JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

15 September 2005 *

In Case T-325/01,

DaimlerChrysler AG, established in Stuttgart (Germany), represented by R. Bechtold and W. Bosch, lawyers,

applicant,

v

Commission of the European Communities, represented by W. Mölls, acting as Agent, and H.-J. Freund, lawyer, with an address for service in Luxembourg,

defendant,

APPLICATION primarily for annulment of Commission Decision 2002/758/EC of 10 October 2001 relating to a proceeding under Article 81 of the EC Treaty (Case COMP/36.264 — Mercedes-Benz) (OJ 2002 L 257, p. 1), and, in the alternative, for a reduction in the fine imposed by that decision,

* Language of the case: German.

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

composed of P. Lindh, President, R. García-Valdecasas and J.D. Cooke, Judges,

Registrar: I. Natsinas, Administrator,

having regard to the written procedure and further to the hearing on 25 May 2004,

gives the following

Judgment

Facts

1 This action seeks the annulment of Commission Decision 2002/758/EC of 10 October 2001 relating to a proceeding under Article 81 of the EC Treaty (Case COMP/36.264 — Mercedes-Benz) (OJ 2002 L 257, p. 1) ('the contested decision').

2 DaimlerChrysler AG ('the applicant') is a German group which carries on business in particular in the manufacture and marketing of motor vehicles.

3 On 21 December 1998, Daimler-Benz AG merged with the applicant under a business combination agreement of 7 May 1998. The applicant then became the legal successor to Daimler-Benz AG and all of the latter's rights, assets, liabilities and obligations were transferred to it.

4 Before the merger, Daimler-Benz AG was the umbrella company of the Daimler-Benz group, which was active worldwide through its subsidiaries. In addition, on 26 May 1997, Mercedes-Benz AG, a subsidiary of Daimler-Benz AG, merged with the latter company. Since that date, it has been the motor vehicle division within Daimler-Benz AG. As in the contested decision, the name 'Mercedes-Benz' is used in this judgment to refer, as the context requires, to Daimler-Benz AG (until 1989), to Mercedes-Benz AG (until 1997), to Daimler-Benz AG (1997 and 1998) and to the applicant (from 1998).

5 From the beginning of 1995, the Commission received a number of complaints from consumers concerning restrictions on the export of new Mercedes-Benz motor vehicles imposed by companies in the Daimler-Benz group in various Member States.

6 The Commission had information that companies belonging to that group were partitioning the market contrary to Article 81(1) EC. On 4 December 1996, the Commission adopted a number of decisions ordering investigations pursuant to Article 14 of Council Regulation No 17 of 6 February 1962: First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-

1962, p. 87). Those investigations took place on 11 and 12 December 1996 at the premises of Daimler-Benz AG in Stuttgart (Germany), Mercedes-Benz Belgium SA/NV in Belgium, Mercedes-Benz Nederland NV in Utrecht (Netherlands) and Mercedes-Benz España, SA, in Spain.

7 On 21 October 1998, the Commission sent a request for information to Daimler-Benz AG under Article 11 of Regulation No 17, to which the latter replied on 10 November 1998. On 15 June 2001, the Commission sent a further request for information to the applicant, to which the latter replied on 9 July 2001. In the course of carrying out the investigations on 11 and 12 December 1996, the Commission found and seized a large number of documents which, together with the requests for information sent to the applicant and the latter's observations, constitute the basis of the contested decision.

8 On 10 October 2001, the Commission adopted the contested decision.

Contested decision

9 In the contested decision, the Commission held that Mercedes-Benz had itself or through its subsidiaries Mercedes-Benz España, SA ('MBE'), and Mercedes-Benz Belgium SA ('MBBel') infringed Article 81(1) EC. According to the Commission, the measures established in the contested decision related to the retailing of Mercedes-Benz passenger cars (recitals 143 to 149).

10 In the contested decision, the Commission described the companies concerned and their distribution network. It stated that the distribution of Mercedes-Benz passenger cars in Germany is essentially carried out through a network comprising branches belonging to the group, agents having the status of commercial agents (as defined in Paragraph 84(1) of the German Commercial Code), who have the authority to negotiate business transactions, and commission agents (recital 15). The distribution network in Belgium comprises an importer, MBBel, which, from an unspecified date, was a wholly owned subsidiary of Daimler-Benz AG, which has in turn been a wholly owned subsidiary of the applicant since 21 December 1998, and which sells new vehicles through two branches, dealers and agents/workshops, which also negotiate new-vehicle sales contracts (recitals 17 and 19). Passenger cars are distributed in Spain through a network comprising three branches of MBE and dealers. Some of the agents/workshops do not sell vehicles, but only negotiate sales contracts. MBE is a wholly owned subsidiary of the national holding company Daimler-Benz España, SA, which is in turn a 99.88 per cent subsidiary of Daimler-Benz AG. Since 21 December 1998, that holding company has been a wholly owned subsidiary of the applicant (recital 20).

11 The Commission held that, contrary to what the applicant had maintained during the administrative procedure, Article 81(1) EC applies to the agreements between Mercedes-Benz and its German agents in the same way as it would apply to an agreement with an authorised dealer. It stated that 'the restrictions imposed on an agent must therefore be assessed in the same way as for a dealer' (recital 168).

12 The Commission held in that regard, first, that the German Mercedes-Benz agents have to bear a number of commercial risks inextricably linked to their function as agent for Mercedes-Benz and which result in Article 81 EC being applicable to the agreements between them and Mercedes-Benz (recitals 153 to 160).

13 In particular, a German Mercedes-Benz agent bears a considerable share of the price risk where he negotiates the sale of vehicles. If an agent offers discounts on the sale of new vehicles which are accepted by Mercedes-Benz, these are deducted in their entirety from his commission (recitals 155 and 156).

14 A German agent also bears the risk of transport costs for new vehicles under Clause 4(4) of the German agency agreement. In the same way as a dealer, the agent is required to pass on the costs of transport and the transport risk contractually to the customer (recital 157).

15 The agent must also use a considerable part of his own financial resources for sales promotion purposes. He must, in particular, acquire demonstration vehicles at his own expense (Clause 4(7) of the German agency agreement). Mercedes-Benz grants special terms for the purchase of demonstration and business cars. Those cars are subject to a minimum retention period of three to six months and a minimum running distance of 3 000 kilometres. Thereafter, the agent may resell them on the second-hand market, also bearing the sales risk for this not insignificant number of vehicles (recital 158).

16 In carrying out his activities, a German Mercedes-Benz agent is exposed to a number of other commercial risks, acceptance of which is a precondition for becoming a Mercedes-Benz agent. Clause 13 of the agency agreement requires the agent to carry out guarantee work on vehicles which are subject to a manufacturer's guarantee. German agents are required, at their own expense, to set up a workshop and carry out after-sales service and guarantee work there and, on request, must

provide standby and emergency cover (Clause 12 of the agency agreement). In addition, a German agent is required to maintain, at his own expense, a stock of spare parts to carry out repairs to vehicles in his workshop (Clause 14 of the agency agreement) (recital 159).

17 Secondly, the Commission indicated that, financially speaking, a German agent's income from activities pursued on a self-employed basis exceeds many times over his income from negotiating the sale of new vehicles. It stated: 'For his activity as an intermediary the agent receives a commission which in the case of passenger cars is made up of a basic commission of 12.2 per cent and a service commission of up to 3.6 per cent. This commission income of at most 15.8 per cent constitutes the revenue from the agency activity. Out of this revenue the agent has to finance the discounts he grants to car buyers. The revenue actually earned from agency business is therefore lower than the abovementioned 15.8 per cent.' It goes on to say (recital 159): 'the revenue from acting as an intermediary amounts, if vehicle prices are regarded as part of this revenue, to approximately 50 per cent of the total revenue of an agent. But the agent's actual revenue from acting as an intermediary per se is the [above]mentioned commission. If this is compared with the agent's revenue from activities contractually linked to dealing in new vehicles in respect of which the agent bears the entire risk, it becomes apparent that only about one-sixth of total revenue is derived from acting as an agent proper'.

18 The Commission held that in view of the number and quantitative scope of the risks that the agents have to bear, the applicant's argument that those risks are typical of those borne by a true commercial agent could not be accepted. It stated that: 'the position would be different only if the agent could choose whether to assume in particular the considerable risks connected with demonstration and business vehicles, carrying out guarantee work, setting up maintenance and repair facilities and supplying spare parts, or simply to negotiate new-vehicle sales contracts'. That is, however, not the case (recital 160).

19 It rejected as irrelevant the applicant's argument that the German agents form an integral part of its business. The applicant relied in that regard on 'the requirements which the agent has to meet personally and commercially (his business activity generally involves selling exclusively Mercedes-Benz vehicles, acting as a "Mercedes-Benz agent", setting up, equipping and staffing his business, advertising, maintaining a certain image, representing the interests of [the applicant], and complying with the Mercedes-Benz identification guidelines)' and on the fact that the agents are 'agents of a single company' and may sell only Mercedes-Benz vehicles (recital 162). However, the Commission held in the contested decision that the criterion of 'integration' is, unlike risk allocation, not a separate criterion for distinguishing a commercial agent from a dealer (recital 163). The Commission compared the provisions of the German agency contracts referred to by the applicant with those of the agreements relating to dealerships abroad in order to show that German agents formed an 'integral part' of the undertaking (recital 164). It held that that comparison revealed that the requirements imposed on German agents were identical to those placed on dealers and that both forms of distributor formed an equally 'integral' part of the Mercedes-Benz distribution system (recital 165).

20 The Commission contends that Mercedes-Benz impeded competition by means of four separate measures.

21 In the first place, it claims that on the introduction of the new W 210 series (new E-Class) very clear instructions were issued, in particular in a document of 6 February 1996, to all members of the German distribution network, including agents, 'to concentrate on their own territory'. The instructions applied not only to the new model but to sales of new vehicles more generally. At the end of the document, Mercedes-Benz threatened that it would: 'not hesitate to withhold vehicles in the W 210 series, should [it] discover that an allocation is not warranted by the absorption capacity of a specific territory'. That lent particular emphasis to the instructions.

22 According to the Commission, the purpose of those instructions was to ensure that the dealers sold the W 210 and other models allocated to them within their contract territory alone and did not supply customers from outside the contract territory who did not belong to the customer base within that territory. That was intended, as the document put it, to limit 'internal competition', that is to say 'intra-brand' competition between German agents, and between those agents and German and foreign dealers. The aim of the document of 6 February 1996 was thus to restrict 'intra-brand' competition.

23 The Commission held, secondly, that in nearly all cases customers from other Member States outside the contract territory were required to pay a deposit of 15 per cent of the purchase price. That practice made parallel trading even more difficult, as it restricted the freedom of agents to pursue their own marketing policy and, for example, to waive those deposits when they knew the identity of the customer from outside the contract territory. Even if such deposits might sometimes be advisable from a commercial point of view, no deposits were required for sales in Germany despite the fact that, there too, there might in some cases be similar concerns as to creditworthiness. That rule accordingly discriminated against parallel trading and favoured sales of vehicles in Germany (recital 174).

24 Thirdly, the Commission held that the purpose of the ban on supplying foreign leasing companies where no lessee was specified, which was incorporated into the German agency agreements (see Clause 2(1)(d)) and the Spanish dealership agreements (see Clause 4(d)), was to restrict competition between the leasing companies within the Mercedes-Benz group and outside leasing companies in Germany and Spain. The latter could acquire Mercedes vehicles only on a case-by-case basis, that is to say when they already had a specific customer available, but not for stock purposes. That made it impossible for them to supply a vehicle quickly. The rules governing the sale of vehicles to leasing companies also led to outside leasing companies not receiving the same discounts on purchases of vehicles for lease as those received by other operators of vehicle fleets. Taken as a whole, the

provisions in question had a negative impact on the conditions under which the outside leasing companies could obtain Mercedes vehicles and hence could enter the downstream leasing market in competition with companies in the Mercedes-Benz group. The object of the rules governing the leasing activities of agents and dealers was to restrict competition on price and delivery terms for leased vehicles (recital 176).

25 Fourthly, the Commission held that the agreement of 20 April 1995 between MBBel and the Belgian Mercedes-Benz dealers' association, which limited discounts to three per cent and provided for an outside agency to monitor the level of discounts agreed on E-Class vehicles, with larger discounts leading to reductions in allocations of new E-Class vehicles, had as its object the restriction of price competition in Belgium.

26 Having determined that the measures in question had an appreciable effect on trade between Member States and that they could not be exempted from the application of Article 81(1) EC, the Commission held that a fine should be imposed on the applicant as the party responsible for all the infringements of competition law committed by Daimler-Benz AG and Mercedes-Benz AG and by the Daimler-Benz subsidiaries MBBel and MBE.

27 The Commission took the view that the measures aimed at restricting exports constituted a single infringement consisting of two elements (the instructions not to sell outside the contract territory and the 15 per cent deposit rule), which for a time had a cumulative effect. That infringement was particularly serious, so that a fine of a basic amount of EUR 33 million was appropriate. As regards the duration of the infringement, the Commission stated that, if both elements of the infringement were taken together, it began on 12 September 1985 and had not yet ended. It was therefore an infringement of long duration. However, the potential impact of the deposit rule was much smaller than that of the instructions aimed directly against

exports. The latter had been in force only from 6 February 1996 to 10 June 1999, that is to say for three years and four months. The Commission therefore considered that it was appropriate to increase the basic amount by only 42.5 per cent, that is to say by EUR 14.025 million. The basic amount accordingly stood at EUR 47.025 million.

28 The Commission considered that the prohibition on selling vehicles to leasing companies for stock laid down in the German agency agreement and the Spanish dealership agreement should be classified as serious. The basic amount of the fine should be set at EUR 10 million. The infringement began on 1 October 1996 and had not yet ended. Its duration therefore amounted to five years, which represented a period of medium duration. It considered that the basic amount should be increased by 50 per cent on the basis of the duration of the infringement. The increase was accordingly EUR 5 million, thereby bringing the basic amount to EUR 15 million.

29 The Commission held that the measures adopted with the active participation of MBBel for fixing selling prices in Belgium were by their nature a very serious infringement of the competition rules. Overall, it considered that that infringement was serious and held that a basic amount of EUR 7 million was appropriate. Those measures were in force from 20 April 1995 to 10 June 1999, that is to say for a period of medium duration, and it was appropriate to increase the basic amount by 40 per cent, that is to say by EUR 2.8 million, to EUR 9.8 million.

30 There were no aggravating or mitigating circumstances recorded by the Commission in the contested decision. Therefore, the sum of the above amounts gives a total fine of EUR 71.825 million.

31 In the light of those considerations, the Commission adopted the contested decision, the operative part of which reads as follows:

'*Article 1*

[Mercedes-Benz has itself] or through [its] subsidiaries [MBE] and [MBBel] infringed Article 81(1) of the EC Treaty by taking the following measures to restrict parallel trade:

— as of 6 February 1996 all agents in Germany were instructed as far as possible to supply new vehicles supplied to them, and in particular those in the W 210 series, only to customers in their own contract territory and to avoid internal competition; these measures were in force until 10 June 1999,

— as of 12 September 1985 their agents in Germany were instructed to require a deposit of 15% of the vehicle price for orders for new vehicles placed by [customers from outside the contract territory]; this measure has not yet been terminated,

— restricting, from 1 October 1996 until the present time, the supply of passenger cars to leasing companies for stock,

— participating in agreements to restrict the granting of discounts in Belgium, these agreements having been concluded on 20 April 1995 and terminated on 10 June 1999.

