JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
6 July 2000 *

In Case T-62/98,

Volkswagen AG, established in Wolfsburg (Germany), represented by R. Bechtold, Rechtsanwalt, Stuttgart, with an address for service in Luxembourg at the Chambers of Loesch and Wolter, 11 Rue Goethe,

applicant,

v

Commission of the European Communities, represented by K. Wiedner, of its Legal Service, acting as agent, assisted by H.J. Freund, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: German.

APPLICATION for annulment of Commission Decision 98/273/EC of 28 January 1998 relating to a proceeding under Article 85 of the EC Treaty (Case IV/35.733 — VW) (OJ 1998 L 124, p. 60) or, in the alternative, for reduction of the fine imposed on the applicant in that decision,

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

composed of: R.M. Moura Ramos, President, V. Tiili and P. Mengozzi, Judges,

Registrar: B. Pastor, Principal Administrator,

having regard to the written procedure and further to the hearing on 7 October 1999

gives the following

Judgment

Facts and legal background

1 The applicant is the holding company of the Volkswagen group. The group's business activities include the manufacture of motor vehicles of the Volkswagen,

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

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

3 Dealership contracts are, subject to certain conditions, exempted from Article 85(1) of the EC Treaty (now Article 81(1) EC) by Commission Regulation (EEC) No 123/85 of 12 December 1984 on the application of Article 85(3) of the EEC Treaty to certain categories of motor vehicle distribution and servicing agreements (OJ 1985 L 15, p. 16), 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 85(1) of the Treaty was not to apply during the period from 1 October 1995 to 30 September 1996 to agreements already in force on 1 October 1995 which satisfied the conditions for exemption provided for in Commission Regulation (EEC) No 123/85.

4 Article 1 of Regulation No 123/85 provides as follows:

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

— only to the other party, or

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

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

6 Article 3 of Regulation No 123/85 provides as follows:

'The exemption ... shall also apply where [the selective distribution agreement] is combined with an obligation on the dealer:

...

8. outside the contract territory

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

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

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

10. to supply to a reseller:

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

...

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

7 The wording of Articles 1, 2 and 3 of Regulation No 1475/95 is almost identical to that of the corresponding provisions of Regulation No 123/85. Article 6(1) of Regulation No 1475/95 provides as follows:

'The exemption shall not apply where:

...

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

(7) the manufacturer, the supplier or another undertaking within the network directly or indirectly restricts the freedom of final consumers, authorised intermediaries or dealers to obtain from an undertaking belonging to the network of their choice within the common market contract goods or

corresponding goods ... or the freedom of final consumers to resell the contract goods or corresponding goods, when the sale is not effected for commercial purposes; or

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

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

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

10 By letter of 24 February 1995 the Commission informed the applicant that, on the basis of complaints from German consumers, it had concluded that the applicant or Autogerma had forced Italian dealers for Volkswagen and Audi makes to sell vehicles solely to Italian customers by threatening to terminate their dealer contracts. In the same letter the Commission gave formal notice to the

applicant to put an end to that barrier to re-exportation and to inform it, within three weeks of the date of receipt of that letter, of the measures adopted in that regard.

11 In its letter of 30 March 1995 the applicant replied that the difficulties encountered by some consumers might have been caused by a problem of communication, in particular between Autogerma and the Italian dealers. It annexed to its letter a copy of a circular which had been sent on 16 March 1995 to the Italian dealers in order to eliminate any possibility of misunderstanding.

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

13 On 17 October 1995 the Commission adopted a decision ordering investigations under Article 14(3) of Council Regulation No 17 of 6 February 1962: First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959–1962, p. 87). The investigations took place on 23 and 24 October 1995 at the premises of the applicant and Audi and, in Italy, at those of Autogerma, Auto Brenner Spa in Bolzano, Auto Pedross Herbert & Co. in Silandro, Dorigoni SpA in Trento, Eurocar SpA in Udine, IOB Silvano & C. SRL in Germona, Adriano Mansutti in Tricesimo, Günther Rabanser in Pontegardena, Mutschlechner SAS in Brunico and Franz Nitz in Vipiteno. Through those investigations the Commission sought to establish whether the applicant and Audi had entered into agreements or implemented concerted practices with Autogerma and their dealers in Italy by which new motor vehicles were not to be sold to final consumers resident in Member States other than Italy.

14 On the basis of the documents found during those investigations the Commission reached the conclusion that the applicant, Audi and Autogerma had put in place,

with their Italian dealers, a market-partitioning policy. On 25 October 1996 the Commission served a statement of objections to that effect on the applicant and Audi.

15 By letter of 18 November 1996 the applicant and Audi requested access to the file. They inspected the file on 5 December 1996.

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

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

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

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

20 On 28 January 1998 the Commission adopted Decision 98/273/EC relating to a proceeding under Article 85 of the EC Treaty (Case IV/35.733 — VW) (OJ 1998 L 124, p. 60, hereinafter 'the decision' or 'the contested decision'). The decision is addressed solely to the applicant. The Commission states that the applicant is responsible for the infringement found because Audi and Autogerma are its subsidiaries and their activities were known to it. As regards the Italian dealers, the Commission states that they did not participate actively in the barriers to re-export but, as victims of the restrictive policy introduced by the manufacturers and Autogerma, were forced to consent to that policy.

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

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

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

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

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

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

26 The Commission concludes that those measures, which all form part of the contractual relations which the manufacturers maintain, through Autogerma, with the dealers in their selective distribution network, are the result of an agreement or concerted practice and constitute an infringement of Article 85(1) of the Treaty since they represent the implementation of a market-partitioning policy. It explains that those measures are not covered by Regulation No 123/85 and Regulation No 1475/95, since no provision of those regulations exempts an agreement which aims to prevent parallel exports by final consumers, by intermediaries acting on their behalf or by other dealers in the dealer network. It

also states that an individual exemption cannot be granted in the present case, since the applicant, Audi and Autogerma did not notify any aspect of their agreement with the dealers, and that in any event the barriers to re-exportation are at variance with the objective of consumer protection set out in Article 85(3) of the Treaty.

27 In answer to the submission by the applicant and Audi, in their comments on the statement of objections, that some of the documents on which the Commission relies are merely internal reports of the Volkswagen group which represent only an internal discussion and occasionally conflicts of interests within the group, the Commission states that the conflicts within the group are irrelevant, since they do not alter the fact that the applicant and its subsidiaries, Audi and Autogerma, entered into an agreement with their dealers which is incompatible with the Community competition rules. In answer to the line of argument also set out in the comments on the statement of objections to the effect that, first, the largest proportion of re-exports from Italy to Germany and Austria was accounted for by clearly inadmissible supplies to independent dealers and that sales to private individuals (including those through intermediaries) and to other Volkswagen and Audi dealers were negligible, the Commission states that even if only a tiny number of sales to final consumers, their intermediaries or other dealers in those makes is prevented, trade between Member States is nevertheless appreciably affected and there is therefore an infringement of the Community competition rules.

28 In Article 1 of the decision the Commission finds that the applicant and its subsidiaries Audi and Autogerma 'have infringed Article 85(1) of the EC Treaty by entering into agreements with the Italian dealers in their distribution network in order to prohibit or restrict sales to final consumers coming from another Member State, whether in person or represented by intermediaries acting on their behalf, and to other authorised dealers in the distribution network who are established in other Member States'. In Article 2 of the decision it orders the applicant to bring an end to the infringements and requires it to take, *inter alia*, the measures set out there.

29 In Article 3 of the decision the Commission imposes a fine of ECU 102 million on the applicant in view of the gravity of the infringement found. The Commission contends that the obstruction of parallel imports of vehicles by final consumers and of cross deliveries within the dealer network hampers the objective of creating the common market, which is one of the fundamental principles of the European Community, and the infringement found is therefore particularly serious. Moreover, it points to the fact that the relevant rules have been settled for many years and the fact that the Volkswagen group has the highest market share of any motor vehicle manufacturer in the Community. The Commission also refers to documents as proof that the applicant was fully aware that its behaviour infringed Article 85 of the Treaty. It states, moreover, that the infringement lasted for more than 10 years. Lastly, the Commission took into account, as aggravating circumstances, the fact that the applicant, first, did not put an end to the measures in question even though it had received two letters from the Commission in 1995 pointing out that preventing or restricting parallel imports from Italy was an infringement of the competition rules and, second, had used the dependence of dealers on a motor vehicle manufacturer, and so caused, in this case, quite substantial turnover losses for a number of dealers. The decision explains that the applicant, Audi and Autogerma threatened more than 50 dealers that their contracts would be terminated if they continued to sell vehicles to foreign customers and that 12 dealership contracts were in fact terminated, endangering the existence of the businesses concerned.

30 The decision was sent to the applicant by letter dated 5 February 1998 and received by it on 6 February 1998.

31 By letter of 2 March 1998 the applicant informed the Commission of the measures taken to implement Article 2 of the decision and asked whether they were in fact in line with those required by that article. By letter of 27 March 1998

the Commission replied that the measures were, in essence, in conformity with those required by the decision.

Procedure and forms of order sought

32 By application lodged at the Court Registry on 8 April 1998 the applicant brought the present action.

33 The written procedure terminated on 11 January 1999.

34 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fourth Chamber) decided to open the oral procedure and, by way of measures of organisation of the procedure, requested the parties to reply to written questions and to produce certain documents. The parties complied with those requests.

35 The parties presented oral argument and answered questions put to them by the Court at the hearing in open court on 7 October 1999.

36 The applicant claims that the Court should:

— annul the decision;

— order the defendant to pay the costs.

37 The defendant contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

Substance

38 The applicant relies essentially on five pleas in law. The first and second pleas allege errors of fact and of law in applying Article 85 of the Treaty. The third, fourth and fifth pleas allege infringement of the principle of good administration, the obligation to state reasons for the decision, and the right to be heard.

39 Moreover, in the alternative, the applicant pleads that the fine imposed by the decision should be reduced on the ground that it is excessive.

A — *First plea: errors of fact in applying Article 85 of the Treaty*

Barriers to re-exportation

Preliminary findings

40 The applicant submits, in the context of its first plea, that it complied with the principles for selective distribution laid down by Regulations No 123/85 and No 1475/95. It always acknowledged that sales by its Italian dealers to final consumers in other Member States and to other dealers in its distribution network were lawful. It claims that all the measures which the Commission classified, in the contested decision, as incompatible with the Community competition rules had in fact the sole aim of preventing unlawful sales, that is to say, sales to independent dealers. The applicant's argument is based on the assertion that 'all persons concerned knew that sales by Italian dealers to final consumers in other Member States and to other dealers in the distribution network were lawful and were not to be hindered' and therefore seeks to show that the alleged barriers did not exist (paragraphs 13 and 78 of the application). More specifically, the applicant asserts that all the dealers of the group were entitled, throughout the period referred to by the Commission, to sell new vehicles to final consumers both within and outside their contract territory and to make cross deliveries to other dealers of the Volkswagen and Audi makes (paragraph 56 of the application).

41 The applicant does not dispute that if it had prevented re-exportation from Italy in the circumstances indicated by the Commission, such conduct would have been contrary to the dealership contracts and the Community rules. It would have exposed itself to proceedings by the Commission and would have incurred

contractual liability towards the dealers in its distribution network for failure to comply with Regulations Nos 123/85 and 1475/95 (paragraph 4 of the reply).

42 The defendant does not dispute that the prohibition of re-exportation by independent dealers and the provisions adopted for that purpose are compatible with the Community competition rules. However, it submits that the measures adopted by the applicant, Audi and Autogerma in fact concerned all re-exportation of motor vehicles from Italy.

43 In those circumstances, the Court must examine whether the Commission incorrectly assessed the facts in finding in Article 1 of the decision that the applicant and its subsidiaries, Audi and Autogerma 'infringed Article 85(1) of the EC Treaty, by entering into agreements with the Italian dealers in their distribution network in order to prohibit or restrict sales to final consumers coming from another Member State, whether in person or represented by intermediaries acting on their behalf, and to other authorised dealers in the distribution network who are established in other Member States'. In order to do so, it is necessary to ascertain whether the Commission gathered sufficiently precise and consistent evidence to give grounds for a firm conviction that the alleged infringement took place (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).

The barrier resulting from the bonus system

— Arguments of the parties

44 As regards the specific measures adopted by Autogerma in regard to dealers who had made sales outside their contract territory, the applicant objects, first, to the

findings made by the Commission regarding the method of calculating the quarterly 3% bonus. It explains that Autogerma usually awarded dealers a bonus, defined in 'Convenzione B' (which was annexed to the dealership contract), the amount and conditions of which varied over the years and which is intended to reward them for the results achieved in the course of carrying out their contractual obligations. Given that, amongst those obligations, the obligation to promote to the utmost sales of new vehicles in the contract territory and to offer a quality after-sales service to customers in that territory is important, the award of the bonus logically depended on the proper performance of that obligation. According to the applicant, from 1 January 1988 until 31 December 1990 this 3% bonus was awarded at a rate of 2 and 0.5% for achieving four-monthly and yearly sales targets respectively, and at a rate of 0.5% for compliance with other standards. That split was later altered (from 1 January 1991 until 30 April 1994: 1.5% for the four-monthly sales target and 1.5% for the annual sales target; from 1 May 1994 until 31 December 1994: 1.4% for the four-monthly sales target, 1% for the annual target and 0.6% for the degree of customer satisfaction). Convenzione B contained an express rule that when calculating the bonus all sales were to be taken into account, but those made outside the contract territory would be taken into account only up to a maximum of 15% of total sales made by the dealer ('the 15% rule'). In practice, however, the 15% rule, in force until 30 September 1996, was not applied. From 1 October 1996 all sales of new vehicles were taken into account when calculating the bonus. Initially the quantity of vehicles sold was determined on the basis of deliveries. However, from 1 January 1995 until 30 September 1996 the bonus for achieving the four-monthly sales target depended on registrations.

45 The applicant states that the documents cited by the Commission to show that sanctions were imposed through that bonus are either irrelevant to that question or of no evidential value. Sanctions were imposed only on distributors who had breached their dealership contract by supplying motor vehicles to independent dealers. It is clear from the wording and context of all the documents cited by the

Commission that only sales to independent dealers were concerned. Furthermore, there is no evidence to justify the conclusion drawn by the Commission that the bonus system at issue induced a number of dealers to cease generally from sales outside their contract territories. Moreover, contrary to the Commission's assertion, 'Unione Concessionari Audi Volkswagen' (Union of Audi and Volkswagen dealers, 'UCAV') never expressed disagreement with that system. Furthermore, the Commission had long been informed of the subject-matter of that system, as it had received a copy of Convenzione B in 1988. It had not expressed any objection to that system because, according to the applicant, the entire system and in particular the 15% rule, was compatible with Regulation No 123/85.

46 The defendant states, first, that, in the case of the Audi A4 vehicle, the financial loss suffered by the dealer in the event of his exceeding the ceiling fixed by the 15% rule in the event of a sale followed by registration of a vehicle outside the contract territory amounted to 8% of the invoice price of the vehicle, which corresponded to a loss of bonus of 3% and of a split margin of 5%.

47 The defendant states, second, that in none of the documents cited in the decision is a distinction drawn, as regards payment of the bonus, according to whether the sales outside the contract territory were agreed with independent dealers or with final consumers or other authorised dealers. The defendant refers to one document in which it is stated that the bonus was 'blocked with respect to all sales outside the contract territory'. It also cites documents to show that the bonus was a means of exercising pressure so as to discourage sales outside the contract territory and that the Italian dealers felt that their freedom of action was thereby restricted. Lastly, the defendant submits that the system applicable since 1988 was reinforced with effect from autumn 1993 by making the payment of the 3% bonus subject to the registration of the vehicles in the dealers' contract territory.

— Findings of the Court

48 As a preliminary point, the Court observes that the applicant does not dispute that from 1 January 1988 until 30 September 1996 calculation of the bonus awarded by Autogerma to Italian dealers to reward proper performance by them of their contractual obligations was subject to the 15% rule stipulated in Convenzione B. According to that rule, both sales within and outside the contract territory were taken into account for the purpose of payment of the bonus, but the latter sales only up to a maximum of 15% of total sales (see paragraph 44 above).

49 That rule was liable to induce Italian authorised dealers to sell at least 85% of available vehicles within their contract territory. It restricted opportunities for final users and authorised dealers in other Member States to acquire vehicles in Italy, in particular during periods in which such purchases were of major interest to them and the number of vehicles available for sale in that State was limited (see, in that regard, paragraph 79 et seq. below). The Commission could therefore rightly conclude, in particular in point 181 of the decision, that the 15% rule fell outside the exemption granted by Regulation No 123/85. Although Regulation No 123/85 provides manufacturers with substantial means of protecting their distribution systems, it does not authorise them to adopt measures which contribute to a partitioning of the markets (judgment in Case C-70/93 *Bayerische Motorenwerke* [1995] ECR I-3439, paragraph 37).

50 Moreover, the applicant's argument that the 15% rule was not applied in practice and was not therefore used as a means of restricting exports from Italy lacks credibility in the light of a number of documents before the Court.

51 Thus, in an internal note of 28 June 1994 (endnote No 97 to the decision), entitled 'Non-payment/withholding of the extra bonus for outside-areas sales (including parallel exports)', Mr Schlesinger, Chairman of Autogerma, states as follows:

'I am writing to confirm what I have already told you verbally, namely that I want every single case of subsequent payment of an extra discount that has been suspended or withheld for out-of-area sales/parallel exports to be submitted to me for approval.

...

I would remind you once again that our network must sell our vehicles in Italy (above all in order to "survive") and must not carry on "distribution" activities outside our area.

As you are aware, Autogerma has for a long time been constantly asking its own parent companies for special terms for supplies, prices, special equipment, etc.; we cannot "return the favour" by selling our vehicles abroad.'

52 In a note of 4 July 1994 (endnote No 97 to the decision) Mr Schlesinger states:

'I would point out in that regard, for the umpteenth time, that ... our dealers must wholly cease to sell outside their territory (save as regards the 15% of vehicles provided for in the dealer contract which must, however, be "registered"); the bonus will not be paid for [sales] "outside the contract territory" and, henceforth,

that bonus and any other bonuses/promotional campaigns of any nature will be paid on the basis of "registered" vehicles (and not delivered vehicles).'

53 Next, the minutes of the meeting of 27 July 1994 between UCAV and Autogerma (endnote No 67 to the decision) refers to the following discussion:

'Scarabel:

said that special rebates for sales outside the contract territory had been withheld in the case of some dealers who would be legally entitled to demand payment, at least in theory. He stressed the need for a fresh discussion of the 15% quota for tolerated sales outside the contract territory.

Dr Schlesinger:

... the special rebate was just a supplementary rebate, something over and above what was customary. It had been operated very generously, and if now about 20 dealers out of about 234 had not received this special rebate, the reason was that it was not intended as a reward for wholesalers or exporters. In the past we turned a blind eye, but now we are inclined to refuse the special rebate for sales outside the contract territory, as it is given on the basis of registrations rather than deliveries.

...

Dr Schlesinger:

asked the UCAV to sensitise the base to a good launch for the new Polo (restricted grant of rebates, no exports) ...'

54 A report by Audi on a visit to Autogerma on 12 October 1994 (endnote No 101 to the decision) confirms:

'sales outside one's own territory are allowed up to a maximum of 15% (subsidiaries, etc); the 3% bonus is not awarded beyond that amount.'

55 The circular of 20 October 1994 sent by Autogerma to authorised dealers concerning invoicing for the new Volkswagen Polo (endnote No 85 to the decision) also gives it to be understood that the 15% rule was applied, since it states:

'It remains to be decided whether it is advisable, that is to say whether it is in the interests of all of us, to alter the present 15% authorisation for out-of-territory sales, either upward or downward.'

56 Next, in an internal note of 22 November 1994 (endnote No 91 to the decision) it is stated that 'the quarterly bonus will be paid on the basis of vehicle registrations in the contract territory, not generally according to sales'. According to a circular from Audi on 8 December 1994 that measure was linked to the planned split margin system and was intended to ensure 'that a margin or bonus

is paid only in the event that it is evidently the result of working the dealer's own contract territory ...' (endnote No 92 to the decision).

57 Lastly, in an internal note of the applicant of 24 March 1995 (endnote No 91 to the decision), it is confirmed:

'The dealer is authorised to supply up to 15% in other contract territories. The bonus is paid when 80-85% of the target has been achieved. The bonus is currently based on deliveries, but will be paid in future only for registrations.'

58 Those documents show that the 15% rule was applied with the express intention of discouraging sales abroad by the Italian dealers. It is also clear from the above statements by Mr Schlesinger on 4 July 1994 and by Mr Scarabel on 27 July 1994, and from the circular of 20 October 1994, the report by Audi on the meeting with Autogerma on 12 October 1994 and the note of 24 March 1995, all mentioned above, that the 15% rule was not only applied as a criterion for refusing payment of the bonus for sales made outside the contract territory where the ceiling of 15% of total sales was exceeded, but was also interpreted as prohibiting such sales.

