JUDGMENT OF THE COURT

6 January 2004 *

In Joined Cases C-2/01 P and C-3/01 P,

Bundesverband der Arzneimittel-Importeure eV, established in Mülheim an der Ruhr (Germany), represented by U. Zinsmeister and W.A. Rehmann, Rechtsanwälte, with an address for service in Luxembourg,

appellant,

supported by

European Association of Euro Pharmaceutical Companies (EAEPC), established in Brussels (Belgium), represented by M. Epping and M. Lienemeyer, Rechtsanwälte, with an address for service in Luxembourg,

intervener at the appeal stage,

* Language of the case: German.

Commission of the European Communities, represented by K. Wiedner and W. Wils, acting as Agents, assisted by H.-J. Freund, Rechtsanwalt, with an address for service in Luxembourg,

appellant,

supported by

Kingdom of Sweden, represented by A. Kruse, acting as Agent, with an address for service in Luxembourg,

and by

European Association of Euro Pharmaceutical Companies (EAEPC),

interveners at the appeal stage,

TWO APPEALS against the judgment of the Court of First Instance of the European Communities (Fifth Chamber, Extended Composition) of 26 October 2000 in Case T-41/96 *Bayer* v *Commission* [2000] ECR II-3383, seeking to have that judgment set aside,

the other parties to the proceedings being:

Bayer AG, established in Leverkusen (Germany), represented by J. Sedemund, Rechtsanwalt, with an address for service in Luxembourg,

applicant at first instance,

and

European Federation of Pharmaceutical Industries' Associations, established in Geneva (Switzerland), represented by A. Woodgate, solicitor, with an address for service in Luxembourg,

intervener at first instance,

THE COURT,

composed of: V. Skouris, President, P. Jann, C.W.A. Timmermans and J.N. Cunha Rodrigues (Presidents of Chambers), D.A.O. Edward (Rapporteur), A. La Pergola, J.-P. Puissochet, R. Schintgen, F. Macken, N. Colneric and S. von Bahr, Judges,

Advocate General: A. Tizzano,
Registrar: H.A. Rühl, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 12 November 2002, at which the Bundesverband der Arzneimittelimporteure eV was represented by W.A. Rehmann, the Commission by K. Wiedner, assisted by H.-J. Freund, the European Association of Euro Pharmaceutical Companies (EAEPC) by A. Martin-Ehlers, Rechtsanwalt, Bayer AG by J. Sedemund, and the European Federation of Pharmaceutical Industries' Associations by A. Woodgate,

after hearing the Opinion of the Advocate General at the sitting on 22 May 2003,

gives the following

Judgment

1 By two applications lodged at the Court Registry on 5 January 2001, the Bundesverband der Arzneimittel-Importeure eV ('BAI') and the Commission of the European Communities lodged an appeal under Article 49 of the EC Statute of the Court of Justice against the judgment of the Court of First Instance of 26 October 2000 in Case T-41/96 *Bayer* v *Commission* [2000] ECR II-3383 ('the judgment under appeal') by which the Court annulled Commission Decision 96/478/EC of 10 January 1996 relating to a proceeding under Article 85 of the EC Treaty (Case IV/34.279/F3 — Adalat) (OJ 1996 L 201, p. 1; 'the contested decision').

Background to the dispute

Facts

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

'1 The applicant, Bayer AG (hereinafter "Bayer" or "the Bayer Group"), is the parent company of one of the main European chemical and pharmaceutical groups and has a presence through its national subsidiaries in all the Member States of the Community. For many years, it has manufactured and marketed under the trade name "Adalat" or "Adalate" a range of medicinal preparations whose active ingredient is nifedipine, designed to treat cardio-vascular disease.

2 In most Member States, the price of Adalat is directly or indirectly fixed by the national health authorities. Between 1989 and 1993, the prices fixed by the Spanish and French health services were, on average, 40% lower than prices in the United Kingdom.

3 Because of those price differences, wholesalers in Spain exported Adalat to the United Kingdom from 1989 onwards. French wholesalers followed suit as from 1991. According to Bayer, sales of Adalat by its British subsidiary, Bayer UK, fell by almost half between 1989 and 1993 on account of the parallel imports, entailing a loss in turnover of DEM 230 million for the British subsidiary, representing a loss of revenue to Bayer of DEM 100 million.

4 Faced with that situation, the Bayer Group changed its delivery policy, and began to cease fulfilling all of the increasingly large orders placed by wholesalers in Spain and France with its Spanish and French subsidiaries. That change took place in 1989 for orders received by Bayer Spain and in the fourth quarter of 1991 for those received by Bayer France.'

The contested decision

3 Following complaints by some of the wholesalers concerned, the Commission started an administrative investigation procedure concerning alleged infringements of Article 85(1) of the EC Treaty (now Article 81(1) EC) by the subsidiaries of Bayer in France ('Bayer France') and Spain ('Bayer Spain'). On 10 January 1996, the Commission adopted the contested decision.

4 According to the Commission, Bayer France and Bayer Spain infringed Article 85(1) of the Treaty by imposing an export ban as part of their commercial relations with their respective wholesalers. It maintains that such an agreement constituted an appreciable restriction of competition and had an equally appreciable effect on trade between Member States (points 155 to 199 of the contested decision).

5 More particularly, the Commission has deduced the existence of that export ban from its analysis of Bayer's conduct, and especially from the existence of a system of identifying exporting wholesalers and applying successive reductions in the volumes delivered to them by Bayer France and Bayer Spain if the wholesalers concerned were exporting all or part of the medicinal products supplied to them.

6 According to the Commission's analysis, delivery of the volumes which Bayer France and Bayer Spain had agreed to supply was subject to compliance with an export ban. Bayer France and Bayer Spain adjusted the volumes delivered by reference to the wholesalers' conduct in response to the export ban. If they infringed it, wholesalers faced a further automatic reduction in the supplies of medicinal products.

7 In the light of those considerations, the Commission concluded, in recital 170 of the contested decision, that Bayer France and Bayer Spain had subjected their wholesalers to a permanent threat of reducing the quantities supplied, a threat which was repeatedly carried out if they did not comply with the export ban.

8 The Commission held that the conduct of the wholesalers showed that they had not only understood that an export ban applied to the goods supplied, but also that they had aligned their conduct on that ban. They had thereby demonstrated, at least in appearance in relation to Bayer France and Bayer Spain, their acceptance of the export ban imposed by their supplier as part of the continuous commercial relations which the wholesalers had with that supplier. In that respect, the Commission explains in points 182 and 183 of the contested decision:

'(182) By using various devices in order to obtain supplies, in particular that of spreading orders intended for export among... various agencies... and [placing orders] with other "non-supervised" wholesalers... , the wholesalers adjusted the way in which their orders were presented so as to bring them into line with Bayer France and Bayer Spain's requirement that export of the product was to be prohibited.

(183) They began to present their orders to their supplier, Bayer France or Bayer Spain, in such a way as to suggest that the orders were intended to cover only domestic requirements. Once the two companies had seen through this initial ploy, the wholesalers even began to comply with the national "quotas" imposed by their supplier, negotiating as far as they could to increase them to the maximum, thus bowing to the strict application of and compliance with the figures regarded by Bayer France and Bayer Spain as normal for the supplying of the domestic market.'

9 The Commission concludes, in recital 184 of the contested decision, that that behaviour demonstrated the wholesalers' compliance with the export ban which was incorporated into the continuous commercial relations between Bayer France and Bayer Spain and their wholesalers. In its view, therefore, there was an agreement within the meaning of Article 85(1) of the Treaty.

