

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 16 November 1983

relating to a proceeding under Article 85 of the EEC Treaty (IV/30.696 — Distribution system of Ford Werke AG)

(Only the German text is authentic)

(83/560/EEC)

THE COMMISSION OF THE EUROPEAN
COMMUNITIES,

WHEREAS:

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 Greece, and in particular Articles 3 (1) and 6 (1) thereof,

Having regard to the Dealer Agreements for Ford vehicles notified on 30 January 1963, 29 October 1964, 14 September 1973 and 14 May 1976 by Ford Werke AG, Cologne, Federal Republic of Germany, in accordance with Article 4 of Regulation No 17,

Having regard to the Commission Decision of 2 July 1982 to initiate proceedings,

Having heard the undertakings concerned and interested third parties, in accordance with Article 19 (1) and (2) of Regulation No 17, and Article 5 of 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⁽²⁾,

After consultation with the Advisory Committee on Restrictive Practices and Dominant Positions,

I. THE FACTS

A. The firms

- (1) Ford Motor Company (hereinafter referred to as 'Ford US') is a company incorporated in the State of Delaware, USA, and has its principal place of business at Dearborn, Michigan, USA.
- (2) Ford-Werke AG (hereinafter referred to as 'Ford Germany') is a company incorporated under the laws of the Federal Republic of Germany and registered at Cologne. It is a 100 %-owned subsidiary of the Ford Motor Company.
- (3) Ford Motor Company Limited (hereinafter referred to as 'Ford Britain') is a company incorporated in England and has its registered office at Brentwood. It is, like Ford Germany, a subsidiary of Ford US.
- (4) Similar Ford-US subsidiaries are operating in all other Member States except Luxembourg, where Ford US is represented by their Belgian subsidiary, the Ford Motor Company (Belgium) NV.
- (5) Ford of Europe Incorporated (hereinafter referred to as 'Ford Europe') is a company also registered in the State of Delaware, USA. It is a 100 %-owned subsidiary of Ford US and has offices in the United Kingdom, the Federal

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

⁽²⁾ OJ No 127, 20. 8. 1963, p. 2268/63.

Republic of Germany and Belgium. Ford Europe has responsibility for coordinating the allocation of certain economic functions among the direct Ford companies.

All these companies call themselves the 'Ford Group'.

B. The manufacture of Ford motor cars

1. *The product*

- (6) The products concerned are new Ford motor cars (passenger cars) and parts of them.

The Ford cars can be divided into certain car models, such as the 'Fiesta', the 'Escort', the 'Taunus' / 'Cortina' (name given in the UK to the 'Taunus') the 'Sierra', the 'Granada' and the 'Capri'.

Each model is manufactured in certain versions, as far as, for example, the engine, the gearbox and the transmission are concerned. These different versions have also specific and different specifications. Among these specifications one can distinguish between specifications which are compulsory according to the national laws and road regulations of the Member States, and others which meet the consumer's demand or which the manufacturer or his distributors thinks appropriate for one selling area. Left-hand drive ('LHD') or right-hand drive ('RHD') fall under the second category, they are not obligatory specifications of a car.

2. *The manufacture*

- (7) Ford Germany, which has plants in Cologne, Saarlouis (Germany) and in Genk (Belgium), produces the full range of Ford cars marketed in Europe with LHD. It also produces some Ford car models such as the 'Granada' and the 'Capri' range in all versions with RHD. Some other car models, such as the 'Sierra', the 'Escort' and the 'Fiesta', are produced only in some versions with RHD. Until mid-1982 it manufactured also certain versions of the 'Cortina' with RHD. There are no substantial cost differences between the production of LHD and that of RHD cars.
- (8) Ford Britain currently manufactures at its Dagenham and Halewood plants in the United Kingdom certain versions of the 'Fiesta', the 'Escort' and the 'Sierra'. Until mid-1982 it also manufactured certain versions of the 'Cortina'. The versions produced by Ford Britain are almost exclusively RHD cars.

Ford Britain purchases from Ford Germany RHD cars manufactured by the latter. These purchases account for a substantial proportion of Ford Germany's total production and exports.

