

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 15 December 1992

relating to a proceeding pursuant to Article 85 of the EEC Treaty

(IV/31.400 — Ford Agricultural)

(Only the English text is authentic)

(93/46/EEC)

THE COMMISSION OF THE EUROPEAN
COMMUNITIES,

Having regard to the Treaty establishing the European
Economic Community,

Having regard to Council Regulation No 17 of 6
February 1962, First Regulation implementing Articles 85
and 86 of the Treaty ⁽¹⁾, as last amended by the Act of
Accession of Spain and Portugal, and in particular
Article 3 (1) thereof,

Having regard to the Statement of Objections of 17 May
1990,

Having given the undertaking concerned the opportunity
to make known its views on the objections raised by the
Commission; pursuant to Article 19 (1) of Regulation
No 17 and Commission Regulation No 99/63/EEC of
25 July 1963 on the hearings provided for in Article 19
(1) and (2) of Council Regulation No 17 ⁽²⁾,

After consulting the Advisory Committee on Restrictive
Practices and Dominant Positions,

THE FACTS

The parties

(1) Ford New Holland Limited, which is currently a
subsidiary of Fiat Geotech Tecnologie per la

Terra SpA, was, at the time of the Statement of
Objections, a subsidiary of Ford Motor Company
Limited, itself a subsidiary of the Ford Motor
Company. On 1 January 1987 it assumed responsi-
bility for the Ford Motor Company Limited's
tractor operations within the United Kingdom,
together with the harvesting machinery activities
of New Holland Ltd, formerly Sperry New
Holland. The Ford group of companies distributed
tractors within the Community, first through Ford
Motor Company Limited, and then through Ford
New Holland Limited, and through a number of
other subsidiary companies, established within
most Member States, or, exceptionally, through
independent importers and dealers under contract
to a company within the group. Hereafter, unless
the context requires the identification of a
particular subsidiary or division, these will be
referred to as 'Ford'.

The Product

(2) This Decision concerns tractors which, almost
exclusively, are sold for agricultural use.

The position of the parties

(3) Ford was one of the largest manufacturers of agri-
cultural tractors in the world. Within the
Community it had, in 1987, a market share of 9 %
and in the UK one of 29 %. Ford's group
turnover, worldwide, was US\$ 92 445 million.

⁽¹⁾ OJ No 13, 21. 2. 1962, p. 204/62.

⁽²⁾ OJ No 127, 20. 8. 1963, p. 2268/63.

Ford's distribution system

- (4) Ford distributed tractors through a network of exclusive dealers appointed, in almost all cases, by the national Ford subsidiary. Since the adoption of Commission Regulation (EEC) No 123/85 of 12 December 1984 on the application of Article 85 (3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements ⁽¹⁾, Ford had been adapting the terms of its contracts for tractor dealers so as to conform to the conditions of that Regulation and had claimed that its distribution system was thus exempt by virtue of that Regulation. Ford has, since, modified these contracts to conform with the conditions of Regulation (EEC) No 1983/83 ⁽²⁾.

The proceedings

- (5) From 29 October 1964, Ford had submitted a number of notifications of selective distribution contracts requesting either negative clearance or an exemption pursuant to Article 85 (3). In 1982, the Commission began to receive complaints, both formal and informal, of interference on Ford's part with parallel trade in tractors from other tractor manufacturers/importers. The Commission began to investigate Ford in 1985, with a request for information under Article 11 of Regulation No 17 in January, followed by investigations pursuant to Article 14 of that Regulation in Ford's Basildon tractor plant in the UK in March, Ford's Belgian subsidiary in June and Ford's Dutch subsidiary in July of that year.

In parallel, the Commission had obtained information from other manufacturers, from trade associations and from dealers or purchasers of tractors which throw light on Ford's conduct. The Commission had already, on 11 November 1988, issued a Statement of Objections concerning a UK tractor registration exchange (ref. IV/31.370 and IV/31.466) addressed, among others, to Ford; this sought to condemn Ford for its participation in the exchange, and for the use made by the members, including Ford, for the purpose of tracing parallel imports, of the registration documents made available to the exchange by the registration authorities for its statistical purposes. In its response dated 31 January 1989 to that Statement of Objections, Ford argued that the parallel import issue had nothing to do with the activities of the exchange.

⁽¹⁾ OJ No L 15, 18. 1. 1985, p. 16.

⁽²⁾ OJ No L 173, 30. 6. 1983, p. 1.

