JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)
15 July 1994 *

In Case T-17/93,

Matra Hachette SA, a company governed by French law, established in Paris, represented by Mario Siragusa, of the Rome Bar, and Antoine Winckler, of the Paris Bar, with an address for service in Luxembourg at the Chambers of Arendt and Medernach, 8-10 Rue Mathias Hardt,

applicant,

v

Commission of the European Communities, represented by Francisco Enrique González Díaz, of its Legal Service, acting as Agent, assisted by Ami Barav, of the Paris Bar, with an address for service in Luxembourg at the office of Georgios Kremlis, also of the Commission's Legal Service, Wagner Centre, Kirchberg,

defendant,

supported by

* Language of the case: French.

Portuguese Republic, represented by Rui Chancerelle de Machete, of the Lisbon Bar, Luís Inês Fernandes, Director of the Legal Service of the Directorate-General for European Community matters of the Ministry of Foreign Affairs, and Teresa Moreira, assistant to the Deputy State Secretary for Foreign Trade, acting as Agents, assisted by Pedro Machete, of the Lisbon Bar, with an address for service in Luxembourg at the Portuguese Embassy, 33 Allée Scheffer,

Ford of Europe Inc., a company governed by English law, established at Brentwood, United Kingdom, and **Ford Werke AG**, a company governed by German law, established in Cologne, Germany, represented by Wolfgang Schneider, Rechtsanwalt, Frankfurt-am-Main, with an address for service in Luxembourg at the Chambers of L. Dupong, 14 A Rue des Bains,

and

Volkswagen AG, a company governed by German law, established at Wolfsburg, Germany, represented by Rainer Bechtold, Rechtsanwalt, Stuttgart, with an address for service in Luxembourg at the Chambers of Loesch and Wolter, 8 Rue Zithe,

interveners,

APPLICATION for the annulment of Commission Decision 93/49/EEC of 23 December 1992 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/33.814 — Ford/Volkswagen, OJ 1993 L 20, p. 14), by which the Commission

declared Article 85(1) of the Treaty inapplicable to a joint venture set up between Ford of Europe Inc. and Volkswagen AG and, secondly, of the decision of the same date by which the Commission dismissed the complaint lodged by the applicant on 26 June 1991,

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

composed of: J. L. Cruz Vilaça, President, C. P. Briët, D. P. M. Barrington, A. Saggio and J. Biancarelli, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 28 June 1994,

gives the following

Judgment

Facts

1 On 4 February 1991, Ford of Europe Inc. and Volkswagen AG ('VW') (the 'founders') notified to the Commission under Council Regulation No 17 of 6 February 1962, the First Regulation implementing Articles 85 and 86 of the Treaty

(OJ, English Special Edition 1959-62, p. 87, 'Regulation No 17') an agreement for a joint venture, known as AutoEuropa, to be set up in Setúbal, Portugal, for the production of a multi-purpose vehicle ('MPV'), the 'VX62'. The agreement provides that the two founders are to own the joint venture as to half each. The purpose of the notification was primarily to secure from the Commission a declaration that it was unnecessary for any further action to be taken ('negative clearance') together with a declaration, under Article 85(3) of the Treaty, that the provisions of Article 85(1) did not apply to the joint venture ('exemption').

The main characteristics of the project

2 According to Matra Hachette SA ('Matra' or 'the applicant'), the joint venture is intended to perform certain functions within the manufacturing process. According to Ford, its purpose is, on the contrary, to bring together all the functions involved in the manufacture of the vehicle. To that end, it will have a press shop, a coachwork production unit, an advanced-technology painting unit, a trim shop and a final assembly unit. According to Ford, the founders' aim is to make considerable use of local suppliers. It contends therefore that the applicant is wrong to claim that all the important parts of the vehicle will be imported.

3 Similarly, in Ford's view it is incorrect to state that all the vehicles produced will be exported. First, the volume of exports will depend upon demand; secondly, commercial policy decisions will be taken by each of the founders independently.

4 The joint venture is intended to become operational with effect from 1995. According to Matra, its production capacity will be around 50 to 80% of the European production capacity for MPVs; according to Ford, it will be around 30%.

5 On 26 March and 16 April 1991, the Portuguese authorities notified to the Commission under Article 93 of the EEC Treaty a plan to grant for the project in question State aid totalling ECU 750 million, according to the applicant, and ECU 547 million according to Ford.

The pre-litigation procedure

6 On 26 June 1991, Matra lodged with the Commission a complaint under Articles 85, 92, 93 and 175 of the EEC Treaty. On 27 June 1991, the applicant was received by the Director-General of the Directorate-General for Competition of the Commission, who explained to it his refusal to initiate a procedure under Article 93(2) of the Treaty and his intention to accede to the application for exemption.

7 On 13 July 1991, the Commission published a Notice pursuant to Article 19(3) of Council Regulation No 17 concerning notification No IV/33.814 — Ford/Volkswagen, making public the fact that it intended to respond favourably to the notification made to it (OJ 1991 C 182, p. 8). Following that publication, on 9 August 1991 the applicant submitted its written observations, in which it requested access to the file compiled by the Commission and an opportunity to submit oral observations.

8 On 16 July 1991, the Commission informed the Portuguese authorities that it considered that the aid programme, as notified, was in conformity with Article 92 of the Treaty.

9 On 21 October 1991, the Commission informed the applicant that it intended granting it access to all the important parts of the file, but that a hearing did not seem appropriate at that stage.

10 On 23 December 1991, the Commission disclosed to the applicant, for its comments, copies of certain documents from the file, together with a list of documents which it did not intend disclosing to Matra, by reason of their confidential nature. On 15 January 1992, the applicant asked that certain of the documents should be made available to it either directly or, if need be, through the intermediary of independent experts. That request related to the agreement entered into between the founders, the information concerning determination of the joint venture's 'break-even point'; that concerning the envisaged differentiation between the MPVs sold by Ford and those sold by VW, and that concerning the 'cannibalization' by the jointly produced MPV of the sales of existing VW vehicles. On 31 January and 10 February 1992, the Commission refused that request.

11 On 17 February 1992, the applicant submitted its observations on the documents which had been disclosed to it on 23 December 1991.

12 In May 1992, the Commission sent to the applicant the communication provided for in Article 6 of Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Regulation No 17 (OJ, English Special Edition 1963-64, p. 47, hereinafter referred to as 'Regulation No 99/63'). In it, it informed Matra that it intended rejecting its complaint. Matra submitted its observations on that communication on 20 May 1992.

13 The applicant was heard by the Commission on 15 June 1992.

14 On 23 December 1992, the Commission granted, subject to certain obligations and requirements, the exemption requested by the founders (Commission Decision 93/49/EEC of 23 December 1992 relating to a proceeding pursuant to Article 85 of the EEC Treaty, IV/33.814 — Ford/Volkswagen, OJ 1993 L 20, p. 14, hereinafter referred to as 'the Decision'). A copy of the Decision, which expires on 31 December 2004, was sent to the applicant by the Commission; it was accompanied by a decision rejecting the applicant's complaint.

Procedure

15 In was in those circumstances that the applicant brought two actions concerning the project in question.

16 By a first application, received at the Registry of the Court of Justice on 6 September 1991, the applicant sought the annulment of the abovementioned decision of 16 July 1991 by which the Commission informed the Portuguese authorities of its approval of the State aid programme. That action was dismissed by judgment of the Court of Justice of 15 June 1993 in Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203.

17 The present application, received at the Registry of the Court of First Instance on 16 February 1993, seeks the annulment, first, of the Decision granting the exemption for the joint venture and, secondly, of the decision rejecting the applicant's complaint, since it is based exclusively on the grounds of the Decision.

18 The applicant's pleas in law were initially directed against the decision in the French language, dated 16 December 1992, annexed to the letter sent to the applicant on 23 December 1992. However, during the written procedure, the Commission stated that that text was the final draft of the Decision, as adopted on 23

December 1992, which is authentic in the English and German languages. That text, subsequently published in the *Official Journal of the European Communities*, was appended by the applicant as Annex 2 to its application. In those circumstances, the Commission has requested that the Court treat the applicant's pleas in law, in so far as they relate to the exemption measure, as being directed against the Decision adopted on 23 December 1992.

19 The written procedure between the main parties ended on 20 September 1993 with the lodgment of the Commission's rejoinder.

20 By application of 11 May 1993, Ford of Europe Inc. and Ford Werke AG (hereinafter referred to as 'Ford') sought leave to intervene in the proceedings in support of the defendant. By application of 27 May 1993, VW sought leave to intervene in the proceedings in support of the defendant. VW also requested, pursuant to Article 35(2)(b) of the Rules of Procedure, permission to use the German language wholly or in part in the course of the present proceedings. Finally, by application of 4 June 1993, the Portuguese Republic sought leave to intervene in support of the defendant.

21 By order of the Court of First Instance (Second Chamber) of 1 July 1993, the Portuguese Republic, Ford and VW were granted leave to intervene in support of the defendant and the request for an exception to the rules on languages, submitted by VW, was rejected in so far as it related to the written procedure. By letter from the Registry of 6 June 1994, VW was granted leave to address the Court in German at the hearing.

22 On 20 September 1993, the Portuguese Republic, Ford and VW each submitted a statement in intervention. The written procedure was closed on 23 November 1993 with the lodgment of the applicant's observations on the statements lodged by the interveners.

23 Upon hearing the report of the Judge Rapporteur, the Court of First Instance (Second Chamber) decided to open the oral procedure without any preparatory inquiry. The main parties and the interveners presented oral argument and answered the questions put to them by the Court at the public sitting on 28 June 1994.

The forms of order sought

24 The applicant claims that the Court should:

(i) declare the application admissible;

(ii) annul the Commission's decision of 16 December 1992, and its decision of 23 December 1992 rejecting its complaint, and in general take all such measures as the Court considers appropriate to bring to an end the contested infringement of the EEC Treaty rules and the effects thereof;

(iii) order the defendant to pay the costs.

