II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 4 December 1991

relating to a proceeding under Article 85 of the EEC Treaty
(Case IV/33.157 — Eco System/Peugeot)

(Only the French text is authentic)

(92/154/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation No 17 of 6 February 1962, first Regulation implementing Articles 85 and 86 of the Treaty [1], as last amended by the Act of Accession of Spain and Portugal, and in particular Article 3 thereof,

Having regard to Commission Regulation (EEC) No 123/85 of 12 December 1984 on the application of Article 85 (3) of the EEC Treaty to certain categories of motor vehicle distribution and servicing agreements [2], as amended by the Act of Accession of Spain and Portugal, and in particular Article 10, point 2, thereof,

Having regard to the application submitted by Eco System SA, Rouen (France), on 19 April 1989 alleging infringement of Article 85 (1) of the Treaty by Peugeot SA, in particular its subsidiary Automobiles Peugeot SA, Paris, by obstructing the parallel imports made through the intermediary of Eco System, and requesting the Commission to put an end to such infringement,

Having regard to the Commission Decision of 27 November 1989 to initiate proceedings in this case,

Having given Peugeot SA and Automobiles Peugeot SA the opportunity to make known their views on the objections raised by the Commission, in accordance with Article 19 (1) of Regulation No 17 and with Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19 (1) and (2) of Council Regulation No 17 [3],

Having consulted the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

I. THE FACTS

Nature of the proceeding

1. This Decision arises from an application, pursuant to Article 3 of Regulation No 17, made on 19 April 1989 by Eco System SA, Rouen (France) (Eco System), in respect of the obstacles which it has been encountering since the beginning of March 1989 among the Peugeot and Talbot dealer networks in Belgium and Luxembourg in its activity as authorized agent acting on behalf of French final consumers wishing to purchase a Peugeot vehicle through its services.

2. The complaint is directed against Automobiles Peugeot SA, on the grounds that it is the originator of the abovementioned obstacles, and against the following three resellers on the grounds that they have refused to honour the sales contracts presented through the intermediary of Eco System:

   1. Peugeot Talbot Belgique SA, (PTB), Nivelles,

   2. Peugeot Talbot Service SA, Brussels,

   3. G. Gewelt bvba, Heverlee.

[1] OJ No 13, 21. 2. 1962, p. 204/62.
[2] OJ No.L 15, 18. 1. 1985, p. 16.
[3] OJ No 127, 20. 8. 1963, p. 2268/63.

Eco System's complaint

3. Eco System has asked the Commission to adopt a decision compelling Peugeot SA and Automobiles Peugeot SA to put an end to the serious harmful effects suffered by it as a result of the abovementioned obstacles and, in particular, a circular distributed on 9 May 1989 within the Peugeot-Talbot network in Belgium, France and Luxembourg.

Eco System bases its request on the fact that the circular has prevented it from acting on behalf of French consumers wishing to purchase Peugeot cars in Belgium and Luxembourg and that the resulting damage which it suffered was so considerable as to jeopardize its activities as intermediary.

The undertakings

4. Automobiles Peugeot SA, Paris, a subsidiary of Peugeot SA (PSA), and Automobiles Citroën SA form part of the automobile division of the group (hereinafter referred to as 'Peugeot').

On 9 May 1989, PSA distributed the circular objected to by Eco System, notably in its network in France, Belgium and Luxembourg.

Automobiles Peugeot SA is the industrial division which builds the Peugeot cars that are distributed in France, Belgium and Luxembourg, where half their total sales are achieved. In 1988, the number of registrations of new Peugeot and Talbot cars was 1 052 000 in Western Europe (8 % of the market), 491 800 (22 %) in France, and 42 500 (9,2 %) in Belgium/Luxembourg.

5. Peugeot Talbot Belgique SA (PTB) is a subsidiary of Automobiles Peugeot SA and imports new Peugeot cars for resale to approved dealers (79 dealers, 3 subsidiaries and 383 agents, making a total of 465 [1988 figures]). In 1988, it had a total turnover of Bfrs [. . .] (1) corresponding to [. . .] vehicles.

6. Peugeot Talbot Service SA (PTS), another subsidiary of Automobiles Peugeot SA, is itself one of PTB's approved dealers and distributes new cars through three Belgian branches (two in Brussels and one in Antwerp). In 1988, it had total turnover of Bfrs [. . .] from sales of [. . .] cars, of which [. . .] were delivered to intermediaries acting as authorized agents and, in particular, [. . .] to Eco System.

(1) In the published version of the Decision, some information has hereinafter been omitted, pursuant to the provisions of Article 21 of Regulation No 17 concerning non-disclosure of business secrets.

7. G. Gewelt bvba, Heverlee, is one of Peugeot-Talbot's approved dealers in Belgium. Operating as an independent trader, it achieved a turnover in 1988 of Bfrs [. . .], including Bfrs [. . .] from sales of new Peugeot cars, representing [. . .] vehicles, of which [. . .] were sold through Eco System.

8. Eco System has specialized since 1985 in acting as intermediary for import purchases of cars by French final consumers. In the period from 1 September 1988 to 31 August 1989 it earned commissions totalling some FF [. . .], i.e. an average commission of 3 % on approximately 1 500 cars. It is not possible to determine with any accuracy the total number of cars imported into France by consumers. However, CECRA (the European trade association for dealers and repairers) estimates that some 30 000 cars of all makes were imported in 1988, one third through intermediaries, the distribution by make being very uneven with French makes predominating.