C. The provisions of Ford Germany's Distribution Agreement to be considered

- (9) Ford Germany, which is not only a manufacturer of Ford cars but is also a Ford sales company, notified the Commission on 14 May 1976 of a standard agreement between itself and selected main dealers (Ford dealers), the Main Dealer Agreement (Haupthändlervertrag).
- (10) Article 1 of this agreement refers to Ford Germany's standard series production passenger vehicles, which are in turn defined according to model ('Fiesta', 'Escort', 'Taunus', 'Capri' and 'Granada').
- (11) Under Article 2 of the Agreement, Ford Germany undertakes to sell all its products (vehicles and parts of motor vehicles) to the Ford dealer. The dealer in turn undertakes to sell those Ford products to final consumers or to retail dealers. No restriction based on particular specifications (e.g. the driving position (LHD or RHD)) is mentioned with regard to the term 'vehicle' ('Fahrzeuge') as employed in the Agreement. The Agreement defines 'vehicles' as 'the normal series production models of all the passenger cars ...'.
- (12) The Ford dealer is free to sell vehicles to final customers within the Community regardless of where they are resident and to other retail dealers authorized to sell Ford cars by a company of the Ford Group within the Community (Article 2).
- (13) Paragraph 1 of Article 5 stipulates that the Ford dealer shall not without the prior written consent of Ford Germany conclude or maintain any agreement or other arrangement for the sale of new vehicles that have not been manufactured or delivered by Ford Germany or by a Ford Group company. The same shall apply to direct or indirect trade conducted either through the dealer's premises or other sales points.

Paragraph 2 of Article 5 prohibits the dealer without the prior written consent of Ford Germany to distribute in any appreciable quantity high-quality, non-motor trade goods, or to engage in any other activity in the motor trade through other persons or companies.

(14) Paragraph 2 of Article 6 assigns to Ford dealers an area of responsibility (Marktverantwortungsgebiet). Ford Germany engages itself to the Ford dealer, not in general to permit any other Ford dealer to set up or to rent directly or indirectly any centres for the distribution or servicing of new Ford cars or for the distribution or reconditioning of used vehicles in this area (paragraph 2). Only within that area of responsibility, the dealer may maintain a downstream organization at locations approved by Ford Germany (paragraph 3). Paragraph 8 obliges the dealer to achieve a certain sales target.

(15) The Main Dealer Agreement contains further clauses which appear either to restrict the Ford dealers in their business behaviour or to reinforce the effects of the abovementioned Articles (paragraphs 11 to 14). Finally the practical application of certain provisions of the Main Dealer Agreement by Ford Germany appears to be restrictive.

However, none of these other clauses and practices are the object of this Decision. The Commission reserves the right to deal with them in separate proceedings.

D. Practical application of the Main Dealer Agreement to be considered

(16) By 31 March 1982, the Main Dealer Agreement had been signed by 733 dealers. Before 1 May 1982, Ford Germany made available to its Ford dealers all standard series car models in their different versions and specifications according to Article 1 of the Main Dealer Agreement.

As far as RHD cars equipped according to German road traffic regulations (e.g. the Straßenverkehrszulassungsordnung) were concerned these vehicles were sold by Ford Germany to German Ford dealers under the notified Agreement and at the usual price for LHD cars plus a supplement of ... DM⁽¹⁾ for administrative costs. These cars contributed to

the achievement of the dealers sales targets (see paragraph 14 above).

(17) In respect of LHD or RHD cars with other specifications than according to German road traffic regulations, the Ford dealers acted according to Ford Germany as 'intermediaries' for such orders from buyers not resident in Germany. Such vehicles were — according to Ford Germany — delivered to German Ford dealers, not under the Main Dealer Agreement but under a 'Visit Europe Plan' which was not notified to the Commission. Legally, these motor cars were sold to individual buyers, the Ford dealer acting as the buyer's agent. Nevertheless the profits for the dealers were similar to those for cars usually sold under the Main Dealer Agreement. The obligations of the Ford dealers in respect of warranty, after-sales service, etc. as agreed under the Agreement were the same but these sales did not contribute to the achievement of the dealers' sales targets.

