JUDGMENT OF THE COURT (Sixth Chamber)

18 September 2003 *

In Case C-338/00 P,

Volkswagen AG, established in Wolfsburg (Germany), represented by R. Bechtold, Rechtsanwalt, with an address for service in Luxembourg,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (Fourth Chamber) of 6 July 2000 in Case T-62/98 *Volkswagen* v *Commission* [2000] ECR II-2707, seeking to have that judgment set aside in part,

the other party to the proceedings being:

Commission of the European Communities, represented by K. Wiedner, acting as Agent, assisted by H.-J. Freund, avocat,

defendant at first instance,

* Language of the case: German.

THE COURT (Sixth Chamber),

composed of: J.-P. Puissochet, President of the Chamber, C. Gulmann, V. Skouris (Rapporteur), F. Macken and N. Colneric, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: M.-F. Contet, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 27 June 2002,

after hearing the Opinion of the Advocate General at the sitting on 17 October 2002,

gives the following

Judgment

1 By application lodged at the Court Registry on 14 September 2000, Volkswagen AG brought an appeal under Article 49 of the EC Statute of the Court of Justice against the judgment of the Court of First Instance (Fourth Chamber) of 6 July 2000 in Case T-62/98 *Volkswagen* v *Commission* [2000] ECR II-2707 (here-

inafter referred to as 'the judgment under appeal') in which the Court of First Instance dismissed in part its application for the annulment of Commission Decision 98/273/EC of 28 January 1998 relating to a proceeding under Article 85 of the EC Treaty (Case IV/35.733 — VW) (OJ 1998 L 124, p. 60) (hereinafter referred to as 'the decision' or 'the contested decision').

The legal framework

2 Dealership contracts for the distribution of motor vehicles are, subject to certain conditions, exempted from Article 85(1) of the EC Treaty (now Article 81(1) EC) by Commission Regulation (EEC) No 123/85 of 12 December 1984 on the application of Article 85(3) of the EEC Treaty to certain categories of motor vehicle distribution and servicing agreements (OJ 1985 L 15, p. 16).

3 Agreements of this kind are defined in recital 1 in the preamble to Regulation No 123/85 as being '... agreements, for a definite or an indefinite period, by which the supplying party entrusts to the reselling party the task of promoting the distribution and servicing of certain products of the motor vehicle industry in a defined area and by which the supplier undertakes to supply contract goods for resale only to the dealer, or only to a limited number of undertakings within the distribution network besides the dealer, within the contract territory'.

4 According to recital 9 in the preamble to that regulation, '[the] restrictions imposed on the dealer's activities outside the allotted area lead to more intensive distribution and servicing efforts in an easily supervised contract territory, to knowledge of the market based on closer contact with consumers, and to more demand-orientated supply (Article 3, points 8 and 9)...'.

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

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

— only to the other party, or

— only to the other party and to a specified number of other undertakings within the distribution system,

for the purpose of resale certain motor vehicles intended for use on public roads and having three or more road wheels...'.

6 Article 2 of Regulation No 123/85 states that the exemption under Article 85(3) of the Treaty also applies 'where the obligation referred to in Article 1 is combined with an obligation on the supplier [not] to sell contract goods to final consumers... in the contract territory'.

7 Article 3 of Regulation No 123/85 provides:

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

...

8. outside the contract territory

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

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

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

10. to supply to a reseller:

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

...

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

8 Article 4(1) of Regulation No 123/85 provides:

'Articles 1, 2 and 3 shall apply notwithstanding any obligation imposed on the dealer to:

...

(3) endeavour to sell, within the contract territory and within a specified period, such minimum quantity of contract goods as may be determined by agreement between the parties or, in the absence of such agreement, by the supplier on the basis of estimates of the dealer's potential sales;

...

(8) inform customers, in a general manner, of the extent to which spare parts from other sources might be used for the repair or maintenance of contract goods or corresponding goods;

...'.

9 Regulation No 123/85 was replaced, with effect from 1 October 1995, by Commission Regulation (EC) No 1475/95 of 28 June 1995 on the application of Article 85(3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements (OJ 1995 L 145, p. 25).

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

'The exemption shall not apply where:

...

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

...

(7) the manufacturer, the supplier or another undertaking within the network directly or indirectly restricts the freedom of final consumers, authorised intermediaries or dealers to obtain from an undertaking belonging to the network of their choice within the common market contract goods or corresponding goods... or the freedom of final consumers to resell the contract goods or corresponding goods, when the sale is not effected for commercial purposes; or

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

...'.

Facts of the dispute and proceedings before the Court of First Instance

11 The facts underlying the dispute are set out as follows in the judgment under appeal:

'1 The applicant is the holding company of the Volkswagen group. The group's business activities include the manufacture of motor vehicles of the Volkswagen, Audi, Seat and Skoda makes, and the manufacture of components and spare parts....

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

...

8 From September 1992 and during 1993 the value of the Italian lira declined greatly in comparison with the German mark. However, the applicant did

not make a proportionate increase in its sales prices in Italy. The price differences which resulted from that situation made it economically advantageous to re-export vehicles of the Volkswagen and Audi makes from Italy.

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

10 By letter of 24 February 1995 the Commission informed the applicant that, on the basis of complaints from German consumers, it had concluded that the applicant or Autogerma had forced Italian dealers for Volkswagen and Audi makes to sell vehicles solely to Italian customers by threatening to terminate their dealer contracts. In the same letter the Commission gave formal notice to the applicant to put an end to that barrier to re-exportation and to inform it, within three weeks of the date of receipt of that letter, of the measures adopted in that regard.

...

13 On 17 October 1995 the Commission adopted a decision ordering investigations under Article 14(3) of Council Regulation No 17 of 6 February 1962: First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87). The investigations took place on 23 and 24 October 1995...

14 On the basis of the documents found during those investigations the Commission reached the conclusion that the applicant, Audi and Autogerma had put in place, with their Italian dealers, a market-partitioning policy. On 25 October 1996 the Commission served a statement of objections to that effect on the applicant and Audi.

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

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

...

20 On 28 January 1998 the Commission adopted [the contested decision]. The decision is addressed solely to the applicant. The Commission states that the applicant is responsible for the infringement found because Audi and Autogerma are its subsidiaries and their activities were known to it. As regards the Italian dealers, the Commission states that they did not

participate actively in the barriers to re-export but, as victims of the restrictive policy introduced by the manufacturers and Autogerma, were forced to consent to that policy.

...

22 As regards the measures taken by the applicant and Audi, the Commission cites the introduction by the applicant of a "split margin system"... The Commission also mentions the reduction by the applicant and Audi of dealers' stocks. That measure, accompanied by a policy of restricted supply, caused a considerable increase in delivery times and led some customers to cancel their orders. It also allowed Autogerma to refuse supplies requested by German dealers (cross-deliveries inside the Volkswagen distribution network). The Commission also refers to the conditions laid down by Audi and Autogerma for calculating the quarterly 3% bonus paid to dealers on the basis of the number of vehicles they had sold.

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

...

26 The Commission concludes that those measures, which all form part of the contractual relations which the manufacturers maintain, through Autogerma, with the dealers in their selective distribution network, are the result of an agreement or concerted practice and constitute an infringement of Article 85(1) of the Treaty since they represent the implementation of a market-partitioning policy. It explains that those measures are not covered by Regulation No 123/85 and Regulation No 1475/95, since no provision of those regulations exempts an agreement which aims to prevent parallel exports by final consumers, by intermediaries acting on their behalf or by other dealers in the dealer network. It also states that an individual exemption cannot be granted in the present case, since the applicant, Audi and Autogerma did not notify any aspect of their agreement with the dealers, and that in any event the barriers to re-exportation are at variance with the objective of consumer protection set out in Article 85(3) of the Treaty.

...

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

29 In Article 3 of the decision the Commission imposes a fine of ECU 102 million on the applicant in view of the gravity of the infringement found. The Commission contends that the obstruction of parallel imports of vehicles by

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

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

...'

12 By application lodged at the Registry of the Court of First Instance on 8 April 1998, the present appellant brought an action against that decision.

13 In support of its application for annulment, the present appellant relied essentially on five pleas in law. The first and second pleas respectively alleged errors of fact and of law in the application of Article 85 of the Treaty. The third, fourth and fifth pleas alleged infringement of the principle of proper administration, the obligation to state reasons, and the right to a fair hearing.

14 The present appellant also argued, by way of an alternative submission, that the fine imposed by the contested decision ought to be reduced on the ground that it was excessive.

15 In support of its first and second pleas in particular, the present appellant submitted that:

— with regard to the barrier resulting from the bonus system and the alleged infringement of Regulation No 123/85, the 3% bonus had been granted, logically, on the basis of the proper performance of the dealer's obligation to concentrate his activity within his contract territory; consequently, the 15% rule, under which, for the calculation of the bonus, all sales were to be taken into account but those made outside the contract territory would be taken into account only up to a maximum of 15% of total sales achieved by the dealer (hereinafter 'the 15% rule') was entirely justified by the wording of Regulation No 123/85 (recitals 1 and 9 and Article 4(1)(3) thereof);

— contrary to what the Commission alleges, a split margin system was never introduced;

— the Commission erred in finding that the business conduct of the manufacturers and of their distribution network in Italy vis-à-vis consumers from other Member States constituted a barrier to re-exportation;

— all of the instances of termination of dealership contracts on which the Commission relied concerned dealers who had sold vehicles on numerous occasions to independent dealers and who had on occasion also committed other serious breaches of their contractual obligations;

— the conduct alleged did not continue after October 1995; the documents removed by the Commission related only to the years 1993, 1994 and 1995; and

— a restriction on supplies to the Italian market cannot be classified as an agreement within the meaning of Article 85(1) of the Treaty.

16 In its third plea, alleging infringement of the principle of proper administration, the present appellant criticised the Commission for having, prior to the adoption of the contested decision, publicised its assessments and its intentions in regard to the fine.

17 In its fourth plea, alleging an inadequate statement of reasons for the contested decision, the present appellant stated that the objections raised by it and by Audi during the administrative procedure had been inadequately examined. Thus, the

Commission failed, in the contested decision, to take into consideration the analysis of documents submitted in response to the statement of objections.

