ADVISORY OPINION OF THE COURT

1 April 1998*

(*Competition – Motor vehicle distribution system – Compatibility with Article 53(1) EEA – Admission to the system – Nullity*)

In Case E-3/97

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by Nedre Romerike herredsrett (Nedre Romerike Municipal Court) for an Advisory Opinion in the case pending before it between

Jan and Kristian Jæger AS

Supported by the
Norwegian Association of Motor Car Dealers and Service Organisations

and

Opel Norge AS

on the interpretation of Article 53 of the EEA Agreement.

THE COURT,

composed of: Bjørn Haug, President, Thór Vilhjálmsson and Carl Baudenbacher (Judge-Rapporteur), Judges,

Registrar: Asle Aarbakke, Legal Secretary

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* Language of the request for an advisory opinion: Norwegian.

after considering the written observations submitted on behalf of:

– the plaintiff, represented by Counsel Pål Magne Bakka, Advokatfirmaet Harris, Bergen;

– the defendant, represented by Counsel Jon Lyng, Advokatfirmaet Lyng & Co., Oslo;

– the Government of the Kingdom of Norway, represented by Hege M. Hoff, Royal Ministry of Foreign Affairs, acting as Agent;

– the EFTA Surveillance Authority, represented by Rolf Helmich Pedersen, Officer, Legal & Executive Affairs, acting as Agent;

– the Commission of the European Communities, represented by Richard Lyal, Member of its Legal Service, acting as Agent.

having regard to the Report for the Hearing,

after hearing the oral observations of the plaintiff, the defendant, the Norwegian Government, the EFTA Surveillance Authority and the Commission of the European Communities at the hearing on 19 February 1998,

gives the following

Advisory Opinion

Facts and Procedure

1 By an order dated 2 September 1997, registered at the Court on 8 September 1997, Nedre Romerike herredsrett, a Norwegian municipal court, made a Request for an Advisory Opinion in a case brought before it by Jan and Kristian Jæger AS, plaintiff, against Opel Norge AS, defendant. The case concerns the refusal to accept a new dealer for Opel cars in Norway.

2 The plaintiff, Jan and Kristian Jæger AS (hereinafter "Jæger"), is a wholly-owned subsidiary of Jæger-gruppen AS (the "Jæger Group"). Jan and Kristian Jæger are shareholders in the Jæger Group, which is a significant purchaser and dealer in different makes of motor vehicles, including Toyota, BMW, Rover and Land Rover.

3 The defendant, Opel Norge AS (“Opel”), is wholly-owned by General Motors Co. of the United States of America. It has 53 independent dealers in Norway. A

standard dealership agreement is entered into with the dealers, normally for five years at a time. These agreements conform as much as possible to Opel's standard European dealership agreement.

4 On 13 December 1995, Jæger brought an action against Opel claiming that Opel had entered into a dealership agreement with it or, subsidiarily, that Opel was under an obligation to do so. The Norwegian Association of Motor Car Dealers and Service Organisations declared itself an intervener in support of Jæger by pleadings of 9 December 1996.

5 During the handling of the dispute by Nedre Romerike herredsrett, disagreement arose as to the interpretation of Article 53(1) EEA. The question is whether the provision prohibits certain terms in a motor vehicle dealership agreement.

6 In the spring of 1994, Jan and Kristian Jæger entered into negotiations with Opel for the establishment of a new Opel dealership in the Bergen area.

7 At a meeting in May 1994, the parties agreed that any such dealership should be held by a new company with its own management and Board of Directors, independent of the other companies in the Jæger Group and occupying premises separate from those of other companies in that group.

8 There was an exchange of letters between Jan Jæger on the one hand and Opel on the other regarding the shareholder structure in the new company. A new meeting was held on 9 May 1995. Following that meeting, Opel asked Jan and Kristian Jæger to apply for a dealership. In a letter of 22 May 1995, Jan and Kristian Jæger applied for an Opel dealership for the Bergen area on behalf of a new company which was to be created.

9 According to the application, Kristian Jæger would be General Manager of the new company and would hold 51% of the shares. His father, Jan Jæger, would hold the remaining 49% and would be Chairman of the Board of Directors.

