JUDGMENT OF THE COURT (Third Chamber)

30 November 2006 *

In Joined Cases C-376/05 and C-377/05,

REFERENCES for a preliminary ruling under Article 234 EC, from the Bundesgerichtshof (Germany), made by decisions of 26 July 2005, received at the Court on 12 October 2005, in the proceedings

A. Brünsteiner GmbH (C-376/05),

Autohaus Hilgert GmbH (C-377/05)

v

Bayerische Motorenwerke AG (BMW),

* Language of the case: German.

THE COURT (Third Chamber),

composed of A. Rosas, President of Chamber, J. Malenovský, A. Borg Barthet, U. Lõhmus and A. Ó Caoimh (Rapporteur), Judges,

Advocate General: L.A. Geelhoed,
Registrar: K. Sztranc-Slawiczek, Administrator,

having regard to the written procedure and further to the hearing on 7 September 2006,

after considering the observations submitted on behalf of:

— A. Brünsteiner GmbH and Autohaus Hilgert GmbH, by F.C. Genzow and C. Bittner, Rechtsanwälte,

— Bayerische Motorenwerke AG (BMW), by R. Bechtold, Rechtsanwalt,

— the Commission of the European Communities, by A. Whelan, K. Mojzesowicz and M. Schneider, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 28 September 2006,

gives the following

Judgment

1 The references for a preliminary ruling concern the interpretation of the first indent of Article 5(3) of Commission Regulation No 1475/95 of 28 June 1995 on the application of Article [81](3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements (OJ 1995 L 145 p. 25), and of Article 4 of Commission Regulation (EC) No 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector (OJ 2002 L 203, p. 30).

2 Those references were made in proceedings brought by A. Brünsteiner GmbH ('Brünsteiner') and Autohaus Hilgert GmbH ('Hilgert') against Bayerische Motorenwerke AG ('BMW') relating to the validity of the termination by the latter, with a year's notice, of the agreements it had entered into with Brünsteiner and Hilgert ("the applicants in the main proceedings") for the distribution of BMW vehicles in Germany.

The legal context

3 The 19th recital in the preamble to Regulation No 1475/95 states:

'Article 5(2)(2) and (3) and Article 5(3) lay down minimum requirements for exemption concerning the duration and termination of the distribution and

servicing agreement, because the combined effect of the investments the dealer makes in order to improve the distribution and servicing of contract goods and a short-term agreement or one terminable at short notice is greatly to increase the dealer's dependence on the supplier. In order to avoid obstructing the development of flexible and efficient distribution structures, however, the supplier should be entitled to terminate the agreement where there is a need to reorganise all or a substantial part of the network. ...'

4 Article 1 of Regulation No 1475/95 exempts from the prohibition laid down under Article 81(1) EC agreements by which a supplier makes an authorised reseller responsible for promoting the distribution of the contract goods within a defined territory and agrees to reserve the supply of vehicles and spare parts, within that territory, to that dealer.

5 Article 4(1) of that regulation provides that the exemption is to apply notwithstanding any obligation by which the dealer undertakes to comply, in distribution, sales and after-sales servicing, with minimum standards regarding, in particular, the equipment of the business premises or the repair and maintenance of contract goods.

6 Article 5(2) and the first indent of Article 5(3) provide that:

'2. Where the dealer has, in accordance with Article 4(1), assumed obligations for the improvement of distribution and servicing structures, the exemption shall apply provided that:

...

(2) the agreement is for a period of at least five years or, if for an indefinite period, the period of notice for regular termination of the agreement is at least two years for both parties; ...

3. The conditions for exemption laid down in (1) and (2) shall not affect:

— the right of the supplier to terminate the agreement subject to at least one year's notice in a case where it is necessary to reorganise the whole or a substantial part of the network.'

7 In its explanatory brochure relating to Regulation No 1475/95, the Commission of the European Communities states as follows in reply to question 16(a), headed 'Are there any possibilities for early termination of the agreement?':

'The manufacturer has the right to terminate the agreement early (on one year's notice) where it needs to restructure the whole or a substantial part of the network. Whether it is necessary to reorganise is established between the parties by agreement or at the dealer's request by an expert third party or an arbitrator. Recourse to an expert third party or an arbitrator does not affect the right of either party to apply to a national court under national law (Article 5(3)). Where the supplier provides for himself in the contract unilateral rights of termination exceeding the limits set by the regulation, he automatically loses the benefit of the block exemption (Article 6(1)(5), see point 1.2 above).

