ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE
3 June 1996 *

In Case T-41/96 R,

Bayer AG, a company incorporated under German law with its registered office at Leverkusen (Germany), represented by Jochim Sedemund, Rechtsanwalt, Cologne, with an address for service in Luxembourg at the Chambers of Aloyse May, 31 Grand-Rue,

applicant,

v

Commission of the European Communities, represented by Wouter Wils and Klaus Wiedner, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the offices of Carlos Gómez de la Cruz, of the Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for suspension of the operation of Article 2 of the Commission Decision of 10 January 1996 relating to a proceeding under Article 85 of the EC Treaty (IV/34.279/F3: Adalat),

* Language of the case: German.

THE PRESIDENT OF THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES

makes the following

Order

Facts and Procedure

1 The Bayer Group is an international chemical group which holds eighth position in the worldwide pharmaceutical industry. According to the figures in the Commission Decision of 10 January 1996 relating to a proceeding under Article 85 of the EC Treaty (IV/34.279/F3: Adalat; hereinafter 'the decision'), its sales for 1991 to 1992 amounted to approximately ECU 3 264 million. The parent company of the group, Bayer AG (hereinafter 'Bayer'), has for a number of years manufactured and marketed under the trade name Adalat (Adalate in France) a range of medicinal preparations (hereinafter 'Adalat'), the active ingredient of which is nifedipine, designed to treat cardio-vascular disease. According to internal documents of Bayer cited in the decision, Adalat 'currently represents one of the leading products in hypertension and coronary heart disease', and 'is a leading high-profile product'. Adalat comes ninth amongst the forty most sold medicinal products in the world in 1992, with sales of approximately ECU 783 million.

2 The decision shows that Adalat represents a major product in the sales strategy of Bayer's subsidiaries in the various Member States. In 1992, it represented approx-

imately 15% of the total turnover of Bayer Spain and 36% of that of Bayer France. In the United Kingdom, it represented 56% of the total turnover of Bayer UK.

3 According to information supplied by Bayer, Adalat's share of the Community market is about 8%. According to information from the same source reproduced in the decision, Bayer holds about 7% and 9% respectively for coronary heart disease and hypertension in Spain, 5% and 4% of the same markets in France, and 20% and 17% in the United Kingdom.

4 In most Member States, the price of Adalat is directly or indirectly fixed by the national health authorities. Between 1989 and 1993, the prices fixed by the Spanish and French health services were, on average, 40% lower than prices in the United Kingdom. For Adelat Retard 20mg, the price difference in Spain was between 35% and 47% and in France about 24%. Similarly, the price of Adalat capsules was lower, by 48 to 55% in Spain and by 39 to 45% in France, than in the United Kingdom.

5 Because of those price differences, wholesalers in Spain exported Adalat to the United Kingdom from 1989 onwards. French wholesalers followed suit as from 1991. According to Bayer, sales of Adalat by Bayer UK fell by almost half between 1989 and 1993, on account of the parallel imports. Bayer's British subsidiary thus lost turnover of DM 230 million, representing a loss of revenue to Bayer of DM 100 million.

6 Faced with that situation, Bayer Spain and Bayer France decided that they would no longer fulfil all orders placed by the wholesalers in Spain and France.

7 It was in those circumstances that, on 10 January 1996, the Commission adopted the above decision in relation to Bayer, finding in Article 1 that Bayer Spain and Bayer France had committed an infringement of Article 85 of the Treaty, for which their parent company was liable, by concluding with their wholesalers in Spain and France, in the context of continuing commercial relations, an agreement whose purpose was to prohibit the export of Adalat to other Member States. The geographical markets defined by the Commission as relevant were the national markets, inasmuch as the sale of medicinal products is influenced by the administrative or supply policies adopted in the Member States by the national health services. According to the decision, an examination of the conduct adopted by Bayer Spain and Bayer France towards their respective wholesalers demonstrates in this case the existence of an export prohibition imposed by those Bayer subsidiaries in the context of commercial relations with their customers. The Commission deduced the existence of such a prohibition from what it perceived as a system for identifying exporting wholesalers and progressively reducing volumes supplied by the two subsidiaries in the event of wholesalers exporting all or part of the products supplied (paragraph 156).

