REPORT FOR THE HEARING
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 Municipal Court (Nedre Romerike Herredsrett) for an Advisory Opinion in the case pending before it between

Jan and Kristian Jæger AS

and

Opel Norge AS

on the interpretation of Article 53(1) of the EEA Agreement.

I. Introduction

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 against Opel Norge AS. The case concerns the refusal to accept a new dealer in a system with selective distribution of motor vehicles.

II. Legal background

2. Rules concerning selective distribution of motor vehicles are included in Commission Regulations 123/85[1] and 1475/95[2]. Regulation 123/85 was part of the EEA Agreement when it entered into force on 1 January 1994[3]. The validity of Regulation 123/85 was extended until 30 September 1995. This extension has

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1 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, hereinafter referred to as "Regulation 123/85" (OJ No L 15, 18.1.1985, p. 16).

2 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, hereinafter referred to as "Regulation 1475/95" (OJ No L 145, 28.6.1995, p. 25).

3 Act referred to in part B, No. 4, Annex XIV EEA.

not been provided for in the EEA context. Regulation 1475/95, which replaces Regulation 123/85, was implemented into the EEA Agreement in accordance with Article 98 EEA by Joint Committee Decision No. 46/96 of 19 July 1996[4]. At the time of the dispute between the parties, Regulation 123/85, according to its wording, had ceased to apply in the EEA, without Regulation 1475/95 having entered into force. Following Article 3 of Joint Committee Decision No. 46/96 of 19 July 1996, Regulation 1475/95 did not enter into force in the EEA until 1 August 1996, and should be applied with effect as of 1 October 1995.

III. Facts and Procedure

3. The plaintiff, *Jan and Kristian Jæger AS*, is a wholly-owned subsidiary of Jæger-gruppen AS. Jan and Kristian Jæger are shareholders in this group, which is a significant purchaser and dealer in different makes of motor vehicles.

4. On 13 December 1995, Jan and Kristian Jæger AS brought an action against Opel Norge AS (hereinafter "Opel") claiming that Opel had entered into a dealership agreement with it and, subsidiarily, that Opel was under an obligation to enter into a dealership agreement with it. The Norwegian Association of Motor Car Dealers and Service Organisations declared itself an intervener by pleadings of 9 December 1996.

5. During the handling of the dispute by Nedre Romerike Herredsrett, disagreement has arisen as to the interpretation of Article 53(1) EEA. The question is whether the provision prohibits terms of an agreement relating to ownership of motor vehicle dealers.

6. The defendant, Opel, is wholly-owned by General Motors Co. of the United States. Opel 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.

7. In the spring of 1994, Jæger-gruppen AS entered into negotiations with Opel for the establishment of a new Opel dealership in the Bergen area. 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 that it should occupy premises separate from those of other companies in this group. There was some 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, on behalf

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4 Act referred to in part B, No. 4a, Annex XIV EEA.

of a new company which was to be created, for an Opel dealership for the Bergen area. 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 be Chairman of the Board of Directors.

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

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

10. The parties do not agree as to whether under Norwegian contract law a binding dealership agreement has been entered into and, consequently, whether Opel has an obligation towards Jan and Kristian Jæger AS to conclude a contract. 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 vary from 0% to 100%.

11. Nedre Romerike Herredsrett has decided to submit a Request for an Advisory Opinion on these questions to the EFTA Court.

IV. Questions

12. The following questions were referred 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?
   b. If so, will this be applicable regardless of the aim or effects of the condition?
   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?

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

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?

V. Written observations

13. Pursuant to Article 20 of the Statute of the EFTA Court and Article 97 of the Rules of Procedure, written observations have been received from:

- the plaintiff, represented by Counsel Counsel Pål Magne Bakka, Advokatfirma Harris, Bergen,

- the defendant, represented by Counsel Jon Lyng, Advokatfirma Lyng & Co., Oslo;

- the Government of the Kingdom of Norway, represented by Hege M. Hoff, 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.