25 The Commission contends that the Court should:

(i) dismiss the action brought by Matra as unfounded;

(ii) order the applicant to pay the costs.

26 The Portuguese Republic claims that the Court should:

(i) dismiss the action.

27 Ford claims that the Court should:

(i) dismiss the action brought by Matra as unfounded;

(ii) order the applicant to pay the costs, including those of the intervener, Ford.

28 VW claims that the Court should:

(i) dismiss Matra's action and order the applicant to pay the costs, including those of the intervener.

Pleas in law and arguments of the parties

29 The intervener, Ford, maintains that the case should not proceed on the ground that the decision is not of direct and individual concern to the applicant, in that the risk of marketing the 'Espace' vehicle is borne by Renault. However, in the circumstances of the case, the Court considers it appropriate to examine the substance of the case first. In that regard, the applicant challenges both the formal and the substantive legality of the exemption decision.

The formal legality of the Decision

30 The applicant maintains, first, that the decision was adopted in breach of the general principles of Community law and that it infringes essential procedural requirements.

— *The first plea of formal illegality: breach of the general principle that the rights of the defence must be observed*

Summary of the parties' arguments

31 With regard to breach of the general principles of Community law, the applicant withdrew, in its reply, the plea made in its application as to breach of the principle of sound administration. In its pleadings, in their final form, the applicant therefore confines itself to maintaining, with regard to breach of the general principles of Community law, that the Decision is vitiated by breach of the rights of the defence, in that it was not granted access to certain essential information in the file on the case and was not therefore able properly to put its views to the Commission. It considers that the refusal to disclose certain documents in the file, notified to it after the communication provided for in Article 6 of Regulation No 99/63 was sent to it, renders illegal the procedure under which the measure was adopted.

32 The Commission considers that that plea is unfounded. In its view, the applicant's argument is based on a misinterpretation of Regulations Nos 17 and 99/63. The rights of the defence must be observed only in relations between the Commission and the undertaking to which a proceeding pursuant to Articles 85 or 86 relates, not in relations between third parties to that procedure and the Commission.

33 According to the Portuguese Republic, the rights of the defence need only be observed, in Community competition law, with respect to undertakings liable to have a penalty imposed upon them by the Commission. Since no statement of objections has been addressed by the Commission to the applicant, who therefore is not liable to be penalized, no infringement of the rights of the defence can be found in its regard. The procedure followed by the Commission with regard to the applicant is not vitiated by any breach of procedural rights, since the complainant was on several occasions enabled to assert its 'legitimate interests'.

Findings of the Court

34 It has been consistently held — and the defendant and the intervener rightly cite the cases in question — that the principle that there must be full disclosure in the administrative procedure before the Commission for the application of competition rules to undertakings applies only to undertakings which may be penalized by a Commission decision finding an infringement of Articles 85 or 86 of the Treaty, since the rights of third parties, as laid down by Article 19 of Regulation No 17, are limited to the right to participate in the administrative procedure (judgment of the Court of Justice in Joined Cases 142/84 and 156/84 *BAT and Reynolds* v *Commission* [1987] ECR 4487, paragraphs 19 and 20). It follows that the Commission enjoys some latitude in taking account, in its decision, of the written observations and any oral observations presented by them. In particular, contrary to the applicant's contention, third parties cannot claim a right of access to the file compiled by the Commission on the same basis as the undertakings under investigation (judgment of the Court of Justice in Case 53/85 *Akzo* v *Commission* [1986] ECR 1965).

35 That fact cannot be changed by the applicant's incorrect interpretation of the judgment of the Court of First Instance in Case T-64/89 *Automec* v *Commission* [1990] ECR II-367 (*Automec I*). According to paragraph 46 of that judgment, 'that notification (provided for in Article 6 of Regulation No 99/63) is similar to the statement of objections provided for in Article 2 of Regulation No 99/63, which is also

the result of a preliminary examination of the elements of the case on the basis of which the Commission fixes a time-limit for the undertakings to which it is addressed to make their views known. By the position it occupies in the procedure, therefore, the notification provided for in Article 6 of Regulation No 99/63 is analogous to that statement of objections. It must be added that, as the Court of Justice held in its judgment in Case 60/81 *IBM* v *Commission*, cited above, the statement of objections must guarantee the observance of the right to a fair hearing, whereas the notification provided for in Article 6 of Regulation No 99/63 is intended to defend the procedural rights of the complainants, which are, however, not as far-reaching as the right to a fair hearing of the companies which are the object of the Commission's investigation.'

36 The Court considers that the applicant's interpretation, according to which it follows from that judgment that the investigation of a complaint submitted by a third party for consideration by the Commission must, after the communication provided for in Article 6 of Regulation No 99/63 is sent, involve full disclosure, ignores the terms of the last sentence of the paragraph from that judgment cited above.

37 It follows that the applicant's first plea must be rejected.

— *The second plea of formal illegality: the Commission prejudged its decision*

Summary of the parties' arguments

38 The applicant claims, with regard to the infringement of essential procedural requirements, that, by authorizing under Article 93 of the Treaty the grant of State aid to a joint venture almost one year before an exemption was granted in respect

of that venture, the Commission prejudged the outcome of the procedure under Article 85(3) of the Treaty. It states that, although to date there has been no decision defining the procedural relationship between Articles 85 and 93 of the Treaty, the Commission must, when examining a plan for State aid, assess the compatibility of the plan not only with the special provisions of Article 92 of the Treaty but also with the Treaty rules as a whole. In the present case, the applicant considers that the imperative need for consistency, stressed in the case-law, placed the Commission under an obligation to examine all the economic information and legal aspects before reaching any decision whatsoever regarding the plan in question, regardless of whether the decision to be taken was covered by Article 85 of the Treaty or by Article 93. However, the timing of the decisions taken and the statements of reasons for them show that that course was not followed. Moreover, by adopting the abovementioned decision of 16 July 1991 under Article 93 of the Treaty, the Commission necessarily rendered ineffective the consultative procedure provided for by Regulation No 17.

39 Following the judgment in *Matra* v *Commission*, cited above, the applicant claims that, in view of the fact that the decision of 16 July 1991 on State aid was adopted first, the Commission should, when examining the application for exemption, have taken into consideration the effect on competition of the State aid granted by the Portuguese authorities. However, it is clear that that course was not followed, with the result that the obligation to ensure consistency between Articles 85 and 92 of the Treaty was not fulfilled.

40 The Commission states that the decision adopted by it under Article 93 of the Treaty was contested before the Court of Justice and that its legality cannot be debated before the Court of First Instance. It states that the two decisions at issue are separable and that one of them cannot possibly prejudge the legality of the other. As Advocate General Van Gerven stated in his Opinion in *Matra* v *Commission* [1993] ECR I-3222, cited above, it is solely because an application for exemption meets with a negative response that the aid cannot be granted or, if it has already been granted, must be repaid. The course of the two procedures shows

that both aspects of the case, which, for procedural reasons, cannot be linked (judgment of the Court of Justice in Case 120/73 *Lorenz* [1973] ECR 1471), were considered simultaneously. In that regard, it must be borne in mind in particular that the notice provided for in Article 19(3) of Regulation No 17 was adopted prior to the abovementioned decision of 16 July 1991 on aid.

41 According to the Portuguese Republic, the plea is of no consequence. It states that the applicant's approach is contradictory: either the procedure under Article 85(3) of the Treaty is not used, the corollary of which is that the economic effects of the aid are not taken into account; or else the alleged failure to take account of the economic impact of the aid may be the subject of an assessment, in the present proceedings, and lead to acknowledgement of the fact that the procedure under Article 85(3) of the Treaty may lead to a result different from that reached by an examination of the project under Article 93(2) of the Treaty in the context of *Matra* v *Commission*. In the first hypothesis, it would be necessary to evaluate the authority of the judgment of the Court of Justice in *Matra* v *Commission* as *res judicata*. The fact that the Commission had prejudged the decision would then, at most, constitute a defect affecting the legality of the first of the two decisions, adopted by the Commission under Article 93, not the legality of the Decision.

42 In any event, it is pointless for Matra to claim that the effects of the aid have not been taken into account for the purposes of the present Decision. Those effects were certainly taken into account, but in relation to criteria different from those adopted in the decision of 16 July 1991, and in a different context. Despite the aim of consistency referred to in the case-law of the Court of Justice, procedures under Article 85 on the one hand and, on the other, under Article 93 are 'independent procedures governed by specific rules' (judgment in *Matra* v *Commission*, cited above, paragraph 44).

43 VW considers that the applicant's plea must be rejected, having regard to the judgment in *Matra* v *Commission*, cited above, which, according to VW, means that the applicant's arguments in that regard, from both the procedural and the substantive points of view, must be rejected.

Findings of the Court

44 The Court finds that the administrative procedure followed in the present case raises the problem of the inter-relationship, for the purposes of investigation of one and the same case, between the rules concerning State aid and the rules contained in Articles 85 and 86 of the Treaty.

45 The Court considers, however, that, as rightly pointed out by the Portuguese Republic, the second plea of formal illegality raised by the applicant is, in its general thrust, devoid of consequence. The fact, even if established, that, by its decision on State aid, the Commission prejudged the legality of the exemption Decision at issue here is, in any event, irrelevant to the legality of the latter Decision and is only capable of affecting the legality of the decision of 16 July 1991 on State aid, since, in any event, the applicant neither shows nor indeed claims that the Commission considered that its powers were circumscribed, when adopting the Decision, by virtue of its abovementioned decision of 16 July 1991.

46 The Court also considers that the only limb of the plea of any consequence is the claim that, by adopting the decision on State aid on 16 July 1991, that is to say only three days after publication of the notice provided for in Article 19 of Regulation No 17, the Commission rendered ineffective the consultative procedure provided for by that regulation, the purpose of which is to enable third parties to put forward their views before the Commission adopts any decision favourable to an undertaking. However, that limb of the plea must be rejected since the applicant, which, in the circumstances of this case, was fully in a position to submit its observations following the communication of 13 July 1991, has not shown that the consultative procedure thereby opened by the Commission was in fact rendered ineffective.