18 Finally, in support of its alternative submission, alleging that the fine imposed on it was excessive, the present appellant stated that it had never intended to commit any infringements and that the documents cited in the contested decision with a view to proving the contrary (recital 214 of the decision) had been completely misinterpreted by the Commission. It also submitted that the 15% rule had been expressly laid down in 'Convenzione B' (agreement annexed to the dealership contract), which had been notified to the Commission in 1988; consequently, in accordance with Article 15(5) of Regulation No 17, no fine could be imposed on it by reason of the fact that it had applied that rule.

The judgment under appeal

The barrier resulting from the bonus system and the alleged infringement of Regulation No 123/85

19 The Court of First Instance ruled *inter alia* as follows:

'49 That rule [the 15% rule] was liable to induce Italian authorised dealers to sell at least 85% of available vehicles within their contract territory. It restricted

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

...

189 ... in the present case it is clear from the fact that the 15% rule was in force continuously between 1 January 1988 and 30 September 1996... that the applicant infringed the Community competition rules throughout that period (see paragraph 49 above)....'

The introduction of a split margin system

20 In paragraph 72 of the judgment under appeal, the Court of First Instance ruled that the Commission had not adduced sufficiently precise and consistent evidence

of the introduction, in the form of an agreement or concerted practice, of a split margin system and that the contested decision therefore contained an error of assessment in that regard.

The barrier resulting from business conduct vis-à-vis consumers

21 The Court of First Instance ruled *inter alia* as follows:

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

22 After reproducing, in paragraphs 106 to 114 of the judgment under appeal, a portion of that correspondence, the Court of First Instance held:

'115 Those documents show in an adequately representative manner that during the period concerned a potential customer resident outside Italy

faced the greatest difficulties in finding an Italian Volkswagen and Audi dealer prepared to sell him a vehicle. Consequently, the Commission could properly conclude that the business conduct of the manufacturers and their distribution network in Italy vis-à-vis consumers from other Member States also constituted a barrier to re-exports.'

The sanctions allegedly imposed on dealers

23 The Court of First Instance stated, in paragraph 169 of the judgment under appeal, that the evidence adduced by the Commission regarding the termination of dealership contracts did not rule out the possibility that only dealers who had, along with other failures to comply with their contractual obligations, sold vehicles to independent dealers were in fact sanctioned and that the Commission had therefore committed an error of assessment in treating it as an established fact that the terminations of the dealership contracts in question constituted an unlawful measure.

The duration of the barriers to re-exports

24 The Court of First Instance found, in paragraph 192 of the judgment under appeal, that the Commission had not proved to the requisite legal standard that the present appellant was still committing an infringement between 1 October 1996 and January 1998.

The question whether restriction of supplies to the Italian market constituted an agreement within the meaning of Article 85(1) of the Treaty

25 The Court of First Instance ruled *inter alia* as follows:

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

Infringement of the principle of proper administration by reason of disclosures to the press

26 The Court of First Instance found, in paragraphs 280 to 282 of the judgment under appeal, that, prior to the adoption of the contested decision, a vital part of the draft decision referred to the Advisory Committee and then, for final approval, to the College of Commissioners was the subject of several leaks to the press. It also found that those disclosures to the press were not restricted to

expressing the personal views of the member of the Commission responsible for competition matters regarding the compatibility with Community law of the measures under examination but also informed the public, to a high degree of precision, of the amount of the fine envisaged. The Court of First Instance formed the view that, in so proceeding, the Commission acted in a manner injurious to the dignity of the impugned undertaking and to the interests of proper administration at Community level.

27 The Court of First Instance pursued its line of reasoning as follows:

'283 It is settled case-law that an irregularity of the type found above may lead to annulment of the decision in question if it is established that the content of that decision would have differed if that irregularity had not occurred (Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraph 91; [Case T-43/92] *Dunlop Slazenger* v *Commission* [[1994] ECR II-441], paragraph 29). However, in the present case the applicant has not adduced such proof. There are no grounds for supposing that if the information at issue had not been disclosed the Advisory Committee or the College of Commissioners would have altered the proposed amount of the fine or the content of the decision.

284 Consequently, this part of the third plea must also be rejected....'

The inadequate statement of reasons for the contested decision

28 The Court of First Instance held *inter alia* as follows:

'297 The statement of reasons for the contested decision showed, in conformity with the requirements of Article 190 of the EC Treaty (now Article 253 EC), clearly and unequivocally the Commission's reasoning and so enabled the applicant to ascertain the reasons for that decision in order to defend its rights, and the Court to review the correctness of the decision (Case C-278/95 P *Siemens* v *Commission* [1997] ECR I-2507, paragraph 17; Case T-150/89 *Martinelli* v *Commission* [1995] ECR II-1165, paragraph 65; and [Case T-229/94] *Deutsche Bahn* v *Commission* [[1997] ECR II-1689], paragraph 96).

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

299 Moreover, in the decision and, more specifically, in recitals 194 to 201 thereof, the Commission, as stated in paragraph 27 above, expressly replied to certain observations submitted by the applicant and Audi in

response to the statement of objections. It should be added here that the Commission did not have to reply to the applicant's detailed objections, such as those submitted in regard to its margin policy. All that was required of the Commission was to explain clearly and unequivocally, as it did in recitals 62 to 66 of the decision, why it took the view that a split margin system had been instituted (see *Siemens* v *Commission*, cited above, paragraphs 17 and 18). Likewise, the Commission gave adequate reasons for its analysis of the documents obtained by amply explaining the grounds on which it considered that those documents were of such a nature as to prove the existence of the alleged infringement, but without replying point-by-point to the different interpretations submitted by the applicant in its reply to the statement of objections....'

The excessive nature of the fine imposed

29 With regard, first, to the intentional nature of the infringement, the Court of First Instance ruled in the following terms:

'334 As to the first question, it is not disputed that in the present case the Commission found that the infringement was committed intentionally and not merely negligently (recital 214 of the decision). That assessment is wholly justified. As has been found above in the context of the first plea, the applicant adopted measures whose object was to partition the Italian market and thus to hinder competition... Moreover, it is not necessary for an undertaking to have been aware that it was infringing the competition rules laid down in the Treaty for an infringement to be regarded as having

been committed intentionally; it is sufficient that it could not have been unaware that the object of its conduct was the restriction of competition (Case T-61/89 *Dansk Pelsdyravlerforening* v *Commission* [1992] ECR II-1931, paragraph 157, and Case T-143/89 *Ferriere Nord* v *Commission* [1995] ECR II-917, paragraph 41). In view of the existence of settled case-law holding that actions partitioning markets are incompatible with the Community competition rules..., the applicant could not have been unaware that its conduct hindered competition.'

30 Next, with regard to the question whether the 15% rule had been notified to the Commission and to the consequences resulting therefrom for the determination of the fine in the contested decision, the Court of First Instance ruled as follows:

'342 As to the argument that Convenzione B had been notified in 1988 and, accordingly, the Commission could not impose a fine on the applicant in respect of the 15% rule agreed in that agreement, the Court points out, first, that the prohibition laid down in Article 15(5)(a) of Regulation No 17 on the imposition of fines in respect of acts taking place "after notification to the Commission and before its decision in application of Article 85(3) of the Treaty, provided they fall within the limits of the activity described in the notification" applies only in respect of agreements which have in fact been notified in accordance with the necessary formalities (Joined Cases 240/82 to 242/82, 261/82, 262/82, 268/82 and 269/82 *Stichting Sigarettenindustrie and Others* v *Commission* [1985] ECR 3831, paragraph 77; [Case T-29/92] *SPO and Others* v *Commission* [[1995] ECR II-289], paragraph 342; also Case 30/78 *Distillers Company* v *Commission* [1980] ECR 2229, paragraphs 23 and 24). Next, it must be pointed out that in a letter dated 25 November 1988 (Annex 3 to the defence) the Commission informed Autogerma that the dispatch by it of Convenzione B was not a notification for the purposes of Regulation No 17...

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

344 On the other hand, the 15% rule could be taken into account for the purposes of fixing the fine in respect of the period from 1993 to 1996. As has been found above..., during that period the ceiling provided by the 15% rule was combined, and thus strengthened, with other measures, in order to hinder re-exports.... Consequently, even if it were proved that Convenzione B had been notified, it would still be necessary to find that since 1993 the application of the 15% rule fell outside the scope of the activity as set out in the text of the agreement notified to the Commission, so that, by virtue of the clear wording of Article 15(5)(a) of Regulation No 17, the exemption from fines would no longer apply. It follows that it would have been appropriate to take 1 September 1993 as the starting date of the period to be taken into account when fixing the fine...'.

31 Finally, the Court of First Instance found, in paragraph 346 of the judgment under appeal, that, as the duration of the infringement to be taken into account for the purpose of fixing the fine had to be reduced to a period in the order of three years and as the description of the infringement made by the Commission in order to assess the gravity of the infringement was not wholly correct, it was necessary for it, in the exercise of its unlimited jurisdiction, to vary the contested decision and to reduce the amount of the fine imposed on the present appellant.

32 The Court of First Instance ruled in this regard as follows:

'347 However, the reduction of the fine does not necessarily have to be proportionate to the reduction in the period which the Commission had taken into account nor correspond to the sum of the percentage increases applied by the Commission in respect of the period from 1988 to August 1993, the last quarter of 1996 and 1997 (see, by analogy, *Dunlop Slazenger*, cited above, paragraph 178). The Court must carry out, in the exercise of its jurisdiction in the matter, its own assessment of the circumstances of the case in order to determine the amount of the fine (Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 111; Case T-148/94 *Preussag Stahl* v *Commission* [1999] ECR II-613, paragraph 728). In the present case, the highly grave nature of the infringement committed, apparent from paragraph 336 above, on the one hand, and the intensity with which the unlawful measures were implemented, as shown by the abundant correspondence discussed above in the context of the first plea, on the other hand, call for a fine which acts as a real deterrent (see Case T-12/89 *Solvay* v *Commission* [1992] ECR II-907, paragraph 309, and Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraph 33). In the light of those considerations, the fine imposed of ECU 102 million, which corresponded approximately, as the applicant confirmed in reply to a written question from the Court, to 0.5% of turnover achieved in 1997 by the Volkswagen group in Italy, Germany and Austria, and to 0.25% of its turnover in the European Union in the same year, is not abnormally high. Lastly, the fact that the Commission's conclusions as to the split margin system and the termination of certain dealership contracts have not been adequately proved does not reduce the highly grave nature of the infringement in question, duly established by proof of the other infringing conduct...