In the period from 1988 to May 1989, customers of Eco System could also use the services of the company Euro Service, Rouen, with which Eco System has staffing links, in order to complete type-approval formalities and other technical and administrative tasks. In 1988, the services provided by Euro Service to its clients represented FF [. . .], and its net profit before tax totalled FF [. . .].

Exclusive and selective car distribution

9. Peugeot and Talbot cars are distributed in Belgium, Luxembourg and France by the same network of approved dealers, on the basis of a standard-form distribution contract. The earlier versions of this standard contract were notified to the Commission before the entry into force on 1 July 1985 of Regulation (EEC) No 123/85 which grants the exemption provided for in Article 85 (3) of the EEC Treaty to certain categories of exclusive and selective motor vehicle distribution and servicing agreements. On 24 December 1985, Automobiles Peugeot SA informed the Commission of a new standard contract, i.e. after the entry into force of the Regulation. The abovementioned notification has been inapplicable since 1 July 1985, as a result of the Regulation, and Automobiles Peugeot SA was informed of this by the Commission by letter dated 23 March 1987.

10. The standard-form distribution contract currently used by Peugeot for the dealers in its distribution network, in particular in France, Belgium and Luxembourg, includes in substance among its provisions the usual clauses contained in exclusive and selective motor vehicle distribution contracts. Peugeot argues that the contract should be exempted under the Regulation.

Differences between price levels in Belgium, Luxembourg and France

11. In 1987, 1988 and 1989, net resale prices, exclusive of tax, for final consumers published in its tariffs and catalogues and recommended by Peugeot to its approved dealers (list prices) were substantially higher (at least 10 % in some cases on 1 January 1989) in France than in Belgium and Luxembourg for the same or comparable new cars supplied under contract programmes.

12. The Commission has undertaken in early 1990 a series of investigations among various manufacturers to assess the real importance of these price differences between different Community countries for all makes. The results are under examination. It can already be said, however, that an increasing number of consumers, especially French consumers, are interested in importing their new cars, notably from Belgium or Luxembourg. On the other hand, it has been confirmed in the course of this procedure that Peugeot dealers have not endeavoured, any more than dealers of other makes, to take advantage of these price differences by building up supplies among themselves.

The circular objected to

13. The circular of 9 May 1989 was distributed by Peugeot SA, a draft version having been sent on 25 April 1989 to the Directorate-General for Competition for information, without having been formally notified. It was sent by Automobiles Peugeot SA to all approved dealers in Belgium, Luxembourg and France through the respective subsidiaries in those countries. Although the circular refers to Eco System by name, it is of general scope, as Peugeot confirmed in its statement to the Commission of 25 August 1989. The circular instructs dealers, on the basis of the distribution contract, to suspend supplies to Eco System, on the ground that it was exercising an activity equivalent to that of a reseller whilst acting in the legal capacity of authorized agent. It instructs the dealers and their agents not to accept orders for new Peugeot or Talbot vehicles from Eco System, whether the latter is acting on its own behalf or on behalf of its principals, and not to deliver such vehicles to it while its organization and activities remain unchanged. The circular stipulates that, in general, the same instructions apply to any other body acting under similar conditions to Eco System.

In substance, the circular puts forward the following arguments:

(a) Any person acting as authorized agent in a professional capacity is exercising an activity which, by virtue of its professional nature, is equivalent to that of a purchaser/reseller.

This was the case with Eco System, in particular, which had developed its activity as authorized agent into a regular business activity and, for that purpose, carried out advertising campaigns in the media, at trade fairs and shows and through computerized telecommunications systems, and had commercial premises some of which fell within the large-scale distribution category.

(b) Authorized agents who themselves assume the economic risks resulting from the transactions effected by their principals are therefore carrying out an activity equivalent to that of a purchaser/reseller.

This applies to Eco System because, despite the undeniable existence of a written authorization to look for the vehicles specified, it assumes in respect of its customers all the risks associated with the transactions which it processes, whether upstream in acquiring the vehicles from its suppliers (price variations, variations in exchange rate parities, discounts, rebates, availability of the model ordered, etc.), or downstream in respect of its customers (price guarantee, compliance with delivery dates, insolvency of customers, cancellation of orders, refunding of sums received by way of reservation, etc.).

(c) An authorized agent whose remuneration is as large as that of an approved dealer but who does not have to bear the same costs and obligations is exercising an activity equivalent to that of a purchaser/reseller.

This also applies to Eco System since it receives remuneration for each of its transactions which greatly exceeds the usual rate of remuneration of intermediaries being at least equal to the usual remuneration of an approved dealer in the Peugeot network, without having to bear the sales and after-sales costs which the approved dealer agrees to bear.

The circular also concludes that the general nature of all the services provided by Eco System is in itself sufficient for Eco System, in its present organization, to be regarded as equivalent to a reseller within the meaning of Regulation (EEC) No 123/85, with regard to the exclusive and selective distribution of cars.

