JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)
21 October 2003 *

In Case T-368/00,

General Motors Nederland BV, established in Sliedrecht (Netherlands),

Opel Nederland BV, established in Sliedrecht,

represented by D. Vandermeersch, R. Snelders and S. Allcock, lawyers, with an address for service in Luxembourg,

applicants,

v

Commission of the European Communities, represented by W. Mölls and A. Whelan, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: English.

APPLICATION for, as the principal claim, annulment of the Commission's decision C (2000) 2707 of 20 September 2000 relating to a proceeding under Article 81 EC (Case COMP/36.653 — Opel) (OJ 2001 L 59, p. 1) or, in the alternative, cancellation or reduction of the fine imposed on the applicants by that decision,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Second Chamber),

composed of: N.J. Forwood, President, J. Pirrung and A.W.H. Meij, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 10 December 2003,

gives the following

Judgment

1 Opel Nederland BV ('Opel Nederland') was established on 30 December 1994 as a 100% subsidiary of General Motors Nederland BV ('General Motors Nederland') and took over the latter's commercial activities in the Netherlands, thereby

reducing the activities of General Motors Nederland to those of a controlling holding company, 100% owned by General Motors Corporation, established in Detroit (United States).

2 Opel Nederland is the sole national sales company for the 'Opel' brand in the Netherlands. Its business activities comprise import, export and wholesale trade in motor vehicles and associated spare parts and accessories. It is, however, not involved in the production of Opel vehicles. It has concluded dealership agreements for sales and service with about 150 dealers who, as a result, are integrated in the Opel distribution network in Europe as authorised resellers.

3 Dealership contracts are, subject to certain conditions, exempted from the application of 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 [81(3)] of the EEC Treaty to certain categories of motor vehicle distribution and servicing agreements (OJ 1985 L 15, p. 16). That regulation was replaced, with effect from 1 October 1995, by Commission Regulation (EC) No 1475/95 of 28 June 1995 (OJ 1995 L 145, p. 25). According to Article 7 of Regulation No 1475/95, the prohibition laid down in Article [81(1)] EC is not to apply during the period from 1 October 1995 to 30 September 1996 to agreements already in force on 1 October 1995 which satisfy the conditions for exemption laid down by Regulation No 123/85.

4 Article 3(10)(a) of each of those regulations permits the manufacturer and/or its importer to forbid dealers to supply contract goods, or corresponding goods, to resellers who are not part of the sales network. However, the two regulations do not permit the manufacturer and/or its importer to prohibit dealers from supplying contract goods, or corresponding goods, to final consumers, their authorised intermediaries or other dealers who are part of the distribution network of the manufacturer and/or importer.

5 In response to indications of large-scale exportation by some of its dealers, Opel Nederland has, since the second half of 1996, devised and adopted a series of measures.

6 On 28 and 29 August 1996, Opel Nederland sent a letter to 18 dealers who, during the first half of 1996, had exported at least 10 vehicles. In that letter, it stated:

'... We have noticed that your company has sold an important amount of Opels abroad during the first half of 1996. To us, the quantity is so large that we have a strong suspicion that the sales are not in accordance with the letter and spirit of the current and the coming Opel Dealer Sale and Service Contract.... We intend to check your answer with the data that is registered about this in your books. We will subsequently inform you about what happens next. The above does not change the fact that you are primarily responsible for a satisfactory sale performance in your special sphere of influence.'

7 At a meeting held on 26 September 1996, the management of Opel Nederland decided to adopt measures concerning exports from the Netherlands. The minutes of that meeting describe those measures as follows:

'... Decisions made:

1. All known export dealers (20) will be audited by Opel Nederland BV. Priority is top-down as indicated on the list "Export dealers", dated 26 September 1996. Mr Naval [Director of Finance] will organise this.

2. Mr de Heer [Director of Sales and Marketing] will respond to all dealers who answered the first letter on export activities which Opel sent to them. They will be advised about the audits and that product shortage will result in limited allocation.

3. The district sales managers will discuss the export business with the export dealers within the next two weeks. The dealers will be informed that due to restricted product availability they will (until further notice) only receive a number of units which equals their sales evaluation guide. They will be asked to indicate to the district manager which units from their outstanding orders they really want to receive. The dealers themselves will have to solve any problem with their purchaser.

4. Dealers who inform the district manager that they do not want to stop exporting vehicles on a large scale will be requested to meet Messrs de Leeuw [General Manager] and de Heer on 22 October 1996.

5. Mr Notenboom [Director of Sales Personnel] will ask GMAC to audit the dealer stock to establish the right number of units still present. It is expected that an important part could meanwhile have been exported.

6. In future sales campaigns vehicles which will be registered outside Holland will not qualify. Competitors are applying similar conditions.

7. Mr Aukema [Merchandising Manager] will delete the names of the exporting dealers from the campaign lists. The audit results will determine future qualification.

8. Mr Aelen [Director of Personnel and Finance] will draft a letter to the dealers informing them that as of 1 October 1996 Opel Nederland BV will charge NLG 150 for supplying upon request for official importers declarations, like type approval, and the preparation of customs documents for certain tax-free vehicles (e.g. diplomats).'

8 Following the letter of 28/29 August 1996 and the dealers' replies, Opel Nederland wrote a second letter to the 18 dealers concerned on 30 September 1996. In that letter, it stated:

'... Your answer was disappointing to us, as it means that you do not have any understanding of the common interests of all Opel dealers and Opel Nederland. Our audit department will be instructed to investigate your statements. Pending the investigation, you will not receive the information on the campaigns, as we doubt whether your retail figures are correct.'

9 The audits announced took place between 19 September and 27 November 1996.

10 On 24 October 1996, Opel Nederland sent all dealers a circular concerning sales to end users abroad. According to that circular, dealers are free to sell to end users residing in the European Union and end users may also use the services of an intermediary.

11 On 4 December 1996, having received information according to which Opel Nederland was pursuing a policy of systematically obstructing exports of new vehicles from the Netherlands to other Member States, the Commission adopted a decision ordering investigations under Article 14(3) of Council Regulation (EC) No 17 of 6 February 1962: First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87). The investigations ordered were carried out on 11 and 12 December 1996 at the premises of Opel Nederland and van Twist, an Opel dealer in Dordrecht (Netherlands).

12 On 12 December 1996, Opel Nederland issued dealers with guidelines regarding the sale of new vehicles to resellers and intermediaries.

13 By circular of 20 January 1998, Opel Nederland informed its dealers that the exclusion of payment of a bonus for an export sale had been removed with retrospective effect.

14 On 21 April 1999, the Commission sent the applicants a statement of objections.

15 Opel Nederland and General Motors Nederland submitted their observations with respect to the statement of objections by letter of 21 June 1999.

16 They also put forward their views to the competent department of the Commission at a hearing on 20 September 1999.

17 On 20 September 2000, the Commission adopted the contested decision, which was notified to the applicants on 27 September 2000.

Procedure and forms of order sought

18 By application lodged at the Court Registry on 30 November 2000, the applicants brought the present action.

19 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Second Chamber) decided to open the oral procedure and adopted measures of organisation of procedure in which it requested the parties to reply to certain written questions. The parties complied with that request.

20 At the hearing on 10 December 2002, the parties presented oral argument and replied to questions put by the Court.

21 The applicants claim that the Court of First Instance should:

— annul the contested decision;

— in the alternative, cancel or reduce the amount of the fine imposed by that decision;

— order the Commission to pay the costs.

22 The Commission contends that the Court should:

— dismiss the application;

— order the applicants to pay the costs.

The contested decision

23 By the contested decision, the Commission imposes on the applicants a fine of EUR 43 million for infringement of Article 81(1) EC. In that decision, it concludes that Opel Nederland entered into agreements with Opel dealers in the Netherlands aimed at restricting or prohibiting export sales of Opel vehicles to end users resident in other Member States and to Opel dealers established in other Member States.

24 That conclusion is based on the following key allegations:

(i) in September 1996, Opel Nederland adopted a general strategy aimed at restricting or preventing all export sales from the Netherlands;

(ii) Opel Nederland's general strategy was implemented through individual measures which were adopted by mutual consent with dealers as part of the practical implementation of the dealership contracts and which became an integral part of Opel Nederland's contractual relations with dealers in its selective distribution system in the Netherlands.

25 According to the contested decision, the general strategy comprised, *inter alia*, the following measures:

(a) a restrictive supply policy limiting supplies on the basis of existing sales targets applied from the beginning of October 1996 to 24 October 1996, with respect to sales to final consumers, and from the beginning of October 1996 to 12 December 1996, with respect to sales to other Opel dealers;

(b) a restrictive bonus policy excluding export sales to final consumers from retail bonus campaigns, applied from 1 October 1996 to 20 January 1998;

(c) an indiscriminate direct export ban applied from 31 August 1996 to 24 October 1996, with respect to sales to final consumers, and from 31 August 1996 to 12 December 1996, with respect to sales to other Opel dealers.

26 With respect to determining the amount of the fine, the contested decision states that, in accordance with Article 15 of Regulation No 17, the Commission must have regard to all circumstances of the case and, in particular, the gravity and duration of the infringement.

27 In the contested decision, the Commission describes the infringement as very serious since Opel Nederland impeded achievement of the objective of a single market. The decision takes account of the Opel brand's important position on the relevant markets in the European Union. According to the decision, the infringement concerned the Netherlands market for the sale of new motor vehicles but also affected the markets in other Member States, and all those Member States in which the pre-tax prices of Opel cars were substantially higher than in the Netherlands must be regarded as potential sources of export demand. Opel Nederland acted intentionally, since it could not have been unaware that the measures were intended to restrict competition. In conclusion, the Commission considers that a fine must be imposed which penalises that very serious infringement in an appropriate way and excludes, by its deterrent effect, any repetition and that an amount of EUR 40 million is an appropriate amount as a basis for the determination of the amount of the fine.

