as the act of resale.

- 21 The applicants consider that, in order to be allowed to operate in the motor vehicle sector, a professional agent must be completely neutral so far as demand is concerned. If, by his own commercial action, the agent interferes with demand he is said to carry on an activity equivalent to that of a reseller. The fact that Eco System alleged that Peugeot's circular caused its turnover to collapse proves that Eco System's activity is not neutral in relation to demand. If that were the case, the share of its turnover obtained with Peugeot vehicles should correspond more or less to the demand for that make in the French market, that is, 22%.
- 22 In the applicant's opinion, an agent is in breach of this duty of neutrality in the market and, consequently, exceeds the limits of his professional activity as a provider of services if, in particular, he organizes sales promotions or advertising campaigns for vehicles of a make which he has permanently on offer in the market rather than for his own activity. Eco System had even displayed a number of Peugeot cars in the Carrefour chain of stores and used an advertising brochure issued by Carrefour. The confusion created by that advertising in the public mind regarding Eco System's true activity in the market — which moreover it is claimed, was recognized by the Commission — was bound to lead the applicants to consider that Eco System was carrying on an activity equivalent to that of a reseller. Indeed, by offering an alternative source of supply of Peugeot vehicles under conditions equivalent to those of a dealer, Eco System appeared in the eyes of the public as a distributor or dealer of the Peugeot network, rather than as a person providing services.
- 23 The applicants contend in particular that Eco System assumes on each transaction risks which are abnormal for a mere agent but which are characteristic of the activity of a reseller, namely:
- the risk of having to dispose of an unsold vehicle or having it on its hands, in so far as Eco System has advanced the price and must sell the vehicle if a customer withdraws;
 - a storage risk, because if a vehicle is lost or damaged Eco System must indemnify its customer;

- a credit risk, because Eco System or its financial intermediary advances the price of the vehicle and may have to bear the cost in the event of the customer's insolvency;
- a financial risk, because Eco System covers variations in exchange rates.

- 24 In this connection the applicants point out that the fact that the agent has prior authorization and that he does not go outside the terms thereof is not sufficient to prevent his activity from being equivalent to that of a reseller, because the financial risks he bears are of the same kind as those borne by a genuine reseller. To conclude otherwise would render the concept of activity equivalent to that of a reseller meaningless and at the same time deprive Peugeot of the means of protecting its distribution network. On this point the applicants refer to the judgment of the Court of Justice and the Opinion of the Advocate General, Sir Gordon Slynn, in Case 243/83 *Binon* [1985] ECR 2015, at page 2017, from which it follows, that they allege that although a trader may appear to be an agent if he holds an authority in proper form, he cannot still be an agent if he acts on behalf of several hundred principals and thereby becomes an independent trader for the purposes of competition law.
- 25 The Commission observes at the outset that the notice of 12 December does not form part of the whole body of Community law by reference to which an application for annulment must be assessed and, that consequently, the application should be dismissed in so far as it is based on infringement of that notice.
- 26 The Commission disputes the applicants' interpretation of Community law by citing the judgment of the Court of Justice in Case 10/86 *VAG France* [1986] ECR 4071, which states, with reference to Regulation No 123/85, that agreements restricting competition which are capable of affecting trade between Member States are automatically prohibited unless the provisions of Article 85(1) of the EEC Treaty are declared inapplicable by the Commission in accordance with Article 85(3). In the Commission's opinion, it follows that the conditions to which exemp-

tion is subject must be interpreted widely, whereas the measures for protecting the network which are actually authorized by Regulation No 123/85 must be strictly interpreted as clauses restricting competition which have been exempted. That position, it is contended, conforms to the general principles concerning the interpretation of regulations granting exemption by category.