59 It follows from all the foregoing that the Court must reject the argument that the Commission wrongly concluded that the applicant sought, jointly with its subsidiaries Audi and Autogerma, to hinder re-exportation from Italy by using the bonus system provided for in Convenzione B.

60 The argument that, as Convenzione B was notified in 1988, the Commission could not impose a fine on the applicant for having applied the 15% rule stipulated in that agreement will be examined in the context of the alternative plea for reduction of the fine.

Introduction of a split margin system

— Arguments of the parties

61 The applicant submits that although the idea of a split margin system was discussed in 1994 in particular in regard to the new Volkswagen Polo and Audi A4 vehicles, and was motivated by the desire to ensure that each dealer concentrated his activities on his own contract territory, such a system was never introduced, contrary to what the Commission alleges. The applicant observes also that an addendum to the dealership contract would have been required in order to introduce that system. The key document in regard to margins, namely the addendum to the contracts concluded with the Italian dealers, usually called 'allegato A' contains no evidence of the introduction of a split margin. The applicant cites several circulars from Autogerma to the dealers. In the circular of 20 October 1994 Autogerma merely explained what had been discussed with UCAV. In those of 2 November 1994 and 9 May 1995 it announced that there was no question, as regards invoicing for the new Volkswagen Polo vehicle, of a split margin and that an overall discount of 13% would therefore be applied. The applicant also refers to a document of similar content with regard to the Audi A4 vehicle, and submits a statement to the same effect by the chairman of UCAV. It observes that the only person cited by the Commission who alleges that a split margin system was actually applied is Mr Mutschlechner, who was a sub-dealer of Beikircher, a dealer. The applicant observes that it cannot be ruled out that some dealers applied such a system to sub-dealers, but that is not the responsibility of the manufacturers or Autogerma. The applicant does not dispute that a split margin system, such as that envisaged at the material time, would have been incompatible with Community law.

62 The defendant contends, based on the documents cited in the decision, that a split margin system was introduced in October/November 1994. It submits that the fact that UCAV rejected a previous attempt by Autogerma to introduce such a system in May 1994 sheds no light on the question whether Autogerma

nevertheless initiated it in autumn 1994. The Autogerma circular of 2 November 1994 shows, on the other hand, that a provisional split margin system was introduced until 30 April 1995 with regard to the new Volkswagen Polo. That system was actually applied. Likewise, as regards the Audi A4, the defendant observes that an internal Audi document of 25 November 1994 shows that UCAV accepted the proposed split margin system on 18 October 1994 and that the system was applied thereafter. The fact that several months later, in February 1995, UCAV no longer wished to approve such a system did not affect the application of that system. Furthermore, the defendant disputes that an amendment to the dealership contract was necessary in order to establish that system.

63 In its reply the applicant states that in its statement in defence the Commission accepts that the split margin system was not introduced by the circular of 20 October 1994 and alleges that it was introduced by the circular of 2 November 1994. The applicant submits, moreover, that contrary to what was stated in the decision, the Commission contends, before the Court of First Instance, that this system was applied only temporarily, namely until 30 April 1995. However, no split margin system was introduced. The applicant annexes to its reply a report from the accountants, Coopers & Lybrand, dated 30 October 1998 which states as follows: 'Our review of all the data relevant to the investigation with regard to the period from 1 July 1994 to 31 December 1995 has shown that in no case was a margin reduction applied by [Autogerma] — neither for the VW Polo nor the Audi A4. In each case the dealers received the full margin due to them of 13% (VW Polo) or 15% (Audi A4).'

64 The defendant disputes that there is a conflict between the decision and the defence as regards the split margin system. The decision and the defence refer to the circular of 2 November 1994 relating to the implementation of that system and explain that initially it was to apply only until 30 April 1995. Moreover, the defendant observes that the Coopers & Lybrand report cannot call in question the evidential value of the circulars sent to the dealers by Autogerma on 20 October and 2 November 1994.

— Findings of the Court

65 The Commission's contention that a split margin system was established in October or November 1995 for the new Audi A4 and Volkswagen Polo vehicles (see paragraph 62 above) is not adequately substantiated by the documents before the Court.

66 In a note of 10 November 1994 (endnote No 87 to the decision), Autogerma states that there are still certain points to be decided with the dealers before that new system can in fact be established. It states:

'Both parties, Autogerma and dealers, are first to agree a test phase for the new margin system until 30 April 1995.'

67 Similarly, in a report of 10 February 1995 on a meeting with Autogerma (endnote No 42 to the decision) Audi states:

'Autogerma indicates the measures introduced until now: — split margin for A4 — has not yet, however, been approved by the Italian dealers' association; not yet actually effective, probably in the coming months ...'.

68 As to the Volkswagen Polo, some documents suggest that a split margin system was proposed by the applicant and Autogerma. Internal notes of 22 November

1994 and 6 February 1995 (endnote No 91 to the decision; endnote No 49 to the decision) mention 'division of the dealer margin on Polo' and, in other terms, 'split margins for the Polo A03' as a measure adopted by Autogerma. Furthermore, an internal note of the applicant dated 24 March 1995 (endnote No 91 to the decision) indicates that 'there was criticism of the splitting of the Polo margin'. Lastly, when the Commission carried out its investigations, an Italian sub-dealer, Mr Mutschlechner, stated that 'with effect from November 1994, when marketing of the new Polo began, there was an agreement between Autogerma and its dealers ("the UCAV agreement") according to which the 9% margin [granted] to the [sub-dealer] was not paid in full when the vehicle was sold but part (4%) was retained and payment thereof was subject to evidence that the vehicle had indeed been registered in the territory' (endnote No 86 to the decision).

69 However, apart from that statement by Mr Mutschlechner, which concerns the specific case of sub-dealers, there is no evidence from which it can be clearly concluded that the introduction of the split margin with regard to the new Volkswagen Polo was the subject of an agreement between all the interested parties, including UCAV. An Autogerma note of 24 October 1994 (endnote No 79 to the decision) refers to a positive view by that body, but also indicates that its definite agreement had not yet been obtained:

'The result of our discussions with UCAV, the dealers' association, is that we will split the margin in the case of the new Polo as follows:

— an immediate discount (in the vehicle invoice)

— a subsequent discount if the vehicle is registered in the dealer's contract territory.

The entire discount will be given immediately in the case of demonstration Polos. We plan to introduce the new system for normal invoicing: 8 + 5% or 10 + 3% after final agreement with UCAV in the next few days.'

70 Moreover, it is clear from the documents before the Court that the proposed split margin system had been criticised within the Volkswagen group. In an internal note of 23 February 1995 (endnote No 80 to the decision), Mr Bothe, who was employed by the applicant, writes:

'I have heard from BMW that Autogerma intends to introduce a split margin. For vehicles that are not registered in the dealer's contract territory the margin is to be only 2/3 of the margin they would usually obtain.

That rule, of which Mr Bertino had already informed me on 10 February, worries me. It is contrary to Article 6[(1)(8)] of the new draft [EC Regulation] and leads to loss of the exemption.

But even now the EC Commission is likely to regard a split margin as not covered by the current [EC Regulation] because it seeks to prevent the trans-border transactions desired by the Commission.

I told Mr Bertino that the proposed approach represents a difficult tight-rope walk and can be defended only if it is kept within the group. The information received from BMW shows, however, that the subject is already being discussed outside the group. What is more, Mr Breitgoff, a re-importer known to us in northern Germany is reported to have stated yesterday morning in an interview on Bayerische Rundfunk: "VW is shut up tight in Italy". As Mr Breitgoff has already complained about us on several occasions to the Commission, it is in my opinion only a question of time before the subject, already very likely to attract a fine, is taken up by the Commission.

We should therefore very quickly agree with Autogerma on a form of words and approach which can be justified to the Commission as well.'

71 That document shows that towards the end of February 1995 Autogerma had not yet implemented a split margin system ('Autogerma intends to introduce a split margin') and that the applicant itself was hesitant about approving the establishment of such a system.

72 It must therefore be concluded that, as regards the new Audi A4 and Volkswagen Polo vehicles, the documents before the Court are not consistent as to whether a split margin system was in fact agreed between the manufacturers, Autogerma and the dealers. In those circumstances, the Commission has not adduced sufficient precise and consistent evidence of the introduction, in the form of an agreement or concerted practice, of such a system. The contested decision therefore contains an error of assessment in that regard.

The barrier resulting from measures taken at supply level

— Arguments of the parties

73 According to the applicant, the Commission wrongly considered that the deliveries by Autogerma to the dealers were delayed and limited because of the increase in re-exports and that the measures adopted at the level of supply therefore also constituted a barrier to re-exportation.

74 The applicant states, first, that over a certain period and because of difficulties in starting production of models that were particularly in demand, such as the new Volkswagen Polo and Audi A4 vehicles, Autogerma was able to supply its Italian dealers only on a *pro rata* basis in order to ensure an equitable distribution of those models. Reductions in delivery are, moreover, immune from attack from a legal point of view. As to the measures proposed to it by Autogerma by letter of 26 September 1994 (which consisted, in particular, in checking distribution of the new Volkswagen Polo), the applicant explains that those measures were never implemented. The Volkswagen Polo had not yet been marketed at the time when that letter was written.

75 The applicant also submits a breakdown of figures to show that the Commission's claim that the Italian market was supplied restrictively is wholly without foundation. It cites figures to prove that towards the end of 1992 Autogerma and the Italian dealers had accumulated over-large stocks of Volkswagen and Audi vehicles because of a steep drop in demand in Italy. However, thereafter the fall in the value of the Italian lire caused high demand on the Italian market from

German and Austrian purchasers. Consequently, during 1994 and 1995 needs and orders substantially exceeded production, which caused an increase in delivery periods. For that reason and because of the risk in exchange-rate variation, some customers decided to cancel their orders. The applicant explains that this problem is usually most acute when new models are launched, such as the Audi A4, since in that case production can be adapted only progressively to demand. The applicant states that in any event it has never applied in Italy a different distribution policy from that in force in the other Community countries. Distribution has always been determined by the needs in the Member States, on the one hand, and production possibilities, on the other. The delivery periods for the new models in Italy and in other Community countries were therefore similar.

76 According to the applicant, the fact that during 1993, 1994 and 1995 at least 20 000 vehicles per year were actually re-exported from Italy proves that more vehicles were delivered than was necessary to supply Italian final consumers.

77 Finally, the applicant states that the Commission has not adduced any evidence to show that the manufacturers and Autogerma prohibited Italian dealers from supplying other dealers in the network. The applicant acknowledges that a German dealer, Mr Senger, informed it by letter of 26 November 1993 that an Italian dealer had told him that supplies to German dealers had been prohibited. It states, however, that it immediately refuted that assertion and stated, in its letter of 7 December 1993, that there was no legal or contractual means of prohibiting cross deliveries. The applicant states in that context that if an Italian dealer refused to supply German dealers that is undoubtedly explained by the desire to service his habitual local customers first. Moreover, the applicant considers that the documents on which the Commission relied merely show that the widespread practice of supplying to independent dealers was felt by German authorised dealers to be harmful; that some of them requested the manufacturers

to intervene; and that Autogerma considered that the German authorised dealers were disturbing the Italian dealers too much through their incessant requests for cross deliveries. It states, however, that Autogerma's request that the German dealers should cease that practice was never complied with and was not required.

78 The defendant contends, referring to documents cited in the decision, that the lengthy delivery periods to which Autogerma referred in its replies to some potential purchasers were the very consequence of the 'supply of the Italian market in accordance with its needs'. Several documents show that there was a real quota for deliveries to Italian dealers, which was intended to reduce re-exportation from Italy. Such a quota was indeed introduced, in particular for the delivery of Audi A4 and Volkswagen Polo vehicles, even if it is true that the Volkswagen Polo was not yet available on the market when Autogerma's letter of 26 September 1994 was written.

— Findings of the Court

79 Several documents seized by the Commission prove that a strategy of imposing quotas was implemented in order to restrict all re-exports from Italy.

80 Thus, an internal document entitled 'State of measures to combat the grey market, 25.11.1994' states that, in so far as concerns the new Audi A4, 'supply will be managed in such a way that only Italian demand will be satisfied' (endnote No 58 to the decision). It can be concluded from this that the aim pursued was to

eliminate the delivery of vehicles to any purchaser resident outside Italy, including final consumers and Volkswagen and Audi dealers. It is stated in the same document that the measure would enter into force in January 1995. According to a letter from Autogerma to Audi dated 13 June 1994 (endnote No 62 to the decision), the fixing of quotas for Audi vehicles was already practised in 1994 for the old models. It states: 'although the delivery periods for the Audi 80 could be significantly reduced by up to eight months, quotas are still applied to the dealers'.

81 Moreover, the minutes dated 30 August 1993 of a meeting between the applicant and Audi show that they already envisaged measures to reorganise supplies to their dealers in such a way that the number of vehicles available in Italy would be drastically reduced (endnote No 105 to the decision). It is stated:

'Practical measures

1. Reduction of the pressure on stocks in Italy by diverting production volume from Italy to other markets ...

2. Vehicles in Autogerma's import store are to be repurchased through VW AG in order to place them in other markets in accordance with point No 1. Expense to be assessed by Controlling.'

82 It appears that this reorganisation achieved its objectives with effect from 1993. In a letter to the applicant dated 26 November 1993 (endnote No 112 to the decision) an authorised German Volkswagen and Audi dealer complains of the following facts:

'According to our Italian dealer, supplies to German VW/Audi dealers have been prohibited with immediate effect upon instruction by Volkswagen AG. No confirmed vehicles will be delivered.'

83 In its letter of 7 December 1993 replying to that serious accusation of a barrier to cross deliveries (endnote No 113 to the decision), the applicant does not dispute that a supply strategy aiming to satisfy solely demand from Italian consumers was already in place and was having an effect. It states:

'We would, however, like to take up a statement made in your letter to the effect that the Italian dealer concerned is said to have stated that "supplies to German VW/Audi dealers have been prohibited with immediate effect upon instruction by Volkswagen AG".

This is not correct, in particular since there would be no legal or contractual grounds for it. It seems, rather, that the measures adopted in Wolfsburg to ensure supply of the Italian market in accordance with need are gradually proving effective so that Italian dealers are first of all supplying their traditional customers with the available goods.'

84 It is clear from an internal Audi note of 6 February 1995 that Audi decided to decline an order from Italian dealers for the supply of 8 000 vehicles. The reasons given for that refusal are as follows (endnote No 109 to the decision):

'Agreement to an additional 8 000 vehicles would already put the Italian dealers in a position to re-export Audi A4 vehicles and reach agreement to that effect with independent importers and dealers ... In order to give a signal in Italy that

the announced policy of restricted supply in line with real market conditions will be maintained, the importer should be immediately informed of the decision by the competent department that the 8 000 vehicles requested will not be delivered.'

85 Even after the receipt by the applicant of the Commission's letter of 24 February 1995 (see paragraph 10 above), Audi, in a report of 15 May 1995, refers to the 'satisfaction of solely Italian domestic demand' as a success (endnote No 104 to the decision).

86 An Autogerma document, probably of 31 January 1995, concerning measures to 'prohibit re-exports from Italy' refers to 'adaptation of supplies to demand' (endnote No 42 to the decision).

87 Furthermore, it is apparent from a fax sent by Autogerma to Audi on 6 October 1995 (endnote No 111 to the decision) that this policy of restricted supply as a means of partitioning the Italian market was maintained until the end of 1995. It is stated:

'From the present point of view it is not realistic to expect to reach the desired 36 000 sales to customers. Increased activities in addition to the "strong year-end programme" we have already presented to you would inevitably lead to a situation where some of these additional vehicles delivered to customers would not actually be registered in Italy.

For this reason we shall keep to the total volume of 35 190 sales to customers.'

88 It is clear from those documents taken as a whole that the Commission was entitled to conclude that the applicant, with the support of its subsidiaries Audi and Autogerma, implemented a policy of imposing supply quotas on Italian dealers with the express aim of hindering re-exportation from Italy and thus of partitioning the Italian market.

89 Since that policy openly aimed to hinder re-exportation, its characterisation as a measure intended to partition the Italian market cannot be called in question by the production difficulties to which the applicant refers. The imposition of those quotas, combined with the system for payment of the bonus (the 15% rule, see paragraphs 48 to 58 above), was of such a nature as to induce the Italian dealers to refuse to sell vehicles to purchasers in Member States other than Italy, thus including, contrary to the applicant's claims (see paragraph 77 above), authorised Audi and Volkswagen dealers.

90 Contrary to the applicant's claim that those dealers had of their own accord formed the view that it was of no interest to them to sell vehicles outside their contract territory, the documents cited above show that supply to them was restricted in order to influence them and, in particular, to discourage them from re-exporting vehicles from Italy.

91 The effectiveness of that strategy was reinforced by the information sent to the dealers, also referred to in the Autogerma document of 31 January 1995 ('that neither bonus nor sales aid is granted for re-exported vehicles'). Faced simultaneously with both restricted supply and the '15% rule' and knowing that

re-exports were looked upon with disfavour by Autogerma and the manufacturers, it was clearly fully in the interests of the Italian dealers to sell the limited number of vehicles available entirely or almost entirely to purchasers residing in Italy. Their business conduct was therefore influenced by the manufactures and Autogerma.

92 That analysis is also corroborated by a letter of 6 October 1994 to the firm Silemotori Negro in Conegliano (Italy), in which Autogerma writes:

'We want to draw your attention to the fact that the new Audi A4 Avant will be launched approximately one year after the new Audi A4 Limousine (January 1995) and it is therefore all the more important to sell well the few vehicles which remain for such a long period of time. In so doing particular attention should be given to sales within one's own contract territory.'

93 It follows from the whole of the above findings that the applicant's argument that there was no barrier at the level of supply cannot be upheld.

The barrier caused by business conduct vis-à-vis consumers

— Arguments of the parties

94 The applicant also complains that the Commission wrongly found that the business conduct of the manufacturers and of their distribution network in Italy

vis-à-vis consumers from other Member States constituted a barrier to re-exportation.

95 The applicant observes, first, that the Commission relies on complaints made by certain customers to the manufacturers. In fact, the manufacturers drew up a standard letter in order to reply to potential purchasers who demanded to know why prices were different from one country to another. The applicant states that it did not supply false information to consumers but, to the contrary, it assisted potential customers in Member States other than Italy who wished to acquire a Volkswagen or Audi vehicle in Italy by ordering its personnel to supply them with a list of all Italian dealers.

96 Autogerma's practice of referring potential purchasers to the dealers was wholly legitimate as Autogerma does not sell vehicles directly to consumers. Although dealers are entitled to supply vehicles to final consumers without restriction, they are not obliged to do so. In one specific case, Autogerma did in fact ask a potential purchaser to confirm his intention of purchasing a vehicle in Italy but, contrary to the Commission's claim, it did not demand confirmation that the customer was acquiring it 'either directly or through a reliable intermediary'. Furthermore, when customers requested the assistance of Autogerma where they were experiencing problems with a dealer, Autogerma was at pains to assist them. The manufacturers themselves also took pains to advise German customers who had experienced problems in obtaining a vehicle from an Italian dealer.

97 The applicant adds that while it is true that some letters from German or Austrian customers show that they had been refused solely on the grounds of nationality, it

is wrong to conclude that those refusals were due to a prohibition from the manufacturers or Autogerma. It is clear that a dealer who, for one reason or another, does not wish to sell, prefers to claim that he cannot do so rather than to say that he does not wish to do so. In any event, the letters cited by the Commission do not solely prove that their authors had met with a refusal by Italian dealers. They also prove that the applicant, Audi and Autogerma immediately explained, on each occasion when customers contacted them, that supplies to final consumers should not be refused and assisted the customer to obtain a vehicle.

98 The applicant submits that dealers may have an interest in selling certain models which are particularly sought after, but available only in limited quantities, primarily to customers in their contract territory. In that way, they ensure the profitability of their after-sales service. They also avoid the difficulties associated with recovery of value added tax (VAT). Thus, the Italian dealers questioned by the Commission in the course of its investigations did not confirm that they had refused to sell to foreign final consumers under pressure from the manufacturers or Autogerma, but stated that such sales were, quite simply, of no interest to them. Some of them even firmly denied the existence of a prohibition on sales to other countries or stated that they had received an express order to sell to all final consumers, irrespective of their residence.

