JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
3 December 2003 *

In Case T-208/01,

Volkswagen AG, established in Wolfsburg (Germany), represented by R. Bechtold, lawyer,

applicant,

v

Commission of the European Communities, represented by W. Mölls, acting as Agent, with an address for service in Luxembourg,

defendant,

* Language of the case: German.

APPLICATION for annulment of Commission Decision 2001/711/EC of 29 June 2001 relating to a proceeding under Article 81 of the EC Treaty (Case COMP/F-2/36.693 — Volkswagen) (OJ 2001 L 262, p. 14) or, in the alternative, reduction of the amount of the fine imposed on the applicant,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Fourth Chamber),

composed of: V. Tiili, President, P. Mengozzi and M. Vilaras, Judges,

Registrar: D. Christensen, Administrator,

having regard to the written procedure and further to the hearing on 18 June 2003,

gives the following

Judgment

Facts

1 Volkswagen AG (hereinafter 'Volkswagen' or 'the applicant') is the holding company and the largest undertaking of the Volkswagen group, which operates

in the automobile construction sector. The motor vehicles produced by the applicant are sold in the Community, within the framework of a system of selective and exclusive distribution, by authorised dealers with which the applicant has concluded a dealership agreement.

2 Under Clause 4(1) of the dealership agreement in its September 1995 and January 1998 versions, Volkswagen grants the dealer an agreed territory for the range of vehicles and for after-sales service. In return, the dealer undertakes to promote sales and the after-sales service intensively within the agreed territory and to exploit its market potential to the utmost. Under Clause 2(6) (January 1989 version) or Clause 2(1) (September 1995 and January 1998 versions) of the dealership agreement, the dealer undertakes 'to defend and promote in every way the interests of [Volkswagen], of the Volkswagen distribution organisation and of the Volkswagen brand'. It is also stipulated that 'the dealer will comply with all instructions issued for the purposes of the agreement regarding the distribution of new Volkswagen cars, the stocking of replacement parts, customer service, sales promotion, advertising, training, and the ensuring of quality in each area of Volkswagen's business'. Finally, under Clause 8(1) of the dealership agreement, '[Volkswagen] will issue non-binding price recommendations concerning retail prices and discounts'.

3 On 17 July 1997 and 8 October 1998, following a buyer's complaint, the Commission sent the applicant, under Article 11 of Council Regulation No 17 of 6 February 1962: First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition, Series I, 1959-1962, p. 87), requests for information concerning its pricing policy and, particularly, the fixing of the selling price of the Volkswagen Passat model in Germany. The applicant replied to those requests on 22 August 1997 and 9 November 1998 respectively.

4 On 22 June 1999, on the basis of the information forwarded, the Commission sent the applicant a statement of objections in which it accused it of having infringed Article 81(1) EC by agreeing with the German dealers in its distribution network to strict price discipline for sales of the Volkswagen Passat model.

5 The Commission relied therein, in particular, on three circulars sent by the applicant to its German dealers on 26 September 1996, and 17 April and 26 June 1997, and five letters sent to certain of them, on 24 September, 2 and 16 October 1996, 18 April 1997 and 13 October 1998 (hereinafter together called 'the calls at issue').

6 By letter of 10 September 1999, the applicant replied to that statement of objections and stated that the facts set out therein were essentially correct. The applicant did not request a hearing.

7 On 15 January and 7 February 2001, the Commission sent the applicant two further requests for information, to which it replied on 30 January and 21 February 2001 respectively.

8 On 6 July 2001, the Commission notified the applicant of its Decision 2001/711/EC of 29 June 2001 relating to a proceeding under Article 81 of the EC Treaty (Case COMP/F-2/36.693 — Volkswagen) (OJ 2001 L 162, p. 14, hereinafter 'the contested decision').

9 The contested decision provides:

'*Article 1*

[Volkswagen] has infringed Article 81(1) of the EC Treaty by setting the selling price of the VW Passat on the basis of exhortations to its German authorised dealers to grant limited discounts or no discounts at all to customers in selling the VW Passat.