Description of the system operated by Eco System

14. Eco System is an undertaking whose object is to offer French consumers the service of purchasing their car for them in the country where the price is lowest. Its staff, which amounted to some 15 persons at the beginning of 1989, numbered only five by the end of 1989 in addition to six members of staff seconded to Euro Service (see above). It also has a network of

correspondents throughout France, paid on commission, who account for 50 % of its transactions. The Paribas Bank acquired 10 % of its capital in 1988. Eco System does not provide any guarantee service, after-sales service and does not take its customers' used cars in part-exchange. In practice, it obtains written authorizations from interested French consumers through advertising in the media. Eco System does not keep a stock of cars, but simply exhibits sold cars awaiting delivery in its showrooms, one at Rouen, the other on Avenue des Champs Elysées in Paris.

15. In practice, Eco System operates essentially between Belgium and France; according to information obtained, the procedure is as follows:

The purchaser gives Eco System, using a standard form, prior written authority, for a limited period, to look for and acquire on his behalf a vehicle of a given make, model and specification, at a maximum price stipulated in French francs. The authorization provides details of all VAT costs and other taxes and all other costs and expenses due to transport and import formalities and operations, and a commission for Eco System generally set at between 2 % and 3 %, not including any services rendered by Euro Service. Together with the written authorization, the purchaser gives Eco System a down-payment on the price of the car, usually 10 %. In addition to the price, the place of delivery in France, the delivery period and the date of expiry of the authorization are specified in writing. The car is always invoiced by the selling dealer directly in the name of the purchaser and not in that of Eco System, in Belgian francs, tax-free for export. The purchase price is paid to the selling dealer immediately on delivery of the vehicle to Eco System or a financial body. Immediately after the delivery to the final customer, at the place stipulated in the authorization, the customer in turn pays Eco System.

A publicity brochure produced by Eco System in the form of a practical guide sets out in detail all the services provided by Eco System and Euro Service for their customers. At the same time as the events in question, a replica of the brochure, although in a different colour, was printed and distributed by the large chain store, Carrefour, under its own name. At this time, in September 1988, Eco System concluded a cooperation agreement with this supermarket chain which granted them the use of a stand in a shopping centre in the suburbs of Paris.

The particular conditions of the transaction *vis-à-vis* the final customer are as follows. Eco System transfers or arranges for the transfer to Belgium of the entire sum required to pay for the purchase, takes or arranges for the accepting of physical delivery of the vehicle and organizes its transport to Rouen, the usual place of customs clearance. From the outset, the vehicle is temporarily registered in Belgium in the name of Eco System's customer, and Eco System guarantees final registration in France in accordance with the rules in force. All import, transport, registration and insurance formalities and costs are settled and paid for by Eco System on behalf of the purchaser. The advance on the price enjoyed by the purchaser through Eco System amounts to three or four days, and the operations are carried out as follows. Initially, the Belgian dealer informs Eco System by telefax that the vehicle specified in the authorization is available on his premises. Eco System immediately advises the customer, who informs his motor vehicle insurance company. Secondly, Eco System receives the invoice and gives the necessary instructions to pay the seller in Belgium. The purchaser accordingly becomes the owner and is as such solely responsible for the vehicle on the premises of the dealer as soon as the temporary registration plate in his name is attached. The purchaser is informed orally by Eco System in advance and in detail of all these elements in the process and their implications, particularly with regard to liability. Thirdly, the vehicle is brought by a road haulage operator to Rouen, where it is cleared through customs by Eco System (or Euro Service) which looks after it for several hours before it is actually made available to the purchaser, who immediately receives a provisional bill and pays Eco System. The pre-financing of the purchase accordingly lasts four days in most cases. The final, itemized bill is sent to the purchaser later.

Any additional services provided by Euro Service at the request of the purchaser are invoiced directly for an amount which is generally between FF 1 000 and 3 000 depending on the model and the destination for delivery. Such services include transport, storage, final registration and cleaning of the vehicle.

16. Between 1986 and 1989, up to the date of the circular, Eco System's imports from Belgium on behalf of its customers were as follows:

Vehicle

	Peugeot	Other makes	Total
1. 4. 1986 to 31. 3. 1987	483	944	1 427
1. 4. 1987 to 31. 3. 1988	904	1 845	2 749
1. 4. 1988 to 31. 3. 1989	1 211	2 777	3 988

Before March 1989, because of market circumstances, Eco System's sources of supply were generally situated in Belgium. These were mainly approved dealers belonging to the Peugeot network in Belgium, but also included some dealers in France. Eco System's situation deteriorated seriously as a result of the obstacles Peugeot put in its way from March 1989 and of the circular that was issued in May, as shown in the table below.

Number of cars imported by Eco System

	Peugeot from Belgium/Luxembourg		Other		Total	
	1988	1989	1988	1989	1988	1989
January	78	87	81	275	159	362
February	86	93	70	294	156	387
March	96	46	173	246	269	292
April	102	7	214	163	316	231
May	106	10	261	259	377	321
June	137	34	249	182	386	252
July	134	3	231	134	365	142
August	102	0	194	46	296	46
September	64	8	111	55	175	73
October	98	6	171	106	269	127
November	119	1	260	89	379	107
December	122	0	262	73	384	88

In particular, the cooperation between Eco System and Carrefour which lasted from November 1988 to November 1989 allowed Eco System to complete the following number of transactions:

Month	Orders
November 1988	94
December 1988	106
January 1989	101
February 1989	73
March 1989	45
April 1989	38
May 1989	17
June 1989	21
July 1989	8
August 1989	8
September 1989	7
October 1989	8
November 1989	8

Eco System states that the Belgian and Luxembourg networks of makes other than Peugeot learned of PSA's circular and, under its influence, became less willing to undertake or continue supplies to Eco System; moreover, the predominance of French makes in its sales reflects demand on the French market, where it carries on its business, and it is therefore not able to restore balance in its sources of supply by switching to non-French makes.