Article 2

[Mercedes-Benz] shall, immediately after this Decision is notified, bring to an end the infringements established in Article 1 to the extent that they are still continuing and shall not replace them with restrictions having the same object or effect; in particular, it shall at the latest within two months of notification of this Decision:

— withdraw circular No 52/85 of 12 September 1985 by sending a circular to the German agents and principal agents, in so far as it instructs them to require [customers from outside the contract territory] to pay a deposit of 15% when ordering a passenger car,

— remove from the German agency agreements and the Spanish dealer agreements the rules prohibiting the sale of new vehicles to leasing companies for stock ...

Article 3

A fine of EUR 71.825 million is imposed on [Mercedes-Benz] in respect of the infringements referred to in Article 1.

...'

32 The contested decision shows that the Commission considered in essence that the expression 'customer from outside the contract territory' was used by the Mercedes-Benz group in the documents found in the course of the investigations (see paragraph 7 above) to denote, in cross-border sales, final consumers from another State within the European Economic Area.

Procedure and forms of order sought

33 By application lodged at the Registry of the Court of First Instance on 20 December 2001, the applicant brought the present action.

34 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fifth Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure, requested the parties to answer a number of written questions before the hearing. The parties complied with that request.

35 The parties presented oral argument and answered the questions put by the Court at the hearing held in open court on 25 May 2004.

36 The applicant claims that the Court should:

— annul the contested decision;

— in the alternative, reduce the amount of the fine imposed in Article 3 of the contested decision;

— order the Commission to pay the costs.

37 The Commission contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

38 The applicant puts forward four pleas in law in support of its application. The first is based on an infringement of Article 81(1) EC and a manifest error in the assessment of the agreements entered into with the Mercedes-Benz agents in Germany. The second plea, regarding the first and third measures established by the Commission in the contested decision, is based on an infringement of Article 81 EC and of Commission Regulation (EC) No 1475/95 of 28 June 1995 on the application of Article [81](3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements (OJ 1995 L 145, p. 25). The third plea is based on an infringement of Article 81(1) EC and a manifest error in the assessment of the second and fourth measures established by the Commission in the contested decision. The fourth plea contends that the amount of the fine imposed by Article 3 of the contested decision is incorrect.

The first plea, based on an infringement of Article 81(1) EC and a manifest error in the assessment of the agreements entered into with Mercedes-Benz agents in Germany

Arguments of the parties

39 The applicant challenges the Commission's conclusions in the contested decision as to the legal status of the German agents. It argues that its German commercial agency agreements are not subject to the prohibition on concerted practices under Article 81(1) EC in so far as they relate to the activities of its agents in selling new Mercedes-Benz vehicles. The agents do not bear any of the risks involved in the sale of vehicles. Furthermore, they are wholly integrated into the Mercedes-Benz organisation and have the same legal relationship with it as do its employees. They therefore satisfy the conditions laid down by the Court of Justice in settled case-law relating to the inapplicability of the prohibition on concerted practices to commercial agency agreements.

40 The applicant submits first of all that it maintains its own distribution network in Germany, both through branches and through commercial agents who act in the name and for the account of Mercedes-Benz and dealers who act in their own name but for the account of Mercedes-Benz. It states that agents in the Mercedes-Benz German sales network are not, either legally or economically, dealers in new vehicles. They negotiate purchase contracts for new vehicles on behalf of Mercedes-Benz in accordance with requirements laid down by the latter. The fact that the agents do not buy new vehicles from Mercedes-Benz and thus hold no stock is of considerable importance from an economic point of view. The burden of risk associated with the sale of new vehicles, including those related to the holding of stock and the corresponding illiquidity of capital, lies entirely on Mercedes-Benz. The agents bear only the risk arising from their activities as intermediaries. The

applicant is thus legally free to decide whether, and on what terms, it will enter into contracts for sale. The instructions given to agents and their contractual obligations as regards the entering into of contracts of sale and the terms on which they are written do not fall within the scope of the law relating to concerted practices.

41 The case-law of the Court of Justice provides that Article 81(1) EC does not apply to agency contracts when two cumulative conditions are satisfied, namely, first, that the agent is integrated in the sales network of the manufacturer and, secondly, that he carries out his activities as intermediary and representative for the exclusive benefit of the principal (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 and Case C-266/93 *Volkswagen and VAG Leasing* [1995] ECRI-3477).

42 As regards the requirement for 'integration', the approach followed by the Commission in the contested decision is illogical and incompatible with the case-law, in particular when the latter states that 'the criterion of integration is, unlike risk allocation, not a separate criterion for distinguishing a commercial agent from a dealer' (recital 163 in the contested decision).

43 By disregarding issues of 'integration' and by giving additional weight to the criterion of 'risk allocation', the Commission extended the scope of the prohibition on concerted practices to the commercial agency further than has ever been done before. However, it is clear from *Suiker Unie and Others* v *Commission*, cited in paragraph 41 above, that the Court of Justice takes the view that 'integration' means not only that the agent should not share in any risks, but also that his interests should be the same as those of his principal.

44 The applicant also argues that, contrary to what the Commission stated in the contested decision (see recitals 164 and 165 in the contested decision), the fact that foreign dealers who are not commercial agents transact with third parties in the same way as the German Mercedes-Benz agents is of no significance. It must also be established that the corresponding risks are shared. Furthermore, the analogy cannot be sustained, as the case-law of the Court of Justice provides that 'integration' is dependent not only on external characteristics relating to the way in which the dealer transacts with third parties generally and customers in particular, but also on 'internal' factors associated with risk sharing and the requirement that the agent act wholly in the interests of his principal.

45 It also criticises the Commission for taking the view in the contested decision that, in assessing contracts entered into between a manufacturer and an agent from the point of view of the law relating to concerted practices, it is sufficient to determine whether or not the commercial agent has to bear the risks 'inextricably' linked to his function as intermediary (see, to that effect, recital 153 in the contested decision). That approach, which was adopted by the Commission in the contested decision and in its guidelines on vertical restraints (OJ 2000 C 291, p. 1) ('the guidelines') represents a departure from its approach to the applicability of Article 81 EC for which there is no objective justification. Furthermore, it is incompatible with the case-law of the Court of Justice on the matter.

46 The applicant accepts that Mercedes-Benz agents bear certain costs and risks.

47 First, an agent must assume in every case a 'commission' risk. The commission is usually fixed as a percentage of the volume of sales made by the agent. The agent's ability to earn commission is therefore increased when the volume of sales is high and reduced when the volume of sales is low. When the principal, which is

ultimately responsible for deciding whether a contract is to be concluded on the terms specified by the buyer, grants discounts, it is reducing not only its own revenue but also the commercial agent's commission. However, the Mercedes-Benz agents do not share price risks and it is wrong to hold that the deduction of 'price concessions' from the agent's commission is a 'price risk'.

48 The true position is that the amount of the commission obtained by the agent is determined by the commercial agency agreement. It varies according to whether the sale represents a single transaction or was concluded with a major customer or a 'user'. The agent is paid a lower commission for sales to major customers and certain users, since sales to customers which have a special contractual relationship with Mercedes-Benz (and not with the agent) in the form of volume or category discounts do not, generally speaking, require the same level of commitment as other kinds of sale, especially those to new customers. Payment to the agent of a lower commission is thus objectively justified. There is no rule of law which requires that commercial agents are always to be entitled to the same level of commission irrespective of the type of sale.

49 As regards new cars, a considerably higher level of commitment is required of dealers than of Mercedes-Benz agents, especially concerning forward funding of vehicles and the risk of sale. In the case of a dealer, the latter amounts to the whole of the sale price of the motor vehicle, whereas a Mercedes-Benz agent bears only the risk of not achieving his targeted commission. Furthermore, the exposure of commercial agents to 'commission risk' is limited to the amount of the commission. The risk of selling a motor vehicle at a loss is borne by the dealer but does not arise in the case of an agent. The fact that an agent may grant a discount under a special agreement concluded with the customer, to the detriment of his commission, does not mean that there is a commercial agency agreement for the purposes of the law relating to concerted practices. It should instead be seen as an element of leeway granted by Mercedes-Benz to the agent.

50 Secondly, a Mercedes-Benz agent has to meet business expenses arising mainly out of the sales promotion activities which he undertakes with a view to successfully concluding the maximum possible number of sales. Thirdly, an agent undertakes, in his own name, for his own account and at his own risk, workshop repairs and the sale of spare parts.

51 The applicant challenges the Commission's finding in the contested decision that the preferential treatment attaching to the activities of commercial agents cannot apply to the Mercedes-Benz agents since, in particular, they are contractually required to provide after-sales services in their own garages, to undertake guarantee work and to have spare parts in stock at all times (see paragraph 16 above).

52 In *Volkswagen and VAG Leasing*, cited in paragraph 41 above, the Court of Justice held that dealers participated in the risks linked to contracts entered into by them with VAG Leasing as commercial agents, by reason of the obligation to repurchase vehicles on the expiry of the leasing contracts at a price which had been agreed in advance. Moreover, the Court of Justice did not accept that selling vehicles to customers and negotiating the sale of vehicles as agents constituted parallel activities and referred to the after-sales servicing activities undertaken by the dealers in their own name and for their own account. However, that does not mean that the Court of Justice regarded after-sales servicing as an independent activity, as it can exist only as an adjunct to the activity of selling. There is nothing in the judgment to suggest that the carrying-on of business as a commercial agent and the provision of after-sales services lead to a double-sided relationship, thereby excluding any right to preferential treatment under the law relating to concerted practices.

53 The obligation imposed on agents under Clause 13(1) of the agency agreement 'to carry out guarantee work on vehicles supplied by Daimler-Benz irrespective of where and through whom they were sold' is a condition precedent to the application

of the exemption under Article 5(1)(a) of Regulation No 1475/95. If Mercedes-Benz were not to have imposed the corresponding obligation to undertake guarantee work on its agents, the Commission would probably have argued that the agency agreements did not satisfy the conditions laid down under Regulation No 1475/95.

54 The Commission's assumption that the only compensation an agent receives for guarantee work he carries out is a 'guarantee payment', calculated on the basis of the average customer cost rate and which therefore is 'not necessarily' the same as the rates which he might freely negotiate with and recover from third parties, is without foundation. By undertaking guarantee work, agents recover more than merely the reimbursement of their expenses; in other words, they recover the same payment they would have charged a third party for the same repair. Prices for this work cover the agent's costs together with an element for profit. The agent carries out the guarantee work as part of his normal servicing activities and acts to that extent in his own name and for his own account. The difference from 'ordinary' repairs is 'simply the fact that the owner of the vehicle is not the customer but Mercedes-Benz, which calls upon the agent to carry out the guarantee obligation, the latter being a matter for Mercedes-Benz alone'.

55 The same applies to the setting-up of the workshop and the maintenance of the stock of spare parts which the agent is required to undertake. Those activities are carried out by the agent in his own name and for his own account. It is accordingly appropriate for him to fund those investments.

56 The agents do not contribute towards transport costs (see, to that effect, recital 157 in the contested decision). It is true that Clause 4(4) of the agency agreement requires the agent to enter into an arrangement with the customer as to transport costs. However, that should be construed not as a risk but rather as an additional opportunity for the commercial agent to make a profit. The agent participates in transport arrangements organised by Mercedes-Benz with contractual forwarding

agents, under which he can arrange for the transport of motor vehicles at a fixed price which is recharged, together with a supplement, to customers at the same time as they are invoiced for his services relating to the preparation and registration of the vehicle. Furthermore, even if it were the case that German commercial agents in the Mercedes-Benz distribution network are not entirely free of the transport cost risk, the risk involved is only an 'insignificant' one, whether seen as part of the wider whole or in isolation.

57 Agents' participation in sales promotion does not entail participation in the risks linked to the different forms of selling, but arises from the obligation imposed on them to organise and fund the staffing and equipping of the commercial agency activities which they undertake. Agents do not take part in national or regional advertising, but only in promotional activities connected with their own business. Commercial agents bear the costs of those activities and the risks arising from them through their commission. The Commission's argument that demonstration vehicles are specimens or documentation for the purposes of Article 4(2)(a) of Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents (OJ 1986 L 382, p. 17) is without foundation. That directive makes no reference to specimens but only to documentation, in other words material specifically produced for marketing purposes and not vehicles used for demonstration purposes and then sold by the agent on terms which give rise to no loss on his part.

58 The fact that a Mercedes-Benz agent may service a large number of demonstration vehicles does not mean that he participates in the risks relating to the sale of new vehicles, but only that his activities as agent require considerable investment in terms of marketing to customers. In that regard, the applicant contests the Commission's finding in the contested decision that 'an average of 21.66 per cent of the turnover of branches and agencies was accounted for by demonstration and business vehicles'. That rate reflects 'the national turnover of Mercedes-Benz passenger cars'. It is not a figure which relates solely to agents.

59 By contrast, 'if the rate is applied to agents, using as a denominator not ... only the commissions earned by them but also the turnover of Mercedes-Benz in relation to sales effected through their agents, it falls to only eight per cent for new vehicles and 9.8 per cent if utility vehicles are included'. Furthermore, 'if the share of demonstration and business vehicles is added to the agent's actual turnover ..., the rate for passenger cars alone is 15.8 per cent, or 19.3 per cent if utility vehicles are included'.

60 The Commission cannot treat the sale of demonstration vehicles, where the agent benefits from preferential terms, as a risk borne by the latter (recital 158 in the contested decision). Such a risk generally does not arise. On the contrary, activities involving demonstration vehicles provide additional revenue to the agent. However, even if the commercial agent was unable to dispose of demonstration vehicles at prices higher than his purchase price and thus incurred higher costs, that would not be a relevant argument. The commercial agent funds through his own resources only activities linked to the negotiation of sales which he is required to undertake under the commercial agency agreement and it is only the risks directly connected with those activities which fall to his account.

61 The Commission's assertion in the contested decision that in total revenue figures for a typical commercial agency 'only about one sixth of total revenue is derived from acting as an agent proper' is legally irrelevant. The method of calculation used by the Commission in the contested decision is also incorrect and it is necessary to take account of '[the agent's] revenue from external sources and not to take account only of the amount of commission received'. Agency business represents 'approximately 55 per cent of the total turnover of a commercial agent according to the calculations made by Mercedes-Benz'.

62 The Commission argues that given the nature and the extent of the costs and risks imposed by the applicant on its agents and the size of the revenue achieved by the agent through his independent activities in comparison with the revenue he achieves as an agent in selling new cars, Article 81(1) EC applies to the agreements entered into between the applicant and its German agents in the same way as it applies to an agreement entered into with a dealer.

63 The agreement between an agent and his principal is a contract entered into between two separate undertakings and accordingly it must, as a matter of principle, satisfy the requirements of competition law. The provisions of those agreements thus avoid the application of those rules only in so far as their object or effect is not anti-competitive.

64 The applicant fails to have regard both to the nature of the risks which agents are required to bear and to the legal consequences of the transferring of those risks to its agents.

