OPINION OF ADVOCATE GENERAL TIZZANO

delivered on 17 November 2005 [1]

1. By a judgment of 3 December 2003 in Case T-208/01 *Volkswagen* v *Commission* [2003] ECR II-5141 ('the judgment under appeal'), the Court of First Instance annulled Commission Decision 2001/711/EC of 29 June 2001 relating to a proceeding under Article 81 of the EC Treaty (the 'contested decision'), [2] which penalised Volkswagen AG for having concluded with its German distribution network an agreement designed to fix the retail price of cars of the Passat model. The Commission is now seeking to have that judgment annulled.

I — Facts and procedure

A — *The facts which gave rise to the dispute*

2. In the judgment under appeal, the facts which gave rise to the dispute are described as follows:

'1 Volkswagen AG (hereinafter "Volkswagen" or "the applicant") is the holding company and the largest undertaking of the Volkswagen group, which operates in the automobile construction sector. The motor vehicles produced by the applicant are sold in the Community, within the framework of a system of selective and exclusive distribution, by authorised dealers with which the applicant has concluded a dealership agreement.

2 Under Clause 4(1) of the dealership agreement in its September 1995 and January 1998 versions, Volkswagen grants the dealer an agreed territory for the range of vehicles and for after-sales service. In return, the dealer undertakes to promote sales and after-sales services intensively within the agreed territory and to exploit its market potential to the utmost. Under Clause 2(6) (January 1989 version) or Clause 2(1) (September 1995 and January 1998 versions) of the dealership agreement, the dealer undertakes to "defend and promote in every way the interests of [Volkswagen], of the Volkswagen distribution organisation and of the Volkswagen brand". It is also

1 — Language of the case: Italian.

2 — Case COMP/F-2/36.693 — Volkswagen (OJ 2001 L 262, p. 14).

stipulated that "the dealer will comply with all instructions issued for the purposes of the agreement regarding the distribution of new Volkswagen cars, the stocking of replacement parts, customer service, sales promotion, advertising, training and the ensuring of quality in each area of Volkswagen's business". Finally, under Clause 8(1) of the dealership agreement "[Volkswagen] will issue non-binding price recommendations concerning retail prices and discounts".'

B — *The contested decision*

3. Following a complaint by a car purchaser, the Commission began an administrative investigation to determine whether there had been any violation of Article 81(1) EC in relation to the fixing of the resale price of the Volkswagen Passat model in Germany. On completion of the investigation, the Commission adopted the contested decision by which:

— it found that Volkswagen had infringed Article 81(1) EC by 'setting the selling price of the VW Passat model on the basis of exhortations to its German authorised dealers to grant limited discounts or no discounts at all to customers in selling the VW Passat' (Article 1);

— it imposed on Volkswagen a fine of EUR 30.96 million (Article 2).

4. In the statement of reasons for the decision, the Commission sought to demonstrate: (i) that Volkswagen had concluded with the German dealers an agreement on the resale price of the Passat models (paragraphs 56 to 69); (ii) that the object of the agreement was to restrict competition (paragraphs 70 to 74); (iii) that the agreement had a significant effect on trade between Member States (paragraphs 81 to 91); and (iv) the agreement at issue could not benefit from an individual exemption or an exemption by category within the meaning of Article 81(3) EC (paragraphs 93 to 96).

5. With regard to point (i) in particular, which forms the subject-matter of this appeal, the Commission inferred the existence of agreed rules in relation to prices from the fact that Volkswagen had sent three circulars to all its German dealers as well as five letters to a certain number of them (the 'calls at issue') in which the automobile manufacturer told its retailers not to give

discounts (or to give very limited discounts) on sales of the Passat, threatening them with legal action if they failed to comply with those instructions (paragraphs 29 to 55).