28 With respect to the duration of the infringement, the Commission contends that it lasted from the end of August 1996 or the beginning of September 1996 until January 1998, thus totalling 17 months, which is an infringement of medium duration.

29 Taking into account the respective duration of the three specific measures, the Commission considers that it is justified in increasing the amount of EUR 40 million by 7.5%, that is EUR 3 million, to a basic amount of EUR 43 million.

30 Finally, the Commission considers that there are no extenuating circumstances in the present case, particularly since Opel Nederland continued to implement one major element of the infringement, namely the restrictive bonus policy, after the investigations carried out on 11 and 12 December 1996.

Law

31 In support of their principal claim, the applicants raise four pleas in law. The first alleges, *inter alia*, lack of proof of certain factors constituting the infringement. The second, third and fourth pleas allege errors of fact and law in applying Article 81 EC.

32 In the alternative, the applicants raise a fifth plea in law, alleging infringement of the principle of proportionality and of the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ 1998 C 9, p. 3; 'the guidelines')

The first plea in law, alleging lack of proof that Opel Nederland adopted a general policy aimed at restricting all exports

Arguments of the parties

33 The applicants deny that Opel Nederland ever adopted a strategy to prevent or restrict all exports without distinction. A proper reading of the documents on

which the Commission relies, in particular the minutes of the meeting of 26 September 1996, reveals that the strategy was aimed solely at limiting irregular export sales to unauthorised resellers and not at restricting lawful export sales to final consumers or other dealers.

34 In that connection, the applicants observe, first, that the Commission bases its allegations for the most part on internal working documents which do not reflect company policy and which, in any event, are of no probative value. Those working documents merely reflect an internal debate among Opel Nederland's staff as to possible strategies in response to strong suspicions that certain dealers were engaging in large-scale exports to unauthorised resellers. Moreover, neither the wording of the contested decision of 26 September 1996 nor that of the prior internal email exchanges support the conclusion that Opel Nederland sought to restrict all exports without distinction.

35 Second, the applicants state that, viewed in its proper context, the evidence produced by the Commission is consistent with Opel Nederland's lawful strategy of restricting irregular sales to unauthorised sellers. Viewed in its proper context, the decision of 26 September 1996 reflects a policy designed to reduce the scope for irregular exports to unauthorised resellers and to ensure that special campaign bonuses intended to stimulate sales in the Netherlands served their purpose.

36 The applicants submit, thirdly, that all the communications to dealers expressly distinguished between regular and irregular export sales.

37 Fourthly, the applicants state that they do not exclude the possibility that some of their district managers may have misunderstood the scope of the decision of 26 September 1996 and that, in individual conversations with certain dealers, those managers may have conveyed the erroneous impression that Opel Nederland sought to restrict all exports without distinction. However, such temporary misunderstandings on the part of some individuals cannot be regarded as evidence of a general company strategy.

38 Fifthly, the applicants submit that the absence of a company strategy to restrict all exports is further confirmed by the corrective measures taken by Opel Nederland as soon as it discovered that its decision of 26 September 1996 might be misconstrued. The applicants refer, in particular, to the circular sent to all dealers on 24 October 1996. According to the applicants, the Commission is wrong to claim that that circular was concerned only with sales to end users. The applicants state that the bonus policy adopted on 26 September 1996 was not discontinued at that point because it was considered defensible under Community competition rules and, in any event, was not aimed at restricting regular exports. By the time Opel Nederland decided, on 20 January 1998, to put an end to the bonus policy with retrospective effect, it had received no indication from the Commission that that policy was contrary to Article 81 EC.

39 The absence of the alleged strategy is shown, sixthly, by the absence of any penalties imposed on regular or, indeed, irregular exports. No dealership contract was terminated, despite the proof of serious breaches of contract by several dealers, and no dealer was refused delivery of any vehicle on the grounds of its destination or any restrictive supply policy.

40 Finally, the applicants submit that, for the purposes of the application of Article 81 EC, Opel Nederland's alleged strategy is irrelevant unless it is accepted

by its dealers. Referring to Case T-41/96 *Bayer* v *Commission* [2000] ECR II-3383, paragraph 176, the applicants argue that what is relevant here is not the existence of any alleged strategy or intent on the part of Opel Nederland to reduce exports but, rather, the content of the agreements actually concluded with the dealers. There was never an agreement, express or implied, between Opel Nederland and any of its dealers concerning a restrictive supply policy or a restrictive bonus policy contrary to Article 81 EC. Only for a very brief period between October and December 1996 did a very small number of dealers (namely nine out of a total of 150) undertake not to export at all.

41 The Commission has itself admitted that the dealers did not actively adhere to Opel Nederland's policy. In accordance with the findings in *Bayer*, cited above, unilateral action on the part of Opel Nederland is, the company submits, not contrary to Article 81 EC.

42 The Commission disputes the validity of the applicants' arguments.

Findings of the Court

43 The Court must first examine the reasoning in the contested decision which supports the allegation that, on 26 September 1996, Opel Nederland adopted a decision which establishes the existence of a general strategy to prevent and/or limit exports from the Netherlands to other Member States.

44 Recitals 17 and 21 of the contested decision show that the Commission's allegation is based on a reading of the minutes of Opel Nederland's management meeting on 26 September 1996, which describe the measures decided upon at that meeting. It is true that the Commission also refers, in recitals 18, 19 and 20 of the contested decision, to internal documents prior to the meeting of 26 September 1996 (namely an email by the sales manager of 15 July 1996, together with a handwritten commentary by the Director of Sales and Marketing, a letter of 18 September 1996 from the Managing Director and an email from the Finance staff manager of 23 September 1996), but those references are intended only to describe the context in which the decision adopted on 26 September 1996 came into being. In recital 21 of the contested decision, it is further stated that Opel Nederland's decision of 26 September 1996 followed internal reflections.

45 Contrary to what the applicants maintain, the Commission's allegations are not therefore based on internal working documents which do not represent company policy. As the Commission has rightly argued in its written submissions, they are based on the minutes of the management meeting of 26 September 1996, which constitutes a final document concerning measures taken by the most senior managers of Opel Nederland.

46 Secondly, it needs to be examined whether, as the Commission maintains, the incriminated decision of 26 September 1996 reflects a general strategy of Opel Nederland to prevent and/or limit exports as a whole, or whether, as the applicants maintain, it reflects the existence of a lawful strategy designed to limit irregular sales to unauthorised resellers, prohibited by the relevant dealership contracts.

47 On that subject, it is important to note at the outset that, in the wording of the minutes, no distinction is drawn between exports which conform with, and those which are contrary to, the dealership contracts. In accordance with that wording,

the measures taken all concern exports. The applicants' argument that Opel Nederland merely sought to limit exports which did not comply with the dealership contracts is not in any way reflected in the terms of the minutes.

48 That interpretation, based on the wording of the minutes, is confirmed by a reading of the three internal documents which preceded the decision of 26 September 1996. Those documents show that, from the second half of 1996 onwards, the senior managers of Opel Nederland were worried by the growth of exports and that they studied measures designed to limit, or halt, all exports and not just exports contrary to the provisions of the dealership contracts. The document of 23 August 1996, cited in recital 65 of the contested decision, in which it is written that 'measures will be taken (in cooperation with the legal department) to "stop" export totally' corroborates that position on the part of the senior managers at Opel Nederland.

49 It should also be noted that, by its very nature, the decision by Opel Nederland no longer to grant bonuses for export sales could only concern sales which complied with the dealership contracts, given that the bonuses have never been granted in respect of sales to persons other than final consumers.

50 The Commission's interpretation is also corroborated by the fact that, at the time of the adoption of the decision, the audits at the premises of dealers suspected of selling for export had not yet been carried out, and that Opel Nederland therefore could not know whether the 'exporting' dealers had in fact agreed to sell to unauthorised resellers.

51 Moreover, as the Commission comments in its written submissions, if the top managers of Opel Nederland had wished to draw a distinction between regular and irregular exports, they would probably not have failed to mention it

expressly in their decision taken on 26 September 1996. That is especially so as that distinction is essential in the sector concerned, having regard to the provisions of Regulations Nos 123/85 and 1475/95.

52 Next, it should be noted that the applicants have not pleaded the existence of other documents of Opel Nederland, dating from the period concerned, showing clearly that the company was seeking only to limit irregular exports.

53 Indeed, the communications sent to dealers, such as those cited by the applicants, in which, so they maintain, an express distinction was made between regular and irregular exports, consist, on the one hand, of documents concerning a period well before that which is the subject-matter of the present proceedings, and, on the other, documents drawn up from 24 October 1996 onwards, when Opel Nederland took, as the company itself puts it, corrective measures. Those documents cannot therefore cast doubt on the analysis of Opel Nederland's conduct during the period from July to October 1996.

54 Nor, as the Commission has pointed out in its written submissions, is the fact that Opel Nederland took corrective measures as from the end of October 1996 relevant in determining the existence of a restrictive strategy before that date.

55 Finally, as the Commission has rightly argued in its written submissions, the absence of sanctions against dealers does not preclude the existence of a general restrictive strategy, especially since, as indicated in recital 93 of the contested decision, the decision not to take measures against dealers who had infringed their dealership contract was not taken until 23 December 1996, that is to say after the Commission's investigations, carried out on 11 and 12 December 1996.

