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Reassessing Borders Between Agreements and Unilateral Practices after Case C-74/04, Volkswagen II

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LT Anti-competitive practices; Competition agreements; Dominant position; EC law

I. Introduction

The European Court’s case law on the boundaries between an agreement, caught by Art.81, and unilateral practices (caught only in case of dominant position), had been described by an American author as “one of the greatest weaknesses of Community Competition Law”. At the time it was made, this evaluation was probably justified.

Starting in 1983, the Court adopted several surprising judgments, which stretched the concept of an agreement to such a point as to motivate conceptual-philosophical frustrations, such as those expressed in Oliver Black’s “What is an Agreement”. This all changed with Adalat. The Court seemed to go back to the common sense notion of agreement, establishing as a basic principle that:

“the concept of an agreement within the meaning of Article 85(1) of the Treaty, 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”.

In analysing this case law, it is important to distinguish principles from actual application in the specific cases, otherwise obvious contradictions surface. The quest for general principles is made further difficult by the Court’s typical attempt to reverse its case law while making it seem perfectly harmonious.

II. Where we stood so far

As was made clear in the judgment of July 13, 2006, which followed Advocate General Tizzano’s Opinion, there are two ways to show that apparent unilateral practices within the context of continuous business relations are actually agreements:

- “first path”: based on powers resulting from clauses of a general agreement drawn up in advance; or
- “second path”: based on the conduct of the parties (explicit or tacit acquiescence).

There were at least four precedents for the “first path”, and five (now six) for the “second path”.

6 Case T-188/01, GlaxoSmithKline, not yet reported; Case C-279/87, Tipp-Ex GmbH & Co KG (Tipp-Ex case) [1990]

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A. First path: powers foreseen in a general agreement

In AEG, the Court concurred with the Commission that the manufacturer's refusal to admit into the selective distribution system new dealers who were unwilling to comply with its price discipline was not a unilateral action. It was an agreement (with the already existing dealers), given that it formed "part of the contractual relations between the undertaking and resellers", since admission of a distributor was "based on the acceptance, tacit or express, by the contracting parties of the policy pursued by AEG", which supposedly included that particular exclusionary policy.

However, there was nothing in the agreement itself which foresaw such a policy, as is made obvious by its approval by the Commission upon notification. The Court was unconcerned that the manufacturer could implement this policy unilaterally, but the solution was made surprising by the fact that the policy was in both manufacturer and existing dealers' interests.

The same cannot be said of Ford. The manufacturer unilaterally refused to supply right-hand driven cars to its German dealers (to prevent exports to the United Kingdom) and there was nothing to show that these had given their consent to a practice clearly contrary to their interests. Even so, once again the Court considered that:

"admission to the Ford AG dealer network implied acceptance by the contracting parties of the policy pursued by Ford with regard to the models to be delivered to the German market". 7

This was based on a questionable interpretation of the dealership agreement. The only clause specifically discussed by the Court was one that "left certain matters to be decided later by the manufacturer", but this was in the context of matters which could not be foreseen because of possible technological developments. 8

BMW did little more than restate Ford. Following complaints from dealers in other Member States, BMW had sent out a circular prohibiting its German dealers from supplying leasing companies unless they could guarantee that these vehicles would not be exported, threatening to terminate the contract of those who failed to comply. A specific clause of the agreement was quoted in the circular, but the Court neither reproduced it nor felt the need to discuss whether it was an appropriate basis for the power invoked by the manufacturer.

In VW I, Volkswagen imposed supply quotas on Italian dealers, expressly to block parallel exports. The CFI's approach, however, blurred whether it was following strictly a "first path" or also a "second path" approach. 9 The ECJ's confirmation of the CFI judgment is based on the breathtaking assertion that "paragraph 236 of that judgment [made clear] that this policy was able to be imposed by virtue of the dealership contract". Paragraph [236] did no such thing. It was, on the other hand, based on the fact that Volkswagen had not denied that the agreement gave it the power to impose the policy in question. Neither the CFI nor the ECJ judgment identified a clause in the dealership agreement which gave the manufacturer the power to impose the restriction. The CFI's basic argument was that, through quotas and bonuses schemes, the manufacturer had "influenced" the conduct of the distributors. Implementation had been shown through consumer complaints (after warnings and cases of contract termination), and there was also proof of a compliance surveillance mechanism. In other words, at the CFI this was more of a "second path" than a "first path" case. It was the ECJ who reduced it to a "first path" argument.

