

# Unilateral acts and the concept of agreement In Article 81(1) of the EC Treaty: the Court of First Instance in *Bayer v Adalat*

by Richard Whish

The scheme of the EC competition rules is that Article 81 applies to conduct by two or more undertakings which are consensual, and that Article 82 applies to unilateral action by a dominant firm. It follows that unilateral conduct by a firm that is not dominant is not caught at all, which is why in some cases fairly outlandish claims of dominance have been made, see e.g. Case 75/84 *Metro v Commission (No 2)* [1986] ECR 3021; [1987] 1 CMLR 118, paras 79-92; Case 210/81 *Demo-Studio Schmidt v Commission* [1983] ECR 3045; [1984] 1 CMLR 63. However it is important to appreciate that conduct which might at first sight appear to be unilateral has sometimes been held by the Commission to fall within Article 81(1) as an agreement or a concerted practice, and that the Commission's decisions in this respect have usually been upheld by the Community Courts; however, in *Bayer AG/Adalat* OJ [1996] L 210/1 the Commission stretched the notion of an agreement too far, and the decision was annulled by the Court of First Instance Case T-41/96, 26 October 2000, unreported.

The characterisation of apparently independent, unilateral action as an agreement is particularly likely to occur in the context of relations between a producer and the participants in its distribution system: the Commission is vigilant in these circumstances to monitor conduct which either has the effect of maintaining resale prices or which leads to the partitioning of national markets and the suppression of parallel trade.

## AEG TELEFUNKEN V COMMISSION; FORD V COMMISSION

In *AEG-Telefunken v Commission* Case 107/82 [1983] ECR 3151; [1984] 3 CMLR 325, the ECJ rejected a claim that refusals to supply retail outlets which were objectively suitable to handle AEG's goods were unilateral acts falling outside Article 81(1). The ECJ held that such refusals

arose out of the contractual relationship between the supplier and its established distributors and their mutual acceptance, tacit or express, of AEG's intention to exclude from the network distributors. AEG's refusals to supply were not unilateral but provided proof of an unlawful application of its selective distribution system, as their number was sufficient to preclude the possibility that they were isolated cases not forming part of systematic conduct *AEG*, paras 31-39. In *Ford v Commission* Cases 25, 26/84 [1985] ECR 2725; [1985] 3 CMLR 528, the ECJ held that a refusal by Ford's German subsidiary to supply right-hand drive cars to German distributors was attributable to the contractual relationship between them. The *Ford* judgment is an extension of *AEG*. In *AEG* there was an obvious community of interest between the distributors who received supplies from AEG, that 'cut-price' outlets should not be able to obtain goods and undercut their prices; in this case it was easy to see that certain assumptions might creep into the relationship between AEG and its usual customers. In *Ford* however the German distributors with whom Ford had entered into contracts did not themselves benefit from the refusal to supply right-hand drive cars: the beneficiaries of this policy were distributors in the UK, who would be shielded from parallel imports. Here the 'unilateral' act held to be attributable to the agreements between supplier and distributors was not an act for the benefit of those very distributors.

## SUBSEQUENT CASES

In several decisions after *AEG* and *Ford* the Commission has applied Article 81(1) to apparently unilateral conduct. In *Sandoz* OJ [1987] L 222/28; [1989] 4 CMLR 628, it held that, where there was no written record of agreements between a producer and its distributors, unilateral measures, including placing the words 'export prohibited' on all invoices, were attributable to the continuing

commercial relationship between the parties and were within Article 81(1). On appeal the ECJ upheld the Commission's decision Case C-277/87 *Sandoz Prodotti Farmaceutici Spa v Commission* [1990] ECR I-45; in *Vichy OJ* [1991] L 75/57, upheld on appeal Case T-19/91 *Vichy v Commission* [1992] ECR II-415, the Commission specifically applied paragraph 12 of the *Sandoz* judgment. In *Tipp-Ex OJ* [1987] L 222/1; [1989] 4 CMLR 425, upheld on appeal Case C-279/87 *Tipp-ex GmbH v Commission* [1990] ECR I-261, the Commission applied the ECJ's judgments in *AEG* and *Ford*, holding that there was an infringement of Article 81 consisting of agreements between *Tipp-Ex* and its authorized dealers regarding the mutual protection of territories. In *Bayo-n-ox OJ* [1990] L 21/71; [1990] 4 CMLR 930; see also *Bayer Dental OJ* [1990] L 351/46; [1992] 4 CMLR 61, goods were supplied at a special price on condition that the customers use them for their own requirements: they could not resell them; this stipulation was contained in circulars sent by the supplier to the customers. The Commission said that by accepting the products at the special price the customers had tacitly agreed to abide by the 'own requirements' condition. The fact that a customer is acting contrary to its own best interests in agreeing to its supplier's terms does not mean that it is not party to a prohibited agreement under Article 81(1): see e.g. *Gosmé/Martell-DMP OJ* [1991] L 185/23; [1992] 5 CMLR 586.

