JUDGMENT OF THE COURT (Third Chamber)

13 July 2006 *

In Case C-74/04 P,

APPEAL under Article 56 of the Statute of the Court of Justice, brought on 16 February 2004,

Commission of the European Communities, represented by W. Mölls, acting as Agent, assisted by H.-J. Freund, Rechtsanwalt, with an address for service in Luxembourg,

appellant,

the other party to the proceedings being:

Volkswagen AG, established in Wolfsburg (Germany), represented by R. Bechtold and S. Hirsbrunner, Rechtsanwälte, with an address for service in Luxembourg,

applicant at first instance,

* Language of the case: German.

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, J. Malenovský, J.-P. Puissochet, S. von Bahr (Rapporteur) and U. Lõhmus, Judges,

Advocate General: A. Tizzano,
Registrar: K. Sztranc, Administrator,

having regard to the written procedure and further to the hearing on 29 September 2005,

after hearing the Opinion of the Advocate General at the sitting on 17 November 2005,

gives the following

Judgment

1 By its appeal, the Commission of the European Communities seeks to have set aside the judgment of the Court of First Instance of the European Communities of 3 December 2003 in Case T-208/01 *Volkswagen* v *Commission* [2003] ECR II-5141 ('the judgment under appeal'), by which it annulled Commission Decision 2001/711/EC of 29 June 2001 relating to a proceeding under Article 81 of the EC Treaty (Case COMP/F-2/36.693 — Volkswagen) (OJ 2001 L 262, p. 14, 'the contested decision').

Facts and legal framework

2 The facts and legal framework of the case, as they result from the judgment under appeal, may be summarised as follows.

3 Volkswagen AG ('Volkswagen') is the parent company and the largest undertaking of the Volkswagen group, which manufactures motor vehicles. The motor vehicles produced by Volkswagen are sold in the European Community, within the framework of a system of selective and exclusive distribution, by authorised dealers with which that company has concluded a dealership agreement ('the dealership agreement').

4 Under Clause 4(1) of the dealership agreement in its September 1995 and January 1998 versions, Volkswagen grants the dealer a contract territory for the range of vehicles and for customer service. In return, the dealer undertakes to promote sales and the customer service intensively in his specific area and to exploit its market potential to the best of his ability. Under Clause 2(6) (January 1989 version) or Clause 2(1) (September 1995 and January 1998 versions) of the dealership agreement, the dealer undertakes 'to defend and promote in every way the interests of Volkswagen AG, of the Volkswagen distribution organisation and of the Volkswagen brand'. It is also stipulated that 'the dealer will comply with all instructions issued for the purposes of the agreement regarding the distribution of new Volkswagen cars, the stocking of replacement parts, customer service, sales promotion, advertising, training, and the ensuring of quality in each area of Volkswagen's business'. Finally, under Clause 8(1) of the dealership agreement, 'Volkswagen AG will issue non-binding price recommendations concerning retail prices and discounts'.

5 On 17 July 1997 and 8 October 1998, following a buyer's complaint, the Commission sent Volkswagen, under Article 11 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), requests for information concerning the company's pricing policy and, particularly, the fixing of the selling price of the Volkswagen Passat model in Germany. Volkswagen replied to those requests on 22 August 1997 and 9 November 1998 respectively.

6 On 22 June 1999, on the basis of the information received, the Commission sent Volkswagen a statement of objections alleging that it had infringed Article 81(1) EC by agreeing with the German dealers in its distribution network to strict price discipline for sales of the Volkswagen Passat model.

7 The Commission relied therein, in particular, on three circulars sent by Volkswagen to its German dealers on 26 September 1996 and 17 April and 26 June 1997, and five letters sent to some of them on 24 September, 2 and 16 October 1996, 18 April 1997 and 13 October 1998 ('the calls at issue').

8 By letter of 10 September 1999, Volkswagen replied to that statement of objections, stating that the facts set out therein were essentially correct. It did not request a hearing.

9 On 15 January and 7 February 2001, the Commission sent Volkswagen two further requests for information, to which it replied on 30 January and 21 February 2001 respectively.

10 On 6 July 2001, the Commission notified Volkswagen of the contested decision. The operative part of that decision reads as follows:

'*Article 1*

Volkswagen AG has infringed Article 81(1) of the EC Treaty by setting the selling price of the VW Passat on the basis of exhortations to its German authorised dealers to grant limited discounts or no discounts at all to customers in selling the VW Passat.

Article 2

A fine of EUR 30.96 million is imposed on Volkswagen AG in respect of the infringement referred to in Article 1.

...

Article 4

This decision is addressed to Volkswagen AG, D-38436 Wolfsburg.

...'