65 The Commission notes that, according to the applicant, case-law provides that in order for Article 81(1) EC not to apply to agency agreements two cumulative conditions must be satisfied: first, the risks inherent in such a relationship must be shared and, secondly, there must be 'integration' of the agent in the undertaking of the principal. The applicant is thus giving a wider scope to the prohibition on concerted practices in the context of agency relationships than the Commission does, because the latter refuses to recognise an agent's preferential status under competition law only if he is required to bear significant financial and commercial risks without requiring, in addition, that he be integrated (however that expression may be defined) in the undertaking of his principal. *Volkswagen and VAG Leasing*, cited in paragraph 41 above, is to be interpreted as meaning that the Court of Justice no longer treats the criterion of 'integration' as being a separate concept from that of

risk sharing. In *Suiker Unie and Others* v *Commission*, cited in paragraph 41 above, and in particular paragraphs 538 to 542 of that judgment, the Court of Justice held that an agent cannot be treated as being 'integrated' in the undertaking of his principal if he bears certain risks.

66 Moreover, the application to the present case of the reasoning of the Court of Justice in *Suiker Unie and Others* v *Commission*, cited in paragraph 41 above, shows that where relationships are 'double-sided', that is to say where the intermediary is both an agent and an independent trader, the prohibition of concerted practices applies not only to the activities which he carries on in his own name and for his own account but also to the activities he carries on in the name and for the account of the principal. In the present case, the applicant's German agents carry out significant independent activities and even though the applicant and the agents do not market the same goods in carrying out their activities, contrary to the situation which arose in *Suiker Unie and Others* v *Commission*, cited in paragraph 41 above, the sale of new cars, the operation of a workshop and after-sales servicing are objectively closely connected. The agent is required to perform guarantee work on vehicles and to provide an after-sales service together with the sale of spare parts precisely in order that new cars may be sold, and the same applies to the other risks that he has to bear. That connection suggests that a uniform approach to the contractual relationship should be adopted, and that that approach should extend to the applicability of competition law.

67 The judgment of the Court of Justice in Case 311/85 *Vlaamse Reisbureaus* [1987] ECR 3801 bears no relevance to the resolution of these proceedings, as the facts which arose in that case differ from those which arise in the present dispute.

68 The Commission also refers to *Volkswagen and VAG Leasing*, cited in paragraph 41 above, where the Court of Justice confirmed that a commercial agent loses his preferential status under competition law when he bears even one of the risks arising from the contracts negotiated for his principal. Accordingly, the fact that the

applicant's German agents do not bear the whole, but only a significant share, of the risks arising from the transactions in which they act as intermediaries does not call into question the applicability of the prohibition on concerted practices to the measures restricting parallel trade which form part of the arrangements with them.

69 The applicant's interpretation of *Volkswagen and VAG Leasing*, cited in paragraph 41 above (see paragraph 52 above) is incorrect. The applicant is attempting to give the impression that the contested decision goes beyond that case-law, whereas, on the contrary, the Commission interpreted it restrictively. It took into consideration the fact that the agents undertake separate activities involving commercial risks, namely services provided in relation to the manufacturer's guarantee, after-sales servicing and the sale of spare parts only because they are an adjunct, thought by the manufacturer to be indispensable, to that part of the agent's activities under which the agent acts as an intermediary. It is impossible to make sense of the applicant's position that after-sales servicing should play no part in the present case for the purposes of assessing the measures restricting competition entered into as part of the agency relationship.

70 Some of the obligations imposed by a principal on its agent may go beyond the obligation of mutual defence of interests and thus be disproportionate. It is thus appropriate to investigate whether, in each individual case, the relevant obligation restricting competition is truly required by virtue of the nature of the relationship and whether it is necessary in order to protect the 'legal status' of the agent.

71 The Commission takes the view that the obligations which aim to limit 'intra-brand' competition on the market for goods and to restrict competition through price and conditions of supply for leased cars were not required by the nature of the relationship between the parties nor did they form an integral part of the arrangements for selling cars through commercial agents. That applies to the

conditions under which the applicant restricted the agents' commercial freedom by obliging them to require a deposit of 15 per cent from customers from the Community and by instructing them to sell, where possible, new vehicles only to customers within their contract territory and to avoid internal competition. It is wrong to argue, as the applicant does, that the prohibition on concerted practices applies to agency agreements only where the agent bears the risks and the costs arising from the conclusion or implementation of sales contracts entered into or negotiated by him on behalf of the undertaking and not where he carries on an independent economic activity as regards the activities which the principal has appointed him to carry out. That argument fails to have regard to the nature of the conduct complained of by the Commission. It also fails to take sufficient account of economic realities in that it has regard only to the upstream risks assumed by the agent by virtue of the fact that he purchases the goods in order to resell them. First, the extent of the risks which are removed from the applicant and taken on by the agent by virtue of that assumption will depend on the circumstances of each particular case. Secondly, the risks linked to upstream sales often arise from the fact that those sales require a market-specific infrastructure, irrespective of the acquisition of the goods by the agent. The Commission refers in that regard to the activities involving the performance of obligations under the manufacturer's guarantee, which largely takes precedence over the guarantee provided by the reseller itself, and to after-sales servicing and the purchase, presentation and resale of demonstration vehicles. Mercedes dealers relieve the applicant of the sales risk, as such, only to a limited extent, as the latter manufactures its cars 'to order' and not for stock purposes. An undertaking which uses commercial agents to distribute its products and which transfers to them risks which are particular to the contracts or to the market must expect to see the prohibition on concerted practices apply to its relations with its agents. The obligatory assumption of economic risks by the agent should go hand in hand with the agent's commercial freedom to face those risks and to restrict that commercial freedom is contrary to competition law where competition is appreciably restricted by doing so.

72 The applicant's arguments regarding the analysis of the sharing of the various risks in the contested decision should be rejected apart from its observations relating to the place where the agreement was executed.

73 As regards price risk, the applicant transfers part of the marketing risk in its vehicles to its agents. The full amount of any discount offered by the agent is deducted from his commission. The commercial agents thus participate in the applicant's sales risk and the prohibition on concerted practices accordingly applies (see, to that effect, *Suiker Unie and Others* v *Commission*, cited in paragraph 41 above), whether the agent forgoes his commission under a particular agreement on prices or under standard agreements as to terms and conditions which the applicant enters into with its major customers. In each case, the applicant uses the agent's commission as a marketing incentive and thereby obliges the latter to share the costs and risks associated with the sale of vehicles. The agent's commission is reduced by an amount which can be as high as six per cent when he sells a car to a customer with which the applicant has entered into an agreement as to terms and conditions. Moreover, the cost of discounts given to major customers is borne by the applicant only to the extent that they exceed six per cent. The position of dealers and agents is economically similar. Under Directive 86/653, an agent's remuneration is generally calculated as a percentage of the volume of the contracts he has negotiated.

74 Where that volume differs from what had originally been anticipated, a commercial agent normally assumes only the risk that the agreed commission rates will be applied to that reduced volume. An agent is not required as a matter of course to take the steps necessary to ensure that his principal does not suffer the consequences of variations in volume by, for example, forgoing his commission to the extent of any discount. It is therefore impossible to interpret the fact that the agent assumes to a greater or lesser degree the applicant's marketing risk in all types of contract as meaning simply that there is no agreement which prevents agents from forgoing their commission.

75 Agents also bear the risk associated with transport costs. Under the agency agreement, the agent is obliged to deliver the new car purchased by the customer to him and to agree the amount of the payment for that service with him. The opportunity to make a higher profit by virtue of the difference between the amount to be paid to the carrier and the payment agreed with the customer in no way affects

the fact that the agent runs the risk of not receiving payment from the customer. If the vehicle is not delivered to the customer, transport costs already paid will none the less remain the responsibility of the agent. Inasmuch as the applicant relies on the obligations normally imposed on commercial agents and which form an integral part of the system, the answer should be that German law applicable to commercial agents provides that the delivery of the goods is a matter for the principal and not the agent. Lastly, it is unnecessary to consider whether the risks associated with transport costs are 'insignificant', as the agents must also bear many other commercial risks.

76 Under the agency agreement, the agent is required to devote a considerable part of his financial resources to sales promotion and he bears the sales risk for a large number of vehicles (see paragraph 58 above). With reference to the figure of 15.8 per cent to which the applicant refers (see paragraph 59 above), the revenue from resales of demonstration cars and business cars is considerable compared to the commission received by the agents as a result of acting as an intermediary in new-car sales. Contrary to what the applicant maintains, the financial commitment which the latter requires of its agents and the risk imposed on them cannot be considered separately from their activities as intermediaries, as demonstration cars are market-specific investments which the applicant requires the agents to make and which are directly relevant to marketing to the final customer. Article 4(2)(a) of Directive 86/653 requires the principal to make demonstration cars available free of charge to a commercial agent, as these represent the 'specimens' or the 'documents' necessary for him to carry on his activity. The applicant's duties are thus passed on to the agents. It follows that the applicant requires its agents to assume the duties, risks and financial overheads linked to the marketing of its products which are imposed on it by the legislature. By requiring its agents to conduct themselves to a large degree as independent dealers in (demonstration) vehicles, the applicant is turning them into 'false' commercial agents, with the result that competition law applies.

77 The agents have to meet the manufacturer's guarantee offered by the applicant for new cars, set up a workshop, maintain a stock of spare parts and offer after-sales and guarantee services at their own expense and at their own risk (recital 159 in the contested decision). Those market-specific investments required of the commercial agents mean that the latter share the costs and risks associated with the marketing of the applicant's new cars.

78 The Commission challenges the distinction made by the applicant between the activities of the agent and after-sales services, stating that it is artificial and does not reflect economic reality. The purpose of after-sales service is to promote the applicant's sales in the light of the final customer's expectation that there will be a maintenance network for the vehicle he is buying. Furthermore, the applicant itself treats commercial agency activities and after-sales servicing as an economic unit. Clause 6 of the agency agreement provides that, if the car is transferred to the contract territory of another agent within a specified period, part of the first agent's commission is to be transferred to the second. The agent's activity as an intermediary cannot therefore be considered in isolation from the costs and risks which the agent has to bear in providing guarantee services, after-sales service and spare parts. The Commission refers once again to the similarity between the present case and the facts which gave rise to the judgments in *Volkswagen and VAG Leasing*, cited in paragraph 41 above, and *Suiker Unie and Others* v *Commission*, cited in paragraph 41 above. The agent's right to remuneration for providing guarantee and after-sales services is of no relevance, since he must none the less bear the costs and risks associated with carrying on his activity. Regulation No 1475/95, which the applicant refers to, does not apply where all that is involved is mere 'intermediation' in relation to the sale of new cars, since the element of 'resale', as defined in Article 10(12) thereof, is lacking. The agent could therefore perfectly well allow true agents the choice of whether or not to provide guarantee and after-sales services. Lastly, the risks assumed by the agent in relation to defective goods should be attributed primarily to his membership of the applicant's guarantee network, and the same applies to after-sales servicing.

79 As regards the applicant's objection that the Commission compared the agent's revenue in terms of commission with the revenue which he realises in his own name and for his own account, the Commission argues that, even using the applicant's benchmark as a basis, a large part of the agent's economic activity falls within the independent activities required of him by the applicant and that that part must not be left out of account in assessing the contractual relationships between the applicant and its agents for the purposes of competition law.

80 The Commission rejects the applicant's argument that the agents should be treated as branches. Whether an agent is an independent commercial agent does not depend on whether he acts in the interests of his principal or those of third parties as well. The prohibition on concerted practices applies if the agent has to bear contract- or market-specific risks, as is the case in these proceedings.

Findings of the Court

81 According to settled case-law, where the Court is faced with an application for the annulment of a decision pursuant to Article 81(1) EC, as a general rule it undertakes a comprehensive review of the question whether or not the conditions for the application of Article 81(1) EC are met (see, to that effect, Case 42/84 *Remia and Others* v *Commission* [1985] ECR 2545, paragraph 34, and Joined Cases 142/84 and 156/84 *BAT and Reynolds* v *Commission* [1987] ECR 4487, paragraph 62).

82 Article 81(1) EC provides:

'The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market ...'

83 It is clear from the wording of that article that the prohibition thus laid down concerns exclusively conduct that is coordinated bilaterally or multilaterally, in the form of agreements between undertakings, decisions by associations of undertakings and concerted practices. It follows that the concept of an agreement within the meaning of Article 81(1) EC, as interpreted in case-law, centres around the existence of a joint intention between at least two parties (Case T-41/96 *Bayer* v *Commission* [2000] ECR II-3383, paragraphs 64 and 69, upheld by the Court of Justice in Joined Cases C-2/01 P and C-3/01 P *BAI and Commission* v *Bayer* [2004] ECR I-23).

84 It follows that, where a decision by a manufacturer constitutes unilateral conduct of the undertaking, that decision escapes the prohibition laid down in Article 81(1) EC (see, to that effect, Case 107/82 *AEG* v *Commission* [1983] ECR 3151, paragraph 38; Joined Cases 25/84 and 26/84 *Ford and Ford of Europe* v *Commission* [1985] ECR 2725, paragraph 21; and Case T-43/92 *Dunlop Slazenger* v *Commission* [1994] ECR II-441, paragraph 56).

85 It is also settled case-law that in competition law the term 'undertaking' must be understood as designating an economic unit for the purpose of the subject-matter of the agreement in question, even if in law that unit consists of several persons, natural or legal (Case 170/83 *Hydrotherm* [1984] ECR 2999, paragraph 11, and Case

T-234/95 *DSG* v *Commission* [2000] ECR II-2603, paragraph 124). The Court of Justice has emphasised that, for the purposes of applying the competition rules, formal separation of two companies resulting from their having distinct legal identity, is not decisive. The test is whether or not there is unity in their conduct on the market. Thus, it may be necessary to establish whether two companies that have distinct legal identities form, or fall within, one and the same undertaking or economic entity adopting the same course of conduct on the market (see, to that effect, Case 48/69 *ICI* v *Commission* [1972] ECR 619, paragraph 140).

86 The case-law shows that this sort of situation arises not only in cases where the relationship between the companies in question is that of parent and subsidiary. It may also occur, in certain circumstances, in relationships between a company and its commercial representative or between a principal and its agent. In so far as application of Article 81 EC is concerned, the question whether a principal and its agent or 'commercial representative' form a single economic unit, the agent being an auxiliary body forming part of the principal's undertaking, is an important one for the purposes of establishing whether given conduct falls within the scope of that article. Thus, it has been held that 'if ... an agent works for the benefit of his principal he may in principle be treated as an auxiliary organ forming an integral part of the latter's undertaking, who must carry out his principal's instructions and thus, like a commercial employee, forms an economic unit with this undertaking' (*Suiker Unie and Others* v *Commission*, cited in paragraph 41 above, at paragraph 480).

87 The position is otherwise if the agreements entered into between the principal and its agents confer upon the agent or allow him to perform duties which from an economic point of view are approximately the same as those carried out by an independent dealer, because they provide for the agent accepting the financial risks of selling or of the performance of the contracts entered into with third parties (see, to that effect, *Suiker Unie and Others* v *Commission*, cited in paragraph 41 above, at paragraph 541). It has therefore been held that an agent can lose his character as independent economic operator only if he does not bear any of the risks resulting from the contracts negotiated on behalf of the principal and he operates as an

auxiliary organ forming an integral part of the principal's undertaking (see, to that effect, *Volkswagen and VAG Leasing*, cited in paragraph 41 above, at paragraph 19).