Article 2

A fine of EUR 30.96 million is imposed on [Volkswagen] in respect of the infringement referred to in Article 1.

...

Article 4

This decision is addressed to [Volkswagen], D-38436 Wolfsburg....'

Proceedings

10 The applicant brought this action by application lodged at the Registry of the Court of First Instance on 10 September 2001.

11 On 25 February 2002, the Commission lodged its rejoinder at the Court Registry, that is four days after the expiry of the time-limit for doing so, without having previously either sought and obtained the extension of that time-limit or stated any circumstances excusing its non-observance. Consequently, the Court rejected that pleading as being out of time.

12 On hearing the Report of the Judge-Rapporteur, the Court (Fourth Chamber) decided to open the oral procedure.

13 The parties presented oral argument and answered questions put by the Court at the hearing on 18 June 2003.

Forms of order sought by the parties

14 The applicant claims that the Court should:

— annul the contested decision;

— in the alternative, reduce the amount of the fine imposed by Article 2 of the contested decision;

— order the Commission to pay the costs.

15 The Commission contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

16 As its principal argument, the applicant claims that the contested decision should be annulled on the ground that the applicant has not infringed Article 81(1) EC. First, there was no agreement, within the meaning of that provision, between the applicant and its German dealers. Secondly, assuming that the calls at issue were the subject of an agreement, they were not capable of affecting, much less, appreciably affecting, trade between Member States, so that Article 81(1) EC does not apply. In the alternative, the applicant seeks the reduction of the amount of the fine imposed on it by the contested decision.

17 It is convenient to consider, first, the principal claim seeking the annulment of the contested decision and, in that context, the applicant's plea in law that the calls at issue were not the subject of any agreement, within the meaning of Article 81(1) EC, between the applicant and its German dealers.

Arguments of the parties

18 The applicant points out, first of all, that under settled case-law the concurrence of wills between undertakings is the central element in the concept of agreement within the meaning of Article 81(1) EC. For that reason, unilateral measures taken without the agreement of their addressee are not caught by that provision. They are prohibited only exceptionally, when they are unilateral purely by appearance and their addressee agrees to them tacitly. That is true even in the context of selective distribution (Joined Cases 32/78, 36/78 to 82/78 *BMW Belgium* v *Commission* [1979] ECR 2435, hereinafter 'the *BMW Belgium* judgment'; Case 107/82 *AEG* v *Commission* [1983] ECR 3151, hereinafter 'the *AEG* judgment'; Case C-277/87 *Sandoz prodotti farmaceutici* v *Commission* [1990] ECR I-45, hereinafter 'the *Sandoz* judgment'; Case C-279/87 *Tipp-Ex* v *Commission* [1990] ECR I-261; and Case T-41/96 *Bayer* v *Commission* [2000] ECR II-3383, paragraphs 71 et seq., 162, 167, 169 and 170, hereinafter 'the *Bayer* judgment').

19 The Commission was therefore wrong to allege, in recital 62 to the contested decision, that unilateral calls by a manufacturer constitute an agreement within the meaning of Article 81(1) EC when they are 'intended to influence' the dealer in the performance of its contract and to conclude, on that basis, that there was such agreement in this case. In doing so, the Commission is seeking to impose a new legal approach which not only enlarges the meaning of 'agreement', but also changes the rules on the burden of proof in its favour. That approach would mean that an attempt to influence would henceforth be capable of infringing Article 81(1) EC. In actual fact, neither the judgment of the Court of First

Instance in Case T-62/98 *Volkswagen* v *Commission* [2000] ECR II-2707, hereinafter 'the *Volkswagen* judgment', on which the Commission based its decision, nor the judgments of the Court of Justice in Joined Cases 25/84 and 26/84 *Ford* v *Commission* [1985] ECR 2725, hereinafter 'the *Ford* judgment', and in Case C-70/93 *Bayerische Motorenwerke* v *ALD* [1995] ECR I-3439, hereinafter 'the *BMW* judgment', referred to in the *Volkswagen* judgment, cast any doubt on the case-law which requires that there be consent, express or tacit.

