

JUDGMENT OF THE COURT (Fifth Chamber)
11 November 1986 *

In Case 226/84

British Leyland Public Limited Company, a company governed by English law, whose registered office is at Uxbridge, represented by Christopher Bellamy and Nicolas Paines, Barristers-at-law, and R. P. A. Coles, Solicitor, with an address for service in Luxembourg at the Chambers of André Elvinger and Jean Hoss, 15 Côte d'Eich,

applicant,

v

Commission of the European Communities, represented by Karen Banks, a member of its Legal Department, and its Legal Adviser, Thomas F. Cusack, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of its Legal Department, Jean Monnet Building, Kirchberg,

defendant,

supported by

Derek Merson, garage proprietor, residing at Minehead, Somerset, represented by Julian Henry Maitland-Walker, Solicitor, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 34 B rue Philippe-II,

intervener,

APPLICATION for a declaration that Commission Decision No 84/379/EEC is void and, in the alternative, for a reduction of the fine,

THE COURT (Fifth Chamber)

composed of: Y. Galmot, President of the Chamber, F. Schockweiler, U. Everling, R. Joliet and J. C. Moitinho de Almeida, Judges,

Advocate General: M. Darmon

Registrar: D. Louterman, Administrator

* Language of the Case: English.

having regard to the Report for the Hearing and further to the hearing on 6 May 1986,

after hearing the Opinion of the Advocate General delivered at the sitting on 8 July 1986,

gives the following

JUDGMENT

1 By an application lodged at the Court Registry on 11 September 1984, British Leyland Public Limited Company, a company governed by English law, (hereinafter referred to as 'BL') brought an action under the second paragraph of Article 173 of the EEC Treaty for a declaration that Commission Decision No 84/379/EEC of 2 July 1984 relating to a proceeding under Article 86 of the EEC Treaty (Official Journal 1984, L 207, p. 11) was void. By that decision the Commission found that BL had infringed Article 86 in the following respects:

- (1) by refusing to issue certificates of conformity between June 1981 and April 1982 when a National Type Approval certificate (hereinafter referred to as an 'NTA certificate') was in force for the left-hand-drive variant of the Metro;
- (2) by deciding in November 1981 no longer to seek National Type Approval for the left-hand-drive Metro as a means of impeding re-importation of that vehicle into the United Kingdom from other Member States;
- (3) by charging UKL 150 to traders for the provision of certificates of conformity in respect of left-hand-drive Metros between August 1981 and April 1982, and by charging UKL 100 for the same service to both independent dealers and individuals since 16 March 1983, when National Type Approval for the left-hand-drive variant of the Metro was renewed;

it consequently imposed on BL a fine of 350 000 ECU. BL seeks, in the alternative, a reduction in the amount of the fine.

- 2 Reference is made to the Report for the Hearing for a full account of the facts of the case, the procedure and the conclusions and submissions of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

The existence of a dominant position

- 3 In order to establish whether BL in fact occupies a dominant position, it is first necessary to identify the relevant market.
- 4 In Great Britain, a person seeking to register a vehicle for use on the roads must, unless he is importing the vehicle for personal use, produce a 'certificate of conformity' certifying that the vehicle conforms to a previously approved type vehicle. That certificate is issued by the manufacturer of the vehicle on the basis of the National Type Approval certificate (NTA certificate) which it has obtained from the Department of Transport, or by the holder of a Primary Minister's Approval Certificate (PMAC), which can be obtained from the Department of Transport only if the manufacturer provides the necessary technical information.
- 5 In the light of those rules, the relevant market is not that of the sale of vehicles, as BL claims, but a separate, ancillary market, namely that of services which are in practice indispensable for dealers who wish to sell the vehicles manufactured by BL in a specific geographical area (see judgment of 13 November 1975, Case 26/75 *General Motors v Commission* [1975] ECR 1367, at p. 1378).
- 6 It appears from the documents before the Court that BL markets its vehicles in Great Britain through a selective distribution network. Outside that network, however, a trade developed in the re-importation of 'Metro' cars, mainly from Belgium, as a result of the differences between the prices charged by BL in the United Kingdom for right-hand-drive vehicles and in the continental EEC Member States for left-hand-drive vehicles.
- 7 In order to show that it does not occupy a dominant position in the market of the services described above, BL claims that private individuals may register vehicles purchased abroad in the United Kingdom without having to produce a certificate of conformity.
- 8 It appears from the British rules that that facility is exceptional and is reserved exclusively for private individuals. It is subject to strict conditions and accorded exclusively in respect of personal use, and, although it has been used by certain

dealers to obtain vehicles for their customers, it cannot be regarded as a regular procedure for registering cars imported commercially.