1. Jan and Kristian Jæger AS

14. The *plaintiff* states that the case law of the ECJ[5] on selective distribution is, together with Article 53 EEA, of particular significance for the present case.

15. One of the consequences of a condition on a specific ownership structure in a company is that the dealership company is prevented from joining a group, for example, as a wholly-owned subsidiary in a group which then, through other subsidiaries, deals in new motor vehicles of other makes[6].

16. According to the plaintiff, such clauses have a clear competition-distorting object and effect. The conditions impose requirements on the dealer which, according to case law on selective distribution, go considerably further than is necessary to protect the reputation of the brand name. Furthermore, the conditions are applied in an arbitrary and discriminatory fashion.

17. The real object of these conditions is to break up a strong competitor who, through a number of years, has demonstrated the ability to build up different makes.

18. In any event, the object of such a condition must be considered to be to ensure that the dealer only deals in one make of car. This distorts competition because it renders impossible (1) multi-brand dealerships and (2) building up of a strong dealer stage. Both of these aims are fundamental considerations in the new Regulation 1475/95. Avoiding a "conflict of interest" is not a concern which can make it lawful.

19. The requirement that the General Manager is to own at least 51% of the shares (and the Chairman of the Board 49%) *ex lege* prevents the dealer company from becoming a subsidiary in a group. Furthermore, it will prevent groups from dealing in new motor vehicles.

20. The plaintiff states that groups are particularly widespread and this form of business organization is an important instrument for effective, appropriate organization of a business operation. An example is multi-brand dealerships. Others are dealerships for new and used motor vehicles, or motor vehicles and machines as well as property ownership.

21. Thus, the condition will have the main effect of distorting the structure at the dealer stage, since large, financially strong groups will have to refrain from

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5 Case 26/76 *Metro* v *Commission* [1977] ECR 1875 (hereinafter "*Metro*").

6 The Jæger group is one of Norway's largest car dealers and deals in *inter alia* Toyota, BMW, Rover and Land Rover.

becoming dealers. The dealer stage will consist of relatively small businesses and become considerably more dependent on the supplier than a dealer which is part of a strong group would. A weaker dealer stage will carry less weight for building up its organization and competing with other makes of cars. Inter-brand competition will be weakened. In addition, a weak dealer stage with its essential operations linked to one supplier will be much more vulnerable to tactics and pressure from the supplier, with all forms of concerted practices which, as a whole, reduce competition between different brand dealers.

22. The first effect of the buy-out requirement will be that the dealer company will not be able to have any corporate law connection to groups which deal in other new motor vehicles of other makes, in this case the Jæger group. Secondly, it implies that not even the shareholders in the dealer company can have any such corporate law connections.

23. Referring to case law of the ECJ[7], the plaintiff is of the opinion that the conditions on ownership structure do not consist of objective criteria of a qualitative nature relating to the technical qualifications of the reseller and its staff.

24. The plaintiff is of the opinion that Article 53 EEA clearly applies to a situation where the supplier deliberately enforces a condition on ownership structure in a different manner in relation to the "new" and the "old" dealers. This applies to the requirement that the General Manager hold 51% of the shares, in which Opel has admitted its practice varies.

25. The supplier shall not impose conditions which go further than what is "indispensable". Lawful conditions must be imposed in the same fashion on all dealers. The plaintiff concludes from this that Opel's practice is obviously discriminatory.

26. Since "gentlemen's agreements" and other, non-binding understandings[8] have been covered under Article 85 EC, the above situation must clearly be considered as one which comes within the scope of Article 53 EEA. *A fortiori* must this be so when even "concerted practices" make Article 53 EEA applicable.

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7 Case 26/76 Metro SB-Großmärkte GmbH & Co.KG v Commission of the European Communities [1977] ECR 1875.