10 By letter of 29 June 1995, Opel put forward an offer of dealership to Kristian and Jan Jæger on that basis. In accordance with normal practice, the offer was made to the person who was to be the General Manager of the new company. It was a condition of the offer that Kristian and Jan Jæger were to sell their shares in the Jæger Group by 31 December 1996 and that they could not be involved with competing products.

11 The following clauses were contained in the offer from Opel:

> "2. The General Manager referred to in § 3 of the Agreement will be Kristian Jæger who, from the outset, will hold 51% of the company’s shares. Jan Jæger will hold 49% of the shares as of the time the company is established and will be Chairman of the Board of Directors. Kristian Jæger is authorized to bind the company alone or together with the Chairman of the Board of Directors. It is a condition that Kristian Jæger will have right of first refusal at face value on the

remainder of the shares beyond his current 51%. It is further a condition that both Kristian Jæger and Jan Jæger are to be bought out of the Jæger group no later than 31 December 1996.

3. With reference to point 2, Kristian Jæger, Jan Jæger and the new Opel dealer may not become involved with competing products."

12 In a letter of 18 September 1995, the offer was formally accepted by Jan and Kristian Jæger on behalf of the company being created. The acceptance conformed to the offer on all points except for the provisions on ownership structure.

13 Opel did not accept the change in relation to the offer. The standard agreement has not been signed by either of the parties.

14 The parties do not agree as to whether, under Norwegian contract law, a binding dealership agreement has been entered into. They furthermore disagree as to whether Opel has imposed the condition regarding shareholder structure in a discriminatory manner, given that the General Managers' ownership shares in Opel's dealer companies in Norway vary from 0% to 100%.

15 Nedre Romerike herredsrett decided to refer a Request for an Advisory Opinion on the following questions to the EFTA Court:

1.a Does Article 53(1) EEA, cf. the rules on selective distribution, prohibit an importer, upon entering into a dealership agreement concerning motor vehicles, from imposing conditions regarding a certain shareholder structure of the dealer?

1.b If so, will this be applicable regardless of the aim or effects of the condition?

1.c Did such a prohibition exist in September 1995?

2.a Does Article 53(1) EEA, cf. the rules on selective distribution, prohibit an importer, upon entering into a dealership agreement concerning motor vehicles, from imposing conditions regarding the owners and/or general manager in the dealer company holding ownership interests in other companies which deal and/or hold ownership interests in other companies which deal in motor vehicles?

2.b If so, is this applicable regardless of the aim or effects of the condition?

2.c Did such a prohibition exist in September 1995?

3. Does it follow from Article 53(1) EEA that an importer of motor vehicles in September 1995 had an obligation to enter into a

dealership agreement with any or all who wished to be dealers and who otherwise met the qualitative criteria the importer could lawfully impose on dealers?

4. *Is Article 53(1) EEA to be construed to the effect that negotiations about an agreement or an agreement to enter into an agreement is tantamount to an "agreement" and, consequently, sufficient to bring the matter within the scope of Article 53(1)?*

5. *Is Article 53(1) EEA to be construed to the effect that a refusal to accept a dealer falls to be examined under Article 53 when that refusal can serve to enforce an anti-competitive policy or contractual practice between the importer and other, existing dealers?*

6. *Is Article 53(2) to be construed to the effect that if a condition is contrary to Article 53(1) and/or the rules on selective distribution, the entire contract is then of no legal force or effect?*

16 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

Legal background

17 The provisions in question are Article 53 EEA, 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 No L 15, 18.1.1985, p. 16), hereinafter referred to as "Regulation 123/85", and Commission Regulation (EC) No 1475/95 of 28 June 1995 on the application of Article 85(3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements, (OJ No L 145, 29.6.1995, p. 25), hereinafter referred to as "Regulation 1475/95".

18 Article 53 EEA reads as follows:

"1. The following shall be prohibited as incompatible with the functioning of this Agreement: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Contracting Parties and which have as their object or effect the prevention, restriction or distortion of competition within the territory covered by this Agreement, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
– any agreement or category of agreements between undertakings;
– any decision or category of decisions by associations of undertakings;
– any concerted practice or category of concerted practices;
which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question."

19 Article 53 EEA is identical in substance to Article 85 EC. Thus, Article 6 EEA and Article 3(2) of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice are applicable when interpreting Article 53 EEA.