(18) Ford Germany produced in 1981 some ... cars including some ... RHD cars. In addition to some ... RHD cars, which it sold directly to Ford Britain for sale in the UK, about ... RHD cars had a specification as usually sold in the UK and about ... RHD cars had a specification as usually sold in Germany.

Between January and June 1982 about ... RHD cars were delivered under the Main Dealer Agreement to Ford dealers in Germany with specifications according to the German road traffic regulation and at substantially the same prices as for LHD vehicles.

(19) The customers for RHD vehicles in Germany included *inter alia* UK citizens living in Germany and wishing to import their vehicles into the United Kingdom when they subsequently returned there as well as customers resident outside Germany.

(20) In 1981, RHD-vehicle sales in Germany under the Main Dealer Agreement were handled by 92 Ford dealers, although 20 of them accounted for the bulk of business.

(21) On 27 April 1982, Ford Germany sent a circular to the Ford dealers who had sold or distributed RHD vehicles with German and other specifications.

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

The circular states *inter alia*: 'As our business is to distribute vehicles for the German market, which requires only LHD vehicles, RHD versions are not part of our normal sales range ... Your function of exploiting the German market in the best way for our products is central to our domestic distribution organization ... We would therefore inform you that we can accept orders for RHD vehicles only where the Ford dealer took them before 1 May 1982. This decision also applies to orders placed under the Visit Europe Plan.... The Visit Europe Plan with its personal specifications for tourists, diplomats and business travellers mainly from other continents, will continue to be available for LHD vehicles. RHD vehicles may be obtained from Ford Personal Import and Export Ltd (PIE), London ... If you are approached by customers looking for RHD vehicles, we would ask you to refer them to PIE or to any authorized Ford dealer in the United Kingdom....'

Ford Germany put this announcement into effect and refused to accept any orders for RHD vehicles from German dealers.

E. Grounds for modifying the practice with regard to deliveries

- (22) From studies carried out by Ford Group companies and a comparison of the retail prices recommended for new Ford vehicles in the Member States, it emerges that comparing the before-tax dealers' selling price, there were in the years 1981 and 1982 differences, depending on the model, of to % between Germany and the United Kingdom (British price equals 100 %, car specification differences are considered).
- (23) As early as 27 April 1981, Ford Europe had recommended to Ford Germany that Ford Germany refrain from offering RHD vehicles to German dealers. Ford Germany's legal department expressed misgivings regarding this recommendation on the grounds that RHD vehicles were covered by the term 'vehicles' of the Main Dealer Agreement and that German dealers were entitled to sell such vehicles.

In a letter to Ford Europe dated 3 December 1981, Ford Britain had the following to say regarding sales of RHD vehicles by Ford Germany to German dealers:

'... The more this happens the greater will be the press comment and public outcry each time we price. Taken to extremes, this could even limit the extent to which price moves may be taken. From all points of view in Britain the situation has become serious and concerning. Ford of Britain therefore recommends that the sale of German-built RHD units to dealers on the Continent, be they German or British specifications, should be stopped....'

- (24) A memo of Ford Germany's Financial Director dated 11 December 1981 regarding RHD car sales to German Ford dealers and the subsequent 'export' of these cars by the customers to the United Kingdom reads *inter alia* as follows:

'Ford Werke AG exports a substantial part of its production to England.

...

Ford Werke AG's financial results will be decisively influenced by these exports.... The financial results are possible because the level of vehicle prices in England is influenced by the English cost-structure, but we produce at German costs.

As an enterprise, Ford Werke AG should have every interest in keeping the English vehicle price structure intact and in doing everything that is legally possible to hold down these re-exports'.

From Ford Group's own documents — Z/BP-1 — it is obvious that substantial differences existed between the German price and the UK price for Ford cars and that Ford Germany's object in cutting off supplies of RHD vehicles to German dealers was to protect Ford Britain (note dated 5 April 1982 and signed by D. Goeudevert).

F. Reaction of third parties

- (25) Several Ford dealers in Germany protested to Ford Germany about its decision to discontinue deliveries of RHD cars to German dealers, mainly on the ground that sales of RHD vehicles in Germany would be handled by PIE and even then only on behalf of special customers (diplomats, British military personnel and other UK citizens permanently resident abroad)

and not 'normal' Community citizens. This means that a 'non-Ford dealer' (PIE) can sell Ford products in Germany, even in the dealer's area of responsibility, and the dealers claim that this would be in breach of the Main Dealer Agreement.