99 As regards the undertaking which, in a circular of 15 October 1993, Autogerma had recommended that its dealers should have signed by some purchasers, the applicant disputes that it was intended to prevent re-exports. That undertaking obliged the purchaser to refrain from selling the vehicle within a period of three months and before having driven it for 3 000 km and to pay a penalty of 10% of the purchase price if he failed to do so. Such a measure in no way hindered supplies to final consumers outside the contract territory. It merely protected the selective distribution system by allowing the dealer to obtain further assurance that the purchaser was not a man of straw acting on behalf of an independent dealer. Moreover, according to the letter of 26 September 1994 from Autogerma to the applicant, the undertaking at issue was to be required only of suspect

foreign purchasers, namely customers whose status as final consumer was in doubt. Already in its circular of 15 October 1993 Autogerma advised dealers to adopt that measure only in those circumstances. The applicant adds that it was entitled to regard such a measure as lawful, at least until the entry into force of Regulation No 1475/95. That is clear from a Commission letter of 31 March 1995. It also states that since the beginning of 1996 the undertaking in question has no longer been required.

100 Lastly, in so far as the Commission concluded that Autogerma wished to hinder re-exports by invoicing all vehicles including VAT (point 42 of the decision), the applicant claims that it merely applied the legislation under which supplies such as those from Autogerma to its dealers are subject to VAT.

101 The defendant points, first, to the content of a handwritten note, referred to in point 34 of the decision, by which the applicant required its employees never to give the impression to final consumers or authorised intermediaries who had requested information that it had given instructions that no information should be disclosed. It states, next, that on numerous occasions potential purchasers complained of barriers to re-exports, to such an extent that the applicant drew up a standard letter of reply to them. German and Austrian consumers were made to run a real obstacle race, part of which was the delivery periods. The large number of letters of complaint from potential purchasers reveals that state of affairs.

102 As regards, more specifically, the measure whereby customers whose status as final consumer was doubtful, that measure, after having merely been recommended to dealers, subsequently became compulsory.

103 The defendant also submits that the written statements by dealers made on the occasion of the investigations in October 1995 are not of great evidential value, having regard to the fact that the dealers had received warnings from Autogerma and threats from it to terminate their dealership contract. Those threats explain, moreover, the differences between the written and oral statements of some dealers. In any event, several documents show unequivocally that potential foreign purchasers met with an express refusal to sell.

104 Lastly, the defendant cites a document which, it claims, unequivocally shows that the VAT inclusive invoicing was knowingly implemented in order to hinder re-exports.

— Findings of the Court

105 The applicant's argument is manifestly at variance with the considerable number of complaints which were sent, particularly during 1995, by consumers in Member States other than Italy and, for the most part, of German or Austrian nationality, either to the applicant, Audi or Autogerma, or to the Commission. Following a request by the Court to send to it all the letters received from consumers or obtained by it the Commission produced more than 60 letters or faxes all of which complain of the obstacles encountered by those consumers in acquiring a Volkswagen or Audi vehicle in Italy. It is sufficient to set out hereinafter some of the correspondence considered by the Commission in the contested decision.

106 In a fax of 15 February 1995 addressed to Audi (endnote No 33 to the decision) Mr Wieser writes:

'I contacted an Audi dealer in South Tyrol in order to purchase an Audi A4 1.8 and import it into Austria.

I found out however that pursuant to an instruction from the Audi factory no sales may be made to Austrians ...

When I pointed out that these measures infringed Community law your dealer told me that he knew that they were unlawful but he was afraid that your firm would take reprisals.'

107 In a fax of 27 April 1995 to the Commission (endnote No 36 to the decision) Mr Bernhard writes:

'I hereby complain about the following VW firms ...: I wanted to order a VW Passat GL from Autohaus Lanz and was told that there was no problem in selling a vehicle to me as a German within the EC. Two days later, I knew what type of vehicle and accessories I wanted and placed an order. The next day the owner of the firm telephoned me and told me that he was not allowed to sell a car to me since I was German (a rule of Volkswagen AG).

I then tried to buy a vehicle from the Brenner-Garage SPA, Volkswagen dealer and service centre. That was also refused.'

108 In a fax of 27 April 1995 sent to the applicant (endnote No 132 to the decision) Mr Lenz writes:

'With reference to my telephone conversation with you, I would like once again to make clear the situation represented to me in Italy which is, not only in my view, a dreadful one.

'As a serious customer for the above Golf (for my son) on the occasion of my Easter visit to South Tyrol, I was told at three VW dealerships that it was forbidden to export any vehicles whatsoever and that they had to comply strictly with this rule. Some dealers had already had their concessions withdrawn for failure to observe it.

I was further informed that interested purchasers were to be put off with spurious excuses such as: delivery period approximately one year, available vehicles have already been sold or reserved, etc.

Obviously no account was taken of the fact that there can be no prohibitions to that effect, as we live in the EU. That fact should be known by now even in the furthermost corner of the EU. Shouldn't it?

In the ARD programme "Auto und Verkehr" on 22 April 1995 German television dealt precisely with this subject and gave a full report of the inadmissibility of such a rule. You must surely also be aware of that! ...'

109 In a letter of 18 May 1995 sent to Autogerma, with a copy to Audi and the Commission (endnote No 39 to the decision), Mr Baur writes:

'Returning once again to my case: on 19 February 1995 I ordered, through an intermediary who has authority to act in my name, an Audi A6 from the firm Funari. This order was registered with you under No 95/0014. As there is a legally valid contract, I would like you to tell me immediately when my car will be delivered.

Present indications are that you are doing everything to keep customers away from Audi. I have contacted several Italian dealers who tell me that they could expect reprisals to be taken (of course the threats are made only by telephone) if even one Audi is delivered to Austria ...'

110 In a letter of 8 June 1995 sent to the applicant (endnote No 36 to the decision), Mr Keppler writes:

'Between 2 May and 4 May 1995 I was in Italy. In the vicinity of St Leonhardt the VW dealer there gave us the staggering news that in the whole of South Tyrol we would not find a VW dealer who would sell a VW to a foreigner. The reason he gave was that VW had prohibited sales. If that prohibition were ignored, VW had threatened to withdraw the dealership concession. And that was in fact the case. In the whole of South Tyrol (at least in Merano, Bolzano and Schlanders) no dealer would sell us a VW ...

This is what we were told by the Brenner-Garage in Bolzano and Merano: "Until December 1994 we sold cars to Germans like mad, but now Volkswagen has

turned off the tap. We receive from VW just the number of vehicles with which, with considerable delivery periods, we can satisfy the domestic market. We would like to sell you a VW, but unfortunately Volkswagen has made this impossible."'

111 In a letter of 23 June 1995 to Autogerma (endnote No 133 to the decision), Mr Schneider writes:

'I would like to buy a Audi A4 1.8 in Italia and export it to Austria.

All dealers told me that it is not possible because they wouldn't become any car in the future if they order a car for an Austrian once more ...'

112 In a fax of 19 July 1995 sent to the applicant (endnote No 134 to the decision) Mr Mosser writes:

'As Austria is now also part of the EU I would like to ask a very important question.

On 8 June 1995 I was in Italy, our neighbour, in order to purchase an Audi A4 TDI. First of all I drove to Gemona and then to San Daniele.

However, I had an unpleasant surprise. The management of the business in Gemona and San Daniele told me that the general representative of Audi had prohibited each garage from selling vehicles to foreigners.'

113 In a fax of 3 August 1995 to Audi (endnote No 135 to the decision) Mr Bilogan writes:

'I intend to acquire [an Audi A4] in Italy. I have been told by several people that Italian dealers are not allowed to sell anything to persons from the Federal Republic of Germany and Austria, apparently because of an instruction from the vehicle manufacturer.'

114 In a letter sent to the applicant (endnote No 136 to the decision) Mr Albrecht writes:

'As a convinced European I too wanted once in a while to enjoy the advantages of the EU, as you do too in your firm, and so my wife and I went to Italy.

We stopped in Milan and looked for a VAG dealer. We were overjoyed when we saw in the showroom the vehicles we planned to purchase. It was to be a Polo for my wife and a new Audi A4 for me.

However, very quickly our joy turned to disappointment. Without beating about the bush we were told that, upon instruction from Wolfsburg, we as Germans could not obtain those models of vehicle.

What we retained from our nice two-day holiday are the costs of travel and accommodation and the realisation that your firm would like to benefit from the advantages of the EU but the little man, as usual, is left behind and should kindly make his purchases in Germany.'

115 Those documents show in an adequately representative manner that during the period concerned a potential customer resident outside Italy faced the greatest difficulties in finding an Italian Volkswagen and Audi dealer prepared to sell him a vehicle. Consequently, the Commission could properly conclude that the business conduct of the manufacturers and their distribution network in Italy vis-à-vis consumers from other Member States also constituted a barrier to re-exports.

116 That conclusion is not undermined by the interpretation of each of those documents put forward by the applicant in its pleadings, nor by its explanations in regard to VAT, nor, lastly, by the practice of the manufacturers and Autogerma of replying systematically to the complainant that it was a misunderstanding and of taking the practical measures to enable him to purchase a vehicle from an Italian dealer. If the same refusal is systematically given, it cannot be regarded as a misunderstanding. Next, the fact that persons who complained were assisted to purchase a vehicle in Italy may be explained by the fear that they might bring an action before the courts; it does not alter the fact that it had become difficult for potential customers from another Member State to acquire a Volkswagen or Audi vehicle in Italy.

117 As to the applicant's criticisms of the assessments in the contested decision of the measure whereby undertakings were required from some purchasers, it must be

observed that although that measure was not in itself of such a nature as to prevent re-exports by final consumers, this in no way undermines the above finding that the Italian dealers were directed to refuse in each case to sell vehicles to foreign purchasers. Consequently, it is unnecessary to examine the question as to how the measure at issue must be interpreted. Furthermore, the applicant's argument that it could infer from its correspondence with the Commission that the latter considered the measure in question to be lawful is at variance with a letter of 23 November 1994 which the Commission sent to it and which will be analysed below in the course of the Court's consideration of the alternative plea alleging that the fine imposed is excessive (see paragraphs 338 and 339 below).

118 It follows from all the foregoing considerations that the applicant's argument that the business conduct of the manufacturers and their distribution network in Italy vis-à-vis consumers did not constitute a barrier to re-exports cannot be accepted.

The applicant's argument that the measures adopted were solely designed to prevent sales to independent dealers

— Arguments of the parties

119 The applicant states that the finding reached in the contested decision that all re-exports were hindered is also due to the fact that the Commission misinterpreted the terminology used in correspondence within the Volkswagen group.

120 The Commission wrongly understood the expression 'grey market' to refer not only to sales to independent dealers but also sales to authorised dealers and final

consumers in Member States other than Italy. The applicant contests the Commission's assertion that the manufacturers and Autogerma knowingly treated the grey market as synonymous with re-exports from Italy and so failed to distinguish between lawful and unlawful re-exports (recitals 43 to 58 of the decision). It is evident that 'grey market' refers to unlawful transactions and not to lawful sales.

121 The applicant does not dispute that in the correspondence within the group and between Autogerma and the dealers more general expressions such as 're-exports', 'sales organised outside the contract territory', 'sales outside the contract territory' and 're-sellers' are used, but in all those cases it argues that it is clear from the wording or the context of the correspondence in question, or from a subsequent document, that only unlawful re-exports, namely those not in conformity with the dealership contracts, were referred to.

122 The applicant cites certain circulars sent by Autogerma to the dealers which clearly show that Autogerma prohibited them solely from selling to independent dealers. It does not dispute that Autogerma recommended to the dealers, in particular in regard to the new Volkswagen Polo, to concentrate their sales activities on their own contract territory in Italy, but claims that is lawful.

123 In any event, the Commission has not proved that the use of general expressions in the correspondence and circulars left dealers in a state of uncertainty which made them avoid concluding contracts with final consumers or intermediaries acting on their behalf (recitals 60 and 61 of the decision). The applicant states that the dealers, as business men, are aware of the relevant Community legislation

and that, moreover, their dealership contract points out the difference between authorised sales to final consumers and prohibited sales to independent dealers.

124 The applicant disputes the Commission's interpretation of certain documents on which the Commission relies in order to prove the existence of a 'general strategy' to prevent lawful exports. The note of 21 September 1994 sent to the applicant by Autogerma (recital 21 of the decision) contains only general reflections on the type of possible measures. By that document Autogerma had attempted to show the applicant that it intended to take active steps against all re-exports, while in reality the only instruments at its disposal were those available under the dealership contracts.

125 The other documents refer only to sales to independent dealers. In the case of the note of 26 September 1994, also sent to the applicant by Autogerma (recital 22 to the decision), that is clear from its very wording and, in particular, from the reference made in it to Regulation No 123/85. That interpretation is, moreover, confirmed by another note from Autogerma to the applicant dated 24 October 1994.

126 The same is true of the applicant's internal note of 6 February 1995 regarding measures adopted by Autogerma to avoid re-exports (recital 23 of the decision) and from an internal Audi note of 12 December 1994 (recital 24 of the decision) which related only to a draft circular on 'the grey market; margin system in Italy'. Furthermore, the circular which was ultimately sent to the German dealers entitled 'grey market' asked them to gather information on independent dealers. The same was true of the reports, from the Autogerma department with responsibility for monitoring the Italian authorised dealers, of 17 December 1993 concerning the sales practices of two dealers; an Autogerma note of 15 March 1995; a fax from the applicant to Audi dated 24 March 1995; a letter from Audi to its German dealers on 16 March 1995; and a fax of 27 March 1995 from Porsche Austria, which is responsible for the import of Volkswagen, Audi and Porsche motor vehicles into Austria (recitals 25, 28, 31, 41 and 42 of the decision).

127 Lastly, the applicant complains that the Commission did not take into account either the conflicts of interest within the Volkswagen group, which sometimes led to exaggerations in the internal notes, nor the identity of the authors of the documents used as evidence, who were sometimes merely junior employees.

128 The defendant states that the applicant failed to make sure that the measures in question in fact related only to re-exports by independent dealers and that they did not also affect those made by final consumers, intermediaries acting on their behalf and other dealers of the same distribution network. The purpose of the measures went beyond the applicant's alleged aim, that is to say, solely to prevent sales to independent dealers. While it is possible, as the applicant asserts, that Autogerma and the Italian dealers knew that sales to final foreign consumers and other dealers in the distribution network were authorised and should not therefore be hindered, they did not in any event put that rule into practice.

129 The defendant claims that both in the correspondence between the applicant, Audi and Autogerma and in the correspondence between Autogerma and the dealers, no clear distinction is drawn between authorised re-exports and prohibited re-exports. Several documents show that the concept of 'grey market' or 'grey re-import market' included, for the persons concerned, exports to final consumers and to other dealers in the network. The defendant refers in that regard to a presentation intended for the Audi management board meeting on 13 February 1995 which refers to instructions that were intended to reduce by at least 50% the 'current volume of re-imports', while stating that those re-imports could be either 'cross-purchases abroad by German authorised dealers' or 'supplies to dealers outside the organisation (= grey market dealers)'. It also refers to an internal Audi note of 12 December 1994 and to a letter written by the Audi customer service department to a potential Austrian purchaser.

130 As to the other terms used in correspondence within the Volkswagen group in order to indicate the transactions which were to be prevented, the defendant cites a report of 4 June 1994 on a check carried out at a dealer's premises. It is clear from that report that the expression 'sales activities organised abroad' covers all re-exports from Italy. The defendant also observes that Autogerma sometimes omitted to add the adjective 'organised' in its correspondence with the dealers.

131 In any event, it is absolutely clear from the Autogerma notes that certain measures were directed against exports in general. The defendant also refers to other documents cited in the decision which, it claims, prove that all re-exports were concerned.

132 As to the notes of 21 and 26 September and 24 October 1994 sent by Autogerma to the applicant, and to the Autogerma note of 15 March 1995, the defendant contends that they show the confusion which the applicant had created between authorised and prohibited re-exports. Furthermore, those notes clearly concern measures which had already been taken. Another Autogerma note to the applicant, dated 14 June 1994, covers the same matters and shows, moreover, that Autogerma wrongly used Regulation No 123/85 in order to restrict the dealers' activity. The Audi internal note of 12 December 1994 proves that a split margin system was implemented, which was intended to prevent authorised re-exports.

— Findings of the Court

133 In the light of all the evidence and documents referred to above, the Court cannot uphold the applicant's argument that the measures adopted by it, Audi and Autogerma were in fact solely concerned to prevent sales to independent dealers. As the Court has found, the ceiling provided for by the 15% rule was applied to

re-exports as a whole (see paragraphs 48 to 58 above), supplies to Italian dealers were the subject of a quota with the express aim of reducing the number of re-exports (see paragraphs 80 to 89 above) and final consumers in Member States other than Italy were confronted with obstacles to the purchase of a vehicle in Italy (see paragraphs 105 to 115 above).

134 It follows that the applicant's argument that the expression 'grey market' shows that only sales to independent dealers were concerned cannot be upheld. While it is true that this expression appears in a large number of documents obtained by the Commission and may convey the idea of unlawful transactions, namely sales to independent dealers, it is also the case that some correspondence within the Volkswagen group relates to re-exports from Italy in general (see, for example, the documents cited in paragraphs 51 and 87 above) and that the 15% rule and the complaints from potential customers clearly do not specifically concern sales to independent dealers.

135 Furthermore, several documents which, according to their title, relate to the grey market, the 'grey exports [from Italy]' or the 'grey imports [coming from Italy]' appear nevertheless, having regard to their content, to cover re-exports from Italy in general.

136 Thus, an internal Audi note of 12 December 1994 (endnote No 17 to the decision) is worded as follows:

'Grey imports Italy

Enclosed, at your request, the draft of the letter to the German dealers' organisation.

This letter is critical. The reason for it is to be found in the currently applicable block exemption regulation. It is clearly stated there that manufacturers may not take measures to prevent lawful parallel imports. There is therefore a certain risk in associating the measures which we have adopted in Italy with the prevention of re-imports and to document this in a letter to the German dealers' association. This should be borne in mind in particular against the background of the contentious issue of the extension and alteration of the block exemption.

The measures in Italy should be communicated by word of mouth through the regions.'

137 It is thus stated in that note that it would be better to give information by word of mouth concerning the measures which had been adopted in regard to Italy, since written communications on that subject might reveal the incompatibility of those measures with Regulation No 123/85. That note shows the ambiguity of the expression 'grey market' used in internal correspondence within the Volkswagen group. Although the title of that note indicates that it concerns 'grey imports Italy', its content concerns parallel imports in general and not merely imports by independent dealers.

138 There is another example of that same ambiguity in the fax of 27 March 1995 from Porsche Austria to Audi (endnote No 31 to the decision). That fax is

entitled 'grey imports' but then states that, thanks to the measures adopted, all re-exports of Audi A4 vehicles from Italy to Austria have been eliminated. It states:

'Re: Grey imports

At last some good news to report on this subject!

From recent discussions with dealers in the areas concerned, we have been able to establish that the issue of "grey imports" has settled down. Thus, until now not even a single A4 has been imported from Italy to Austria. The measures introduced by you jointly with the Italian importer therefore seem to be effective ...'

139 Reference should also be made to the 'Marketing Plan Deutschland 1995' (endnote No 50 to the decision) in regard to that same issue. In that document the applicant sets out the following strategy in regard to re-imports into Germany:

'Counter measures to bring re-imports under control by means of a continuous analysis of quotations and delivery flows as well as the exercise of influence on dealers.

Targeted measures against "grey importers".'

140 In that document the expression 'grey importers' could refer to 'independent dealers', but the previous paragraph shows that re-imports into Germany as a whole were also the subject of the counter measures whose object was to restrict those re-imports by adjusting prices and controlling deliveries or supplies, and through the exercise of influence on the dealers.

141 It must therefore be concluded that in the light of the internal correspondence of the Volkswagen group as a whole, the expression 'grey market', as used in that correspondence, can clearly not be interpreted as covering solely sales to independent dealers. That conclusion is not undermined by the fact that the circulars sent by Autogerma to the Italian dealers make a clear distinction, referring to Regulation No 123/85, between sales to final consumers (irrespective of their place of residence), which they describe as lawful, and sales to independent dealers, which they describe as 'unlawful'. It is conceivable that when drawing up those formal notices to the dealers Autogerma complied with the Community rules whilst reserving the possibility of issuing instructions to them through more informal channels.

142 The conclusion that the applicant, Audi and Autogerma did not confine their actions to preventing sales to independent dealers is corroborated still further by the notes of 21 and 26 September 1994 sent by Autogerma to the applicant (endnotes Nos 14 and 15 to the decision). Those notes contain the majority of the evidence on which the Commission relies against the applicant.

143 The note of 21 September 1994 states that its object is 'parallel exports' and is worded as follows:

'Dear Sirs,

We refer to the issue raised at the meeting and already dealt with in detail in order to describe the current situation.

There is great concern throughout the whole Italian sales organisation with regard to the achievement of sales objectives and the need to maintain the sales successes of the past. This necessity has led some of our partners, under pressure from outside sales organisations, including a number of foreign Volkswagen and Audi dealers, to sell in places far from those designated in their contracts, and in some cases indeed outside the country.