47 Moreover, the Commission is legally entitled to give a decision on the compatibility of the planned aid with Article 92 of the Treaty provided that it has formed the conviction, with sufficient probability, that the operation is capable of falling within the scope of Article 85(3) of the Treaty (judgment in *Matra* v *Commission*, cited above, paragraph 45). In the present case, that conviction is sufficiently apparent from the publication in the *Official Journal of the European Communities* of the notice provided for by Article 19 of Regulation No 17. If, having regard in particular to the observations submitted by third parties following that publication, the operation nevertheless did not benefit from the exemption measure initially envisaged, the only result would be that the aid granted on the basis of the decision adopted under Article 92 of the Treaty would have to be repaid. Accordingly, it has certainly not been established, contrary to the applicant's contention, that the decision on State aid had the effect, in fact or in law, of rendering devoid of purpose the consultative procedure provided for by Article 19(3) of Regulation No 17 or limited the powers of the Commission to grant the requested exemption.

48 Finally, as regards the argument put forward in the reply that the Commission should have taken account, at the stage of the Decision, of the impact of the State aid granted, it too is in any event unfounded. The only precondition for examination of the extent to which an agreement between undertakings may qualify for an exemption is that the Commission must establish that the agreement in question actually comes within the scope of Article 85(1). In the present case, the anti-competitive nature of the agreement was ascertained by the Decision. Accordingly, the only possible impact of taking account of the State aid granted would be to reinforce the anti-competitive nature of the agreement, in so far as State aid makes it possible, by lowering the undertaking's cost prices, to distort competition. However, the assessment of the extent of the anti-competitive effect of an agreement for which an exemption is requested is entirely unconnected with the assessment of the substantive scope of Article 85(1) of the Treaty and must be carried out by the Commission not under Article 85(1) but under Article 85(3), in relation, in particular, to the indispensability of the restrictions of competition (see below, paragraphs 135 to 140).

49 It follows that the second plea of formal illegality put forward by the applicant must be rejected.

— The third plea of formal illegality: inadequate statement of reasons

Summary of the parties' arguments

50 The applicant claims that the Decision infringes essential procedural requirements by giving an inadequate statement of the reasons on which it is based. The plea comprises two limbs.

51 According to the first limb, the Decision is characterized by a failure to analyse the economic impact of the State aid granted to the joint venture. With the exception of paragraph 16 of the preamble, which is purely factual, the Decision disregards the 'public' competition rules, even though the aid granted to the joint venture has, in the applicant's opinion, a profound effect on the balance of competition to be determined for the purposes of considering the request for exemption. In particular, the Commission did not consider whether, in view of the volume of aid granted to them, the two founders might each be in a position to penetrate the relevant market independently of the other.

52 According to the second limb of the plea, the Decision does not mention the excess production capacity created by the joint venture. This could be estimated at 40% of the Community market in multi-purpose vehicles over the reference period as against 16% for the rest of the car industry, which rate the Commission, in its notice concerning the Community framework on State aid to the motor vehicle industry (OJ 1989 C 123, p. 3) itself considered 'dangerous'. Accordingly, the lack of any statement of reasons in the Decision on a matter of such importance constitutes a substantive defect.

53 The Commission considers that the Decision contains an adequate statement of reasons, having regard to the case-law of the Court of Justice. The Decision refers neither to the impact of the aid nor to the argument concerning the alleged excess production capacity because those matters are entirely irrelevant. In short, the Decision thus fully satisfies the requirement of a statement of reasons.

54 The Portuguese Republic considers, with regard to the first limb of the plea, that 'the pros and cons of a joint venture will be weighed against each other on an overall economic balance, by means of which the type and the extent of the respective advantages and risks can be assessed' (Commission notice concerning the assessment of cooperative joint ventures pursuant to Article 85 of the EEC Treaty, OJ 1993 C 43, p. 2, paragraph 57). There is thus an obligation to take account of the effects of State aid, in so far as they relate to the material requirements of Article 85(3) of the Treaty. That obligation is satisfied in the present case. Moreover, the applicant's allegation cannot be taken into account since it does not establish that the alleged omission on the part of the Commission had substantial repercussions on the economic balance of the operation, assessed for the purposes of Article 85(3) of the Treaty. In the present case, substantial repercussions of that kind are not possible since the aid granted merely compensates for the disadvantages associated with the location of the undertaking in Setúbal.

55 As regards the second limb of the plea, the Portuguese Republic takes the same view as the Commission.

Findings of the Court

56 The Court considers that the first limb of the plea, alleging that the Commission failed to evaluate the impact of the State aid, must be rejected since, as just

indicated (see paragraph 48 above), that matter is capable only of affecting the appraisal of the anti-competitive effects of the project and not the question whether it falls within the scope of Article 85(3) of the Treaty. In that regard, the applicant should therefore have established that the Commission's appraisal of the conditions laid down by Article 85(3) of the Treaty, in particular the third such condition, was vitiated by a manifest error of assessment (see below, paragraphs 135 to 140).

57 The Court considers that the same applies to the second limb of the plea, concerning the alleged failure to consider the impact of the excess production capacity. Like State aid, excess production capacity has an impact, if at all, only on the extent of the anti-competitive effect of the agreement. Moreover, in any event, the matter under review relates not to the statement of reasons for the Decision but to the question whether the Decision is well founded, having regard in particular to the third of the four conditions laid down by Article 85(3) of the Treaty.

The substantive legality of the Decision

58 The applicant puts forward four pleas concerning the substantive legality of the Decision. It claims, first, that the Decision is vitiated by an infringement of Article 85 of the Treaty, by reason of manifest errors of appraisal; secondly, that it infringes Article 85, likewise by reason of the errors of law by which it is vitiated; thirdly, that the Decision is further vitiated by an error of law, in that it is in breach of Article 86 of the Treaty; and fourthly that the Decision is vitiated by misuse of powers and procedure.

The first plea of substantive illegality: manifest errors of appraisal constituting an infringement of Article 85 of the Treaty

59 In support of the first plea of substantive illegality, the applicant relies on the work of two experts, Professor Encaoua and Dr Klaue, and maintains that, although the Commission was right to consider that the agreement came within the scope of Article 85(1) of the Treaty, its analysis of its restrictive effects on competition is inadequate since it should have led the Commission to exclude the agreement from the scope of Article 85(3). More particularly, it contends, first, that the adverse effects on competition deriving from the agreement between the undertakings concerned are such that they cannot be compensated for by the project's contribution to economic development and, secondly, that, in breach of the principle of proportionality, the Commission did not undertake a comparative examination of the advantages and disadvantages of the project. In those terms, the plea is composed of two limbs, concerning the adverse impact of the project on competition and the question whether the project meets the conditions laid down in Article 85(3) of the Treaty.

The first limb of the plea in law, concerning the adverse effect of the joint venture on competition in the relevant market.

— Summary of the parties' arguments

60 The applicant states that the restrictions on competition deriving from the joint venture are analysed in paragraphs 18 to 22 of the Decision. As the Commission has in fact pointed out in numerous previous decisions, the pooling by competitors of means of production and development necessarily leads to a restriction of competition, *inter alia* because it hampers the emergence of technological or industrial advantages which, in the absence of such pooling of means of production, would make it possible to differentiate between competing products and because it leads

to concertation regarding investment decisions and the use of production capacity.

61 The adverse effects on competition of the project in question are, in the applicant's view, four-fold.

62 In the first place, the relationship between the founders and the joint venture is adversely affected, since it may be supposed that the agreement is accompanied by restrictive clauses regarding the supply of major components, licences in respect of intellectual property rights or non-competition clauses. In that regard, the applicant states that it does not understand how a 'cost-plus' agreement can function without the founders enjoying powers of control and audit of the joint venture, which in its view necessarily means that each of the two partners will possess detailed information concerning the expenditure and investments made by the joint venture.

63 The adverse effect on competition derives, secondly, from the network effect of the project in question. According to the applicant, the Commission should have included in its evaluation an assessment of the impact of the project on the relevant market, in view of the fact that Ford is associated with Nissan and Mazda and that the joint venture project supplements other agreements concluded by the two undertakings concerned in Latin America ('AutoLatina').

64 The restrictions on competition which must be taken into account relate, thirdly, according to the applicant, to the likely spill-over effect deriving from or strengthened by such cooperation. In fact, the Decision offers the founders the possibility of coordinating their behaviour in markets other than the multi-purpose vehicle market, in particular the 'cannibalized' markets, that is to say the middle and top-of-the range private car segments. Similarly, the fact that the selling price will in

principle be the same for Ford and VW gives the impression that price competition will be severely limited.

65 Fourthly and finally, the agreement will, in the applicant's view, have an anti-competitive effect on the vehicle marketing networks of the undertakings concerned — the independent functioning of which is open to doubt — by integrating their commercial policy to a considerable extent.

66 In short, in the applicant's view, the adverse effects on competition, of the kind with which Article 85(1) of the Treaty is concerned, deriving from the joint venture at issue, are such that the project cannot lawfully be granted an exemption.

67 According to the Commission, the applicant's arguments relating to the production of vehicles concern, firstly, the quantities produced, and, secondly, price competition. The Commission rejects both arguments.

68 As regards the quantities produced, the Commission considers that, contrary to the applicant's contention, the joint venture's production capacity is not equally shared between the founders. According to the Commission, Ford and VW will independently submit their orders to AutoEuropa. In the event of the latter's production capacity being insufficient to meet those orders, the available production capacity will be shared between the founders in proportion to the volumes ordered by each of them. As a result, within the limits of AutoEuropa's production capacity, the two founders will each be in a position to develop their own strategy, determining wholly independently the numbers of multi-purpose vehicles produced by each of them. Moreover, each of the founders will, in its own right, take the financial responsibility for the decisions adopted.

