DISTRIBUTION AGREEMENTS (MOTOR VEHICLES): THE VW CASE

Subject: Distribution agreements
Sales restrictions
Parallel imports
Fines

Industry: Motor vehicles
(Some implications for other industries)

Parties: Volkswagen AG
Commission of the European Communities

Source: Judgment of the Court of First Instance in Case T-62/98 (*Volkswagen v Commission*), dated 6 July, 2000, as summarised in Court press release 50/00 and in Commission statement IP/00/725

(Note. Four main points to note about this case are, first, that the Court of First Instance substantially upheld the Commission's decision against Volkswagen; second, that it reduced the fine imposed by the Commission, because of irregularities in the Commission's findings and procedures; third, that the fine is nevertheless the largest to be imposed on a single manufacturer in respect of a breach of the EC rules on competition; and, fourth, that the Commission sees the court decision as a support for the policy of creating a single market, of ending discrimination between the nationals of different Member States and thus of helping consumers.

Two different commentaries on the case are reproduced below, one by the court itself and the other by the Commission. The difference in tone will be noted. The Commission's statement usefully provides the background to the case, but makes no mention of the irregularities causing the court to reduce the fine by € 12m.)

Court press release

The Court of First Instance has confirmed the existence and gravity of infringements committed by the Volkswagen group which hindered the purchase of vehicles in Italy by final, non-Italian consumers. The fine imposed by the Commission was 102,000,000 ECUs; the Court has confirmed it in most respects, merely reducing it to € 90,000,000.

On 28 January 1998, the Commission adopted a decision in which it found the conduct of Volkswagen, the German motor vehicle manufacturer, and its subsidiaries AUDI AG and AUTOGERMA SpA infringed the EC Treaty rules on freedom of competition in the common market.

The Commission complained that Volkswagen had entered into agreements with its subsidiaries and the Italian dealers in its distribution network in order to prohibit or restrict sales in Italy to final consumers from other Member States and

to authorised dealers in its distribution network in other Member States. Among the means employed by Volkswagen in restricting those parallel imports from Italy were the imposition of supply quotas to Italian dealers and a bonus system discouraging them from selling to non-Italian customers.

The Commission found that the partitioning of a part of the common market was a serious infringement of the EC competition rules and imposed a fine of 102,000,000 ECUs on Volkswagen. In essence the Court has dismissed Volkswagen's application seeking annulment of the Commission's decision.

The Court has found, first, that the allegations against Volkswagen were accurate: the Italian Volkswagen and Audi dealers were in fact induced to sell at least 85% of available vehicles in Italy, to the detriment of purchasers from other Member States who were unable to purchase from them at a time when the low level of the Italian lire offered advantageous prices to German and Austrian customers in particular.

The Court has pointed out that. although motor vehicle manufacturers may protect their networks, that does not authorise them to adopt measures which tend to partition the market.

The Court has upheld the Commission's argument, that Volkswagen committed an infringement which was particularly serious. The seriousness of the infringement was magnified both by the size of the Volkswagen group and by the fact that it was committed in spite of the extensive case-law on the subject. The Court points out that such an infringement runs counter to one of the fundamental objectives of the Community: the achievement of a single market.

The Court has nevertheless reduced the fine imposed on Volkswagen in particular because it found that the infringement had lasted for only three years (from 1993 to 1996); the Commission did not adequately prove that the infringement continued after that period.

The Court has also held that the Commission did not fully comply with the principle that an investigation is confidential: the fine which the Commission intended to impose on Volkswagen was in fact announced to the press before the decision was adopted. The Court points out that, until a final decision terminating the proceedings has been taken, the principle of business secrecy must govern the conduct of all proceedings relating to undertakings and their business relationships.

Commission statement

In its judgement, the Court of First Instance has upheld the Commission Decision of 28/1/1998 against Volkswagen establishing a serious infringement of EC Competition rules. Together with its subsidiaries Audi AG and Autogerma SpA, their common Italian importer, Volkswagen AG had prevented its dealers in Italy from selling new cars to non-residents, in particular German and Austrians consumers. The fine imposed by the Commission on Volkswagen was slightly revised [decreased by 12%] by the Court. Volkswagen AG had appealed to with

the Court of First Instance against this decision in April 1998, rejecting the Commission's findings and considering the amount of the fine as totally [inappropriate. (The Commission statement says "inadequate", which is patently wrong.)]

"This ruling is good news for European consumers," Competition Commissioner Mario Monti said. "The opportunity to buy goods at better prices in other Member States is indeed one of the key advantages of the Single Market. Car makers have some latitude in the way they choose to organise their distribution networks, but the rules also give consumers the unalterable right to buy, either directly or through an authorised intermediary, a car in the Member State of their choice. By upholding such rights, competition policy directly serves citizens. The decision adopted by the Commission against Volkswagen indicates that it does not hesitate to take the necessary measures against motor manufacturers who do not comply with the rules on motor vehicle distribution," Mr. Monti said. "Today's judgement of the Court encourages us to pursue vigorously this endeavour. The conduct of manufacturers also plays a role in the evaluation of the current Regulation on car distribution."

It is worth pointing out that, on the basis of the decision and this judgement, consumers who feel that they have been the victim of similar practices can take their case directly to the national competition authorities or national courts (or both). Those authorities and courts will usually have jurisdiction to establish whether there has been an infringement of European competition law and to order the manufacturer or the importer to bring the infringement to an end.

