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CASE CARD | 4 October 2021

BAI and Commission v. Bayer (C-2/01 P and C-3/01 P)

Unilateral conduct (supply quotas)

1. CASE SUMMARY

A. Summary of facts

Bayer manufactured and marketed under the trade name 'Adalat' a range of medicinal preparations. Bayer adopted measures to limit exports of Adalat by wholesalers from France and Spain to the United Kingdom ('UK'). More particularly, Bayer changed its delivery policy in order to prevent or limit exports of Adalat by wholesalers to the UK, and began to cease fulfilling all of the increasingly large orders placed by wholesalers in Spain and France with its Spanish and French subsidiaries. The reason for the change of supply policy was that in the period between 1989 and 1993 the prices charged for Adalat in France and Spain were about 40% lower than those charged in the UK. That led to significant parallel exports of Adalat from Spanish and French wholesalers to the UK, which caused a significant loss of turnover for Bayer's UK subsidiary.

B. Notes on case history

The Commission contended that there was an agreement between Bayer and the Spanish and French wholesalers in relation to the export of Adalat to other Member States. Its case was that Bayer's delivery policy amounted to an export ban, to which the wholesalers had consented, in the knowledge that if they did not do so, their orders would be further restricted. According to the Commission, the actions of the wholesalers showed that they had aligned their own conduct in relation to the export ban by limiting their orders from Bayer purely to their domestic requirements. Supplies intended for exports were obtained elsewhere (mostly from non-supervised wholesalers).

Bayer applied to the CFI to annul the Commission decision on the ground that the allegedly infringing conduct was, in fact, unilateral conduct: in the absence of any agreement between itself and its wholesalers relating to the export of Adalat to the UK, the conduct did not fall within the scope of Article 101(1) TFEU. Bayer argued that it had adopted a unilateral policy of limited delivery in order to make parallel exports more difficult and that, far from agreeing to such a policy, the wholesalers had opposed it. Accordingly, the requisite 'concurrence of wills' was plainly lacking, in the absence of which Article 101(1) TFEU could not apply.

The CFI accepted Bayer's position. According to the CFI, the Commission did not prove to the requisite legal standard that Bayer actually imposed an export ban on its wholesalers (i.e. that it established a systematic

monitoring of the actual final destination of the packets of Adalat supplied after the adoption of its new supply policy or that it applied a policy of threats and penalties against exporting wholesalers). It also had not sufficiently proven that Bayer had made supplies of that product conditional upon compliance with the alleged export ban. In addition, in the CFI's view, the documents reproduced in the contested Commission decision did not demonstrate that Bayer sought to obtain any form of agreement from the wholesalers on the implementation of its policy designed to reduce parallel imports.

C. Legal analysis

C.1 - Framework of analysis

The ECJ upheld the judgment of the CFI and thereby confirmed that, under the given circumstances, no agreement in the sense of Article 101(1) TFEU could exist. In doing so, it distinguished certain elements that are *needed* to arrive at the existence of an anticompetitive agreement under Article 101(1) TFEU, other elements that are *not sufficient* and lastly elements that are *helpful* in that respect. The ECJ also distinguished purely unilateral conduct from conduct that is taken into account to assess another agreement which has already been determined to exist.

C.2 - Article 101(1) TFEU – elements needed to qualify as an anticompetitive agreement

The necessary components are:

- a manifestation of the wish of one of the contracting parties to achieve an anti-competitive goal which is considered as an invitation to the other party, whether express or implied, to fulfil that goal jointly (§102);
- acquiescence by the other party, whereby it is necessary to explore the "genuine wishes" of such other party. In this case, when confronted with Bayer's policy, the wholesalers continued ordering products from Bayer. However, their way of doing so made Bayer believe that the needs of the national markets had grown. On that basis the CFI correctly considered that there was a lack of concordance between the wishes of Bayer and the wishes of the wholesalers (§121-123).

C.3 - Article 101(1) TFEU – elements that are insufficient to qualify as anticompetitive agreement

The ECJ has determined that the following two situations are insufficient to arrive at an agreement:

- the expression of a unilateral policy of one of the contracting parties, which can be put into effect without the assistance of others, even if such unilateral policy is aimed at preventing parallel imports (§101);
- the mere fact that a measure imposed unilaterally by a manufacturer, which has the object or effect of restricting competition, falls in the context of continuous business relations between the manufacturer and its

wholesalers (§142).

C.4 - Article 101(1) TFEU – elements that are helpful for the qualification as anticompetitive agreement

The ECJ pointed at two helpful indicators to find an agreement, that are however not by themselves conclusive:

- the establishment of a system of subsequent monitoring and penalties (§83);
- the conduct of the parties concerned (§100).