88 Accordingly, where an agent, although having separate legal personality, does not independently determine his own conduct on the market, but carries out the instructions given to him by his principal, the prohibitions laid down under Article 81(1) EC do not apply to the relationship between the agent and the principal with which he forms an economic unit.

89 Under this plea in law, the parties are in disagreement as to the Commission's analysis in the contested decision of the legal status of the German Mercedes-Benz agents for the purposes of Article 81(1) EC and in particular as to the degree of risk borne by those agents under the agency agreement and the question of their integration into Mercedes-Benz.

90 It is accordingly for the Court to consider, in the light of the above, whether, in the contested decision, the Commission correctly assessed the legal relationship between the applicant and its commercial agents in Germany.

91 It should be noted that that relationship is governed, in particular, by the terms of a standard-form agreement entered into between Mercedes-Benz and its agents and by the German Commercial Code. In its replies to the written questions put by the Court (see paragraph 34 above), the applicant stated that the version of the standard-form agency agreement considered in the contested decision was that of June 1997. It also confirmed that that version was essentially identical to the versions in force during the whole of the period to which the contested decision relates. The documents before the Court show that the terms and conditions of the standard-form agreement are unilaterally determined by Mercedes-Benz. It is also not in

dispute that the agreement entered into between Mercedes-Benz and its German agents is an agency contract under German commercial law. The Commission has not argued in these proceedings that the agency agreements entered into by Mercedes-Benz with individual agents differ materially in any way.

92 The parties do not dispute that the duties formally conferred on the agent under the agency agreement reflect the way in which the agreement is performed in practice. Thus, it is agreed that, both under the terms of the agency agreement and in practice, it is Mercedes-Benz, and not its German agents, which is responsible for selling new Mercedes-Benz cars in the Federal Republic of Germany directly to customers, and that agents are prohibited from selling them in their own name and for their own account.

93 The agency agreement is worded in such a way that the German agent has no authority or power to sell Mercedes-Benz vehicles. The role of the German agent is limited to seeking orders from potential customers, which it passes on to Mercedes-Benz for approval and implementation. In that regard, Clause 4(1) and (3) of the agency agreement states that the agent is to negotiate vehicle sales at prices fixed by Mercedes-Benz and that the contract of sale is to enter into force only from the time when Mercedes-Benz has accepted the order which the agent has passed on.

94 It is also clear from the documents before the Court that when he negotiates a contract for sale with a customer, the agent has no authority with regard to the price of the vehicle to be received by Mercedes-Benz. In its replies to the written questions put by the Court, the applicant confirmed that the agent has no authority to grant discounts at the expense of Mercedes-Benz without the latter's agreement. It added, however, that the agent was authorised to grant discounts which would be

deducted from its own commission without that agreement and confirmed that the agency agreement did not contain any provision which prohibited such a partial waiver of commission. The applicant stated that, if the agent grants discounts to customers when selling new cars, he has to deduct them from his commission.

95 It should now be considered whether the Commission was correct to state in the contested decision that when the German agent negotiates the sale of vehicles he bears a considerable share of the price risk associated with those vehicles when he grants discounts which fall to be deducted in their entirety from his commission (see recital 155).

96 The documents before the Court show that German agents, unlike Mercedes-Benz dealers in other countries, do not buy new vehicles from Mercedes-Benz for resale to customers and it is a matter of agreement that the agent is not required to hold a stock of new vehicles (see recital 156 in the contested decision). The agency agreement provides that the agent may buy new Mercedes-Benz vehicles only for his own requirements or for demonstration purposes (Clause 9(2)).

97 As the German Mercedes-Benz agent is not required to hold a stock of cars, it is wrong to treat him, for economic purposes, as being in the same position as a dealer in cars who receives from the manufacturer, by way of remuneration, a margin which he uses not only to fund his new-car sales business in general, but also, and above all, to grant discounts to car buyers (see recital 156 in the contested decision). It should be observed in that regard that a Mercedes-Benz agent is not obliged, either under the agency agreement or in practice, to give up part of his commission in order to sell a car which he has in stock. That would represent a real price risk, as he would already have had to bear the costs associated with the purchase of the car and of holding it in stock. Unlike a dealer, the agent does not bear the risk of cars which he holds in stock remaining unsold. Therefore, if the agent does not wish to forgo a part of his commission, he does not take an order for a car.

98 The terms of the Mercedes-Benz dealership agreements entered into in Belgium and Spain show that the dealers are required to hold a stock of vehicles at all times. The volume of that stock is to be determined in particular by agreement between the parties (see Clause 8 of the Belgian dealership agreement and Clause 15(a) of the Spanish dealership agreement). It follows that, as regards the sale of vehicles, the position of the Mercedes-Benz agent in Germany differs considerably from that of Mercedes-Benz dealers in Belgium and Spain. The latter bear a substantial share of the risk associated with vehicle sales, whereas in Germany that risk is essentially borne by Mercedes-Benz. The Commission was therefore wrong to treat the agent as being in the same economic position as a dealer with respect to price risk (recital 156 in the contested decision).

99 In the circumstances of the present case, the fact that a German Mercedes-Benz agent is authorised, without, however, being obliged, to grant discounts which are deducted from his commission and exercises his commercial freedom in forgoing a part of his commission on individual sales in order, if possible, to maximise his overall commission by selling more cars cannot be classified as 'price risk'.

100 It follows from the above that it is Mercedes-Benz which sells the vehicles and which takes, on a case-by-case basis, the decision to accept or to reject the orders negotiated by the agent. It seems that the commercial freedom of a German agent in relation to the sale of Mercedes-Benz vehicles is extremely limited, so that he is not in a position to influence competition on the market in question, namely the retail market for Mercedes passenger cars (see recital 143 in the contested decision).

101 Thus, when a customer orders a vehicle but the sale does not proceed, the financial implications, and hence the risks associated with that transaction, remain with the

applicant. Indeed, the latter confirmed at the hearing that it was solely responsible for all risks associated inter alia with non-delivery, defective delivery and customer insolvency.

102 In summary, it is clear from the points set out above that, as regards the market in question, it is Mercedes-Benz, and not its German agents, which determines the conditions applying to all car sales, in particular the sale price, and which bears the principal risks associated with that activity, as the German agent is prevented by the terms of the agency agreement from purchasing and holding stocks of vehicles for sale. In those circumstances, it must be held that the relationship between the agents and the applicant is such that the former sell Mercedes-Benz vehicles in all material respects under the direction of the applicant, with the result that they should be treated in the same way as employees and considered as integrated in that undertaking and thus forming an economic unit with it. It follows that, in carrying on business on the market in question, the German Mercedes-Benz agent does not himself constitute an 'undertaking' for the purposes of Article 81(1) EC.

103 It is necessary to consider whether that conclusion is undermined by the Commission's claim in the contested decision that, under the agency agreement, the applicant requires its agents to bear other costs and risks, without giving them any choice in the matter.

104 In that regard, the Commission held in the contested decision that under the agency agreement Mercedes-Benz does not bear the risk associated with transport costs, but imposes it on the agent (see recital 157). The latter, like an independent dealer, must bear the transport cost risk of new vehicles and pass on those costs to the customer through the contract entered into with him.

105 The Court notes in that regard that Clause 4(4) of the agency agreement provides that 'if the customer does not himself collect the vehicle at the factory gate, the agent is to deliver it in return for a payment to be agreed with the customer'. In its replies to questions put by the Court, the applicant confirmed that in Germany 35 per cent of cars had been handed over to customers at the factory in 2003. Although that information does not relate to the period covered by the contested decision, it none the less shows that the possibility under the agency agreement of the customer taking delivery of a car at the factory is far from a purely theoretical one which is relevant only when the agent and the customer cannot agree on the costs or terms of delivery. Moreover, the Commission confirmed at the hearing that it was unlikely that the transport cost risk would apply in reality. In practice, the customer is informed of the date of delivery of the vehicle before arrangements for transport are put in place and if he cannot be contacted the vehicle does not leave the factory.

106 It is clear from the above that the Commission has significantly overstated the degree of risk borne by the agent in relation to transport costs.

107 The Commission also stated in the contested decision that under the agency agreement the agent must acquire demonstration vehicles for his own account (recital 158), carry out repair work under the manufacturer's guarantee (subparagraph (a) of recital 159), set up a workshop for his own account and provide after-sales service and guarantee work and, on request, standby and emergency cover and keep a stock of spare parts for his own account (subparagraphs (b) and (c) of recital 159). The Commission held in the contested decision that, if only in view of the number and quantitative scope of the risks that Mercedes-Benz agents have to bear, the latter's argument that the risks assumed by its German agents are typical of those borne by a genuine commercial agent cannot be accepted (recital 160).

108 It should be observed in that regard that Clause 4(7) of the agency agreement requires the agent to bear the costs of demonstration vehicles himself and that

Mercedes-Benz has the right, if necessary, to specify the number of such vehicles it considers are needed. It thus appears that when those demonstration vehicles are purchased by the agent, the latter runs a certain risk. It is possible, for example, that those vehicles may be difficult to resell at a profit. However, even if it is accepted that such a risk exists, it none the less remains the case, as the Commission itself found in recital 158 in the contested decision, that the vehicles were purchased on preferential terms and may be resold three to six months later if they have accumulated a minimum of 3 000 kilometres. That point significantly undermines the importance which the Commission attaches to the obligation regarding demonstration vehicles in the contested decision and, accordingly, to the extent of the risk in question.

109 It follows that the Commission's analysis in recital 158 in the contested decision materially overstates the importance of the risks associated with the obligation on agents to purchase demonstration vehicles.

110 As regards the Commission's observations on the agents' obligation to carry out repair work under the guarantee, the documents before the Court show that the agent receives a guarantee payment from Mercedes-Benz for the approved guarantee work and that that payment is calculated, as regards the cost of labour, on the basis of the average customer cost rate weighted by reference to turnover, with the agent notifying the rate to Mercedes-Benz in advance at the start of each quarter, and, as regards the cost of materials, on the basis of the cost price to the agent plus a premium in respect of Mercedes-Benz products (see Clause 13(3) of the agency agreement).

111 The Commission has failed to show that the guarantee payment is commercially inadequate and that the agent accordingly bears a genuine financial risk as regards the obligation to carry out repair work under guarantee. The contested decision does not show that those activities associated with the sale of Mercedes-Benz cars in

fact give rise to exceptional risks, even if it is true that if they are not properly and efficiently managed they may be loss-making and reduce, or even eliminate, the profits made by the agent in selling cars. The Commission has also failed to prove that the obligations imposed on the agent to set up a workshop, to provide after-sales servicing and to acquire and stock spare parts give rise to meaningful economic risks.

112 The true position is that the Commission merely lists the obligations imposed under the agency agreement that are linked to the sale of vehicles and mentions the alleged significance of the revenue obtained by the agent from those activities which are contractually linked to the sale of vehicles compared with the revenue he obtains from the sale of cars themselves, without showing how those obligations represent material risks for which the agent is responsible. The Commission did not carry out a correct assessment of the extent of those obligations in practical terms. In the view of the Court, those obligations do not represent a commercial risk which would justify a Mercedes-Benz agent being categorised as an independent operator.

113 It follows that the categorisation of the status of the German Mercedes-Benz agent under Article 81(1) EC set out in paragraph 102 above is not undermined by the fact that the German Mercedes-Benz agents are required to undertake certain activities and assume certain financial obligations under the agency agreement. It should also be noted that the activities are carried out on markets other than the market at issue in the present case. Even if it must be recognised that those obligations expose the agent to certain limited risks, they do not of themselves operate to affect the relationship between the applicant and its agents under competition law as regards the market at issue in these proceedings.

114 The Commission also states in the contested decision that a number of the provisions of the German agency agreement are the same as those of the Mercedes-Benz dealership agreements entered into in Belgium and Spain and concludes from that 'that the requirements placed on agents are identical to those placed on dealers

and that both forms of distributor form an equally integral part of the Mercedes-Benz sales organisation' and that that 'aspect is thus not a suitable basis for distinguishing between commercial agents and dealers' (recital 165).

115 The provisions in question concern in particular the obligations to do all that is necessary to distribute the products, to protect the applicant's interests as regards the use of the Mercedes-Benz name and trade mark and the rules relating to the setting-up of branches and showrooms away from the main premises. Those provisions essentially concern ancillary matters which are common to all types of distribution agreement and, as the Commission itself argues, do not serve to distinguish a commercial agent from an independent dealer.

116 Contrary to what the Commission claims in recital 165 in the contested decision, those provisions do not show that the Mercedes-Benz dealers in Belgium and Spain are as strongly integrated in the Mercedes-Benz distribution system as its German agents. The Court considers that that conclusion by the Commission is manifestly incorrect and fails to take account of the fundamental differences between the German agents and the Belgian and Spanish dealers as regards the sale of Mercedes-Benz vehicles.

117 Unlike the German agency agreement, the standard-form Mercedes-Benz dealership agreements in Belgium and Spain provide in particular that the dealer is responsible for the marketing of vehicles and the negotiation of sales. The dealer buys his goods and sells them to his customers for his own account, in his own name and at his own risk (see Clause 2 of the Belgian agreement and Clause 6 of the Spanish agreement). Similarly, the standard-form Mercedes-Benz dealership agreements in Belgium and Spain provide that Mercedes-Benz and its dealers are to remain independent. The dealer is not an agent or a representative of Mercedes-Benz and neither of the parties can bind the other (see Clause 2 of the Belgian agreement and Clause 6 of the

Spanish agreement). In addition, the Belgian and Spanish dealers have to maintain at all times a stock of new vehicles, over and above vehicles designated as demonstration vehicles, which are to be displayed at their premises and delivered to their customers (Clause 8 of the Belgian agreement and Clause 15(a) of the Spanish agreement). Like the German agency agreement, conditions of sale are annexed to the Belgian and Spanish agreements but, in the case of the latter, the conditions relate to the sale of cars by the Mercedes-Benz group to the dealer (Clause 12 of the Belgian agreement and Clause 8 of the Spanish agreement).

118 The Court is therefore of the opinion that, contrary to the view taken by the Commission, those matters emphasise the material difference between, on the one hand, the role of the German agent, who forms an integral part of the undertaking of his principal, Mercedes-Benz, and, on the other hand, that of the independent dealer in Belgium and Spain. The market at issue in these proceedings is that of the retail sale of Mercedes-Benz passenger cars. An independent dealer is in a position to determine, or at the very least to influence, the terms on which the sales are made, as he is the seller, who bears the main share of the price risk in the vehicle and who maintains a stock of the vehicles. It is that negotiating margin of the dealer, which comes between the manufacturer and the customer, which exposes the dealer to a risk that Article 81 EC may apply to his relationship with the manufacturer. The role and the status of the German Mercedes-Benz agent in the present case are very different.

119 It follows that the existence of an agreement between undertakings for the purposes of Article 81(1) EC has not been established to the requisite legal standard.