This possibility for early termination has been introduced to provide the manufacturer with an instrument for flexible adaptation to changes in distribution structures (recital 19). A need for reorganising may arise due to the behaviour of competitors or due to other economic developments, irrespective of whether these are motivated by internal decisions of a manufacturer or external influences, e.g. the closure of a company employing a large workforce in a specific area. In view of the wide variety of situations which may arise, it would be unrealistic to list all the possible reasons.

Whether or not a "substantial part" of the network is affected, must be decided in the light of the specific organisation of a manufacturer's network in each case. "Substantial" implies both an economic and a geographical aspect, which may be limited to the network, or a part of it, in a given Member State. The manufacturer has to reach an agreement — either with or without the intermediation of an expert third party or arbitrator — with the dealer, whose distribution agreement will be terminated, but not with other dealers who are only indirectly affected by an early termination.'

8 From 1 October 2002, Regulation No 1475/95 was replaced by Regulation No 1400/2002.

9 Under the 12th recital in the preamble to that latter regulation:

'Irrespective of the market share of the undertakings concerned, this Regulation does not cover vertical agreements containing certain types of severely anti-competitive restraints (hardcore restrictions) which in general appreciably restrict

competition even at low market shares and which are not indispensable to the attainment of the positive effects mentioned above. This concerns in particular vertical agreements containing restraints such as minimum or fixed resale prices and, with certain exceptions, restrictions of the territory into which, or of the customers to whom, a distributor or repairer may sell the contract goods or services. Such agreements should not benefit from the exemption.'

10 The 36th recital in the preamble to that regulation states:

'... Regulation No 1475/95 ... is applicable until 30 September 2002. In order to allow all operators time to adapt vertical agreements which are compatible with that regulation and which are still in force when the exemption provided for therein expires, it is appropriate for such agreements to benefit from a transition period until 1 October 2003, during which time they should be exempted from the prohibition laid down in Article 81(1) under this Regulation'.

11 The first sentence of Article 4(1) of Regulation No 1400/2002, headed 'Hardcore restrictions', provides that the exemption is not to apply to vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object one or more of the restrictions listed in the rest of that provision.

12 Article 10 of that regulation provides:

'The prohibition laid down in Article 81(1) [EC] shall not apply during the period from 1 October 2002 to 30 September 2003 in respect of agreements already in force

on 30 September 2002 which do not satisfy the conditions for exemption provided for in this Regulation but which satisfy the conditions for exemption provided for in Regulation ... No 1475/95'

13 The Commission's explanatory brochure relating to Regulation No 1400/2002, includes the following statement in reply to question 20, headed 'How can termination of contracts which comply with Regulation No 1475/95 be effected during the transitional period?':

'The expiry of Regulation No 1475/95 on 30 September 2002 and its replacement by a new regulation does not in itself imply that there should be a reorganisation of the network. After the entry into force of the regulation, a vehicle manufacturer may nonetheless decide to substantially reorganise its network. To comply with Regulation No 1475/95 and thus, to benefit from the transitional period, notices of regular contract termination should thus be given two years in advance unless a reorganisation is decided upon or if there is an obligation to pay compensation.'

14 In addition, in relation to question 68, headed 'Does the Regulation provide for minimum periods of notice?', the brochure states, in the fourth paragraph of the reply to that question, as regards termination on one year's notice:

'The question as to whether or not it is necessary to reorganise the network is an objective one, and the fact that the supplier deems such a re-organisation to be necessary does not settle the matter in case of dispute. In such a case it shall be for the national judge or arbitrator to determine the matter with reference to the circumstances.'

The disputes in the main proceedings and the questions referred

15 In 1996 the applicants in the main proceedings entered into a contract with BMW for the distribution of motor vehicles manufactured by BMW. Article 11.6 of the contract provided:

'11.6. Termination due to reorganisation of the distribution network

Where it is necessary for BMW to reorganise the whole or a substantial part of its distribution network, it may terminate the contract on 12 months' notice.

The above shall apply also where the general legal situation of the contract changes in essential respects.'

16 In September 2002 BMW terminated all the distribution agreements within its European network with effect from 30 September 2003, on the ground that Regulation No 1400/2002 involved considerable legal and structural alterations in the vehicle distribution sector. BMW then concluded new contracts with most of its former distributors, taking effect from 1 October 2003 and adapted to the requirements of Regulation No 1400/2002.