- 27 In the defendant's opinion, one of the essential conditions for selective and exclusive distribution agreements to be exempted is that clauses restricting competition which they contain should be limited so as not to prevent the final consumer from receiving a fair share of the benefit resulting from those agreements, and, in particular, from making his purchase in a Member State other than his own in order to take advantage of the sometimes appreciable price differences between national markets, even in neighbouring countries. However, for a final consumer actually to have the opportunity to purchase a vehicle from any approved member of the distribution network in any Member State, it is essential for the consumer to be able to use an intermediary, whether a professional one or not, who is given prior authority to purchase and, if necessary, take delivery of a specified motor vehicle.
- 28 According to the Commission, that is precisely the object of Article 3(11) of Regulation No 123/85, which aims to preserve for final consumers the option of being supplied by an intermediary with prior authority, whether a professional one or not. In these circumstances, the provision in question must be interpreted as meaning that it permits the distribution network to protect itself, first, against the activity of parallel importers acting as non-approved resellers and, secondly, against intermediaries who have not received prior authority from a final consumer, or who have been authorized by a non-approved reseller, or again who have been authorized, but where the vehicle which is the subject of the authority has not been specified. However, that provision does not permit the adoption of a protection measure consisting in a refusal to record orders for specified vehicles from a duly authorized intermediary, or refusing to deliver such vehicles, if the intermediary is acting on behalf and for the account of his principals and has not gone outside the scope of his authority. The concept of 'activity equivalent to that of a reseller' which appears in the notice of 12 December cannot therefore refer to trading by a professional intermediary, but solely to false authorizations or fraudulent conduct by authorized intermediaries, otherwise the basic principles of Regulation No 123/85 would be infringed.

29 In this connection the Commission observes that it is an inherent characteristic of Eco System's professional activity that the company can not only advertise its business as an intermediary, but can also make choices as to the makes and types of vehicles for which it wishes to offer its services and, in this way, it may appear to the public as an alternative source of supply for vehicles, particularly those made by Peugeot. In reply to the applicant's arguments, the Commission contends, first, that statistical analysis shows that Eco System does not concentrate on the Peugeot make and, secondly, that by its advertising Eco System has never created any misunderstanding as to the true nature of its business. In its advertising brochures it has even systematically emphasized the specific nature of the contractual relationship between principal and agent. Regarding Eco System's temporary collaboration with Carrefour, the Commission observes that the only proven fact is that a single Peugeot vehicle awaiting delivery was displayed, with the principal's express consent, in Carrefour premises for some 10 days. So far as concerns Eco System's advertising brochure which was published and distributed by Carrefour under its own name, the Commission, while accepting that the cover page of the copy might have given rise to some misunderstanding, nevertheless considers that Peugeot's overall final reaction in this respect 'is contrary to the principle of proportionality'.

30 Regarding the risks assumed by Eco System, the defendant stresses that the applicants have produced no proof in support of their allegation that Eco System bears any risks of disposal of vehicles, storage or credit other than those which would be borne by and agent. According to the Commission, Eco System bears no legal or financial risk characteristic of the activity of selling and reselling, that is, entailing two transfers of ownership and the risks associated with ownership. In that respect the Commission notes that Eco System's actions as agent are confined to creating a direct legal relationship between the principal and the dealer, comprising in particular the direct invoicing of the former by the latter, the registration and insurance of the vehicle in the principal's name, the transfer of ownership and of risks on payment to the seller and, finally, remuneration of the agent in the form of a commission. In the Commission's opinion, the credit which Eco System allows its principal for a certain period does not have the effect of causing it to bear the risk of unsold goods, which is characteristic of the reseller's activity, beyond the credit

risk inherent in the provision of any service. Moreover, the Commission denies that Eco System bears any financial risk whatever owing to variations in exchange rates or prices.

31 Finally, the defendant denies that the applicants' reference to the *Binon* judgment cited above is relevant to this case. In its opinion, there is no possible comparison between, on the one hand, assessment in relation to Article 85(1) of the activity of an intermediary on behalf of a supplier of goods or services, to which the *Binon* judgment relates, and, on the other, assessment in relation to Article 85(3) and Regulation No 123/85 of Eco System's activity as an intermediary in connection with transactions on behalf of individual buyers, each of which is a once-only transaction.

