

Case T-325/01

DaimlerChrysler AG

v

Commission of the European Communities

(Competition — Article 81 EC — Agreements, decisions and concerted practices — Agency agreements — Distribution of motor vehicles — Economic unit — Measures seeking to obstruct parallel trade in motor vehicles — Price fixing — Regulation (EC) No 1475/95 — Fine)

Judgment of the Court of First Instance (Fifth Chamber), 15 September 2005 II - 3326

Summary of the Judgment

1. *Competition — Agreements, decisions and concerted practices — Agreements between undertakings — Meaning — Bilateral or multilateral conduct — Included — Unilateral conduct — Not included*
(Art. 81(1) EC)
2. *Competition — Community rules — Undertaking — Meaning — Economic unit — Legal persons with a distinct identity linked by an agency agreement — Rules as to whether an economic unit exists*
(Art. 81(1) EC)

3. *Competition — Agreements, decisions and concerted practices — Not allowed — Group exemption — Regulation No 1475/95 — Concept of ‘resale’*
(Commission Regulation No 1475/95, Art. 10(12))
4. *Competition — Administrative procedure — Statement of objections — Necessary content — Observance of the rights of the defence*
(Council Regulation No 17, Art. 19(1); Commission Regulation No 99/63, Arts 2 and 4)
5. *Competition — Agreements, decisions and concerted practices — Concerted practice — Meaning — Coordination and cooperation incompatible with the obligation on each undertaking to determine independently its conduct on the market*
(Art. 81(1) EC)
6. *Competition — Agreements, decisions and concerted practices — Agreements between undertakings — Burden of proving the infringement on the Commission — Evidence adduced of participation in meetings having an anti-competitive object — Burden of proof on the undertaking as regards distancing in relation to decisions taken*
(Art. 81(1) EC)
7. *Competition — Agreements, decisions and concerted practices — Decisions of associations of undertakings — Non-binding decision of an association applied by its members — Included*
(Art. 81(1) EC)
8. *Competition — Agreements, decisions and concerted practices — Effect on trade between Member States — Concerted practice producing its effects in the whole of the territory of a Member State — Automatic effect*
(Art. 81(1) EC)
9. *Competition — Community rules — Infringement committed by a subsidiary — Imputation to the parent company — Conditions — Separate legal personality of the subsidiary not relevant — Relevance of the fact that the subsidiary is wholly owned — Obligation of the parent company to rebut the presumption that management power was actually exercised over its subsidiary* (Art. 81(1) EC)

1. The prohibition laid down in Article 81 (1) EC concerns exclusively conduct that is coordinated bilaterally or multilaterally, in the form of agreements between

undertakings, decisions by associations of undertakings and concerted practices. Accordingly, the concept of an agreement within the meaning of that provi-

sion centres around the existence of a joint intention between at least two parties. It follows that, where a decision by an undertaking constitutes unilateral conduct on its part, such a decision escapes the prohibition laid down in that article.

(see paras 83-84)

2. For the purposes of applying the competition rules, formal separation of two companies resulting from their having distinct legal identity, is not decisive. The test is whether or not there is unity in their conduct on the market. Thus, it may be necessary to establish whether two companies that have distinct legal identities form, or fall within, one and the same undertaking or economic entity adopting the same course of conduct on the market.

Such a situation arises not only in cases where the relationship between the companies in question is that of parent and subsidiary. It may also occur, in certain circumstances, in relationships between a company and its commercial representative or between a principal and its agent. In so far as application of Article 81 EC is concerned, the question whether a principal and its agent or

'commercial representative' form a single economic unit, the agent being an auxiliary body forming part of the principal's undertaking, is an important one for the purposes of establishing whether given conduct falls within the scope of that article. Thus, if an agent works for the benefit of his principal he may in principle be treated as an auxiliary organ forming an integral part of the latter's undertaking, who must carry out his principal's instructions and thus, like a commercial employee, forms an economic unit with this undertaking.

The position is otherwise if the agreements entered into between the principal and its agents confer upon the agent or allow him to perform duties which from an economic point of view are approximately the same as those carried out by an independent dealer, because they provide for the agent accepting the financial risks of selling or of the performance of the contracts entered into with third parties. Therefore, an agent can lose his character as independent economic operator only if he does not bear any of the risks resulting from the contracts negotiated on behalf of the principal and he operates as an auxiliary organ forming an integral part of the principal's undertaking. Accordingly,

where an agent, although having separate legal personality, does not independently determine his own conduct on the market, but carries out the instructions given to him by his principal, the prohibitions laid down under Article 81 (1) EC do not apply to the relationship between the agent and the principal with which he forms an economic unit.

contract being used to facilitate the acquisition outside the exclusive distribution network of the ownership of a vehicle when it is still in a new condition.

