II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 18 August 1982

relating to a proceeding under Article 85 of the EEC Treaty (IV/30.696 — Distribution system of Ford Werke AG — interim measure)

(Only the German text is authentic)

(82/628/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 85 thereof,

Having regard to Council Regulation No 17 of 6 February 1962 [1], and in particular Articles 3 (1) and 6 (1) thereof,

Having regard to the Main Dealer Agreement notified on 14 May 1976 by Ford Werke AG, Cologne, Federal Republic of Germany, in accordance with Article 4 of Regulation No 17,

Having regard to the investigations carried out on 13 and 14 May 1982 at the premises of Ford Werke AG,

Having regard to the Commission Decision of 2 July 1982 to initiate proceedings,

Having heard the undertakings concerned and interested third parties on 23 July 1982, in accordance with Article 19 (1) and (2) of Regulation No 17,

Having given the Advisory Committee on Restrictive Practices and Dominant Positions the opportunity to deliver its opinion of 23 July 1982,

Whereas :

THE FACTS

A. FORD WERKE AG'S DISTRIBUTION SYSTEM IN GERMANY

1. On the basis of a Main Dealer Agreement (Haupthändler-Vertrag) notified to the Commission on 14 May 1976, Ford Werke AG (Ford AG) operates a distribution system in Germany. It provides for the following restrictions :
   - — selection of dealers on grounds of quality and quantity, with allocation of an agreed area in which the dealer has special responsibility for marketing (marketing area) (Articles 6 and 7 of the Main Dealer Agreement),
   - — a ban on the sale of competing makes (Article 5 of the Main Dealer Agreement),
   - — a ban on the sale of Ford vehicles to dealers outside the distribution system (Article 2 of the Main Dealer Agreement),
   - — a ban on certain marketing activities outside the agreed area (Article 6 of the Main Dealer Agreement).
2. The main provisions of relevance to the present proceeding are the clauses in the Main Dealer Agreement which concern Ford AG's sales range and the vehicles which Ford main dealers are entitled to distribute. These clauses are as follows (*) :

[1] OJ No 13, 21. 2. 1962, p. 204/62.

(*) Translated from the German.

Article 1 (1)

'Products

means all vehicles and original parts as defined below and the bodies for vehicles included in the company's supply range. The other goods included in the supply range are the subject of separate agreements, and do not fall within the definition of products for purposes of this agreement.'

Article 1 (2)

'Vehicles

means the standard specification models of all the passenger cars, light commercial vehicles and chassis listed in Annex 1 to this Main Dealer Agreement.'

Annex 1 (extract)

'... for purposes of this agreement the main dealer is entitled to sell the following models :

Passenger cars

Fiesta,
Escort,
Taunus,
Capri,
Granada ;

Light utility vehicles

Transit (with petrol engine)...'

Article 2 (1)

'The company undertakes to sell its products to the main dealer. The main dealer undertakes to sell these products to final customers or to dealers.

(a) The main dealer may sell vehicles to final customers regardless of whether they are resident in his marketing area. ...

(b) The main dealer may sell vehicles to his own downstream organization and to other main dealers for resale ; he may further sell vehicles to dealers resident in another European Community country and authorized to sell such vehicles by a group company. ...'

3. As far as the main dealer's sales range coverage and distribution rights are concerned, the provisions of the Main Dealer's Agreement applied by the Ford Motor Company Limited (Ford Britain) in the United Kingdom are the same as those of the abovementioned Main Dealer Agreement (Haupthändler-Vertrag). The vehicles are described in very general terms, using model names (Fiesta, Escort, Cortina, Capri, Granada). There is no limitation of the delivery range based on vehicle specifications. Sales to final customers and to dealers resident in other European Community countries and authorized to sell Ford vehicles by other Ford companies are specifically and unreservedly permitted.

B. THE DISTRIBUTION OF RIGHT-HAND DRIVE VEHICLES BY FORD AG BEFORE 1 MAY 1982

4. Until now Ford AG has distributed right-hand drive vehicles in two main ways :

(1) through German Ford dealers under the Ford Main Dealer Agreements ;

(2) under the Visit Europe Plan (direct sales to individual customers).