32 The intervener Eco System observes that Article 3(11) of Regulation No 123/85 was intended by the Commission to enable individuals to purchase of vehicles at the lowest price anywhere in the Community. In view, first, of the time and the resources necessary to seek out, in the twelve Member States, the Peugeot dealer offering the best price for a particular vehicle and, secondly, of the many formalities in connection with a parallel import, only the operations of a professional agent such as Eco System would be capable of performing the function of regulating the market, which is the aim of Article 3(11) of Regulation No 123/85, thus preventing that provision from becoming a dead letter. On that point the intervener relies on the judgments of the Court of Justice in Joined Cases 56 and 58/64 [1966] ECR 429 *Consten and Grundig v Commission* and in Joined Cases 100 to 103/80 and *Musique Diffusion Française v Commission* [1983] ECR 1825, to the effect that exclusive distribution agreements preventing parallel imports were illegal, and observes in this respect that Peugeot's approved dealers have never tried to profit from price differences in vehicles between the Member States by obtaining supplies from each other. In those circumstances, Eco System considers that the concept of 'activity equivalent to that of a reseller' cannot be interpreted in a way which would render Article 3(11) of Regulation No 123/85 nugatory. In any case the concept covers only fraudulent acts concealing the fact that a trader who represents himself as an agent is actually a reseller, and it certainly does not apply to activity such as the intervener's, which is in substance governed by Article 1984 et seq. of the French Civil Code relating to agency contracts.

- 33 The intervener European Bureau observes, that the benefit to consumers from distribution networks which are exempted under Article 85(3) is illusory if, as the applicants allege, the ambit of Article 3(11) of Regulation No 123/85 depends on an economic and commercial assessment of the intermediary's activity. The objective of the provision, it claims, is to enable the supplier to ensure that the final consumer, when he buys a vehicle, establishes a direct contractual relationship with a distributor who is a member of the exclusive or selective distribution network. The purpose in particular is to give the consumer a contractual right against a member of the network if the vehicle is faulty.

— Findings of the Court

- 34 In this case the Court considers that, in order to exercise its power to review the legality of the contested decision, within the limits of the applicant's plea, it must ascertain whether the Commission was justified in taking the view that the circular of 9 May 1989 from Peugeot to its dealers in France, Belgium and Luxembourg, and its implementation by them exceeded the limits of the exemption provided for by Regulation No 123/85 and constituted an agreement or, at least, a concerted practice prohibited by Article 85(1) of the EEC Treaty.
- 35 At the outset the Court of First Instance observes that, as the Court of Justice held in paragraph 12 of its judgment in Case 10/86 *VAG France*, cited above, 'Regulation No 123/85, as a regulation applying Article 85(3) of the EEC Treaty, is limited to providing economic agents in the motor vehicle industry with certain possibilities enabling them to remove their distribution and servicing agreements from the scope of the prohibition contained in Article 85(1) despite the inclusion in those agreements of certain types of exclusivity and no-competition clauses'. As Recital (2) in the preamble to Regulation No 123/85 states, 'Notwithstanding that the obligations ... listed in Articles 1, 2 and 3 of this Regulation normally have as their object or effect the prevention, restriction or distortion of competition within the common market and are normally apt to affect trade between Member States, the prohibition in Article 85(1) of the Treaty may nevertheless be declared inapplicable to these agreements by virtue of Article 85(3), albeit only under certain restrictive conditions'.

- 36 In this context it should be observed that, pursuant to Article 3(11) of Regulation No 123/85, the exemption granted under Article 85(3) also applies where the dealer undertakes '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'.
- 37 In this respect the Court stresses that, regard being had to the general principle of the prohibition of agreements restricting competition in Article 85(1) of the Treaty, provisions derogating therefrom in a regulation on exemption by categories cannot be interpreted widely or so as to extend the effects of the regulation further than is necessary for the protection of the interests which they are intended to safeguard (see the judgment of the Court of Justice in Case 90/83 *Paterson* [1983] ECR 1567, paragraph 16).
- 38 To enable judgment to be given in this case, it is necessary to clarify by reference to these principles the interpretation of the concept of 'intermediary [with] prior written authority' within the meaning of Article 3(11) of Regulation No 123/85.
- 39 In that connection it should be observed, in the first place, that, as the Court of Justice has consistently held (see in particular the judgment in Case 327/82 *Ekro* [1984] ECR 107, at paragraph 11), the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning must normally be given an independent, uniform interpretation which must be sought while taking account of the context of the provision and the purpose of the relevant measures. However, the court may still refer to the law of the Member States in order to interpret the content and scope of such a provision of Community law (see the judgment of the Court of First Instance in Case T-85/91 *Khouri v Commission* [1992] ECR II-2637, paragraph 32).