8 Under Article 2 of the decision, Bayer is 'required to terminate the infringement found in Article 1, and in particular:

— to send a circular to wholesalers in France and Spain within two months of the notification of this decision, stating that exports are permitted within the Community and will not cause any penalty to be incurred;

— within two months of the notification of this decision, to state that information clearly in the general conditions of sale applicable in France and Spain'.

9 Article 3 of the decision imposes a fine of ECU 3 million on Bayer, while Article 4 fixes a periodic penalty of ECU 1 000 for each day's delay in performing the specific obligations set out in Article 2.

10 By application lodged at the Registry of the Court of First Instance on 22 March 1996, Bayer requested annulment of the decision.

11 By a separate document lodged at the Court Registry the same day, the applicant also applied under Article 185 of the Treaty for suspension of the operation of Article 2 of the decision. The Commission submitted its written observations by a document lodged at the Court Registry on 4 April 1996, on which the applicant submitted observations by a document lodged on 17 April 1996; the Commission in turn replied by a document lodged on 25 April 1996. The parties presented oral argument on 2 May 1996.

Law

12 Under the combined provisions of Articles 185 and 186 of the Treaty and Article 4 of Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities (OJ 1988 L 319, p. 1), as amended by Council Decision 93/350/Euratom, ECSC, EEC of 8 June 1993 (OJ 1993 L 144, p. 21), Council Decision 94/149/ECSC, EC of 7 March 1994 (OJ 1994 L 66, p. 29) and Council Decision 95/1/EC, Euratom, ECSC of 1 January 1995 (OJ 1995 L 1, p. 1), the Court of First Instance may, if it considers that circumstances so require, order that application of contested acts be suspended or prescribe any necessary interim measures.

13 Article 104(1) of the Rules of Procedure of the Court of First Instance provides that an application for suspension is admissible only if the applicant is challenging the measure in question in proceedings before the Court of First Instance. Article 104(2) of the Rules of Procedure provides that applications for interim measures under Articles 185 and 186 of the Treaty must state the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the interim measures applied for. Such measures must be provisional in the sense that they do

not prejudge the decision on the substance of the case (see the order of the President of the Court of First Instance in Case T-23/96 R *De Persio* v *Commission* [1996] ECR II-527, paragraph 19).

Arguments of the parties

Prima facie case

14 Bayer states at the outset that it does not object to the statement that, for the wholesalers it supplies, 'exports are permitted within the Community'. It never imposed export restrictions on wholesalers and has no intention of doing so. However, it challenges the phrase 'will not cause penalties to be incurred', which implies that the company is no longer entitled unilaterally to refuse to supply, in whole or in part, wholesalers which export its products to other national markets, and thereby imposes upon it an 'obligation to supply'.

15 The applicant maintains that Bayer Spain and Bayer France have not concluded any agreement with their wholesalers in Spain and France containing a prohibition on the export of Adalat products to other Member States, in particular the United Kingdom. At the hearing, the applicant confirmed that the object of reducing supply to wholesalers in Spain and France was to stem parallel exports to the United Kingdom. However, the subsidiaries had never imposed an export prohibition on their customers. In so far as they were under no obligation to supply, they unilaterally refused to fulfil certain orders. In order to avoid any agreement with the wholesalers concerning an export prohibition, they even gave instructions to their distribution staff not to divulge the true reasons for the unilateral reduction in the volume of supplies and to refer systematically to 'insufficient stock' due to internal problems of delivery or production.

16 Bayer challenges in particular the Commission's assertions that exporting wholesalers were identified by means of a sales monitoring system and then incurred an automatic reduction in their supplies. There is no evidence for those allegations. Since in the present circumstances the applicant had no means of checking after supplying a wholesaler whether the products were exported, the wholesalers knew that they had no cause to fear a reduction in supplies if they exported. Therefore, contrary to what the Commission maintains, they had no 'interest in complying with the export prohibition'. Moreover, the Commission itself established that the distribution monitoring system chosen by the applicant merely consisted of first registering the quantities supplied to each wholesaler during previous periods ('reference quantities') and determining unilaterally in advance the monthly and annual quantities which the applicant wished to supply to the wholesaler (usually the reference quantity raised by approximately 10% each year), then checking, with the aid of the distribution monitoring system, the point at which the current orders of a wholesaler exceeded the reference quantities. In that case, the applicant no longer accepted the order, or accepted it only in part. The Commission's observation that, in isolated cases, the applicant did not add 10% to the reference quantity, or subsequently corrected it, does not alter the fact that the applicant fixed the quantities to be supplied unilaterally in advance.

