OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER

delivered on 17 October 2002 [1]

I — Introduction

1. The subject of this appeal is the judgment of the Court of First Instance of 6 July 2000 in *Volkswagen* v *Commission*, [2] partially annulling Commission Decision of 28 January 1998 relating to a proceeding under Article 85 of the EC Treaty [3] and reducing to EUR 90 000 000 the fine of ECU 110 000 000 imposed by the Commission. The main appeal has been brought by the defendant undertaking, and the Commission has cross-appealed.

II — The facts and the relevant provisions

2. As they are stated in the contested judgment, the facts and relevant provisions with which the present matter is concerned may be reproduced as follows.

3. The appellant is the holding company of the Volkswagen group. The group's business activities include the manufacture of motor vehicles of the Volkswagen, Audi, Seat and Skoda makes, and the manufacture of components and spare parts. The group also has industrial engines, financial services and insurance operations. The appellant has a 98.99% holding in Audi AG (Audi). Audi's main business, which is established at Ingolstadt, Germany, is the manufacture and distribution of vehicles of the Audi make, and the manufacture of components and engines.

4. Motor vehicles of the Volkswagen and Audi makes are sold in the Community through selective distribution networks. The import into Italy of those vehicles, their spare parts and accessories, is carried out exclusively by Autogerma SpA (Autogerma), a company incorporated under Italian law, established in Verona, Italy, which is a wholly owned subsidiary of the appellant and which accordingly constitutes, with the appellant and Audi, one economic unit. Distribution in Italy takes place through legally and economically independent dealers, who are nevertheless contractually bound to Autogerma.

1 — Original language: Spanish.

2 — Case T-62/98 *Volkswagen* v *Commission* [2000] ECR II-2707, hereinafter 'the contested judgment'.

3 — Case IV/35.733 — VW, OJ 1998 L 124 p. 60, hereinafter 'the Decision'.

5. Dealership contracts are, subject to certain conditions, exempted from Article 85(1) of the EC Treaty (now Article 81(1) EC) by Commission Regulation (EEC) No 123/85 of 12 December 1984 on the application of Article 85(3) of the EEC Treaty to certain categories of motor vehicle distribution and servicing agreements,[4] replaced, with effect from 1 October 1995, by Commission Regulation (EC) No 1475/95 of 28 June 1995.[5] According to Article 7 of Regulation No 1475/95, the prohibition laid down in Article 85(1) of the Treaty was not to apply during the period from 1 October 1995 to 30 September 1996 to agreements already in force on 1 October 1995 which satisfied the conditions for exemption provided for in Commission Regulation (EEC) No 123/85.

6. Article 1 of Regulation No 123/85 provides:

'Pursuant to Article 85(3) of the Treaty it is hereby declared that subject to the conditions laid down in this Regulation Article 85(1) shall not apply to agreements to which only two undertakings are party and in which one contracting party agrees

to supply within a defined territory of the common market

— only to the other party, or

— only to the other party and to a specified number of other undertakings within the distribution system, for the purpose of resale certain motor vehicles intended for use on public roads and having three or more road wheels...'.

7. Article 2 of Regulation No 123/85 states that the exemption is also to apply 'where the obligation referred to in Article 1 is combined with an obligation on the supplier [not] to sell contract goods to final consumers... in the contract territory'.

8. Article 3 of Regulation No 123/85 provides: 'The exemption shall also apply where the [selective distribution] obligation

4 — OJ 1985 L 15, p. 16.
5 — OJ 1995 L 145, p. 25.

is combined with an obligation on the dealer:

...

8. outside the contract territory

(a) not to maintain branches or depots for the distribution of contract goods or corresponding goods;

(b) not to seek customers for contract goods or corresponding goods;

9. not to entrust third parties with the distribution or servicing of contract goods or corresponding goods outside the contract territory;

10. to supply to a reseller:

(a) contract goods or corresponding goods only where the reseller is an undertaking within the distribution system,

...

11. to sell motor vehicles within the contract programme or corresponding goods to final consumers using the services of an intermediary only if that intermediary has prior written authority to purchase a specified motor vehicle and, as the case may be, to accept delivery thereof on their behalf.'

9. The wording of Articles 1 to 3 of Regulation No 1475/95 is almost identical to that of the corresponding provisions of Regulation No 123/85. Article 6(1) of Regulation No 1475/95 provides:

'The exemption shall not apply where:

...

(3) ... the parties agree restrictions of competition that are not expressly exempted by this Regulation; or

...

(7) the manufacturer, the supplier or another undertaking within the network directly or indirectly restricts the freedom of final consumers, authorised intermediaries or dealers to obtain from an undertaking belonging to the network of their choice within the common market contract goods or corresponding goods..., or the freedom of final consumers to resell the contract goods or corresponding goods, when the sale is not effected for commercial purposes; or

(8) the supplier, without any objective reason, grants dealers remunerations calculated on the basis of the place of destination of the motor vehicles resold or the place of residence of the purchaser...'.

10. From September 1992 and during 1993 the value of the Italian lira declined greatly in comparison with the German mark. However, the appellant did not make a proportionate increase in its sales prices in Italy. The price differences which resulted from that situation made it economically advantageous to re-export vehicles of the Volkswagen and Audi makes from Italy.

11. During 1994 and 1995 the Commission received letters from German and Austrian consumers complaining of obstacles to the purchase in Italy of new motor vehicles of the Volkswagen and Audi makes for immediate re-export to Germany or Austria.

12. By letter of 24 February 1995 the Commission informed the appellant that, on the basis of complaints from German consumers, it had concluded that the appellant or Autogerma had forced Italian dealers for Volkswagen and Audi makes to sell vehicles solely to Italian customers by threatening to terminate their dealership contracts. In the same letter the Commission gave formal notice to the appellant to put an end to that barrier to re-exportation and to inform it, within three weeks of the date of receipt of that letter, of the measures adopted in that regard.

13. In its letter of 30 March 1995 the appellant replied that the difficulties encountered by some consumers might

have been caused by a problem of communication, in particular between Autogerma and the Italian dealers. It annexed to its letter a copy of a circular which had been sent on 16 March 1995 to the Italian dealers in order to eliminate any possibility of misunderstanding.

14. By letter of 2 May 1995 the Commission replied that the circular of 16 March 1995 had not put an end to the barriers to re-exportation. It referred to new complaints from several German and Austrian consumers.

