ANNULMENT (CHEMICALS): THE BAYER CASE

Subject: Annulment (of Commission Decision)
Fines
Distribution arrangements
Parallel exports

Industry: Chemicals; pharmaceuticals
(Implications for other industries)

Parties: Bayer AG
European Federation of Pharmaceutical Industries' Associations
Commission of the European Communities
Bundesverband der Arzneimittel-Importeure eV
(The EFPIA intervened in support of Bayer, the BAI in support of the Commission)

Source: Judgment of the Court of Justice of the European Communities in Case T-41/96, (Bayer v Commission), dated 26 October 2000; Court of Justice press release 78/00

(Note. This is a comparatively rare type of case, in which the Decision of the Commission has been annulled in its entirety. As the Court's press release points out, the case was decided largely on the facts: the Commission simply failed to persuade the Court that it could provide adequate evidence of the existence of an infringement. For this reason, the judgment is not reproduced in full in the report which follows. However, there are several passages in the Court's judgment in which the law is reviewed, with particular reference to the standard of proof required and the extent to which an agreement may be inferred from the parties' conduct, in the absence of a clear indication that an agreement was signed or intended.)

Press Release

The Commission has not proved the existence of an agreement between Bayer and its Spanish and French wholesalers. The fine of €3m is annulled. The continuance of commercial relations between, on the one hand, a manufacturer who unilaterally changes his distribution policy and, on the other, wholesalers who are clearly opposed to that new practice, does not amount to an acquiescence by the wholesalers in that policy, and is therefore not in itself sufficient to establish the existence of an agreement prohibited by Community competition law.

The Bayer Group is one of the main European chemical and pharmaceutical groups, represented in all Member States by national subsidiaries. It produces and markets a range of medicinal products for treating cardio-vascular disease under the trade name "Adalat" or "Adalate". In most Member States, the price of

medicinal products is fixed, directly or indirectly, by the competent national authorities. Between 1989 and 1993, the price of Adalat in France and Spain was much lower than that in the United Kingdom. Those price differences of about 40% caused Spanish wholesalers (from 1989) and then French wholesalers (from 1991) to export that medicinal product in large quantities to the United Kingdom. That practice of parallel imports caused a loss of turnover of DM 230m for Bayer's British subsidiary.

The Bayer Group then unilaterally changed its supply policy so as to fulfil orders from Spanish and French wholesalers only at the level of their habitual needs. On 10 January 1996, following complaints by some of the wholesalers concerned, the Commission adopted a decision requiring Bayer to amend its practice, which the Commission held to be contrary to Community competition law, and fined it €3m.

The Court of First Instance has annulled that decision, following an action brought by Bayer against it. The Court considers that the Commission has not proved that Bayer and its Spanish and French wholesalers made an agreement to limit parallel exports of Adalat to the United Kingdom. In the eyes of the Court, neither the conduct of the Bayer Group nor the attitudes of the wholesalers constitute elements of an agreement between undertakings. None of the documents submitted by the Commission contains evidence of an intention by Bayer to prohibit exports by wholesalers or evidence that it sought to obtain their agreement to its new supply policy designed to limit parallel exports. Nor has the Commission demonstrated that the wholesalers adhered to that policy, their reaction indicating, on the contrary, an attitude of opposition.

The Commission has therefore not proved the existence of acquiescence by the wholesalers, express or implied, in the attitude adopted by the manufacturer. Finally, the Court of First Instance rejects the argument that the Commission may legitimately consider it sufficient, for the purposes of proving the existence of an agreement, to find that the parties have continued to maintain their commercial relations, and points out that the very concept of an agreement is based on a concurrence of wills between economic operators.

Judgment

62. It is settled case-law that, where it hears an action for the annulment of a decision applying Article 85(1) of the Treaty, the Court of First Instance must undertake a comprehensive review of the question whether or not the conditions for applying Article 85(1) are met (Case 42/84, *Remia* v *Commission*, paragraph 34; Joined Cases 142/84 and 156/84, *BAT and Reynolds* v *Commission*, paragraph 62).

63. Under the first paragraph of Article 85(1) of the Treaty:
"[T]he following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which

have as their object or effect the prevention, restriction or distortion of competition within the common market ..."

