the infringement of Article 85 (1) of the Treaty which follows therefrom has been committed by the said importer intentionally within the meaning of Article 15 (2) of Regulation No 17 and it matters little whether or not the importer was aware that at the same time Article 85 (1) of the Treaty was being infringed.

3. The fact that, in similar previous cases of prohibited agreements between the person granting the dealership and the dealers, the Commission did not consider that there was reason to impose fines on the dealers as well cannot deprive it of the power to come to a different decision in a fresh case where the conditions for the exercise of the power to impose a fine set out in Article 15 (2) of Regulation No 17 are satisfied. Such difference of treatment does not constitute an infringement of the principle of non-discrimination.

In Joined Cases

32/78 — BMW BELGIUM S.A., Kontich

36/78 — AUTOHANDEL O. COCQUYT N.V., Bruges

37/78 — ÉTS. W. JORSSEN, Wilrijk

38/78 — GARAGE HINDRICKS, Roeselare

39/78 — P.V.B.A. J. SIAU-VERMEESCH, Dendermonde

40/78 — ÉTS. J. DE SMETH, Overijse

41/78 — ÉTS. JO VALLÉ, Bree

42/78 — ÉTS. J. DEPOTTER, Chièvres

43/78 — GARAGE J. WILIQUET S.P.R.L., Verviers

44/78 — ÉTS. RAJANS S.A., Braine-l'Alleud

45/78 — GARAGE VERHAEREN, Brussels

46/78 — S.C. DEWILDE MOTOR, Brussels

47/78 — ÉTS. AUTOGAMAS S.P.R.L., Brussels

48/78 — ÉTS. HOUYOUX, Brussels

49/78 — GARAGE LÉON LOUYET S.P.R.L., Charleroi

50/78 — STATION ALBERT 1er S.A., Genval

51/78 — S.P.R.L. AUTO-SERVICE, La Louvière

52/78 — ÉTS A. PETIT & CO. S.A., Liège

53/78 — ÉTS JEAN BLAISE S.P.R.L., Lobbes

54/78 — ÉTS. CUISINIER, Mons

55/78 — ÉTS. BRIOT S.P.R.L., Namur

56/78 — GARAGE GEORGES ANTOINE, Seraing

57/78 — GARAGE HUBERT SCAILLET, Spontin

58/78 — Éts. Ferracin, Tamines
59/78 — Éts. Le Stop, Wavre
60/78 — Autobedrijf De Ruysscher, Aalst
61/78 — Garage W. Termont-Vermeire, Adegem
62/78 — N.V. Centrauto, Borgerhout
63/78 — Garage R. Geurts & Zn P.v.b.a., Genk
64/78 — Étn. Dekkers, Ghent
65/78 — Étn. J. Vandeperre P.v.b.a., Halle (Brabant)
66/78 — J. Sebrechts, Halle (Kempen)
67/78 — Garage Van Avondt & Zn P.v.b.a., Herent-Leuven
68/78 — Garage A. Ottevaere, Hever
69/78 — Ceres-Leterme P.v.b.a., Ieper [Ypres]
70/78 — Garage St. Christophe P.v.b.a., Kortrijk
71/78 — Garage Vangoidsenhoven, Vissenaken-Kumtich
72/78 — Garage Moderne-Ghyselinck, Lokeren
73/78 — Garage R. Kellens-Behiels, Maasmechelen
74/78 — Garage S. De Mey, Maldegem
75/78 — Etn. J. & M. Sels P.v.b.a., Mechelen
76/78 — Garage Tanghe P.v.b.a., Melsbroek
77/78 — P.v.b.a. Gebr. Van den Bulck, Merksem
78/78 — P.v.b.a. De Kempische Molen, Mol
79/78 — Garage W. Aalbrecht, Opwijk
80/78 — Etn. Erco N.V., Schoten
81/78 — Garage A. Liesens, Tongeren
82/78 — Garage Centrum-Mottoul, Wachtebeke

represented:

— in Case 32/78, by Georges van Hecke, Advocate at the Cour de Cassation, and (for the written procedure) by Jean François Bellis, of the Brussels Bar,

— in Cases 36 to 82/78, by Michel Waelbroek and Georges Vandersanden, Advocates at Brussels,

with an address for service in Luxembourg at the Chambers of E. Arendt, 34 Rue Philippe II,

applicants,

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Antonio Marchini-Camia, acting as Agent, assisted by Francis Herbert and Jean-J. Evrard, Advocates at Brussels, with an address for service in Luxembourg at the office of its Legal Adviser Mario Cervino, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for the annulment of Commission Decision 78/155/EEC of 23 December 1977, relating to a proceeding under Article 85 of the Treaty (IV/29.146/BMW), published in Official Journal 1978, L 46, p. 33,

THE COURT

composed of: H. Kutscher, President, J. Mertens de Wilmars and Lord Mackenzie Stuart (Presidents of Chambers), P. Pescatore, M. Sørensen, A. O'Keeffe and G. Bosco, Judges,

Advocate General: J.-P. Warner
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

I — Facts and written procedure

1. BMW Belgium S.A., Kontich, a subsidiary of Bayerische Motoren Werke AG, Munich, formed in Belgium in July 1973, organized in that Member State, in its capacity as an importer of BMW vehicles, a network of specialized dealers for the distribution of its products. On 13 January 1975 it notified the Commission of the standard form dealership agreement entered into by its

dealers and applied for exemption under Article 85 (3) of the EEC Treaty.

The second sentence of clause 1 (a) of that standard form agreement provided:

"The dealer undertakes, however, not to sell any vehicles or parts to dealers who have not been approved for the distribution of the products covered by the agreement, except for spare parts and components ordered for the purpose of carrying out repairs."

That standard form largely corresponds to the standard agreement which is used as a basis for the distribution system operated by BMW Munich in the Federal Republic of Germany and West Berlin, and which, by the Commission Decision of 13 December 1974, was exempted under Article 85 (3) of the Treaty.

2. During 1975 price control measures were introduced or strengthened by the Belgian Government to contain inflation. Those measures, which were responsible for a freeze of prices for a certain number of products including cars resulted in the retail prices of new BMW vehicles during 1975 and early 1976 being lower in Belgium than in other countries of the Common Market.

The difference in price resulted in new BMW vehicles being re-exported from Belgium to other Member States of the Community and elsewhere. The re-exports of new BMW vehicles, in particular to the Federal Republic of Germany, were at their highest from August to November 1975 inclusive. As the price control measures came to an end on 1 November 1975, with the result that the difference between the Belgian and the German prices narrowed, re-exports to the Federal Republic of Germany became less and less significant as from that date.

3. In several letters addressed to BMW Belgium from January 1975 onwards, BMW Munich informed its Belgian subsidiary of the re-importation of BMW vehicles into the Federal Republic of Germany. By letter dated 23 June 1975 BMW Munich indicated that re-imports of new BMW cars into the Federal Republic of Germany had achieved an excessive degree of publicity and were harming its relations with the BMW dealers in certain areas. BMW Belgium was asked to send a circular to its dealers drawing their attention to BMW's distribution policy; the circular was to make the following points:

"1. The legal situation following approval of the BMW distribution agreement by the Commission of the European Communities is that no BMW dealers may sell to unauthorized dealers. This requires dealers to exercise extreme caution and to have considerable knowledge of the trade when assessing prospective customers."

In a subsequent letter of 22 July 1975 BMW Munich stated *inter alia:*

"... May we remind you that according to the terms of the dealership agreement, re-exports themselves do not constitute a breach and no objection should be taken to individual cases. Please confine your attention to cases where you suspect there has been a sale to an unauthorized dealer in breach of the agreement."

BMW Belgium for its part sent, between May and October 1975, individual letters to several dealers on the subject of the said re-exports. It also sent to all the Belgian BMW agents two circulars, one dated 4 July 1975 and the other 29 September 1975.

The letter dated 4 July 1975, stated, in particular, the following:

"We have to inform you that we have unfortunately received information from BMW's Munich Head Office to the effect that a number of dealers have been selling BMW cars in the Netherlands and the Federal Republic of Germany. At a time when we are having to ration car supplies we can see no justification for such sales.

Furthermore we would remind you that the BMW agreement requires each dealer to refrain from selling any BMW product to dealers who have not been appointed for the sale of BMW goods.

Dealers who sell cars through such unauthorized dealers in Belgium or elsewhere are in serious breach of their BMW distribution agreement.

..."

The second circular, of 29 September 1975, stated *inter alia:*

"Apart from sending individual letters to specific dealers, we wrote to all of you on 4 July 1975 referring you to the provisions of the BMW distribution agreement concerning sales to unauthorized dealers.

However reports are still coming in from our Munich Head Office and from the importer in the Netherlands to the effect that Belgian dealers are selling cars there, and we must unfortunately conclude that these dealers cannot or will not understand the consequences of what they are doing.

...

3. It will be clear that BMW Munich can draw only two conclusions from this:

   (a) Belgian prices are too low;

   (b) Belgian dealers have excessive stocks.

   The consequences are clear enough:

   (a) our prices must be brought up to those of neighbouring countries as quickly as possible;

   (b) supplies of new vehicles to Belgium must be cut back from October 1975.

4. You yourselves are already being put at a serious disadvantage by the fact that at a time when BMW cars are in short supply you are supplying customers who:

   (a) will never come to your workshop;

   (b) will never buy parts of accessories from you;

   (c) will never give you the opportunity to make a further profit on a car sold to you in part exchange;

   (d) will never, unlike most customers in your territory, give you any reason to expect an opportunity to sell them a second or third BMW.

5. Moreover, you will be creating serious difficulties both for yourselves and for the other members of the network by provoking BMW into what would after all be a logical reaction — drastically reducing the number of cars intended for Belgium.

Our view is therefore that in the present situation there is only one solution: henceforth no BMW dealer in Belgium will sell cars outside Belgium or to firms who propose to export them.

...

We therefore ask you to agree to the above proposals by signing the attached copy.

We enclose a statement by the members of the Dealers' Advisory Committee who fully support our arguments and who will meet you personally at regional meetings to explain their views.

Agreed ..."

The statement of the eight members comprising the Belgian BMW Dealers' Advisory Committee, also dated 29 September 1975, expressed the unanimous support of all the members of the Committee for "the statements made by BMW Belgium in its circular of 29 September 1975" and continued as follows:

"... We find it particularly regrettable that the entire distribution network should suffer on account of a small number of dealers who irresponsibly ignore the importer's recommendation of 4 July 1975 by delivering cars for export.

We have therefore asked for the names of these dealers to be made known to us so that we, your Dealers' Advisory Committee, can inform you which of your fellow dealers are responsible for any reduction in the supply of two-door and 518 models to Belgium.

The Dealers' Advisory Committee considers that its most important function is to give good advice to the distribution network and the only advice it has to offer in this case is: No more sales outside Belgium."

4. Of the 90 Belgium BMW dealers 48 signed the copy of the letter which was attached to the circular from BMW Belgium of 29 September 1975 and was returnable for the purpose of indicating agreement.

Having been informed of the steps taken by BMW Belgium, BMW Munich responded with a letter of 17 October 1975, in which it expressed its satisfaction with the action of BMW Belgium in the following terms:

"We are pleased to see what you have been doing about dealers who, by supplying unauthorized dealers in breach of their agreement, have been jeopardizing the efficiency of the BMW distribution network ..."

and continued,

"As already mentioned on 17 January, 23 June and 22 July 1975, we must again ask you, in respect of any measures taken, to bear in mind that:

— no action may be taken against your dealers simply because they have re-exported cars; warnings may be given only where a dealer is suspected of selling cars to non-approved dealers in breach of his agreement,

— no action may be threatened against your dealers unless made necessary by a proved breach of their agreement."

