

2. Order Finland to pay the costs.

*Pleas in law and main arguments*

The period prescribed for transposition of the directive expired on 17 November 2002.

(<sup>1</sup>) OJ 2000 L 290, p. 27.

**Appeal brought on 16 February 2004 by the Commission of the European Communities against the judgment delivered on 3 December 2003 by the Fourth Chamber of the Court of First Instance of the European Communities in Case T-208/01 between Volkswagen AG and Commission of the European Communities**

(Case C-74/04 P)

(2004/C 94/51)

An appeal against the judgment delivered on 3 December 2003 by the Fourth Chamber of the Court of First Instance of the European Communities in Case T-208/01 between Volkswagen AG and Commission of the European Communities was brought before the Court of Justice of the European Communities on 16 February 2004 by the Commission of the European Communities, represented by Walter Mölls, acting as Agent, assisted by Dr Heinz-Joachim Freund, Rechtsanwalt, with an address for service in Luxembourg.

The applicant claims that the Court should:

1. set aside the judgment of the Court of First Instance of 3 December 2003 in Case T-208/01; (<sup>1</sup>)
2. refer the case back to the Court of First Instance;
3. order the respondent to pay the costs.

*Pleas in law and main arguments*

By the abovementioned judgment, the Court of First Instance annulled Commission Decision 2001/711/EC of 29 June 2001 relating to a proceeding under Article 81 of the EC Treaty (Case COMP/F-2/36.693 — Volkswagen) (<sup>2</sup>). In that decision, the Commission had found that between June 1996 and September 1999 Volkswagen had agreed a fixed resale price with its German dealers, contrary to Article 81 EC. The decision imposed upon Volkswagen a fine of EUR 30.96 million.

The Court found that the demands made by Volkswagen AG to its German dealers did not become part of the dealership agreements since they were unlawful. They were unilateral measures not covered by Article 81 EC.

In so reasoning the Court has misapplied the concept of agreement as set out in Article 81(1) EC and so breached that provision.

In the Commission's view the Court is requiring too high a level of knowledge from the parties to a selective distribution agreement of its application and development in practice. At the same time it is confusing those demands with the requirements for the agreement to be lawful.

In this connection, the Court is overlooking in particular the peculiarities of selective distribution systems, which are based upon a framework agreement which requires to be completed

and put into more concrete terms. The fact that such an agreement is not itself unlawful at a certain time does not preclude its becoming so at a later date. As regards the dealers in particular, their general interest is in retaining their position as members of the distribution system. It cannot be assumed that they systematically — to a certain degree preventatively — upon the conclusion of the contract reject all later requirements which may prove to be unlawful. That applies particularly when, depending on the circumstances, the dividing line between lawful and unlawful measures can be difficult to determine.

The Commission's line of argument is confirmed by the established case-law of the Court of Justice, which the Court of First Instance has misinterpreted. In the present case, in addition, it can clearly be seen from the actions of the parties (manufacturer and dealers) that they regarded the requirements as part of the dealership contract. Those facts also prove that the reasoning of the Court of First Instance is incorrect. In so far as the Court regarded them as irrelevant (in the case of the manufacturer) or entirely ignored them (in the case of the dealer), that is due to the abovementioned error regarding the concept of agreement.

(<sup>1</sup>) Not yet published in the European Court Reports.

(<sup>2</sup>) OJ 2001 L 262, p. 14.

**Reference for a preliminary ruling by the Hof van Beroep te Antwerpen by order of that Court of 11 February 2004 in the case of Ministerie van Financiën against 1..., 2. Hendrick Hanssens, 3. Rudi Verhoeven, 4. World Wide Shipping and Forwarding N.V.**

(Case C-75/04)

(2004/C 94/52)

Reference has been made to the Court of Justice of the European Communities by order of the Hof van Beroep te Antwerpen (Court of Appeal) of 11 February 2004, received at the Court Registry on 17 February 2004, for a preliminary ruling in the case of Ministerie van Financiën against 1..., 2. Hendrick Hanssens, 3. Rudi Verhoeven, 4. World Wide Shipping and Forwarding N.V. on the following questions:

1. For the purpose of determining the customs debt in accordance with Article 201 et seq. of the Community Customs Code (Council Regulation (EEC) No 2913/92 of 12 October 1992 (<sup>1</sup>)), in the event of non-discharge of T1 documents issued for purposes of exportation to various countries of a consignment of non-Community goods (in casu, textile goods/T-shirts) in transit, where the non-discharge is the result of prior removal from customs supervision, must the first infringement, that is to say, the removal from transit, be taken into account, or must, rather, account be taken of what is chronologically the subsequent infringement, consisting in the non-discharge of the relevant T1 documents? In other words, does the customs debt arise as against a declarant acting in good faith in respect of non-discharge of T1 documents resulting from prior removal from transit — in which the declarant was in no way involved — on the basis of Articles 203(1) and 215(1) of the Community Customs Code or on the basis of Articles 204(1) and 215(3) of the Community Customs Code?