64. It is clear from the wording of that article that the prohibition thus proclaimed concerns exclusively conduct that is coordinated bilaterally or multilaterally, in the form of agreements between undertakings, decisions by associations of undertakings and concerted practices.

65. In this case, it is found in the Decision that there is an agreement between undertakings within the meaning of that article. The applicant maintains, however, that the Decision penalises unilateral conduct on its part that falls outside the scope of the article. It claims that the Commission has given the concept of an agreement within the meaning of Article 85(1) of the Treaty an interpretation which goes beyond the precedents in the case-law and that its application to the present case infringes that provision of the Treaty. The Commission contends that it has fully followed the case-law in its evaluation of that concept and has applied it in a wholly appropriate manner to the facts of this case. It therefore needs to be determined whether, having regard to the definition of that concept in the case-law, the Commission was entitled to perceive in the conduct established in the Decision the factors constituting an agreement between undertakings within the meaning of Article 85(1) of the Treaty.

The concept of an agreement under Article 85(1) of the Treaty

66. The case-law shows that, where a decision on the part of a manufacturer constitutes unilateral conduct of the undertaking, that decision escapes the prohibition in Article 85(1) of the Treaty (Case 107/82, *AEG* v *Commission*, paragraph 38; Joined Cases 25/84 and 26/84, *Ford and Ford Europe* v *Commission*, paragraph 21; Case T-43/92, *Dunlop Slazenger* v *Commission*, paragraph 56).

67. It is also clear from the case-law in that in order for there to be an agreement within the meaning of Article 85(1) of the Treaty it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way (Case 41/69, *ACF Chemiefarma* v *Commission*, paragraph 112; Joined Cases 209/78 to 215/78 and 218/78, *Van Landewyck and Others* v *Commission*, paragraph 86; Case T-7/89, *Hercules Chemicals* v *Commission*, paragraph 256).

68. As regards the form in which that common intention is expressed, it is sufficient for a stipulation to be the expression of the parties' intention to behave on the market in accordance with its terms (see, in particular, *ACF Chemiefarma*, paragraph 112, and *Van Landewyck*, paragraph 86), without its having to constitute a valid and binding contract under national law (Case C-277/87, *Sandoz*, paragraph 13).

69. It follows that the concept of an agreement within the meaning of Article 85(1) of the Treaty, as interpreted by the case-law, centres around the existence of a concurrence of wills between at least two parties, the form in which it is

manifested being unimportant so long as it constitutes the faithful expression of the parties' intention.

70. In certain circumstances, measures adopted or imposed in an apparently unilateral manner by a manufacturer in the context of his continuing relations with his distributors have been regarded as constituting an agreement within the meaning of Article 85(1) of the Treaty (Joined Cases 32/78, 36/78 to 82/78 *BMW Belgium and Others* v *Commission* [1979] ECR 2435, paragraphs 28 to 30; *AEG*, paragraph 38; *Ford and Ford Europe*, paragraph 21; Case 75/84 *Metro* v *Commission* ('*Metro II* [1986] ECR 3021, paragraphs 72 and 73; *Sandoz*, paragraphs 7 to 12; Case C-70/93 *BMW* v *ALD* [1995] ECR I-3439, paragraphs 16 and 17).

71. That case-law shows that a distinction should be drawn between cases in which an undertaking has adopted a genuinely unilateral measure, and thus without the express or implied participation of another undertaking, and those in which the unilateral character of the measure is merely apparent. While the former do not fall within Article 85(1) of the Treaty, the latter must be regarded as revealing an agreement between undertakings and may therefore fall within the scope of that article. That is the case, in particular, with practices and measures in restraint of competition which, though apparently adopted unilaterally by the manufacturer in the context of its contractual relations with its dealers, nevertheless receive at least the tacit acquiescence of those dealers.

72. It is also clear from that case-law that the Commission cannot hold that apparently unilateral conduct on the part of a manufacturer, adopted in the context of the contractual relations which he maintains with his dealers, in reality forms the basis of an agreement between undertakings within the meaning of Article 85(1) of the Treaty if it does not establish the existence of an acquiescence by the other partners, express or implied, in the attitude adopted by the manufacturer (*BMW Belgium*, paragraphs 28 to 30; *AEG*, paragraph 38; *Ford and Ford Europe*, paragraph 21; *Metro II*, paragraphs 72 and 73; *Sandoz*, paragraphs 7 to 12; *BMW* v *ALD*, paragraphs 16 and 17).