Proceedings

17. The complaint lodged by Eco System on 19 April 1989 was accompanied by a request for interim measures on the ground that there was a risk of serious and irreparable damage.

On 27 April 1989, after receipt of the complaint, the Commission sent Peugeot-Talbot Belgique, Peugeot-Talbot Service, Brussels, and G. Gewelt, Heverlee (Belgium) a request that they state their position and a request for information based on Article 11 of Regulation No 17. The Parties concerned replied on 26 May and 9 and 15 June 1989. On 28 July 1989, the Commission sent PSA and Automobiles Peugeot SA, Paris, by telefax confirmed by letter on 1 August, an initial statement of its position, along the same lines as this Decision, with regard to the circular, and Peugeot replied on 25 August maintaining its previous position. On 28 September 1989 the Commission unsuccessfully requested Peugeot to restore to its dealers the freedom to supply Eco System. Two statements of objections were therefore sent on 6 December 1989 to the two companies, one on the imposition of interim measures and one as the principal statement of objections. The Parties replied on 26 December 1989 and 26 January 1990 respectively, maintaining the same position. Requests for additional information were sent on

3 and 5 October 1989 to Peugeot-Talbot (Belgium) and to Peugeot SA and Automobiles Peugeot SA, Paris, which replied on 11 and 20 October.

The Parties were heard on 19 March 1990. At the hearing, statements were made on behalf and at the request of Peugeot by the European professional associations CLCA/CCMC (Liaison Committee of Automobile Manufacturers and Committee of Common Market Automobile Constructors), and CECRA (European Committee for the Car Trade and Car Repairs). The BEUC (European Bureau of Consumers' Union) spoke in support of Eco System.

Finally, on 21 January 1991, Peugeot sent the Commission a last written statement which reorganized and supplemented the different series of arguments put forward by it and by the CCMC/CLCA and CECRA in the various stages of the proceedings.

18. On 26 March 1990, the Commission adopted a decision imposing interim measures on Peugeot. The decision, which did not prejudge the substances of the case, only required Peugeot to suspend its circular of 9 March 1989 to enable Eco System to negotiate and possibly to realize, in the Belgian, Luxembourg and French networks, under normal market conditions, a volume of transactions equal to that of its sales in the year preceding the sending of the circular of 9 May 1989. On 24 April 1990, Peugeot lodged an appeal before the Court of First Instance of the European Communities asking that the interim measures be withdrawn and their application suspended. Peugeot's application for suspension was rejected by order of the Court of 21 May 1990. Furthermore, the Court, in its judgment of 12 July 1991, rejected the application for withdrawal, ruling that none of the arguments invoked were valid; an appeal against this judgment was lodged before the Court of Justice by Peugeot on 12 September 1991.

The arguments put forward by Peugeot

19. In the preceding oral and written comments, Peugeot has put forward its view regarding principles and facts. This can be summarized as follows. With regard to principles, Peugeot considers that the circular objected to forms part of its exclusive and selective distribution system which is exempted under Regulation (EEC) No 123/85. The circular simply constitutes a measure for the application of its standard-form distribution contract, in particular the provisions concerning out-of-area sales through an intermediary. In particular, Article V of the contract requires the dealer to check whether the intermediary has effectively received prior and due authorization from the customer, to draw up all the documents in the name of that customer and to inform the principal of the sale. Peugeot maintains that the Regulation enables the principal to take action to protect the exclusive and selective nature of its distribution network if the authorized agent, irrespective of the existence of a written authorization, exercises an activity equivalent to that of a reseller. Peugeot considers that Eco System exercises such an equivalent activity in several respects and that it is therefore justified in refusing to supply it.

20. As regards facts, there are a number of indications which, according to Peugeot, taken either separately or as a whole, both support and add to the reasoning summarized in the circular sent to its dealers.

— The first concerns the considerable freedom of action available to agents, compared with the constraints and charges imposed on network dealers, which gives unreasonable scope to the intra-brand competition envisaged in the 25th recital of Regulation (EEC) No 123/85.

— The second relates to a number of characteristics of Eco System, referred to in the summary note sent by Peugeot on 25 January 1991 to the Commission.

Firstly, Eco System pursues its activities in a professional capacity and therefore operates as an authorized reseller within the meaning of the Commission notice concerning Regulation (EEC) No 123/85 (point I.3, second sentence) [1]. Evidence of this lies in the lasting nature of the services it provides and their characteristics (type of advertising, fixed-price tariffs, display of vehicles).

Secondly, Eco System, in bearing the risks inherent in purchase and resale, exceeds the function of assistance which all legal systems define as characteristic of an intermediary provider of services. This is borne out by its field of activity (risk that the purchasers in name will not take delivery of the vehicles, risks associated with storage prior to delivery, credit risk in the event of the insolvency of purchasers, risk of fluctuating exchange rates and increased purchase prices) and its behaviour (no obligation to pass on benefits to purchasers, no obligation to reflect such benefits in full or to provide purchasers with a purchase invoice, acting as intermediary for dealers whilst maintaining business relations with them, abnormally high remuneration for a simple intermediary compared with commercial practice, use of large-scale distribution systems such as Carrefour).