8 Case 41/69 ACF Chemiefarma NV v Commission of the European Communities [1970] ECR 661.

27. The plaintiff refers to the *AEG*[9] and the *Ford*[10] case. From these judgments, the plaintiff maintains that it follows that unilateral legal situations, where a private-law binding contractual relationship does not exist, are to be considered as tied to or stemming from an agreement and thereby subject to Article 53 EEA. This is particularly true of distribution systems. In the present case, it is the existence of the supplier's agreements with third parties which makes Article 53 EEA applicable.

28. Following case law of the ECJ[11], the plaintiff considers that the automatic nullity in question only 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.

29. In addition to the effect of invalidity, the breach of the law in the present case has the effect of the agreement being considered entered into or, alternatively, that Opel is under an obligation to conclude an agreement. This follows from the *Metro* and *AEG* judgments and the absence of a block exemption in September 1995.

30. The plaintiff suggests answering the questions as follows:

> *Question 1:*
> *Article 53(1) EEA, cf. Article 6 and the rules on selective distribution, must be interpreted so that conditions regarding a given shareholder structure of the dealer which are imposed by an importer of new motor vehicles when a dealership agreement is entered into have both a competition-distorting aim and a competition-distorting effect, judged both per se and in context, and are prohibited.*
> *An independent, additional ground for considering the condition as prohibited will be present where an importer has not required all dealers to meet the condition formally and in fact without undue delay, including not treating differently dealers who joined the system before or after 1986.*
> *The concern of avoiding a "conflict of interest" does not make the condition lawful.*
> *The prohibitions applied in September 1995 and apply today.*
>
> *Question 2:*
> *Article 53(1) EEA, cf. Article 6 and the rules on selective distribution, must be interpreted so that conditions to the effect that the owners of the dealer are to sell off their (direct or indirect) ownership interest in other dealer companies which are imposed by an importer of new motor vehicles when a dealership agreement is entered into have both a competition-distorting aim and a*

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9 Case 107/82 AEG-Telefunken AG v Commission of the European Communities [1983] ECR 3151.

10 Joined Cases 25 and 26/84 Ford Werke AG and Ford of Europe Inc. v Commission of the European Communities [1985] ECR 2725.

11 Case 56/65 Société Technique Minière v Maschinenbau Ulm GmbH [1966] ECR 235.

competition-distorting effect, judged both per se and in context, and are prohibited.
An independent, additional ground for considering the condition as prohibited will be present where an importer has not required all dealers to meet the condition formally and in fact without undue delay, including not treating differently dealers who joined the system before or after 1986.
The concern of avoiding a "conflict of interest" does not make the condition lawful.
The prohibitions applied in September 1995 and apply today.

Question 3:
Article 53(1) EEA, cf. 53 (2) 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.

Question 4:
Article 53(1) EEA, cf. Article 6, must be interpreted so that where parties in a process of concluding an agreement have come so far that one of the parties has given a legally-binding offer, Article 53 will apply to that offer. In addition, Article 53(1) EEA, cf. Article 6, is applicable to all conditions, pre-conditions and understandings which are laid down in the course of a gradual process of concluding an agreement.

Question 5:
When a refusal to accept a dealer can serve to enforce a competition-distorting policy or contractual practice between the importer and other, existing dealers, the refusal must be assessed under Article 53 EEA.

Question 6:
Article 53 (2) EEA cannot be considered as authorizing total invalidity in a case of a condition on ownership structure in a selective distribution system for new motor vehicles.

2. Opel Norge AS

31. The *defendant* is of the opinion that neither Article 53 EEA nor the rules regarding selective distribution apply to a case such as the one at hand, where the parties have not moved beyond the negotiations stage. During the negotiations the opposite parties of Opel Norge As were the two individuals Jan and Kristian Jæger.

32. Referring to the *Metro* judgment of the ECJ, the defendant submits that the criteria applied by Opel Norge AS regarding ownership structure in connection with the selection of its dealers must be viewed as non-discriminatory and necessary to ensure reasonable distribution of advanced technical products such as cars.