348 Having regard to all the above circumstances and considerations, the Court, in the exercise of its unlimited jurisdiction under Article 172 of the

EC Treaty (now Article 229 EC) and Article 17 of Regulation No 17 (see Case C-320/92 P *Finsider* v *Commission* [1994] ECR I-5697, paragraph 46, and Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 129), considers it proper to reduce the amount of the fine... to EUR 90 million.'

33 The operative part of the judgment under appeal is worded as follows:

'[The Court of First Instance hereby]

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

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

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

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

3. Dismisses the remainder of the application;

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

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

The appeal

34 By its appeal, the appellant claims that the Court should:

— set aside the judgment under appeal and declare the contested decision to be void;

— order the Commission to pay the costs of the proceedings before the Court of First Instance and the Court of Justice.

35 In its reply, the appellant states that the forms of order which it seeks are to be construed and interpreted in the light of the reasoning of the appeal, from which it follows that it is not seeking that the judgment under appeal be set aside in its entirety but only in so far as it adversely affects the appellant.

36 The Commission claims that the Court should:

— dismiss the appeal;

— set aside the contested judgment and refer the case back to the Court of First Instance in so far as it reduced to EUR 90 million the amount of the fine imposed on the appellant without taking into account, in fixing that fine, the 15% rule laid down in 'Convenzione B' of the dealership contract concluded in 1988 for the period from 1988 to 1992;

— order the appellant to pay the costs of the proceedings before the Court of Justice and reserve to the Court of First Instance the decision on costs in the cross-appeal.

The main appeal

37 In support of its appeal, the appellant invokes nine grounds of appeal providing as follows:

— contrary to what the Court of First Instance held, the 3% reduction in the bonus paid to Italian dealers who completed more than 15% of their sales outside their contract territory is not contrary to Article 85(1) of the Treaty and is in any event covered by Regulation No 123/85 (first ground of appeal);

— the 'restricted supply' to the Italian market, which the Court of First Instance took into account, does not fall within the scope of the prohibition of concerted practices in Article 81(1) as it is a unilateral measure (second ground of appeal);

— the account taken of the bonus system (see the first plea) in the calculation of the fine is contrary to Article 15(5)(a) of Regulation No 17 (third ground of appeal);

— the findings by the Court of First Instance as to the intentional nature of the infringement fail to satisfy the requirements of Article 15(2) of Regulation No 17 (fourth ground of appeal);

— the Court of First Instance based the judgment under appeal on facts differing from those on which the contested decision was based (fifth ground of appeal);

— the Court of First Instance failed to guarantee the right to a fair hearing (as a right of the defence) by using, to the appellant's detriment, complaints lodged by consumers on which the appellant had been unable to set out its views during the administrative procedure (sixth ground of appeal);

— contrary to the finding of the Court of First Instance, the contested decision is not adequately reasoned and is, by virtue of that fact, unlawful (seventh ground of appeal);

— the Court of First Instance failed to comply with its obligation to provide reasons in regard to the fine which it fixed (eighth ground of appeal); and

— the premature announcement of the draft decision by the commissioner responsible for competition matters must, in any event, render the contested decision unlawful (ninth ground of appeal).

The first ground of appeal

Arguments of the parties

38 In its first ground of appeal, the appellant challenges the legal assessment of the Court of First Instance to the effect that the 15% rule, even taken in isolation, is not compatible with Article 85(1) of the Treaty or was not, in any event, covered by Regulation No 123/85 in force at that period (paragraph 49 of the judgment under appeal; see also paragraph 189 of the judgment under appeal, read in conjunction with paragraph 343 thereof).

39 So far as the interpretation of Article 85(1) of the Treaty is concerned, the appellant submits that, in its application to the Court of First Instance, it set out the following reasoning which has not, in substance, been challenged. A dealer who sells a vehicle in an area which is outside his contract territory generally has much less to bear in the way of costs, both with regard to the sale transaction and after-sale service, than in the case of a sale within his contract area. Consequently, the loss of the bonus is offset by a corresponding economic advantage. The bonus system therefore does not have a restrictive effect on competition, either in its purpose or its effects, and for that reason does not breach Article 85(1) of the Treaty.

40 Contrary to what the Court of First Instance held, the 15% rule comes in any event within the exemption granted by Regulation No 123/85. The desired objective was that a dealer should, as a matter of priority, look after the customers within his own area. In this regard, it follows from recitals 1 and 9 and from Article 4(1)(3) and (8) of Regulation No 123/85 that that regulation recognises the specific responsibility to be assumed by a dealer in regard to his own contract area.

41 In particular, if the manufacturer or importer may, pursuant to Article 4(1)(3) of Regulation 123/85, require the dealer to make every effort to sell a minimum number of vehicles within his contract area, the supplier is also entitled to grant bonuses if that dealer operates successfully within his contract area. That at least is the position with regard to percentages that are comparatively low in relation to total remuneration (up to 3%) and if, for the majority of sales (up to 15%), even those made for the benefit of customers in other contract areas are recompensed.

42 The Commission submits that this ground of appeal is manifestly inadmissible. The appellant, it claims, is merely repeating its submissions at first instance and does not call into question the reasoning of the Court of First Instance set out in paragraphs 49 and 189 of the judgment under appeal.

43 In the alternative, the Commission argues that the ground of appeal is unfounded. The bonus rule restricted the opportunities for end-users and dealers in other Member States to obtain vehicles in Italy and thus gave rise to direct discrimination in regard to exports. As it thus amounted to a measure which contributed to market partitioning and which the appellant specifically implemented for that purpose, the 15% rule could not from the outset benefit from an exemption.

Findings of the Court

44 It follows from paragraphs 49 and 189 of the judgment under appeal, read in conjunction with paragraph 343 thereof, that the 15% rule must, according to the Court of First Instance, be declared incompatible with Article 85(1) of the Treaty inasmuch as it was liable to induce Italian authorised dealers to sell at least 85% of available vehicles within their contract territory and therefore restricted opportunities for end-users and dealers in other Member States to acquire vehicles in Italy, and thus had the purpose of ensuring a degree of territorial protection and, to that extent, partitioning of the market. The Court of First Instance also found, in paragraph 49 of its judgment, that the Commission was entitled to conclude that that rule fell outside the exemption granted by Regulation No 123/85 on the ground that, although Regulation No 123/85 provided manufacturers with substantial means of protecting their distribution systems, it did not authorise them to adopt measures contributing to a partitioning of the markets.

45 For the purpose of challenging the findings by the Court of First Instance in relation to the breach of Article 85(1) of the Treaty, the appellant merely reproduces the arguments which it set out in this regard in its application at first instance without calling into question either the reasoning on the basis of which the Court of First Instance concluded that the 15% rule amounted to a market-partitioning measure or the finding that such a rule had to be classified as a measure incompatible with Article 85(1) of the Treaty.

46 This first branch of the ground of appeal must therefore be dismissed as being inadmissible.

47 According to settled case-law, where an appeal merely repeats or reproduces verbatim the pleas in law and arguments previously submitted to the Court of

First Instance, without even including an argument specifically identifying the error of law allegedly vitiating the judgment under appeal, it fails to satisfy the requirements under Article 58 of the Statute of the Court of Justice and Article 112(1)(c) of its Rules of Procedure. In reality, such an appeal amounts to no more than a request for re-examination of the application submitted to the Court of First Instance, which, under Article 56 of that Statute, falls outside the jurisdiction of the Court of Justice (see Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, paragraph 35, Case C-210/98 P *Salzgitter* v *Commission* [2000] ECR I-5843, paragraph 42, and Case C-321/99 P *ARAP and Others* v *Commission* [2002] ECR I-4287, paragraph 48).

48 The appellant also claims that, in finding that the 15% rule was not covered by Regulation No 123/85, the Court of First Instance misconstrued and misapplied that regulation in so far as it failed to take proper cognisance of the specific responsibility which a distributor is recognised as having in relation to his contract territory by Article 4(1)(3) and (8) of that regulation, read in the light of recitals 1 and 9 in its preamble.

49 Suffice it to hold in this regard that a measure which is liable to partition the market between Member States cannot come under those provisions of Regulation No 123/85 that deal with the obligations which a distributor may lawfully assume under a dealership contract. The Court of First Instance properly held in paragraph 49 of the judgment under appeal that, although that regulation provided manufacturers with substantial means by which to protect their distribution systems, it did not authorise them to adopt measures which contributed to a partitioning of the market (*Bayerische Motorenwerke*, cited above, paragraph 37).

50 This second branch of the ground of appeal is consequently unfounded.

51 It follows that the first ground of appeal must be rejected in its entirety.

The second ground of appeal

Arguments of the parties

52 In its second ground of appeal, the appellant takes issue with the finding of the Court of First Instance, in paragraph 236 of the judgment under appeal, that the measures imposing supply quotas for the Italian market constituted agreements for the purposes of Article 85(1) of the Treaty on the ground that they formed part of a set of continuous business relations governed by a general agreement drawn up in advance.

53 According to the appellant, the facts of the present case differ significantly from those of the cases which led to the above judgments in *Ford* v *Commission* and *Bayerische Motorenwerke*, to which the Court of First Instance made reference. In paragraph 21 of *Ford* the Court took the view that the dealers had agreed to the manufacturer's decision. Likewise, in paragraph 17 of *Bayerische Motorenwerke*, the Court took into account the fact that the circular there in question formed part of the contractual relations between Bayerische Motorenwerke AG and its distributors and that it also referred expressly at several points to the dealership contract.

