surrounding the application of that agreement. During that examination, it is entitled to take the view that the manufacturer's refusal to supply dealers in a Member State with items from its product range suitable for export is, of itself, a key element in partitioning the common market artifically, and to balance the improvement in the distribution of the goods resulting from the agreement against the disadvantages in regard to competition flowing from the fact that it is impossible to buy certain items from the product range in a Member State at the prices charged there and the significant reduction in competitive pressure in another Member State which is the consequence thereof.

3. In a decision refusing to grant an exemption under Article 85 (3) of the Treaty in respect of a selective distribution system, 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 artifically to partition the common market.

OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN
delivered on 8 May 1985

My Lords,

These joined applications are made under Articles 173 and 174 of the EEC Treaty. The applicants are Ford-Werke AG (Case 25/84), which is incorporated in the Federal Republic of Germany ('Ford Germany'), and Ford of Europe Incorporated (Case 26/84), which is incorporated in the State of Delaware, USA ('Ford Europe'). Both applicants are subsidiaries of Ford Motor Company, which is also incorporated in the United States. The applicants seek the annulment of Articles 1 and 2 of Commission Decision 83/560 of 16 November 1983 (Official Journal 1983, L 327, p. 31). This Decision is the final decision adopted by the Commission in an investigation into the arrangements made by Ford Germany for the distribution and sale of Ford products in Germany. An interim Decision was made on 18 August 1982 (Official Journal 1982, L 256, p. 20) and declared void by the Court in its judgment in Joined Cases 228 and 229/82 *Ford of Europe Incorporated and Ford-Werke AG* v *Commission* [1984] ECR 1129. The facts are fully set out there. For the purposes of the present proceedings, it seems to me that a brief summary will suffice.

Ford Germany manufactures Ford cars and sells them in Germany. It sells a significant proportion of its production to other companies in the Ford Group, notably Ford Motor Company Limited ('Ford Britain'). Ford Germany distributes the vast majority, if not all, of the Ford cars it sells in Germany through a selective distribution system. On 14 May 1976 it notified to the Commission a new Main Dealer Agreement ('the MDA'). By the notification it sought a negative clearance for the MDA or a declaration of inapplicability under Article 85 (3) of the Treaty. At the material time (1982), Ford Germany sold both left-hand-drive ('LHD') and right-hand-drive ('RHD') cars to its dealers under the MDA. The RHD cars were built to German legal specifications and were sold at the usual price for LHD cars, plus a supplement for administrative costs. Ford Germany also operated a 'Visit Europe Plan' which was not notified to the Commission. Under this plan Ford Germany sold, *inter alia*, RHD cars built to British legal specifications to ordinary individuals visiting Germany. It seems to be accepted that legally these cars were sold to the individuals themselves with the German dealer acting as the buyer's agent. The applicants maintain that the Visit Europe Plan was quite distinct from the MDA. The Commission has taken the view that this is incorrect. It points to the fact that the profits for dealers under the plan were similar to those for cars usually sold under the MDA and that the obligations of Ford dealers in respect of such matters as the warranty and after-sales service were the same. On the other hand, sales made under the plan did not contribute to the achievement of the dealers' sales targets under the MDA. By the end of 1981 the number of orders for RHD cars placed with Ford Germany in Germany had begun to grow rapidly. By its own account, Ford Germany regarded that development as a matter of great concern because it posed a threat to the long-term viability of Ford Germany's most important customer, Ford Britain. Following consultations with Ford Britain and Ford Europe, Ford Germany decided to discontinue sales of RHD cars in Germany both to German Ford dealers and under the Visit Europe Plan. It notified its dealers of this decision by a circular sent out on 27 April 1982. In the circular it said that it would only accept orders for RHD vehicles if the dealer had taken them before 1 May 1982. The Commission regarded the connection between this refusal to supply and the MDA as close and direct because the circular was addressed exclusively to German dealers who were parties to the MDA. The effect of the circular was therefore to alter the relationship between Ford Germany and the dealers parties to the MDA.

'It was therefore Ford Germany's dealer agreement and the relationship it created that was at issue when Ford Germany sent out the circular and terminated the supplies. The circular makes the effect of the agreement much more restrictive and the benefits of it less advantageous than they

would have been had exports of RHD Ford cars still been possible for German dealers' (paragraph 42 of the Decision).