120 The first plea in law must therefore be accepted as being well founded.

The second plea in law, based on an infringement of Article 81 EC and of Regulation No 1475/95 as regards the first and third measures established by the Commission in the contested decision

121 The second plea is divided into two parts. In the first place, the applicant submits that the Commission has failed to prove in the contested decision that Mercedes-Benz entered into agreements with its commercial agents in Germany which prevented, within the meaning of Article 81(1) EC, the latter from selling vehicles to final customers abroad. It states that the instructions given to the agents related only to sales to unauthorised resellers, and they are accordingly exempt under Article 3 (10) of Regulation No 1475/95. In the second place, the applicant argues that the restrictions on supplies to leasing companies in Spain and Germany do not constitute restrictions on competition for the purposes of Article 81(1) EC and are, in any event, exempt under Regulation No 1475/95.

122 It follows from the findings of the Court in relation to the first plea that the commercial agency agreements entered into by Mercedes-Benz with its agents in Germany are not subject to the prohibition on concerted practices under Article 81 (1) EC. Accordingly, any instructions that Mercedes-Benz may have given to its agents in Germany not to sell to customers outside their contract territory and the alleged restrictions on supplying leasing companies in Germany do not fall within the scope of Article 81(1) EC. It is therefore unnecessary to consider the first part of this plea nor is it necessary to consider the second part of it in so far as it concerns obligations imposed on the German agents regarding the sale of new cars to leasing companies.

Arguments of the parties

123 The applicant claims that the Commission was wrong to contend in the contested decision that the aim of the restrictions on supplying leasing companies in Spain 'for stock' is to restrict competition. There are a number of reasons why the Spanish dealership agreements do not infringe Article 81(1) EC. First, as regards price advantages and discounts, the leasing companies in the Mercedes-Benz group and those outside the group are treated in exactly the same way. The conditions of purchase which apply to leasing companies in the Mercedes-Benz group are no different from those applying to final customers. Moreover, it is wrong to say that major customers are automatically entitled to price discounts. It is for Mercedes-Benz to decide whether major customers are to be granted discounts and such differences as there may be in treatment between the leasing companies and 'major accounts' are not the result of agreements restricting competition. Furthermore, the decision to grant or refuse price discounts to a particular category of customers is a unilateral act and not an agreement subject to Article 81(1) EC. Secondly, contrary to what the Commission states in the contested decision, the purpose of the prohibition on supplying external leasing companies 'for stock' is not to limit competition. The true position is that the supply of a car to a lessee is no quicker, as Mercedes-Benz customers generally desire a model of their choice and equipped to their own specification. The applicant adds that the tables set out in recitals 14 and 22 in the contested decision show that the outside leasing companies are in competition with its own companies. The proportion of the leasing market for Mercedes-Benz vehicles held by outside leasing companies increased from 28 per cent in 1996 to 36 per cent in 2000.

124 Even if Article 81(1) EC were to have been infringed, that infringement would in any event be exempt. Until 30 September 1996, the prohibition in question was exempt under Commission Regulation (EEC) No 123/85 of 12 December 1984 on the

application of Article [81](3) [EC] to certain categories of motor vehicle distribution and servicing agreements (OJ 1985 L 15, p. 16).

125 The applicant also submits that the prohibition on supplying leasing companies for stock purposes was exempt under Regulation No 1475/95 from 1 October 1996, which is the date on which that regulation entered into force. Leasing companies which order motor vehicles separately from leasing contracts which have already been entered into, or which are actually in the course of being entered into, for stock purposes act in practice as resellers when they enter into leasing arrangements for those vehicles.

126 By virtue of Article 1 of Regulation No 1475/95, that regulation applies to motor vehicle dealership agreements where the role of the dealer can be described as one of 'resale'. Article 10(12) of the regulation defines 'resale' so as to mean the disposal of a motor vehicle which the reseller has acquired in his own name and on his own behalf. Regulation No 1475/95 distinguishes between resellers and final customers. Under Article 3(10) of the regulation, a distributor may be expressly prohibited from supplying resellers. Such a prohibition has the effect of protecting the system of selective distribution.

127 The applicant claims that, although Article 10(12) of Regulation No 1475/95 'provides that the term "resale" is to include a leasing contract entered into by the acquirer from the dealer and a lessee which provides for a transfer of ownership or an option to purchase', there is nothing in that regulation to indicate whether leasing companies which have not yet entered into an actual agreement with a third party relating to the motor vehicle in question are a 'reseller' or a 'final customer'. However, contrary to what the Commission maintains, it would be absurd to interpret Article 10(12) of Regulation No 1475/95 as meaning that the expression

'resale' could apply only to a leasing contract which includes an option to purchase by virtue of which the lessee would become an owner prior to the expiry of the contract. The aim of the provision is instead to place a leasing contract on the same footing as a resale where the lessee obtains an option to purchase at the time the contract is concluded or while it is in force. Article 10(12) of the regulation covers all leasing contracts which provide for a transfer of ownership or an option to purchase.

128 Furthermore, that provision has very different consequences in the Member States depending on the contractual form of leasing contract that is customary in each country. Under Spanish law, leasing contracts cannot be entered into without an option to purchase at the end of the contract. Accordingly, a Spanish leasing company is always a 'reseller'.

129 Under Spanish Law No 26/1988 of 29 July 1988 on the supervision and control of credit institutions ('Law 26/1988'), the concept of a leasing contract requires by definition that there be an option to purchase for the benefit of the lessee. If there is no such purchase option, the contract falls to be categorised as a contract of hire. Leasing companies are forbidden to enter into such contracts of hire for reasons of administrative supervision. As a result, leasing companies in Spain are restricted to entering into true leasing transactions which incorporate an option to purchase in favour of the lessee. Accordingly, all leasing contracts entered into in that country satisfy the conditions laid down under the second sentence of Article 10(12) of Regulation No 1475/95 and fall to be categorised as resale transactions.

130 Where the actual destination of the motor vehicle is not known, the applicant should 'at least have the opportunity of protecting the selective distribution system against unauthorised resales which then can no longer be monitored or traced'.

131 If, over and above their role of providing funding, leasing companies were able to act as independent traders on the market, they would be in a position to dispose of cars quickly and to offer significant price discounts by reason of the volume of their purchases, without being under a duty to undertake the significant investment and expenditure needed to meet the requirements of after-sales servicing and to perform maintenance and guarantee work on cars sold. The acquisition of stock by leasing companies would not ensure the level of quality of the selective distribution system, which allows new cars to be stocked in conditions which are impeccable from a technical point of view and means that they are delivered to customers only after being inspected by specialists. It is essential that that level of quality be provided if the reputation of the Mercedes-Benz trade mark is to be guaranteed.

132 The restrictions on supplies for stock to leasing companies are intended to prevent circumvention of the prohibition on supplying to resellers which, moreover, reflects the Commission's definition of the aim of Regulation No 1475/95. In taking the view that the restrictions on those supplies were not exempt under Regulation No 1475/95, the Commission fails to have regard to the principles laid down by the Court of Justice in relation to Regulation No 123/85 in *Volkswagen and VAG Leasing*, cited in paragraph 41 above, and in Case C-70/93 *Bayerische Motorenwerke* [1995] ECR I-3439. That case-law provides that leasing companies are to be classified as resellers where they do not confine themselves to purchasing vehicles in order to satisfy requests from their customers but build up stock 'which they offer to customers attracted in that way'.

133 The Commission disputes the applicant's argument that the measures in question do not restrict competition.

134 It considers that the applicant was seeking to prevent the intermediaries from achieving a higher volume of sales, corresponding to the volume of the demand from leasing companies, and thus from systematically passing on the economies of

scale which normally accompany high-volume purchases to the companies in question, which are in competition with the Mercedes-Benz leasing companies.

135 The Commission questions the applicant's interpretation of Regulation No 1475/95, which, in its view, does not exempt a prohibition on supplying leasing companies for stock or reserve purposes. The Commission is of the opinion that that regulation allows a manufacturer to prohibit its dealers from selling new vehicles to resellers who do not form part of its distribution network, without losing the benefit of the exemption. Article 10(12) of the regulation lays down the circumstances in which the entering into of a leasing contract falls to be treated as a resale. That applies when the contract 'provides for a transfer of ownership or an option to purchase prior to the expiry of the contract'. In all other cases, the leasing company falls to be treated as a final customer and it would be unlawful to prohibit or to restrict sales to those companies. The applicant's interpretation of Article 10(12) of Regulation No 1475/95 is therefore too wide. The disputed provisions in the Spanish dealership agreements make no distinction between cases where the contract used by the leasing company provides an opportunity to purchase the vehicle before or after the expiry of the contract (recital 110 in the contested decision), but prohibit supplies to leasing companies irrespective of that issue whenever the order is intended for stock purposes. Such an order does not turn the leasing company into a reseller.

136 The risk of leasing companies selling cars to interested customers directly from their reserves or before the expiry of the contract could be covered by appropriate contractual provisions and does not entitle the applicant to prohibit supplies to those companies when those cars are intended for stock purposes.

137 The aim of Article 10(12) of Regulation No 1475/95 is to prevent the prohibition on supplies to resellers who dispose of vehicles which are in a new condition being circumvented. Under that provision, such a circumvention will occur whenever the

lessee under a leasing contract obtains the right to acquire ownership of the leased vehicle before the expiry of the contract. Whether or not there has been a circumvention will depend on the time when ownership of the vehicle is stated to pass to the lessee or may pass to him, and not on the date on which the lessee is granted the option to purchase on the termination of the contract. *Volkswagen and VAG Leasing*, cited in paragraph 41 above, and *Bayerische Motorenwerke*, cited in paragraph 132 above, relate to the legal position under Regulation No 123/85, which contains no provision expressly applying to leasing contracts. That gap was filled by Regulation No 1475/95, which provided that there is a resale only when the lessee may, by virtue of the option to purchase, acquire ownership of the vehicle prior to the expiry of the leasing contract.

Findings of the Court

138 In the contested decision, the Commission held inter alia that the applicant had, either itself or through MBE, restricted, from 1 October 1996 until the adoption of the decision, the supply of cars to leasing companies in Spain for stock and that that restriction was not exempt by virtue of Regulation No 1475/95.

139 Under the second part of this plea, the applicant submits, first, that Clause 4(d) of the Spanish dealership agreement does not infringe Article 81(1) EC and, secondly, that the prohibition on supplying cars to leasing companies in Spain for stock is in any event exempt under Regulation No 1475/95.

140 The Commission stated in recital 196 in the contested decision that 'the restrictions on supplies to outside leasing companies are deliberately aimed at leasing companies which wish to acquire a larger number of vehicles or whole leasing fleets for which

they have not yet found any identifiable customers'. In recital 176, it stated inter alia that the rules governing the leasing business of dealers and agents have as their object a restriction of competition on prices and delivery conditions for leasing vehicles. Relying on established case-law, it held that it was not necessary to consider the effects of the measures at issue, as it is sufficient for the purposes of Article 81(1) EC that those measures have the object of restricting competition (recital 178).

141 The Court observes first of all that the Commission did not distinguish in the contested decision between the German market and the Spanish market as regards the alleged restrictions on supplies to leasing companies. It assumed that Clause 4(d) of the Spanish dealership agreement gave rise to the same restrictions on competition as Clause 2(1)(d) of the agreement with the German agents (see, in particular, recitals 105 to 111 and 176).

142 The arguments put forward by the applicant under the second part of this plea show that, unlike the position in Germany, the contractual relationship between the parties to leasing contracts in Spain is governed by a specific law, namely Law 26/1988.

143 Additional provision No 7 to Law 26/1988 provides in particular:

'1. "Leasing activities" means contracts having as their sole object the transfer of the right to use movable or immovable property, purchased for that purpose in accordance with the specifications of the future user, in consideration of periodic payments of the leasing charges referred to in paragraph 2 of this provision. The

user may employ the goods so transferred only for the purposes of carrying out agricultural, fishing or industrial activities, activities of craftsmen, or services or vocational activities. The leasing contract must grant the user an option to purchase on its expiry.

Where, for any reason whatsoever, the user does not acquire the goods which form the subject-matter of the contract, the lessor may dispose of them to a new user, and the fact that the goods were not purchased in accordance with the specifications of the new user shall not be deemed to infringe the principle laid down in the preceding subparagraph.

2. This provision applies to contracts having a minimum duration of two years when they relate to movable property and of ten years when they relate to immovable property or industrial establishments. However, in order to avoid abuse, the Government may lay down other minimum periods for the duration of the contracts having regard to the different types of property to which those contracts may relate.'

144 With effect from 1 January 1996, paragraph 2 of additional provision No 7 to Law 26/1988 was replaced by Article 128(2) of Law 43/1995 of 27 December 1995 on corporation tax (BOE No 310 of 28 December 1995, p. 37072), which provides:

'The preceding paragraph applies to contracts having a minimum duration of two years when they relate to movable property and of ten years when they relate to immovable property or industrial establishments. However, in order to avoid abuse, other minimum periods may be laid down by regulation for the duration of the contracts having regard to the different types of property to which those contracts may relate.'

145 It follows from those provisions that leasing contracts entered into in Spain are subject to a number of specific conditions and, in particular:

— they must have a minimum duration of two years when they relate to movable property, including motor vehicles;

— they must grant the lessee an option to purchase on their expiry;

— movable assets, including motor vehicles, which are the subject-matter of leasing contracts must be purchased for that purpose in accordance with the specifications laid down by the lessee.

146 It follows that the Spanish Law governing leasing contracts requires that every Spanish leasing company must already have identified a lessee under the leasing contract when it acquires the vehicle.

147 Therefore, the Commission's implicit assumption that the clauses in the German and Spanish dealership agreements are identical in their effect is not well founded. That has two consequences as regards this plea.

148 In the first place, every leasing contract entered into in Spain must have a minimum duration of two years and the option to purchase may be exercised only on expiry of the contract. Therefore, the option to purchase cannot be exercised before the expiry of a minimum period of two years. It follows that the lessee under a leasing contract in Spain cannot, by exercising the option to purchase, procure the disposal of a vehicle which is in a new condition.

149 In that regard, it should be noted that Regulation No 1475/95 exempted from the application of Article 81(1) EC agreements whereby one party (the supplier) undertook in favour of another (the dealer), within a defined territory of the common market, to supply 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 new motor vehicles, together with spare parts therefor (Article 1).

150 Under Article 3(10) of Regulation No 1475/95, the exemption also applied where the undertaking referred to above was combined with an obligation on the dealer not to supply to a reseller contract goods unless the reseller was an undertaking within the distribution system. The term 'resale' was defined in Article 10(12) of the regulation as meaning 'all transactions by which a physical or legal person — "the reseller" — disposes of a motor vehicle which is still in a new condition and which he had previously acquired in his own name and on his own behalf, irrespective of the legal description applied under civil law or the format of the transaction which effects such resale'. The same subparagraph stated that the term 'resale' was to include 'all leasing contracts which provide for a transfer of ownership or an option to purchase prior to the expiry of the contract'.

151 Amongst other things, that regulation allowed a supplier, under agreements regulating its exclusive distribution network, to prohibit dealers from making supplies to a purchaser who is a reseller within the meaning of Article 10(12),

including a purchaser who is deemed to be a reseller by reason of the fact that he disposes of new vehicles under the type of leasing contracts referred to in that provision.

152 In that regard, it is clear from Clause 4(d) of the Spanish dealership agreement that the prohibition imposed on dealers did not cover all supplies to leasing companies outside the Mercedes-Benz group, but only those where the companies had not identified a customer.

