# JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)
19 May 1999 *

In Case T-175/95,

**BASF Coatings AG**, formerly BASF Lacke und Farben AG, a company incorporated under German law, established in Münster-Hiltrup (Germany), represented by Ferdinand Hermanns, Rechtsanwalt, Düsseldorf, with an address for service in Luxembourg at the Chambers of Loesch and Wolter, 11 Rue Goethe,

applicant,

v

**Commission of the European Communities**, represented initially by Bernd Langeheine and subsequently by Wouter Wils, both of its Legal Service, acting as agents, assisted by Heinz-Joachim Freund, of the Brussels Bar, with an address for service in Luxembourg at the offices of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of Commission Decision 95/477/EC of 12 July 1995 relating to a proceeding pursuant to Article 85 of the Treaty

* Language of the case: German.

(Case IV/33.802 — BASF Lacke+Farben AG, and Accinauto SA) (OJ 1995 L 272, p. 16),

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

composed of: B. Vesterdorf, President, R.M. Moura Ramos and P. Mengozzi, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 13 January 1998 and 2 April 1998,

gives the following

## Judgment

## Background

*Partis and products concerned*

1 BASF Coatings AG (hereinafter 'BASF' or 'the applicant'), formerly BASF Lacke und Farben AG, a German company with its registered office in Münster-Hiltrup

(Germany), manufactures refinishing products for vehicles sold under the trade name Glasurit. Its turnover for 1991 was DEM 1 668 000 000, of which DEM 314 000 000 was accounted for by worldwide sales of motor vehicle refinishing paints and DEM 243 000 000 by sales of those products within the Community.

2 Glasurit products are distributed by:

— subsidiaries of the BASF group in the Netherlands, Italy, France, Spain, the United Kingdom, Ireland, Austria, Sweden and Finland;

— independent distributors bound by exclusive distribution agreements in Belgium, Luxembourg, Denmark and Portugal;

— five regional exclusive distributors in Germany;

— an independent non-exclusive distributor in Greece.

3 Accinauto SA ('Accinauto') is a Belgian company, established in Brussels. Since 1937, it has distributed the BASF group's motor vehicle refinishing paints in Belgium and Luxembourg. Since 1974, it has been the exclusive distributor of Glasurit products for the same contract territory. Its turnover for the tax year

1991 was BEF 738 000 000, some 85% of which was accounted for by BASF products.

4 In the United Kingdom and Ireland, motor vehicle refinishing paints of the BASF group are distributed by BASF Coating and Inks Ltd ('BASF C & I'), a wholly-owned subsidiary of the BASF group.

5 Refinishing paints are distinct from paints for new vehicles, despite having the same composition and being manufactured on the same production lines. Paints for new vehicles are intended for vehicle manufacturers, whilst refinishing paints are intended for repair workshops. For that reason, refinishing paints are distributed in different packaging and quantities from products used for new vehicles.

6 During the period between 1985 and 1992, retail prices for vehicle refinishing paints, including Glasurit products, were higher on average in the United Kingdom than in Belgium.

*Administrative procedure*

7 On 28 January 1991, Ilkeston Motor Factories Ltd ('IMF') and Calbrook Cars Ltd, two United Kingdom-based distributors of vehicle refinishing paints, lodged

a complaint with the Commission alleging that BASF and Accinauto had infringed Community competition rules.

8 The complainants stated that they had obtained their supplies of Glasurit products — IMF directly and Calbrook Cars Ltd through the intermediary of IMF — from Accinauto since 1986. During the summer of 1990, Accinauto had stopped supplying them, at the instigation of BASF. Thus BASF and Accinauto colluded to prevent parallel imports of Glasurit products into the United Kingdom.

9 On 26 June 1991, the Commission carried out investigations at the commercial premises of BASF, BASF C & I, Accinauto and Technipaint, a company created in 1982 by the management of Accinauto and having the same registered office as the latter.

10 It then obtained written information from the various parties pursuant to Article 11 of Council Regulation No 17 of 6 February 1962: First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87; 'Regulation No 17').

11 On 12 May 1993, the Commission sent statements of objections to BASF and Accinauto.

12 On 23 September 1993, a hearing was held in the case.

13 After consulting the Advisory Committee on Restrictive Practices and Dominant Positions, the Commission adopted Decision 95/477/EC of 12 July 1995 relating to a proceeding pursuant to Article 85 of the EC Treaty (Case IV/33.802 — BASF

Lacke+Farben AG, and Accinauto SA) (OJ 1995 L 272, p. 16; 'the contested decision'). That decision was notified to the applicant on 21 July 1995.

*Content of the contested decision*

14 In the operative part of the contested decision, the Commission found that the agreement between BASF and Accinauto, under which Accinauto SA was required, from 8 October 1982 to 31 December 1991, to pass on to BASF any customer enquiries coming from outside the contract territory, infringed Article 85(1) of the EC Treaty (now Article 81(1) EC). For having participated in that infringement, the Commission fined BASF ECU 2 700 000 and Accinauto ECU 10 000.

15 In the recitals in the preamble to its decision, the Commission states that, under the first subparagraph of Article 2(2) of the exclusive distribution agreement concluded in June/October 1982 between BASF and Accinauto (the '1982 agreement'), with retroactive effect as from 1 January 1981, Accinauto undertook to 'pass on' to BASF any customer enquiries coming from outside the contract territory. The Commission considers that the phrase 'pass on customer enquiries' must be understood to mean that the party to whom the enquiries are 'passed on' takes the place of the party doing the 'passing on'. As a result, Accinauto was prohibited from deciding independently whether to supply customers based outside Belgium or Luxembourg. It was BASF which decided whether and on what conditions Accinauto, BASF or a third party might respond to those orders.

16 The Commission maintains that its interpretation of Article 2 of the agreement is confirmed by the manner in which the parties consistently applied it.

17 When, in March 1986, IMF first contacted Accinauto, the latter obtained 'special authorisation' to commence supplies. BASF granted that authorisation to Accinauto because it wished to 'channel and normalise' parallel exports of Glasurit products to the United Kingdom. That was in line with measures taken by BASF against parallel imports in 1985 and 1986. For a nine-month period, it marked products sold by distributors in Belgium, the Netherlands and Germany in order to identify the channels through which Glasurit products arrived on the British market.

18 According to the Commission, BASF asked Accinauto to stop supplies to IMF and other British customers in June 1989. Thus the decision to stop parallel exports to the United Kingdom, which had initially been authorised, was taken by BASF.

19 The Commission found, however, that Accinauto did not comply with the prohibition imposed on it by BASF. As from July 1989, it invoiced sales to IMF through Technipaint, thereby continuing its supplies to the United Kingdom without BASF's knowledge.

20 At the end of May 1990, Accinauto ceased supplies to IMF, following a tightening of supervision by BASF. According to information supplied by BASF C & I, the problem of parallel imports was getting worse, and BASF had evidence of a Belgian source of supply.

21 As from that date, Accinauto complied unreservedly with the 1982 agreement. According to the Commission, the infringement of the competition rules did not

end until 1 January 1992, when a new distribution agreement, signed by the parties on 14 December 1992 and 22 January 1993, entered into force with retroactive effect. That agreement no longer contains the contested clause requiring Accinauto to pass on to BASF any customer enquiries not originating in its contract territory.

22 The Commission considers that Article 2(2) of the 1982 agreement had the object and effect of restricting competition between Accinauto and other suppliers of Glasurit motor vehicle refinishing paints, and in particular between Accinauto and BASF C & I. That agreement was liable to affect trade between Member States by restricting parallel exports of Glasurit products from Belgium to the United Kingdom.

