

JUDGMENT OF THE COURT (Sixth Chamber)
5 June 1997 *

In Case C-41/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the Landgericht Hamburg (Germany) for a preliminary ruling in the proceedings pending before that court between

VAG-Händlerbeirat eV

and

SYD-Consult

on the interpretation of Article 85(3) of the EC Treaty and 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 (OJ 1985 L 15, p. 16),

THE COURT (Sixth Chamber),

composed of: G. F. Mancini, President of the Chamber, J. L. Murray, G. Hirsch, H. Ragnemalm and R. Schintgen (Rapporteur), Judges,

* Language of the case: German.

Advocate General: G. Tesauero,
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- VAG-Händlerbeirat eV, by D. Kunath, Rechtsanwalt, Frankfurt am Main, and R. Bechtold, Rechtsanwalt, Stuttgart,

- SYD-Consult, by W. Loseries and S. Fedder, Rechtsanwälte, Hamburg,

- the French Government, by C. de Salins and R. Loosli-Surrans, Assistant Director and Chargé de Mission in the Directorate of Legal Affairs, Ministry of Foreign Affairs, acting as Agents,

- the Commission of the European Communities, by K. Wiedner and F. E. González-Díaz, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of VAG-Händlerbeirat eV, SYD-Consult and the Commission at the hearing on 10 December 1996,

after hearing the Opinion of the Advocate General at the sitting on 27 February 1997,

gives the following

Judgment

- 1 By order of 4 October 1995, received at the Court on 13 February 1996, the Landgericht (Regional Court) Hamburg referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question on the 'imperviousness' of a selective distribution system enjoying exemption under 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 (OJ 1985 L 15, p. 16), as a precondition for its enforceability against third parties.
- 2 That question was raised in proceedings concerning unfair competition brought by VAG-Händlerbeirat eV (hereinafter 'VAG'), the German association of concessionaires approved by Volkswagen AG (hereinafter 'VW'), against the company SYD-Consult.
- 3 Within the European Union, VW distributes the motor vehicles manufactured by it exclusively through approved concessionaires who deal directly with the end users. The distribution contracts concluded by those concessionaires provide, *inter alia*, that they may not sell new vehicles to resellers who are not bound to VW by a distribution contract.

- 4 Although not bound by such a contract, SYD-Consult sells in Germany new VW vehicles purchased in Italy from approved concessionaires and reimported into Germany. Since the sale prices in Italy are considerably lower than those charged in Germany, SYD-Consult is able to offer the vehicles to its German customers at prices lower than those charged by approved German concessionaires.

- 5 In support of its action for unfair competition before the Landgericht Hamburg, in which it seeks an order requiring SYD-Consult to cease such business, VAG relied on the fact that, within the European Union, VW has set up a selective distribution system enjoying exemption under Regulation No 123/85 and that SYD-Consult has obtained new vehicles covered by that system by taking advantage of a breach of contract by Italian concessionaires, thus securing an unjustified competitive advantage which is unlawful by virtue of Paragraph 1 of the Gesetz gegen den unlauteren Wettbewerb (German Law on unfair competition, hereinafter 'the UWG').

- 6 In the proceedings before the national court, SYD-Consult objected, primarily, that VW's selective distribution system is not 'impervious', with the result that, under the relevant German case-law, the conditions for an infringement of Paragraph 1 of the UWG are not fulfilled. It is apparent from the order for reference that, by virtue of that case-law, the acquisition and sale, by persons outside a selective distribution system, of goods covered by such a system constitute an infringement of Paragraph 1 of the UWG only where the system is itself legally valid and 'impervious' both in theory and in practice.

- 7 VAG contended in reply that the judgment of the Court of Justice in Case C-376/92 *Cartier* [1994] ECR I-15 had established that that German case-law was

incompatible with Community law and that, therefore, by virtue of the principle of the unrestricted and uniform application of Community law, the initiation of proceedings against a third party cannot depend on the 'imperviousness' of a selective distribution system, even under German unfair competition law.

- 8 Considering that the decision to be given in the dispute before it depended on the interpretation of that judgment and its applicability to the present case, the Landgericht Hamburg stayed proceedings pending a preliminary ruling from the Court of Justice on the following question:

'In the light of the judgment of the Court of Justice of 13 January 1994 in Case C-376/92 *Metro-SB-Märkte GmbH & Co KG v Cartier S. A.*, is it compatible with Community law, in particular with the principle of the unrestricted and uniform application of Community law, if German national law applies in such a way that proceedings for an injunction restraining the distribution of products covered by a selective distribution system exempted from application of Article 85(1) by a block exemption of the EC Commission may be brought against outsiders who obtain those products outside such a selective distribution system only if — in addition to satisfying the further requirements of Paragraph 1 of the Gesetz gegen den unlauteren Wettbewerb (UWG) — the selective distribution system is "impervious", specific reference being made to the alternative of the selective distribution system being required to be "impervious" merely in theory, or "impervious" in theory and in practice?'