17 The applicants in the main proceedings were not offered such contracts. Accordingly they brought actions before the German courts with a view to challenging the lawfulness of the termination of their distribution contracts, claiming that termination ought not to have taken place until the expiry on 30 September 2004 of the two-year notice period.

18 On 26 February 2004 those actions were dismissed on appeal by the Oberlandesgericht München (Higher Regional Court, Munich) on the ground that the alterations entailed by adoption of Regulation No 1400/2002 made it necessary to reorganise the BMW distribution network. According to that court, restrictions of competition that had hitherto been compatible with Regulation No 1475/95 henceforth constituted hardcore restrictions within the meaning of Article 4 of Regulation No 1400/2002, with the result that, even regardless of the termination of distribution contracts of 30 September 2003, all the clauses restrictive of competition contained in those contracts had become invalid on 1 October 2003. BMW could not accept, even only until 30 September 2004, contracts stripped of their clauses restricting competition, or indeed no contracts at all, if they were caught by total invalidity under national law.

19 The applicants in the main proceedings have brought an appeal on a point of law against those decisions before the Bundesgerichtshof (Federal Court of Justice).

20 In its orders for reference that court, pointing out that according to a narrow interpretation, based on the explanatory brochures relating to Regulations Nos 1475/95 and 1400/2002, the need to reorganise cannot be justified solely by the entry into force of Regulation No 1400/2002, but must be justified by economic developments, considers that that entry into force necessarily has some effect on the internal structures of the distribution systems. Not only economic but also legal reasons might make it necessary to reorganise a distribution network. In addition, the distribution system is a structural component of the network. Lastly, Regulation No 1400/2002 made necessary a change of unknown proportions when it ceased to exempt the hitherto widespread combination of exclusive distribution and selective distribution. Manufacturers must choose one or other of those two systems. Now, under a selective distribution system, which will nearly always be the one chosen, territorial restrictions and protection of dealers' territory is no longer authorised. In addition, sales and servicing must be separated and brand exclusivity will by and large disappear.

21 If a manufacturer had not either adapted its contracts or terminated them and replaced them with new contracts before the transitional period expired, all clauses restrictive of competition would, by virtue of Article 81 EC, have become invalid on 1 October 2003, since the restrictions permitted by Regulation No 1475/95 constitute in part hardcore restrictions for the purposes of Article l4 of Regulation No 1400/2002, thus causing the exemption of all clauses restrictive of competition in those contracts to lapse. That would mean that, within the distribution network, there were two legal regimes, and those distributors who had not been willing to agree to the alterations to their contracts would find themselves freer than others. A manufacturer could not accept such problems.

22 That being so, the national court even wonders whether the question of the lawfulness of the termination has not in actual fact become devoid of purpose. Under national law, the invalidity of the clauses restricting competition would have caused the contracts at issue to lapse in their entirety from 1 October 2003. According to that court, the statements made by the Commission in its explanatory brochure on Regulation No 1400/2002 militate against such a consequence and call for a narrow interpretation of Article 4 of Regulation No 1400/2002.

23 In those circumstances, the Bundesgerichtshof has decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling in both the cases before it:

'(1) Is the first indent of Article 5(3) of ... Regulation ... No 1475/95 to be so interpreted that the need to reorganise the whole or a substantial part of the network and the resulting right of the manufacturer to terminate agreements with dealers in its distribution network, on one year's notice, can also arise

because the entry into force of ... Regulation ... No 1400/2002 ... required far-reaching changes to the distribution systems previously used by manufacturers and their dealers under Regulation ... No 1475/95 which were exempted under that regulation?

(2) If the first question is to be answered in the negative:

Is Article 4 of Regulation ... No 1400/2002 to be so interpreted that, exceptionally, the existence of agreements which are restrictive of competition in a motor vehicle dealership agreement which constitute hardcore restrictions ("black list" of prohibited terms) under that regulation did not, on expiry of the one-year transitional period on 30 September 2003 laid down in Article 10 of the Regulation, cause the lapse of the exemption from the prohibition under Article 81(1) EC for all agreements restrictive of competition in the dealership agreement, if that agreement was concluded when Regulation ... No 1475/95 was still applicable, in accordance with the requirements of that regulation and exempted by that regulation? Is this still the case where the invalidity under Community law of all contractual provisions restrictive of competition leads in national law to the invalidity of the contract in its entirety?'

