THE DISTINCTION BETWEEN AN “AGREEMENT” WITHIN THE MEANING OF ARTICLE 81(1) OF THE EC TREATY AND UNILATERAL CONDUCT

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A. Introduction

Article 81(1) of the EC Treaty prohibits agreements between undertakings, decisions of associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, whereas Article 82 EC prohibits any abuse of a dominant position within the common market or in a substantial part thereof by undertakings insofar as such abuse may affect trade between Member States. EC competition law thus prohibits certain kinds of agreements, but does not define the term “agreement”.2

The question of the exact delimitation of the concept of an “agreement” within the meaning of Article 81(1) EC, and the distinction between such an agreement and unilateral conduct, has arisen particularly in cases concerning restrictions of parallel imports by undertakings.3 Parallel imported goods are

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1 Concerted practice can be defined as “a form of coordination between undertakings which, without having been taken to the stage where an agreement properly so-called has been concluded, knowingly substitutes for the risks of competition practical cooperation between them”, ECJ Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 A. Ahlström Osakeyhtiö and others v Commission [1993] ECR I-1307, para 63. The explanations that follow focus on the concept of an “agreement” within the meaning of Art 81(1) EC. It is, however, not necessary to elaborate a precise distinction between agreements on the one hand and concerted practices on the other. Rather, collusive conduct (in the form of an agreement, a decision of an association of undertakings, or concerted practices) should be distinguished from non-collusive conduct. See ECJ Case C-49/92P Commission v Anic Partecipazioni Spa [1999] ECR I-4125, paras 132–33; R Whish, Competition Law (London, LexisNexis, 5th edn, 2003), 96; see also O Schaller, Les ententes à l'importation en droit de la concurrence (Fribourg, Éditions Universitaires Fribourg Suisse, 2002), para 378.


those which have been imported outside a manufacturer’s official distribution channels. Parallel imports occur with regard to products which are sold (almost) identically in different geographical markets, and whose prices differ significantly. Parallel imports may, to the benefit of consumers, increase intra-brand competition and thus lower prices. In the view of the European Commission, parallel imports are a means to prevent market segregation and thus to pursue the paramount objective of the European Union, the creation of a single market.

Competition law has regularly been used as a means to achieve the objective of market integration. Limitations of parallel trade within the Community are considered as substantial restrictions of competition within the meaning of Article 81(1) EC. It is, however, important to note that the objective of the prohibition of Article 81(1) EC is not to eliminate obstacles to the single market in the Community altogether, but merely to prohibit obstacles to intra-Community trade arising as a result of a concurrence of wills between at least two parties, and constituting an agreement (or a decision of associations of undertakings or concerted practice) within the meaning of this provision. Whereas measures adopted by Member States which prevent the free movement of goods are prohibited by Articles 28–30 EC, unilateral measures


5 Rosenfeld, supra n 4, 299; Jakobsen and Broberg, supra n 3, 138 n 72; Leimgruber, supra n 4, 138–39; see also Freytag, supra n 4, 17.


9 See Rey and Venit, supra n 6, 153, 154 n 6; Crampes et al, supra n 8, 11.


The distinction between agreements within the meaning of Article 81(1) EC and unilateral conduct of undertakings not having a dominant market position is thus of great importance. In some cases, “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 Treaty” even in the absence of an explicit agreement between two or more undertakings.
In order to elaborate the distinction between agreements within the meaning of Article 81(1) EC and unilateral conduct, I will, in the first part of this paper, set a context and briefly analyse the definition of the term "agreement" as given in the case law of the European Court of Justice (ECJ) and the Court of First Instance (CFI). In the second part, I will analyse the case law of the European courts and the decisions of the Commission regarding the distinction between unilateral conduct and "agreements" within the meaning of Article 81 EC, thereby also regarding economic and policy considerations. The analysis of the case law will comprise three sections. In the first section, I will analyse some early cases, in which the question of assessing apparently unilateral conduct in the context of continuous business relations (governed by a general agreement drawn up in advance) arose. In the second section, I will discuss cases in which there was a demand by the supplier for a particular line of conduct on the part of the distributor, thereby considering whether there is a need to establish the acquiescence of the addressees of an instruction in the conduct suggested. In the third section, the Bayer case is discussed, which concerned the "concomitant existence of an agreement which is in itself neutral and a measure restricting competition that has been imposed unilaterally", without an invitation or instruction by the supplier towards its dealers.

The conclusion suggests that the recent judgments of the European courts with regard to the distinction between "agreements" within the meaning of Article 81(1) EC and unilateral conduct (which require the Commission, in cases where an undertaking adopts apparently unilateral conduct, to establish the acquiescence of the other party to find an agreement within the meaning of Article 81(1) EC) should be welcomed as these judgments restrict the concept of an agreement within the meaning of Article 81(1) EC to cases where there is a concurrence of wills of the parties involved.

B. DEFINITION OF THE TERM "AGREEMENT" WITHIN THE MEANING OF ARTICLE 81(1) EC

As mentioned above, Article 81(1) EC does not define the term "agreement". For an agreement within the meaning of Article 81(1) EC to be found to exist, it is, according to the case law of the European courts, necessary that the undertakings in question express their joint intention to behave in the market in a

16 The present paper is focused on the distinction between "agreements" within the meaning of Art 81(1) EC and unilateral conduct. The Commission's power to grant exemptions for agreements according to Art 81(3) EC will thus not be particularly dealt with in this paper.
17 ECJ Joined Cases C-2/01P and C-3/01P, supra n 11, para 141.
certain way. It follows that the concept of an agreement within the meaning of Article 81(1) EC is characterised by the existence of a “concurrence of wills” between at least two parties. Provided that such a concurrence of wills is established, the form of the agreement is not relevant for the applicability of Article 81(1) EC. An agreement can therefore be concluded in writing, orally, or tacitly.

According to the case law of the courts, both horizontal and vertical agreements fall under the scope of Article 81(1) EC. As Cot pointed out, it is, however, remarkable that all the leading cases regarding the distinction between agreements within the meaning of Article 81(1) EC and unilateral conduct have concerned vertical agreements.

Neither the fact that the terms and conditions of an agreement were determined by one of the parties (eg by means of using general conditions), nor the fact that one of the parties was dependent upon another party, or accepted the terms of an agreement only under duress (provided, however, that it was still in a position to refuse the conclusion of the agreement), excludes the


19 CFI Case T–41/96, supra n 10, para 69; see also the CFI’s German banking cases (Case T–44/02 Dresdner Bank AG v Commission, not yet reported, paras 63–65; Case T–54/02 Vereins- und Westbank AG v Commission, not yet reported, paras 52–54; Case T–56/02 Bayerische Hypo- und Vereinsbank AG v Commission, not yet reported, paras 59–61; Case T–60/02 Deutsche Verkehrsbank AG v Commission, not yet reported, paras 54–56; Case T–61/02 Commersbank AG v Commission, not yet reported, paras 53–55). See also J Bocken, “Hof van Justitie, 6 januari 2004” [2004] Nieuw Juridisch Weekblad 737.


finding of an agreement within the meaning of Article 81(1) EC. Such a finding is furthermore not excluded by the fact that the anti-competitive conduct is not in the interest of all the parties. Whether or not the agreement constitutes a valid and binding contract under national law is also not decisive.

C. THE DISTINCTION BETWEEN AN “AGREEMENT” AND UNILATERAL CONDUCT IN THE CASE LAW OF THE EUROPEAN COURTS AND IN THE DECISIONS OF THE COMMISSION

As mentioned above, the Commission considers EC competition law as a means to achieve the paramount objective of market integration. Thus, the term “agreement” within the meaning of Article 81(1) EC has been given a wide definition. It is, however, interesting to notice in this context that also with regard to other legal orders such as US antitrust law, it has been argued in the legal doctrine that “the definition of ‘agreement’ will, itself, be coloured by one’s view of the goal or goals of the antitrust laws.”


26 ECJ Case C-277/87 Sandoz prodotti farmaceutici SpA v Commission [1990] ECR I-45; CFI Case T-41/96, supra n 10, para 68; Weiß, supra n 14, Art 81 N 52; Schröter, supra n 20, Art 81 N 51.


