

JUDGMENT OF THE COURT

17 September 1985

In Joined Cases 25 and 26/84

- (1) **Ford-Werke AG**, whose registered office is in Cologne (Federal Republic of Germany),

applicant in Case 25/84,

- (2) **Ford of Europe Inc.**, whose permanent address is in Wilmington, Delaware (United States),

applicant in Case 26/84,

both represented by J. Lever, Q. C., and C. S. Vajda, of Gray's Inn, London, assisted by P. Collins, Solicitor, London, and by P. Sambuc, Rechtsanwalt, of Cologne, with an address for service in Luxembourg at the Chambers of J.-C. Wolter,

v

Commission of the European [Union], represented by its Legal Adviser, J. Temple Lang, with an address for service in Luxembourg at the office of M. Beschel, Jean Monnet Building, Kirchberg,

defendant,

supported by

the Bureau Européen des Unions de Consommateurs, Brussels, represented by S.A. Crossick, Solicitor of the Supreme Court of England and Wales, with an address for service in Luxembourg at the Chambers of E. Arendt,

APPLICATION for a declaration that Commission Decision No 83/560/EEC

of 16 November 1983 relating to a proceeding under [Article 101 TFEU] (IV/30.696 -distribution system of Ford-Werke AG) (Official Journal L 327, p. 31) is void,

THE COURT

composed of: Lord Mackenzie Stuart, President, G. Bosco, O. Due and C. Kakouris (Presidents of Chambers), P. Pescatore, T. Koopmans, U. Everling, K. Bahlmann and R. Joliet, Judges,

Advocate General: Sir Gordon Slynn

Registrar: H. A. Ruhl, Principal Administrator

after hearing the Opinion of the Advocate General delivered at the sitting on 8 May 1985,

gives the following

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

- 1 By applications lodged at the Court Registry on 25 January 1984, Ford Werke Aktiengesellschaft, of Cologne, and Ford of Europe Incorporated, of Wilmington, Delaware (United States), brought two actions under [the fourth paragraph of Article 263 TFEU] for a declaration that Commission Decision No 83/560 of 16 November 1983 relating to a proceeding under [Article 101 TFEU] (IV/30.696 -Distribution system of Ford Werke AG; Official Journal L 327, p. 31) is void.
- 2 By order of 29 February 1984 the Court ordered the cases to be joined, because

of their close relationship, for the purposes of the written and the oral procedure and the judgment.

- 3 The applicants are subsidiaries of Ford Motor Company, a company incorporated in the United States of America. Ford of Europe Incorporated (hereinafter referred to as 'Ford of Europe') is a corporation incorporated in the United States of America and has offices in the United Kingdom, Belgium and the Federal Republic of Germany, while Ford-Werke Aktiengesellschaft (hereinafter referred to as 'Ford AG') is a company incorporated under German law established in the Federal Republic of Germany and, in its capacity as a manufacturing company, in Belgium as well.
- 4 Ford of Europe coordinates the allocation of economic activity amongst the European subsidiaries of Ford Motor Company (hereinafter referred to as 'the Ford Group'). Ford AG manufactures Ford vehicles, some of which are sold by it on the market consisting of the Federal Republic of Germany and the remainder of which are exported, in particular to certain Member States where they are marketed by other companies of the Ford Group. A large proportion of Ford AG's production is sold directly to Ford Motor Company Limited (hereinafter referred to as 'Ford Britain') in the United Kingdom with a view to its being marketed there by that company which, like Ford AG, has established its own sales programme and its own distribution network. Consequently Ford AG produces both left-hand-drive cars and right-hand-drive cars on a regular basis.
- 5 In order to implement its sales programme on the German market Ford AG established a selective distribution system based on a main dealer agreement [Hauptdealer-Vertrag] binding it to its German distributors. That agreement was notified to the Commission on 14 May 1976 and Ford AG requested negative clearance for it under Article 2 of Council Regulation No 17 of 6 February 1962 (Official Journal, English Special Edition 1959-1962, p. 87) or, in the alternative, an exemption under [Article 101(3) TFEU].
- 6 Until 1 May 1982 a certain number of right-hand drive cars, some constructed to British specifications and the rest to German specifications, were supplied by