The steps taken by Autogerma are therefore intended to warn the Volkswagen/Audi dealers to stay in the territories designated by their contracts; checks have been carried out on all dealers individually in order to establish that they are complying with their contract, with particular reference to sales activities outside the contract territory (six dealers have had their contracts terminated for breach of contract ...). With other dealers we intend to raise allegations of breach of contract, on the basis of certain "audit results" regarding deliveries, in order to obtain more detailed data on the final purchasers of the vehicles.

We will be developing this approach further in the sales organisation; the plan calls for a new and even more important margin structure, with a higher percentage for the "maggiori-sconti" bonus, which depends on the achievement

of the quantity and quality obligations in the contract, and a lower fixed percentage on vehicle invoices. This will give a better distribution of the margins.'

144 That note refers to action by Autogerma intended to confine the Italian dealers to their contract territories. Having regard to the subject of that note ('parallel exports') and the link made in it between, on the one hand, the finding that some dealers sometimes did business abroad and, on the other, Autogerma's action ('consequently'), the words 'to warn the Volkswagen/Audi dealers to stay in the territories designated by their contracts' must reasonably be understood as meaning the exercise by Autogerma of pressure on the dealers so that they cease sales outside their contract territories, in particular to foreigners.

145 That note also shows that in order to take those steps, systematic checks were implemented ('checks have been carried out on all dealers individually').

146 Furthermore, the present tense and the terms used prove that the steps taken by Autogerma had already been effective. Only the measures cited in regard to the margin are presented as being a plan.

147 Lastly, the Court points out that Autogerma took the view that it would be useful to obtain 'more detailed data on the final purchasers'. Since sales to final consumers are by definition lawful, Autogerma had no good reason for wanting to ascertain the identity of those consumers. Likewise, in the second paragraph of its note, in which it describes the problem which its action is intended to meet, Autogerma suggests that the dealers of the network established abroad are intruders. That description of the situation seems to express a desire to hinder

cross deliveries. In any event, the reference to final consumers and foreign dealers in that note indicates that it does not concern solely sales to independent dealers.

148 The list of measures sent by Autogerma to the applicant in a note of 26 September 1994 some days later (endnote No 15 to the decision) confirms the foregoing matters.

149 That note refers to 19 'measures taken by Autogerma to control and prevent re-export'. Although it is true that the description of several of those measures does not disclose their scope (see, for example, the expressions 'recidivist dealers receive notice to leave' and '... [avoid] that dealers look for undesired selling channels'), the note also contains sentences which clearly let it be understood that all re-exports were concerned.

150 Thus, it states that 'the quarterly bonus, blocked for all the extra territory sales, would be paid, starting from the next quarter, only on the base of car registrations'. The requirement, as a condition of payment of the bonus, that the vehicle be registered in Italy clearly discourages not only sales to independent dealers but also cross deliveries and direct sales to final consumers in other Member States. Consequently, that measure was clearly intended to partition the Italian market. While it is true that the measure is presented as one which must be implemented only 'from the next quarter', that is not the case for another similar measure mentioned in the same note, pursuant to which 'also for the promotional actions, which are mostly in favour of the final customer, registration in Italy is required for the payment of support generally consisting in accessories, buy-back promise or financing opportunities'.

151 There is additional evidence in the fact that the note refers in general terms to the prevention of re-exports as the aim to be pursued ('measures taken ... to control and prevent re-export', or '... dissuade dealers involved with re-export').

152 Nor, lastly, can the applicant validly complain that the Commission failed to take into account conflicts of interest within the Volkswagen group or the identity of the authors of the documents obtained. Those matters do not invalidate the content of those documents.

The checks, warnings and sanctions to which the dealers were subject

— Arguments of the parties

153 The applicant contends that the Commission wrongly found that it, Audi and Autogerma systematically monitored sales made by the Italian dealers.

154 First, the applicant observes that the Commission concluded, based on an e-mail of 26 January 1995, that a fee of DEM 150 had been introduced for the issue of a certificate of conformity (recital 27 of the decision) whereas that fee was in fact introduced over a period of a few weeks following the entry into force of a new set of rules, and only in respect of a very small number of vehicles. The fact that the fee was presented in that e-mail as intended to make re-imports difficult is due to the fact that the writer was not responsible for that fee or the issue of the certificates of conformity. In so far as the Commission also took account of the

fact that Audi required, in addition to a fee, evidence of purchase (recital 27 of the decision), the applicant explains that a copy of the sale contract or invoice was required solely in order to ensure that the person applying for the certificate of conformity was in fact the purchaser. The applicant states also that the fee was intended to cover the internal and external costs associated with the issue of the certificates and gives a general idea of those costs.

155 Second, the applicant states that the Commission concluded, in the light of a number of documents, that the manufacturers had instructed Autogerma to maintain systematic surveillance of re-exports and to report back its observations on that matter (recitals 28, 29 and 39 of the decision), whereas it was manifestly impossible, on the basis of the information in those documents, to monitor the sales of each dealer. The figures on re-exports did not enable it to be determined which dealer had sold a particular vehicle. The applicant, Audi and Autogerma carried out checks only if an application for a certificate of conformity was made by a firm or person who could clearly be suspected of being an independent dealer. That was so, for example, in the case of the 25 checks carried out by Audi between June 1994 and February 1995. After those checks, the applicant and Audi sent to Autogerma the names of the dealers who had seriously breached their contractual obligations, or the chassis numbers of the vehicles sold by independent dealers, so that Autogerma could identify the dealers who had sold those vehicles. The exchange between the manufacturers and Autogerma of such information was not an illegal practice but was intended solely to detect sales to independent dealers.

156 Third, the applicant submits that the Commission stated that Autogerma monitored vehicle orders 'on a daily basis' (recital 40 of the decision), whereas the minutes of 10 February 1995 on which that claim is based relate to a spot check of those orders. Even though, according to the minutes, Autogerma promised to introduce a permanent check, such a check was never carried out. Nor is it true that Autogerma required the Italian dealers to refrain from selling vehicles to customers not resident in Italy without its prior consent (recital 114 of the decision). Lastly, the applicant observes that even if Autogerma had

permanently monitored the orders recorded, that would not have been unlawful, since such monitoring is a means of discovering, in time and preventatively, sales to independent dealers.

157 Fourth, the applicant contends that the assertion in the decision that the Kraftfahrt-Bundesamt (German Federal office for motor vehicles) assisted in monitoring the Italian dealers (recitals 26 and 28 of the decision) is also incorrect. In the information which it supplied the Kraftfahrt-Bundesamt erased the last three numbers of the chassis number, thus preventing identification of the vehicles in question. Furthermore, it merely disclosed data for statistical purposes, which enabled the applicant and Audi to establish, for each model, the total number of vehicles re-imported into Germany.

158 The applicant submits that although Autogerma gave formal notice to the dealers to cease 'sales organised outside their contract territory', it is also clear that the expression 'organised sale' means sales to independent dealers. That is unequivocally clear from a report of 7 December 1993 concerning, *inter alia*, the formal notices sent by Autogerma to the dealers and the replies sent by some of those dealers, in which they undertook to cease selling to independent dealers. The applicant cites documents to show that the dealers to whom formal notice was given were in fact selling large numbers of vehicles to independent dealers, so that firm action by Autogerma was necessary, both legally and economically. The applicant observes also that more than 90% of re-exports of Volkswagen and Audi vehicles from Italy to Germany, estimated by the Commission at 19 000 vehicles in 1993, 22 000 in 1994 and 19 000 in 1995 (recital 11 of the decision), were carried out by independent dealers. It also points to letters from German authorised dealers in which they complain of the fact that other authorised dealers were supplying, in breach of their contract, dealers who were not part of the network, and ask the applicant to take the necessary measures to stop those practices.

159 As regards the sanctions which were actually imposed, the applicant states that the instances of termination of dealership contracts on which the Commission relies all concern dealers who had sold vehicles on various occasions to independent dealers and who had sometimes also committed other serious breaches of their contractual obligations.

160 According to the defendant, it is clear from the documents cited in the decision as a whole that the sales of Italian authorised dealers, including those to individuals, were systematically monitored and were the subject of a daily control by Autogerma. It also disputes that the decision states that Audi was able to carry out such monitoring with the aid of information supplied by the Kraftfahrt-Bundesamt. It states, nevertheless, that an Audi employee who had purchased an Audi A4 vehicle in Italy was afraid that the vehicle 'would show up as a re-import and would cause trouble' in the event of a check on the statistics issued by the Kraftfahrt-Bundesamt (recital 30 of the decision).

161 As to the warnings and sanctions, the defendant refers to the letter of 13 June 1994 in which Autogerma informs Audi that it has, first, sent a warning to dealers requiring them to confine their sales exclusively to the Italian home market and, second, terminated two dealership agreements. By letter of 14 June 1994 sent to the applicant, Autogerma stated that since September 1993 it had continuously urged about 60 dealers to refrain from any sales activity outside their sales territory, with threats to terminate their dealership contracts if they did not do so. The defendant also refers to an internal note of the applicant dated 20 February 1995 according to which the Volkswagen group is 'infringing the legislation in force' and 'very soon, several dealers (including quite large undertakings) will have their dealership contracts terminated on account of grey imports (vis-à-vis third parties for other reasons of course)'. The defendant also points out that Autogerma did not specifically refer to independent dealers in the June 1994 notes referred to above. Quite to the contrary, in that note it deals generally with formal notice and termination of certain dealership contracts on account of sales outside the contract territory.

— Findings of the Court

162 First, the Court finds that the contested decision sets out relevant and consistent evidence of the fact that the applicant, in particular with the assistance of its subsidiary Autogerma, systematically carried out checks to ensure the effectiveness of the measures adopted in order to hinder re-exports from Italy and sent warnings to dealers which were intended to restrict their business activities.

163 As the Court has found in paragraph 145 above, Autogerma confirmed in its note of 21 September 1994 to the applicant that it was carrying out checks at each of its dealers to satisfy itself that they were not making sales outside their contract territories. Likewise, it is clear from Mr Schlesinger's statements, cited in paragraph 51 above, that he thought it important to check personally each case of the grant or retention of the bonus when the 15% rule had to be applied. Those items of evidence are not contradicted by the specific arguments submitted by the applicant (see paragraphs 154 to 157 above). Moreover, the applicant's assertion that continuous individual surveillance of dealers was not possible does not invalidate the conclusion that a systematic policy of surveillance was implemented by Autogerma and thus supported the other measures adopted in order to hinder re-exports from Italy.

164 As to the warnings sent by the manufacturers, the Court points out, first, that in their complaints to the manufacturers or to the Commission the German and Austrian consumers all mention those warnings, referring to statements made to them by the Italian dealers. That is apparent, for example, from the letters or faxes cited in paragraphs 106, 107, 109, 110 and 112 to 114 above (fax from Mr Wieser: '... on the basis of an instruction from Audi'; fax from Mr Bernhard: 'an instruction of Volkswagen AG'; letter from Mr Baur: 'the threats are of course only made by telephone'; letter from Mr Keppler: '... that VW had prohibited the sale. If that prohibition were ignored VW would have threatened to withdraw the dealer concession'; fax from Mr Mosser: '... that the garage in question had

received a prohibition from Audi's general agency'; fax from Mr Bilogan: 'on account of an instruction from the vehicle manufacturer'; letter from Mr Albrecht: 'upon instruction from Wolfsburg'). Those statements are confirmed by Autogerma's letter to Silemotori Negro, cited in paragraph 92 above, and, as regards more specifically the cross deliveries, by the letter of 26 November 1993 sent by a German Volkswagen and Audi dealer to the applicant, cited in paragraph 82 above.

165 Audi's internal note of 12 December 1994, cited in paragraph 136 above, confirms that Audi thought it preferable that the measures adopted in regard to sales in Italy should be communicated by word of mouth. Moreover, the objective set out in the note of 21 September 1994 sent by Autogerma to the applicant, cited in paragraph 143 above, that 'Volkswagen/Audi dealers [were to be warned] to stay in the territories designated by their contracts' leads to the conclusion that warnings were given to them to that effect. The letter sent by Autogerma to Audi on 13 June 1994 (cited in paragraph 80 above) confirms: 'dealerships were warned by Autogerma on several occasions to conduct business exclusively in Italy. Two dealerships were even terminated'. Similarly, in a letter of 14 June 1994 sent to the applicant concerning parallel exports (endnote No 65 to the decision) Autogerma writes: 'since September 1993 around 60 dealers have been continually warned to refrain from sales outside their contract territory, whether in Italy or abroad. It was expressly pointed out to those dealers that if they did not do so they would have to reckon with the termination of the dealership. ... Autogerma intends to proceed with the same determination in future in order to achieve the established objective of prohibiting exports from Italy.' Lastly, influence over the dealers was specifically mentioned in the 'Marketingplan Deutschland 1995', cited in paragraph 139 above ('influence on dealers'). In the context of that document, that influence must be understood as instruction to German dealers to cease importing vehicles.

166 Second, it must be found, on the other hand, that the contested decision does not contain sufficiently relevant and consistent evidence that the applicant, with the aid of its subsidiary, Autogerma, actually imposed sanctions on the Italian dealers, in particular by terminating their dealership contract on the ground that

they had delivered vehicles to final consumers or Volkswagen or Audi dealers in other Member States.

167 It is, admittedly, apparent from some documents that the authorised dealership contracts of some Italian dealers were terminated on grounds relating to re-exports. That is, for example, the case in the note sent by Autogerma to Audi on 13 June 1994, cited in paragraph 165 above, and the list sent by Autogerma to the applicant by letter of 7 June 1994 (endnote No 121 to the decision) relating to three dealership contracts terminated in 1993 and drawn up in the following terms:

'(1) Dino Conti Trieste

Reasons:
(a) Grey export
(b) Cooperation with other brands

(2) Beretich Pordenone

Reasons:
(a) Grey export
(b) Market coverage
(c) Weak organisation
(d) Financial problems

(3) Autosial S. Benedetto (AP)
(a) Grey export
(b) Financial problems'.

168 However, it is wholly conceivable that those dealers had in fact infringed their dealership contracts, in particular by selling vehicles to independent dealers, which would fully justify the sanction imposed. Audi's statement in its report of 10 February 1995 on the meeting with Autogerma (endnote No 125 to the decision) according to which 'eight dealers were given notice' and 'grey export was not indicated as a reason for giving notice', is not of such a nature as to invalidate that consideration, since there are in any event other types of infringement of the dealership contract than sales to independent dealers. Counsel for the defendant confirmed, moreover, at the hearing, in reply to a question from the Court, that the dealers who had their contracts terminated had sold vehicles to independent dealers.

169 Consequently, the evidence adduced by the Commission regarding the termination of the dealership contracts does not rule out the possibility that only dealers who had, along with other failures to comply with their contractual obligations, sold vehicles to independent dealers were in fact sanctioned. It follows that the Commission committed an error of assessment in taking the view that it was proven that the terminations of the dealership contracts in question constituted an unlawful measure.

The effects of the barriers to re-exports

Arguments of the parties

170 According to the applicant, the Commission has not shown that the alleged measures adopted by the manufacturers and Autogerma influenced lawful re-exports from Italy.

171 The very fact that throughout the periods when there was a significant disparity between the Italian lire on the one hand, and the German mark and Austrian schilling on the other, there were numerous re-exports of vehicles from Italy proves that the measures allegedly adopted by the applicant, Audi and Autogerma did not have appreciable effects. The applicant argues that the actual re-exports during 1993, 1994 and 1995 of around 20 000 vehicles per year from Italy to Germany show either that the measures aimed at sales to independent dealers were ineffective or that those measures were effective but that the lawful purchases by final German consumers in Italy increased in proportion. The applicant also observes that in 1995, in comparison with the 19 338 vehicles re-exported, there were only 36 complaints from persons describing themselves as final consumers who had been unable to obtain a vehicle in Italy. A large number of those complaints were, moreover, unjustified. The applicant adds that some of those complainants eventually obtained the desired vehicle, whereas others were in fact independent dealers.

172 The applicant also claims that throughout most of the period taken into account by the Commission, namely between 1987 and the beginning of 1993, consumers residing outside Italy had no real interest in acquiring a vehicle in Italy. Rather, it was in the interests of the Italian customers to purchase in another Member State.

173 Lastly, the Commission's assertion that the dealers, following the prohibition imposed on them, decided to cease exporting or to do so solely up to a limit of 15% of total sales, or took further measures such as registration of all vehicles in Italy or termination of dealers who had sold abroad, is not justified by any of the documents cited in support.

174 The defendant points out, at the outset, that any measure whose object or effect is to partition national markets by preventing parallel imports is contrary to the EC Treaty as soon as it becomes appreciable. The infringement of Article 85(1) of the

Treaty does not depend upon the success of the attempts to partition the national markets.

175 The defendant states next that having regard to the large number of letters of complaint sent by purchasers there is no doubt that the Italian dealers took the view that they had been prohibited from selling vehicles to foreigners. It is clear that this situation was caused to a large extent by the lack of distinction, in the instructions given by Autogerma to its dealers, between lawful and unlawful sales.

176 Likewise, the letters sent by the dealers to potential purchasers, informing them of a delivery period of more than one year and of probable price increases, had the obvious result that the majority of those purchasers decided not to purchase a vehicle in Italy. The fact of requiring the purchaser to undertake not to resell the vehicle within three months following the purchase or before the vehicle had covered 3 000 km, and otherwise to pay a heavy penalty, is also of such a nature as to discourage acquisitions in Italy.

177 Lastly, the defendant cites a document which, it claims, shows a reduction in re-exports of Audi vehicles from Italy.

Findings of the Court

178 It is settled case-law that for the purpose of the application of Article 85(1) there is no need to take account of the actual effects of an agreement when it has as its object the prevention, restriction or distortion of competition within the common market. Consequently, it is not necessary to show actual anti-competitive effects

where the anti-competitive object of the conduct in question is proved (see Joined Cases 56/64 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299, 342, and Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraphs 12 to 14). As the Court has just held, the Commission has proved that the applicant adopted measures whose object was to partition the Italian market (see in particular paragraphs 88 and 89 above). The Commission was not therefore required to investigate the actual effects which those measures had on competition within the common market.

179 Furthermore, those measures were by their nature capable of affecting trade between the Member States within the meaning of Article 85(1) of the Treaty (Joined Cases 32/78, 36/78 to 82/78 *BMW Belgium and Others* v *Commission* [1979] ECR 2435, paragraph 32). To be capable of affecting trade between Member States, a decision, an agreement or a concerted practice must make it possible to foresee with a sufficient degree of probability, on the basis of a set of objective elements of law or fact, that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States capable of hindering the attainment of the objectives of a single market between States. In that regard it is necessary to consider in particular whether the measures in question are capable of bringing about a partitioning of the market in certain products between Member States and thus rendering more difficult the interpenetration of trade which the Treaty is intended to create (Case 56/65 *Société Technique Minière* v *Maschinenbau Ulm* [1966] ECR 235, 249; Case T-77/92 *Parker Pen* v *Commission* [1994] ECR II-549, paragraph 39). That is clearly the case here. The 15% rule and the imposition of supply quotas to Italian dealers each amount to territorial protection, in particular for German and Austrian authorised dealers, and to a reduction in the freedom of Italian dealers to conduct their business. Those measures bound all Volkswagen and Audi dealers in a substantial part of the common market (Italy) and thereby contributed to the partitioning of the Italian market. Practices restricting competition and extending over the whole territory of a Member State are by their very nature capable of reinforcing the compartmentalisation of markets on a national basis, thereby holding up the economic interpenetration which the Treaty is intended to bring about (see, by analogy, Case 42/84 *Remia* v *Commission* [1985] ECR 2545, paragraph 22, and *Bayerische Motorenwerke*, cited above, paragraphs 19 and 20).

180 Lastly, and in any event, the complaints from German and Austrian consumers, analysed in paragraphs 105 to 116 above, prove that the measures adopted by the applicant, Audi and Autogerma had real effects. Audi did not hide the fact, moreover, that there had been a 'success' (see the document cited in paragraph 85 above; see also the fax from Porsche Austria cited in paragraph 138 above).

181 For all those reasons, the applicant's argument concerning the effects of the barriers to re-exports cannot be upheld.

The duration of the barriers to re-exports

Arguments of the parties

182 The applicant states that the conduct alleged against it did not in any event begin in 1987 or continue after October 1995. It observes that the documents obtained by the Commission relate only to the years 1993, 1994 and 1995.

183 As regards the date on which that conduct began, the applicant states that the Commission fixed it at 30 December 1987, relying on the dates of a version of Convenzione B (recital 202 of the decision). Since that document proves only that the dealers and Autogerma reached agreement on the bonus system and does not have any bearing on the other measures alleged in the decision, the Commission's

assertion that the infringement referred to in the decision is, generally, proved to date from 30 December 1987 is not consistent.

184 As regards the date on which the alleged infringement ceased, the applicant observes that, having regard to the circular sent to the dealers in December 1996, the conclusion in recital 216 of the decision that at that time '[the infringement had] not been completely terminated' is wrong. Consequently, even if the finding in Article 1 of the decision were correct, Article 2 of the decision would have to be annulled because it orders the applicant to take certain measures which it had already taken.