The Commission Decision challenged in these proceedings is addressed to Ford Germany alone. Ford Europe's application is admissible for the reasons set out in Joined Cases 228 and 229/82, at paragraph 13. Article 1 of the Decision finds that the MDA restricts competition and affects trade between Member States within the meaning of Article 85 (1) of the Treaty; exemption pursuant to Article 85 (3) for the MDA 'as applied by (Ford Germany) since 1 May 1982' is refused. By Article 2 of the Decision Ford Germany is ordered 'to bring the abovementioned infringement to an end immediately'.

The Decision deals with the MDA 'as it has been operated by Ford Germany since 1 May 1982 in application of which Ford Germany does not any longer supply RHD vehicles to German dealers' (paragraph 28 of the Decision). The limited nature of the Commission's examination of the arrangements made by Ford Germany is also underlined in paragraphs 15 and 34 of the Decision. The Commission does not purport to cover every aspect of the arrangements made for the distribution and sale of Ford cars by Ford Germany. It looks only at the situation after the circular of 27 April 1982 came into effect.

The provisions of the MDA which, the Commission considers, fall within the prohibition in Article 85 (1) of the Treaty are mentioned in paragraphs 28-34 of the Decision. These are in particular that Articles 2, 5 and 6 of the MDA in effect:

(a) restrict competition by limiting the number of dealers available to other car manufacturers;

(b) by limiting dealers to their allotted areas and to the Ford products they also restrict the intensity of competition within and outside the allotted area both within the Ford Germany distribution network and in inter-brand competition;

(c) limit authorised Ford dealers in using other dealers for the distribution of Ford products;

(d) restrict Ford Germany to the exercise of itsfreedom of contract to choose other 'resellers' for the sale of Ford cars and thus restrict competition.

Article 85 (1) being found to apply to these provisions, and the MDA being found to have an appreciable effect on trade between Member States, the Commission found it unnecessary to deal with the other clauses and practices set out in paragraph 15 of the Decision.

In the result it seems to me clear what clauses the Commission is relying on as constituting the infringement of the Treaty found to exist by the Commission in Article 1 of the Decision which is required to be brought to an end by Article 2.

In the circumstances, the claim made by Ford Germany and Ford Europe that the Commission Decision offends against the principle of legal certainty in so far as the Decision finds that the MDA infringes Article 85 (1) cannot, in my view, be accepted. It amounts to saying that the Commission must come to a decision on the compatibility with the competition rules of every clause of the agreement or indeed of every act of an undertaking. No authority

has been cited for this broad proposition. The principle of legal certainty does not, in my opinion, require this to be done. It is sufficient if the Commission indicates the scope of its investigation and its findings with sufficient clarity and precision that the undertaking concerned can identify without any ambiguity what has been found against it so that it can take steps accordingly. This, in my opinion, has been done in pararaphs 28-34 of the Decision. The fact that Ford Germany and Ford Europe say that they are uncertain about what they must do in order to adopt a dealer agreement which in other respects does not fall within Article 85 (1), does not vitiate the decision on specific matters. It is enough that they are given a clear and precise indication of what has been found to fall within Article 85 (1). They then know what they cannot do. The Commission is not obliged by law to specify in such a Decision how undertakings should conduct their business or write their agreements.

It seems to me, as the Commission contends, that if Ford continues not to supply right hand drive cars in Germany, Ford will have to amend the specific clauses referred to in order to avoid the restrictions specified by the Commission. If it recommences such supplies then those particular clauses would not require to be amended.

Having found that there was an infingement under Article 85 (1), the Commission then dealt in the Decision with the application for an exemption under Article 85 (3). The Commission considered that in the application of Article 85 (3) it has a discretion. Every time the Commission has to decide whether the four requirements of Article 85 (3) are fulfilled, 'it also . . . must see whether the benefits flowing from the distribution agreement as practised compensate for the disadvantages due to the restriction of competition in its practical application . . . Account must be taken *inter alia* of the fact, whether or not the setting up of a selective distributive system has the tendency to maintain high price levels and prevent the development of certain channels of distribution' (paragraph 35). It continues, 'a unilateral act may be taken into account by the Commission even if it is not directly caused by the agreement because the Commission must consider an agreement in the economic context in which it has been applied' (paragraph 36). Further:

"(41) The only reason for refusing to supply local approved dealers with goods suitable for export is the wish to protect the market in the other Member State from parallel imports at more favourable prices. At least in all these circumstances the refusal to supply can be regarded as a key element in partitioning the common market artificially, and in a high-price Member State ...