5. On 20 October and 19 November 1975 the Automobilimporte C. Heuer and MGH Motorgesellschaft mbH undertakings, established in the Federal Republic of Germany, informed the Commission that Belgian dealers belonging to the BMW distribution network were no longer willing to supply them certain new BMW models for re-export to the Federal Republic of Germany. That information was supplied in connexion with Article 3 (2) (b) of Regulation No 17/62 of the Council (Official Journal, English Special Edition 1959-1962, p. 87) and with its possible application in view.

The two undertakings claimed that in sending their orders to those dealers they were acting as "agents" on behalf of the consumers and not as "dealers".

In a letter of 24 November 1975 MGH suggested to BMW Belgium that it should agree that MGH would in future import new vehicles into the Federal Republic of Germany on the basis of the written authorization of the producers in the Federal Republic of Germany who were involved. On 2 December 1975 BMW Belgium replied that MGH had still provided no proof that it was indeed acting only as agent, and the fact that it described itself as an agent was immaterial to the actual nature of its business.

Having commenced an investigation into the affair, the Commission sent to BMW Belgium a letter dated 26 November 1975 for the purpose of establishing whether and to what extent BMW Munich, BMW Belgium and the Dealers' Advisory Committee had prevented re-exports from Belgium to other countries of the Common Market.

On 27 January 1976 MGH applied for an interlocutory injunction against BMW Belgium in the Rechtbank van Koophandel [Commercial Court], Antwerp, under Article 54 of the Belgian Trade Practices Act and Article 85 (1) of the EEC Treaty.

On 20 February 1976 BMW Belgium sent a further circular to all Belgian BMW distributors in which it stated, *inter alia:*

"On 29 September 1975 we wrote to you on the subject of the new situation arising on the Belgian market following the sale of new BMW vehicles to dealers in other countries in 1975.

...

We are informed that this circular and the letter attached to it are regarded by outsiders as instructions from importers to dealers, although this was not our intention.

If this has been the case, we should now like to put an end to any misunderstanding.

It was not in the past, nor is it now, our intention or that of the Dealers' Advisory Committee to impose specific instructions on you or to prohibit you from exporting. You are to regard our circular of 29 September 1975 as null and void in so far as it might be construed as an export prohibition.

The object of our letter of 29 September was to remind you that, under your distribution agreement your are prohibited from selling BMW vehicles to unauthorized dealers in Belgium or elsewhere.

In no case do we wish or did we wish to prevent a BMW dealer from trading with an agent acting for private customers, but we do oppose transactions between BMW and resellers.

..."

MGH's application to the Rechtbank von Koophandel, Antwerp, for an injunction against BMW Belgium ended on 11 March 1976 with a judgment embodying the terms of an amicable settlement. That judgment confirmed BMW Belgium's undertaking to refrain from refusing to sell or from allowing to be sold, through its Belgian distribution system, new vehicles to MGH, on condition that MGH ceased acting as a dealer and limited itself to the role of an agent, justifying, where appropriate, each sale by the production of a proper authorization.

In the meantime MGH had brought an action for damages against BMW Belgium in the Landgericht [Regional Court] Bielefeld (Federal Republic of Germany), alleging an infringement of Article 85 (1) of the EEC Treaty. In its judgment of 27 September 1977 the Landgericht Bielefeld dismissed the action finding *inter alia* as follows:

"The decisive factor is not the way in which the plaintiff or any buyer chose to regard the plaintiff's activity, but the way in which its activity was bound to be regarded by others, in particular by the defendant. Considering the external circumstances, an outsider, judging by the form of the various contractual relations, could only reach the conclusion that the plaintiff was a dealer.

Moreover the defendant's circular of September 1975 might be regarded as such a prohibition (a general prohibition on exporting). However, there is no point in giving a definitive reply to that question.

Article 85 of the EEC Treaty does not go so far as to protect against a prohibition those who may legitimately be subject to a prohibition on selling.

That would be precisely the situation of the plaintiff acting as a dealer ...".

Further, an exchange of letters took place between the Heuer undertaking and BMW Belgium between October and December 1975, the outcome of which was that BMW Belgium sent to Heuer a letter dated 23 January 1976, worded as follows:

"By your letter of 15 December 1975 you have supplied us with proof that you have not recently been engaged in any activity other than that of an agent in importations.

We hereby confirm that we will not raise any objection in the future to your activity as an agent."

6. In the meantime the Commission had followed the procedure laid down in Article 3 of Regulation No 17/62 of the Council, and finally, on 23 December 1977, adopted the decision which is the

subject of the present applications and was addressed to BMW Belgium and to the 47 Belgian BMW dealers who signed the circular of 29 September 1975. In that decision, published in the Official Journal of the European Communities of 17 February 1978 (Official Journal 1978 L 46, p. 33), the Commission confirmed the existence in this case of two agreements prohibited under Article 85 (1) of the Treaty:

— The agreement which the 47 Belgian BMW dealers had entered into with BMW Belgium and with each other, resulting from their written declaration accepting BMW's circular of 29 September 1975;

— The agreement which the eight members of the Dealers' Advisory Committee had entered into with each other and with BMW Belgium and on which was based the circular from the Advisory Committee of 29 September 1975, the contents of which had been approved by BMW Belgium.

Article 1 of the decision stated that it was thereby established that the undertakings to which the decision was addressed

"... infringed Article 85 (1) of the Treaty establishing the European Economic Community by agreeing on the general export prohibition called for in the circular from BMW Belgium of 29 September 1975 and the circular from the Belgium BMW Dealers' Advisory Committee, and maintaining that prohibition from 29 September 1975 to 20 February 1976."

On the basis of that finding, Article 2 of the decision imposed fines, the amount of which varied according to the degree of responsibility established on the part of: (a) BMW Belgium, (b) the eight members of the Dealers' Advisory Committee and (c) the other 39 dealers. Further, for three members of the Advisory Committee the fine was lower than for the other five members, by reason of their lower turnover. Finally Article 3 of the decision stipulated that the fines were payable within three months from the date of notification of the decision.

7. BMW Belgium, the members of the Belgian BMW Dealers' Advisory Committee and the 39 Belgian BMW dealers mentioned in the decision made the present application, challenging that decision, on 10 and 15 March 1978.

By an order of 12 April 1978, the Court decided to join Cases 36 to 82/78 for the purpose of the written and oral procedure, and Cases 32/78 and 36 to 82/78 for the purpose of the oral procedure.

Having heard the report of the Judge-Rapporteur and the views of the Advocate General, the Court opened the oral procedure after asking BMW Belgium and the Commission a number of questions.

II — Conclusions of the parties

The applicants claim that the Court should annul Commission Decision of 23 December 1977 and order the Commission to pay the costs.

The defendant claims, in all the cases, that the Court should dismiss the applications as unfounded and order the applicants to bear the costs.

III — Submissions and arguments of the parties

A — Case 32/78

1. Infringement of Article 85 of the Treaty

BMW Belgium points out, in the first place, that the Commission itself did not seriously dispute that MGH and Heuer acted as non-approved dealers during the period under consideration. The text of the disputed decision did not adopt certain passages of the notification of complaints, in which it is stated that the two undertakings acted as agents and that they were among the undertakings who were adversely affected by the prohibition. The decision avoided that problem, merely stating (paragraph 22) that it was unnecessary to determine whether MGH and Heuer, in attempting to obtain more BMW vehicles, were acting solely as agents for consumers outside Belgium. In fact, it was expressly acknowledged by the Acting Director of the Commission's Directorate of Restrictive Practices and Abuse of Dominant Positions, at the hearing on 23 March 1977, that the argument that MGH and Heuer had acted as agents was untenable.

Hence the procedure before the Commission was initiated as a result of complaints submitted by undertakings which were not entitled to claim supplies of BMW cars. That fact allows the question to be raised whether those undertakings really had a "legitimate interest", within the meaning of Article 3 (2) (b) of Regulation No 17/62, in the Commission's initiating of a procedure in the present case.

(a) The meaning of the circulars of 29 September 1975

Having made that preliminary observation, BMW approaches the substance of the dispute by examining first of all the question of the real meaning of the circulars of 29 September 1975 (the circular from BMW Belgium and the letter, attached thereto, from the Belgian BMW Dealers' Advisory Committee). In the opinion of BMW Belgium, it is erroneous to interpret those circulars as having as their object or effect the prohibition of exports of BMW cars: their object was solely to remind Belgian BMW dealers of the prohibition on selling to non-approved dealers. In fact:

(i) In order to interpret those circulars correctly, it is necessary in the first place to adhere to the *text* thereof. The text refers explicitly to the circular of 4 July 1975, which the Commission recognizes is in no way unlawful, and which merely recalls (second paragraph) the undertaking entered into by the Belgian BMW dealers, under the dealership contract "not to refrain from selling any BMW product to dealers who have not been appointed for the sale of the BMW goods".

Contrary to the statement of the Commission, the list of disadvantages set out in point 4 of the circular of

29 September 1975 does not in any way constitute confirmation of BMW Belgium's intention to prohibit sales to consumers residing outside the area. Those disadvantages relate essentially to sales to non-approved dealers who resell the vehicles at a considerable distance from the dealer's area. On the other hand, a consumer resident outside the area may perfectly well purchase parts or accessories from the dealer from whom he buys a BMW, sell him his car in part exchange, and even buy from him his second or third BMW.

As for the circular of the same date issued by the Dealers' Advisory Committee, that also was intended, in expressing the Committee's regret over the behaviour of certain dealers who had not followed the recommendation contained in the circular of 4 July 1975, to put a stop to practices (deliveries to non-approved dealers) contrary to the obligations contained in the dealership agreement.

The Commission's argument was based on a method of interpretation which consisted in disregarding the clear, decisive passages in the circulars and in concentrating on other passages which, removed from their context, were capable of suggesting the intention of the part of BMW Belgium to prohibit all exports.

That method, doubtful in itself, is still less justified if the circumstances in which the circulars of 29 September 1975 were sent out are brought to mind. Following the price freezing measures adopted by the Belgian Government, operations on the Belgian market by non-approved dealers — especially from Germany and the Netherlands — had become increasingly frequent throughout 1975. It was precisely with the aim of putting an end to those operations that BMW Belgium asked its dealers no longer to "sell cars outside Belgium or to firms who propose to export them".

(ii) Secondly, the real meaning of those circulars of 29 September 1976 may be inferred from the *legal and factual context in which they are set.*

On the one hand, the issue of a further circular after that of 4 July 1975 was done as a result of instructions given to BMW Belgium by BMW Munich. As BMW Munich had always insisted — as is recognized by the disputed decision itself — in its contacts with BMW Belgium, that the objective was to stop sales by dealers to non-approved dealers and not to prohibit exports as such, it was difficult to imagine that BMW Belgium, a wholly-owned subsidiary of BMW Munich, in sending the circular could have been pursuing any aim other than that — laid down by the parent company — of preventing the continuation of sales to non-approved dealers. The file does not contain any factor of such a nature as to defeat that presumption. On the contrary, BMW Munich exercised particularly tight control over the activities of BMW Belgium: at the material time, three executives of BMW Belgium were employees of BMW Munich. The

Commission was wrong to interpret the letter from BMW Munich of 17 October 1975 as indicating that BMW Munich had seen the measures taken by BMW Belgium as constituting an absolute export prohibition. In that letter BMW Munich repeated the directives given in its previous letters: if it had felt that that directive had not been observed by BMW Belgium, BMW Munich would not have failed to react.

