DISTRIBUTION (MOTOR VEHICLES): THE VW CASE

Subject: Distribution
Differential pricing

Industry: Motor vehicles

Parties: Volkswagen
Commission of the European Communities

Source: Judgment of the Court of Justice of the European Communities, dated 18 September 2003, in Case C-338/00P (Volkswagen AG v Commission of the European Communities)

(Note. This has been a long-running case; and, since the Court of Justice largely upheld the views of the Court of First Instance, the judgment has been strictly edited. The interest of the case lies mainly in the way in which VW sought to "partition the market"; that is, by trying to keep the Italian market separate from the market for VW cars in other Member States. The principal means by which VW sought to achieve this end was an arrangement, referred to here as "Convenzione B", requiring 85% of Italian sales of VW cars to be limited to the Italian market. The Court of First Instance had reduced to €90m the even heavier fine originally imposed by the Commission; the Court of Justice did not interfere with this assessment.)

Judgment

[Paragraph 1 indicates that the action is an appeal against a judgment of the Court of First Instance, which had dismissed in part an application to annul a Commission Decision finding an infringement by VW and imposing a fine. Paragraphs 2 to 10 set out the requirements of the Motor Vehicle Block Exemption Regulation (predecessor to the regulation described on page 250 of this issue) and the general legal framework of the proceedings.]

Facts and proceedings before the Court of First Instance

11. The facts underlying the dispute are set out as follows in the judgment under appeal:
1 The applicant is the holding company of the Volkswagen group. The group's business activities include the manufacture of motor vehicles of the Volkswagen, Audi, Seat and Skoda makes, and the manufacture of components and spare parts. ...
2 Motor vehicles of the Volkswagen and Audi makes are sold in the Community through selective distribution networks. The import into Italy of those vehicles, their spare parts and accessories, is carried out exclusively by Autogerma SpA (Autogerma), a company incorporated under Italian law, established in Verona (Italy), which is a wholly owned subsidiary of the applicant and which

accordingly constitutes, with the applicant and Audi, one economic unit. Distribution in Italy takes place through legally and economically independent dealers, who are nevertheless contractually bound to Autogerma.

...

8 From September 1992 and during 1993 the value of the Italian lira declined greatly in comparison with the German mark. However, the applicant did not make a proportionate increase in its sales prices in Italy. The price differences which resulted from that situation made it economically advantageous to re-export vehicles of the Volkswagen and Audi makes from Italy.

9 During 1994 and 1995 the Commission received letters from German and Austrian consumers complaining of obstacles to the purchase in Italy of new motor vehicles of the Volkswagen and Audi makes for immediate re-export to Germany or Austria.

10 By letter of 24 February 1995 the Commission informed the applicant that, on the basis of complaints from German consumers, it had concluded that the applicant or Autogerma had forced Italian dealers for Volkswagen and Audi makes to sell vehicles solely to Italian customers by threatening to terminate their dealer contracts. In the same letter the Commission gave formal notice to the applicant to put an end to that barrier to re-exportation and to inform it, within three weeks of the date of receipt of that letter, of the measures adopted in that regard.

...

13 On 17 October 1995 the Commission adopted a decision ordering investigations under Article 14(3) of Council Regulation No 17 of 6 February 1962: First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87). The investigations took place on 23 and 24 October 1995 ...

14 On the basis of the documents found during those investigations the Commission reached the conclusion that the applicant, Audi and Autogerma had put in place, with their Italian dealers, a market-partitioning policy. On 25 October 1996 the Commission served a statement of objections to that effect on the applicant and Audi.

15 By letter of 18 November 1996 the applicant and Audi requested access to the file. They inspected the file on 5 December 1996.

16 On 19 December 1996 Autogerma, at the express request of the applicant, sent a circular to the Italian dealers stating that exports to final users (including those through intermediaries) and to dealers belonging to the distribution network were lawful and would therefore not be penalised. The circular also indicated that the discount granted to dealers on the sale price of vehicles ordered, known as the margin, and payment of their bonus did not depend in any way on whether the vehicles had been sold within or outside their contract territory.

...