15. On 17 October 1995 the Commission adopted a decision ordering investigations under Article 14(3) of Regulation No 17 of the Council of 6 February 1962: First Regulation implementing Articles 85 and 86 of the Treaty. [6] The investigations took place on 23 and 24 October 1995 at the premises of the appellant and Audi and, in Italy, at those of Autogerma, Auto Brenner SpA in Bolzano, Auto Pedross Herbert & Co. in Silandro, Dorigoni SpA in Trento, Eurocar SpA in Udine, IOB Silvano & C. SRL in Gemona, Adriano Mansutti in Tricesimo, Günther Rabanser in Pontegardena, Mutschlechner SAS in Brunico and Franz Nitz in Vipiteno. Through those investigations the Commission sought to establish whether the appellant and Audi had entered into agreements or engaged in concerted practices with Autogerma and their dealers in Italy by which new motor vehicles were not to be sold to final consumers resident in Member States other than Italy.

16. On the basis of the documents found during those investigations the Commission reached the conclusion that the appellant, Audi and Autogerma had introduced, with their Italian dealers, a market-partitioning policy. On 25 October 1996 the Commission served a statement of objections to that effect on the appellant and Audi.

17. On 18 November 1996 the appellant and Audi requested access to the file. They inspected the file on 5 December 1996.

18. On 19 December 1996 Autogerma, at the express request of the appellant, sent a circular to the Italian dealers stating that exports to final users (including those through intermediaries) and to dealers belonging to the distribution network were lawful and would therefore not be penalised. The circular also indicated that the discount granted to dealers on the sale price of vehicles ordered, known as the margin, and payment of their bonus did not depend in any way on whether the vehicles had been sold within or outside their contract territory.

6 — OJ, English Special Edition 1959-1962, p. 87.

19. Observations on the statement of objections were sent by the appellant and Audi to the Commission by letter of 12 January 1997.

20. They also put forward their views to the competent departments of the Commission at a hearing on 7 April 1997.

21. On 7 October 1997 the appellant's lawyer had, at his request, a further meeting with the director of those departments concerning, *inter alia*, the question whether the Commission was of the view that the infringements found had ceased or were continuing.

22. On 28 January 1998 the Commission adopted Decision 98/273/EC, relating to a proceeding under Article 85 of the EC Treaty, addressed solely to the appellant and declaring it to be responsible for the infringement found because Audi and Autogerma are its subsidiaries and their activities were known to it. As regards the Italian dealers, the Commission states that they did not participate actively in the barriers to re-export but, as victims of the restrictive policy put into practice by the manufacturers and Autogerma, were forced to consent to that policy.

23. As regards the matters alleged against the appellant, the Commission cites a series of documents as evidence, first, that the appellant and Audi, by targeted measures and a task force with its own human and material resources, prevented the re-exportation of vehicles from Italy to Germany and other Member States and, secondly, that, acting on instructions from the appellant and Audi, Autogerma carried out rigorous investigations at Italian dealers in order to curb the practice of some of them by which they sold motor vehicles to foreign purchasers, and imposed heavy penalties on some of those dealers.

24. As regards the measures taken by the appellant and Audi, the Commission cites the 'split-margin system' applicable to sales of the new Volkswagen Polo in Italy. Under that system, the dealer, instead of receiving an overall discount of 13% on the amount invoiced for each vehicle ordered, was awarded a discount of only 8% on invoice and a further 5% to be paid later, solely upon registration of the vehicle in the contract territory. According to the decision, Audi established a similar system for the sale of the Audi A4 motor car in Italy. The Commission also mentions the reduction by the appellant and Audi of dealers' stocks. That measure, accompanied by a policy of restricted supply, caused a considerable increase in delivery times and led some customers to cancel their orders. It also allowed Autogerma to refuse supplies requested by German dealers (cross-deliveries inside the Volkswagen distribution network). The Com-

mission also refers to the conditions laid down by Audi and Autogerma for calculating the quarterly 3% bonus paid to dealers on the basis of the number of vehicles they had sold.

25. Amongst the penalties imposed by Autogerma on the dealers, the Commission refers to the termination of certain dealership contracts and the cancellation of the quarterly 3% bonus for sales outside the contract territory.

26. The decision states that the measures adopted by the appellant, Audi and Autogerma to restrict sales of motor vehicles by Italian dealers related to deliveries both to dealers who were not part of the network ('independent dealers') and to final users and Volkswagen and Audi dealers residing or established in Member States other than Italy.

27. The Commission also cites documents to show that the above measures in fact restricted trade between Italy, on the one hand, and Germany and Austria, on the other, in that orders by numerous customers residing in the latter two States were refused by the Italian dealers.

28. The Commission concludes that those measures, which all form part of the contractual relations which the manufacturers maintain, through Autogerma, with the dealers in their selective distribution network, are the result of an agreement or concerted practice and constitute an infringement of Article 85(1) of the Treaty since they represent the implementation of a market-partitioning policy. It explains that those measures are not covered by Regulation No 123/85 and Regulation No 1475/95, since no provision of those regulations exempts an agreement which aims to prevent parallel exports by final consumers, by intermediaries acting on their behalf or by other dealers in the dealer network. It also states that an individual exemption cannot be granted in the present case, since the appellant, Audi and Autogerma did not notify any aspect of their agreement with the dealers, and that in any event the barriers to re-exportation are at variance with the objective of consumer protection set out in Article 85(3) of the Treaty.

29. In answer to the submission by the appellant and Audi, in their comments on the statement of objections, that some of the documents on which the Commission relies are merely internal reports of the Volkswagen group which represent only an internal discussion and occasionally reflect conflicts of interests within the group, the Commission states that the conflicts within the group are irrelevant, since they do not alter the fact that the appellant and its subsidiaries, Audi and Autogerma, entered into an agreement with their dealers which

is incompatible with the Community competition rules. In answer to the line of argument also set out in the comments on the statement of objections to the effect that, first, the largest proportion of re-exports from Italy to Germany and Austria was accounted for by unlawful supplies to independent dealers and that sales to private individuals (including those through intermediaries) and to other Volkswagen and Audi dealers were negligible, the Commission states that even if only a tiny number of sales to final consumers, their intermediaries or other dealers in those makes is prevented, trade between Member States is nevertheless appreciably affected and there is therefore an infringement of the Community competition rules.

