

ORDER OF THE COURT OF FIRST INSTANCE (Third Chamber)
12 July 2000 *

In Case T-45/00,

Conseil National des Professions de l'Automobile, whose registered office is in Suresnes, France,

Fédération Nationale des Distributeurs, Loueurs et Réparateurs de Matériels de Bâtiments de Travaux Publics et de Manutention, whose registered office is in Joinville-le-Pont, France,

Auto Contrôle 31 SA, established in Toulouse, France,

YAM 31 SARL, established in Toulouse,

Roux SA, established in Saint-Denis-de-Saintonge, France,

Marc Foucher-Creteau, residing in Paris,

Verdier Distribution SARL, established in Juvignac, France,

represented by C. Bourgeon, of the Paris Bar, with an address for service in Luxembourg at the Chambers of F. Brouxel, 6 Rue Zithe,

applicants,

* Language of the case: French.

V

Commission of the European Communities, represented by W. Wils, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices (OJ 1999 L 336, p. 21),

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

composed of: K. Lenaerts, President, J. Azizi and M. Jaeger, Judges,

Registrar: H. Jung,

makes the following

Order

Background to the dispute

- 1 Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices (OJ 1999 L 336, p. 21, hereinafter 'the contested Regulation') states that, under certain conditions, Article 81(1) EC shall not apply to agreements or concerted practices entered into between two or more undertakings each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services (hereinafter 'the vertical agreements').
- 2 The applicants are small and medium-sized enterprises (hereinafter 'the SMEs') or, in the case of the Conseil National des Professions de l'Automobile (hereinafter 'the CNPA') and the Fédération National des Distributeurs, Loueurs et Réparateurs de Matériels de Bâtiments de Travaux Publics et de Manutention (hereinafter 'the DLR'), represent the interests of such enterprises. The SMEs in question were bound by vertical agreements falling within the scope of the contested Regulation.

Procedure and forms of order sought by the parties

3 By application lodged at the Court Registry on 29 February 2000, the applicants brought this action.

4 The applicants claim that the Court should:

— annul the contested Regulation;

— order the Commission to bear the costs.

5 By a separate document, lodged at the Court Registry on 5 April 2000, the Commission lodged an objection of inadmissibility under Article 114(1) of the Rules of Procedure of the Court of First Instance.

6 In its objection the Commission contends that the Court should:

— dismiss the application as inadmissible;

— order the applicants to bear the costs.

- 7 The applicants submitted their observations on the objection of inadmissibility on 18 May 2000.

Admissibility

- 8 Under Article 114(3) of the Rules of Procedure, proceedings relating to the objection of inadmissibility are oral, unless the Court takes a decision to the contrary. In this instance, the Court considers that an examination of the documents in the case has clarified the situation sufficiently and that there is no need to open the oral procedure.

Arguments of the parties

- 9 The Commission explains that the contested Regulation cannot be regarded as a decision which, although in the form of a regulation, is of direct and individual concern to the applicants, within the meaning of the fourth paragraph of Article 230 EC. It is, in fact, a measure of a purely legislative nature. The application is therefore inadmissible.

- 10 The applicants maintain that the Commission is wrong to rely on Article 230 EC since the adoption of the contested Regulation infringed the essential procedural requirements laid down in Article 83(1) EC and infringed Article 81(1) EC.
- 11 They also point out that the contested Regulation is really a decision which is of direct and individual concern to them. They explain, for that purpose, that they are or represent SMEs which, as distributors, are economically dependent on the large suppliers. Owing to the application of the contested Regulation, the vertical agreements which impose that state of economic dependence and which eliminate all competition under one trade mark escape the application of Article 81(1) EC and the penalty of automatic invalidity established in Article 81(2) EC. They emphasise the cumulative effect of the restrictions on competition contained in the vertical agreements (Case 26/76 *Metro v Commission* [1977] ECR 1875 and Case 75/84 *Metro v Commission* [1986] ECR 3021).
- 12 Finally, referring to Case 63/69 *Compagnie Française Commerciale et Financière v Commission* [1970] ECR 205) and Case 101/76 *Koninklijke Scholten Honig v Council and Commission* [1977] ECR 797, the applicants point out that the contested Regulation gives no definition of the objective legal or factual situation which might give grounds for going against the provisions of the EC Treaty.

Findings of the Court

- 13 In the first place, the application, which has been brought by natural or legal persons, seeks the annulment of a regulation adopted by the Commission.

Therefore, contrary to what the applicants maintain, the admissibility of the application must be assessed in the light of the conditions laid down in the fourth paragraph of Article 230 EC.

14 Whether or not the application is admissible is unaffected by the applicants' claim that the adoption of the contested Regulation infringed the essential procedural requirements laid down in Article 83(1) EC, which provides that the regulations necessary for the purpose of implementing the principles contained in Articles 81 EC and 82 EC are to be adopted by the Council, and that it also infringed Article 81(1) EC. That argument goes to the substance of the case. Moreover, an act of the Commission, which is presumed to be lawful (Case C-199/92 P *Hüls v Commission* [1999] ECR I-4287, paragraph 84), does not have to give a definition of 'the objective legal or factual situation which might give grounds for going against the provisions of the EC Treaty.'