23 The Commission decided to impose fines on BASF and Accinauto, stating that the ban on passive sales conflicted with the objective of establishing a common market and constituted a particularly serious infringement of Community law, the latter being very clear on this point in terms both of the products and the market concerned. BASF and Accinauto had, moreover, committed the infringement intentionally.

**Procedure**

24 The present action was commenced by an application lodged at the Registry of the Court of First Instance on 25 September 1995.

25 In its application, the applicant requested the Court to adopt the following measures of organisation of procedure:

— an order that the applicant's lawyer be granted access to the Commission's original documents concerning the administrative procedure;

— in the alternative, an order that the Commission send all the documents concerning the administrative procedure to the Court of First Instance to enable factors tending to exonerate the applicant to be examined;

— an order that a full record in German of the hearing of 23 September 1993 be sent to the applicant.

26 The case, which was originally assigned to the First Chamber, Extended Composition, was referred to the First Chamber by decision of the Court of First Instance of 4 December 1997, adopted pursuant to Articles 14 and 51 of the Rules of Procedure.

27 On hearing the report of the Judge-Rapporteur, the Court of First Instance (First Chamber) decided that there was no need to order the measure of organisation of procedure proposed by the applicant. It also decided to open the oral procedure without any other measures of organisation or preliminary inquiry.

28 The parties presented oral argument and replied to the oral questions of the Court at the hearing which took place on 13 January 1998.

29 Following the assumption of duties by a new member of the Court, the composition of the First Chamber was altered by a decision of the Court of First Instance of 10 March 1998.

30 Having regard to Article 33(2) of the Rules of Procedure, the Court of First Instance (First Chamber), in its new composition, ordered the reopening of the oral procedure by order of 13 March 1998, in accordance with Article 62 of the Rules of Procedure.

31 The parties did not appear at the hearing on 2 April 1998. Upon a proposal of the applicant, and after hearing the defendant, the Court authorised the parties to refer to their oral arguments of 13 January 1998, without a fresh hearing, and to lodge written versions of those arguments, which were registered at the Court Registry on 14 April 1998.

**Forms of order sought**

32 The applicant claims that the Court should:

— annul the contested decision in so far as it concerns the applicant;

— in the alternative, withdraw or reduce the fine imposed on the applicant by Article 2 of that decision;

— order the Commission to pay the costs;

— order the Commission to repay to the applicant the costs of the bank guarantee which it had to provide as security for payment of the fine.

33 The Commission contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

**The claim for annulment of the contested decision**

34 In support of its action, the applicant puts forward three pleas in law as grounds for annulment. The first alleges infringement of essential procedural requirements, in that the rights of the defence were not respected. It is in two parts, respectively alleging refusal of access to the Commission's file and the absence of translation into German of the whole of the minutes of the hearing. The second plea alleges infringement of Article 85(1) of the Treaty, in that the Commission wrongly concluded that the 1982 agreement was in breach of that provision. The third plea alleges misuse of powers, in that the Commission exercised its discretion erroneously in determining the amount of the fine.

*The plea alleging infringement of essential procedural requirements*

First part: refusal of access to the file

— Arguments of the parties

35 The applicant argues that its defence rights in the administrative procedure were infringed by the Commission's refusal to allow it access to the complete file built up in the course of that procedure. It maintains that, in order to comply with the adversarial nature of the procedure laid down by Regulation No 17, the Commission must give the counsel of the undertakings concerned the opportunity to examine the original file and decide what documents they wish to use in support of their arguments. The institution had no right to decide on its own what documents were relevant for the defence.

36 The Commission annexed to the statement of objections copies of only a part of the documents which it had in its possession, namely a list of the documents which constituted the case-file, together with 19 appendices and three separate files with annexes. However, the summary list did not sufficiently indicate the nature of the documents which, in the Commission's assessment alone, contained business secrets of the complainants or constituted internal Commission documents. Moreover, the numbering of the copies sent was either non-existent or illegible, thus preventing the applicant from checking whether they were exhaustive and in conformity with the original documents.

37 The introduction into the terms of reference of the hearing officer of a new provision enabling undertakings to ensure through him that copies sent to them conformed with the original documents proves, in the applicant's submission, that the Commission recognised the legal uncertainty arising from its practice

concerning access to the file. The document of the Paris International Chamber of Commerce, annexed to the reply, showed that that opinion was shared in European business circles.

38 By rejecting the applicant's request that its lawyer be permitted to consult the original file and take copies of material not sent to it, the Commission had failed in this case to comply with its obligations under the case-law of the Court of First Instance (Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, paragraph 54; Joined Cases T-10/92, T-11/92, T-12/92 and T-15/92 *Cimenteries CBR and Others* v *Commission* [1992] ECR II-2667, paragraph 38; Case T-65/89 *BPB Industries and British Gypsum* v *Commission* [1993] ECR II-389, paragraph 30; Case T-30/91 *Solvay* v *Commission* [1995] ECR II-1775, paragraphs 59 and 81).

39 The applicant maintains that, amongst the documents sent to it, none could be regarded as tending to exonerate it. It was thus probable that the Commission knowingly omitted to bring to the applicant's knowledge essential parts of the file which were important for its defence. In that context, the applicant raises the possibility that some of the documents which were not sent might show that parallel imports of Glasurit products were not in any way prevented in the years 1986 to 1991.

40 The Commission contends that in this case its application of the rules on access to the file which result from the case-law of the Court of Justice and the Court of First Instance was correct in every respect (*Hercules*, paragraph 54; *Cimenteries CBR*, paragraph 41; *BPB Industries*, paragraph 31; and, on appeal, Case C-310/93 P *BPB Industries and British Gypsum* v *Commission* [1995] ECR I-865). In its submission, the applicant cannot deduce from that case-law that it has a right to consult the original file in order to verify the exhaustiveness and the

conformity of the copies and to satisfy itself that all incriminating and exonerating documents have been sent to it.

41 The sending of the documents was not subordinate to the question whether they were incriminating or exonerating in nature. The Commission states that it sent the applicant a complete summary of all the documents on the file and complete copies thereof, save only for those which were confidential. Since that summary specified with sufficient clarity and precision all the documents which were not accessible to the applicant, or were only partially accessible to it, this was not a complete refusal of disclosure of the kind of which the Commission was accused in *Solvay* (paragraphs 94 and 95) and in Case T-36/91 *ICI* v *Commission* [1995] ECR II-1847, paragraphs 100 and 104.

42 The Commission emphasises that the applicant has failed to request access to specific documents, mentioned in the summary, which were not sent to it on the ground that they contained business secrets of Accinauto and certain other undertakings. Had the applicant made such a request, the Commission would have been able to consult the undertakings concerned and decide how far it was able to make the relevant documents accessible without infringing the right of those undertakings to the protection of their business secrets.

43 Nor did the applicant make use of the opportunity, which had been mentioned to it by letter of 15 September 1993, of applying to the hearing officer for confirmation that the summary was exhaustive.

44 Therefore, the Commission submits, the applicant's argument that documents relevant to its defence were concealed from it rests on mere speculation and

conjecture. The applicant has put forward nothing to justify the conclusion that such documents actually existed.

— Findings of the Court

45 Under the case-law, the procedure governing access to the file in competition cases is designed to enable the addressees of a statement of objections to examine evidence in the Commission's files so that they are in a position effectively to express their views on the conclusions reached by the Commission in that statement on the basis of that evidence. Access to the file is thus one of the procedural guarantees intended to protect the rights of the defence and to ensure, in particular, that the right to be heard provided for in Article 19(1) and (2) of Regulation No 17 can be exercised effectively. The Commission has an obligation to make available to the undertakings involved in Article 85(1) proceedings all documents, whether in their favour or otherwise, which it has obtained during the course of the investigation, save where the business secrets of other undertakings, the internal documents of the Commission or other confidential information are involved (*Hercules*, paragraph 54; *Cimenteries CBR*, paragraphs 38 and 41; *BPB Industries*, paragraphs 29 and 30; *Solvay*, paragraph 59).