(43) In balancing the improvement in distribution of cars resulting from the agreement — and the share in those advantages allowed to consumers — against the disadvantages in all the legal and economic circumstances, the Commission finds that Ford Germany's distribution system as applied since 1 May 1982 does not allow adequate competition at the distribution level, because it is no longer possible to buy RHD Ford

> cars in Germany at the very significantly lower German prices . . . , and so, the competitive pressure in the United Kingdom is significantly reduced. ...

(45) Ford Germany alleges that refusal of an exemption would oblige it to practise "full line availability', that is, to make available to its German dealers all of the series production cars marketed by any Ford Group company anywhere in the Community. Ford Germany also says a refusal would amount to imposing an obligation on it to manufacture RHD cars. Neither argument is correct.

This Decision merely concludes that a unilateral termination of supplies which has practical effects similar to an export ban may make Article 85 (3) inapplicable and that in all the circumstances, for Ford Germany to obtain an exemption, it should make RHD cars available to its German dealers as it did before May 1982. Ford Germany is free, if it wishes, to adopt a dealer agreement which does not fall under Article 85 (1).

... as a result of the present Decision, Ford Germany remains free to deliver RHD vehicles with German or with other specifications. Nor is the Commission deciding whether it would be a prerequisite for an exemption that RHD cars should be available to German Ford dealers if Ford Germany no longer manufactured them, or was unable to produce them at a cost substantially below its production costs in the United Kingdom: in the present circumstances those questions do not arise.'

It is said by the Applicants:

(i) that the Commission's approach to granting an exemption under Article 85 (3) was fundamentally wrong;

(ii) there are inadequacies and defects in the reasoning of the Decision which indicate the lack of a coherent legal principle underlying it;

(iii) the Commission is said also to have misused its powers. These arguments to some extent overlap.

Ford Germany and Ford Europe maintain that the correct approach to the application of Article 85 (3) (which the Commission did not follow) is as follows:

(1) the Commission should first identify each provision of the agreement that falls within Article 85 (1), looking at all the circumstances relevant to a proper appreciation of whether they have the object or effect of preventing, restricting or distorting competition within the common market and of whether they have any actual or potential effect on trade between Member States, in either case to an appreciable degree;

(2) then the Commission should see whether the four conditions laid down in Article 85 (3) are satisfied so that those provisions may be exempted, looking at all the circumstances that are relevant to a proper appreciation of whether the four conditions are satisfied;

(3) lastly, the Commission should state unequivocally the results of that exercise. According to Ford Germany

and Ford Europe, the Commission largely failed to perform the first part of the operation. It made a series of mistakes in carrying out the second part and went on to take into account further considerations in addition to the four conditions laid down by Article 85 (3). These considerations are said to be extraneous, irrelevant and legally erroneous. The Commission's decision to refuse exemption was therefore wrong and, because the Commission applied tests other than those provided in Article 85 (3), tainted by a misuse of power.

In my opinion, when considering whether to exempt under Article 85 (3), the Commission is not obliged to identify each provision of an agreement that falls within Article 85 (1).

If the agreement is found in substantial respects not to satisfy the conditions set out in Article 85 (3) the Commission is not required to go on and consider expressly in the decision all other clauses of the agreement or aspects of the decision or concerted practice in question.

On the other hand, in considering whether an exemption should be granted, the Commission is not limited to looking at the clauses of the agreement. It may have regard to the economic and legal context in which the agreement is made and operated and take into account all relevant circumstances. This view is borne out by paragraph 22 of the Court's judgment in Case 26/76 *Metro* v *Commission* [1977] ECR 1875 which is relied on by the Commission. It was held there that in determining whether a particular selective distribution system could be exempted under Article 85 (3) the Commission may take into account the existence of selective distribution systems set up by competing manufacturers of the same product. It follows, *a fortiori,* that the Commission may have regard to the relevant practices of the parties to the agreement in question even if those practices are not strictly covered by the terms of the agreement.