6. According to the Commission, those instructions constituted not merely unilateral conduct on the part of Volkswagen but an agreement within the meaning of Article 81 EC, in so far as they formed part of the continuous business relations the manufacturer maintained with its dealers based on the relevant dealership agreements (paragraphs 57 to 59). According to the Commission, it was, in fact, clear from 'the established case-law of the European Court of Justice [that] admission to a distribution network implies that the contracting parties explicitly or implicitly accept the distribution policy of the manufacturer. The circulars therefore became part and parcel of the agreements between Volkswagen AG and its authorised dealers, since they [had] to be regarded as part of a set of continuous business relations based on an existing general agreement (the dealer agreement)' (paragraph 57).

7. In particular, the Court of Justice had made it clear that 'calls by a manufacturer to its authorised dealers constituted an agreement if they were "intended to influence the ... dealers in the performance of their contract with (the manufacturer or importer)"'. In the Commission's view, that condition was met in the instant case (paragraph 62).

8. Consequently, the Commission took the view that '[t]he question of whether and to what extent the German Volkswagen dealers [had] actually changed their pricing on the basis of the circulars and warnings [could] be left open' (paragraph 68).

9. Finally, the Commission rejected Volkswagen's arguments that the pricing policy at issue could not have been accepted, even tacitly, by the dealers since not only was it not contemplated in the dealership agreement, but it was also contrary to Clause 8(1) of that agreement.

10. On the contrary, according to the Commission, the calls at issue were based on a clause in the agreement, namely Clause 2(6) (paragraph 64). Moreover, nor could there be said to be a 'contradiction' between the call at issue and Clause 8(1) of the agreement. That clause provides that '[Volkswagen] will issue non-binding price recommendations concerning retail prices and discounts'. Such recommendations include the calculation of prices and adjustment arrangements applying between the dealer and the manufacturer. The fact that this mechanism includes the right of the manufacturer to issue non-binding price

recommendations does not mean that the dealer has any specific guarantee that the manufacturer will in future abstain from making binding specifications, for example under Clause 8(1) of the agreement (paragraph 65).

C — *Proceedings before the Court of First Instance and the judgment under appeal*

11. By an application lodged on 10 September 2001, Volkswagen asked the Court of First Instance principally to annul the Commission's decision or, in the alternative, to reduce the amount of the fine imposed by the decision.

12. By a judgment of 3 December 2003, the Court of First Instance accepted the main plea in law of Volkswagen concerning the applicability of Article 81(1) EC to the case, and annulled the contested decision, on the ground that, in its view, 'the Commission [had] not proved ... a concurrence of wills between the applicant and its dealers in relation to the calls at issue'. [3]

13. In assessing the applicant's complaint, the Court of First Instance first pointed out, referring in particular to the judgment in *Bayer* v *Commission*, [4] that 'the concept of agreement within the meaning of Article 81(1) EC ... centres around the existence of a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties' intention' [5] and that, consequently, 'a decision of the manufacturer [which] constitutes unilateral conduct of the undertaking' is not caught by that provision. [6]

14. The Court of First Instance goes on to state that it is, therefore, necessary 'that a distinction should be drawn between cases in which an undertaking has adopted a genuinely unilateral measure, and thus without the express or implied participation of another undertaking, and those in which the unilateral character of the measure is merely apparent. While the former do not fall within Article 81(1) EC, the latter must be regarded as revealing an agreement between undertakings and may therefore fall within the scope of that article. That is the case, in particular, with practices and measures in restraint of competition which, though apparently adopted unilaterally by the manufacturer in the context of its contractual relations with its dealers, nevertheless receive at least the tacit acquiescence of those dealers.' [7]

3 — Contested judgment, paragraph 68.

4 — See Case T-41/96 [2000] ECR II-3383.

5 — Contested judgment, paragraph 32.

6 — Contested judgment, paragraph 33.

7 — Contested judgment, paragraph 35.