21. In conclusion, Peugeot considered that there was no basis for the statement of objections of 6 December 1989 and that it would be unjustified to withdraw the exemption.

[1] OJ No C 17, 18. 1. 1985, p. 4.

The arguments put forward by Eco System

22. Eco System, for its part, argues that its activities as authorized agent are professional in nature and considers them compatible with Peugeot's exclusive and selective distribution system within the meaning of Regulation (EEC) No 123/85. In its complaint, it refers in particular to the provisions of Article 3, point 11, of the Regulation concerning written authority and to the Sixteenth Competition Report (professional character of the intermediary). It stresses that its activities fall within the framework of the Regulation and cannot be deemed equivalent to the resale of vehicles. It therefore rejects all of Peugeot's arguments set out above.

II. LEGAL ASSESSMENT

A. Applicability of Article 85 (1) and non-applicability of Article 85 (3)

a. *The circular*

23. The circular in question, which was sent by Peugeot to its dealers in Belgium, Luxembourg and France, infringes Article 85 (1) of the EEC Treaty for the following reasons.

The circular is not a unilateral measure by Peugeot. On the contrary, it is an integral part of the commercial relations between the manufacturer and the distributors in its network; those relations, for their part, are based on a standard distribution contract signed by all the Parties concerned. The purpose of the circular is to spell out the obligations which the contracts, as interpreted by Peugeot, impose on distributors belonging to its sales network. Consequently, the mere transmission by Peugeot of the circular to its dealers contains all the features of an 'agreement' within the meaning of Article 85, without it being necessary to establish that the circular was explicitly or tacitly accepted by those to whom it was sent [1]. The latter demonstrated their consent by following the instructions issued by Peugeot.

The agreement described above has as its object and effect the restriction of competition within the common market, within the meaning of Article 85 (1). Since it is implemented by all undertakings in the Peugeot network in the countries concerned, it is designed to prevent, and generally does prevent, the export to France of Peugeot vehicles purchased in Belgium or Luxembourg by French consumers using the services of Eco System. The sensitive nature of this restriction derives from the Peugeot make's important position on the Community market. Since the agreement, by definition, relates to cross-border trade, it is likely to affect trade between Member States; this has sensitive consequences, since, although the Peugeot vehicles reimported into France by Eco System account for only a small proportion of Peugeot sales, parallel imports are likely to make a significant contribution to reducing price differentials within the Community, while the circular sent out by Peugeot to the distributors in its network helps to perpetuate the partitioning of national markets.

Moreover, the agreement in question, as it results from the said circular, does not qualify for the block exemption provided for in Regulation (EEC) No 123/85, since the clauses prohibiting the import or export of cars are not included in the competition-restricting obligations allowed by the Regulation.

24. Lastly, the agreement in question cannot qualify for individual exemption, either. First, under Article 4 (1) of Regulation No 17, a decision to apply Article 85 (3) of the EEC Treaty cannot be issued until the agreement has been notified. To date, the Commission has not been notified of the circular in question. The mere transmission of the circular to the Directorate-General for Competition, which took place on 25 April 1989, does not constitute notification, since it does not meet the formal requirements laid down for that purpose by Commission Regulation No 27 [2], as last amended by Regulation (EEC) No 2526/85 [3]; furthermore, such transmission did not give the Commission the associated information which it needs to assess the situation.

Secondly, in any case, even if the circular had been notified in the proper way, an individual exemption could not be granted. It is apparent that an agreement designed to prevent parallel imports between Member States does not satisfy the criteria for applying Article 85 (3) of the EEC Treaty. In particular, it is difficult to imagine that such an agreement could allow consumers a fair share of the resulting benefit and offset the threat which it represents for competition.

b. *Peugeot's distribution system*

25. Faced with clauses designed to prevent the parallel import or export of contract goods, the Commission may, by individual decision, and pursuant to Article 10 of Regulation (EEC) No 123/85, withdraw the benefit of the application of the

(1) See judgment of the Court of Justice of 17 September 1985, Ford Werke AG and Ford of Europe Inc. v. European Commission; joint cases Nos 25 and 26/84, [1985] ECR 2725.

(2) OJ No 35, 10. 5. 1962, p. 1118/62.

(3) OJ No L 240, 7. 9. 1985, p. 1.

Regulation where the manufacturer or an undertaking within the distribution system continuously or systematically, and by means not exempted by the Regulation, makes it difficult for final consumers or other undertakings within the distribution system to obtain contract goods or corresponding goods within the common market.

Since the circular issued by Peugeot, when examined in context, constitutes an inseparable element of the selective and exclusive distribution contracts currently in force between Peugeot and its distributors in France, Belgium and Luxembourg, and since it contains Peugeot's interpretation of Article V of the company's standard contract, the exemption provided for by the Regulation may be withdrawn in respect of all such contracts.

Peugeot's behaviour exceeds the limits for exemption by category and cannot, for the reasons explained below, be justified by the characteristics or the activities of Eco System.

26. Intra-brand competition

(a) Peugeot's arguments run along the following lines:

Although the Commission has stated in the 25th recital of Regulation (EEC) No 123/85 that there should, to a certain extent, be some intra-brand competition, Eco System has more freedom of action than an approved dealer in the system: in particular, it can display several makes of vehicle in its showrooms, including makes for which a local approved dealer may already hold exclusive rights. It can also seek and recruit agents throughout France without being restricted to a specific area of activity. Thus it is in a position to compete against approved Peugeot resellers, who are not similarly placed, for the same brands, which runs counter to an exclusive and selective distribution system. The 'certain extent' allowed for intra-brand competition by the abovementioned 25th recital has thus been exceeded.

