JUDGMENT OF THE COURT (Third Chamber)

6 April 2006 *

In Case C-551/03 P,

APPEAL under Article 56 of the Statute of the Court of Justice, lodged on 29 December 2003,

General Motors BV, formerly General Motors Nederland BV and Opel Nederland BV, established in Lage Mosten (Netherlands), represented by D. Vandermeersch and R. Snelders, advocaten, and T. Graf, Rechtsanwalt, with an address for service in Luxembourg,

appellant,

the other party to the proceedings being:

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

defendant at first instance,

* Language of the case: English.

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, J. Malenovský, S. von Bahr (Rapporteur), A. Borg Barthet and U. Lõhmus, Judges,

Advocate General: A. Tizzano,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 14 July 2005,

after hearing the Opinion of the Advocate General at the sitting on 25 October 2005,

gives the following

Judgment

1 In its appeal, General Motors BV has applied for the partial annulment of the judgment of the Court of First Instance in Case T-368/00 *General Motors Nederland and Opel Nederland* v *Commission* [2003] ECR II-4491 ('the contested judgment'), whereby the Court of First Instance partially annulled the Commission's decision C(2000) 2707 of 20 September 2000 relating to a proceeding under Article 81 EC (Case COMP/36.653 — Opel) (OJ 2001 L 59, p. 1; 'the contested decision').

Background

2 The facts and legal background, as they appear in the contested judgment, may be summarised as follows.

3 Opel Nederland BV ('Opel Nederland') was established on 30 December 1994 as a 100% subsidiary of General Motors Nederland BV ('General Motors Nederland'). It is the sole national sales company for the 'Opel' brand in the Netherlands. Its business activities comprise import, export and wholesale trade in motor vehicles and associated spare parts and accessories. It has concluded dealership agreements for sales and service with about 150 dealers who, as a result, are integrated in the Opel distribution network in Europe as authorised resellers.

4 Dealership contracts are, subject to certain conditions, exempted from the application of Article 85(1) of the EC Treaty (now Article 81(1) EC) by Commission Regulation (EEC) No 123/85 of 12 December 1984 on the application of Article [81(3)] of the EEC Treaty to certain categories of motor vehicle distribution and servicing agreements (OJ 1985 L 15, p. 16). That regulation was replaced, with effect from 1 October 1995, by Commission Regulation (EC) No 1475/95 of 28 June 1995 (OJ 1995 L 145, p. 25).

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

contract goods, or corresponding goods, to final consumers, their authorised intermediaries or other dealers who are part of the distribution network of the manufacturer and/or importer.

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

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

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

'... Decisions made:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15 On 20 September 2000, the Commission adopted the contested decision.

The contested decision

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

17 That conclusion was based on the following key allegations: first, in September 1996, Opel Nederland had adopted a general strategy aimed at restricting or preventing all export sales from the Netherlands; secondly, Opel Nederland's general strategy was implemented through individual measures which were adopted by mutual consent with its dealers as part of the practical implementation of the dealership contracts and which became an integral part of Opel Nederland's contractual relations with dealers in its selective distribution system in the Netherlands.

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

— a restrictive supply policy;

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

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

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

20 In the contested decision, the Commission described the infringement as very serious since Opel Nederland had impeded achievement of the objective of a single market. It took account of the Opel brand's important position on the relevant markets in the Union. According to that decision, the infringement had also affected the markets in other Member States. Opel Nederland had acted intentionally, since it could not have been unaware that the measures were intended to restrict competition. In conclusion, the Commission considered that an amount of EUR 40 million constituted an appropriate basis for determining the amount of the fine.

21 With regard to the duration of the infringement, the Commission considered that it lasted from the end of August 1996 or the beginning of September 1996 until January 1998, thus totalling 17 months, which was an infringement of medium duration. Taking into account the respective duration of the three specific measures, the Commission considered that it was justified in increasing the amount of EUR 40 million by 7.5%, that is EUR 3 million, to a fine of EUR 43 million.