15. In that connection, the Court of First Instance emphasised, however, that it was clear from settled case-law [8] that 'the Commission cannot hold that apparently unilateral conduct on the part of a manufacturer, adopted in the context of the contractual relations which it maintains with its dealers, in reality forms the basis of an agreement between undertakings within the meaning of Article 81(1) EC if the Commission does not establish the existence of an acquiescence by the other partners, express or implied, in the attitude adopted by the manufacturer'. [9]

16. Having made that point, and moving on to assess the applicability of Article 81(1) EC to the case at issue, the Court of First Instance then noted that the Commission itself had admitted that 'it had not been established that the calls at issue [had] been implemented in practice'. The reason for this was because the Commission had not considered such verification necessary because, again in its view, the distribution policy at issue was tacitly accepted by the dealers on signing the dealership agreement. [10]

17. However, the Court of First Instance rejected that line of argument. In its view, it is quite possible to regard as having been accepted in advance, upon and by the signature of a lawful dealership agreement, 'a lawful contractual variation which is foreseen by the contract, or a variation which, having regard to commercial usage or legislation, the dealer could not refuse'. [11] But it cannot be presumed that 'an unlawful contractual variation' had been accepted in advance by the dealers. [12] In that case, 'acquiescence in the unlawful contractual variation can occur only after the dealer has become aware of the variation desired by the manufacturer'. [13]

18. In the view of the Court of First Instance, the actual case-law cited — but then misconstrued — by the Commission confirms:

— that 'for an agreement within the meaning of Article 81(1) EC to be found to exist, it is necessary to prove a concurrence of wills'; and that

— 'such a concurrence of wills must cover particular conduct, which must, therefore, be known to the parties when they accept it'. [14]

8 — The Court of First Instance referred, in particular, to Joined Cases 32/78 and 36/78 to 82/78 *BMW Belgium and Others* v *Commission* [1979] ECR 2435; Case 107/82 *AEG* v *Commission* [1983] ECR 3151; Joined Cases 25/84 and 26/84 *Ford* v *Commission* [1985] ECR 2725; Case C-277/87 *Sandoz prodotti farmaceutici* v *Commission* [1990] ECR I-45; and *Bayer* v *Commission* (cited in footnote 4 above).

9 — Contested judgment, paragraph 36.

10 — Contested judgment, paragraphs 38 to 40.

11 — Contested judgment, paragraph 45.

12 — Ibid.

13 — Ibid.

14 — Contested judgment, paragraph 56.

19. However, 'contrary to the Commission's argument, it does not follow from the case-law that, for a request to form part of a contract, the decisive element is that the request be intended to influence the dealer in the performance of the contract. If that were the case, the sending by the manufacturer of a call to its dealers would lead, systematically, to the establishment of an agreement, since by definition such a call is intended to influence those dealers in the performance of their contracts.' [15]

20. On the basis of those considerations, the Court of First Instance concluded that the Commission's assumption that 'the signature of a ... contract implied tacit acceptance of those calls in advance' — so that it was not necessary to 'prove actual acquiescence of the dealers to those requests' — was unfounded. [16]

21. Finally, the Court of First Instance dismissed the ground of challenge made by the Commission in the alternative to the effect that acquiescence in the calls at issue could, in any event, be inferred from the combined provisions of Clause 2 and Clause 8 of the dealership agreement.

22. On the one hand, the Court of First Instance took the view that 'Clause 2(1) or (6) of the dealership agreement, by which the dealer binds itself to "defend and promote in every way the interests of Volkswagen ..., of the Volkswagen distribution organisation and of the Volkswagen brand" can ... be interpreted as referring solely to lawful means. To maintain the contrary would amount, in effect, to deducing from such a contractual clause, drafted in neutral terms, that the dealers had bound themselves by an illegal agreement.' [17]

23. The Court of First Instance goes on to point out that no different conclusion can be drawn from the 'fact that Volkswagen refers to Clause 2 of the dealership agreement in the calls at issue ... The existence of a possible organic link between Clause 2 of the dealership agreement and the calls at issue can be established only objectively, by analysing the provisions concerned independently of what one of the contracting parties later states. As has been stated above, it is clear from the very terms of Clause 2 that it does not in any way envisage an anti-competitive variation of the contract.' [18]