Further, the circulars in question must be seen in the context of a series of letters which were addressed by BMW to certain Belgian dealers individually between 29 May and 23 October 1975 and which, far from being ambiguous, recalled the terms of clause 1 of the agreement.

The very fact that the date on which most of those letters were sent was very close to that of the circular of 29 September 1975 from BMW Belgium, contradicts the interpretation given to that circular by the Commission. It hardly seems plausible that such a circular could have been intended to prohibit exports absolutely when letters addressed to the same people individually within a matter of days disclosed only a concern to prevent deliveries to non-approved dealers.

Two of those individual letters addressed on 23 October 1975, that is to say three weeks after the circular of 29 September 1975, to the dealers Warnez and Yde, who BMW Belgium had good reason to believe had delivered cars to non-approved dealers in Germany, clearly confirmed, at a time when no suspicion had been aroused, that the aim of the said circular was to remind dealers of the prohibition on sales to "non-approved dealers", laid down in clause 1 of the agreement.

(iii) Thirdly, in order to define the real meaning of the circulars of 29 September 1975, it is necessary to interpret them in the light of the *conduct of the parties.* Both the conduct of BMW Belgium and that of its dealers prove in fact that the circular of 29 September 1975 must be interpreted as a reminder of the undertakings arising under clause 1 of the agreement.

— As for the conduct of *BMW Belgium,* there are numerous factors proving that, during the period from 29 September 1975 to 20 February 1976, BMW Belgium did not at any time object to sales by Belgian dealers to private individuals or approved dealers outside Belgium: it objected only to sales by its dealers of BMW cars to non-approved dealers.

In sending the circular of 20 February 1976 to its dealers, BMW Belgium's only aim was to remind them of the terms of the dealership contract. Its attitude at that juncture could not have been dictated by the Commission's request for information of 26 November 1975. It was not until 17 November 1976 that the Commission, in its notification of the complaints, informed BMW Belgium of its objections with regard to the circular of 29 September 1975.

— As for the *dealers,* it is established that they continued to sell BMW vehicles to private individuals and to approved dealers outside Belgium after 29 September 1975. Those exports — the reduction in which as from 1 November 1975 was due to a price increase in Belgium, showing that the circular of 20 February 1976 did not have the effect of increasing sales outside Belgium in relation to the situation which was created by the circulars of 29 September 1975 — were effected not only by the dealers who had not signed the circular of 29 September 1975, but also by dealers who had signed that circular. Their conduct confirms that the dealers interpreted the circular as a reaffirmation of clause 1 of the agreement.

If the Court should consider it necessary, BMW Belgium is ready to prove by all forms of evidence, and in particular by witnesses, that the circulars of 29 September 1975 were interpreted by the dealers in that way.

The fact, relied on by the Commission (defence, p. 20), that immediately after the circular of 29 September 1975 the dealer Sels notified MGH of its decision to refuse all deliveries "without proof of MGH's capacity", does not prove the opposite. It did not require a great deal of research to ascertain in what capacity MGH was acting. The fact that MGH ordered 12 vehicles at once in its own name was such as to enable Sels immediately to identify MGH as a dealer (non-approved).

Further, it is artificial to lay down a distinction between dealers according as they did or did not return to BMW Belgium the signed copy of the circular. All the dealers of the BMW network received a copy of the circular and none indicated its disagreement. As BMW Belgium did not send a reminder insisting that the dealers sign the circular, no one can say how many more dealers would have signed in the event of a reminder. Moreover, no appreciable difference is discernible in the conduct of the dealers who signed the circular and those who did not sign it. Therefore it is not permissible to state that the failure to sign on the part of a number of dealers must necessarily be interpreted as an indication of any sort of disagreement with the terms of the circular: it would perhaps be more realistic to see in that a sign of negligence more than anything else.

In the light of all those factors BMW Belgium concludes that the circulars of 29 September 1975 were intended only as a reminder of the undertakings arising under clause 1 of the agreement, and that they were not interpreted by the recipients as going beyond that aim or as being meant to impose a general prohibition on exports from Belgium. The Commission's argument (defence, page 20) to the effect that neither the members of the Advisory Committee nor

the dealers contested the existence in this case of an infringement of Article 85 (1) of the Treaty, is contradicted by the very fact that they are all requesting primarily the annulment of the decision in question.

(b) The significance of signing the BMW Belgium circular of 29 September 1975

The applicant resolutely submits that in this case no "agreement" was entered into contrary to Article 85 (1) of the Treaty. The requirement that the dealers *sign* the circular from BMW Belgium of 29 September 1975, which the Commission considers to constitute the agreements objected to, was a mere formality arising from a purely practical consideration.

The fact that BMW Belgium asked its dealers to return to it a signed copy of the circular does not in any way imply that the circular had the meaning which the Commission ascribes to it. As numerous dealers were no longer complying with clause 1 of the dealership agreement, it was not unreasonable of BMW Belgium to ask them to renew their undertaking in writing. Furthermore a request to that effect was addressed to certain dealers individually in a letter sent by BMW Belgium.

But, to be strictly accurate, there was another reason why BMW requested its agents in this case to sign the copy of the circular and to return it. That reason is essentially practical in nature: it was to prevent the circular of 29 September 1975 from passing unnoticed in the flood of documents received almost daily by the Belgian BMW dealers from BMW Belgium (134 circulars at least, between July 1975 and the end of February 1976, on various subjects, to which must be added the ordinary correspondence, invoices, forms etc. . . .). As far as BMW Belgium was concerned, the formality of signing the circular did not create a binding agreement in civil law. It was merely a means of drawing the dealers' attention to the text of the circular: that is why no reminder was issued to the dealers who did not return to copy of the circular.

2. The fine

In the first place, the *imposition* of the fine was unjustified.

The above considerations make it clear that BMW Belgium cannot have meant to ask its dealers to subscribe to a general prohibition, but that its sole aim was to prevent sales to non-approved dealers. Although some of the terms of the circular of 29 September 1975, taken out of context, may have created the impression that BMW Belgium's aim went beyond that, it cannot be said that BMW Belgium acted with the "deliberate intention" of committing an act contrary to the Treaty. Precisely to avoid committing such an act, BMW Belgium submitted the text of the circular to its usual legal adviser: that was evidence of its concern to comply with the law.

Moreover, the duration of the alleged infringement, assessed at five months by the decision, could have been considerably shortened if the Commission had notified its objections to the circular of 29 September 1975 sooner. In fact it was of its own initiative that BMW Belgium sent the circular of 20 February 1976 to its network of dealers: that circular could have been issued sooner if the Commission had informed BMW Belgium of its objections, even if only provisionally, after receipt of the earlier circular.

Secondly the *amount* of the fine was unjustified, it being too high, having regard particularly to:

— the nature of the "infringement", which in fact amounted to no more than the use of a few words which were inappropriate, in that they exceeded the intention of their author, in a text the general tenor of which was not unlawful,

— the short period between the issue of the circular of 29 September 1975 and of the circular of 20 February 1976,

— the fact that the alleged infringement had no real effect on trade between Belgium and the other countries of the Community, other than to make more difficult the purchase in Belgium of new BMW vehicles by non-approved dealers, that is to say by firms which, in any case, could not legitimately claim to be entitled to supplies of cars.

The *Commission* replies by describing first the practice followed by it, and also the case-law of the Court on the interpretation and application of Article 85 of the EEC Treaty, as regards export prohibitions.

It goes on to describe the special features of the car market and, having briefly summarized the fact of the dispute, it sets out the context in which the arguments arose. In that regard, it points out that these concern not the prohibition on sales to non-approved dealers, which a selective distribution system such as that operated by BMW Munich imposes upon the dealers, but rather the proposal made by BMW Belgium to its agents, in its circular of 29 September 1975, that they should cease exporting vehicles from Belgium, which, apart from not being authorized within the context of the selective distribution system, is, on the contrary, expressly excluded by Commission Decision of 13 December 1974, authorizing BMW Munich to operate that system.

It is not contested that at the material time, there existed a considerable price difference between Belgium and the Federal Republic of Germany and that the subsequent changes in Belgium and in the other Member States brought about a levelling off in the differences between the prices charged to consumers and the decline in exports to Germany. But all that is irrelevant in so far as it is established that the circulars at issue were intended to prohibit all exports to other Member States: as the object of the agreement was unlawful, the question whether that agreement had any appreciable effect on intra-Community trade is irrelevant.

Further, the question whether the BMW Belgium dealers' refusal to deliver to MGH and Heuer can be justified on the ground that those two undertakings must be regarded as "resellers", would be relevant in reviewing the disputed decision only if that decision were specifically based on a consideration of their capacity. That is not the case. The question whether the refusal to deliver to MGH and Heuer was not justified and the question whether there existed a "legitimate suspicion" with regard to those two undertakings, as regards their capacity as "resellers", did not play any part in the adoption of the decision: that decision related solely to the terms of an agreement imposing on the Belgian BMW dealers a *general* prohibition (of indefinite duration) on all sales outside Belgium.

As regards, in particular, the applicant's interpretation of the letter from the dealer Sels of 6 October 1975, the fact that MGH ordered from Sels in its own name 12 vehicles at once does not in any way prove that the order received by Sels could come only from a non-approved dealer. That order could also have come from an approved dealer or from an undertaking which wished to purchase a fleet of cars of the same make (the latter case was expressly provided for by the agreement).

Having made those general points, the Commission considers in more detail the arguments contained in the application, making in essence the following observations:

1. The infringement of Article 85 of the Treaty

(a) The meaning of the circulars of 29 September 1975

None of the arguments relied on by the applicant in support of its interpretation of the circulars of 29 September 1975 confirms that its submission is well founded.

(i) In the first place, as regards the *text* of the circulars, although it is true that the circular from BMW Belgium of 29 September 1975 refers to that of 4 July 1975, in which the applicant endeavoured to restrict the sales prohibition to non-approved dealers, it is none the less beyond dispute that, apart from that reference, the circulars taken as a whole refer to export operations in general without distinction. To become convinced of that it is sufficient to read the passages of the circular in which BMW Belgium, after confirming the existence of exports to the Federal Republic of Germany and the Netherlands, without making any distinction between sales authorized under the agreement and those not authorized, and after explaining the reasons for that phenomenon (point 2), lists the difficulties to which it gives rise, both for BMW Munich (point 3) and the purchaser (point 4). It is precisely because of those difficulties that the circular ends by indicating the path to be followed, stating that "henceforth no BMW dealer in Belgium will sell cars outside Belgium or to firms who propose to export them" (point 5, second paragraph).

A more thorough analysis of those difficulties shows that the real purpose of the circular was to prohibit all exports of BMW vehicles.

The only relevant question, given that list of difficulties, is whether, having regard to the explicit, unequivocal text of the proposals contained in the circular, the disadvantages listed indicated clearly that the proposals applied only to sales to non-approved dealers. An affirmative reply is possible only if the said disadvantages could apply solely to the case of a sale to non-approved dealers. But that was not the case: the difficulties listed, by their nature, related to all sales outside the dealers' area, particularly to all exports, whether the sales were to non-approved dealers, to approved dealers outside the area, to consumers or to agents acting on behalf of consumers.

