

# COMMISSION

## COMMISSION DECISION

of 2 July 1984

relating to a proceeding under Article 86 of the EEC Treaty

(IV/30.615 – BL)

(Only the English text is authentic)

(84/379/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 <sup>(1)</sup>, as last amended by the Act of Accession of Greece, and in particular Article 3 thereof,

Having regard to the application lodged under Article 3 of Regulation No 17 on 6 November 1981 by Derek Merson, a sole trader,

Having regard to the Commission decision of 28 June 1982 to initiate proceedings in this case,

Having given BL the opportunity to make known its views on the objections raised by the Commission, in accordance with Article 19 (1) of Regulation No 17 and with 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 <sup>(2)</sup>,

After consultation with the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

### I. THE FACTS

#### A. BL

- (1) BL was given its present structure on 11 August 1975 and has been a public limited company since 31 July 1981.

- (2) BL is the second largest British car manufacturer and ranks seventh in Europe as a whole in terms of its turnover. On 31 December 1982 the United Kingdom Government owned 99,7% of the issued capital of the company with 69 000 private shareholders accounting for the remaining 0,3%.

#### B. THE BRITISH TYPE-APPROVAL REGULATIONS

- (3) In most circumstances passenger cars can be licensed for use on roads in Great Britain (England, Wales and Scotland) only if there is a type-approval certificate in force in respect of the vehicle in question whether manufactured in Great Britain or imported. The existence of such a type-approval certificate shows that the vehicle complies with certain standards of design, construction and environmental protection. The current regulations which govern the national type-approval arrangements are contained in Statutory Instrument No 1092 of 1979, as amended by Statutory Instruments Nos 1980/879 and 1165, 1981/696 and 1619 and 1982/8. These regulations are made by the Secretary of State for Transport pursuant to powers conferred on him by the Road Traffic Acts 1972 and 1974.

- (4) The national type-approval (hereinafter NTA) regulations do not apply to all classes of vehicle. In particular, a type-approval certificate will not be necessary for temporary or personal imports as defined by the regulations. In all other cases, however, NTA applies and compliance with the regulations is mandatory. Thus by virtue of section (51) (1) of the Road Traffic Act 1972 and NTA

<sup>(1)</sup> OJ No 13, 21. 2. 1962, p. 204/62.

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

Regulation 14 it is an offence for any person to use, or cause or permit to be used on roads in Great Britain a vehicle subject to NTA if it has not been certified. Similarly, by virtue of section 62 of the Road Traffic Act 1972, as amended, it is an offence to sell, supply or offer to sell or supply a vehicle subject to NTA if approval has not been granted.

- (5) Compliance with the NTA regulations, which is essentially a two-stage process, can be achieved in a variety of ways. Thus in the case of vehicles manufactured in the EEC and first sold in Great Britain, a manufacturer first obtains an NTA certificate from the Department of Transport and then supplies a certificate that a given vehicle conforms with the approved type on delivery of the vehicle in question.
- (6) Alternatively, a manufacturer – and in this case any other person including an importer – can apply for a certificate for a single variant of any model range. This application, which forms part of the standard procedure for obtaining NTA for vehicles manufactured outside the EEC, leads to the grant of a Primary Minister's Approval Certificate (PMAC). Thereafter subsequent Minister's Approval Certificates (sub-MACs) can either be provided by the manufacturer on request in the case where he (the manufacturer) has obtained the PMAC, or can be created by the importer himself in the case where he has obtained the PMAC.
- (7) While the NTA does permit an importer to apply for a PMAC, most importers – whether individuals or traders – are unlikely to take advantage of this opportunity since obtaining a PMAC independently may require physical testing of the vehicle, which costs approximately £ 20 000. However, even if the manufacturer provides systems information which would make physical testing unnecessary, the cost of obtaining a PMAC – approximately £ 800 – is likely to deter most importers. Except in cases where advantage is taken of the personal import exemption referred to in paragraph 4 above, individuals or traders need the cooperation of the motor manufacturer in order to comply with the NTA regulations.

#### C. THE DEMAND FOR IMPORTED BL VEHICLES

- (8) In 1981, BL was selling left-hand-drive (LHD) variants of its models in certain other Member

States at prices considerably lower than those charged by BL's authorized UK dealers for right-hand-drive (RHD) equivalents. In normal circumstances demand for attractively priced BL vehicles in the United Kingdom might have been satisfied by personal imports of RHD vehicles sold outside the United Kingdom.

