

JUDGMENT OF THE COURT
24 October 1995 *

In Case C-70/93,

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

Bayerische Motorenwerke AG

and

ALD Auto-Leasing D GmbH,

on the interpretation of Article 85(1) of the EEC Treaty and 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),

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, C. N. Kakouris,
D. A. O. Edward, G. Hirsch (Presidents of Chambers), G. F. Mancini,

* Language of the case: German.

F. A. Schockweiler (Rapporteur), J. C. Moitinho de Almeida, P. J. G. Kapteyn, P. Jann, H. Ragnemalm and L. Sevón, Judges,

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

after considering the written observations submitted on behalf of:

- Bayerische Motorenwerke AG, by Karl Peter Mailänder, Rechtsanwalt, Stuttgart,

- ALD Auto-Leasing D GmbH, by Albrecht Bach, Rechtsanwalt, Stuttgart,

- the German Government, by Claus-Dieter Quassowski, Regierungsdirektor at the Federal Ministry of Economic Affairs, acting as Agent,

- the French Government, by Philippe Pouzoulet, Deputy Director at the Directorate of Legal Affairs of the Ministry of Foreign Affairs, and Hubert Renié, Secretary for Foreign Affairs at the Directorate of Legal Affairs at the same Ministry, acting as Agents,

- the United Kingdom, by S. Lucinda Hudson, Assistant Treasury Solicitor, acting as Agent, assisted by Peter Goldsmith QC,

- the Commission of the European Communities, by Bernd Langeheine, of the Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Bayerische Motorenwerke AG, ALD Auto-Leasing D GmbH, the French Government, the United Kingdom, and the Commission, represented by Götz zur Hausen, Legal Adviser, acting as Agent, at the hearing on 17 May 1994,

after hearing the Opinion of the Advocate General at the sitting on 22 November 1994,

having regard to the reopening of the oral procedure on 25 January 1995,

after considering the oral observations of Bayerische Motorenwerke AG, ALD Auto-Leasing D GmbH, the French Government, the United Kingdom, represented by Lindsey Nicoll, of the Treasury Solicitor's Department, acting as Agent, and Peter Goldsmith QC, and the Commission, represented by Bernd Langeheine, at the hearing on 31 May 1995,

after hearing the opinion of the Advocate General at the sitting on 8 June 1995,

gives the following

Judgment

- 1 By order of 19 January 1993, received at the Court on 15 March 1993, the Bundesgerichtshof (Federal Court of Justice) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation of Article 85(1) of the EEC Treaty and 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).

- 2 Those questions were raised in proceedings between Bayerische Motorenwerke AG ('BMW') and ALD Auto-Leasing D GmbH ('ALD') concerning a circular letter sent by BMW, a motor vehicle manufacturer, to its authorized dealers in Germany, in which it called upon them not to supply leasing companies that made vehicles available to customers residing or having their seat outside the contract territory of the dealer in question.

- 3 ALD is a leasing company which is not tied to a motor vehicle manufacturer. It offers *inter alia* the leasing of BMW vehicles, which it buys from the dealers or subsidiaries of the BMW parent company offering it the best price conditions. According to the order for reference, the leasing contracts offered by ALD do not include a purchase option.

- 4 BMW sells its vehicles in Germany partly through subsidiary companies and partly through selected dealers. Its sales are organized in the same way outside Germany, in particular in the Member States of the Community. Point 2.4 of the agreement concluded by BMW with its dealers prohibits them from 'using an intermediary outside the contract territory with regard to the contract goods'.

- 5 BMW also extends its activities to vehicle leasing in so far as its group of companies contains BMW Leasing GmbH, whose services are also offered by the BMW dealers.

- 6 BMW claims that the appearance of independent leasing companies, which are therefore not subject to the contractual obligations imposed on members of the BMW network (in particular the obligation to restrict their activities to a specified territory), has created an imbalance in its commercial organization. Those independent companies concentrate on purchasing from certain BMW dealers and lease the vehicles to customers established outside the contract territory of those dealers. Those customers then turn for free customer services and maintenance to the BMW dealer in the contract territory in which they are established. Since those dealers are not involved in the original sales transaction, they do not obtain any profit margin. They therefore complained to BMW about the activities of independent leasing companies which were disturbing the network.

- 7 Following those complaints, on 12 February 1988 BMW sent to all its dealers in Germany a circular headed 'Supplies to independent leasing companies' which provides *inter alia*:

'Transactions with lessees whose seat is outside your contract territory and which were or are solicited by the independent company are not permitted. In those cases the independent leasing company is in practice functioning as an intermediary. Such a function in the context of permanent business relations outside the contract territory constitutes a breach of point 2.4 of the BMW dealer agreement. The position is otherwise only if the request for the vehicle is made by the customer/lessee

or if your company maintains commercial relations with a customer which itself wishes to involve an independent leasing company. In such a case, the request does not come from an intermediary; the independent leasing company merely performs the leasing contract involved.