46 Having regard to the general principle of equality of arms, which presupposes that in a competition case the knowledge which the undertaking concerned has of the file used in the proceeding is the same as that of the Commission, the Commission is not entitled to decide on its own whether the documents seized in the investigation of the matter are capable of exonerating the undertaking concerned. At the least, therefore, the Commission must draw up a sufficiently detailed list of the documents which are not annexed to the statement of objections to enable the undertaking to which that statement is addressed to

request access to specific documents likely to be useful in its defence (*Solvay*, paragraphs 83 and 101).

47 In this case, the Commission sent the applicant a list of the documents comprising the case-file, together with 19 appendices and three files with annexes containing copies of documents accessible to the applicant.

48 An examination of the list summarising the 1336 pages of the Commission's file shows that documents or groups of documents were classified in 12 categories established by reference to the nature of their content and six categories determined in relation to their degree of confidentiality. Documents classified in category F were inaccessible to the applicant in their entirety. A single document, classified in category D, was partially accessible to it. The list showed the number of pages of each document and the respective dates on which they were drawn up, save, as regards documents not transmitted, for those constituting pages 97, 103 to 105, 108 to 110, 167, 171, 622 to 626, 690 and 897 to 899 of the file.

49 After receiving that list, which was sent to it with the statement of objections, the applicant did not make any specific request to the Commission for access to one or more of the documents not supplied to it. In its letter of 16 June 1993, it merely requested access to the original and complete file established by the Commission, claiming that it had received copies of only a part of the documents collected in the course of the investigation and that, bearing in mind a lack of legibility in the pagination, it was having difficulty in verifying the exhaustiveness and conformity of the copies in relation to the original documents.

50 In those circumstances, the Court finds that the Commission's refusal to authorise the applicant's lawyer to consult the original file arose in a different context from that in *Solvay* and *ICI*. Unlike the applicants in those cases, the applicant had a

list prepared by the Commission's staff of all the documents on the file, including those which were not sent to it. That list constituted a sufficient basis for the applicant to take cognisance of the existence of the documents in question and, where appropriate, for it to object to the fact that the Commission had not sent it documents of a certain kind, in particular annexes to the complaint or documents found on Accinauto's premises, which might have been capable of being used in its defence.

51 Since the applicant made no request specifying the origin or categories of unsent documents to which it wished to have access, it did not put the Commission in a position to give it a reply in conformity with the methods whereby the institution is required to give the undertaking concerned access to documents containing business secrets of other undertakings, whether involved in the proceeding or not. In the circumstances of this case, the Court cannot criticise the Commission for failing to use one of the methods specified in paragraphs 92 and 93 of the *Solvay* judgment, namely the preparation of non-confidential versions of all documents containing business secrets of the complainants and Accinauto or, in the event of difficulty, consultation with those undertakings in order to obtain documents from which sensitive information had been removed.

52 The Commission could therefore legitimately rely on its duty of confidentiality as regards certain documents in rejecting the applicant's request for full access to the file.

53 To the extent that BASF has not specified further before the Court which documents were wrongly considered to be confidential, or of which documents it

wished to obtain non-confidential versions, it has not made out its case for the measures of organisation of procedure which it has requested.

54 The mere assertion by the applicant that the documents sent did not contain any in its favour cannot establish the actual existence of such documents amongst those which the Commission was entitled not to send to it on the ground of their confidentiality (*BPB Industries*, paragraph 33, and, on appeal, at paragraph 27).

55 In those circumstances, the Court cannot grant the request for a measure of organisation of procedure in the form of an order directing the Commission to communicate the entire file to the applicant.

56 Similarly, where an undertaking does not adduce any specific evidence to cast doubt upon the confidentiality of certain documents in the file, it is not the function of the Community judicature to look at each document not disclosed in order to verify the arguments relied on by the Commission for not having made them available (*BPB Industries*, on appeal, paragraph 30).

57 Nor, therefore, can the Court grant the alternative request for a measure of organisation of procedure in the form of an order directing the Commission to send the entire file to the Court of First Instance.

58 As regards the applicant's argument that the numbering of the copies sent to it was non-existent or illegible, thus preventing it from verifying that those copies

were exhaustive and in conformity with the original documents, it must be acknowledged that a lack of care in the reproduction of the documents and the numbering of the pages may hinder comprehension of them. However, the defects in pagination referred to cannot be regarded in this case as adversely affecting the rights of the defence. The applicant is not alleging that the Commission refused to supply it with legible and correctly-numbered copies, and, contrary to what was suggested to it, it chose not to apply to the hearing officer for verification of the exhaustiveness of the copies in relation to the original file.

59 The arguments based on the criticisms made of the Commission's procedures for access to the file, in particular by the Paris International Chamber of Commerce, and on the fact that those criticisms were recognised as well founded at the time of the adoption of Commission Decision 94/810/ECSC, EC of 12 December 1994 on the terms of reference of hearing officers in competition procedures before the Commission (OJ 1994 L 330, p. 67) must also be rejected. Those arguments of a general nature are not capable of establishing the reality of an infringement of the rights of the defence, which must be examined in relation to the specific circumstances of each individual case (*Solvay*, paragraph 60).

60 The first part of the plea must therefore be dismissed.

Second part: absence of a translation into German of the whole of the minutes of the hearing

— Arguments of the parties

61 The applicant argues that, by failing to supply it with a full German version of the minutes of the hearing of 23 September 1993, the Commission infringed Article 3

of Council Regulation No 1 of 15 April 1958 determining the languages to be used by the European Economic Community (OJ, English Special Edition 1952-1958, p. 59). That article provides that '[D]ocuments which an institution of the Community sends to a Member State or to a person subject to the jurisdiction of a Member State shall be drafted in the language of such State.'

62 The applicant submits that the minutes of a hearing constitute a procedural document in the sense contemplated by Article 19(1) of Regulation No 17 and Article 2(1) of Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (OJ, English Special Edition 1963-1964, p. 47). It maintains that, as an undertaking concerned, it is entitled to communication of the minutes in the language of the Member State to whose jurisdiction it is subject (Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraphs 48 and 49).

63 The fact that it had nothing in writing which contained a translation of the statements of other participants at the hearing who spoke in French or English, particularly those made by the representatives of Accinauto, the complainant undertakings and the Member States, prevented it from properly preparing its defence in the administrative procedure. Even though the Commission provided simultaneous interpretation of those statements during the hearing, translation of the whole of the minutes into German was essential for an understanding of the objections raised against the applicant, and in particular to enable it to clarify the facts referred to on that occasion with its employees who were not present at the hearing. Its rights of defence were therefore infringed.

64 The Commission contends, on the contrary, that the minutes of the hearing do not constitute a 'document' within the meaning of Article 3 of Council Regulation No 1 of 15 April 1958. In cases concerning the application of the competition rules, that provision has been applied solely to statements of objections and decisions intervening during the administrative procedure. The

Commission argues that the minutes serve to record the remarks of the representatives of the various parties, and are sent to them solely so that they may verify that their own statements have been correctly recorded (Case T-77/92 *Parker Pen* v *Commission* [1994] ECR II-549, paragraphs 72 to 75). The minutes are not, it submits, a document drawn up for the benefit of the undertakings participating in the procedure.

65 In any event, no procedural defect can be held to have occurred, since the applicant's statements at the hearing were recorded in German and it has not been alleged that the minutes contained substantial errors or omissions as far as it was concerned.