153 The definition of the term 'resale' in Article 10(12) of Regulation No 1475/95 shows that a supplier may prohibit dealers from supplying natural or legal persons deemed to be 'resellers' only where the latter dispose of motor vehicles in a new condition. The purpose of putting leasing contracts on the same footing as resales is to allow the supplier to guarantee the integrity of the distribution network by avoiding a leasing contract which includes a transfer of ownership or an option to purchase before the expiry of the contract being used to facilitate the acquisition outside the distribution network of the ownership of a vehicle when it is still in a new condition.

154 Therefore, contrary to what the applicant maintains, Law 26/1988 does not have the effect that all Spanish leasing contracts automatically satisfy the conditions for exemption laid down under Article 2(10) of Regulation No 1475/95.

155 It follows from the above that the applicant's argument as regards the application of the exemption provisions under Regulation No 1475/95 is unfounded.

156 In the second place, since Spanish law requires that every leasing company must already have identified a lessee at the time when the vehicle is acquired, the restrictions identified by the Commission in recital 176 in the contested decision have already been imposed by the applicable legislation, regardless of Clause 4(d) of the Spanish dealership agreement. In other words, by virtue of that legislation alone, companies outside the Mercedes-Benz group find themselves in the same position as those which form part of that group. It follows that the applicant's argument that the restrictions on supplying leasing companies in Spain are not restrictions on competition within the meaning of Article 81(1) EC is well founded.

157 Inasmuch as it extends to the alleged infringement committed in Spain, the third indent of Article 1 of the contested decision should accordingly be annulled.

The third plea, based on an infringement of Article 81(1) EC and a manifest error of assessment of the second and fourth measures established by the Commission in the contested decision

158 The third plea is divided into two parts. First, the applicant submits that the Commission has not proved the existence of an agreement with its German agents under which the latter must require a deposit of 15 per cent of the sale price of the vehicle from customers outside the contract territory. It also argues that, in any event, that deposit was objectively justified and that it was entitled to instruct its agents to require payment of it. Secondly, the applicant contends that the Commission was wrong to hold in the contested decision that the meeting of 20 April 1995 of the nine members of the Belgian Mercedes-Benz dealers' association with the MBBel management demonstrated the existence of an agreement between them to restrict price competition in Belgium.

159 It follows from the Court's findings in relation to the first plea that Article 81(1) EC does not apply to the instruction given by Mercedes-Benz to its German agents by circular letter No 52/85 of 12 September 1985 to require payment from customers outside their contract territory of a deposit of 15 per cent of the price of the vehicle. It is accordingly unnecessary to consider the first part of this plea.

Arguments of the parties

160 The applicant argues that the Commission was wrong to hold in the contested decision that the meeting of 20 April 1995 of the nine members of the Belgian Mercedes-Benz dealers' association with the management of MBBel demonstrated the existence of an agreement between that association and MBBel to restrict price competition in Belgium. The Belgian dealers' association had no power to take a decision which would bind its members, but merely formulated recommendations. Furthermore, the statement by one of the dealers, Mr Kalscheuer, at that meeting that 'relations between dealers were improved as a result of the action against price slashing' shows that the measure in question had already been decided upon by the dealers.

161 The applicant does not deny that MBBel took part in the meeting of 20 April 1995 and that, on its own initiative, the Belgian dealers' association proposed to reduce the rate of discounts to a maximum of three per cent for the new W 210 series. However, it argues that MBBel did not participate either vertically or horizontally in an agreement to fix selling prices and that MBBel took no steps to implement that proposal, which, moreover, it did not agree to. On the contrary, MBBel had always opposed such proposals. It had been present only as observer and importer. No representative of MBBel had spoken at the meeting. The fact that only MBBel was in a position to implement reductions in vehicle supplies does not prove that it had in fact adopted such a strategy.

162 It was not the case that MBBel represented the interests of the branches at the meeting and the latter were not yet active members of the association at the time. However, it is not clear that it would have been in the interests of the branches to limit the rate of discounts. That is demonstrated by the fact that the dealer Goossens, as is recorded in the minutes of the association, criticised the branches for having practised 'price slashing'. Furthermore, as the allegation made in the contested decision regarding a horizontal restriction (see recital 141) is not set out in the statement of objections, it should not have been taken into account. As regards the Commission's argument referred to in paragraph 177 below, the applicant maintains that it is based on a selective reading of the statement of objections (see point 186 of the statement). In addition, the action against 'price slashing' put into practice before 20 April 1995 could be categorised as a 'horizontal' agreement only to the extent that it had been decided upon among dealers. While the Commission stated in point 168 of the statement of objections that MBBel had taken part in that action against price slashing, there was nothing to prove that MBBel had participated in it as a competitor of the dealers.

163 The applicant also denies that the letter of 17 October 1995 sent by MBBel to Mercedes-Benz AG (recital 119 in the contested decision) establishes the interest of MBBel in seeing a reduction in the level of discounts offered by the Belgian dealers. MBBel had referred to the average list prices and not the sales prices actually invoiced by the dealers. In addition, it denies that the letter from MBBel of 14 March 1996 criticising a Belgian dealer from Charleroi who had wrongly introduced himself to a customer as representing a dealer in Namur demonstrated MBBel's disapproval of the discount given for a W 210 series car 'of six per cent'.

164 The applicant finds the Commission's allegations with regard to MBBel's participation contradictory in that they allege both that MBBel was 'ready to give its active support' to restricting discounts (recital 115 in the contested decision) and that MBBel 'took part in' those restrictions (recital 120). Subsequently, the

Commission acknowledged that the meeting of 20 April 1995 resulted from an initiative on the dealers' part, but it nevertheless stated that MBBel clearly took the lead at that meeting (recital 233 in the contested decision).

165 The fact that Mercedes-Benz occasionally checked that dealers were performing all their duties as intermediaries by sending ghost purchasers to them has no connection with the alleged fixing of selling prices. Such visits, which other motor manufacturers also carry out, were perfectly lawful, as the dealers undertake in their commercial dealership agreement to adopt a high-quality market position. Moreover, the dealers' pricing policies were only one factor out of many others that were taken into account in that assessment.

166 There was no connection between the meeting of 20 April 1995 and the meeting at Antwerp on 27 March 1996 (see recital 117 in the contested decision). The minutes of the meeting of 20 April 1995 refer to monitoring sales until the 'end [of] 1995' and the visits referred to in the minutes of the meeting of 27 March 1996 plainly took place until 1996.

167 The applicant denies that the fax from MBBel of 26 November 1996, in which it commissioned the company Tokata to send representatives to visit dealers and certain agencies, provided a means for MBBel to monitor discounts offered on the C-Class Estate 220 D and 250 TD models. The information recovered was anonymous and it was not possible to take action against specific dealers. The measures involved a full examination of all services offered to customers and not merely price discounts. Visits were made not only to dealers but also to 13 parallel importers. The way in which those investigations were carried out gives no grounds

for suggesting that the purpose was to force the dealers to sell at list price. Moreover, there was nothing in the fax to show that those involved would have preferred a maximum discount of three per cent. The minutes of the meeting of 20 April 1995 concerned vehicles of different series from those referred to in the fax from MBBel of 26 November 1996 to Tokata.

168 The applicant denies that the purported fixing of selling prices in Belgium had a material influence on inter-State trade. If an agreement on discounts did exist, that agreement concerned only sales made in Belgium. The volume of cross-border sales was not affected by it. The applicant also denies that the purported infringement lasted from 20 April 1995 until the circular of 10 June 1999. The Commission has not stated whether the infringement was always perpetrated with the same intensity. The action against 'price slashing' referred to in the minutes of the meeting of 20 April 1995 was temporary, concerned only the W 210 model and was intended only to apply during the introductory phase of the new model, that is to say until the end of 1995. The minutes of the meeting of 27 March 1996 show that the dealers in Antwerp found that there was no consensus as regards price discounting. Furthermore, the other documents relied on by the Commission do not show that the proposed action continued beyond 1995. They relate only to visits which were standard practice and the results of which were not recorded on an individual basis, so that it would have been impossible to take any sanctions against one of the dealers.

169 The applicant considers that there is no justification for imputing the fixing of selling prices in Belgium to it.

170 As a preliminary point, it argues that in the present case the Commission disregarded its practice relating to the imposition of fines on a company or the group to which it belongs. The Commission ought to have taken into account a number of factors, namely the extent of the subsidiary's decision-making autonomy,

the degree to which the parent company was aware of the activities of the subsidiary that contravened the law relating to concerted practices, the participation of that company in the infringement, the actual influence of the parent company on the subsidiary's trading policy and the extent to which membership of the company organs of the parent company and its subsidiary overlapped (see Commission Decision 87/1/EEC of 2 December 1986 relating to a proceeding under Article [81] of the EEC Treaty (IV/31.128 — Fatty acids) (OJ 1987 L 3, p. 17); Commission Decision 86/398/EEC of 23 April 1986 relating to a proceeding under Article [81] of the EEC Treaty (IV/31.149 — Polypropylene) (OJ 1986 L 230, p. 1); Commission Decision 85/617/EEC of 16 December 1985 relating to a proceeding pursuant to Article [81] of the EEC Treaty (IV/30.839 — Sperry New Holland) (OJ 1985 L 376, p. 21); Commission Decision 84/388/EEC of 23 July 1984 relating to a proceeding under Article [81] of the EEC Treaty (IV/30.988 — Agreements and concerted practices in the flat-glass sector in the Benelux countries) (OJ 1984 L 212, p. 13); and Commission Decision 78/155/EEC of 23 December 1977 relating to a proceeding under Article [81] of the EEC Treaty (IV/29.146 — BMW Belgium NV and Belgian BMW dealers) (OJ 1978 L 46, p. 33)). In the motor vehicle sector, the national sales subsidiaries concerned were treated as being responsible where the infringement could be localised in the corresponding Member State (Commission Decision 2001/146/EC of 20 September 2000 relating to a proceeding under Article 81 of the EC Treaty (Case COMP/36.653 — Opel) (OJ 2001 L 59, p. 1)).

171 The Commission's assertion that the applicant is responsible for the conduct of MBBel since it is almost a 100 per cent shareholder in it is unfounded. The judgment of the Court of Justice in Case C-286/98 P *Stora Kopparbergs Bergslags* v *Commission* [2000] ECR I-9925, paragraph 28 et seq., shows that a 100 per cent shareholding is not on its own sufficient to establish the responsibility of a parent company under the law relating to concerted practices. The Commission would have to adduce other evidence to show that the applicant had also, in practice, influenced the conduct of MBBel. The applicant denies having been aware of the activities of MBBel and having actively supported them. It submits that the Commission failed to prove that it had been informed of the meeting of the dealers' association of 20 April 1995. It contends that even if MBBel had taken part in the action against 'price slashing', that had been done without the applicant's agreement.

It adds in its reply that the Commission was wrong to claim that the onus is on the applicant to prove that that infringement was not its responsibility, since Mercedes-Benz had put itself forward in the administrative procedure as being the sole interlocutor of the Commission in relation to the infringement in Belgium. It maintains that the onus is on the Commission to prove that Mercedes-Benz was informed of the alleged price-fixing measures and that it had 'actively encouraged' them.

172 The Commission submits that MBBel was a party, on 20 April 1995, to an agreement with the Belgian dealers to limit permitted discounts to three per cent and that failure to comply with that agreement had to lead to cuts in vehicle supplies. It contends that the applicant is responsible for that infringement of competition rules, since it constituted an economic unit with MBBel.

173 There can be no doubt whatsoever that those who took part in the meeting of 20 April 1995 adopted the measures against 'price slashing', since Mr Rauw, who drafted the minutes, made a clear distinction in it between points which the speaker wished to stress, more or less firm demands, advice and recommendations, and assessments, criticisms and declarations of intention made by those present. Furthermore, the paragraph relating to the use of ghost shopping, the conduct of the Brussels branch of MBBel as regards prices and the use of cuts in vehicle supplies where discounts in excess of three per cent had been granted shows that the discussions indeed related to the adoption of those measures and that MBBel took part in them.

174 Moreover, the applicant's arguments based on the fact that the minutes do not show that any representative of MBBel spoke at the meeting, that the latter took part in the meeting as importer and not as representative of its branches, and that the dealers' association did not have the necessary authority to adopt binding decisions are irrelevant. Any person who takes part in a meeting which results in anti-competitive agreements must raise objections in order to indicate clearly that he is not a party to the agreement. The minutes of the meeting of 20 April 1995 do not

record any opposition whatsoever on MBBel's part. The latter even approved the limitation on discounts to three per cent. Had the position been otherwise, Mr Rauw could not have stated that if that limitation were to be exceeded there would be cuts in vehicle supplies, knowing that only MBBel was in a position to take such a step.

175 Contrary to what the applicant maintains (see paragraph 162 above), MBBel had an interest in putting an end to price slashing. It made no sense for MBBel to maintain high average prices if the dealers were always to grant larger discounts, thereby undermining the credibility of the list prices. Furthermore MBBel, as an importer, supplies not only the Belgian dealers, thus creating a vertical relationship, but also final customers through its Brussels branches, thus giving rise to the horizontal relationship, disputed by the applicant, between MBBel and its dealers.

176 Plainly, Mr Goossens of the Belgian dealers' association did not consider it necessary, in order to accuse the branches of price slashing, for representatives of those branches to take part in the meeting of 20 April 1995 as well as several members of MBBel's management. It is clear that MBBel was treated not only as a supplier but also as a competitor of the dealers and that it participated in the agreement to restrict discounts in both those capacities.

177 Contrary to what the applicant contends (see paragraph 162 above), the statement of objections was not restricted to vertical competition. The Commission explained (in point 222 of the statement of objections) that the purpose of the action agreed upon between MBBel and the dealers in order to combat price slashing and exercise control over the granting of discounts by cuts in vehicle supplies where discounts exceeded three per cent was to restrict price competition in Belgium. MBBel was accordingly referred to not only as a party to an agreement to restrict discounts by cutting supplies but also, more generally, as an undertaking which took part in an agreement to limit discounts, exercise control over the conduct of dealers with

regard to discounts and cut supplies where discounts in excess of three per cent were granted. Moreover, the applicant cannot describe the legal analysis of MBBel's participation in the agreement as new, since the Commission had indicated in the statement of objections that MBBel had already been party to a price agreement, primarily of a horizontal nature, prior to 20 April 1995, namely the action against 'price slashing'. It is not necessary for the agreement to be binding under civil law for it to constitute an agreement for the purposes of Article 81(1) EC (Case C-277/87 *Sandoz Prodotti Farmaceutici* v *Commission* [1990] ECR I-45, paragraph 13) (see paragraph 160 above).

178 The contested decision shows that the Belgian dealers were aware that the announcement of ghost shopping would be implemented and that MBBel was very insistent that the dealers maintained their actual resale prices at the highest possible level (recitals 117 and 119 in the contested decision). The applicant's argument that the individual appraisals of the various dealers were anonymous is wrong. Indeed, there had already been a failure to respect the anonymity of those appraisals in the minutes of the meeting of 27 March 1996, as the dealer Van Steen NV was referred to in them by name. The individual discounts which the five dealers investigated were ready to grant did not have to be described in detail in the minutes, since it was clear that each of the dealers had offered a discount higher than the three per cent figure allowed by the association. The alleged later differences of opinion between the dealers with regard to the level of discounts are irrelevant, particularly as the agreement at issue was binding on them inter alia as regards MBBel.

