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CASE CARD | 4 October 2021

Ford v. Commission (25/84 and 26/84)

Unilateral conduct (circular to dealer network)

1. CASE SUMMARY

A. Summary of facts

Ford AG employed a selective distribution system based on a main dealer agreement binding it to its German distributors. This agreement was notified to the Commission by Ford AG with the intention of obtaining an exemption under Article 101(3) TFEU.

Following an increase in demand by British customers for right-hand drive cars in the German market, Ford AG issued a circular to its German dealers stating that it would no longer accept their orders for those cars and that, as of that date, all such cars would have to be purchased either from a Ford dealer established in the United Kingdom ('UK') or from a subsidiary of Ford Britain.

The Commission adopted a definitive decision, which stated that Ford's main dealer agreement restricted competition and affected trade between Member States in the sense of Article 101(1) TFEU. The Commission refused to grant an exemption under 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). Finally, the Commission ordered Ford AG to bring the infringement to an end. The action for annulment concerns this "contested decision" (dated 16 November 1983).

The key question in the proceedings leading up to the final Commission decision was whether the Commission was able to rely upon the circular containing the refusal to supply right hand drive vehicles in support of its decision to deny the exemption based upon Article 101(3) TFEU. Ford argued that the Commission could not do so in view of the fact that its refusal was a unilateral act falling outside the scope of Article 101 TFEU. The Commission argued that it was obliged to take such refusal into account because Ford's conduct is an integral part of the context in which the agreement applies..

B. Legal analysis

B.1 - Article 101(1) TFEU

The ECJ first ruled that Ford AG's circular did not constitute a unilateral act, but instead formed part of the contractual relations between Ford and its dealers. The notified selective distribution agreement contained provisions that granted Ford the right to change the range of vehicles that could be distributed. The presence of

such clauses in the notified agreement entails that Ford's decision forms part of the contractual relationship. (§20-22).

B.2 - Article 101(3) TFEU

The ECJ confirmed that the Commission was entitled to take into account Ford's refusal to supply right-hand-drive vehicles in the context of its examination of the exemption under Article 101(3) TFEU. The ECJ noted that Ford's decision to discontinue supplies of right-hand-drive cars was not made in any contractual context other than that of Ford AG's main dealer agreement. (§25-26)

The ECJ also accepted the Commission's argument that it was obliged to take account of all the circumstances surrounding the application of Ford AG's agreement and that it was thus entitled to decide that the mere refusal to supply German dealers with right-hand-drive cars suitable for export was a key element in artificially partitioning the common market. (§33)

The ECJ furthermore agreed with the Commission that the latter was not obliged to carry out a detailed examination of all the advantages and disadvantages likely to flow from Ford AG's selective distribution system as it had good reason to believe that Ford used such a system to prevent parallel imports and thus to artificially partition the common market. (§46)

Ford's application was therefore dismissed in its entirety by the ECJ.

2. QUOTES

"*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.*" (§21)

"*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).*" (§46)

3. RELEVANT LEGISLATION

- Article 101 TFEU
- Vertical Guidelines, §123
- Supplementary Guidelines on Vertical Restraints in Motor Vehicles Sector, §51

4. RELEVANT LITERATURE

On the distinction between unilateral conduct and an agreement or concerted practice, see F. WIJCKMANS and F. TUYTSCHAEVER, *Vertical Agreements in EU Competition Law*, Oxford University Press, 2018, §3.54 – 3.93.

5. PRACTICAL SIGNIFICANCE

The judgment underscores that the assessment of an undertaking's dealer agreement under Article 101 TFEU is done in light of the legal and economic context in which that agreement operates.