Ford AG to its appointed German dealers and were sold in the Federal Republic of Germany. Since the spring of 1981 there had been a great increase in demand for right-hand-drive cars on that market because prices were considerably lower than those on the British market, partly as the result of monetary fluctuations, and therefore a growing number of British customers were buying those vehicles from German dealers. Because it was concerned about the effects of such sales on the position of Ford Britain and its distribution network, Ford AG notified the German Ford dealers by a circular dated 27 April 1982 that with effect from 1 May it would no longer accept their orders for right-hand-drive cars and that as from that date all such cars would have to be purchased either from a Ford dealer established in the United Kingdom or from a subsidiary of Ford Britain.

- 7 That circular led the Bureau Européen de unions de consommateurs [European Office of Consumer Unions], an intervening party in these cases, to lodge with the Commission on 12 May 1982 a complaint requesting it to order interim measures. On 2 July 1982 the Commission decided to institute proceedings ... under Article 6 (1) of Regulation No 17/62', a provision which concerns the application of [Article 101(3) TFEU], and sent a statement of objections to Ford AG. In that statement the Commission indicated that it planned to rule that the marketing system practised by Ford AG contravened [Article 101(1) TFEU] and could not be exempted under [Article 101(3) TFEU], but that in the meantime it intended to issue a provisional order instructing Ford AG to withdraw its circular of 27 April 1982 and to reinstate right-hand-drive cars in the company's product range.
- 8 On 18 August 1982, the Commission adopted a decision containing interim measures (Official Journal L 256, p. 20). That decision required Ford AG, within 10 days from the date of notification thereof, to withdraw its circular of 27 April 1982 and to inform its German Ford dealers that right-hand-drive cars still formed part of Ford AG's agreed delivery range. The decision was to apply until adoption of a decision concluding the proceedings.
- 9 That decision was declared void by the Court in its judgment of 28 February 1984 (Joined Cases 228 and 229/82 *Ford v Commission* [1984] ECR 1129). The

Court did not rule on the question whether the Commission, when adopting in pursuance of Articles 6 and 8 of Regulation No 17 a decision in application of [Article 101(3) TFEU], may regard the refusal to supply as a circumstance which prevents an exemption from being granted in respect of a dealer agreement or may subject such an exemption to the requirement that supplies be resumed. It considered however that the Commission had no authority to convert that requirement, by means of a decision ordering interim measures, into a separate, enforceable order which left no choice to the undertaking concerned.

10 On 16 November 1983, the Commission adopted the definitive decision which is the subject of the present application. That decision is addressed to Ford AG and revokes the decision of 18 August 1982 (Article 3). The Commission therein states that Ford AG's main dealer agreement restricts competition and affects trade between Member States in the sense of [Article 101(1) TFEU]. It refuses to grant an exemption pursuant to [Article 101(3) TFEU] for that agreement as applied by Ford AG since 1 May 1982, the date on which Ford AG's circular of 27 April 1982 came into force (Article 1). Finally, the Commission orders Ford AG to bring the infringement to an end (Article 2).

11 In the statement of the reasons on which its decision is based, the Commission indicates that the decision considers only the main dealer agreement, as operated by Ford AG since 1 May 1982, in the operation of which Ford AG no longer supplies right-hand-drive vehicles to its German dealers (paragraph 28 of the decision). That termination of deliveries may, according to the Commission, be taken into account in applying [Article 101 TFEU] even though it was not directly caused by the agreement because the Commission must consider an agreement in the economic context in which it has been applied (paragraph 36 of the decision).