20 Also, the applicant points out, again according to settled case-law, that apparently unilateral behaviour may be covered by Article 81(1) EC only if it 'forms part' of the contractual relations, that is to say that it is compatible with the existing contractual relationship by reason of the unanimous interpretation of both parties to the contract. It is only in such cases that the 'materialisation' of the contractual links alleged by the Commission can take place. It is not therefore sufficient that the manufacturer's calls 'form part' of a pre-existing contractual link, nor that the manufacturer refers, in such calls, to the dealership agreement.

21 The applicant claims that a dealer who joins a distribution network can agree to a distribution policy only in so far as it is already established. Later changes to that policy can take place only if the contract contains an appropriate reservation, and only within its limits. If there is none, the contract would have to be varied by both parties. The calls at issue, some of which came moreover only from a sales director of the applicant and were written on his personal letterhead, are not only objectively incompatible with the dealership agreement, particularly with its Clause 8(1), which provides only for recommended prices, but also were perceived as such by the dealers, as is shown particularly by the reactions of the dealers Binder and Rütz. The Commission's assertions that that provision of the contract does not guarantee that the applicant will abstain from issuing binding instructions as to price in the context of Clause 2(1) of that contract, or that the

fact that behaviour contravenes Article 81(1) EC does not mean that it is outside a general contractual reservation, are inconsistent with the rules of construction of contracts. For the same reasons, the Commission cannot suggest that the dealership agreement included an implied reservation allowing price fixing. Furthermore, the fact that some of the calls at issue were coupled with threats to terminate the dealership agreement does not in the least mean that this contract was the objective basis of those requests.

22 The Commission was therefore wrong, according to the applicant, to maintain that the question whether dealers had actually adjusted their prices in response to the calls at issue could be left open and that more precise findings in that regard were not necessary. The existence of an agreement could be assumed only if the dealers had acquiesced in the calls at issue and — at the very least as proof of such agreement — had also changed their conduct in relation to prices.

23 Finally, in relation to the conduct of the dealers following the calls at issue, the applicant claims that, while it is not itself in a position to prove that they did not influence their conduct in relation to price, the figures quoted by the Commission in the contested decision, far from reflecting significant changes in that conduct, show, on the contrary, an increase in the discounts. The applicant proposes that a witness should be called on this subject and refers to figures which indicate that the discounts allowed by the dealers increased.

24 The Commission maintains, on its part, that the calls at issue became integral parts of the dealership agreement and therefore constitute 'agreements' within the meaning of Article 81(1) EC.

25 As its principal argument, the Commission claims, first of all, that, according to the *AEG*, *Ford*, *BMW*, and *Volkswagen* judgments, it is not necessary, at least in the case of selective distribution systems such as that in this case, to look for acquiescence to a call by the manufacturer in the behaviour which the dealer adopts in the context of that call (for example after its receipt). Such acquiescence must be regarded as established as a matter of principle, from the mere fact that the dealer has entered the distribution network. It is therefore deemed to have been given by the dealer. According to the Commission, that case-law, which serves as the basis of the contested decision, is not put in doubt by the judgments cited by the applicant, indeed on the contrary.

26 Also, the Commission claims that, for a call by the manufacturer to become part of the contract, it is not necessary that the distribution agreement include an express reservation clause. The decisive point is the purpose of the call, which is to influence dealers in the performance of that contract. Thus, an unlawful policy of a manufacturer adopted in the context of a lawful distribution agreement, can become an integral part of that contract without the necessity of the contract containing an express reservation to that effect. It is presumed that by joining a distribution system, the dealer approves the manufacturer's distribution policy in advance, a policy which is naturally not foreseeable in all its details when the dealer joins. Those principles apply also to the manufacturer's policy in relation to resale prices. The *AEG* and *Ford* judgments confirm that argument.