On the other hand, commercial relations of that type within the contract territory pose no problem.

This has the following consequences for the operation of your business:

1. Under the dealer agreement, it is basically your duty in the case of contracts with independent leasing companies to ascertain where the customer is resident or has its seat. If that place is not within your contract territory, the independent leasing company should in principle be referred to a member of the commercial organization responsible for the area in question.

...

3. In the event of a breach as defined above, we are entitled, after warning against such breach of contract, to terminate the contract under point 11.5.

...

- 8 ALD took the view that the circular breached both German competition law and Article 85 of the EEC Treaty. It therefore brought an action before the Landgericht (Regional Court) Frankfurt am Main for an injunction ordering BMW to discontinue its anticompetitive conduct. The Landgericht granted ALD's application for an injunction on the basis of national law, taking the view that the call to refrain from supplying independent leasing companies in certain circumstances constituted a call to a boycott of those companies made with the intention of unfairly causing harm to them, which was contrary to German competition law.

- 9 BMW's appeal to the Oberlandesgericht (Higher Regional Court) Frankfurt am Main was unsuccessful.

- 10 BMW then appealed on a point of law ('Revision') to the Bundesgerichtshof which partly upheld the lower courts' decisions. It stated that the circular contained a call for a supply embargo which exceeded the scope of the dealers' contractual obligations and principally concerned ALD, the largest independent leasing company in Germany. However, the Bundesgerichtshof refused to find that the circular constituted in that respect a call to a boycott, prohibited under German law. For that to be the case, proof was required of an intention unfairly to cause harm to the independent leasing companies. In its view, no such intention existed if the conduct of BMW remained within the limits of anticompetitive practices authorized by Community law in the context of a selective distribution system. Accordingly, the Bundesgerichtshof took the view that the compatibility of the circular with Community law, and in particular with Regulation No 123/85, might call into question the finding that the circular was unlawful under national law.

- 11 BMW considered that the call for a refusal of supplies was covered by the Community block exemption regulation and that the exemption granted by Community law precluded the national court from applying the German competition rules, which were more stringent.
- 12 However, in the absence of an express exemption in Regulation No 123/85 for commitments such as those imposed on BMW dealers by the circular, the Bundesgerichtshof doubted that that regulation could justify BMW's conduct.
- 13 Accordingly it decided to stay the proceedings and requested the Court of Justice to give a preliminary ruling on the following questions:

'1. Is it contrary to Article 85(1) of the EEC Treaty — even in the light of Regulation (EEC) No 123/85 — for a motor vehicle manufacturer which sells its motor vehicles through a selective distribution system to agree with its authorized dealers that independent leasing companies are not to be supplied with motor vehicles in cases where the vehicles are intended to be made available to lessees residing or having their seat outside the contract territory of the authorized dealer in question, or for a motor vehicle manufacturer to call on its authorized dealers to act in such a way?

2. If Question 1 is answered in the negative, does Regulation (EEC) No 123/85 preclude a national court from ruling that a call by a motor vehicle manufacturer to its authorized dealers such as that described in Question 1 should be prohibited on the ground that it amounts to a supply embargo which is unlawful under national legislation?'

Question 1

- 14 By its first question the national court first wishes to ascertain whether Article 85(1) of the EEC Treaty must be interpreted as meaning that it prohibits a motor vehicle manufacturer which sells its vehicles through a selective distribution system from agreeing with its authorized dealers that they are not to supply vehicles to independent leasing companies where, without granting an option to purchase, those companies make them available to lessees residing or having their seat outside the contract territory of the authorized dealer in question, or from calling on such dealers to act in such a way. Secondly, if that is the case, it wishes to know whether Regulation No 123/85 must be interpreted as meaning that it exempts such an agreement.

Application of Article 85(1) of the Treaty

- 15 It is settled case-law, established by the judgment in Case 56/65 *Société Technique Minière v Maschinenbau Ulm* [1966] ECR 235 and in Joined Cases 56/64 and 58/64 *Consten and Grundig v Commission* [1966] ECR 299, that agreements between traders at different levels in the economic process, also known as 'vertical agreements', may constitute agreements within the meaning of Article 85(1) of the Treaty and be prohibited by it.
- 16 Furthermore, in Joined Cases 25/84 and 26/84 *Ford v Commission* [1985] ECR 2725, paragraph 21, the Court held that a call by a motor vehicle manufacturer to its authorized dealers did not constitute a unilateral act which fell outside

the scope of Article 85(1) of the Treaty but was an agreement within the meaning of that provision if it formed part of a set of continuous business relations governed by a general agreement drawn up in advance.