24 By order of the President of the Court of 18 January 2006, Cases C-376/05 and C-377/05 were joined for the purposes of the written and oral procedures and of the judgment.

The questions

Preliminary observations

25 In its written observations before the Court of Justice and also at the hearing, BMW has challenged the validity of the provisions of Article 5(2) and (3) of Regulation

No 1475/95 on the ground, essentially, that they are contrary to Article 81(3) EC, in particular because, first, they subject the application of the block exemption to additional restrictions of competition that are neither indispensable nor to the advantage of consumers and, second, they are motivated by social considerations unrelated to competition.

26 According to the Court's case-law, it is for the referring court alone to determine the subject-matter of the questions it intends to refer. It is solely for the national courts before which actions are brought, and which must bear the responsibility for the subsequent judicial decision, to determine in the light of the special features of each case both the need for a preliminary ruling in order to enable them to deliver judgment and the relevance of the questions which they submit to the Court (see, to that effect, C-159/97 *Castelletti* [1999] ECR I-1597, paragraph 14, and Case C-154/05 *Kersbergen-Lap and Dams-Schipper* [2006] ECR I-6249, paragraph 21).

27 In its requests for a preliminary ruling, the national court seeks solely to obtain an interpretation of Article 5(2) and (3) of Regulation No 1475/95. It does not state that it has any doubts as to the validity of those provisions or that any such question was raised before it in the case in the main proceedings.

28 In those circumstances, Article 234 EC not constituting a means of redress available to the parties to a case pending before a national court, the Court cannot be compelled to evaluate the validity of the act of Community law on the sole ground that that question has been put before it by one of the parties in its written pleadings (see, to that effect, Case C-402/98 *ATB and Others* [2000] ECR I-5501, paragraphs 30 and 31, and Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 28).

29 As a result, as the Commission correctly argued at the hearing, there are no grounds for examining the question raised by BMW of the validity of Article 5(2) and (3) of Regulation No 1474/95.

The first question

30 By this question the national court seeks in substance to ascertain whether the entry into force of Regulation No 1400/2002 could be such as to require the reorganisation of all or a substantial part of a manufacturer's distribution network for the purposes of the first indent of Article 5(3) of Regulation No 1475/95 and therefore to justify the application of the right to terminate the agreement subject to one year's notice provided for in that provision.

31 In Case C-125/05 *Vulcan Silkeborg* [2006] ECR I-7637, the Court has already answered that question, ruling that even if the entry into force of Regulation No 1400/2002 did not, of itself, require the reorganisation of the distribution network of a supplier within the meaning of the first indent of Article 5(3) of Regulation No 1475/95, that entry into force might, however, in the light of the particular nature of the distribution network of each supplier, have required changes that were so significant that they must be truly regarded as representing a reorganisation within the meaning of that provision.

32 On that point, the Court nevertheless emphasised, in paragraphs 59 to 61 of that judgment, that while Regulation No 1400/2002 introduced substantial amendments in relation to the block exemption scheme established by Regulation No 1475/95, the changes which might be made by suppliers to their distribution network in order to be certain that they would continue to benefit from the block exemption could be

introduced simply by adapting the agreements in force on the date on which the latter regulation ceased to apply, during the transitional period of a year provided for by Article 10 of Regulation No 1400/2002. Such an adaptation would not automatically entail the need, under the applicable national law, for those agreements to be terminated or, in any event, for the whole or a substantial part of the distribution network to be reorganised.

33 As the Court held in paragraph 64 of *Vulcan Silkeborg*, it is for the national courts or arbitrators to determine, in the light of all the evidence in the case before them, whether the changes made by a supplier constitute, in accordance with the first indent of the first paragraph of Article 5(3) of Regulation No 1400/2002, a reorganisation of the whole or a substantial part of its distribution network and whether that reorganisation was made necessary by the entry into force of Regulation No 1400/2002.

34 In that regard, the Court has held in paragraphs 29 and 30 of the same judgment that a 'reorganisation of the whole or a substantial part of the network' within the meaning of the first indent of Article 5(3) requires a significant change, both substantively and geographically, to the distribution structures of the supplier concerned, which may relate, inter alia, to the nature or form of those structures, their subject-matter, the allocation of internal duties within those structures, the manner in which the goods and services in question are supplied, the number or quality of the participants in those structures, or their geographical coverage (*Vulcan Silkeborg*, paragraphs 29 and 30).