C.5 - Article 101(1) TFEU – unilateral conduct versus conduct forming part of an agreement

The ECJ distinguished the current case from the case law of AEG and Ford. In the latter cases, it was undisputed that an agreement capable of infringing Article 101(1) TFEU existed. The question addressed in that case law is whether measures subsequently adopted by the manufacturer formed part of the agreement in question and whether they needed to be taken into account when examining the compatibility of that agreement with Article 101(1) TFEU. In the case at hand, the legal question related to the very existence of an anti-competitive agreement. (§106 and 109)

2. QUOTES

"*[…] In that regard, although the existence of an agreement does not necessarily follow from the fact that there is a system of subsequent monitoring and penalties, the establishment of such a system may nevertheless constitute an indicator of the existence of an agreement.*" (§83)

"*However, such an agreement cannot be based on what is only the expression of a unilateral policy of one of the contracting parties, which can be put into effect without the assistance of others. To hold that an agreement prohibited by Article [101(1) TFEU] may be established simply on the basis of the expression of a unilateral policy aimed at preventing parallel imports would have the effect of confusing the scope of that provision with that of Article [102 TFEU].*" (§101)

"*For an agreement within the meaning of Article [101(1) TFEU] to be capable of being regarded as having been concluded by tacit acceptance, it is necessary that the manifestation of the wish of one of the contracting parties to achieve an anti-competitive goal constitute an invitation to the other party, whether express or implied, to fulfil that goal jointly, and that applies all the more where, as in this case, such an agreement is not at first sight in the interests of the other party, namely the wholesalers.*" (§102)

"*The Court of First Instance thus sought to determine whether, in the absence of an export ban, the wholesalers nevertheless shared the intention of Bayer to prevent parallel imports. In the context of that analysis, the Court of*

First Instance did not make any error of law by referring to the genuine wishes of the wholesalers to continue ordering medicinal products for export and for the needs of the national market." (§121)

"*In any event, as the Advocate General points out in point 108 of his Opinion, the plea concerning the absence of a meeting of minds presupposes that there was a declared intention on the part of the wholesalers to join in with the intention of Bayer to prevent parallel imports. However, as has been pointed out in paragraphs 52 and 53 of this judgment, the Court of First Instance held that the documents supplied by the Commission do not establish that the wholesalers wished to give Bayer the impression that, in response to its declared wish, they were proposing to reduce their orders to a given level.*" (§122)

"*The wholesalers' strategy was, on the contrary, by distributing orders for export amongst the various branches, to make Bayer believe that the needs of the national markets had grown. Far from establishing the existence of a meeting of minds, that strategy merely constituted an attempt by the wholesalers to turn to their advantage the application of Bayer's unilateral policy, the implementation of which did not depend on their cooperation.*" (§123)

"*In that respect, it is important to note that this case raises the question of the existence of an agreement prohibited by Article [101(1) TFEU]. The mere concomitant existence of an agreement which is in itself neutral and a measure restricting competition that has been imposed unilaterally does not amount to an agreement prohibited by that provision. Thus, the mere fact that a measure adopted by a manufacturer, which has the object or effect of restricting competition, falls within the context of continuous business relations between the manufacturer and its wholesalers is not sufficient for a finding that such an agreement exists*." (§141)

3. RELEVANT LEGISLATION

- Article 101 TFEU
- Vertical Guidelines, §25, footnote 14

4. RELEVANT LITERATURE

On tacit acquiescence in the context of consent by conduct to arrive at concurrence of wills, see F. WIJCKMANS and F. TUYTSCHAEVER, *Vertical Agreements in EU Competition Law*, Oxford University Press, 2018, §3.75 – 3.86.

5. PRACTICAL SIGNIFICANCE

The case is relevant for practitioners because it clarifies the difference between ‘agreements’ falling within the scope of Article 101(1) TFEU and ‘unilateral conduct’ falling outside the scope of that provision:

- For unilateral measures of a supplier which do not require the cooperation of the customer to be carried out (e.g. reduction of supplies to prevent exports) to qualify as an agreement, there must be an invitation by the supplier to its customer to commonly achieve the anti-competitive goal.
- The conduct of the customer must be analysed to determine whether or not it consents with the anti-competitive policy pursued by the supplier, in which case there will be an agreement in the sense of Article 101(1) TFEU.
- Accordingly, if a supplier adopts unilateral measures to make parallel exports more difficult and merely announces these specific measures to its customer, such conduct is unilateral behaviour that falls outside the scope of Article 101(1) TFEU.