## BAYER V COMMISSION

The Commission again characterized apparently unilateral action as an agreement in *Bayer AG/Adalat OJ* [1996] L 201/1; on this occasion, however, the CFI annulled the decision since, in its view, the Commission had failed to prove the existence of an agreement Case T-41/96, 26 October 2000, unreported. In order to prevent its French and Spanish wholesalers from supplying parallel exports to the UK, and thereby to protect its UK pricing strategy, Bayer had reduced supplies of the drug *Adalat* to France and Spain. Prices for pharmaceuticals in France and Spain were as much as 40% less than in the UK, so that the market was ripe for parallel trade. The Commission held that a tacit agreement existed between Bayer and the wholesalers not to export to the UK contrary to Article 81(1): in its view the agreement was evidenced by the wholesalers ceasing to supply the UK in response to Bayer's tactic of reducing supplies. It has to be said that this would appear to be counter-intuitive, given that the wholesalers had tried every means possible to defy Bayer and to obtain extra supplies for the purpose of exporting to the UK: there was no 'common interest' in this case between Bayer and the wholesalers, whose respective needs were diametrically opposed.

Bayer did not deny that it had reduced the quantities delivered to France and Spain, but it argued that it had acted unilaterally rather than pursuant to an agreement. The Commission's decision was criticised, see Kon and

Schoeffler 'Parallel Imports of Pharmaceutical Products: a New Realism or Back to Basics?' [1997] ELR 123, Lidgard 'Unilateral Refusal to Supply: an Agreement in Disguise?' [1997] ECLR 352. Bayer obtained a suspension of the decision pending judgment order reported at Case T-41/96R *Bayer AG v Commission* [1996] ECR II-381; [1996] 5 CMLR 290; see *Lasok* (1997) 34 CMLRev 1309. In a very significant judgment, the CFI has now held that there was no agreement. After stressing that Article 81(1) applies only to conduct that is coordinated bilaterally or multilaterally, the Court reviewed the case-law and stated that the concept of an agreement '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', para 69. It acknowledged that there could be an agreement where one person tacitly acquiesces in practices and measures adopted by another, para 71; however it concluded that the Commission had failed both to demonstrate that Bayer had intended to impose an export ban, paras 78-110, and to prove that the wholesalers had intended to adhere to a policy on the part of Bayer to reduce parallel imports, paras 111-157. The CFI was satisfied that earlier judgments, including *Sandoz*, *Tippex* and *AEG* were distinguishable, paras 158-171. It also rejected the argument that the wholesalers, by maintaining their commercial relations with Bayer after the reduction of supplies, could thereby be held to have agreed with it to restrain exports, paras 172-182. The Court specifically said that a measure taken by a manufacturer that would hinder parallel imports is lawful, provided that it is not adopted pursuant to a concurrence of wills between it and its wholesalers contrary to Article 81(1) and provided that it does not amount to an abuse of a dominant position contrary to Article 82, para 176. The Court was not prepared to extend the scope of Article 81(1), acknowledging the importance of 'free enterprise' when applying the competition rules, para 180.

The importance of this judgment, which the Commission has appealed to The ECJ, cannot be overstated. Had the CFI upheld the decision of the Commission, the notion that an agreement for the purpose of article 81(1) requires consensus between the parties would have been eliminated; whilst this would have given the Commission greater control over restrictions of parallel trade within the Community, it would have done so at the expense of the integrity of the competition rules, which clearly apprehend unilateral behaviour only where a firm has a dominant position in the sense of Article 82. 

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