Several Ford dealers from the United Kingdom argued *inter alia* to the Commission that availability of RHD vehicles to German dealers for sale to mostly UK customers would undermine their own sales substantially. The current Ford system of distribution gives UK dealers a sound base on which to invest and to operate profitably. Since tremendous differences exist between Ford car prices in Germany and the United Kingdom, selling of RHD cars by German (or other continental) dealers to UK customers would cause financial loss to UK dealers. The long-term effect of the availability of RHD cars to German dealers would be a reduction in the prices of RHD cars in the United Kingdom. On the other hand, a dealership requires a significant financial investment. The adequate return on investment would be reduced, if not destroyed, if RHD cars from the continent at substantially continental prices could be purchased by UK customers.

It is noted that none of the UK Ford dealers concerned had attempted, nor was interested in importing Ford cars in parallel, even though the distribution system allowed it and on some models they could have made more than by buying from Ford UK.

- (26) The Bureau européen des unions de Consommateurs (BEUC) a consortium of consumer organizations in the Member States made *inter alia* the following main comments :

As a matter of fact consumers will essentially — if not to say only — buy cars abroad if price disparities make it worthwhile. The repeated attempts by several car manufacturers to partition the common market and restrict parallel imports whenever price disparities make it financially interesting for consumers to buy abroad are seriously undermining the basic principles of the Treaty.

G. Procedure

- (27) On 18 August 1982, the Commission required Ford Germany by interim measure Decision 82/628/EEC⁽¹⁾ *inter alia* to withdraw its circular dated 27 April 1982 to German Ford dealers and to refrain from taking any measures having the same effect as the circular. This interim measure Decision was to apply until adoption of the Decision concluding the proceeding, that is the present Decision.

On 3 September 1982, Ford Germany applied to the European Court of Justice to declare the Commission Decision void and to suspend the operation of the contested Decision. On 29 September 1982, the President of the Court, by way of interim decision :

- suspended the Commission Decision in so far as it required Ford Germany to deliver RHD vehicles constructed to British specifications to its German dealers,
- maintained the Decision in so far as it required Ford Germany to deliver RHD vehicles constructed under German specifications to its German dealers, but limited the scope of that requirement to a certain number of cars.

On 24 August 1982, the Commission sent a statement of objections to Ford Germany, to which the latter answered on 5 November 1982. Ford Germany did not request an oral hearing.

II. LEGAL ASSESSMENT

A. Applicability of Article 85 (1) of the EEC Treaty

- (28) The present Decision considers only the Main Dealer Agreement as it has been operated by Ford Germany since 1 May 1982 in application of which Ford Germany does not any longer supply RHD vehicles to its German dealers.
- (29) The Ford distribution system in Germany is based on the Main Dealer Agreement, concluded between undertakings (Ford Germany and its authorized dealers).

⁽¹⁾ OJ No L 256, 2. 9. 1982, p. 20.

- (30) According to paragraph 2 of Article 6 of the Main Dealer Agreement, Ford Germany allots to the dealer an area of responsibility (Marktverantwortungsgebiet) and commits itself not to conclude distribution and servicing agreements for new Ford cars as a matter of principle with other undertakings operating within the allotted area.

This restricts Ford Germany in the exercise of its freedom of contract to choose other resellers for the sale of Ford cars and thus restricts competition.

- (31) Ford dealers are prohibited under Article 2 of the Main Dealer Agreement from selling vehicles to independent dealers. Such independent undertakings are unable to purchase and resell the products covered by the Main Dealer Agreement. Article 5 stipulates that the Ford dealer must not — except with the consent of Ford Germany — sell new motor vehicles which were not manufactured by Ford Germany or any other company of the Ford group; it further obliges the Ford dealer not to engage in any distribution and servicing agreement with third parties in respect of products which may compete with Ford products. Finally, paragraph 3 of Article 6 obliges the Ford dealer not to engage in any special sales activity outside its area of responsibility.