179 The appointment of Tokata on 26 November 1996 shows that the dealers' conduct with regard to discounts was an important factor in carrying out ghost shopping, contrary to what is maintained by the applicant, which considers it to represent only one of several factors (see paragraph 165 above). The true purpose of the appointment was to test the reaction of the 47 Belgian dealers to a request for a discount of seven per cent.

180 According to the Commission, the applicant denies any connection between, on the one hand, the agreement of 20 April 1995 and, on the other hand, the ghost shopping carried out at the five dealers in Antwerp in spring 1996 and the instructions of November 1996 to carry out ghost shopping at all the Belgian dealers (see paragraph 166 above). The time-limit of the end of 1995 laid down under the agreement of 20 April 1995 relates only to the specific sanction imposed, namely the cutting of supplies, and not to the setting of a ceiling on discounts of three per cent. The Commission did not claim that the ghost shopping was carried out pursuant to the decision of 20 April 1995, but held that such shopping showed that the dealers were aware that this type of action would be taken. The Commission adds that on 14 March 1996 MBBel expressed its dissatisfaction with the fact that a dealer in Charleroi had sold a W 210 series vehicle with a discount of six per cent.

181 As regards the appreciable restriction on trade between Member States, which the applicant denies (see paragraph 168 above), the creation and maintenance of an artificial zone in which high prices are practised may give rise to trade patterns which differ from normal patterns. It is clear from case-law that practices restricting competition which extend over the whole territory of a Member State by their very nature have the effect of reinforcing the partitioning of markets on a national basis (*Bayerische Motorenwerke*, cited in paragraph 132 above, at paragraph 20; Case C-309/99 *Wouters and Others* [2002] ECR I-1577, paragraph 95; and Case T-62/98 *Volkswagen* v *Commission* [2000] ECR II-2707, paragraph 179).

182 The Commission claims that the applicant terminated the fixing of selling prices in Belgium only with the circular of 10 June 1999 (recital 223 in the contested decision). It again states that the date referred to in the minutes of the meeting of 20 April 1995, namely the end of 1995, related only to the sanction of cutting supplies and not the agreement to limit discounts to three per cent. The dealers' practices in relation to discounting were also monitored in 1996 (recitals 117 and 118 in the contested decision). Furthermore, those checks were not limited in any way to vehicles in the W 210 series, but also included other types of vehicles, in this case C-Class cars. Since the principal objective of carrying out ghost shopping was to

monitor discounts granted by the dealers, as was decided on 20 April 1995, the extension of the measures to other classes of vehicles and the criticisms made in relation to excessive discounts (recital 119 in the contested decision) prove that the agreement of 20 April 1995, which the minutes show reflected practices already carried out in the past, was not in any way a unique, isolated and temporary measure. Similarly, the Commission refers to the applicant's argument that the aim of the price-fixing agreement was to improve dealers' profitability. According to the Commission, that objective could not be achieved by a measure which was only intended to last for a few months.

183 The Commission considers that the applicant's arguments referred to in paragraphs 169 to 171 above regarding its responsibility in the present case are without foundation. The applicant's responsibility for the conduct of MBBel arises purely because that company was almost wholly owned by the applicant because, given its ties to the parent company, it was not in a position to adopt its own distribution policy and constituted an economic unit with the applicant.

184 The Commission states in the first place that, where, as in these proceedings, the parent company holds 100 per cent of the shares in its subsidiary, the Commission does not have to prove that the parent actually gave the subsidiary the instructions which it carried out. *Stora Kopparbergs Bergslags* v *Commission*, cited in paragraph 171 above, to which the applicant refers, shows that it is permissible in such a case to assume that the parent company in fact exercises a controlling influence on the conduct of its subsidiary, particularly where the parent put itself forward as being the sole interlocutor of the Commission with respect to the infringement concerned. In those circumstances, it is for the applicant to overcome that presumption by sufficient evidence. In the present case, the applicant also put itself forward to the Commission as the sole interlocutor as regards the infringement committed in Belgium. Nor did the applicant deny that it was in a position to exercise a controlling influence on the conduct of that subsidiary on the market. Lastly, the applicant has failed to provide any proof that MBBel could conduct its affairs on an independent basis.

185 The Commission also states that the applicant had been informed of the efforts made by MBBel to maintain average prices at a high level (recital 119 in the contested decision).

Findings of the Court

186 The first point to be made is that the applicant objects that the Commission stated for the first time in the contested decision, with respect to the infringement regarding the fixing of selling prices in Belgium, that MBBel had participated in a horizontal restriction on competition. The contested decision states that 'MBBel behaved both as a competitor of the dealers, namely as operator of two branches, and as a supplier to the dealers'. In addition, the Commission held in the contested decision that the latter, vertical, aspect was clearly the 'focal point of the agreement' (recital 141).

187 Although the applicant does not put the point in those terms, the Court considers that that argument should be interpreted as an objection based on the infringement of the rights of the defence.

188 A reading of Article 19(1) of Regulation No 17 in conjunction with Articles 2 and 4 of Regulation No 99/63/EEC of the Commission of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Regulation No 17 (OJ, English Special Edition 1963-1964, p. 47) shows that the Commission is to communicate objections which it raises against undertakings or associations concerned by them and is to deal in its decisions only with those objections in respect of which those undertakings or associations have been afforded the opportunity of making known their views as to the accuracy and the relevance of the facts, objections and surrounding circumstances on which the Commission relies (see, to that effect, Case 85/76

Hoffmann-La Roche v *Commission* [1979] ECR 461, paragraph 9, and Joined Cases T-10/92 to T-12/92 and T-15/92 *Cimenteries CBR and Others* v *Commission* [1992] ECR II-2667, paragraph 33).

189 It is settled case-law that the statement of objections must be couched in terms that, albeit succinct, are sufficiently clear to enable the parties concerned properly to identify the conduct complained of by the Commission. It is only on that condition that the statement of objections can fulfil its function under the Community regulations of giving undertakings all the information necessary to enable them to defend themselves properly before the Commission adopts a final decision (see, inter alia, Case T-352/94 *Mo och Domsjö* v *Commission* [1998] ECR II-1989, paragraph 63; Case T-348/94 *Enso Española* v *Commission* [1998] ECR II-1875, paragraph 83; and Case T-308/94 *Cascades* v *Commission* [1998] ECR II-925, paragraph 42). It is also settled case-law that that requirement is observed where the decision does not allege that the persons concerned have committed infringements other than those referred to in the statement of objections and takes into consideration only facts on which the persons concerned have had the opportunity of making known their views (see, inter alia, Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraph 94, and Joined Cases T-191/98 and T-212/98 to T-214/98 *Atlantic Container and Others* v *Commission* [2003] ECR II-3275, paragraph 113). However, the Commission's final decision is not necessarily required to be a replica of the statement of objections (Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraph 67, and *ACF Chemiefarma* v *Commission*, paragraph 91).

190 It is in the light of those principles that the objection based on the infringement of the applicant's rights of defence should be considered.

191 In the present case, it should be determined whether the objection that MBBel was party to an alleged horizontal restriction of competition was set out in the statement of objections in sufficiently clear terms to enable the applicant to become properly aware of it.

192 The Court takes the view that where the statement of objections provides a clear indication of the nature of the infringement of competition law which the undertaking in question is alleged to have committed and the material facts relied on in that regard, that undertaking is in a position to reply to those allegations and to defend its rights. For the decision adopted by the Commission subsequently to categorise an economic agreement as 'vertical' or 'horizontal' does not constitute a fundamental alteration to the complaints set out in the statement of objections.

193 The Commission did not explicitly invoke either the horizontal or the vertical aspect of the infringement in question in the statement of objections and thus did not categorise the alleged infringement as 'horizontal' or 'vertical'. However, the applicant does not deny that the Commission briefly set out in the statement of objections the reasons why MBBel was alleged to have entered into an agreement with the Belgian dealers to fix the selling price of Mercedes vehicles in Belgium. The facts and the material criticisms of MBBel's conduct set out by the Commission in the contested decision were therefore referred to in the statement of objections. It should also be pointed out that the Commission took the view in the contested decision that the vertical aspect of the alleged infringement was crucial, with the horizontal aspect being invoked on a purely ancillary basis.

194 In those circumstances, compliance with the rights of the defence did not require the Commission explicitly to categorise the infringement in question as vertical or horizontal in the statement of objections.

195 For the sake of completeness, the Court would add that the applicant does no more than raise this objection without indicating in what way the fact that the Commission is alleged not to have raised the 'horizontal' aspect of the infringement before the adoption of the contested decision caused it to suffer damage. The documents before the Court show that the applicant replied to the allegations regarding the fixing of selling prices in Belgium made by the Commission in the statement of objections. The applicant did not argue in its application that its reply

to the statement of objections would have been materially different if the word 'horizontal' had featured in the statement. It should also be pointed out that a reading of the part of the contested decision which relates to the imposition of the fine for the infringement in question shows that the Commission did not explicitly rely on the horizontal aspect of the infringement in imposing the fine (recitals 245 to 248).

196 The contested decision shows that the Commission took the view that an agreement to restrict price competition in Belgium was entered into on 20 April 1995 between MBBel and the Belgian Mercedes-Benz dealers' association, under which discounts were limited to three per cent and an external agency was to monitor the level of discounts granted for the E-Class, with higher discounts entailing a cut in supplies of vehicles of that class (recitals 113 and 177).

197 The section of the minutes of the meeting in question headed 'action against price slashing' states: 'Relationships between dealers have improved as a result of that action. [One dealer — Mr Goossens —] accuses the Brussels branches of price slashing. An outside agency will be employed to carry out "ghost shopping" to test the level of discounts on the W 210. If a discount higher than three per cent is granted, the number of vehicles allocated until [the] end [of] 1995 will be reduced.'

198 The applicant acknowledges that, at the meeting of 20 April 1995 which MBBel attended, the Belgian Mercedes-Benz dealers' association referred to an agency commissioned to carry out visits using ghost shoppers. It maintains, however, that the dealers' association cannot take any decision which is binding on its members and that it may only formulate 'recommendations'. It also states that MBBel took no steps to implement those recommendations, nor did it approve them. MBBel

attended only as observer and importer and none of its representatives spoke at the meeting. Furthermore, even if there were to have been a limitation of discounts, that would not have had an appreciable effect on trade between Member States.

199 It is settled case-law that for there to be an agreement within the meaning of Article 81(1) EC it is sufficient for the undertakings concerned to have expressed their joint intention to behave on the market in a certain way (*ACF Chemiefarma* v *Commission*, cited in paragraph 189 above, at paragraph 112; Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck and Others* v *Commission* [1980] ECR 3125, paragraph 86; and Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission ('PVC II')* [1999] ECR II-931, paragraph 715).

200 Far from requiring that an actual 'plan' be drawn up, the criteria of coordination and cooperation laid down by case-law must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition that every economic operator must determine independently the policy which he intends to adopt in the common market. Although it is true that this requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it does however strictly preclude any direct or indirect contact between such operators, the object or effect of which is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market (*Suiker Unie and Others* v *Commission*, cited in paragraph 41 above, at paragraphs 173 and 174, and *PVC II*, cited in paragraph 199 above, at paragraph 720).

201 Where there is a dispute as to the existence of an infringement of the competition rules, it is for the Commission to prove the infringements found by it and to adduce evidence capable of demonstrating to the requisite legal standard the existence of the circumstances constituting an infringement (Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 58).

202 However, where it has been established that an undertaking has participated in meetings between undertakings of a manifestly anti-competitive nature, it is for that undertaking to put forward evidence to establish that its participation in those meetings was without any anti-competitive intention, by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs (see, to that effect, Case C-199/92 P *Hüls* v *Commission* [1999] ECR I-4287, paragraph 155, and Case C-235/92 P *Montecatini* v *Commission* [1999] ECR I-4539, paragraph 181). In the absence of evidence of that distancing, the fact that an undertaking does not abide by the outcome of those meetings is not such as to relieve it of full responsibility for the fact that it participated in the concerted practice (Case T-347/94 *Mayr-Melnhof* v *Commission* [1998] ECR II-1751, paragraph 135, and Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others* v *Commission* [2000] ECR II-491, paragraph 1389).

203 It cannot be disputed that MBBel was present at the meeting of the dealers' association on 20 April 1995, during which the continuation of 'price slashing' and the intention to take steps to detect and prevent discounts higher than three per cent were referred to. It must be noted that a number of senior representatives of MBBel were present at that meeting and that the minutes of it were drawn up by Mr Rauw, who was MBBel's manager for dealer development (see, inter alia, recital 115 in the contested decision). The applicant's contentions that MBBel played a minor

role at the meeting in question (see paragraph 161 above) are therefore not supported by the documents before the Court. The participation of those representatives of MBBel at the meeting in question shows that, contrary to what the applicant maintains, MBBel played a central role in the discussions.

204 Accordingly, as MBBel did not prove that it distanced itself from the discussions on price discounts, the Commission was entitled to consider that MBBel, by its unqualified presence at the meeting of 20 April 1995 during which the objective of taking action against 'price slashing' was clearly referred to, had participated in the joint intention which led to the putting into place of the measures to detect and prevent the discounts in question.

205 Furthermore, the applicant's assertion that the MBBel branches were not active members of the dealers' association at the time is irrelevant, since MBBel's participation in the anti-competitive agreement has been established.

206 It should also be held that, as the Commission contends, only MBBel was in a position to implement the threat made at the meeting of 20 April 1995 to cut off supplies of vehicles allocated. Its silence on that occasion can be interpreted only as an approval of and participation in the action against 'price slashing' which had already been decided upon by the Belgian dealers since, in particular, the threat of cutting off the supplies of vehicles allocated until the end of 1995 if discounts higher than three per cent were granted required the active participation of MBBel as supplier of the dealers and strengthened the agreement in question.

207 The presence of that undertaking at the meeting, without it publicly distancing itself from its discussions, therefore led the other participants to believe that it accepted the decisions taken at the meeting and that it intended to contribute by its own

conduct to the common objectives pursued by all the participants. The fact that the action against 'price slashing' had been put in place before the meeting did not prevent the Commission from taking the view that MBBel had participated in a decision taken on 20 April 1995 as to future prices and was disposed to give its active support to price fixing, the monitoring of prices charged by dealers and, if necessary, the application of sanctions in the event of failure to comply with the instructions from that date.

208 The applicant's argument that the fact that MBBel checked from time to time to see whether dealers were performing all their duties as intermediaries (see paragraph 165 above) was perfectly lawful, since the dealers undertook in their commercial dealership agreement to adopt a high-quality market position, is not persuasive and must be rejected. The applicant acknowledges in its application that the dealers' pricing policies were one factor, among many others, in that assessment (see paragraph 165 above). The prices charged by the dealers have no connection with the quality of the services they provide. Furthermore, MBBel does not attempt to justify those checks on pricing policies on the basis of Clause 11 of the Belgian dealership agreement, which provides that MBBel may determine a maximum price, but not a minimum price.

209 It is also necessary to reject the applicant's argument that the information gathered was anonymous (see paragraph 168 above) and that it was impossible to take action against specific dealers. It is clear from the minutes of the meeting of the Mercedes dealers in Antwerp of 27 March 1996 that discounts given by a particular dealer, namely Van Steen NV, were identified by ghost shoppers and raised at the meeting in question.