54 Furthermore, in its judgment in Case T-41/96 *Bayer* v *Commission* [2000] ECR II-3383, at paragraph 169, the Court of First Instance expressly stressed that the subjective element of a meeting of minds is an absolute condition for the

application of Article 85(1) of the Treaty. It is therefore not sufficient to refer to the dealership contract in order to establish the acceptance by dealers of an allegedly restrictive supply policy.

55 In the present case, even if the dealership contract provided for the possibility of supplying dealers below their declared requirements, the reason for this supply below declared requirements, as established by the Court of First Instance, that is to say, the barrier to exports, was not covered by the dealership contract. Under that contract, distributors were free to sell the vehicles delivered by the appellant both to foreign end-users and to other dealers. The restrictions confirmed by the Court of First Instance were not desired by dealers because they rejected reductions in supplies and such restrictions had, in so far as they existed, the character of a unilateral measure falling outside the scope of Article 85(1) of the Treaty. The judgment under appeal disregards the wording of that provision and removes the distinction between that provision and Article 86 of the EC Treaty (now Article 82 EC).

56 The Commission submits that this ground of appeal lacks any basis. The appellant itself confirms that the restriction on supplies as such was possible under the contract. Consequently, the dealers approved the possibility of such a restriction on supplies when they signed the contract. When the appellant made use of that possibility it did so within the framework of continuous business relations governed by a general agreement drawn up in advance, that is to say, the dealership contract (paragraph 236 of the judgment under appeal).

57 In the Commission's view, the Court of First Instance correctly applied the case-law of the Court which it itself cited. The above judgments in *Ford* v *Commission* and *Bayerische Motorenwerke* do not in any way confirm the appellant's argument that it is necessary to draw a distinction between the solutions to be adopted on the basis of the objectives which it was pursuing by

making use of the possibility of a restriction on supplies as provided for by the contract. In the dealership contracts of the companies involved in the cases which resulted in those judgments there was no provision whatever that the dealer was required not to export or that the manufacturer was required not to make use of the possibilities granted to it by those contracts in order to prevent exports.

58 Finally, in paragraph 169 of *Bayer* v *Commission*, cited above, which is invoked by the appellant, the Court of First Instance interpreted another judgment of the Court which also involved Bayerische Motorenwerke AG, namely that in Joined Cases 32/78 and 36/78 to 82/78 *BMW Belgium and Others* v *Commission* [1979] ECR 2435. A comparison between that judgment and that in *Bayerische Motorenwerke* shows only that a measure that appears to be unilateral (such as the invitation made by a motor vehicle manufacturer to its distributors or the unilateral supply to those distributors by the manufacturer) is in reality an agreement as it forms part of continuous business relations governed by a general agreement drawn up in advance (see *Ford* v *Commission* and *Bayerische Motorenwerke*, cited in paragraph 236 of the judgment under appeal) or where dealers have expressed their agreement by adopting a particular line of conduct in reaction to the measure in question (see *BMW Belgium and Others* v *Commission*, cited above).

59 The appellant's contention that an agreement can be regarded as having been concluded only if the addressees or 'victims' of an apparently unilateral measure have expressed their agreement by means of their conduct, and not if the unilateral measure forms part of continuous business relations governed by a general agreement drawn up in advance, is at variance with the judgments in *Ford* v *Commission* and *Bayerische Motorenwerke* and must for that reason be rejected.

Findings of the Court

60 It is settled case-law that a call by a motor vehicle manufacturer to its authorised dealers is not a unilateral act which falls outside the scope of Article 85(1) of the

Treaty but is an agreement within the meaning of that provision if it forms part of a set of continuous business relations governed by a general agreement drawn up in advance (*Ford* v *Commission*, paragraph 21, and *Bayerische Motorenwerke*, paragraphs 15 and 16).

61 In paragraph 236 of the judgment under appeal, the Court of First Instance ruled that this case-law was applicable to the present case because all of the measures adopted by the appellant, including the 15% rule and the imposition of supply quotas, were intended to influence Italian dealers in the performance of their contract with Autogerma.

62 The appellant criticises the Court of First Instance for having wrongly concluded that this case-law was applicable in the present context. It argues that, in *Ford* and *Bayerische Motorenwerke*, the restrictions found to have occurred originated in the respective dealership contracts. In the present case, in contrast, even if the dealership contract provided for the possibility of a limitation of supplies to Italian dealers, the reason for that restricted supply, as established by the Court of First Instance, that is to say, the barrier to re-exports from Italy of vehicles supplied to Italian dealers, is not covered by the dealership contract as those dealers are free to sell those vehicles to foreign end-users and foreign distributors. In the absence of any expression by the dealers themselves of their agreement to the restrictions found to have been imposed, the appellant argues that those restrictions, in so far as they existed at all, constituted a unilateral measure which is not covered by Article 85(1) of the Treaty.

63 In this regard, it is clear from paragraphs 79 to 90 of the judgment under appeal that the appellant implemented a policy of imposing supply quotas on Italian dealers with the express aim of blocking re-exports from Italy and thus of partitioning the Italian market. It is also clear from paragraph 236 of that judgment that this policy was able to be imposed by virtue of the dealership contract.

64 The appellant does not deny that the dealership contract provided for the possibility of limiting supplies to Italian dealers and does not dispute the finding of the Court of First Instance that this limitation was imposed with the express aim of blocking re-exportation from Italy of the vehicles delivered to those dealers.

65 It follows that, by accepting the dealership contract, the Italian dealers consented to a measure which was subsequently used for the purpose of blocking re-exports from Italy and thus of restricting competition within the Community.

66 Regarding the appellant's assertion that the barrier to the re-exportation of vehicles delivered to Italian dealers was not desired by the latter, it is necessary to take account of paragraphs 90 and 91 of the judgment under appeal, to which paragraph 236 thereof refers. In those paragraphs, the Court of First Instance, after rejecting the appellant's arguments that the Italian dealers had of their own accord formed the view that it was of no interest to them to sell vehicles outside their contract territory, found that those dealers, faced simultaneously with both restricted supply and the 15% rule — which was also agreed within the framework of the dealership contract (see paragraphs 44, 48 and 342 of the judgment under appeal) — and being aware that re-exports were regarded with extreme disfavour by Autogerma and the manufacturers, clearly had every interest in selling the limited number of vehicles available entirely or almost entirely to purchasers residing in Italy and that their business conduct was therefore influenced by the manufacturers and Autogerma.

67 It follows that, contrary to what the appellant alleges, the Court of First Instance found that the limitation on re-exports, which was the objective pursued by the appellant, also resulted from the business conduct of the Italian dealers and that

this conduct was influenced by the appellant, it being, furthermore, common ground that the means employed for that purpose, in particular the restricted supply of vehicles, resulted from clauses in the dealership contract and had thus received the agreement of the dealers.

68 That being so, the Court of First Instance proceeded correctly in law in applying in this case the case-law cited in paragraph 236 of the judgment under appeal.

69 The second ground of appeal must for that reason be rejected.

The third ground of appeal

Arguments of the parties

70 In its third ground of appeal, the appellant first submits that the Court of First Instance erred in finding, in paragraph 342 of the judgment under appeal, that 'Convenzione B', and thus the 15% rule laid down therein, had not been notified in accordance with the formal requirements.

71 The appellant submits that it follows from the Community law in force at the material time (Regulation No 27 of the Commission of 3 May 1962: First Regulation implementing Regulation No 17 (Form, content and other details concerning applications and notifications) (OJ, English Special Edition

1959-1962, p. 132), as amended by Commission Regulation (EEC) No 2526/85 of 5 August 1985 (OJ 1985 L 240, p. 1) (hereinafter 'Regulation No 27'), in particular Part VI, first paragraph, of the 'complementary note' set out in the annex to that regulation; see also, with effect from 1993, Commission Regulation (EC) No 3666/93 of 15 December 1993 amending Regulation No 27 and Regulations (EEC) No 1629/69, (EEC) No 4260/88, (EEC) No 4261/88 and (EEC) No 2367/90 with a view to implementing the competition provisions laid down in the Agreement on the European Economic Area (OJ 1993 L 336, p. 1), and in particular the 'complementary note' set out in the annex to that regulation) that, with regard to subsequent amendments to notified agreements, their informal communication to the Commission must, in regard to the legal validity of such communication, be assessed in the same way as a notification.

72 The appellant goes on to argue that, by holding in paragraph 344 of the judgment under appeal that since 1993 the application of the 15% rule fell outside the scope of the activity as set out in the agreement notified to the Commission, with the result that the exemption from fines no longer applied, the Court of First Instance interpreted Article 15(5)(a) of Regulation No 17 in a manner at variance with that provision's wording. Article 15(5)(a) uses the expression 'provided...' and not the conjunction 'if...', which indicates that, in relation to what has been notified, the exemption from fines continues to apply, but, in contrast, cannot apply only for what goes beyond the framework of that notification. It follows, the appellant argues, that the account taken of the 15% rule in the calculation of the fine from 1993 breaches Article 15(5)(a) of Regulation No 17.

73 The Commission submits that the prohibition on imposing fines set out in Article 15(5)(a) of Regulation No 17 expressly applies only in the case of agreements that have actually been notified. The mere communication of an agreement does not constitute notification. Compliance with the formalities set out in Article 4 of Regulation No 27 is not an end in itself but is intended to make it possible to examine the notified agreement for purposes of competition law. By simply communicating an agreement, undertakings cannot meet their obligation to set out the reasons for their application and the evidence required for entitlement to an exemption under Article 85(3) of the Treaty (see *SPO and Others* v *Commission*, cited above, paragraph 262).

74 The appellant, the Commission contends, errs in invoking Part VI of the complementary note to Regulation No 27, which states that the Commission must be informed of every material change made to the agreement after the application or notification. 'Convenzione B' not only amended the dealership contract notified in 1963. On the contrary, by reason of the 15% rule, that agreement contains a new agreement which has the purpose and result of limiting competition, which was in no way the situation with regard to the dealership contract notified.