The decision of January 1998 is the most important Commission decision to date concerning obstacles to re-imports of new motor vehicles. The size of the fine is an indication that the Commission will not tolerate practices of this kind and will act with similar determination against other manufacturers who set out to partition the market for new cars. In its decision, the Commission had found that the conduct of Volkswagen and Audi, which are part of the largest car manufacturing group in Europe, was a threat to the proper operation of the Single Market, and a very serious infringement of Community competition law.

In setting the fine, the Commission took account not only of the nature of the infringement but also of its duration and of the fact that the companies concerned of the Volkswagen group had set up the system of restrictive practices by exploiting the economic strength they enjoyed in their relationship with their network of authorised dealers in Italy. An aggravating factor was that Volkswagen had not taken appropriate action, when told by the Commission, already before the inspections carried out in 1995, that its behaviour was not in line with the European competition rules and with Regulation No 1475/95 applicable to motor vehicle distribution.

In its decision, the Commission had fined Volkswagen for systematically forcing its authorised dealers in Italy to refuse to sell Volkswagen and Audi cars to non-Italian buyers. In 1995, the Commission had received a large number of complaints from consumers who had had difficulty buying new cars in Italy. In its decision, the Commission found that Volkswagen, Audi and Volkswagen's

Italian subsidiary Autogerma had devised, in concert with their Italian dealers, a strategy aimed at preventing, or at least substantially restricting, sales from Italy to other Member States, especially Germany and Austria. This strategy was aimed at sales to final consumers but also at sales to intermediaries acting on behalf of the buyer and to Volkswagen or Audi dealers in other Member States.

In October 1995, the Commission had carried out inspections at Volkswagen's offices in Wolfsburg, at Audi's offices in Ingolstadt, at Autogerma's offices in Verona (Autogerma is a wholly owned subsidiary of Volkswagen, and the official importer for both makes in Italy) and at the offices of a number of VAG dealers in the north of Italy. Documents found in the course of those inspections provided clear evidence of a market-partitioning policy pursued by Volkswagen, Audi and Autogerma.

Some of the illegal practices identified were the following. About fifty authorised dealers were threatened that their dealership contracts would be terminated if they sold to foreign customers, and some twelve dealerships were actually terminated. The profit margins and bonuses of authorised dealers who sold outside their allotted territories were systematically reduced. Deliveries to Italian dealers were rationed; in 1995 alone, Audi refused to supply some 8,000 cars which Autogerma had promised them. Autogerma kept the Italian dealers under supervision and gave clear warnings to those who sold to non-Italian customers; it also monitored lists of foreign customers. Volkswagen and Audi recommended to their Italian dealers that they should not tell their foreign customers the real reasons for the refusal to sell but should instead try to discourage them by speaking of different specifications and difficulties with the guarantee; they were not to let them know that they had instructions to this effect from the Volkswagen group.

The documents found clearly indicate that Volkswagen and Audi were well aware that these practices were unlawful. The fine, even though reduced to € 90 million, is the highest fine ever imposed on a single European enterprise for infringement of competition law.

Regulation 1475/95 contains a so-called "black list" of clauses and practices which are not allowed under this Regulation. This list is of particular importance for European consumers. It reinforces their right to purchase a new car, either directly or via an authorised intermediary, wherever they wish to do so in the European Union.

Therefore, the Regulation forbids any direct or indirect hindrance of parallel trade, namely, the refusal of dealers to supply a consumer simply because this consumer is a resident of another Member State; charging foreign consumers higher prices or imposing longer delivery periods than for native consumers; refusing to grant guarantee services or other free-of-charge services for cars imported from another Member State; hindering the activities of intermediaries authorised by consumers by applying excessive criteria concerning their mandate; restriction of supplies by manufacturers to dealers who sell cars to consumers resident in another Member State; threats by manufacturers to terminate contracts with dealers who sell cars to consumers resident in another Member State; any

interference by manufacturers with the freedom of consumers to resell new cars, provided that the sale is not effected for commercial purposes

Additional measures to ensure the consumer's freedom of choice for the maintenance and repair of his car are designed to safeguard the freedom of dealers to sell to consumers spare parts offered by independent suppliers which match the quality of those spare parts offered by the manufacturer; the manufacturer has to make accessible to independent repairers the technical knowledge required for the repair or maintenance of his brand of cars.

Any infringement of the provisions of the "black list" renders essential parts of manufacturers' distribution agreements void. This legal effect improves the opportunity for any injured party to bring infringements to the attention of the competent national courts. The courts can - unlike the Commission - grant injunctions and award damages.

A Commission decision is expected later this year in similar infringement procedures against Daimler Chrysler and Opel Nederland. Moreover, the Commission is currently investigating allegations that PSA and Renault have also obstructed the sale of vehicles to customers from other Member States. ■

The Microsoft / Telewest Case

Microsoft Corp has informed the European Commission that it has agreed to limit its investment in Telewest Communications plc to a minority interest, and will not therefore exercise a decisive influence over the British broadband cable company. This means that Microsoft no longer has joint control over Telewest, leading it to withdraw its notification of the original deal, under which it was acquiring control with Liberty Media Corp. Consequently, the Commission will not take any further action with regard to this operation.

US software giant Microsoft had notified an operation in February whereby it would have acquired joint control over Telewest with Liberty Media, a subsidiary of AT&T Corp. The Commission, on March 22, started an in-depth probe into the deal over fears that it would reduce competition in the digital cable industry, in particular regarding the supply of software for digital television set-top boxes in the United Kingdom.

Following the Commission's objections, expressed in a formal statement in May, Microsoft has now informed the Commission that, while keeping its 23,7% in Telewest, it is breaking all structural links with Liberty Media and giving up any rights which would have given it decisive influence over decisions at Telewest.

Commission Statement IP/00/733, dated 7 July 2000.