- 40 In this case, and as the Court of First Instance held in the *Peugeot I* judgment, cited above, paragraph 33, it is apparent from the structure of Article 3(11) of Regulation No 123/85 that its objective is to preserve the possibility of the involvement of an intermediary provided that there is a direct contractual relationship between the dealer and the final consumer. It must be added that, to protect the distribution network from unlawful competition which may arise from some non-approved reseller, the existence of such relationship must be established by a prior written authority, given by the final user of the vehicle to the intermediary acting in his name and on his behalf, to buy a specified vehicle.
- 41 It should be stressed in this respect that the production of such prior written authority to purchase the vehicle and, if necessary, take delivery of it is the only condition imposed on the intermediary by the said provision. It follows that the actual wording of Article 3(11) of Regulation No 123/85 cannot allow the exclusion of a duly authorized intermediary on the sole ground that he is acting in a professional capacity.
- 42 Secondly, the Court notes that, in view of the practical difficulties which the search for a given vehicle at the best price on the whole of Community territory and its delivery may involve for the final consumer the exclusion of intermediaries acting in a professional capacity would in fact deprive Article 3(11) of its effectiveness and would result in impeding parallel imports and, consequently, partitioning national markets. In those circumstances, such exclusion, as the Court of Justice held in Joined Cases 56 and 58/64 *Consten and Grundig v Commission* and in Joined Cases 100 to 103/80 *Musique Diffusion Française v Commission*, cited above, at paragraph 86, would be likely to frustrate the most fundamental aims of the Community, particularly the attainment of a single market.
- 43 However, it must be recognized that activity as an intermediary in a professional capacity may entail, first, promotional measures aimed at the public and the possibility of concentrating one's efforts on certain makes of vehicles and, secondly, acceptance of the risks inherent in any undertaking providing services.

- 44 Furthermore, with regard to the applicants' argument that paragraph 1.3 of the notice of 12 December aims to interpret restrictively the concept of 'intermediary [with] ... authority' in Article 3(11) of Regulation No 123/85, it should be observed at the outset that, as the Court of Justice held in the judgment in Case C-266/90 *Soba* [1992] ECR I-287, paragraph 19, an interpretative note cannot have the effect of modifying the mandatory rules contained in a regulation.
- 45 The Court observes that, according to the text of the notice of 12 December, 'undertakings within the distribution system can be obliged not to supply new vehicles within the contract programme or corresponding vehicles to or through a third party who represents himself as an authorized reseller of new vehicles within the contract programme ... or carries on an activity equivalent to that of a reseller. It is for the intermediary or the consumer to give the dealer within the distribution system documentary evidence that the intermediary, in buying and accepting delivery of a vehicle, is acting on behalf and for account of the consumer'.
- 46 In reply to the applicants' argument based on this extract from the notice of 12 December, the Court finds, first, that the passage in question aims to interpret not only Article 3(11) of Regulation No 123/85, but also Article 3(10), particularly subparagraph (a), pursuant to which the clauses in a distribution agreement by means of which the distributor undertakes to restrict the contract goods or corresponding goods to the members of the network are exempted from the prohibition laid down by Article 85(1) of the EEC Treaty. Secondly, the Court considers that the Commission, in its interpretation of Article 3(10) and (11) of Regulation No 123/85, might legitimately take account of the need to give full effect to Article 3(10), that is, to give the distribution network effective protection against the acts of non-approved third parties. In this way the Commission might lawfully set out, in the relevant notice, the conditions which must be fulfilled by an authorized intermediary to comply with the requirements of Article 3(11). Those requirements must be applied so as to ensure that the delivery, by an approved reseller, of contract goods to an intermediary with prior written authority cannot be regarded as a breach by the reseller of the obligation of exclusive resale within the distribution network which, where appropriate, may be imposed upon him on the basis of Article 3(10) of the regulation. For this purpose it was legitimate for the notice of

12 December to make it clear, without disregarding the provisions of the regulation in question and without restricting their scope, that undertakings within the distribution network might be required to refuse to fulfil orders from an intermediary *de facto* carrying on an activity equivalent to that of a reseller, and to refer to the conditions set out in Article 3(11) of the regulation which must be met by any intermediary wishing to avail himself of those provisions.