- (32) These clauses restrict competition by limiting the number of dealers available to other car manufacturers. By limiting dealers to their allotted areas and to the Ford products they also restrict the intensity of competition within and outside the allotted area both within the Ford-Germany distribution network and in inter-brand competition.

Authorized Ford dealers cannot freely draw up agreements with other dealers, within and outside their allotted area, through whom they want to distribute and service Ford vehicles.

These obligations on the Ford dealer afford to him only limited scope for determining his marketing policy.

- (33) The Main Dealer Agreement has an appreciable effect on trade between Member States for the same reasons as set out in paragraph 19 of Commission Decision 75/73/EEC of 13

December 1974 (BMW) ⁽¹⁾, namely that dealers who would otherwise have been able to export Ford products but were not admitted to the distribution system were prevented from supplying customers in other Member States. Approved German Ford dealers are not allowed to promote sales actively outside Germany or to deliver Ford vehicles to retail dealers in other Member States who do not belong to any Ford distribution system. The refusal to supply prevents all deliveries of RHD vehicles by Ford dealers in Germany either to other authorized Ford dealers or to final customers, primarily in the United Kingdom.

- (34) Due to these provisions, which constitute the most important part of the Ford Main Dealer Agreement, Article 85 (1) applies to that agreement. Therefore, in the present Decision it is not necessary to deal with the other clauses and practices as mentioned in paragraph 15.

B. Non-applicability of Article 85 (3) of the EEC Treaty

- (35) In the application of Article 85 (3), the Commission has a discretion (see Judgment of the Court in Case 26/76 — Metro v. Commission, 1977 ECR at p. 1916). Every time the Commission has to decide whether the four requirements of Article 85 (3) (improvement of the production or distribution of goods or promotion of economic progress; equitable share in the benefits to users; indispensability of the restrictions; no elimination of competition) are fulfilled, it also (see Judgment of the Court in Cases 56/64 and 58/64 — Consten and Grundig v. Commission, 1966 ECR at p. 502, in the English text at p. 348) must see whether the benefits flowing from the distribution agreement as practised compensate for the disadvantages due to the restriction of competition in its practical application. As the decision of the Court in the case AEG emphasized (paragraph 37 of Decision 107/82 of 25 October 1983) account must be taken *inter alia* of the fact, whether or not, the setting-up of a selective distribution system has the tendency to maintain high price levels and prevent the development of certain channels of distribution.

⁽¹⁾ OJ No L 29, 3. 2. 1975, p. 1.

(36) The Court of Justice has consistently said that in applying Article 85 (3) the agreements have to be looked at in the light of all the surrounding circumstances. The Commission considers that, of all the factors that must be taken into account, priority must be given to the issue of whether a party has restricted competition by impeding parallel imports.

Ford Germany argues that the omission to do something that would put the German dealers in a position to compete in a certain way cannot be equated with a restriction imposed on them by means of an agreement. The refusal to supply RHD cars, according to Ford Germany, is a unilateral act which cannot be taken into account when considering whether to grant an exemption for the Main Dealer Agreement.

The Commission, on the other hand, considers that it is justified in not granting an exemption if the parties to an agreement exercise rights or take measures to prevent dealers or consumers from obtaining the goods to which the agreement relates either in the territory or elsewhere. This is made clear by, for example Article 3 of Regulation 67/67/EEC⁽¹⁾ and Article 3 of Regulation (EEC) No 1983/83⁽²⁾. This means that unilateral measures which as such do not constitute agreements or practices within the meaning of Article 85 (1) may have to be considered in deciding whether an exemption can be given. If the connection between the unilateral act and the agreement is sufficiently close and direct and if the act has a sufficient impact on competition, it may be immaterial for an examination of the agreement under Article 85 (3) whether the act is a direct consequence of the agreement or not.