12 The applicants and the Commission all agree that the main issue in this case is whether the Commission was entitled to refuse an exemption under [Article 101(3) TFEU] for Ford AG's main dealer agreement by reason of the fact that that undertaking had discontinued supplies of right-hand-drive cars to its German distributors. According to the applicants, discontinuance of supplies of right-hand-drive cars does not fall under the prohibitions laid down in [Article 101 TFEU]. The Commission contends that consideration of the main dealer agreement with a view to a possible exemption cannot fail to take account of the

context in which the agreement functions and of Ford AG's conduct, which is part of that context.

13 Since the various submissions relied upon by the applicants are related to that principal problem, it is necessary to examine it before proceeding any further.

(a) The unilateral nature of the undertaking's conduct

14 The applicants' claim that the necessity in the automobile industry, in which the products sold are technically sophisticated, to have recourse to a system of selective distribution has been recognized by the Commission. Such a system was established by Ford AG in the form of the main dealer agreement which it entered into with its dealers. That agreement is no more restrictive of competition than any other distribution system in the automobile industry. Thus, the Commission would have been willing to exempt the agreement, on the basis of [Article 101(3) TFEU], from the application of [Article 101(1) TFEU] were it not for the fact that it wished to prevent the discontinuance of sales of right-hand-drive cars by Ford AG in Germany. In reality, the contested decision is not concerned with the revocation of certain clauses of the main dealer agreement which are alleged to be restrictive but seeks rather to restore sales of right-hand-drive Ford cars on the German market.

15 According to the applicants, the circular of 27 April 1982 and the discontinuance of sales of right-hand-drive cars to German dealers announced therein were of a unilateral nature. However, a unilateral act cannot be included among the agreements, decisions and concerted practices prohibited by [Article 101 TFEU]. First, an undertaking which produces motor cars cannot be obliged to include a certain type of car in its production or marketing programme since it is that undertaking which bears the risk inherent in any entrepreneurial activity. Secondly, discontinuance of deliveries of right-hand-drive cars has in this case no connection with the main dealer agreement, and in any event, the Commission has in no way established the existence of such a connection. It must therefore be concluded that withdrawal of right-hand-drive cars from the market has no relevance to the assessment of the main dealer agreement in the light of the Treaty.

- 16 The Commission draws attention first to the fact that the decision to grant or refuse an exemption under [Article 101(3) TFEU] in respect of an agreement falling under the prohibition contained in [Article 101(1) TFEU] must be adopted in the light of the entire economic and legal context in which the agreement has operated. The behaviour of a n undertaking whose relationship to its dealers is based on a system of selective distribution is part of that context. In this case, the decision not to grant an exemption in respect of the main dealer agreement was particularly justified because the consequence of Ford AG's behaviour was to aggravate significantly the restrictive effects of such agreements and to reduce intra-brand competition solely for the purpose of putting an end to parallel imports into Great Britain and thereby erecting barriers between the national markets.
- 17 With regard to the connection between the main dealer agreement and the refusal to supply right-hand-drive cars to German dealers, the Commission refers to the statement of the reasons on which the contested decision is based (paragraph 42) according to which Ford AG's main dealer agreement and the type of relationship which it created were the context in which Ford AG's circular letter of 27 April 1982 was sent and in which that firm discontinued deliveries of right-hand-drive cars. The circular was exclusively addressed to dealers who were parties to the German main dealer agreement whereas, previously, Ford AG had sold right-hand-drive cars only to and through those dealers, and the dealers' right to obtain Ford motor cars under Article 2 of the agreement included right-hand-drive cars. The circular thus altered the relationship between Ford AG and its dealers.
- 18 The Bureau Européen des Unions de Consommateurs draws attention to Article 2, paragraph 1, of the main dealer agreement which provides that Ford must supply its dealers with its 'products'. Article 1 of the agreement defines the product line as including all cars and spare parts produced by Ford AG. With regard to cars, the same provision states that that term means 'the normal serial models of passenger cars and light and medium commercial vehicles and chassis . . . as specified in schedule 1 [to the agreement]', which schedule lists a certain number of models (Fiesta, Escort, etc.) and adds that if a new model is introduced, Ford AG will offer it to the dealers by written notice altering that schedule.