47 The Court's present task is to determine whether Eco System has exceeded the limits of Article 3(11) of Regulation No 123/85, as the applicants maintain, by assuming risks characteristic of the activity of a reseller, rather than that of an intermediary, in such a way that it could be regarded as carrying on, in a professional capacity, an activity equivalent to that of a reseller and not an activity as a provider of services.

48 On this point, first, the Court considers it appropriate to point out that the operations of an authorized intermediary, as provided for by the provision under consideration, presuppose the creation of a direct contractual relationship of purchase and sale between the purchaser of the vehicle (the final consumer) and the distribution network. In order to be allowed to act in this capacity without the reseller being able to refuse to contract with him, the intermediary must confine himself to providing a service consisting in establishing contact between a customer wishing to buy a specific motor vehicle at the best price and a reseller who is a member of the network and is prepared to supply it, in creating the necessary direct contractual relationship between the two parties and in carrying out the associated formalities. In those circumstances, the intermediary acts exclusively as the representative of the final consumer. It follows that the legal relationships arising from the act or acts of the agent are created directly between the principal and the third party concerned, in this case the reseller, the agent not being a party to them. In this case it is common ground that the vehicle which is the subject of the authorization is from the beginning registered directly, albeit provisionally, in the name of Eco System's customer, to whom the invoice is made out. Therefore Eco System, as agent, is not a party to the contract of purchase and sale which it concludes with a reseller belonging to the motor vehicle network on behalf and for account of the final consumer and, consequently, it never acquires ownership of the vehicle which is the subject of the transaction. In contrast, and as provided for by Article II, paragraph 3, of Peugeot's 'distributorship agreement' for Belgium, which was placed in the file in the *Peugeot I* case, a reseller who is a member of the network 'contracts in

his own name and for his own account and shall not in any way be regarded as the agent of the importer or of the manufacturer’.

- 49 The existence, in cases where an agent acts, of a direct relationship between the final consumer and the distribution network is confirmed by the obligation imposed, as a condition for exemption, on undertakings in the distribution network by Article 5(1)(1)(a) and (b) of Regulation No 123/85 to honour guarantees and perform free servicing and vehicle recall work, whatever the place of purchase of the vehicle in the common market. As stated by Recital (12) in the preamble to Regulation No 123/85, these provisions, like Article 3(11) of the same regulation, ‘are intended to prevent the consumer’s freedom to buy anywhere in the common market from being limited’. In this connection the Court observes that Article 7 of the general conditions annexed to Eco System’s standard authorization agreement stipulates that ‘the guarantee is a matter for the manufacturer; it constitutes an obligation which is both statutory and contractual, it is owed by and may be demanded from the manufacturer’s network in accordance with the guarantee document supplied with the vehicle. As Eco System’s authority is limited to importation, it excludes any technical guarantee and is the responsibility of the manufacturer and his network alone’ This stipulation merely reflects the existence of such a guarantee obligation on the part of the undertakings belonging to the distribution network, to the exclusion of any obligation of the same kind on the intermediary’s part.
- 50 In the circumstances described in the two preceding paragraphs, it must be concluded that Eco System, as an authorized intermediary, cannot bear any risk arising from the double transfer of ownership characteristic of the purchase and resale of a product, or risk relating to ownership, particularly the risk of disposal or of unsold goods, that is, the risk of having to sell the vehicle if the final consumer withdraws and of assuming responsibility where necessary for the financial damage caused by loss of the sale.
- 51 However, it must be pointed out, secondly, that as shown by the file and the parties’ oral explanations, in so far as Eco System initially pays to the approved reseller who supplies the vehicles, the basic price together with value added tax and the

costs of importing the vehicle specified in the contract, and subsequently seeks reimbursement of those amounts from the purchaser, it normally grants its customers in each transaction credit equal to the amount it advances over and above the deposit received at the time the written authority is obtained. The Court considers that the grant of this credit, limited to the few days between the date of purchase with payment to the reseller belonging to the network and the date of delivery to the purchaser, who reimburses Eco System for its advance, does not alter the legal designation of an authority of this kind, even if such credit is not inherent in the activity of an agent. From this point of view, Eco System's position does not differ from that of any agent who is bound, by contract, to incur expenses which the principal must repay, as required by the law of most of the Member States.