...

[The Commission compared the circumstances of the present case to those of the Sandoz case.]

163. Although the two cases resemble each other in that they concern attitudes of pharmaceutical groups designed to prevent parallel imports of medicinal products, the concrete circumstances characterising them are very different. In the first place, unlike the situation in the present case, the manufacturer in *Sandoz* had expressly introduced into all its invoices a clause restraining competition, which, by appearing repeatedly in documents concerning all transactions, formed an integral part of the contractual relations between Sandoz and its wholesalers. Second, the actual conduct of the wholesalers in relation to the clause, which they complied with *de facto* and without discussion, demonstrated their tacit acquiescence in that clause and the type of commercial relations underlying it. On

the facts of the present case, however, neither of the two principal features of *Sandoz* is to be found; there is no formal clause prohibiting export and no conduct of non-contention or acquiescence, either in form or in reality.

164. Second, the Commission relies on the judgment in *Tipp-Ex* v *Commission*, cited above, in which the Court of Justice confirmed its decision penalising an agreement designed to prevent exports and in which, unlike the situation in *Sandoz*, there had not been a written stipulation concerning the export ban. It claims that Tipp-Ex, like the applicant in this case, had also argued before the Court of Justice that this was a unilateral measure that did not fall within the scope of Article 85(1) of the Treaty, and that, since the supplies from the distributor to the parallel exporter had actually taken place, there was no common interest in parallel exports being terminated.

165. That case concerned an exclusive distribution agreement between Tipp-Ex and its French distributor, DMI, which had complied with the manufacturer's demand that the prices charged to a customer should be raised so far as was necessary to eliminate any economic interest on his part in parallel imports. Moreover, it had been established that the manufacturer carried out subsequent checks so as to give the exclusive distributor an incentive actually to adopt that conduct (recital 58 of Commission Decision 87/406/EEC of 10 July 1987 relating to a proceeding under Article 85 of the EEC Treaty (OJ 1987 L 222, p. 1). Paragraphs 18 to 21 of the judgment show the reasoning followed by the Court of Justice, which, after finding the existence of a verbal exclusive distribution agreement for France between Tipp-Ex and DMI and recalling the principal facts, wished to examine the reaction of and, therefore, the conduct adopted by the distributor following the penalising conduct adopted by the manufacturer. The Court of Justice then found that the distributor 'reacted by raising by between 10 and 20% the prices charged only to the undertaking ISA France. After the interruption of ISA France's purchases from DMI during the whole of 1980, DMI refused at the beginning of 1981 itself to supply Tipp-Ex products to ISA France. It was only after those findings with regard to the conduct of the manufacturer and the distributor that the Court of Justice arrived at its conclusion as to the existence of an agreement within the meaning of Article 85(1) of the Treaty: "it is therefore established that DMI acted upon the request of Tipp-Ex not to sell to customers who resell Tipp-Ex products in other Member States" (Case C-279/87, *Tipp-Ex* v *Commission,* paragraph 21).

166. In *Tipp-Ex*, therefore, unlike the situation in the present case, there was no doubt as to the fact that the policy of preventing parallel exports was established by the manufacturer with the cooperation of the distributors. As indicated in that judgment, that intention was already manifest in the oral and written contracts existing between the two parties (see paragraphs 19 and 20 concerning the distributor DMI and 22 and 23 concerning the distributor Beiersdorf) and, if there were any remaining doubt, analysis of the behaviour of the distributors, pressed by the manufacturer, showed very clearly their acquiescence in the intentions of Tipp-Ex in restriction of competition. The Commission had proved not only that the distributors had reacted to threats and pressure on the part of the manufacturer, but also the fact that at least one of them had sent the

manufacturer proof of its cooperation. Finally, the Commission itself observes in this case that, in *Tipp-Ex*, in order to determine whether an agreement existed, the Court of Justice took the approach of analysing the reaction of the distributors to the conduct of the manufacturer running counter to parallel exports and that it was in assessing that reaction of the distributor that it concluded that there must be an agreement in existence between it and Tipp-Ex designed to prevent parallel exports.