75 The appellant's criticism of paragraph 344 of the judgment under appeal lacks any basis. The 15% rule and the other measures with which it was combined, and which have reinforced it since 1993 for the purpose of hindering re-exports, constitute a single infringement having the sole economic objective of partitioning the Italian market. It would thus be artificial to subdivide such conduct, which is characterised by a single purpose (see paragraph 234 of the judgment under appeal).

Findings of the Court

76 In the first limb of this ground of appeal, the appellant argues that the Court of First Instance erred in holding, in paragraph 342 of the judgment under appeal, that 'Convenzione B', and thus the 15% rule laid down therein, had not been notified in accordance with the formal requirements.

77 In paragraph 342, however, the Court of First Instance, after pointing out that the prohibition laid down in Article 15(5)(a) of Regulation No 17 on the imposition of fines applies only in respect of agreements which have in fact been notified in accordance with the requisite formalities, limited itself to noting that,

according to the Commission, the communication of 'Convenzione B' was not a notification for the purposes of Regulation No 17 but did not set out its own views on that matter.

78 The fact that the Court of First Instance took no view in this regard is also evident from paragraph 343 of the judgment under appeal, in which that Court followed its own line of reasoning '[irrespective] of the question whether or not the sending of Convenzione B was a notification for the purposes of Regulation No 17'.

79 It follows that the first limb of the appellant's third ground of appeal is based on a misappraisal of paragraph 342 of the judgment under appeal.

80 That first limb must therefore be rejected.

81 In the second limb of its third ground of appeal, the appellant alleges that the Court of First Instance misconstrued Article 15(5)(a) of Regulation No 17 by holding, in paragraph 344 of the judgment under appeal, that, since 1993, the application of the 15% rule fell outside the limits of the activity as described in 'Convenzione B', with the result that, even if it were established that the latter had been notified in the required form, the exemption from fines no longer applied and the 15% rule therefore ought to have been taken into account for the purpose of fixing the fine from 1 September 1993.

82 According to the appellant, it follows from the wording of Article 15(5)(a) of Regulation No 17 that the exemption continues to apply in respect of what has been notified and that, in contrast, it cannot apply in respect of what is outside the framework of such notification.

83 It should be borne in mind in this regard that, in accordance with Article 15(5)(a) of Regulation No 17, fines cannot be imposed in respect of acts taking place after notification to the Commission and before the decision by which the Commission grants or refuses application of Article 85(3) of the Treaty, 'provided they fall within the limits of the activity described in the notification'.

84 It follows from that provision that, on an *a contrario* reading, when the acts in question go beyond the limits of the notified activity, the exemption from fines cannot apply to any of those acts as the activity in question will no longer correspond to that described in the notification. This finding is corroborated by the fact that in a case such as the present, in which the conduct the subject of complaint consists of a series of measures pursuing the same objective, it would be artificial to subdivide that conduct for the purpose of applying the exemption from fines only to a certain number of the measures which make up that series.

85 It follows that the interpretation of Article 15(5)(a) of Regulation No 17 set out in paragraph 344 of the judgment under appeal is not vitiated by any error of law.

86 The second limb of the third ground of appeal must for that reason be rejected.

87 The third ground of appeal must accordingly be rejected in its entirety.

The fourth ground of appeal

Arguments of the parties

88 In its fourth ground of appeal, the appellant challenges the finding by the Court of First Instance, in paragraph 334 of the judgment under appeal, that the infringement of which it is accused was intentional in nature. It submits in this regard that the 'fault principle', which must be respected in Community competition law, means that, in order for a sanction to be imposed, the person concerned must have acted in a manner that was objectively unlawful and must have been subjectively aware that it was unlawful. This remains the position even in regard to an undertaking, which is a legal person capable of demonstrating its intention only through the actions of natural persons that can be attributed to it.

89 In the present case, the Commission and Court of First Instance derived the intentional nature of the infringement from statements made by persons at least some of whom were not parties directly involved, without having established whether those persons had themselves also committed any objective infringements. The mere confirmation that certain persons working for the appellant had behaved in a manner that was objectively unlawful, coupled with the affirmation, concerning other employees, that the appellant had to that extent acted intentionally, does not satisfy the requirements of the 'fault principle'. This does not mean that all the objective and subjective elements of the infringement resulting from each type of conduct need be concentrated in one and the same person. It must, however, be established, for each action, that it had the intentional character required for purposes of a fine; this was not done in the present case.

90 Even assuming that an undertaking is responsible for the conduct of all persons acting within its sphere of influence or responsibility (see, in this regard, Joined Cases 100/80 to 103/80 *Musique Diffusion Française and Others* v *Commission*

[1983] ECR 1825, paragraph 97), it is at the very least necessary that it can be established that those persons in particular, that is to say, those who committed the act complained of, acted improperly.

91 In a number of earlier decisions, the Commission and the Court proceeded on the basis of a normative notion of fault in finding a fault specific to the undertaking instead of simply attributing to it the fault of natural persons (see Commission Decision 82/203/EEC of 27 November 1981 relating to a proceeding under Article 85 of the EEC Treaty (IV/30.188 — Moët et Chandon (London) Ltd) (OJ 1981 L 94, p. 7, at p. 10) and Commission Decision 82/267/EEC of 6 January 1982 relating to a proceeding under Article 85 of the EEC Treaty (IV/28.748 — AEG-Telefunken) (OJ 1982 L 117, p. 15, at p. 27)). The fact of referring to blame specific to the undertaking itself is, however, only recognition of an organisational fault for which the various objectively illegal activities engaged in by employees were not taken into consideration. In the present case, neither the contested decision nor the judgment under appeal, the latter confirming the former, makes it possible to identify what this fault of which the appellant is accused might be. The Commission and Court of First Instance ought, at the very least, to have demonstrated that the appellant was open to criticism for shortcomings in its organisation or for breaches of its duty of surveillance (see, in this connection, point 17 of Commission Decision 83/667/EEC of 5 December 1983 relating to a proceeding under Article 85 of the EEC Treaty (IV/30.671 — IPTC Belgium) (OJ 1983 L 376, p. 7) and point 21 of Commission Decision 85/79/EEC of 14 December 1984 relating to a proceeding under Article 85 of the EEC Treaty (IV/30.809 — John Deere) (OJ 1985 L 35, p. 58)).

92 The Commission submits that the appellant's view that the acts of an employee can be attributed to an undertaking only if that employee contains in his person all the objective and subjective elements of an infringement is incompatible with the nature of competition law as the law governing undertakings or with the division of labour within their organisation.

93 Thus, all acts of persons authorised to act on behalf of undertakings are attributable to the latter (see *Musique Diffusion Française and Others* v *Commission*, cited above, paragraph 97). This follows clearly from paragraph 234 of the judgment under appeal, in which the Court of First Instance confirmed the Commission's classification of the appellant's conduct, where the Commission concluded that there had been one single infringement.

Findings of the Court

94 The Court of First Instance found, in paragraph 334 of the judgment under appeal, that the appellant had adopted measures the object of which was to partition the Italian market and that, in view of the existence of well-established case-law holding that market partitioning is incompatible with Community competition rules, it could not have been unaware that its conduct hindered competition.

95 At the hearing, counsel for the appellant, requested by the Court to provide details on the fourth ground of appeal, stated that, in order to establish that the infringement was intentional in nature, the Commission and Court of First Instance ought to have identified the persons who had acted improperly and were therefore to be treated as responsible for the infringement committed or, at least, the person who ought to have been held responsible for the appellant's defective organisation which made such an infringement possible.

96 It must be noted in this regard that the view supported by the appellant can have no application in Community competition law, in which infringements that have been committed give rise to fines which, under Article 15(2) of Regulation No 17,

are imposed on undertakings which have participated intentionally or through negligence in the infringement. Article 15(2) of Regulation No 17, moreover, provides that decisions imposing such a fine are not of a criminal law nature.

97 It should be added that, were the appellant's view to be upheld, this would impinge seriously on the effectiveness of Community competition law.

98 It follows that, contrary to the appellant's argument, the Court of First Instance did not err in law in taking the view that the intentional nature of the infringement was established without demanding the identification of the persons who had acted improperly within the undertaking or who ought to have been held responsible for any defective organisation of the undertaking.

99 The fourth ground of appeal must therefore be rejected.

The fifth ground of appeal

Arguments of the parties

100 In its fifth ground of appeal, the appellant argues that the judgment under appeal is based on facts which differ from those on which the contested decision was

based. It submits in this regard that, in that decision, the Commission used, as grounds for the infringement of Article 85(1) of the Treaty, a series of measures which it regarded as constituting a single infringement. The Court of First Instance did not confirm the analyses made by the Commission in recitals 62 to 72 of the contested decision with regard to the margin policy, and in recitals 93 to 97 dealing with termination of the dealership contracts (see, respectively, paragraphs 65 to 72 and 166 to 169 of the judgment under appeal), nor, consequently, the single general strategy of the appellant, which, according to the Commission, consisted of seven sets of elements.

101 Even if, according to the Court of First Instance, the other measures, considered in isolation, were contrary to Article 85(1) of the Treaty, the Court of First Instance could not have replaced the facts on which the contested decision was based with other facts and assumed that the Commission would have adopted the same decision in such a case. If the facts constituting the basis of that decision were not confirmed in the course of the review conducted by the Court of First Instance, the latter was under an obligation to annul that decision.

102 The Commission, in contrast, submits that it and the Court of First Instance did assess the same facts. The fact that that Court took the view that the evidence provided by the Commission in regard to the two issues mentioned in paragraph 100 of the present judgment was inadequate has no bearing on the soundness of its assessment. The Commission adds that, if sufficient evidence can be adduced only in respect of some of the anti-competitive acts for which the undertaking concerned is held responsible in their entirety, the grouping of those acts into one single infringement does not prevent the Court of First Instance from confirming the decision in question with regard to those acts which have been proved. If these latter, considered in isolation, are to be regarded as constituting a single infringement by reason of their single economic objective, the Court of First Instance also cannot be prevented from confirming that fact. According to the Commission, that was the situation in the present case (see paragraph 234 of the judgment under appeal).