28 See Burns, supra n 2, 3, see also 5.

The AEG-Telefunken case concerned a selective distribution agreement notified by the German company Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG (AEG-Telefunken) to the Commission, according to which AEG-Telefunken would supply its products to all resellers which fulfilled certain objective criteria. The Commission indicated that such a system did not infringe Article 85(1) EEC Treaty (now Article 81(1) EC). However, as time passed, several resellers filed complaints with the Commission, claiming that AEG-Telefunken refused to supply its products to them. The Commission therefore opened proceedings and found that the selective distribution system actually operated by AEG-Telefunken did not correspond to the system notified to it. The Commission held that AEG-Telefunken infringed Article 85(1) of the Treaty by excluding resellers which satisfied the objective criteria stipulated in AEG-Telefunken's selective distribution system, but were not willing to accept AEG-Telefunken's price policy. Referring to its Metro I judgment, the ECJ held that refusals to approve resellers who complied with the qualitative requirements of the selective distribution system constituted an unlawful application of the system if their numbers showed that it is a conduct adopted systematically. In its judgment, the ECJ rejected the argument brought forward by AEG-Telefunken that its behaviour constituted unilateral conduct, and considered the refusal to approve resellers who satisfied the qualitative criteria of the selective distribution agreement to be part of the agreements AEG-Telefunken had concluded with its authorised resellers. The Court held that approval of a reseller was based on the (tacit or express) acceptance of AEG-Telefunken's policy, including the systematic exclusion of resellers not accepting the pricing policy.

In Ford, the Commission held that the discontinuation of the supply of right-hand-drive cars to German resellers by Ford-Werke AG (Ford) in order to prevent them from exporting the cars into the UK altered Ford's agreement with its German resellers. This agreement was considered to restrict competition and to affect trade between the Member States in the sense of Article 85(1) EEC (now Article 81(1) EC), which could not be exempted pursuant to Article 85(3) EEC (now Article 81(3) EC).
In the proceedings before the ECJ, Ford and Ford of Europe Inc claimed that the decision to withdraw right-hand-drive vehicles from distribution in Germany was a unilateral decision which would as such not fall under the prohibition contained in Article 85(1) EEC (now Article 81(1) EC). The ECJ did not follow this argument and ruled that the decision of the supplier to refuse deliveries of right-hand-drive vehicles formed part of the contractual relationship between the supplier and the resellers, and that admission to the supplier’s network implied acceptance by the reseller of the policies to be pursued by the supplier with regard to the products to be delivered. Thus, the ECJ held that the Commission was right to take into consideration such a refusal to sell when deciding upon the possibility of granting an exemption pursuant to Article 85(3) EEC (now Article 81(3) EC).

Contrary to AEG-Telefunken, where the authorised resellers were benefiting from the supplier’s initiative to maintain a high profit margin, Ford’s decision was disadvantageous to its German resellers. Thus, several German resellers excluded from selling right-hand-drive cars were not willing to accept Ford’s decision and objected to this decision. There were thus critical remarks in the legal doctrine with regard to the ECJ’s judgment. It was argued that in situations such as in Ford, the mere fact that dealers continued their business relationship should not be considered as their acquiescence to the supplier’s measures, especially if the dealers had no alternatives, as under those circumstances they could not be expected to terminate the relationship. Moreover, some legal scholars criticised the ECJ’s finding that admission to the distribution network implied acceptance of the supplier’s future policies. In my view, there are good arguments in support of these criticisms, particularly if one takes into consideration the CFI’s recent judgment in Volkswagen II (which will be discussed below and which has still to be upheld by the ECJ). In Volkswagen II, the CFI held that a concurrence of wills “must cover particular conduct, which must, therefore, be known to the parties when they accept it”. The CFI thus held that contractual variations could only be considered as having been accepted in advance where such variations were lawful, where they were foreseen by the original contract or where the dealer could not—due to commercial usage or legislation—refuse.

35 See ECJ Joined Cases 25/84 and 26/84, supra n 12, para 15.
36 Ibid, para 21.
38 ECJ Case 107/82, supra n 12, para 45.
41 Wertenbruch, supra n 14, 149.
42 Lübbig, supra n 20, 568; Brown, supra n 40, 388.
43 CFI Case T-208/01, supra n 12, para 56.
44 CFI Case T-208/01, supra n 12, para 45.
2. Cases in which There Was a Demand by the Supplier for a Particular Line of Conduct on the Part of the Distributor

(a) The Principle Established in the Sandoz Case

In *Sandoz*, the Commission held that, although no written general contract existed between Sandoz prodotti farmaceutici SpA (Sandoz) and its customers, “the continuous commercial relationship set up and concretised by the whole of the . . . commercial procedures normally provided for by Sandoz . . . in its relations with its customers and at least implicitly accepted by them” constituted an agreement within the meaning of Article 85 EEC (now Article 81 EC).\(^4\) Thus the invoices sent to Sandoz’s dealers, and the export restriction (“Export prohibited”) included therein, could not be considered as the expression of unilateral conduct, but formed part of such an agreement within the meaning of Article 85(1) EEC, which was confirmed by the fact that other commercial clauses of relevance to the customers were also printed on the invoices.\(^5\) The fact that Sandoz used these invoices constantly and systematically led the Commission to the conclusion that Sandoz’s customers tacitly acquiesced in the export restriction by placing new orders.\(^6\) In its judgment, the ECJ held that:

“The systematic dispatching by a supplier to his customers of invoices bearing the words ‘Export prohibited’ constitutes an agreement prohibited by Article 85(1) of the Treaty, and not unilateral conduct, when it forms part of a set of continuous business relations governed by a general agreement drawn up in advance, based on the consent of the supplier to the establishment of business relations with each customer prior to any delivery and the tacit acceptance by the customers of the conduct adopted by the supplier in their regard, which is attested by renewed orders placed without protest on the same conditions.”\(^7\)

However, the judgment has been criticised in the legal doctrine, since it seems doubtful whether the mere continuation of a business relationship and the payment of invoices could be considered as a tacit acceptance of export restrictions included in those invoices.\(^8\) It is argued by some legal scholars that a

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5. Ibid, paras 26–27.
7. ECJ Case C-277/87, supra n 26, para 1.
8. Wertensbruch, supra n 14, 149–50; Jakobsen and Broberg, supra n 3, 131; Lübbig, supra n 20, 567–68. See also JE Thompson, Case Comment (Case 277/87 and Case 279/87) (1990) 27 Common Market Law Review 590, 602–7; and J Shaw, “The Concept of an Agreement in Art 85 EEC” (1991) European Law Review 262, who argued that the *Sandoz* case shows “the extent to which, in order to ensure the comprehensive coverage of anticompetitive conduct under Articles 85 and 86 which is necessary in order to protect the competitive structure of the common market, the consensual element in an Article 85 ‘agreement’ will be glossed over”. See also J Borer, “Spruchpraxis zum EG-Wettbewerbsrecht (1990)” (1992) Schweizerische Zeitschrift für internationales und europäisches Recht 81–82.
concerne of wills and thus an agreement within the meaning of Article 81(1) EC is not established if the resellers, irrespective of the export restriction set out by the supplier, export the goods in question.\textsuperscript{50} In my view, these scholars are correct in pointing out that for a finding of an agreement within the meaning of Article 81(1) EC, one should take into consideration all circumstances of the case at hand. In the absence of an explicit acceptance by the dealer of the export restrictions suggested by the supplier, the non-observance of the restrictions may be considered as an indication for the absence of an agreement with regard to such restrictions.

In its \textit{Tipp-Ex} decision, the Commission held that the conduct of an undertaking could not be considered as unilateral conduct, "where it forms part of the contractual relations between the undertaking and its dealers".\textsuperscript{51} According to the Commission, the authorised dealers of Tipp-Ex Vertrieb GmbH & Co KG accepted the latter's policies concerning the mutual protection of territories (communicated to them via telex), which thus became an integral part of the agreement between the dealers and Tipp-Ex Vertrieb GmbH & Co KG. The Commission's decision was upheld by the ECJ,\textsuperscript{52} which was, according to Thompson, no surprise, bearing in mind the ECJ's previous case law.\textsuperscript{53}

In its decisions in \textit{Vichy}\textsuperscript{54} (confirmed by the CFI\textsuperscript{55}), \textit{Gosme/Martell-DMP}\textsuperscript{56} and \textit{Bayer Dental},\textsuperscript{57} the Commission referred to the approach of the ECJ in the \textit{Sandoz} case, and held that the repeated use of general conditions of sale printed on the back of invoices, on order forms and price lists may lead to the conclusion that the distributors have accepted the clauses contained therein, and that therefore the existence of an agreement within the meaning of Article 85(1) EEC (now Article 81(1) EC) was established.

\textit{(b) Need to Establish the Acquiescence of Addressees of Instructions in the Context of Ongoing Business Relations?}

In cases where a supplier had sent instructions to its resellers, the question arose whether, for the finding of an agreement within the meaning of Article 81(1) EC, the Commission had to establish the acquiescence of the reseller in the conduct suggested by the supplier.