24. Furthermore, the Court of First Instance emphasised that Clause 8(1) of the dealership

15 — Contested judgment, paragraph 57.
16 — Contested judgment, paragraph 59.
17 — Contested judgment, paragraph 63.
18 — Contested judgment, paragraph 66.

contract 'is also drafted in neutral terms, indeed in terms rather prohibitive of the possibility for Volkswagen to issue binding price recommendations'. [19]

25. In the light of all of the above considerations, the Court of First Instance concluded that the Commission had failed to prove that the German dealers had acquiesced in Volkswagen's pricing policy and, consequently, that the contested decision had been adopted in breach of Article 81(1) EC. [20]

D — *Proceedings before the Court of Justice*

26. By an appeal brought on 16 February 2004, the Commission asked the Court of Justice to: (i) set aside the judgment under appeal; (ii) to refer the case back to the Court of First Instance; and (iii) order Volkswagen to bear the costs.

27. The defendant plainly objected to those claims and asked the Court of Justice to reject the application and order the appellant to pay the costs.

28. On completion of the written procedure, which also included a second exchange of [written] observations, a hearing of the parties took place on 29 September 2005.

II — Legal analysis

29. By its single ground of appeal, the Commission is challenging the assessment of the Court of First Instance to the effect that the calls by which Volkswagen exhorted its dealers not to give discounts on sales of the Passat models did not constitute agreements within the meaning of Article 81(1) EC. In the Commission's view, the Court of First Instance had placed too restrictive an interpretation on the concept of 'agreement' and, consequently, had infringed that provision.

Arguments of the parties

30. The appellant's main contention is that the interpretation of the Court of First Instance is incompatible with settled case-law, [21] according to which an 'agreement'

19 — Contested judgment, paragraph 64.

20 — Contested judgment, paragraph 68.

21 — The Commission refers, in particular, to *AEG* v *Commission* and *Ford* v *Commission* (cited in footnote 8 above), and to Joined Cases C-2/01 P and C-3/01 P *BAI and Commission* v *Bayer* [2004] ECR I-23.

within the meaning of Article 81 EC exists simply if calls of the kind at issue have been made by a manufacturer in the context of a set of continuous business relations based on an existing general agreement. Similarly, according to that same case-law, the admission of a dealer to a selective distribution system always involves that dealer's explicit or tacit acceptance of the manufacturer's distribution policy. [22]

31. In such cases, in order to ascertain whether an agreement exists, it is not therefore necessary to prove, contrary to the view of the Court of First Instance, that the dealers have specifically consented to the measure at issue. Nor can it be held that, by signing up to a dealership agreement, the dealer is accepting the manufacturer's distribution policy solely in regard to lawful variations or, at any rate, measures of which the dealer is aware.

32. Therefore, by departing from the existing case-law, the judgment under appeal has, in the appellant's view, laid down excessively strict requirements in relation to proving the existence of agreements concerning vertical restrictions of competition.

33. Not only that, but, according to the Commission, as well as being incompatible with established case-law, the interpretation of the concept of agreement contained in the judgment under appeal fails to take account of the nature and characteristics of selective distribution agreements. Such agreements in fact constitute a general framework designed to apply for a certain number of years and, therefore, to be gradually supplemented and put into more concrete terms, depending on the requirements of the parties, market conditions, technological developments and so on. Since not all of those variations can be predicted at the time when the dealership agreement is entered into, such agreements, as the Court of Justice itself acknowledged in its judgment in *Ford* v *Commission*, inevitably leave some elements to subsequent decisions by the manufacturer. Therefore, signature of the dealership agreement implies that the dealer is accepting such measures in advance.