10 The Commission therefore held, in Article 1 of the contested decision, that 'the prohibition on the exportation to other Member States of the products Adalate and Adalate 20 mg LP from France and on that of the products Adalat and Adalat-Retard from Spain, as has been agreed as part of their ongoing business relations, between Bayer France and its wholesalers since 1991, and between Bayer Spain and its wholesalers since at least 1989, constitutes an infringement of Article 85(1) of the Treaty on the part of Bayer AG'.

11 In the words of Article 2 of the contested decision:

'Bayer AG shall bring the infringement to an end and shall in particular:

— send, within two months of notification of this decision, a circular to the wholesalers in France and in Spain stating that exports are allowed within the Community and are not penalised,

— include this clarification, within two months of notification of this decision, in the general terms and conditions of sale for France and Spain.'

12 Article 3 of the contested decision imposed a fine of ECU 3 million on Bayer, and Article 4 imposed a periodic penalty payment of ECU 1 000 in respect of each day of delay in carrying out the requirements specifically set out in Article 2, following the expiry of the two-month time-limit specified for their implementation.

The procedure before the Court of First Instance and the judgment under appeal

13 By application lodged at the Registry of the Court of First Instance on 22 March 1996, Bayer brought an action for the annulment of the contested decision. By separate document lodged at the Court Registry on the same day, it also applied for suspension of the operation of Article 2 of that decision. By order of the President of the Court of First Instance of 3 June 1996, suspension of the operation of Article 2 of the contested decision was granted and costs were reserved.

14 On 1 August 1996, a German association of importers of medicinal products, the Bundesverband der Arzneimittel-Importeure eV ('BAI') applied for leave to intervene in support of the Commission. On 26 August 1996, the European

Federation of Pharmaceutical Industries' Associations ('EFPIA'), a trade association representing the interests of 16 national trade associations in the medicinal products industry, applied for leave to intervene in support of Bayer. By orders of 8 November 1996, the President of the Fifth Chamber (Extended Composition) of the Court of First Instance granted the two associations leave to intervene.

15 On hearing the report of the Judge-Rapporteur, the Court of First Instance decided to open the oral proceedings and, by way of measures of organisation of procedure pursuant to Article 64 of the Rules of Procedure, to put a series of questions in writing to Bayer and the Commission, requesting them to reply at the hearing. The parties presented oral argument and replied to the written and oral questions of the Court of First Instance at the hearing on 28 October 1999.

16 In the judgment now under appeal, the Court of First Instance annulled the contested decision and ordered the Commission to pay Bayer's costs on the ground that it had incorrectly assessed the facts of the case and made an error in the legal assessment of those facts by holding it to be established that there was a meeting of minds between Bayer and the wholesalers referred to in that decision, which justified the conclusion that there was an agreement within the meaning of Article 85(1) of the Treaty, designed to prevent or limit exports of Adalat from France and Spain to the United Kingdom.

17 In reaching that conclusion, the Court of First Instance began by summarising, in paragraphs 66 to 72 of the judgment under appeal, the case-law concerning the concept of an 'agreement' within the meaning of Article 85(1) of the Treaty, especially where such an agreement is found to exist on the strength of apparently unilateral conduct of the manufacturer. In that regard, the Court emphasised in particular that, 'where a decision on the part of a manufacturer constitutes unilateral conduct of the undertaking, that decision escapes the prohibition in Article 85(1) of the Treaty' (paragraph 66). It continued by stating that 'a distinction should be drawn between cases in which an undertaking has adopted a genuinely unilateral measure, and thus without the express or implied participation of another undertaking, and those in which the unilateral character of the measure is merely apparent. Whilst the former do not fall within

Article 85(1) of the Treaty, the latter must be regarded as revealing an agreement between undertakings and may therefore fall within the scope of that article. That is the case, in particular, with practices and measures in restraint of competition which, though apparently adopted unilaterally by the manufacturer in the context of its contractual relations with its dealers, nevertheless receive at least the tacit acquiescence of those dealers' (paragraph 71).

18 In that context, and faced with the statement by Bayer that, although it had introduced a unilateral policy designed to reduce parallel imports, it had never planned or imposed an export ban, the Court of First Instance took the view that 'in order to determine whether the Commission [had] established to the requisite legal standard the existence of a concurrence of wills between the parties concerning the limitation of parallel exports, it [was] necessary to consider whether, as [Bayer] maintains, the Commission [had] wrongly assessed the respective intentions of Bayer and the wholesalers' (paragraph 77 of the judgment under appeal).

19 As for the alleged intention of Bayer to impose an export ban, the Court held, in paragraph 109 of the judgment under appeal, that the Commission had not proved to the requisite legal standard either that Bayer France and Bayer Spain imposed an export ban on their respective wholesalers, or that Bayer established a systematic monitoring of the actual final destination of the packets of Adalat supplied after the adoption of its new supply policy, or that [Bayer] applied a policy of threats and penalties against exporting wholesalers, or that it made supplies of that product conditional on compliance with the alleged export ban. Nor, in the Court's view, did the documents reproduced in the contested decision show that Bayer sought to obtain any form of agreement from the wholesalers concerning the implementation of its policy designed to reduce parallel imports. In its judgment, the documents relied upon by the Commission did not provide any evidence in support of the assertion that the applicant made its supply policy for each wholesaler conditional upon the actual conduct of the latter in relation to the final destination of the products supplied.

20 The Court of First Instance then examined, in paragraphs 111 to 157 of the judgment under appeal, the attitude and the actual conduct of the wholesalers in order to determine whether there was an agreement within the meaning of Article 85(1) of the Treaty. It concluded, first of all, that the Commission's finding that the wholesalers had aligned their conduct in accordance with the alleged export ban failed on factual grounds, particularly because the Commission had not sufficiently established in law that Bayer had imposed an export ban on its wholesalers, or that supplies were made conditional on compliance with that alleged export ban (paragraphs 119 and 122 of the judgment under appeal).

21 The Court therefore examined whether, having regard to the actual conduct of the wholesalers following the adoption by Bayer of its new policy of restricting supplies, the Commission could legitimately conclude that they acquiesced in that policy (paragraph 124). Having taking into consideration the documents referred to in the contested decision, it determined as follows:

> '151 Examination of the attitude and actual conduct of the wholesalers shows that the Commission has no foundation for claiming that they aligned themselves on [Bayer's] policy designed to reduce parallel imports.
>
> 152 The argument based on the fact that the wholesalers concerned had reduced their orders to a given level in order to give Bayer the impression that they were complying with its declared intention thereby to cover only the needs of their traditional market, and that they acted in that way in order to avoid penalties, must be rejected, because the Commission has failed to prove that [Bayer] demanded or negotiated the adoption of any particular line of conduct on the part of the wholesalers concerning the destination for export of the packets of Adalat which it had supplied, and that it penalised the exporting wholesalers or threatened to do so.

153 For the same reasons, the Commission cannot claim that the reduction in orders could be understood by Bayer only as a sign that the wholesalers had accepted its requirements, or maintain that it is because they satisfied [Bayer's] requirements that they had to procure extra quantities destined for export from wholesalers who were not "suspect" in Bayer's eyes and whose higher orders were therefore fulfilled without difficulty.

154 Moreover, it is obvious from the recitals of the [contested decision] examined above that the wholesalers continued to try to obtain packets of Adalat for export and persisted in that line of activity, even if, for that purpose, they considered it more productive to use different systems to obtain supplies, namely the system of distributing orders intended for export among the various agencies on the one hand, and that of placing orders indirectly through small wholesalers on the other. In those circumstances, the fact that the wholesalers changed their policy on orders and established various systems for breaking them down or diversifying them, by placing them through indirect means, cannot be construed as evidence of their intention to satisfy Bayer or as a response to any request from Bayer. On the contrary, that fact could be regarded as demonstrating the firm intention on the part of the wholesalers to continue carrying on parallel exports of Adalat.