\textsuperscript{50} Wertenbruch, \textit{supra} n 14, 149; Lübbig, \textit{supra} n 20, 567–68; Jakobsen and Broberg, \textit{supra} n 3, 131.
\textsuperscript{51} \textit{Tipp-Ex} [1987] OJ L222/1, para 49.
\textsuperscript{52} Case C-279/87 \textit{Tipp-Ex v Commission} [1990] ECR I–261.
\textsuperscript{53} Thompson, \textit{supra} n 49, 601.
\textsuperscript{57} \textit{Bayer Dental} [1990] OJ L351/46, para 9.
In the BMW Belgium case, which had been decided by the ECJ before the Sandoz case, BMW Belgium SA had reminded its resellers at the request of its parent company Bayerische Motorenwerke AG in circular letters that the distribution agreement did not permit sales to non-authorised resellers. However, the wording used in the circular letter seemed to express the intention of stopping all supplies to foreign purchasers, irrespective of whether the purchaser was a non-authorised reseller, consumer or consumer’s agent. A significant number of Belgian resellers countersigned the circular letter as requested by BMW Belgium SA. The ECJ held that the dealers had subscribed to an agreement within the meaning of Article 85(1) EEC which, according to the CFI in its later Bayer judgment (which will be discussed below), “shows that the Court of Justice intended to confirm the existence of acquiescence by the dealers”.59

The question whether the addressees of an instruction acquiesced in this instruction also arose in other cases. In Konica, as well as in Bayo-n-ox, the Commission found an acceptance of the addressees and thus an agreement within the meaning of Article 81(1) EC. In Konica, the supplier, Konica UK Ltd (Konica), had asked its wholesalers in a circular letter not to engage in ‘grey exporting’, ie in exporting Konica products (films) to other countries, especially to Germany, where the prices were significantly higher. In case of failure to cooperate, Konica had threatened to stop supplies to the respective wholesalers or to raise prices. Several wholesalers carried on their normal business relationship without explicitly reacting to the circular letter, but abstained from exporting Konica films to other EEC countries after receiving Konica’s request. According to the Commission, Konica’s conduct did not constitute a unilateral measure but was an offer of an agreement, which was (implicitly) accepted by several dealers. Moreover, the Commission held that the promise of Konica Europe GmbH (which marketed Konica products in Germany) not to supply supermarkets, and its policy of buying-up parallel imported products, formed part of its supply contracts with its dealers, and thus constituted an agreement within the meaning of Article 85(1) EC.

In Bayo-n-ox, the pharmaceutical company Bayer AG (Bayer) had offered its customers two kinds of prices for its product Bayo-n-ox: on the one hand, customers could buy products for a (reduced) special price (varying from customer to customer), on the condition that the products bought were not resold. On the other hand, the customers could buy the products at the normal price without such restrictions. Bayer sent a circular to its customers

58 ECJ Joined Cases 32/78, 36/78 to 82/78, supra n 24.
59 CFI Case T–41/96, supra n 10, para 169.
confirming the special prices for orders meeting the customers' own requirements, and asked them to countersign the circular. Some undertakings expressly confirmed their agreement with Bayer's proposal, while others returned an amended confirmation (without rejecting the principle of exclusion of resale); only one undertaking expressly rejected Bayer's proposal. Quite a number of undertakings, however, did not give their views in writing. In its circular, Bayer argued that it was confirming existing agreements. However, the Commission held that the question of whether prior agreements containing such terms actually existed could be left open, since the choice of the (lower) special price by the customer had to be considered as the tacit acquiescence by the customer of Bayer's restrictions, unless the customer expressly rejected these.

In Eco System/Peugeot, the Commission went even further and held that:

"the mere transmission by Peugeot of the circular to its dealers contains all the features of an 'agreement' within the meaning of Article 85, without it being necessary to establish that the circular was explicitly or tacitly accepted by those to whom it was sent".

The background of this case was as follows: between 1987 and 1989, net resale prices for Peugeot cars in France were substantially higher than in Belgium and Luxembourg. Eco System SA (Eco) specialised in acting as an intermediary for import purchases of cars by consumers in France. Automobiles Peugeot SA (Peugeot) thus sent an instruction to its approved resellers in Belgium, Luxembourg and France to suspend supplies to Eco, and to any other organisation acting under similar conditions. The Commission considered this instruction not as constituting a unilateral measure, but as forming an integral part of the commercial relations between Peugeot and its resellers. These relations were governed by a general agreement, signed by all parties. According to the Commission, the instructions contained in the circular spelled out the obligations, which the contract imposed, in Peugeot's view, on the admitted resellers. Thus, the Commission concluded that it was not obliged to establish an explicit or tacit acceptance of the addressees of the circular. The generality of this conclusion is remarkable, even more so since in Eco System/Peugeot, as well as in other cases, the Commission noted that the addressees of the circular demonstrated their consent by following the instructions. It is submitted here that the Commission's conclusion is incorrect. The Commission
has to demonstrate to the requisite legal standard the existence of circumstances constituting an agreement within the meaning of Article 81(1) EC.\textsuperscript{70} In *Eco System/Peugeot*, the Commission's decision was upheld by the courts.\textsuperscript{71} In other cases, however, the courts adopted an approach different from the one followed by the Commission in *Eco System/Peugeot*.

In its judgment in *Newitt/Dunlop Slazenger International*,\textsuperscript{72} the CFI held, relying on the ECJ's *Sandoz* judgment,\textsuperscript{73} that "For an agreement between a supplier and a reseller to fall within the prohibition in Article 85(1) of the Treaty, it is sufficient that the reseller accepts, at least tacitly, the anti-competitive prohibition which the supplier imposes on him".\textsuperscript{74} Contrary to the Commission, which held in its *Eco System/Peugeot* decision (discussed above) that the mere transmission of a circular (spelling out the obligations imposed on the distributors) contained all the features of an agreement, without the need to establish that the addressee explicitly or tacitly acquiesced in its terms, the CFI thus seemed to require that the dealer's acquiescence in the anti-competitive prohibition imposed upon it by the supplier was established. It is noteworthy that in its recent *SEP et autres/Automobiles Peugeot SA* decision,\textsuperscript{75} the Commission examined whether the dealers in the Netherlands acquiesced in the conduct suggested by the supplier. Between 1997 and 2003, Automobiles Peugeot SA implemented, through its subsidiary Peugeot Nederland NV, a strategy designed to prevent exports by its dealers in the Netherlands. The measures adopted in order to implement the strategy consisted in a performance bonus, which was made dependent upon the final destination of the vehicle, and in direct pressure exercised on exporting dealers. The Commission found that the dealers implicitly acquiesced in the conduct suggested by Automobiles Peugeot SA and Peugeot Nederland NV, and imposed a fine of €49.5 million on Automobiles Peugeot SA and Peugeot Nederland NV.

(c) The *Volkswagen* Cases: a Clarification?

1. *Volkswagen I*

Between 1993 and 1995, there were significant price differentials for motor vehicles between Italy and Germany, which provided an incentive for parallel exports from Italy to Germany. In the *Volkswagen I* case, Autogerma SpA, Volkswagen AG's wholly owned subsidiary acting as importer in Italy of

\textsuperscript{72} CFI Case T–43/92, supra n 12.
\textsuperscript{73} ECJ Case C–277/87, supra n 26.
\textsuperscript{74} CFI Case T–43/92, supra n 12, para 60.
Volkswagen and Audi vehicles, sent its authorised dealers instructions, cautions and warnings in order to influence their sales activities, and repeatedly urged them, orally and by means of circular letters, not to engage in grey exports. A new bonus scheme was introduced, which exerted (financial) pressure on the dealers not to sell vehicles to customers residing outside their contract territories. In addition, Volkswagen AG (Volkswagen) and Audi AG (of which Volkswagen owned 98.99% of the shares) decided to restrict supplies to the Italian market in order to restrict re-exports from Italy. Referring to the ECJ’s judgments in Ford and in BMW v ALD, the Commission considered Volkswagen’s conduct and that of its subsidiary as forming part of the contractual relationship which the manufacturers maintained through Autogerma SpA with their dealers. In BMW v ALD, Bayerische Motorenwerke AG (BMW) had sent a circular to its authorised dealers instructing them not to supply cars to leasing companies that made the vehicles available to customers residing outside the respective dealer’s contract territory. In a preliminary ruling requested by the German Bundesgerichtshof, the ECJ held that BMW’s call to its authorised resellers formed part of a set of continuous business relations governed by a general agreement drawn up in advance, in particular since the circular expressly referred to the dealership agreement, and had thus to be regarded as an agreement within the meaning of Article 85(1) EEC.