- 52 In addition, the Court finds that the means available to an agent to meet the risk of the final consumer's insolvency or of the latter's refusal to fulfil the terms of the written authority, risks which the agent bears in the situations which have just been described, differ in any case from those available to a reseller belonging to the network. Apart from his lien, the agent may have recourse to the conventional remedies, namely, the judicial procedures of seizure and sale of goods belonging to a third party. In Eco System's case, that system takes the form of the 'penalty' clause in Article 5 of the general conditions printed on the reverse of the standard authorization agreement used by Eco System, which provides that 'it, after signing and before expiry of the authorization, the principal refuses the performance thereof, he shall pay a penalty equal to double the amount of the deposit together with the cost of any legal proceedings for the enforcement of his obligations, since the order placed for his account cannot be cancelled or rescinded'. In contrast, as normally provided in the general conditions of sale of motor vehicles applied by dealers belonging to the network of the different makes, an approved reseller also has the option, which is not available to an agent, if a customer withdraws or fails to pay, of considering the sale null and void and disposing of the vehicle or retaking possession of it and selling it for his own benefit without recourse to the legal proceedings mentioned above.

- 53 Thirdly, regarding the exchange risk alleged by Peugeot, the Court observes, to begin with, that variations in exchange rates are a factor inherent in any intra-

Community transaction of the type in question here, and the applicants have certainly not shown that the risk is borne by Eco System in connection with its activity as a duly authorized intermediary. On the contrary, it appears from the file that the exchange risk is borne by the principal and not by Eco System in its capacity as agent. On this point the Court notes, first, that examination of Eco System's standard authorization agreement shows that Eco System, unlike an approved reseller, does not bind itself to a firm price, but gives an undertaking only to the extent of an estimated price which will not be finally fixed until after favourable or unfavourable variations in exchange rates have been taken into account. In this respect the Court also observes that the third subparagraph of Article 2 of Eco System's general conditions provides that 'monetary or price fluctuations may occur, but shall not affect the validity of the authorization'. The Court also notes that Eco System's standard authorization agreement provides expressly that 'if Eco System is unable to import the vehicle within the period indicated, the deposit shall be returned to the principal, to the exclusion of any damages'. Thus it is not impossible for Eco System to use such a stipulation in the event of variations in exchange rates which are too unfavourable and would have too much effect, before the vehicle is purchased from the reseller, on the estimated price agreed upon with the principal. Moreover, the Court observes that it is apparent from the contested decision, which has not been challenged by the applicants on this point, that in order to cover the risks of fluctuations in exchange rates to which customers are exposed pending performance of the authorization agreement, Eco System has confined itself to setting up for its customers a system of premiums for exchange rate variations which operates as a compensation fund among the customers. It follows from the foregoing that the applicants have not adduced any evidence capable of casting doubt on the conclusion of the contested decision that 'the financial risks ... resulting from exchange rate or price fluctuations have ceased to exist in the present organization of Eco System'.

- 54 Fourthly, regarding the storage risk which, according to the applicants, means that Eco System has to indemnify the principal in the event of loss of or damage to the vehicle during the period between the receipt of the vehicle by Eco System from the reseller and delivery to the buyer, the Court observes that such a risk, assuming it to have been proved, must be deemed normal, as confirmed by examination of the laws of the Member States, in the framework of an authorization agreement which, like that in question, entails purchase on behalf of the principal, import, dispatch, storage for a limited period, and delivery. In any case the risk attaching to

the storage of the vehicle in the conditions just described differs from the risks attaching to ownership which, as already shown in this case, are borne by the final consumer as soon as the contract for the sale of the vehicle is concluded.