56 The Commission is therefore right to argue that, on 26 September 1996, Opel Nederland had adopted a general strategy designed to hinder all exporting.

57 Thirdly, it is necessary to examine the applicants' argument that the existence of general strategy on the part of Opel Nederland is irrelevant for the purposes of applying Article 81 EC if it is not accepted by the company's dealers, or, in other words, if it constitutes nothing more than a unilateral act.

58 In that respect, it should be recalled that, in the absence of agreements between undertakings, a unilateral act by one undertaking without the express or tacit participation of another does not fall within Article 81(1) EC (Case 56/65 *Société Technique Minière* v *Maschinenbau Ulm* [1966] ECR 235; Case 107/82 *AEG* v *Commission* [1983] ECR 3151, paragraph 38; and Joined Cases 25/84 and 26/84 *Ford* v *Commission* [1985] ECR 2725, paragraph 21).

59 It should be noted that several passages in the contested decision, especially in recitals 103 and 136, are ambiguous as to whether the Commission is claiming that the general strategy constitutes, as such, an infringement of Article 81(1) EC.

60 However, in recitals 111 and 142 *et seq.* of the contested decision, assessing the conduct of Opel Nederland in relation to Article 81 EC, a clear distinction is drawn between the general strategy and the three individual measures allegedly taken in the context of that strategy. According to the Commission's argument, those individual measures became an integral part of the distribution agreements between Opel Nederland and its dealers and comprise the constituent parts of the infringement and the subject-matter of the contested decision.

61 In those circumstances, the applicants' argument is inoperative.

62 It follows that the applicants' first plea in law is unfounded.

The second plea in law, alleging an error of fact and law vitiating the assessment that Opel Nederland implemented a policy of restricting supply contrary to Article 81 EC

Arguments of the parties

63 The applicants concede that, on 26 September 1996, Opel Nederland decided to inform several dealers that, due to restricted product availability, they would, until further notice, receive only the number of units specified in their 'Sales Evaluation Guide' (hereinafter 'SEG'). Opel Nederland considered that a shortage could justify limiting the number of vehicles which could be supplied to the 21 dealers suspected of engaging in irregular sales.

64 However, the applicants claim, first, that the decision of 26 September 1996 to use the SEG as a limit on the supply of products was never implemented. No order was ever refused on the ground that it would cause the dealer to exceed its SEG or any other quota. In practical terms, it would have been impossible to implement such a restrictive supply system as a result of the technicalities of the ordering system of the General Motors group, 'GM*Drive'. Once entered correctly, all orders placed by a dealer are automatically processed by the 'GM*Drive' system without involving Opel Nederland.

65 Secondly, the applicants claim that the decision of 26 September 1996 was never communicated to the dealers so that they cannot be deemed to have agreed to the restrictive supply policy. The applicants refer in that connection to the judgment in *Bayer*. According to the applicants, there is no evidence — nor did Opel Nederland at any time admit — that any dealer was told that orders exceeding the SEG, or orders within the SEG target but earmarked for export, would not be met.

66 Nor can the fact that Opel Nederland took corrective measures in October and December 1996 be regarded as proof of the communication and implementation of the alleged restrictive supply policy. Those corrective measures were simply intended as a response to indications that some dealers were under the mistaken impression that Opel Nederland prohibited exports and they merely confirmed the dealers' right to engage in regular export sales and included no reference to any restriction of supply.

67 Thirdly, the applicants submit that, in any event, the decision of 26 September 1996 did not make supplies conditional on compliance with any export ban and, therefore, did not limit the freedom of dealers to use the allocated volumes to engage in regular export sales.

68 Even if Opel Nederland had used the SEG as a maximum for supply, that would have constituted a unilateral measure which would not have amounted to an agreement with its dealers to restrict exports. Moreover, the dealers' performance was, within the framework of the SEG, evaluated on the basis of the total number of vehicles sold, irrespective of their destination. Dealers would not therefore have been 'penalised' for choosing to export rather than sell in their own sales territory.

69 In their reply, the applicants state further that the decision of 26 September 1996 to use the SEG in allocating supplies did not constitute an alteration of the contractual terms governing Opel Nederland's relationship with its dealers, given that the standard-form dealer contract does not impose an obligation on Opel Nederland to supply the amounts ordered by the dealers. Opel Nederland is free to honour a specific order at its sole discretion.

70 The Commission argues, first, that the communication of the restrictive supply policy to the dealers identified as exporters was sufficient for its adoption as part of the contractual package governing dealership. The implementation of that decision is not dependent on proof of actual rejection of a dealer's order in a specific case.

71 Furthermore, the measure limiting supplies to those envisaged in the SEG can be regarded as having had restrictive effects on competition within the common market from the time of its incorporation into the dealership contracts through being communicated to the dealers concerned. In circumstances of restricted supply, it is, the Commission submits, foreseeable that dealers will have a greater interest in serving their local customers and in ceasing or reducing export sales. That disincentive to export is, it argues, mainly due to Opel Nederland's system of setting sales targets and assessing dealer performance. According to the Commission, the SEG targets are principally concerned with the territory attributed to the dealer. That also follows from the objective economic advantages of selling to local customers, the fact that any export order is difficult to satisfy if the predicted domestic demand in the dealer's contract territory materialises, and the cumulative effects of restricted supplies and Opel Nederland's bonus policy.

72 Even in the absence of proof of actual rejection of a dealer's order, the alteration of the contractual conditions applying to the supply of vehicles to dealers constituted an agreement designed to prevent, restrict or distort competition.

That alteration of the conditions was, by its nature, capable of reinforcing the partitioning of markets on a national basis, thereby impeding the economic interpenetration which the Treaty is intended to achieve.

73 According to the Commission, the applicants' claim regarding the 'GM*Drive' ordering system is unconvincing. It is difficult to accept that the export policy of the Opel Nederland management could be overridden by the technicalities of the ordering system.

74 The Commission adds that the applicants have not even attempted to demonstrate the existence of production delays affecting their entire product range which might have justified their restrictive policy. In any event, given the fact that the object of Opel Nederland's policy regarding vehicle allocation was to prevent or discourage exports, its characterisation as a measure designed to partition the Netherlands market cannot be called into question by any production difficulties even if they existed. In that regard, the Commission refers to Case T-62/98 *Volkswagen* v *Commission* [2000] ECR II-2707, paragraph 89.

75 Secondly, the Commission contends that the decision of 26 September 1996 was communicated to the dealers. According to that decision, the dealers 'will be informed' of the said policy. The district managers were supposed to act to that effect, that is to say to inform the dealers, more precisely 'within the next two weeks'. There is nothing to suggest that the decision taken on that date was modified or mitigated in any respect before its implementation by the persons responsible, in particular the district managers. At the beginning of October 1996, the district managers actually contacted the dealers concerned. Within the framework of introductory visits, they advised them on the subject of exports. It is unlikely that the district managers completed that task only partially and that they failed to inform the dealers of the restrictive supply policy. The Commission observes further that the other aspects of the decision of 26 September 1996, namely the audits, the policy on bonuses and the sending of a second letter to the

export dealers were fully implemented. Finally, the applicant's claim that they do not exclude the possibility that some of the district managers may have orally advised a limited number of dealers that the motor vehicles indicated in the SEG were essentially intended for the Netherlands market can only be interpreted as a partial admission corroborating the other evidence.

76 Thirdly, the Commission contends that the changes in policy communicated to the dealers became an integral part of the contract. In that connection, it refers to the case-law establishing that the effect of the inclusion of a dealer in a distribution network is that the dealer is deemed to accept the policy pursued by the manufacturer and its supplier and that their commercial relationship continues to be governed by a pre-existing general agreement (*AEG* v *Commission*; *Ford* v *Commission*, paragraph 21; and *Volkswagen*, cited above, paragraph 236). That reference is supported in the present case by Article 7.3 of the supplementary provisions to the 1992 dealership contract, which defines the contract and states that it is to be interpreted in the light of all subsequent supplements and communications.

77 With respect to the applicants' argument alleging the absence of a contractual obligation to supply, the Commission contends, first, that it constitutes a new plea in law which should be rejected as inadmissible in accordance with Article 48(2) of the Rules of Procedure. Second, the Commission maintains that, by the restrictive supply measure, Opel Nederland supplemented its discretionary power with a new rule on maximum quantities to be allocated to the targeted export dealers.

Findings of the Court

78 It is undisputed between the parties, as is clear from paragraph 3 of the minutes of the meeting of 26 September 1996, cited in paragraph 7 above, that the

management of Opel Nederland had decided to inform the dealers identified as exporters of that fact that delivery volumes would, in future, be limited to the number specified in each dealer's SEG.

79 The question arises, however, whether that measure constitutes an agreement for the purposes of Article 81(1) EC. As has been recalled in paragraph 58 above, a unilateral act by an undertaking does not fall within that provision.

80 In that respect, the Commission argues, in recital 37 of the contested decision, that the dealers concerned were informed of the restrictive supply policy and that that decision was 'thus' implemented. In recital 105 of the contested decision, it is stated that this is a restriction imposed on dealers. In recital 111, the Commission maintains, in relation to the three measures alleged, that they were carried out by mutual agreement as part of the practical implementation of the dealership contracts, and, once again, that they were agreed with the dealers.

81 The Court finds, however, that there is no direct proof in the contested decision that the measure in question was communicated to the dealers.