- (9) At this time, however, BL only generally supplied its distributors in other Member States (except Ireland) with RHD variants under special schemes designed to facilitate purchases by diplomatic or military personnel. It followed that the only way in which demand for cheaper BL vehicles could be satisfied was by the importation of LHD variants.
- (10) When BL closed its assembly plant at Seneffe in Belgium in 1981, prospective UK purchasers seeking to take advantage of the price differentials between the United Kingdom and some other Member States were obliged to purchase vehicles produced in the United Kingdom to specifications appropriate for other Member States and then reimport them.
- (11) Having obtained an LHD vehicle the importer would be faced with several problems before he could use it lawfully on the roads. First, in order to obtain a certificate of conformity from the manufacturer, he would have to establish that certain minor specification changes had been carried out.
- (12) Once type approval was granted, the owner would then normally want to convert his vehicle to RHD even though driving an LHD vehicle is not prohibited. Conversion, however, does not present great technical difficulties and neither invalidates type approval nor contravenes UK safety regulations if carried out properly.
- (13) The path was therefore clear for substantial trade in BL vehicles to develop between Member States. Demand was particularly strong for the LHD version of the Metro which was covered by NTA certificates first granted on 17 July 1980.

#### D. BL'S REACTION

- (14) In the event, the importation of the Metro was not welcomed by BL's authorized UK dealers. This discontent found expression in BL Dealer Council

meetings, which provide an opportunity for authorized dealers and BL management to discuss their mutual concerns. Commission investigations subsequently revealed that BL responded to the dealers' complaints on 4 November 1981 by informing the Dealer Council that there was 'no longer any commercial justification for maintaining UK type approval for LHD cars and that existing approvals should be allowed to lapse from October 1981'.

- (15) However, any impression that BL gave to the Dealer Council that type approval would no longer be available after October 1981 as a result of its actions was erroneous. In fact all vehicles manufactured before the date on which type approval is intended to lapse can be registered at any time. Indeed, even those vehicles manufactured after that date can be registered so long as an application is made within six months. In the case of the LHD variant of the Metro it follows that vehicles manufactured before October 1981 can still be registered, whereas vehicles manufactured after that date could be registered up until 1 April 1982.
- (16) In spite of the fact that BL ought to have been aware of the continued availability of type approval for the LHD Metro, examination of BL's business records for the period October 1981 to April 1982 showed that the company had on occasion rejected requests for assistance addressed to it, on the grounds that type approval did not exist.
- (17) BL's decision not to renew type approval, and its assertions that such approval did not exist when it was still in force, were not the only measures the company took which impeded the reimportation of LHD Metros. Other documents examined by the Commission show that in the period June 1981 to January 1982 BL consistently refused to provide the information necessary to obtain certificates of conformity. Whether BL denied existence of a type approval or simply refused to assist purchasers in obtaining certificates of conformity by withholding vital information, the result was the same. In either case, the LHD Metros could not be lawfully used on the roads in England, Scotland and Wales.
- (18) In particular, the Commission's inspectors examined a so-called 'pirate' file at BL's premises.

This file contained correspondence with several car dealers and individuals which disclosed the following facts: on 18 June 1981, BL informed, Auto Europa of Birmingham that no certificates of conformity were available for LHD Metros and declined to provide the relevant NTA numbers; on 23 June 1981, BL wrote to International Cars RHT Ltd of Edgware in similar terms; on 11 August 1981, BL wrote to Mrs Fox of Pevensey denying, in effect, that NTA for LHD Metros applied to vehicles sold in Member States other than the United Kingdom; on 16 November 1981, BL informed Royal Cars AMS Autos Ltd of London that it would not provide NTA numbers for LHD Metros; on 17 November 1981, BL wrote to Mr Merson, the complainant in this case, to inform him that BL was not able to provide NTA numbers for any LHD Metro; on 12 January 1982, BL informed Mr Doyle of Preston that LHD Metros were not type-approved. At all material times, however, type approval for the LHD Metro was still in force and certificates of conformity could have been granted.

- (19) It was against this background that a question was asked in the House of Commons on 2 February 1982 which was designed to elicit information about Government intentions in this area. In reply, the Secretary of State for Transport stated that his officials were approaching the manufacturers and their accredited dealers to discuss how individual purchasers and individual dealers could be given prompt and ready access to the type-approval information they needed and to which they had a right under international trading law.
- (20) Three weeks later, BL indicated that it had reviewed its policy and was now able to issue the necessary certificates. However, BL decided to impose a charge of £ 150 for creating a certificate and requested payment before providing the information. The fact that the work involved in granting a certificate was purely administrative in nature prompted the Commission to investigate BL's pricing policies with a view to discovering whether the figure of £ 150 was excessive or discriminatory.
- (21) The investigation showed that BL had charged varying amounts for the different sorts of type-approval information. Thus BL had charged

either nothing or £ 25 in respect of each vehicle (LHD or RHD), whether the applicant was a private individual or a trader. However, in July 1981, when concern was first being voiced at Dealer Councils about the influx of LHD vehicles, BL raised its charge for granting a certificate of conformity to a trader for LHD variants to £ 150 whilst retaining the £ 25 charge for private individuals and RHD vehicles. At the same time BL also raised the charge for granting a sub-MAC to LHD models that had been manufactured at Seneffe and for which it had obtained a PMAC. In this case the price was raised from £ 100 to £ 150.