30. In Article 1 of the Decision the Commission finds that the appellant and its subsidiaries Audi and Autogerma have infringed Article 85(1) of the EC Treaty by entering into agreements with the Italian dealers in their distribution network in order to prohibit or restrict sales to final consumers coming from another Member State, whether in person or represented by intermediaries acting on their behalf, and to other authorised dealers in the distribution network who are established in other Member States.

31. In Article 2 of the Decision it orders the appellant to bring an end to the infringements and requires it to take, *inter alia*, the measures set out there.

32. In Article 3 of the Decision the Commission imposes a fine of ECU 102 million on the appellant in view of the gravity of the infringement found. The Commission contends that the obstruction of parallel exports of vehicles by final consumers and of cross deliveries within the dealer network hampers the objective of creating a common market, which is one of the fundamental principles of the European Community, and the infringement found is therefore particularly serious. Moreover, it points to the fact that the relevant rules have been settled for many years and the fact that the Volkswagen group has the highest market share of any motor vehicle manufacturer in the Community. The Commission also refers to documents as proof that the appellant was fully aware that its behaviour infringed Article 85 of the Treaty. It states, moreover, that the infringement lasted for more than 10 years. Lastly, the Commission took into account, as aggravating circumstances, the fact that the appellant, first, did not put an end to the measures in question even though it had received two letters from the Commission in 1995 pointing out that preventing or restricting parallel exports from Italy was an infringement of the competition rules and, second, had used the dependence of dealers on a motor vehicle manufacturer, and so caused, in this case, quite substantial

turnover losses for a number of dealers. The decision explains that the appellant, Audi and Autogerma threatened more than 50 dealers that their contracts would be terminated if they continued to sell vehicles to foreign customers and that 12 dealership contracts were in fact terminated, endangering the existence of the businesses concerned.

33. The decision was notified to the appellant by letter of 5 February 1998.

34. By letter of 2 March 1998 the appellant informed the Commission of the measures taken to implement Article 2 of the Decision and asked whether they were in fact in line with those required by that article.

35. By letter of 27 March 1998 the Commission replied that the measures were, in essence, in conformity with those required by the decision.

36. By application lodged at the Registry of the Court of First Instance on 8 April 1998 the appellant brought an action for annulment.

37. Following the written and oral procedures, during which, by way of measures of organisation of procedure, the parties were required to reply to written questions and to produce specific documents, the Court of First Instance gave its judgment, in which it:

'1. Annuls Commission Decision 98/273/EC of 28 January 1998 relating to a proceeding under Article 85 of the EC Treaty (Case IV/35.733 — VW) in so far as it finds that:

(a) a split margin system and termination of certain dealership contracts by way of penalty were measures adopted in order to hinder re-exports of Volkswagen and Audi vehicles from Italy by final consumers and authorised dealers in those makes in other Member States;

(b) the infringement had not completely ceased between 1 October 1996 and the adoption of the decision;

2. Reduces the amount of the fine imposed on the applicant by Article 3 of the contested decision to EUR 90 000 000;

3. Dismisses the remainder of the application;

4. Orders the applicant to bear its own costs and to pay 90% of the costs incurred by the Commission;

5. Orders the Commission to bear 10% of its own costs.'

38. On 14 September 2000 Volkswagen lodged the present appeal. In its response, dated 29 November 2000, the Commission cross-appealed.

The case was assigned, for examination, to the Sixth Chamber of the Court of Justice.

The hearing in the appeal, at which Volkswagen and the Commission presented oral argument, was held on 27 June 2002.

III — Consideration of the original appeal

39. In support of its appeal, Volkswagen puts forward nine pleas in law.

First plea in law, alleging infringement of Article 81(1) EC as regards the classification of the bonus scheme

40. Under its first plea, the appellant complains that the Court of First Instance committed an error of law in its classification of the '15% rule', according to which both sales within and outside the contract territory were taken into account for the purpose of payment of a bonus of up to 3% to dealers, but the latter sales only up to a maximum of 15% of total sales. According to paragraph 49 of the contested judgment, the application of that rule, in so far as it restricted the opportunities for final users and dealers in other Member States to acquire vehicles in Italy, encouraged partitioning of the markets, a situation unprotected by Regulation No 123/85 and incompatible with Article 81(1) EC. Again according to that judgment, the infringement is continuing, although no other anti-competitive conduct on the part of the defendant undertaking between 1988 and 1992 has been shown.

41. According to Volkswagen, the 15% rule is not incompatible with Article 81(1) EC, since a dealer has fewer costs in respect of a sale made outside the contract territory than in respect of those made within it. He makes these savings because he has no advertising and commercial costs, which are prohibited by contract outside the respective territories, or costs in respect of after-sales service. The loss of bonus is offset by a comparable advantage, so it is therefore economically neutral and cannot have a restrictive effect on competition because it is compatible with Article 81(1) EC.

42. In any event, in the appellant's submission, the 15% rule falls within the exemption granted by Regulation No 123/85. In the first recital in the preamble to that regulation, the contracts which are subject to the exemption are defined as those by which the supplying party entrusts to the reselling party the task of promoting the distribution and servicing of certain products of the motor vehicle industry *in a defined area* and by which the supplier undertakes to supply contract goods for resale only to the dealer, or only to a limited number of undertakings within the distribution network besides the dealer, *within the contract territory*.[7] Furthermore, according to the ninth recital, 'the restrictions imposed on the dealer's activities outside the allotted area lead to more intensive distribution and servicing efforts in an easily supervised contract territory, to knowledge of the market based on closer contact with consumers, and to more demand-orientated supply'.

43. The objective of the 15% rule was in accordance with those recitals, because it sought to induce the dealer to give priority to customers within his territory, for whom he had a special responsibility. The appellant ends by pointing out that, in any event, the bonus was a relatively small percentage of the total remuneration and was paid in the majority of cases (up to 15% of total sales).

44. The appellant contends that the Court of First Instance had not taken account of those circumstances in the contested judgment.

45. The Commission complains that the appellant is merely repeating, almost verbatim, the arguments put forward in its application, without criticising reasoning of the Court of First Instance, and it therefore requests that the plea be declared manifestly inadmissible.