In its judgment in Volkswagen I, the CFI rejected the arguments brought forward by Volkswagen against the Commission’s conclusion that the barriers to re-exportation constituted an agreement within the meaning of Article 81(1) EC, and held that:

“a call by a motor vehicle manufacturer to its authorised dealers is not a unilateral act which falls outside the scope of Article 85(1) of the Treaty but is an agreement within the meaning of that provision if it forms part of a set of continuous business relations governed by a general agreement drawn up in advance”.

The ECJ confirmed the judgment of the CFI, holding that the appellant did not deny that the dealership contract provided for the possibility of limiting supplies to Italian dealers, and that such limitation was imposed on the dealers in order to prevent re-exportation of vehicles delivered to the Italian dealers. Thus, the ECJ

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77 Ibid, para 103.
78 Ibid, para 80.
79 Ibid, paras 82–92.
80 ECJ Joined Cases 25/84 and 26/84, *supra* n 12.
81 ECJ Case C-70/93, *supra* n 21.
83 ECJ Case C-70/93, *supra* n 21, paras 16–18.
ruled that "by accepting the dealership contract, the Italian dealers consented to a measure which was subsequently used for the purpose of blocking re-exports from Italy and thus of restricting competition within the Community". It is submitted that the courts required in this case only limited evidence for the inference of acquiescence by the dealers in the conduct suggested by the supplier. It was thus of interest to see how the courts would decide in the second Volkswagen case, in which the CFI gave its judgment on 3 December 2003, ie shortly after the ECJ's judgment in Volkswagen I (18 September 2003).

2. Volkswagen II

In Volkswagen II, the question arose whether the signing of a dealership agreement could be regarded as a tacit acceptance of future (unlawful) variations of the agreement. In this case, Volkswagen had sent circulars to its dealers containing the instruction not to sell a new model for less than the recommended retail price, and to observe "strict price discipline". Volkswagen also sent warnings to dealers who did not follow this policy. Comparable to its approach in Eco System/Peugeot, but without referring to this decision, the Commission held that both the circulars and the warnings had to be seen in the context of the contractual relations between Volkswagen and its dealers, and that the circulars as well as the warnings put the contractual relations between Volkswagen and its dealers with regard to the latter's pricing behaviour into concrete terms (the authentic German text uses the word konkretisieren, which can be translated as "to put something into concrete terms", whereas in the English translation the formulation "give practical effect to" is used).

Referring to the judgments of the ECJ in AEG-Telefunken and Ford, according to which admission of a dealer to a distribution network implied acceptance of the distribution policy of the manufacturer by the dealer, the Commission held that both the circulars and the warnings formed part of the agreements between Volkswagen and its authorised dealers. The Commission thus found agreements within the meaning of Article 81(1) EC which restricted competition within the common market.

In line with its approach in Eco System/Peugeot, the Commission argued in the proceedings before the CFI that, in the light of the judgments in AEG-Telefunken, Ford, BMW v ALD, and Volkswagen (I), it was:

"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".\textsuperscript{90}

The Commission also rejected Volkswagen’s view that the distribution agreement must include a reservation clause for a call by a manufacturer to become part of the distribution agreement. According to the Commission, by their joining the distribution network, the dealers agreed to the manufacturer’s distribution policy without there being a need for such a policy to be foreseeable in detail.\textsuperscript{91}

Referring to the ECJ judgments in BMW Belgium, AEG-Telefunken, Ford and Sandoz and the CFI’s Bayer judgment\textsuperscript{92} (which will be discussed below), the CFI rejected the Commission’s views and ruled that:

"It is also clear from the 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."\textsuperscript{93}

In particular, the CFI rejected the Commission’s argument that the dealers agreed in advance, by signing the underlying distributorship agreement complying with competition law, to follow subsequent unlawful variations of the agreement imposed on them by the manufacturer.\textsuperscript{94}

According to the CFI, the Commission misinterpreted the ECJ’s case law. The AEG-Telefunken case concerned the dealers’ acquiescence in anti-competitive conduct by the manufacturer, and not their acquiescence given in advance to a yet unknown policy to be adopted by the manufacturer.\textsuperscript{95} With regard to the ECJ’s decision in Ford, the CFI pointed out that in this case the question whether a circular sent by the manufacturer to its dealers could be linked to Ford’s Main Dealer Agreement arose in the context of an examination of the agreement under Article 81(1) EC, and with regard to a possible exemption under Article 81(3) EC. It was thus—according to the CFI in Volkswagen II—in this specific context that the ECJ held that the circular was linked to the Main Dealer Agreement and thus that the Commission was right in taking the circular into consideration while deciding upon the granting of an exemption under Article 81(3) EC.\textsuperscript{96} With regard to the BMW v ALD case\textsuperscript{97}

\textsuperscript{90} CFI Case T–208/01, supra n 12, para 25.
\textsuperscript{91} Ibid, para 26.
\textsuperscript{92} CFI Case T–41/96, supra n 10, para 72.
\textsuperscript{93} CFI Case T–208/01, supra n 12, para 36.
\textsuperscript{94} Ibid, paras 43–44.
\textsuperscript{95} Ibid, paras 48–50.
\textsuperscript{96} Ibid, para 51.
\textsuperscript{97} ECJ Case C–70/93, supra n 21.
relied on by the Commission, the CFI held in its Volkswagen II judgment that the question to be answered by the ECJ was not so much whether an agreement had been reached, but whether a request, on the assumption that it was accepted by the resellers (thus establishing the existence of an agreement within the meaning of Article 81(1) EC), fell under the applicable exemption regulation.98

In its judgment, the CFI also rejected the Commission’s argument that, for a request to be considered as forming part of an agreement, it was merely decisive whether the request was “intended to influence” the dealer in the performance of the agreement.99 The same argument was brought forward by the Commission in the DaimlerChrysler case.100 In this case, the Commission also argued with regard to alleged export restrictions in Germany that a call by a manufacturer to its dealers constituted an agreement if it is intended to influence the dealers in the performance of the contract with the manufacturer.101 The Commission thus held that admission to the selective distribution network implied acceptance by dealers of the suppliers’ distribution policy and of later changes thereof, which are usually communicated to the dealers by means of circulars or instructions, and which the dealers explicitly or tacitly accept.102 The CFI, however, ruled that the German representatives could not be considered as (independent) undertakings within the meaning of Article 81(1) EC.103 The CFI thus partially annulled the Commission’s decision.

Based on the CFI’s judgment in Volkswagen II, one can, however, conclude that in cases where an undertaking instructs another undertaking in the context of ongoing business relations to adopt a particular conduct, it is necessary for the finding of an agreement within the meaning of Article 81(1) EC to positively establish the acquiescence of the other undertaking in such conduct, and thus to establish the existence of a “concurrence of wills”.104 A concurrence of wills necessarily requires that the conduct to be adopted is known to the parties at the time of their acceptance.105 The approach adopted by the CFI should, in my view, be welcomed.106 The concept of an agreement

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98 CFI Case T-208/01, supra n 12, para 52.
99 Ibid, paras 57–58.
101 Ibid, para 136.
102 DaimlerChrysler [2002] OJ L257/1, para 125. See also JCB [2002] OJ L69/1, para 139 (the CFI partially annulled the Commission’s decision (Case T–67/01 JCB Service v Commission [2004] ECR II–49); the Case is presently pending at the ECJ (Case C–167/04P)).
103 Case T-325/01 DaimlerChrysler v Commission, not yet reported, para 102.
104 See also Klees, supra n 27, 292; Schulz, supra n 14, 20.
105 CFI Case T-208/01, supra n 12, para 56.
within the meaning of Article 81(1) EC would be strained if the acceptance of a distribution agreement by a dealer was regarded as covering future unlawful variations imposed on the dealer by the supplier, which were not known to the dealer at the time of the acceptance of the distribution agreement. However, there has been an appeal against the judgment of the CFI. It thus remains to be seen whether it will be upheld by the ECJ.107

3. The Bayer Case

(a) The Principle Established in Bayer

The pharmaceutical company Bayer produces the pharmaceutical product “Adalat” (in France called “Adalate”). Adalat is used in the treatment of cardiovascular diseases and is distributed in various European countries. In 1989 and 1991, Bayer’s subsidiaries Bayer Spain and Bayer France realised that some of their wholesalers were exporting large quantities of Adalat into the UK, where the product was sold by Bayer UK (the British subsidiary of Bayer) at prices approximately 40% above those in France and Spain. The price difference was mainly the consequence of state-controlled prices in France and Spain. In order to avoid these exports, which resulted in a significant reduction in Bayer UK’s turnover, Bayer decided to limit the supplies to the French and Spanish wholesalers to the quantities they needed to meet their domestic requirements. Orders above those quantities were no longer fulfilled by Bayer Spain and Bayer France. As the wholesalers, due to governmental regulations in France and Spain, were obliged to keep a stock of pharmaceutical specialties in order to enable them to supply their domestic markets,108 the supply restrictions imposed by Bayer Spain and Bayer France on their wholesalers hindered the latter from exporting the quantities of Adalat supplied to them into the UK.