- 9 By that question, the national court seeks essentially to ascertain whether Article 85(3) of the Treaty and Regulation No 123/85 must be interpreted as precluding the application of national case-law on unfair competition under which a selective distribution system, even if enjoying exemption under those provisions, is not enforceable against third parties unless it is impervious.

- 10 In answering that question, it must be made clear, first, that according to the order for reference the German case-law relied on by VAG has been developed in connection with disputes in which producers of goods called on approved distributors to fulfil their contractual commitments and is based on the view that an approved distributor can be required to fulfil his commitments only if the selective distribution system is impervious in all respects, since otherwise he would be placed in an unfair competitive situation as compared with third parties.
- 11 According to that case-law, a selective distribution system is thus binding on the parties and is enforceable against third parties only if it is absolutely impervious, in which case a third party who has succeeded in obtaining products covered by the system is presumed to have taken advantage of a breach of contract by an approved distributor.
- 12 Second, it must be borne in mind that, in paragraph 28 of the judgment in *Cartier*, cited above, the Court found that the imperviousness of a selective distribution system is not a condition for its validity under Community law. That finding was based in particular on the consideration that, in order to appraise the lawfulness of an agreement under Article 85 of the Treaty, it is not necessary to enquire whether the conditions are fulfilled for that agreement to be capable of being enforced against third parties by means of an action for unfair competition (paragraph 24).
- 13 It follows that a selective distribution system which is not impervious and cannot therefore, under national case-law on unfair competition, be enforced against third parties may be valid under Article 85(1) of the Treaty.

- 14 Hence it cannot be deduced from the *Cartier* judgment that national case-law on unfair competition under which a selective distribution system that is not impervious is not enforceable against third parties is incompatible with Article 85(1) of the Treaty.
- 15 Third, it should be noted that what is true for Article 85(1) of the Treaty must, *a fortiori*, be true for Article 85(3) of the Treaty or for a Commission regulation, such as Regulation No 123/85, concerning the application of that provision of the Treaty to certain categories of agreements and concerted practices.
- 16 As the Court also pointed out in Case C-226/94 *Grand Garage Albigeois and Others* [1996] ECR I-651, paragraph 15, and in Case C-309/94 *Nissan France and Others* [1996] ECR I-677, paragraph 15, Regulation No 123/85, as a regulation applying Article 85(3) of the Treaty, does not lay down any mandatory provisions directly affecting the validity or the content of contractual provisions or oblige the contracting parties to adapt the content of their agreement but 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.
- 17 It follows, moreover, from paragraph 20 of those two judgments that Regulation No 123/85 cannot be interpreted as prohibiting a trader who is outside the official distribution network for a given make of motor vehicle and is not an authorized intermediary within the meaning of Article 3(11) of that regulation from acquiring new vehicles of that make by way of parallel imports and independently carrying

on the business of marketing such vehicles (see most recently to that effect, Case C-128/95 *Fontaine and Others* [1997] ECR I-967, paragraph 17).

- 18 Finally, as the Court reaffirmed in paragraphs 13 and 16 of the judgment in *Fontaine and Others*, Regulation No 123/85, in accordance with the function assigned to it in relation to the application of Article 85 of the Treaty, concerns only contractual relations between suppliers and their approved distributors and specifies the conditions under which certain agreements between them are lawful having regard to the competition rules of the Treaty, and it cannot affect the rights and obligations of third parties in relation to contracts concluded between vehicle manufacturers and their concessionaires, in particular those of independent dealers.
- 19 Having regard to all the foregoing considerations, the answer to be given to the question referred to the Court for a preliminary ruling is that neither Article 85(3) of the Treaty nor Regulation No 123/85 is to be interpreted as precluding the application of national case-law on unfair competition under which a selective distribution system, even if enjoying exemption under those provisions, is not enforceable against third parties unless it is impervious.

Costs

- 20 The costs incurred by the French Government and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the question referred to it by the Landgericht Hamburg by order of 4 October 1995, hereby rules:

Neither Article 85(3) of the EC Treaty nor 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 be interpreted as precluding the application of national case-law on unfair competition under which a selective distribution system, even if enjoying exemption under those provisions, is not enforceable against third parties unless it is impervious.

Mancini

Murray

Hirsch

Ragnemalm

Schintgen

Delivered in open court in Luxembourg on 5 June 1997.

R. Grass

G. F. Mancini

Registrar

President of the Sixth Chamber