20 Certain agreements in the field of motor vehicle distribution have been exempted from the scope of Article 85 EC and Article 53 EEA by virtue of Regulation 123/85, subsequently replaced by Regulation 1475/95, see below.

Applicability in time

21 Article 53 EEA has been in force in the EFTA States of the EEA since the entry into force of the EEA Agreement on 1 January 1994.

22 Regulation 123/85 was part of the EEA Agreement when it entered into force (Act referred to in part B, No. 4, Annex XIV EEA) and was to remain in force, according to Article 14 of that Regulation, until 30 June 1995.

23 Within the Community, the applicability of Regulation 123/85 was extended until 30 September 1995 by virtue of Article 13 of Regulation 1475/95. Regulation 1475/95 replaced Regulation 123/85 effective 1 October 1995. Article 7 of Regulation 1475/95 provides that agreements in force on 1 October 1995 which satisfied the conditions in Regulation 123/85 were to remain valid until 30 September 1996.

24 Regulation 1475/95 was implemented in the EEA Agreement pursuant to Article 98 EEA by Joint Committee Decision No. 46/96 of 19 July 1996 (Act referred to in part B, No. 4a, Annex XIV EEA). According to that decision, Regulation 1475/95 entered into force in the EEA on 1 August 1996, but would have effect as of 1 October 1995. However, the Joint Committee Decision empowered the individual EFTA States to adopt transitional measures for the period from 1 July 1995 to 19 July 1996, in so far as was necessary for constitutional reasons.

25 It is, in principle, a matter for the national court to determine the extent to which Norway availed itself of the possibility of adopting transitional measures in its national legislation for the period in question. However, the Court notes that, according to information submitted by the Norwegian Government, the following positions with regard to transitional measures seem to have been adopted:

a) it was decided not to extend the applicability of Regulation 123/85 beyond 30 June 1995;
b) it was decided not to apply Regulation 1475/95 before 19 July 1996, with the consequence that the transitional provision in Article 7 of that Regulation did not apply.

26 If the national court finds that this description of national transitional measures is correct, the situation in Norway may be described as follows: from 1 January 1994 until 30 June 1995, Article 53 EEA was applicable, with the exemptions provided for in Regulation 123/85. From 1 July 1995 until 19 July 1996 only Article 53 EEA was applicable, with no block exemptions. Since 19 July 1996, Article 53 EEA has been applicable, with the exemptions provided for in Regulation 1475/95.

27 It is contested in the present case whether an agreement was concluded in September 1995 by virtue of Opel's formal offer and Jæger's purported acceptance thereof. Based on the information provided by the Norwegian Government concerning the adoption of transitional measures, the alleged agreement in September 1995 falls to be considered under Article 53 EEA and relevant case law alone.

28 The Court notes that the national court, in its first, second and third questions, asks specifically about the situation in September 1995. The fourth, fifth and sixth questions are general questions about the interpretation of Article 53 EEA and not about either of the two block exemptions. The Court will limit its Advisory Opinion accordingly.

29 The defendant submits that even if Regulation 123/85 was not formally in force in Norway in September 1995, it should be considered applicable for reasons of homogeneity with Community law.

30 That argument cannot be accepted. It is for the EEA Joint Committee to implement new Community legislation in the EEA by adopting amendments to the Annexes and Protocols to the EEA Agreement. And although homogeneity is one of the fundamental principles of the EEA Agreement, it follows from the structure of the Agreement and the legislative procedure provided for therein that this might not always be fully achieved in terms of simultaneous application of legislative measures. Thus, Article 102 EEA provides that decisions of the EEA Joint Committee shall be made "as closely as possible" to the adoption by the Community of the corresponding new Community legislation with a view to permitting a simultaneous application within the Community and EFTA pillars. The decision of the Joint Committee relevant to the present case implies that during a transitional period there would not necessarily be full homogeneity, and there is no basis for challenging the validity of that decision.

31 The defendant further submits that even though no block exemptions were formally in force in Norway in September 1995, Article 53 EEA should be interpreted in the light of Regulation 123/85 for reasons of homogeneity.

32 The Court finds that one cannot interpret the general prohibition in Article 53(1) EEA in order to bring it within the terms of a block exemption which, in itself, is not an interpretation of the provision but an exemption, i.e. something which derogates from the provision.