167. It follows that that judgment, like *Sandoz*, merely confirms the case-law to the effect that, although apparently unilateral conduct by a manufacturer may lie at the root of an agreement between undertakings within the meaning of Article 85(1) of the Treaty, this is on condition that the subsequent conduct of the wholesalers or customers may be interpreted as *de facto* acquiescence. As that condition is not fulfilled in this case, the Commission cannot rely on the alleged similarity between these two cases in support of its argument that acquiescence existed in this case.

168. For the same reasons, neither the Commission nor BAI may validly rely on the assessments carried out by the Court of Justice in *BMW Belgium*, *AEG* and *Ford and Ford Europe* in support of their argument that acquiescence by the wholesalers exists in this case.

169. In *BMW Belgium*, in order to determine whether there was an agreement within the meaning of Article 85(1) of the Treaty between BMW and its Belgian dealers, the Court of Justice examined the measures capable of demonstrating the existence of an agreement, in that case circulars sent to BMW dealers, 'according to their tenor and in relation to the legal and factual context in which they [were] set, and concluded that the circulars in question indicate[d] an intention to put an end to all exports of new BMW vehicles from Belgium (paragraph 28). It added that in sending those circulars to all the Belgian dealers, BMW Belgium played the leading role in the conclusion with those dealers of an agreement designed to halt such exports completely (paragraph 29). Paragraph 30 of that judgment shows that the Court of Justice intended to confirm the existence of acquiescence by the dealers.

170. In *AEG*, in which the respective intentions of the manufacturer and the distributors do not appear clearly and in which the applicant expressly relied on the unilateral nature of its conduct, the Court of Justice considered that, in the context of a selective distribution system, a practice whereby the manufacturer, with a view to maintaining a high level of prices or to excluding certain modern channels of distribution, refused to approve distributors who satisfied the qualitative criteria of the system did 'not constitute, on the part of the undertaking, unilateral conduct which, as AEG claims, would be exempt from the prohibition contained in Article 85(1) of the Treaty. On the contrary, it forms part of the contractual relations between the undertaking and resellers (paragraph 38). The Court of Justice then sought to determine the existence of acquiescence by the distributors by stating: 'Indeed, in the case of the admission of a distributor, approval is based on the acceptance, tacit or express, by the contracting parties of the policy pursued by AEG which requires inter alia the exclusion from the

network of all distributors who are qualified for admission but are not prepared to adhere to that policy (paragraph 38). That approach has been confirmed in the other selective-distribution cases decided by the Court of Justice (*Ford and Ford Europe*, paragraph 21; *Metro II*, paragraphs 72 and 73; *BMW* v *ALD*, paragraphs 16 and 17).

171. It follows that the Commission cannot rely on the case-law precedents which it has cited in order to establish the existence of an agreement in this case.

The Commission's argument that, in order to prove the existence of an agreement, it is sufficient to find that the parties maintain their commercial relations

172. The Commission's reasoning shows that it maintains, albeit ambiguously (see the structure of the Decision summarised in recitals 155 and 156 and developed in recitals 171 to 188), that the mere finding of fact that the wholesalers did not interrupt their commercial relations with Bayer after the latter established its new policy designed to restrain exports is a sufficient ground for it to hold that the existence of an agreement between undertakings within the meaning of Article 85(1) of the Treaty is established.

173. Such an argument cannot be accepted. The proof of an agreement between undertakings within the meaning of Article 85(1) of the Treaty must be founded upon the direct or indirect finding of the existence of the subjective element that characterises the very concept of an agreement, that is to say a concurrence of wills between economic operators on the implementation of a policy, the pursuit of an objective, or the adoption of a given line of conduct on the market, irrespective of the manner in which the parties' intention to behave on the market in accordance with the terms of that agreement is expressed (see, in particular, *ACF Chemiefarma*, paragraph 112; *Van Landewyck and Others*, paragraph 86). The Commission misjudges that concept of the concurrence of wills in holding that the continuation of commercial relations with the manufacturer when it adopts a new policy, which it implements unilaterally, amounts to acquiescence by the wholesalers in that policy, although their *de facto* conduct is clearly contrary to that policy.