20 On 28 January 1998 the Commission adopted [the contested decision]. The decision is addressed solely to the applicant. The Commission states that the applicant is responsible for the infringement found because Audi and Autogerma are its subsidiaries and their activities were known to it. As regards the Italian dealers, the Commission states that they did not participate actively in the barriers to re-export but, as victims of the restrictive policy introduced by the manufacturers and Autogerma, were forced to consent to that policy.

...

22 As regards the measures taken by the applicant and Audi, the Commission cites the introduction by the applicant of a split margin system ... The Commission also mentions the reduction by the applicant and Audi of dealers' stocks. That measure, accompanied by a policy of restricted supply, caused a considerable increase in delivery times and led some customers to cancel their orders. It also allowed Autogerma to refuse supplies requested by German dealers (cross-deliveries inside the Volkswagen distribution network). The Commission also refers to the conditions laid down by Audi and Autogerma for calculating the quarterly 3% bonus paid to dealers on the basis of the number of vehicles they had sold.

23 Among the penalties imposed by Autogerma on the dealers, the Commission refers to the termination of certain dealership contracts and the cancellation of the quarterly 3% bonus for sales outside the contract territory.

...

26 The Commission concludes that those measures, which all form part of the contractual relations which the manufacturers maintain, through Autogerma, with the dealers in their selective distribution network, are the result of an agreement or concerted practice and constitute an infringement of Article 85(1) of the Treaty since they represent the implementation of a market-partitioning policy. It explains that those measures are not covered by Regulation EEC/123/85 and Regulation EC/1475/95, since no provision of those regulations exempts an agreement which aims to prevent parallel exports by final consumers, by intermediaries acting on their behalf or by other dealers in the dealer network. It also states that an individual exemption cannot be granted in the present case, since the applicant, Audi and Autogerma did not notify any aspect of their agreement with the dealers, and that in any event the barriers to re-exportation are at variance with the objective of consumer protection set out in Article 85(3) of the Treaty.

...

28 In Article 1 of the decision the Commission finds that the applicant and its subsidiaries Audi and Autogerma have infringed Article 85(1) of the EC Treaty by entering into agreements with the Italian dealers in their distribution network in order to prohibit or restrict sales to final consumers coming from another Member State, whether in person or represented by intermediaries acting on their behalf, and to other authorised dealers in the distribution network who are established in other Member States. In Article 2 of the decision it orders the applicant to bring an end to the infringements and requires it to take, inter alia, the measures set out there.

29 In Article 3 of the decision the Commission imposes a fine of ECU 102 million on the applicant in view of the gravity of the infringement found. The Commission contends that the obstruction of parallel imports of vehicles by final consumers and of cross-deliveries within the dealer network hampers the objective of creating the common market, which is one of the fundamental principles of the European Community, and the infringement found is therefore particularly serious. Moreover, it points to the fact that the relevant rules have been settled for many years and the fact that the Volkswagen group has the highest market share of any motor vehicle manufacturer in the Community. The Commission also refers to documents as proof that the applicant was fully aware

that its behaviour infringed Article 85 of the Treaty. It states, moreover, that the infringement lasted for more than 10 years. Lastly, the Commission took into account, as aggravating circumstances, the fact that the applicant, first, did not put an end to the measures in question even though it had received two letters from the Commission in 1995 pointing out that preventing or restricting parallel imports from Italy was an infringement of the competition rules and, second, had used the dependence of dealers on a motor vehicle manufacturer, and so caused, in this case, quite substantial turnover losses for a number of dealers. The decision explains that the applicant, Audi and Autogerma threatened more than 50 dealers that their contracts would be terminated if they continued to sell vehicles to foreign customers and that 12 dealership contracts were in fact terminated, endangering the existence of the businesses concerned.
30 The decision was sent to the applicant by letter dated 5 February 1998 and received by it on 6 February 1998.
... *[This ends the paragraphs quoted from the judgment under appeal.]*

12. By application lodged at the Registry of the Court of First Instance on 8 April 1998, the present appellant brought an action against that decision.

13. In support of its application for annulment, the present appellant relied essentially on five pleas in law. The first and second pleas respectively alleged errors of fact and of law in the application of Article 85 of the Treaty. The third, fourth and fifth pleas alleged infringement of the principle of proper administration, the obligation to state reasons, and the right to a fair hearing.