17 In those circumstances, the applicant rejects the Commission's argument that the wholesalers accepted the alleged export prohibition by reducing the volume of their orders 'in appearance' only, conduct which constitutes, by reason of the commercial relations between the applicant and its wholesalers, an agreement within the meaning of Article 85(1) of the Treaty (paragraph 181 of the decision). That interpretation is incompatible with the wording of Article 85 and with the structure and purpose of Community competition law. In Bayer's submission, the latter does not prohibit unilateral conduct solely on the ground that it is designed to prevent parallel exports. The decision thus extends the scope of Article 85 to include a unilateral refusal to supply, which in principle can fall only under Article 86 of the Treaty.

18 In particular, the Commission's analysis has the effect of removing the central element from the concept of agreement within the meaning of Article 85, namely the existence of a joint intention. According to the Commission's argument, a supplier

wishing, like the applicant, to adopt strictly unilateral measures would not be able to prevent an 'agreement' from coming into being, even against its wishes, since it would be enough for the customer to alter its conduct in relation to orders unilaterally. There would, moreover, be an agreement within the meaning of Article 85 even if the customer altered its conduct in appearance only, and its actual conduct clearly showed, on the contrary, that it had no intention to conclude the agreement alleged. The decision thus goes significantly beyond the case-law of the Court and the current practice of the Commission, which moreover regards this decision as a test case.

19 Finally, the word 'penalty' used in Article 2 of the decision is imprecise. It could include the solution, already envisaged by the applicant, of altering its sales system in order to stem parallel exports. In that case, Bayer would terminate supplies to wholesalers and confer that function on its own subsidiaries, a situation not falling under Article 85. The applicant concludes that Article 2 cannot be applied immediately, in so far as its scope has not been defined by the Commission.

20 In reply, the Commission first explains that the word 'penalty' covers the reductions in supply described in the decision and any other measure producing the same effect, namely compliance with an export prohibition.

21 Moreover, the conduct censured in the decision was not purely unilateral, but resulted from the joint intentions of Bayer Spain and Bayer France on the one hand, and their respective wholesalers in Spain and France on the other. In the Commission's argument, an agreement within the meaning of Article 85(1) requires an interest of the two parties in concluding that agreement, without that interest necessarily being held in common. In this case, the applicant's interest was to prevent, or at least reduce, parallel exports. The wholesalers' interest was to avoid a reduction in supplies of Adalat.

22 The existence of an agreement containing an export prohibition is demonstrated by Bayer's reductions in supplies to wholesalers violating that agreement, in order to dissuade them from continued exporting. With the aid of a distribution monitoring system, Bayer identified the wholesalers in Spain and France which exported to other Member States and considerably reduced their supplies. Those reductions were applied automatically once a wholesaler infringed the export prohibition. Contrary to the applicant's argument, they were not based on a reference quantity fixed for each wholesaler at the beginning of each financial year by reference to the quantity supplied the previous year, increased by 10%. For certain wholesalers, such as CERP Lorraine or Hefame, supplies were reduced in relation to the preceding year, with no addition of 10%. For others, such as Hufasa and Cofares, they were reduced to below the requirements of the national market.

23 The wholesalers were well aware of the reason for those refusals to supply, and tacitly accepted the export prohibition. Their compliance with the prohibition is demonstrated in particular by the reduction in the amounts they ordered from Bayer Spain and Bayer France in order to align themselves with the figures which those subsidiaries considered normal, following negotiations with their clients, for supplying the national market. The existence of an agreement is confirmed by the fact that, according to the Commission, a number of wholesalers attempted to obtain greater supplies by indirect methods, precisely because they had to undertake to Bayer not to export and thus to order reduced and non-exportable quantities.