27 Alternatively, if it is held that an express reservation is necessary, Clause 2(1) or (6) of the dealership agreement must, according to the Commission, be regarded as such a clause. The arguments advanced by the applicant, based on the effect of Clause 8(1) of the dealership agreement, on the lack of any provision in the agreement for sanctions in the event of non-observance of the manufacturer's recommendations and on the fact that Clause 2(1) or (6) of that agreement is mentioned in only some of the calls at issue, does not put that assessment into question.

28 Finally, so far as concerns the parties' actual behaviour following the calls at issue, the Commission submits, in its defence, that such behaviour shows that they regarded those calls as forming part of the dealership agreement. The applicant's arguments, concerning the effect to be given to the reactions of the dealers Binder and Rütz to the calls at issue and to the fact that some of them came from a sales director of the applicant on his personal letterhead, do not put that assessment into question.

29 The Commission submits, however, that the agreement fined in the contested decision is based solely on the calls at issue, since the dealers' approval had already been given previously by their joining the distribution system. Therefore, it is of little importance that the dealers also approved the calls at issue again, subsequently, by their actual behaviour in respect of prices. That question can be left open (recital 68 of the contested decision). All the applicant's submissions on that subject are therefore irrelevant.

Findings of the Court

30 According to settled case-law, in order for there to be 'agreement' within the meaning of 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 (see, to that effect, Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraph 112; Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck and Others* v *Commission* [1980] ECR 3125, paragraph 86; Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraph 256, and the *Bayer* judgment, paragraph 67).

31 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 (see, to that effect, *ACF Chemiefarma*, cited above, paragraph 112; *Van Landewyck and Others*, cited above, paragraph 86, and the *Bayer* judgment, paragraph 68).

32 It follows that the concept of 'agreement' within the meaning of Article 81(1) EC, as interpreted by the case-law, 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 (the *Bayer* judgment, paragraph 69).

33 The case-law also shows that, where a decision of the manufacturer constitutes unilateral conduct of the undertaking, that decision escapes the prohibition in Article 81(1) EC (see, to that effect, the *AEG* judgment, paragraph 38; the *Ford* judgment, paragraph 21; Case T-43/92 *Dunlop Slazenger* v *Commission* [1994] ECR II-441, paragraph 56, and the *Bayer* judgment, paragraph 66).

34 In certain circumstances, measures adopted or imposed in an apparently unilateral manner by a manufacturer in the context of its continuing relations with its distributors have been regarded as constituting an agreement within the meaning of Article 81(1) EC (the *BMW Belgium* judgment, paragraphs 28 to 30; the *AEG* judgment, paragraph 38; the *Ford* judgment, paragraph 21; the *Sandoz* judgment, paragraphs 7 to 12; the *BMW* judgment, paragraphs 16 and 17, and the *Bayer* judgment, paragraph 70).

35 That case-law shows that a distinction should 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 81(1) EC, 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 *Bayer* judgment, paragraph 71).

36 It is also clear from that case-law that 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 81(1) EC if the Commission does not establish the existence of an acquiescence by the other partners, express or implied, in the attitude adopted by the manufacturer (see, to that effect, the *BMW Belgium* judgment, paragraphs 28 to 30; the *AEG* judgment, paragraph 38; the *Ford* judgment, paragraph 21; the *Sandoz* judgment, paragraphs 7 to 12, and the *Bayer* judgment, paragraph 72).

37 It is in the light of that case-law that it must be established whether the Commission has, in the contested decision, proved an agreement within the meaning of Article 81(1) EC between the applicant and its dealers with regard to the calls at issue.

38 In that regard, it must be held, first of all, that it has not been established that the calls at issue were implemented in practice. The Commission admits this, in particular, in recital 74 of the contested decision, in the following terms:

'It is hardly possible, in the circumstances of the case, to determine the precise conduct of dealers...'

39 The Court holds also that, as is apparent, essentially, from recital 60 of the contested decision, the Commission's primary argument in finding the existence of an agreement within the meaning of Article 81(1) EC is that the applicant's distribution policy at issue was tacitly accepted by the dealers on signing the dealership agreement. Therefore, according to the Commission, 'the question of whether and to what extent the German Volkswagen dealers actually changed their pricing on the basis of the circulars and warnings can be left open' (recital 68 of the contested decision).