14. The present appellant also argued, by way of an alternative submission, that the fine imposed by the contested decision ought to be reduced on the ground that it was excessive.

[Paragraphs 15 to 32 set out the main points in the judgment of the Court of First Instance.]

33. The operative part of the judgment under appeal is worded as follows:
[The Court of First Instance hereby]
1 Annuls Commission Decision 98/273/EC of 28 January 1998 relating to a proceeding under Article 85 of the EC Treaty (Case IV/35.733 - VW) in so far as it finds that:
(a) a split margin system and termination of certain dealership contracts by way of penalty were measures adopted in order to hinder re-exports of Volkswagen and Audi vehicles from Italy by final consumers and authorised dealers in those makes in other Member States;
(b) the infringement had not completely ceased between 1 October 1996 and the adoption of the decision;
2 Reduces the amount of the fine imposed on the applicant by Article 3 of the contested decision to €90m;
3 Dismisses the remainder of the application;
4 Orders the applicant to bear its own costs and to pay 90% of the costs incurred by the Commission;
5. Orders the Commission to bear 10% of its own costs.

The appeal

34. By its appeal, the appellant claims that the Court should:
- set aside the judgment under appeal and declare the contested decision to be void;
- order the Commission to pay the costs of the proceedings before the Court of First Instance and the Court of Justice.

35. In its reply, the appellant states that the forms of order which it seeks are to be construed and interpreted in the light of the reasoning of the appeal, from which it follows that it is not seeking that the judgment under appeal be set aside in its entirety but only in so far as it adversely affects the appellant.

36. The Commission claims that the Court should:
- dismiss the appeal;
- set aside the contested judgment and refer the case back to the Court of First Instance in so far as it reduced to EUR 90 million the amount of the fine imposed on the appellant without taking into account, in fixing that fine, the 15% rule laid down in Convenzione B of the dealership contract concluded in 1988 for the period from 1988 to 1992;
- order the appellant to pay the costs of the proceedings before the Court of Justice and reserve to the Court of First Instance the decision on costs in the cross-appeal. The Commission claims that the Court should:
- dismiss the appeal;
- set aside the contested judgment and refer the case back to the Court of First Instance in so far as it reduced to EUR 90 million the amount of the fine imposed on the appellant without taking into account, in fixing that fine, the 15% rule laid down in Convenzione B of the dealership contract concluded in 1988 for the period from 1988 to 1992;
- order the appellant to pay the costs of the proceedings before the Court of Justice and reserve to the Court of First Instance the decision on costs in the cross-appeal.

[Paragraphs 37 to 43 set out the parties' arguments on the first ground of appeal.]

Findings of the Court on the first ground of appeal

44. It follows from paragraphs 49 and 189 of the judgment under appeal, read in conjunction with paragraph 343 thereof, that the 15% rule must, according to the Court of First Instance, be declared incompatible with Article 85(1) of the Treaty inasmuch as it was liable to induce Italian authorised dealers to sell at least 85% of available vehicles within their contract territory and therefore restricted opportunities for end-users and dealers in other Member States to acquire vehicles in Italy, and thus had the purpose of ensuring a degree of territorial protection and, to that extent, partitioning of the market. The Court of First Instance also found, in paragraph 49 of its judgment, that the Commission was entitled to conclude that that rule fell outside the exemption granted by Regulation EEC/123/85 on the ground that, although Regulation EEC/123/85 provided

manufacturers with substantial means of protecting their distribution systems, it did not authorise them to adopt measures contributing to a partitioning of the markets.

45. For the purpose of challenging the findings by the Court of First Instance in relation to the breach of Article 85(1) of the Treaty, the appellant merely reproduces the arguments which it set out in this regard in its application at first instance without calling into question either the reasoning on the basis of which the Court of First Instance concluded that the 15% rule amounted to a market-partitioning measure or the finding that such a rule had to be classified as a measure incompatible with Article 85(1) of the Treaty.