155 In the absence of evidence of any requirement on the part of [Bayer] as to the conduct of the wholesalers concerning exports of the packets of Adalat supplied, the fact that they adopted measures to obtain extra quantities can be construed only as a negation of their alleged acquiescence. For the same reasons, the Court must also reject the Commission's argument that, in the circumstances of the case, it is normal that certain wholesalers should have tried to obtain extra supplies by circuitous means since they had to undertake to Bayer not to export and thus to order reduced quantities, not capable of being exported.

156 Nor, finally, has the Commission proved that the wholesalers wished to pursue Bayer's objectives or wished to make Bayer believe that they did. On the contrary, the documents examined above demonstrate that the wholesalers adopted a line of conduct designed to circumvent Bayer's new policy of restricting supplies to the level of traditional orders.

157 The Commission was therefore wrong in holding that the actual conduct of the wholesalers constitutes sufficient proof in law of their acquiescence in [Bayer's] policy designed to prevent parallel imports.'

22 The Court of First Instance pursued its reasoning with an analysis of the case-law precedents cited by the Commission in order to establish the existence in this case of an agreement within the meaning of Article 85(1) of the Treaty, before concluding, in paragraph 171 of the judgment under appeal, that the Commission could not successfully rely on those precedents in order to call into question the analysis which had led the Court to conclude that, in this case, the wholesalers' acquiescence in Bayer's new policy had not been established and that, therefore, the Commission had failed to prove the existence of such an agreement.

23 Concerning the judgment in Case C-277/87 *Sandoz Prodotti Farmaceutici* v *Commission* [1990] ECR I-45, the Court of First Instance held:

'161 That case concerned the penalty imposed by the Commission on a subsidiary of a multinational pharmaceutical company, Sandoz, which was guilty of inserting into invoices which it sent to customers (wholesalers, pharmacies and hospitals) the express words "export prohibited". Sandoz had not denied the presence of those words in its invoices, but had disputed that there was an agreement within the meaning of Article 85(1) of the Treaty. The Court of Justice dismissed the action

after replying to each of the applicant's arguments. It considered that the sending of invoices with those words did not constitute unilateral conduct, but, on the contrary, formed part of the general framework of commercial relations which the undertaking maintained with its customers. It reached that conclusion after examining the way in which the undertaking proceeded before authorising a new customer to market its products and taking into account the practices repeated and applied uniformly and systematically at each sales operation (paragraph 10 of the judgment). It was at that stage in its reasoning that the Court of Justice dealt with the question of the acquiescence of the commercial partners in the export ban, mentioned in the invoice, in the following terms:

"It should also be noted that the customers of Sandoz PF were sent the same standard invoice after each individual order or, as the case may be, after the delivery of the products. The repeated orders of the products and the successive payments without protest by the customer of the prices indicated on the invoices, bearing the words 'export prohibited', constituted a tacit acquiescence on the part of the latter in the clauses stipulated in the invoice and the type of commercial relations underlying the business relations between Sandoz PF and its clientele. The approval initially given by Sandoz PF was thus based on the tacit acceptance on the part of the customers of the line of conduct adopted by Sandoz PF towards them."

162 It was only after those findings that the Court of Justice concluded that the Commission was entitled to take the view that "the whole of the continuous commercial relations, of which the 'export prohibited' clause formed an integral part, established between Sandoz PF and its customers, were governed by a pre-established general agreement applicable to the innumerable individual orders for Sandoz products. Such an agreement is covered by the provisions of Article 85(1) of the Treaty".

163 Although the two cases resemble each other in that they concern attitudes of pharmaceutical groups designed to prevent parallel imports of medicinal products, the concrete circumstances characterising them are very different. In the first place, unlike the situation in the present case, the manufacturer in *Sandoz* had expressly introduced into all its invoices a clause restraining competition, which, by appearing repeatedly in documents concerning all transactions, formed an integral part of the contractual relations between Sandoz and its wholesalers. Second, the actual conduct of the wholesalers in relation to the clause, which they complied with *de facto* and without discussion, demonstrated their tacit acquiescence in that clause and the type of commercial relations underlying it. On the facts of the present case, however, neither of the two principal features of *Sandoz* is to be found; there is no formal clause prohibiting export and no conduct of non-contention or acquiescence, either in form or in reality.'

24 Concerning the judgment in Case C-279/87 *Tipp-Ex* v *Commission* [1990] ECR I-261, also cited by the Commission, in which the Court of Justice confirmed a Commission decision penalising an agreement designed to prevent exports and in which, unlike the situation in *Sandoz*, there had not been a written stipulation concerning the export ban, the Court of First Instance held:

'165 That case concerned an exclusive distribution agreement between Tipp-Ex and its French distributor, DMI, which had complied with the manufacturer's demand that the prices charged to a customer should be raised so far as was necessary to eliminate any economic interest on his part in parallel imports. Moreover, it had been established that the manufacturer carried out subsequent checks so as to give the exclusive distributor an incentive actually to adopt that conduct (recital 58 of Commission Decision 87/406/EEC of 10 July 1987 relating to a proceeding under Article 85 of the EEC Treaty (OJ 1987 L 222, p. 1). Paragraphs 18 to 21 of the judgment show the reasoning followed by the Court of Justice, which, after finding the existence of a verbal exclusive distribution agreement for France between Tipp-Ex and DMI and recalling the principal facts, wished to examine the reaction of and, therefore, the conduct adopted by the

distributor following the penalising conduct adopted by the manufacturer. The Court of Justice then found that the distributor "reacted by raising by between 10 and 20% the prices charged only to the undertaking ISA France. After the interruption of ISA France's purchases from DMI during the whole of 1980, DMI refused at the beginning of 1981 itself to supply Tipp-Ex products to ISA France". It was only after those findings with regard to the conduct of the manufacturer and the distributor that the Court of Justice arrived at its conclusion as to the existence of an agreement within the meaning of Article 85(1) of the Treaty:

"It is therefore established that DMI acted upon the request of Tipp-Ex not to sell to customers who resell Tipp-Ex products in other Member States" (paragraph 21 of the judgment).

166 In *Tipp-Ex*, therefore, unlike the situation in the present case, there was no doubt as to the fact that the policy of preventing parallel exports was established by the manufacturer with the cooperation of the distributors. As indicated in that judgment, that intention was already manifest in the oral and written contracts existing between the two parties (see paragraphs 19 and 20 concerning the distributor DMI and 22 and 23 concerning the distributor Beiersdorf) and, if there were any remaining doubt, analysis of the behaviour of the distributors, pressed by the manufacturer, showed very clearly their acquiescence in the intentions of Tipp-Ex in restriction of competition. The Commission had proved not only that the distributors had reacted to threats and pressure on the part of the manufacturer, but also the fact that at least one of them had sent the manufacturer proof of its cooperation. Finally, the Commission itself observes in this case that, in *Tipp-Ex*, in order to determine whether an agreement existed, the Court of Justice took the approach of analysing the reaction of the distributors to the conduct of the manufacturer running counter to parallel exports and that it was in assessing that reaction of the distributor that it concluded that there must be an agreement in existence between it and Tipp-Ex designed to prevent parallel exports.

167 It follows that that judgment, like *Sandoz*, merely confirms the case-law to the effect that, although apparently unilateral conduct by a manufacturer may lie at the root of an agreement between undertakings within the meaning of Article 85(1) of the Treaty, this is on condition that the subsequent conduct of the wholesalers or customers may be interpreted as *de facto* acquiescence. As that condition is not fulfilled in this case, the Commission cannot rely on the alleged similarity between these two cases in support of its argument that acquiescence existed in this case.'