82 The contested decision merely states, in recital 36, that Opel Nederland does not deny that, following its decision of 26 September 1996, the dealers concerned may have been wrongly advised or brought under an erroneous impression that the company intended to apply a restrictive supply policy or expected the dealers concerned to reduce or discontinue exports, without a proper distinction being made between the different types of transaction, and that Opel Nederland BV admits, in its reply to the statement of objections, that some of its district managers may have given oral advice to certain dealers, or brought them under an impression, that the sales targets indicated in their respective SEG were

intended first and foremost for the Netherlands market. Having regard to the role and hierarchical position of district managers in the organisation of the undertaking, the contested decision states, in recital 37, that 'accordingly, it must be concluded that the action taken by the district managers, and referred to by Opel Nederland BV, were the direct consequence of the decision of 26 September 1996, and that this decision was thus implemented'. The fact that the individual audits [mentioned in paragraph 1 of the minutes of the meeting of 26 September 1996] were effectively operated, and that the district managers reported from their introductory visits, is put forward in support of that conclusion. Finally, the Commission notes, in recital 37, that Opel Nederland BV considered it necessary to take corrective measures in October and December 1996.

83 It should, however, be noted, first, that, in its reply to the statement of objections, Opel Nederland clearly denied that there had been communication, even erroneous communication, to the dealers of a restrictive supply policy, linked to the SEG. The company's supposed admission, to which recital 36 of the contested decision refers, relates not to that measure but to the possible erroneous communication, by certain district managers, of the fact that the SEG primarily concerned the Netherlands market, and of the fact that Opel Nederland sought to limit all exports without distinction. The Commission is therefore wrong to plead the absence of denial and the admission by Opel Nederland in order to demonstrate the communication to dealers of the specific measure in question.

84 It should also be pointed out that, in the words of paragraph 2 of the decision of 26 September 1996, Mr de Heer, Director of Sales and Marketing, was given the task of replying to all dealers who answered the first letter from Opel Nederland concerning export activities, to inform them of the organisation of the audits and 'of difficulties in supply resulting in limited allocation of vehicles'. Whilst the letters sent by Mr de Heer to the persons concerned on 30 September 1996, pursuant to that decision, do refer to the organisation of the audits, they are silent both as to the alleged difficulties in supply and as to the limited allocation of vehicles allegedly resulting therefrom.

85 As it thus appears that, contrary to what had been expressly decided four days earlier, the Director of Sales and Marketing of Opel Nederland himself refrained from mentioning restrictions on supply in his letter of 30 September 1996 to the dealers concerned, the Commission is wrong to rely on the absence of any indication that the decision of 26 September 1996 was amended or toned down in certain respects before it was implemented by those in charge, and also wrong in maintaining that the 'other aspects of the decision of 26 September 1996' were 'fully implemented'. Nor is the Commission right to assume that the district managers, who are hierarchically subordinate to the Director of Sales and Marketing and thus deemed to have acted in accordance with his instructions (see recital 37 of the contested decision), spontaneously took the initiative to refer to certain problems of supply at the time of their visits in October 1996 to the dealers concerned.

86 The other evidence on which the contested decision is based constitutes, at most, only circumstantial evidence in support of the Commission's argument that the measure was communicated to the dealers.

87 Nor, moreover, do the other documents on the file support the conclusion that the measure in question was actually applied or implemented. Not only, as the Commission admits, is there no proof that a single order from a dealer has been refused on the ground that it would result in that dealer's SEG being exceeded, but, in addition, it is clear from the figures supplied by the applicants in reply to a written question of the Court concerning the SEG in 1996 for the dealers concerned, that the dealers who in September 1996 had already exceeded their individual SEG for that year, sometimes by a considerable margin, continued to place and receive orders in the months which followed. The accuracy of those figures has not, as such, been challenged by the Commission. It follows that the existence of the alleged agreement cannot be further corroborated by the adoption of measures relating to its application or implementation, the existence of which has not been established.

88 In those circumstances, the Court considers that it has not been established to the requisite legal standard that the restrictive supply measure was communicated to

the dealers and still less that that measure entered into the field of the contractual relations between Opel Nederland and its dealers. In that respect, it should be recalled that the Commission is under a duty to produce sufficiently precise and coherent proof to justify the firm conviction that the alleged infringement has taken place (Joined Cases 29/83 and 30/83 *CRAM and Rheinzink* v *Commission* [1984] ECR 1679, paragraph 20; Joined Cases T-185/96, T-189/96 and T-190/96 *Riviera Auto Service and Others* v *Commission* [1999] ECR II-93, paragraph 47).

89 It follows that the second plea in law is well founded, without there being any need to examine the other arguments put forward in support of that plea.

The third plea in law, alleging an error in fact and in law vitiating the assessment that Opel Nederland implemented a system restricting retail bonuses contrary to Article 81 EC

Arguments of the parties

90 The applicants do not dispute that export sales to final consumers were excluded from its bonus campaigns following the decision of 26 September 1996. However, they deny that that policy can be regarded as an agreement with its dealers to restrict exports which infringes Article 81 EC.

91 They submit, first, that there is no evidence that dealers expressly or impliedly agreed to restrict legitimate export sales in response to Opel Nederland's new bonus policy. The continued participation of the dealers in the bonus campaigns

shows that they accepted that they would not receive a bonus for export sales but it is insufficient to demonstrate that there was an agreement restricting competition with the dealers which infringed Article 81 EC, if exports in fact continued unabated. In *Bayer*, the Court of First Instance confirmed that the Commission had misjudged the concept of the concurrence of wills in holding that the continuation of commercial relations with the manufacturer when it adopts a new policy, which it implements unilaterally, amounts to acquiescence by the wholesalers in that policy, although their de facto conduct is contrary to that policy.

92 The figures show that the dealers continued to export throughout the period of implementation of that policy, which shows that they did not accept an export restriction. The applicants refer to a report by National Economic Research Associates (NERA) of 21 June 1999, which shows that the volume of regular export sales was not affected by the exclusion of exports from campaign bonuses. Accordingly, it cannot be maintained that the dealers agreed to any export restriction contrary to Article 81 EC.

93 Secondly, the applicants submit that the policy on bonuses was not intended to restrict competition. On the contrary, the object of the system was to stimulate sales in the Netherlands. Opel Nederland did not wish bonus campaigns to provide an additional stimulus for exports, which is very different from aiming to restrict exports. The normal dealer margin in the Netherlands was sufficient to make export sales profitable without additional bonuses.

94 Thirdly, the applicants claim that the bonus policy did not have the effect of restricting competition. On the contrary, the relevant documents show that the volume of regular export sales did not decline appreciably as a result of Opel

Nederland's exclusion of export sales to final consumers from campaign bonuses. That is not surprising since the exclusion of export sales did not diminish the incentive or ability of Opel Nederland's dealers to engage in legitimate export activity. In that connection, the applicants maintain that the normal dealer margin on Opel cars amounts to approximately 5% to 15% of the net catalogue price and actually allows dealers to make a profit on export sales without the payment of additional bonuses.

95 A bonus policy excluding export sales to final consumers from retail bonus campaigns can be restrictive of exports only if it is combined with a restriction of supplies. In that case, there may be an incentive for the dealer to reserve the limited number of cars available to him for the domestic market in order to qualify for the additional bonus. However, Opel Nederland never implemented a restrictive supply policy. As a result, the bonus policy cannot have had a restrictive effect on competition. In any event, the decision itself recognises that the alleged restrictive supply policy was discontinued on 24 October 1996 as regards sales to final consumers. Accordingly, at the very least, the Commission erred in considering that the retail bonus policy infringed Article 81(1) EC as from 24 October 1996 (and until 28 January 1998).

96 The Commission maintains that the applicants' arguments are unfounded.

Findings of the Court

97 It is common ground between the parties, as is shown by paragraphs 6 and 7 of the minutes of the meeting of 26 September 1996, that the management of Opel

Nederland had decided to exclude export sales from the bonus system. It is also undisputed that that decision was applied during several sales promotion campaigns between 1 October 1996 and 20 January 1998, on which date the measure was withdrawn, with retrospective effect, by means of a circular to dealers.

98 Secondly, in so far as the applicants deny that the implementation of the measure constitutes an agreement, within the meaning of Article 81(1) EC between Opel Nederland and its dealers, it should be pointed out, as the Commission has done in its written submissions, that, as from 1 October 1996, the applications for bonuses were treated in accordance with the conditions then applicable, which excluded export sales from the scope of the bonus system. The new conditions thus became an integral part of the dealership contracts between Opel Nederland and its dealers and became incorporated into a series of continuous commercial relations governed by a pre-established general agreement. The measure in question is not therefore a unilateral act but an agreement within the meaning of Article 81(1) EC (*AEG*, paragraph 38; *Ford*, paragraph 21).

99 As stated in recital 135 of the contested decision, that decision is primarily based on the argument that the alleged measures had the object of restricting competition. It therefore needs to be examined, thirdly, whether the measure in question can be classified as having the object of restricting competition.

100 In that respect, the Commission rightly argues that, as bonuses were no longer granted for export sales, the margin of economic manœuvre which dealers have to carry out such sales is reduced in comparison with that which they have to carry out domestic sales. Dealers are thereby obliged either to apply less favourable conditions to foreign customers than domestic customers, or to be

content with a smaller margin on export sales. By withdrawing bonuses for export sales, the latter became less attractive to foreign customers or to dealers. The measure was therefore, by its very nature, likely to inhibit export sales, even without any restriction on supply.

101 Moreover, it is clear from the assessment of the first plea that the measures adopted by the management of Opel Nederland were prompted by the increase in export sales and were designed to reduce them.