40 The Commission restates its position in paragraph 8 of its defence, which reads 'it is not necessary, at least in the case of selective distribution systems such as that in this case, to look for acquiescence to a manufacturer's call in the conduct adopted by the dealer in the context of that call (for example after its receipt)'. According to the Commission, 'such acquiescence must be regarded as established as a matter of principle by the mere fact that the dealer has entered the manufacturer's distribution network' and 'it is deemed to have been given in advance'. The Commission goes on to state essentially that it is of little importance whether the contract contains an express reservation which allows calls such as the calls at issue. In the absence of such a clause, such a call could still become an integral part of the contract, or 'form part' of the contract. The decisive point is the purpose of that call, which is to influence dealers in the performance of that contract (paragraphs 11 and 12 of the defence).

41 The same idea is expressed in recital 62 of the contested decision, in which the Commission, citing the *Volkswagen* judgment (paragraph 236), states that 'calls by a manufacturer to its authorised dealers constituted an agreement if they were "intended to influence the... dealers in the performance of their contract with (the manufacturer or importer)"'.

42 The Court notes, finally, that the Commission does not assert that the dealership agreement, in particular Clause 2(1) or (6) and Clause 8(1) thereof, is contrary to competition law.

43 It follows from the foregoing findings that the Commission's case, clearly repeated in paragraph 15 of the defence, amounts to claiming that a dealer who has signed a dealership agreement which complies with competition law is deemed, upon and by such signature, to have accepted in advance a later unlawful variation of that contract, even though, by virtue precisely of its compliance with competition law, that contract could not enable the dealer to foresee such a variation.

44 That argument of the Commission, which is the principal basis of the contested decision and by virtue of which the Commission disregards, as irrelevant, the question whether the applicant's dealers actually acquiesced in the calls at issue when they became aware of them, that is to say after they were sent to them, cannot succeed.

45 It can admittedly be envisaged that a contractual variation could be regarded as having been accepted in advance, upon and by the signature of a lawful dealership agreement, where it is a lawful contractual variation which is foreseen by the contract, or is a variation which, having regard to commercial usage or legislation, the dealer could not refuse. By contrast, it cannot be accepted that an unlawful contractual variation could be regarded as having been accepted in advance, upon and by the signature of a lawful distribution agreement. In that case, acquiescence in the unlawful contractual variation can occur only after the dealer has become aware of the variation desired by the manufacturer.

46 Consequently, the Commission is wrong to assert, in this case, that the signature by the applicant's dealers of the dealership agreement involves acceptance on their part of the calls at issue. Such an assertion is contrary to Article 81(1) EC as interpreted in the case-law cited in paragraphs 30 to 36 above, which requires proof of a concurrence of wills.

47 The Court considers that the Commission is proceeding from a mistaken interpretation of the case-law which it cites in support of its case, when it argues that, according to the *AEG*, *Ford*, *BMW* and *Volkswagen* judgments, it is not necessary, at least in the case of selective distribution systems such as the one in this case, to look for acquiescence to a manufacturer's call in the conduct adopted by the dealer in the context of that call (for example after its receipt), and that such acquiescence ought to be regarded as having been established as a matter of principle by the mere fact that the dealer has entered the distribution network.

48 In fact, contrary to the Commission's claim, the Court of Justice, in the *AEG* judgment, found expressly that the distributors acquiesced in AEG's anti-competitive actions when it stated that 'in the case of the admission of a distributor, approval is based on the acceptance, tacit or express, by the contracting parties of the policy pursued by AEG which requires inter alia the exclusion from the network of all distributors who are qualified for admission but are not prepared to adhere to that policy' (paragraph 38 of the judgment).

49 In other words, in the *AEG* judgment, the Court did not suggest that the distributors' acquiescence in AEG's anti-competitive policy constituted acquiescence given in advance, upon signature of the contract, to an as yet unknown policy of the manufacturer.