- 55 Finally, the Court notes in this context that the commission received by Eco System in consideration of its services consists, according to the standard agreement, in a stated percentage of the price invoiced by the supplier of the vehicle, and is therefore a normal form of remuneration in an authorization agreement such as this.
- 56 It follows from the whole of the foregoing that Eco System, in so far as it acts as a duly authorized intermediary, cannot be deemed to assume any legal or financial risk whatever characteristic of the activity of purchasing and reselling.
- 57 In the framework of the present plea it is next appropriate to consider whether Eco System in practice went beyond the limits of the written authorities received by it from final consumers pursuant to Article 3(11) of Regulation No 123/85.
- 58 The Court points out that the only circumstance put forward in this connection by the applicants is the misunderstanding said to have been caused in the public mind by an advertising brochure issued by Carrefour under its own name, repeating the contents of the brochure published by Eco System, during the temporary collaboration between the two companies.
- 59 In this respect the Court considers that, even accepting that such a practice may have something in common with the activity of canvassing sales which is not part of an agent's functions, in this case the Commission was right to take the view that

such misunderstanding could arise only from the cover of the brochure and that in any case the true nature of Eco System's activity was clearly indicated therein. Therefore Peugeot's reaction was correctly judged to be manifestly disproportionate because measures specifically aiming to stop the distribution of the brochure would have been sufficient without any need to send out the contested circular.

- 60 It must therefore be concluded from the foregoing that Eco System did not exceed the limits of the written authorities given to it by final consumers and, consequently, did not infringe Article 3(11) of Regulation No 123/85 with regard to the conditions for the operations of an intermediary.
- 61 With regard, finally, to the applicants' argument based on the judgment of the Court of Justice in Case 243/83 *Binon*, cited above, and the Opinion of Advocate General Sir Gordon Slynn, to the effect that an intermediary authorized by a large number of principals becomes an independent trader, the Court of First Instance points out, first, that the case-law contains no element which may be transposed to this case, in which an agent acts on behalf and for the account of final consumers and not as a distribution agent responsible for organizing retail sales in the interest of the producers (publishers) and, secondly, that a purely quantitative criterion based on the number of authorizations received by an intermediary acting in a professional capacity cannot by itself alter the nature of his operations with regard to Article 3(11) of Regulation 123/85. This finding is, moreover, compatible with the economic object of Article 3(11) of Regulation No 123/85, namely to prevent, by maintaining parallel imports, the partitioning of national markets in the framework of a system of motor vehicle distribution agreements, and thereby to contribute to the attainment of a single market, as stated in paragraph 42 of this judgment.
- 62 In view of all the foregoing it must be concluded that there is no basis in Article 3(11) of Regulation No 123/85 for allowing the members of a car distribution network to refuse, on the ground that the intermediary is acting in a professional capacity, to sell motor vehicles within the contract programme or corresponding

vehicles to final consumers using the services of an intermediary who proves, by means of a prior written authority, that he is acting on behalf and for account of those consumers. It follows that, provided that the intermediary does not exceed the authority given to him by the final consumer to purchase and, if necessary, take delivery of a specified motor vehicle, a distributor's refusal to sell to the intermediary is contrary to Regulation No 123/85.

- 63 The Commission was therefore right to conclude that the contested circular could not in any case be justified by Eco System's alleged failure to comply with the requirements of Article 3(11) of Regulation No 123/85. Consequently the refusal to sell, which is the subject of the circular, goes beyond the scope of the exemption enjoyed by the Peugeot distribution network under that regulation.
- 64 It follows from the foregoing considerations that the first plea concerning infringement of Article 3(11) of Regulation No 123/85, in conjunction with the notice of 12 December, must be rejected.

The plea concerning breach of the principle of legal certainty

— The parties' arguments

- 65 The applicants contend that the Commission, in order to justify the discrepancy between the contested decision and the interpretation which it had itself given of Article 3(11) of Regulation No 123/85 in the notice of 12 December, purported to adopt on 4 December 1991, that is, on the same date as that of the contested decision, a new notice interpreting Regulation No 123/85. By laying down new criteria for defining the concept of 'intermediary', that notice, it is alleged, rendered the concept of 'activity equivalent to that of a reseller' meaningless. In that way the Commission frustrated Peugeot's legitimate expectation of maintaining its situation under the regulation.