— Findings of the Court

66 Under Article 9(4) of Regulation No 99/63, 'the essential content of the statements made by each person heard shall be recorded in minutes which shall be read and approved by him'.

67 It is common ground in this case that the applicant was able effectively to take note of the essential content of its own statements at the hearing of 23 September 1993, which were recorded in the minutes in German, and that it is not alleging that the minutes contained substantial errors or omissions as far as it was concerned.

68 Nor does the applicant deny that it had the opportunity to follow, with the aid of simultaneous interpretation, the statements of the other persons heard.

69 The applicant cannot rely on the absence of translation of those parts of the minutes which were drafted in a language other than that of its own Member State in order to establish an infringement of its rights of defence. In this case, the absence of translation is not liable to have harmful consequences capable of vitiating the administrative procedure (*ACF Chemiefarma*, paragraph 52, and *Parker Pen*, paragraph 74).

70 Any difficulties which the applicant might have had in preparing its defence cannot alter that finding, since it was represented at the hearing and the Commission supplied it with documentation containing the other participants' statements in their original language.

71 The second part of the plea must therefore be dismissed. It follows that the plea alleging infringement of essential procedural requirements must be dismissed in its entirety.

*The plea alleging infringement of Article 85(1) of the Treaty, in that the Commission wrongly concluded that the 1982 agreement infringed that provision*

72 The applicant essentially denies that the 1982 agreement constituted an agreement contrary to Article 85(1) of the Treaty, designed to prevent parallel imports of Glasurit products into the United Kingdom. The Commission committed errors of assessment, first, in its interpretation of Article 2(2) of that agreement; secondly, in its conclusion that the parties' implementation of the agreement confirmed its interpretation thereof; thirdly, in its analysis of the

effects of that agreement on competition and on trade between Member States; and, fourthly, as regards the date on which the alleged infringement of the competition rules ceased.

First part: interpretation of Article 2(2) of the 1982 agreement

— Arguments of the parties

73 The applicant maintains that the expression 'pass on customer enquiries' in Article 2(2) of the 1982 agreement refers solely to the passing on of information allowing it the better to plan its distribution organisation and commercial strategy, and fulfil its obligation to supply the market on an equitable basis in the event of difficulties in supply.

74 It maintains that 'pass on' means 'inform' in both Article 2(1) and Article 2(2). The article contained no obligation to pass on orders, given that it follows implicitly from the right of exclusive distribution in the contract territory conferred on Accinauto under Article 1. Moreover, Article 2 concerned only 'enquiries' from customers, the sole object of which was to obtain information on the possibilities and conditions of delivery. Thus it did not apply to customers' orders.

75 In the applicant's submission, there is nothing in Article 2(2) of the agreement which requires its consent for sales outside the contract territory of Accinauto. It is sufficient in that respect to compare the text of the clause in question with that

of a reservation of manufacturer's approval contained in a distribution agreement for the region of Nigeria, also concluded by the applicant in 1982.

76 Under Article 4(1) and (2) of the 1982 agreement, Accinauto undertook to inform BASF regularly as to the general market situation and to draw up an annual sales report. However, since Article 4 applied only to information concerning business in the contract territory, information concerning enquiries addressed to it from outside that territory were covered only by Article 2(2) of the agreement. The applicant states that information on sales outside the contract territory were also of great interest to it, particularly in order to avoid those sales being taken into account in the turnover achieved by each distributor in its exclusive territory. The amount of certain subsidies granted by BASF to its distributors, contributions towards advertising costs for example, was determined by reference to the turnover they had achieved in their respective territories.

77 The applicant further argues that the history of the agreement should be taken into account in order to understand the attention which the parties gave to the question of its compatibility with Community competition rules. The former exclusive sales contract concluded between Accinauto and the legal predecessor of BASF was notified to the Commission in 1969. Following objections raised by the Commission, the parties abandoned in 1970 a clause which stipulated that Accinauto was not authorised to export goods forming the subject-matter of the contract outside the contract territory.

78 Bearing that precedent in mind, at the time of the negotiations which led to the 1982 agreement, the applicant received an assurance from the head of its legal department that the new Article 2(2) complied with Community law. Since the

parties had no doubts as to the lawfulness of that clause, they did not consider it necessary to notify the 1982 agreement to the Commission.

79 The Commission contends that the reasons put forward by the applicant to justify its interpretation of the passing-on obligation in Article 2(2) of the agreement are unconvincing. It reaffirms that that clause contains a disguised prohibition of passive export sales without prior authorisation, and not a simple obligation to pass on information.

— Findings of the Court

80 Article 2 of the 1982 agreement appears under the heading 'Exclusive distribution right and ban on competition'. The first subparagraph of Article 2(2) provides: 'The authorised dealer undertakes to pass on to [BASF] any customer enquiries coming from outside the contract territory and to refrain, outside the contract territory, from seeking customers or maintaining branches or supply depots for the distribution of the contract products.'

81 It is common ground between the parties that the final part of the contractual clause in question contains a prohibition on active sales measures by the dealer outside the contract territory, a prohibition which complies with Community competition law. The dispute as to the interpretation of that clause thus concerns only the part dealing with passive sales to customers based outside the territory.

82 In order to determine whether the parties to the 1982 agreement agreed upon a restriction on the authorised dealer's freedom to carry out passive sales of the products covered by the exclusive distribution contract to customers based in

other Member States and whether, in consequence, they concluded an agreement prohibited by Article 85(1) of the Treaty, the Court must take a number of factors into account. Apart from examination of the wording of Article 2(2) and of the scope of the other clauses in the contract which relate to the authorised dealer's obligation under that clause, those factors include the factual and legal circumstances surrounding the conclusion and implementation of that agreement which enable its purpose to be elucidated.

83 The wording of Article 2(2) clearly indicates that the parties prescribed a particular system for dealing with customer enquiries coming from outside the contract territory. It does not, however, specify the purpose for which those enquiries were to be passed on to the manufacturer or the consequences of this for the authorised dealer's freedom to carry out the passive sales solicited, especially where they came from customers based in other Member States.

84 The Court would observe that for the purposes of construing the wording of that clause, it is immaterial that the passing-on obligation applies to enquiries, which seek merely to determine whether and on what terms Accinauto could supply, and not to orders placed by customers outside the contract territory. As the Commission has pointed out, if a negative response were given to an enquiry passed on in pursuance of the clause, there would be no point in the customer placing an order with Accinauto. The fact that the authorised dealer is obliged to pass on enquiries which precede orders does not support the conclusion that he retains his freedom of decision in full and is not subject to any restriction as regards satisfying the orders.

85 As regards the insertion of Article 2(2) into the agreement and the determination of its purpose in relation to that of other clauses providing for exchanges of information between the parties, it is necessary, first, to reject the applicant's argument that the passing-on obligations in Article 2(1) and (2) are of the same kind as the obligations to provide information contained in Article 4 of the

agreement. Although under Article 4(1) and (2) Accinauto undertakes to inform BASF regularly on sales and the market situation in the contract territory, that information is of a general nature and detailed particulars of it are to be given only by means of summary reports, drawn up at the end of each calendar year. By contrast, Article 2(1) and (2) provide that the authorised dealer or the manufacturer are to be informed immediately of the receipt of enquiries according to whether they emanate, respectively, from customers based in the contract territory or from those based outside it. The Court therefore finds that the passing-on obligations in Article 2, by providing for reciprocal notification of specific supply enquiries, are different in kind from the obligations to provide information laid down by Article 4.