102 Having regard both to the nature of the measure and the aims which it pursues, in the light of the economic context in which it was to be applied, the Court finds, in accordance with consistent case-law, that the measure constitutes an agreement with the object of restricting competition (see, to that effect, Case 19/77 *Miller* v *Commission* [1978] ECR 131, paragraph 7; Joined Cases 96/82 to 102/82, 104/82, 105/82 and 110/82 *IAZ and Others* v *Commission* [1983] ECR 3369, paragraphs 23 to 25; *CRAM and Rheinzink*, paragraph 26).

103 This analysis of the purpose of the measure further implies that the applicants' general line of argument to the effect that the exclusion of export sales from the bonus system was justified by the fact that the bonuses were designed to stimulate sales in the Netherlands, is inoperative. It should be added that the applicants' supporting arguments — based on the fact that national sales often involve part exchanges and on the existence of a special car tax in the Netherlands (the 'BPM') — are neither coherent nor supported by reference to particular cases.

104 According to consistent case-law, and as the Commission has pointed out in its written submissions, there is no need to take account of the concrete effects of an agreement when it has as its object the prevention, restriction or distortion of

competition within the common market (Joined Cases 56/64 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299; Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraphs 12 to 14). There is therefore no need to examine the arguments of the parties concerning the concrete effects of the measure in question.

105 By way of additional observation, however, the Court rejects the applicants' argument that the figures, as they appear in the NERA report, show that export sales were not influenced by the measure in question. Those figures, which show that export sales did not cease during the period from October 1996 to January 1998, do not exclude the possibility that, without the measure in question, export sales would have been higher. In recital 135 of the contested decision, the Commission rightly observes that it is impossible to determine the number of exports which the measures taken by Opel Nederland have actually prevented.

106 It follows from the above considerations that the third plea in law cannot be accepted.

The fourth plea in law, alleging an error in fact and in law vitiating the assessment that Opel Nederland implemented a direct ban on exports, contrary to Article 81 EC

Arguments of the parties

107 The applicants observe, as a preliminary point, that they do not exclude the possibility that certain district managers of Opel Nederland may have misunder-

stood the scope of the decision of 26 September 1996 — which was designed merely to stop exports to unauthorised resellers — and that, in individual conversations with dealers, those district managers may have conveyed the erroneous impression that Opel Nederland sought to restrict all exports without distinction, or failed to react to dealer 'commitments' which were unduly broad in scope. However, that will have contributed, at most, to the short-lived commitment undertaken by the nine dealers named in the Commission's decision (namely the dealers Van Zijll, Staals and Spoormaker and, subsequently, Hemera, Göttgens-Beek, Loven, Canton-Reiss, Welling and Nedam) and, in any event, did not appreciably restrict inter- or intra-brand competition.

108 With respect to the first phase of the alleged ban, as described in the contested decision (entitled 'internal reflections and instructions', which preceded Opel Nederland's letter to certain dealers of 28/29 August 1996), the applicants claim that none of the documents cited by the Commission (with the exception of those concerning the isolated 'Tigra' incident of June 1995 and the Spoormaker incident) establish that Opel Nederland subjected individual dealers to controls and warnings concerning regular export activity. The evidence relating to that phase concerns internal proposals for action which were not communicated to individual dealers.

109 With respect to the second phase of the ban, as described in the contested decision (entitled 'the "first warning letter" [of 28/29 August 1996] and the subsequent events'), the applicants state that the letter in question informed a limited number of dealers of Opel Nederland's suspicion as to the regularity of some of their sales and requested confirmation of their compliance with their contractual obligations. The letter was clearly worded and sought no commitment from the dealers to cease regular exports. All commitments undertaken by the dealers Van Zijll and Staals were unilateral acts prompted by the dealers' realisation that their export practices did not comply with the dealership contract.

110 With respect to the third phase of the ban, as described in the Commission's decision (entitled 'the decision of 26 September 1996 and the subsequent events'), the applicants maintain that the decision of 26 September 1996 sought to preserve the integrity of the selective distribution system following serious indications of large-scale irregular exports to unauthorised resellers. According to the applicants, they cannot be reproached for deciding to carry out audits aimed only at identifying sales to unauthorised resellers and other breaches of the dealership contract.

111 The applicants argue that, in any event, the 'agreements' concerned only nine dealers for a short period and they did not result in an appreciable restriction of competition. The Commission does not take account of the limited number of dealers involved or of the short duration of any agreement. The applicants state that the vast majority of the 150 dealers had no doubt as to their right to engage in regular export sales during the relevant period and that the Commission's evidence concerns only dealers exporting to Germany.

112 The figures suggest that the effect of the alleged infringement on cross-border sales was minimal. The applicants refer, in particular, to the NERA report, according to which there is no correlation between the identified decline in exports and the measures taken by the applicants. Since corrective measures were taken on 24 October 1996, the alleged infringement lasted only a few weeks and the impact can have been only minimal. Contrary to what the Commission claims, the applicants maintain that the Commission is none the less obliged to provide proof of the impact or effect of the ban on exports. Even if the agreements imposed absolute territorial protection, the effect on the market can have been only minimal (Case 5/69 *Völk* [1969] ECR 295, paragraphs 5 to 7, and Case C-306/96 *Javico* [1998] ECR I-1983, paragraph 17).

113 The Commission's allegation that the audits were a means of applying pressure is, the applicants submit, unsustainable. On the contrary, an audit implies that legitimate exports are permitted. If the applicants had wished to prevent legitimate exports, no audit would have been necessary.

114 According to the applicants, the dealer Van Zijll had already undertaken to cease exporting on 31 August 1996, that is to say well before the meeting with the Director of Sales and Marketing, which took place on 17 September 1996. No meetings took place with the dealer Staals and, following an internal discussion, it decided unilaterally to stop all exports. With respect to the dealer Loven's commitment of October 1996, the applicants observe that corrective measures were taken only a few weeks later on 24 October 1996.

115 The letter of 30 September 1996, which was also sent to those dealers which had confirmed the legitimacy of their exports, can be explained by the fact that the audits revealed that 17 of the 21 dealers which had been the subject of an audit had infringed the dealership contract. The purpose of the meetings with the district managers was to carry out preliminary investigations in order to determine the nature of the exports.

116 As regards the first phase of 'internal reflections and instructions', the Commission submits, first of all, that, although not communicated to the dealers, the internal documents cited in the decision are useful in interpreting the content of Opel Nederland's policy and, in particular, in rejecting the applicants' arguments that, whatever the information "erroneously" communicated to dealers may have been, the policy of the undertaking was concerned solely with combating unauthorised exports.

117 As regards the second phase, the Commission argues that the letter of 28/29 August 1996 was intended to create an atmosphere of menace discouraging

dealers from engaging even in authorised exports and, in any case, from resisting any future initiatives of Opel Nederland aimed at preventing or reducing all exports.

118 That interpretation is supported, first, by the absence of any indication that Opel Nederland acted on the basis of evidence that achievement of the sales targets by all the dealers in their contract territory had actually been adversely affected. There was no reason why their local performance should suffer unless Opel Nederland restricted supplies. In particular, the references to suspicions of conduct inconsistent with the letter and spirit of the dealership contract, before the audit and without citing evidence of an infringement, were menacing, and that impression was reinforced by the sending of a second warning letter in response to the legitimate protestations by some dealers.

119 Second, the aim of heightening the dealers' awareness of the strategy developed by Opel Nederland of restricting even regular export sales is clear from the available reports on contacts with individual dealers. That applies, in particular, to the reaction of the Director of Sales and Marketing to the reply of Wolves Autoservice to the first letter. Although Wolves maintained that it had sold only to German final consumers, and had not yet been audited, the director instructed the responsible district manager to inform Wolves that 'he is primarily employed for his own territory' and that '[p]riority lies in the Netherlands'.

120 The applicants' argument that the dealer Van Zijll's commitment to cease exports was unilateral is untenable. The letter of 28/29 August 1996 was preceded by a discussion with the competent sales manager at Opel Nederland regarding 'excessive exports' and was immediately followed by a meeting with a director of its parent company NIMOX, which promised to discuss the matter with Van Zijll in order to settle it.

121 Likewise, the commitment to cease exports of new vehicles, procured from the dealer Staals two days later, was not a unilateral measure.

122 The applicants' argument that the dealers were aware that their exports were inconsistent with the dealership contract fails to take account of the fact that two dealers, namely Loven and Spoormaker, had undertaken the same commitment to cease all exports even though they had only made authorised exports.

123 With respect to the third phase, the Commission argues that the audits were not exclusively concerned with identifying those dealers which had acted irregularly. The refusal to provide information on the current promotional campaigns before their declarations had been investigated by the audit department had the effect of penalising all exporters and thus reinforced the message that all exports were to cease or be reduced.

124 The Commission observes that the vast majority of the dealers concerned replied to the letter of 28/29 August 1996 by stating that their sales were in complete conformity with the dealership contract. Although, at the end of September, Opel Nederland was not yet in a position to prove otherwise, it none the less stated in its second letter of 30 September 1996: 'Your answer was disappointing to us, as it means that you do not have any understanding for the common interests of all the Opel dealers and Opel Nederland.' The dealers may well have been uncertain what was expected of them in relation to exports, in the 'common interest', in addition to their claimed compliance with the dealership agreement.

125 The Commission does not consider it necessary to prove express acquiescence by all dealers in the export ban policy. By virtue of Article 7.3 of the supplementary provisions to the dealership contract, the dealers are deemed to have accepted that policy once it was announced to them. Therefore, proof that some dealers

concluded express agreements with Opel Nederland to cease exports would merely reinforce that conclusion.

126 The Commission submits that an agreement to cease exports of comparatively short duration may constitute, for the period that it is applicable, an appreciable restriction on competition. Accordingly, the effects of an agreement on competition are not determined by reference to its duration, which is taken into account in calculating the amount of the fine.