- 66 In the applicants' opinion, the Commission also breached the principle that Community acts must not be retroactive inasmuch as the new interpretation of Regulation No 123/85 was applied retroactively by the Commission to an act by Peugeot (the circular of 9 May 1989) which ought to have been covered by the previous interpretation of the regulation. In any case, according to the applicants, the legal uncertainty arises from the fact that the Commission never gave a clear, precise definition of the concept of 'activity equivalent to that of a reseller'.
- 67 The Commission replies that the applicants had received a letter of 15 July 1987, signed by a head of department in DG IV, clearly setting out the Commission's position with regard both to the general question of the activity of intermediaries acting in a professional capacity and the particular case of Eco System.
- 68 Regarding its new notice, the defendant considers that it does not entail any retroactive application because it merely points out the principle that an intermediary referred to by Regulation No 123/85 acts on behalf and for account of the final consumer and cannot therefore assume risks relating to ownership.
- 69 The intervener Eco System merely points out that the Court's *Peugeot I* judgment, cited above, has already dismissed the arguments concerning breach of the principle of legal certainty which the applicants have again put forward.
- 70 The intervener European Bureau observes on this point that the Commission's second notice concerning Regulation No 123/85 is no more of a legislative act than the notice of 12 December, nor does it amount to an authentic interpretation and cannot therefore modify the regulation. The European Bureau adds that there has been no retroactive application of the second notice because it has not altered the principle that an intermediary who produces prior written authority comes within the ambit of Article 3(11) of Regulation No 123/85.

— Findings of the Court

- 71 It should first be observed that the contested decision is in no way based, and could not legally be based, on the Commission's further notice of 4 December 1991 relating to Regulation No 123/85 and moreover never mentions it. It follows that the new notice cannot be relied upon by the applicants to challenge the legality of the contested decision.
- 72 With regard to the argument that, in the contested decision, the Commission failed to follow its own interpretation in the notice of 12 December of Article 3(11) of Regulation No 123/85, thereby breaching the principle of legal certainty, it should be observed that, as the Court has already noted (see paragraphs 44 and 46 above), the expression 'activity equivalent to that of a reseller' which appears in the notice cannot in any case be interpreted so as to restrict the scope of the concept of 'intermediary [with] prior written authority' in Article 3(11) of Regulation No 123/85.
- 73 It must be added that, as the Court observed in the *Peugeot I* judgment, cited above, paragraph 48, the Commission's officers had, in the letter of 15 July 1987, already informed the applicants of their views concerning the concept of 'activity equivalent to that of a reseller' used in the notice of 12 December 1984. Paragraph 3.2 of that letter clearly stated that 'provided that an intermediary assumes the type of entrepreneurial risk that is appropriate for a service undertaking and not an entrepreneurial risk of the kind ... appropriate to the business of buying and reselling, the business of that intermediary cannot be described as an activity equivalent to that of a reseller within the meaning of the notice ...'.
- 74 In view of the foregoing, it must be declared that the applicants have not adduced any new factor capable of casting doubt on the Court's findings in the said *Peugeot I* judgment concerning the absence of any breach by the Commission of the

principle of legal certainty. Consequently the second plea must also be considered unfounded.

- 75 It follows from the whole of the foregoing that, as the two pleas relied by the applicants in support of their claims have been declared unfounded, the action must be dismissed.

Costs

- 76 Pursuant to Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the applicants have been unsuccessful and the Commission and the interveners have applied for costs, the applicants must be ordered jointly and severally to pay the costs, including those of the interveners.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

- 1. Dismisses the application;**
- 2. Orders the applicants jointly and severally to pay the costs, including those of the interveners.**

Cruz Vilaça

Barrington

Biancarelli

Saggio

Briët

Delivered in open court in Luxembourg on 22 April 1993

H. Jung

J. L. Cruz Vilaça

Registrar

President