25 In relation to the judgments in Case 107/82 *AEG* v *Commission* [1983] ECR 3151 and Joined Cases 25/84 and 26/84 *Ford* v *Commission* [1985] ECR 2725, the Court of First Instance held:

'170 In *AEG*, in which the respective intentions of the manufacturer and the distributors do not appear clearly and in which the applicant expressly relied on the unilateral nature of its conduct, the Court of Justice considered that, in the context of a selective distribution system, a practice whereby the manufacturer, with a view to maintaining a high level of prices or to excluding certain modern channels of distribution, refused to approve distributors who satisfied the qualitative criteria of the system did "not constitute, on the part of the undertaking, unilateral conduct which, as AEG claims, would be exempt from the prohibition contained in Article 85(1) of the Treaty. On the contrary, it forms part of the contractual relations between the undertaking and resellers" (paragraph 38). The Court of Justice then sought to determine the existence of acquiescence by the distributors by stating: "Indeed, in the case of the admission of a distributor, approval is based on the acceptance, tacit or express, by the contracting parties of the policy pursued by AEG which requires inter alia the exclusion from the network of all distributors who are qualified for admission but are not prepared to adhere to that policy" (paragraph 38). That approach has been confirmed in the other selective-distribution cases decided by the Court of Justice [Joined Cases 25/84 and 26/84 *Ford and Ford Europe* v *Commission* [1985] ECR 2725, paragraph 21; Case 75/84 *Metro* v *Commission* ("*Metro II*") [1986] ECR 3021, paragraphs 72 and 73; Case C-70/93 *BMW* v *ALD* [1995] ECR I-3439, paragraphs 16 and 17]'.

26 In relation to the judgment in Joined Cases 32/78 and 36/78 to 82/78 *BMW Belgium and Others* v *Commission* [1979] ECR 2435, the Court of First Instance held:

> '169 In *BMW Belgium*, in order to determine whether there was an agreement within the meaning of Article 85(1) of the Treaty between BMW and its Belgian dealers, the Court of Justice examined the measures capable of demonstrating the existence of an agreement, in that case circulars sent to BMW dealers, "according to their tenor and in relation to the legal and factual context in which they [were] set", and concluded that the circulars in question "indicate[d] an intention to put an end to all exports of new BMW vehicles from Belgium" (paragraph 28). It added that "in sending those circulars to all the Belgian dealers, BMW Belgium played the leading role in the conclusion with those dealers of an agreement designed to halt such exports completely" (paragraph 29). Paragraph 30 of that judgment shows that the Court of Justice intended to confirm the existence of acquiescence by the dealers.'

27 The Court of First Instance also dismissed, in paragraphs 173 to 181 of the judgment under appeal, the Commission's argument that the mere finding of fact that the wholesalers did not interrupt their business relations with Bayer after the latter established its new policy designed to restrain exports gave sufficient grounds for a finding that the existence of an agreement between undertakings within the meaning of Article 85(1) of the Treaty was established. On the contrary, it held that the proof of an agreement between undertakings within the meaning of that provision must be based upon the direct or indirect finding of the existence of the subjective element that characterises the very concept of an agreement, that is to say a meeting of minds between economic operators.

28 More particularly, in paragraphs 179 to 182 of the judgment under appeal, the Court of First Instance complains that the Commission is trying to widen the scope of the 'Rules applying to undertakings' in Section 1 of Chapter 1 of Title V of the Treaty.

29 As a result, the Court of First Instance annulled the contested decision without examining Bayer's alternative pleas, alleging erroneous application of Article 85(1) of the Treaty to conduct that was legitimate under Article 47 of the Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties (OJ 1985 L 302, p. 23), and misapplication of Article 15 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) in imposing a fine on Bayer.

Procedure and forms of order sought

30 By order of the President of the Court of Justice of 28 March 2001, Cases C-2/01 P and C-3/01 P were joined for the purposes of the written procedure, the oral procedure and the judgment.

31 On 9 April 2001, the European Association of Euro Pharmaceutical Companies ('EAEPC'), an association representing the interests of European pharmaceutical companies, applied for leave to intervene in support of BAI and the Commission. By order of 26 September 2001, the President of the Court of Justice allowed the intervention of EAEPC.

32 On 23 April 2001, pursuant to the first paragraph of Article 37 of the EC Statute of the Court of Justice, the Kingdom of Sweden applied for leave to intervene in support of the Commission. By order of 25 June 2001, the President of the Court of Justice allowed the intervention of the Kingdom of Sweden.

33 BAI claims that the Court should:

— annul the judgment under appeal and dismiss the claims of Bayer at first instance;

— in the alternative, refer the matter back before the Court of First Instance;

— order Bayer to pay the costs, including those incurred by BAI in connection with its intervention at first instance.

34 The Commission claims that the Court should:

— annul the judgment under appeal and dismiss Bayer's action against the contested decision;

— order Bayer, in its capacity as respondent and as applicant, to pay the costs of the cases before the Court of Justice and the Court of First Instance.

35 Bayer, the applicant at first instance, contends that the Court should:

— dismiss the Commission's appeal in its entirety;

— order the Commission to pay the costs of the appeal.

36 EFPIA, the intervener in support of Bayer at first instance, contends that the Court should:

— dismiss the appeal of the Commission and BAI;

— order the Commission to reimburse to EFPIA the costs which it has incurred.

37 The Kingdom of Sweden, intervening in support of the Commission, contends that the judgment under appeal should be annulled.

38 EAEPC, intervening in support of BAI and the Commission, contends that the Court should:

— annul the judgment under appeal and dismiss Bayer's application at first instance;

— in the alternative, refer the matter back before the Court of First Instance;

— order Bayer to pay the costs.

Summary of the parties' pleas

39 BAI advances three pleas in law in support of its appeal, arguing, first, that the Court of First Instance failed fully to take into account the facts on which the contested decision was based, second, that it made an erroneous assessment of the evidence in breach of the rules on the burden of proof, and, third, that it erred in law as to the legal criteria used to determine the existence of an agreement within the meaning of Article 85(1) of the Treaty.

40 The Commission makes a general criticism of the restrictive approach of the Court of First Instance in applying Article 85(1) of the Treaty to export restrictions, before advancing five more precise pleas in law, essentially arguing that the Court of First Instance used too restrictive an interpretation of the concept of an 'agreement' within the meaning of that provision, that it erred in law as to the application of Article 85(1), and that it misinterpreted the evidence.

41 The pleas in law concerning the legal assessment by the Court of First Instance in relation to the concept of an 'agreement' within the meaning of Article 85(1) of the Treaty generally raise the question whether the Court accepted an excessively restrictive interpretation of that provision, excluding the possibility that an agreement including an export ban might be considered to have been concluded in a situation such as that under examination in the present case.

Preliminary observation

42 Before examining the pleas in law which have been advanced, it should be noted that, in the contested decision, the Commission confined itself strictly to the examination of one complaint, alleging the existence of an 'agreement' within the meaning of Article 85(1) of the Treaty between Bayer and its wholesalers, and that it did so in the context of a market defined by reference to the main therapeutic indications for the product in question, namely Adalat. It should be made clear, therefore, that neither the possible application of other aspects of Article 85, nor Article 86 of the EC Treaty (now Article 82 EC), nor any other possible definitions of the relevant market are at issue in these proceedings.

The pleas concerning the factual findings

43 Both BAI and the Commission challenge the factual findings of the Court of First Instance, arguing that it failed to take full account of the facts on which the Commission based its decision, concerning, respectively, the checks allegedly carried out by Bayer as to the final destination of the products ordered and the intention of the wholesalers to make Bayer believe that they would henceforth place orders only for the needs of their national market.

The checks allegedly carried out by Bayer

Arguments of the parties

44 In its first plea, BAI challenges the accuracy of the finding of the Court of First Instance, in paragraph 109 of the judgment under appeal, that the Commission

failed to establish that Bayer instituted monitoring of the final destination of the products delivered to Spanish and French wholesalers. The Court of First Instance therefore reached an erroneous legal assessment, its conclusion that there was no agreement within the meaning of Article 85(1) of the Treaty having been reached by overlooking relevant evidence on the file.