174. Moreover, in accordance with the general scheme of the Treaty, an undertaking may be penalised under Community competition law only if it has infringed prohibitions contained in Article 85(1) or Article 86 of the Treaty. In that respect, it should be noted that the applicability of Article 85(1) is based on a number of conditions, namely that, (a) there must be an agreement between at least two undertakings or a similar arrangement such as a decision of an association of undertakings or a concerted practice between undertakings, (b) that arrangement must be capable of affecting trade within the Community, and (c) that it must have as its object or effect the restriction of competition to an appreciable extent. It follows that, in the context of that article, the effects of the conduct of an undertaking on competition within the common market may be examined only if the existence of an agreement, a decision of an association of undertakings or a concerted practice within the meaning of Article 85(1) of the

Treaty has already been established (Case 56/65 *Société Technique Minière* v *Maschinenbau Ulm* [1966] ECR 235, at p. 248 et seq.). It follows that the aim of that provision is not to 'eliminate obstacles to intra-Community trade altogether; it is more limited, since only obstacles to competition set up as a result of a concurrence of wills between at least two parties are prohibited by that provision.

175. That interpretation of Article 85(1) of the Treaty was followed by the Court of Justice in Case C-73/95 P *Viho* v *Commission* [1996] ECR I-5457, paragraphs 15 to 17, in which, upholding a judgment of the Court of First Instance, it held that the fact that the policy implemented by a parent company consisting essentially in dividing various national markets between its subsidiaries might produce effects outside the ambit of the group which were capable of affecting the competitive position of third parties could not render Article 85(1) of the Treaty applicable, even when read in conjunction with Article 2 and Article 3(c) and (g) of the EC Treaty. On the other hand, such unilateral conduct could fall under Article 86 of the Treaty if the conditions for its application, as laid down in that article, were fulfilled.

176. Having regard to the foregoing considerations, and contrary to what the Commission and the BAI appear to maintain, the right of a manufacturer faced, as in this case, with an event harmful to his interests, to adopt the solution which seems to him to be the best is qualified by the Treaty provisions on competition only to the extent that he must comply with the prohibitions referred to in Articles 85 and 86. Accordingly, provided he does so without abusing a dominant position, and there is no concurrence of wills between him and his wholesalers, a manufacturer may adopt the supply policy which he considers necessary, even if, by the very nature of its aim, for example, to hinder parallel imports, the implementation of that policy may entail restrictions on competition and affect trade between Member States.

177. The Commission relies in this respect on the judgment of the Court of Justice in Joined Cases C-267/95 and C-268/95, *Merck and Beecham*, as a basis for arguing that in all circumstances parallel imports must be protected. It maintains that, in that judgment, the Court of Justice put an end to speculation concerning the scope of the solution adopted in the judgment in Case 187/80, *Merck* v *Stephar and Exler*, by stating that the control of prices in certain Member States did not justify any derogation from the principle of the free movement of goods and that the possibility of preventing parallel imports entailed an undesirable partitioning of national markets. Therefore, the Commission maintains, even in the pharmaceutical sector, parallel imports may not be hindered either by national measures or by agreements between undertakings.

178. It should, however, be noted that, in that judgment, the Court of Justice limits itself to answering the question concerning, first, the expiry date of certain transitional provisions contained in the Act of Accession of the Kingdom of Spain and the Portuguese Republic (Articles 47 and 209 of the Act of Accession) which permitted the prevention of parallel exports of pharmaceutical products from those countries into other parts of the Community, and, second, the legal regime applicable to parallel imports after the expiry of the relevant transitional periods

and to the question whether the scope of the solution adopted in *Merck* v *Stephar and Exler* should be reconsidered. The reasoning of the Court of Justice in *Merck and Beecham* does not concern the issue in this case, which does not fall within the law on the free movement of goods under Articles 30, 34 and 36 of the EC Treaty (now, after amendment, Articles 28 EC, 29 EC and 30 EC), and, contrary to what the Commission claims, does not in any way presume a general prohibition on preventing parallel exports applying not only to Member States but also, and in all cases, to undertakings.