- 19 The Bureau Européen des Unions de Consommateurs also observes that after deliveries of right-hand-drive cars to German dealers had been discontinued, the main dealer agreement became an instrument by which Ford AG prevented parallel imports of right-hand-drive cars into the British market, thus maintaining the high level of British prices and consequently depriving consumers of the advantages which the common market ought to afford them.
- 20 It must be observed in this regard that agreements which constitute a selective distribution system and which, as in this case, seek to maintain a specialized trade capable of providing specific services for high-technology products are normally concluded in order to govern the distribution of those products for a certain number of years. Because technological developments are not always foreseeable over such a period of time, those agreements necessarily have to leave certain matters to be decided later by the manufacturer. As the Bureau Européen des Unions des Consommateurs has rightly pointed out, it is precisely such later decisions that were provided for in Schedule 1 to Ford AG's main dealer agreement as far as the models to be delivered under the terms of that agreement are concerned.
- 21 Such a decision on the part of the manufacturer does not constitute, on the part of the undertaking, a unilateral act which, as the applicants claim, would be exempt from the prohibition contained in [Article 101(1) TFEU]. On the contrary, it forms part of the contractual relations between the undertaking and its dealers. Indeed, admission to the Ford AG dealer network implies acceptance by the contracting parties of the policy pursued by Ford with regard to the models to be delivered to the German market.
- 22 Consequently, the applicants' argument based on the unilateral nature of the withdrawal of right-hand-drive cars from Ford AG's model range must be rejected.
- 23 The applicants also claim that even supposing that the withdrawal of right-hand-drive cars from Ford AG's model range may be related to some agreement, it cannot be related to the main dealer agreement. Right-hand-drive cars meeting British statutory specifications were never distributed under that agreement since

deliveries of such cars were part of a special arrangement known as the 'Visit Europe Plan' applicable solely to the sale of right-hand-drive cars.

24 It appears from the documents before the Court that the arrangement known as the 'Visit Europe Plan' was not notified to the Commission and that all the right-hand-drive cars were sold in Germany by dealers who were tied by the main dealer agreement. The conditions and procedures which normally applied on the sale of Ford cars, and in particular those which concerned the dealers' profit margin, applied to warranties, after-sales service and so forth. The only special feature of sales under that arrangement was that they did not contribute to achieving the sales targets agreed between Ford AG and the dealers. The circular of 27 April 1982 was exclusively addressed to German dealers who were parties to the main dealer agreement.

25 Those circumstances of fact, which are mentioned in the contested decision (paragraphs 17 and 42), are sufficient to show that the decision to discontinue supplies of right-hand-drive cars was not made in any contractual context other than that of the main dealer agreement.

26 It follows from the foregoing that the Commission was entitled, during its examination of the main dealer agreement with a view to the possibility of granting an exemption in respect of it under [Article 101(3) TFEU], to take account of the discontinuance of deliveries of right-hand-drive cars by Ford AG to its German dealers.

(b) The applicants' other submissions

27 The other submissions relied upon by the applicants allege respectively:

-incorrect reasoning of the contested decision;

-misuse of powers;

-breach of the principle of legal certainty; and

-inadequacies in the statement of the reasons on which the decision is based.

28 With regard to the reasoning employed in the decision, the applicants criticize the Commission for having adopted an incorrect method. Before considering whether the conditions laid down in [Article 101(3) TFEU] were or were not fulfilled, the Commission ought first of all to have identified each of the provisions of the agreement falling under [Article 101(1) TFEU]. According to the case-law of the Court, undertakings are entitled to an appropriate examination by the Commission of their requests for negative clearance or for an exemption in respect of the agreement.

29 The applicants add that when it refused the exemption the Commission based its decision on the first two conditions laid down in [Article 101(3) TFEU] concerning agreements which contribute to improving the production or distribution of goods or to promoting technical or economic progress while allowing consumers a fair share of the resulting benefit. When it considered those conditions, the Commission ought first of all to have determined what might be the favourable and unfavourable effects of the agreement in question and then to weigh them up one against the other. However, none of the considerations set out in the contested decision suggests that such an assessment actually took place.