86 Secondly, in Article 2(1), as worded, BASF's obligation to pass on to the authorised dealer all enquiries and all information that might promote the sale of the products in the contract territory comes immediately after a ban on his using other distribution channels in that territory. The passing-on obligation laid down in that clause, like the ban on using other distribution channels, thus belongs to the very substance of the exclusive right granted to Accinauto inasmuch as it is necessary for the effective exercise of that right. It follows that the interpretation contended for by the applicant, whereby the term 'pass on' simply means 'inform' the other party of the existence of the supply enquiries, both in Article 2(1) and Article 2(2), cannot be accepted.

87 Since the passing-on obligation imposed on the authorised dealer by Article 2(2) of the agreement covers only enquiries coming from outside the contract territory, it cannot be that the sole purpose of that clause is to enable the applicant to achieve better planing of its distribution organisation and its commercial strategy. The Commission has rightly pointed out that, if the applicant wished to be informed as to the quantity and quality of the products concerned by the enquiries addressed to Accinauto, the passing-on obligation should have applied equally to enquiries from customers based in the contract territory. Such

information could, moreover, have been supplied to the applicant on a regular basis in a general manner or in the context of summary reports, as envisaged in Article 4 of the agreement, and not as a preliminary to each supply. Nor was it necessary for BASF to have advance notice of the destination of the goods ordered from Accinauto in order to be in a position to allocate limited supply quantities uniformly between its authorised dealers. Its interest in obtaining information on export sales, particularly for the purpose of calculating the advertising subsidies which it granted to each dealer, could also have been satisfied by an obligation to draw up summary reports concerning those sales.

88 The Court therefore finds that the applicant's explanations concerning the purpose of the passing-on obligation in Article 2(2) of the 1982 agreement are not such as to invalidate the Commission's contention that that clause contains a disguised prohibition on passive export sales without prior authorisation.

89 Moreover, the history of the agreement offers an explanation for the ambiguous terms in which the parties to the 1982 agreement drafted the clause complained of and for the disguised nature of the export ban which it contains. The applicant cannot deny the implicit content of that clause by invoking the fact that, in the exclusive distribution agreement for Nigeria which it also concluded in 1982, an express prohibition on exports was stipulated. Since that agreement was not subject to the requirements laid down by the Community competition rules, the parties were able to express their intentions more clearly.

90 In those circumstances, it needs to be considered whether, as the Commission maintains, its interpretation of Article 2(2) of the 1982 agreement is further

confirmed by the fact that the parties implemented an agreement with a view to preventing parallel imports of Glasurit products into the United Kingdom.

Second part: implementation of the agreement

— Arguments of the parties

91 In the applicant's submission, the implementation of the agreement at issue shows that the Commission misconstrued the expression 'pass on'. It contends that the facts corroborate its own interpretation of that agreement.

92 When, in March 1986, IMF first made an enquiry of Accinauto, that company's managing director, Mr Dudouet, contacted BASF merely in order to obtain information as to the market situation and the availability of the products requested. Mr Dudouet rarely carried out exports and had deduced that the orders for the British market promised to be for large quantities. Since the products requested by IMF were products easily sold and, as was customary in the car repair market, the quantities had to be delivered at short notice, any delays in delivery could have caused serious problems to customers. Thus, contrary to what the Commission maintains, Accinauto did not seek authorisation from BASF either to make deliveries to IMF or to fix the conditions applicable to those sales.

93 Accinauto delivered the desired quantities to IMF and business relations between the two companies subsequently developed successfully. Until 1990,

orders from IMF increased consistently, as did the discounts granted to it by Accinauto.

94 At the end of that period, the weakness of the pound sterling and price rises in Belgium and the Netherlands contributed to a fall in parallel imports of Glasurit products into the United Kingdom. For that reason, the applicant did not share the concerns on the subject of parallel imports expressed by BASF C & I in a fax message of 28 March 1990.

95 Nevertheless, since there was a shortage of certain Glasurit products, Mr Dudouet was asked as a matter of priority to use the available products to supply customers in his exclusive distribution territory.

96 As from June 1989, the sales by Accinauto to IMF were invoiced in the name of Technipaint solely in order to separate the exports from the Belgian operations. That separation became possible in 1989, after the entry into service of a new computer system. It enabled Accinauto to increase the transparency of its operations and to limit the payment of bonuses due to its collaborators. BASF was also keen on the separate registration of operations, since it contributed to the advertising costs concerning sales in the contract territory.

97 Contrary to what is stated in points 75 and 76 of the preamble to the contested decision, Accinauto did not cease to supply IMF at the end of May 1990 but only in December 1990. The first order which reached Accinauto since the delivery at the end of May 1990 was dated 4 December 1990. IMF did not place any new

orders between those two dates, despite the reference to a future order in the letter from IMF's lawyers to Accinauto of 3 July 1990.

98 Accinauto decided to cease supplying IMF independently because of their company's unreliability and the threatening attitude which it had adopted. Since August 1989, IMF had no longer paid invoices on time. In a conversation with Accinauto on 5 June 1990, IMF had insisted on obtaining extra supplies, even though the availability of a large number of Glasurit products was affected by bottlenecks. It had threatened to lodge a complaint against Accinauto for infringement of Community competition rules and to establish a subsidiary in Belgium for the purpose of carrying out direct exports to the United Kingdom.

99 Accinauto first informed BASF by letter of 7 February 1991, with which it enclosed a copy of the letter it had sent to IMF on 19 December 1990, that it had finally broken off business relations with IMF.

100 The applicant accuses the Commission of having failed to take account of the supply difficulties which it had mentioned, and of which, it maintains, it produced convincing evidence during the administrative procedure. For various reasons, there were major bottlenecks in BASF's supply capacities during the period in question, and the main product ranges, especially the most used basic colours, were affected.

101 BASF had established an information network between itself and its distributors, including Accinauto, in order to ensure regular supply to the European market in a time of shortage. In order to fulfil its delivery obligations towards customers for

Glasurit products, it wished to be aware of product flows and the sales situation in the various national markets.

102 The applicant further considers that it might legitimately expect its exclusive distributors to take care to ensure the best possible supply to established customers in their respective territories, and not to use slender resources to accept new orders or carry out deliveries outside those territories.

103 The lawfulness of the conduct it pursued finds recognition, it submits, in the recitals in the preamble to Commission Regulation (EEC) No 1983/83 of 22 June 1983 on the application of Article 85(3) of the Treaty to categories of exclusive distribution agreements (OJ 1983 L 173, p. 1), just as it had done so in Commission Regulation No 67/67/EEC of 22 March 1967 on the application of Article 85(3) of the Treaty to certain categories of exclusive dealing agreements (OJ, English Special Edition 1967, p. 10). The parties to an exclusive distribution agreement may thus include clauses allowing the manufacturer to verify whether the main purpose of such an agreement, namely to operate intensively in the contract territory, is being respected by the distributor.

104 The applicant maintains that the situation of shortage referred to gives a different complexion to the facts found by the Commission and thus permits a different explanation from that adopted in the contested decision (Case 77/77 *BP* v *Commission* [1978] ECR 1513, paragraphs 32 and 33; Joined Cases 29/83 and 30/83 *CRAM and Rheinzink* v *Commission* [1984] ECR 1679, paragraph 16).

105 The Commission reaffirms its conclusion that the parties' implementation of the agreement, especially after March 1986, confirms that Article 2(2) thereof did in

fact reserve for the manufacturer a right to approve passive sales. It submits that the applicant's explanations are unconvincing, and not capable of invalidating the legal assessment of the conduct noted in the contested decision. It also points out that the applicant had already pleaded its difficulties in supply during the administrative procedure, and that these were made the subject of an in-depth analysis in the context of that procedure.