46. In the alternative, the Commission contends that the 15% rule contributed to

7 — Emphasis added by the appellant.

the partitioning of the markets, an objective which it pursued, so it could not qualify for an exemption.

47. I consider that this plea should be declared inadmissible. It is stated in paragraph 49 of the contested judgment that, 'although Regulation No 123/85 provides manufacturers with substantial means of protecting their distribution systems, it does not authorise them to adopt measures which contribute to a partitioning of the markets'. From the passage which ends with those words it may be inferred that the Court of First Instance took into account that Regulation No 123/85 accorded specific exceptional powers to the manufacturers but did not allow any infringement of one of the fundamental principles of the common market which, according to an almost ritual expression in the case-law of the Court of Justice, prohibits a partitioning of the market between the Member States which renders more difficult the interpenetration of trade which the Treaty is designed to create. [8]

48. What the appellant is striving to do, repeatedly, is to demonstrate that the 15% rule is justified and that it has a neutral effect on the competitive position of the various dealers (within a given national market, it should be understood), but it in no way affects the finding, which underlies the reasoning of the Court of First Instance, that the system was likely to contribute to the closing-off of the markets of the Member States. In those circumstances, it should be remembered that where an appeal merely repeats or reproduces verbatim the pleas in law and arguments previously submitted to the Court of First Instance, including those based on facts expressly rejected by that Court, it fails to satisfy the requirements under Article 51 of the EC Statute of the Court of Justice since, in reality, such an appeal amounts to a request for re-examination of the contested judgment, which undermines the specific purpose of this extraordinary remedy. However, the requirement does not preclude an appellant from repeating previous arguments in order to challenge the interpretation or application of Community law by the Court of First Instance. [9] As I have shown above, this is not the position in the present case.

49. The first plea in law should therefore be declared inadmissible.

Second plea in law, alleging infringement of Article 81(1) EC by holding the supply restriction measures to be agreements

50. The appellant does not challenge, as such, the finding of fact made by the Court

8 — See, amongst many others, judgments in Case 56/65 *Société Technique Minière (LTM)* [1966] ECR 235; Case 8/72 *Cementhandelaren* v *Commission* [1972] ECR 977, paragraph 29; Case 42/84 *Remia* v *Commission* [1985] ECR 2545, paragraph 22, and Case C-35/96 *Commission* v *Italy* [1998] ECR I-3851, paragraph 48.

9 — See, in particular, the judgments in Case C-210/98 P *Salzgitter* v *Commission* [2000] ECR I-5843, paragraphs 42 and 43; and Case C-321/99 P *Associação dos Refinadores de Açúcar Portugueses and Others* v *Commission* [2002] ECR I-4287, paragraphs 48 and 49.

of First Instance that Volkswagen implemented a supply fixing strategy with the express aim of restricting the number of re-exports from Italy. However, it does dispute that those restrictive measures can constitute 'a set of continuous business relations governed by a general agreement drawn up in advance', within the meaning of the judgments in *Ford* v *Commission* [10] and *Bayerische Motorenwerke*, [11] so as to bring them, as agreements, within the scope of Article 81 EC.

51. According to Volkswagen, in the *Ford* case the exclusion by the manufacturer of certain types of vehicles from its relations with its distributors was based directly on the dealership agreement, which expressly reserved to the manufacturer the right to decide which models he would supply. In *Bayerische Motorenwerke*, the disputed restrictions were first imposed in a circular sent to the distributors, which made numerous references to the dealership agreement, a fact which gave the Court of Justice reason to hold that there had been an agreement, for the purposes of Article 81, since the circular formed part of a set of continuous business relations governed by an agreement.

52. In the appellant's submission, the facts in the present case are different. Even if it were conceded that the dealership agreement had provided for the fixing of quotas, that is to say, a lower supply of vehicles than the dealers required, it did not authorise the manufacturer to prevent re-exports. Under the contract, distributors were free to sell the vehicles delivered both to consumers and to other foreign dealers. So the restrictive practice found by the Court of First Instance is not protected by the contract and is therefore a unilateral measure falling outside the scope of Article 81 EC.

53. Volkswagen contends that the broad interpretation of the concept 'agreement' preferred by the Court of First Instance blurs the line between Articles 81 EC and 82 EC, attributing to the former provision of the potential of prohibiting any conduct which restricts competition. Volkswagen refers, finally, to the judgment of the Court of First Instance in *Bayer* v *Commission*, [12] in which it is emphasised that Article 81 EC requires the acquiescence of the parties in order for it to apply.

54. It should be remembered, first of all, that Article 81 EC declares to be incompatible with the common market, and prohibited, all agreements between undertakings which may affect trade between Member States and which have *as their object or effect* the prevention, restriction or distortion of competition. Nor should it

10 — Joined Cases 25/84 and 26/84 *Ford* v *Commission* [1985] ECR 2725, paragraph 21.

11 — Case C-70/93 *Bayerische Motorenwerke* [1995] ECR I-3439, paragraphs 15 and 16.

12 — Case T-41/96 *Bayer* v *Commission* [2000] ECR II-3383.

be forgotten that the Court of First Instance stated that it has been proved that a policy of imposing supply quotas on Italian dealers had been implemented with the aim of restricting re-exportation from Italy [13] and that that policy could be imposed in accordance with the dealership agreement. [14] Therefore, to constitute an infringement by concerted practice, it is sufficient that, on the basis of the dealership contract, it has been possible to limit deliveries and that the restriction has *the object or effect* of hindering intra-Community competition. It follows, therefore, that the appellant's argument is ineffective for the purpose of challenging the reasoning of the Court of First Instance.

55. Furthermore, as the Commission points out, in *Ford* v *Commission* and *Bayerische Motorenwerke*, cited above, the respective dealership contracts likewise did not authorise the manufacturer to impose specific restrictions on exports, but this did not prevent the Court of Justice from declaring that the then Article 85 of the EC Treaty was applicable. In the second of those cases, the fact that the circular referred to the principal contract is mentioned only to add greater weight and does not have the conclusive nature accorded to it by the appellant. Finally, the judgment of the Court of First Instance in *Bayer* v *Commission* refers to the judgment of the Court of Justice in *BMW Belgium and Others* v *Commission*, [15] in which it is stated that an apparently unilateral measure must be regarded as an agreement if the conduct of its addressees indicates their consent, [16] a situation which is added to — but does not replace — that contemplated in *Ford* v *Commission* and *Bayerische Motorenwerke*, which were, furthermore, later cases. The outcome of the specific assessment made by the Court of First Instance in *Bayer* v *Commission* is the subject of an appeal brought by the Commission; the case on the appeal is still pending.