69 As regards, secondly, price competition, the Commission maintains that both the founders — as is apparent from paragraph 38 of the Decision — 'will purchase their versions of the MPVs from the joint venture, in principle, at the same price'. According to the Commission, the vehicles are transferred by the joint venture to the founders at a price reflecting the manufacturing costs of the vehicle, together with a 'small profit margin, intended to satisfy the Portuguese tax authorities'. For that reason, the transfer price will in principle, initially, be identical for Ford and VW. However, each of the founders will, at a subsequent stage, have to bear the cost of the options intended to individualize their version of the multi-purpose vehicle. The choice of such options will be made independently by each of the two undertakings. Accordingly, it is incorrect to claim that there will be no price difference between the vehicles produced by Ford and those produced by VW.

70 Furthermore, the Commission considers that the founders will be in a competitive situation at the distribution stage. The Commission maintains, first, that the applicant has essentially concerned itself with restrictions on competition between the founders. However, an agreement which restricts competition between the parties may nevertheless stimulate competition from third parties. In the present case, not only will the agreement under consideration not lead to any elimination of competition as regards a substantial part of the products in question but moreover will be such as to increase competition in a market in which the applicant's presence is preponderant.

71 As regards, secondly, the network effect, the Commission considers, with regard, firstly, to the assessment of the effects on the market of the cooperation agreements concluded between Ford and Nissan, that the multi-purpose vehicle jointly manufactured by Ford and Nissan is an adaptation of the vehicle named 'Aerostar', manufactured and marketed by Ford in the United States of America, which could be adapted to suit European consumers only with difficulty. In any event, since the agreement concluded between Ford and Nissan expressly provides that each of the two partners will be able to market the jointly manufactured vehicle outside the United States of America and, secondly, since Nissan is already present in the Community, it is doubtful that Nissan will withdraw from this expanding market after the arrival of Ford and VW.

72 As regards, next, consideration of the effects of the existing agreements between Ford and Mazda, the Commission points out that there is no joint production involving those two manufacturers in Europe and that, contrary to the applicant's allegations, the latter have not set up a joint venture distribution operation in Japan. It considers that, although Ford has a minority holding in the capital of Mazda, both manufacturers remain independent from each other and the partnership agreements concluded by them do not relate to multi-purpose vehicles.

73 Finally, the Commission states that the cooperation between Ford and VW in Latin America concerns neither the Community market nor the multi-purpose vehicle market. The applicant's assertion that the relative importance of the Ford and VW distribution networks in the various Member States will lead to a geographical apportionment designed to secure maximum penetration in the relevant market is entirely gratuitous since it is apparent from the third condition imposed on the undertakings, by Article 2A of the operative part of the Decision, that exemption was granted in respect of the agreement only subject to prior approval by the Commission in the event of either of the founders deciding not to market any of its models in any of the Member States of the Community.

74 As regards the argument concerning the spill-over effect, the Commission states that care is taken in the Decision, by means of the second obligation imposed on the undertakings by Article 2A of the operative part, to limit the risk of any transfer of sensitive information between the joint venture and the founders.

75 The Portuguese Republic states, first, that the Commission enjoys a wide discretion in this area. It considers that the agreement, which does not adversely affect potential competition between the founders, does not undermine the maintenance of effective competition between them, as is apparent from paragraphs 7, 8, 11, 21,

35, 38 and 41 of the Decision, and from Article 2A of the operative part of it. The independence of the founders extends both to their purchasing strategies and to the differentiation of the vehicles marketed, to competition with the other partners of the founders and to the alleged limitation of competition resulting from the alleged spill-over effect.

76 The intervener, Ford, considers, first, that the applicant is disregarding the case-law of the Court of Justice according to which, where complex economic assessments are involved, judicial review is limited to the examination of any manifest error which the Commission may have committed.

77 As regards, first, the relationship between the two founders, Ford states that, contrary to the applicant's allegations, there are no anti-competitive covenants between them. The founders are both vested jointly with the intellectual property rights in the project and are entitled to use them freely. There is no restriction between them regarding use of essential components. Most components of the vehicle are obtained, according to Ford, from external suppliers.

78 As regards, secondly, the assessment of the network effect, Ford maintains that the partnership agreement between Ford and Nissan regarding multi-purpose vehicles in the United States of America, which expressly provides that each of the two parties may export the vehicle covered by that agreement, has no relevance to the present case. Conversely, the intervener maintains that it will not hesitate to export the 'VX62' to the United States of America if it sees a market niche for it there.

79 Ford also maintains, with regard to the agreement between itself and Mazda, that, contrary to the applicant's allegations, there is no joint production of vehicles. It states that there is likewise no joint venture distribution operation in Japan.

80 Finally, according to Ford, the AutoLatina joint venture, operating in Brazil and Argentina, is a genuine 'merger' of Ford and VW activities in Latin America and is accounted for by an extremely difficult competitive environment. AutoLatina does not form part of a global cooperation strategy between the two groups.

81 As regards, thirdly, the risk of 'cannibalization' of certain of the products in the ranges distributed by the manufacturers, Ford considers that the applicant's allegations on that point are incorrect. Station wagons are vehicles which differ considerably from MPVs, and are not therefore substitutable for MPVs.

82 As regards, fourthly and finally, the effect of the joint venture on the distribution of vehicles, Ford states that the venture is a production venture and considers that there is no risk of its becoming, *de facto*, a distribution joint venture. The agreements concluded between the founders mean that the joint venture is a virtually independent supplier which will receive the orders issued separately by each of the founders. Contrary to the applicant's allegations, there is thus no sharing of production capacity. According to Ford, the vehicles will be sold by the joint venture to the founders, at prices strictly based on the real manufacturing costs. The selling prices to consumers will be determined independently by each of the two founders, and each will define its own product strategy. Finally, compliance with the principle that the founders should remain independent is guaranteed by the confidentiality undertakings which the agents of the joint venture had to sign.

83 VW entertains doubts as to whether, as contended by the applicant, the joint venture is capable of adversely affecting competition in the relevant market, that being the reason, furthermore, for the submission to the Commission of an application for negative clearance.

— Findings of the Court

84 The Court considers that, at this stage in the examination of the case, the first limb of the plea, as put forward by the applicant, can only be rejected. That first limb consists, without challenging the conclusion reached by the Commission to the effect that the agreement at issue falls within the scope of Article 85(3) of the Treaty, in the contention, first, that the Commission did not adequately evaluate the anti-competitive effects of that agreement and, secondly, that a correct evaluation of those effects would have shown that competition in the common market would be so undermined that no individual exemption could be granted in respect of the agreement in question.

85 The Court observes that such reasoning presumes that there are adverse effects on competition which, by their nature cannot qualify for an exemption under Article 85(3). In other words, as the Commission rightly points out, such reasoning presumes acceptance of the view that there are infringements which are inherently incapable of qualifying for an exemption — but Community competition law, the applicability of which is subject to the existence of a practice which is anti-competitive in intent or has an anti-competitive effect on a given market, certainly does not embody that principle. On the contrary, the Court considers that, in principle, no anti-competitive practice can exist which, whatever the extent of its effects on a given market, cannot be exempted, provided that all the conditions laid down in Article 85(3) of the Treaty are satisfied and the practice in question has been properly notified to the Commission.

86 Furthermore, even if it were well founded, the first limb of the plea is in any event irrelevant to the legality of the decision. Even if it were conceded that the analysis of the anti-competitive effects of the agreement, as undertaken by the Commission, were inadequate, that would not affect the applicability to this case of Article 85(1) of the Treaty, and the applicability of Article 85(3) of the Treaty would

not be at issue (see the judgment of the Court of Justice in Case 32/65 *Italy* v *Council and Commission* [1966] ECR 389). The arguments put forward in support of the first limb of the plea can be examined only in the context of the second limb, concerning the question whether the joint venture satisfies the conditions laid down in Article 85(3).

87 It follows that the first limb of the plea of substantive illegality must be rejected.

The second limb of the plea: the fulfilment or otherwise by the joint venture of the conditions laid down in Article 85(3) of the Treaty.

88 The applicant considers that the project notified to the Commission satisfies none of the four conditions laid down by Article 85(3) of the Treaty.

— Whether the joint venture contributes to the achievement of economic and technical progress

(i) Summary of the parties' arguments

89 The applicant claims that the agreement does not contribute to the promotion of technical or economic progress. According to the Commission's consistent practice, any contribution to economic progress must be objective and real. The maintenance of employment, referred to by the Commission, is taken into consideration by the Court of Justice for the purposes of Article 85(3) of the Treaty only to

the extent to which it is a factor of economic efficiency. In the present case, however, the implementation of the project coincides with the closure of several industrial sites in Europe and merely amounts to a transfer of employment from areas where unemployment is high and labour is costly to an area where there is less unemployment and labour is cheaper, so that the joint venture cannot be regarded as contributing to the 'economic and social cohesion' of the Community.

90 The 'regional' objective, although legitimate, cannot in the applicant's view be one of the factors to be taken into account in assessing the contribution of a project to economic progress. In the present case, the manufacturers' choice of site constitutes a handicap which the grant of massive state aid was specifically intended to offset. The Commission cannot therefore rely, for the purposes of one of the two procedures, on arguments which manifestly contradict those relied on in the other.

91 The applicant also maintains that the joint venture does not manifestly contribute to technical progress. It questions the validity of certain factual information relied on by the Commission in the present proceedings, which was not taken into account in the Decision. For the rest, none of the four factors referred to in recital 25 of the Decision to justify the contribution to technical progress resulting from the assembly plant has been substantiated, so that the Commission's assessment on that point is vitiated by an error of fact.