(see para. 153)

(see paras 85-88)

4. The Commission must communicate objections which it raises against undertakings or associations concerned by them and is to deal in its decisions only with those objections in respect of which those undertakings or associations have been afforded the opportunity of making known their views as to the accuracy and the relevance of the facts, objections and surrounding circumstances on which the Commission relies.

3. The definition of the term 'resale' in Article 10(12) of Regulation No 1475/95 on the application of Article [81](3) [EC] to certain categories of motor vehicle distribution and servicing agreements shows that a supplier may prohibit dealers from supplying natural or legal persons deemed to be 'resellers' only where the latter dispose of motor vehicles in a new condition. The purpose of putting leasing contracts which include a transfer of ownership or an option to purchase before the expiry of the contract on the same footing as resales is to allow the supplier to guarantee the integrity of the distribution network by avoiding a leasing

The statement of objections must be couched in terms that, albeit succinct, are sufficiently clear to enable the parties concerned properly to identify the conduct complained of by the Commission. It is only on that condition that the statement of objections can fulfil its function under the Community regulations of giving undertakings all the information necessary to enable them to defend themselves properly before the Commission adopts a final decision. That requirement is observed where the decision does not allege that the persons concerned have committed infringe-

ments other than those referred to in the statement of objections and takes into consideration only facts on which the persons concerned have had the opportunity of making known their views. However, the Commission's final decision is not necessarily required to be a replica of the statement of objections.

sufficient for the undertakings concerned to have expressed their joint intention to behave on the market in a certain way.

Where the statement of objections provides a clear indication of the nature of the infringement of competition law which the undertaking in question is alleged to have committed and the material facts relied on in that regard, that undertaking is in a position to reply to those allegations and to defend its rights. For the decision adopted by the Commission subsequently to categorise an economic agreement as 'vertical' or 'horizontal' does not constitute a fundamental alteration to the complaints set out in the statement of objections.

Far from requiring that an actual 'plan' be drawn up, the criteria of coordination and cooperation must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition that every economic operator must determine independently the policy which he intends to adopt in the common market. Although this requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it does however strictly preclude any direct or indirect contact between such operators, the object or effect of which is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market.

(see paras 188-189, 192)

5. For there to be an agreement within the meaning of Article 81(1) EC, it is

(see paras 199-200)

6. Where there is a dispute as to the existence of an infringement of the competition rules, it is for the Commission to prove the infringements found by it and to adduce evidence capable of demonstrating to the requisite legal standard the existence of the circumstances constituting an infringement.
- takings for the purposes of Article 81(1) EC even if it is not binding on the members concerned, at least to the extent that the members to whom the decision applies comply with its terms.

(see para. 210)

However, where it has been established that an undertaking has participated in meetings between undertakings of a manifestly anti-competitive nature, it is for that undertaking to put forward evidence to establish that its participation in those meetings was without any anti-competitive intention, by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs. In the absence of evidence of that distancing, the fact that an undertaking does not abide by the outcome of those meetings is not such as to relieve it of full responsibility for the fact that it participated in the concerted practice.

8. Where a concerted practice extends over the whole of the territory of a Member State it has, by its very nature, the effect of reinforcing the partitioning of markets on a national basis, thereby holding up the economic interpenetration which the Treaty is designed to bring about.

(see para. 212)

(see paras 201-202)

9. The fact that a subsidiary undertaking has separate legal personality from its parent company is not sufficient to exclude the possibility of imputing its conduct to the latter, in particular where the subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company.
7. A measure may be categorised as a decision of an association of under-

In that regard, while a 100 per cent shareholding of the capital of the subsidiary by the parent company does not in itself suffice for a finding that the latter actually exercised management power, which is a pre-condition for the imputation of the conduct of the former to the latter, the Commission is entitled to base its decision on such imputation on the fact that the parent company does not dispute that it was in a position to exert a decisive influence on its subsidiary's commercial policy and produced no evidence to support its claim that the subsidiary was autonomous. Where the whole of the share capital of the subsidiary is held, the Commission is entitled to assume that the parent

company exerts a decisive influence on the conduct of its subsidiary, particularly where the parent company had put itself forward in the administrative procedure as being the sole representative of the companies in the group.

In those circumstances, it is for the parent company to rebut that presumption by sufficient evidence.

(see paras 218-220)