24 As in Case C-277/87 *Sandoz* v *Commission* [1990] ECR I-45 (Summary publication), where distributors tacitly accepted an export prohibition in order to be admitted as commercial partners, the export prohibition constituted one of the essential elements in the continuing commercial relations between Bayer and its wholesalers in Spain and France. Furthermore, the facts in this case are similar to the circumstances underlying Commission Decision 80/1283/EEC of 25 November 1980 relating to a proceeding under Article 85 of the EEC Treaty (IV/29.702: Johnson & Johnson; OJ 1980 L 377, p. 16), where distributors accepted as from 1 January 1977 an unwritten export prohibition imposed by the manufacturer, which

applied a monitoring system and threatened to suspend or delay supplies to parallel exporters.

Urgency

25 The applicant points out that immediate implementation of Article 2 of the decision would oblige it to fulfil all orders from wholesalers who export, and would entail a considerable increase in parallel trade. The proportion of total consumption of Adalat in the United Kingdom represented by parallel imports, already nearly 50% in 1993, would exceed 75%, owing to the great interest of wholesalers in Spain and France in obtaining extra supplies for export. The Commission reported that interest to be such that orders for Adalat rose within a short period to 300% of quantities supplied in the past, and that one wholesaler alone ordered approximately 50% of the total consumption in Spain. Moreover, the obligation to supply imposed by the provision in question would probably be applied not only to the products in dispute but also to all the applicant's other products and to the products of other pharmaceutical manufacturers. It would necessarily entail a very large increase in parallel trade as regards the applicant's main products. All national markets would thus be supplied with products coming from Member States in which the competent national health authorities fix prices at the lowest level, the divergence being up to 100%. The predominant supplying of the various national markets from 'low-price countries' will irreparably damage the applicant's distribution system, which currently has branches in practically all Member States. Finally, the applicant would suffer losses in annual turnover, for its main products alone, capable of reaching approximately DM 240 million.

26 In particular, if 75% of the United Kingdom market were to be supplied with Adalat products by wholesalers based in Spain, the result, assuming a price differential of 30%, would be a loss of annual turnover by Bayer UK of approximately

DM 100 million and a consequent loss of DM 30 million for the applicant. That would deprive the distribution structure established by Bayer in the United Kingdom of all economic foundation. The applicant would be obliged to dismiss a large part of the staff of Bayer UK, which employs more than 540 people in its pharmaceutical branch. It would lose a qualified staff and direct access to its customers, which resulted from work stretching back over several decades. Such a loss would be irreparable in the short term. For all those reasons, immediate implementation of Article 2 of the decision would cause the applicant disproportionate and irreparable economic damage.

27 The applicant challenges the Commission's argument that it would be enough to lower its prices in the United Kingdom so as to compete with Adalat products imported from Spain or France. The prices charged in the United Kingdom are subject to a control on profits by the National Health Service (hereinafter 'NHS'). A price reduction in that country would have the same disastrous consequences as a massive increase in parallel imports, leading to losses in turnover and results which would threaten the existence of the pharmaceutical branch of Bayer UK. Moreover, Article 85 does not empower the Commission to require the applicant to lower its prices. In any event, the only relevant question is whether immediate implementation would lead to an irreparable change in the status quo to the detriment of the applicant. The question whether, as the Commission maintains, the applicant would still make sufficient profit if the decision were put into immediate effect is completely irrelevant.

28 The Commission argues that the applicant's arguments concerning urgency are based on a misunderstanding of Article 2 of the decision. That article concerns only non-exportation agreements between the applicant and its wholesalers in Spain and France. Bayer is not therefore required to supply each wholesaler to an unlimited extent. It may restrict or cancel supplies, provided that it does not do so in order to penalize exports.

29 The Commission submits that the applicant, on whom the burden of proof rests, has not produced any evidence to show, first, that immediate implementation of Article 2 of the decision would entail a considerable increase in parallel exports to the United Kingdom. According to the statistics produced by Bayer (Annex 3 to the application for interim measures), those imports had already more than doubled between 1984 and 1993, so that, by 1993, they represented nearly half the Adalat products marketed in the United Kingdom. From 1992, moreover, parallel exports of Adalat to the United Kingdom ceased to be profitable for wholesalers established in France, owing to the devaluation of sterling. As for exports from Spain, even though they represent one-tenth of the products sold by the applicant in Spain, they amount to no more than a small part of parallel exports to the United Kingdom as a whole, owing to the smaller size of the Spanish market. The Commission concludes that parallel exports from Spain have never been significant, and that those from France are no longer significant today.