92 The applicant maintains, finally, that the improvements made to the multi-purpose vehicle itself do not constitute 'economic progress' within the meaning of Article 85(3) of the Treaty. Furthermore, the Commission has, it contends, admitted that the improvements are merely the optimization of existing technical developments. The applicant rejects the Commission's interpretation of its own decision-

making practice. The decisions in question refer to real progress, which is lacking in the present case since the purely 'cosmetic' innovations made to the product are not such as to offset its adverse effect on competition.

93 The Commission observes, first, that under Community law no practices exist which, because of their adverse effect on competition, cannot qualify for an exemption of the kind provided for in Article 85(3) of the Treaty.

94 As regards, first of all, the contribution of the manufacturing process to technical progress, the Commission insists that its appraisal must take account of the relevant sector of activity and market. In that context, it states that the project facilitates the bringing together of the skills of the two partners in the spheres of engineering and know-how. The Commission, which considers that the applicant takes too narrow a view of the term 'contribution to technical progress', maintains that, even if not all the technologies employed are in themselves entirely innovative, the fact that they are brought together at one and the same production site undeniably constitutes technical progress. The reduction of production costs constitutes an essential factor to be taken into account when examining the contribution made by an agreement to technical progress. In the present case, the economies achieved by the project — which the applicant does not challenge — make it possible to reduce production costs.

95 As regards, next, the improvements made to the product, the Commission maintains in the first place that, contrary to the applicant's assertions, the 'VX62' is not a simple adaptation of the vehicles produced by the founders but is an entirely new product. It also maintains that the joint venture project 'makes available an advanced vehicle designed to meet the requirements of European consumers which will be separately offered by the partners in differentiated versions throughout the

Community'. By contrast with the 'Espace', the 'VX62' is to be made entirely of steel, an option which displays certain technical advantages. Moreover, the applicant does not contest those technical improvements to the product but denies that they are sufficiently 'significant'. In the Commission's view, it thereby adopts a narrow interpretation of the first of the conditions referred to in Article 85(3) of the Treaty, which is fulfilled in that the proposed product incorporates a number of recent technical developments which are not usually concentrated in the same product; it is not necessary for each of the components of the product to embody a technological innovation.

96 Finally, according to the Commission, it is possible to take into account, as regards the contribution to economic and technical progress, factors other than those expressly mentioned in those provisions. They include, for example, the maintenance of employment and, in that regard, the applicant cannot establish a correlation between the opening of the Setúbal site and the closure by the founders of industrial sites elsewhere in Europe. Accordingly, regional policy concerns may be taken into consideration, for the purposes of Article 85(3) of the Treaty, in conformity with the requirements of Article 130A of the EC Treaty. That certainly does not mean that the restrictions of competition deriving from the agreement were declared valid solely because of the geographical location of the joint venture. As is apparent from paragraph 36 of the Decision, it is based primarily on the intrinsic merits of the project.

97 According to the Portuguese Republic, the Decision lists, in paragraphs 24 to 26, a number of undeniable advantages which the applicant endeavours, in vain to minimize. Those advantages relate both to technical progress resulting from the manufacturing process and to the economic progress reflected by the product. The Portuguese Republic considers that the concept of technical progress, in the sense used by the applicant, does not coincide with the substantive concept of economic progress within the meaning of Article 85(3) of the Treaty.

98 The intervener, Ford, states, with regard first to the contribution made by the joint venture to the improvement of production, that the joint venture will be the first car manufacturing operation in Europe which integrates all the elements of the rational production process, as identified by the Massachusetts Institute of Technology ('MIT') in 1990. No car manufacturing plant in Europe at present combines all those rational production factors.

99 As regards, secondly, the contribution of the project to technical progress, Ford considers that the 'VX62' will represent an entirely new vehicle concept. On that basis, the Commission was therefore right to consider that the 'VX62' was a technologically advanced product. As regards the choice of material, whilst fibreglass is suitable for the vehicle produced by Matra, that material is not appropriate for a forecast production of 180 000 units a year.

100 As regards, thirdly, the promotion of economic progress, which, according to Ford, is a matter entirely overlooked by the applicant even though it is an essential factor in the appraisal of the conditions laid down in Article 85(3) of the Treaty, Ford considers that the project will represent 'economic progress' for Portugal and, in a way, for Europe as a whole. The project will make it possible to 'catapult' the Portuguese economy into the car industry, with real repercussions on the development of other manufacturing industries in Portugal.

101 Finally, Ford emphasizes that the Commission was right not to take account of the alleged excess production capacity since no vehicle expert shares Matra's view regarding the existence of such overcapacity. A comparison between production capacity and forecast demand shows limited excess production capacity, of around 2 to 12%, which is necessary to respond to fluctuations in demand.

102 VW observes, as a preliminary point, that the applicant's argument takes no account of the fact that the Commission enjoys considerable latitude where complex economic facts are involved and that the operation at issue is not inherently of an exceptional nature.

103 VW also emphasizes that, by determining that the project contributed to the achievement of both technical and economic progress, the Commission went beyond its obligations, since those two conditions apply in the alternative. It considers that it is apparent from the Commission's decision-making practice that the contribution of a restrictive agreement to economic and technical progress must be assessed by comparison with the situation which would have existed in the absence of the agreement in question. Accordingly, the effect of the restrictive agreement must be assessed by reference to the situation which would exist if each of the two founders produced vehicles independently. Such a comparison would reveal economies of scale, which would be sufficient to establish that the agreement contributed to technical progress.

(ii) Findings of the Court

104 It must first be borne in mind that the Commission may only grant an individual exemption decision if, in particular, the four conditions laid down by Article 85(3) of the Treaty are all met by the agreement, with the result that an exemption must be refused if any of the four conditions is not met (judgment of the Court of Justice in Joined Cases 43/82 and 63/82 *VBVB and VBBB* v *Commission* [1984] ECR 19; judgment of the Court of First Instance in Case T-66/89 *Publishers Association* v *Commission* [1992] ECR II-1995); secondly, it is incumbent upon notifying undertakings to provide the Commission with evidence that the conditions laid down by Article 85(3) are met (judgment in *VBVB* and *VBBB* v *Commission*, cited above), an obligation which, in the proceedings before the Court, must be assessed in the light of the onus which falls on the applicant to provide information to challenge the Commission's appraisal; thirdly, where complex economic facts are involved, judicial review of the legal characterization of the facts is limited to the possibility of the Commission having committed a manifest error of assessment

(judgment of the Court of Justice in Case 42/84 *Remia and Others* v *Commission* [1985] ECR 2545).

105 With regard more particularly to the first of the four conditions laid down by Article 85(3), it should be borne in mind that, by virtue of that provision, the agreements which may qualify for an exemption are those which contribute 'to improving the production or distribution of goods or to promoting technical or economic progress'.

106 The Court notes that in the present case the examination of this first condition is dealt with in paragraphs 24 to 26 of the Decision. Paragraph 24 is limited to considerations concerning the adaptation of the product to suit the requirements of European consumers and the differentiation of the product by each of the two founders. Paragraph 25 deals more particularly with an examination of the contribution to technical progress deriving from the know-how and capacity of the founders and from the manufacturing process, whereas paragraph 26 is devoted to the improvement made by the vehicle itself, described as 'a continuous development of technical progress of production in the Community'.

107 It follows that it is only in relation to paragraphs 24 to 26 of the Decision that the merits of the applicant's arguments should be considered. Consequently, certain arguments put forward by Matra, which do not relate to the Commission's appraisal at that stage of the examination of the application made to it, are irrelevant. That is true, in particular, of the argument concerning the contribution to 'social' progress and the contribution to regional progress (matters not dealt with in the Decision) as part of the analysis of the project's contribution to technical or economic progress, regardless of the arguments put forward, by the defendant or the interveners, in the written procedure before this Court.

108 The Court therefore considers that, having regard to paragraph 24 of the Decision, as analysed above, the discussion of the appraisal in this case of the first of the four

conditions is limited to the question whether, as maintained by the Commission and contrary to the arguments put forward by the applicant, the manufacturing process for the 'VX62' vehicle, as described in paragraph 25 of the Decision, together with the improvements to the product referred to in paragraph 26, are such as to justify the application of the provisions in question to the present case.

109 As regards, first, the manufacturing process, it is clear from the unambiguous statements from the intervener, Ford, which have not been seriously challenged by the applicant, that the manufacturing process to be used at Setúbal constitutes the first application by a European car manufacturer of the enhanced form of the manufacturing process recommended in 1990 by the most authoritative researchers in the field of technological development, such as the Massachusetts Institute of Technology (MIT). The Court considers, despite the applicant's assertions to the contrary, that an optimization of the manufacturing process of that kind is in conformity with the meaning and purpose of the first of the four conditions laid down by Article 85(3) of the Treaty.

110 As regards, secondly, the technical improvements made to the product, described as 'cosmetic' by the applicant, they must be assessed in relation to the state of development of car construction techniques in Europe when the Decision was adopted. Adopting that approach, the Court considers that, as maintained by the Commission, the technical improvements made to the vehicle fall within the scope of Article 85(3), since they bring together in a single product techniques which, where they exist, are at present used in isolation, on different models.

111 It follows that the Commission's assessment, according to which the manufacturing process for the vehicle and the technical improvements made to the product are conducive to improvement of the production or distribution of products or to the promotion of technical or economic progress, does not contain any manifest error.

— Whether the agreement provides consumers with a fair share of the resulting benefit

(i) Summary of the parties' arguments

112 Secondly, the applicant claims that its present position on the market derives from its emphasis on innovation. Referring to experts' reports produced by it, it maintains that the agreement, contrary to the statements in paragraph 27 of the Decision, does not give consumers a fair share of the benefits resulting from it. The applicant maintains, first, that the Decision does not specify how the existence of the agreement provides consumers with a level of quality different from that which would have been achieved if the founders had remained independent. The applicant goes on to say that the differentiation of the products marketed by each of the two founders is very limited and cannot constitute an advantage for the consumer. It having been established that the founders each envisaged penetrating the multipurpose vehicle market on its own account, the joint venture will detract from the ranges of products offered.