127 The dealers who expressly agreed to abandon their export trade accounted for 65% of exports during the relevant period.

128 The Commission challenges the applicants' claim that the agreements concerned only exports to Germany. If Opel Nederland's measures hit exporters of vehicles to Germany and Austria, that was because those countries were probably the main destinations of export trade, but the measures affected exports to all the Member States. In any event, the demonstrable partitioning of the Dutch market from that of Germany would, in itself, be sufficient to establish an appreciable effect on trade between Member States.

129 Referring to *Volkswagen*, the Commission observes that, for the purpose of applying Article 81(1) EC, there is no need to take account of the actual effects of an agreement where it has as its object the prevention, restriction or distortion of competition within the common market. The measures considered are by their nature capable of affecting trade between the Member States. They make it possible to foresee with a sufficient degree of probability that they may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States.

Findings of the Court

— Preliminary considerations

130 The third measure allegedly taken by Opel Nederland consists, according to recital 110 of the contested decision, in a direct ban and/or restriction of exports, implemented by means of orders given to dealers and prohibitions addressed to them on the carrying out of export sales. According to that recital, many dealers undertook to stop carrying out such sales following those orders.

131 Recitals 79 to 87 of the contested decision cite the factors which, according to the Commission, constitute proof that orders were addressed to 10 dealers (namely Van Zijll, Wolves, Staals, Spoormaker, Hemera, Göttgens-Beek, Loven, Canton-Reiss, Welling and Nedam) and that the latter then undertook to Opel not to carry out any new export sales.

132 The Commission distinguishes three phases in the inception and implementation of that measure: the first is entitled 'internal reflections and instructions', the second 'the "first warning letter" [namely the letter to dealers of 28/29 August 1996] and the subsequent events' and the third 'the decision of 26 September 1996 and the subsequent events'.

133 According to recitals 168 and 169 of the contested decision, the measure was implemented between the end of August/beginning of September 1996 and December 1996. The starting date, the end of August/beginning of September 1996, relates to the undertaking by the dealer Van Zijll expressed in a letter of

31 August 1996. The end date, December 1996, relates to the second 'corrective' circular letter from Opel Nederland to dealers of 12 December 1996.

134 It should be noted at the outset that the Commission does not claim that infringements of competition law took place during the first phase. The description of that phase, in recitals 59 to 69 of the contested decision, serves to establish the context in which, according to the Commission, the measure was studied and elaborated by the responsible persons of Opel Nederland at the internal level. In addition, reference is made to an event in June 1995, namely an order to the dealer Lathouwers not to export Tigra models, but that event is not relevant to the contested decision, which concerns measures allegedly taken as from the end of August/beginning of September 1996.

135 The Court will therefore examine the arguments of the parties concerning the second and third phases, as indicated in the contested decision, and, first, the Commission's central allegation that the 10 dealers mentioned were ordered not to carry out export sales and undertook not to do so.

— The orders to dealers

Van Zijll

136 The applicants do not deny that, by a letter of 23 August 1996, the dealer Van Zijll undertook to cease its export activities immediately, and that it renewed that undertaking at a meeting with the Director of Sales and Marketing of Opel Nederland on 17 September 1996.

137 The letter of 23 August 1996 is not one of the documents on the Court file, but its existence is revealed by a letter from Van Zijll to Opel Nederland of 4 November 1996 (see recitals 80 and 81 of the contested decision).

138 The question arises whether the undertaking by Van Zijll was a unilateral act, as the applicants claim, or an act in response to an incitement or order by Opel Nederland, as the Commission maintains.

139 In that respect, it should be noted that, in the two documents from the senior managers at Opel Nederland of 18 September 1996, referred to in recital 80 of the contested decision, it is written, respectively, that, after several conversations between Van Zijll and the senior managers at Opel Nederland, 'Van Zijll, the largest [exporter] has agreed to stop' and that 'we [namely Mr Nefkens of NIMOX, the parent company of Van Zijll, Mr Kirpestein (of Van Zijll) and Mr De Heer (of Opel Nederland)] have agreed to cease export activities'. Those documents bear witness to the fact that the undertaking of Van Zijll was obtained after an intervention by Opel Nederland. It is, moreover, scarcely plausible that the dealer should have terminated its exports at its own initiative, contrary to its commercial interests.

Staals

140 It is not disputed between the parties that, in its letter to Opel Nederland of 20 September 1996 (referred to in recital 83 of the contested decision), the dealer Staals expressed its undertaking not to carry out any further exports 'due to the disadvantages that this can cause both of us'.

141 The Commission's argument that the undertaking of that dealer was secured after intervention by Opel Nederland is corroborated by the document of 18 September 1996, referred to in paragraph 139 above, in which it is written:

'Within our possibilities, we are trying to kill the export business; Van Zijll, the major [exporter] has agreed to stop. We're working on the others.'

142 As in the case of Van Zijll, it is, moreover, scarcely plausible that Staals should have terminated its exports at its own initiative, contrary to its commercial interests.

Spoormaker

143 The applicants do not deny that the dealer Spoormaker, which had received an order from an Austrian Opel dealer for 14 vehicles of the Astra type, was ordered as early as July 1996 not to accept that type of order. Nor is it denied that an Opel Nederland document of 2 October 1996, to which reference is made in recital 87 of the contested decision, reveals that it repeated its undertaking after an interview with the district manager of 1 October 1996.

Hemera, Götggens-Beek, Loven, Canton-Reiss, Welling, Nedam

144 An internal memorandum of an Opel Nederland district manager of 5 October 1996, referred to in recital 84 of the contested decision, shows that these six

dealers all undertook to cease their exports immediately following introductory visits by district managers, carried out in accordance with the decision taken by Opel Nederland on 26 September 1996.

Wolves

145 In recital 82 of the contested decision, mention is made of the dealer Wolves Autoservice. According to a handwritten note by Opel Nederland's Director of Sales and Marketing on the letter of reply from that dealer to Opel Nederland's letter of 28/29 August 1996, referred to in recital 82 of the contested decision, the district manager responsible was asked to instruct the dealer to concentrate on his own contract territory. The contested decision does not, however, refer to documents or other evidence showing that Wolves undertook not to export.

146 Having regard to the above considerations, the Court considers that the Commission has assembled sufficiently precise and coherent proof to justify the firm conviction that nine dealers (namely Van Zijll, Staals, Spoormaker, Hemera, Götggens-Beek, Loven, Canton-Reiss, Welling and Nedam) did in fact, as from the end of August/beginning of September 1996, undertake not to carry out any more export sales, and did so after an incitement to that end from Opel Nederland.

147 Since it results from a meeting of minds between Opel Nederland and the dealers in question, the measure constitutes an 'agreement' within the meaning of Article 81(1) EC, which forms part of the existing contractual relations between the parties. It should further be noted, as the Commission has rightly pointed out in recital 117 of the contested decision, that the fact that the dealers' consent was not given without a certain amount of pressure from Opel Nederland cannot call into question the existence of an agreement.

148 The applicants' argument, that the dealers' undertakings were unilateral in character, cannot therefore be accepted.

149 Moreover, contrary to what the applicants argue, these undertakings cannot be interpreted as resulting from the 'bad conscience' of the dealers from having carried out sales that did not comply with the relevant dealership contract. It transpired, after the audits, that the dealers Loven and Spoormaker had never carried out exports that did not comply with the contractual provisions. Moreover, even if a 'bad conscience' might have been at the root of an undertaking no longer to sell to unauthorised resellers, it cannot explain an unconditional undertaking to halt all exports.

150 The contested decision does not contain proof that, apart from the nine dealers referred to, other dealers gave the same undertaking. The Commission's argument that the infringement concerns not only the nine dealers in respect of which proof of an express undertaking exists, but the whole of the 20 dealers identified as exporters, cannot therefore be accepted.

151 However, according to the Commission's figures, mentioned in recital 99 of the contested decision, at the end of June 1996 the nine dealers in question accounted for about 65% of all exports carried out. Those figures are not disputed. The Commission has rightly deduced therefrom that Opel Nederland was enabled, by virtue of those undertakings alone, to obtain a considerable reduction in the volume of exports.

152 The applicants' argument that the 'short-lived' agreements with the nine dealers in question did not involve a significant restriction on competition or significantly affect trade between Member States cannot be accepted.

153 In that respect, the Commission rightly argues that an agreement to stop exporting of relatively short duration may, in the course of its application, involve a significant restriction on competition and significantly affect trade between Member States, and that the duration of the infringement is a factor to be taken into consideration in calculating the amount of the fine. In this case, having regard to the position of the Opel brand on automobile markets, notably those of the Netherlands and Germany, the number of vehicles sold for export from the Netherlands in 1996, and the fact that the nine dealers accounted for about 65% of exports, the effect of the measure on trade between Member States and the operation of competition was not, in any event, insignificant within the meaning of the judgments in *Völk* (paragraphs 5 to 7) and *Javico* (paragraph 16).

154 Moreover, as pointed out in paragraphs 99 and 104 above, since the contested decision was based essentially on the argument that the measures taken by Opel Nederland had the restriction of competition as their object, the Commission was not required to demonstrate their effect. Assessment of the first plea in law shows it to have been established that Opel Nederland adopted its measures in the context of a strategy designed to limit exports. Concerning, more particularly, the direct prohibition measure, the Opel Nederland document of 23 August 1996, referred to in recital 65 of the contested decision, corroborates that analysis.

155 It follows that there is no need to examine further the arguments of the parties concerning the assessment of the actual effects of the measure in question.