Findings of the Court

103 The fact that the Commission, in the contested decision, took the view that the infringement of which the appellant was accused consisted of a series of measures was not such as to prevent the Court of First Instance from annulling that decision in part once it had formed the view that some of the measures of which the alleged infringement consisted had not been proved or from confirming that those measures, the anti-competitive effect of which had been established, constituted, in view of their common purpose, a single infringement.

104 In particular, contrary to what the appellant submits, the fact that the Court of First Instance confirmed the unitary nature of the infringement committed on the basis of a portion only of the measures that were the subject of incrimination in the contested decision does not in any way mean that it based its assessment on facts which differed from those underlying that decision.

105 This ground of appeal must therefore also be rejected.

The sixth ground of appeal

Arguments of the parties

106 In its sixth ground of appeal, the appellant submits that, in paragraphs 105 to 115 of the judgment under appeal, the Court of First Instance failed to guarantee

its right to a fair hearing by using, to its detriment, complaints from consumers which the Commission produced during those proceedings and on which the appellant had been unable to set out its views during the administrative procedure.

107 The Commission, the appellant argues, identified and took into account, as against the appellant, only 15 complaints from consumers, of which the appellant was made aware during the administrative procedure when it was given access to the case-file. The appellant was given access to the other complaints only when the Commission, ordered to do so by the Court of First Instance on 12 July 1999, forwarded all of the complaints to it by letter of 10 August 1999. The appellant had no opportunity to set out its views on those complaints in writing. Nor was it in a position to submit detailed observations on those complaints or to provide details on the different individual cases at the hearing on 7 October 1999 because the time allocated to its counsel to present oral argument was limited to 30 minutes.

108 In paragraph 105 of the judgment under appeal, the Court of First Instance used all of the correspondence and faxes to which it referred against the appellant. The same conclusion can be drawn from paragraph 115 of that judgment, in which the Court of First Instance found that the documents mentioned in paragraphs 106 to 114 of the judgment, and which were examined in the contested decision, revealed the barriers to exports in a sufficiently representative manner. The Court of First Instance clearly regarded these complaints as being representative of the other complaints which had not been communicated to the appellant.

109 According to the settled case-law of the Court, the right to a fair hearing, as a right of the defence, requires that the undertaking concerned be afforded the opportunity, from the stage of the administrative procedure, to make known its views on the truth and relevance of the facts, objections and circumstances put forward by the Commission (see paragraph 311 of the judgment under appeal and the case-law cited therein). If the Commission cannot justify its decision a posteriori by relying on evidence which was not communicated to the undertaking concerned in the course of the administrative procedure, the Court of First Instance should also not be able to use such evidence against that undertaking.

110 The Commission points out that the appellant set out its views during the hearing before the Court of First Instance on the content of the consumer complaints which it had placed on the case-file by letter of 20 August 1999. It adds that the appellant has not claimed that the Commission refused it wholly or in part access to those complaints during the administrative procedure and that the Court of First Instance could therefore not use them without infringing the right to a fair hearing.

111 The Commission submits further that the appellant contradicts the letter of 10 December 1996 from its representative, read in conjunction with the confirmatory declaration of 5 December 1996 in which Ms Pretzell, who worked with the appellant's representative, confirmed that she had full access to the Commission's file on 5 December 1996.

112 According to the Commission, it also follows from paragraph 115 of the judgment under appeal that the Court of First Instance based itself solely on the letters which were cited in paragraphs 106 to 114 of that judgment and which had been examined by the Commission in the contested decision. It is for that reason incorrect to allege, as the appellant does, that the Court of First Instance used as evidence all of the complaints made against the appellant.

Findings of the Court

113 This ground of appeal is based on the premiss that it was during the proceedings before the Court of First Instance that the appellant was first afforded access to the complaints of consumers which the Commission produced in this case.

114 That premiss is incorrect.

115 As the Commission submits in its statement of defence, without being challenged by the appellant on this point, the appellant did have full access, during the administrative procedure, to the Commission's file, including those complaints.

116 That being so, on the assumption that, in paragraphs 105 and 115 of the judgment under appeal, the Court of First Instance, as the appellant alleges, used not only the documents which the Commission analysed in the contested decision but also all of the complaints made against it, the appellant is in any case not entitled to submit that the Court of First Instance failed to guarantee its right to a fair hearing.

117 The sixth ground of appeal must accordingly be rejected.

The seventh ground of appeal

Arguments of the parties

118 In its seventh ground of appeal, the appellant submits that the Court of First Instance misappraised the essence of the duty to state reasons laid down in Article 190 of the EC Treaty (now Article 253 EC) in ruling, in paragraph 299 of the judgment under appeal, that it was sufficient for the Commission to address,

in the contested decision, some of the objections raised by the appellant in response to the statement of objections. Reasoning in which the Commission, without any identifiable method, merely examines a number of the objections raised by the undertaking concerned and quite simply ignores the rest cannot assist the Commission in monitoring its own activities or persuade that undertaking that the adopted decision is well founded, nor does it enable the public to be properly informed of the grounds which led the Commission to adopt its decision, these being functions which the statement of reasons must also fulfil. The legal reasoning underlying paragraph 297 of the judgment under appeal places in question the very meaning of the administrative procedure.

119 It is significant in this regard that, in the contested decision, the Commission did not, or practically did not, examine the objections raised by the appellant in its reply to the statement of objections relating to the split margin system and the duration of the infringement, two points on which the Court of First Instance annulled that decision.

120 The Commission submits that this ground is in part inadmissible and for the rest unfounded.

121 Given that the Court of First Instance annulled the contested decision on the two points mentioned by the appellant, the Court cannot annul them anew, even if those points are vitiated by an absence of reasoning, a matter which the Court of First Instance, moreover, expressly examined and rejected in paragraphs 299 and 300 of the judgment under appeal. The appellant fails to indicate the other points in respect of which it takes the view that the contested decision suffers from an absence of reasoning such as might have resulted in its annulment, nor does it submit that the Court of First Instance ought to have annulled the decision in its entirety on the ground of an alleged absence of reasoning with regard to the two points mentioned above.

122 The appellant, the Commission continues, distorts the content of paragraph 299 of the judgment under appeal, in which the Court of First Instance stressed that the Commission, which had in any event already satisfied its obligation to state reasons (paragraphs 297 and 298), also expressly replied to a number of the observations made by the appellant and Audi in response to the statement of objections. It cannot be inferred from that content that the Commission did not need to reply to the other objections raised following that communication and that it was simply able to ignore them. The Court of First Instance did no more than establish that the Commission had provided sufficient reasons for its assessment of the documents removed and specified the grounds on which the Commission took the view that those documents were of such a kind as to prove the existence of the infringement alleged. Furthermore, it does not in any way follow from the Court's case-law that the Commission had to reply on a point-by-point basis to the various interpretations which the appellant gave to those documents in its reply to the statement of objections.

Findings of the Court

123 This ground of appeal consists of two limbs. In the first of these, the appellant is essentially criticising the Court of First Instance for having defined incorrectly, in paragraph 297 of the judgment under appeal, the requirements which must be satisfied by the statement of reasons for a Commission decision such as that here under challenge. In the second limb of this ground of appeal, the appellant criticises the Court of First Instance for also having erred in its appraisal of the scope of the Commission's obligation to state reasons under Article 190 of the Treaty in finding, in paragraph 299 of the judgment under appeal, that it was sufficient for the Commission to reply to only some of the objections which the appellant had raised in response to the statement of objections.

124 With regard to the first limb of this ground of appeal, it is settled case-law that the statement of reasons required by Article 190 of the Treaty must disclose in a clear and unequivocal fashion the reasoning followed by the Community institution which adopted the measure in question in such a way as to enable the

persons concerned to ascertain the reasons for the measure in order to defend their rights and to enable the Community judicature to exercise its power of review (see, *inter alia*, Case C-482/99 *France* v *Commission* [2002] ECR I-4397, paragraph 41).

125 It was precisely on the basis of those criteria that the Court of First Instance appraised, in paragraph 297 of the judgment under appeal, the reasons given for the contested decision. It cannot therefore be criticised for having erred in law in that regard.

126 The first limb of the seventh ground of appeal must for that reason be rejected.

127 With regard to the second limb of the seventh ground of appeal, although the Commission is required under Article 190 of the Treaty to set out all the circumstances of fact and law justifying the adoption of a decision and the legal considerations which led the Commission to adopt it, that article does not require the Commission to discuss all the matters of fact and law which may have been dealt with during the administrative procedure (Joined Cases 43/82 and 63/82 *VBVB and VBBB* v *Commission* [1984] ECR 19, paragraph 22, and Case 246/86 *Belasco and Others* v *Commission* [1989] ECR 2117, paragraph 55).

128 In the present case, the Court of First Instance explained, in paragraphs 298 to 302 of the judgment under appeal, why it took the view that the contested decision was adequately reasoned, stressing moreover, in paragraph 299, that the Commission had expressly addressed a number of the observations which the appellant and Audi had raised in response to the statement of objections.

129 In those circumstances, the statement in paragraph 299 that the Commission did not have to reply to all of the appellant's detailed objections is not in itself vitiated by an error of law.

130 The appellant, however, submits that the Court of First Instance ought to have insisted that the Commission address, in the contested decision, at least the objections which it had raised following notification of the statement of objections and which related to the split margin system and the duration of the infringement, two points on which the Court of First Instance, for separate reasons, annulled that decision.

131 Independently of the question whether the appellant is entitled to argue that the Court of First Instance erred in law in respect of one part of the contested decision which was annulled on separate grounds, it must be pointed out in this regard that, in paragraphs 299 and 300 of the judgment under appeal, the Court of First Instance explained why it took the view that the Commission's decision was adequately reasoned with regard to implementation of the split margin system and the duration of the infringement.

132 In so proceeding, the Court of First Instance correctly determined, in line with the case-law cited in paragraph 127 of the present judgment, the scope of the obligation to state reasons laid down in Article 190 of the Treaty.