113 The applicant also considers that the obligation imposed by Article 2 A(1) of the operative part of the Decision is 'worrying', since it might indirectly allow VW to control Ford's commercial policy, by limiting the latter's expansion in market segments where it is dependent upon VW.

114 The applicant also claims that the project will not contribute to increased price competition. The effects of the exempted project on prices are in its view linked with the excess production capacity resulting from it, and with the fact that, in view of the competitive advantage enjoyed by them because of the State aid granted to them, only the founders are able to respond to the changes in the

market resulting from their own project. In the longer term, that policy might enable the undertakings concerned to acquire a collective dominant position, after ousting their competitors.

115 The Commission contends that it is apparent from paragraph 27 of the Decision that European consumers will enjoy a fair share of the advantages deriving from the agreement, consisting in the greater availability of a wider range of multi-purpose vehicles, of high quality and at a reasonable price. The applicant's criticisms in that regard are in its view based on a dubious premise, namely that Ford and VW could each for itself have undertaken the production of multi-purpose vehicles similar to those manufactured by AutoEuropa. In fact, in the absence of a joint venture, Ford and VW would not have entered the market under such advantageous conditions for the consumer.

116 Finally, no case has been made out for the possibility of a collective dominant position, since the combined market shares of the two manufacturers will amount to 30% in 1996, quite apart from the fact that, contrary to the applicant's assertion, they will compete with each other in distributing vehicles. Again, contrary to the applicant's contention, the AutoEuropa project has not prompted certain competitors to abandon their initial projects relating to the MPV market segment.

117 The Portuguese Republic considers that the Commission has not adopted a restrictive view of the second of the four conditions laid down in Article 85(3) of the Treaty since, in addition to a lower price, consumers will benefit from the joint venture by virtue of the improved quality of the products. Moreover, the risk that the founders might attain a collective dominant position must be ruled out, as stated by Advocate General Van Gerven in his Opinion in *Matra* v *Commission*, cited above (paragraph 15). The applicant has thus not established that the Commission committed any manifest error of assessment.

118 According to Ford, the project ensures that the consumer will receive a fair share of the benefits resulting from it, by allowing increased competition in the multi-purpose vehicle market, where at present competition is not healthy.

119 VW states that, in accordance with its consistent practice, the Commission has upheld an agreement from which the consumer will benefit, since it intensifies competition in the relevant market.

(ii) Findings of the Court

120 The Court would point out in the first place that, according to the second of the four conditions laid down by Article 85(3) of the Treaty, agreements qualifying for exemption are those which allow consumers 'a fair share of the resulting benefit'. The question whether the project in question satisfies that condition is examined in paragraph 27 of the Decision, according to which the exempted project will enable economies of scale to be achieved and promote intensified competition in the market, to the benefit of the European consumer.

121 Examination of the applicant's criticisms on this point shows that they raise two main questions.

122 The first question is whether, as contended, the advantage given to the consumer must be assessed by reference to the present state of the market or by reference to the advantage that might have been afforded to the consumer in the event of the founders having chosen to penetrate the market individually. The Court considers that, as rightly maintained by the Commission, the applicant's reasoning is based on false premises. At that stage of the examination of the application for exemption, it is incumbent upon the Commission to appraise the project submitted to it

as objectively as possible, without in any way considering the appropriateness of the project by reference to other technically possible or economically viable choices, since it is common ground that it is when considering the third of the four conditions laid down by Article 85(3) of the Treaty that the Commission may, in order to appraise the indispensability of the restrictions on competition resulting from the project in question, take account of other possible choices. The applicant's view that the advantage made available to the consumer by the project in question should be assessed by reference to the advantage accruing to the consumer from other technologically possible or economically viable choices is therefore, to that extent, unfounded.

123 The applicant's argument then raises the question whether the project at issue is capable of affording the founders a collective dominant position. In that regard, the applicant's reasoning is based on the idea that the existence of considerable excess production capacity, linked with substantial State aid, enables the founders to engage in unfair practices, ousting the competition and, in the longer term, giving the founders a collective dominant position, which they will abuse to the detriment of the consumer (see below, paragraph 153).

124 The Court considers that the applicant's reasoning takes for granted, successively, the acquisition by the founders of a collective dominant position, then the abuse by those undertakings of that position. Such reasoning is purely hypothetical and can only be rejected, without its being necessary for the Court to say whether, in the presence of an adequately substantiated infringement of Article 86 of the Treaty, the Commission is required to reject a request for an exemption (see below, paragraph 154).

125 In short, the Court considers that the statements contained in paragraph 27 of the Decision have not been seriously contested by the applicant, and therefore the Decision cannot be regarded as vitiated by a manifest error of assessment on that point.

— Whether the restrictions on competition deriving from the agreement are indispensable

(i) Summary of the parties' arguments

126 Thirdly, the applicant submits that the restrictions of competition analysed above are not indispensable. In contradiction with other passages of the Decision, paragraph 19, in the applicant's view, concedes that each of the two undertakings concerned has the capacity to produce a multi-purpose vehicle independently. To be consistent with its previous practice, the Commission should therefore, on the basis of that finding, have rejected the request for exemption. It nevertheless decided that the third of the conditions laid down in Article 85(3) of the Treaty was met in this case, firstly on grounds of regional policy and secondly for reasons associated with the rapidity and effectiveness with which the project was to be carried out.

127 According to the applicant, that assessment is incorrect for six different reasons. In the first place, the decision wrongly referred to the criterion of 'exceptional circumstances', which is alien to competition law. Secondly, it considers that it cannot be stated that neither of the two partners, in view of their size and the fact that at present they both have excess capacity, could achieve production of the scope envisaged by the project. Thirdly, the mere fact that the joint venture will become economically viable with an annual production of 110 000 vehicles is not sufficient to show that the parties to the agreement could not achieve a reasonable profit acting separately. Fourthly, each of the partners could have penetrated the multi-purpose vehicle market individually under satisfactory conditions merely by adapting existing models. Fifthly, whilst it is true that Matra is not in the same position as the joint venture, its situation nevertheless shows that, at the expense of other technological options, each of the two founders could have penetrated the market individually. Sixthly and lastly, the agreement is liable to affect the competitive behaviour of Nissan and Mazda, which are linked to Ford by cooperation agreements. In short, Matra considers that, in view of the alternative solutions

available, the Commission has not shown that the choices made by the manufacturers are indispensable.

128 According to the Commission, the applicant's criticisms on this point are based on the hypothesis that each of the two competitors could individually penetrate the market segment in question. The Commission considers that, contrary to the applicant's contention, the Decision is not vitiated by any contradiction, since the examination of the ability of each of the two competitors to undertake the production of a multi-purpose vehicle individually was made in the context of the assessment of the restrictive effects on competition, within the meaning of Article 85(1) of the Treaty, whereas the indispensability of the agreement is assessed under Article 85(3), in relation to real and specific situations.

129 The Commission considers that, without cooperating, the two competitors would not have penetrated the market in question or would have done so under conditions much less favourable to the public interest. The applicant's argument that each of the two manufacturers could penetrate the market by adapting existing models is not borne out by the facts. The modest results achieved in Europe by the 'Mondeo' vehicle seem to confirm that market penetration in Europe cannot be achieved merely by adapting models marketed in the United States of America.

130 The Commission adds that the applicant cannot, by its criticism of the break-even point as defined by the manufacturers and accepted in the Decision, impose its own technological choices on its competitors. Since the profitability threshold for a vehicle such as the 'VX62' is around 110 000 vehicles a year and the studies carried out by the manufacturers place their sales, individually, at around 80 to 90 000 vehicles a year, the result would have been losses which would have forced each of the manufacturers to abandon the project of launching an MPV.

131 The Portuguese Republic considers that the Decision sets out in detail the reasons for which the restrictions on competition deriving from the joint venture are indispensable. In its view, the applicant is guilty of methodological error with respect to the third of the four conditions laid down by Article 85(3). The question raised in that context is not whether each of the two founders had sufficient capacity to penetrate the multi-purpose vehicle market in general. The question, which is clarified to some extent by paragraph 29 of the Decision, is whether the founders were in a position individually to penetrate the MPV market. That question must be asked having regard to the specific joint venture project at issue here.

132 Ford states that the decision to invest in the MPV market was taken on the basis of a market study which revealed substantial demand for vehicles of that type. Ford then studied the various alternative ways of entering the market, which required it to examine the conditions under which MPVs could be produced in a new plant, and it became apparent that that was the only viable solution. In that context, Ford first considered launching a model inspired by the 'Renault Espace' concept. That option was found to be unsuitable, for technical and cost reasons. Ford then made a different choice, namely to produce a vehicle made of steel, of European design, in a rationalized plant. However, the production prospects of a plant intended for the production of a vehicle of that kind were, according to Ford, around 80 to 90 000 vehicles a year, whereas the profitability threshold for the project appeared to be 200 000 vehicles a year. Accordingly, the only solution available to Ford was, in its view, to combine its production capacity with that of another manufacturer.

133 Finally, Ford, which exploited the 'world vehicle' concept with the 'Mondeo' vehicle, maintains that that concept is not appropriate to a multi-purpose vehicle intended for mass production in Europe.

134 VW considers that the Commission's assessment as to whether the agreement satisfied the third of the conditions laid down by Article 85(3) of the Treaty is not vitiated by any manifest error.

(ii) Findings of the Court

135 According to the terms of the third and fourth conditions laid down by Article 85(3) of the Treaty, exemption is available for agreements which do not 'impose on the undertakings concerned restrictions (of competition) which are not indispensable to the attainment of (the) objectives' of improving the production or distribution of products and promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit. It follows that the Decision must establish that any adverse effects on competition resulting from the project are proportionate to the contribution made by it to economic or technical progress. As stated in the judgment of the Court of Justice in Joined Cases 56/64 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299, 'this improvement must in particular show appreciable objective advantages of such a character as to compensate for the disadvantages which they cause in the field of competition'. It is therefore for the Court to verify whether, as contended by the founders, any adverse affects on competition deriving from the project in question are indispensable in order to attain the objectives of achieving economic and technical progress.