185 The defendant states, first, that in recital 202 of the decision it fixed the starting date of the infringement at 30 December 1987, relying solely on the bonus system, so that there is no possibility of a misunderstanding as to the object or extent of the infringement at issue over the period in question. The fact that the other measures were taken only at a later date does not preclude it from describing those measures as a whole, including the bonus system, as an overall strategy.

186 Next, the defendant observes that an infringement always begins with a first agreement or first concerted practice and continues until the last agreement or last concerted practice has been abolished or otherwise stopped. The circular of 16 March 1995 did not cause the infringement to cease, because that circular was not implemented. That is shown by several documents. Furthermore, the circular did not amend the measures intended to impose a financial penalty in respect of sales made outside the contract territory, such as the blockage of the 3% bonus. Nor did the circular of December 1996 completely end the infringement.

187 Lastly, the defendant states that the fact that the infringement became less severe in 1997 was taken into account, when fixing the fine, by the sliding-scale calculation of the increases applicable over the period of the infringement.

Findings of the Court

188 As a preliminary point, it must be recalled that the requirement of legal certainty, on which economic operators are entitled to rely, entails that when there is a dispute concerning the existence of an infringement of competition law the Commission should adduce at least evidence of facts sufficiently proximate in time for it to be reasonable to accept that infringement continued uninterruptedly between two specific dates (Case T-43/92 *Dunlop Slazenger* v *Commission* [1994] ECR II-441, paragraph 79).

189 First, in the present case it is clear from the fact that the 15% rule was in force continuously between 1 January 1988 and 30 September 1996 (see paragraph 48 above) that the applicant infringed the Community competition rules throughout that period (see paragraph 49 above). While it is true, as also pointed out in paragraph 49 above, that this rule was likely to play a more significant role in periods where it was of great interest to consumers of other Member States to purchase a vehicle in Italy (in the present case, from 1993 onwards), the object of the rule in question was to ensure a degree of territorial protection and therefore, to that extent, the partitioning of the market in that it induced the Italian dealers to reserve each year at least 85% of available vehicles for sale to Italian

customers. Lastly, although the Commission has made a slightly inaccurate statement in placing the date of entry into force of the 15% rule in 1987 (recital 75 of the decision), 30 December (recitals 202 and 216 of the decision) or 31 December (recital 215 of the decision), that has no bearing on the broad logic of the decision and cannot therefore lead to its annulment, since the Commission did not take 1987 into account when fixing the amount of the fine (recital 217 of the decision).

190 Second, the only item of evidence adduced by the Commission to show that the applicant was to some extent committing an infringement over the period from 1 October 1996 to the date of adoption of the contested decision is the assertion that the applicant did not, after receiving the statement of objections in October 1996 and throughout that period, issue a clear statement that the measures to partition the market had been cancelled. That is confirmed by paragraphs 27, 28 and 348 of the defence and by paragraph 126 of the rejoinder. In the latter paragraph, the Commission explained that at the end of 1996 and during 1997 the view could not be taken that an end had been put to the infringement because the applicant had not shown that it had cancelled 'any territorial restriction also contained in the contracts'. In its reply to a question from the Court at the hearing, the defendant's counsel confirmed that explanation.

191 However, that assessment of the facts is at variance with certain documents before the Court. Thus, in paragraph 48 of the reply by the applicant and Audi to the statement of objections it is clearly stated that 'the 15% rule ceased with effect from 1 October 1996'. Moreover, at the hearing on 7 April 1997 the applicant stated that 'the Volkswagen and Audi dealer contracts, and the importer contracts within the European Union ... were amended on 1 October 1996 in such a way that they complied with the new framework conditions laid down by the EC Commission in Regulation 1475/95'. Moreover, in the circular of 19 December 1996 sent at the applicant's request to the Italian dealers,

Autogerma clearly explained to them the commercial rights which they had under the Community rules as follows:

'Dear Sirs,

In October 1996 the Commission of the European Union formally complained of the fact that we had sought to prevent, from 1987 onwards, by various means, sales of Volkswagen and Audi vehicles in Germany and in Austria. Like Volkswagen AG and Audi AG, we consider that those criticisms are not justified. We wish, however, to clarify matters as follows:

1. You are authorised, without restriction, to sell motor vehicles to final consumers in all the Member States of the European Union and the European Free Trade Area. That applies also in the case where the final user purchases through an intermediary.

   You are also authorised, without restriction, to sell motor vehicles to other dealers in the Volkswagen and Audi network in the Member States of the European Union and the European Free Trade Area.

   If you conclude such sales, you will not incur any sanction, direct or indirect, from us or from Volkswagen AG and Audi AG.

2. On the other hand, you are not authorised to sell motor vehicles to undertakings which are not members of the Volkswagen-Audi network.

3. The discounts which are allowed to you by Autogerma and the award and calculation of bonuses will not depend in any way, directly or indirectly, in whole or in part, on the volume of sales which you make outside your contract territory.'

192 As it has not adduced any evidence, the Commission has not proved to the requisite legal standard that the applicant was still committing an infringement between 1 October 1996 and January 1998.

Conclusions

193 The relevant and consistent documents obtained by the Commission show that the applicant adopted measures whose object was to partition the Italian market for new Volkswagen and Audi vehicles; those measures took the form of a supply quota for Italian dealers, a policy whereby the usual bonus of 3% was only partially awarded to dealers who made more than 15% of their sales to persons resident outside Italy, and of checks and warnings. Moreover, it has been proved that those measures amounted to obstacles to the acquisition in Italy of Volkswagen and Audi vehicles by consumers and by authorised dealers of those makes in other Member States.

194 It thus follows from examination of the first plea that the Commission was entitled to conclude that the applicant, jointly with its subsidiaries Audi and Autogerma, infringed Article 85(1) of the Treaty. The question whether the Commission erred in law in describing the unlawful measures as 'agreements' between the applicant, Audi and Autogerma on the one hand, and the Italian

dealers on the other (see the wording of Article 1 of the contested decision, cited in paragraph 28 above) will be examined below in the context of the second plea.

195 Moreover, the evidence adduced by the Commission and cited above is so cogent that the figures and arguments submitted by the applicant relating to the considerable quantities of vehicles nevertheless re-exported from Italy to Germany in the period in question here (see paragraph 76 above) cannot in any event affect the conclusions relating to the existence of the infringement. Those elements show, at most, that the measures adopted by the applicant and its subsidiaries were not sufficient to achieve the objective that had been set (see also paragraph 178 above). In any event, even if it were true that the number of re-exports prevented was low in comparison with the number of re-exports carried out despite the measures adopted in order to prevent them, that could not alter the systematic nature of the infringements duly found by the Commission and considered above (see Case 107/82 *AEG* v *Commission* [1983] ECR 3151, paragraphs 45 and 46).

196 It must be found, next, that although the applicant has proved that some recitals of the decision contain errors of fact in that the Commission drew its conclusions as to the split margin system and the termination of some dealership contracts without having sufficiently precise, relevant and consistent evidence (see paragraphs 65 to 72 and 166 to 169 above) that cannot lead to the annulment of the decision as a whole. As has just been found in paragraphs 193 and 194 above, the Commission rightly concluded that the applicant had infringed Article 85(1) of the Treaty.

197 Nevertheless, those errors of fact committed by the Commission vitiate the operative part of the decision to a certain extent. In particular, as is clear from recitals 214 and 220 of the decision, the split margin system and the termination of some dealership contracts were taken into consideration, if only in a minor

way, in determining the gravity of the infringement and thus when fixing the fine set out in Article 3 of the decision.

198 It follows that the contested decision must be annulled in so far as it finds that a split margin system and the termination of certain dealership contracts by way of sanction constituted measures adopted in order to hinder re-exports of Volkswagen and Audi vehicles from Italy by final consumers and dealers in those makes in other Member States.

199 It must be found that the lack of evidence in regard to the period from 1 October 1996 until the date of the adoption of the contested decision does not affect the legality of Article 1 of the decision in so far as the Commission finds there that the applicant infringed Article 85(1) of the Treaty. Nor does it call in question the legality of Articles 2 and 5 of the decision, in which the Commission orders the applicant to take, in particular, certain measures to bring to an end the infringement and fixes a penalty payment in order to secure the implementation of those instructions. In that respect, the fact that the Commission failed to adduce relevant and consistent evidence of the continuation of the infringement after 1 October 1996 does not in itself justify the definite conclusion that the infringement had in fact ceased. Consequently, although the Commission must be criticised for having fixed the fine on the basis, *inter alia*, of an unproven assertion that the infringement had continued between 1 October 1996 and the date of adoption of the decision, it cannot, on the other hand, be criticised for having given certain instructions to the applicant, coupled with a penalty payment, in order to ensure with certainty that all infringing conduct had ceased. Moreover, even assuming that the infringement had in fact ceased, that would in any event deprive Articles 2 and 5 of the decision of their effect.

200 Nevertheless, the Commission's error in regard to the duration of the infringement vitiates the operative part of the decision to a certain extent. In particular, as is clear from recital 217 of the decision, the end of 1996 and the

year 1997 were taken into account in fixing the fine set out in Article 3 of the decision.

201 Consequently, the contested decision must be annulled also in so far as it finds that the infringement had not ceased in the period from 1 October 1996 until the adoption of the decision.

202 It follows from the whole of the foregoing considerations that the contested decision must be annulled in so far as it finds, first, that a split margin system and the termination of certain dealership contracts by way of sanction constituted measures adopted in order to hinder re-exports from Italy of Volkswagen and Audi vehicles by final consumers and dealers in those makes in other Member States and, second, that the infringement in question had not fully ceased in the period from 1 October 1996 until the adoption of the decision.

B — *The second plea: errors of law in applying Article 85 of the Treaty*

Arguments of the parties

203 The applicant submits that the Commission committed several errors of law in applying Article 85 of the Treaty.

No definition of the market

204 The applicant states that in the decision the Commission examined the criteria for applying Article 85(1) of the Treaty that were the easiest to verify, such as whether the manufacturers, Autogerma and the dealers are undertakings. However, unlike in the statement of objections, it did not deal at all with the question as to how the market on which the infringement of the Treaty took place is to be defined. The applicant acknowledges that the definition of the product market is clear in the present case (market for motor vehicles) but claims that the failure to define the geographic market vitiates the decision.

205 In that context, the applicant claims that it is only when the market is defined that it is possible to determine exactly whether the agreement or concerted practice in question is capable of affecting trade between Member States and has the object or effect of preventing, restricting or distorting competition within the common market. It points out, moreover, that the position adopted by the Commission in the statement of objections, namely that the relevant geographic market is the common market, was firmly challenged by the manufacturers in their observations on that statement. The common market is not the relevant geographic market, since there are significant differences both legal (in regard to taxation) and economic (monetary, purchase preferences) between the Member States.

206 The defendant contends that a definition of the geographic market was unnecessary in the present case. As a general rule a definition of the market is necessary only in the context of merger control or proceedings relating to abuse of a dominant position. Where Article 85(1) of the Treaty is applied, the only

mandatory geographic question raised is whether the agreement or concerted practices in question are capable of affecting trade between Member States.

Erroneous appraisal of the barriers as a whole

207 The applicant claims that when an agreement is assessed in the light of Article 85(1) of the Treaty it is necessary to distinguish the parties to that agreement who are actually subject to the prohibition laid down in that article from those who are not. In the present case, the Commission disregarded that rule in inferring a prohibition or a restriction of exports from a 'system of measures' (recitals 112 and 131 of the decision).

208 Furthermore, the measures alleged by the Commission do not form a system, since there is no link between them.

209 The defendant contends that it is clear that the measures dealt with in the decision, such as the bonus and split margin systems, the imposition of supply quotas and the undertaking required from purchasers, form an overall strategy which aimed to induce the Italian dealers to refrain from any activity outside their contract territory. Furthermore, the defendant contends that it distinguished between authorised measures and prohibited measures, since it criticised only the measures whose object or effect was to hinder or prevent sales to final consumers (as appropriate, through intermediaries) and dealers in Member States other than Italy.

Incorrect characterisation of the barriers, taken as a whole, as agreements

210 The applicant claims that the Commission wrongly characterised the measures adopted by the two manufacturers in question and Autogerma as agreements concluded between them and the Italian dealers. Although it recognises that there was an agreement in regard to the bonus system, which is expressly stipulated in Convenzione B, annexed to the dealership contract, and that would have been the case in regard to the split margin system if it had been introduced, the other measures, such as the prohibition of cross deliveries within the distribution network and a restriction of supply on the Italian market cannot, in its view, be characterised as such. The decision is, moreover, contradictory in that regard, since it states on the one hand, that the measures 'were adopted by mutual agreement for the practical application of the dealership contract' (recital 128) and, on the other hand, that 'for a concerted practice to exist it is sufficient for an undertaking knowingly and of its own accord to adjust its behaviour in line with the wishes of another undertaking' (recital 129).

211 The applicant adds that the undertaking required of certain customers, which the Commission also described as incompatible with the Community competition rules, cannot constitute an agreement within the meaning of Article 85(1) of the Treaty, since the customers are not undertakings.

212 The defendant states, first, that the various measures dealt with in the decision display, in various degrees, the elements of an agreement or at the very least represent concerted practices. No purpose is served in drawing a detailed distinction between those two notions, since the Treaty prohibits both agreements and concerted practices.

213 The defendant acknowledges that there cannot be an agreement or concerted practice within one and the same economic entity. It adds, however, that this does

not preclude internal documents from being capable of proving that measures which were discussed were then implemented and were the subject of agreements or concerted practices. Thus, the restriction of supplies to the Italian market became part of the contractual relationship between Autogerma and the dealers in so far as the dealership contract made Autogerma's deliveries to the dealers subject to Autogerma's receipt of supplies from the manufacturers.

214 In any event, there was an agreement in the sense that numerous dealers agreed to apply the prohibition on cross deliveries within the distribution network.

215 Lastly, the argument that the purchaser of the vehicle is not an 'undertaking' is irrelevant. The defendant observes that it is not the undertaking required of the customer by the dealer which is contrary to the Treaty but the agreement concluded between Autogerma and the dealers relating to the obligation to require such an undertaking.

Infringement of Regulations No 123/85 and No 1475/95

216 The applicant also complains that the Commission did not duly take into account Regulation No 123/85 which defines, in its first recital, agreements in a selective distribution system of motor vehicles as agreements 'by which the supplying party entrusts to the reselling party the task of promoting the distribution and servicing of certain products of the motor vehicle industry in a defined area and by which the supplier undertakes to supply contract goods for resale only to the dealer, or only to a limited number of undertakings within the distribution network besides the dealer, within the contract territory'. According to recital 9 in the preamble to that regulation, restrictions may be imposed on the dealers' activities outside the agreed territory in so far as they 'lead to more intensive distribution and servicing

efforts in an easily supervised contract territory, to knowledge of the market based on closer contact with consumers, and to more demand-orientated supply'. Moreover, Article 4(1)(3) of Regulation No 123/85 provides that the dealer may be under an obligation to 'endeavour to sell, within the contract territory and within a specified period, [a] minimum quantity of contract goods'. The Commission failed to take account of Regulation No 123/85, in particular when assessing the bonus system. According to the applicant, the 15% rule was perfectly justified by the above terms of Regulation No 123/85. Each dealer is deemed to concentrate his activities on his contract territory. It follows that neither the object nor the effects of the bonus system were restrictive of competition.

217 The applicant states that Regulation No 123/85 alone is decisive in regard to the legal assessment of that system, since it was no longer applicable in the period after the entry into force of Regulation No 1475/95. It adds, nevertheless, that even after the entry into force of Regulation No 1475/95 the bonus system was lawful, since that regulation authorises different remuneration 'on the basis of the place of destination of the motor vehicles resold or the place of residence of the purchaser'.

218 The Commission also failed to take account of Regulation No 123/85 and Regulation No 1475/95 when assessing the alleged efforts by the manufacturers to limit supplies to dealers in Italy to the number of vehicles actually required there. The applicant states that under the system created by those regulations the manufacturer is not required to supply to importers and dealers as many vehicles as they have ordered. Quite to the contrary, each manufacturer is entitled to apply a sales policy the object of which is, within the limits of possibly reduced supplies, to supply a national market according to its needs.

219 The applicant also challenges the Commission's contention that the measure whereby an undertaking was required from certain customers is incompatible with Article 3(11) of Regulation No 123/85. Under that provision, it is not permitted to restrict a dealer from selling to final consumers who use the services of an intermediary if those consumers have previously authorised the intermediary in writing to purchase a specified motor vehicle. In the present case, undertakings were required specifically in a different case, namely where a customer purchases without an intermediary.

220 Moreover, the applicant states that it, Audi and Autogerma always remained within the framework of Article 3(10)(a) of Regulation No 123/85 by acknowledging the right of dealers to supply vehicles to resellers who are undertakings in the distribution network.

221 The applicant refers to the wording of the dealership contracts themselves to support the arguments summarised above. It cites, *inter alia*, the dealership contract for Volkswagen and Audi in the January 1989 version which was applied in Germany until the expiry of Regulation No 123/85 on 30 September 1996. Under that contract, 'the dealer is not authorised to sell the contract goods for delivery to persons or firms outside the VW and Audi distribution network who resell ... motor vehicles and/or spare parts without the prior written agreement of VW AG'. It also cites the 'transition contract' which was applied from 1 October 1996 until 31 December 1997 which contained the same rule. It refers also to the contract in force in Germany since 1 January 1998 which reproduces the above rule and adds that 'The dealer may sell new motor vehicles ... to final consumers who have used the services of an intermediary only if he has prior written authority to purchase a specified motor vehicle and, in the event that an intermediary takes delivery of the vehicle, only if he has also been given authority to do so'. It cites, next, the dealership contract applicable in Italy from 30 December 1987 until 30 December 1996. That contract provides: 'The dealer may sell the contract products to all final consumers irrespective of their residence. If the final consumer uses an intermediary in order to purchase a contract vehicle, the dealer will not deliver the vehicle if the intermediary in question is not able to produce a written authority from the final consumer; in the event of direct delivery to the intermediary, that must be expressly provided for in the authority. The dealer is not authorised to sell the contract products to resellers who do not form part of the network while spare parts may be sold to third

parties in order to carry out repairs.' It cites, lastly, the contract which has been in force in Italy since 1 October 1996 according to which: 'The dealer is not authorised to distribute and sell the contract products to resellers outside the distribution network ... Under this contract the dealer may sell new vehicles to final consumers who have used an intermediary only where the intermediary has prior written authority to purchase a specified motor vehicle and, in the event that an intermediary takes delivery of the vehicle, if he has also received authority to do so.' According to the applicant, all those provisions prove that Regulation No 123/85 and Regulation No 1475/95 were properly complied with.

222 The applicant concludes from the above that, if the Court were to find that there was an incompatibility with Article 85(1) of the Treaty, Article 85(3) of the Treaty would have to be applied by the Commission using Regulation No 123/85 and, as appropriate, Regulation No 1475/95 as a basis.

223 The applicant stresses, however, that the acts found by the Commission predate October 1996 and submits that Regulation No 1475/95 is not therefore applicable in this case. As to the period after 1 October 1996 the Commission has not adduced any evidence whatsoever from which it could be concluded that the alleged infringement had continued. For that reason, the applicant submits that the Commission wrongly asserted in the decision that the exemption granted by Regulation No 1475/95 was not applicable in the present case. It adds that interested third parties will be able to rely on that assertion before the national courts. Furthermore, according to Article 6(3) of Regulation No 1475/95 the inapplicability of the exemption is to apply only for the duration of the practice complained of. For that reason too, there can be no question of the inapplicability of the exemption, as the conduct complained of has ceased to exist. The applicant points out that the Commission also relied in the decision on Article 6(1)(3) of Regulation No 1475/95, according to which the exemption is not to apply where 'the parties agree restrictions of competition that are expressly exempted by this regulation', even though that provision was not referred to in the statement of objections and, in any event, cannot apply in the present case since no restriction of competition was agreed between the manufacturers, Autogerma and the

dealers. The applicant contends that the exemption of the distribution network of the Volkswagen group is therefore still applicable. Article 6 of Regulation No 1475/95 cannot be interpreted as meaning that the adoption of restrictive measures deprives the distribution network in question wholly and permanently of the benefit of the exemption. In that context, the applicant also argues that Article 6(2) of Regulation No 1475/95, according to which the exemption no longer applies in the cases listed in paragraph 1 of that article, is incompatible with Article 7 of Regulation No 19/65/EEC of the Council of 2 March 1965 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices (OJ, English Special Edition 1965–1966 p. 35) which empowers the Commission to withdraw the benefit of application of the exemption in a particular case only after a procedure conducted in accordance with Regulation No 17.