33. In the view of the defendant, the wording of the question "upon entering into … imposing conditions" is imprecise. The formulation has no relevance for the factual situation in the case and the problem is hypothetical, since no agreement has been entered into or concluded by the parties. Furthermore, the defendant is of the view that the formulation of the question: "imposing conditions regarding a certain shareholder structure" is imprecise.

34. For the defendant, Article 53(1) EEA and the rules on selective distribution do not apply in a situation where an importer and the potential dealer have not entered into a binding agreement on the establishment of a dealer relationship. Nor do the provisions referred to in the question generally preclude importers of motor vehicles from choosing their dealers based on non-discriminatory qualitative criteria in order to ensure reasonable distribution of the motor vehicles and services related thereto, including conditions as to who are to be shareholders in the dealership company and the specific share distribution among the shareholders.

35. The defendant states that, under Norwegian law, there was a period with a "break" from 30 June 1995 until 19 July 1996, when the Regulations were implemented under Norwegian law.

36. The defendant is of the view that the presumption principle must be particularly strong in a situation where Norway can be condemned for breach of treaty due to failure to implement and which can harm politically important relationships of trust with the EU. The defendant submits that a reinforced presumption principle can also be grounded in the duty of loyalty under Article 3 EEA.

37. The defendant considers that it must be possible to deduce from this a duty for Norwegian courts, in accordance with the EU law principle on interpretation in accordance with directives, to interpret national law as much as possible in accordance with non-implemented directives. Under the EEA, the duty must apply not only in relation to directives but also in relation to regulations.

38. It would be entirely unreasonable if agreements between private parties which were formerly valid and in accordance with the block exemption were to be deemed invalid and thereby without legal effect for the period from 30 June 1995 until 19 July 1996.

39. For the defendant, it is obvious that for September 1995 there exists no prohibition against importers of motor vehicles choosing dealers based on conditions as to who is to be shareholders in the dealership company, and the specific share distribution among them. Considerations of harmonization of the rules in the EU with the rules in the European Economic Area point towards the block exemption in Regulation 123/85 having been replaced by the new block exemption in Regulation 1475/95; this also applies for Norway.

40. Furthermore, the EEA Agreement does not prohibit an importer and a new, potential dealer from agreeing that a condition for further negotiations on future co-operation is that the owner and general manager are not to hold shares in competing operations or are not to engage in competing operations.

41. The defendant is of the opinion that question 3 is also imprecise and that the formulation is unfortunate. For the defendant, it is unclear what the person asking the question refers to by the term “met the qualitative criteria the importer could lawfully impose on dealers”. In any case, the EEA Agreement does not impose on importers of cars a duty to conclude a contract with companies wishing to become new car dealers in an area where there is room for several dealers.

42. Furthermore, Article 53(1) EEA may not be interpreted as also applying to situations in which two parties are in negotiations without having completed them and where no contractual relationship has been established and where no *de facto* business collaboration has been entered into, either, or no implied agreement exists between the parties.

43. For Opel it is not “an anti-competitive policy” to impose requirements to the effect that a General Manager must have an ownership interest which is dominant and as strong as possible. In the view of Opel, this requirement is economically important and legitimate. Furthermore, it is capable of strengthening the economy and power of the dealers and thereby their competitiveness, which serves consumers. Opel is of the view that the requirements help to build up the community of interest between the ownership interests and management, and that this enhances the dealerships’ economic basis, productivity, the technical and economic development of the products and services, and that this is in the interest of consumers.

44. With respect to question 6 as well, the defendant’s comment is that the formulation of the question is imprecise and hypothetical. No agreement has been entered into by the parties and it is also an incorrect use of terminology to use the expression "condition". The essential point is that the relevant factual and legal issue is not covered by question 6.

45. The defendant submits that Article 53(1) EEA, cf. (2), gives no authority to intervene in a negotiation situation between two parties, so that a pre-condition in an offer from one party to enter into an agreement may be viewed as unlawful with the consequence that the party in question is legally bound to enter into an agreement without this condition.