34. Finally, the Commission criticises the distinction that the Court of First Instance draws between 'lawful' and 'unlawful' contractual variations (see point 17 above), a distinction on the basis of which the Court of First Instance concluded — in the appellant's view, incorrectly — that: (i) at the time when a lawful dealership contract is signed, the dealer accepts only lawful contractual variations, and that (ii) a clause drafted in neutral terms can relate only to 'lawful' measures.

35. According to the Commission, however, that distinction is not relevant in terms of

22 — The Commission draws attention, in particular, to Case C-70/93 *Bayerische Motorenwerke* [1995] ECR I-3439 and Case C-338/00 P *Volkswagen* v *Commission* [2003] ECR I-9189.

proving that a dealer has accepted a measure imposed by a manufacturer. In point of fact — and as is, moreover, confirmed by the cases which gave rise to the Court's judgments in relation to dealership agreements — unlawful measures may be adopted on the basis of perfectly legitimate or entirely neutral clauses in an agreement.

36. The Commission adds that this is a criterion that is hard to apply in practice because it is not always easy for the dealers to distinguish between lawful and unlawful measures, particularly where that assessment requires an interpretation of the rules on exemption applicable in this field.

37. For its part, Volkswagen, however, contends that the Court of First Instance applied Article 81(1) EC correctly to this case, and, in particular, that the interpretation of the concept of 'agreement' contained in the judgment under appeal is not incompatible with established Community case-law.

Assessment

38. This appeal raises once again the difficult issue of the application of Article 81(1) EC, and, more specifically, the concept of 'agreement' contained therein, to seemingly unilateral measures adopted by manufacturers in the context of business relations with their dealers. [23]

39. More particularly, it is necessary to establish here whether it can be assumed, as the Commission maintains, but contrary to the view of the Court of First Instance, that by subscribing to a dealership agreement, the dealer acquiesces in advance to all the measures adopted by the manufacturer in the context of the consequent relationship, including anti-competitive conduct of the kind at issue.

40. Although each arrived at different conclusions, both the Commission and Volkswagen having answered that question by citing the many judgments of the Court in relation to dealership agreements, it therefore seems to me to be appropriate to begin by seeking to clarify the significance and scope of that case-law.

23 — In my Opinion in *BAI and Commission* v *Bayer* (cited in footnote 21 above), I dealt with similar matters of interpretation of Article 81 EC, albeit within a different factual context. In that case, in contrast to the present case, the manufacturer and retailers had not in fact entered into any distribution agreement, and the manufacturer had not addressed to its own wholesalers any kind of instruction or request, but had 'confined itself' to setting in place a system of sales quotas with the aim of preventing or limiting parallel imports. That Opinion does, however, contain an analysis of the Community case-law concerning vertical restrictions to which I shall have occasion to return and, in part at least, may be of use in assessing this case (see, in particular, points 49 to 78).

41. As regards the aspect material to this case, it appears to me that the Court has defined as only apparently unilateral, and thus, in fact, as genuine agreements, two kinds of measure adopted in the context of the relations between manufacturers and dealers.

42. The first concerns those measures which are provided for under the actual dealership agreement. In that connection, the Court has taken the view that, by being party to an agreement which envisages or at least permits the adoption of subsequent measures by the manufacturer, the dealer is consenting in advance to comply with those measures. In other words, such measures are deemed to fall within the scope of Article 81(1) EC in so far as they are covered by the acquiescence in the dealership agreement, of which they have basically to be considered to be 'an integral part'.