According to the Commission, Bayer Spain and Bayer France imposed an export ban on their wholesalers.109 The wholesalers were aware of Bayer’s real intentions, although these had not been communicated to them. In the Commission’s view, the commercial relations between Bayer France and its wholesalers on the one hand and Bayer Spain and its wholesalers on the other were governed by a pre-established general agreement, which could be deduced from the fact that both suppliers and resellers were familiar with applicable standard commercial procedures, and from the fact that the invoices sent to the wholesalers contained standard clauses governing the supplies of goods.110 The export ban had, according to the Commission, been introduced

107 Pending Case C–74/04. See, however, the opinion of AG Tizzano, Case C–74/04 P Commission v Volkswagen AG, not yet reported, in which AG Tizzano proposed that the ECJ should dismiss the appeal.
109 Ibid, para 156.
110 Ibid, para 172.
into these continuous business relations, which followed from the fact that the orders for Adalat were regularly renewed and were thus continuous and ongoing, and from the fact that the export restrictions imposed by Bayer France and by Bayer Spain on their wholesalers were applied systematically and consistently. The Commission was, moreover, of the opinion that the wholesalers (which tried to circumvent the supply restrictions by spreading orders amongst different agencies and non-supervised wholesalers\textsuperscript{111}) adapted to Bayer’s system and thus implicitly acquiesced to the export ban imposed on them.\textsuperscript{112}

The Commission thus found an agreement within the meaning of Article 85(1) EC (now Article 81(1) EC).\textsuperscript{113} In the legal doctrine, the Commission’s decision was criticised.\textsuperscript{114} It is submitted here that in its Bayer decision, the Commission did indeed strain the concept of an agreement within the meaning of Article 81(1) EC. In this regard, it is also interesting to note that the German Monopolies Commission (Monopolkommission) regarded the approach adopted by the European Commission in Bayer as unconvincing.\textsuperscript{115} The Commission’s Bayer decision and its wide understanding of the resellers’ acquiescence in the conduct of a supplier must, however, be seen in the light of the Commission’s previous decisions, in which the Commission continuously extended the concept of an agreement within the meaning of Article 81(1) EC.

In Bayer, however, the CFI annulled the Commission’s decision. The CFI held that unilateral conduct by an undertaking, adopted in the context of its contractual relations with its commercial partners, could form the basis of an agreement between undertakings within the meaning of Article 81(1) EC, but that for such a finding, the Commission had to establish the acquiescence of those partners, express or implied, with the attitude adopted by the undertaking.\textsuperscript{116} The CFI drew a distinction between “genuinely” unilateral measures (which do not fall under Article 81(1) EC) and measures in which the unilateral character is merely apparent, and which therefore have to be considered as agreements within the meaning of Article 81(1) EC.\textsuperscript{117} However, the CFI concluded that the Commission had neither established that the Bayer subsidiaries imposed an export ban on their respective wholesalers, nor that Bayer introduced a systematic monitoring of the final destination of the products supplied, nor that threats or sanctions were used against wholesalers

\textsuperscript{111} Ibid, para 182.
\textsuperscript{112} Ibid, paras 173–76.
\textsuperscript{113} The Commission thereby relied on its decision in Johnson & Johnson [1980] OJ L377/16.
\textsuperscript{114} See, eg Lidgard, supra n 3, 359–60.
\textsuperscript{116} CFI Case T–41/96, supra n 10, para 72.
\textsuperscript{117} Ibid, para 71.
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not complying with the alleged export ban, nor that the supply of Adalat was made conditional upon compliance with the alleged export ban.\textsuperscript{118} According to the CFI, the concept of an "agreement" within the meaning of Article 81(1) EC is characterised by a "concurrence of wills" of the parties involved.\textsuperscript{119} However, the CFI held that the behaviour of the wholesalers confronted with the supply reduction of Bayer France and Bayer Spain could not be considered as acquiescence to Bayer’s conduct. In particular, the CFI pointed out that the wholesalers tried to obtain additional supplies by various means in circumvention of Bayer’s policy.\textsuperscript{120} This conduct could not be construed as an acceptance of the restrictions imposed on them by Bayer.\textsuperscript{121}

Moreover, the CFI noted with regard to the ECJ’s judgment in Merck and Beecham\textsuperscript{122} relied on by the Commission that in order to achieve an objective such as the harmonisation of prices in the pharmaceutical market, the Commission could not extend the competition rules set out in the EC Treaty, especially since the Treaty provided other means for the Commission to bring about such a harmonisation.\textsuperscript{123} This finding by the CFI is remarkable.\textsuperscript{124} For the first time, the Commission’s approach of enlarging the concept of an agreement within the meaning of Article 81(1) EC in order to pursue the paramount objective of market integration was called into question.\textsuperscript{125}

The ECJ (Full Court) dismissed the appeals of the Bundesverband der Arzneimittel-Importeure e.V. (BAI) and the Commission. Both BAI and the Commission argued that the CFI misinterpreted Article 85(1) EC in that it wrongly held that an agreement within the meaning of that provision concerning an export ban could only be found to exist if the manufacturer requests its wholesalers to adopt a particular conduct.\textsuperscript{126} The ECJ held that:

"For an agreement within the meaning of Article 85(1) of the Treaty to be capable of being regarded as having been concluded by tacit acceptance, it is necessary that the manifestation of the wish of one of the contracting parties to achieve an anti-competitive goal constitute an invitation to the other party, whether express or implied, to fulfil that goal jointly, and that applies all the more where, as in this case, such an agreement is not at first sight in the interests of the other party, namely the wholesalers".\textsuperscript{127}

\textsuperscript{118} Ibid, paras 109, 119.
\textsuperscript{119} Ibid, para 173.
\textsuperscript{120} Ibid, paras 126–29. See also the considerations in the Commission’s decision Bayer [1996] OJ L201/1, paras 93, 96–104 (regarding France) and paras 122–30 (regarding Spain).
\textsuperscript{121} See CFI Case T–41/96, supra n 10, paras 154–57.
\textsuperscript{123} CFI Case T–41/96, supra n 10, para 179.
\textsuperscript{124} See also Lemaire and Meulenbelt, supra n 11, 501, 505.
\textsuperscript{125} Rey and Venit, supra n 6, 174.
\textsuperscript{126} ECJ Joined Cases C–2/01P and C–3/01P, supra n 11, paras 90–93.
\textsuperscript{127} Ibid, para 102.
Consequently, the ECJ found that the CFI was right in examining whether Bayer's subsidiaries requested a particular conduct to be adopted by their wholesalers. In addition, the ECJ held that the existence of a system of monitoring the destination of goods delivered and penalties, although in itself not necessarily implying the existence of an agreement within the meaning of Article 85(1) EC (now Article 81(1) EC), nevertheless constituted an indicator for the existence of such an agreement. In its judgment, the ECJ made clear that "an agreement cannot be based on what is only the expression of a unilateral policy of one of the contracting parties, which can be put into effect without the assistance of the others". It follows that the fact that the producer is in a position to follow its policy independently of the behaviour of its resellers indicates unilateral conduct not covered by Article 81(1) EC. The fact that the producer is in such a position does not rule out, however, that the producer is required to seek the collaboration of its wholesalers for the distribution of its goods. In the pharmaceutical market, the producer, in order to fulfil its legal obligations to ensure appropriate and sufficient supplies of medicinal products placed on the market in a Member State, and to maintain sufficient stocks in that Member State, may need the collaboration of its wholesalers. Moreover, there may be other legal reasons, such as monopolies granted to wholesalers, which require the producer of pharmaceutical products to seek the collaboration of the wholesalers.