Further, if the aim of the circular really was to remind dealers of the prohibition already imposed by clause 1 of the dealership agreement, it was not necessary to ask the dealers, as the circular did, to indicate in writing their agreement "with the above proposals". In that regard, it is significant that, in applications 36 to 82/78, neither the members of the Dealers' Advisory Committee nor the dealers themselves contested the existence of the infringement alleged by the Commission. The letter which the dealer Sels — a signatory of the circular — sent to the applicant on 6 October 1976 seems moreover to confirm this. Similarly, the circular from the Dealers' Advisory Committee is quite unequivocal. Admittedly it refers to the circular from BMW Belgium of 4 July 1975, but it is also true that it recommends the Belgian BMW agents to refrain from all exporting, giving them the advice: "No more sales outside Belgium."

(ii) Secondly, as for the argument based on the *legal and factual context* in which the circulars of 29 September 1975 must be set, that argument may be met by comparing the terms of those circulars with the very different tenor of the letters sent by BMW Munich to BMW Belgium.

The claim that BMW Belgium, being a wholly-owned subsidiary of BMW Munich, could not, in sending the circulars in question, have a different purpose from that laid down by the parent company, cannot constitute a useful criterion for the interpretation of those circulars. The intention of BMW Munich, as expressed in its letter of 17 October 1975, was a purely internal matter, forming part of the parent company's instructions to its subsidiary, which instructions were extraneous to the company's relations with third parties.

The external circumstances which, for the sake of argument, might remove from the agreement in question (comprising the circular from BMW Belgium and the dealers' acceptance

thereof) the meaning which must be ascribed to it if its terms standing alone are taken into consideration may only be circumstances affecting *all the parties* to the agreement, that is to say circumstances affecting the recipients of the circular also, and not circumstances affecting only one of those parties, such as, for example, internal instructions given by the parent company to its subsidiary. Therefore the argument based on those instructions does not permit of the claim that the circular must have had a different meaning for the dealers from that expressed by its clear wording.

Moreover, the argument based on the sending of individual letters falls down for several reasons and renders the applicant's offer of proof on that issue quite irrelevant. The letters in question engender confusion between permitted activities and prohibited ones. What is more, a series of letters passed on to the Commission by Counsel for the applicants in Cases 36 to 82/78 bears witness to the general policy of export prohibition and to BMW Belgium's insistence that the dealers should abstain from all exports, even legitimate ones (rejoinder, annexes 7, 8 and 9).

Further as regards the letters and prior to the circulars, they could not eliminate all doubt as to the meaning of the circulars except to the extent to which those letters constituted circumstances affecting all the parties to the agreement. In fact that is not the case: as they concerned only a limited number of signatories, the letters in question can at most restrict the scope of the circulars with regard to that limited number. Besides, even in the case of the signatories, those letters do not prove the restricted meaning claimed for the circulars of September 1975. In those letters BMW Belgium reacted by attacking infringements of the agreement expressly and clearly, whilst the terms of the said circulars expressed general prohibition on exports. In those circumstances, it cannot be said that the dealers who received the letters and the circulars could have construed the prohibition obtained in the latter restrictively, because, if the prohibition was limited in scope, BMW Belgium would have used the terms of the personal letters. As regards the two letters, quoted in the reply (page 10), subsequent to the circulars, they too are incapable of throwing light on the meaning, for those concerned, of the circulars of 29 September 1975, for the simple reason that they were subsequent to the circulars (as was the clarification from BMW Munich to BMW Belgium of 17 October 1975) and also because they were addressed to dealers who had not signed the circular and so were not parties to the agreement.

Finally, the position of the other dealers who signed the circular and who had not received personal letters must not be forgotten. In the case of those dealers, it may be wondered whether, faced with the terms of those circulars, they must

not have seen therein an extension of the scope of the previous circular of 4 July 1975.

Further, BMW Belgium, by reason of its general and special knowledge, as a wholly-owned subsidiary of BMW Munich, of the scope of the prohibition contained in Article 85 (1) of the Treaty in relation to selective distribution, must have been aware that a general export prohibition constituted an obstacle to the exemption which it was seeking under paragraph (3) of the said article for the Belgian dealership agreement. Whilst it had notified that agreement, it had also, in a document not covered by the notification and intended not to leave the restricted circle comprising its dealers, reintroduced a general prohibition on exporting which it had taken good care not to insert into the agreement.

(iii) As regards the *conduct of the parties,* the fact that the applicant did not oppose sales to individuals or to approved dealers abroad by Belgian dealers does not constitute proof of the restricted meaning of the circular of 29 September 1975, in so far as the applicant could know of those exports only after being informed thereof by the network in the neighbouring country in which the sales had taken place, and in the meantime the instructions from BMW Munich of 17 October 1975, the Commission's request for information of 26 November 1975 and the proceedings commenced by MGH in the Rechtbank van Koophandel, Antwerp, on 27 January 1976 must have persuaded it to be somewhat cautious.

Further, the applicant's attempts to show that the recipients of the circulars of 29 September 1975 understood and could only understand those circulars as a prohibition on exports in accordance with clause 1 of the dealership agreement could only succeed if it were proved that the persons concerned, *taken as a whole,* (namely all or almost all, the dealers, signatories or non-signatories) could have understood the circulars in no other way. At the very least, it must be proved that all the parties to the agreement (namely, apart from BMW Belgium, the 47 signatories) could interpret those circulars only in a more restricted sense than that which would normally follow from the terms thereof. For that purpose the applicant mentions six dealers (reply, page 13) who, after receiving the circular, exported cars for private individuals. But apart from the fact that:

— two of those six dealers did not sign the circular from BMW Belgium;

— the exports in question (very few in number) could have been the result of a deliberate intention not to comply with the instructions received;

— those exports seem above all to concern "transit" operations which were authorized at the time when the dealership agreement imposed a general export prohibition,

and even if it be admitted — which it is not — that the dealers in question understood the circular in the sense suggested by the applicant, nevertheless the fact that just a few of the recipients of the circulars may have interpreted

them in a more restricted sense that the terms thereof suggest cannot prove that the great majority of the dealers did the same.

In fact, neither the members of the Advisory Committee nor the dealers themselves contest, in their applications 36 to 82/78, the existence in this case of the infringement alleged by the Commission, which clearly suggests that the circular in question was intended to impose a general export prohibition. When in the course of the hearing before the Commission the applicants attempted to place the circulars in their context, they endeavoured in fact to demonstrate the absence of agreement on their part and not the absence of an intention to restrict trade (application, annex 17, p. 10).

The Commission infers from those factors that BMW Belgium and the signatories of the circular of 29 September 1975 concluded agreements the object of which was to prohibit exports of BMW cars from Belgium to other Member States, and which were of unlimited duration.

(b) The significance of signing the circular from BMW Belgium of 29 September 1975

In the Commission's submission, the signing by the dealers concerned of the circular from BMW Belgium of 29 September 1975 was a constituent element of the agreement concluded between those parties. Requiring the dealers to sign the circular was not just a simple device to prevent it from passing unnoticed. In truth,

— the fact that BMW Belgium has, on other occasions, insisted on signature in order to compel a party in breach of its obligations to renew a previous undertaking does not preclude signature from being required when a new undertaking is entered into following 'proposals';

— if the only purpose of requiring signature of the circular was to prevent it from passing unnoticed, it would have been logical, on finding that it had apparently come to the attention of scarcely half of the recipients, to send a reminder in order to be certain that the circular had not been 'swamped in the mass of paper';

— everything suggests that the object of requiring the circular to be signed was to enable BMW Belgium to know which of the dealers expressed their agreement on a general policy prohibiting exports. That requirement must be seen in the light of the thinly veiled threat which occurs in the circular issued by the Advisory Committee.

(2) The fine

As regards the *principle* of imposing a fine, the Commission points out in the first place that the applicant's argument to the effect that it did not act 'intentionally', finds no support in the advice of its Counsel of 26 September 1975. The fact of distributing a circular the terms of which clearly express a general export prohibition must be taken to indicate the deliberate intention, not the gross negligence, of the author thereof. To accept any argument to the contrary would be to open the door to dubious practices and to make it more difficult for the Commission to prove a deliberate intention.

Secondly, the fact that the instructions given by BMW Munich to its wholly-owned subsidiary BMW Belgium tended to advocate a limited, rather than a total export prohibition is not decisive. The Commission was entitled to conclude in its decision that BMW Belgium, although subject to the controlling authority of BMW Munich, none the less enjoyed a sufficient degree of autonomy to decide on the content of its circular. Apart from the fact that, in the course of the administrative procedure, BMW Belgium never argued that its dependence on BMW Munich went so far as to prevent it from deciding itself on the contents of the circular in question, it should be noted that BMW Munich, by limiting its intervention on 19 October 1975 to a mere reminder of the limits within which a selective distribution system may restrict exports, seems to confirm that it was leaving its Belgian subsidiary sufficient managerial autonomy to decide itself on the contents of its circular.

In fact, BMW Belgium's failure to react quickly to the interventions of BMW Munich and in particular to those of 17 October 1975 is significant; the instructions from the parent company, the fears expressed by the applicant's Counsel and the Commission's request for information on 26 November 1975 should have ensured that BMW Belgium was under no illusion as to the extensive, and therefore illegal, scope of the two circulars in question. Those circumstances, and moreover the clear wording of those circulars, prove on the contrary that, in asking the dealers to sign the circular of 29 September 1975, the applicant deliberately attempted to obtain, through the conclusion of an agreement and without any form of notification to the Commission, something which the Commission refused BMW Munich and which the applicant knew to be contrary to Article 85 (1) of the Treaty and not capable of being exempted under Article 85 (3), namely a general export prohibition.

Furthermore, even if it be admitted that BMW Munich did not allow BMW Belgium such autonomy, the only consequence is that the conduct in question must be regarded as being marked by a unity of action on the part of the two companies, so that it would be permissible to ascribe that conduct to them both so as to hold them jointly liable for the infringement of Article 85 of the Treaty. The fact that, accepting that hypothesis, the Commission omitted to take advantage of that unity of action so as to extend the liability of the subsidiary to the parent company can in no way vitiate the legality of the decision taken against the subsidiary.

If, in spite of all those factors, the Court none the less were to consider that the deliberate nature of the infringement alleged by the disputed decision has not been proved, there would arise the question whether it should not, in exercise of its unlimited jurisdiction (under Article 17 of Regulation No 17/62), substitute its decision for that of the Commission and declare that the infringement was committed negligently, as there is in any case evidence before it to prove negligence.

Further, as regards the *amount* of the fine, the Commission emphasizes that it matches the degree of blame on the part of the applicant, which, in full awareness of the limits to its selective distribution system, did not hesitate deliberately to infringe Article 85 of the Treaty.

The applicant's arguments to the effect that the duration of the infringement could have been shortened if the Commission had informed it of its objections sooner is unfounded. The record of the facts shows that every stage of the administrative procedure, which concerned a large number of undertakings and following which the decision in question was taken, was executed by the Commission without respite and without any appreciable delay. On the contrary it was BMW Belgium which, by not reacting more swiftly to the above-mentioned matters, contributed to the gravity of the infringement.

Taking account of the tenor of the circular of 29 September 1975, its context, the nature of the selective distribution system, which is in itself restrictive, but none the less permitted under Article 85 (3) of the Treaty, and the fact that the fine was not only punitive in aim, but was also meant to constitute a deterrent, both particular and general, the fine imposed in this case does not appear excessively severe.