The fourth question

33 By its fourth question, which the Court considers should be dealt with first, the national court seeks to ascertain the scope of application of Article 53(1) EEA which prohibits *inter alia* all agreements between undertakings and concerted practices, which may affect trade between Contracting Parties, and have as their object or effect the prevention, restriction or distortion of competition within the territory covered by the EEA Agreement.

34 While the *plaintiff* argues that Article 53 EEA applies to situations where, in a gradual process of concluding an agreement, one of the parties has given a legally binding offer, as well as to all conditions and understandings within that process, the *Commission of the European Communities* and the *EFTA Surveillance Authority* support the *defendant's* view, *viz.*, that Article 53(1) EEA applies to agreements and not to negotiations which do not culminate in an agreement.

35 The *Court* notes that the concept of "agreement" in Article 53(1) EEA is an autonomous concept, which does not fully correspond to the concept of "agreement" in different national legal systems. According to decisions of the ECJ and CFI regarding the concept in Article 85(1) EC, the minimum requirement for there to be an "agreement" within the meaning of the provision is an expression of a joint intention of the parties involved to conduct themselves on the market in a specific way, the object or effect of the conduct being the prevention, restriction or

distortion of competition (see the judgment in Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraph 112; and the judgment in Joined Cases 209 to 215 and 218/78 *Van Landewyck* v *Commission* [1980] ECR 3125, paragraph 86; and of the CFI in Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711).

36 The Court further notes that negotiations which have not yet culminated in an expression of a joint intention are not covered by the concept "agreement" in Article 53(1) EEA. Nor does the provision apply to unilateral conduct of an undertaking, including offers made for the conclusion of a contract as long as the offer has not been accepted by other party in the sense of expressing an intention to adhere to the provisions in the offer.

37 For the sake of completeness, the Court notes that the offer for a contract made by Opel was accepted by Jan and Kristian Jæger on all points except on those allegedly in conflict with Article 53 EEA. If, under national contract law, an agreement is found to have been concluded but without the contested clauses, such an agreement would not be contrary to Article 53(1) EEA since it would not contain the allegedly illegal terms.

38 The answer to the fourth question must therefore be that negotiations about an agreement or an agreement to enter into an agreement amount to an "agreement" within the meaning of Article 53(1) EEA only if there is an expression of the parties' having reached a joint intention to conduct themselves on the market in a specific way.

The fifth question

39 It is argued by the *plaintiff* that the applicability of Article 53(1) EEA extends to conduct of an undertaking which, although seemingly unilateral, relates to the undertaking's agreements with third parties. This contention seems to be the basis for the fifth question of the national court, which asks whether a refusal to accept a dealer falls to be examined under Article 53 EEA when the refusal can serve to enforce an anti-competitive policy or contractual practice between the importer and other dealers.

40 In this connection, the plaintiff refers to Case C-107/82 *AEG* v *Commission* [1983] ECR 3151, where the ECJ found that a refusal to approve a distributor for a system of selective distribution was not unilateral conduct but formed part of the contractual relations between the undertaking and resellers, since the admission of a distributor was based on the acceptance, tacit or express, by the contracting parties of the policy pursued by the undertaking, which required the exclusion from the network of all distributors which qualified for admission but were not prepared to adhere to the policy.

41 For the purpose of determining whether Article 53(1) EEA applies to a situation such as in the present case, the *Court* finds that the criteria established in the above-mentioned case *AEG* v *Commission* are relevant.

42 The answer to the fifth question must be that where a car importer operates a distribution system which may affect channels of distribution and the conditions of which are not negotiable and are imposed on all accepted dealers, a refusal to accept a dealer forms part of the contractual relations between the undertaking and its dealers which fall to be examined under Article 53 EEA.

43 The Court adds that, for an analysis of a distribution system under Article 53 EEA, the essential assessment is whether prevention, restriction or distortion of competition follows from agreements or concerted practices. The assessment must also take into account the extent to which restrictions on competition inherent in the different arrangements can be accepted as enhancing competition and being beneficial to the consumer. The categorization of the different systems is of lesser importance.