(22) With supplies of RHD and LHD BL variants manufactured outside the United Kingdom rapidly running out as a result of the closure of BL's plant at Seneffe in January 1981 and the number of RHD vehicles manufactured in the United Kingdom but sold abroad being so limited, the most significant charge levied by BL was the £ 150 on LHD variants reimported by traders. This sum of £ 150 proved to be six times higher than the price charged to private importers or traders for the small number of RHD variants of the same vehicle that found their way into the United Kingdom, and yet, as the Commission investigation showed, the amount of administrative time involved was the same in the case of both variants – namely two hours of clerical work.

(23) It was with a view to avoiding these obstacles that some traders tried to obtain BL's assistance in seeking a PMAC for their own reimports. With BL's help a PMAC could have been obtained for approximately £ 800 irrespective of whether an NTA certificate was in force or not. However, BL refused to furnish traders with the systems-approval information necessary to obtain this alternative form of type approval. Furthermore when BL decided to re-apply for an NTA certificate for LHD models towards the end of 1982 BL continued to be uncooperative. In fact the only concession that BL was prepared to make to traders was to reduce the charge for granting a certificate of conformity from £ 150 to £ 100. However this charge, which became effective on 16 March 1983, when the new LHD type approval came into force, appears to have been achieved at the expense of individual purchasers of LHD variants who now have to pay £ 100 instead of £ 25.

## II. LEGAL ASSESSMENT

### A. ARTICLE 86

(24) Article 86 of the EEC Treaty prohibits as incompatible with the common market any abuse by an undertaking of a dominant position within the common market or a substantial part thereof in so far as it may affect trade between Member States.

#### (a) Dominance

(25) (i) *The relevant market*

The relevant market is the market for the supply of information relating to national type-approval certification needed by an importer seeking to license a BL vehicle for use on the roads in Great Britain, which is a substantial part of the common market.

(ii) *BL's dominant position*

BL's dominant position in the above market arises by virtue of the provisions of the United Kingdom Road Traffic Acts and the Motor Vehicles (Type Approval) (Great Britain) Regulations made thereunder which authorize BL alone to apply for national type approval for vehicles of its own manufacture and subsequently to grant the certificates of conformity which are necessary if a vehicle is to be licensed and used on the road. The technical availability of the alternative PMAC procedure for obtaining type approval for individual vehicles does not in any way undermine this analysis. In the first place the cost of obtaining such approval independently – namely £ 20,000 – is prohibitive, and in the second place BL did not and will not furnish importers with information necessary to obtain the PMAC for £ 800. In these circumstances the PMAC procedure cannot be considered as a substitute.

#### (b) Abuse

(26) BL has abused its dominant position in Great Britain, which is a substantial part of the common market, in several ways. First, BL refused to supply a number of traders and private individuals

wishing to reimport LHD Metros into Great Britain with certificates of conformity in spite of the fact that an NTA certificate for these vehicles was in force at the time of application. Secondly, BL deliberately decided not to update the NTA certificates for the LHD variant of the Metro. Thirdly, when BL finally decided to update its NTA certificate for the LHD Metro, it demanded a fee for the grant of a certificate of conformity which was both excessive and discriminatory, having regard to the fee charged by BL for the RHD variant of the same vehicle. The Commission's investigations referred to in paragraph 18 above show that BL's refusal to assist importers was consistent. As a result, BL Metros that had been imported from other Member States could not be legally used and vehicles for which a demand clearly existed and continues to exist are subjected to a penalty. By its actions BL has therefore abused its dominant position in the market for the provision of information relating to national type-approval certification necessary for the licensing of its vehicles for use on the roads in Great Britain.

(27) Such behaviour cannot be justified on any objective grounds. The first abuse – namely the refusal to grant certificates of conformity – cannot simply be explained away as an administrative error. Such decisions in the BL organization are not taken at a local level but are the responsibility of one centralized department. In these circumstances the Type Approval Department is unlikely to have been unaware of the company's desire to impede reimports and BL's explanation is therefore not convincing. BL's attempt to justify its second abuse – namely its decision not to update the NTA certificate for the LHD Metro – must be viewed in the same light. The company's desire to reduce administrative costs might have been a credible explanation for its behaviour had its decision not been taken at a time when the Dealer Council was urging BL to restrict the flow of reimported Metros into the United Kingdom.