B — Cases 36 to 82/78

(1) Submissions and arguments of the applicants

The *applicants* begin their factual arguments with general considerations which apply to all the applications. First they challenge the assertion that the undertaking entered into by them at the request of BMW Belgium 'henceforth to sell no cars outside Belgium' was understood or interpreted as having the object or the effect of partitioning the markets. In fact:

— the entire legal and factual context in which the events in question occurred, from BMW Munich's letters addressed to BMW Belgium between 17 January and 17 October 1975, to the circulars from BMW Belgium of 4 July 1975, 29 September 1975 (first paragraph) and 20 February 1976, shows that the circulars of 29 September 1975 concerned only the prohibition of sales to non-approved dealers.

— The letters, produced by the defendant in Annex 5 to its defence, sent by BMW Belgium to certain dealers to remind them of their contractual obligation not to sell to 'non-approved dealers', show clearly that the sole concern of BMW Belgium was to ensure compliance with the selective distribution system, in the form in which it had been accepted as valid by the Commission, and reveal, once again, that the intention both of the importer and of the dealers was to avoid sales outside Belgium to non-approved dealers. The fact that MGH and Heuer experienced 'increasing difficulties in obtaining new vehicles in Belgium' does not in any way prove that the prohibition on parallel imports was strengthened, simply because it was

lawful not to deliver to non-approved dealers, such as those two undertakings. As is shown by the answers reproduced in the annex to the reply, those letters had no effect on the conduct of the dealers with regard to sales outside Belgium. In this regard, it is worth noting that no complaint was received from private individuals, non-dealers, for the good reason that the alleged general export clause was never applied to them.

— Contrary to the Commission's submission, it is by no means irrelevant to inquire as to the exact nature of the activities of MGH and Heuer, because it is precisely the climate of 'legitimate suspicion' existing on that point throughout the Belgian network of BMW dealers which explains to a large extent the terms of the circulars of 29 September 1975, and which shows how in reality BMW Belgium and its dealers wished to safeguard the selective distribution system against the activities of non-approved dealers.

— In order to appreciate fully the significance of the undertaking entered into by the applicants when they signed the BMW Belgium circular of 29 September it is essential to emphasize the dealers' total economic dependence on BMW Belgium. It is sufficient to read in particular the provisions of clauses 3 and 6 to 16 of the agreement to become convinced of that. The effect — taking into account also the fact that the greater part of the dealers' turnover comes from the sale of BMW cars and spare parts — is that the dealers are practically obliged, on pain of losing their dealership, to accede to the wishes of BMW Belgium.

— Moreover, it should not be forgotten that, in view of the not inconsiderable disadvantages of sales-outside a dealer's area, it is natural that the dealers should give priority to sales to customers from their area, without there being any need to see in that conduct any intention to oppose sales abroad on principle.

— Besides, as is clear from the letters contained in the annex to the reply, the circulars in question did not have any effect on the conduct of the dealers with regard to sales outside Belgium.

In support of these arguments, the applicants state their readiness to prove, *inter alia*, by all forms of evidence, that MGH and Heuer were not acting as agents and that there existed, at the time when the circulars of 29 September 1975 were signed a psychological climate of distrust amongst the Belgian BMW dealers with regard to the would-be agents who were in reality nothing but independent dealers. Further, they criticize the Commission's statement to the effect that they did not deny 'the unlawful nature of the agreements

prohibiting exports', or the fact that 'the circulars of 29 September 1975 restrict competition'. That statement goes too far and does not express the real intentions of the applicants. If the latter had wished to limit their actions to challenging the imposition of the fines, they would not have asked for the annulment of the Commission's decision, but only for the annulment of the fines imposed or a reduction thereof. Although they had chosen in their applications not to challenge the allegation that the circulars of 29 September 1975 were contrary to the rules on competition, that was because they considered that that role fell rather to BMW Belgium, which had assumed the responsibility for sending the incriminated circular and which had in a way 'enjoined' the members of the Advisory Committee to follow its lead.

Further, the Commission cannot rely on the minutes of the hearing before the Commission (defence, p. 14) to infer that the applicants accepted the unlawful nature of those circulars. There it had simply been said that 'if one considers it in the abstract and removed from its context, the circular of 29 September 1975 may be interpreted as an agreement between undertakings, the object of which was to restrict competition and to affect trade between Member States' (minutes of the hearing, p. 10).

Going on to examine the precedents (decisions of the Commission, case-law of the Court), relied on by the defendant in support of its argument that the position adopted in the present case in the disputed decision was in accordance with a practice and a case-law that are consistent and hence well-known, the applicants object that neither those decisions nor that case-law are relevant to the present case. Admittedly the Commission has always been concerned about the harmful effects on competition which may ensue from exclusive and selective distribution clauses in the motor trade, in particular from the prohibition of parallel imports, but it has not always adopted such a severe and repressive attitude towards those clauses as it has in the present cases.

Having made those general points, the applicants develop their legal arguments:

(a) *Cases 44 to 82/78 (Dealers other than the members of the Advisory Committee)*

(i) As regards their *participation in the agreement restricting competition,* the applicants point out in the first place that the question whether the dealers consented freely is a question of fact: in each case it is necessary to consider whether, in the absence of the constraints imposed upon the dealers by the risk of losing their dealership if they were to oppose the will of the supplier, the dealers would have indicated their agreement to the circular of 29 September 1975 in the same way, that is to say without reservation.

Even if one were compelled to admit that economic dependence is not sufficient to vitiate consent, it would not necessarily follow that there is justification for imposing a fine on dealers for having participated under those conditions in an agreement, however unlawful it may be.

Moreover, contrary to the Commission's argument, the fact that certain dealers refrained from sending back the signed circular to BMW Belgium does not prove in itself that they refused to participate in an infringement of Article 85 of the Treaty. In the first place, it may be pointed out that none of those dealers expressly refused to sign the circular on the ground that it was contrary to the provisions of the said article. Secondly, it is beyond dispute that many of those dealers considered that the circular did not concern them because of their size and their geographical location (it was only exceptionally that they sold abroad); others perhaps simply neglected to act upon it.

Finally it should be noted that the economic dependence of the dealers on BMW Belgium, even supposing, as the Commission does, that it was not total, may have been sufficient to induce some of them to sign an agreement although they did not necessarily approve of all its terms. It cannot be denied that there was insistence on the part of BMW Belgium that the dealers should give their agreement. Such was the role which BMW Belgium had caused the members of the Advisory Committee to play; the latter did not even take part in the drafting of the circular which they signed for sending to the dealers.

The applicants end by pointing out, in the light of certain cases specifically cited, that in all its previous decisions whereby fines were imposed for infringements of Article 85 (1) of the Treaty on account of dealership agreements, the Commission had never penalized dealers, but only those granting the dealership. By treating the Belgian BMW dealers, apparently without valid reasons, more severely than in the past it treated dealers placed in comparable situations, the Commission infringed the principle of non-discrimination to the detriment of those dealers.

(ii) Going on to state their position with regard to the *imposition of the fine*, the applicants repeat that it was never their intention to subscribe to a general export prohibition. At the time of the two meetings which took place on 13 and 31 October 1975 between BMW Belgium and its dealers, after the issue of the circulars of 29 September 1975, the dealers expressed their concern over the conduct of certain dealers in Belgium and abroad who were reselling outside Belgium, and, in the course of the meeting of 31 October 1975 they protested to BMW Belgium, which in its correspondence was apparently treating in the same manner those who had sold to non-approved dealers and those who had complied with their undertakings (see annex 6 to the defence, p. 6). Besides, the object of the discussion which took place on 31 October 1975 was not to prohibit all sales of vehicles abroad, but to see that all the dealers complied with their undertakings, in particular by taking care not to sell to non-approved dealers.

(b) Cases 36 to 43/78 (Members of the Advisory Committee)

These *applicants* likewise deny having intended to commit an infringement of Article 85 (1) of the Treaty.

Taking account of the psychological climate of distrust which prevailed at that time throughout the network of Belgian BMW dealers with regard to the would-be agents, who were in reality nothing but independent dealers, the applicants considered that by giving their agreement they were merely doing their duty as members of the Advisory Committee.

In the first place, they did not take any initiative in the matter. As the Commission observes, it was on the initiative of BMW Belgium that the members of the Advisory Committee were induced to give their agreement to the terms of the "warning" of 29 September 1975. That document was drafted in advance by BMW Belgium and the applicants were called together merely for the purpose of approving it. One cannot rule out the possibility that, by seeking the support of the Advisory Committee, BMW Belgium expected to obtain the agreement of the dealers to its circular of 29 September 1975 more easily. However that may be, as from the moment when they were asked to give their support, the only course open to the applicants, by virtue of the degree of economic dependence binding them to BMW Belgium was to fall into line. Secondly, at no time during the preparation of the incriminated circulars did the members of the Advisory Committee have in mind the risk of a possible application of Article 85 (1) of the Treaty. In their view, as in the view of all the dealers, the agreement could not have had any effect other than that authorized by the selective distribution system. That is indeed why the members of the Advisory Committee had considered it was useful to draw the particular attention of the dealers to the fact that their concern was solely to prevent sales to non-approved dealers.

Admittedly, the terms of the "warning" might seem excessive, but a look at the first paragraph of the circular of 29 September 1975 makes clear that in it BMW Belgium is reminding the dealers of the prohibition, laid down in the agreement, on selling to "non-approved dealers". The practical difficulty experienced by the dealers in distinguishing between genuine agents and independent dealers largely explains the terms of the circular and of the "warning", but does not affect its real meaning, which in the minds of the signatories thereto was to protect the Belgian selective distribution network against exports effected at the request of non-approved dealers.

Thus it was wrong to claim that the applicants had acted "intentionally" and had "consciously" infringed the Community rules. Moreover, the applicants, who manage their undertakings personally, do not run a legal department which could have drawn their attention to the risks of approving the terms of the circular of 29 September 1975. Hence it is unjust to ascribe to them — as the Commission does — a knowledge of the case-law of the Court and the practice of the Commission, in

particular the decision of 13 December 1974 granting exemption to BMW Munich.

As for the *amount* of the fine, the applicants point out that they have been subjected to a heavier fine than that imposed on the other dealers simply because they were members of the Advisory Committee at the time. In this connexion they emphasize that, as regards their presence on the Advisory Committee, although they were elected when they put themselves forward, none the less it was only by chance that the dispute now before the Court occurred during the period in which they were members of the said committee.

In those circumstances it is going too far to make that fact alone a basis for the imposition of a heavier fine than that imposed on the other dealers. In so far as it imposes such a fine on the members of the Advisory Committee, the decision should therefore be annulled on the ground that it is insufficiently and unclearly reasoned, as well as being contrary to Article 15 of Regulation. No 17/62 of the Council and to the principle of non-discrimination.

The applicants end by adding to the offer of proof made jointly with the other dealers a further offer to prove that the "warning" of 29 September 1975 was drafted by BMW Belgium and presented by it for signature to the members of the Advisory Committee on the occasion of a meeting convened for that purpose.

(2) Submissions and arguments of the Commission

Replying first of all to all the applications, the *Commission* recalls its own practice and the case-law of the Court on the subject of export prohibitions. It points out that in general both are governed by a concern to prevent the partitioning of national markets and to ensure that parallel imports may be made. That is particularly true in the motor-car sector in which for many years BMW Munich has been negotiating with the Commission with regard to the possibility of securing exemption for a series of agreements on imports and distribution affecting not only the German market, but also that of other Member States.