44 It is for the national court to assess whether the conditions set out above are met in the case before it.

The third question

45 With its third question, the national court seeks to ascertain whether under Article 53(1) EEA an importer of motor vehicles, in September 1995, was under an obligation to enter into a dealership agreement with any or all who wished to become dealers and who otherwise met the qualitative criteria which the importer could lawfully impose on dealers.

46 The *plaintiff* submits that Article 53(1) EEA must be interpreted so that an importer of new motor vehicles in September 1995 had an obligation to enter into dealership agreements with some or all of those who wished to be dealers and met the qualitative criteria which the importer could lawfully impose on a dealer.

47 The *defendant*, the *EFTA Surveillance Authority* and the *Commission of the European Communities* are of the opinion that the EEA Agreement does not impose on importers of cars any duty to conclude a contract with persons or companies wishing to become new car dealers in an area where there is room for several dealers.

48 The *Court* notes that, in the case of certain selective distribution systems, an importer, in order not to infringe Article 53(1) EEA, may become obliged to accept all potential dealers who meet qualitative criteria imposed by the importer. Thus, depending on the circumstances, a refusal to accept a dealer may constitute an infringement of Article 53(1) EEA. If the distributor nevertheless refuses to comply with that requirement, the legal consequences may be, for instance, that

fines are levied, or that the distributor is denied an individual exemption in procedures before the EFTA Surveillance Authority or the Commission of the European Communities (see Article 56 EEA).

49 But there is no basis under Article 53 EEA for imposing upon an unwilling distributor a duty to enter into a specific dealership agreement (see the judgment of the CFI in Case T-24/90 *Automec* v *Commission* [1992] ECR II-2223). The situation might be different under Article 54 EEA, but there is no indication that that provision applies in the present case.

50 The Court adds that a denial of entering into an agreement may have various legal consequences under applicable national laws, such as an obligation to make good the damage caused to a third party, or a possible obligation to enter into a contract. Consequently, it is possible that a national court may have the power under the rules of national law to order one trader to enter into a contract with another. This is to be determined under national law.

51 The answer to the third question must therefore be that Article 53(1) EEA does not impose an obligation on an importer of motor vehicles to enter into a dealership agreement with any or all who wish to become dealers and who otherwise meet the qualitative criteria the importer could lawfully impose on dealers in September 1995.

The first and second questions

52 By its first and second questions, the national court asks whether certain conditions in a motor vehicle dealership agreement requiring a specific ownership structure in the dealer company and restricting the owners' right to have ownership interests in other companies involved in car dealing are covered by the prohibition in Article 53(1) EEA.

53 The Court notes that the national court asks about "Article 53(1) EEA, cf. the rules on selective distribution", referring for the latter expression to the interpretation of the general prohibition developed in the case *Metro* v *Commission* [1977] ECR 1875 and subsequent case law. The Court notes, however, that the questions do not relate to the applicability of the block exemption in Regulation 123/85.

54 The *plaintiff* points out that the General Manager was to own at least 51% of the shares and that the Chairman of the Board was expected to hold the remaining shares. The 51% requirement prevents the dealer company from joining a group of dealers, in particular from becoming a subsidiary in a group which deals in motor vehicles of other makes through other subsidiaries. The clause furthermore prevents groups from dealing in new motor vehicles of other makes. The conditions on ownership structure do not consist of objective criteria of a qualitative nature relating to the technical qualifications of the dealer or its staff

within the meaning of the *Metro* judgment of the ECJ, and they are not indispensable within the meaning of that judgment. The plaintiff furthermore states that Opel has admitted that its practice concerning imposing conditions on ownership structure differs with regard to “new” and “old” dealers. The plaintiff concludes from this that Opel's practice is obviously discriminatory.

55 With respect to the requirement forbidding ownership interests in other companies which deal and/or hold ownership interests in other companies which deal in motor vehicles, the plaintiff submits that the real object of this condition is to break up a strong competitor who, over many years, has demonstrated the ability to build up sales of different car makes. It must be considered that the object of such a condition is to ensure that the dealer and even the shareholders in the dealer company may only deal in one make of car. This distorts competition because it renders impossible multi-brand dealerships and the building up of a strong dealer stage, thereby weakening inter-brand competition.