These arguments cannot be accepted for the following reasons:

(b) Regulation (EEC) No 123/85 was intended, *inter alia,* to enable individual consumers to purchase a new vehicle in a Member State other than their own where conditions as regards price and quality were more favourable. In this respect the mobility of the final consumer is intrinsic to the exclusive and selective distribution system provided for in the Regulation. In the case in point, only the substantial price differences between France and Belgium explain why French consumers take advantage of their mobility to purchase cars in Belgium. Eco System's activity as intermediary does not therefore introduce an 'unreasonable' degree of intra-brand competition; it simply renders the conditions under which they exercise that mobility more practicable.

Eco System cannot be regarded as an independent distributor. The essence of its activity is the close relationship between authorized agent and final consumer, who is represented by the agent and who benefits from the latter's services.

With regard to its simultaneous display of different makes of car, Eco System has opted — in keeping with its market — to act as an intermediary for several makes. As a service intermediary, it cannot therefore be accused of living off the sales networks of automobile manufacturers: the two trading activities are distinct and cannot be compared. Lastly, no breach by dealers of their contractual obligations has been established or invoked in this particular case.

27. The professional activities of the authorized agent

(a) As regards the fact that Eco System sets itself up as an independent source of supply for consumers, or in other words that it exercises its activity as an authorized agent on a professional basis, Peugeot's arguments may be summarized as follows:

— Eco System supplies its services on a permanent and not a sporadic basis by means of advertising, catalogues, Minitel, etc.,

— Eco System actively seeks customers, in particular by means of commercial promotions in the form of advertising relating directly to vehicles and not to its own activity as intermediary. Peugeot places particular emphasis in this respect on the brochures and press handouts, the tariffs published by Eco System and the fact that it displays cars at trade fairs and motor shows and in its own showrooms. According to Peugeot, these characteristics taken as a whole make it look so much like a dealer that the inevitable conclusion — in the public's eyes — is that Peugeot cars are being offered for sale.

(b) As the Commission has already stated in the 25th recital of Regulation (EEC) No 123/85, it considers that vehicle distribution agreements can be exempted so long as effective competition exists, not only between manufacturers' distribution systems but also to a certain extent within each system within the common market. In particular with regard to intra-brand

competition, the Commission's aim was not simply to ensure mobility for individual consumers but to see that they really benefit therefrom.

The Commission also considers that 'the European consumer must be able to make use of the service of individuals or undertakings to assist in purchasing a new vehicle in another Member State' (1). Therefore, any contract clause which is specifically designed to protect quantitative selection in accordance with Article 3, point 10 of Regulation (EEC) No 123/85 (i.e. the ban on selling to resellers not belonging to the distribution system) cannot be extended to exclude professional intermediaries when they are bound to a final consumer by a prior written authority to purchase and accept delivery of a specified motor vehicle (Article 3, point 11 of Regulation (EEC) No 123/85 referred to above).

The Commission has already stated its views on this matter in its Sixteenth Competition Report (1986, point 30, paragraph 3):

'Where intermediaries are involved, the Commission has always refused to accept as a valid ground for refusing to sell to an intermediary who has a written order to purchase a new vehicle the fact that he is collecting orders professionally or is charging for his services.'

(c) In such conditions, the various professional services provided, involving the search for favourable purchasing terms, the concluding of purchasing agreements that are immediately binding on the final consumer and principal, and the implementation of such agreements, must not be hindered simply on account of their professional nature. There is no doubt that consumers wishing to purchase a new car in another Member State are still faced with difficulties. The transaction can be extremely complex and difficult: e.g., comparing the specifications and prices of models on sale in the different countries, finding the right seller, organizing purchase and delivery, and sorting out customs and registration procedures, sometimes with the added complication of language barriers. Such problems can deter many consumers from attempting to import a car themselves. That is why it is essential, if parallel imports are to take place in practice, for consumers to be able to make use of the services of a professional intermediary, i.e. persons whose job it is to supply appropriate advice and assistance and to act as agents for the purchase and actual import of the vehicle.

(d) Lastly, as is clear from, among others, the Sixteenth Competition Report referred to above (point 30, last paragraph), the professional nature of an agent with a prior written authority is not in itself contrary to the contractual obligations of approved resellers covered by Article 3, points 10 and 11 of Regulation (EEC) No 123/85. In particular, the simple fact that Eco System can announce the prices it hopes to obtain, carry out advertising campaigns in the media, at trade fairs and shows, or use computerized telecommunications systems and showrooms to that end cannot justify refusal to deliver on account of its 'professional nature'. This remains true as long as such activities are confined to helping to promote Eco System's services and clearly show that the company — subject to what is set out below under point 30, concerning the supermarket chain Carrefour — is not acting as a seller of cars and that the cars displayed in the showroom are still vehicles being handed over on the final customer, who has authorized their display, and which are therefore not for sale.

Accordingly, the simple fact that Eco System may use sales representatives operating under its control and paid on a commission basis is not a sufficient justification, either, for refusing delivery on account of its 'professional nature'.