224 The defendant disputes, first, the applicant's argument that the 15% rule was authorised by the recitals in the preamble to and by Article 4(1)(3) of Regulation No 123/85. It points out that there is an infringement of Article 85(1) of the Treaty when the parties to an exclusive distribution agreement agree or practise prices, discounts or deductions of such a nature as to make re-exports more difficult. That is manifestly the case where an agreement makes the award of bonuses subject to the non-export of the contract products. The fact that the dealer is primarily responsible for his own contract territory does not justify measures intended to hinder sales outside that territory. Recital 9 in the preamble to Regulation No 123/85, cited by the applicant, is revealing precisely in regard to that point. Moreover, the payment of better remuneration for sales made within the contract territory leads indirectly to a territorial limitation not provided for in Article 4(1) of Regulation No 123/85. Lastly, it states that the 15% rule could not be justified by Article 6(1)(8) of Regulation No 1475/95, since that rule, far from having an objectively justified purpose, was intended to restrict re-exports.

225 The defendant contends, next, that to delay and impose quotas on, as in this case, supplies to dealers in order to hinder authorised exports is certainly not compatible with Regulations No 123/85 and No 1475/95.

226 The defendant also states that the measure whereby Italian dealers were required to obtain a written undertaking from some customers constitutes a restriction of the freedom of action of those dealers, in that it makes the sale of vehicles more difficult, and is therefore contrary to Article 3(11) of Regulation No 123/85.

227 As to the applicability of Regulation No 1475/95, the defendant restates that the infringement in question ceased only with the measures adopted by the applicant in accordance with Article 2 of the decision. Consequently, that regulation was also applicable. The defendant also disputes that it asserted in the decision that the exemption under Regulation No 1475/95 was inapplicable. It merely reproduced certain passages of Article 6 of Regulation No 1475/95.

228 The defendant concludes that the limits on the obligations which may be imposed on dealers in accordance with Article 3(10)(a) and (11) of Regulation No 123/85 were exceeded, as were the limits of the exemption provided for in Article 3 of Regulation No 1475/95 in so far as the agreements and concerted practices objected to in the decision were not cancelled or terminated before 1 October 1996.

229 As to the provisions of the dealership contracts cited by the applicant, the defendant states that they remained a dead letter. It does not deny the applicant the right to take measures intended to prevent deliveries to independent dealers, but the measures adopted in this case went beyond that objective. Clearly, the

provisions of the dealership agreements cannot be used to justify infringements of the competition rules. It also points out that the dealership contract of 30 December 1987 makes the supply of new vehicles ordered by Italian dealers subject to supply to Autogerma by the manufacturers and that it is at that level of supply that the applicant took one of the measures intended to prevent re-exports from Italy.

Findings of the Court

Failure to define the market

230 As regards the scope of the Commission's obligation to define the relevant market before finding an infringement of the Community competition rules, the Court points out that the approach to defining the relevant market differs according to whether Article 85 or Article 86 (now Article 82 EC) of the Treaty is to be applied. For the purposes of Article 86, the proper definition of the relevant market is a necessary precondition for any judgment as to allegedly anti-competitive behaviour, since, before an abuse of a dominant position is ascertained, it is necessary to establish the existence of a dominant position in a given market, which presupposes that such a market has already been defined. On the other hand, for the purposes of applying Article 85, the reason for defining the relevant market, if at all, is to determine whether the agreement, the decision by an association of undertakings or the concerted practice at issue is liable to affect trade between Member States and has as its object or effect the prevention, restriction or distortion of competition within the common market (Case T-29/92 *SPO and Others* v *Commission* [1995] ECR II-289, paragraph 74). Consequently, there is an obligation on the Commission to define the market in a decision applying Article 85 of the Treaty where it is impossible, without such a definition, to determine whether the agreement, decision by an association of undertakings or concerted practice at issue is liable to affect trade between Member States and has as its object or effect the prevention, restriction or distortion of competition within the common market (Joined Cases T-374/94,

T-375/94, T-384/94 and T-388/94 *European Night Services and Others* v *Commission* [1998] ECR II-3141, paragraphs 93 to 95 and 105).

231 As has already been held in the context of the first plea (see paragraphs 179, 193 and 194 above), the Commission duly proved in the decision that the applicant committed an infringement whose object was to restrict competition within the common market and which was by its nature liable to affect trade between Member States. Since the Commission was entitled to find that the applicant had, jointly with its subsidiaries Audi and Autogerma, partitioned the Italian market, it naturally followed that the transactions from Italy to all the other Member States were capable of being affected. Consequently, the application of Article 85 of the Treaty by the Commission did not require, in this case, that it first define the geographic market.

232 It follows that the first part of the second plea must be rejected.

The assessment of the barriers as a whole

233 In so far as the applicant argues that the Commission failed to distinguish conduct prohibited under Article 85(1) of the Treaty from conduct not prohibited, its argument is, essentially, the same as that put forward in the context of the first plea, alleging that the Commission incorrectly assessed the facts when it applied that article. As the Court has already held, first, that the introduction of a split margin system has not been proved and that the termination of certain dealership contracts was wrongly appraised and, second, that all the other infringing conduct alleged against the applicant was directed at partitioning the Italian market, this part of the second plea, taken on its own, no longer has any force.

234 Furthermore, nothing precludes the items of evidence on which the Commission relies in order to prove the existence of an infringement of Article 85(1) of the Treaty from being assessed as a whole rather than separately (see Case 48/69 *ICI* v *Commission* [1972] ECR 619, paragraph 68, and Case T-311/94 *BPB de Eendracht* v *Commission* [1998] ECR II-1129, paragraph 201). The Commission cannot therefore be criticised for having taken together, in the present case, the various items of evidence obtained during its investigations and so to reach overall conclusions regarding the applicant's conduct. That method of research and interpretation was all the more justified in that the subject-matter of all the documents obtained by the Commission was re-exports of vehicles from Italy. In the light of that fact, the applicant's argument that there is no link between the various measures alleged by the Commission is unconvincing. To the contrary, the various measures adopted by the applicant form part of a series of acts with one economic objective, namely the partitioning of the Italian market. It would thus be artificial to split up such conduct, which is characterised by a single purpose, into strictly separate items (see Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraph 263).

235 It follows that the second part of the second plea must also be rejected.

Characterisation of the barriers, taken as a whole, as agreements

236 It is settled law that a call by a motor vehicle manufacturer to its authorised dealers is not a unilateral act which falls outside the scope of Article 85(1) of the Treaty but is an agreement within the meaning of that provision if it forms part of a set of continuous business relations governed by a general agreement drawn up in advance (Joined Cases 25/84 and 26/84 *Ford* v *Commission* [1985] ECR 2725, paragraph, 21 and *Bayerische Motorenwerke*, cited above, paragraphs 15 and 16). That case-law is applicable in the present case. As is clear from the Court's examination of the first plea (see in particular paragraphs 49, 58, 89 to 92 and 162 to 165 above), the 15% rule, the imposition of supply quotas, the checks and warnings were all intended to influence the Italian dealers in the performance of their contract with Autogerma.

237 Furthermore, in the context of an infringement consisting of several linked actions, the Commission cannot be expected to classify the various elements of the infringement precisely as an agreement or a concerted practice. In any event, both those forms of infringement are covered by Article 85 of the Treaty (see Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraphs 132 and 133).

238 As regards, lastly, the applicant's argument that the undertakings required of certain customers cannot constitute agreements on the ground that those customers are not 'undertakings', it suffices to find that, as the Commission has rightly observed, it is not the undertakings as such which were so characterised but the decision within the Volkswagen group requiring them to be obtained.

239 It follows that the third part of the second plea must also be rejected.

Infringement of Regulations No 123/85 and No 1475/95

240 The Court points out, first of all, that there is no longer any need to rule on the fourth part of the second plea in so far as it concerns infringement of Regulation No 1475/95. The Court has already found that the Commission has not proved that an infringement continued after 30 September 1996 (see paragraphs 190, 191 and 192 above). Consequently, the Commission's assessment, in particular in recital 191 of the decision, that for the period after 1 October 1996 the barriers to re-exportation imposed by Volkswagen, Audi and Autogerma are not covered by Regulation No 1475/95 ceases automatically to have any weight in the light of the above finding.

241 As regards the alleged infringement of Regulation No 123/85, the Court points out again that the Commission has proved that the applicant, jointly with its subsidiaries Audi and Autogerma, hindered re-exports from Italy (see the analysis and conclusions set out under the first plea). It is settled case-law that Article 85(1) of the Treaty may not be declared inapplicable where the parties to a selective distribution contract conduct themselves in such a way as to restrict parallel imports (Case 86/82 *Hasselblad* v *Commission* [1984] ECR 883, paragraph 35; *Dunlop Slazenger* v *Commission*, cited above, paragraph 88; Case T-49/95 *Van Megen Sports* v *Commission* [1996] ECR II-1799, paragraph 35). The very spirit of a regulation granting block exemption for distribution agreements is to make the exemption available under it subject to the condition that users will, through the possibility of parallel imports, be allowed a fair share of the benefits resulting from the exclusive distribution (Case T-141/89 *Tréfileurope* v *Commission* [1995] ECR II-791, paragraph 119).

242 Consequently, it cannot be claimed that the Commission infringed Regulation No 123/85 by refusing to declare Article 85(1) of the Treaty inapplicable to the conduct duly found to exist in the present case (see, as to the 15% rule, paragraphs 49 to 58, 179 and 189 above, as to the imposition of supply quotas, paragraphs 79 to 92 above, and as to the surveillance and warnings, paragraphs 162 to 165 above). Although Regulation No 123/85 provides manufacturers with substantial means of protecting their distribution systems, it does not authorise them to partition their markets (*Bayerische Motorenwerke*, cited above, paragraph 37). That regulation does indeed exempt agreements whereby a supplier entrusts an approved reseller with promoting, in a particular territory, the distribution and sales and after-sales service of motor vehicles and undertakes to deliver the contract goods within that territory only to that reseller. It thus exempts in particular the obligation on the authorised distributer not to sell to independent dealers (Article 3(10)) unless they are intermediaries, that is to say traders who act for final consumers and are given written authority for that purpose (Article 3(11)) (Case C-226/94 *Grand Garage Albigeois and Others* [1996] ECR I-651, paragraphs 13 and 14). However, the fact remains that under Article 10 of Regulation No 123/85 the Commission may withdraw the benefits of the application of that regulation where it finds that an agreement exempted

under the regulation nevertheless has effects which are incompatible with the conditions laid down by Article 85(3) of the Treaty, and in particular 'where the manufacturer or an undertaking within the distribution system continuously or systematically, or by means not exempted by this regulation, makes it difficult for final consumers or other undertakings within the distribution system to obtain contract goods or corresponding goods ... within the common market'.

243 It follows from all the foregoing considerations that there is no longer any need to rule on the fourth part of the second plea in so far as it concerns infringement of Regulation No 1475/95 and that the remainder of this part of the plea must be rejected.

244 It follows from all the foregoing considerations that the second plea cannot succeed.

C — *The third plea: infringement of the principle of good administration*

Arguments of the parties

245 The applicant claims that the Commission failed to have regard to elementary procedural principles. In particular, the Commission displayed a lack of objectivity and impartiality in the conduct of the procedure and selected and assessed the evidence in a biased manner. The observations in reply to the statement of objections were mostly not taken into consideration. Above all, the evidence adduced by the applicant and Audi are not assessed objectively. In conducting the investigation in such a manner, the Commission infringed its obligation of good faith, namely the obligation to examine, carefully and impartially, all the relevant evidence in the case.

Infringement of the principle of good administration when interpreting the documents seized during the investigations

246 The Commission acted in bad faith in selecting from the documents seized during the investigations and interpreting them in a biased manner. In particular, it did not seriously consider the possibility that it was only sales to independent dealers that the applicant, Audi and Autogerma had attempted to prevent. Wishing to prove its theory at any cost, the Commission distorted the meaning of several documents and drew conclusions based on unwarranted presumptions. On the other hand, it did not wish to take into account either the exculpatory evidence, such as the minutes drawn up on the occasion of the investigations carried out at the premises of the Italian dealers and information supplied by Autogerma in regard to the bonus system, or relevant commercial data supplied by the applicant and Audi in response to the statement of objections, such as the fact that Italy is the largest export market in Europe for Volkswagen and Audi makes. Although some documents went beyond what is lawful under Community law, the Commission could have taken the view that they were misplaced initiatives which can never be ruled out in a large distribution organisation.

247 The defendant contends that the applicant's arguments are not supported by any evidence. It adds that the evidence that the applicant prevented all re-exports was quite simply too abundant for its conduct to be interpreted differently.

248 The defendant adds that, as regards the investigations at the dealers' premises, it took into account not only their written statements but also their oral statements. The latter statements naturally differed from the former, since the dealers had been threatened with termination of their contracts. Moreover, the records of the dealers' written statements, which the applicant considers to exculpate it, are in fact inculpatory documents if they are 'read between the lines'.

Infringement of the principle of good administration in relation to Article 89 of the EC Treaty

249 According to the applicant, the Commission acted in bad faith in failing to express a view, prior to adopting the decision, on the question whether the measures adopted by the applicant following the statement of objections were appropriate for putting an end to the alleged infringement of the Community competition rules. The applicant states that it sent to the Commission the text of the circular sent to the dealers in December 1996 and that it expressly referred to that document once again at the hearing on 7 April 1997. At the end of the hearing, its legal representative asked the competent head of unit of the Commission to confirm to him that the dispatch to the dealers of that circular had put an end to the alleged infringements and suggested a meeting in that regard, which in fact took place on 7 October 1997. However, neither at the hearing on 7 April 1997 nor at the meeting on 7 October 1997, and despite the applicant's express request, did the Commission express a view on whether the applicant and Audi had actually put an end to the alleged infringement, but stated, in recital 216 of the decision, that at that time '[the infringement had] not been completely terminated'.

250 The applicant contends that such conduct by the Commission is inconsistent with its obligation of good faith. That obligation must be interpreted in the light of Article 89(1) of the EC Treaty (now, after amendment, Article 85(1) EC), pursuant to which the Commission, when it finds an infringement of Article 85 or 86 of the Treaty, must propose 'appropriate measures to bring it to an end'. In the present case, the Commission infringed that provision in failing to express a view on the measures adopted by the applicant following the statement of objections.

251 The defendant submits that the measures adopted by the applicant after the statement of objections did not put an end to the infringement. Neither the

explanations given in the reply to the statement of objections and during the hearing, nor the circular sent to the dealers in December 1996, were adequate, since those measures were merely an instruction to eliminate barriers to re-exports in practice, whereas the applicant had also been given notice, in the statement of objections, to terminate the agreement providing for those barriers. The defendant points out that the circular in question did not amend the bonus system. Only in its application to the Court did the applicant explain, producing the dealership contract in force since 1 October 1996, that system had ceased with effect from that date. In its reply to the statement of objections the applicant merely stated that the 15% rule had been cancelled with effect from 1 October 1996.

252 The defendant states that that circular, like the circular sent to the dealers in 1995 following its letter of formal notice of 24 February 1995, merely contained 'clarifications', whereas it had stressed the need to abolish the restrictions that had been put in place.

253 Lastly, the defendant states that the applicant's representative was informed of the fact that the purpose of the meeting of 7 October 1997 was not to repeat or continue the hearing, since the draft decision was already being considered within the Commission. It was not therefore possible to reply to the question whether the measures adopted in order to put an end to the infringement were adequate.

Infringement of the principle of good administration in relation to Article 191 of the EC Treaty

254 The applicant contends that the Commission acted in bad faith in refusing, in its letter of 26 February 1998, to send to its legal representative copies of the

documentary evidence in the order of the endnotes set out in the decision, in answer to his request in a letter of 18 February 1998. That refusal caused it a considerable increase in work, even though the Commission has an obligation under Article 191(3) of the EC Treaty (now Article 254(3) EC) to notify the whole of the decision, thus including the documents referred to in the notes therein.

255 The defendant contends that the applicant is confusing the scope of the necessary notification and the purpose of access to the file. The fact that documents are cited in the text or footnotes to a contested decision does not make them an integral part of it. In any event, the refusal at issue cannot invalidate the decision, since it was made after the adoption of the decision.

256 The defendant adds that administrative documents, including the evidence, are sent to the Court of First Instance when a measure of inquiry to that effect has been ordered pursuant to Article 49 of the Court's Rules of Procedure. Unless such a measure has been ordered, an application to obtain once again, after inspecting the file and the adoption of the final decision, documents made available in a different order cannot be well founded.

Infringement of the principle of good administration in relation to Article 214 of the EC Treaty

257 The applicant complains that the Commission, prior to adopting the decision, publicised its assessments and its intentions in regard to the fine.

258 On 6 January 1998 the Westdeutsche Rundfunk broadcast a report on the infringements alleged against the applicant and on the fine envisaged, which was

in 'hundreds of millions'. That report was taken up in the newspapers and the applicant states that this would not have been possible without the assistance of a Commission official.

259 Furthermore, on 26 January 1998 the Commission confirmed to the Deutsche Press Agentur that a fine of hundreds of millions would be imposed on the applicant.

260 In addition, on the morning of 28 January 1998 at the latest, the Commission's press service sent to the editors of the principal daily newspapers a version of the press release prepared for diffusion after the adoption of the decision.

261 Lastly, in an interview granted to the weekly magazine *Die Zeit*, the Commissioner responsible for competition matters, Mr Van Miert, stated that the applicant would have to pay a fine of around DEM 200 million. That interview was published on 29 January 1998 but an account of it had already been broadcast on the morning of 28 January 1998.

262 The applicant argues that those facts show not only an infringement of Article 214 of the EC Treaty (now Article 287 EC) which lays down an obligation of confidentiality, but also that the Advisory Committee meeting of 26 January 1998, the preparatory meeting of the chefs de cabinet on 27 January 1998 and the plenary session of the Commission leading to the adoption of the decision on the afternoon of 28 January 1998 could not have taken place without bias and in normal circumstances. By acting in such a way, the Commission necessarily harms the undertaking concerned, which cannot effectively defend itself, since it does not yet have the exact grounds of the final decision.

263 Moreover, that situation continued during the week following the adoption of the decision. Despite its request to have the full text of the decision in advance, it

received, on 28 January 1998 at 16.42, only the operative part and had to await notification on 6 February 1998 before it had the grounds of the decision in its hands, whereas Mr Van Miert organised a press conference on 28 January 1998 at 17.00 at which he commented on those grounds in detail. On 2 February 1998 a magazine published a report on the decision in which several documents were cited.

264 The defendant observes, as a preliminary point, that the procedure initiated against the applicant gave rise to intense public interest.

265 It states, next, that in so far as its officials communicated information to the press prior to the adoption of the decision, that information concerned only the stage which the administrative procedure had reached and did not influence the deliberations within the Commission (Advisory Committee meeting on 26 January 1998; preparatory meeting of the chefs de cabinet of 27 January 1998; plenary meeting of the Commission on 28 January 1998).

266 Furthermore, contrary to the applicant's assertion, Mr Van Miert did not refer in the interview granted to a journalist from *Die Zeit* to the probable amount of the fine. When questioned in that regard, the journalist concerned stated that it had been indicated to him on the afternoon of 27 January 1998 that the amount of the fine would probably be around DEM 200 million. When the journalist asked for details by telephone on 28 January 1998, Mr Van Miert's spokesman confirmed that amount. That spokesman, also questioned in that regard, stated that he had expressly drawn the journalist's attention to the fact that the Commission meeting was suspended at the time of their telephone conversation and that the amount of the fine had therefore not yet been fixed.

267 As to the statements to the public on 28 January 1998 the defendant explains that, in accordance with its current practice, it sent to the applicant the operative

part of the decision on the day which it was adopted and notified the full text some days later. The decision had first to be authenticated by the signatures of the President and the Executive Secretary and no rule provides for notification or communication of such an act informally to the representatives of the addressee. Moreover, its officials know that an act such as the decision can be sent to third parties only after it has been notified to the undertaking concerned and after the undertaking has stated that it does not contain business secrets. In the present case, the Commission received that statement on 24 February 1998 and prior to that date the decision was not sent to third parties either in whole or in part. Furthermore, the applicant was aware of the facts alleged against it and could, if it had wished, have commented on the reports which appeared in the press before 6 February 1998.

268 In any event, the applicant has not stated how the statements made by the Commission before and after adoption of the decision could have vitiated its legality.

Findings of the Court

269 It must be observed as a preliminary point that the applicant makes a number of criticisms of the procedure leading to the adoption of the decision. It complains that the Commission displayed, in particular, a lack of impartiality and care in the selection and appraisal of the evidence. According to the applicant, the omissions by the Commission constitute, when taken together, an infringement of the duty of good faith. In the light of the case-law, the defects pleaded by the applicant must be considered under the heading of infringements of the principle of good administration, which includes the duty on the Commission to examine carefully and impartially all the relevant aspects of the individual case (Case C-269/90 *Technische Universität München* [1991] ECR I-5469, paragraphs 14 and 26, and Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719,

paragraph 62; Case T-44/90 *La Cinq* v *Commission* [1992] ECR II-1, paragraph 86; and Joined Cases T-528/93, T-542/93, T-543/93 and T-546/93 *Métropole Télévision and Others* v *Commission* [1996] ECR II-649, paragraph 93). In paragraph 22 of its application the applicant linked its argument concerning the duty of good faith to that case-law.