56. In the light of those considerations, I suggest that the plea in law should be rejected as unfounded.

Third plea in law, alleging infringement of Article 15(5)(a) of Regulation No 17 by taking account of the bonus system for the purposes of calculating the amount of the fine

57. The Court of First Instance considered that the existence of the 15% rule, established in 1988 and shown to be contrary to competition, could be taken into account for the purposes of calculating the amount of the fine in respect of the period from 1993 to 1996. [17] In reaching that conclusion, the Court of First Instance had rejected the applicant's claim that the aforementioned rule had been notified by letter of 20 January 1988, enclosing the form of 'Convenzione B', and could there-

13 — Paragraphs 79 and 88 of the contested judgment.

14 — Paragraph 236 of the contested judgment.

15 — Joined Cases 32/78 and 36/78 to 82/78 *BMW Belgium and Others* v *Commission* [1979] ECR 2435.

16 — Paragraphs 28 to 30 of the judgment in *BMW Belgium and Others* v *Commission*.

17 — Paragraph 344 of the contested judgment.

fore qualify for the exemption from fine provided by Article 15(5)(a) of Regulation No 17.

58. Under this plea, Volkswagen again refers to the letter of 1988 and persists in describing it as formal notification in the light of the rules applicable at the time, namely Commission Regulation No 27 of 3 May 1962, [18] as amended, from which, it claims, it may be inferred that a system with the characteristics of the 15% rule could be the subject of 'informal' notification.

59. This part of the third plea is obviously irrelevant. As is quite clear from paragraph 343 of the contested judgment ('Irrespective of the question whether or not the sending of Convenzione B was a notification for the purposes of Regulation No 17,...'), when it was considered whether it was appropriate to apply Regulation No 17, the status to be accorded to the letter of 20 January 1988 was not taken into account. Rather, the Court of First Instance confirmed that the exemption from fine provided under Article 15(5)(a) of Regulation No 17 did not apply for the period 1993 to 1996 because it considered that the measures which had been notified were not within the limits of the activity described therein. On the one hand, during that period the 15% rule had been accompanied, and thus reinforced, by other measures likely to hinder re-exports; and on the other, during that time the 15% rule was given a wide interpretation and application, prohibiting any sale outside the contract territory beyond 15% of total sales.

60. The appellant contends that, according to its wording, the exemption from fine provided by Article 15(5)(a) applies to measures duly communicated *in so far* as they are within the limits of the notified activity. I do not agree with this reading. From a semantic point of view, the conjunctions used in the main language versions allow, or even impose, a conditional meaning (*pour autant, soweit, provided, nella mesura, siempre que*). From the teleology of the provision, I agree with the Commission that it would be artificial to try to split up a body of conduct characterised by a single purpose. [19]

61. The third plea should therefore be rejected, in part as irrelevant and in part as unfounded.

Fourth plea in law, alleging infringement of Article 15(2) of Regulation No 17 in relation to the finding that the conduct was intentional

62. Article 15(2) of Regulation No 17 authorises the Commission to impose fines

18 — First Regulation implementing Regulation No 17 of the Council of 6 February 1962 (OJ English Special Edition 1959-62 (I) p. 132).

19 — See paragraph 234 of the contested judgment.

of up to 10% of the turnover for the preceding financial year, if the defendant undertaking has acted intentionally or negligently.

63. In paragraph 334 of the contested judgment it is stated that the Commission's assessment that the infringement was committed intentionally, and not negligently, was wholly justified. In that regard, reference was made to recital 214 of the Commission's Decision which contains extracts from documents in which several of the undertaking's executives reveal that they were aware that they were committing anti-competitive acts. Under this fourth plea in law, Volkswagen disputes the method used by the Commission, confirmed by the Court of First Instance, to determine that its conduct was intentional. In the appellant's submission, there would have been an intentional infringement only if the various authors of the statements contained in recital 214 of the Decision could be treated as a single natural person who, objectively, commits the infringement and, subjectively, does so intentionally.

64. The appellant considers that, in the present case, neither the Commission nor the Court of First Instance had troubled to ascertain whether the specific persons who had committed the infringements had acted intentionally. According to this method, the intent to infringe would be proved if, within an undertaking, certain persons objectively commit the fault, while others, belonging, for example, to its legal department, are aware of the illegality of those actions, notwithstanding the criminal-law principle of fault applicable to this kind of case, which requires that the illegal conduct and the subjective intent be attributed to the same person. In the case of an undertaking, the principle would require, at least, that it could be charged with inadequate organisation or a breach of its duty of supervision.

65. The aim of this plea is not at all clear. If the appellant's reasoning is upheld, it would not be necessary to make significant alterations to the terms of the contested judgment, unless it were claimed that the conduct complained of cannot even be characterised as negligent. Article 15(2) of Regulation No 17 requires intent or negligence as alternative preconditions for the imposition of fines, the amount of which, again according to that provision, will be depend on the gravity and duration of the infringement. Be that as it may, I do not share the appellant's view.

66. In general, as the appellant itself concedes, the body of safeguards developed in the field of criminal law, which has as its protagonists the penalising State, on the one hand, and the individual charged with the offence on the other, is not transferred *en bloc* to the field of competition law. Those safeguards are designed specifically to compensate for that imbalance of power. In the case of free competition, those

parameters are altered, since it is sought to protect the community of individuals which constitutes society and is composed of groups of consumers against powerful corporations with significant resources. To accord such offenders the same procedural safeguards as those accorded to the most needy individuals, apart from being a mockery, would entail, essentially, a lower degree of protection, in this case economic protection, for the individual as the main victim of anti-competitive conduct. I therefore consider it important that the procedural rules be adapted to the specific field of competition. The requirements of the rules on indirect evidence, for example, should be relaxed, since such evidence is often the only means of revealing intent to infringe.