Having clarified those points, the Commission states emphatically, with regard to all the applications, that the disputed decision is not based on the refusal to sell to MGH and Heuer as proof of the existence of an infringement of Article 85 of the Treaty. The question whether or not that refusal was justified in the light of clause 1 (a) of the dealership agreement, and the existence of a "legitimate suspicion" on the part of the dealers as to whether those two undertakings were genuinely acting as agents has no relevance to this case: such factors could not alter the legal appraisal of a clause which prohibits the Belgian BMW dealers in a general manner from continuing to "sell cars outside Belgium or to firms who propose to export them" (circular from BMW Belgium of 29 September 1975).

The aim of restricting competition pursued by the agreements and resulting from the dealers' acceptance, as between

each other and as against BMW Belgium, of the circular of 29 September 1975, is confirmed by the general tenor of that circular and by the Advisory Committee's "warning" attached thereto and, if necessary, by the conduct of the parties.

The applicant's argument to the effect that the undertaking entered into by the dealers at the request of BMW Belgium was not understood or interpreted as having the object or the effect of partitioning the markets does not stand up to the obvious implications of the very terms of the circular and the "warning" or of the factual and legal context in which they are situated. The argument relied on in this regard by the applicants whereby the circulars in question did not have any effect on the conduct of the dealers as regards sales outside Belgium is not relevant, since the possible lack of any such effect does not enter into consideration once it is established that the object of the agreement was restrictive of competition.

Further, as regards the argument based on the inherent disadvantages of sales outside a dealer's area, it is sufficient to observe that those disadvantages apply to all such sales, including sales to approved dealers, to private individuals and their agents. Following that line of argument, there would also be justification, in the eyes of the dealers, for refusing to sell to such purchasers, as moreover is expressly confirmed by the terms of the circular from BMW Belgium of 29 September 1975 stating under point 4 the disadvantages of sales outside a dealer's area.

The Commission concludes these general considerations by stating that the infringement of Article 85 (1) of the Treaty arising from the agreements at issue was committed "intentionally" by BMW Belgium and by the members of the Advisory Committee, and "negligently" by the other dealers.

It then states its views, with regard to each group of applicants, on the legal arguments advanced by the applicants.

(a) Cases 44 to 82/78

(i) On the question of *participation* in the agreement restricting competition, it points out in the first place that the existence of close ties amounting to economic dependence on BMW Belgium cannot be regarded as sufficient to vitiate consent, at least not to the point of holding that there was not, in spite of the signing of the letter attached to the circular from BMW Belgium of 29 September 1975, genuine agreement, that is to say "the expression of an independent will with a real possibility of choice".

In fact, the close economic dependence of the dealers on the supplier is a factor common to all the selective distribution agreements and one which the Commission has always taken into account in that sphere.

Further, the question which arises is not whether greater independence would have made it easier for the dealers to refuse to sign the circular from BMW Belgium of 29 September 1975, but

whether the restriction on their independence of which they complain precluded their free consent. Whatever their reasons may have been, the fact that some dealers did not sign suggests that refusal was possible in face of the "proposals" which they must have known to be contrary to the rules on competition. Even if it cannot be denied that there was "insistence" on the part of BMW Belgium to induce the dealers to give their consent, that fact must have made those dealers realize that, as was clear from the text thereof, the function of the circulars was not limited to a proposal to subscribe to undertakings already entered into under the dealership agreement.

The applicants' analysis of the reasons why some dealers did not sign the circular is irrelevant to the case. In particular, the argument based on the geographical situation of those dealers in relation to the frontiers is unfounded, because in several cases the dealers in question, although situated near the French frontier or in the middle of the country, had delivered to private individuals in Germany.

Similarly, as regards the argument based on the priority to be given to sales in each dealer's area, although such a priority seems natural, it does not however justify, from the dealers' point of view, entering into an undertaking not to export.

(ii) Going on to consider the *imposition of the fine*, the Commission states that such a fine is based on the dealer's negligence, which, by its very nature, does not require the author of the act to have performed it intentionally.

The minutes of the meetings of 13 and 31 October confirm, moreover, that the distinction between sales to non-approved dealers, prohibited by the agreement, and other export operations was well-known to the dealers. The applicants omit to mention that those minutes also refer to "sales to private individuals in Germany" and speak in a general manner of the disadvantages of sales outside the dealer's area (defence, annex 6, p. 6).

In fact, a dealer distributing cars must have known in September 1975 that a clause prohibiting exports was contrary to Article 85 (1) of the Treaty, because,

— the unlawfulness of a clause prohibiting exports had been recognized by the Court on several occasions, between 13 July 1966 and the time at which the events in question occurred (see judgment 25/75 *Van Vliet);*

— as BMW dealers, the applicants must have been particularly well informed in that sphere, since it was precisely with regard to BMW Munich that the Commission's decision granting exemption was taken on 13 December 1974, subject to the express condition that any prohibition on exports to private individuals or to agents be removed;

— the specialist press in the motor trade had moreover given a detailed account of the content and the implications of that decision (defence, annex 2);

— various debates and questions in the European Parliament had underlined the importance of the question of export prohibitions in the motor trade (defence, annex 1);

— after removing the export prohibition BMW Munich submitted new dealership agreements to its dealers and in accompanying letters drew their attention to that essential difference as against the previous version;

— as is evidenced by the aforesaid minutes of the meetings of 13 and 31 October 1975, the dealers had the question of exports specifically brought to their notice.

Finally the Commission challenges the applicants' argument to the effect that the Commission, never having imposed fines on dealers in the past, could not do so in the present case. It points out that following that line of argument, it could never rely on Article 15 (2) of Regulation No 17 if it had not done so in its first decision on the subject. Apart from the fact that that argument disregards the discretionary power of the Commission in this sphere, it prevents the Commission from taking into account in its decisions the need to allow undertakings a period of adaptation before they comply with the rules on competition in specific sectors, whereas once that period has come to an end and the method of applying those rules has been clarified, the Commission should be able to apply with full severity the prohibitions contained in Article 85 of the Treaty and to impose sanctions.

(b) Cases 36 to 43/78

(i) As regards the *imposition of the fine*, the Commission observes that the applicants are wrong to claim that they did not intend to commit the infringement in question. When a contractual clause forming part of an agreement clearly has an object which is indisputably restrictive of competition, it necessarily follows that the author intended to commit the infringement. By sending their "letter" attached to the circular from BMW Belgium of 29 September 1975, supporting the proposals contained therein and urging the dealers to fall in with them, the members of the Advisory Committee actively participated in the infringement: thus their intention to commit it is proved.

The argument based on the psychological climate of "suspicion" which is said to have prevailed at the time throughout the Belgian network and on the need to prevent sales to non-approved dealers is not sufficient to exclude such an intention. First, the nature of MGH's and Heuer's activities does not prove anything about the object of the circular. Secondly, the members of the Advisory Committee should have realized that their intervention with the dealers would give special weight to any proposal made by BMW Belgium. Since they must have known that the export prohibition was contrary to Article 85 of the Treaty, the members of the Advisory

Committee, if their concern really was to prevent sales to non-approved distributors, should have insisted on that point in their circular: precisely the opposite occurred, for not once did the circular refer to sales to non-approved dealers. It is not by chance that the members of the Advisory Committee, in the special position *vis-à-vis* the dealers which they occupied of their own choice, actively supported a proposal to prohibit exports, thus urging the other dealers to give their consent to it. Therefore it is natural that they be held responsible for the unlawful consequences resulting from their conduct. The fact that no complaint was lodged by private buyers is not relevant to this case: the applicants themselves are in a good position to know that a private individual, however well-informed of his rights he may be, rarely involves himself in proceedings against commercial undertakings.

None the less the Commission recognized that some of the factors put forward by the applicants affected the *gravity* of their responsibility for the infringement. Thus, in the disputed decision (paragraph 26), the economic dependence (from which it may be inferred that they did not act on their own initiative) was accepted as a mitigating circumstance.

(ii) As to the *amount of the fine*, the Commission denies that the applicants suffered a heavier fine by virtue of the fact — purely fortuitous according to them — that they were members of the Advisory Committee at the time. The greater severity of the fine was due to the fact that, occupying a position which entailed a certain amount of responsibility and authority in the relations between BMW Belgium and its dealers, the applicants supported, with the weight of that authority, the proposals of BMW Belgium and thus took a more active part in the infringement than the other dealers.

III — Oral procedure

The parties presented oral argument at the hearing on 28 March 1979.

The Advocate General delivered his opinion at the hearing on 12 June 1979.

Decision

1 By applications lodged on 10 and 15 March 1978, the applicants asked for the annulment of Commission Decision 78/155/EEC of 23 December 1977 relating to a proceeding under Article 85 of the EEC Treaty (Official Journal 1978, L 46, p. 33), censuring them for having subscribed to an export

prohibition contrary to Article 85 (1) of the EEC Treaty and imposing fines on them by reason of that infringement.

2 As Cases 32/78 and 36 to 82/78 were joined for the purpose of the oral procedure, it is proper to keep them joined for the purpose of the judgment.

3 BMW Belgium, which is a wholly-owned subsidiary of the Bayerische Motoren Werke AG company of Munich (hereinafter referred to as "BMW Munich"), on 13 January 1975 notified to the Commission the standard form distribution agreement entered into by its dealers and applied for exemption under Article 85 (3) of the EEC Treaty. That standard form agreement contains no general export prohibition but prohibits Belgian BMW dealers from selling new BMW vehicles to non-approved dealers. Further, it largely corresponds to the standard agreement which is used as a basis for the selective distribution system operated in the Federal Republic of Germany and West Berlin by BMW Munich, which the Commission, by Decision of 13 December 1974 (Official Journal 1975 L 29, p. 1), exempted under Article 85 (3) from the prohibition laid down in the first paragraph of that article, on the ground in particular that no prohibitions on exports were laid down in the terms of the agreement.

4 In fact one of the essential characteristics of the selective distribution system thus authorized by the Commission is that the BMW dealers, although undertaking not to sell to non-approved dealers, remain free to sell not only within their own area, but also anywhere else in the Common Market, to other BMW dealers, to consumers or to their agents.

5 In 1975 the prices of new BMW cars were appreciably lower in Belgium than in other Member States, by reason, at least in part, of the price-freezing measures imposed by the Belgian Government between 5 May and 1 November 1975.

This discrepancy in prices brought about an increase in re-exports of BMW vehicles from Belgium to other Member States, particularly to the Federal Republic of Germany and to the Netherlands. A number of those exports were made to non-approved dealers who were not acting on behalf of the consumers.

6 In several letters addressed to BMW Belgium starting in January 1975, BMW Munich informed its Belgian subsidiary of the re-imports of new BMW vehicles into the Federal Republic of Germany. It asked BMW Belgium to send circulars to its dealers drawing their attention to BMW's distribution policy.

BMW Belgium reacted by sending a number of letters to certain of its dealers reminding them particularly of the terms of clause 1 of their agreement, which provided at (a) that "the dealer undertakes not to sell to dealers who are not approved for the distribution of the products covered by the agreement, except for spare parts and components ordered for the purpose of carrying out repairs".

7 On 4 July 1975 it addressed to all the Belgian BMW dealers a circular in which it informed them that a number of dealers had been selling BMW cars in the Netherlands and the Federal Republic of Germany, and reminding them that "the BMW agreement requires each dealer to refrain from selling any BMW product to dealers who have not been appointed for the sale of BMW goods".