The judgment under appeal

11 By application lodged at the Registry of the Court of First Instance on 10 September 2001, Volkswagen brought an action for annulment of the contested decision, or in the alternative a reduction of the amount of the fine imposed on it by that decision.

12 In paragraph 32 of the judgment under appeal, the Court of First Instance, referring to paragraph 69 of its judgment in Case T-41/96 *Bayer* v *Commission* [2000] ECR II-3383, found that for the purposes of Article 81(1) EC the concept of 'agreement', as interpreted by the case-law, centres on 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.

13 In paragraph 33 of the judgment under appeal, the Court observed that, where a decision of the manufacturer constitutes unilateral conduct of the undertaking, that decision escapes the prohibition in Article 81(1) EC (see, to that effect, Case 107/82 *AEG* v *Commission* [1983] ECR 3151, paragraph 38; Joined Cases 25/84 and 26/84 *Ford* v *Commission* [1985] ECR 2725, paragraph 21; and *Bayer* v *Commission*, paragraph 66).

14 In paragraph 35 of the judgment under appeal, the Court observed 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. Whilst the former do not fall within Article 81(1) EC, 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 (*Bayer* v *Commission*, paragraph 71).

15 In paragraph 38 of the judgment under appeal, the Court found that it had not been established that the calls at issue had been implemented in practice.

16 In paragraph 39 of the judgment under appeal, the Court stated that the Commission's main argument for finding that there was an agreement within the meaning of Article 81(1) EC was that Volkswagen's distribution policy was tacitly accepted by the dealers on signing the dealership agreement.

17 In paragraph 43 of the judgment under appeal, the Court noted that the Commission's case amounted to claiming that a dealer who has signed a dealership agreement which complies with competition law is deemed, upon and by such signature, to have accepted in advance a later unlawful variation of that agreement, even though, by virtue precisely of its compliance with competition law, that agreement could not enable the dealer to foresee such a variation.

18 In paragraph 45 of the judgment under appeal, the Court found that it is possible for a contractual variation to be regarded as having been accepted in advance, upon and by the signature of a lawful dealership agreement, where it is a lawful contractual variation which is foreseen by the agreement, or is a variation which, having regard

to commercial usage or legislation, the dealer could not refuse. By contrast, the Court held that an unlawful contractual variation cannot be regarded as having been accepted in advance upon and by the signature of a lawful distribution agreement.

19 In paragraph 46 of the judgment under appeal, the Court stated that the Commission was wrong to assert that the signature by Volkswagen's dealers of the dealership agreement involved acceptance on their part of the calls at issue.

20 In paragraph 47 of the judgment under appeal, the Court considered that the Commission had misinterpreted the case-law which it cited in support of its case when it argued that, according to the judgments in *AEG* v *Commission*; *Ford* v *Commission*; Case C-70/93 *Bayerische Motorenwerke* [1995] ECR I-3439; and Case T-62/98 *Volkswagen* v *Commission* [2000] ECR II-2707, it was not necessary, at least in the case of selective distribution systems such as this one, to look for acquiescence to a manufacturer's call in the conduct adopted by the dealer in the context of that call (for example after its receipt) and that such acquiescence ought to be regarded as having been established as a matter of principle by the mere fact that the dealer had entered the distribution network.

21 In paragraph 56 of the judgment under appeal, the Court stated that the Commission's argument was clearly contradicted by the judgments of the Court of Justice in Joined Cases 32/78 and 36/78 to 82/78 *BMW Belgium and Others* v *Commission* [1979] ECR 2435 and Case C-277/87 *Sandoz prodotti farmaceutici* v *Commission* [1990] ECR I-45, and also by the judgment of the Court of First Instance in *Bayer* v *Commission*, relied on by Volkswagen in support of its action. Those judgments all confirm that, for an agreement within the meaning of Article 81(1) EC to be found to exist, it is necessary to prove a concurrence of wills. In addition, that concurrence of wills must cover particular conduct, which must, therefore, be known to the parties when they accept it.

22 In paragraph 61 of the judgment under appeal, the Court noted the Commission's alternative claim that, even were it to be held that a reservation clause in the dealership agreement is necessary before it can be held that the calls at issue form part of that agreement, Clause 2(1) or (6) of that agreement must be regarded as being such a clause.

23 The Court rejected that alternative claim, stating in paragraph 63 of the judgment under appeal that Clause 2(1) or (6) of the dealership agreement must be interpreted as referring solely to lawful means. To maintain the contrary would amount in effect, the Court observed, to deducing from such a contractual clause, drafted in neutral terms, that the dealers had bound themselves by an illegal agreement. The Court added in paragraph 64 of the judgment under appeal that Clause 8(1) of the dealership agreement is also drafted in neutral terms, indeed in terms which would deny Volkswagen the possibility of issuing binding price recommendations.