Contrary to the allegation of Ford Germany, a unilateral act may be taken into account by the Commission even if it is not directly caused by the agreement because the Commission must consider an agreement in the economic context in which it has been applied. Even if Ford Germany's allegation were correct, the refusal to supply substantially reduced the benefits of the Main Dealer Agreement to buyers wishing to obtain RHD cars at favourable prices. In asses-

sing whether any national distribution system within the Community fulfils the requirements of Article 85 (3), the possibility of parallel imports to and from the Member State in question must always be considered, since these will have an important effect on intra-brand price competition in the Member States concerned and therefore on the benefits of the agreement to consumers: 'consumers' in Article 85 (3) means consumers throughout the Community, not just in one Member State.

(37) Ford Germany's Main Dealer Agreement as operated before 1 May 1982 seems to give some of the benefits which distribution agreements usually give in the car industry but no special or exceptional benefits.

(38) Although Ford Germany still produces RHD cars in Germany and could easily make them available there, since 1 May 1982 German Ford dealers are unable to compete in the supply of RHD cars to authorized dealers and final users either within their area or outside.

(39) Consumers within Germany and in the United Kingdom are no longer able to buy RHD Ford cars from German dealers, as they were before 1 May 1982. Since cars are one of the most expensive single items which most consumers buy and since consumer demand in the United Kingdom is almost exclusively for RHD cars, the disadvantage to their interests is substantial: consumers within the Community and above all car buyers in the United Kingdom are now deprived of an important source of supply of RHD cars produced at lower cost than in the United Kingdom and available at low prices.

(40) RHD cars which were delivered in accordance with the contract in question are suitable for export. Many of the RHD cars manufactured in Germany by Ford Germany are exported to another Member State. They have been and can conveniently be sold to or by approved dealers in Germany at prices substantially below those at which the goods are available elsewhere.

(41) The only reason for refusing to supply local approved dealers with goods suitable for export is the wish to protect the market in the other Member State from parallel imports at more favourable prices. At least in all these circumstances the refusal to supply can be regarded as a key element in partitioning the common

⁽¹⁾ OJ No 57, 25. 3. 1967, p. 849/67.

⁽²⁾ OJ No L 173, 30. 6. 1983, p. 1.

market artificially, and in maintaining price levels in a high-price Member State (where prices are high because Ford costs there are high — see paragraph 24 above).

- (42) Contrary to what Ford Germany alleges, the connection between the refusal to RHD cars to German dealers and the Main Dealer Agreement is close and direct. The circular of 27 April 1982 was exclusively addressed to German dealers who were parties to the German Main Dealer Agreement. Previously, Ford Germany sold RHD cars in Germany only to and through those dealers and the dealers' right to obtain Ford motor cars (Article 2 of the Agreement) and the dealers' sales targets (Article 6 of the Agreement) included RHD with German specifications. It was Ford Germany's relationship with the dealers party to the Main Dealer Agreement which was altered by the circular. It was therefore Ford Germany's dealer agreement and the relationship it created that was at issue when Ford Germany sent out the circular and terminated the supplies. The circular makes the effect of the agreement much more restrictive and the benefits of it less advantageous than they would otherwise have been had exports of RHD Ford cars still been possible for German dealers.

- (43) In balancing the improvement in distribution of cars resulting from the agreement — and the share in those advantages allowed to consumers — against the disadvantages in all the legal and economic circumstances, the Commission finds that Ford Germany's distribution system as applied since 1 May 1982 does not allow adequate competition at the distribution level, because it is no longer possible to buy RHD Ford cars in Germany at the very significantly lower German prices (see paragraph 22), and so, the competitive pressure in the United Kingdom is significantly reduced.

In general, consumers should be free to purchase Ford cars where ever they wish within the Community and, unless there are strong reasons to the contrary, Ford dealers should be able and free to deal in substantially all important Ford car versions especially those which are produced by the Ford Group company which supplies them. In general it is a prerequisite of

an exemption that dealers and consumers should enjoy these freedoms and that an enterprise should not take steps to prevent customers in one Member State from obtaining its products in another Member State. This is the more so when the only purpose of these steps is to prevent competition between authorized dealers and to protect higher price levels.

- (44) Contrary to what Ford Germany says, for an exemption it is not sufficient for Ford Germany to impose no restriction on the Ford dealers' selling and exporting the Ford cars in their hands. Since the effects of a restrictive agreement must be considered in its economic and legal context, other acts of one or both parties to the agreement must also be taken into account. The refusal to deliver cars for which there is a certain demand inside Germany and a strong demand outside Germany has substantially the same economic effect as a prohibition on exporting RHD cars from Germany.