50 It is appropriate, furthermore, to observe that the statement, in paragraph 38 of the *AEG* judgment, that AEG's attitude was not unilateral but 'form[ed] part of the contractual relations between the undertaking and resellers' is not an unconditional statement, but rests on the Court's previous finding that the distributors had acquiesced in that conduct, which, necessarily, aimed to influence those contractual relations.

51 In the *Ford* judgment, the dispute was not about the question whether or not the dealers had acquiesced in the circular sent by Ford which was intended to be anti-competitive. It was, actually, common ground that the circular had been implemented in practice by Ford and that the dealers, despite some protests, had complied with it. The case concerned the question whether that circular, applied by the parties, could be linked to the Ford dealership agreement, when that agreement was examined in the light of Article 81(1) EC and with a view to possible exemption under Article 81(3) EC. It was in that context that the Court of Justice, having found that the disputed circular was linked to the dealership agreement (Annex I to that agreement), was able to rule that the Commission had been entitled to take it into account in its examination of the agreement with a view to the possibility of granting an exemption under Article 81(3) EC (the *Ford* judgment, paragraphs 20, 21 and 26).

52 So far as concerns the *BMW* judgment, given on a reference for a preliminary ruling, the Court does not consider that it is directly relevant to this case. In that case the question referred was not so much whether an agreement had actually been reached between BMW and its dealers on the contents of the circular sent to them by BMW, as whether such a request, assuming that it was accepted and therefore constituted an agreement within the meaning of Article 81(1) EC, came within the relevant exempting regulation, namely Commission Regulation (EEC) No 123/85 of 12 December 1984 on the application of Article [81](3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements (OJ 1985 L 15, p. 16).

53 So far as concerns the case which gave rise to the *Volkswagen* judgment, it follows clearly, both from the Commission's decision and from the Court of First Instance's judgment in that case (see paragraph 236 of the *Volkswagen* judgment, read in conjunction with the paragraphs to which it refers) and confirmed by the Court of Justice in Case C-338/00 P *Volkswagen* v *Commission* [2003] ECR I-9189), that the manufacturer's initiatives had actually been put into effect, since the Italian dealers had complied with them and refused to sell to their foreign customers. The acceptance by Volkswagen's dealers of its anti-competitive initiatives was not in doubt in that case.

54 Thus, the conclusion reached by the Court in the *Volkswagen* judgment, whereby it rejected the plea for annulment of the Commission's decision based on Volkswagen's allegedly unilateral initiatives, was founded on acquiescence arising from implementation in practice of the manufacturer's initiatives.

55 It follows from that analysis of the *AEG*, *Ford*, *BMW* and *Volkswagen* judgments that the Commission was wrong to rely on them in support of its contention that the signature of a distribution agreement implies, as a matter of principle and irrefutably, the tacit acceptance of future unlawful variations of that agreement.

56 Moreover, the Commission's argument in this case is clearly undermined by the *Sandoz*, *BMW Belgium* and *Bayer* judgments and the judgment in *Tipp-Ex* v *Commission*, cited by the applicant. Those judgments all confirm that, for an agreement within the meaning of Article 81(1) EC to be found to exist, it is necessary to prove a concurrence of wills. In addition, in accordance with the case-law cited in paragraphs 30 and 31 above, such a concurrence of wills must cover particular conduct, which must, therefore, be known to the parties when they accept it.

57 In addition, contrary to the Commission's argument, it does not follow from the case-law that, for a request to form part of a contract, the decisive element is that the request be intended to influence the dealer in the performance of the contract. If that were the case, the sending by the manufacturer of a call to its dealers would lead, systematically, to the establishment of an agreement, since by definition such a call is intended to influence those dealers in the performance of their contracts.

58 On the other hand, a call forms part of a pre-existing contract, that is to say forms an integral part of that contract, where it is indeed intended to influence the dealers in the performance of the contract, but above all where that call is, in some way or other, actually accepted by the dealer.