46. This first branch of the ground of appeal must therefore be dismissed as being inadmissible.

47. According to settled case-law, where an appeal merely repeats or reproduces verbatim the pleas in law and arguments previously submitted to the Court of First Instance, without even including an argument specifically identifying the error of law allegedly vitiating the judgment under appeal, it fails to satisfy the requirements under Article 58 of the EC Statute of the Court of Justice and Article 112(1)(c) of its Rules of Procedure. In reality, such an appeal amounts to no more than a request for re-examination of the application submitted to the Court of First Instance, which, under Article 56 of that Statute, falls outside the jurisdiction of the Court of Justice (see Case C-352/98 P, *Bergaderm and Goupil v Commission*, paragraph 35; Case C-210/98 P, *Salzgitter v Commission*, paragraph 42; and Case C-321/99 P, *ARAP and Others v Commission*, paragraph 48).

48. The appellant also claims that, in finding that the 15% rule was not covered by Regulation EEC/123/85, the Court of First Instance misconstrued and misapplied that regulation in so far as it failed to take proper cognisance of the specific responsibility which a distributor is recognised as having in relation to his contract territory by Article 4(1)(3) and (8) of that regulation, read in the light of recitals 1 and 9 in its preamble.

49. Suffice it to hold in this regard that a measure which is liable to partition the market between Member States cannot come under those provisions of Regulation No 123/85 that deal with the obligations which a distributor may lawfully assume under a dealership contract. The Court of First Instance properly held in paragraph 49 of the judgment under appeal that, although that regulation provided manufacturers with substantial means by which to protect their distribution systems, it did not authorise them to adopt measures which contributed to a partitioning of the market (*Bayerische Motorenwerke*, cited above, paragraph 37).

50. This second branch of the ground of appeal is consequently unfounded.

51. It follows that the first ground of appeal must be rejected in its entirety.

[Paragraphs 52 to 59 set out the parties' arguments on the second ground of appeal]

Findings of the Court on the second ground of appeal

60. It is settled case-law that a call by a motor vehicle manufacturer to its authorised dealers is not a unilateral act which falls outside the scope of Article 85(1) of the Treaty but is an agreement within the meaning of that provision if it forms part of a set of continuous business relations governed by a general agreement drawn up in advance (*Ford v Commission*, paragraph 21, and *Bayerische Motorenwerke*, paragraphs 15 and 16).

61. In paragraph 236 of the judgment under appeal, the Court of First Instance ruled that this case-law was applicable to the present case because all of the measures adopted by the appellant, including the 15% rule and the imposition of supply quotas, were intended to influence Italian dealers in the performance of their contract with Autogerma.

62. The appellant criticises the Court of First Instance for having wrongly concluded that this case-law was applicable in the present context. It argues that, in *Ford* and *Bayerische Motorenwerke*, the restrictions found to have occurred originated in the respective dealership contracts. In the present case, in contrast, even if the dealership contract provided for the possibility of a limitation of supplies to Italian dealers, the reason for that restricted supply, as established by the Court of First Instance, that is to say, the barrier to re-exports from Italy of vehicles supplied to Italian dealers, is not covered by the dealership contract as those dealers are free to sell those vehicles to foreign end-users and foreign distributors. In the absence of any expression by the dealers themselves of their agreement to the restrictions found to have been imposed, the appellant argues that those restrictions, in so far as they existed at all, constituted a unilateral measure which is not covered by Article 85(1) of the Treaty.

63. In this regard, it is clear from paragraphs 79 to 90 of the judgment under appeal that the appellant implemented a policy of imposing supply quotas on Italian dealers with the express aim of blocking re-exports from Italy and thus of partitioning the Italian market. It is also clear from paragraph 236 of that judgment that this policy was able to be imposed by virtue of the dealership contract.

64. The appellant does not deny that the dealership contract provided for the possibility of limiting supplies to Italian dealers and does not dispute the finding of the Court of First Instance that this limitation was imposed with the express aim of blocking re-exportation from Italy of the vehicles delivered to those dealers.

65. It follows that, by accepting the dealership contract, the Italian dealers consented to a measure which was subsequently used for the purpose of blocking re-exports from Italy and thus of restricting competition within the Community.