The alleged infringement of the principle of good administration when interpreting documents obtained during the investigations

270 The arguments submitted by the applicant in support of this part of the third plea, namely that the Commission displayed partiality and failed to take into account certain evidence in the applicant's favour, is indissociable from the question whether the findings of fact made in the decision are properly supported by the evidence adduced by the Commission (see Case T-3/89 *Atochem* v *Commission* [1991] ECR II-1177, paragraph 39). The material nature of an infringement which has actually been proved at the end of an administrative procedure cannot be called in question by evidence of the Commission's premature display, during that procedure, of its belief as to the existence of that infringement.

271 As has already been stated in the context of the first plea, the facts which the Commission took into account in the contested decision are, in all essential respects, proven to the requisite legal standard. Consequently, to that extent, it is of no avail to the applicant to submit that the Commission made a biased assessment of the documents seized or drew conclusions on the basis of unwarranted assumptions. In so far as the Commission found facts which were not sufficiently proved, the Court has already held that the decision must be annulled (see paragraph 202 above).

272 Moreover, the applicant's arguments are based on mere assertions and are not such as to show that the Commission did in fact pre-judge the contested decision or lacked objectivity in its investigation.

273 It follows from all those considerations that the first part of the third plea must be rejected.

Alleged infringement of the principle of good administration in relation to Article 89 of the Treaty

274 Article 89 of the Treaty provides that the Commission must ensure the application of the principles laid down in Articles 85 and 86 of the Treaty and implement the orientation of Community competition policy (Case C-234/89 *Delimitis* v *Henninger Bräu* [1991] ECR I-935, paragraph 44, and Case C-119/97 P *UFEX and Others* v *Commission* [1999] ECR I-1341, paragraph 88). As the applicant rightly submits, the Commission's duty to conduct its investigations with care and impartiality must also be interpreted in the light of that article.

275 However, the applicant has not proved that the Commission failed to consider whether or not the infringement had ended. To the contrary, recital 216 of the decision, according to which at that time '[the infringement had] not been completely terminated', and recital 219, which sets out the reasons for that assessment (see paragraph 300 below), although vitiated by a lack of evidence (see paragraphs 190 to 192 above) show that the Commission did consider that question. Moreover, the fact that the Commission did not yet wish to express a view on that issue at the hearing on 7 April 1997 and at the meeting on 7 October 1997 cannot be regarded as a failure to carry out its duty to conduct the investigation with care, interpreted in the light of the duty to ensure the observance by the applicant of the principles laid down in Article 85 of the Treaty. In that respect, it need merely be observed that in point 203 of its statement of objections the Commission indicated that in its view the infringement committed was of such a nature as to require the applicant, Audi and Autogerma to '[remove] throughout the Community all territorial restrictions from their agreements and concerted practices'. Having regard to that clear statement as to the measures to be taken in order to re-establish a situation in conformity with Community law, it cannot be argued that the Commission should once more formally have expressed a view on the applicant's compliance with the principles laid down in Article 85 of the Treaty in the period between the statement of objections and the decision adopted more than one year later.

276 It follows that this part of the third plea must also be rejected.

Alleged infringement of the principle of good administration in relation to Article 191 of the Treaty

277 The Court finds that the applicant's request for access to the file was sent to the Commission on 18 February 1998, after adoption and notification of the decision. It thus post-dates the adoption of the decision; consequently, the legality of the decision cannot in any circumstances be affected by the Commission's refusal to grant that request (see by analogy Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck and Others* v *Commission* [1980] ECR 3125, paragraph 40, Case T-145/89 *Baustahlgewebe* v *Commission* [1995] ECR II-987, paragraph 30, and Case T-229/94 *Deutsche Bahn* v *Commission* [1997] ECR II-1689, paragraph 102).

278 Consequently, that part of the third plea must also be rejected.

Alleged infringement of the principle of good administration in relation to Article 214 of the Treaty

279 Article 214 of the EC Treaty lays down an obligation on the members, officials and servants of the institutions of the Community 'not to disclose information of the kind covered by the obligation of professional secrecy, in particular

information about undertakings, their business relations or their cost components'. Although that provision primarily refers to information gathered from undertakings, the expression 'in particular' shows that the principle in question is a general one which applies also to other confidential information (Case 145/83 *Adams* v *Commission* [1985] ECR 3539, paragraph 34; and Case T-353/94 *Postbank* v *Commission* [1996] ECR II-921, paragraph 86).

280 In the present case, it is clear from the documents before the Court that prior to the adoption of the contested decision a vital part of the draft decision referred to the Advisory Committee and then, for final approval, to the College of Commissioners was the subject of several leaks to the press. As early as the beginning of January 1998 the press obtained information that the applicant would soon have a large fine imposed on it. Subsequently, the following information was published: 'Volkswagen AG, Wolfsburg, will have to pay a fine of "around" DEM 200 million on account of infringements of EU law. EU Commissioner Karel Van Miert announced this in an interview with the Hamburg weekly magazine *Die Zeit*. Until now, a fine of this amount had been confirmed only in well-informed circles. The decision is to be announced in Brussels on Wednesday.' Likewise, the weekly magazine *Der Spiegel* stated: 'On Wednesday this week [VW-boss] Piëch will receive further bad news: the EU Commission in Brussels will impose a fine of hundreds of millions on Piëch and Audi boss Herbert Demel.' Moreover, as is apparent from an answer to a question put by the Court at the hearing in this case, the fact that a journalist from *Die Zeit* obtained, before adoption of the decision, information that the fine provided for was around DEM 200 million is not disputed by the defendant.

281 It must be observed that those disclosures to the press were not restricted to expressing the personal views of the member of the Commission responsible for competition matters regarding the compatibility with Community law of the measures under examination, but also informed the public, extremely precisely, of the amount of the fine envisaged. In *inter partes* procedures which are liable to

result in the imposition of a penalty, the nature and amount of the penalty proposed are by their very nature covered by business secrecy until the penalty has been finally approved and announced. That principle ensues, in particular, from the need to have due regard for the reputation and standing of the person concerned during a period in which no penalty has been imposed on that person. In the present case, the Commission must be held to have harmed the standing of the undertaking charged by causing a situation to arise in which that undertaking learned from the press the exact nature of the penalty which, in all probability, was to be imposed on it. To that extent, the Commission's duty not to disclose to the press information on the specific penalty envisaged is not merely coterminous with its duty to respect business secrecy, but also with its duty of good administration. Finally, it should be borne in mind that the principle of the presumption of innocence applies to the procedures relating to infringements of the competition rules by undertakings that may result in the imposition of fines or periodic penalty payments (Case C-199/92 P *Hüls* v *Commission* [1999] ECR I-4287, paragraph 150; judgments of the European Court of Human Rights of 21 February 1984, *Öztürk*, Series A No 73, and of 25 August 1987 *Lutz*, Series A No 123-A). That presumption of innocence is clearly not respected by the Commission where, prior to formally imposing a penalty on the undertaking charged, it informs the press of the proposed finding which has been submitted to the Advisory Committee and the College of Commissioners for deliberation.

282 Moreover, in causing such sensitive aspects of the matters under deliberation to be disclosed to the press, the Commission acted in a manner injurious to the interests of good administration at the Community level precisely inasmuch as it enabled the public at large to have access, during the process of investigation and deliberation, to such information, internal to the administration.

283 It is settled case-law that an irregularity of the type found above may lead to annulment of the decision in question if it is established that the content of that decision would have differed if that irregularity had not occurred (Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraph 91; *Dunlop Slazenger* v *Commission*, cited above, paragraph 29). However, in the present case the applicant has not adduced such proof. There are no grounds for supposing that if

the information at issue had not been disclosed the Advisory Committee or the College of Commissioners would have altered the proposed amount of the fine or the content of the decision.

284 Consequently, this part of the third plea must also be rejected. The third plea must therefore be rejected in its entirety.

D — *The fourth plea: inadequate statement of reasons*

Arguments of the parties

285 The applicant states that the objections raised by it and by Audi during the administrative procedure were not adequately examined. Thus, the Commission failed to take into consideration the analysis of the documents submitted in response to the statement of objections. The applicant observes that the contested decision reproduces, almost word-for-word, the statement of objections except for a few paragraphs. Since the requirement for a statement of reasons must be assessed in the light of the content of the measure, the nature of the grounds relied on and the interest which the persons concerned may have in receiving explanations, the Commission should have carefully examined the applicant's objections in the present case, which it itself described as particularly important and which involves the highest ever fine to date. According to the applicant, it is only in its defence in this case that the Commission actually examined the observations submitted on the statement of objections.

286 The applicant gives some examples to show that the objections which it and Audi raised were not carefully examined.

287 First, in the decision the Commission found, under the heading 'margins' (recital 62 et seq.) that from the end of 1994 Autogerma introduced a split margin system, but did not refer to any of the detailed arguments raised by the applicant to the effect that such a system was discussed but never implemented.

288 Second, in recital 56 of the decision, the Commission states that Autogerma forbade the dealers from selling to 'salonisti' and that those instructions also applied to sales to final consumers through intermediaries, but does not give any specific case by way of example or answer the objections raised by the applicant to the effect that, first, the 'salonisti' are independent dealers (owning showrooms ('saloni')) and, second, that the prohibition did not cover cases where the 'salonisti' had been instructed by final consumers.

289 Third, recital 216 of the decision, which states that at that time '[the infringement had] not been completely terminated' is also a perfect illustration of a breach of the duty to state reasons.

290 Fourth, the part of the decision in which the Commission determines the amount of the fine is also vitiated by a serious defect in reasoning. In recital 213 of the decision the Commission states that the re-exports by final consumers were 'temporarily' 'impeded', without giving any supporting reasons. In the same recital the Commission asserts that the infringement also had effects on the markets for new motor vehicles, particularly in Germany and Austria and 'also on the markets in all the other Member States', but without substantiating that assertion. The Commission also determined the amount of the fine by relying on the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and of Article 65(5) of the ECSC Treaty (OJ 1998 C 9, p. 3, 'the Guidelines'). The applicant contends that the Guidelines, published in the *Official Journal of the European Communities* two weeks before the adoption of the contested decision, were specifically formulated with the proceeding initiated

against it in mind and that, in breach of its duty to state reasons, the Commission did not expressly refer to them.

291 The applicant adds that the Commission referred, in numerous endnotes to the decision, to documents which it does not reproduce or reproduces only in part.

292 Lastly, the applicant asserts once again that the documents cited in the decision do not prove the existence of individual or general measures adopted against lawful re-exports from Italy.

293 The defendant submits that the decision does not contain any defect in reasoning. It contends that it set out the facts and legal considerations of essential importance in the statement of the reasons for the decision and disclosed the matters which led it to adopt that decision. Each finding made in the decision is justified by the reference, in an endnote, to the documents on which the finding is made. Similarly, the various measures characterised as an infringement are described and analysed in detail and the effects of those measures are also indicated, in particular by quotations from letters from final consumers. The legal assessment also contains a full statement of reasons. Moreover, all the principal arguments submitted by the applicant during the administrative procedure are analysed and refuted in the decision.

294 As regards, in particular, the question whether or not the alleged infringement had ceased, the defendant contends that there is an adequate statement of reasons in recital 219 of the decision, according to which the applicant has not made the necessary amendments, in particular to the dealership contracts, following the formal notice given in February and May 1995, and in recitals 202 and 203 of the decision, according to which the infringement continued until the bonus system was amended. There is a proper statement of reasons for its assessment of the duration of the infringement.

295 As to the applicant's objection that the decision refers, in various notes, to documents which are not or only partially reproduced, the defendant states that this objection was submitted for the first time in the reply and is therefore inadmissible. In any event, the objection is also unfounded because the duty to state reasons does not require that all the evidence relied on in support of the decision be reproduced in full.

296 Lastly, the defendant observes that the fact that the decision corresponds to a large extent to the statement of objections does not mean that there has been an infringement of the duty to state reasons.

Findings of the Court

297 The statement of reasons for the contested decision showed, in conformity with the requirements of Article 190 of the EC Treaty (now Article 253 EC), clearly and unequivocally the Commission's reasoning and so enabled the applicant to ascertain the reasons for that decision in order to defend its rights, and the Court to review the correctness of the decision (Case C-278/95 P *Siemens* v *Commission* [1997] ECR I-2507, paragraph 17; Case T-150/89 *Martinelli* v *Commission* [1995] ECR II-1165, paragraph 65; and *Deutsche Bahn* v *Commission*, cited above, paragraph 96).

298 It is clearly explained in the contested decision, with regard to the various types of conduct complained of, why the Commission considered that the applicant had infringed Article 85(1) of the Treaty. The Commission's analyses have enabled the Court to exercise its power of review. By the same token, both in its application and during the proceedings, the applicant has replied to the arguments set out by

the Commission in the decision in relation to the finding of an infringement, which shows that the decision supplied it with the necessary information to enable it to defend its rights.

299 Moreover, in the decision and, more specifically, in recitals 194 to 201 thereof, the Commission, as stated in paragraph 27 above, expressly replied to certain observations submitted by the applicant and Audi in response to the statement of objections. It should be added here that the Commission did not have to reply to the applicant's detailed objections, such as those submitted in regard to its margin policy. All that was required of the Commission was to explain clearly and unequivocally, as it did in recitals 62 to 66 of the decision, why it took the view that a split margin system had been instituted (see *Siemens* v *Commission*, cited above, paragraphs 17 and 18). Likewise, the Commission gave adequate reasons for its analysis of the documents obtained by amply explaining the grounds on which it considered that those documents were of such a nature as to prove the existence of the alleged infringement, but without replying point-by-point to the different interpretations submitted by the applicant in its reply to the statement of objections. Lastly, the Commission clearly explained in recital 56 of the decision why it classified the prohibition on sales to 'salonisti', which it inferred from the documents cited in endnote No 68 to the decision, as evidence of infringement, by stating that 'salonisti' drew no distinction between independent resellers and intermediaries and that, consequently, the latter were also covered by the prohibition thus laid down.

300 In so far as the applicant complains that the Commission did not specify the reasons for its view that the infringement had not been fully terminated when the decision was adopted, the Court finds that this line of argument is also unfounded. While it is true that this assertion has not been proved and thus constitutes an error of fact with the result that the contested decision must be annulled in so far as it contains that assertion (see paragraph 202 above), it is nevertheless the case that the Commission set out its reasons in that regard by explaining in recital 219 of the decision that 'steps were not taken to ensure that

the previously imposed impediments to sales to final consumers and intermediaries were removed. In particular, the dealer contracts have not been modified accordingly.'

301 As regards the fixing of the fine, it is sufficient to point out that in recitals 215 to 222 of the contested decision the Commission gave a detailed explanation of the criteria taken into account and the method of calculating the fine imposed on the applicant. As the Commission stated in recital 213 of the decision that factors which made the infringement particularly serious were that 'sales of vehicles for parallel exports by final consumers' were made 'considerably more difficult, and even temporarily [impeded] altogether' and that the infringement had effects 'on the markets for new motor vehicles, in particular in Germany and Austria, but also on the markets in all other Member States', it must be accepted that those considerations are the logical consequence of findings made previously in the decision, according to which the applicant and its subsidiaries succeeded in hindering all re-exports from Italy (see, for example, recital 146 of the decision). Moreover, contrary to the applicant's submissions, in recital 217 of the decision the Commission expressly referred to the Guidelines on which it relied, and indicated their reference in the Official Journal.

302 Lastly, contrary to the applicant's assertions, the Commission was not required to reproduce the documents to which it referred in the endnotes to the decision, since the applicant or its subsidiaries had those documents at their disposal (Joined Cases T-551/93, T-231/94 to T-234/94 *Industrias Pesqueras Campos and Others* v *Commission* [1996] ECR II-247, paragraph 144).

303 It follows from all the foregoing considerations that the fourth plea must be rejected.

E — *The fifth plea: infringement of the right to a fair hearing*

Arguments of the parties

304 The applicant points out that by letter of 29 November 1996 the Commission rejected its request for extension of the period which it had been allowed for submitting its observations on the statement of objections. That period was two months. However, having regard to the volume of the statement of objections, the number of interested persons and the documents to be examined in various languages, a longer period was clearly necessary in order to draw up observations.

305 The applicant explains that, although the urgency of the case is a factor to be taken into consideration, it is also clear that in the Commission's view the present case was not urgent, since it had taken more than a year to conduct its investigation before the statement of objections and that, after it had received observations on that statement, it took the same time to adopt the contested decision.

306 The defendant states that the period allowed, of two months and two weeks (including Christmas holidays), is considerably longer than the minimum period of two weeks laid down in Article 11(1) of Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Regulation No 17 (OJ, English Special Edition 1963–1964, p. 47). There was no valid reason to extend it. The majority of the evidence came from the establishments of the applicant and its subsidiaries Audi and Autogerma; the documents in question were drawn up in the languages normally used by them for

the purposes of communication and, apart from the Italian dealers who had not actively participated in the infringement, all the persons concerned belonged to the same group.

307 Furthermore, as the applicant has not indicated the points on which it would have wished to submit more detailed observations, it has not shown how its right to a fair hearing was affected.

308 Lastly, the defendant submits that the case was urgent, having regard to the large number of complaints from consumers. It adds that although it is regrettable that the administrative procedure was delayed and that the decision could not be taken rapidly, that does not make its refusal to grant an extension unlawful *ex post facto*.

309 In its reply the applicant observes that in its statement in defence the defendant relies on the urgency of the present case to justify its refusal to extend the period, whereas in the letter of refusal the reason given was wholly different, namely that the case was not 'exceptionally complex'. The applicant states that not only is there clear inconsistency but the documents lodged at the Court and, in particular, the application to extend the period for lodging the defence prove that the case is 'exceptionally complex'.

310 The defendant argues that the volume and content of the defence logically correspond to those of the application.

Findings of the Court

311 It is settled case-law that due observance of the rights of the defence in a procedure which may give rise to penalties requires that the undertaking concerned be afforded the opportunity, from the stage of the administrative procedure, to make known its views on the truth and relevance of the facts, objections and circumstances put forward by the Commission (Case 85/76 *Hoffman-La Roche* v *Commission* [1979] ECR 461, paragraph 11; and Joined Cases T-39/92 and T-40/92 *CB and Europay* v *Commission* [1994] ECR II-49, paragraph 48).

312 As regards, in particular, the period for lodging observations on the statement of objections, Article 11(1) of Regulation No 99/63 requires that the Commission is to have regard to 'the time required for preparation of comments' and 'the urgency of the case'.

313 Although the period allowed in the present case was short in comparison with the volume of the documents in the case and the number of unlawful acts alleged against the Volkswagen group, it is not in dispute that the applicant nevertheless succeeded in making known its views in an effective manner. It is clear from the observations on the statement of objections, set out in a letter of 12 January 1997, that the applicant gave a highly detailed exposition of its views on each essential allegation made by the Commission. The applicant has not, moreover, specified the aspect of the case on which it would have submitted even more detailed observations if the period allowed to it had been extended.

314 Consequently, it is not proved that the period allowed in this case for submitting observations on the statement of objections was excessively short and that the Commission failed to take due account of the time required to draw up those observations.

315 In any event, a plea alleging infringement of the rights of the defence put forward as a ground for annulment, can be upheld only where the alleged infringement was capable of actually affecting the applicant's defence (Case T-37/91 *ICI* v *Commission* [1995] ECR II-1901, paragraphs 59, 66 and 70). As explained in the preceding paragraphs, that is not the situation in the present case.

316 Moreover, it must be observed that the Commission's reason for refusing the application for an extension of time, namely that the case was not exceptionally complicated, is not erroneous. Although voluminous, the case-file was not of great complexity for the applicant, since it was deemed to be well informed both of the conduct of the Volkswagen group and the Community rules and case-law on parallel imports.

317 Lastly, in so far as Article 11(1) of Regulation No 99/63 also requires that regard be had to the urgency of the case, it must be observed that the Commission, because it took the view that it was faced with a particularly serious infringement of the competition rules, could have been minded to conduct the administrative procedure swiftly so as to be able to put an end to the conduct complained of as quickly as possible. Contrary to the applicant's submissions, that consideration is not contradicted by the fact that a year elapsed between the investigations and the service of the statement of objections and an identical period between receipt of the observations on that statement and the adoption of the decision. The Commission had to analyse a very large number of documents, whereas the applicant and Audi had to explain, in essence, only their own conduct as it emerged from those documents (see *Suiker Unie and Others* v *Commission*, cited above, paragraphs 97 and 98).