43. That seems to me to be the logic underlying the *Ford* v *Commission*, *AEG* v *Commission* and *Bayerische Motorenwerke* judgments cited by the Commission in support of its own arguments. [24] In *Ford* v *Commission*, the Court in fact rejected the arguments of the applicant company concerning the allegedly unilateral nature of certain measures restricting deliveries, pointing out that under Ford's dealership agreement it was necessary to 'leave certain matters to be decided later by the manufacturer' including specifically, as expressly provided for in Schedule 1 of the agreement, decisions concerning the models to be delivered. [25] Similarly, although it may not perhaps emerge as clearly from the grounds of these judgments, in the *AEG* v *Commission* and *Bayerische Motorenwerke* cases, the restrictive measures at issue were considered to arise out of the relevant dealership agreements, [26] and, consequently, the Court held that the manufacturer's conduct or decision did not constitute a unilateral act since it formed part of the 'contractual relations between the undertakings and resellers'. [27]

44. In that same perspective, it is necessary to cite also the most recent *Volkswagen* judgment in which the Court held that Article 81 EC was applicable to measures limiting deliveries adopted by Volkswagen in relation to its Italian dealers, stressing in particular the fact that the 'contract *provided for* the possibility of limiting supplies'. [28] Therefore, 'by accepting the dealership con-

24 — The fundamental issue in those cases was to determine whether measures adopted by manufacturers were separate and distinct with respect to the dealership agreements or whether they were in some way caught by those agreements and had, therefore, to be taken into consideration in assessing the compatibility of the agreements with the rules on competition. For a more detailed analysis of those judgments, see my Opinion in *Bayer* v *Commission* (points 68 to 74 in particular).

25 — *Ford* v *Commission* (cited in footnote 8 above), paragraph 20.

26 — See *AEG* v *Commission* (cited in footnote 8 above), paragraphs 38 and 39, and *Bayerische Motorenwerke* (cited in footnote 22 above), paragraph 17.

27 — *Ford* v *Commission* (cited in footnote 8 above), paragraph 21, and *AEG* v *Commission*, paragraph 38. See also *Bayerische Motorenwerke* (cited in footnote 22 above), paragraph 17.

28 — *Volkswagen* v *Commission* (cited in footnote 22 above), paragraph 64. My emphasis.

tract, the Italian dealers consented to a measure which was subsequently used for the purpose of blocking re-exports from Italy'. [29]

45. The other instance of measures which are only seemingly unilateral which Community case-law envisages relates, however, to circumstances in which there are no relevant contractual provisions or, indeed, there is no agreement, and is based on the supposition that consent to the manufacturer's requests may be given not only explicitly but also tacitly. In such cases, therefore, acceptance of those requests is inferred from the conduct of the persons to whom they are addressed, with the result that the agreement must be deemed to have been reached even where, in response to such requests, the dealers exhibit their acquiescence through specific actions. [30]

46. Specifically in that context, the Court held in its judgment in *Sandoz prodotti farmaceutici* v *Commission*, embracing a particularly broad interpretation of the concept of agreement, that '[t]he repeated orders of the products and the successive payments without protest by the customer of the prices indicated on the invoices bearing the words "export prohibited" constituted a tacit acquiescence on the part of the latter in [that restrictive clause]'. [31] In other words, *and without even verifying whether the goods in question were actually exported or not*, the Court identified a form of 'tacit acquiescence' — and therefore considered that an 'agreement' had been concluded — solely on the ground that, once that those words had been inserted into the invoices, the wholesalers did not challenge it and continued to obtain their supplies regularly from the pharmaceutical company.

47. Contrary to the Commission's claims, therefore, it does not follow from the judgments considered above that in order to determine the existence of an agreement within the meaning of Article 81(1) EC, it is sufficient to establish that a measure has been adopted by a manufacturer in the context of the continuous business relations which it maintains with its dealers and/or that the latter form part of a particular distribution system. [32] What in fact matters is that the dealers have consented to the specific measure in question, that consent being able to be given *upstream*, in clauses in an agreement (first premiss), or *downstream*,

29 — Ibid., paragraph 65.

30 — See, in particular, *BMW Belgium and Others* v *Commission* (cited in footnote 8 above), paragraphs 28, 29 and 37.

31 — *Sandoz prodotti farmaceutici* v *Commission* (cited in footnote 8 above), paragraph 11. See also, more recently, *BAI and Commission* v *Bayer* (cited in footnote 21 above), paragraph 142.

