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CASE CARD | 4 October 2021

Commission v. Volkswagen (C-74/04 P)

Definition of agreement

1. CASE SUMMARY

A. Summary of facts

The European Commission ('Commission') lodged an appeal against the judgment of the Court of First Instance ('CFI') of 3 December 2003, in which the CFI annulled the Commission decision imposing a fine of EUR 30,96 million on Volkswagen for infringing Article 101(1) TFEU for setting the selling price of the Volkswagen Passat.

The European Court of Justice ('ECJ') upheld the judgment of the CFI and dismissed the appeal as unfounded. The Commission decision related to three circulars that Volkswagen had sent to its German dealers subsequent to the signing of the dealership contracts, as well as five letters that had been sent to some of those dealers, urging its dealers to maintain a price discipline for the new Volkswagen Passat model, and to only grant limited discounts or no discounts at all.

B. Legal analysis

The Commission held that by signing the dealership agreement, the authorized dealers had given their prior consent to all measures adopted by Volkswagen in the context of that dealership agreement.

B.1 - Article 101(1) TFEU

The CFI and the ECJ rejected the Commission's view and stated that for an agreement within the meaning of Article 101(1) TFEU to be established, it is necessary to prove a concurrence of wills. In addition, such a concurrence of wills must cover particular conduct that must be known to the parties when they accept it. The will of the parties can either result from the clauses of the dealership agreement or from the consenting conduct of the parties. (§36-39)

In order to establish whether the circulars in question were an agreement in the sense of Article 101(1) TFEU, it should therefore have been considered whether the clauses of the dealership agreement provided for (or authorized) Volkswagen to adopt subsequent pricing policies taking into account the aims pursued in the light of the economic and legal context in which the agreement was signed. Contrary to the CFI, the ECJ further clarified that clauses which comply with the competition rules and/or are drafted in neutral terms cannot automatically be excluded as authorizing subsequent measures which are contrary to competition rules.

2. QUOTES

"*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.*" (§48)

"*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.*" (§44)

3. RELEVANT LEGISLATION

- Article 101(1) TFEU

4. RELEVANT LITERATURE

On concurrence of wills, see F. WIJCKMANS and F. TUYTSCHAEVER, *Vertical Agreements in EU Competition Law*, Oxford University Press, 2018, §3.67 – 3.74.

5. PRACTICAL SIGNIFICANCE

The Commission has the obligation to prove that there is a concurrence of wills on the part of the parties to an agreement in each specific case and the concurrence of wills has to cover specific conduct that has to be known to the parties. The signing of an agreement cannot as a matter of principle imply the acceptance of later unlawful variations or additions to that agreement.

However, the concurrence of wills can be established from the (neutral/compliant) clauses of the general dealership agreement authorizing subsequent unilateral measures. By signing such an agreement, the dealer is consenting in advance to comply with those measures, which are then considered to form part of the continued business relation and hence fall within the scope of Article 101(1) TFEU. In the absence of such clauses, the concurrence of wills can also be established based on the conduct of the parties.