106 The Commission submits that the documents before the Court contradict the version of the facts presented by the applicant. The internal note of 5 June 1990, mentioned in points 43 and 52 of the preamble to the contested decision, showed that BASF had granted Mr Dudouet 'special authorisation' to supply IMF, following the first order which the latter placed with Accinauto in March 1986. Other documents show that the halting of supplies to IMF did indeed take place at the instigation of BASF, and that, as from June 1989, Accinauto invoiced those sales through the intermediary of Technipaint in order to conceal them. Finally, following a tightening in control by BASF, Accinauto terminated the exports in May 1990.

107 According to the Commission, the supply difficulties pleaded by the applicant cannot explain the conduct of the parties to the agreement, given that the shortage was confined to the period between 1988 and the end of 1990. Moreover, the correspondence exchanged between BASF and its dealers concerning parallel imports to the United Kingdom show no trace of any concern that supply to other national markets might be insufficient. The withdrawal of the special authorisation granted to Accinauto is to be explained not by difficulties in supply experienced by BASF but by the fact that parallel imports were damaging to BASF C & I and resulted in a reduction in prices charged in the United Kingdom.

108 In any event, according to the Commission, the conclusions which the applicant claims to draw from the judgment in *BP* and the recitals in the preamble to Regulation No 1983/83 are mistaken. The manufacturer could not require an exclusive distributor henceforth to sell only to customers based in the contract

territory while reserving for itself the corresponding right to refuse to supply that distributor in a 'shortage situation'. Such a clause, the Commission submits, is incompatible with Regulation No 1983/83; in order to enjoy the advantages conferred by that regulation, the applicant must also bear the disadvantages.

— Findings of the Court

109 It should be observed, as a preliminary point, that the infringement of the competition rules which the Commission, in the contested decision, found to exist concerns the conclusion by the parties of an agreement designed to prevent parallel imports of Glasurit products into the United Kingdom. The Court's examination of the implementation of the 1982 agreement is therefore concerned solely with confirming whether the Commission's interpretation of Article 2(2) thereof is well founded.

110 In that respect, the applicant denies the existence of a causal link between the facts noted in the contested decision and the implementation of an alleged agreement contrary to Article 85(1) of the Treaty. In its submission, the conduct of the parties to the 1982 agreement is explained by the difficulties in supply experienced by BASF during the period in question and by business decisions taken independently by Accinauto.

111 However, the Commission has correctly pointed out that the bottlenecks affected BASF deliveries only between 1988 and 1990, whereas the agreement complained of was in force from 1982 until 1991.

112 The supply difficulties referred to cannot therefore explain BASF's actions in marking products sold by distributors in Belgium, the Netherlands and Germany

during 1985 and 1986 with a view to identifying the channels through which Glasurit products arrived on the United Kingdom market.

113 Nor can those difficulties substantiate the explanation given by the applicant for its contacts with Accinauto in March 1986, before the first delivery to IMF took place; there was no objective reason why Mr Dudouet needed to enquire first as to the availability of the products ordered.

114 Moreover, business relations between Accinauto and IMF intensified in 1989, notwithstanding the serious difficulties experienced by BASF during the whole of that year. At the time when those relations were broken off, in June 1990, the shortage situation pleaded by the applicant was already largely alleviated.

115 It is, moreover, apparent from BASF's internal memoranda and from the correspondence which it received from BASF C & I and Accinauto that the problem of parallel imports arose in the context of their effects on the business of the British subsidiary and not in the context of difficulties in delivery which might affect the supply of Belgian and Luxembourg customers.

116 It follows that the difficulties affecting BASF's deliveries did not have a substantial impact in this case on the implementation of the 1982 agreement. That being so, the applicant's arguments as to the lawfulness of its conduct in a situation of shortage, particularly in the light of the judgment in *BP* and the

recitals in the preamble to Regulation No 1983/83 of 22 June 1983, are irrelevant for the purposes of the examination of this case.

117 The Court finds that, according to an internal memorandum of BASF dated 5 June 1990, Accinauto had obtained 'special authorisation' to supply IMF:

'The owner of [IMF], Derby, is insisting on further car paint supplies from Accinauto (1989 approx. 10 tonnes). For this customer, Mr Dudouet had at the time obtained a special supply authorisation from Mr Kunath. At that time, authorisation was given for a limited amount of supplies from Brussels. Reason: no increase in volume by other dealers in Belgium. If consent is not given for a further supply, we are threatened with court proceedings. [...] Mr Dudouet is waiting to hear what the approach should be in future.'

118 In a letter of 7 June 1989, addressed to BASF, Mr Dudouet refers to the context in which that authorisation had been granted and maintained up to that date:

'Three or four years ago now, Glasurit decided, in view of the large quantities of parallel imports into the United Kingdom, to place with our help, on all products sold coming from our stocks, a special marking for each customer, to enable the origin of the consignment to be determined easily. [...] In view of this trade, we agreed with Glasurit to try to channel and normalise these purchases in order to follow the quantities purchased by our customers regardless of purchase outside the sales territory. [...] We would draw your attention to the fact that, if we dismantle this network, we can no longer guarantee to you that our 70 dealers or

large body repair businesses will not be tempted or asked to do business with Great Britain, which would considerably disrupt our internal market.'

119 Those particularly clear documents show that, contrary to what the applicant claims, Accinauto did not act independently in its business dealings with IMF. The closeness of the control exercised by BASF on Accinauto's exports is confirmed in another internal memorandum, dated June 1990:

'Herewith Accinauto's reply to our question as to how much material [Glasurit] is going from Belgium to Great Britain. We must assume that Dudouet is telling the truth. He is well aware that he depends on us and will not wish to take any risks.'

120 The second part of the plea, alleging error by the Commission in its assessment of the implementation of the 1982 agreement, must therefore be dismissed.

Third part: effects of the agreement on competition and on trade between Member States

— Arguments of the parties

121 The applicant complains that the Commission took insufficient account of the particularities of the British market in vehicle refinishing paints.

122 It states that the marketing costs for its products were and remain higher in the United Kingdom than in other European markets. The relatively late introduction of 'new technology' products to the British market left BASF C & I facing exceptional costs in making that technology known and providing after-sales service at the workshops. Sellers of several brands and parallel importers, who did not offer technical support or a full range of products, profited without cost to themselves from the services supplied by the manufacturer and its exclusive distributor.

123 The applicant indicates that parallel imports of Glasurit products developed because of the price difference in the vehicle refinishing paints market between the United Kingdom and other Community countries. That difference was due mainly to higher marketing costs in the United Kingdom, but also to the price control system operating in Belgium since the early 1980s. That system had been decided upon by the Belgian State in order to prevent an increase in retail prices.

124 Nevertheless, the Commission was mistaken, according to the applicant, in its view that the position of Glasurit products on the British market and the price differences between Belgium and the United Kingdom were such as to encourage substantial parallel imports, which were prevented by the 1982 agreement.

125 The applicant challenges the accuracy of the market shares held at point 16 of the recitals to the contested decision to be accounted for by parallel imports of Glasurit products as a proportion of total sales of those products in the United Kingdom market between 1986 and 1990. In reality, the total value of parallel

imports for each year remained well below DEM 2 000 000, with Accinauto's total sales to IMF representing well below DEM 500 000, even in the best years.

126 BASF maintains that the prices to be taken into account for competition purposes are the distributor's net selling prices, which are 'catalogue prices' less the discount granted to the buyer. It argues that the differences between the prices charged in Belgium and those charged in the United Kingdom diminish significantly if net selling prices rather than 'catalogue prices' are considered. It cites by way of example the differences between the 'catalogue prices' and the net prices charged by Accinauto and BASF C & I in 1988 for product lines 21 and 54. That shows, in the applicant's submission, that parallel import activity was worth while only if sufficiently large discounts were granted to importers.