35 Contrary to the submissions of the applicants in the main proceedings, if there is nothing to require, neither is there anything to prevent, such a reorganisation's resulting from the amendment of clauses in a distribution agreement following the entry into force of new exemption rules. Moreover, the Court has ruled in paragraph 54 of *Vulcan Silkeborg* that Regulation No 1400/2002 introduced substantial amendments to the block exemption scheme established under Regulation

No 1475/95, by laying down more stringent rules than those under the latter regulation for exemption from a number of restrictions on competition subject to the prohibition laid down under Article 81(1) EC.

36 With regard to the condition laid down in the first indent of the first paragraph of Article 5(3) of Regulation No 1475/95 as to the necessity of the reorganisation, the Court stated in paragraph 37 of *Vulcan Silkeborg* that that condition required reorganisation to be capable of being convincingly justified on grounds of economic effectiveness based on objective circumstances internal or external to the supplier's undertaking which, failing a swift reorganisation of the distribution network, would be liable, having regard to the competitive environment in which the supplier carries on business, to prejudice the effectiveness of the existing structures of that network.

37 Therefore, contrary to what the Commission maintains, the mere fact that the supplier considers, on the basis of a subjective commercial appraisal of the position in which its distribution network finds itself, that a reorganisation of that network is necessary is not, of itself, sufficient to establish the need for such a reorganisation for the purposes of the first indent of Article 5(3) of Regulation No 1475/95. By contrast, any adverse economic consequences which would be liable to affect a supplier in the event that it were to terminate the distribution agreement with a two years' notice period are relevant in that regard (*Vulcan Silkeborg*, paragraph 38).

38 The answer to the first question must accordingly be that the entry into force of Regulation No 1400/2002 did not, of itself, require the reorganisation of the distribution network of a supplier within the meaning of the first indent of Article 5(3) of Regulation No 1475/95. However, that entry into force may, in the light of the particular nature of the distribution network of each supplier, have required changes that were so significant that they must be regarded as representing a true reorganisation within the meaning of that provision. It is for the national courts or arbitrators to determine, in the light of all the evidence in the case before them, whether that is the position.

The second question

39 By this question the national court seeks to ascertain whether the fact that a distribution agreement fulfilling the conditions for exemption laid down in Regulation No 1475/95 contains restrictions of competition prohibited by Article 4 of Regulation No 1400/2002 necessarily means that, once the transitional period provided for by Article 10 of that latter regulation has expired, the block exemption under that regulation no longer applies to all the restrictions of competition contained in such an agreement, in particular when, under national law, the effect would be that the agreement would lapse in its entirety.

40 The decision for reference makes it clear that this question is asked with regard to the situation in which termination of an agreement with a year's notice made after the entry into force of Regulation No 1400/2002, such as the termination effected by BMW in this case, is considered to be contrary to the first indent of Article 5(3). According to the national court, if, for want of lawful termination by the supplier, such an agreement were under national law to be invalid in its entirety from 1 October 2003, it could not in any case be performed, as the applicants in the main proceedings request, for the period until 30 September 2004. That court wonders therefore whether, exceptionally, on a proper construction of Article 4 of Regulation No 1400/2002 that provision does not entail the inapplicability of the block exemption to that agreement.

41 It follows from the answer given to the first question that in certain circumstances the entry into force of Regulation No 1400/2002 may justify the application of the right to terminate on a year's notice under the first indent of the first paragraph of Article 5(3) of Regulation No 1475/95. However, as indicated in paragraph 38 above, it is for the national court alone to determine, in the light of all the evidence in the case before it, whether the conditions laid down by that provision have been satisfied in the case in the main proceedings.

42 In those circumstances, given that it is not inconceivable that the termination of agreements on a year's notice effected in this case does not satisfy those conditions, an answer is to be given to second question too with a view to providing the national court with all those elements for the interpretation of Community law which may be of assistance in adjudicating on the case pending before it (see, to that effect, Case C-387/01 *Weigel* [2004] ECR I-4981, paragraph 44, and Case C-152/03 *Ritter-Coulais* [2006] ECR I-1711, paragraph 29).

43 In this regard, it is to be borne in mind that, as recital No 36 in the preamble to Regulation No 1400/2002 makes clear, it is the purpose of Article 10 of that regulation to introduce a transitional period in order to allow all operators the time to adapt to that regulation all agreements compatible with Regulation No 1475/95 which were in force on the date on which that regulation ceased to be applicable. To that end, that provision states that the prohibition laid down in Article 81(1) EC is not to apply to those provisions during the period from 1 October 2002 to 30 September 2003.