210 As regards the applicant's argument that the dealers' association did not have the authority to take decisions binding its members, but only to formulate recommendations, it is settled case-law that a measure may be categorised as a

decision of an association of undertakings for the purposes of Article 81(1) EC even if it is not binding on the members concerned, at least to the extent that the members to whom the decision applies comply with its terms (see, by way of analogy, Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ and Others* v *Commission* [1983] ECR 3369, paragraph 20; *Van Landewyck and Others* v *Commission*, cited in paragraph 199 above, at paragraphs 88 and 89; and Case T-136/94 *Eurofer* v *Commission* [1999] ECR II-263, paragraph 15). That requirement is sufficiently established in this case by the fact that the members of the dealers' association in Belgium and MBBel decided at the meeting of 20 April 1995 to monitor, using ghost purchasing by members of an outside agency, the level of discounts given for the W 210 vehicle model and that ghost shoppers did indeed make visits to dealers. That information shows that the course of action decided upon at the meeting of 20 April 1995 was implemented.

211 With respect to the applicant's argument referred to in paragraph 162 above that it is not clear that the MBBel branches had an interest in limiting the rate of discounts, the Court is of the view that, since MBBel's participation in the concerted practice has been established, it is not necessary to consider whether MBBel and its branches had an interest in participating in it. In any event, as the Commission has argued, MBBel and, accordingly, its branches had an interest in ending the price slashing, in particular as it supplies not only the dealers but also final customers through a number of branches. The letter of 17 October 1995 from MBBel to Mercedes-Benz AG, in which MBBel stated that it was doing 'all [it] can to carry out [its] work correctly ([it is] avoiding exports) and [is] attempting to keep [its] average price at a high level', also shows, as the Commission stated in recital 119 in the contested decision, the store set on a low level of price discounting by the Belgian dealers. In that regard, the applicant's argument that MBBel was referring to average list prices and not the selling prices actually invoiced by the dealers is not persuasive and must be rejected.

212 The applicant's argument that the fixing of selling prices in Belgium did not affect inter-State trade to an appreciable extent, since it only concerned sales in that

country and cross-border sales were not affected, must be rejected. It is settled case-law that where a concerted practice extends over the whole of the territory of a Member State it has, by its very nature, the effect of reinforcing the partitioning of markets on a national basis, thereby holding up the economic interpenetration which the Treaty is designed to bring about (*Wouters and Others*, cited in paragraph 181 above, at paragraph 95; Case 8/72 *Vereeniging van Cementhandelaren* v *Commission* [1972] ECR 977, paragraph 29; *Remia and Others* v *Commission*, cited in paragraph 81 above, at paragraph 22; and Case C-35/96 *Commission* v *Italy* [1998] ECR I-3851, paragraph 48). The applicant does not deny that the meeting of 20 April 1995, and thus the infringement in question, concerned the whole of Belgium, as the Commission held in recital 197 in the contested decision.

213 The applicant also contends that the Commission has failed to show that the purported infringement lasted from 20 April 1995 until the circular letter of 10 June 1999, in which the applicant stated inter alia that the dealers were to be free to set the prices and terms of their sales to customers. The Commission ought to have held that the infringement ceased at the end of 1995, as the action against 'price slashing' referred to in the minutes of the meeting of 20 April 1995 was temporary and related only to the introduction of the new W 210 model.

214 It is clear from case-law that it is for the Commission to prove not only the existence of the concerted practice, but also its duration (see *Dunlop Slazenger* v *Commission*, cited in paragraph 84 above, at paragraph 79, and *Cimenteries CBR and Others* v *Commission*, cited in paragraph 188 above, at paragraph 2802).

215 In the present case, there is more than one source of evidence to suggest that the infringement continued after the end of 1995. As the Commission rightly maintains, it is clear from the minutes of the meeting of 20 April 1995 that the time-limit laid down of the end of 1995 relates only to the sanction agreed upon and not to the fixing of the ceiling on discounts at three per cent. In addition, the minutes of the meeting of 27 March 1996 show that ghost shopping for the E 290 TD model was carried out inter alia at five dealers in Belgium in 1996. Contrary to what the applicant contends (see paragraph 166 above), the meeting of 20 April 1995 and that

of 27 March 1996 are connected. Furthermore, in a letter of 14 March 1996, MBBel clearly expressed its dissatisfaction with the fact that a W 210 series vehicle had been sold with a discount of six per cent. The insertion of an exclamation mark after that percentage ('6%!') leaves no room for doubt that the discount in question was considered to be worthy of criticism. In the light of the objections raised by MBBel against discounts higher than three per cent granted by dealers in Belgium and the continuation of ghost shopping, the dealers would have expected repercussions if discounting were detected until well after the end of 1995. In those circumstances, the Commission was entitled to hold that the agreement of 20 April 1995 fixing the prices of vehicles in Belgium was not a temporary measure, but lasted until it was terminated by the circular of 10 June 1999.

216 By its argument that the Commission did not state whether the infringement relating to price fixing in Belgium had always been perpetrated with the same degree of intensity (see paragraph 168 above), the applicant contends that the Commission committed a manifest error of assessment as regards the seriousness of the infringement at certain times. The Court is of the view that the Commission correctly assessed the duration (see paragraph 215 above) and the seriousness of the infringement in question. Furthermore, the applicant does not dispute the seriousness of the infringement. Given that the infringement lasted for the period established in the contested decision, it is not for the Commission to establish that it was committed with the same intensity when there was no proof that it had ceased.

217 The applicant complains that the Commission imputed to it the conduct of MBBel, its subsidiary in Belgium, solely because it had nearly a 100 per cent shareholding in that subsidiary.

218 In that regard, it should be noted that the fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility of imputing its conduct to the parent company, in particular where the subsidiary, although having separate legal personality, does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company (see, inter alia, *ICI* v *Commission*, cited in paragraph 85 above, at paragraphs 132 and 133; Case 52/69 *Geigy* v *Commission* [1972] ECR 787, paragraph 44; and Case 6/72 *Europemballage and Continental Can* v *Commission* [1973] ECR 215, paragraph 15). A 100 per cent shareholding in the capital of the subsidiary cannot, in itself, be sufficient to prove the existence of such control by the parent company. The imputation to the parent company of its subsidiary's conduct is always dependent on a finding that management power was actually exercised (see, to that effect, *ICI* v *Commission*, cited in paragraph 85 above, at paragraphs 132 to 141; Joined Cases 32/78 and 36/78 to 82/78 *BMW Belgium and Others* v *Commission* [1979] ECR 2435, paragraph 24; and *Stora Kopparbergs Bergslags* v *Commission*, cited in paragraph 171 above, at paragraph 23).

219 As the Court of Justice held in *Stora Kopparbergs Bergslags* v *Commission*, cited in paragraph 171 above, at paragraph 28, while a 100 per cent shareholding does not in itself suffice for a finding of responsibility against the parent company, the Commission is also entitled to base its decision on the imputation to the parent company of the conduct of the subsidiary on the fact that the parent company did not dispute that it was in a position to exert a decisive influence on its subsidiary's commercial policy and produced no evidence to support its claim that the subsidiary was autonomous. Given the fact that the whole of the share capital of the subsidiary was held, the Commission is entitled to assume that the parent company exerted a decisive influence on the conduct of its subsidiary, particularly where the parent company had put itself forward in the administrative procedure as being the sole representative of the companies in the group.

220 In those circumstances, it is for the parent company to rebut that presumption by sufficient evidence.

221 It is clear from the documents before the Court in the present case that the applicant does not deny that Mercedes-Benz held the whole of the capital of MBBel at the time of the infringement in question and acknowledges that it had put itself forward in the administrative procedure as being the sole representative before the Commission with respect to the Belgian infringement. Moreover, the applicant does no more than contend that it was not aware of the activities of MBBel and denies that it gave active support to those activities, without providing any evidence whatsoever that it was not in a position to influence MBBel's trading policy or evidence as to the latter's autonomy. It follows that the applicant has not rebutted the presumption that it did indeed exert a decisive influence on the conduct of its subsidiary MBBel, by adducing sufficient evidence.

222 This part of the third plea and, accordingly, the third plea in its entirety must therefore be rejected.

The fourth plea, alleging that the amount of the fine imposed by Article 3 of the contested decision was incorrectly set

Arguments of the parties

223 The applicant contends that the fine imposed by Article 3 of the contested decision lacks any justification in the absence of any infringement of Article 81(1) EC. Even if such an infringement were to be established, the fine is excessive.

224 As regards the conduct in relation to the German market, the applicant essentially argues that the fine should be declared to be illegal since the measures which Mercedes-Benz is alleged to have taken were adopted on the basis of commercial agency agreements which, as they contain no restrictions applicable to commercial agents, fall outside the scope of Article 81(1) EC.

225 In so far as it could infringe Article 81(1) EC, the prohibition on sale to leasing companies in Spain is in any event exempt by virtue of Regulation No 1475/95, which precludes the imposition of a fine. Even if the Community Court does not accept the applicant's submissions, it must take into consideration the fact that there are substantial legal arguments available to it in support of its contention that those practices satisfy the conditions for exemption.

226 As regards the fixing of selling prices in Belgium, the applicant argues that, although the Commission claims (recital 245 in the contested decision) that such price fixing related exclusively to the W 210 model, it none the less found that discounting practice was monitored for other models. That finding plainly relates to the 'ghost shopping' that was carried out by Tokata for the C-Class models. Those visits did not relate to the alleged price fixing (see paragraph 167 above). The Commission ought not to have treated the fact that a number of models were involved as an aggravating factor. Furthermore, the statement in recitals 223 and 225 of the contested decision that the selling prices had been fixed from 20 April 1995 until 10 June 1999 is contradicted by the fact that the decision recorded in the minutes of the meeting of 20 April 1995 had effect only until the end of 1995 (see paragraph 174 above). MBBel did not have a major role in the alleged limitation of price discounts. On the contrary, that measure had already been initiated by the dealers prior to the meeting of 20 April 1995. Even if it were the case that MBBel participated in that

measure, it was not in charge of its implementation. Any participation in the measure was not for the purposes of defending MBBel's own interests but in order to improve the profitability of the dealers.

227 As regards the infringement constituted by the fixing of selling prices in Belgium, the Commission submits that the applicant's arguments should be rejected. In the first place, its assessment in recital 245 in the contested decision was only that 'overall' the infringement in question was 'serious' and it set the basic amount of the fine at EUR 7 million, which represents approximately one third of the maximum fine of EUR 20 million laid down for serious infringements under 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). The complaint against the applicant was that it monitored discounts given by dealers not only on the W 210 model but also on other models of vehicle. Furthermore, even if the infringement in question were to have been restricted to the W 210 model, the Commission was entitled to take that point into consideration for the purposes of the deterrent effect of the fine.

228 The Commission considers that it has already refuted the applicant's objections regarding the duration of the infringement (see paragraph 182 above).

229 Furthermore, the Commission did not rely on the fact that MBBel may have had a leading role in restricting discounts when it calculated the amount of the fine, but merely took account of MBBel's active participation in the measures to fix selling prices in Belgium. Without such active participation, the sanction for exceeding the ceiling on discounts could not have been implemented. The minutes of the meeting of 20 April 1995 show that the action against 'price slashing' had existed beforehand. However, the limitation of discounts to a maximum of three per cent was decided upon at that meeting, with the active participation of the applicant, and it cannot

therefore be claimed that MBBel was confronted with that measure after it had been adopted. As regards the interest that MBBel itself had, the Commission argues that the limitation of discounts served to maintain the importer's policy of high prices. Lastly, the assessment of the matter would have been no different if MBBel had in fact wished to maintain the profitability of the dealers (*AEG* v *Commission*, cited in paragraph 84 above, at paragraphs 40 to 42 and 71 to 73).

Findings of the Court

230 The first point to make is that it follows from the finding made in relation to the previous pleas that the fine specified in Article 3 of the contested decision should be annulled in so far as it was imposed on the applicant by reason of the instructions given to the German agents to sell new vehicles supplied so far as at all possible only to customers from their contract territory and to avoid internal competition, and to require payment of a deposit of 15 per cent of the price of the vehicle where vehicles were ordered by clients from outside the contract territory. The fine of a starting amount of EUR 71.825 million should first of all be reduced by EUR 47.025 million (recital 242).

231 The findings made in relation to the previous pleas also show that the fine specified in Article 3 of the contested decision should be annulled in so far as it was imposed on the applicant by reason of the restriction of supplies of passenger cars to leasing companies for stock purposes in Germany and Spain. The fine of a starting amount of EUR 71.825 million should secondly be reduced by EUR 15 million (recital 244).

232 As regards the infringement constituted by the fixing of prices in Belgium, the Court is of the opinion that the applicant is wrong to argue that the Commission treated the fact that a number of models were involved as an aggravating factor. It is clear from recital 248 in the contested decision that the Commission did not take any

aggravating factor whatsoever into account when setting the fine. In any event, while it is true that the Commission stated in the contested decision that on 26 November 1996 MBBel instructed Tokata to carry out ghost shopping at 47 Belgian dealers and to monitor discounts granted on C-Class models, that fact shows, as the Commission contends, that the ghost purchases were normal practice on MBBel's part and that they were not limited to a specific model.

233 With respect to the applicant's argument as to the duration of the infringement involving price fixing in Belgium, the Court is of the view that the Commission's determination in that regard was correct (see paragraph 215 above). The Court also finds that MBBel played a central role in fixing the selling prices of vehicles in Belgium (see paragraph 209 above). There is therefore no reason to reduce the fine imposed for the infringement in question.

234 In the light of all the above, the part of the fine which relates to the infringements in Germany and Spain must be annulled. The other arguments relied on by the applicant in support of its application for annulment of the fine or a reduction in its amount must be rejected. The Court, in the exercise of its unlimited jurisdiction, confirms the amount of the fine relating to the infringement involving price fixing in Belgium at EUR 9.8 million.

Costs

235 Under Article 87(3) of the Rules of Procedure of the Court of First Instance, the Court may, where each party succeeds on some and fails on other grounds, order costs to be shared or order each party to bear its own costs. In the present case, it is appropriate to order the Commission to bear its own costs and 60 per cent of the applicant's costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. **Annuls Article 1 of Commission Decision 2002/758/EC of 10 October 2001 relating to a proceeding under Article 81 of the EC Treaty (Case COMP/36.264 – Mercedes-Benz) save in so far as it finds that DaimlerChrysler AG and its legal predecessors Daimler-Benz AG and Mercedes-Benz AG have themselves or through their subsidiary Mercedes-Benz Belgium SA infringed Article 81(1) EC by participating in agreements to restrict the granting of discounts in Belgium, those agreements having been concluded on 20 April 1995 and terminated on 10 July 1999;**

2. **Annuls Article 2 with the exception of its first sentence;**

3. **Annuls Article 3 of Decision 2002/758 in so far as it set the amount of the fine imposed on the applicant at EUR 71.825 million;**

4. **Sets the amount of the fine imposed by Article 3 of Decision 2002/758 for the infringement relating to price fixing in Belgium at EUR 9.8 million;**

5. Dismisses the remainder of the action;

6. Orders the Commission to bear its own costs and 60 per cent of those of the applicant and orders the applicant to bear 40 per cent of its own costs.

Lindh García-Valdecasas Cooke

Delivered in open court in Luxembourg on 15 September 2005.

H. Jung P. Lindh

Registrar President