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

The contested judgment

23 By an application lodged at the Registry of the Court of First Instance on 30 November 2000, General Motors Nederland and Opel Nederland brought an action seeking annulment of the contested decision and, in the alternative, annulment of the fine imposed by that decision or reduction in its amount.

24 In their first plea, General Motors Nederland and Opel Nederland denied that Opel Nederland had ever adopted a strategy to prevent or restrict all exports without distinction. A proper reading of the documents on which the Commission relied, in particular the minutes of the meeting of 26 September 1996, would, they argued, reveal that the strategy was aimed solely at limiting irregular export sales to unauthorised resellers and not at restricting lawful export sales to final consumers or other dealers.

25 The Court of First Instance found, in paragraph 45 of the contested judgment, that the Commission's allegations were based on the minutes of the management meeting of 26 September 1996, which constituted a final document concerning measures taken by the most senior managers of Opel Nederland.

26 It indicated, in paragraph 47 of the contested judgment, that the applicants' argument that Opel Nederland merely sought to limit exports which did not comply with the dealership contracts was not in any way reflected in the terms of the minutes.

27 In paragraph 48 of the contested judgment, the Court added that that interpretation was confirmed by a reading of certain internal documents showing that the senior managers of Opel Nederland were worried by the growth of exports and that they studied measures designed to limit, or halt, all exports.

28 The Court further pointed out, in paragraph 49 of the contested judgment, that the decision by Opel Nederland no longer to grant bonuses for export sales could only concern sales which complied with the dealership contracts, given that the bonuses had never been granted in respect of sales to persons other than final consumers.

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

30 In paragraph 56 of the contested judgment, the Court held that the Commission had rightly concluded that, on 26 September 1996, Opel Nederland had adopted a general strategy designed to hinder all exports.

31 In their second plea, General Motors Nederland and Opel Nederland argued that the Commission had erred in fact and in law by holding that Opel Nederland had implemented a policy of restricting supply, contrary to Article 81 EC.

32 In paragraph 88 of the contested judgment, the Court of First Instance held that it had not been established to the requisite legal standard that the restrictive supply measure was communicated to the dealers and still less that that measure entered into the field of the contractual relations between Opel Nederland and its dealers.

33 In those circumstances, the Court held that the second plea was well founded. It therefore annulled the contested decision in so far as it had established the existence of a restrictive supply measure contrary to Article 81(1) EC.

34 In their third plea, General Motors Nederland and Opel Nederland argued that the Commission had erred in fact and in law by holding that Opel Nederland had implemented a system restricting retail bonuses, contrary to Article 81 EC.

35 In paragraph 98 of the contested judgment, the Court of First Instance held that the exclusion of export sales from the bonus system, which had become an integral part of the dealership contracts between Opel Nederland and its dealers, constituted an agreement within the meaning of Article 81(1) EC.

36 It then examined, from paragraph 99 onwards, whether the measure in question was designed to restrict competition.

37 In paragraph 100 of the contested judgment, the Court upheld the Commission's argument that, as bonuses were no longer granted for export sales, the margin of economic manoeuvre which dealers had to carry out such sales was reduced in comparison with that which they had to carry out domestic sales. Dealers were thereby obliged either to apply less favourable conditions to foreign customers than domestic customers, or to be content with a smaller margin on export sales. By withdrawing bonuses for export sales, the latter became less attractive to foreign customers or to dealers. The Court therefore held that, by its very nature, the measure was likely to inhibit export sales, even without any restriction on supply.

38 Referring to the assessment of the first plea, the Court added, in paragraph 101 of the contested judgment, that the measures adopted by the management of Opel Nederland were prompted by the increase in export sales and were designed to reduce them.