45 Relying on the documents referred to by the Commission in recitals 140 and 80 of the contested decision, BAI argues that Bayer had managed to trace back as far as Spanish wholesalers by means of the serial numbers of consignments found in the United Kingdom. Contrary to the finding of the Court of First Instance, BAI argues that those documents show that such checks took place, even if they concerned only a limited number of consignments.

46 Both Bayer and EFPIA argue that this plea is inadmissible, since it seeks only to challenge the assessment of the facts by the Court of First Instance in paragraphs 105, 108 and 109 of the judgment under appeal. Bayer adds that this plea is based on an erroneous version of the facts since, even if serial numbers 'may' lead to exporting wholesalers, they do not prove that such checks actually took place. In any event, Bayer denies that serial numbers enable given operators to be identified, since a given number is normally found on consignments sent to several wholesalers.

Findings of the Court

47 Under Article 225 EC and Article 58 of the Statute of the Court of Justice, whereby an appeal before the Court of Justice is limited to points of law, the Court of First Instance has exclusive jurisdiction, first, to establish the facts except where the substantive inaccuracy of its findings is apparent from the

documents submitted to it and, second, to assess those facts, save where the evidence has been misinterpreted. When the Court of First Instance has established or assessed the facts, the Court of Justice has jurisdiction under Article 225 EC only to review the legal characterisation of those facts by the Court of First Instance and the legal conclusions it has drawn from them (Case C-7/95 P *Deere* v *Commission* [1998] ECR I-3111, paragraph 21).

48 Here, in its first plea, BAI is challenging only the assessment of the facts by the Court of First Instance and, in particular, the fact that the Court, while taking the documents referred to in the contested decision into consideration, concluded that the Commission had not proved to the requisite legal standard that there was 'systematic monitoring' by Bayer of the final destination of the consignments of Adalat delivered to wholesalers after the adoption of its new policy on the supply of medicinal products. Therefore, the objection of inadmissibility raised by Bayer and EFPIA is well founded, and BAI's first plea must be dismissed.

The wholesalers' intention to make Bayer believe that they would henceforth place orders only for the needs of their national market

Arguments of the parties

49 In its third plea, the Commission argues that the Court of First Instance failed to take into account, or misinterpreted, several pieces of evidence when it held in paragraph 126 of the judgment under appeal that the documents relied on by the Commission in the contested decision did not demonstrate that the wholesalers wished to give Bayer the impression that they were following its new commercial policy.

50 The Commission argues, first, that the Court of First Instance did not take account of the fact that the local branches of wholesalers, amongst whom orders intended for export were spread, were urged to show discretion after Bayer France had refused to honour orders openly intended for export, and, secondly, that the Court of First Instance did not take into consideration the fact that that distribution of desired quantities amongst local branches could have had no object other than to deceive Bayer as to their export plans.

51 The Commission further emphasises both the intention of the wholesalers to deceive Bayer as to the level of national market needs, as demonstrated by the letters referred to in the contested decision, and the necessity of such an approach, given, on the one hand, the intention of the wholesalers to continue exporting medicinal products and, on the other, Bayer's policy of delivering such products only to meet the needs of the national market.

52 Bayer and EFPIA reply that the complaint alleging failure to take certain evidence into account should be dismissed at the outset, since in the judgment under appeal the Court of First Instance examined, and took detailed account of, all the documents mentioned by the Commission in the contested decision, with the result that this plea is directed only against the facts found by the Court of First Instance. As for the complaint that the evidence was misinterpreted, they argue, first, that the Court of First Instance expressly determined, in paragraphs 125, 128, 131 and 143 to 152 of the contested judgment, that certain undertakings feigned greater needs for the national market and, secondly, that the Commission did not even attempt to demonstrate that the Court of First Instance, in taking allegedly 'misrepresented' evidence into account, reached a different assessment. In reality, they submit, the Commission is seeking once again to challenge the factual findings of the Court of First Instance.

Findings of the Court

53 The Court notes first that, in its examination as to whether, in the absence of proof of an attempt by Bayer to obtain wholesalers' agreement to, or acquiescence in, its new commercial policy, the actual conduct of those wholesalers may lead to the conclusion that they acquiesced in that policy, the Court of First Instance took into account all the documents referred to by the Commission in the contested decision.

54 In that regard, the Court of First Instance did not in any way find that the wholesalers did not intend to deceive Bayer as to their export intentions. It merely held that the documents to which the Commission had referred did not establish that the wholesalers had wished to give Bayer the impression that, in compliance with its declared intention, they were willing to reduce their orders to a given level.

55 Secondly, concerning the alleged misinterpretation of the evidence, the Court of First Instance has, on the one hand, nowhere denied that, in response to Bayer's policy, certain wholesalers preferred to place orders by distributing them around their local branches under the pretext of an increase in orders officially destined for the national market.

56 The Court of First Instance also expressly recognised that the wholesalers had conducted difficult negotiations with Bayer in order to persuade it that their customary national needs had grown and needed to be satisfied. However, it concluded that that fact could not be used to demonstrate that the wholesalers had acquiesced in Bayer's policy.

57 The Commission's third plea in law must therefore be dismissed as unfounded.

The burden of proof as to the existence of an agreement within the meaning of Article 85(1) of the Treaty

Arguments of the parties

58 In its second plea in law, BAI accuses the Court of First Instance of committing an error of law by accepting the principle that the burden of proof of an agreement within the meaning of Article 85(1) of the Treaty between Bayer and the wholesalers concerned rests exclusively with the Commission (paragraphs 119 to 121 of the contested decision). By so doing, the Court of First Instance disregarded the principle recognised by the Court of Justice in Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraph 96, that, where the evidence gathered by the Commission is prima facie sufficient to establish the existence of an agreement, it is for the undertaking concerned to prove that there was no meeting of minds between itself and its distributors.

59 In that regard, BAI argues that, according to the facts found by the Commission and not challenged by Bayer, there were dialogues between Bayer and the wholesalers on the occasion of the export restrictions introduced by Bayer. In the course of those dialogues, Bayer clearly demonstrated its intention to prevent parallel imports by applying sales quotas. That intention was, moreover, understood by the wholesalers, who ended by accepting such a limitation. Although the Court of First Instance correctly set out all those facts, it failed to draw the correct legal conclusions. BAI submits that, by virtue of the judgment in *Anic Partecipazioni*, the Court of First Instance should have held that the existence of an agreement within the meaning of Article 85(1) of the Treaty was prima facie established, placing on Bayer the onus of proving that there was no meeting of minds. The judgment under appeal was thus also based on that erroneous application of law.

60 In reply, both Bayer and EFPIA argue that the judgment in *Anic Partecipazioni*, concerning facts which were different from those in this case, is in no way applicable here. Bayer, supported by EFPIA, maintains that, in reality, this complaint is directed against the factual finding of the Court of First Instance that the Commission did not produce proof of the existence of an agreement within the meaning of that provision, and that it is therefore inadmissible or unfounded.

Findings of the Court

61 Concerning the objection of inadmissibility raised by Bayer and EFPIA, it is sufficient to note that the question of the allocation of the burden of proof, although it may have an impact on the findings of fact by the Court of First Instance, is a question of law. Therefore, this objection of inadmissibility is unfounded.

62 As to the merits, it should be noted that, in *Anic Partecipazioni*, contrary to what BAI is suggesting, the Court of Justice did not modify the principle that, where there is a dispute as to the existence of an infringement of the competition rules, it is for the Commission to prove the infringement which it has found and to adduce evidence capable of demonstrating to the requisite legal standard the existence of circumstances constituting an infringement.

