

Case T-208/01

Volkswagen AG

v

Commission of the European Communities

(Competition — Distribution of motor vehicles — Article 81(1) EC —
Price agreement — Meaning of ‘agreement’ — Proof of the existence
of an agreement)

Judgment of the Court of First Instance (Fourth Chamber), 3 December
2003 II-5143

Summary of the Judgment

Competition — Agreements, decisions and concerted practices — Agreements between undertakings — Meaning — Joint intention to adopt conduct in the market — Anti-competitive request by a manufacturer to its dealers who are party to a dealership agreement which complies with competition law — Excluded in the absence of proof of acquiescence by the dealers
(Art. 81(1) EC)

The concept of 'agreement' within the meaning of Article 81(1) EC centres around the existence of a joint intention between at least two parties, with the result that a decision of an undertaking which constitutes unilateral conduct escapes the prohibition in that article, unless it receives at least the tacit acquiescence of another undertaking.

The Commission cannot therefore 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 81(1) EC if the Commission does not establish the existence of an acquiescence, express or implied, on the part of the dealers, in the attitude adopted by the manufacturer.

In that regard, while it can be envisaged that a contractual variation of a dealership agreement which complies with the competition rules could be regarded as having been accepted by the dealers in advance, upon and by the signature of that agreement, where it is a lawful contractual variation which is foreseen by that agreement, or is a variation which, having regard to commercial usage or legislation, the dealer could not refuse, it cannot, by contrast, be accepted that an unlawful contractual variation of a like dealership agreement, such as a request by the manufacturer to its dealers to cease giving discounts, could be regarded as having been accepted in advance, upon and by the signature of that lawful agreement. In the latter case, acquiescence in the unlawful contractual variation desired by the manufacturer can occur only after the dealers have become aware of that variation.

(see paras 30-36, 45)