To sum up this "formalist" path, as termed by A.G. Tizzano, until VW II, EC competition law seemed to consider that dealers party to a general agreement were deemed to accept future anti-competitive policies or "unlawful" interpretations of that agreement by the manufacturer. Little or no effort was made to identify specific clauses which foresaw the policy or power in question. Indeed, it would appear that such clauses might not have existed.

B. Second path: conduct of the parties

In the absence of a general agreement drawn up in advance, or if this agreement does not foresee or allow for the policies in question, an apparent unilateral practice may still be shown to be an agreement and/or concerted practice through the analysis of the conduct of the parties. The leading case for the "second path" is now Adalat.

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7 Ford, at [21].
8 ibid., at [20].
9 VW I, at [236]-[237].
In the interest of succinctness, and given that this part of the case law is untouched by VW II, only a brief interpretation of the present legal regime is presented.

As mentioned above, the Commission must show “concurrency of wills” (a “meeting of minds”), which may be explicit or tacit. This is the fundamental principle which allows for the distinction between Arts 81 and 82. Under EC competition law, it is legitimate for an undertaking not holding a dominant position on the relevant market to unilaterally adopt anti-competitive behaviours (which should not, generally, be profitable given the absence of market power).

So how does one establish concurrency?

Explicit concurrency would derive from “smoking guns” such as correspondence between manufacturer and distributors (e.g. in which the latter reluctantly acquiesce to the manufacturer’s policy), records of meetings of the dealer council, etc. If explicit concurrency is shown, there is no need to show implementation. Although the border is thin, what distinguishes this line of jurisprudence from the general case law concerning the existence of agreements is the fact that, in these cases, the agreement on an anti-competitive policy is imposed by an undertaking in a position of relative strength on other undertakings (usually in a vertical relation), the policy in question not being beneficial to the latter.

The new leading case in this area is GlaxoSmithKline. This is a good example to show the border between a “first path” and a “second path—explicit concurrency” case. Although the facts centred on the General Sales Conditions, according to the Court’s approach, the manufacturer had not simply imposed a policy which he claimed to be entitled to impose under that document, but rather sought and obtained the agreement of most wholesalers, who returned to the manufacturer a signed copy of the revised General Sales Conditions, as requested. The fact that trade associations which included some of those wholesalers had filed complaints with the Commission was insufficient to counter the evidence of the existence of an agreement included in the challenged Decision.

As for tacit acceptance, according to the ECJ this implies at least an explicit or implicit invitation to concurrency from the producer to the distributors. For this purpose, it is irrelevant that the distributors autonomously perceive the true reason for the scheme.

The mere continuation of contractual relations is not enough to demonstrate concurrency with a unilaterally imposed measure or policy. It would appear, therefore, that Sandoz is no longer good law, in so far as it derived concurrency from “renewed orders placed without protest”.

Sandoz had also established that there is no need to show implementation of the agreement in question (a general rule for agreements under Art. 81). That is quite simple to understand in cases of express agreement, but how does one demonstrate tacit concurrency without implementation? Here too, Sandoz may have become obsolete (except in what is relevant for “express agreement” cases).

Subsequently, much of Dunlop-Slazenger is also no longer good law, in so far as it repeated and applied Sandoz. Here, the CFI went so far as to say that the existence of concurrency was unaffected by the evidence of distributors’ non-compliance with the manufacturers’ policy.

The requirements for demonstrating tacit concurrency vary depending on whether the manufacturer is capable of implementing his policy unilaterally, or if the distributors’ co-operation is required.

If the manufacturer implements his policy unilaterally, and does not “invite” distributors to agree (a mere confession of intent may be deemed an “invitation”), there is no agreement. Adalat has therefore substantially reduced the possibility of unilaterally imposed policies within continuous business relations coming within the scope of Art. 81.