67. Against that background, the appellant appears not to be claiming for itself more favourable treatment than that received in a criminal case by any natural person. Its reasoning is highly misleading. If, in order for an infringement to be constituted, it actually needed to be determined, within an undertaking, to which individual or individuals both the illegal conduct and the intention or negligence may be attributed, that would not be to treat the legal person and the natural person equally; the former would be accorded almost complete impunity, since it would be enough for executive orders to come always from persons without specific legal knowledge for any charge to fail.

68. Those preliminary observations having been made, it is now possible to make a specific assessment of the submission. The appellant persists in complaining that, in the present case, intent has been proved on the basis of the conduct of specific persons and the statements of others. However, the contested judgment cannot be understood in that way. In paragraph 334 it is said, more straightforwardly, that the appellant sought to partition a national market, that such conduct is clearly contrary to the Community competition rules and that, therefore, the appellant could not have been unaware that its conduct was infringing them. That methodology has nothing to do with an accumulation of various responsibilities but seeks to attribute the conduct and the intent to the defendant undertaking, as such; for that reason the complaints made in this appeal are irrelevant.

69. The Court of Justice should therefore reject the fourth plea in law as also unfounded.

Fifth plea in law, alleging distortion of the facts which constitute the infringement

70. According to the appellant, the Commission based its decision on the overall

assessment of up to six instances of anti-competitive conduct of action relating, respectively, to the margins policy, the bonus policy, the restrictive supply to the Italian market, the restriction on supplies within the distribution network, the termination of contracts and the statements of undertaking. All of them, taken together, constitute a single infringement of Article 81(1) EC. The Court of First Instance, in not finding two of those instances of conduct to be proved (namely, those relating to the margins policy and the termination of contracts) but in nevertheless maintaining that there was an infringement, departed from the facts as determined by the Commission.

71. This plea is unfounded. The facts assessed by the Commission, and then by the Court of First Instance, are clearly the same. The Court of First Instance has complete freedom to give them their correct legal classification, as multiple infringements, a continuing infringement or, conceptually, a body of infringements, particularly in the field of judicial review of penalties for infringement of the rules of free competition, in which it has unlimited jurisdiction under Article 229 EC and Article 17 of Regulation No 17.

72. This plea in law should also be rejected as manifestly unfounded.

Sixth plea in law, alleging lack of means of defence because of infringement of the right to a fair hearing in respect of certain complaints from individuals

73. The appellant complains that the Court of First Instance deprived it of a means of defence by relying on evidence which had not been communicated to the appellant in the administrative stage and which, in the judicial stage, was communicated to it only after the written procedure had ended, and that it did not have enough time at the hearing to comment on it properly. Volkswagen refers specifically to the collection of over 60 letters or faxes of complaint from individuals, to which the Court of First Instance refers in paragraph 105 and, implicitly, in paragraph 115 of the contested judgment, in order to reject the then applicant's claim that the commercial behaviour of Volkswagen and of its distribution network in Italy towards consumers did not constitute an obstacle to re-exports. Those documents, with the exception of those referred to in paragraphs 106 to 114 of the contested judgment, which also appear in the Commission's decision, had only been shown to the appellant on 10 August 1999, after the Court of First Instance had ordered this to be done. At the hearing held on 7 October 1999, Volkswagen only had a total of 30 minutes in which to present its oral argument, so it merely made a few general observations with regard to the complaints.

The appellant states that it was confident that these documents would not be used as evidence since it had not been given a copy during the administrative procedure.

74. This plea gives rise to a number of observations.

75. Firstly, the Commission claimed, in its response to the appeal, that the appellant, contrary to what it asserts, did have access to the whole file, in which the aforementioned complaints were contained, on 5 December 1996, as is shown by a document signed by one of its representatives, which the Commission attaches as an annex. Volkswagen has not challenged the truthfulness of that statement.

76. Secondly, if the appellant had wanted to make sure that such complaints would not be used as evidence by the Court of First Instance, it should have registered a protest, at the latest during the hearing; this it did not do; nor did it request, as an exceptional measure, the reopening of the written procedure or an extension of the time allowed it for oral argument at the hearing. Instead, as is apparent from the content of that argument, which is included in the appellant's pleadings, the appellant merely expressed doubts as to the evidential weight of such a small number of complaints as against more than 19 000 vehicles exported by the Italian dealers. In those circumstances, there was nothing to prevent the Court of First Instance, in the exercise of its unlimited jurisdiction, from referring to evidential documents which had been duly submitted for consideration by both parties.

77. Thirdly and lastly, it is not at all clear that the Court of First Instance based any of its deductions on those complaints; it evokes them only generically in paragraph 105 of the contested judgment and after quoting the content of others also included in the Commission's decision, which it describes, in paragraph 115, as 'adequately representative' of them all, although it is true that it had introduced them with the expression '[i]t is sufficient to set out...'. In spite of this lack of precision, even if the appellant were given the benefit of the doubt and it were thought that the Court of First Instance did in fact take account of those complaints as evidence, the reasons stated under the preceding points suggest that the plea be rejected as unfounded.

Seventh plea in law, alleging error in the definition of the Commission's duty to state reasons

78. The appellant criticises the judgment at first instance because it believes that it contains a mistaken concept of the duty to state reasons laid down in Article 253 EC. Volkswagen refers to three examples of objections to the statement of objections to which no response was given in the subsequent Commission decision. The Court of First Instance rejected the applicant's

claims on the ground that '[t]he statement of reasons for the contested decision showed,..., clearly and unequivocally the Commission's reasoning and so enabled the applicant to ascertain the reasons for that decision in order to defend its rights, and the Court to review the correctness of the decision', [20] and stated that 'the Commission did not have to reply to the applicant's detailed objections', but only to 'certain observations' submitted in response to the statement of objections. [21] In accordance with that concept, the statement of reasons for an administrative decision would not have other functions, such as to explain the reasoning on which it is based, to inform the public, to persuade the addressee undertaking that it is well founded, contributing to its acceptance, or to prevent the Commission adopting an inadequate text proposed by its collaborators.

79. I can share the appellant's desire that the statement of reasons should fulfil the various aims referred to, but I have to say that the definition of the obligation laid down in Article 253 EC, as inferred from paragraphs 297 to 299 of the contested judgment, is completely in accordance with the law as stated over and over again in the case-law. [22]

20 — Paragraph 297 of the contested judgment.

21 — Paragraph 299 of the contested judgment.

22 — The most recent example, if I am not mistaken, is the judgment of the Court of Justice, sitting in plenary session, in Case C-482/99 *France* v *Commission* [2002] ECR I-4397, paragraph 41.