5. The right-hand drive vehicles distributed by Ford AG are ordinary series-production vehicles. They were manufactured in its own works at Köln-Niehl, Saarlouis and Genk (Belgium) and supplied in one of two versions, depending on the legal requirements in force in their probable place of first registration. Those for sale under the Visit Europe Plan had a speedometer dial marked in miles, and exterior mirrors and lamps fitted for driving on the left ('UK specifications'). Those for supply to German dealers were generally fitted to meet the requirements of the German road traffic rules (with speedometer dial marked in kilometres rather than miles, for example —'German specifications').

The price to the dealer for right-hand drive vehicles was equal to that of the corresponding left-hand drive version, with the addition of a 'processing fee' of DM ... [1].

6. Sales of German-specification right-hand drive vehicles took place under the Ford Main Dealer Agreement. Ford AG regarded these vehicles as part of its sales range.

The German Ford dealers ordered these vehicles from the inland-orders processing department and they were taken into account when their quantity bonuses were worked out. Because they were fitted to meet the requirements of the German road traffic rules, however, a special ordering procedure was followed.

[1] In the published version of the Decision, some figures have hereinafter been omitted, pursuant to the provisions of Article 21 of Regulation No 17 concerning non-disclosure of business secrets.

7. Supplies of right-hand drive vehicles to German dealers have developed as follows :

1980	1981	1982 (1 January to 18 June)	Outstanding orders at 18 June 1982
...	...	...	...

The following were supplied under the Visit Europe Plan :

1980	1981	1982 (1 January to 15 June)	Outstanding orders at 18 June 1982
...	...	...	...

8. Demand for right-hand drive vehicles on the Continent has risen rapidly since spring 1981. In March 1981, ... vehicles were supplied ; in March 1982 there were ... The number of orders received by Ford AG rose even faster than the number of vehicles supplied. This can be clearly seen from the above 1982 figures for deliveries and outstanding orders.

9. The bulk of the right-hand drive vehicles sold by Ford AG on the Continent was intended for use in the United Kingdom ; this was the case for almost 100 % of vehicles sold under the Visit Europe Plan, and for about 80 % of those supplied to German dealers. A substantial proportion of the vehicles supplied to German dealers were first registered in Germany and only exported to the UK at a later date as used vehicles.

10. The number of German Ford dealers selling right-hand drive vehicles rose in parallel with the increase in sales :

1980	Second quarter of 1981	First quarter of 1982
...	...	...

Some 60 further dealers took part in the Visit Europe Plan. Thus in the first quarter of 1982 there were already more than ... main dealers selling right-hand drive vehicles, about ... % of the ... German Ford main dealers. However, the scale of involvement varied greatly from one dealer to another.

C. THE ENDING OF RIGHT-HAND DRIVE SALES BY FORD COMPANIES ON THE CONTINENT

11. In March 1982, in response to insistent requests by Ford Britain, the decision was taken within the Ford Group to end the distribution of right-hand drive vehicles by the Continental Ford companies. This decision of principle was put into effect in two stages :

— with effect from 1 April 1982 in the areas covered by what are known as the national sales companies, Ford Denmark and Ford Netherlands. Ford Belgium had already withdrawn right-hand drive vehicles from its sales range in June 1981,

— with effect from 1 May 1982 by Ford AG.

More than 95 % of the deliveries affected by that decision of principle were by Ford AG.

12. On 27 April 1982 Ford AG sent the following circular (*) to about ... German Ford dealers who had sold right-hand drive vehicles in the past :

'Right-hand drive Ford vehicles

Gentlemen,

In the past we have accepted orders received from you and a small number of other Ford main dealers for a negligible total of right-hand drive vehicles. As our business is to distribute vehicles for the German market, which requires only left-hand drive vehicles, right-hand drive versions are not part of our normal sales range. We have merely met the wishes of special customers in particular cases, such as those buying under the Visit Europe Plan and customers from the diplomatic corps or from among the Nato troops stationed in Germany.

Your function of exploiting the German market in the best way for our products is central to our domestic distribution organization. This alignment of the organization prevents us from maintaining our business in right-hand drive vehicles for a special public with special wishes.