30 Secondly, the Commission argues that the applicant has not shown that suspension of the operation of the decision is necessary to prevent the risk of damage which it alleges. Making allowance for transport and packaging costs borne by the parallel importers, Bayer UK could avoid a massive increase in parallel imports merely by reducing its prices to a level still considerably higher than prices in Spain and France, so that it would still make sufficient profits. The only possible damage therefore consists in a reduction of its profits. In that respect, the Commission emphasizes that the applicant holds large parts of the United Kingdom markets, exceeding 16% and 19% respectively in respect of two of the main products in the Adalat range. It is therefore unlikely that Bayer UK can be ousted from the United Kingdom in the short term, especially since it markets other products in that country.

Reconciliation of the interests involved

31 The applicant considers that it has an overriding interest in having the operation of Article 2 of the decision suspended, in order to prevent irreparable and disproportionate damage and to preserve the economic status quo. The suspension requested

would have no effect on the current situation regarding parallel imports, the wholesalers in Spain and France remaining at liberty to export all or part of the Adalat products purchased from Bayer Spain and Bayer France.

32 By contrast, there is no overriding Community interest in Article 2 being implemented immediately. Parallel exports to the United Kingdom essentially benefit wholesalers making windfall profits. Whereas in the case of sales to their traditional customers in Spain and France the wholesalers' commercial margin is about 12%, that margin is doubled in the case of parallel exports of Adalat to the United Kingdom.

33 The 'indirect' advantage to United Kingdom consumers, resulting from part of the benefit of the lower prices being enjoyed by the NHS, would be marginal. Consumers must pay the same price, whether the products come from Bayer UK or by way of parallel import, since the NHS, which has a practical monopoly of purchasing pharmaceutical products in the United Kingdom, will in principle grant the same reimbursement for a given product, whatever its origin.

34 Finally, account must be taken of the fact that the decision constitutes a test case, the legal basis of which is doubtful to say the least and the effect of which should not be accepted before the Court's ruling in the main action.

35 The Commission replies that the interests of the applicant must be reconciled with the public interest and the interests of the other persons affected. The requested suspension would harm not only the interests of parallel exporters, who are merely making legitimate use of the opportunities offered by the single market, but also the interests of the NHS and, consequently, of United Kingdom consumers and

taxpayers, having regard to the system whereby the NHS, on the basis of an annual calculation and by means of a reimbursement procedure known as 'claw-back', recovers part of the discounts granted by wholesalers to pharmacies.

Findings of the Court

Prima facie case

36 Article 2 of the decision, of which the applicant requests suspension, aims to bring to an end the infringement found in Article 1, which in the Commission's view is constituted by an agreement between, on the one hand, Bayer Spain and Bayer France and, on the other hand, their respective wholesalers in Spain and France containing a prohibition on the export of Adalat to other Member States. Article 2 requires the applicant to state in a circular to be sent to wholesalers in Spain and France, and in its general conditions of sale applicable in those countries, that 'exports are permitted within the Community and will not cause any penalty to be incurred'.

37 Contrary to the applicant's submission, the word 'penalty' referred to in Article 2 has been defined by the Commission. It must be understood by reference to the factors constituting the infringement as found by the decision, and thus covers only refusals to supply wholesalers identified as exporters, in order to dissuade them from continuing to breach the alleged export prohibition, and any other measure producing the same effect.

38 It is therefore obvious that the word 'penalty' does not cover every refusal to supply motivated by the applicant's wish to limit parallel exports. It must be interpreted in relation to the definition of 'agreement' used in the decision.