80. This plea, since it is unfounded, should also be rejected.

Eighth plea in law, alleging failure to state reasons in regard of the fine imposed

81. The appellant claims that the considerations set out in paragraphs 347 and 348 of the contested judgment, in which it is merely stated that the fine of ECU 102 000 000 imposed by the Commission 'is not abnormally high' and that the reduction to EUR 90 000 000 is considered 'proper', do not comply with the obligation to state reasons laid down in Article 33 read in conjunction with Article 46 of the EC Statute of the Court of Justice. A more detailed explanation was necessary, in particular because the application of the calculation criteria used by the Commission would have given an appreciably lower figure which, in Volkswagen's submission, was approximately EUR 50 000 000.

82. The appellant complains that the Court of First Instance did not identify the relative gravity of each of the courses of conduct in question and that the final amount of the fine did not properly reflect the fact that several of the charges made had been rejected or that the infringement was found to have lasted for a shorter time. Furthermore, it was inappropriate to take into consideration the parameter of turnover,

which the Commission introduced for the first time during the judicial proceedings and which, in any event, under Article 15(2) of Regulation No 17, is only relevant as a maximum limit.

83. Volkswagen is aware that, according to the case-law,[23] the Court of First Instance has unlimited jurisdiction to rule on the amount of fines imposed on undertakings for infringements of Community law and it is not for the Court of Justice, when ruling on questions of law in the context of an appeal, to substitute, on grounds of fairness, its own assessment for that of the Court of First Instance in the matter. Nevertheless, Volkswagen considers that the Court of Justice should at least be able to verify that the Court of First Instance has not exceeded the limits of its duty of review.

84. It should be pointed out that the Court of First Instance, which, as the appellant acknowledges, has unlimited jurisdiction as far as concerns penalties, is not bound by the amount of the fine or by the method of calculating it or by the assessment of the relative gravity and duration of the infringements, the criteria preferred by the Commission. What is more, when it comes to imposing a fine, it has considerable latitude.

85. Contrary to what the appellant claims, the Court of First Instance does give the reasons for which it has not reduced the fine further. After pointing out, in paragraph 347 of the contested judgment, that it is for itself to assess the circumstances of the case in order to determine the amount of the fine,[24] which means that the reduction does not necessarily have to be in proportion to the lesser duration established or match the criteria used by the Commission, the Court of First Instance gives its own opinion, in Article 336, on the gravity of the infringement. In view of the fact that the infringement sought to partition a national market, the Court of First Instance considers that it is, by its very nature, particularly grave, because it is contrary to the most fundamental objectives of the Community and, in particular, to the achievement of a single market: the applicant in the case, together with its subsidiaries, prevented consumers from enjoying without impediment the freedoms of the common market laid down by the Treaty, thus detracting from one of the most important achievements in the building of Europe. Again according to the contested judgment, the conduct was also especially grave because of the size of the industrial group which committed it and because it occurred in spite of the warning given repeatedly in Community case-law concerning parallel imports in the automobile sector.

86. The Court of First Instance maintains that the lack of adequate evidence of one of

23 — See Case C-310/93 P *BPB Industries and British Gypsum* v *Commission* [1995] ECR I-865, paragraph 34.

24 — As acknowledged in Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 111.

the instances of unlawful conduct complained of, relating to the split margin system and the termination of certain dealership contracts, does not reduce the gravity of the infringement.

87. In those circumstances, accepting that the fine imposed by the Commission is not abnormally high, since it is approximately equivalent to 0.5% of the Volkswagen group's turnover for 1997 in Italy, Germany and Austria and to 0.25% of its turnover in the European Union, and taking into account all the elements of the case, the Court of First Instance reduced it to the amount already stated.

88. In my view, the Court of First Instance has given adequate reasons for its course of action. I suggest, therefore, that this plea in law be rejected, since it, too, is unfounded.

Ninth plea in law, alleging legal error in not holding the premature disclosure of the content of the Decision to be an invalidating defect

89. In paragraphs 279 to 283 of the contested judgment, there is fierce criticism of the irregularity consisting in the disclosure of essential elements of the Decision before its adoption by the College of Commissioners, but the annulment requested on that ground is rejected, since there is nothing to show that if the information in question had not been disclosed, the amount of the fine or the content of the proposed decision would have been different. The Court of First Instance bases its reasoning on the case-law of the Court of Justice, in particular on the judgment in *Suiker Unie and Others* v *Commission*,[25] and on the judgment of the Court of first Instance in *Dunlop Slazenger* v *Commission*.[26]

90. In the appellant's submission, that case-law is irrelevant, since the facts giving rise to it are substantially different from those in this case. Volkswagen claims that the determination by the Court of First Instance is tantamount, in practice, to granting impunity to the Commission in respect of irregularities of that kind, since it would be difficult to prove that the content of a decision would have been different if the institution had acted lawfully. The mere risk of such a possibility ought, then, to be enough to invalidate the measure which is the subject of the improper disclosure. In the present case that risk is a consequence of the fact that, once the amount of the proposed fine had been published, the College of Commissioners could not amend it without discrediting, in the eyes of the public, the Member responsible for competition matters.

25 — Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraph 91.

26 — Case T-43/92 *Slazenger Dunlop* v *Commission* [1994] ECR II-441, paragraph 29.

91. The Commission contends that the factual differences between the case-law cited by the Court of First Instance and the present case, when there are any, are incidental. It states that it is necessary to distinguish between the acts of the Commission, whose role is of a collegiate nature, and those of its Members, and further contends that annulment of a decision simply as a penalty with a view to preventing the occurrence of similar events has no foundation in law and would in any event be disproportionate. As for the risk that prior disclosure of the amount of the proposed fine may have compromised the freedom of judgment of the Members of the Commission, that is mere speculation which cannot make up for the lack of evidence of a causal link between communication to the outside would and the content of the decision.

92. In paragraphs 279 to 282 of the contested judgment, it is considered established, firstly, that, prior to the adoption of the decision, a vital part of the draft decision referred to the Advisory Committee and then, for final approval, to the College of Commissioners, was leaked to the press. This was the amount of the planned fine, about which the public was informed very precisely. Then the Court of First Instance holds that that irregularity infringes the obligation of professional secrecy imposed on the officials and servants of the Community by Article 214 of the Treaty, that it harms the standing of the undertaking charged, since the undertaking learned from the press the nature of the penalty which was to be imposed on it, and that it infringes the principle of good administration. Finally, and this is the main complaint, the premature disclosure infringes the principle of the presumption of innocence, since the likely verdict is communicated to the press before the undertaking charged has been formally found guilty.