179. In reality, rather than supporting the Commission's argument, that judgment merely confirms that, under the system of the Treaty, it is not open to the Commission to attempt to achieve a result, such as the harmonisation of prices in the medicinal products market, by enlarging or straining the scope of Section 1 (Rules applying to undertakings) of Chapter 1 of Title VI of the Treaty, especially since that Treaty gives the Commission specific means of seeking such harmonisation where it is undisputed that large disparities in the prices of medicinal products in the Member States are engendered by the differences existing between the state mechanisms for fixing prices and the rules for reimbursement, as is the case here (see recitals 151 and 152 of the Decision). As the Court of Justice pointed out in paragraph 47 of the judgment in *Merck and Beecham*, it is settled case-law that distortions caused by different price legislation in a Member State must be remedied by measures taken by the Community authorities (see Case 16/74, *Centrafarm* v *Winthrop*, paragraph 17; *Musik-Vertrieb Membran and K-tel International* v *GEMA*, paragraph 24; Joined Cases C-427/93, C-429/93 and C-436/93 *Bristol-Myers Squibb and Others*, paragraph 46; *Merck and Beecham*, paragraph 47).

180. An extension of the scope of Article 85(1) of the Treaty, such as that proposed by the Commission, would lead to a paradoxical situation in which refusal to sell would be penalised more heavily in the context of Article 85(1) than in that of Article 86, since the prohibition in Article 85(1) would hit a manufacturer deciding to refuse or restrict future supplies but without terminating his commercial relations with his customers altogether, whereas, under Article 86, refusal to supply, even where it is total, is prohibited only if it constitutes an abuse. The case-law of the Court of Justice indirectly recognises the importance of safeguarding free enterprise when applying the competition rules of the Treaty where it expressly acknowledges that even an undertaking in a dominant position may, in certain cases, refuse to sell or change its supply or delivery policy without falling under the prohibition laid down in Article 86 (see Case 27/76 *United Brands* v *Commission* [1978] ECR I-207, paragraphs 182 to 191).

181. Nor, finally, can the Commission rely in support of its argument upon its conviction, which is, moreover, devoid of all foundation, that parallel imports will in the long term bring about the harmonisation of the price of medicinal products. The same applies to its claim that 'it is not acceptable for parallel imports to be hindered so that pharmaceutical undertakings may impose excessive rates in countries not applying any price control in order to compensate for lower profits in Member States which intervene more on prices.

182. It follows that the Commission could not legitimately regard an agreement between the wholesalers and the manufacturer as being established on the basis of the mere finding that pre-existing commercial relations continued.

Conclusion

183. It follows from the whole of the foregoing considerations that the Commission incorrectly assessed the facts of the case and made an error in the legal assessment of those facts by holding it to be established that there was a common intention between Bayer and the wholesalers referred to in the Decision, which justified the conclusion that there was an agreement within the meaning of 85(1) of the Treaty,designed to prevent or limit exports of Adalat from France and Spain to the United Kingdom.

184. As a result, the principal plea in law raised in this action must be declared to be well founded ... ■

The C3D / Rhone Capital / Go-Ahead Group Case

The Commission has decided to refer to the UK competition authorities part of the proposed takeover by French company C3D and Rhône Capital of the Go-Ahead Group Plc. The referral concerns the passenger transport by bus in the south or south-west of London where the transaction threatens to create a dominant position. The Commission has decided to clear the rest of the transaction. C3D is a France-based holding company. It is active in the London bus market via London United, London United Busways Ltd, Stanwell and Westlink. Rhône is a US based investment fund. Go-Ahead is a British transport company active in road and rail transport. It is present in the London bus market via London General, London Central and Metrobus.

In the present case, the UK competition authority informed the Commission that it had identified one market within the UK in which the conditions for such a referral existed. This market concerns the passenger transport by bus in the London area. The UK competition authority considers that, for a number of reasons, this market represents a distinct market within the UK territory and that the notified operation could lead to the creation of a dominant position in the south or south-west of London. The Commission considers that the UK is well placed to carry out the necessary review as it has recently investigated a number of operations in the London bus passenger transport market, namely Cowie/British Bus and Metroline/MTL North London. The UK has a maximum of four months to reach a final decision. The referral to the UK authorities relates only to the bus passenger market in London. The Commission has cleared those parts of the deal which relate to services to airports, rail transport and bus services outside London as its investigation showed that there were no competition concerns in these areas. (Source: Commission Statement IP/00/1195, 20 October 2000.)