46. The defendant has fundamental objections to the formulation of the questions and is of the view that a number of them must be reformulated. In the view of the defendant, the questions 1) b. and 2) b. should not be answered without further clarification from the plaintiff.

3. The Norwegian Government

47. The *Norwegian Government* concentrates its written observations on questions 1) c. and 2) c. and argues that no group exemption for distribution and servicing agreements existed in Norwegian law in the period 1 July 1995 to 19 July 1996. This opinion is based on the fact that a new act of Community law is not part of the EEA Agreement until the EEA Joint Committee has decided that it is to be incorporated into the Agreement. A new act of Community law cannot be made applicable to Norwegian nationals and enterprises until it has been implemented into Norwegian law.

48. The principle that individuals and economic operators are not bound by obligations under international law until these have been implemented in Norwegian law follows from the dualistic system which is based on the Norwegian Constitution.

49. The Norwegian Government proposes to answer the above mentioned questions as follows:

> *The decision of the EEA Joint Committee No. 46/96 on the incorporation into the EEA Agreement of Commission Regulation 1475/95 applied from 1 October 1995. The individual EFTA States could however, for constitutional reasons, lay down transitional measures for the period between 1 July 1995 and the date of adoption of the decision, 19 July 1996. The individual EFTA states were thereby for constitutional reasons free to delay the implementation of the Regulation, or to lay down national adaptations to it, until 19 July 1996. Thus, it will be for the national court to interpret national legislation implementing the Regulation and, on this basis, decide whether the prohibition set out in Article 53, paragraph 1, of the EEA Agreement did exist in Norwegian law in September 1995.*

4. The EFTA Surveillance Authority

50. The *EFTA Surveillance Authority* states that it will be for the national court, based on the facts presented, to establish what content of the national law is applicable to the present case. Furthermore, it will be for the national court to decide when an agreement has been entered into and, if so, on what date.

51. According to the EFTA Surveillance Authority, an application for an individual exemption under Article 53 (3) was not made by the parties.

52. Concerning the question whether negotiations about an agreement or an agreement to enter into an agreement amount to an "agreement" within the meaning of Article 53(1) EEA, the EFTA Surveillance Authority refers to the

case law of the ECJ[12] and comes to the conclusion that unless a joint intention of the parties to conduct themselves in a specific way on the market is established, there is no agreement within the meaning of Article 53(1) EEA.

53. If the parties, without having entered into an agreement, have initiated activity which amounts to a "concerted practice"[13] within the meaning of Article 53(1), such activity could be contrary to Article 53(1). Since the parties only seem to have reached the stage of negotiations, no such co-ordination between the parties seems to have taken place.

54. Concerning the question whether a supplier could lay down conditions as to the structure of the ownership of the dealership company without violating Article 53(1) regardless of the aim or effects of the condition, the EFTA Surveillance Authority submits that the condition on a certain shareholder structure would by itself in most cases amount to a restriction of competition within the meaning of Article 53(1). In addition, the restrictive effect of such a condition seems to be strengthened due to the nature of the business in question. In many cases, the establishment of a dealership company would require a substantial amount of capital, which in turn, due to the condition of a shareholder structure, may restrict potential dealers from applying for dealerships. A dealership company will often not be able to finance the whole activity through loans, but will have to have a certain amount of equity capital in order to obtain loans and thus to commence business. Even if it were 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 a minimum equity capital are fulfilled.

55. A condition on specific shareholder structure may also imply a restriction on the shareholder to sell his 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 already-existing companies.

56. It seems that the requirement concerning a specific ownership structure is not a qualitative requirement in the meaning of the *Metro* judgment of the ECJ and would thus, in most cases, be a restriction within the meaning of Article 53(1).