66. Regarding the appellant's assertion that the barrier to the re-exportation of vehicles delivered to Italian dealers was not desired by the latter, it is necessary to take account of paragraphs 90 and 91 of the judgment under appeal, to which paragraph 236 thereof refers. In those paragraphs, the Court of First Instance, after rejecting the appellant's arguments that the Italian dealers had of their own accord formed the view that it was of no interest to them to sell vehicles outside their contract territory, found that those dealers, faced simultaneously with both restricted supply and the 15% rule - which was also agreed within the framework of the dealership contract (see paragraphs 44, 48 and 342 of the judgment under appeal) - and being aware that re-exports were regarded with extreme disfavour by Autogerma and the manufacturers, clearly had every interest in selling the limited number of vehicles available entirely or almost entirely to purchasers residing in Italy and that their business conduct was therefore influenced by the manufacturers and Autogerma.

67. It follows that, contrary to what the appellant alleges, the Court of First Instance found that the limitation on re-exports, which was the objective pursued by the appellant, also resulted from the business conduct of the Italian dealers and that this conduct was influenced by the appellant, it being, furthermore, common ground that the means employed for that purpose, in particular the restricted supply of vehicles, resulted from clauses in the dealership contract and had thus received the agreement of the dealers.

68. That being so, the Court of First Instance proceeded correctly in law in applying in this case the case-law cited in paragraph 236 of the judgment under appeal.

69. The second ground of appeal must for that reason be rejected.

[Paragraphs 70 to 168 refer to a number of allegations of irregularities in procedure; the Court rejected all the allegations. Paragraphs 169 to 180 refer to a cross-appeal by the Commission, based mainly on an assessment of the extent of the infringement during the years 1988 to 1992; the Court rejected the cross-appeal. Paragraph 181 deals with costs.]

Court's Ruling

The Court hereby:

1. Dismisses the main appeal and the cross-appeal;
2. Orders each party to bear its own costs. ■

Note. The foregoing case was largely concerned with the incidence of Regulation EEC/123/85. This has now been replaced by Regulation EC/1400/2002, a reminder of whose general scope will be found in the report on the next page of this issue. The text of the current regulation was printed in our October 2002 issue at page 232. "Partitioning of the market" of the kind described in the VW case could still happen but will *a fortiori* be a serious infringement.

Motor Vehicle Distribution

There has already been wide exposure, here and elsewhere, of the new rules on competition governing car sales and servicing; but the Commission has provided a timely reminder that it was on 1 October, 2003, that a major part of the rules would become effective. The Block Exemption Regulation on Motor Vehicle Distribution had come into force twelve months previously, but allowed for an initial period of transition. After a further transitional period, on 1 October 2005, the so-called location clause will be abolished, finally making the new rules fully effective. The rules which became effective on 1 October 2003 open the way to new distribution techniques, such as Internet sales and multi-branding, and are intended to introduce more competition between different retail channels. The new rules also remove residual barriers to cross-border purchases and allow dealers to place advertisements or mail shots throughout the single market. Car owners will have a wider choice of after sales service providers, whether through authorised or fully independent repair shops. No repair shop may be prevented from servicing several brands and repair shops will no longer be obliged to operate a dealership as well.

The rules cover the sale and after-sales services of all motor vehicles (passenger cars, light commercial vehicles, trucks and buses). They allow car manufacturers to choose between exclusive distribution, under which each authorised dealer is given a sales territory, or selective distribution, under which dealers are selected according to a set of objective criteria but are not allocated a sales territory. Almost all manufacturers have chosen selective distribution throughout the single market.

The main features introduced by the new rules and coming into force on 1 October 2003 are:

multi-branding;
stand-alone repair shops;
independent repair shops not affiliated to a particular brand;
more liberal rules on the use of spare parts and
more opportunities for dealers to sell to customers from abroad.

Dealers in a *selective distribution* system may place advertisements throughout the single market and address mail shots and personalised e-mails to consumers located anywhere in the European Union. Dealers in an *exclusive distribution* system may actively sell to independent resellers within their exclusive territory and may also, if approached, sell to final consumers or resellers based outside their territory. It will, however, be two more years, from 1 October 2005, before new rules allow dealers in a selective distribution system to set up a secondary sales outlet or a delivery point in another part of their own country or in another Member State of the European Union.

Source: Commission Statement IP/03/1318, dated 30 September 2003