- 9 The British rules therefore confer on BL a form of administrative monopoly in the relevant market and, with regard to the issue of certificates of conformity, place the dealers in a position of economic dependence which is characteristic of a dominant position (see judgment in *General Motors*, cited above).
- 10 Consequently, the applicant's submission that it does not occupy a dominant position must be rejected.

Abuse of a dominant position

- 11 According to the Commission, BL has abused that dominant position in three ways. In the first place, in November 1981 it allowed the NTA certificate for left-hand-drive Metros which it had obtained when that model was first marketed to expire. Secondly, in certain cases it refused to issue certificates of conformity for vehicles of that type which had been re-imported from the continent, although it was in a position to do so. Finally, in other cases it charged an excessive fee for the issue of the certificates of conformity.

(a) The non-renewal of the NTA certificate

- 12 BL claims that the fact that it allowed the NTA certificate for left-hand-drive Metros to expire cannot constitute an abuse since, as the Commission moreover concedes, it was not under any duty in the first place to request type approval for those vehicles, which it does not market in the United Kingdom.
- 13 Without there being any need to consider whether, in order to avoid a partitioning of markets within the Common Market, there might have existed an initial duty to seek type approval for left-hand-drive vehicles, it is sufficient to note that by requesting that approval, which was intended to enable it to sell on the British market vehicles rejected for sale on the continent, BL allowed a trade in the re-importation of such cars to develop. That trade came about as a result of its pricing policy.

- 14 BL was aware of the existence of such trade in re-imported vehicles because of the complaints it received from the dealers belonging to its selective distribution network who demanded that BL take steps to eliminate it. It is clear, *inter alia*, from the minutes of the dealer council meetings on 16 January and 4 November 1981 that BL promised to make every effort to limit re-importations, in particular by allowing the NTA certificate for left-hand-drive Metros to expire from October 1981. Further confirmation of the existence of such a trade is to be found in the complaints received by the Commission from commercial importers when BL stated that it was no longer able to issue certificates of conformity.
- 15 It is, moreover, not possible to accept BL's argument that it is under no obligation to dealers outside its selective distribution network, which has been accepted as permissible by the Commission.
- 16 BL cannot rely on the selective distribution system which it operates in the United Kingdom in order to create barriers to the reimportation of vehicles by independent dealers from other Member States (see judgments of 21 February 1984, Case 86/82 *Hasselblad v Commission* [1984] ECR 883, and of 10 December 1985, Case 31/85 *ETA v DK Investment* [1985] ECR 3933). In any event the fact that BL's distribution system has been accepted by the Commission cannot justify BL's abuse of its dominant position.
- 17 BL also refers to commercial considerations. It claims that it had no further commercial interest in maintaining the NTA certificate for left-hand-drive Metros, since it no longer sold such vehicles on the British market, and that it was necessary to allow the approval to lapse in order to reduce production costs.
- 18 That argument, as such, is not relevant since, since by obtaining an NTA certificate for left-hand-drive versions, BL created a situation in which left-hand-drive cars re-imported from the continental EEC Member States were sold in the United Kingdom. As is clear from the minutes of its United Kingdom dealer council meetings, the only reason for the refusal to renew the NTA certificate for left-hand-drive Metros was BL's intention to impede re-importations and to

protect its distribution network. As regards the need to cut costs referred to by BL, it should be noted that the updating of the NTA certificate by means of the notification of alterations made to left-hand-drive versions would have entailed only slight administrative costs for BL, particularly since, as is clear from the hearing, those alterations were the same as those made to right-hand-drive vehicles.

- 19 BL's objection that it is concerned to protect its reputation and needs to ensure that the importers carrying out the conversion of left-hand-drive vehicles to right-hand-drive are sufficiently qualified is unfounded since the NTA certificate and the certificates of conformity were for left-hand-drive models and the conversion of the vehicles to right-hand-drive, carried out after they have been released on to the market and registered, is not under BL's control. BL cannot prevent purchasers of such vehicles from using traders outside its network for that purpose.
- 20 Finally BL's claim that the non-renewal of the NTA certificate for left-hand-drive vehicles in no way impeded trade is not relevant. In the first place, the statistics supplied concern the total volume of re-importations of vehicles and do not allow any conclusion to be drawn regarding the volume of re-importations for resale by traders. More importantly, however, for a measure to be regarded as adversely affecting trade between the Member States, it is not necessary to establish specifically what effects it has at present on the volume of such trade. According to the express wording of Articles 85 and 86 of the EEC Treaty, it is sufficient that the measure may affect trade between Member States. It is indisputable that by making it impossible to register vehicles re-imported on a commercial basis, BL was acting in a way liable to affect the trade in such vehicles between the Member States.
- 21 In conclusion it must be held that, by deciding to allow the NTA certificate for left-hand-drive Metros to lapse in October 1981 with the object of creating a barrier to re-importations, a lawful trade in which had been established following the initial issue of an NTA certificate for that type of vehicle, BL abused the dominant position it held by virtue of the British rules concerning registration.