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12 Case 41/69 ACF Chemiefarma NV v Commission of the European Communities [1970] ECR 661; Case T-7/89 S.A. Hercules Chemicals N.V. v Commission of the European Communities [1991] II ECR 1711; Case C-277/87 Sandoz prodotti farmaceutici SpA v Commission of the European Communities [1990] I ECR 45.

13 Case 48/69 Imperial Chemical Industries Ltd. v Commission of the European Communities [1972] ECR 619.

57. Referring to the case law of the ECJ[14], it is stated that the requirement "may affect trade" is satisfied in the present case. It is not necessary to establish that the agreement has in fact affected trade between Member States; it suffices to establish that the agreement is capable of having such an effect. Furthermore, an effect on inter-State trade will normally be presumed where the agreement directly relates to international transactions.

58. The EFTA Surveillance Authority is of the opinion that it will be for the national court to consider whether an agreement is unlikely either to affect trade or to restrict competition to any appreciable extent[15]. Therefore, the national court has to identify the relevant market, i.e. the product and geographical market in which the product competes[16].

59. Having established the relevant product and geographical market, the national court will have to consider whether the agreement affects trade and competition to any appreciable extent in this market.

60. When assessing whether an agreement in a selective distribution system has an appreciable effect on competition and trade, the national court will, firstly; have to consider whether the agreement in its own right has an appreciable effect. If it does not, but the agreement is a part of a network of similar agreements, the tests in *Delimitis*[17] will have to be applied.

61. The EFTA Surveillance Authority takes the view that the requirement of a specific ownership structure would, in most cases, regardless of the aim, be a restriction on competition within the meaning of Article 53(1) in September 1995 and would thus be contrary to that article if the agreement also appreciably affects trade and competition.

62. 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 seems to be a restriction of competition within the meaning of Article 53(1) EEA because it restricts the owner and General Manager from starting competing businesses themselves, since their influence over another undertaking is limited if they are unable to be in a ownership position. Thus, it may be assumed that the interest for these persons in starting up a new business would be reduced. The condition on ownership in competing companies would also prevent other potential dealers from getting access to qualified persons who

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14 Case 42/84 Remia BV and Others v. Commission of the European Communities [1985] ECR 2545; Case 19/77 Miller International Schallplatten GmbH v Commission of the European Communities [1978] ECR 131; Case 172/80 Gerhard Züchner v Bayerische Vereinsbank AG [1981] ECR 2021.

15 Case 5/69 *Franz Völk* v *Établissements J. Vervaecke* [1969] ECR 295.

16 See footnote 11.

17 Case C-234/89 *Stergios Delimitis* v *Henninger Bräu AG* [1991] I ECR 935.

could, in addition to providing capital, also bring valuable knowledge of the trade into other potential dealer companies.

63. A condition to the effect that the General Manager or owners of car dealer companies may not own parts in other competing companies is not a qualitative criterion within the meaning of *Metro*, but amounts, regardless of the aim of the condition, to a restriction of competition within the meaning of Article 53(1).

64. Referring to the *AEG*[18] judgment of the ECJ, the EFTA Surveillance Authority submits that the refusal to admit potential dealers to selective distribution systems which exclude certain qualified dealers is not a unilateral act, but falls to be examined under Article 53(1).

65. Reference is made to the *Hasselblad*[19] case in which the ECJ held that Article 85(1) applies if the system restricts the number of dealers admitted. Hence, in order for a selective distribution system not to fall within Article 53(1), all suitably qualified resellers must be admitted to the system. Therefore, Article 53(1) is infringed if Opel denies access to potential dealers which fulfil the qualitative criteria which Opel could lawfully set.

66. Following the case law of the ECJ[20], nullity as a civil law consequence of breaches of Article 85(1) EC only applies to those provisions or features in the agreement or practice which violate Article 85(1) EC and thus Article 53(1) EEA. The remaining provisions are unaffected by the nullity sanction, provided they are severable from the rest of the agreement. The question of severability is a matter to be decided by reference to the law applicable to the agreement or practice in question. Accordingly, it will be for the national court, in light of the national legislation, to decide on the question of severability.