39 That preliminary observation having been made, it should be noted that the parties' arguments are fundamentally opposed to each other as to the qualification of the conduct censured in the decision, which consists, so far as the applicant is concerned, in the reduction of its supplies in accordance with certain detailed rules in order to restrain parallel exports, and, so far as the wholesalers are concerned, in their adaptation to such conduct. The controversy concerns the question whether or not such conduct forms part of an agreement within the meaning of Article 85(1) of the Treaty and therefore falls within the scope of that article. The applicant argues that its refusals to supply are purely unilateral. The Commission argues that, on the contrary, they constitute one of the aspects of an agreement designed to partition national markets.

40 In that regard, it should be remembered that the existence of an agreement within the meaning of Article 85(1) requires a joint intention of the parties, without there being any need for them to express their consent formally. Such consent may also arise implicitly from clear and unequivocal conduct by undertakings in the context of continuing commercial relations (see the judgment in *Sandoz* v *Commission*, cited above).

41 Having regard to the arguments put forward by the parties, it should also be noted that, by applying Article 85(1) in certain circumstances to refusals to supply intended to restrain parallel exports, the Commission has adopted a decision likely to raise the particularly delicate question as to the circumstances in which a refusal to sell is capable, when it occurs in the context of continuing commercial relations, of constituting one of the aspects of an agreement containing an export prohibition. Such a question, which concerns the determination of the factors constituting an agreement under Article 85, and hence the scope of that article itself, will require detailed examination in the main proceedings.

42 At this interim stage, the applicant's arguments do not appear prima facie to be manifestly lacking in foundation.

43 The applicant recognizes that the refusals to supply in question were intended to stem parallel exports by limiting quantities supplied. However, it argues that the information system which it applied was designed only to identify the wholesalers whose orders had increased out of proportion in relation to previous years. Such conduct — if established — does not necessarily have be interpreted, in itself, as intended to impose an export prohibition on wholesalers. The applicant was entitled in principle to organize its distribution system as it chose and to make full use of its contractual freedom in putting its commercial policy into effect, without being bound by an obligation under Article 85(1) to supply its customers.

44 In those circumstances, the Court must examine the applicant's objections to the Commission's argument that the 'distribution control system' (in the words used by a document of Bayer Spain found by the Commission at the premises of Bayer France, cited at paragraphs 109 and 158 of the decision) established by the applicant was designed to identify exporting wholesalers precisely in order to 'penalize' them by reducing supplies.

45 Although that monitoring system clearly formed part of continuing business relations between the applicant and its customers, as in the *Sandoz* and Johnson & Johnson matters, both cited above and relied on by the Commission in its argument, it nevertheless did not include an express export prohibition, unlike those two cases.

46 In the *Sandoz* case, the words 'Export prohibited' were placed on invoices, which were not mere accounting documents but contained detailed and indispensable clauses for professional traders and business relations in general between Sandoz and its retailers. On that basis the Court held that that clause prohibiting export, tacitly accepted by customers, formed part of the general framework of business relations between the undertaking in question and its retailers (paragraphs 9 to 12 of the *Sandoz* judgment). Moreover, in the Johnson & Johnson matter, Decision 80/1283/EEC, cited above, shows that the export prohibition, which was initially

the subject of an express provision accompanying price lists, was subsequently maintained by threats to suspend or delay supplies. In practice, the undertaking in question had established a system for monitoring its customers so as to identify exporters, particularly through test purchases, the numbering of batches, and the removal of pieces from the instructions contained with the products supplied.

47 In this case, the facts do not demonstrate so clearly either that the system established by the applicant was intended to monitor the distribution of its products amongst its customers with the precise aim of imposing an export prohibition upon them, or that the wholesalers had given their tacit consent to such a prohibition in the context of their continuing business relations with Bayer Spain and Bayer France.

48 In particular, the evidence on which the decision is based does not at first sight appear to be sufficient for it to be presumed that the wholesalers interpreted the disputed conduct of the applicant as a threat to reduce supplies, if they proceeded to carry out parallel exports. The fact that they were aware of the reasons underlying the applicant's refusal to supply them does not necessarily signify that the wholesalers had deduced from such conduct an intention on the part of the applicant to prohibit them from exporting the products supplied by monitoring exports and 'penalizing' them by fresh reductions in supply. It should be noted in that respect that, in the documents cited in the decision, the wholesalers do not refer either to such a prohibition or to a monitoring system designed to identify parallel exports and established by the applicant in order to enforce that prohibition upon them. They merely refer to the applicant's intention to prevent parallel exports by limiting supplies.