17 According to the documents in the present case, the call to refrain from supplying independent leasing companies contained in the circular of 12 February 1988 was made in the context of the contractual relations between BMW and its dealers. Furthermore, the circular expressly refers to the dealership agreement on numerous occasions. The call which it contains therefore forms part of a set of continuous business relations governed by a general agreement drawn up in advance.

18 That call must therefore be regarded as an agreement within the meaning of Article 85(1) of the Treaty. In order to determine whether that agreement is prohibited by Article 85(1), it must be considered whether the ban on supplies resulting from the agreement has as its object or effect the restriction to an appreciable extent of competition within the common market and whether it may affect trade between Member States.

19 As regards the requirement that competition be restricted, it should be noted that, by virtue of the agreement in question BMW dealers are able to supply vehicles of the BMW mark to independent leasing companies only if the vehicles are to be made available to lessees having their seat within the contract territory of the dealer in question. Consequently, only the dealer in whose territory the lessee has its seat is authorized by the manufacturer to supply to ALD vehicles of the BMW mark, to the exclusion of all other BMW authorized dealers. That amounts

to absolute territorial protection for the BMW dealer on whose territory the customer of ALD is established. Furthermore, the agreement reduces each dealer's freedom of commercial action in so far as each individual dealer's choice of customer is confined exclusively to those leasing companies which have concluded contracts with lessees established within that dealer's contract territory.

- 20 As regards the effect on trade within the Community, the agreement in question, since it relates to products such as vehicles of the BMW mark, which are the subject of significant international trade, may affect trade between Member States in two respects. First, that agreement binds all BMW dealers in a substantial part of the common market (Germany) and thereby contributes to the partitioning of the German market. As the Court has held on several occasions, practices restricting competition which extend over the whole territory of a Member State by their very nature have the effect of reinforcing the compartmentalization of markets on a national basis, thereby obstructing the economic interpenetration which the Treaty is intended to bring about (see *Case 42/84 Remia and Others v Commission* [1985] ECR 2545, paragraph 22). Secondly, the effect of the agreement in question is to restrict the opportunity for foreign leasing companies to purchase vehicles of the BMW mark in Germany. Those companies would in a way be affected by an export ban, since the German BMW dealers are able to supply vehicles to them only if the lessee has its seat in the contract territory of the dealer in question.
- 21 In view of the foregoing considerations, it appears that the agreement in question has as its object and effect the restriction to an appreciable extent of competition within the common market and may affect trade between Member States.
- 22 The answer to the first part of the first question submitted by the national court must therefore be that Article 85(1) of the EEC Treaty must be interpreted as

meaning that it precludes a motor vehicle manufacturer which sells its vehicles through a selective distribution system from agreeing with its authorized dealers that they are not to deliver vehicles to independent leasing companies where, without granting an option to purchase, those companies make them available to lessees whose residence or seat is outside the contract territory of the dealer in question, or from calling on such dealers to act in that manner.

Regulation No 123/85

23 Secondly, the national court essentially asks whether such an agreement is exempted by Regulation No 123/85.

24 Regulation No 123/85 exempts from Article 85(1) of the Treaty agreements by which a supplier entrusts to an (authorized) reseller the task of promoting the distribution of the contract goods in a defined area and undertakes to supply, within that territory, motor vehicles and spare parts only to that reseller (Article 1). It also exempts an obligation on dealers not to sell motor vehicles of competing marks (Article 3(3)) and not to sell the contract goods to resellers which do not belong to the distribution system (Article 3(10)) unless they are intermediaries, that is to say, traders acting in the name and for the account of final consumers and who have received prior written authority to that effect (Article 3(11)).

25 On the other hand, none of the provisions of the regulation explicitly governs leasing. Only Article 13, which defines the terms used in the regulation, sets out in point 12 that “‘distribute” and “sell” include other forms of supply such as leasing’.