30 With regard to the application of [Article 101(1) TFEU], the Commission considers that it is sufficient to establish that the principle restrictive clauses of the agreement fall under that provision. In its view, it is necessary to undertake an appraisal of the agreement taken as a whole since agreements of this kind, and particularly those which establish a system of selective distribution, often include several restrictive clauses, and since their application may be restrictive from several points of view. In such circumstances, it is difficult to isolate the effects of any given clause and to determine with certainty that that clause, taken in isolation, is likely to restrict or distort competition.

- 31 The Commission admits that its refusal to grant the exemption provided for in [Article 101(3) TFEU] is based on the first two conditions laid down in that provision. It contends however that Ford AG's refusal to supply right-hand-drive cars in Germany effectively prevented those two conditions from being satisfied. That refusal produced effects which were more serious than those which would flow from a mere prohibition of exports because it also reduced competition in Germany in respect of such cars, while at the same time preventing United Kingdom consumers from buying right-hand-drive cars at German prices.
- 32 The Court considers that the applicants' arguments concerning the application of [Article 101(1) TFEU] find no basis in the terms of the decision. The clauses of the main dealer agreement most likely to restrict competition are explained in the decision and particular reference is made to paragraph 2 of Article 6, to Articles 2 and 5 and to paragraph 3 of Article 6 of the agreement (paragraphs 30 and 31 of the decision). The decision goes on to find that by means of those clauses Ford AG was in a position to prevent German Ford dealers from promoting sales actively outside Germany and from delivering Ford vehicles to retail dealers in other countries who do not belong to any Ford distribution system (paragraph 33). The decision concludes that 'due to these provisions, which constitute the most important part of the Ford main dealer agreement' [Article 101(1) TFEU] applies to that agreement (paragraph 34). That reasoning, which makes it clear that the Commission took account of all the terms of the agreement at issue, is not founded on an erroneous method.
- 33 With regard to the Commission's refusal to grant an exemption under [Article 101(3) TFEU], it must be emphasized that the Commission was entitled to consider that, when examining the main dealer agreement with a view to deciding whether or not to grant an exemption, it was obliged to take account of all the circumstances surrounding the application of that agreement and that it was thus entitled to take the view that the mere refusal to supply German dealers with right-hand-drive cars suitable for export was a key element in partitioning the common market artificially (paragraph 41). The decision adds that in balancing the improvement in distribution of cars resulting from the agreement against the disadvantages, in regard to competition which flowed from the fact that it was impossible to buy right-hand-drive cars in Germany at German prices and that competitive pressure in the United Kingdom was thus significantly reduced (paragraph 43), the Commission arrived at the conclusion that the first two conditions in [Article 101(3) TFEU] were not satisfied.

34 Consequently, the submission that the method of reasoning employed in the decision is erroneous cannot be accepted.

35 The submission alleging misuse of powers is based on two circumstances: first, the Commission is said to have refused to exempt the main dealer agreement on a legally irrelevant ground; secondly, it is alleged that, in its drafting of the contested decision, the Commission created uncertainty, particularly with regard to objections which it might later have to other as yet unspecified clauses of the agreement.

36 The first part of that submission has already been considered. The second part deals in fact with a possible breach of the principle of legal certainty, a matter which will be dealt with in relation to another submission.

37 It is not therefore necessary to rule separately on the submission alleging misuse of powers.

38 In their submission alleging a breach of the principle of legal certainty, the applicants contend that the decision at issue left them in complete uncertainty as regards their legal position. On the one hand, the decision specifies that Ford AG 'is free, if it wishes, to adopt a dealer agreement which does not fall under [Article 101(1) TFEU]' (paragraph 45), without indicating which clauses of the agreement actually fall under that provision. On the other, the decision orders Ford AG to bring 'the abovementioned infringement' to an end without saying clearly what course of conduct the undertaking is required to adopt.