56 The *defendant* is of the opinion that the distribution system operated by it in Norway is not an open selective distribution system of the kind dealt with by the ECJ in its judgments in *Metro* and *AEG*. However, in any case it is submitted that the criteria applied by it in the case at hand regarding ownership structure in connection with the selection of its dealers must be viewed as non-discriminatory and necessary to ensure reasonable distribution of such advanced technical products as cars and therefore in conformity with the principles applied by the ECJ in its *Metro* judgment. The ownership structure clause is, in the defendant‘s view, a necessary tool to ensure that the dealer is able to fulfil its duties under the contract. The defendant states that the EEA Agreement does not prohibit an importer and a new, potential dealer from agreeing on a condition for future co-operation to the effect that the owner and general manager are not to hold shares in competing operations or are not to engage in competing operations. This requirement helps to build up a community of interest between the ownership interests and management. This enhances the dealerships' economic basis, productivity, the technical and economic development of the products and services and is in the interest of consumers.

57 In its written observations, the *EFTA Surveillance Authority* stated, with reference to the assumption in the request for an advisory opinion, that a selective distribution system was established. It referred to the *AEG* judgment of the ECJ, and submitted that Article 53(1) EEA was infringed if Opel denied access for potential dealers who fulfilled the qualitative criteria which Opel could lawfully set. At the oral hearing, based on further information then available, the EFTA Surveillance Authority pointed out that the system operated by Opel does not appear to be such a system.

58 With regard to the clauses in question, the EFTA Surveillance Authority submits that the condition of a certain shareholder structure would by itself in most cases amount to a restriction of competition within the meaning of Article 53(1) EEA. The restrictive effect of such a condition seems to be strengthened due to the

nature of the business in question. The establishment of a dealership company will often require a substantial amount of capital which, in turn, may restrict potential dealers from applying for dealerships, due to the condition on shareholder structure. A dealership company will frequently be unable to finance the whole activity through loans, but will have to possess a certain amount of equity capital in order to obtain loans and thus operate a business. Even if it were economically possible to start a new business without equity capital, national legislation in many EEA States requires that economic activities may only be carried out if certain requirements as to minimum equity capital are fulfilled.

59 A condition which requires a specific shareholder structure may also imply a restriction on the possibility for shareholders' to sell their shares. If this condition implies that the owner or owners may only sell their shares to the other owners of the dealership company, or only with the prior consent of the supplier, such a condition may also imply certain foreclosure effects for new, potential dealers since it may be difficult to enter the market through the acquisition of shares in existing companies. The EFTA Surveillance Authority concludes that such a condition would, in most cases and regardless of the aim, constitute a restriction within the meaning of Article 53(1) EEA and would thus be contrary to that Article if the agreement also affects trade and competition.

60 The requirement imposed on the owner and the General Manager not to own shares in other companies retailing cars, or companies owning parts of such undertakings, is not a qualitative criterion within the meaning of *Metro* but rather amounts to a restriction of competition within the meaning of Article 53(1) EEA, regardless of the aim of the condition.

61 The *Commission of the European Communities* submits that the *Metro* doctrine of the ECJ on selective distribution agreements is not of direct relevance to the present case. Opel does not operate a selective distribution system which is open to all dealers who want to join the system. It operates a system in which one dealer or a small number of dealers in each area are appointed. According to the Commission, distribution agreements in the motor vehicle sector, including the one in the present case, may be characterized as being "between selective distribution agreements ... and exclusive distribution agreements, but ... rather closer to the latter".

62 As regards the clauses in question, the Commission is of the opinion that a distinction must be drawn between the ownership clause and the requirement that Jan and Kristian Jæger dissolve all links with the Jæger Group. A clause requiring the General Manager of a car dealership to hold at least 51% of the shares in the dealership company may, depending on the circumstances, constitute a restriction of competition. This may, however, not be the case where the clause merely serves to identify the individuals with whom the supplier has negotiated the dealership agreement and to ensure that those persons retain effective control of the corporate entity.

63 In the view of the Commission, the requirement that all connections with the Jæger Group should be severed goes beyond what is necessary to establish a distinct legal entity and is therefore restrictive of competition and prohibited by Article 53(1) EEA.

64 The *Court* notes that the request for an advisory opinion describes the distribution system operated by Opel in Norway as a "selective distribution system" within the meaning of the *Metro* judgment of the ECJ and subsequent case law of the ECJ.