On the other hand, if the distributors’ co-operation is required, since one can not presume concurrency from mere continuation of business relations, an agreement will only be deemed to tacitly exist where its implementation is shown (i.e. where there is evidence of compliance by the distributors). This logic is closer to that of concerted practices than to that of agreements.

There are three possible up-sides to this otherwise grim scenario for the scope of Art. 81. They are, in principle, useful only for a scenario where the distributors’ co-operation is required.

10 GlaxoSmithKline, at [79] and [83]–[84].
11 ibid., at [88].
12 Adalat, at [102]. This is an effective turn in the case law, and it reflects Black’s earlier criticism: “The missing element is the idea (expressed in contract law by the principle that, for a contract to exist, there must be an offer that is accepted) that Y gives his undertaking in response to X’s”, cited above, fn.4, at p.305.
13 Adalat, at [141].
14 ‘The ECJ’s attempt to distinguish this case is more bewildering than helpful—see: Adalat, at [142].
15 Sandoz, at [3].
16 Dunlop-Slazenger, at [61].
The first is that it is not ruled out that the mere absence of protests from the distributors, in the context of continuous business relations, is enough to bring about an agreement.\textsuperscript{17} One should note that it is unclear whether Adalat excluded this argument for unilaterally imposed policies.

Secondly, the ECJ noted that:

“although the existence of an agreement does not necessarily follow from the fact that there is a system of subsequent monitoring and penalties, the establishment of such a system may nevertheless constitute an indicator of the existence of an agreement.”\textsuperscript{18}

Finally, AEG seems to still be good law in so far as it established that the Commission need not show more than a few cases of policy implementation, at which point the burden of proof shifts to the manufacturer to show that those were isolated cases.\textsuperscript{19}

\section*{III. The contribution of VW II}

\subsection*{A. Facts}

Volkswagen II centred on the imposition of minimum prices by the car manufacturer on its German dealers in what concerned a new VW Passat model. It did so by sending out circulars to its dealers expressly calling for “strict price discipline” (in agreement with the dealer council), and through letters to rogue dealers, following complaints of others, wherein it threatened to terminate the dealership agreement unless minimum prices were conformed with. Volkswagen invoked the obligation to protect “brand image” as the basis for the eventual termination of contract (the offer of substantial discounts supposedly being “extremely damaging to the brand”). The Commission also obtained replies to Volkswagen from some of these dealers, reluctantly conforming.

Complaints from other dealers and meetings with the dealer council allowed VW, to some extent, to monitor discounts practiced by the dealers. And complaints from consumers showed the successful implementation of Volkswagen’s policy.

\textsuperscript{17} A.G. Van Gerven defended this view in his Opinion in Sandrex—see M. Waeaelbroeck and A. Frignani, [1999] European Competition Law 126. See also A.G. Tizzano’s Opinion in VW II, at [53].

\textsuperscript{18} Adalat, at [83].

\textsuperscript{19} AEG, at [39] and [44]–[46].

\subsection*{B. Relevant legal issues}

In VW II, The ECJ expressly stated that even within the “first path” (powers resulting from a general agreement drawn up in advance) the Commission must show “concurrency of wills.”\textsuperscript{20} The relevant issue, however, is the level of requirement for establishing whether prior concurrence was given to a certain call or practice at the time of the signing of the general agreement.

It so happened that, in this case, the Commission only argued the “first path”, thereby effectively reducing what could have been a straightforward case to a borderline issue in the case law.

Had the Commission argued on the basis of an explicit or tacit acquiescence of the dealers, it could have counted particularly on the precedents of Dunlop-Slazenger and VW I. The result would probably have been different.

As it was, Volkswagen II boiled down to determining whether there were clauses in the general agreement which provided for or authorised the calls in question. On this point, two approaches surfaced.

The CFI believed that if a behaviour contrary to competition law is not expressly foreseen in the general agreement, then it cannot be deemed automatically concurred with by the dealers. In other words, one cannot presume prior concurrence with anti-competitive interpretations of ambiguous clauses (“unlawful contractual variations”).

The CFI’s solution would have the merit of clarity. It would also have the arguable demerit of virtually eliminating the “first path” mentioned above, since one will rarely find nowadays a general agreement which expressly foresees or allows infringements of Competition Law. This is particularly important in the context of the recent Adalat case, which substantially narrowed the “second path”.