We would therefore inform you that we can accept orders for right-hand drive vehicles only where you took them before 1 May 1982. This decision also applies to orders placed under the Visit Europe Plan. Orders which you took before 1 May 1982 and which reached us by 7 May 1982 will be dealt with in the same way as before.

(*) Translated from the German.

The Visit Europe Plan, with its personal specifications for tourists, diplomats and business travellers mainly from other continents, will continue to be available for left-hand drive vehicles. Right-hand drive vehicles may be obtained from Ford Personal Import and Export Ltd, 8 Balderton Street, London W1Y 2BN. If you are approached by customers looking for right-hand drive vehicles, we would ask you to refer them to that address or to any authorized Ford dealer in the United Kingdom. For the information of any such customer you will shortly be receiving an adequate number of copies of a prospectus in English which you are asked to display in your showrooms. In the meantime you should use the enclosed leaflet for the information of customers interested in right-hand drive vehicles.

Yours faithfully,

H. Dederichs'

D. DISTRIBUTION OF RIGHT-HAND DRIVE VEHICLES ON THE CONTINENT SINCE 1 MAY 1982

13. All purchases of right-hand drive vehicles on the Continent are now handled by Personal Import Export Limited (PIE), a subsidiary of Ford Britain. For sales to British military personnel in the Federal Republic, PIE will be using the services of NAAFI and other firms. German Ford dealers are excluded from this business. They are to refer potential customers to PIE or to Ford dealers in the United Kingdom.

14. PIE supplies only to the following categories of customers on the Continent:

— British military personnel,

— other Bitish citizens residing outside the United Kingdom on a permanent basis,

— diplomats and staff of international organizations,

— tourists and businessmen from non-Community countries.

15. PIE sells right-hand drive vehicles on the Continent at the corresponding German list prices with the addition of a supplement of .. %. Ford AG states that the vehicles, including any built in Germany or Belgium, must be trasnported to the United Kingdom and delivered from here to the Continent. The .. % supplement is to cover *inter alia* transport costs.

E. THE DIFFERENCES BETWEEN UNITED KINGDOM AND GERMAN PRICES

16. Comparing the before-tax dealer's selling price, the average price disparity between the United Kingdom and Germany is about .. % at present. This takes account both of the lowering of prices in Britain on 1 April 1982 and of the value of the differences in the specifications of the basic models in the two countries. The following table gives examples of price differences for some models:

Escort		
L 1·3 L five-door	+ DM ...	+ .. %
XR 3 three-door	+ DM ...	+ .. %
Taunus/Cortina		
L 2·0 L four-door	+ DM ...	+ .. %
Ghia 2·8 L four-door	+ DM ...	+ .. %
Granada		
S 2·0 L four-door	+ DM ...	+ .. %
Ghia 2·8 L automatic, four-door	+ DM ...	+ .. %
Capri		
S 2·0 L OHC	+ DM ...	+ .. %
Injection 2·8 L	— DM ...	— .. %

These figures are based on data supplied by Ford AG. The exchange rate used in the comparison was £ 1 = DM

F. THE REASONS WHY FORD AG STOPPED DISTRIBUTING RIGHT-HAND DRIVE VEHICLES — FORD'S ARGUMENTS

17. At the hearing on 23 July 1982 the Ford Group companies did not dispute that their objective in discontinuing sales of right-hand drive vehicles on the Continent was to keep up price levels of new Ford vehicles in the United Kingdom. Unrestricted parallel imports would bring heavy revenue losses, notably to Ford Britain, but also to Ford AG, because the intergroup prices to Ford Britain were higher than the prices to German dealers. In 1981 Ford AG's total output of right-hand drive vehicles was ..., of which ... were supplied directly to Ford Britain for sale in the United Kingdom.

Ford AG told the Commission that if an interim measure were adopted it could be forced on economic grounds to raise the prices for right-hand drive vehicles in Germany so as to discourage parallel exports to the United Kingdom.

As a result right-hand drive vehicles supplied to German dealers would be much dearer than comparable left-hand drive vehicles.