(b) *The refusal to issue certificates of conformity*

- 22 It appears from the information provided to the Court that the NTA certificate covers all vehicles manufactured by BL which conform to that certificate, or in respect of which the specifications have subsequently been notified to the competent authority, and that it loses its validity only for vehicles to which non-notified alterations have been made. Since BL ceased to notify the alterations made to its left-hand-drive Metros in October 1981, it could therefore validly issue certificates of conformity both for vehicles manufactured before that date and for vehicles manufactured after that date to which no non-notified alterations had been made in relation to the previously approved type vehicle.
- 23 In order to satisfy itself that it was entitled to issue certificates of conformity BL need only have requested the chassis numbers identifying the vehicles and checked the date of manufacture so as to determine whether non-notified alterations had been made to the vehicles. It is clear from an examination of the applications submitted to BL by traders that, in at least four cases, BL might have concluded that the cars were still covered by the NTA certificate. BL gave evasive replies, leaving the traders uncertain as to the formalities which had to be completed, so as to discourage them from re-importing vehicles. It is clear from BL's replies that it deliberately refused, if not to issue the certificates of conformity which were perhaps not always clearly and expressly requested, at least to communicate the information and to provide the services necessary for registering the vehicle which, under the British rules, it alone was in a position to supply to the dealers.
- 24 It follows from the foregoing that BL's conduct can only be construed as the manifestation of a deliberate intention on its part to create barriers to re-importations which come into competition with its approved distributors. That conduct must therefore be regarded as an abuse of a dominant position.

(c) *The excessive nature of the fees*

- 25 It appears from the documents before the Court that BL initially charged a single fee of UKL 25 for both right-hand-drive and left-hand-drive Metros for the issue

of certificates of conformity. It left that amount unchanged for right-hand-drive vehicles, but on 1 July 1981 it increased the fee for left-hand-drive vehicles to UKL 150 for dealers and UKL 100 for private individuals. On 16 March 1983 BL introduced a uniform fee of UKL 100 following the Commission's criticism in its statement of objections of 17 July 1982 that the UKL 150 fee was too high. Since these proceedings were brought, that amount has been reduced to UKL 50.

- 26 BL denies that by charging a fee of UKL 150 or UKL 100 it abused a dominant position.
- 27 As the Court held in its judgment in *General Motors* (cited above), an undertaking abuses its dominant position where it has an administrative monopoly and charges for its services fees which are disproportionate to the economic value of the service provided.
- 28 It appears from the documents before the Court and the information provided by the parties that, in the case of both right-hand-drive and left-hand-drive vehicles, in order to issue a certificate of conformity it is necessary to determine from the chassis number the date of manufacture of the vehicle. It is then possible to identify the number of the corresponding NTA certificate. It is, therefore, a simple administrative check which cannot entail significant costs. For left-hand-drive vehicles the certificate is in principle issued before conversion, if they are converted to right-hand-drive. The only difference in relation to the issue of a certificate for a right-hand-drive vehicle lies in the need to verify that the four alterations essential for a left-hand-drive vehicle have been made, namely the adjustment of headlights, full beam and dipped, the calibration of the speedometer in miles per hour, the adaptation of the rear fog lamp and the addition of a wing-mirror on the right front door. That verification does not require an inspection of the vehicle. It is effected on the basis of a certificate furnished by a garage and, on the basis of the cost incurred, cannot therefore justify the charging of different fees for the issue of certificates of conformity according to whether the vehicles are right-hand-drive or left-hand-drive. Initially the fee for left-hand-drive vehicles was six times greater than that for right-hand-drive vehicles.

29 Moreover, BL itself admitted at the hearing that the difference which existed at one time according to whether the certificate was requested by a dealer, who was charged UKL 150, or by a private individual, who was charged only UKL 100, was not based on the cost but on the consideration that the trader who was carrying out a transaction for gain could be required to pay a higher fee. The fact that the fee was first reduced to UKL 100 and then UKL 50, whilst for right-hand-drive vehicles it remained at UKL 25, also suggests that it was fixed solely with a view to making the re-importation of left-hand-drive vehicles less attractive.

30 In those circumstances, the Commission was entitled to conclude that the fee was fixed at a level which was clearly disproportionate to the economic value of the service provided and that that practice constituted an abuse by BL of the monopoly it held by virtue of the British rules.