39 Having regard both to the nature of the measure and the aims which it pursued, and in the light of the economic context in which it was to be applied, the Court found in paragraph 102 of the contested judgment, in accordance with consistent case-law, that the measure constituted an agreement with the object of restricting competition (see, to that effect, Case 19/77 *Miller* v *Commission* [1978] ECR 131, paragraph 7; Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ and Others* v *Commission* [1983] ECR 3369, paragraphs 23 to 25; Joined Cases 29/83 and 30/83 *CRAM and Rheinzink* v *Commission* [1984] ECR 1679, paragraph 26).

40 In the alternative, General Motors Nederland and Opel Nederland argued that the fine of EUR 43 million bore no reasonable relation to the gravity and duration of the alleged infringement. In addition, they argued, the Commission had taken no

account of the lack of intent, the limited impact of that infringement on intra-Community trade and the immediate corrective action taken by Opel Nederland on its own initiative.

41 In paragraph 199 of the contested judgment, the Court held that, given the existence of the three measures alleged, the basic amount of EUR 40 million appeared to be justified and that sufficient reasons had been stated for it in the contested decision. It held in paragraph 200, however, that, since the existence of the restrictive supply measure had not been established, that amount should be reduced. In the circumstances of the case, the Court determined the basic amount, reflecting the gravity of the infringement, at EUR 33 million. In paragraph 203 of the contested judgment, the Court held that the 7.5% increase in the amount, applied by the Commission in the light of the duration of the infringements, was justified. Therefore, the amount of the fine was taken to EUR 35 475 000.

The appeal

42 General Motors Nederland and Opel Nederland have claimed that the Court of Justice should:

— annul the contested judgment insofar as it relates to Opel Nederland's alleged restrictive export strategy and bonus policy and confirms a fine in that regard;

— annul the contested decision to the extent not yet annulled by the contested judgment and insofar as it relates to Opel Nederland's alleged export strategy and bonus policy, and imposes a fine in that regard;

— in any event, reduce the fine of EUR 35 475 000;

— alternatively, remand the case to the Court of First Instance for reconsideration in accordance with the Court's judgment;

— order the Commission to pay the costs.

43 The Commission contends that the Court should dismiss the appeal and order General Motors Nederland and Opel Nederland to pay the costs.

44 By letter of 20 June 2005, the Court was informed by General Motors Nederland and Opel Nederland that those two companies had merged to form a single company called 'General Motors BV' ('General Motors').

The first ground of appeal

Arguments of General Motors

45 By its first ground of appeal, General Motors argues that the Court of First Instance erred in law in upholding the Commission's finding that Opel Nederland engaged in a general policy seeking to restrict all exports.

46 It maintains, first, that the reasoning of the Court of First Instance manifestly distorts the wording of the minutes of the meeting of 26 September 1996, which contains no reference to any general strategy to restrict all exports.

47 Secondly, it argues, the Court of First Instance infringed the duty to state reasons by, on the one hand, taking the view that the Commission did not base its claims on Opel Nederland's internal documents, whilst on the other hand itself relying, in reality, on those same documents for its conclusion that there was a general strategy to restrict all exports.

48 Thirdly, it considers that the reasoning of the Court of First Instance is circular. The Court first used the bonus policy to conclude that there was a general strategy to restrict all exports, and then uses that alleged general strategy to conclude that that bonus policy had a restrictive object.

49 General Motors argues lastly that the Court of First Instance infringed the duty to state reasons and distorted the evidence by stating, in paragraph 50 of the contested judgment, that the Commission's interpretation was corroborated by the fact that, at the time of the meeting on 26 September 1996, the audits at dealers' premises had not yet taken place, so that Opel Nederland could not know whether the 'exporting' dealers had in fact agreed to sell to unauthorised resellers. In fact, General Motors argues, at least one audit was carried out before the meeting of 26 September 1996. Moreover, that meeting had been preceded by a letter to dealers in which Opel Nederland had enquired about the lawfulness of sales activities, but to which those dealers had not given satisfactory replies.