18. As a further reason for discontinuing right-hand drive sales, Ford AG stated that the ending of right-hand drive sales would make the dealers consolidate their sales promotion efforts in their marketing areas. They would no longer be enticed away from their real contractual function. The company could not, however, substantiate any neglect of sales in dealers' marketing areas resulting from right-hand drive sales.

G. THOSE CONCERNED BY FORD AG's MEASURES, THE PUBLIC AND COMPETITORS — THEIR REACTIONS

19. The ending of right-hand drive sales led to protests by several German dealers who were particularly affected, and by the association of German Ford dealers, the Deutsche Ford-Hændler Vereinigung e V.

20. The Commission received complaints from British citizens, who could no longer purchase right-hand drive vehicles on the Continent.

21. On 12 May 1982 the Bureau Européen des Unions de Consommateurs (BEUC) made an application to the Commission, pursuant to Article 3 of Regulation No 17, for the initiation of proceedings against four car manufacturers, including Ford AG.

22. Numerous publications, particularly the British press, have considered the steps taken by Ford AG as restraints on intra-Community trade and a challenge to the whole scheme of competition upheld by the Community and its institutions. Many questions have been put by Members of the European Parliament on the subject of restrictions of trade in right-hand drive vehicles with a view to the rapid re-establishment of the common market in cars.

23. The attention of the Community's car industry and car trade is riveted upon Ford AG's action and the Commission's reaction thereto. There is a risk that other manufacturers will follow the example of the Ford Group, which is market leader in the United Kingdom (.. % market share in 1981 with .. vehicles sold) and also in a strong position on the Irish market, and put an end in the near future to the parallel trade in right-hand drive vehicles, which, from their point of view, is undesirable.

LEGAL ASSESSMENT

A. CONDITIONS FOR THE ORDERING OF INTERIM MEASURES

I. Applicability of Article 6 (1) in conjunction with Article 3 (1) of Regulation No 17

24. Where an agreement is notified to the Commission for the purpose of exemption from the prohibition laid down in Article 85 (1), the Commission has to check in the context of the procedure under Article 6 (1), whether there is any infringement and, if so, whether it qualifies for exemption under Article 85 (3). Where an established infringement is still in effect and cannot be exempted, the Commission may, further to the procedure under Article 6 (1) and in application of Article 3 (1), require the undertaking concerned to bring the infringement to an end (cease-and-desist decision).

II. Power to order an interim measure where infringement is likely

25. The power to take a decision requiring the termination of an infringement must, as laid down by the Court of Justice of the European Communities in its Judgment in Case 792/79 R *Camera Care*/1980/ECR 119, notably Ground of Judgment 17, 'be exercised in the most efficacious manner best suited to the circumstance of each given situation'. Accordingly, such a decision 'may be preceded by any preliminary measures which ... appear necessary (to the Commission) at any given moment'. The adoption of interim measures consequently precedes the finding and also the termination of the infringement under Articles 85 or 86. It follows that at this stage of the proceeding it is not necessary to establish an infringement conclusively; a distinct likelihood of infringement is sufficient.

26. The interim measure must be restricted to the measures necessary for ensuring the effectiveness of any decision. These measures — referred to by the Court of Justice (ibid., Ground of Judgment 18) as 'protective measures' — may therefore comprise both an order to perform some act and to desist from some act, provided that they are indispensable and are restricted to what is necessary in the particular situation.

27. The Commission further adheres to the principles laid down for the adoption of interim measures in the abovementioned decision of the Court of Justice : they may be taken only in cases proved to be urgent and — where there is no party seeking their adoption — only in order to avoid a situation which is intolerable for the public interest (Ground of Judgment 19).

B. APPLICATION OF THESE PRINCIPLES TO FORD'S DISTRIBUTION SYSTEM

I. Likelihood of infringement of Article 85 (1)

1. *The restriction of competition in the distribution system notified*

28. The distribution system notified by Ford AG with a view to exemption under Article 85 (3) for application in Germany is based on conclusion of the Main Dealer Agreement with selected resellers (dealers).