24 In those circumstances, the Court of First Instance annulled the contested decision.

Forms of order sought and plea in law relied on in support of the appeal

25 The Commission asks this Court to set aside the judgment under appeal, to refer the dispute back to the Court of First Instance and to order Volkswagen to pay the costs.

26 In support of its appeal, it relies on one plea, alleging that the Court of First Instance misconstrued Article 81(1) EC.

27 Volkswagen contends that the appeal should be dismissed and the Commission ordered to pay the costs.

The appeal

Arguments of the parties

28 By its plea, the Commission alleges that the Court of First Instance misconstrued Article 81(1) EC in finding that the calls at issue did not constitute agreements between undertakings as contemplated in the settled case-law of the Court of Justice.

29 The Commission states that, according to the settled case-law of the Court of Justice, a distributor's admission into a selective distribution network implies its explicit or tacit adherence to the distribution policy pursued by the manufacturer (*AEG* v *Commission*, paragraph 38; *Ford* v *Commission*, paragraph 21; and Joined Cases C-2/01 P and C-3/01 P *BAI and Commission* v *Bayer* [2004] ECR I-23, paragraph 144).

30 The Commission adds that, according to equally settled case-law, a call by a motor vehicle manufacturer to its authorised dealers does not constitute a unilateral act which falls outside the scope of Article 81(1) EC 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 (see *Ford* v *Commission*, paragraph 21; *Bayerische Motorenwerke*, paragraphs 15 and 16; and Case C-338/00 P *Volkswagen* v *Commission* [2003] ECR I-9189, paragraph 60).

31 The Commission argues that the judgment under appeal was given in disregard of that case-law and is incompatible with the nature of selective distribution systems.

32 According to the Commission, the dealer, in signing the dealership agreement, accepted future measures which were likely to become part of the framework established by the agreement. It maintains that, contrary to what was held by the Court of First Instance in paragraphs 45 and 56 of the judgment under appeal, such measures do not necessarily have to be foreseen by the dealership agreement or comply with the law in order to be considered to be an agreement within the meaning of Article 81(1) EC.

33 Volkswagen contends that the interpretation of the concept of agreement by the Court of First Instance is fully in keeping with the case-law of the Court of Justice and that provision of the EC Treaty.

Findings of the Court

34 The Commission maintains essentially that the Court of First Instance could not, without committing an error of law, be unaware that, in signing a dealership agreement, dealers give their prior consent to all measures adopted by the motor vehicle manufacturer in the context of that contractual relationship.

35 In support of its argument, the Commission refers to settled case-law according to which a call by a motor vehicle manufacturer to its authorised dealers does not constitute a unilateral act but an agreement within the meaning of Article 81(1) EC if it forms part of a set of continuous business relations governed by a general agreement drawn up in advance.

36 However, the case-law to which the Commission refers does not imply that any call by a motor vehicle manufacturer to dealers constitutes an agreement within the meaning of Article 81(1) EC and does not relieve the Commission of its obligation to prove that there was a concurrence of wills on the part of the parties to the dealership agreement in each specific case.

37 The Court of First Instance rightly noted, in paragraphs 30 to 34 of the judgment under appeal, that, in order to constitute an agreement within the meaning of Article 81(1) EC, it is sufficient that an act or conduct which is apparently unilateral be the expression of the concurrence of wills of at least two parties, the form in which that concurrence is expressed not being by itself decisive.

38 As stated by Volkswagen in paragraph 29 of its response to the notice of appeal, to find otherwise would have the effect of reversing the burden of proof of the existence of a breach of the competition rules and contravening the principle of presumption of innocence.

39 The will of the parties may result from both the clauses of the dealership agreement in question and from the conduct of the parties, and in particular from the possibility of there being tacit acquiescence by the dealers in a call from the manufacturer (see, to that effect, Case C-338/00 P *Volkswagen* v *Commission*, paragraphs 61 to 68).

40 In the present case, with respect to the first possibility, the Commission inferred that there was a concurrence of wills between the parties solely on the basis of the clauses of the dealership agreement in question. The Court of First Instance then had to proceed, as it did, to consider whether those calls were explicitly contained in the dealership agreement or, at the very least, whether the clauses of that agreement authorised motor vehicle manufacturers to make such calls.

41 It should be borne in mind that, in paragraph 20 of the judgment in *Ford* v *Commission*, the Court rejected an argument based on the allegedly unilateral nature of certain measures of selective distribution of motor vehicles, stating that dealership agreements must necessarily leave certain aspects for subsequent decision by manufacturers and that such decisions were expressly provided for in Annex 1 to the dealership agreement in question.