28. Assistance to third parties

The arguments put forward by Peugeot on this point may be summarized as follows, with regard to risks borne and behaviour.

29. As to the risks which it incurs, Eco System, according to Peugeot, does not simply provide final consumers with assistance since it also bears the following four types of risk normally associated with resale:

— the risk of being left with a vehicle should a customer withdraw before delivery. It is then Eco System's responsibility (as they have already paid for the vehicle) and not the dealer's to sell the vehicle and if necessary to take action to recover sums committed by it,

— the risks associated with storage since, if a vehicle is lost or damaged, or causes an accident, whilst in

(1) Commission Notice of 12 December 1984 concerning Regulation (EEC) No 123/85, point I.3.

the custody of Eco System, the latter cannot claim compensation from either the supplier or the final purchaser, and its liability may be incurred,

— a credit risk: should a customer prove insolvent (e.g. a dishonoured cheque), Eco System must bear the full cost of the vehicle for which it has paid an advance or take action to recover sums owed. Eco System can only try to reduce the risk (by checking customer solvency, obligatory guarantees, insurance) but cannot eliminate it,

— a financial risk, since Eco System covers any fluctuations in exchange rates or prices in the period covered by the written authority.

Contrary to Peugeot's claims and since, as pointed out above, Eco System at no point owns the vehicle in question, none of these four risks is borne by Eco System to the extent that its activity could be considered equivalent to resale. The first three risks — that of having an unsold vehicle on its hands, storage risk and credit risk — are not inherent in the system of authorization that Eco System has conceived, since they can only occur by accident and are not the normal consequence of transactions that take place as planned. In addition, such risks arise only during the short period, three or four days at most, between collection of the vehicle by Eco System and delivery to the purchaser. They are not in any way comparable to the risks attached to ownership, which from the start is held solely by the purchaser in full knowledge of the facts; they cannot therefore, for the purposes of Regulation (EEC) No 123/85 and the notice of 12 December 1984, justify the circular in question.

The financial risks referred to, resulting from exchange rate or price fluctuations, have ceased to exist in the present organization of Eco System. On the one hand, Eco System is committed only as to means, i.e. the proposed purchase of a vehicle for a maximum price, and not as to result, i.e. it has not quoted a firm price. On the other, in order to cover the risk of changes in exchange rate parities during a transaction, it offers its customers a system of premiums in respect of exchange rate changes which acts as a compensation fund.

30. As to its behaviour, Eco System, according to Peugeot, also exceeds the limits of providing assistance to third parties in view of its behaviour towards customers and suppliers alike:

— it suffers the losses or benefits from the gains resulting from its transactions and also offers its customers a guaranteed price, whereas an intermediary really acting on a customer's behalf must pass on any profits or losses,

— in particular, it is not required to pass on all the benefits it obtains in the form of purchase discounts. Peugeot gives the example of a consumer who failed to receive a statement of accounts from Eco System,

— nor is it required to give the purchase invoice to its customers, who are therefore not really able to verify the accounts,

— in any one case, it acts on behalf of other third parties in addition to its customer: i.e. on behalf of the dealer since it has special links with its customary suppliers (reserved stock, special terms for grouped sales). Peugeot gives two examples of continuous business relationships between Eco System and certain Peugeot dealers: Gewelt of Heverlee, and Transco in Antwerp,

— its transactions, taking account of those carried out by Euro Service, provide it with a total remuneration of the same size as that of an approved dealer, although naturally it does not have to bear the same costs or constraints. The amount stems from the difference between the purchase price Eco System pays its supplier and the price it charges its customer, which is equivalent to a gross trading margin and actually equal to the gross margin of a Belgian dealer,

— it makes use of distribution through large supermarkets; in particular, its recent collaboration with the Carrefour chain, until Peugeot's action put an end to it, altered the nature of its activities and in any event was far from constituting assistance to third parties.

None of the behaviour referred to by Peugeot is engaged in by Eco System in a manner which would constitute an activity equivalent, in this context, to that of a reseller, for the following reasons and in the following order.

In the first place, Eco System operates on the basis of an authorization to search for a vehicle which in every case involves a detailed and exhaustive statement of accounts which is sent to the customer. On the basis of the information obtained in the course of this proceeding, there is no reason to believe, and Peugeot has not provided any proof, that it fails to pass on in full to its customer any gains or losses resulting from the transaction. The invoice, in particular, is in the name of and addressed to the customer, and includes any discounts obtained. A careful examination of the specific case referred to by Peugeot (an invoice and written authority in the name of Mr Bourdeau), shows that this transaction followed the usual procedures and included a detailed statement of accounts.

Secondly, as regards Eco System's special relation with its suppliers, the Commission has not identified, and Peugeot has not supplied, any elements which point to collusion between Eco System and any dealer for the purpose of reserving stocks of new vehicles for the former or obtaining exceptional special terms. In this respect, Peugeot is indeed able to cite two instances of special business relationships involving Gewelt bvba and Transco NV. Nevertheless, there is nothing in the file to prove that these relationships reached the stage of formal contracts to supply Eco System.