127 Regarding price differentials, the applicant submits new figures. It claims that annexes 55 and 56 which it produced to the Court for inclusion in the case-file prove that discounts granted by BASF C & I might in practice be as much as 52%, taking net selling prices in the United Kingdom to a level very close to the net prices charged by Accinauto in Belgium, despite the differences at the 'catalogue prices' level. The applicant recalls that, in its reply to the statement of objections, it sent the Commission a comparative price table for the period from 1988 to 1991. That table showed that some of the goods were delivered by BASF at lower prices in the United Kingdom than in Belgium, which explained why IMF was always asking for greater discounts from Accinauto.

128 Furthermore, the Commission failed to take account of the fact that, besides Accinauto, distributors in other Member States might serve as a source of supply for parallel imports into the United Kingdom. According to the current knowledge of the applicant, a large number of undertakings besides Accinauto sold Glasurit products for importation into the United Kingdom during the period in question. The parallel importers were perfectly well informed as to the

respective sources of supply in the various countries of the Community and carried out common purchases with distributors charging the most advantageous prices for each line of products. That is confirmed by the fact that IMF obtained certain products on behalf of Calbrook Cars Ltd from Accinauto, whereas Calbrook obtained other products on better terms in the Netherlands and Germany.

129 According to the applicant, the quantities exported by Accinauto constituted only a fraction of the total volume of parallel imports of dual-ingredient Glasurit products into the United Kingdom, representing at most 1% of sales of those products on the British market. The applicant therefore challenges the Commission's conclusion that the agreement complained of produced an appreciable effect on trade between Member States.

130 The Commission replies that the documents discovered at BASF's premises show the price differences noted in the contested decision and that those differences were likely to encourage parallel imports from Belgium to the United Kingdom. It is not established that BASF C & I granted the considerable discounts alleged by the applicant, reducing the actual differences between the net selling prices of Glasurit products of lines 21 and 54. If such discounts had indeed averaged 50%, they would have been far higher than discounts granted in the other contract territories. In any event, the applicant itself admits in its application that the differences between prices charged in the United Kingdom and those in other Member States were one of the causes of the parallel imports.

131 The Commission contends that it has demonstrated that the agreement in question was likely to have an appreciable effect on intra-Community trade, and points out that it is not required to prove that such an effect on trade between Member States actually occurred (Case 19/77 *Miller* v *Commission* [1978] ECR 131, paragraph 15). It emphasises that it carried out the necessary investigations and presented in the contested decision its findings concerning the market

position of the undertakings concerned, the size of their production and exports and their pricing policy.

132 The new tables produced by the applicant concerning the discounts granted by BASF C & I to four of its main customers in 1988 and 1989 are not conclusive. Nor does Annex 54 permit the conclusion that the price differences between Belgium and the United Kingdom were insignificant. The Commission states that it acknowledged that the price differences for products in lines 21 and 54, which were very marked in 1985-1986, diminished significantly in 1989-1990. Nevertheless, it was precisely in the face of pressure from parallel imports that the applicant made an effort to align the prices charged in the two countries, which shows how essential it is that parallel imports can be effected without hindrance.

— Findings of the Court

133 Article 85(1) of the Treaty prohibits all agreements between undertakings which have as their object or effect the restriction of competition within the common market, provided they are capable of affecting trade between Member States. It is settled case-law that, by its nature, a clause designed to prevent a buyer from reselling or exporting goods he has bought is liable to partition the markets and consequently to affect trade between Member States (*Miller*, paragraph 7; Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and Others* v *Commission* [1993] ECR I-1307, known as the '*Woodpulp*' cases, paragraph 176). When it is evident that the sales of at least one of the parties to an anti-competitive agreement constitute a not inconsiderable proportion of the relevant market, Article 85(1) of the Treaty should be applied (*Miller*, paragraph 10; *Parker Pen*, paragraph 44).

134 In this case, the applicant has disputed neither the Commission's definition of the relevant market, namely the British market in vehicle refinishing products, nor

the fact that BASF's share of that market in 1991 was 16%, including 12% for Glasurit products. Its criticisms are limited to the volumes of parallel imports which the Commission indicated in point 16 of the preamble to the contested decision. Bearing in mind the position which BASF held on the relevant market and the fact, confirmed by the applicant itself, that Glasurit prices on that market between 1986 and 1991 were, on average, higher than those charged on the markets of other Member States, particularly Belgium, the Commission was right in concluding that the agreement in question was capable of affecting intra-Community trade.

135 In those circumstances, the Court finds that that agreement, by virtue of its object, constitutes a restriction on competition prohibited by Article 85(1) of the Treaty, without its being necessary to consider whether, as claimed by the applicant, it had no appreciable effects on the market concerned (Joined Cases 56/64 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299; Case T-43/92 *Dunlop Slazenger* v *Commission* [1994] ECR II-441, paragraph 127).

136 The applicant's other objections to the Commission's finding of infringement of Article 85(1) are therefore inoperative, since, even if upheld, they cannot lead to the conclusion that an agreement having the object and scope of the one in point in that case does not infringe the Community competition rules.

Fourth part: date on which the infringement ceased

— Arguments of the parties

137 The applicant argues that, even if there were an infringement of the competition rules, it ended not later than the end of June 1990. The Commission should have

held that BASF's letter to Accinauto of 21 June 1990 clearly indicated to the latter that it was free to take its own sales decisions. In any event, the Commission itself acknowledged that BASF's letter to IMF's lawyers of 22 June 1990, a copy of which was sent to Accinauto, was sufficiently comprehensible and clear in that respect.

138 The Commission reiterates its contention that the agreement in restraint of competition did not end until the parties removed the offending clause. In the circumstances, Accinauto could not interpret the copy of the letter sent to the complainant's lawyers in June 1990 as meaning that BASF waived the right to approve exports which it had reserved for itself in Article 2(2) of the 1982 agreement. The aim of that letter was merely to forestall possible claims by IMF.

— Findings of the Court

139 Since the infringement found by the contested decision was the conclusion of, and participation by the parties in, an exclusive distribution agreement in which one of the clauses pursued an object contrary to Article 85(1) of the Treaty, the Commission was right in holding that that infringement did not end until the two parties removed the clause in question. Under the case-law, the fact that a clause whose object is to restrict competition has not been implemented by the contracting parties is not sufficient to remove it from the ambit of the prohibition laid down in Article 85(1) of the Treaty (*Miller*, paragraph 7; *Ahlström Osakeyhtiö*, paragraph 175). In this case, the letters relied on by the applicant do not establish that the parties genuinely intended to renounce the offending

clause. Indeed, as the Commission found, the clearer terms used in the letter of 22 June 1990 were really aimed at weakening the accusations of anti-competitive conduct which had been addressed to the parties by the complainant IMF.

140 It follows from all the foregoing considerations that the plea alleging infringement of Article 85(1) of the Treaty must be dismissed.

*The plea alleging misuse of powers in determining the amount of the fine*

Arguments of the parties

141 The applicant accuses the Commission of misusing its discretion by failing to take account, when determining the amount of the fine, of the mildness and short duration of the alleged infringement, the difficult economic situation of the applicant and the absence of unlawful intent.

142 BASF contends that the seriousness of the infringement is to be measured in relation to the effects which the allegedly anti-competitive agreement had on trade. In this case, the agreement had no effect, not having been implemented by the parties. Even if it had been applied, the agreement would not have affected the flow of parallel imports into the United Kingdom from Belgium. There was only one refusal to supply, in December 1990, which was determined not by the

agreement but by an independent decision of Accinauto. Moreover, the volume of parallel imports affected by the 1982 agreement was insignificant in comparison with the total sales of Glasurit products in the United Kingdom.