156 Apart from the instructions and undertakings, the Commission also took into consideration the letters from Opel Nederland to the exporting dealers of 28/29 August and 30 September 1996, which it describes as 'warning' letters, and the audits, carried out at the premises of exporting dealers during the months from September to November 1996, which, according to the Commission, were also threatening in character.

157 Although those descriptions are not devoid of all foundation, having regard to the wording of the two letters and the context in which those measures were drawn up, the Court considers that the Commission has not proved to a sufficient legal standard that those acts form part of the infringement. The two letters and the audits in question may also be interpreted as having a legitimate purpose, namely to monitor the export sales in order to be able to detect sales which did not comply with the dealership contracts. Subject to those qualifications, the existence of the third measure is established.

158 As for the duration of the measure, the Court considers that the Commission is right to argue that the circular letter of 24 October 1996 cannot be regarded as sufficient to put an end to the infringement as regards the prohibition of exports destined for authorised Opel dealers. That letter concerns sales to final consumers living in other Member States and it does not make clear that sales to other Opel dealers established in other Member States were lawful.

159 It follows that the applicants' fourth plea in law is unfounded.

The alternative plea in law, alleging infringement of the principle of proportionality and the Commission's guidelines on fines

160 Assessment of the four main pleas in law does not lead to annulment of the contested decision as a whole. It is therefore necessary to examine the fifth plea in law, raised in the alternative.

Arguments of the parties

161 The applicants argue, in the alternative, that the fine of EUR 43 million bears no reasonable relation to the gravity and duration of the alleged infringement. In setting the fine at EUR 43 million, the Commission infringed Article 15(2) of Council Regulation No 17, the principle of proportionality and its own guidelines on the calculation of fines. In addition, the Commission did not take into account the lack of intent, the limited impact on intra-Community trade and the immediate corrective action taken by Opel Nederland on its own initiative.

162 The applicants argue that the infringement cannot be regarded as 'very serious'. The Commission wrongly assumes that Opel Nederland pursued a general policy to restrict all exports, whereas it sought merely to protect the integrity of its selective distribution system and to ensure that special campaign bonuses intended to stimulate sales in the Netherlands served their purpose.

163 The contested decision wrongly concludes that the infringement had an appreciable market impact in the whole of the European Union. The Commission errs in declaring that the object of a measure is sufficient to establish an infringement. The guidelines require an assessment of the actual market impact where it can be measured. The Commission refused to consider the economic evidence in the NERA report, according to which the contested measures had little or no impact.

164 The applicants consider that the mere hypothesis that any of the nine dealers might, during the brief period in question, have engaged in regular export sales to the United Kingdom or to any other Member State is not sufficient to establish that the geographic area affected included Member States other than the Netherlands and Germany.

165 A base fine of EUR 40 million to penalise an infringement which lasted, at most, 104 days is excessive, particularly as the infringement was committed in respect of a very limited number of dealers. The decision lacks any reasoning justifying the base amount.

166 In particular, there is no basis that would permit Opel Nederland to compare the level of the base amount set in this case with similar amounts set in other Commission decisions in this area.

167 The decision was wrong in that it fixed the duration of the infringement as lasting from 31 August 1996 to 20 January 1998, whereas the alleged infringement lasted, at most, from 31 August 1996 to 24 October 1996 as regards sales to final consumers, from the beginning of October 1996 to 12 December 1996 as regards sales to other Opel dealers, and from the beginning of October 1996 to 24 October 1996, as regards the restrictive bonus policy. A total fine of EUR 43 million, of which EUR 3 million is imposed solely in respect of the duration, in the case of an infringement lasting three months is excessive in light of the Commission's previous practice on the subject.

168 The applicants argue that the decision has also infringed the guidelines on the calculation of fines in that it fails to take account of extenuating circumstances, such as the non-implementation in practice of the offending practices or agreements, termination of the infringements before and at the time of the Commission's first interventions, the existence of reasonable doubt on the part of the undertaking as to whether the restrictive conduct constituted an infringement and the non-intentional nature of the infringements. Each of those factors applied in this case.

169 As the applicants argued in the context of the second and fourth pleas, the alleged policy of restrictive supply was never actually implemented. Opel Nederland

never sought to apply a direct ban on exports without distinction and, in any event, the alleged ban on exports involved only nine dealers.

170 Opel Nederland was the victim of massive fraud and sought, entirely legally, to restrict sales to unauthorised resellers and to ensure the effectiveness of its retail bonus campaigns.

171 By its circular letters of 24 October 1996 and 12 December 1996, Opel Nederland took immediate corrective measures.

172 Opel Nederland had reasonable grounds to believe that its bonus policy was compatible with competition law. The Commission should not have waited until April 1999 before advising Opel Nederland in its statement of objections that it regarded the bonus policy as an infringement of Article 81 EC.

173 Finally, any infringement of Article 81 EC resulted largely from a temporary misunderstanding of Opel Nederland's lawful attempts to protect the integrity of its selective distribution system.

174 The Commission contends that the gravity of the infringement is made clear by the fact that Opel Nederland deliberately decided to combat both regular and irregular exports of its dealers. The applicants' claim that the infringement was of short duration is wrong in so far as it is based on the false premiss that the infringement was confined to the period when all three elements of the strategy of partitioning the market were being implemented. In reality, the bonus scheme was, in itself, a breach of the competition rules, which was exacerbated by the other features of the campaign. In *Volkswagen*, the Court of First Instance did

not question the Commission's finding that the discriminatory bonus rules constituted, in themselves, a very serious infringement. Moreover, the duration of an infringement is a factor to be considered not in assessing gravity or calculating the starting amount of the fine, but, rather, in fixing its final amount.

175 The Commission maintains that it correctly assessed the real impact of the infringement on the market, since the markets on which pre-tax prices were substantially higher than in the Netherlands, for example Germany, were potential sources of export demand. That market analysis was upheld by the Court of First Instance in the *Volkswagen* case, in which it held that, once the Commission had found that a national market had been partitioned by a car manufacturer, it naturally followed that transactions to all the other Member States could be affected. In addition, the figures available do not permit an exact assessment of the impact of either the infringement as a whole or its various individual components on export volumes.

176 The Commission questions several of the conclusions drawn by the applicants from the NERA report. That report neither considers the effects on German final consumers nor examines the impact on Opel dealers established outside the Netherlands. The report is based on the erroneous premiss that the export restrictions caused no damage to consumers since they were able either to import an equivalent car of another brand from the Netherlands or to purchase the desired Opel model in another Member State where the price is low. Thus, the report fails to take into account the effects on the exercise of the right of Community consumers to purchase the car of their choice in the Member State of their choice.

177 The Commission states that the imposition of a fine is not a purely mathematical exercise. Each case must be assessed separately and, in some of the cases referred to by the applicants, it took account of extenuating circumstances which are absent from this case. It maintains that the base fine of EUR 40 million is consistent with its previous practice in this area.

178 The Commission observes that, in Joined Cases 100/80 to 103/80 *Musique Diffusion française* v *Commission* [1983] ECR 1825, paragraph 106, the Court of Justice found that the Commission's power to impose fines was not solely concerned with punishing individual infringements but also encompassed the duty to pursue a general competition policy. Thus, in assessing the gravity of an infringement, the Commission must take into account not only the specific circumstances of the case but also the context in which the infringement was committed and the need for its action to have deterrent effect, especially in the case of particularly harmful infringements. Moreover, the Court of Justice held that it was open to the Commission, when faced with recurrent breaches the unlawfulness of which is well established, to raise the level of fines. It seems normal that a clear, intentional and very serious infringement of the competition rules designed to partition a national market from the rest of the Community, committed by a major producer of a high-value product which has not been deterred from acting in that way despite the measures taken by the Commission over more than 30 years, merits a base amount of EUR 40 million.

179 According to the Commission, none of the extenuating circumstances relied on by the applicants can be accepted in this case.

Findings of the Court

— Preliminary considerations

180 Under Article 15(2) of Regulation No 17, the Commission may by decision impose on undertakings which have intentionally or negligently infringed Article [81](1) EC fines of between EUR 1 000 and EUR 1 million, or a sum in excess thereof not exceeding 10% of the turnover in the preceding business year of each of the undertakings participating in the infringement. The amount of the fine is to

be determined by taking into account both the gravity and the duration of the infringement.

181 Pursuant to Article 17 of Regulation No 17, the Court of Justice is to have unlimited jurisdiction within the meaning of Article 172 of the Treaty (now Article 229 EC) to review decisions whereby the Commission has fixed a fine or periodic penalty payment, and may cancel, reduce or increase the fine or periodic penalty payment imposed.

182 In 1998, the Commission adopted guidelines for calculating fines, with a view, in the words of the first recital of that document, to ensuring the transparency and impartiality of the Commission's decisions in that area.

183 According to the second recital of the guidelines, the Commission's new method of determining the amount of a fine is to adhere to the rules set out in the guidelines, which start from a basic amount which is to be increased to take account of aggravating circumstances or reduced to take account of extenuating circumstances. According to point 1 of the guidelines, the basic amount is to be determined according to the gravity and duration of the infringement

184 Point 1A of the guidelines states that assessment of the gravity of the infringement must take account of its nature, its actual impact on the market, where that can be measured, and the size of the relevant geographic market. Infringements are thus classified into three categories, allowing a distinction to be made between minor infringements (likely fines: EUR 1 000 to EUR 1 million), serious infringements (likely fines: EUR 1 million to EUR 20 million) and very serious infringements (likely fines: above EUR 20 million).