The dealers are selected as follows ; a certain level of business attained by the firm ; employment of qualified staff ; after-sales service complying with guidelines established by Ford, provision of a guarantee, definition and allocation of an agreed area in which the dealer has special responsibility for marketing (marketing area) ; no more dealers appointed in this area.

29. The Main Dealer Agreement prohibits the dealers *inter alia* from :

— dealing in competing makes,

— selling Ford vehicles to dealers outside the distribution system,

— undertaking certain marketing activities outside the marketing area.

30. Such contractual provisions constitute restrictions of competition within the meaning of Article 85 (1), as pointed out by the Commission in its Decision of 13 December 1974 (BMW) (OJ No L 29, of 3. 2. 1975, p. 1, recitals 13 to 18).

2. *Possible exemption under Article 85 (3)*

31. Despite the fact that Ford's distribution system is probably caught by Article 85 (1), as in the case of BMW's distribution system (recitals 23 to 31 of the BMW Decision), consideration may be given to possible exemption from the prohibition in Article 85 (1).

One test for exemption would be *inter alia* that although Ford dealers should concentrate first and foremost on their customers in their marketing area, they should not be prevented from serving customers outside this area. Neither final customers nor other Ford dealers from other Member States should be barred from purchasing Ford vehicles from a dealer belonging to Ford AG's distribution network. The distribution system should not prevent an appointed dealer from competing with other appointed dealers in the Community.

32. Any such decision on exemption would have to take account of all objective legal and factual circumstances in which the distribution system operates.

(a) Practical application of Ford's distribution system until 30 April 1982

33. The wording of the Main Dealer Agreement and practical application thereof until 30 April 1982 would seem to have satisfied the above test ; the restrictions of competition which the distribution system probably contained may well have qualified for exemption.

In accordance with the wording of the Main Dealer Agreement, Ford AG undertook to supply *all vehicles* to the dealers, provided they were standard specification models. The vehicles were also described in very general terms by means of model names (Fiesta, Taunus, Granada) and there was no restriction in the delivery range based on vehicle specifications or registration regulations in the vehicles' possible country of destination. The Commission would not have agreed to such a restriction, had it been notified.

34. Until 30 April 1982 Ford kept to this wide definition of the term 'vehicle', in the sense that right-hand drive vehicles (1) were sold to dealers under the Main Dealer Agreement. All Ford's appointed dealers could without appreciable difficulties obtain right-hand drive vehicles produced and sold by Ford AG. Such sales were also included in the calculations of quantity bonuses.

(b) Arrangements after 1 May 1982

35. By means of the circular dated 27 April 1982 (recital 12) Ford abandoned this practical application of the distribution system with effect

(1) Vehicles with speedometer dial marked in kilometres, exterior mirror on the left, lamps fitted for driving on the right.

from 1 May 1982 with the aim of maintaining the high level of retail prices for Ford vehicles in the United Kingdom and Ireland. Ford's appointed dealers in Germany can now obtain from Ford AG only vehicles specifically equipped for the German market or similar markets (left-hand-drive, speedometer dial marked in kilometres, exterior mirror on the left).

The practical outcome of Ford AG's unilateral restriction of the term 'vehicle' in the Main Dealer Agreement is that Ford dealers can no longer compete in those areas of the common market where vehicles are sold with specifications different from the German ones. This applies particularly to the United Kingdom and Ireland. It leads to the sealing-off of markets within the Community.

36. Furthermore, as a result of the new arrangements, Ford dealers can no longer be fully operational and hence competitive in their marketing areas.

Before 1 May 1982 they could take orders from customers resident in their marketing areas even when they wanted to buy right-hand drive vehicles. Right-hand drive vehicles may be registered in Germany; they are not against German law. But that is now no longer possible, since such customers have to deal with the Ford subsidiary, PIE, in London. This also affects competition within the marketing area. Ford AG has thus created a situation in which vehicles produced by Ford AG are sold at fixed prices in the marketing area of its tied dealers by third parties outside the distribution system. That is inconsistent with the distribution system notified.

37. The object and effect of the practical application of the distribution system is to eliminate an essential feature of competition for Ford products at the retail stage. As a result appointed dealers and customers cannot benefit from price disparities at retail level. Consumers thereby lose the advantages of competition in the German car market.

