Case T-41/96

Bayer AG

v

Commission of the European Communities

(Competition — Parallel imports — Article 85(1) of the EC Treaty (now Article 81(1) EC) — Meaning of 'agreement between undertakings' — Proof of the existence of an agreement — Market in pharmaceutical products)

Summary of the Judgment

1. *Competition — Agreements, decisions and concerted practices — Agreements between undertakings — Meaning — Bilateral or multilateral conduct — Included — Unilateral conduct — Not included — Conduct appearing unilateral — Need to prove acquiescence by other undertakings in that conduct*
   (EC Treaty, Art. 85(1) (now Art. 81(1) EC))

2. *Competition — Agreements, decisions and concerted practices — Agreements between undertakings — Meaning — Concurrence of wills as to the conduct to be adopted on the market — Included — Form in which wills expressed — Not relevant*
   (EC Treaty, Art. 85(1) (now Art. 81(1) EC))

3. *Competition — Agreements, decisions and concerted practices — Agreements between undertakings — Proof of the existence of an agreement — Existence of a concurrence of wills*
   (EC Treaty, Art. 85(1) (now Art. 81(1) EC))

4. *Competition — Community rules — Material scope — Conduct affecting intra-Community trade but not constituting an agreement, decision or concerted practice or an abuse of a dominant position — Not included*
   (EC Treaty, Arts 85(1) and 86 (now Arts 81(1) EC and 82 EC))

1. It is clear from the wording of the first paragraph of Article 85(1) of the Treaty (now the first paragraph of Article 81(1) EC) that the prohibition which it proclaims concerns exclusively conduct that is coordinated bilaterally or multilaterally, in the form of agreements between undertakings, decisions by associations of undertakings and concerted practices. Thus, if a decision by an undertaking constitutes unilateral conduct on its part, that decision escapes the prohibition in Article 85(1) of the Treaty.

   Apparently unilateral conduct by an undertaking, adopted in the context of its contractual relations with its commercial partners, may in reality form the basis of an agreement between undertakings, within the meaning of Article 85(1) of the Treaty, if the acquiescence of those partners, express or implied, with the attitude adopted by the undertaking is established.

   A distinction should therefore be drawn between cases in which an undertaking has adopted a genuinely unilateral measure, and thus without the express or implied participation of another undertaking, and those in which the unilateral character of the measure is merely apparent. Whilst the former do not fall within Article 85(1) of the Treaty, the latter must be regarded as revealing an agreement between undertakings and may therefore fall within the scope of that article. That is the case, in particular, with practices and measures in restraint of competition which, though apparently adopted unilaterally by the manufacturer in the context of its contractual relations with its dealers, nevertheless receive at least the tacit acquiescence of those dealers.

   The Commission cannot hold that apparently unilateral conduct on the part of a manufacturer, adopted in the context of the contractual relations which it maintains with its dealers, in reality forms the basis of an agreement between undertakings within the meaning of Article 85(1) of the Treaty if it does not establish the existence of acquiescence by the other partners,

express or implied, in the attitude adopted by the manufacturer.

(see paras 64, 66, 71-72, 111)

2. In order for there to be an agreement within the meaning of Article 85(1) of the Treaty (now Article 81(1) EC) it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way. As regards the form in which that common intention is expressed, it is sufficient for a stipulation to be the expression of the parties' intention to behave on the market in accordance with its terms, without its having to constitute a valid and binding contract under national law. It follows that the concept of an agreement within the meaning of Article 85(1) of the Treaty centres around the existence of a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties' intention.

(see paras 67-69)

3. The proof of an agreement between undertakings within the meaning of Article 85(1) of the Treaty (now Article 81(1) EC) must be founded upon the direct or indirect finding of the existence of the subjective element that characterises the very concept of an agreement, that is to say a concurrence of wills between economic operators on the implementation of a policy, the pursuit of an objective, or the adoption of a given line of conduct on the market, irrespective of the manner in which the parties' intention to behave on the market in accordance with the terms of that agreement is expressed. The Commission misjudges that concept of the concurrence of wills in holding that the continuation by wholesalers of their commercial relations with a manufacturer when it adopts a new policy, which it implements unilaterally, amounts to acquiescence by those wholesalers in that policy, although their *de facto* conduct is clearly contrary to that policy.

(see para. 173)

4. An undertaking may be penalised under Community competition law only if it has infringed prohibitions contained in Article 85(1) or Article 86 of the Treaty (now Articles 81(1) and 82 EC). In that respect, it should be noted that the applicability of Article 85(1) is based on a number of conditions, namely that, (a) there must be an agreement between at least two undertakings or a similar arrangement such as a decision of an association of undertakings or a concerted practice between undertakings, (b) that arrangement must be capable of affect-

ing trade within the Community, and (c) that it must have as its object or effect the restriction of competition to an appreciable extent. It follows that, in the context of that article, the effects of the conduct of an undertaking on competition within the common market may be examined only if the existence of an agreement, a decision of an association of undertakings or a concerted practice within the meaning of Article 85(1) of the Treaty has already been established. It follows that the aim of that provision is not to 'eliminate' obstacles to intra-Community trade altogether; it is more limited, since only obstacles to competition set up as a result of a concurrence of wills between at least two parties are prohibited by that provision.

In the light of the above, the right of a manufacturer faced with an event harmful to his interests, such as parallel imports, to adopt the solution which seems to him to be the best is qualified by the Treaty provisions on competition only to the extent that he must comply with the prohibitions referred to in Articles 85 and 86. Accordingly, provided he does so without abusing a dominant position, and there is no concurrence of wills between him and his wholesalers, a manufacturer may adopt the supply policy which he considers necessary, even if, by the very nature of its aim, for example, to hinder parallel imports, the implementation of that policy may entail restrictions on competition and affect trade between Member States.

(see paras 174, 176)