32 — In that connection, see, in particular, *BAI and Commission* v *Bayer* (cited in footnote 21 above), in which the Court noted that '[t]he mere concomitant existence of an agreement which is in itself neutral and a measure restricting competition that has been imposed unilaterally does not amount to an agreement prohibited by that provision. Thus, the mere fact that a measure adopted by a manufacturer, which has the object of restricting competition, falls within the context of continuous business relations between the manufacturer and its wholesalers is not sufficient for a finding that such an agreement exists' (paragraph 141).

in the form of more or less explicit acquiescence (second premiss).

48. In other words, for Article 81 EC to apply, it must be established that the economic operators concerned have mutually agreed to adopt a particular form of conduct or measure. That concordance of wills of the parties does not in fact merely mark the dividing line between the scope of Articles 81 EC and 82 EC, namely the dividing line between the rules applicable to agreements and those relating to unilateral measures, but defines the very concept of agreement.

49. Turning now to this case, and continuing the analytical approach I have followed so far, it seems to me, above all, that the Court of First Instance cannot be criticised, though the Commission levels this criticism, for having incorrectly applied Article 81(1) EC, by having required proof that the German dealers had agreed to comply with the specific calls by Volkswagen in relation to pricing, even though those calls formed part of a set of continuous business relations based on an existing general agreement and the dealers belonged to a selective distribution system. By requiring that 'actual acquiescence by the dealers to those requests' be proven, [33] the Court of First Instance was simply applying the principles arising, as we have seen, from Community case-law in this field.

50. In order to furnish such proof, the Commission could have taken two different approaches, in accordance with the lines of case-law set out above.

51. The first approach, which we may define as more formalistic, required the Commission to demonstrate that the provisions of the dealership agreement allowed Volkswagen to adopt measures of the kind at issue.

52. The second approach, which we may consider better reflects the true influence of each of the parties in the relationship, shifts the analysis to a different area, namely the actual conduct of the German dealers when they received the instructions on discounts. The Commission could, for instance, have tried to demonstrate that by implementing or, at any rate, in some way complying with Volkswagen's requests, the dealers had implicitly demonstrated their consent to the manufacturer's new policy.

33 — Contested judgment, paragraph 59.

53. I would add that opting for the latter approach could have involved a difficult problem of interpretation of the significance and scope of the abovementioned judgment in *Sandoz prodotti farmaceutici* v *Commission*. That problem would have arisen in so far as it would have been necessary to assess whether the Commission could infer the consent of the dealers solely on the basis of (any) failure on their part to challenge the calls at issue or if, in fact, it ought also to have assessed whether there were factors to suggest that an automatic and, indeed, rather simplistic inference of that nature was not justified in the case in point.

54. But let me immediately make the point that in its assessment of this appeal, the Court will not have to broach that kind of issue because the Commission did not take the approach set out above in order to prove that the dealers had given their consent. In point of fact, by basing its analysis exclusively on the existence of a selective distribution agreement, the signing of which, according to the Commission, implied the acceptance in advance of the contested measures, [34] the appellant did not in the end consider it necessary to determine 'whether and to what extent the German Volkswagen dealers actually changed their pricing on the basis of the circulars and warnings (recital 68 of the contested decision)' or whether, in any event, they refrained from challenging the calls at issue. [35]

55. It therefore remains to be established whether the other set of circumstances described above exists, that is to say whether the Commission could actually rely on the dealership agreement in question to conclude that a pricing agreement had been entered into between Volkswagen and the German dealers.

56. But in that connection, the Court of First Instance has already itself established that the ban on giving discounts imposed by Volkswagen had no basis in any provision of the dealership agreement. [36] That finding constitutes an evaluation of the evidential value to be attributed to the evidence submitted to the Court of First Instance (and particularly the clauses in the agree-

34 — An approach explicitly confirmed by the Commission at the hearing.