The abovementioned condition for exempting the system is therefore no longer satisfied. Ford's distribution system based on the Main Dealer Agreements thus appears to constitute a non-exemptible restriction of competition which, since it is still in effect, should be brought to an end under Article 3 (1) of Regulation No 17.

3. *Ford's arguments*

38. However, Ford AG's arguments that:

— *vis-à-vis* left-hand drive vehicles, right-hand drive vehicles are 'other goods',

— a clear distinction has to be made between the production range, the sales range and the distribution system,

— its commitment to sell covers only those vehicles normally required in the dealer's marketing area,

do not detract from the above assessment.

39. No credence can be given to the assertion that right-hand drive vehicles are fundamentally different from left-hand drive vehicles and that they can no longer be regarded as 'standard specification models' within the meaning of Article 1 (2) of the Main Dealer Agreement. The manufacturing and technical differences are minor. Ford AG itself manufactures large quantities of right-hand drive vehicles and sells them in the Community; until 30 April 1982 they were also supplied to German dealers on the basis of the distribution agreement notified.

It would be incompatible with the very nature of an exemptible distribution system, in which appointed dealers must be able to compete outside their respective agreed areas, if the manufacturer were in a position to specify which vehicles the dealers could sell and in which areas of the common market. In fact, under a distribution system, customers must in principle be able to obtain from any appointed dealer all types of the manufacturer's series-production vehicles on sale within the Community. This is particularly pertinent in this case, since Ford AG manufactures right-hand drive vehicles itself and sells them in the United Kingdom.

II. Effect on trade between Member States

40. The distribution system as applied is liable to have an appreciable effect on trade (for the same reasons as in the BMW Decision, recital 19) because dealers who are prepared to export Ford products, but are not admitted to the system, are prevented from supplying customers in other

Member States. Moreover, as applied since 1 May 1982, the distribution agreement affects trade in particular, since it prevents the cross-border competition in right-hand drive vehicles represented by German dealers' sales to Ford's appointed dealers and to customers, notably in the United Kingdom and Ireland.

III. **The public interest**

41. The freedom of dealers participating in the distribution system to compete, with the manufacturer's goods, at retail level within the Community is just as intrinsic to the principles of competition, as such, as the opportunity for customers to purchase the goods distributed by the manufacturer in the Community from any appointed dealer, irrespective of the particular Member State in which the latter's premises are located. The practical application of Ford's distribution system prevents both dealers and consumers from exercising these rights.

42. As applied since 1 May 1982 the distribution system has provoked anger and indignation both on the part of dealers in Germany and of consumers in the United Kingdom and in Ireland, who consider themselves deprived of the advantages of a common market. An interim measure is required in the interests of countless individual consumers and of numerous dealers. Orders received by Ford AG for right-hand drive vehicles have recently been running at ... a month, which demonstrates the real scale on which consumers are affected. It should not be overlooked that over 30 % of passenger cars sold in the United Kingdom are produced by Ford.

The Ford Group is also market leader in Ireland (22 % market share). There are also fears that other manufacturers could follow the market leader's example. In addition, consumers in the United Kingdom and Ireland lose all the advantages resulting from the competitive situation created in their respective markets by parallel imports. Complaints by German dealers and their associations bear witness to the economic effect on resellers (recitals 19 and 20).

43. In applying its distribution agreement since 1 May 1982, Ford AG has created a situation which is intolerable for the public interest in the Community. It puts the whole system of competition in the Community in jeopardy in an unacceptable fashion and cannot be countenanced, not even until the adoption of a Decision on the application for exemption or of a cease-and-desist Decision.

IV. **Urgency**

44. It is also urgent that the Commission take action. Ford AG is only supplying in respect of orders for right-hand drive vehicles placed before 1 May 1982. As regards delivery periods, therefore, it is expected that supplies of right-hand drive vehicles to German dealers will be phased out. In the present state of the market, even a brief interruption in supplies of right-hand drive vehicles could have a long-term effect on parallel imports.

The purchase of a car is in many cases something which is done at a particular time and cannot be put off until later. Customers cannot be expected to delay purchase of a right-hand drive Ford vehicle until the Commission adopts a final Decision.