15 Next, under the fourth paragraph of Article 230 EC, natural or legal persons may institute proceedings against a decision which, although in the form of a regulation, is of direct and individual concern to them. The object of that provision is, in particular, to prevent the Community institutions from being in a position, merely by choosing the form of a regulation, to exclude an application by an individual against a decision which concerns him directly and individually, and thus to make it clear that the choice of form cannot change the nature of the measure (Joined Cases 789/79 and 790/79 *Calpak and Società Emiliana Lavorazione Frutta v Commission* [1980] ECR 1949, paragraph 7, and order in Case T-476/93 *FRSEA and FNSEA v Council* [1993] ECR II-1187, paragraph 19). It is evident from settled case-law that the criterion for distinguishing between a regulation and a decision is whether the measure at issue is of general application or not (see, in particular, Case 307/81 *Alusuisse v Council and Commission* [1982] ECR 3463, paragraph 8).

16 It is therefore necessary to determine the nature of the contested measure.

- 17 The contested Regulation states that, under certain conditions, Article 81(1) EC does not apply to vertical agreements. The contested Regulation, which defines its scope in abstract terms, is of general application to undertakings involved in vertical agreements and concerted practices.
- 18 Accordingly, owing to its scope, the contested Regulation is of a legislative nature and is not a decision within the meaning of Article 249 EC.
- 19 However, the fact that the contested Regulation is of a legislative nature does not preclude it from being of direct and individual concern to some natural or legal persons (see Case C-309/89 *Codorniu v Council* [1994] ECR I-1853, paragraph 19, Joined Cases T-480/93 and T-483/93 *Antillean Rice Mills and Others v Commission* [1995] ECR II-2305, paragraph 66, and Joined Cases T-481/93 and T-484/93 *Exporteurs in Levende Varkens and Others v Commission* [1995] ECR II-2941, paragraph 50).
- 20 As regards, first of all, whether the applicants are individually concerned by the contested Regulation, it must be borne in mind that natural or legal persons can be considered to be individually concerned by a measure of general application only if the measure in question affects them because of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons (Case 25/62 *Plaumann v Commission* [1963] ECR 95, 107; order in Case T-122/96 *Federolio v Commission* [1977] ECR II-1559, paragraph 59, and order in Case T-120/98 *Alce v Commission* [1999] ECR II-1395, paragraph 19).
- 21 In that regard, the applicants state that they, or in the case of the CNPA and the DLR their members, are economically dependent on the large suppliers and that it

is impossible, because of the effect of the contested Regulation, to invoke the penalty of automatic invalidity established by Article 81(2) EC for vertical agreements falling within the sphere of application of the contested Regulation.

22 It is settled case-law that applications may be declared admissible when made by associations representing the interests of their members who would themselves be entitled to act (*Exporteurs in Levende Varkens*, cited in paragraph 19 above, paragraph 64; *Federolio*, cited in paragraph 20 above, paragraph 61).

23 However, the exemption granted by the contested Regulation, which prevents the application of Article 81(1) EC and, consequently, of the penalty of invalidity established by Article 81(2) EC, affects the applicants in their capacity as economic operators bound by vertical agreements, in the same way as all the other operators who are party to such agreements. As regards the state of economic dependence to which attention is drawn by the applicants, that circumstance is not such as to differentiate them from all the other economic operators since, as the applicants themselves claim in their application, in France 'several thousand [SMEs]' and in Europe 'several tens of thousands of [SMEs]' are in the same position.

24 Finally, the CNPA and the DLR do not assert any procedural right or invoke any interest of their own, as distinct from that of their members, which was affected by the contested Regulation (Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy and Others v Commission* [1988] ECR 219, paragraphs 21 to 24, and Case

C-313/90 *CIRFS and Others v Commission* [1993] ECR I-1125, paragraphs 28 to 30; *Federolio*, cited in paragraph 20 above, paragraph 61).

- 25 It follows from all of the above that the applicants cannot be considered to be individually concerned by the contested Regulation. The applicants fail to satisfy one of the conditions for admissibility required under the fourth paragraph of Article 230 EC and therefore this application must be dismissed as inadmissible.
- 26 However, whilst the applicants cannot bring an application for the annulment of the contested Regulation, they may still plead before the national courts, adjudicating in accordance with Article 234 EC, that the Regulation is unlawful (Case C-70/97 P *Kruidvat v Commission* [1998] ECR I-7183, paragraphs 48 and 49).

Costs

- 27 Under 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 other party's pleadings. Since the Commission has asked for costs and the applicants have been unsuccessful, the latter must be ordered to bear the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby orders:

1. The application is dismissed as inadmissible.
2. The applicants are ordered to bear the costs.

Luxembourg, 12 July 2000.

H. Jung

Registrar

K. Lenaerts

President