However, the ECJ noted that:

"in the contested decision, the Commission confined itself strictly to the examination of one complaint, alleging the existence of an 'agreement' within the meaning of Article 85(1) of the Treaty between Bayer and its wholesalers, and that it did so in the context of a market defined by reference to the main therapeutic indications for the product in question, namely Adalat. It should be made clear, therefore, that neither the possible application of other aspects of Article 85, nor Article 86 of the EC Treaty (now Article 82 EC), nor any other possible definitions of the relevant market are at issue in these proceedings."
WA Rehmann doubted whether the Bayer case could be distinguished from the Sandoz case.\textsuperscript{134} According to the CFI, the Bayer case differed significantly from the Sandoz case, although both cases concerned restrictions on parallel imports of pharmaceutical products. First, in Bayer, there was no explicit instruction of the supplier such as in Sandoz. Secondly, in Sandoz the wholesalers adhered to the restrictions imposed upon them by the supplier without discussions, whereas in Bayer the wholesalers tried to circumvent the restrictions by various means.\textsuperscript{135} In his opinion, AG Tizzano agreed that the factual circumstances in Bayer differed significantly from those in Sandoz: in Sandoz, the manufacturer had clearly expressed its intention regarding the wholesalers' conduct, and had requested them not to export the goods delivered, whereas in Bayer, Bayer's subsidiaries had not requested their wholesalers to adopt a particular conduct, but had adopted an approach which enabled them to achieve their aim to restrict parallel imports without the co-operation of the wholesalers.\textsuperscript{136} Bayer had, as Cot noted, the intention to restrict parallel trade, but this intention had not been communicated to its wholesalers.\textsuperscript{137} AG Tizzano considered Sandoz's request to be the crucial element in distinguishing the Sandoz case from the Bayer case. According to him:

"it was only the request (or requirement) by Sandoz not to export that enabled the Court to find a form of ‘tacit acceptance’ in the fact that the wholesalers continued to order supplies from the manufacturer as usual and without demur, because an offer or a requirement—however expressed, even implicitly—is to my mind always necessary for the finding of an agreement to be regarded as having been made by way of tacit acceptance".\textsuperscript{138}

However, as the Sandoz judgment already interpreted the concept of an agreement within the meaning of Article 81(1) EC very broadly in the view of AG Tizzano, he was of the opinion that one should not go any further.\textsuperscript{139} With regard to the criticisms brought forward in the legal doctrine of the ECJ's Sandoz judgment referred to above, and, moreover, with regard to the wide interpretation given to the concept of an agreement within the meaning of Article 81(1) EC in the Commission's decisions referred to above, it is submitted here that the conclusion of AG Tizzano is correct. The Sandoz and Bayer cases differ significantly. The existence of an invitation by the supplier and tacit acquiescence by the resellers in the restrictions imposed on them in Sandoz on the one hand and attempts to circumvent the restrictions imposed upon the


\textsuperscript{135} CFI Case T-41/96, supra n 10, para 163.

\textsuperscript{136} AG Tizzano, Joined Cases 2/01P and 3/01P, supra n 130, paras 57–59.

\textsuperscript{137} See Cot, supra n 22, 605.

\textsuperscript{138} AG Tizzano, Joined Cases 2/01P and 3/01P, supra n 130, para 60.

\textsuperscript{139} Ibid, para 61.
wholesalers and the absence of an invitation by the supplier to adopt a particular conduct in Bayer on the other are sufficient to distinguish these two cases.

Contrary to Rehmann (who had acted as a representative of BAI, i.e. one of the unsuccessful appellants in Bayer), I am of the opinion that the ECJ had good reasons for distinguishing the Bayer case from the Sandoz case.\textsuperscript{140}

With regard to the judgment of the ECJ in Tipp-Ex, the CFI held that this judgment merely confirmed the case law according to which apparently unilateral conduct of a supplier may form the basis of an agreement within the meaning of Article 85(1) EEC (now Article 81 EC), provided that the subsequent conduct of the wholesalers has to be considered as (express or implied) acquiescence. As the Commission in Bayer did not establish such acquiescence, the CFI held that the Commission could not rely on the Tipp-Ex case.\textsuperscript{141} Moreover, the CFI held that the Commission could, for the same reasons, not rely on the judgments in AEG-Telefunken, Ford and BMW Belgium.\textsuperscript{142}

In his opinion, AG Tizzano argued that the ECJ's judgments in AEG-Telefunken, Ford and BMW v ALD did not support the view that an agreement within the meaning of Article 81(1) EC must be found to exist on the basis of the mere fact that sales restrictions imposed by a manufacturer on its distributors were adopted in the context of continuous business relations.\textsuperscript{143} According to him, in these judgments the ECJ did not decide on the question of whether the measures taken by the suppliers in themselves had to be considered as agreements within the meaning of Article 81(1) EC, solely due to the fact that they were taken in the context of ongoing business relations. Rather, the ECJ had to decide whether these measures constituted separate acts, distinct from the provisions of the selective distribution agreements, or whether they formed an integral part of those agreements, and thus had to be taken into consideration when assessing the lawfulness of the selective distribution agreements as operated by the parties.\textsuperscript{144} In these cases, the existence of an agreement capable of infringing Article 81(1) EC was thus established. In Bayer, however, there was no distribution agreement capable of infringing Article 81(1), to which the measures adopted by the manufacturer could be ascribed.

The ECJ followed this argument and held that the factual circumstances in AEG-Telefunken and Ford differed significantly from those in Bayer, where “the very existence of an anti-competitive agreement” had to be established.\textsuperscript{145} As the ECJ held in paragraph 141 of its Bayer judgment, the mere coexistence of an agreement, which is as such neutral, and a measure, which has the object or

\textsuperscript{140} See also Jephcott, supra n 14, 476; Eilmansberger, supra n 3, 297.
\textsuperscript{141} CFI Case T-41/96, supra n 10, paras 166–67.
\textsuperscript{142} Ibid, paras 168–70.
\textsuperscript{143} AG Tizzano, Joined Cases 2/01P and 3/01P, supra n 130, para 75.
\textsuperscript{144} Ibid, paras 68, 75–76.
\textsuperscript{145} ECJ, Joined Cases C-2/01P and C-3/01P, supra n 11, paras 105–109.
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effect of restricting competition and which had been unilaterally imposed by the manufacturer on its wholesalers, does not amount to an agreement within the meaning of Article 81(1).

As some scholars such as Jephcott have pointed out, it is, however, regrettable that the relation between the Ford case and the Bayer case had not been examined by the courts in more detail. These cases seemed to be comparable insofar as in both there were restrictions on supplies by a supplier which were disadvantageous to the resellers. The resellers then demonstrated their rejection of this policy by means of protests (Ford) or by attempting to circumvent the restrictions (Bayer). Moreover, the ECJ’s finding in Ford that admission to a distribution network implied acquiescence in future policies to be adopted by the supplier (which could be used to distinguish these cases) is, as mentioned above, criticised in the legal doctrine. As mentioned above, one should, with regard to these criticisms, take into consideration the CFI’s recent Volkswagen II judgment, where the CFI held that a concurrence of wills could only be found with regard to a particular conduct known to the parties at the time of their acceptance. A more thorough analysis of the Ford case in the context of the Bayer case could, however, as some legal scholars have argued, have led the courts to the conclusion that Ford was wrongly decided.

Nevertheless, the ECJ’s judgment in Bayer should, in accordance with the major part of the legal doctrine, be welcomed for restricting the concept of an agreement within the meaning of Article 81(1) EC to cases where a "concurrence of wills" of the parties involved has been established. The ECJ made clear that, for an agreement within the meaning of Article 81(1) EC to be found to exist, it is necessary to establish the existence of an invitation

\[146\] Jephcott, supra n 14, 474, 476; see also Brown, supra n 40, 388; DG Goyder, EC Competition Law (Oxford University Press, 4th edn, 2003), 71, n 35.

\[147\] Jephcott, supra n 14, 474, 476.

\[148\] ECJ Joined Cases 25/84 and 26/84, supra n 12, para 21.

\[149\] See CFI Case T-208/01, supra n 12, para 56.

\[150\] See Brown, supra n 40, 388–89. See also Eilmansberger, supra n 3, 392, according to which the Ford case would, based on the approach adopted by the ECJ in Bayer, be decided differently.

\[151\] Kraus, supra n 24, 517; Klees, supra n 27, 292; Henry, supra n 14, 2; M Campolini, “Parallel Import of Pharmaceutical Products Within the European Union: Could Adalat be a Beacon in the Dark for the Innovative Industry?” (2002) 8 International Trade Law & Regulation 35–37; Eilmansberger, supra n 3, 290; Prieto, supra n 106, 616; M Amstutz and M Reinert, “Vertikale Preis- und Gebietsabreden—eine kritische Analyse von Art. 5 Abs. 4 KG” in WA Stoffel and R Zäch (eds), Kartellgesetzesrevision 2003—Neuerungen und Folgen (Zurich, Schulthes, Juristische Medien AG, 2004), 98; Cot, supra n 22, 605; Rey and Venit, supra n 6, 176–77; F Koenigs, “Vorliegen einer gegen den EG-Vertrag verstoßenden Vereinbarung über ein wettbewerbsbeschränkendes Verhalten?” (2004) 57 Der Betrieb, 249; Whish, supra n 1, 106. S Kon and F Schaeffer, “Parallel Imports of Pharmaceutical Products: A New Realism, or Back to Basics” (1997) 18 European Competition Law Review 128, and Lidgard, supra n 3, 359–60 criticised the Commission’s decision in Bayer. See also Bastianon, supra n 11, 421–25. Some legal scholars such as Schröter seemed, however, to favour the approach adopted by the Commission (Schröter, supra n 20, Art 81 N 63; Schröter, supra n 23, Art 81 Abs. 1 N 79); see also Gujer, supra n 4, 139–40, n 720, n 722, 142 n 731.
of one party to adopt a particular conduct, and of an explicit or tacit acquiescence of the other party in that conduct. The approach of the ECJ in *Bayer* is, moreover, in line with the CFI’s *Volkswagen II* judgment.¹⁵²