Findings of the Court

50 As the Advocate General points out in point 51 of his Opinion, although General Motors refers to errors of reasoning, it is in reality seeking by its first ground of appeal to call into question the assessment of facts by the Court of First Instance and, in particular, to challenge the probative value of certain facts and documents which led the Court to conclude that Opel Nederland had adopted a general strategy designed to hinder all exports.

51 In that regard, it is clear from Article 225 EC and the first paragraph of Article 58 of the Statute of the Court of Justice that the Court of First Instance has exclusive jurisdiction, first to find the facts except where the substantive inaccuracy of its findings is apparent from the documents submitted to it and, second, to assess those facts. When the Court of First Instance has found or assessed the facts, the Court of Justice has jurisdiction under Article 225 EC to review the legal characterisation of those facts by the Court of First Instance and the legal conclusions it has drawn from them (see, in particular, Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECRI-8417, paragraph 23).

52 The Court of Justice thus has no jurisdiction to establish the facts or, in principle, to examine the evidence which the Court of First Instance accepted in support of those facts. Provided that the evidence has been properly obtained and the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence have been observed, it is for the Court of First Instance alone to assess the value which should be attached to the evidence produced to it (see, in particular, the order of 17 September 1996 in Case C-19/95 P *San Marco* v *Commission* [1996] ECR I-4435, paragraph 40). Save where the clear sense of the evidence has been distorted, that appraisal does not therefore constitute a point of law which is subject as such to review by the Court of Justice (*Baustahlgewebe*, paragraph 24).

53 This Court therefore needs to examine only the arguments of General Motors seeking to demonstrate that the Court of First Instance distorted evidence.

54 In that respect, it should be noted that such distortion must be obvious from the documents on the Court's file, without there being any need to carry out a new assessment of the facts and the evidence (order of 9 July 2004 in Case C-116/03 P *Fichtner* v *Commission*, not published in the ECR, paragraph 34).

55 As regards the argument of General Motors that the Court of First Instance distorted the terms of the minutes of the meeting of 26 September 1996 by confirming that those minutes demonstrated a general strategy designed to limit export sales, there is no dispute that General Motors Nederland and Opel Nederland acknowledged before the Court of First Instance that the documents on which the Commission had relied, and those minutes in particular, demonstrated the existence of a strategy designed to restrict export sales to unauthorised resellers, prohibited by the dealership contracts.

56 Since the minutes of 26 September 1996 mention different measures designed to limit exports and, in particular, the exclusion of export sales from bonus campaigns, without making any distinction between authorised and unauthorised exports, General Motors has not succeeded in showing that the Court of First Instance clearly misconstrued that document.

57 Concerning the argument of General Motors that the Court of First Instance distorted the evidence in paragraph 50 of the contested judgment by attaching importance to the fact that all the audits of dealers took place after 26 September 1996, this Court finds that, in any event, the statement by the Court of First Instance in that paragraph 50 cannot constitute a distortion of evidence capable of affecting that Court's conclusion as regards the existence of the general strategy referred to above.

58 In those circumstances, the first ground of appeal must be rejected as partly inadmissible and partly unfounded.

The second ground of appeal

Arguments of General Motors

59 In its second ground of appeal, General Motors argues that the Court of First Instance erred in law by upholding the Commission's finding that Opel Nederland had implemented a restrictive retail bonus system in breach of Article 81 EC.

60 General Motors submits first that an agreement can be considered to have a restrictive object only if, at first sight, it manifestly has the sole objective purpose or obvious consequence of appreciably restricting competition. According to General Motors, Opel Nederland's bonus policy cannot be considered to be such an agreement.

61 Secondly, General Motors argues that the case-law cited by the Court of First Instance in paragraph 102 of the contested judgment, which relates to prohibitions on exports and other barriers to export, does not support the conclusion of the Court of First Instance that Opel Nederland's bonus policy constituted an agreement having a restrictive object for the purposes of Article 81 EC. An excessively broad interpretation of that concept ran the risk, moreover, of condemning agreements that were perfectly harmless to competition and, in the absence of opportunities to disprove it, infringed the presumption of innocence and the right to be heard.