49 Moreover, the wholesalers' conduct, when faced with the supply reductions in question, appears at first sight to suggest rather that they did not give their tacit consent to the alleged export prohibition. A brief examination of the documents before the Court shows that the wholesalers did not alter their conduct as regards

exports, but merely adapted the presentation of their orders to the applicant's requirements and gave the appearance of accepting that they would henceforth order only the quantities that Bayer Spain and Bayer France regarded as normal for supplying the national market (paragraph 183 of the decision). In fact, they used various methods to obtain supplies, in particular by a system of spreading orders for export across the various agencies and a system of orders with small wholesalers (paragraph 182).

50 It would therefore appear that the agreement between the applicant and the wholesalers concerned only the volume of orders that the latter placed. Such an agreement cannot in principle be interpreted as implicitly comprising an export prohibition. It imposed no restriction as regards the destination of the products supplied. Subject to certain conditions relating to national legislation on minimum stocks of medicines, the wholesalers could give priority to exports of Adalat to the United Kingdom over the supply of their national market (see the first subparagraph of paragraph 203 of the decision, and paragraph 204).

51 That analysis appears to be confirmed by the steady growth, between 1989 and 1993, of parallel exports from Spain and France, which in 1993 covered nearly 50% of the needs of the United Kingdom market for Adalat products (see the statistics produced by the applicant in Annex 3 to the application for interim measures, and reproduced by the Commission).

52 It follows from the above considerations as a whole, and without prejudice to the assessment to be made in the main proceedings, that the applicant's contention that there was no agreement containing an export prohibition between Bayer Spain and Bayer France and their respective wholesalers in those countries is not at first sight manifestly devoid of all foundation. In any event, the examination of the extremely delicate questions of fact and law raised by the decision as regards the definition of an 'agreement' for the purposes of Article 85(1) is a matter for the Court's ruling on the substance of the case.

Urgency

53 On the question of urgency, the applicant has put forward a number of arguments to establish that the damage it risks suffering in the event of immediate implementation of the provision in question would be serious, difficult to repair, or at the very least disproportionate, having regard in particular to the need to reconcile the interests involved.

54 In assessing the seriousness of the damage claimed by the applicant, particular account must be taken of the fact that Article 2 of the decision is capable of being interpreted, in the light of the grounds stated for that decision, as prohibiting refusals to supply aimed at preventing the growth of parallel exports of Adalat to the United Kingdom by the use of a monitoring system which, in the applicant's submission, is not designed to pressurize wholesalers into not exporting. It is clearly established in the case-law that, whilst a refusal to sell may in certain closely defined circumstances form part of an agreement within the meaning of Article 85(1) (see, in particular, Joined Cases 25/84 and 26/84 *Ford* v *Commission* [1985] ECR 2725, paragraphs 20 to 22), freedom of contract must nevertheless remain the general rule in this area, as the Court of First Instance pointed out in Case T-24/90 *Automec* v *Commission* ([1992] ECR II-2223, paragraphs 51 and 52). In this case, if the applicant's argument were to be accepted by the Court as well founded, immediate implementation of the provision in question would risk depriving the applicant of its independence in defining certain crucial elements in its business policy. It would in any event create uncertainty as regards the extent of the applicant's freedom in defining that policy, having regard in particular to the difficulty of determining, in the light of the criteria used in the decision, whether a refusal to supply constitutes one of the aspects of an agreement containing an export prohibition or whether it constitutes a unilateral measure.

55 A situation of that kind is particularly likely to cause serious damage to the applicant in the context of the pharmaceutical industry, which is distinctive in that prices and methods of reimbursement are fixed or controlled by national health services,

thereby giving rise to large disparities in the prices for a single medicine in the various Member States. In this case, the applicant has no control over its prices in the exporting countries, Spain and France, where the prices of Adalat products are fixed by the competent authorities at a level which is currently, on average, some 40% lower than prices charged in the United Kingdom, as both parties agree.