8 As the re-exports from Belgium none the less continued BMW Belgium sent a number of letters of Belgian dealers concerning those exports. Referring to one of those letters, BMW Munich wrote to BMW Belgium on 22 July 1975, in the following terms

"... May we remind you that according to the terms of the dealership agreement, re-exports in themselves do not constitute a breach and no objection should be taken to individual cases. Please confine your attention to cases where you suspect there has been a sale to an unauthorized dealer in breach of the agreement."

9 On 29 September 1975 all the Belgian BMW dealers were sent two circulars on the basis of which the Commission considered that Article 85 (1) had been infringed. The first of those circulars, issued by BMW Belgium itself, stated *inter alia:*

"Apart from sending individual letters to specific dealers, we wrote to all of you on 4 July 1975 referring you to the provisions of the BMW distribution agreement concerning sales to unauthorized dealers.

However, reports are still coming in from our Munich Head Office and from the importer in the Netherlands to the effect that Belgian dealers are selling cars there and we must unfortunately conclude that these dealers cannot or will not understand the consequences of what they are doing.

. . .

3. It will be clear that BMW Munich can draw only two conclusions from this:

   (a) Belgian prices are too low,

   (b) Belgian dealers have excessive stocks.

   The consequences are clear enough:

   (a) our prices must be brought up to those of neighbouring countries as quickly as possible,

   (b) supplies of new vehicles to Belgium must be cut back from October 1975.

4. You yourselves are already being put at a serious disadvantage by the fact that at a time when BMW vehicles are in short supply you are supplying customers who:

   (a) will never come to your workshop;

   (b) will never buy parts or accessories from you;

   (c) will never give you the opportunity to make a further profit on a car sold to you in part exchange;

   (d) will never, unlike most customers in your territory, give you any reason to expect an opportunity to sell them a second or third BMW.

5. Moreover, you will be creating serious difficulties both for yourselves and for the other members of the network by provoking BMW into what would after all be a logical reaction — drastically reducing the number of cars intended for Belgium.

Our view is therefore that in the present situation there is only one solution: henceforth no BMW dealer in Belgium will sell cars outside Belgium or to firms who propose to export them.

...

"We therefore ask you to agree to the above proposals by signing the attached copy.

We enclose a statement by the members of the Dealers' Advisory Committee who fully support our arguments and will meet you personally at regional meetings to explain their views.

Agreed ..."

12 The second circular, also dated 29 September 1975, containing the statement of the eight members comprising the Belgian BMW Dealers' Advisory Committee, under the heading "Export sales" expressed the unanimous support of the members of the Committee for "the statements made by BMW Belgium in its circular of 29 September 1975" and continued as follows:

"... We find it particularly regrettable that the entire distribution network of dealers should suffer on account of a small number of dealers who irresponsibly ignore the importer's recommendation of 4 July 1975 by delivering cars for export.

We have therefore asked for the names of these dealers to be made known so that we, your Dealers' Advisory Committee, can inform you which of your fellow dealers are responsible for any reduction in the supply of two-door and 518 models to Belgium.

The Dealers' Advisory Committee considers that its most important function is to give good advice to the BMW distribution network and the only advice it has to offer in this case is: No more sales outside Belgium!"

Of the 90 Belgian BMW dealers, 48 (one of whom has since died) indicated their agreement by signing the copy of the letter attached to the circular from BMW Belgium of 29 September 1975.

11 Having been informed of the steps taken by BMW Belgium, BMW Munich reacted with a letter of 17 October 1975 in which, after congratulating BMW Belgium on its action with regard to sales to non-approved dealers, it continued in the following terms:

"As already mentioned on 17 January, 23 June and 22 July 1975, we must again ask you, in respect of any measures taken, to bear in mind that:

— no action may be taken against your dealers simply because they have re-exported cars; warnings may be given only where a dealer is suspected of selling cars to non-approved dealers in breach of his agreement,

— no action may be threatened against your dealers unless made necessary by a proved breach of their agreement."

12 BMW Belgium waited four months before acting upon those instructions by sending a further circular on 20 February 1976 to all the Belgian BMW distributors, in which it stated, *inter alia:*

"On 29 September 1975 we wrote to you on the subject of the new situation arising on the Belgian market following the sale of new BMW vehicles to dealers in other countries in 1975.

...

We are informed that this circular and the letter attached to it are regarded by outsiders as instructions from importers to dealers, although this was not our intention.

If this has been the case we should now like to put an end to any misunderstanding.

It was not in the past, nor is it now, our intention or that of the Dealers' Advisory Committee, to impose specific instructions on you or to prohibit

you from re-exporting. You are to regard our circular of 29 September 1975 as null and void in so far as it might be construed as an export prohibition.

The object of our circular of 29 September 1975 was to remind you that under your distribution agreement you are prohibited from selling BMW vehicles to unauthorized dealers in Belgium or elsewhere.

In no case do we wish, or did we wish, to prevent a BMW dealer from trading with an agent acting for private customers, but we do oppose transactions between BMW dealers and resellers.

. . ."

13 In the meantime, on 20 October and 19 November 1975 the Automobilimporte C. Heuer and MGH Motorgesellschaft mbH undertakings, established in the Federal Republic of Germany, had informed the Commission that approved dealers belonging to BMW Belgium's distribution network were no longer disposed to deliver them certain models of new BMW vehicles for re-export to the Federal Republic of Germany. That information was given in the context of, and for the purpose of, the possible application of Article 3 (2) (b) of Regulation No 17/62 of the Council (Official Journal, English Special Edition 1959-1962, p. 87).

14 On 3 November 1976 the Commission decided to initiate, against BMW Belgium and the Belgian BMW dealers who had signed the letter attached to its circular of 29 September 1975, the procedure which ended in the adoption of the disputed decision.

15 According to that decision the aforesaid circulars of 29 September 1975 made clear the intention of BMW Belgium and of the members of the Advisory Committee to stop all exports of new BMW vehicles from Belgium. Article 1 of the decision concludes therefrom that BMW Belgium, the members of the aforesaid Advisory Committee and the Belgian BMW dealers who signed the letter attached to the circular from BMW Belgium of

29 September 1975, did, on the basis of the said circulars, commit, "intentionally" in the case of BMW Belgium and of the members of the Advisory Committee, and "negligently" in the case of the aforesaid Belgian BMW dealers, an infringement of the provisions of Article 85 (1) of the EEC Treaty by agreeing on the general export prohibition and by maintaining that prohibition from 29 September 1975 to 20 February 1976. The disputed decision specifies that by agreeing on such a prohibition the applicants participated in agreements which might affect trade between Member States and which had as their object the prevention, restriction and distortion to an appreciable extent of competition within the Common Market, within the meaning of the aforesaid Article 85 (1).

16 The said decision also declares that as no notification of such agreements has been made in accordance with Article 4 (1) of Regulation No 17/62 of the Council, Article 15 (5) of that regulation is not applicable and the decision imposes, by Article 2 thereof, fines of varying amounts for the infringement in question.

(1) The infringement of Article 85 (1) of the EEC Treaty

17 (a) BMW Belgium raises first the question whether the procedure relating to the disputed decision, initiated as a result of complaints submitted by Heuer and MGH, constitutes a valid legal basis for the said decision. In that regard it submits that, as MGH and Heuer did not act as agents for consumers, they were not entitled to supplies of new BMW cars. Therefore, it submits, there is no reason to ask whether those undertakings really had in this case a "legitimate interest", within the meaning of Article 3 (2) (b) of Regulation No 17/62, in the initiation of the procedure in question by the Commission.

18 Under Article 3 (1) of the said regulation the procedure relating to decisions which require undertakings or associations of undertakings to bring to an end an infringement of Articles 85 and 86 of the Treaty may be opened "where the Commission, upon application or upon its own initiative, finds"

that there is such an infringement. In that case it matters little whether Heuer and MGH had in this case a "legitimate interest" in requesting the opening of the procedure, as the Commission was entitled to do so upon its own initiative.

19 (b) The applicants also challenge the legality of the disputed decision by submitting that a thorough examination both of the text of the circulars of 29 September 1975 and of the general context in which those circulars are set and of the conduct of the parties shows that the sole object of the said circulars was to remind the Belgian BMW dealers of the prohibition on selling to non-approved dealers, occurring in clause 1 of the dealership agreement, and that it was precisely in that sense that they were understood by the dealers who signed the letter attached to the circular from BMW Belgium.

20 Although it is true that the circular from BMW Belgium of 29 September 1975 begins with a reminder of the terms of the dealership agreement concerning sales to non-approved dealers, that does not alter the fact that that reminder is not accompanied by any distinction between the case of non-approved dealers who, acting on their own account, are not entitled to supplies from Belgian BMW dealers and the case of dealers who, acting as agents for consumers, are entitled to such supplies by virtue of the selective distribution system notified to the Commission. Moreover, the text of that circular taken as a whole, and the text of the circular of the same date from the Advisory Committee, refer to export operations in general.

21 Thus paragraph 3 of the circular from BMW Belgium, indicating the foreseeable reaction of BMW Munich to resales of new BMW cars from Belgium to the Federal Republic of Germany and the Netherlands, refers to circumstances which have nothing at all to do with the capacity of the purchaser of the products exported. Similarly, paragraph 4 of that circular, listing the disadvantages arising from re-exports outside Belgium, refers to difficulties — such as the absence of the continued relationship with the purchaser, the impossibility of selling him parts or accessories, etc. — which apply to all

sales abroad, whatever may be the capacity of the purchaser, approved dealer or not and, in the latter case, agent or not of the consumer.

22 Finally, the statement contained in the circular from BMW Belgium that "our view is therefore that in the present situation there is only one solution: henceforth no BMW dealer in Belgium will sell cars outside Belgium or to firms who propose to export them" and the statement occurring in the circular from the Advisory Committee, in which the only advice given was to effect "no more sales outside Belgium", express unequivocally the intention to stop all supplies to foreign destinations, whatever may be the capacity of the purchaser, approved dealer or not, consumer or consumer's agent.

23 The legal and factual context in which the circulars of 29 September 1975 are set confirms moreover that, by sending the said circulars to the Belgian BMW dealers, BMW Belgium and the Advisory Committee exceeded the terms of the BMW dealership agreement as regards resales to non-approved dealers. In this regard it is sufficient to compare the terms of those circulars with the reservations expressed by BMW Munich in its communications of 22 July 1975 and 17 October 1975 addressed to BMW Belgium. In the first of its communications, in which reference is made to a letter of 9 July 1975 sent by BMW Belgium to a Belgian dealer on the subject of re-exports of new vehicles, BMW Munich expressly recalls the dealership agreement authorized by the Commission, under which only deliveries to independent dealers are prohibited. In the second communication, subsequent to the circulars of 29 September 1975 and sent to BMW Belgium as a result of those circulars, BMW Munich reverts to the conditions of the dealership agreement, specifically stating that no steps may be taken against the Belgian dealers "simply because they have re-exported cars".

24 The argument that BMW Belgium, being a wholly-owned subsidiary of BMW Munich, could not have pursued an aim different from that prescribed by the parent company cannot in this case usefully contribute to the interpretation of the circulars in question. The bond of economic dependence

existing between a parent company and the subsidiary does not preclude a divergence in conduct or even a divergence in interests between the two companies. The reservations expressed by BMW Munich in the aforesaid communications, particularly in that of 17 October 1975, confirm moreover that the point of view expressed in those circulars, taking into account particularly the wording thereof, called for clarification from the parent company.