67. The EFTA Surveillance Authority proposes answering the questions as follows:

> *Questions 1(a),(b) and (c):*
> *A requirement of a specific ownership structure in an agreement between a distributor and a dealer of motor vehicles entered into in September 1995, would, regardless of the aim, in most cases be a restriction on competition in the meaning of Article 53(1) and thus be contrary to this article if the agreement also appreciably affects trade and competition.*
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> *Questions 2(a), (b) and (c):*
> *A clause in an agreement between a distributor and a dealer of motor vehicles entered into in September 1995 which forbids the owners and the managing*

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18 See footnote 9.

19 Case 86/82 Hasselblad (GB) Limited v Commission of the European Communities [1984] ECR 883.

20 See footnote 11.

director from owning shares in other car dealer companies, or companies which own such car dealer companies is, regardless of its aim, contrary to Article 53(1) provided the agreement appreciably affects competition and trade between the Contracting Parties.

Question 3:
According to Article 53(1) an importer of motor vehicles had in September 1995 an obligation to enter into a dealership agreement with all who wished to become dealers provided they met the qualitative criteria the importer lawfully could impose on such dealers.

Question 4:
Negotiations about an agreement or an agreement to enter into an agreement is not tantamount to an "agreement" in the meaning of Article 53(1).

Question 5:
A refusal to accept a dealer into a selective distribution system falls to be examined under Article 53(1) when that refusal can serve to enforce an anti-competitive policy or contractual practice between the other existing dealers.

Question 6:
Article 53(2) applies to those provisions or features in the agreement which violate Article 53(1) provided these parts of the agreement are severable from the rest of the agreement.

5. Commission of the European Communities

68. The *Commission of the European Communities* is of the opinion that a distinction has to be drawn between the ownership structure itself and the requirement that Jan and Kristian Jæger dissolve any links with the Jæger group of companies. A clause requiring the General Manager of a car dealership to hold 51% of the shares in the company holding the dealership does not in itself constitute a restriction of competition. Such a clause ensures that no others have control of the dealer chosen by the supplier.

69. The requirement to dissolve all links with the Jæger group prevents Jan and Kristian Jæger from continuing to have a role or even a financial interest in the business carried on by the group.

70. The Commission emphasizes that Article 53 EEA does not apply to the unilateral acts of undertakings. Only in the hypothesis of a dominant position may a refusal to deal be regarded *ipso facto* as an infringement of the competition rules. Such a refusal would only have an effect on trade between EEA Contracting Parties if such clauses were included in all Opel's dealership

agreements. The combined effect of such clauses in a host of contracts might amount to a significant restriction[21].

71. The Commission states that the case law of the ECJ[22] 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.

72. Distribution agreements in the motor vehicle sector typically contain a number of restrictions of competition. Nevertheless such agreements may be considered beneficial on the ground that they contribute to efficient distribution of motor vehicles.

73. Referring to Regulation 123/85, Regulation 1475/95 and the Decision of the EEA Joint Committee No. 46/96, the Commission assumes that there was a period from 1 July to 30 September 1995 in which no block exemption for motor vehicle distribution agreements was in force in the EEA outside the European Community.

74. After the entry into force of Regulation 1475/95 in Norway, the transitional provision of Article 7 would have had the effect of exempting the clause in question until 30 September 1996.

75. Unlike Regulation 123/85, for contracts entered into after 1 October 1995, Regulation 1475/95 does not authorize the imposition of a single make rule. The new regulation provides for the possibility of multi-brand dealers, so long as different makes are sold in different premises under different management.

76. The Commission considers that the condition of a distinct legal entity does not justify a requirement that the shareholders of each legal entity must be different. A requirement to eliminate all connections with the Jæger group goes beyond what is necessary in order to establish a distinct legal entity. Such a clause is no longer exempted by Regulation 1475/95. It is for the national court to decide whether the remainder of the contract can stand by itself as a valid contract[23].