If prices for RHD cars charged by Ford Germany to its German dealers were at or around the significantly higher level of the corresponding prices in the United Kingdom, this would also have substantially the same economic effect as a prohibition on exports.

Since it is normally a prerequisite for an exemption that intra-brand competition at the distribution level across national frontiers should be possible, or at least unobstructed, and hence that distribution systems within the Community should not cause a substantial part of the Community to be deliberately insulated from the rest (see Article 3 of Regulation 67/67/EEC and Article 3 of Regulation (EEC) No 1983/83), the withdrawal of supplies of RHD Ford cars in Germany makes exemption inappropriate in the circumstances of this case.

- (45) Ford Germany alleges that refusal of an exemption would oblige it to practise 'full line availability', that is, to make available to its German dealers all of the series production cars marketed by any Ford Group company anywhere in the Community. Ford Germany also says a refusal would amount to imposing an obligation on it to manufacture RHD cars. Neither argument is correct.

This Decision merely concludes that a unilateral termination of supplies which has practical effects similar to an export ban may make Article 85 (3) inapplicable and that in all the circumstances, for Ford Germany to obtain an exemption, it should make RHD cars available to its German dealers as it did before May 1982. Ford Germany is free, if it wishes, to adopt a dealer agreement which does not fall under Article 85 (1). The Commission is not deciding whether and if so how far Ford Germany or any other company could be expected, as a condition of exemption of a dealer agreement, to make available products which were not manufactured or sold by it in the Member State in question, or the full range of products manufactured by its group in the Community. This Decision does not suggest that it would be a prerequisite for exemption of Ford Germany's dealer agreement that dealers should be able to sell cars having minor features which were not important to a significant number of consumers of which could be installed easily and cheaply by buyers who want them. But right-hand drive is not a feature of that kind. On the contrary, as a result of the present Decision, Ford Germany remains free to deliver RHD vehicles with German or with other specifications. Nor is the Commission deciding whether it would be a prerequisite for an exemption that RHD cars should be available to German Ford dealers if Ford Germany no longer manufactured them, or was unable to produce them at a cost substantially below its production costs in the United Kingdom: in the present circumstances those questions do not arise.

- (46) Ford dealers in the United Kingdom argue that they will suffer a serious drop in sales if Ford Germany makes available RHD cars to its German dealers, as it did before 1 May 1982, at substantially the same prices as for LHD cars. But different price levels cannot justify protection against intra-brand competition, especially if such protection would conflict with the fundamental principle of the common market which necessitates that competition from import can take place.

C. Application of Article 3 of Regulation No 17

- (47) For the reasons set out above, the Main Dealer Agreement infringes Article 85 (1) and it cannot

as applied since 1 May 1982 be exempted pursuant to Article 85 (3). The Main Dealer Agreement therefore constitutes an infringement of Article 85 (1). The Commission considers it necessary to require Ford Germany, in accordance with Article 3 of Regulation No 17, to terminate the infringement without delay and to refrain from any other agreement or concerted practice having the same object or effect.

HAS ADOPTED THIS DECISION:

Article 1

The Main Dealer Agreement concluded by Ford Werke Aktiengesellschaft with German car dealers for the selling of Ford products restricts competition and affects trade between Member States in the sense of Article 85 (1) of the EEC Treaty. An exemption pursuant to Article 85 (3) for the Main Dealer Agreement as applied by Ford AG since 1 May 1982 is refused.

Article 2

Ford Werke Aktiengesellschaft is hereby ordered to bring the abovementioned infringement to an end immediately.

Article 3

The Commission Decision of 18 August 1982 addressed to Ford Werke Aktiengesellschaft, Cologne, is revoked with the effect on the date of notification of this Decision to Ford Werke Aktiengesellschaft.

Article 4

This Decision is addressed to Ford Werke Aktiengesellschaft, Ottoplatz 2, Köln, Federal Republic of Germany.

Done at Brussels, 16 November 1983.

For the Commission

Frans ANDRIESEN

Member of the Commission