(b) The Context of the *Bayer* Case: Competition Law and Market Integration in the Pharmaceutical Sector

According to Bayer, the Commission intended in the *Bayer* case to establish that prohibitions of parallel imports constitute in themselves violations of Article 81(1) EC, and to achieve a harmonisation of the prices of pharmaceutical products through application of EC competition law.¹⁵³ The Commission, on the other hand, argued that the approach adopted by the CFI called “into question the policy pursued by the Commission in fighting restrictions of competition based upon a system of hindrances to parallel imports”.¹⁵⁴ Some scholars, such as Rey and Venit,¹⁵⁵ are thus of the opinion that, although the judgment of the CFI in *Bayer* (which was confirmed by the ECJ) centred around the concept of an agreement within the meaning of Article 81(1) EC and contained important findings in that regard, the judgment was even more significant from a policy point of view, in that the CFI called into question the Commission’s approach of using competition law to bring about market integration in the market for prescription pharmaceuticals. It thus seems appropriate to take into consideration these policy issues when analysing the *Bayer* case.

In a procedure for a preliminary ruling under Article 234 EC in *Syfait v GlaxoSmithKline*,¹⁵⁶ AG Jacobs was confronted with the question of whether a restriction of supplies of pharmaceutical products by a dominant undertaking could be objectively justified. Answering this question, AG Jacobs analysed the underlying economic and policy issues. It thus seems appropriate to refer to his opinion in the present context, although *Syfait v GlaxoSmithKline* concerned the interpretation of Article 82 EC, whereas in *Bayer*, the question was whether

¹⁵⁴ Ibid, para 65.
¹⁵⁵ Rey and Venit, supra n 6, 154, 157; see also Bastianon, supra n 11, 422–25.
¹⁵⁶ AG Jacobs, Case C–53/03, supra n 131. In its judgment of 31 May 2005 in Case C–53/03 Syneutairismos Farmakopoion Aitolias & Akamniadas (Syfait) and Others v GlaxoSmithKline plc and GlaxoSmithKline AEVE, not yet reported, the ECJ held that it had no jurisdiction to answer the questions referred to it by the Greek competition authority, and thus did not have to comment on the policy considerations of AG Jacobs. In that regard, see D Kraus, “La Cour n’entre (malheureusement) pas en matière dans une affaire d’importations parallèles de médicaments”, Jusletter, 4 July 2005, available at www.weblaw.ch/jusletter/Artikel.asp?ArticleNr=4075&Language=1 (accessed on 16 January 2006), para 11.
Bayer’s conduct fell under Article 81 EC. At the outset, AG Jacobs stated that parallel imports were, in principle, likely to benefit consumers by increasing intra-brand competition and lowering prices in the State of import. Supply restrictions intended to reduce parallel imports could thus only exceptionally be justified. However, in the particular context of the pharmaceutical sector, AG Jacobs held that the decision on whether such conduct by an undertaking was justified also had to take into consideration the regulation of price and distribution of pharmaceutical products, the consequences of unrestricted parallel imports on pharmaceutical producers (and on their research and development activities) and the consequences of unrestricted parallel imports on the position of the consumers.

The pharmaceutical industry is characterised by high levels of sunk costs, essentially expenditure on research and development. Research and development is largely internally financed. A second characteristic of the pharmaceutical industry is that markets for pharmaceutical products do not operate under free and undistorted market conditions. As the main customers of the pharmaceutical manufacturers (through the national health services), national governments have an interest in keeping public expenditure in prescription pharmaceuticals low. There is thus a wide range of measures adopted by national governments to pursue this objective, including different levels of reimbursement by the national health services for different pharmaceutical products, direct and indirect price fixing, and profit controls. However, some states allow the pharmaceutical manufacturer to charge higher prices, recognising that sufficient returns are required to fund research and development. Differentials in prices of pharmaceutical products (which create the incentives for parallel imports) are thus the consequence of different national regulations. Price regulation of pharmaceutical products has been harmonised by Community legislation only to a limited extent. In addition,
the distribution of pharmaceutical products is subject to detailed regulation on both the national and Community levels. For instance, some Member States require pharmaceutical manufacturers and wholesalers to maintain a certain stock of pharmaceutical products,\textsuperscript{166} and Community Directive 2001/83/EC obliges holders of marketing authorisations for medicinal products and distributors to “ensure appropriate and continued supplies”.\textsuperscript{167} As a result of these regulations, when attempting to prevent parallel imports, pharmaceutical manufacturers are seeking not to maintain price differentials which they have created themselves, but to minimise the consequences of low prices imposed on them for their products in some Member States.\textsuperscript{168} Moreover, the market-partitioning effect of supply restrictions is the consequence of the above-mentioned obligations of wholesalers to maintain sufficient stocks for their domestic requirements.\textsuperscript{169}

Based on economic theory and an analysis of the markets for pharmaceutical products, it has been demonstrated that unrestricted parallel imports could negatively affect the incentives for undertakings to invest in research and development.\textsuperscript{170} In its \textit{Glaxo Wellcome} decision of May 2001,\textsuperscript{171} however, the Commission held that there was no convincing evidence for the existence of a causal link between the volume of parallel imports and the investments in research and development. In the context of Article 82 EC in \textit{Syfait v GlaxoSmithKline}, AG Jacobs nevertheless concluded that, in the specific context of the European pharmaceutical market, a policy of supply restrictions adopted by a dominant manufacturer with the intention to restrict parallel imports of the products supplied could constitute a reasonable and proportionate measure of this undertaking, and thus be objectively justified.\textsuperscript{172} However, AG Jacobs explicitly limited his analysis to the pharmaceutical industry. The opinion of AG Jacobs has been criticised by Koenig and Engelmann.\textsuperscript{173} It should, however, be noted that Koenig and Engelmann's

\textsuperscript{166} Ibid, paras 80–81.


\textsuperscript{168} AG Jacobs, Case C–53/03, supra n 131, para 84. See also Bagier [1996] OJ L201/1, para 237. See, however, Koenig \textit{et al}, supra n 4, 920.

\textsuperscript{169} AG Jacobs, \textit{ibid}, para 85.


\textsuperscript{172} AG Jacobs, Case C–53/03, supra n 131, paras 100–1.

\textsuperscript{173} Koenig and Engelmann, supra n 171, 343–48.
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paper is based on an expert assessment commissioned by the European Association of Euro-Pharmaceutical Companies, which also acted as an intervener on the side of the Commission in the Bayer case. Other legal scholars welcomed the AG's approach.174

As mentioned above, the CFI held in Bayer (in the context of Article 81 EC) that restrictions of parallel imports were not generally prohibited by EC competition law.175 The CFI's rejection of the Commission’s approach in Bayer is, as Rey and Venit have argued, validated by the underlying economics of the European pharmaceutical market as described above.176 The application of competition law in order to achieve a harmonisation of the pharmaceutical market in the European Union seems problematic, when taking into consideration the regulatory and economic characteristics of the pharmaceutical market.177 As Kon and Schaeffer argue, “whilst these variations [in the national schemes] remain, it is economically and legally unsound to apply without distinction a set of Community rules premised on a fully integrated market”.178 The harmonisation of the prices for pharmaceutical products requires an overall approach which takes into consideration the economics of the market, as well as national regulations such as requirements to maintain certain stocks, regulations regarding the levels of reimbursement by the national health services for pharmaceutical products and national price-fixing measures.179 Harmonisation thus can be achieved (and attain legitimacy180) only by way of legislative measures.181 It is, however, assumed in the legal doctrine that the Commission will continue its policy of preventing restrictions of parallel imports of pharmaceutical products by using EC competition law.182