62 Thirdly, General Motors considers that the comparison made by the Court of First Instance in paragraph 100 of the contested judgment between national sales and export sales is irrelevant. It argues that, since dealers could achieve a profit margin irrespective of the payment of bonuses, and the supply of vehicles was not limited, Opel Nederland's bonus policy did not reduce the incentive of Netherlands dealers to export during bonus campaigns. In any event, since economic conditions for domestic sales in the Netherlands and for export sales are very different, especially in the light of the high level of Netherlands car tax, the exclusion of export sales from bonus campaigns did not necessarily lead to higher prices or to lower margins for export sales in comparison with domestic sales.

63 Fourthly, General Motors argues that, in paragraph 101 of the contested judgment, the Court of First Instance was wrong to rely on the intention of Opel Nederland in support of its conclusion that there was an agreement having a restrictive object for the purposes of Article 81 EC. The object of an agreement for the purposes of that article must, it argues, be assessed objectively and not by reference to any subjective intention of one of the parties.

Findings of the Court

64 Regarding the first part of this ground of appeal, it is sufficient to note, as the Advocate General states in point 67 of his Opinion, that, contrary to what General Motors argues, an agreement may be regarded as having a restrictive object even if it does not have the restriction of competition as its sole aim but also pursues other legitimate objectives (Joined Cases 56/64 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299, 342; *IAZ*, paragraph 25; Case C-235/92 P *Montecatini* v *Commission* [1999] ECR I-4539, paragraph 122; Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375, paragraph 491).

65 It follows that the first part of the second ground of appeal must be dismissed.

66 As for the second part of the second ground of appeal, it is clear from the case-law cited in paragraph 102 of the contested judgment, as the Court of First Instance rightly states in that paragraph, that account must be taken not only of the terms of an agreement but also of other factors, such as the aims pursued by the agreement as such, in the light of the economic and legal context, in order to determine whether an agreement has a restrictive object for the purposes of Article 81 EC.

67 Even if the case-law cited in paragraph 102 of the contested judgment concerns export prohibitions or comparable restrictions, that case-law shows that an agreement concerning distribution has a restrictive object for the purposes of Article 81 EC if it clearly manifests the will to treat export sales less favourably than national sales and thus leads to a partitioning of the market in question (see in particular, to that effect, *IAZ*, paragraph 23).

68 As the Advocate General points out in point 72 of his Opinion, such an objective can be achieved not only by direct restrictions on exports but also through indirect measures, such as those at issue in this case, since they influence the economic conditions of such transactions.

69 The Court of First Instance was therefore justified in supporting its reasoning by reference to the case-law cited in paragraph 102 of the contested judgment.

70 In those circumstances, that judgment cannot be regarded as containing an excessively broad definition of the concept of an agreement having a restrictive object for the purposes of Article 81 EC, in breach of the presumption of innocence or the right to be heard.

71 The second part of the second ground of appeal must therefore be dismissed.

72 Concerning the third part of the second ground of appeal, it is settled case-law that, in order to determine whether an agreement is to be considered to be prohibited by reason of the distortion of competition which is its effect, the competition in question should be assessed within the actual context in which it would occur in the absence of the agreement in dispute (Case C-7/95 P *Deere* v *Commission* [1998] ECR I-3111, paragraph 76; Case C-8/95 P *New Holland Ford* v *Commission* [1998] ECR I-3175, paragraph 90).

73 As the Advocate General points out in point 74 of his Opinion, it was necessary in a situation such as that in this case to examine what the conduct of Netherlands dealers and the competitive situation in the market in question would have been, if export sales had not been excluded from the bonus policy.

74 It is clear that the Court of First Instance carried out just such an examination by finding, in paragraph 100 of the contested judgment in particular, that, as bonuses were no longer granted for export sales, the margin of economic manoeuvre which dealers had to carry out such sales was reduced in comparison with that which they had to carry out domestic sales.