39 In reply to that argument, the Commission contends in the first place that it had no way of knowing whether Ford AG, as a result of the decision, would decide to restore the situation which existed before May 1982 or to amend the main dealer agreement without altering its refusal to supply right-hand-drive cars in

Germany. It is for Ford AG to organize its own dealer network on condition however that it complies with the requirements of [Union] competition law.

40 The Commission considers that the applicants' submission seems to start from the proposition that Article 2 of the decision requires Ford AG to make it possible for consumers to obtain the manufacturer's full range of models ('full line availability'), but, according to the Commission, that is not the case. The decision is based on the fact that there is a substantial demand for right-hand-drive cars from persons who wish to buy them through German distributors and that price differentials of 10 to 30% explain that demand.

41 It must be borne in mind that the grounds of the decision at issue which deal with the applicability of [Article 101(1) TFEU] refer to certain provisions of the main dealer agreement and in particular to those relating to the exclusive right of the German dealers to represent Ford. The decision is also based on the idea that the restrictive effect of those clauses was significantly increased once Ford AG ceased to supply right-hand-drive cars to its German dealers in order to protect, within the Ford group, the position of Ford Britain and the British dealers. The view taken in the decision is that, in those circumstances, an exemption cannot be granted because 'distribution systems within the [Union] should not cause a substantial part of the [Union] to be deliberately insulated from the rest' (paragraph 44).

42 The Court considers that the infringement which Ford AG must immediately bring to an end by virtue of Article 2 of the decision is sufficiently clear. Article 1 of the decision states that 'the Main Dealer Agreement' falls under the prohibitions contained in [Article 101(1) TFEU] and that an exemption pursuant to [Article 101(3) TFEU] for that agreement 'as applied ... since 1 May 1982' is refused.

43 The submission alleging a breach of the principle of legal certainty is therefore unfounded.

44 There remains to be considered the last submission which is based on alleged inadequacies in the reasoning of the decision. The applicants claim that the Commission has not indicated how the circular of 27 April 1982 could have aggravated the restrictive effects of the main dealer agreement. Even if the Commission was justified in regarding the withdrawal of deliveries of right-hand-drive cars on the German market as the diminution of an advantage flowing from the agreement, it ought in any event to have considered the extent to which the loss of that advantage made it impossible to grant an exemption under [Article 101(3) TFEU] in respect of that agreement.

45 The Commission admits that it regarded the availability of right-hand-drive cars on the German market as one of the advantages of the agreement. It maintains that the decision at issue shows however that Ford AG's behaviour led not only to the loss of that advantage but also to a significant reduction in the other advantages likely to flow from the agreement (paragraphs 36 and 43). The balance between advantages and disadvantages was significantly affected by the fact that Ford AG prevented parallel imports from being carried out and such conduct constitutes a decisive reason for not granting an exemption in respect of the agreement under [Article 101(3) TFEU].

46 With regard to that argument, it should be noted that, as the Commission rightly contends, the Commission is not obliged to carry out a detailed examination of all the advantages and disadvantages likely to flow from a selective distribution system when it has good reason to believe that a manufacturer has used such a system to prevent parallel imports and thus artificially to partition the common market. Moreover, the contested decision does consider what advantages and disadvantages may result from the main dealer agreement (paragraphs 38 and 43).

47 The application must therefore be dismissed in its entirety.

Costs

48 Article 69 (2) of the Rules of Procedure provides that the unsuccessful party is to be ordered to pay the costs. Since the applicants have failed in their

submissions, they must be ordered to pay the costs. The intervener must pay its own costs.

On those grounds,

THE COURT

hereby:

(1) Dismisses the application;

(2) Orders the applicants to pay the costs; the intervener is ordered to pay its own costs.

Mackenzie Stuart
Pescatore

Bosco
Koopmans
Joliet

Due
Everling

Kakouris
Bahlmann

Delivered in open court in Luxembourg on 17 September 1985.

P. Heim
Registrar

A. J. Mackenzie Stuart
President