136 The Court observes that that question is analysed in paragraphs 28 to 36 of the Decision. In those paragraphs, the Commission states in turn that:

— the joint venture may be regarded as necessary, in the light of the exceptional circumstances of the case and the conditions the Commission considers necessary for an exemption to be granted (paragraph 28);

— the founders, each acting alone, could not offer the product under the same conditions (paragraphs 29 and 31) — the latter assessment not being in itself undermined by the fact that other manufacturers, in non-comparable situations, were themselves able individually to penetrate the market (paragraph 33) and that, on the contrary, the joint venture is efficient (paragraph 30);

— it is not possible to penetrate the market by a simple adaptation for the European market of existing vehicles, which means that a new type of vehicle must be developed (paragraph 32);

— the restrictions on competition between the two founders are limited to what is indispensable (paragraph 34);

— the cooperation agreements existing between Ford and Nissan, on the one hand, and Ford and Mazda, on the other, do not exclude competition in the sector in question (paragraph 35);

— the project represents the largest foreign investment ever made in Portugal, thus contributing to harmonious development of the Community and to the reduction of regional disparities; at the same time the Commission states that 'this would not be enough to make an exemption possible unless the conditions of Article 85(3) were fulfilled, but it is an element which the Commission has taken into account' (paragraph 36).

137 The argument put forward by Matra to counter that analysis consists essentially in the contention that, in view of the alternative solutions available, the Commission did not establish that the choices made by the founders were indispensable, with the result that the restrictions of competition deriving from them are not in

themselves justified, and merely resorted to the theory of 'exceptional circumstances', which finds no basis in the text of Article 85(3) of the Treaty.

138 The Court considers that, as the Commission maintains, the central question to be answered, in assessing the legality of the Decision in relation to the third of the four conditions laid down in Article 85(3) of the Treaty, is whether the joint venture is strictly indispensable to enable the founders to penetrate the market in question. If that question is answered in the affirmative, it will *ipso facto* be established that the restrictions of competition deriving from the agreement are indispensable in order to attain the objectives pursued by the two conditions examined above, in particular the first one. The answer is indeed affirmative, since the Commission maintains, without being contradicted in any serious way by the applicant, whose reasoning is based on non-comparable situations, that, if each of the founders actually was technically and financially capable of penetrating the market individually, such penetration could be achieved only at a loss, in view of the particularly high level of the joint venture's 'break-even point' and of the information available concerning forecasts of sales and market shares.

139 As regards the argument based on the reference to 'exceptional circumstances', the Court observes that, although the Commission refers to them, in particular in paragraphs 23 and 28, and in paragraph 36, in which the Decision concludes its examination of the condition under review and considers the project's impact on public infrastructures and on employment, and its impact on European integration, the latter paragraph ends with the following sentence: 'This would not be enough to make an exemption possible unless the conditions of Article 85(3) were fulfilled, but it is an element which the Commission has taken into account'. The Court considers that it is clear from the latter sentence that the 'exceptional circumstances' thus referred to in the Decision were taken into consideration by the Commission only supererogatorily. In other words, it is sufficiently established that, if those circumstances had not been referred to, the operative part of the decision adopted would have been exactly the same as that of the contested Decision. It follows that the applicant's argument that, on the contrary, the individual exemption decision granted for the project in question was adopted only on the basis of the 'exceptional circumstances' surrounding the project must be rejected.

140 Accordingly, the applicant has not established that the Commission's assessment, according to which the restrictions on competition deriving from the joint venture project notified to it are indispensable, is manifestly incorrect.

— Whether the implementation of the agreement is liable to eliminate competition for a substantial part of the products in question

(i) Summary of parties' arguments

141 Fourthly, the applicant maintains that the agreement, which, to a very considerable extent eliminates competition between the manufacturers who are parties to it, enables competition to be eliminated in respect of a substantial part of the products in question. By 1995, the production of the Setúbal plant should account for between 54 and 86% of the market segment concerned, whereas, in its notice concerning the assessment of cooperative joint ventures pursuant to Article 85 of the EEC Treaty, cited above, the Commission indicated that the market shares of undertakings involved in a joint venture should not normally exceed 20% where the founders' cooperation does not extend beyond production and 10% where it includes marketing. Such a situation generates excess production capacity and has already prompted a number of competitors to abandon their projects in the sector concerned. Moreover, such a situation will result in Ford and VW occupying a collective dominant position, providing them with an effective means of setting up barriers to entry into the market concerned and of eliminating any competition in it, so that it is doubtful whether there will be any new entrants to the market. The existence of massive excess production capacity is an essential factor in assessing the risk of elimination of competition, and therefore the Commission's express acknowledgement of the fact that it did not take account of that matter should in itself be sufficient to bring about the annulment of the Decision.

142 According to the applicant, there is nothing in the Decision to support the view, set out in paragraph 38, that the project will bring about 'increased individual sales' such as to lead to 'incremental sales profits'. Moreover, that statement is, at least partially, incompatible with the description of the agreement given in paragraphs 5 and 8 of the Decision. Finally, the restrictions and burdens imposed on the undertakings concerned are not such as to limit the effect of the restrictions on competition resulting from the agreement.

143 The Commission refers essentially, on this point, to paragraphs 37 and 38 of the Decision, in which it considers that it made clear, contrary to the applicant's assertions, that the joint venture will certainly not have the negative consequences envisaged by the applicant and will not eliminate competition in respect of a substantial part of the products in question. The Commission adds that, in its view, this question must be examined by reference not to the manufacturers' production capacity but to their market shares. Furthermore, the arguments put forward by the applicant entail disregarding the judgment of the Court in *Matra* v *Commission*, cited above, in which the Court held that, by deciding that the joint venture did not lead to the creation of excess production capacity, the Commission did not commit any manifest error of assessment. In any event, the existence of excess production capacity, even if established, would not necessarily produce the negative effects envisaged by the applicant.

144 In due course, the multi-purpose vehicle sector will, according to the Commission, have a better and more balanced competitive structure than is the case now, supply of the product being dominated at present by Matra. According to the information available, which is accepted as correct by Matra, the latter holds a market share of just under 50%. In 1995, the year in which the 'VX62' is to be launched, Matra's share will become 21% of the market. It is not apparent how such a structure of supply could result in the elimination of competition in respect of a substantial part of the products.

145 In short, the Commission considers that, in adopting the Decision, it did not manifestly exceed the latitude available to it and that the advantages of the joint venture exceed the disadvantages resulting from the restrictions of competition.

146 The Portuguese Republic considers that the situation of the multi-purpose vehicle market has already been studied in detail, in *Matra* v *Commission*. It is apparent from that examination that the market is at present dominated by the applicant, and therefore an increase in supply would help to restore the balance of the market. Rather than diminishing, as contended by the applicant, competition would become more intense as a result of the contested project. According to the Portuguese Republic, it is apparent from the estimates available to the Commission that the combined market share of the founders, far from giving them a dominant position, will amount to 35% in 1966.

147 In short, the economic balance of the agreement is therefore broadly favourable to the exemption measure adopted and the Commission's assessment is not 'manifestly based on a mistaken appraisal of the economic factors conditioning competition in the sector in question' (judgment of the Court of Justice in Case 26/76 *Metro* v *Commission* [1977] ECR 1875, paragraph 50).

148 Ford maintains that Matra's argument that the joint venture would lead to the elimination of competition in respect of a substantial part of the products concerned is unfounded. That argument is, in its view, based on an incorrect comparison between the production capacity of the joint venture in 1996, namely 190 000 vehicles, and present production capacities. It appears that the production capacity for MPVs in Europe will in reality be around 510 000 vehicles in 1996, of which 190 000, or 35%, will be produced by the joint venture set up by Ford and VW, representing a combined market share of 20 to 25% for the founders, quite apart from the fact that Ford and VW will be in competition at the distribution

stage. Finally, as, moreover, the Court held in *Matra* v *Commission*, cited above, Ford and VW will not enjoy any competitive advantage as a result of the State aid granted to them.

149 VW supports the views of the Commission and the other interveners.

(ii) Findings of the Court

150 The Court would point out, first, that, by virtue of the last of the four conditions imposed by Article 85(3) of the Treaty, an individual exemption decision may be available for agreements which do not 'afford ... undertakings the possibility of eliminating competition in respect of a substantial part of the products in question'.

151 In the present case, that point is covered by paragraphs 37 and 38 of the Decision. According to paragraph 37, cooperation between Ford and VW, far from eliminating competition in the multi-purpose vehicle segment, will on the contrary stimulate it, in view of the important position occupied by the 'Espace'. In paragraph 38, the Decision states that the differentiation of the products offered by each of the two founders will have a positive effect on competition between car manufacturers in Europe at the distribution stage.

152 In challenging those two paragraphs of the Decision, the applicant argues, first, that the Setúbal plant will give rise to excess production capacity in the market concerned. However, the Court notes that the applicant has not established that the Decision is incorrect in that respect, in particular paragraphs 6 and 14 thereof, which are confirmed by Ford's statements. Moreover, in its judgment in *Matra* v *Commission*, cited above, the Court of Justice held that 'as regards the evaluation of the risk of excess production capacity, ... the Commission carried out a compre-

hensive and detailed examination of this question before concluding that no such risk exists .... In those circumstances, the arguments put forward by Matra ... are not such as to establish that the Commission based its decision on a manifestly incorrect assessment of the economic data' (paragraphs 26 and 28). The applicant's argument must therefore be rejected, without its being necessary for the Court to consider whether, as contended by the applicant, which relies in particular on an expert's report from Professor Encaoua, the existence of excess production capacity will necessarily have the effect of ousting competitors.