133 The second limb of the seventh ground of appeal must therefore also be rejected.

134 In the light of the foregoing, the seventh ground of appeal must be rejected in its entirety.

The eighth ground of appeal

Arguments of the parties

135 In its eighth ground of appeal, the appellant submits that the Court of First Instance failed to satisfy the obligation to state reasons imposed on it by Article 46 in conjunction with Article 33 of the EC Statute of the Court of Justice inasmuch as it failed adequately to explain, in paragraphs 347 and 348 of the judgment under appeal, why it formed the view that a fine in the amount of EUR 90 million was justified.

136 It argues that a more detailed statement of reasons is required in this case, a fortiori, as the Commission, for its part, set out extremely detailed reasons for the fine of EUR 102 million which it had imposed on the appellant. In view of the findings in paragraphs 72 (split margin system), 169 (termination of dealership contracts) and 344 and 346 (duration of the infringement to be taken into account in fixing the fine) of the judgment under appeal, the fine would have been significantly lower (approximately EUR 50 million) if the Court of First Instance had applied the criteria defined by the Commission.

137 The final sentence of paragraph 347 of the judgment under appeal is symptomatic of the type of reasoning employed by the Court of First Instance. The imprecise wording of that sentence does not make it possible to identify the degree of seriousness which that Court attributed to the different forms of conduct.

Literally, the wording used means that the fact that two crucial heads of complaint were not established has no bearing on the seriousness of the alleged infringement. Furthermore, the finding relating to the duration of the infringement, set out in paragraph 346 of the judgment under appeal, had practically no bearing on the level of the fine.

138 The Court of First Instance, in paragraph 347 of the judgment under appeal, should not have taken account of the relationship between the fine and the Volkswagen group's turnover, given that this factor had been mentioned only during the proceedings before the Court of First Instance and not in the contested decision (see Case T-141/94 *Thyssen Stahl* v *Commission* [1999] ECR II-347, paragraph 623). Furthermore, in accordance with Article 15(2) of Regulation No 17, turnover is relevant only with regard to the maximum amount of the fine and not as a criterion for calculating that amount.

139 According to the case-law, admittedly, it is not for the Court, when ruling on questions of law in the context of an appeal, to substitute, on grounds of fairness, its own assessment for that of the Court of First Instance exercising its unlimited jurisdiction to rule on the amount of fines imposed on undertakings for infringements of Community law (Case C-310/93 P *BPB Industries and British Gypsum* v *Commission* [1995] ECR I-865, paragraph 34). Nevertheless the Court should, at least, be in a position to verify that the Court of First Instance, when fixing the level of the fine, did not exceed the limits of its powers of review. The Court cannot do so if the Court of First Instance has not set out clearly the reasons why it departed from the criteria applied by the Commission, as indicated in its communication concerning the guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ 1998 C 9, p. 3), which are intended to guarantee equality of treatment for undertakings, and the Court of First Instance takes the view that a fine of EUR 90 million is justified. That is the point established by Case C-291/98 P *Sarrió* v *Commission* [2000] ECR I-9991 at paragraph 98.

140 The Commission submits that this ground of appeal manifestly lacks any basis. The Court of First Instance, it submits, enjoys unlimited jurisdiction when ruling

on the level of fines imposed on undertakings. It was therefore not bound by the Commission's criteria regarding assessment of the fine imposed on the appellant. In examining the present case for the purpose of determining the level of the fine, the Court of First Instance was also not prevented, within the context of its unlimited jurisdiction, from taking account of the relationship between the level of the fine imposed and the turnover of the Volkswagen group.

141 In any event, the reasoning by which the Court of First Instance, in the exercise of its unlimited jurisdiction, saw fit to reduce the amount of the fine to EUR 90 million is in all respects adequate.

142 The judgment in *Sarrió* v *Commission*, cited above, states only that the Court of First Instance is not bound by the method of calculation used by the Commission and that it is not entitled, in proceedings in which several undertakings participated in the same infringement, to draw a distinction between those undertakings without providing an appropriate explanation. The judgment under appeal, however, was delivered in proceedings which involved the appellant alone.

Findings of the Court

143 It should be noted in this regard that, in paragraph 347 of the judgment under appeal, the Court of First Instance first of all indicated that the reduction of the fine did not necessarily have to be proportionate to the reduction in the infringement period which the Commission had taken into account or correspond to the method of calculation which it had used inasmuch as it is for the Court of First Instance itself to carry out, in the exercise of its unlimited jurisdiction in the matter, its own assessment of the circumstances of the case in order to determine the amount of the fine. After pointing out that the particularly serious nature of

the infringement committed, as confirmed in paragraph 336 of the judgment under appeal, that is to say, the partitioning of the Italian market, called for a fine that would act as a real deterrent, the Court of First Instance formed the view that the level of the fine imposed on the appellant by the Commission was not abnormally high when considered against the turnover achieved in 1997 by the Volkswagen group in the three States affected by the infringement, that is to say, Italy, Germany and Austria, and in the European Union. Finally, the Court of First Instance took the view that its rejection of the Commission's conclusions regarding the split margin system and the termination of certain dealership contracts did not reduce the particularly serious nature of the infringement committed, which had been duly established by evidence of the other infringing conduct.

144 Having regard to all of the circumstances and considerations set out in paragraph 347 of the judgment under appeal, the Court of First Instance ruled, in paragraph 348, that it was proper to reduce the amount of the fine to EUR 90 million.

145 The ground of appeal relied on by the appellant consists essentially of three heads of complaint. First, the appellant, invoking the judgment in *Sarrió* v *Commission*, criticises the Court of First Instance for having failed clearly to indicate why it departed from the criteria chosen by the Commission for setting the level of the fine. Second, it argues that the Court of First Instance should not have taken account of the relationship between the fine and the turnover of the Volkswagen group in view of the fact that this element had been introduced during the proceedings before the Court of First Instance and that, in accordance with Article 15(2) of Regulation No 17, turnover is relevant only in regard to the maximum amount of the fine and not as a criterion for calculating that amount. Third, the appellant contends that, at the end of paragraph 347 of the judgment under appeal, the Court of First Instance used imprecise wording which did not make it possible to determine the degree of seriousness which it attributed to the various types of conduct and that it took practically no account, when fixing the amount of the fine, of its rejection of the Commission's analysis of the split margin system and of the termination of the dealership contracts, or of its own

limitation of the duration of the infringement. From this the appellant concludes that the Court of First Instance failed adequately to set out the reasons why it formed the view that a fine in the amount of EUR 90 million was justified.

146 With regard to the first head of complaint, the Court ruled, in paragraphs 97 and 98 of *Sarrió* v *Commission*, that, when the amount of fines is being decided, the exercise of unlimited jurisdiction cannot result in discrimination between undertakings which have participated in an agreement contrary to Article 85(1) of the Treaty and that, if the Court of First Instance intended, in the case of one of those undertakings, to depart specifically from the method of calculation followed by the Commission, which it had not called into question, it should have given reasons for doing so in the judgment under appeal.

147 That finding cannot, however, be applied in the present case, as the judgment under appeal was delivered in proceedings which involved the appellant alone and the Court of First Instance, when exercising its unlimited jurisdiction, is therefore not in principle bound by the method followed by the Commission in calculating the fine (see, to this effect, *Michelin* v *Commission*, cited above, paragraph 111).

148 This first head of complaint must accordingly be rejected.

149 With regard to the second head of complaint, suffice it to hold that, when it is itself examining the circumstances of a case in the exercise of its unlimited jurisdiction, the Court of First Instance may take into consideration, in accordance with Article 15(2) of Regulation No 17, the relationship between the amount of the fine imposed by the Commission and the turnover of the undertaking in question. In any event, in the present case, the Court of First Instance used the turnover of the Volkswagen group, not as a criterion for

calculating the amount of the fine imposed on the appellant, but rather to support the finding in paragraph 347 of the judgment under appeal that that amount was not abnormally high.

150 The second head of complaint must accordingly be rejected.

151 In its third head of complaint, the appellant essentially disputes the proportionate nature of the amount of the fine fixed by the Court of First Instance in the light of the findings which it had made, which led it to reject two of the Commission's complaints, and of the gravity and duration of the infringement. However, it is not for the Court, when ruling on questions of law in the context of an appeal, to substitute, on grounds of fairness, its own assessment for that of the Court of First Instance exercising its unlimited jurisdiction to rule on the amount of fines imposed on undertakings for infringements of Community law. The Court cannot therefore, at the appeal stage, examine whether the amount of the fine fixed by the Court of First Instance, in the exercise of its unlimited jurisdiction, is proportionate in relation to the gravity and duration of the infringement as established by the Court of First Instance on completion of its appraisal of the facts (Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P, C-251/99 P, C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375, paragraphs 611 to 614). In any event, it does not appear that the reasoning set out in paragraph 347 of the judgment under appeal was unreasonable or contradictory.

152 It follows that this head of complaint must also be rejected.

153 In the light of the foregoing, the eighth ground of appeal must be rejected in its entirety.

The ninth ground of appeal

Arguments of the parties

154 In its ninth ground of appeal, the appellant challenges the finding by the Court of First Instance in paragraph 283 of the judgment under appeal that an irregularity such as that arising from disclosure to the press of the amount of the fine imposed on it could result in annulment of the contested decision only if it were established that, had it not been for that irregularity, the content of that decision would have been different.

155 The appellant first expresses the view that the judgments cited by the Court of First Instance are irrelevant as they concerned cases the facts of which differed from those of the present. Thus, paragraph 91 of *Suiker Unie and Others* v *Commission*, cited above, can be explained by the fact that the Commission had not, in contrast to the present case, retained in its decision all of the complaints set out in the statement of objections (*Suiker Unie and Others* v *Commission*, paragraph 92). Furthermore, it follows from paragraph 29 of *Dunlop Slazenger* v *Commission*, cited above, that the question whether the Commission's services were responsible for the disclosure had not been resolved, unlike the position in the present case.

156 The appellant goes on to submit that, if it were to be acknowledged that irregularities such as that confirmed in this case cannot bring into question the validity of the contested decision, such irregularities will, in general, remain unpunished as an undertaking will never be in a position to prove that the decision would have been different had the Commission acted lawfully, even if that undertaking had full knowledge of the Commission's file. It must therefore suffice to invoke the possibility of influence on that decision, which the appellant has done in this case.