Thirdly, and in the light of the foregoing, the only visible remuneration for the import activities of Eco System, and, where appropriate, its Euro Service branch, is the amount expressed as a percentage of the invoice price, at the rate stipulated in the written authority. In the system operated by Eco System, it does not normally benefit from any discounts offered by a dealer — except in the event of fraud, which has to be proven — if its commission is based on the agreed final sales price and since its statement of accounts is detailed and exhaustive. In addition, a dealer's costs in terms of investment in equipment, stock, staff, etc. and his advantages (exclusive territory) should not be compared with those of an intermediary on the pretext that the latter does not provide an after-sales service. Lastly, pricing, and the breakdown of costs by general and specific costs is the responsibility of the trader and not of its original suppliers.

Finally, like any enterprise, a motor vehicle agency is free to promote its specific activities so as to ensure success. In the case in point, there is no reason to deny Eco System the right to establish certain relations with large-scale distribution methods and to use computerized telecommunications or fair advertising, specialized trade fairs and shows. In particular with regard to that objective, Eco System was rightly able to put vehicles imported for and on behalf of its customers on public display. These constitute commercial activities and practices which are both compatible with its status as authorized agent and inherent in its professional nature and which did not give rise, in Eco System's case, to confusion about its not being part of Peugeot's dealer network or to a use of distinctive signs that breaches the rules of civil law on this matter. In this particular case, the various logos, names or makes of car used by Eco System in its advertising to date — according to the evidence unearthed during the investigation — have clearly shown that the company is an authorized agent. As regards Eco System's collaboration with the Carrefour chain, there were admittedly some doubts about the advertising (see point 15 above). But it is not possible to use this against Eco System and conclude that its activity has become equivalent to reselling. In fact, the reaction of Peugeot was contrary to the principle of proportionality. In this respect, the following three facts are decisive:

— only the front page of the catalogue published at the time on Carrefour's behalf was equivocal, since all the information about Eco System's real role was to be found inside,

— this cooperation only lasted for some months, as can be seen in the third table set out under point 16,

— it would have been sufficient for Peugeot to restrict its reactions to this cooperation without having undertaken a global and definitive action against Eco System.

31. The Commission therefore concludes that the various arguments put forward by Peugeot do not, whether singly or as a whole, justify the refusal to supply to Eco System organized by Peugeot and its dealers on the ground that, according to the latter, Eco System had exercised an activity as an agency for motor vehicles which was equivalent to that of a reseller within the meaning of Regulation (EEC) No 123/85 and the notice of 12 December 1984 and which was therefore outside the scope of the Regulation.

In view of the foregoing, therefore, Eco System is an authorized agent for the purposes of Article 3 (11) of the abovementioned Regulation (EEC) No 123/85.

32. Accordingly, the circular distributed by Peugeot and the ban on supplies it contains must be withdrawn.

B. Applicability of Article 10, point 2 of Regulation (EEC) No 123/85

33. Pursuant to Article 10, point 2 of Regulation (EEC) No 123/85, the Commission may withdraw the benefit of the application of the Regulation, where it finds that in an individual case an agreement which falls within the scope of the Regulation nevertheless has effects which are incompatible with the provisions of Article 85 (3) of the Treaty, and in particular, where the manufacturer or an undertaking within the distribution system continuously or systematically, and by means not exempted by the Regulation, makes it difficult for final consumers to obtain contract goods within the common market.

The Commission considers, however, that Peugeot should be given time to comply with the Decision. It has therefore decided to withdraw the benefit of the application of Regulation (EEC) No 123/85 from the Peugeot distribution system in Belgium and Luxembourg and from the distribution agreements concluded in this connection between Peugeot SA and Automobiles Peugeot SA and the undertakings in the two distribution systems concerned. The withdrawal will take effect two months after the date of notification of this Decision unless, within the stipulated period, Peugeot sends a new circular replacing that sent on 9 May 1989 to all its dealers and subsequently refrains from any conduct having the same effect.

C. Applicability of Article 15 (2) of Regulation No 17

34. The Commission considers that the explanatory nature of this Decision, which on the one hand is the first of its type and on the other hand provides a necessary clarification of certain points concerning the activities of authorized agents within the meaning of Regulation (EEC) No 123/85 and the notice concerning that Regulation, makes it unnecessary to impose fines,

HAS ADOPTED THIS DECISION:

Article 1

The Commission considers that the sending of the circular of 9 May 1989 by Peugeot SA and Automobiles Peugeot SA to their dealers in France, Belgium and Luxembourg and its implementation by the latter, which had the effect of halting all supplies of Peugeot vehicles to Eco System, constitute an agreement or at least a concerted practice prohibited by Article 85 (1) of the EEC Treaty.

Article 2

Peugeot SA and Automobiles Peugeot SA must, within two month of the notification of this Decision, send the dealers referred to in Article 1 a new circular cancelling that of 9 May 1989 in order to put an end to the infringement; the dealers must in future refrain from any behaviour that would perpetuate the effects of the circular complained of.

Article 3

The benefit of the application of Commission Regulation (EEC) No 123/85 of 12 December 1984 shall be withdrawn from the standard contract for the exclusive and selective distribution of Peugeot vehicles in Belgium and Luxembourg with effect from the date on which the period referred to in Article 2 expires, unless the Parties concerned have complied in good time with the requirement set out in that Article.

Article 4

This Decision is addressed to:

Peugeot SA
75 avenue de la Grande Armée
F-75116 Paris

and:

Automobiles Peugeot SA
75 avenue de la Grande Armée
F-75116 Paris.

Done at Brussels, 4 December 1991.

For the Commission
Leon BRITTAN
Vice-President