The ECJ’s approach showed itself more sensitive to protecting the scope of anti-competitive activities covered by Art.81.

In Volkswagen II, the producer’s calls invoked namely clauses of protection of brand image as a basis for the right to impose minimum prices—a perfect example of the ambiguity of clauses and resourcefulness of the manufacturers. The CFI first made the point of principle mentioned above, but it then went on to examine the clauses invoked and determine specifically that they did not confer on the manufacturer the power to impose minimum prices.

\textsuperscript{20} VW II, at [36].
The ECJ’s reply was two-fold. First, it rebutted the CFI’s principle, finding it had made an error in law. According to the ECJ, it is possible for a clause drafted in neutral terms to still consist in the acceptance, by the distributors, of a future policy of the producer which is contrary to competition law. And how does one determine this?

The only test set out by the Court is:

“examining the clauses of the dealership agreement individually, taking account, where applicable, of all other relevant factors, such as the aims pursued by that agreement in the light of the economic and legal context in which it was signed”.

Subsequently, however, the Court recalls the limits to its power of review, and considers that the CFI’s specific assessment of the clauses falls within “its absolute discretion”. This, of course, does not guarantee that the CFI’s interpretation was correct. There would certainly be elements in the previous case law to believe otherwise, even though A.G. Tizzano interpreted it in such a way as to concur with the CFI.

On the one hand, there is an express invalidation by the ECJ of the CFI’s principle against presuming concurrence to anti-competitive interpretations of ambiguous clauses. But no serious guidance on how to conduct this analysis is given. At the same time, the ECJ seems to effectively remove itself from the judicial review process in what concerns the “first path” (unless a similar issue comes to it directly through Art.234 EC proceedings) a difficult position to be in if one hopes to change the jurisprudence of the lower court.

At the end of the day, practitioners are confronted with the CFI virtually closing off the “first path”, and with the ECJ apparently wanting business relations governed by general agreements to be submitted to a lower requirement of what constitutes an agreement, but removing itself from the scope of judicial review. So it is the CFI’s interpretation which must be looked at. To add to the uncertainty, we now must wait for the next similar case before the CFI to find out if this Court will head the ECJ’s call to change its views on the matter.

IV. Conclusion

It has been shown that there is a clear trend in the CFI’s case law to put an end to unreasonably wide interpretations of the concept of agreement under Art.81. Differently, the ECJ has shown itself more reluctant to take this step. The reason for this may be that it is more mindful of the gap which this reform will create in EC competition law—a gap in which some national legal orders can be dealt with through the “abuse of economic dependency” doctrine.

Volkswagen II dealt with one of the ways in which an apparently unilateral practice can still be deemed to be an agreement: when the manufacturer exercises powers foreseen in a prior general agreement. Unfortunately, it has given us more questions than answers.

It would appear that, from now on, the Commission will need to make a stronger effort to show specific clauses in the agreement which clearly foresee or allow for the policy in question. It should not be sufficient that the manufacturer alleged that it had this power. While for the CFI ambiguity is not enough, the ECJ seemed to believe that concurrence can be found in an ambiguous clause, but then recognised the CFI’s discretion in assessing whether the specific clauses provide or not for the power in question.

If there is no general agreement, or if no specific (explicit?) basis for the manufacturer’s policy can be identified, the Commission may still attempt to show explicit or tacit concurrence. A finding of tacit concurrence in the context of unilaterally imposed policies has been made substantially harder (or even impossible) by the Adalat case. Significant leg room remains, however, for showing tacit concurrence when the manufacturer’s policies require the co-operation of the distributors.

As the case law moves away from overstretched interpretations of Art.81 and closer to American antitrust law, the Commission will need to find new ways to deal with manufacturers’ anti-competitive policies. Unilateral practices such as those in Adalat may have been rendered outside the scope of Art.81, but careful litigation can prevent other cases, such as Volkswagen II, from slipping through the net.

21 VW II, at [43]–[44]. 22 At [45]. 23 VW II, at [50]. 24 At [56]–[59].