

- (b) in the *Länder* of
- Mecklenburg-Western Pomerania
 - Saxony
 - Schleswig-Holstein
 - Thuringia,
- part-time employees who work less than half of the normal weekly hours of work,

- (c) in the *Länder* of
- Baden-Württemberg
 - Brandenburg
 - Rhineland-Palatinate
 - Saxony-Anhalt,
- part-time employees who work less than one-third of the normal weekly hours of work,

- (d) in North Rhine-Westphalia,
- part-time employees who less than 2/5 of the normal weekly hours of work,

- (e) in Lower Saxony,
- part-time employees who, for a period of up to two months in the course of a year, are employed for less than 15 hours a week,

from eligibility for election to staff committees.

2. Order the Federal Republic of Germany to pay the costs.

Pleas in law and main arguments

The exclusion from eligibility for election to staff committees, for public sector workers employed by the Federal Republic and almost all *Länder*, of part-time employees who normally work less than 18 hours a week (the number of hours is somewhat less in certain *Länder*) constitutes indirect discrimination against women, as they form the great majority of part-time workers. This is accordingly in breach of Directive 76/207/EEC. The rules are also incompatible with Directive 97/81/EC, which provides that part-time workers may not be

treated in a less favourable manner than full-time workers unless such different treatment is justified on objective grounds.

However, there are no objective grounds for the exclusion from eligibility for election. The restricted presence of the relevant employees in the workplace could be compensated for by the creation of flexible working time arrangements and modern means of communication. The Betriebsverfassungsgesetz (Law on labour relations at the workplace), which governs elections to works councils in the private sector, does not restrict eligibility for election in the same way. Such works councils perform the same functions as staff committees in the public sector. Representation of the excluded groups is necessary because they have separate interests, which otherwise would not be taken into account.

⁽¹⁾ OJ 1976 L 39, p. 40.

⁽²⁾ OJ 1998 L 14, p. 9.

Appeal brought on 29 December 2003 by General Motors Nederland BV and Opel Nederland BV against the judgment delivered on 21 October 2003 by the Second Chamber of the Court of First Instance of the European Communities in case T-368/00⁽¹⁾ between General Motors Nederland BV and Opel Nederland BV and the Commission of the European Communities

(Case C-551/03 P)

(2004/C 71/12)

An appeal against the judgment delivered on 21 October 2003 by the Second Chamber of the Court of First Instance of the European Communities in case T-368/00 between General Motors Nederland BV and Opel Nederland BV and the Commission of the European Communities, was brought before the Court of Justice of the European Communities on 29 December 2003 by General Motors Nederland BV and Opel Nederland BV, both established in Sliedrecht (Netherlands), represented by D. Vandermeersch, R. Snelders and T. Graf, lawyers, with an address for service in Luxembourg.

The Appellants claim that the Court should:

1. annul the judgment of the Second Chamber of the Court of First Instance of 21 October 2003 in case T-368/00, General Motors and Opel Nederland vs. Commission of the European Communities, in so far as it relates to Opel Nederland's alleged export strategy and bonus policy and confirms a fine in that regard;

2. annul Commission Decision No C (2000) 2707, of 20 September 2000⁽²⁾ (Case COMP/36.653 — Opel), addressed to General Motors Nederland BV and Opel Nederland BV, to the extent not yet annulled by the judgment of the Second Chamber of the Court of First Instance of 21 October 2003 in case T-368/00, General Motors and Opel Nederland vs. Commission of the European Communities, and in so far as it relates to Opel Nederland's alleged strategy and bonus policy, and imposes a fine in that regard;
3. irrespective of the Court's holding on points 1 or 2, reduce the fine of EUR 35 475 million imposed on General Motors Nederland BV and Opel Nederland BV as erroneously confirmed by the judgment of the Second Chamber of the Court of First Instance of 21 October 2003 in case T-368/00, General Motors and Opel Nederland vs. Commission of the European Communities,

Alternatively,

4. remand the case to the Court of First Instance for reconsideration in accordance with the Court's judgment,

And in either case,

5. order the Commission to pay the Appellants' legal fees and expenses in accordance with Article 69 of the Court's Rules of Procedure.

Pleas in law and main arguments

The Appellants submit that in upholding the existence of a general strategy on the part of the Appellants to restrict all exports the judgment manifestly misconstrues the evidence and fails to state adequate reasons. This error pervades the judgment's assessment of the bonus policy and the level of the fine.

The Appellants' bonus policy differed in a number of crucial aspects from the bonus system at issue in the Volkswagen case, in particular as the bonus payments were limited to temporary promotion campaigns for selected car models that were slow-movers on the domestic market; the bonus policy was not combined with a limited supply policy and list prices allowed dealers to generate a profit margin on export sales irrespective of campaign bonus payments. Opel Nederland's campaign bonus policy, moreover, distinguished itself from

the differential pricing mechanism at issue in Distillers and similar cases, where dealers were required to give a commitment as to the destination of the goods in return for a favourable price.

A car manufacturer's implementation of temporary bonus campaigns limited to the domestic sale of selected slow-moving car models (and designed temporarily to stimulate domestic sales of such models in competition with other brands), without combining such bonus campaigns with any other measure — such as a supply limitation or a requirement to commit to the destination of the cars — should not be treated as a restriction 'by object' under Article 81 EC, irrespective of (and without need to examine) whether or not such a bonus policy effectively restricts competition. The Appellants submit that a bonus policy of the type implemented by them cannot be viewed as having a restrictive object.

In the Appellants' view, the Court of First Instance erred in law in holding that a bonus policy such as that operated by them was, 'by its very nature, likely to inhibit export sales, even without any restriction on supply'. Instead, the Court of First Instance should have examined whether the bonus policy in its proper legal and economic context had the sole objective purpose or obvious consequence of appreciably restricting any competition that could reasonably be expected to have existed in the absence of the contested measure. The Court of First Instance could not avoid this merely by pointing to the purely theoretical 'possibility that, without the measure in question, export sales would have been higher'.

As to the level of the fine, the judgment violates Article 15(2) of Regulation 17 since it is based on manifestly erroneous findings with respect to the alleged general strategy to restrict all exports and the bonus policy. The judgment, moreover, errs in law in holding that Opel Nederland's corrective measures, including in regard to the direct export ban involving nine dealers, did not qualify as attenuating circumstances.

⁽¹⁾ OJ C 61, 24.02.2001, p. 17.

⁽²⁾ 2001/146/EC: Commission Decision of 20 September 2000 relating to a proceeding under Article 81 of the EC Treaty (Case COMP/36.653 Opel) (Text with EEA relevance.) (notified under document number C(2000) 2707) (OJ 2001 L 59, p. 1).