153 The applicant claims, secondly, that the existence of excess production capacity will, in time, enable the founders to achieve a collective dominant position. However, the Court considers that, as stated by the Commission, the achievement or strengthening of a dominant position, whether individual or collective, is not as such prohibited by Articles 85 and 86 of the Treaty. Article 86 merely prohibits the abuse of a dominant position by one or more undertakings. Accordingly, an alleged risk that the founders might in time collectively achieve a dominant position cannot in any event constitute legal justification for withholding an exemption, the likelihood of that risk materializing during the period of validity of the Decision not having been established by the applicant.

154 Accordingly, the Court considers that, as already stated in paragraph 124 above, the argument based on the risk of the achievement and abuse of a collective dominant position must be rejected in any event, without its being necessary for the Court to decide whether — as the applicant necessarily implies — the Commission should, in the presence of a sufficiently clear infringement of Article 86 of the Treaty, reject an application for an individual exemption.

155 The applicant considers, thirdly, that the differentiation of the products will not have any positive impact on competition between the founders at the stage of

distribution of the products. The Court observes, first, that the applicant's statement that paragraph 38 of the Decision conflicts at least partially with the analysis of agreement between the founders set out in paragraphs 5 and 8 of the Decision is in no way substantiated since, in particular, paragraph 8 expressly states that 'The partners are entirely free as to the distribution of the vehicles. They will independently distribute their respective MPVs through their own networks and under their own brand names'. Since the agreement at issue is limited to the production of vehicles and since there is no agreement between the founders concerning the marketing of the vehicles produced by the joint venture and purchased from the latter by the founders, the applicant has not established, as it purports to have done, either that the agreement will have the effect of limiting, to a sufficiently substantial extent, competition between the founders, at the stage of product distribution, or, in any event, that the measures imposed by the Decision, in the form of obligations and requirements to which the founders are subject, are not adequate.

156 It follows that the applicant has not shown that the Commission's appraisal, according to which the project satisfies the last of the four conditions laid down by Article 85(3) of the Treaty, is vitiated by a manifest error.

157 Accordingly, the Court considers that the allegation of a manifest error on the part of the Commission in its appraisal of the facts, in relation to each of the four conditions laid down by Article 85(3) of the Treaty, must be rejected.

158 It follows that the first plea of substantive illegality put forward by the applicant must be rejected.

The second plea of substantive illegality: error of law and infringement of Article 85

Summary of the parties' arguments

159 The applicant maintains that, by refusing to take account of the distortions of competition brought about by the provision of massive financial assistance, the Commission committed an error of law as a result of which it misapplied Article 85 of the Treaty. The error, it claims, is apparent in paragraphs 23 and 26 of the Decision, which refer to 'exceptional circumstances', such as to justify the Decision. The — innovative — theory of 'exceptional circumstances' thus makes it possible to disregard if not all the criteria laid down by Article 85(3) of the Treaty then at least the condition that the restrictions on competition resulting from the project in respect of which an exemption is granted must be indispensable.

160 The Commission has not submitted specific observations on this point. It considers that it gave, in relation to the previous plea, an adequate response to the applicant's assertion regarding the taking into account of regional policy considerations as part of the assessment undertaken pursuant to Article 85(3) of the Treaty, and states that it is perfectly well established that the State aid granted does not adversely affect competition in the relevant market since its only effect is to compensate for the disadvantages deriving from AutoEuropa's location and thereby enables the joint venture to operate on equal terms with the other manufacturers which are more favourably located.

161 Ford considers that the present plea is unfounded, particularly in the light of the judgment in *Matra* v *Commission*, cited above, from which it is apparent that the founders enjoy no competitive advantage as a result of the State aid granted to them. Accordingly, it was proper that the State aid granted to the venture in question was not taken into consideration when the application for exemption was examined.

Findings of the Court

162 The Court would point out that, as Ford also indicated in its statement in intervention, in its judgment in *Matra* v *Commission*, cited above, the Court of Justice held that 'the Commission also undertook an examination and an evaluation of the various aspects of the disadvantages arising from an investment in the Setúbal region. It noted in particular the geographical remoteness of the Setúbal site from the principal markets and the relative economic backwardness of that region, factors which increase the cost of transport, storage, non-local employees and infrastructure, and it found that that disadvantage was compensated for only in part by lower labour and construction costs. Furthermore, the aid granted falls considerably short of the rates authorized under the SIBR (regional incentive scheme) approved by the Commission' (paragraph 27). After making those findings, the Court of Justice dismissed the action brought by Matra, thus confirming the soundness of the Commission's assessment, according to which the aid at issue is not liable to distort competition in the common market. In those circumstances, the applicant has no grounds for claiming that, by failing to express a specific view in the Decision on the aid granted by the Portuguese Republic for the joint venture, the Commission committed an error of law.

163 Furthermore, as stated earlier (see paragraph 139 above), the Court considers that it is apparent from an examination of the Decision, and in particular from paragraph 36 thereof, that the 'exceptional circumstances' referred to therein, in particular in paragraphs 23 and 26, were taken into account only supererogatorily.

164 Accordingly, the plea that the Commission committed an error of law in its assessment of the validity of the project under Article 85(3) of the Treaty must be rejected.

The third plea of substantive illegality: error of law and infringement of Article 86 of the Treaty

Summary of the parties' arguments

165 The applicant maintains that the fact of having been granted an exemption in respect of a concerted practice does not have the effect of rendering Article 86 inapplicable to that practice. Moreover, the mere fact of creating a situation in which an undertaking is prompted to commit abuses contrary to Article 86 of the Treaty is in itself contrary to that article. The applicant considers that, if, impossible though it might seem, the exemption decision should be adjudged to be lawful, the fact that AutoEuropa, occupying a dominant position and being in receipt of massive aid, is operating in the market by means of an agreement between the founders and collusion between their distribution networks in any event constitutes an abusive practice prohibited by Article 86 of the Treaty. Moreover, the fact — acknowledged by the founders themselves, as is apparent from paragraph 31 of the Decision — that the joint venture will, for a sufficiently significant period, operate below its total cost level, by virtue in particular of the subsidies paid by the Portuguese authorities, constitutes an additional infringement of Article 86 of the Treaty.

166 The Commission considers that the applicant's arguments on the point are based on an incorrect premise, namely that the founders occupy a collective dominant. It also points out that Article 86 of the Treaty does not penalize the achievement or strengthening of a dominant position but merely the abusive exploitation of such a position. If there is no abuse, the Commission cannot intervene. In the present case, it considers that Article 86 of the Treaty is not applicable in any event, not only for the reasons set out above but also because the case-law invoked by the applicant on this point is irrelevant to the examination of the facts of the case. According to that case-law, a Member State may not create a situation which prompts an undertaking vested with exclusive rights to abuse its dominant position. However, a Commission decision granting exemption for an agreement which places the undertakings concerned in a dominant position cannot be placed on the same footing as a State measure conferring exclusive rights.

167 According to the Portuguese Republic, Article 86 of the Treaty is not applicable since, in view of the market share forecast for the joint venture, the latter holds no dominant position, as has already been established in the examination of the first plea of substantive illegality.

168 Ford considers that there is no basis in fact or in law for Article 86 of the Treaty to be applied.

Findings of the Court

169 It is apparent from paragraph 39 of the Decision that the Commission examined the validity of the agreement in the light of Article 86 of the Treaty. The Commission states, first, that it could only penalize any abuse of a dominant position after the event (first subparagraph), and, secondly, that in any event the project cannot have the effect of giving the founders, individually or collectively, a dominant position (second subparagraph).

170 As stated earlier (paragraph 153 above), the plea as to an error of law committed by the Commission concerning the applicability of Article 86 of the Treaty to the project notified must, in any event, be rejected, since the conditions laid down by that provision concerning the existence, actually ascertained, of an abuse by one or more undertakings acting collectively are certainly not fulfilled.

The fourth plea of substantive illegality: misuse of powers and procedure

Summary of the parties' arguments

171 The applicant, referring to the first of its pleas concerning the infringement of essential procedural requirements (see paragraphs 38 and 39 above), maintains that, by prejudging the outcome of the procedure initiated by the Commission itself under Article 85(3) of the Treaty, the Commission was guilty of misuse of procedure and misuse of powers, thereby rendering the contested decision void.

172 The Portuguese Republic submits that the considerations set out in connection with the examination of the first plea of substantive illegality show that the Decision is not vitiated by any misuse of powers.

Findings of the Court

173 The Court considers, with regard to the fourth plea of substantive illegality, that it is for the party making the allegation to establish the misuse of powers. In the present case, contrary to its contention, the applicant has not shown that the Commission used its powers for a purpose other than that for which they were conferred by the Treaty and Regulation No 17 (see, in particular, the judgments of the Court of Justice in Case 817/79 *Buyl and Others* v *Commission* [1982] ECR 245 and Case C-331/88 *Fedesa and Others* [1990] ECR I-4023). Accordingly, the alleged misuse of powers has not been established and the plea can only be rejected.

174 It follows from all the foregoing that none of the pleas put forward by the applicant can be upheld and that the application itself must be dismissed, as regards both the form of order sought in respect of the Commission Decision of 23 December 1992 granting an exemption under Article 85(3) of the Treaty to the joint venture in question and the form of order sought in respect of the Commission decision of the same date rejecting, in consequence, the applicant's complaint, without its being necessary for the Court to consider Ford's plea that the case should not be proceeded with.

Costs

175 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it should be ordered to pay the costs, including those of the interveners. However, pursuant to Article 87(4) of those Rules, Member States which have intervened in proceedings are to bear their own costs. Accordingly, the Portuguese Republic must bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. Dismisses the application;

2. **Orders the applicant to pay the costs, including those incurred by the interveners Ford of Europe Inc., Ford Werke AG and Volkswagen AG;**

3. **Orders the Portuguese Republic to bear its own costs.**

Cruz Vilaça Briët Barrington

Saggio Biancarelli

Delivered in open court in Luxembourg on 15 July 1994.

H. Jung J. L. Cruz Vilaça

Registrar President