In order to eliminate effectively the new distribution arrangements' adverse repercussions on the Community's competitive mechanism and on those directly concerned, Ford AG should be obliged, within a short period, to revert to the distribution system as actually applied before 1 May 1982.

V. **Interests**

45. Ford AG changed its distribution arrangements on its own initiative and itself moved away from a distribution system which could probably have been exempted. It would therefore be reasonable to restore the status quo prior to 1 May 1982. Ford AG itself manufactures the right-hand drive vehicles in question. It achieves ample profits on its sales, prices being based on the German list price with a supplement of DM 360. Some loss of profits on the part of Ford AG's fellow-subsidiary, Ford Britain, may have to be accepted.

It would not result from the Commission's Decision, but merely from the re-establishment of free competition at the retail stage.

46. It is unlikely that there will be any substantial drop in sales of right-hand drive vehicles by Ford Britain or British retailers to the benefit of German retailers. German Ford dealers still have to concentrate on sales in their marketing areas. Sales outside this area, however significant and substantial, must consequently be of secondary importance only to these dealers. If sales of right-hand drive vehicles to resellers and customers outside the marketing area should assume

such proportions as to divert the dealers from their primary obligation of sales within their area, Ford could take steps in the context of Article 6 of the Main Dealer Agreement.

VI. **Equity**

47. The measures to be adopted must be of a temporary and conservatory nature and restricted to what is required in the given situation.

The Commission has not granted exemption for Ford's distribution system but exemption could most probably have geen granted for the system as applied until 1 May 1982. Had exemption been granted, abuse of the exemption could have been terminated by retroactively prohibiting specified acts by Ford AG under Article 8 (3) (d) of Regulation No 17. Such a step would merely have re-established the status quo prior to 1 May 1982.

The present circumstances are analagous to a situation to which Article 8 (3) (d) could be applied. Measures can accordingly be taken to re-establish the distribution system as applied by Ford until 1 May 1982. The interim measure may only apply until adoption of a Decision in the proceeding relating to the notification of the Main Dealer Agreement.

48. Moreover, the measure ordered must also contain a provision to prevent any evasion thereof. In addition to the actual withdrawal of the circular, it must also be specified that no measures may be taken to the same effect. There are indications that Ford AG is considering such measures (recital 17).

C. IMPOSITION OF PERIODIC PENALTY PAYMENTS IN THE EVENT OF DELAY

49. The Decision to adopt interim measures is preliminary to a Decision requiring termination of an infringement under Article 3 (1). The Decision on interim measures does not actually find that an infringement has been committed, but merely shows that infringement is highly probable. The grounds on which the Court of Justice concluded in *Camera Care* that the Commission has the power to adopt interim measures, namely to prevent the Commission's final Decision from becoming ineffectual or even illusory, also provide a basis for the Commission's power to give due weight to the interim measures. Periodic penalty payments must therefore be imposed to guarantee fulfilment by the undertaking of the obligations imposed by interim measure. In imposing such periodic penalty payments the Commission abides by the principles laid down by Article 16 of Regulation No 17,

HAS ADOPTED THIS DECISION :

Article 1

Ford-Werke Aktiengesellschaft is hereby required, within 10 days from the date of notification of this Decision :

(a) to withdraw its circular dated 27 April 1982 to German Ford dealers ;

(b) to inform German Ford dealers that right-hand drive vehicles still form part of Ford-Werke Aktiengesellschaft's agreed delivery range.

Ford-Werke Aktiengesellschaft shall refrain for the future from taking any measures having the same effect as the circular.

Article 2

In respect of the measures set out in Article 1 a periodic penalty payment of 1 000 ECU per day shall be payable by Ford-Werke Aktiengesellschaft for each day of delay.

Article 3

This Decision shall apply until adoption of the Decision concluding the proceeding.

Article 4

This Decision is addressed to Ford-Werke Aktiengesellschaft, Ottoplatz 2, D-5000 Cologne 21, Federal Republic of Germany.

Done at Brussels, 18 August 1982.

For the Commission

Frans ANDRIESSEN

Member of the Commission