77. Concerning the question whether a contract may be found to have been concluded on 18 September 1995 and the question whether the defendant is under an obligation to enter into a contract with the plaintiff on the terms agreed

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21 Case 23/67 *S.A. Brasserie de Haecht* v *Wilkin and Wilkin* [1967] ECR 407; Case C-234/89 *Stergios Delimitis* v *Henninger Bräu AG* [1991] ECR I-935; see also the third recital in the Preamble to Regulation 1475/95.

22 See footnote 5.

23 See footnote 11 and Case 319/82 *Société de vente de ciments* v *Kerpen & Kerpen* [1983] ECR 4173.

with the exception of the restrictive clause, the Commission states that Regulation 1475/95 does not establish a code of provisions applicable to motor vehicle distribution agreements[24].

78. Because of the possibility of exemption under Article 53(3) EEA, the Commission considers that at the time of conclusion of the contract it is not possible to know with certainty whether or not a restrictive clause will be considered capable of exemption. Therefore, a national rule of contract law following which the contract between the parties was concluded without the unlawful or void clause would not be applicable in the present case.

79. The Commission is of the view that the defendant is under an obligation to enter into a contract only if it occupies a dominant position on the market in question.

80. The Commission proposes answering the questions as follows:

> *Question 1:*
> *A clause in a contract for the distribution of motor vehicles laying down requirements for the shareholder structure of the corporate entity which is to operate the dealership is not restrictive of competition where it serves merely to identify the individuals with whom the supplier has negotiated the dealership agreement and ensure that those person[s] have effective control of the corporate entity.*
>
> *Question 2:*
> *A clause in a contract for the distribution of motor vehicles which prevents shareholders in the corporate entity operating the dealership from holding ownership interests in other companies which deal in motor vehicles or hold in their turn ownership interests in such companies is restrictive of competition and is thus prohibited by Article 53(1) of the EEA Agreement.*
> *The prohibition in Article 53(1) may be declared inapplicable to certain restrictions of competition by individual decision or by regulation.*
> *Prior to 1 July 1995 an agreement containing a restrictive clause of the kind in question was exempted from the prohibition by virtue of Commission Regulation No. 123/85. No general (block) exemption for restrictive clauses in contracts for the distribution of motor vehicles existed in the EEA between 1 July and 30 September 1995. By virtue of Article 7 of Regulation 1475/95 an agreement containing a restrictive clause of the kind in question entered into on or before 30 September 1995 was exempted from the prohibition for the period from 1 October 1995 to 30 September 1996. There is no block exemption for such a clause in a contract entered into on or after 1 October 1995.*
> *For the period from 1 July to 30 September 1995 and after 1 October 1996 it is open to the parties to a contract containing such a clause to apply for individual exemption.*

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24 Case C-226/94 Grand Garage Albigeois SA and others v Garage Massol SARL [1996] ECR I-651.

Question 3:
Article 53(1) of the EEA Agreement imposes no obligation on an importer of motor vehicles to enter into a dealership agreement.

Question 4:
Article 53(1) is concerned with agreements; it lays down no rules for negotiations which do not culminate in agreements.

Question 5:
Article 53 of the EEA Agreement does not apply to the unilateral acts of undertakings. The fact that a restrictive clause in an agreement is similar to or reinforces restrictive elements in other agreements is relevant in determining whether the restriction is an appreciable one and whether it affects trade between Contracting Parties to the EEA Agreement, so as to fall within the prohibition laid down in Article 53(1).

Question 6:
In accordance with Article 6(2) of Regulation 1475/95, which has effect from 1 October 1995 onwards, the inclusion in a contract for the distribution of motor vehicles of a restrictive clause which is not expressly exempted by that regulation has the consequence that all the restrictive clauses in the contract are void. It is for the national court to determine whether those clauses are severable and whether there remains a contract capable of execution.

Carl Baudenbacher
Judge Rapporteur