One of such circumstances relied on may be a unilateral act of one party to the agreement. The Court has accepted that a unilateral act may be relevant in the context of a contractual relationship (Case 86/82 *Hasselblad (GB) Ltd* v *Commission*, [1984] ECR 883, and Case 107/82 *AEG-Telefunken AG* v *Commission* [1983] ECR 3151). That a unilateral act may be taken into account is not as such challenged by the Applicants. They stress, however, that 'the results of a unilateral act will constitute a relevant aspect of (the legal and economic context in which an agreement operates) if, and only if, as a result of the existence of that aspect, one or more of the four prerequisites for exemption specified in Article 85 (3) is, or alternatively is not, satisfied'.

The real issue here is whether the facts as relied on by the Commission, and in particular the unilateral act of withdrawing the supply of RHD cars, can properly be regarded as a relevant factor, since it is clear that the latter is a crucial aspect of the case.

To summarize very detailed and lengthy arguments, Ford's case essentially is that the

supply of RHD cars was not made under the agreement. It had nothing to do with the agreement, and could not therefore be a benefit under the agreement. To cease supplying RHD cars is therefore not the withdrawal of a benefit under the agreement. It cannot thus have any effect on the proper assessment of whether the agreement, even as operated, and in its relevant context, satisfied any of the conditions for exemption set out in Article 85 (3).

Even if it is right as a matter of national law that the agreement does not cover the supply of RHD cars — and it is unnecessary and inappropriate to consider whether RHD cars with German specifications fell as a matter of interpretation under the MDA — it seems to me that the Commission is entitled to say that this argument of Ford ignores the economic reality and that the Commission did not err in law in so saying. The MDA sets out the arrangements made for the wholesale and retail distribution in Germany of 'company products' which are defined as covering the normal serial models of private cars and light and commercial vehicles and chassis specified in Schedule 1 of the agreement. There is no reference to RHD or LHD cars as such.

It is, however, clear that RHD cars were supplied by Ford through its dealers appointed under the MDA. Those purchasers, particularly from the United Kingdom where the largest number of RHD cars in the Community is to be found, went to German dealers partly no doubt as Ford argues because of the appreciation of sterling against the DM, but partly also because German prices were in any event lower than prices in the United Kingdom. The decision to stop supplying RHD cars in Germany, the cost of manufacturing which was approximately the same as that of manufacturing LHD cars, was taken in order (a) to prevent in particular United Kingdom purchasers from buying them in Germany and (b) to make it necessary for them to buy such cars in the United Kingdom, in order to protect the Ford network in the United Kingdom. That decision as set out in the circular was expressed in general terms and sent to those German dealers who had supplied RHD cars, whether under the Visit Europe Plan or, as I understand it, otherwise. Whether Ford was entitled to do this under the MDA, or whether such an announcement to those dealers was unnecessary because RHD cars were not covered by the MDA, does not seem to me to matter. The MDA constituted the context or framework within which the supply and the circular putting an end to such supply operated. The Commission was entitled to consider the eligibility of the agreement for exemption in the light of that circular and its effect.

On this basis, in my opinion, the Commission was also entitled to be satisfied, as I read it as being satisfied, that the agreement as operated from May 1982 did not 'contribute to improving the distribution of goods' or allow 'consumers a fair share of the resulting benefits' within the meaning of Article 85 (3). RHD cars made and sold in Germany at German prices were no

longer available. A significant price advantage was lost to United Kingdom purchasers without any compensating benefit being conferred on consumers in other parts of the Community. That the existence of this price advantage depended in part, even a substantial part, on circumstances beyond Ford's control, namely exchange rates, does not seem to me to undermine this conclusion. The fact is that the circular deprived consumers of an advantage which they had previously enjoyed.