35 — Contested judgment, paragraphs 38 and 39. And, in point of fact, in the contested decision, the Commission cites the conduct of the parties (the threats of legal action that Volkswagen made to its dealers should they fail to comply with the calls at issue, for example) solely in support of its argument that the calls at issue were 'covered by the dealership agreement' and had, therefore, been accepted *in advance* by the dealers (see the contested decision, paragraphs 66 and 67, and the judgment under appeal, paragraph 60). Furthermore, the only actions taken by a representative number of dealers to which the Commission refers could not, in any event, be relied upon to prove any kind of acquiescence in the *specific* measure at issue. In effect, as is clear from the decision itself, the criticism the 'dealer council' levelled at the large discounts given by some dealers concerned a 'different model', the Golf A4, and not the Passat, which was the subject of the calls at issue (see the contested decision, paragraphs 43 and 67). Similarly, the Commission mentions discussions on price discipline between the Volkswagen managing board and the Audi dealer association, but fails to provide details about the outcome of those discussions or, in particular, to clarify whether or not the question of the calls at issue arose during those discussions (see the contested decision, paragraphs 36 to 41).

36 — See the judgment under appeal, paragraphs 62 to 67.

ment which the Commission cites). We are dealing namely with a finding 'of fact' and, therefore, the kind of assessment which, according to settled case-law, cannot be subject to evaluation by the Court of Justice unless the evidence has been misconstrued. [37] In this case, the Commission has not, however, claimed that the evidence has been misconstrued in this way.

57. That aside, however, I must also point out that the conclusion set out by the Court of First Instance seems to me to be hard to challenge on the merits. It is, in fact, clear that, as well as being drafted in neutral terms, Clause 2 of the dealership agreement (see point 2 above) — which, in the Commission's view, could have provided the basis for the calls at issue — did not in fact refer to the pricing policy, but did provide specifically that in relation to a whole range of aspects of the distribution policy (for instance, the stocking of replacement parts, customer service, training and so on) the dealers had to 'comply with all [the] instructions' issued by the car manufacturer.

58. In addition, the measure at issue was also specifically excluded by one of the provisions in the agreement of relevance here, and more specifically Clause 8, according to which Volkswagen was able to issue only '*non*-binding price recommendations concerning retail prices and discounts'.

59. The very fact that the calls at issue were not in any way provided for or allowed under the dealership agreement is, therefore, in my view, the factor clearly distinguishing this case from the earlier cases cited above, in which the Court held that a measure adopted by a manufacturer was covered by the signing of the dealership agreement (see points 42 to 44 above).

60. In the light of all of the foregoing considerations, I am, therefore, of the view that the Court of First Instance correctly found that 'the Commission has not proved, in the contested decision, a concurrence of wills between [Volkswagen] and its dealers in relation to the calls at issue', [38] with the result that the contested decision was adopted in breach of Article 81(1) EC.

61. I therefore propose that the Court should dismiss the appeal.

37 — Case C-7/95 P *John Deere* v *Commission* [1998] ECR I-3111, paragraphs 21 and 22. To that same effect, see, among many, Joined Cases C-280/99 P to C-282/99 P *Moccia Irme and Others* v *Commission* [2001] ECR I-4717, paragraph 78; Case C-122/01 P *T. Port* v *Commission* [2003] ECR I-4261, paragraph 27; Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraphs 47 to 49; and the order of 9 July 2004 in Case C-116/03 P *Fichtner* v *Commission* (not published in the ECR), paragraph 33.

38 — Contested decision, paragraph 68.

III — Costs

62. In the light of Article 69(2) of the Rules of Procedure and given the conclusion I have reached that the appeal should be dismissed, I consider that the Commission should be ordered to pay the costs.

IV — Conclusion

63. In the light of the foregoing considerations, I propose that the Court should:

— dismiss the appeal;

— order the Commission of the European Communities to pay the costs.