143 The Commission was wrong in taking the duration of the infringement to be the whole of the period of validity of the agreement, between its conclusion on 8 October 1982 and the entry into force of the new agreement on 1 January 1992. In the first place, the Commission itself acknowledged that the effects of the agreement started to be felt only as from 1986. Moreover, Accinauto refused only one delivery, and the applicant clearly informed it no later than June 1990 that it was free to carry out passive sales in the Member States of the Community. The applicant therefore contends that to take the whole period of validity of the agreement into account is unjust, and seriously infringes the principle of proportionality.

144 The applicant further argues that the function of a fine cannot be to aggravate the economic difficulties of an undertaking in the long term, even though the purpose of a fine is to penalise a breach of the law and have a deterrent effect. In determining the amount of the fine, the Commission cannot have been entirely unaware of the fact that BASF C & I had suffered significant losses between 1985 and 1995 and that the applicant itself forecast losses in 1995. In those circumstances, a token fine would have been appropriate.

145 The applicant further emphasises that the lawyers consulted at the time the agreement was concluded considered that the clause in question complied with Community law. The parties and their employees were thus not aware, during the period of validity of that agreement, that they were committing an infringement of the competition rules of the Treaty.

146 The Commission argues that prohibitions on exports are by their nature serious infringements of competition, since they seek artificially to maintain price

differences between the markets of Member States and jeopardise the freedom of intra-Community trade (Joined Cases 100/80, 101/80, 102/80 and 103/80 *Musique Diffusion Française and Others* v *Commission* [1983] ECR 1825, paragraph 107). The market share of the parallel imports concerned by the infringement are therefore immaterial in determining its seriousness. The Commission further maintains that it has already refuted the applicant's claims that the 1982 agreement had no economic effects on parallel imports from Belgium to the United Kingdom, or any influence on the decisions taken by Accinauto.

147 The infringement began on the date on which the exclusive distribution agreement stipulating a right of approval for the manufacturer was concluded, and continued during the whole period of validity of that agreement (Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ* v *Commission* [1983] ECR 3369, paragraph 59). The mere silence of Accinauto which followed BASF's letters of 21 and 22 June 1990 could not validly have varied the 1982 agreement. Under Article 12(2) of that agreement, variations were valid only if made in writing.

148 The amount of the fine does have to be reduced by reference to losses suffered by the applicant and its subsidiary BASF C & I, since the Commission is not required to take into account the negative financial situation of the addressee of the decision. In any event, the losses suffered by the British subsidiary between 1985 and 1989 were compensated for by BASF's profits on the sale of vehicle refinishing products in the United Kingdom over the same period.

149 The Commission challenges the applicant's argument that there was no deliberate intention to restrict competition because the parties were unaware that they were infringing Community law. Any error of law that may have been committed by BASF's lawyers did nothing to alter the fact that the intention of BASF was to

impose a passing-on obligation on Accinauto and thereby to control parallel exports to the United Kingdom.

150 The Commission observes, moreover, that, in fixing the fine at ECU 2 700 000, it remained well below the figure of 10% of the applicant's overall turnover in the preceding business year, that being the ceiling prescribed by Article 15(2) of Regulation No 17.

— Findings of the Court

151 Under Article 15(2) of Regulation No 17, the Commission may by decision impose on undertakings which have intentionally or negligently infringed Article 85(1) of the Treaty fines of between ECU 1 000 and 1 000 000 or a sum in excess thereof but not exceeding 10% of the turnover in the preceding business year of each of the undertakings participating in the infringement. Within those limits, the amount of the fine is determined by reference to the seriousness of the infringement and its duration (*Musique Diffusion Française*, paragraph 118; Case T-327/94 *SCA Holding* v *Commission* [1998] ECR II-1373, paragraph 175).

152 For an infringement of the competition rules of the Treaty to be considered to have been committed intentionally, it is not necessary for the undertaking to have been aware that it was infringing a prohibition laid down by those rules; it is sufficient that it was aware that the object of the offending conduct was to restrict competition (*IAZ*, paragraph 45; Case T-66/92 *Herlitz* v *Commission* [1994] ECR II-531, paragraph 45). As the Court has already found, the applicant cannot have been unaware that the object of the offending clause in the 1982 agreement

was to restrict parallel imports, and, as a result, by partitioning the various national markets, to thwart the very objective of realising the single market which the Treaty seeks to attain. The advice of a lawyer, which the applicant pleads in its aid, cannot exonerate it in that respect (*Miller*, paragraph 18).

153 The Court finds in this case that the Commission complied with the ceiling laid down by Regulation No 17, which refers to the overall turnover of the undertaking concerned (*Musique Diffusion Française*, paragraph 119; Case T-83/91 *Tetra Pak* v *Commission* [1994] ECR II-755, paragraph 247). The Commission stated at the hearing that the amount of ECU 2 700 000 was calculated by applying a coefficient of 7.5% to the turnover of ECU 36 600 000 which, according to information supplied by BASF, was achieved in 1991 through sales of Glasurit products in the United Kingdom, Belgium and Luxembourg. The amount of the fine thus represented only 0.3% of BASF's overall turnover in 1991, which reached approximately ECU 834 000 000 (DEM 1 668 000 000; see paragraph 1 above).

154 It is settled case-law that the amount of the fine must be fixed at a level which takes account of the circumstances and the gravity of the infringement, the last-mentioned matter to be appraised by taking account of the nature of the restrictions on competition (*Parker Pen*, paragraph 92; Joined Cases T-213/95 and T-18/96 *SCK and FNK* v *Commission* [1997] ECR II-1739, paragraph 246).

155 In the contested decision, the Commission was right in finding that the infringement was particularly serious, having regard, in particular, to the nature of the restriction on competition in question and BASF's strong position on the market for vehicle refinishing paints in Europe.

156 The Commission's assessment of the duration of the infringement is, furthermore, in no way erroneous, given that that infringement has been characterised as being the conclusion by the parties of an agreement containing a clause pursuing an object contrary to Article 85(1) of the Treaty. Even if the Court were unable to

find that such a clause was implemented, the fact remains that its mere existence was capable of creating a 'visual and psychological' effect which contributed to a partitioning of the market (*Miller*, paragraph 7; *Herlitz*, paragraph 40). The infringement which began when the 1982 agreement was concluded did not therefore end until the offending clause was effectively removed.

157 It should also be noted that the Commission accepted as a mitigating circumstance the fact that the parties terminated the infringement on 1 January 1992, before the statement of objections was sent to them on 12 May 1993.

158 Finally, the Commission cannot be blamed for not having taken the possibly difficult financial situation of the applicant into account as a mitigating factor. To have done so would have been tantamount to conferring on the applicant an unjustified competitive advantage in relation to undertakings better adapted to market conditions (*IAZ*, paragraph 55).

159 In those circumstances, this Court finds that, in setting the fine on the applicant at ECU 2 700 000, the Commission did not exceed the bounds of the discretion which it enjoys in determining the amount of fines.

160 In the light of all the foregoing considerations, the applicant's claims must be dismissed in their entirety, without its being necessary to examine its claim that the Commission should repay the costs connected with the bank guarantee securing payment of the fine.

## Costs

161 Under Article 87(2) of the Rules of Procedure, 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 and the Commission has applied for costs, the applicant must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

**1. Dismisses the application;**

**2. Orders the applicant to pay the costs.**

Vesterdorf Moura Ramos Mengozzi

Delivered in open court in Luxembourg on 19 May 1999.

H. Jung

Registrar

B. Vesterdorf

President