- 26 BMW combines that provision with Article 3(10)(a) of the regulation, which permits the manufacturer to prohibit its dealers from supplying contract goods to a reseller not within its dealership system, and argues that independent leasing companies are in the same position as resellers not forming part of its distribution system. It is therefore lawful to prohibit dealers from supplying such independent leasing companies. Consequently, the ban on supplies to which the agreement gives rise is covered by Regulation No 123/85.
- 27 That argument cannot be accepted.
- 28 It must be noted at the outset that, having regard to the general principle prohibiting anticompetitive agreements laid down in Article 85(1) of the Treaty, provisions in a block exemption which derogate from that principle cannot be interpreted widely and cannot be construed in such a way as to extend the effects of the regulation beyond what is necessary to protect the interests which they are intended to safeguard.
- 29 Secondly, leasing companies which do not offer an option to purchase cannot be regarded as resellers of new motor vehicles, with whom Regulation No 123/85 is exclusively concerned, so long as they confine themselves to purchasing vehicles in order to satisfy requests from their customers and do not build up stocks which they offer to customers attracted in that way.
- 30 Finally, as the Commission has correctly pointed out, the definition in Article 13(12) relates exclusively to the relationship between the manufacturer and the dealer. That provision is intended to prevent the dealer from circumventing certain of its contractual obligations by resorting to leasing. The object of Article 13(12) is

therefore to prevent the dealer from evading his obligation not to sell vehicles of a different mark (Article 3(3) of the regulation) by leasing to customers vehicles of a competing mark. Similarly, it ensures compliance by the dealer with his obligation not actively to seek customers outside his allotted territory (Article 3(8) of the regulation) by preventing him from leasing the contract goods to customers outside his territory. Article 13(12) is therefore irrelevant for the purpose of determining whether independent leasing companies are resellers outside the distribution system for the purposes of Article 3(10)(a) of the regulation.

31 The exemption provided for in Article 3(10)(a) of the regulation does not therefore cover the call by BMW to discontinue supplies to independent leasing companies such as ALD.

32 BMW argues, secondly, that its call is also covered by Article 3(8) and (9) of the regulation.

33 That provision permits the manufacturer to prohibit its dealers from maintaining, outside their contract territory, depots for the distribution of the contract goods or seeking customers for them there and also from entrusting third parties with the distribution of contract goods outside the contract territory.

34 In that regard, it should first be noted that the supply of vehicles of the BMW mark by dealers in the system to independent leasing companies whose potential customers are situated outside their contract territory does not constitute the maintenance of a depot for the distribution of contract goods outside the contract territory. Nor do the independent leasing companies constitute third parties which the dealers might entrust with the distribution of vehicles of the BMW mark

outside the contract territory. Such companies outside the BMW system do not act for the account of a dealer outside the latter's contract territory but pursue their activities in their own name and for their own account, so that they must be regarded as final users.

35 Consequently, Article 3(8) and (9) of the regulation does not cover the call made by BMW on its dealers for a cessation of supplies.

36 As regards the territorial restrictions imposed by the manufacturer on its dealers, it should also be noted that the ninth recital in the preamble to Regulation No 123/85 expressly provides:

‘The restrictions imposed on the dealers’ activities outside the allotted area lead to more intensive distribution and servicing efforts in an easily supervised contract territory, to knowledge of the market based on closer contact with consumers, and to more demand-orientated supply (Article 3, points 8 and 9). However, demand for contract goods must remain flexible and should not be limited on a regional basis. Dealers must not be confined to satisfying the demand for contract goods within their contract territories, but must also be able to meet demand from persons and undertakings in other areas of the common market. (...)’

37 Accordingly, although Regulation No 123/85 provides manufacturers with substantial means of protecting their distribution systems, it does not authorize them to partition their markets. In the present case, the object and effect of the call contained in the circular are to confine the distribution of vehicles of the BMW mark by the German dealers within the system to their own contract territories

and to impose that prohibition also on those dealers' customers engaging in leasing outside the BMW system. That call cannot, therefore, be exempted under Article 85(3) of the Treaty by virtue of Regulation No 123/85.

- 38 Consequently, the answer to the second part of the first question from the national court is that Regulation No 123/85 must be interpreted as meaning that it does not exempt such an agreement.

Question 2

- 39 There is no need to answer the second question, since it is raised solely in the event that Regulation No 123/85 exempts the agreement in question from the prohibition contained in Article 85(1) of the Treaty.

Costs

- 40 The costs incurred by the German and French Governments, the United Kingdom 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,

in answer to the questions referred to it by the Bundesgerichtshof, by order of 19 January 1993, hereby rules:

Article 85(1) of the EEC Treaty must be interpreted as meaning that it precludes a motor vehicle manufacturer which sells its vehicles through a selective distribution system from agreeing with its authorized dealers that they are not to deliver vehicles to independent leasing companies where, without granting an option to purchase, those companies make them available to lessees whose residence or seat is outside the contract territory of the dealer in question, or from calling on such dealers to act in that manner.

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 must be interpreted as meaning that it does not exempt such an agreement.

Rodríguez Iglesias

Kakouris

Edward

Hirsch

Mancini

Schockweiler

Moitinho de Almeida

Kapteyn

Jann

Ragnemalm

Sevón

Delivered in open court in Luxembourg on 24 October 1995.

R. Grass
Registrar

G. C. Rodríguez Iglesias
President