65 In *Metro,* the ECJ held that a selective distribution system for high-quality and technically advanced consumables is permissible, provided that resellers are chosen on the basis of objective criteria of a qualitative nature relating to the technical qualifications of the reseller and his staff and the suitability of his trading premises and that such conditions are laid down uniformly for all potential resellers and are not applied in a discriminatory fashion.

66 In its subsequent judgment in *AEG,* the ECJ held that the operation of a selective distribution system based on criteria other than those mentioned in *Metro* constitutes an infringement of Article 85(1) EC, and that this is also the case when a system which is in principle in conformity with Community law is applied in practice in a manner incompatible therewith. According to the ECJ, such a practice must be considered unlawful when a manufacturer refuses to approve distributors who satisfy the qualitative criteria of the system, with a view to maintaining a high level of prices or excluding certain modern channels of distribution.

67 In the Court's view, it is not necessary for the answers to the first and the second questions to determine the nature of Opel's distribution system in Norway, as the clauses in question are not of a qualitative nature such as those accepted by the ECJ in *Metro* and *AEG*. However, the Court adds that it is of the view that the system operated by the defendant is not a “simple” selective distribution system within the meaning of the *Metro* and *AEG* decisions of the ECJ. Consequently, the principles developed in those judgments, in particular the requirement that all suitable qualified resellers are to be admitted to the system, are not directly applicable to selective distribution systems for motor vehicles. Motor vehicles are consumer durables requiring expert maintenance and repair. In order to provide such servicing, the co-operation of manufacturers with selected dealers and repairers cannot be extended to an unlimited number of dealers and repairers.

68 In the Court’s view, the object and effect of a clause requiring the dealer to terminate all connections with a dealer group must be to prevent the dealer from selling vehicles of other makes. This amounts to a non-compete clause. That such a provision is restrictive of competition cannot be doubted; see, for comparison, Article 3, paragraph 1 d of Commission Regulation (EEC) No 4087/88 on the application of Article 85(3) of the Treaty to categories of franchise agreements, where a similar clause is deemed to be a restriction of competition but is

exempted for franchise agreements. The Court considers that a non-compete clause such as the one in question here goes beyond the one exempted in Article 3, paragraph 1 d of the Franchising Block Exemption Regulation.

69 The opinion that the percentage clause is in itself not restrictive of competition is obviously based on the assumption that the personal bond between the parties is a decisive element in a dealer relationship. According to this view, a possible negative impact on competition would be outweighed by the pro-competitive effects of the clause. This might be true in certain circumstances. However, in the case at hand, the percentage clause must be read in its context, which includes the group clause. It is thus capable of intensifying the restrictive effects of the latter.

70 When a dealer is prevented from having any corporate law connection with another company, it must be assumed that the chances of a dealer successfully starting a new business will in most cases be reduced. Additionally, the condition in question is also able to prevent other potential dealers from getting access to qualified persons who could, in addition to providing capital, bring valuable knowledge of the trade to other potential dealer companies.

71 The Court considers that the clauses in question have as their object and effect to restrict competition, in particular inter-brand competition. Given the fact that the agreement is part of a network of other dealership agreements, the effect is also appreciable (cf. Case C-234/89 *Delimitis* [1991] ECR I-935). As the agreement relates to international transactions, it may furthermore affect trade between the Contracting Parties (cf. Case 42/84 *Remia* v *Commission* [1985] ECR 2545; Case 19/77 *Miller International Schallplatten GmbH* v *Commission* [1978] ECR 131; Case 172/80 *Züchner* v *Bayerische Vereinsbank* [1981] ECR 2021).

72 For the sake of comparison, the Court notes that, under the block exemption in Regulation 1475/95, which entered into force in Norway on 19 July 1996, a provision preventing a car dealer from selling other brands would not be exempt from the prohibition in Article 53(1) EEA. The Regulation is based on the idea of giving dealers greater commercial independence vis-à-vis manufacturers. The most important reform of this Regulation, compared to the block exemption in Regulation 123/85, consists of a significant loosening of the ban on dealing in competing products. Unlike Regulation 123/85, Regulation 1475/95 does not allow the imposition of a single-make rule. The new Regulation provides for the possibility of multi-brand dealerships, so long as different makes are sold in different premises, under different management in the form of a distinct legal entity, and in a manner which avoids confusion between makes.