42 Likewise, in paragraph 64 of the judgment in Case C-338/00 P *Volkswagen* v *Commission*, this Court held that the Court of First Instance had found correctly that measures taken by Volkswagen to limit the deliveries of motor vehicles to Italian dealers, implemented with the express aim of blocking re-exports from Italy, was part of the ongoing commercial relationship between the parties to the dealership agreement; the Court of First Instance relied, inter alia, on the fact that the dealership agreement in question provided for the possibility of limiting such deliveries.

43 In that context, this Court notes that its case-law does not indicate that the compliance or non-compliance of the contractual clauses in question with the competition rules is necessarily decisive in that examination. It follows that the Court of First Instance erred in law in finding, in paragraphs 45 and 46 of the judgment under appeal, that clauses which comply with the competition rules may not be regarded as authorising calls which are contrary to those rules.

44 The possibility that a call which is contrary to the competition rules may be regarded as being authorised by seemingly neutral clauses of a dealership agreement cannot be automatically excluded.

45 Consequently, the Court of First Instance could not, without making an error of law, refrain from examining the clauses of the dealership agreement individually, taking account, where applicable, of all other relevant factors, such as the aims pursued by that agreement in the light of the economic and legal context in which it was signed.

46 With respect to the second possibility, that is, in the absence of relevant contractual provisions, the existence of an agreement within the meaning of Article 81(1) EC presupposes the dealers' explicit or tacit acquiescence to the measure adopted by the motor vehicle manufacturer (see, to that effect, *BMW Belgium and Others* v *Commission*, paragraphs 28 to 30).

47 In the present case, since the Commission did not rely on there being explicit or tacit acquiescence by the dealers, this second possibility is not relevant for the present dispute.

48 It follows from the foregoing that, in order to determine whether the calls at issue were part of the overall commercial relationship between Volkswagen and its dealers, the Court of First Instance should have considered whether they were provided for or authorised by the clauses of the dealership agreement, taking account of the aims pursued by that agreement per se, in the light of the economic and legal context in which the agreement was signed.

49 As regards in this case the interpretation made by the Court of First Instance of the clauses of the dealership agreement, it is clear from Article 225 EC and the first paragraph of Article 58 of the Statute of the Court of Justice that the Court of First Instance has exclusive jurisdiction, first, to find the facts except where the substantive inaccuracy of its findings is apparent from the documents submitted to

it and, second, to assess those facts. When the Court of First Instance has found or assessed the facts, the Court of Justice has jurisdiction under Article 225 EC to review the legal characterisation of those facts by the Court of First Instance and the legal conclusions it has drawn from them (see, in particular, Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 23).

50 With respect to the clauses of the dealership agreement, the Court of First Instance found in its absolute discretion, in paragraph 2 of the judgment under appeal, that under Clause 2(1) or (6) of that agreement, the dealer undertakes inter alia to defend the interests of the Volkswagen distribution organisation and of the Volkswagen brand and to comply to that end with all instructions issued for the purposes of the agreement regarding the distribution of new vehicles and sales promotion.

51 It is also clear from paragraph 2 of the judgment under appeal that, under Clause 8(1) of the dealership agreement, Volkswagen issues non-binding price recommendations concerning retail prices and discounts.

52 In paragraphs 62 to 68 of the judgment under appeal, the Court of First Instance, in the specific assessment of the dealership agreement, found that those clauses could not be regarded as having authorised Volkswagen to issue binding recommendations to the dealers concerning prices of new vehicles and that the calls at issue did not constitute an agreement within the meaning of Article 81(1) EC.

53 The Court of First Instance correctly relied on the wording of the clauses of the dealership agreement in order to assess their content. However, the Court of Justice does not, in principle, have jurisdiction in the context of an appeal to review the finding by the Court of First Instance that those clauses were drafted in neutral terms, indeed in terms which would deny Volkswagen the possibility of issuing

binding price recommendations. The Court does note, however, that the Court of First Instance did make an error of law in its reasoning in finding that clauses which comply with the competition rules may not be regarded as authorising calls which are contrary to those rules.

54 This error, however, does not affect the soundness of the conclusion reached by the Court of First Instance, to the effect that the calls at issue in the present case cannot be regarded as constituting an 'agreement' within the meaning of Article 81(1) EC.

55 In the light of the foregoing, the Court finds that the Court of First Instance correctly found in paragraph 68 of the judgment under appeal that the contested decision should be annulled.

56 It follows that the appeal should be dismissed as unfounded.

Costs

57 Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since Volkswagen has applied for costs and the Commission has been unsuccessful in its plea, the latter must be ordered to pay the costs.

On those grounds, the Court (Third Chamber) hereby:

1. Dismisses the appeal;

2. Orders the Commission of the European Communities to pay the costs.

[Signatures]