63 In *Anic Partecipazioni*, it was established that an 'agreement', within the meaning of Article 85(1) of the Treaty, had been concluded at a meeting between various participants. The Court therefore held that an undertaking which had participated in that meeting had to bear the burden of proof if it subsequently wished to argue that it did not intend to participate in the implementation of the agreement thus established. It follows that the reversal of the burden of proof in that case took place after the existence of an agreement formed at a meeting

between three undertakings had been established. Moreover, the possibility open to the undertaking concerned, which bore the burden of proof, was to withdraw from the agreement which had been established and not to deny its very existence. Therefore, BAI cannot validly rely on the judgment in *Anic Partecipazioni* in support of its second plea, which is unfounded and must therefore be dismissed.

The pleas in law concerning the concept of an 'agreement' within the meaning of Article 85(1) of the Treaty

64 Both BAI and the Commission criticise the excessively restrictive legal assessment on the basis of which the Court of First Instance held that there was no agreement concerning an export ban falling within the scope of Article 85(1) of the Treaty.

General observations on the approach of the Court of First Instance to the concept of an 'agreement' within the meaning of Article 85(1) of the Treaty

65 The Commission maintains that the judgment under appeal departs from the case-law precedents concerning the concept of an 'agreement' within the meaning of Article 85(1) of the Treaty, and that, by doing so, it redefines the criteria required in order to prove the existence of an export ban and the existence of an agreement in the matter. It argues that the restrictive interpretation of those concepts, together with the stricter requirements concerning proof of the conclusion of an agreement between a manufacturer and a wholesaler envisaging an export ban, call into question the policy pursued by the Commission in fighting restrictions of competition based upon a system of hindrances to parallel imports.

66 In that respect, EAEPC maintains that parallel commerce is a corollary of the achievement of the internal market. The Kingdom of Sweden makes similar arguments, emphasising that, since the medicinal products sector has not been the subject of full harmonisation at European level, it is important to encourage parallel imports so as to prevent the market, which is already vulnerable to unfair conduct aimed at maintaining price differences between the Member States, from being further hindered.

67 Recalling that Member States are prohibited from in any way restricting the free movement of goods in so far as it is not justified by the Treaty, EAEPC argues that State restrictions should not be replaced by restrictions imposed by private parties.

68 According to Bayer, supported by EFPIA, the allegations concerning the scope of Article 85(1) of the Treaty are clearly unfounded. The decisions and the case-law concerning the application of that provision to export bans exclusively concerned cases in which a manufacturer had previously, expressly or tacitly, concluded an agreement with distributors concerning such a ban, in the context of which it subsequently monitored whether that export ban was complied with and imposed penalties on undertakings not complying with the terms of that agreement. That was not the case in the present proceedings, and the precedents cannot therefore be applied to them.

69 The Commission's true objective, Bayer argues, is to enlarge the scope of Article 85(1) of the Treaty and arrange matters in such a way that 'hindrance to parallel imports', falling within the principle of the free movement of goods referred to in Article 30 of the EC Treaty (now, after amendment, Article 28 EC), is established in practice as being in itself an infringement of Article 85(1) of the Treaty. In this case, the Commission is expressly seeking a harmonisation of the price of medicinal products, through the application of that provision, without carrying out a harmonisation of the legislation of the Member States, even though that legislation is the cause of the price differences. It is, Bayer argues, the

Member States and not the pharmaceutical industry which are responsible for different prices being fixed for the same medicinal product in Member States. Those distortions of competition can be eliminated only by applying Article 30 of the Treaty and by a harmonisation of the national provisions on the determination of the prices for medicinal products.

70 The attempt to use Article 85(1) of the Treaty to penalise an undertaking not in a dominant position which decides to refuse deliveries to wholesalers, in order to prevent them from making parallel exports, clearly disregards the necessary conditions for applying Article 85 and the general system of the Treaty. Under that system, measures adopted by a Member State which prevent parallel exports are indeed prohibited by Article 30 of the Treaty, but unilateral measures taken by private undertakings are subject to restrictions, by virtue of the principles of that Treaty, only if the undertaking in question occupies a dominant position on the market, within the meaning of Article 86 of the Treaty, which is not the case here.

71 It is in that context that the Court must examine the various pleas alleging an unduly restrictive interpretation by the Court of First Instance of the concept of an 'agreement' within the meaning of Article 85(1) of the Treaty.

The need for a system of monitoring and penalties as a precondition for finding an agreement concerning an export ban

Arguments of the parties

72 BAI, in its third plea, first part, subparagraph (i), and the Commission, in its first plea, supported by the Kingdom of Sweden, accuse the Court of First Instance of

interpreting Article 85(1) of the Treaty in an excessively restrictive way, in that it wrongly held the existence of a system for monitoring the final destination of consignments of Adalat delivered to exporting wholesalers and for penalising the latter to constitute a necessary condition for an agreement concerning an export ban to be regarded as having been concluded.

73 BAI argues that, although such a system of monitoring and penalties may be evidence of the existence of an agreement prohibited by Article 85(1) of the Treaty, in so far as it may have the effect of obliging the commercial partners concerned to keep their promises, that does not mean that the absence of such a system ipso facto excludes the possibility that an agreement has been concluded. BAI refers in that respect to the judgments in *Sandoz* and *Ford*, in which the Court established the existence of an anti-competitive agreement where there was no such monitoring. The requirement that such a system of monitoring and penalties be established as cumulative preconditions for establishing the existence of an agreement concerning an export ban prohibited by Article 85(1) therefore constituted an error in applying the law.

74 The Commission accuses the Court of First Instance, more particularly, of holding that an agreement concerning an export ban exists only where a system of subsequent controls of the actual final destination of the products ordered is established and penalties are applied to ensure that the products are not exported. In its argument, such an agreement exists in a case, such as the present, where a more subtle, preventive, technique is implemented, placing restrictions on supplies once there is sufficient evidence to suggest the existence of exports. With such a supply policy, direct prohibition following a particular delivery is replaced by an indirect prohibition imposed at the time when orders are placed.

75 In that respect, both the Kingdom of Sweden and EAEPC observe that, instead of imposing export prohibitions that are manifestly contrary to Community law, Bayer is henceforth placing subtle limitations on supply which, combined with the need to hold a sufficiently large quantity of medicinal products permanently in stock, produce the same effect as an export ban. Therefore, they submit, the absence of proof of a system of subsequent controls is not decisive.

76 In reply, Bayer and EFPIA maintain that this plea is in reality concerned only with the finding of facts by the Court of First Instance, and is therefore inadmissible. Moreover, the appellants' argument concerns an interpretation of Article 85(1) of the Treaty which does not appear in the judgment under appeal. Maintaining that the Court of First Instance did no more than verify the factual argument raised by the Commission that Bayer carried out subsequent monitoring of the destination of the goods delivered, Bayer, supported by EFPIA, argues that, in the judgment under appeal, it is not established that there cannot be an 'agreement' on an export ban unless the manufacturer subsequently monitors whether the wholesaler has exported the goods delivered and, if it has, penalises that exporter by reducing supplies or refusing to deliver medicinal products.

77 In addition, concerning the alleged misinterpretation of the case-law on the matter, Bayer states in its reply that, by contrast with the circumstances in this case, in all the cases cited by the Commission, and in all those on which the Court has had to rule hitherto, the manufacturer was trying rather to prevent export of the quantities delivered, whether quotas had been placed on them in advance or not, by means of express or implied import bans.

Findings of the Court

78 In these pleas, the appellants argue that the Court of First Instance was wrong to hold that, as a necessary condition for there to be an agreement within the

meaning of Article 85(1) of the Treaty, Bayer had to have implemented a system for monitoring the final destination of consignments of Adalat and penalising exporting wholesalers.