157 The possibility cannot be discounted in this regard that, during the examination of the proposal concerning the amount of the fine, the Commission members accepted that proposal, not because they considered it to be justified, but rather to avoid disowning their colleague, who had already disclosed the exact amount of the fine to the public.

158 Finally, according to the appellant, in view of the fact that the principles of the presumption of innocence, of the prohibition of harming the reputation of the accused undertaking, and of proper Community administration apply to the contested decision in its entirety and not solely to the amount of the fine, the only sanction which could be envisaged is the annulment of that decision in its entirety.

159 The Commission first of all submits, by reference to paragraphs 91 and 92 of *Suiker Unie and Others* v *Commission* and to paragraph 29 of *Dunlop Slazenger* v *Commission*, that the allegedly different facts of the cases resulting in those judgments, on the basis of which the appellant submits that it is not possible to take into account the settled case-law cited by the Court of First Instance, concerned only *obiter dicta* which did not constitute the basis of the finding by the Court and the Court of First Instance that there was, in the cases in question, nothing to suggest that, had there not been an irregularity, the contested decision would not have been adopted or would have had a different content.

160 The Commission goes on to argue that a distinction must be drawn between the expression of an opinion by a Commission member and a Commission decision which is discussed and adopted in accordance with the principle of collegiality.

161 Public declarations by Commission members have no bearing on a decision itself unless they affect the content of that decision. The fact that this is in general not the case cannot have the consequence that the mere possibility that a public declaration may affect the decision in question must necessarily result in that decision's annulment simply in order not to let that declaration go unpunished. A sanction of this kind would have no legal basis and would, moreover, be disproportionate.

162 Finally, the appellant's argument that other Commission members, when they approved the draft decision, merely wished to avoid disowning their colleague responsible for competition matters is mere speculation and cannot replace the proof that must be adduced in order to establish the causal nexus between disclosure to the press and the content of the contested decision.

Findings of the Court

163 It must first be pointed out that, after finding in paragraphs 280 to 282 of the judgment under appeal that, by disclosing to the press, with a high degree of accuracy, an essential element of the contested decision before its adoption, namely the amount of the fine envisaged, the Commission adversely affected the dignity of the undertaking charged and acted contrary to the interests of proper Community administration, the Court of First Instance rejected annulment of that decision, as requested by the appellant, on the basis of the reasons set out in paragraph 283 of the judgment under appeal, which is worded as follows:

'It is settled case-law that an irregularity of the type found above may lead to annulment of the decision in question if it is established that the content of that

decision would have differed if that irregularity had not occurred (... *Suiker Unie and Others* v *Commission* [cited above], paragraph 91; *Dunlop Slazenger* v *Commission*, cited above, paragraph 29). However, in the present case the applicant has not adduced such proof. There are no grounds for supposing that if the information at issue had not been disclosed the Advisory Committee or the College of Commissioners would have altered the proposed amount of the fine or the content of the decision.'

164 Next, contrary to what the appellant alleges, the Court of First Instance acted correctly in law in taking the view that the case-law cited in paragraph 283 of the judgment under appeal is applicable in the present case. Apart from some immaterial differences between the present case and those which led to the two judgments cited by the Court of First Instance, those judgments had, in particular, the purpose of specifying the consequences liable to follow, in regard to the legality of a decision taken by the Community authorities, from disclosure, prior to adoption of the decision concerned, of one of the elements of that decision. It was precisely an irregularity of this kind that occurred in this case, as the Court of First Instance confirmed in paragraphs 280 to 282 of the judgment under appeal.

165 Finally, it must be added that, contrary to what the appellant claims, the criterion upheld in the two judgments mentioned in paragraph 283 of the judgment under appeal, namely that an irregularity resulting from premature disclosure of an element of the decision may result in its annulment only if it is established that, had it not been for that irregularity, that decision would have differed in content, does not have the effect that irregularities of this kind remain practically unpunished. Quite apart from the possibility of securing annulment of the decision in question in the event that the irregularity committed affected the content of the decision, the person concerned is entitled to seek to establish the liability of the institution involved for any harm which he claims to have suffered by reason of that irregularity.

166 It follows that the ninth ground of appeal must be rejected.

167 As none of the grounds of appeal invoked by the appellant can be upheld, the main appeal must be dismissed in its entirety.

The cross-appeal

Arguments of the parties

168 In its cross-appeal, the Commission challenges the finding in paragraph 343 of the judgment under appeal that, even if the 15% rule specified in 'Convenzione B' had not been notified in the due and proper form, the Commission could not take the view that this rule constituted by itself an element justifying the increase in the amount fixed for the seriousness of the infringement and that consequently the period from 1988 to 1992, during which the 15% rule was the only act of which the appellant was accused, should not have been taken into account when determining the amount of the fine imposed on it.

169 In so finding, the Commission submits, the Court of First Instance acted at variance with the Court's established case-law which it had just cited in

paragraph 342 of the judgment under appeal to the effect that the prohibition on imposing fines provided for in Article 15(5)(a) of Regulation No 17 applies only in respect of agreements which have actually been notified in accordance with the requisite formalities. The fact that 'Convenzione B' was communicated to the Commission in 1988 cannot justify an exception to this principle.

170 Compliance with the formalities set out in Article 4 of Regulation No 27 is not, the Commission submits, an end in itself but is intended to enable the Commission to examine the notified agreement in the light of competition law by encouraging the undertakings concerned to provide it with the information required for that purpose by submitting, *inter alia*, a full account of the facts.

171 Furthermore, in view of the letter which the Commission had sent as early as 1988 to Autogerma (see paragraph 342 of the judgment under appeal), the appellant could not have expected that the Commission would, despite everything, take the view that communication of the new contract and its annexes constituted notification in due and proper form or that the Commission would examine that contract in the light of competition law without taking account of the fact that it had not in any way been notified.

172 It follows that, in so far as the Court of First Instance reduced the amount of the fine to EUR 90 million without taking into account the infringement resulting from application of the 15% rule during the period from 1988 to 1992, the judgment under appeal must be set aside on the ground that it infringes Article 15(5)(a) of Regulation No 17. In accordance with the case-law (*BPB Industries and British Gypsum* v *Commission*, cited above, paragraph 34, and Case C-280/98 P *Weig* v *Commission* [2000] ECR I-9757, paragraph 62), the case should be referred back to the Court of First Instance to enable it to fix afresh the amount of the fine by taking into account the infringement committed during that period.

173 The appellant submits that the exemption from fines provided for in the event of proper notification does not mean that a fine must be imposed or increased if there is no such notification, since the amount of the fine does not depend solely on the duration of the infringement but also on its seriousness and the degree of blame to be attached to the person responsible for it.

174 As the Court of First Instance, in the exercise of its unlimited jurisdiction, has a wide margin of discretion, its decision could be set aside by the Court only if a manifest error of law has been committed. In taking the view that application of the 15% rule, of which the Commission was aware and to which the appellant had not put an end, did not by itself justify the imposition of a fine on the appellant, the Court of First Instance did not exceed the limits of its jurisdictional powers as arbitrator of the facts.

Findings of the Court

175 In paragraph 343 of the judgment under appeal, the Court of First Instance ruled that, irrespective of the question whether or not the sending of 'Convenzione B' was a notification for the purposes of Regulation No 17, the very fact that that agreement had already been sent to the Commission in 1988 ought to have led it to reject the view that that agreement was in itself a factor justifying an increase in the amount fixed in respect of the seriousness of the infringement.

176 On the basis of this finding, the Court of First Instance ruled, in paragraph 343 of the judgment under appeal, that the period from 1988 to 1992, during which the

15% rule set out in 'Convenzione B' was the only act complained of, should not have been taken into account for purposes of fixing the fine. It subsequently reduced the amount of the fine by also taking that factor into account (paragraphs 346 and 348 of the judgment under appeal).

177 Contrary to what the Commission argues, the finding by the Court of First Instance that the period from 1988 to 1992 should not have been taken into account when the fine was being fixed is not vitiated by any error of law.

178 In the first place, the Commission's argument rests on the premiss that the Court of First Instance erred in the application of Article 15(5)(a) of Regulation No 17, which provides for an exemption from fines only in the case of agreements that have been properly notified. That premiss is mistaken because, as has already been indicated in paragraphs 77 and 78 of the present judgment, the Court of First Instance did not rule on the question whether communication of 'Convenzione B' to the Commission constituted notification for the purposes of Regulation No 17 or, consequently, on the question whether the 15% rule set out therein could benefit from the exemption from fines under Article 15(5)(a) of Regulation No 17.

179 Second, in a case such as the present, in which the infringement committed consisted of a series of measures which included the 15% rule and the combined effect of which was perceptible from 1 September 1993 (see paragraph 344 of the judgment under appeal), it is not incorrect to treat as being unjustified an increase in the amount of the fine for the seriousness of the overall infringement in relation to a period prior to the above date between 1988 and 1992, during which only one of the measures constituting the infringement existed, and where that

measure had, moreover, been communicated to the Commission. Consequently, the fact that there was no other unlawful conduct during that period allowed the Court of First Instance to draw the correct inference in law that that rule ought not to have been taken into account for the purpose of fixing the fine, notwithstanding the fact that the 15% rule, considered in isolation, was a measure incompatible with Article 85(1) of the Treaty.

180 It follows that the cross-appeal must be dismissed.

Costs

181 Under Article 69(2) of the Rules of Procedure of the Court, which applies to appeal proceedings pursuant to Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. The first subparagraph of Article 69(3) of those Rules, however, provides that, where each party succeeds on some and fails on other heads, the Court may order that the parties bear their own costs. As the appellant has been unsuccessful in its submissions on the main appeal and the Commission has been unsuccessful in its submissions on the cross-appeal, each party must bear its own costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. **Dismisses the main appeal and the cross-appeal;**

2. **Orders each party to bear its own costs.**

Puissochet Gulmann Skouris

Macken Colneric

Delivered in open court in Luxembourg on 18 September 2003.

R. Grass — Registrar

J.-P. Puissochet — President of the Sixth Chamber