93. However, the Court of First Instance does not draw the slightest inference from so serious an irregularity, since it was not established that the content of the decision would have differed if that irregularity had not occurred.

94. I have no doubt that the contested judgment correctly applies the case-law of the Court of Justice on the potentially invalidating effect of irregularities in the administrative procedure. The present case does not disclose any features of a fundamental nature that are peculiar to it. However, I wonder whether the finding by the Court of First Instance of the infringement of a fundamental right, such as the presumption of innocence, a right enshrined in Article 6(2) of the European Convention of Human Rights and in Article 48(1) of the Charter of Fundamental Rights of the European Union, ought to have been enough for the Court of First Instance to apply, of its own motion, the solution advocated by the Court of Justice in *Baustahlgewebe* v *Commission*,[27] namely reduction of the fine on account of the infringement of another of the

27 — Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417.

safeguards of a fair hearing. After some reflection, I do not think that is the proper course. Such a reduction would inevitably be in the nature of monetary compensation for the damage suffered and, at the same time, act as a deterrent. However, apart from the fact that I share the view taken by Advocate General Léger in his Opinion in *Baustahlgewebe* v *Commission* that the appropriate procedure for bringing claims of that kind is an action for damages against the Community, in the present case there has been no such claim, even an implicit one, so the only thing to do is to invite the appellant to take the steps open to it on account of the infringement of its rights, as found by the Court of First Instance.

95. For these reasons, I propose that the ninth and final plea in law be rejected and, accordingly, that Volkswagen's appeal be dismissed in its entirety.

The cross-appeal

96. The Commission challenges the legal basis for the reduction of the fine by the contested judgment. It claims that the Court of First Instance, after clearly finding, in paragraph 342, that the communication in 1988 of *Convenzione B*, containing the 15% rule, had not been made in the form required by Regulation No 17, left the question unanswered and stated in the following paragraph that 'the very fact that that agreement was sent to the Commission already in 1988 ought to have led the Commission to reject the view that that agreement was in itself a factor justifying an increase in the amount fixed in respect of the gravity of the infringement'. It considered, therefore, that the period from 1988 to 1992, during which the 15% rule was the only act complained of, should not be taken into account when fixing the fine, even if that rule was rightly regarded as incompatible with the Treaty. [28]

97. According to the Commission, that approach infringes the case-law of the Court of Justice which the Court of First Instance itself cited in paragraph 342 of its judgment, [29] according to which exemption from fine provided for in Article 15(5)(a) of Regulation No 17 applies only in respect of agreements notified in accordance with the necessary formalities.

98. The Commission argues that observance of the formal notification requirements, as established in Article 4 of Regulation No 27, is intended to enable it to examine the agreement from the point of view of competition law. To this is added the fact that the Commission had expressly informed the sender that its letter did not constitute notification and that therefore

28 — Paragraph 343 of the contested judgment.

29 — Joined Cases 240/82 to 242/82, 261/82, 262/82, 268/82 and 269/82 *Stichting Sigarettenindustrie and Others* v *Commission* [1985] ECR 3831, paragraph 77, and Case 30/78 *Distillers Company* v *Commission* [1980] ECR 2229, paragraphs 23 and 24.

the Commission was not in a position to decide whether the agreement was compatible with the competition rules. To accord the benefit of the exemption from fine also to undertakings which have merely communicated an agreement without complying with the other formal requirements would be to abolish the main incentive for undertakings to give formal notification.

99. In the light of those considerations, the Commission requests that the contested judgment be set aside, in so far as it reduces the fine on the ground that there has been no infringement relating to the application of the 15% rule between 1988 and 1992; as a consequence of such setting aside, the case should be referred back to the Court of First Instance for a ruling on the definitive amount of the fine, taking into account that aspect of the infringement.

100. Volkswagen, in its defence, interprets the same passage from the contested judgment as meaning that the 15% rule was incompatible with the Treaty, even during the period 1988 to 1992, but that it did not have to be taken into account for calculating the fine because it was the only infringement alleged during that time. Furthermore, the Court of First Instance, in the exercise of its unlimited jurisdiction, has a wide margin of discretion, so that it would be appropriate to set aside the judgment only if it were shown that it had exceeded that margin.

101. Paragraph 343 of the contested judgment is somewhat lacking in precision. First, the Court of First Instance expressly avoids ruling on the validity of communication of the *Convenzione B* in 1988. A reading of the previous paragraph reinforces that impression, as the Commission itself contends. For that reason, it is doubtful whether the claim for setting aside may succeed, since it is based on the premiss that the Court of First Instance incorrectly applied the exemption from fine under Article 15(5)(a) of Regulation No 17. Secondly, it is not easy to deduce what other ground could have led the Court of First Instance to refuse to take into consideration conduct which it had itself described as incompatible with the Treaty. The proper inference is that the Court of First Instance proceeded on the basis that the communication of 1988 served to show that the 15% rule was not in itself sufficiently serious to merit sanction. Be that as it may, the lack of precision in this instance must operate for the benefit of the accused undertaking.

102. For those reasons, I propose that the cross-appeal brought by the Commission should be dismissed.

Costs

103. If the Court of Justice decides to dismiss both appeals, then each party should be ordered to bear its own costs.

104. Under the first paragraph of Article 122 of the Rules of Procedure, where the appeal is unfounded, the Court of Justice is to make a decision as to costs. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings; where there are several unsuccessful parties, the Court is to decide how the costs are to be shared. Under Article 69(3) of the Rules of Procedure, the Court may order the parties to bear their own costs where each party succeeds on some and fails on other heads.

In the present case, since both parties have been unsuccessful in this appeal, each should be ordered to pay its own costs.

Conclusion

105. In consideration of all the above, I suggest that the Court of Justice dismiss both the appeal brought by Volkswagen and the cross-appeal brought by the Commission against the judgment of the Court of First Instance of 6 July 2000 in *Volkswagen* v *Commission* and order each party to bear its own costs.