73 In questions 1.b and 2.b, the national court asks whether a prohibition under Article 53(1) EEA will be applicable regardless of the aim or effects of the condition.

74 Article 53(1) EEA sets out as one of its conditions that the agreements have as their object or effect the prevention, restriction or distortion of competition. Consequently, such aim or effects of the contractual condition must be present for the prohibition in Article 53(1) EEA to apply.

75 Consequently, the first and the second questions must be answered as set out in the operative part below.

The sixth question

76 According to Article 53(2) EEA, agreements or decisions prohibited pursuant to Article 53(1) EEA shall be automatically void. By its sixth question, the national court asks whether this applies to the agreement as a whole or only to those clauses in an agreement that infringe Article 53(1) EEA.

77 The answer to that question follows from settled case law of the ECJ. The automatic nullity in consequence of breaches of Article 85(1) EC, and thus Article 53(1) EEA, applies to those parts of the agreement affected by the prohibition, or to the agreement as a whole if it appears that those parts are not severable from the agreement itself, see the judgment of the ECJ in Case 56/65 *Société Technique Minière* v *Maschinenbau Ulm* [1966] ECR 235. Consequently, any other contractual provisions which are not affected by the prohibition, and which therefore do not involve the application of the EEA Agreement, fall outside EEA law. It is for the national court to determine in accordance with the relevant national law the extent and consequences, for the contractual relations as a whole, of the nullity of certain contractual provisions by virtue of Article 53(2), see the judgment of the ECJ in Case 10/86 *VAG France* v *Magne* [1986] ECR 4071.

Costs

78 The costs incurred by the Government of Norway, the EFTA Surveillance Authority and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, a step in the proceedings 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 Nedre Romerike herredsrett by an order of 2 September 1997, hereby gives the following Advisory Opinion:

1. a) A clause in a contract for the distribution of motor vehicles requiring the General Manager of the dealership company to hold 51% or more of the shares in that company may, depending on the circumstances, not be restrictive of competition within the meaning of Article 53(1) EEA. Taken together with a clause prohibiting ownership of shares in other car dealer companies, however, it is capable of being restrictive of competition within the meaning of Article 53(1) EEA.

b) Such a clause is only contrary to that Article if it is part of an agreement that may affect trade between Contracting Parties and has as its object or effect the prevention, restriction or distortion of competition within the territory covered by the EEA Agreement.

c) The general prohibition in Article 53(1) EEA applied in September 1995.

2. a) A clause in a contract for the distribution of motor vehicles preventing the shareholders in the corporate entity operating the dealership from holding ownership interests in other companies dealing in motor vehicles is capable of being restrictive of competition within the meaning of Article 53(1) EEA.

b) Such a clause is only contrary to that Article if it is part of an agreement that may affect trade between Contracting Parties and has as its object or effect the prevention, restriction or distortion of competition within the territory covered by the EEA Agreement.

c) The general prohibition in Article 53(1) EEA applied in September 1995.

3. Article 53(1) EEA does not impose an obligation on an importer of motor vehicles to enter into a dealership agreement with any or all who wish to become dealers and who otherwise meet the qualitative criteria the importer could lawfully impose on dealers in September 1995.

4. Negotiations about an agreement or an agreement to enter into an agreement amount to an "agreement" within the meaning of Article 53(1) EEA only if there is an expression of the parties' having reached a joint intention to conduct themselves on the market in a specific way.

5. Where a car importer operates a distribution system which may affect channels of distribution and the conditions of which are not negotiable and are imposed on all accepted dealers, a refusal to accept a dealer forms part of the contractual relations between the importer and its dealers which fall to be examined under Article 53 EEA.

6. Article 53(2) EEA applies only to those parts of the agreement which bring it into conflict with the prohibition in Article 53(1) EEA. It is for the national court to determine whether those parts which are contrary to Article 53(1) EEA are severable from the rest of the contract and whether there remains a contract capable of performance.

Bjørn Haug Thór Vilhjálmsson Carl Baudenbacher

Delivered in open court in Luxembourg on 1 April 1998.

Asle Aarbakke
Registrar
Legal Secretary

Bjørn Haug
President