(28) Very much the same considerations apply to BL's attempt to show that the charge of £ 150 for the granting of a certificate of conformity was justified by an increase in overheads. Once again the timing of BL's action and the degree of the increase in price are inconsistent with its explanations. The weakness of BL's justification for the charge of £ 150 becomes more apparent still in the light of its decision actually to reduce the charge to traders by £ 50 to £ 100 whilst at the same time increasing the charge to individuals to £ 100. It is thus apparent

that cost factors were not the decisive element in the determination of the amount of these charges. What is more, the charge of £ 100 is well in excess of the sum that the Court of Justice indicated as being reasonable in its judgment in Case 26/75 *General Motors v. Commission* <sup>(1)</sup>, once allowance is made for inflation. In the circumstances, both the charge of £ 150 and £ 100 to traders, and the revised charge of £ 100 to private individuals constitute penalties on reimports and therefore amount to abuses of BL's dominant position.

(c) **Effect on trade between Member States**

(29) BL impeded trade between Member States by preventing owners of imported vehicles from licensing those vehicles for use on the roads in Great Britain. BL's action also had the effect of deterring would-be importers from taking advantage of lower prices for BL vehicles elsewhere in the common market. In particular, car dealers who would otherwise have been able to satisfy a considerable demand for Metros were prevented from doing so. Furthermore, when NTA was made available, BL's charge of £ 100 for the provision of type-approval information to importers amounts to a penalty on parallel trade. BL therefore impeded, and continues to impede, the free movement of goods and economic interpenetration which the EEC Treaty aims to encourage.

B. ARTICLE 15 OF REGULATION No 17

(30) Article 15 (2) (a) of Regulation No 17 empowers the Commission, by decision, to impose fines of between 1 000 and 1 000 000 units of account or a sum in excess thereof (but not exceeding 10 % of the turnover of the preceding business year) on an undertaking participating in the infringement where, either intentionally or negligently, such undertaking infringes Article 86 of the Treaty.

(31) In fixing the amount of the fine in this case regard should be had to the gravity and the duration of the infringement. BL ought to have known that its

<sup>(1)</sup> [1975] ECR 1367.

actions were a variety of those held to be abusive by the Commission in Decision 75/75/EEC (General Motors Continental) <sup>(1)</sup>. The infringements lasted for a considerable period of time – namely from October 1981 until March 1983 as regards suspension of NTA for LHD variants, from June 1981 to the present day in respect of charges for the supply of certificates of conformity and from October 1981 to April 1982 in respect of the failure to grant certificates of conformity when type approval was still in force. Although the evidence collected by the Commission indicates that BL's infringements were committed intentionally, BL's cooperative attitude in relation to certain of the infringements found to have been committed in this decision should be taken into account in assessing the level of the fine,

charging £ 100 for the same service to both independent dealers and individuals since 16 March 1983, when NTA for the LHD variant of the Metro was renewed.

*Article 2*

In respect of the infringements set out in Article 1, a fine of 350 000 (three hundred and fifty thousand) ECU, that is £ 207 876,55, is imposed on BL. This fine shall be paid within three months of the date of notification of this Decision into the account of the Commission of the European Communities with Lloyds Bank, Overseas Department, PO box 19, 6 Eastcheap, UK-London (account No 1086341).

*Article 3*

BL shall bring the infringement described in Article 1 (iii) to an end and shall inform the Commission promptly of measures taken to this effect.

*Article 4*

This Decision is addressed to:  
BL plc,  
33 – 35 Portman Square,  
UK-London W1H 0HQ.

This Decision is enforceable pursuant to Article 192 of the EEC Treaty.

Done at Brussels, 2 July 1984.

*For the Commission*  
Frans ANDRIESEN  
*Member of the Commission*

HAS ADOPTED THIS DECISION:

*Article 1*

It is hereby established that BL has infringed and continues to infringe Article 86 of the Treaty establishing the European Economic Community in the following respects:

- (i) by refusing to issue certificates of conformity between June 1981 and April 1982 when an NTA certificate was in force for the LHD variant of the Metro;
- (ii) by deciding in November 1981 no longer to seek NTA for the LHD variant of the Metro as a means of impeding reimportation of this vehicle into the United Kingdom from other Member States;
- (iii) by charging £ 150 to traders for the provision of certificates of conformity in respect of LHD Metros between August 1981 and April 1982 and by

<sup>(1)</sup> OJ No L 29, 3. 2. 1975, p. 14.