Ford asked, repeating this request at the hearing held in April 1989, that the Commission treat, if indeed it planned to treat at all, the parallel import question separately with each individual company. On 12 June 1990, the Commission addressed a Statement of Objections to Ford New Holland Limited in the present case which did deal with Ford's use of registration documents, as does the present Decision (it is not, however, concerned with the operation of the exchange itself). On 31 July 1990 Ford replied to the Statement of Objections. Fiat Geotech Technologie per la Terra SpA, the new owner of Ford New Holland Limited, has since waived, by letter dated 19 September 1991, the right to an oral hearing.

Economic background

- (6) The price levels of tractors in the various Member States have traditionally been different; for example, the UK had traditionally high prices. Currency fluctuations have, from time to time, caused price levels to differ; such fluctuations have been sufficient to cause the price levels in States with traditionally high prices to be, from time to time, lower than in neighbouring States. In the years prior to the Commission's investigations, Ford's prices in the UK were 20 to 30 % higher than in continental Europe. The different Ford subsidiaries had, from time to time, offered special prices or discounts. For all of these reasons, farmers or dealers had, from time to time, found it advantageous to buy from or sell into a different Member State. It is understood that Ford had, more recently, sought to equalize its prices in different currencies in order to avoid the problems differing price levels cause.

Ford's reaction to parallel trade

- (7) Ford attempted to prevent dealers selling to customers in, or buying from, another Member State.
- (8) To this end, Ford established systems for the identification of parallel imports and the tracing of their sources. In the UK this made great use of the Government's vehicle registration documents that were made available to the trade association for statistical purposes — copies of these registration documents, for example, were found in Ford's

Belgian offices. Ford also encouraged dealers to report parallel imports, obtained such information through the dealers' associations, from farmers, and even inspected tractors on the farm and die-stamped a secret number on them for the purpose of identification.

orders from outside territories and, in particular, not to export.

Extent of these practices

- (9) Either in reaction to a particular traced parallel trade, or generally, Ford told dealers that such trade was undesirable. In a letter dated 20 February 1979 written by Ford's zone manager for the north of England and Northern Ireland to his superiors, he assured them that on his next visit to Northern Ireland he would inform dealers of the problems created by tractors 'shipped across the border' and 'ask them to be careful not to sell to farmers from the south'. Ford threatened to cancel the dealerships of exporting dealers. Ford delayed delivery when an export was expected, as is shown in a letter written from Ford Nederland to Ford Motor Company Ltd in May 1981; it stated that Ford Nederland would delay delivery of nine tractors that it discovered were to be exported to the UK, since its legal counsel advised it that it would have lost the lawsuit threatened by the jobber if Ford Nederland had persisted in not honouring the order previously accepted. Ford charged higher prices or reclaimed discounts; it made discounts conditional on registration within the territory or on the purchaser retaining and using his purchased vehicle; it refused warranties or suggested that dealers refuse them. In a letter dated 15 May 1981, addressed to all agricultural tractor main dealers and open-territory retail dealers, for example, it was stated 'a warranty issued by Ford Motor Company Limited is only available on tractors purchased through an authorized Ford Tractor Dealer. Some unauthorized importers would appear to be offering "warranty insurance" and it is therefore advisable that farmers should verify the terms carefully because some warranty insurance policies have important exclusion clauses'. Ford sought to profit from differing safety regulations or to render the use of a parallel import illegal by refusing operating manuals in the importer's language. The letter of 15 May 1981 went on to state that 'the provision of an operator manual in English is a legal requirement in the UK and obviously this does not come with a tractor originally sold to another country unless the unauthorized importer can make special arrangements'. The Commission's evidence for these facts runs from 1964 until 1985, with the greater number of documents dating from 1976 to 1985. In spite of the changes made in Ford's distribution contracts (see recital 4 above), in 1990, the staff of some Ford dealers still understood that they were supposed not to accept

- (10) All the then Member States are mentioned in the documents as being involved with the exception of Luxembourg (the investigation took place before the accession of Spain and Portugal). The earliest document concerning parallel trade is dated 13 November 1964.