44 It clearly follows from the actual wording of Article 10 of Regulation No 1400/2002 that from 1 October 2003 the prohibition laid down in Article 81(1) EC applied to agreements that had not been adapted with a view to satisfying the conditions for exemption laid down by that regulation.

45 According to the actual wording of the first sentence of Article 4(1) of Regulation No 1400/2002, and as is apparent from the 12th recital in its preamble, the exemption provided for by that regulation is not extended to agreements which have as their object at least one of the hardcore restrictions listed in Article 4(1).

46 It follows that, contrary to what the national court suggests, and as all the parties which have submitted observations have argued, after the transitional period had

expired the block exemption under Regulation No 1400/2002 was, as the Advocate General has correctly stated in paragraph 30 of his Opinion, inapplicable to agreements that, although concluded in accordance with Regulation No 1475/95, had as their object one of those hardcore restrictions.

47 Where an agreement does not satisfy the conditions provided for by an exempting regulation, the contractual clauses contained in it may be caught by the prohibition laid down by Article 81(1) EC if the conditions for the application of that provision are satisfied and the conditions for exemption under Article 81(3) EC are not satisfied.

48 The consequences, for all other parts of the agreement or for other obligations flowing from it, of the prohibition of contractual terms incompatible with Article 81 EC are not, however, a matter for Community law. It is therefore for the national court to determine, in accordance with the national law applicable, the extent and consequences, for the contractual relation as a whole, of the prohibition of certain terms under Article 81 EC (see, to this effect, Case 10/86 *VAG France* [1986] ECR 4071, paragraphs 14 and 15, and Case C-230/96 *Cabour* [1998] ECR I-2055, paragraph 51).

49 The applicants in the main proceedings consider, nevertheless, that having regard to the primacy of Article 5 of Regulation No 1475/95 and of Articles 4 and 10 of Regulation No 1400/2002, national law must be interpreted in keeping with Community law so that the prohibition of the contract terms restrictive of competition does not automatically entail the invalidity of the entire agreement. In their view, such a consequence could be contemplated only if the distributor has without good reason refused the contract terms proposed by the supplier with a view to adapting to the change of legal situation.

50 That argument cannot be accepted. In point of fact, when the object of an agreement is one of the hardcore restrictions listed in Article 4 of Regulation No 1400/2002, it is in no way contrary to Community law that the prohibition of contractual terms restrictive of competition should entail, under national law, the invalidity of the entire agreement, given that that provision is, as is clear from the 12th recital in the preamble to that regulation, directed at the most serious restrictions of competition in the sector in question and also itself lays down the inapplicability of the block exemption to the agreement in its entirety.

51 The answer to be given to the second question must therefore be that, on a proper construction of Article 4 of Regulation No 1400/2002, once the transitional period provided for by Article 10 of that regulation had expired, the block exemption under that regulation did not apply to contracts satisfying the conditions for block exemption under Regulation No 1475/95 which had as their object at least one of the hardcore restrictions listed in Article 4, with the result that all the contractual terms restrictive of competition contained in such contracts were liable to be caught by the prohibition laid down in Article 81(1) EC, if the conditions for exemption under Article 81(3) EC were not satisfied.

Costs

52 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

1. **The entry into force of Regulation (EC) No 1400/2002 2002 of 31 July 2002 on the application of Article [81](3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector did not, of itself, require the reorganisation of the distribution network of a supplier within the meaning of the first indent of Article 5(3) of Commission Regulation (EC) No 1475/95 of 28 June 1995 on the application of Article [81](3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements. However, that entry into force may, in the light of the particular nature of the distribution network of each supplier, have required changes that were so significant that they must be regarded as representing a true reorganisation within the meaning of that provision. It is for the national courts or arbitrators to determine, in the light of all the evidence in the case before them, whether that is the position.**

2. **On a proper construction of Article 4 of Regulation No 1400/2002, once the transitional period provided for by Article 10 of that regulation has expired, the block exemption under that regulation did not apply to contracts satisfying the conditions for block exemption under Regulation No 1475/95 which had as their object at least one of the hardcore restrictions listed in Article 4, with the result that all the contractual terms restrictive of competition contained in such contracts were liable to be caught by the prohibition laid down in Article 81(1) EC, if the conditions for exemption under Article 81(3) EC were not satisfied.**

[Signatures]