75 The fact that, in the absence of tax harmonisation, domestic sales in the Netherlands and export sales are not subject to identical conditions does not affect that conclusion.

76 Therefore, the third part of the second ground of appeal must be dismissed as unfounded.

77 Finally, concerning the fourth part of the second ground of appeal, whereby General Motors claims that the Court of First Instance erred, in paragraph 101 of the contested judgment, by basing its reasoning on the intention of Opel Nederland to restrict competition, it is true that proof of that intention is not a necessary factor in determining whether an agreement has such a restriction as its object (see, to that effect, *Miller*, paragraph 18, and *CRAM and Rheinzink*, paragraph 26).

78 However, even if the intention of the parties does not constitute a necessary factor in determining the restrictive character of an agreement, there is nothing to prohibit the Commission or the Community courts from taking that intention into account (see, to that effect, *IAZ*, paragraphs 23 to 25).

79 It follows, as the Advocate General points out in point 79 of his Opinion, that the Court of First Instance could legitimately rely also on the intentions of Opel Nederland in order to determine whether the exclusion of export sales from the bonus system pursued a restrictive object for the purposes of Article 81 EC.

80 The fourth part of the second ground of appeal, and therefore that ground in its entirety, must therefore be dismissed.

The third ground of appeal

Arguments of General Motors

81 General Motors argues that the Court of First Instance erred in law by largely upholding the Commission's calculation of the fine in the contested decision.

82 It considers, first, that the reasoning in the contested judgment in respect of the fine contravenes Article 15(2) of Regulation No 17, since it is based on erroneous findings with respect to the existence of the alleged general strategy designed to limit exports and to the conformity of the bonus policy with Article 81 EC.

83 Secondly, General Motors argues that the Court of First Instance erred in law and distorted the evidence in holding that Opel Nederland's actions did not amount to a cessation of the infringements as soon as the Commission intervened.

84 Thirdly, General Motors argues that, in a number of other cases, the Commission has recognised early termination of an infringement as an extenuating circumstance that justifies a reduction in the fine. It refers in particular to Decision 2002/405/EC of 20 June 2001, relating to a proceeding pursuant to Article 82 of the EC Treaty (COMP/E-2/36.041/PO — Michelin) (OJ 2002 L 143, p. 1), where the termination of the infringement, which had occurred before the statement of objections but three years after the investigation had started and one and a half years after the Commission had conducted on-site inspections, fell 'to be considered a mitigating circumstance'.

Findings of the Court

85 It should be noted at the outset that the first part of this third ground of appeal is directly linked to the arguments of General Motors in support of the first two grounds, according to which the bonus system did not constitute an infringement of Article 81 EC. Since those arguments have been dismissed in the context of the examination of those grounds, the first part of the third ground must therefore also be dismissed.

86 Concerning the second and third parts of the third ground of appeal, the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty provide for a reduction in the basic amount of the fine for extenuating circumstances such as cessation of the infringements as soon as the Commission intervened.

87 It is undisputed that Opel Nederland did not put an end to the bonus system until 20 January 1998, more than a year after the Commission first intervened.

88 In those circumstances, and even if the Commission had reduced the fine in a comparable situation, the Court of First Instance was right to hold, in paragraph 204 of the contested judgment, that the Commission was not required to find extenuating circumstances in the contested decision.

89 The second and third parts of the third ground of appeal, and therefore the ground in its entirety, must therefore be dismissed.

90 Since none of the grounds raised by General Motors in support of its appeal is well founded, the appeal must be dismissed.

Costs

91 Under Article 69(2) of the Rules of Procedure, applicable to the procedure on appeal by virtue of Article 118 of those rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs against General Motors and the latter has been unsuccessful, General Motors must be ordered to pay the costs.

On those grounds, the Court (Third Chamber) hereby:

1. Dismisses the appeal;

2. Orders General Motors BV to pay the costs.

[Signatures]