LEGAL ASSESSMENT

Article 85 (1)

- (11) Ford and its dealer customers are undertakings within the meaning of Article 85 (1). The agreements between these parties, as written or applied, constitute agreements between undertakings within the meaning of Article 85 (1).
- (12) The facts set out above show that Ford's contractual relations with its customers included a provision not to export or import or allow the export of the products, and other provisions for the hindrance of parallel trade in the products. These were general provisions relating to importing and exporting; they were not restricted to sales to unauthorized dealers which, whether exports or not, were forbidden by the notified dealer contracts. Therefore, these contractual relations constituted restrictions of competition within the meaning of Article 85 (1).
- (13) Special mention must be made of discounts dependent on non-export or penalties for exporting. It has been argued that, as the Commission accepts that it is lawful to prohibit active marketing outside an exclusive territory, it would be logical for the Commission to allow rewards for active marketing within.
- (14) However, as the Commission has already said in recital 55 of Decision 85/617/EEC in the Sperry New Holland case⁽¹⁾: 'Dealers must have the right to supply farmers from other territories without being penalized by the withdrawal of bonuses. Therefore agreements or practices

⁽¹⁾ OJ No L 376, 31. 12. 1985, p. 21.

concerning bonuses which are conditional on the machine not subsequently being exported by the customer, are prohibited. The same rationale might apply to the condition that the machine is registered for use within the territory of the dealer or that the warranty service be completed within that territory'.

- (15) Special mention should also be made of national safety legislation. The users of independently imported machinery should, of course, use it both safely and legally. Cooperation between Ford and its local dealers aimed at helping these users, at a reasonable price, to respect national law would have been a proper course of action. Contractual relations between them, however, aimed at exploiting safety regulations so as to discourage such importing constitutes an infringement.
- (16) Ford's actions examined above had the object and effect of preventing trade between Member States. There was no justification for Ford's seeking to deny the benefits of free trade to prospective purchasers of its products situated in a State in which the domestic price of its products was higher.
- (17) It must be concluded that these contractual relations constitute an infringement of Article 85 (1).

Article 85 (3)

- (18) As has been said in recital 4, Ford had been adapting its tractor dealer contracts so that their wording conformed with the conditions of Regulation (EEC) No 123/85, in order to claim benefit from the exemption under Article 85 (3) afforded by that Regulation (but, in 1990 and 1991, modified these contracts to conform with the conditions of Regulation (EEC) No 1983/83) (*). Earlier, Ford had notified a number of these contracts with a view to obtaining individual exemptions. These notifications did not, however, disclose the unwritten provisions of the contractual relations described in recitals 8 and 9 which are not, therefore, covered by those notifications.

(*) Agricultural tractors are not covered by Regulation (EEC) No 123/85 — see Commission press release IP(90) 917 of 16 November 1990.

No exemption under Article 85 (3) could, therefore, have been granted.

Article 3 of Regulation No 17

- (19) It appears necessary to condemn these infringements and require Ford so to act that its end users are free, and know that they are free, to buy Ford's products where they choose and that its dealers know that they are free to supply them.

Article 15 (2) of Regulation No 17

- (20) Ford's infringement was serious since it impeded competition from which consumers could have derived substantial benefits.
- (21) The Commission is, however, aware that its tolerance of the claims by Ford to benefit from the exemption afforded for motor vehicle distribution contracts by Regulation (EEC) No 123/85, even after it had carried out the greater part of its investigation in this case, has contributed to allowing Ford to believe that the tracing and prevention of sales to unauthorized dealers was legitimate.
- (22) The Commission also takes into account that the greater bulk of the infringements that have been established relate to a period six or more years ago and recognizes that, for example, the use made of registration documents (recitals 5 and 8) has ceased.
- (23) In these exceptional circumstances, and recognizing, in addition, that Ford's new owners now accept that Ford's conduct amounted to an infringement going beyond the limits of the activities described in Ford's various notifications, and are taking vigorous steps to avoid any repetition of these infringements, the Commission feels that it would be inappropriate to impose a fine on Ford,

HAS ADOPTED THIS DECISION:

Article 1

The contractual relations between Ford New Holland Limited, previously Ford Motor Company Limited, and the other companies within the group, of which the parent company was the Ford Motor Company and which distributed tractors within the Community, that forbade, discouraged or hindered parallel trade in its products constituted an infringement of Article 85 (1) of the EEC Treaty.

Article 2

An exemption under Article 85 (3) of the EEC Treaty for the arrangements mentioned in Article 1 is hereby refused.

Article 3

1. Ford New Holland Limited shall refrain from taking any measure having the same object or effect as those referred to in Article 1.

2. Ford New Holland Limited shall ensure that its resellers are free and know that they are free to sell, if so asked, and the purchasers of its products to buy its products wherever they choose within the Community.

Article 4

This Decision is addressed to:

Ford New Holland Limited,
Cranes Farm Road,
GB-Basildon, Essex SS14 3AD.

Done at Brussels, 15 December 1992.

For the Commission

Leon BRITTAN

Vice-president