31 BL further argues that the fee of UKL 150 was charged only from 1 July 1981 until the expiry of the NTA certificate in October 1981, which was too short a period for it to be considered an infringement.

32 It is true that, when the infringement was pointed out to it by the Commission, BL quickly reduced the amount of the fee from UKL 150 to UKL 100. Moreover, the Commission took account of that in assessing the gravity of the infringement and in fixing the fine. BL's cooperative attitude and the length of the period during which the fee was charged do not, however, alter the basic fact that the infringement occurred.

33 Finally, BL's argument that the amount of the fee had no detrimental effect on the volume of the re-importations is, as the Court has already stated above, irrelevant.

34 In conclusion, it must be held that the complaints made by the Commission in the contested decision are established.

The applicant's contention that various principles of law have been breached

(a) *The right to be heard*

35 BL maintains that the Commission did not contest the fee of UKL 100 introduced on 16 March 1983 until its letter of 25 August 1983, so that BL was entitled to believe, prior to that letter, that the Commission accepted that amount. Moreover, the statement of objections referred only to the fee of UKL 150.

36 In that respect it should be noted that in its statement of objections, the Commission essentially complains that the UKL 150 fee is disproportionate in comparison with the initial fee of UKL 25. BL could and indeed should have deduced from this that it was not so much the fixing of the fee at a particular amount which was contested, but the fact that it was generally too high. In the light of the criteria laid down in the judgment in *General Motors* (cited above), BL must have been aware that the amount of the fee must be proportionate to the economic value of the service. When the Commission informed it by a letter dated 25 August 1983 that the rate of UKL 100 was still too high and requested evidence of the cost of issuing the certificates, it was not raising a new complaint against BL. Nor was it preventing the company from exercising its right to be heard.

37 It must therefore be concluded that, as far as the procedural requirements are concerned, the Commission sufficiently identified the infringement charged and gave BL the opportunity 'to make known [its] views on the truth and relevance of the facts and circumstances alleged' (judgment of 13 February 1979 in Case 85/76 *Hoffman-La-Roche v Commission* [1979] ECR 461).

(b) *Misuse of powers*

38 BL accuses the Commission of having continued the infringement proceedings after the renewal of the NTA certificate for left-hand-drive Metros solely in order to force it to reduce the price of right-hand-drive Metros sold on the continent so as to open up a trade in re-importing vehicles into the United Kingdom for the purpose of undermining the United Kingdom price structure.

- 39 As the Commission concedes, the two questions may be regarded as connected inasmuch as the price level of right-hand-drive cars on the continent explains why it was largely left-hand-drive cars that were re-imported. The two problems are moreover symptomatic of BL's determination to maintain prices in the United Kingdom at a level which is not affected by competition from re-imported cars. The fact that in the course of the investigation the Commission raised the related question of BL's pricing policy in the continental Member States, which, moreover BL agreed to discuss, cannot constitute a misuse of powers, since the constituent elements of an abuse of a dominant position were present and neither the procedure nor the decision went beyond the scope of the statement of objections.
- 40 The submissions based on infringement of the right to be heard and on a misuse of powers must, consequently, be rejected.

(c) *The principle of non-discrimination*

- 41 The applicant claims that by requiring it to maintain National Type Approval for left-hand-drive Metros, the Commission treated it more severely than other motor-vehicle manufacturers established in the United Kingdom on which it did not impose the same obligation.
- 42 As the Commission points out, the position of those other manufacturers was different to that of BL, which was the only one to apply for an NTA certificate for left-hand-drive vehicles and thus allowed a trade in re-imported vehicles to grow up.
- 43 There is therefore no breach of the principle of non-discrimination which, as the Court has previously held, prohibits only the different treatment of identical situations.

The claim in the alternative for a reduction of the fine

- 44 It must be observed that the Commission fixed the fine in accordance with the gravity and the duration of the infringement and that, as it stated in the preamble to its decision, it took account of BL's cooperative attitude during the procedure.

45 The claim for a reduction of the fine must therefore be rejected.

Costs

46 Article 69 (2) of the Rules of Procedure provides that the unsuccessful party is to be ordered to pay the costs. Since BL has failed in its submissions, it must be ordered to pay the costs, including those of the intervener.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

(1) Dismisses the application.

(2) Orders the applicant to pay the costs, including those of the intervener.

Galmot

Schockweiler

Everling

Joliet

Moitinho de Almeida

Delivered in open court in Luxembourg on 11 November 1986.

P. Heim

Y. Galmot

Registrar

President of the Fifth Chamber