174 See eg McCann, supra n 157, 374.
175 CFI Case T-41/96, supra n 10, para 176.
176 See Rey and Venit, supra n 6, 160–61, 176 (it should, however, be noted that the paper of Rey and Venit reflects ideas “developed in connection with work undertaken for GlaxoSmithKline in a case involving parallel trade”); see also Ridyard and Lewis, supra n 160, 16–19. Such economic arguments could, moreover, also be taken into consideration when examining in an Art 81 case the possibility of granting an exemption under Art 81(3) EC (see Rey and Venit, supra n 6, 159, n 27).
177 See also Jakobsen and Broberg, supra n 3, 140–41; Prieto, supra n 106, 618.
178 Kon and Schaeffer, supra n 151, 127. Koenig and Engelmann, supra n 171, 343, take a different view.
179 It is submitted that the Commission has not always sufficiently taken into account the characteristics of the market for pharmaceuticals and of the respective regulatory framework (see Kon and Schaeffer, supra n 151, 128, referring to the Commission’s decisions in Bayer [1996] OJ L201/1 and in Organon IP/95/1345; see also Nazerali et al, supra n 7, 339–40).
180 See Rey and Venit, supra n 6, 173–75.
181 See CFI Case T-41/96, supra n 10, paras 179–81. See also Rey and Venit, supra n 6, 173–75.
(c) Other Cases in which References Were Made to the Bayer Case

The Bayer case must be seen in its particular context. However, it has, in my view, contrary to the views of a part of the legal doctrine,183 wider implications.184 As can be seen from the email of the sales staff manager of Opel Nederland BV (Opel) quoted in the Commission's Opel Nederland BV decision,185 some undertakings in other markets considered adopting a system such as the one implemented by Bayer, should it be held to be compatible with EC competition law. In this case, Opel adopted a strategy intended to prevent parallel imports, which consisted of a supply restrictions policy, a restrictive bonus policy and instructions addressed to the dealers to refrain from export sales in general.186 Referring to the ECJ's decisions in AEG-Telefunken and Förd, the Commission held that the measures adopted by Opel had to be considered not as unilateral acts, but as forming part of the contractual relationships between Opel and its dealers.187 In their applications to the CFI, General Motors Nederland BV and its subsidiary Opel relied particularly on the CFI's Bayer judgment.188 The CFI followed the argumentation of the applicants insofar as it held that the Commission did not sufficiently demonstrate that Opel had communicated the policy of supply restrictions to its dealers.189 The CFI thus annulled the Commission's decision insofar as this decision held that the existence of an agreement regarding supply restrictions infringing Article 81(1) EC had been established, but dismissed the remainder of the application. The ECJ confirmed the judgment of the CFI.190 However, the CFI's Bayer judgment was also relied on by the Commission in its Nintendo decision of October 2002191 and in its recent SEP et autres/Automobiles Peugeot SA decision,192 and, as mentioned above, by the CFI in its Volkswagen II judgment.

The Bayer case has, moreover, also been referred to by Member State courts. In 1999, the Irish Supreme Court held in Chanelle Veterinary Limited v Pfizer (Ireland) Limited that the authorities, in particular the Commission's Bayer decision (which was then under appeal) and the ECJ's Sandoz judgment,

183 Rehmann, supra n 134, 76; Lemaire and Meulenbelt, supra n 11, 499, 505. See also Gujer, supra n 4, 121, 140, n 725, 142 n 731.
184 See also Rosenfeld, supra n 4, 299; Henry, supra n 14, 2; M Noor, “The Bayer Case: New Hope for Manufacturers” (2001) 23 European Intellectual Property Review 158; Schulz, supra n 14, 20; Eilmansberger, supra n 3, 291.
186 See ibid, para 17.
187 Ibid, para 111.
188 See CFI Case T–368/00, supra n 12, paras 40–41, 65.
189 CFI Case T–368/00, supra n 12, para 88.
190 ECJ Case C–551/03 P General Motors BV, not yet reported.
“suggest that very limited evidence is required to justify the inference of ‘concerted practices’”. Nevertheless, the Irish Supreme Court regarded the measure adopted by the supplier in the case at hand (dismissal of an authorised distributor) as unilateral conduct.

In the UK, the Court of Appeal had to distinguish unilateral conduct from the concept of an agreement within the meaning of Article 81(1) EC in its judgment in Unipart Group Ltd v O2 (UK) Ltd. Unipart Group Ltd (Unipart), which purchased airtime wholesale from mobile telephone network operators, claimed damages from O2 (UK) Ltd (O2), arguing that the terms and conditions under which O2 supplied airtime for mobile telephones were contrary to Article 81(1) EC. In Unipart’s view, O2 adopted a policy of “margin squeeze”, charging independent service providers excessive prices for airtime and thus forcing them to reduce their margins. The Court of Appeal strongly relied on the judgments in Bayer, and held that, for the finding of an agreement within the meaning of Article 81(1) EC, it was necessary to establish a concurrence of wills of the parties involved with regard to the anti-competitive conduct to be adopted. In the case at hand, the Court of Appeal found, however, no agreement within the meaning of Article 81(1) EC between Unipart and O2 with regard to the alleged margin squeeze.

As can be seen from these cases, the ECJ’s Bayer judgment is of relevance to various economic sectors. However, as van Sasse van Ysselt has argued, a supplier intending to adopt a policy comparable to Bayer’s should make sure that the factual circumstances correspond to the factual circumstances in Bayer, i.e. that the restriction is not brought into relation with pre-existing agreements capable of infringing Article 81(1) EC, that there is no invitation by the supplier addressed to its resellers to adopt a certain conduct, that there is no system of monitoring and controlling the final destination of the goods supplied, that there are no threats of sanctions and that the supplier can put its policy into effect without the assistance of its resellers. However, undertakings intending to establish a system comparable to that of Bayer will nevertheless

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194 Irish Supreme Court, supra n 193, 349–50, paras 21–25.

195 England and Wales Court of Appeal, Unipart Group Ltd v O2 (UK) Ltd (formerly BT Cellnet Ltd) and Anor [2004] EWCA Civ 1034.

196 England and Wales Court of Appeal, supra n 195, paras 94–108.

197 CREM Van Sasse van Ysselt, “Adalat: een gebruiksaanwijzing” (2004) 5 Nederlands tijdschrift voor Europese Recht 124–25. However, as van Sasse van Ysselt has pointed out, it should be noted that, in its Volkswagen II judgment, the CFI held that a measure of a producer could escape the prohibition of Art 81(1) EC even if it is brought into relation with a pre-existing distributorship agreement and if there is a threat of sanctions by the producer (see the letter referred to in Volkswagen [2001] OJ L262/14, para 30).
have to be very careful in order to ensure compliance with EC competition law.¹⁹⁸

D. Conclusion

The landmark judgments of the ECJ in Bayer and of the CFI in Volkswagen II (which has still to be upheld by the ECJ) should be welcomed, for they contribute to a more precise delimitation of the concept of an agreement within the meaning of Article 81(1) EC.¹⁹⁹ As these judgments made clear, it is necessary for the finding of an agreement infringing Article 81(1) EC in cases where an undertaking adopts apparently unilateral conduct that there is an invitation of this undertaking to adopt a particular conduct, and that the acquiescence of the other party in that conduct is established.²⁰⁰ It is not sufficient for competition authorities (or plaintiffs) to state that the measure of one party (typically a supplier) takes place in the context of an ongoing business relationship.²⁰¹ Instead, the competition authorities (or plaintiffs) will have to prove the existence of a concurrence of wills. Compliance with the restrictions imposed by a supplier on a dealer may thereby—in the absence of the latter’s explicit acquiescence in these restrictions—be considered as an indication of an agreement within the meaning of Article 81(1) EC.²⁰² The fact that the reseller was dependent upon the supplier and thus accepted the restrictions imposed on him only under duress does not exclude the finding of an agreement within the meaning of Article 81(1) EC.

The recent case law of the courts with regard to the distinction between agreements within the meaning of Article 81(1) EC and unilateral conduct, can, as Ratliff has argued, be summarised as follows: “The theme of these judgments for competition authorities and plaintiffs is clear: Prove the specific agreement not to export by dealers and distributors, not just the manufacturer’s desire to achieve that objective.”²⁰³

¹⁹⁹ Kamann and Bergmann, supra n 14, 155; Eilmansberger, supra n 3, 290–91. See, however, with regard to open issues regarding the impact of the ECJ’s Bayer judgment on Art 3(2) of Council Regulation No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 EC ([2003] OJ L1/1) Eilmansberger, supra n 3, 301–3.
²⁰⁰ Klee, supra n 27, 292. See also Cot, supra n 22, 606; Kamann and Bergmann, supra n 14, 154.
²⁰¹ Klee, supra n 27, 292; Kamann and Bergmann, supra n 14, 154.
²⁰² Wertenbruch, supra n 14, 150; see also Rosenfeld, supra n 4, 299.
²⁰³ Ratliff, supra n 152, 60.