185 In accordance with point 1B of the guidelines, the duration of the infringement should be taken into account so as to distinguish between infringements of short duration (in general, less than one year: no increase in amount), infringements of medium duration (in general, one to five years: increase of up to 50% in the amount determined for gravity, and infringements of long duration (in general, more than five years: increase of up to 10% per year in the amount determined for gravity).

186 In points 2 and 3, the guidelines set out, non-exhaustively, aggravating and extenuating circumstances which the Commission will take into account where appropriate.

187 In the contested decision, no express reference is made to the guidelines. In its pleadings, however, the Commission explains and justifies the imposition of the fine in the light of those guidelines.

188 It should be noted that the guidelines do not prejudge the assessment of the fine by the Community judicature, which has unlimited jurisdiction in accordance with Article 17 of Regulation No 17. In addition, while the Commission may determine the amount of the fine in accordance with the method prescribed by the guidelines, it must remain within the context of the penalties defined by Article 15 of Regulation No 17.

189 It should also be recalled that the gravity of infringements has to be determined by reference to numerous factors, such as the particular circumstances of the case, its context and the dissuasive effect of fines, without there being any binding or exhaustive list of the criteria which must be applied (order in Case C-137/95 P *SPO and Others* v *Commission* [1996] ECR I-1611, paragraph 54; judgment in

Ferriere Nord, paragraph 33). In addition, consistent case-law shows that, in the context of Regulation No 17, the Commission has a wide margin of discretion in fixing the amount of fines in order to steer the conduct of undertakings towards compliance with the competition rules (Case T-150/89 *Martinelli* v *Commission* [1995] ECR II-1165, paragraph 59; Case T-49/95 *Van Megen Sports* v *Commission* [1996] ECR II-1799, paragraph 53; Case T-229/94 *Deutsche Bahn* v *Commission* [1997] ECR II-1689, paragraph 127). The Court of First Instance is, however, under a duty to verify whether the amount of the fine imposed is proportionate in relation to the gravity and duration of the infringement (*Deutsche Bahn*, paragraph 127), and to weigh the gravity of the infringement and the circumstances invoked by the applicant (Case C-333/94 P *Tetra Pak* v *Commission* [1996] ECR I-5951, paragraph 48).

— The fine

190 In recitals 175 to 202 of the contested decision, the Commission sets out the arguments which led it to impose a fine of EUR 43 million on the applicants, who, in accordance with Article 3 of the contested decision, are jointly and severally liable for payment. In summary, the Commission describes the infringement as 'very serious', taking into account its nature, its actual impact on the market, in so far as it can be assessed, the size of the relevant geographical market and its 'medium duration', whereas it has not found any extenuating or aggravating circumstances.

191 The Court finds the description of the infringement as 'very serious' justified, and that sufficient grounds are given for that description in the contested decision. Leaving aside its duration, the infringement had as its object the partitioning of the internal market. Such a patent infringement of competition law is, by its nature, particularly serious. It goes against the most fundamental aims of the Community and, in particular, the accomplishment of the single market (Case T-9/92 *Peugeot* v *Commission* [1993] ECR II-493, paragraph 42).

192 The infringement is all the more serious given the size of the applicants and the importance of the Opel brand in the European market, particularly the Netherlands and German markets (see, to that effect, *Musique Diffusion française*, paragraph 120), and given the fact that it was committed despite the warning constituted by the Commission's previous decision-making practice and the consistent case-law on parallel imports, particularly in the automobile industry.

193 Concerning the impact of the infringement on the market and the size of the geographical market in question, the Commission states first, in recital 184 of the contested decision, that the infringement concerns the Netherlands market for the sale of new motor vehicles, but that it also had its effects on the markets of other Member States, particularly Germany.

194 That assessment is also well founded. The infringement concerns the Netherlands and German markets in the first instance, but, in principle, the markets of all Member States where, during the period concerned, the pre-tax price of Opel vehicles was significantly higher than in the Netherlands may be regarded as potential sources of export demand. It must be admitted, however, that the Commission has not supplied concrete evidence of the existence, during the period in question, of demand from consumers or Opel dealers, resident or established in Member States other than Germany, save for an order, in July 1996, from an Opel dealer established in Austria, referred to in recital 86 of the contested decision.

195 The Commission then states, in recital 185 of the contested decision, that the [anti-competitive] object of a measure is sufficient to establish the existence of an infringement and that Article 15 of Regulation No 17 does not specify that the infringement has to be assessed by reference to the actual results on the market, that is to say in relation to the harm caused to purchasers of the products in question.

196 Although that argument is not incorrect, the Commission fails to mention that, in its own guidelines, at point 1A, it expressly undertook, when assessing the seriousness of an infringement, to take into account not only its nature and the extent of the geographical market concerned but also its actual impact on the market where that can be measured. In this case, moreover, all those criteria are referred to in recital 177 of the contested decision.

197 Nevertheless, as stated in paragraph 105 above, the Commission is right to state that, in this case, it is impossible to determine the number of exports which the measures have actually prevented. Having regard, however, to the volume achieved in the first seven months of 1996 (1496 vehicles exported, according to recital 64 of the contested decision), it is reasonable to suppose that the impact of the third measure, consisting in a direct restriction of exports by the nine dealers in question, was considerable. The figures supplied by the applicants in response to a written question of the Court of First Instance appear moreover to indicate that the number of orders from more than 21 'exporting' dealers in October, November and December 1996 had fallen significantly by comparison with the previous months of the same year. The impact of the bonus policy is more uncertain, however, given that export sales had become less advantageous after the introduction of the policy on premiums but that it has not been established that these had become unprofitable.

198 The Commission has also taken into account, in recitals 189 to 193 of the contested decision, the fact that Opel clearly acted intentionally and could not have been unaware that the contested measures had as their object the restriction of competition. That assessment is also justified. The documents of 3 and 12 September 1996, referred to in recitals 51 and 27 of the contested decision, show that Opel Nederland was aware of the fact that the restriction of exports and the policy on bonuses are prohibited by Community law. In so far as it had any doubt as to the compatibility of its bonus policy with competition law, it failed to contact the Commission on that subject either before or after investigations carried out in December 1996. In those circumstances, the applicants cannot rely on the argument that the Commission should not have waited until April 1999 before informing Opel Nederland, in its statement of objections, that it considered the bonus policy in question to be contrary to Article 81 EC.

199 Having regard to the gravity of the infringement, the Commission considers that EUR 40 million constitutes an appropriate basis for determining the basic amount. The Court considers that, in the circumstances of this case and given the existence of the three measures alleged, that amount is justified and that sufficient reasons have been stated for it in the contested decision, even taking into account the reservations expressed in paragraphs 150, 157, 194 and 196 above concerning the number of dealers involved, the unlawful nature of the letters of 28/29 August and 30 September 1996 and the audits, the geographical market concerned and the actual impact of the infringement.

200 Nevertheless, that amount should be reduced, having regard to the fact that the existence of the restrictive supply measure has not been established. It should be noted, in that respect, that the Commission has also assessed the gravity of the infringement by reference to the number of measures alleged. In the circumstances of this case, the Court considers it appropriate to fix the basic amount, in relation to the gravity of the infringement, at EUR 33 million.

201 As for the duration of the infringement, it is established that it lasted from the end of August or the beginning of September 1996 until January 1998, and thus totalled 17 months. In accordance with the guidelines, that is therefore an infringement of medium duration, allowing an increase of up to 50% of the amount determined in relation to the gravity of the infringement.

202 In this case, taking into account the respective duration of the three measures alleged, the Commission has made an increase of 7.5% of the amount of EUR 40 million, namely EUR 3 million, taking the basic amount of the fine to EUR 43 million.

203 The Court can endorse that approach, which takes into consideration amongst other things the fact that the direct prohibitions were brought to an end at the end of October 1996 and the end of December 1996 respectively. Taking into account

the reduction of the fine in relation to the gravity of the infringement, the increase of 7.5% therefore applies to the amount of EUR 33 million, namely EUR 2 475 000, taking the amount of the fine to EUR 35 475 000.

204 Finally, the Court considers that the Commission was not required to find extenuating circumstances, as pleaded by the applicants. The above considerations show that the scenarios of no actual application of the agreements, as held by the Court of First Instance, of a cessation of the infringements as from the time the Commission first intervened, or of an unintentional infringement, do not apply in this case.

205 It follows that the fifth plea in law cannot be accepted, save as regards the amount of the fine.

Costs

206 Under Article 87(3) of the Rules of Procedure of the Court of First Instance, the Court may, where each party succeeds on some and fails on other heads, order that the costs be shared or that each party bears its own costs. As the action has been successful to a limited extent, the Court considers it fair, having regard to the circumstances of the case, to order the applicants to bear four fifths of their own costs and four fifths of the Commission's costs, and to order the Commission to bear one fifth of its own costs and one fifth of the applicants' costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber),

hereby rules:

1. **The contested decision of the Commission C (2000) 2707 of 20 September 2000 relating to a proceeding under Article 81 of the EC Treaty (COMP/36.653 — Opel) is annulled in so far as it establishes the existence of a restrictive supply measure contrary to Article 81(1) EC.**

2. **The amount of the fine imposed on the applicants by Article 3 of the contested decision is reduced to EUR 35 475 000.**

3. **The application is dismissed as to the remainder.**

4. **The applicants are ordered to bear four fifths of their own costs and four fifths of the Commission's costs; the Commission is ordered to bear one fifth of its own costs and one fifth of the applicants' costs.**

Forwood Pirrung Meij

Delivered in open court in Luxembourg on 21 October 2003.

H. Jung N.J. Forwood

Registrar President