56 In those circumstances, the risk of a significant increase in parallel imports of Adalat to the United Kingdom, if the provision in question were given immediate effect, cannot be ruled out. The Commission's arguments to the effect that wholesalers in Spain and France have no further interest in increasing the volume of their exports to that country are not convincing. In the first place, it is undisputed (see paragraph 51 above) that nearly 50% of the needs of the United Kingdom market in 1993 was met by parallel exports of Adalat, which clearly shows the interest of the applicant's customers in Spain and France in such transactions. The price differentials found on the national markets are, moreover, likely to sustain that interest. As for the Commission's arguments that the smaller size of the Spanish market makes a significant increase in parallel exports from that country impossible, such arguments are irrelevant to the existence of a potential for further exports to the United Kingdom. Such potential may entail a significant increase in a wholesaler's activity, irrespective of the needs of the national market. In any event, the Commission's arguments appear to contradict a number of the grounds stated for the decision which refer, for example, to restrictions still hampering wholesalers in Spain wishing to export to the United Kingdom (see, in particular, paragraph 215). Concerning, finally, the devaluation of sterling, which the Commission argues has removed any commercial incentive to export from France since 1992, such devaluation cannot exclude the possibility of a change in currency rates in due course, as indeed the decision points out (paragraph 195). In any event, the Commission itself found that, since 1992, there has been nothing to indicate 'a change in the conduct of the wholesalers' (paragraph 217).

57 In that context, the Commission's assertion that the applicant had the possibility of itself taking action over parallel imports to the United Kingdom by reducing the

prices charged by Bayer UK to a competitive level must be tempered by the fact that the applicant does not itself determine the prices charged in the exporting countries, where they are fixed by the public authorities.

58 It is therefore necessary to weigh the interests involved, in order to determine whether the condition regarding urgency is satisfied.

59 In this case, the applicant has an interest in the requested suspension in order to preserve its freedom of contract (see paragraphs 43 and 54 above) and to maintain the status quo. On that latter aspect, the fact that the applicant might find itself obliged to lower Adalat prices in the United Kingdom in order to prevent a significant increase in parallel imports entails not only the risk of major and irrecoverable losses of profit for the United Kingdom subsidiary but also the risk that the pharmaceutical branch of that subsidiary might be deprived of its economic basis, resulting in the dismissal of many employees. It is undisputed that Adalat represents 56% of the total turnover of Bayer UK.

60 The risk faced by the applicant must be weighed against, first, the interest of wholesalers in Spain and France in increasing the volume of their exports to the United Kingdom in the context of a unified market, and, secondly, the interest of the NHS and of United Kingdom consumers and taxpayers in a reduction of Adalat prices on the national market. Comparison of the various interests involved shows that the damage likely to be caused to the applicant by immediate implementation of the provision in question would be disproportionate in relation to the interests of wholesalers in Spain and France in increasing their exports. The latter already operate in national markets which are far from being entirely partitioned by the disputed business policy of the applicant, as is demonstrated by the level of parallel imports of Adalat to the United Kingdom. As has already been established (see paragraphs 51 and 56 above), those parallel imports covered nearly 50% of the needs of the United Kingdom market in 1993. Moreover, the documents before the Court show that the flow of those imports increased even during the period of the

alleged infringement between 1989 and 1993. Provisional maintenance of the current situation, pending the Court's ruling on the main application, cannot therefore be regarded as an intolerable hindrance to market integration and free competition. As for the interest of the NHS and, in the final analysis, of United Kingdom consumers and taxpayers, it should be remembered that the prices currently charged by Bayer UK, which are higher than those fixed by the Spanish and French authorities, are in any case subject to indirect control in the United Kingdom by the competent authorities, as the decision states (paragraph 151).

61 It follows from the above considerations as a whole that the balance of interests weighs clearly in favour of the applicant, with the result that the risk of damage to which it would be exposed if the Court decided to refuse the requested suspension, which would be disproportionate to say the least, is sufficient to establish the urgency of adopting the measure requested.

62 Since the conditions for granting a suspension of operation have thus been satisfied, the application must be allowed.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. Operation of Article 2 of the decision is suspended.

2. Costs are reserved.

Luxembourg, 3 June 1996.

H. Jung — Registrar

A. Saggio — President