Ford argues that even if the Commission could treat an export ban on cars already made as being in breach of the competition rules, the Commission cannot positively oblige Ford to produce cars. The effect of the Decision is that Ford must maintain 'full line availability'. I do not read the Decision in this way. It appears from paragraph 45 that this is not being required or considered. The Decision is concerned not with production but with the supply of cars actually manufactured, a supply cut off in Germany so as to prevent purchasers from other Member States obtaining them in Germany. Ford, to obtain exemption, had the option of restoring that supply or amending the agreement.

It is argued by Ford that the Commission took into account irrelevant considerations outside the ambit of the four conditions specified in Article 85 (3) and that its motive was to compel Ford to resume supplies of RHD cars at favourable prices. Preventing a non-dominant undertaking from having disparate prices in different Member States and from partitioning the common market by preventing parallel imports of its own products made in one Member State into other Member States, it is said by Ford, may be a proper goal of Community competition policy, but is not a factor which can properly be relied on in deciding whether or not to grant an exemption under Article 85 (3).

There is no doubt that the Commission did consider as an important aspect of the case that the result of what Ford was doing was to establish artificial partitions in the common market, to prevent parallel imports and to give territorial protection to its network in the United Kingdom. Interference with parallel imports made the effects of the agreement more restrictive. The Commission, strongly supported by the arguments of BEUC, argues that it is entitled to take account of these factors when deciding when an exemption should be granted.

In the Decision it is said that these matters are to be taken into account in deciding whether the four conditions are satisfied. This is repeated, in particular, in the Rejoinder, where it is stressed that the Commission does not claim that, if the four conditions of Article 85 (3) are satisfied, the Commission can then perform a separate balancing exercise to decide whether or not to grant an exemption (paragraph 2.6).

The Commission is thus saying that it had regard to what it saw as a restriction of parallel imports and the partitioning of the common market as factors which went to

show that an improvement in distribution and allowing consumers a fair share of the resulting benefit were not satisfied. This approach is in my view not erroneous in law and is justified on the facts. It is difficult to see how the facts found did not also mean that the fourth condition was not satisfied.

In these circumstances it seems to me that it is not necessary to decide whether, after making its assessment that the four conditions are satisifed, the Commission retains in any event a residual discretion, governed by the objects and policy of the Treaty and by the need to take into account only legally relevant factors, to refuse an exemption. Article 85 (3) provides that 'the provisions of paragraph 1 *may*, however, be declared inapplicable', which suggests the existence of a discretion, subject to judicial review by the Court. If such a discretion does exist then it should normally be exercised in favour of granting an exemption if the four conditions are satisfied. If, however, some overriding principle of the Community (e.g. maintaining the unity of the common market) is violated despite the fact that the four conditions are satisfied, then prima facie it seems to me that a discretion remains as to whether exemption should be granted.

However, in my view, this point does not arise if, as I consider, the Commission took these factors into account in deciding whether the four conditions were satisfied. If it is wrong to consider that any form of residual discretion exists once the four conditions are satisfied, then I do not consider in this case that, if the Commission was guided by policy considerations outside the four conditions, this undermines its finding that two of the conditions were not satisfied. That consideration only went to add weight to a conclusion which was justifiably reached on valid considerations. I am not satisfied that if it had been left out a different result would or might have been reached.

I do not accept the argument that there was a failure to give adequate or valid reasons for the decision. Even if 'favourable prices' for the RHD cars were not an express or implied term of the agreement itself, or their withdrawal a reduction of the benefits under the agreement, they were for the reasons given part of the relevant context, because of the link with the operation of the MDA. On that basis the Commission was entitled to conclude that the restrictiveness of the operation of the agreement was thereby increased. Nor do I think that the Commission was required to balance what it had found to be the withdrawal of this advantage against other advantages accruing under the agreement.

It follows from what has been said that I do not consider that there was any misuse of powers by the Commission, either in taking irrelevant considerations into account or in reaching a decision which the applicants argue leaves open the possibility of other clauses of the agreement, in other circumstances, being found to be contrary to Article 85 (1). I accept the Commission's

argument that the effect of what was done was to give Ford a choice between amending the agreement and restoring the supply of RHD cars at prices similar to those charged in Germany for LHD cars.

The parties and the interveners have put forward many other arguments of detail which in my view do not affect the overall conclusion and with which accordingly I do not deal.

In the result in my opinion the applications should be dismissed and the applicants should pay the costs of the Commission and BEUC.