79 However, it does not in any way appear from the judgment under appeal that the Court of First Instance did hold that there could not be an 'agreement' on an export ban unless there were such a system of monitoring and penalties on wholesalers.

80 In examining the alleged intention of Bayer to impose an export ban, the Court of First Instance held, on the one hand, that 'the Commission has not proved to the requisite legal standard either that Bayer France and Bayer Spain imposed an export ban on their respective wholesalers, or that Bayer established a systematic monitoring of the actual final destination of the packets of Adalat supplied after the adoption of its new supply policy... or that it made supplies of this product conditional on compliance with the alleged export ban' (paragraph 109 of the judgment under appeal).

81 Moreover, in its further examination as to whether, as alleged, the wholesalers intended to adhere to Bayer's policy, the Court recalled, referring to what it had just held, that 'the Commission has not sufficiently established in law that Bayer adopted a systematic policy of monitoring the final destination of the packets of Adalat supplied, that it applied a policy of threats and penalties against wholesalers who had exported them, that, therefore, Bayer France and Bayer Spain imposed an export ban on their respective wholesalers, or, finally, that supplies were made conditional on compliance with the alleged export ban' (paragraph 119 of the judgment under appeal).

82 It is clear from that judgment that, in holding that there was no system of subsequent monitoring and penalties established by Bayer, the Court's intention was, first, to reply to the factual argument raised by the Commission that Bayer

had imposed an export ban on the wholesalers which was put in place by identifying the exporting wholesalers and applying successive reductions in the volumes of medicinal products delivered to them if it became apparent that they were exporting all or part of those products.

83 Secondly, the Court of First Instance did not in any event consider that the absence of a system of subsequent monitoring and penalties in itself implied the absence of an agreement prohibited by Article 85(1) of the Treaty. On the other hand, such an absence was regarded as one of the relevant factors in the analysis concerning Bayer's alleged intention to impose an export ban and, therefore, the existence of an agreement in this case. In that regard, although the existence of an agreement does not necessarily follow from the fact that there is a system of subsequent monitoring and penalties, the establishment of such a system may nevertheless constitute an indicator of the existence of an agreement.

84 Concerning the complaints of alleged misinterpretation of the judgments in *Sandoz* and *Ford*, on the ground that, in those judgments, the Court of Justice did not examine whether there was a system of subsequent monitoring and penalties before holding that there was an agreement prohibited by Article 85(1) of the Treaty, it should be reiterated that verification of the existence of such a system is not necessary in all cases for an agreement contrary to that provision to be considered to have been concluded.

85 In *Sandoz*, the manufacturer had sent invoices to its suppliers carrying the express words 'export prohibited', which had been tacitly accepted by the suppliers (see paragraph 23 of this judgment). The Court could therefore hold that there was an agreement prohibited by Article 85(1), without being required to seek proof of that in the existence of a system of subsequent monitoring.

86 In *Ford*, the Court of Justice assimilated to an agreement the decision of a motor manufacturer not to supply right-hand drive vehicles to German dealers in order to remove the possibility of them exporting those cars to the United Kingdom market. It is sufficient to note, in the context of the present plea, that, in this case, there was a simple refusal to sell and not a sale allegedly subject to certain conditions imposed on distributors and that, therefore, a system of subsequent monitoring would in any event have been superfluous.

87 As for the arguments of the Commission, the Kingdom of Sweden and EAEPC, to the effect that a system of subsequent controls was required by the system preventing supply established by Bayer, it should be noted that those arguments tend to underline the unilateral character of the latter's actions as regards the restriction of parallel imports.

88 The mere fact that the unilateral policy of quotas implemented by Bayer, combined with the national requirements on the wholesalers to offer a full product range, produces the same effect as an export ban does not mean either that the manufacturer imposed such a ban or that there was an agreement prohibited by Article 85(1) of the Treaty.

89 Therefore, in holding that the Commission had not established to the requisite legal standard the existence of a system of subsequent monitoring and penalties on wholesalers, the Court of First Instance has not erred in law. The Court must therefore dismiss the plea by BAI and the Commission arguing that such a system of subsequent controls and penalties on wholesalers is not a precondition for the existence of an agreement within the meaning of Article 85(1) of the Treaty.

The plea in law concerning the need for the manufacturer to require a particular line of conduct from the wholesalers or to seek to obtain their adherence to its policy

Arguments of the parties

90 BAI, in subparagraph (ii) of the first part of its third plea, and the Commission, in its second plea, accuse the Court of First Instance of interpreting Article 85(1) of the Treaty in an excessively restrictive manner, in that it wrongly held that an agreement concerning an export ban could not be considered to have been concluded unless the manufacturer requires a particular line of conduct from wholesalers or seeks to obtain their adherence to its policy seeking to prevent parallel imports. More particularly, they argue that it was not necessary to prove that Bayer imposed an express export ban on wholesalers in order to establish the existence of an agreement prohibited by Article 85(1) of the Treaty.

91 BAI, referring in particular to the judgments in *Sandoz* and *Ford*, argues that an agreement within the meaning of Article 85(1) of the Treaty must be regarded as having been concluded simply because wholesalers are continuing to obtain supplies from a manufacturer which has manifested its intention to prevent parallel imports, since, by doing so, they accept, de facto, the commercial policy of that manufacturer.

92 Similarly, the Commission emphasises that, for there to be an agreement within the meaning of Article 85(1) of the Treaty, it is sufficient for the undertakings in question to have expressed their common intention to behave on the market in a given way. It accuses the Court of First Instance of failing to take into consideration the fact that, in this case, Bayer had expressed sufficiently clearly its wish to see the wholesalers change their method of ordering and delivery and that, therefore, that fact taken in combination with the change in the wholesalers' conduct was capable of expressing a common intention between Bayer and the

wholesalers. The Commission refers in that regard to the judgments in *AEG* and *Ford*, in which the Court did not examine whether the manufacturer had required a given line of conduct from those with whom it was dealing, or had tried to obtain their acquiescence to the measures which it had adopted.

93 BAI, EAEPC and the Kingdom of Sweden argue that, where a producer places quotas on wholesalers by reference to the needs of the national market which they supply, that may constitute a hindrance to exports where it is combined with an additional obligation to give priority to supplying a particular market. No express prohibition was necessary. Such a restriction on supplies inescapably has the effect of an export ban and thus an artificial partitioning of markets, since supplies are no longer sufficient to allow exports. The Kingdom of Sweden further observes that, in accordance with Community case-law, particularly the judgment in *Ford*, Bayer's conduct could be described as a partial refusal to sell, applied uniformly and systematically in relation to all wholesalers established in France and Spain, such conduct being capable of being regarded as a contractual provision contrary to Article 85(1) of the Treaty.

94 Bayer and EFPIA maintain that this plea should be dismissed because it stems from an incorrect reading of the judgment under appeal. The Court of First Instance did not in any way make the existence of an 'agreement on an export ban' subject to the question whether Bayer had 'demanded' or actively 'attempted' to obtain the adherence of the wholesalers to an export ban. Furthermore, they argue, this plea does not, in reality, raise any argument of law but challenges a finding of fact, made by the Court of First Instance in paragraph 157 of the judgment under appeal in order to dismiss a factual allegation made by the Commission itself, according to which the actual conduct of the wholesalers did not constitute sufficient proof to establish that they had tolerated the policy designed to hinder parallel exports. Therefore, they argue, this plea is inadmissible.

95 Concerning the alleged misinterpretation of the judgments in *AEG* and *Ford*, which was examined by the Court of First Instance, both Bayer and EFPIA argue that the situation in this case is different from that in those cases and they therefore deny that the Court of First Instance departed from that case-law.

Findings of the Court

96 It does not appear from the judgment under appeal that the Court of First Instance took the view that an agreement within the meaning of Article 85(1) of the Treaty could not exist unless one business partner demands a particular line of conduct from the other.