318 It follows from the whole of the foregoing that the fifth plea must also be rejected.

F — *The alternative plea: the fine imposed was excessive*

Arguments of the parties

319 The applicant states that even if the Commission's findings of fact and of law were well founded, the fine imposed is wholly disproportionate. First, the actual effects of the alleged infringement on trade between Member States were negligible. Second, the applicant never intended to commit the infringements and the documents cited in the decision in order to prove the contrary (recital 214 of the decision) were completely misinterpreted by the Commission. Nor did the applicant take improper advantage of the fact that the dealers were dependent on the manufacturers. On the contrary, only dealers who did not comply with their contract were warned and penalised.

320 The applicant also contends that the guidelines were not complied with, because the Commission did not define the relevant geographic market, even though the guidelines state that 'account must be taken of ... the size of the relevant geographic market'.

321 Next, the applicant repeats its assertion that certain factors taken into account in order to fix the fine were not proved in the decision and that the duration of the infringement found by the Commission is incorrect. It also points out that Autogerma notified Convenzione B to the Commission by letter of 20 January 1988, whereas the Commission infers from that document that there was an infringement from the end of 1987. Consequently, if that agreement had really infringed Article 85 of the Treaty, the Commission breached its obligation under Article 89 of the Treaty to propose, when it has found that there is an infringement, appropriate measures to bring that infringement to an end. The fact that the Commission adopted the decision only in 1998 justifies a reduction in the fine. Furthermore, according to Article 15(5) of Regulation No 17, no fine can be imposed in respect of agreements which have been notified. That rule should therefore have been applied with regard to Convenzione B and also for the

subsequent versions of that document, which all remained within the framework of the notified version.

322 The applicant points out that the Commission had known for years that an undertaking was being required of certain customers and that it had tolerated that measure and stated that clarification in that regard was needed in Regulation No 1475/95.

323 The applicant also states that the defendant admits, in response to the plea of infringement of the rights of the defence, that there was a regrettable delay in the conduct of the administrative procedure. Clearly that delay increased the period taken into account by the Commission in fixing the fine and, therefore, the very amount of that penalty.

324 Moreover, the Commission wrongly regarded as an aggravating circumstance the fact that it had pointed out by letter of 24 February 1995 that it had been informed of the existence of barriers to re-exports from Italy, which constituted an infringement of the Community competition rules, and that the applicant and Audi had not acted upon that warning. The applicant states that a circular was sent to the dealers on 16 March 1995. During the investigation conducted by the Commission the applicant took various measures to put an end to all the alleged infringements.

325 Lastly, the applicant complains that the Commission failed to take into account, as an attenuating circumstance, the major devaluations in the Italian lire from September 1992 onwards, even though the Commission itself accepted in a statement of 31 October 1995 on the impact of monetary fluctuations on the internal market that the monetary fluctuations were creating certain difficulties for the Union's economy. In that context, the applicant states that there is still no single European market in which a manufacturer of motor vehicles can sell the

same products everywhere using only one strategy. It claims that the Member States have different fiscal and monetary systems, which in reality restricts intra-Community trade much more than the restrictions on competition implemented by the manufacturers themselves. Because of those differences, the manufacturers cannot sell at the same prices in all the Member States. The applicant refers in that regard to a letter of 25 February 1998 sent by Mr Van Miert to the former president of the Zentralverband des Deutschen Kraftfahrzeuggewerbes (Central Association of the German Motor Vehicle Trade) in which it was accepted that 'in the absence of harmonisation and on account of the monetary fluctuations regularly occurring between the Member States, the internal market has not yet been achieved so far as concerns motor vehicle distribution'.

326 According to the defendant, the applicant adopted, in bad faith, measures which affected both authorised and prohibited re-exports without distinction. Consequently, the fine is proportional to the gravity of the infringement. The deliberate nature of the infringement is, moreover, proved by certain notes of the applicant and of Autogerma in which they state that they are committing an infringement.

327 The defendant submits, next, that it informed the applicant by letter of 8 May 1987 that the 'notifications' relating to the various dealership contracts and to their revised versions and annexes were of no effect until it had been explained why an exemption was requested for the contractual provisions not exempted by Regulation No 123/85. Moreover, the defendant also informed it by letter of 25 November 1988 that the dispatch of some annexes, including Convenzione B, could not be classified as a 'notification', since the covering letter was only six lines long. The applicant never replied to those letters. In the same context, the defendant contends that the allegation that it considered the undertaking required of certain purchasers to be lawful is erroneous and fallacious. It cites correspondence with the applicant in which it expressly states that the requirement for such an undertaking is incompatible with the principles of the single market. Lastly, it points out that Article 89(1), third sentence, of the Treaty is merely a transitional provision which was replaced by Regulation No 17 and which therefore no longer has any purpose.

328 The defendant also states that there were numerous agreements contrary to the Community competition rules; that the infringement lasted for a number of years (one element of which, the bonus system, had already begun at the end of 1987); that three undertakings in the applicant's group, several departments and numerous employees operating at various levels of the hierarchy were associated with those agreements; that the infringement was caused by a body of different measures, taken together in the framework of an overall strategy; and, lastly, that the infringement had appreciable effects on the markets of all the Member States. The bonus system was directed generally against re-exports from Italy, and the other measures were not confined to trade between Italy and Germany and Austria.

329 Next, the defendant explains that when calculating the increases applicable in view of the duration of the infringement (recital 217 of the decision) it distinguished between, on the one hand, the period from 1988 to 1992 and the year 1997 and, on the other hand, the period from 1993 to 1996. In the latter case, the basic amount of the fine was increased by 10%. However, for the period from 1988 to 1992 and for 1997 the increase applied was only 5%. The total amount of the fine corresponds to around 0.25% of turnover recorded by the Volkswagen group in the European Union in 1997 and around 0.5% of the turnover of that group achieved in that same year in the countries directly or more specifically exposed to the effects of that infringement, namely Italy, Germany and Austria.

330 The devaluation of the Italian lire cannot, according to the defendant, constitute an attenuating circumstance, because, of all the motor vehicle manufacturers established in Member States other than Italy, only the applicant and Audi reacted by means of a general strategy of barriers to re-exports.

331 The defendant observes, lastly, that it referred expressly to the Guidelines (recital 217 of the decision) in order to explain in detail how the basic amount initially fixed to take account of the gravity of the infringement was increased to take account of its duration. It adds that one of the criteria determining the gravity of

the infringement is the geographic extent of the market on which that infringement had an effect and that, contrary to the applicant's assertions, the Guidelines do not refer to a definition of the geographic market.

Findings of the Court

332 Under Article 15(2) of Regulation No 17 the Commission may by decision impose on undertakings which have intentionally or negligently infringed Article 85(1) of the Treaty fines of from 1 000 to 1 million units of account, 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.

333 It is apparent from the clear and precise terms of that provision that it deals with two distinct matters. First, it lays down the conditions which must be fulfilled to enable the Commission to impose fines (initial conditions); these include the condition concerning the intentional or negligent nature of the infringement (first subparagraph). Second, it governs determination of the amount of the fine, which depends on the gravity and duration of the infringement (second subparagraph) (order of the Court of Justice in Case C-137/95 P *SPO and Others* v *Commission* [1996] ECR I-1611, paragraph 53).

334 As to the first question, it is not disputed that in the present case the Commission found that the infringement was committed intentionally and not merely negligently (recital 214 of the decision). That assessment is wholly justified. As has been found above in the context of the first plea, the applicant adopted measures whose object was to partition the Italian market and thus to hinder competition (see paragraphs 88, 89 and 193 above). Moreover, it is not necessary

for an undertaking to have been aware that it was infringing the competition rules laid down in the Treaty for an infringement to be regarded as having been committed intentionally; it is sufficient that it could not have been unaware that the object of its conduct was the restriction of competition (Case T-61/89 *Dansk Pelsdyravlerforening* v *Commission* [1992] ECR II-1931, paragraph 157, and Case T-143/89 *Ferriere Nord* v *Commission* [1995] ECR II-917, paragraph 41). In view of the existence of settled case-law holding that actions partitioning markets are incompatible with the Community competition rules (see paragraph 179 above), the applicant could not have been unaware that its conduct hindered competition.

335 As to the second question, the Court points out, first of all, that the choice of the amount of the fine is an instrument of the Commission's competition policy aimed at directing the conduct of undertakings towards compliance with the competition rules (*Martinelli* v *Commission*, cited above, paragraph 59, and *Van Megen Sports* v *Commission*, cited above, paragraph 53) but that it is nevertheless for the Court to verify whether the amount of the fine imposed is in proportion to the duration and gravity of the infringement (*Deutsche Bahn* v *Commission*, cited above, paragraph 127). The Court must, in particular, weigh the seriousness of the infringement against the circumstances invoked by the applicant (Case C-333/94 P *Tetra Pak* v *Commission* [1996] ECR I-5951, paragraph 48).

336 As is clear from examination of the first plea, the Commission had abundant proof of the infringement designed to partition the Italian market. Such an infringement is by its very nature particularly serious. It frustrates the most fundamental aims of the Community, particularly the attainment of a single market (Case T-9/92 *Peugeot* v *Commission* [1993] ECR II-493, paragraph 42). The applicant, jointly with its subsidiaries, prevented consumers from enjoying without impediment freedoms of the common market laid down by the Treaty, thus detracting from one of the most important achievements in the building of the Community. In the present case, the infringement is of increased gravity because of the size of the Volkswagen group (see Joined Cases 100/80 to 103/80 *Musique Diffusion Française and Others* v *Commission* [1983] ECR 1825, paragraph 120) and the fact that it was committed despite the warning

constituted by the settled case-law on parallel imports in the motor vehicle industry (see Case T-304/94 *Europa Carton* v *Commission* [1998] ECR II-869, paragraph 91). Having regard to those various factors, the lack of monetary and fiscal harmonisation (see paragraph 325 above) cannot, even though it might have given rise to commercial problems for the applicant, justify the infringement in question or even constitute an attenuating circumstance. The lack of harmonisation did not relieve the applicant of its duty to comply with the most basic rules of the common market, such as the rule against partitioning that market.

337 Moreover, contrary to the applicant's submissions, the Commission was not required to fix a lower fine because it was slow in taking action against the conduct of the Volkswagen group. Although, when the gravity of an infringement justifies a heavy fine, account must be taken of the fact that it might have been ended sooner if the Commission had acted more quickly (Joined Cases 6/73 and 7/73 *Istituto Chemioterapico and Commercial Solvents* v *Commission* [1974] ECR 223, paragraph 51), in the present case the Commission sent an initial warning letter to the applicant in February 1995, shortly after receiving a first series of complaints from consumers. In those circumstances, the Commission cannot be accused of lack of diligence which might have contributed to prolonging the duration of the infringement taken into account in determining the amount of the fine. In so far as the applicant alleges that the Commission also increased the period taken into account for fixing the fine by delaying the conduct of the administrative procedure, it need merely be pointed out once more that the duration of that procedure was not excessive (see paragraph 317 above).

338 Nor can the Court uphold, as a ground for reducing the amount of the fine, the applicant's argument that the Commission had known for years that an undertaking was demanded of some purchasers and had tolerated that measure. First, the letter cited by the applicant in support of that argument (paragraph 220 of the application, annex 220 to the application) is dated 31 March 1995 and thus postdates the warning letter sent to it by the Commission on 24 February 1995 (see paragraph 10 above). Next, it is clear from the documents before the Court that the Commission adopted a negative position when it became aware of

that measure as applied by the Volkswagen and Audi dealers at the end of 1994 in several Member States. In a letter of 23 November 1994 it wrote to the applicant as follows:

'We are in possession of forms from Denmark and Belgium which oblige purchasers of new VW/Audi vehicles to acquire the vehicle only for their own use and not to sell it before the expiry of three or six months after registration or until the vehicle has covered at least 3 000 km or 6 000 km, as the case may be. If the vehicle is sold before those conditions are satisfied, the purchaser agrees to pay 10% of the purchase price to the Danish importer or, in the case of Belgium, to the dealer in question.

Such undertakings are incompatible with the principles of the internal market because they are clearly directed against parallel imports. Nor are they covered by the competition rules. Please inform us whether there are corresponding undertakings in the other Member States.

If these undertakings are not withdrawn, the initiation of proceedings against you is likely. Please let me have your comments within two weeks of receipt of this letter.'

339 Although it is apparent from the applicant's reply to that letter that in 1979 it had sent to the Commission the undertaking required of purchasers at that time (Annex 5 to the defence), the Commission cannot be criticised for not having taken action in 1979 after it became aware of that one measure, or for having been too severe in none the less imposing a fine on the applicant in 1998, and not admitting the existence of attenuating circumstances, in respect of a body of measures designed to partition the Italian market, one of which was the practice of demanding an undertaking. Moreover, that undertaking differed from the one sent in 1979 in that it allowed the Volkswagen group to check more easily whether it had been complied with and to apply the penalties provided for in the event of non-compliance, because it required the purchaser to be able to show, in

the event of a check by the group, that the vehicle had been used and the period for which it had been used (endnote No 128 of the decision; Annex 218.1 to the application: 'the purchaser also undertakes, at the request of the above organisation, to produce a document proving that he is using the vehicle in question as final user and the duration of the period for which he has possessed that vehicle').

340 Next, the Commission rightly did not find the dispatch of a circular to the Italian dealers in March 1995 to be an attenuating circumstance. As has been found in paragraphs 57, 58, 88 and 107 to 113 above, the infringement continued after the dispatch of that circular.

341 As regards the applicant's argument that the Commission did not follow the Guidelines, it need merely be observed that they do not require that the Commission formally define the relevant geographic market. The Commission could therefore confine itself to stating in recital 213 of the decision: 'The infringement has had direct effects on the Italian market for the sale of new motor vehicles ... Correspondingly, the infringement has also had effects on the markets for new motor vehicles, in particular in Germany and Austria, but also on the markets in all other Member States.' That finding is, moreover, as has already been held above (paragraph 231), well founded.

342 As to the argument that Convenzione B had been notified in 1988 and, accordingly, the Commission could not impose a fine on the applicant in respect of the 15% rule agreed in that agreement, the Court points out, first, that the prohibition laid down in Article 15(5)(a) of Regulation No 17 on the imposition of fines in respect of acts taking place 'after notification to the Commission and before its decision in application of Article 85(3) of the Treaty, provided they fall within the limits of the activity described in the notification' applies only in respect of agreements which have in fact been notified in accordance with the necessary formalities (Joined Cases 240/82 to 242/82, 261/82, 262/82, 268/82 and 269/82 *Stichting Sigarettenindustrie and Others* v *Commission* [1985] ECR 3831, paragraph 77; *SPO and Others* v *Commission*, cited above, paragraph 342;

also Case 30/78 *Distillers Company* v *Commission* [1980] ECR 2229, paragraphs 23 and 24). Next, it must be pointed out that in a letter dated 25 November 1988 (Annex 3 to the defence) the Commission informed Autogerma that the dispatch by it of Convenzione B was not a notification for the purposes of Regulation No 17:

'In your letter of 20 January 1988 you brought to my attention the standard dealership contract offered by Autogerma to its dealers in Italy.

In that regard, I enclose herewith a copy of the letter which this Directorate sent to Volkswagen on 8 May 1987 ...

In that letter we noted the attestation by Volkswagen that it had modified all its distribution contracts in the various European countries in line with Regulation No 123/85 and we informed Volkswagen of the list of distribution contracts of the Volkswagen group in respect of which no further action was therefore to be taken.

Amongst those contracts was also the standard distribution contract for Italy (your notification of 31 January 1963).

In view of that procedure, a mere statement, even if made, as you assert, by way of notification cannot be a substitute for a notification within the meaning of Regulation No 17 ... and Article 8 of Regulation No 123/85 ...

The Commission is not therefore able to express a view on the conformity of your standard distribution contract with Regulation No 123/85. That does not mean that the contract is not in conformity with that regulation, but rather that it is necessary for the parties concerned to give due effect to the block exemption regulation and to comply with their responsibilities by concluding contracts which satisfy the necessary conditions. Such contracts do not have to be notified where they are already exempted by the regulation ...

On the basis of the foregoing, no further action will be taken in this case.'

343 Irrespective of the question whether or not the sending of Convenzione B was a notification for the purposes of Regulation No 17, the very fact that that agreement was sent to the Commission already in 1988 ought to have led the Commission to reject the view that that agreement was in itself a factor justifying an increase in the amount fixed in respect of the gravity of the infringement (recital 217 of the decision). Consequently, the period from 1988 to 1992, during which the 15% rule stipulated in Convenzione B is the only act complained of (see recital 202 of the decision) must not be taken into account when fixing the fine, even if that rule was rightly regarded as incompatible with the Treaty (see, in regard to the latter point, paragraphs 49 and 189 above).

344 On the other hand, the 15% rule could be taken into account for the purposes of fixing the fine in respect of the period from 1993 to 1996. As has been found above (in particular in paragraphs 79 to 90 and 162 to 165), during that period the ceiling provided by the 15% rule was combined, and thus strengthened, with other measures, in order to hinder re-exports. Moreover, internal documents of the Volkswagen group show that the 15% rule was interpreted and applied extensively during that period, namely as a rule prohibiting any sale outside the contract territory in excess of 15% of total sales (see paragraph 58 above). Consequently, even if it were proved that Convenzione B had been notified, it would still be necessary to find that since 1993 the application of the 15% rule fell outside the scope of the activity as set out in the text of the agreement notified to the Commission, so that, by virtue of the clear wording of Article 15(5)(a) of Regulation No 17, the exemption from fines would no longer apply. It follows

that it would have been appropriate to take 1 September 1993 as the starting date of the period to be taken into account when fixing the fine (see in that regard paragraphs 81 to 83 above and recital 202 of the decision).

345 As the Court has already held, when fixing the fine the Commission also took account of its unproven conclusion that the infringement continued after 30 September 1996 (see paragraph 200 above) and also, in determining the gravity of the infringement, referred to its erroneous findings that a split margin system and the termination of certain dealership contracts by way of penalty were measures taken in order to hinder re-exports (see paragraph 197 above).

346 It follows from the foregoing considerations that the duration of the infringement to be taken into account in order to fix the fine must be reduced to a period in the order of three years and that the description of the infringement made by the Commission in order to assess the gravity of the infringement is not wholly correct. In those circumstances, the Court must, in the exercise of its unlimited jurisdiction vary the decision and reduce the amount of the fine imposed on the applicant (see, by analogy, *Dunlop Slazenger*, cited above, paragraph 154).

347 However, the reduction of the fine does not necessarily have to be proportionate to the reduction in the period which the Commission had taken into account nor correspond to the sum of the percentage increases applied by the Commission in respect of the period from 1998 to August 1993, the last quarter of 1996 and 1997 (see, by analogy, *Dunlop Slazenger*, cited above, paragraph 178). The Court must carry out, in the exercise of its jurisdiction in the matter, its own assessment of the circumstances of the case in order to determine the amount of the fine (Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 111; Case T-148/94 *Preussag Stahl* v *Commission* [1999] ECR II-613, paragraph 728). In the present case, the highly grave nature of the infringement committed, apparent from paragraph 336 above, on the one hand, and the intensity with which the unlawful measures were implemented, as shown by the abundant correspondence discussed above in the context of the first plea, on the other hand, call for a fine

which acts as a real deterrent (see Case T-12/89 *Solvay* v *Commission* [1992] ECR II-907, paragraph 309, and Case C-219/95 P *Ferriere Nord* v *Commission*, cited above, paragraph 33). In the light of those considerations, the fine imposed of ECU 102 million, which corresponded approximately, as the applicant confirmed in reply to a written question from the Court, to 0.5% of turnover achieved in 1997 by the Volkswagen group in Italy, Germany and Austria, and to 0.25% of its turnover in the European Union in the same year, is not abnormally high. Lastly, the fact that the Commission's conclusions as to the split margin system and the termination of certain dealership contracts have not been adequately proved, does not reduce the highly grave nature of the infringement in question, duly established by proof of the other infringing conduct (see paragraphs 193 and 194 above).

348 Having regard to all the above circumstances and considerations, the Court, in the exercise of its unlimited jurisdiction under Article 172 of the EC Treaty (now Article 229 EC) and Article 17 of Regulation No 17 (see Case C-320/92 P *Finsider* v *Commission* [1994] ECR I-5697, paragraph 46, and Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 129), considers it proper to reduce the amount of the fine, expressed in euros pursuant to Article 2(1) of Council Regulation (EC) No 1103/97 of 17 June 1997 on certain provisions relating to the introduction of the euro (OJ 1997 L 162, p. 1) to EUR 90 million.

Costs

349 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 only to a very limited extent, the Court considers it fair, having regard to the circumstances of the case, to order the applicant to bear its own

costs and to pay 90% of the costs incurred by the Commission and to order the Commission to bear 10% of its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber),

hereby:

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

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

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

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

3. Dismisses the remainder of the application;

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

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

Moura Ramos Tiili Mengozzi

Delivered in open court in Luxembourg on 6 July 2000.

H. Jung V. Tiili

Registrar President

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