59 In the present case, the Commission has merely observed, as was evident, that the calls at issue were intended to influence the dealers in the performance of their agreements. It did not consider it relevant to prove actual acquiescence by the dealers to those requests when they had become aware of them, but submitted, wrongly, that the signature of a — lawful — contract implied tacit acceptance of those calls in advance. Therefore, it must be held that the Commission has not proved the existence of an agreement within the meaning of Article 81(1) EC.

60 It is appropriate, in that regard, to hold that recitals 66 and 67 in the contested decision, dealing with the examination of the parties' conduct, documents and statements, do not in the least seek to prove that the dealers acquiesced in the calls at issue when they became aware of them. By those recitals, the Commission seeks only to justify its interpretation of the contract, expressed in recitals 63 to 65 in the contested decision, and which constitutes the Commission's alternative argument analysed below, that an organic link, established by Clause 2(1) or (6) of the dealership agreement, in any event unites the calls at issue to that contract. It is also in that sense that the Commission's allegation, at paragraph 29 of its defence, must be understood, namely that the dealers regarded the calls at issue as 'forming part' of the contract.

61 In the alternative, the Commission claims that, even were it to be held that a reservation clause in the dealership agreement is necessary before it can be held that the calls at issue form part of that agreement, Clause 2(1) or (6) of that

agreement must be regarded as being such a clause. The Commission states that Clause 8(1) of that agreement could not have been intended to limit Clause 2(1) or (6) by preventing its application to binding calls relating to the selling price.

62 That alternative argument cannot be accepted.

63 Clause 2(1) or (6) of the dealership agreement, by which the dealer binds itself to 'defend and to promote in every way the interests of Volkswagen..., of the Volkswagen distribution organisation and of the Volkswagen brand', can only be interpreted as referring solely to lawful means. To maintain the contrary would amount, in effect, to deducing from such a contractual clause, drafted in neutral terms, that the dealers had bound themselves by an illegal agreement.

64 As regards Clause 8(1) of the dealership agreement, it is also drafted in neutral terms, indeed in terms rather prohibitive of the possibility for Volkswagen to issue binding price recommendations.

65 The fact that, in recital 65 in the contested decision, the Commission noted that Clause 8(1) of the dealership agreement 'does not mean that the dealer has any specific guarantee that the manufacturer will in future abstain from making binding specifications in relation to price,...' only emphasises the neutrality of that provision and the fact that it makes no mention at all of binding measures.

66 The Court observes, finally, that the fact that Volkswagen refers to Clause 2 of the dealership agreement in the calls at issue does not mean that, objectively, that clause justifies those requests. The existence of a possible organic link between Clause 2 of the dealership agreement and the calls at issue can be established only objectively, by analysing the provisions concerned independently of what one of the contracting parties later states. As has been stated above, it is clear from the very terms of Clause 2 that it does not in any way envisage an anti-competitive variation of the contract.

67 It follows from the foregoing that the Commission incorrectly argues, in the alternative, that Clause 2(1) or (6) of the dealership agreement constitutes a relevant reservation clause, so that the calls at issue were accepted when that agreement was made.

68 It follows from all the above considerations that the Commission has not proved, in the contested decision, a concurrence of wills between the applicant and its dealers in relation to the calls at issue. It follows that the contested decision was taken in breach of Article 81(1) EC and must therefore be annulled, without the necessity of ruling on the other plea for annulment advanced by the applicant, or on the alternative application for the reduction of the amount of the fine.

Costs

69 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the other party's pleadings. As the applicant has applied for costs and the Commission has been unsuccessful, the Commission must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. **Annuls Commission Decision 2001/711/EC of 29 June 2001 relating to a proceeding under Article 81 of the EC Treaty (Case COMP/F-2/36.693 — Volkswagen);**

2. **Orders the Commission to pay the costs.**

Tiili Mengozzi Vilaras

Delivered in open court in Luxembourg on 3 December 2003.

H. Jung V. Tiili

Registrar President