25 Having regard to that warning, BMW Belgium should have become aware of the urgent need to amend its circular of 29 September 1975. In fact it was not until 20 February 1976, after four months' delay, that BMW Belgium sent a new circular to all its dealers, stating that its circular of 29 September 1975 should be regarded as null and void "in so far as it might be construed as an export prohibition".

26 Moreover, the correspondence between BMW Belgium and some of its dealers during the period from 29 September 1975 to 20 February 1976 does not reveal any factor suggesting that the circulars of 29 September 1975 were conceived by their authors as imposing an export prohibition applying only to non-approved dealers. The individual letters sent by BMW Belgium in the course of that correspondence to some Belgian dealers engendered confusion between permitted activities and prohibited activities and were sometimes worded in such a way as to give the impression that no export sale, even to consumers or their agents, could be allowed.

27 Finally the fact, relied on by the applicants, that in spite of these circulars the Belgian dealers continued to sell new BMW vehicles abroad after 29 September 1975, is not decisive. The information supplied by BMW Belgium in response to a question from the Court concerns only 28 cases out of the 59 cases of re-exportation of which BMW Belgium had knowledge between October 1975 and February 1976.

28 For all those reasons, therefore, it must be concluded that the circular from BMW Belgium of 29 September 1975 and the circular from the Belgian Dealers' Advisory Committee of the same date, considered according to their tenor and in relation to the legal and factual context in which they are set and in relation to the conduct of the parties, indicate an intention to put an end to all exports of new BMW vehicles from Belgium.

29 In sending those circulars to all the Belgian dealers, BMW Belgium played the leading role in the conclusion with those dealers of an agreement designed to halt such exports completely.

30 The Belgian dealers, including the members of the Advisory Committee who gave their consent to the circular from BMW Belgium of 29 September 1975 did, by virtue of that consent, subscribe to such an agreement, the detailed content of which is determined by the said circulars.

31 Having regard to their content and their scope, the above-mentioned agreements had as their object the prevention, restriction or distortion to an appreciable extent of competition within the Common Market in respect of a product of a particular make.

32 By attempting to partition the markets, as regards the export of products of a particular make, those agreements were also capable of affecting trade between the Member States within the meaning of Article 85 (1) of the Treaty.

33 Therefore it follows that BMW Belgium, the members of the Advisory Committee and the Belgian dealers who signed the circular of 29 September 1975 did, on the basis of the circulars in question, subscribe to agreements incompatible with the Common Market and prohibited by the said Article 85 (1).

34 As the agreements were maintained in force until the date of the circular from BMW Belgium of 20 February 1976, the applicants were guilty of an infringement, lasting until that date, of the provisions of the aforesaid article.

35 BMW Belgium and the members of the Advisory Committee, authors of the circular of 29 September 1975, intentionally addressed those circulars to the Belgian dealers, thereby inviting them to subscribe to an agreement whereby they undertook not to re-export the products in question. In so doing, BMW Belgium and the members of the Advisory Committee thus committed the said infringement intentionally.

36 As for the participation in that infringement of the Belgian dealers who signed the circular of 29 September 1975 from BMW Belgium, although it is true that the bonds of economic dependence existing between them and BMW Belgium were liable to affect their freedom of initiative and decision, the existence of those bonds did not make it impossible to refuse to consent to the agreement which was proposed to them, as is shown by the considerable number of dealers who refrained from doing so.

37 Having regard to the terms of the dealership agreement concluded with BMW Belgium, it cannot be accepted that the Belgian BMW dealers did not understand that the circular from BMW Belgium of 29 September 1975, considered according to its text and in the light of the warning contained in the circular of the same date from the Advisory Committee, as requiring the cessation of all sales abroad, or that they were unaware of the fact that by giving their consent in writing to the proposal of BMW Belgium they were agreeing to an export prohibition which went beyond the selective distribution conditions of BMW Munich.

38 For those reasons the applications are unfounded, in so far as they refer to Article 1 of the disputed decision.

(2) The fines

39 On account of the infringement referred to in Article 1, Article 2 of the disputed decision imposes fines on BMW Belgium and on the 47 Belgian BMW dealers who took part in that infringement by virtue of Article 15 (2) (a) of Regulation No 17/62 of the Council.

40 It is clear from the disputed decision that in imposing those fines the Commission considered, on the one hand, that BMW Belgium and the members of the Belgian Dealers' Advisory Committee "were aware that in agreeing a general export prohibition they were infringing Article 85 (1) of the EEC Treaty", and, on the other hand, that the Belgian BMW dealers who signed the letter attached to the circular from BMW Belgium of 29 September 1975 were guilty of negligence.

41 (i) BMW Belgium claims first that, in so far as the circular of 29 September 1975 merely reminded dealers of the prohibition on sales to non-approved dealers, laid down in the clause 1 of the dealership agreement notified to the Commission, Article 2 of the disputed decision was in infringement of Article 15 (5) (a) of Regulation No 17/62, in so far as that provision imposes a fine on BMW Belgium on account of a clause which had been notified.

42 As the interpretation proposed by BMW of its circular of 29 September 1975 has been rejected on the grounds set out above, that argument cannot be upheld.

43 BMW Belgium then submits that, even if there was an infringement of Article 85 (1) of the Treaty it did not commit that infringement intentionally, its true intention being solely to stop sales to non-approved dealers. The alleged proof of that is, *inter alia*, the fact that it took the precaution of obtaining Counsel's advice on the text of its circular of 29 September 1975.

44 It is clear from the foregoing that the circular from BMW Belgium of 29 September 1975, having regard to its tenor and to the legal and factual context in which it is set and to the conduct of the parties, clearly expresses an intention to stop all exports of new BMW vehicles from Belgium, irrespective of the capacity of the purchasers, be they non-approved dealers, consumers or agents acting on behalf of consumers.

Since it cannot be denied that the terms of the circular in question were laid down by the applicant, it is irrelevant whether or not it was aware, in so doing, that it was at the same time infringing the prohibition contained in Article 85 (1) of the EEC Treaty.

45 BMW Belgium further submits that the duration of the infringement in question could have been considerably shortened if the Commission had notified it of its objections to the circular of 29 September 1975.

That argument must be rejected, having regard, in the first place, to the fact that it was not until 20 October 1975 that the Commission was informed by the MGH undertaking of the refusal of certain Belgian approved dealers to supply new BMW vehicles for re-exportation, and secondly to the fact that as early as 17 October 1975 BMW Munich had drawn the attention of BMW Belgium to the parts of the circular which were not in order.

46 Finally BMW Belgium alleges that the amount of the fine in question is too high, having regard to the short period between the issue of the circular of 29 September 1975 and of the circular of 20 February 1976 and to the fact that the infringement had no real effect on the trade between Belgium and the other Member States of the Community, other than to make more difficult the purchase of new BMW vehicles in Belgium by non-approved dealers, that is to say by firms which in any case could not legitimately claim to be entitled to such supplies.

47 As to the first point, it is sufficient to note that the Commission expressly took account, in the sixth subparagraph of paragraph 26 of its decision, of the duration of the infringement in fixing the amount of the fine imposed on BMW and on the eight members of the Advisory Committee and that nothing in the arguments relied on by those concerned shows that that amount was disproportionate in relation to their turnovers.

48 As for the second point, it is to be noted that the applicant itself recognizes that the number of re-exports of new BMW vehicles from Belgium and other Member States was, particularly from August 1975, sufficiently large to induce BMW Belgium to intervene more and more frequently in the affairs of its Belgian distribution network, to the point where it considered it necessary to send out and have distributed throughout that network the circulars of 29 September 1975 which are at issue.

49 (ii) The members of the Belgian Dealers' Advisory Committee also submit that they were wrongly accused in the disputed decision of having "intentionally" infringed the provisions of Article 85 (1) of the Treaty and that it was wrong to impose a heavier fine on them than on the other dealers simply because they were members of the Advisory Committee at the time. In that regard they emphasize that, although they were elected when they put themselves forward, none the less it was only by chance that the dispute now before the Court occurred during the period in which they were members of the said committee.

50 The members of the Advisory Committee further allege that the circular of 29 September 1975 which they addressed to all the Belgian dealers was drafted by BMW Belgium and was presented to them for signature on the occasion of a meeting convened for that purpose. Thus they conclude that the disputed decision should, as regards also the fine imposed on them, be annulled on the grounds that it is insufficiently and unclearly reasoned, as well as being contrary to Article 15 of Regulation No 17/62 of the Council.

51 The eight members of the Advisory Committee must have known that their capacity as spokesmen for the Belgian dealers placed greater responsibility on them with regard to those dealers, and that their intervention with the Belgian distributors could only confer added weight to the proposals of BMW Belgium which they supported with their authority.

By signing, albeit only at the instigation of BMW Belgium, the second circular of 29 September 1975 attached to that of the same date from BMW

Belgium, the eight members of the Advisory Committee thus actively helped to strengthen, in the minds of the Belgian distributors, the authority of the exhortations contained in the circular from BMW Belgium of 29 September 1975. If their concern had really been to prevent sales to non-approved distributors, they should have made that clear by express words in their circular, instead of using terms which gave to understand even more clearly that the prohibition on re-exportation was to apply to all sales outside Belgium.

52 (iii) Finally the other Belgian BMW dealers question whether the imposition of fines on them was well-founded, claiming that they never intended to subscribe to a general prohibition on re-export and that their economic dependence on BMW Belgium was of such a nature as substantially to vitiate their consent to the aforesaid circular. Further they submit that the fines are all the more unjustified in their case because in all its previous decisions whereby fines were imposed for infringements of Article 85 (1) of the Treaty the Commission had never penalized dealers but only those granting the dealership. Thus it is claimed that by treating the Belgian BMW dealers, apparently without valid reason, more severely than in the past it had treated dealers placed in comparable situations, the Commission infringed the principle of non-discrimination to the detriment of those dealers.

53 In this case it is clear from the foregoing that the dealers in question committed an infringement of the provisions of Article 85 (1) of the Treaty. The fact that in similar previous cases the Commission did not consider that there was reason to impose fines on resellers as well cannot deprive it of such a power expressly granted to it by the said regulation, where the conditions required for the exercise thereof are satisfied.

54 As regards the amount of the fines, even if it was a question of an infringement committed intentionally, the Commission carefully assessed the gravity of the infringements in relation to the economic dependence of the dealers on BMW Belgium.

55 It follows that the applicants are also unfounded in so far as they concern Article 2 of the disputed decision.

56 For those reasons the present applications must be dismissed in their entirety.

Costs

57 Under Article 69 (2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs.

58 Since the applicants have failed in their submissions they must be ordered to pay the costs. Each applicant shall pay a part of the costs of the Commission corresponding to the amount of the fine imposed upon it expressed as a percentage of the total fines.

On those grounds,

THE COURT

hereby:

1. **Dismisses the applications as unfounded.**

2. **Orders the applicants to pay the costs. Each applicant shall pay a part of the costs of the Commission corresponding to the amount of the fine imposed upon it expressed as a percentage of the total fines.**

Kutscher Mertens de Wilmars Mackenzie Stuart

Pescatore Sørensen O'Keeffe Bosco

Delivered in open court in Luxembourg on 12 July 1979.

A. Van Houtte
Registrar

H. Kutscher
President