97 On the contrary, in paragraph 69 of the judgment under appeal, the Court of First Instance set out from the principle that the concept of an agreement within the meaning of Article 85(1) of the Treaty 'centres around the existence of a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties' intention'. The Court further recalled, in paragraph 67 of the same judgment, that for there to be an agreement within the meaning of Article 85(1) of the Treaty it is sufficient that the undertakings in question should have expressed their common intention to conduct themselves on the market in a specific way.

98 Since, however, the question arising in this case is whether a measure adopted or imposed apparently unilaterally by a manufacturer in the context of the continuous relations which it maintains with its wholesalers constitutes an agreement within the meaning of Article 85(1) of the Treaty, the Court of First Instance examined the Commission's arguments, as set out in recital 155 of the contested decision, to the effect that Bayer infringed that article by imposing 'an

export ban as part of the... continuous commercial relations [of Bayer France and Bayer Spain] with their customers', and that the wholesalers' subsequent conduct reflected 'an implicit acquiescence' in that ban (paragraph 74 of the judgment under appeal).

99 Concerning the argument that the Court of First Instance wrongly considered it necessary to prove an express export ban on the part of Bayer, it is clear from the Court's analysis concerning the system for monitoring the distribution of the consignments of Adalat delivered (see paragraphs 44 to 48 of this judgment) that it did not in any way require proof of an express ban.

100 Concerning the appellants' arguments that the Court of First Instance should have acknowledged that the manifestation of Bayer's intention to restrict parallel imports could constitute the basis of an agreement prohibited by Article 85(1) of the Treaty, it is true that the existence of an agreement within the meaning of that provision can be deduced from the conduct of the parties concerned.

101 However, such an agreement cannot be based on what is only the expression of a unilateral policy of one of the contracting parties, which can be put into effect without the assistance of others. To hold that an agreement prohibited by Article 85(1) of the Treaty may be established simply on the basis of the expression of a unilateral policy aimed at preventing parallel imports would have the effect of confusing the scope of that provision with that of Article 86 of the Treaty.

102 For an agreement within the meaning of Article 85(1) of the Treaty to be capable of being regarded as having been concluded by tacit acceptance, it is necessary that the manifestation of the wish of one of the contracting parties to achieve an anti-competitive goal constitute an invitation to the other party, whether express or implied, to fulfil that goal jointly, and that applies all the more where, as in this case, such an agreement is not at first sight in the interests of the other party, namely the wholesalers.

103 Therefore, the Court of First Instance was right to examine whether Bayer's conduct supported the conclusion that the latter had required of the wholesalers, as a condition of their future contractual relations, that they should comply with its new commercial policy.

104 Concerning the judgment in *Sandoz*, relied upon by the appellants, it is undisputed that, in that case, the manufacturer had sought the cooperation of wholesalers in order to eliminate or reduce parallel imports, their cooperation being necessary, in the circumstances of that case, in order to attain that objective. In such a context, the insertion by the manufacturer of the words 'export prohibited' on invoices amounted to a demand for a particular line of conduct on the part of the wholesalers. That is not the case here.

105 The appellants have also relied on the judgments in *AEG* and *Ford*, arguing that, in those judgments, in the context of apparently unilateral measures adopted by the manufacturer in relation to its distributors, the Court held that there was an agreement within the meaning of Article 85(1) of the Treaty without enquiring as to the existence of a demand on the part of that manufacturer.

106 However, the need to demonstrate the conclusion of an agreement within the meaning of Article 85(1) of the Treaty did not arise in those cases. The question there was whether the measures adopted by the manufacturers formed part of the selective distribution agreements previously concluded between the manufacturers and their distributors and, therefore, whether those measures had to be taken into account in order to assess the compatibility of those agreements with the competition rules.

107 In *AEG*, the manufacturer had, in applying a selective distribution agreement which had previously been adjudged compatible with Article 85(1) of the Treaty, begun to refuse to approve distributors who met the qualitative criteria of that agreement, and did so in order to maintain a high level of prices or to exclude certain modern channels of distribution. It was thus a question of establishing whether the Commission could base its investigation on the conduct adopted by the manufacturer when applying a selective distribution agreement in order to determine whether that agreement, as applied in a particular case, was contrary to Article 85(1) of the Treaty.

108 In *Ford*, the Court stated in paragraph 12 of its judgment that '[t]he applicants and the Commission all agree that the main issue in this case is whether the Commission was entitled to refuse an exemption under Article 85(3) of the Treaty for Ford AG's main dealer agreement by reason of the fact that that undertaking had discontinued supplies of right-hand-drive cars to its German distributors'.

109 Therefore, the existence of an agreement capable of infringing Article 85(1) of the Treaty having already been established, the Court was able to confine itself in those cases to examining the question whether measures subsequently adopted by the manufacturer formed part of the agreement in question and whether they ought, therefore, to be taken into account when examining the compatibility of that agreement with Article 85(1). Such a question does not therefore correspond to that raised in this case, which is whether the very existence of an anti-competitive agreement has been established. The appellants cannot therefore rely on *AEG* and *Ford* in support of their argument that an agreement prohibited by Article 85(1) of the Treaty has come into existence.

110 As for the arguments of the Kingdom of Sweden and EAEPC, who argue that a demand arises from the combined effect of Bayer's quota policy and the

obligation which wholesalers are under to maintain national stocks, without there being any need for an express demand that exports be limited, it is sufficient to note that such an argument merely serves to demonstrate the unilateral nature of Bayer's commercial policy, which could be carried out without the cooperation of the wholesalers. As it has already been established that the judgments in *AEG* and *Ford* do not apply to this case, the interveners cannot rely on them in support of their arguments either. Therefore, the mere fact that there is a hindrance to parallel imports is not sufficient to demonstrate the existence of an agreement prohibited by Article 85(1) of the Treaty.

111 In the light of the above, the argument based on the need for the manufacturer to require a particular line of conduct from the wholesalers must be rejected.

The plea in law that the Court of First Instance wrongly took the genuine wishes of the wholesalers into account

Arguments of the parties

112 In its fourth plea, the Commission accuses the Court of First Instance of committing an error in law by holding that the conditions for a meeting of minds were not fulfilled because the declared intention of the wholesalers (to order medicinal products only for the needs of the domestic market) did not correspond to their real wishes (to order medicinal products for export also). As it referred only to the genuine wishes of the wholesalers, the Court of First Instance thus misinterpreted the concept of an agreement within the meaning of Article 85(1) of the Treaty.

113 In that regard, the Commission argues in particular that, in *Sandoz*, the Court of Justice attached no importance to genuine wishes or the possible 'mental reservations' of undertakings, given that, for the purposes of the conclusion of an agreement within the meaning of Article 85(1) of the Treaty, the only determinant factor was the declared intention of the undertakings concerned.

114 Similarly, EAEPC and BAI, the latter in its third plea, first part, subparagraph (iii), maintain that the fact that the wholesalers were opposed to a policy that was against their interests is not legally capable of invalidating the fact that, in the final analysis, they adhered to that policy. Although consistent legal practice presupposes a meeting of minds for it to be possible to make a finding of the existence of an agreement prohibited by Article 85(1) of the Treaty, it does not in any way require that the interests of the parties should correspond (see Commission Decision 80/1283/EEC of 25 November 1980 relating to a proceeding under Article 85 of the EEC Treaty (IV/29.702: Johnson & Johnson) (OJ 1980 L 377, p. 16, paragraph 28), Commission Decision 87/406/EEC of 10 July 1987 relating to a proceeding under Article 85 of the EEC Treaty (OJ 1987 L 222, p. 1) (recital 49), and the judgment in *Ford*). EAEPC also refers to Case C-453/99 *Courage and Crehan* [2001] ECR I-6297, which, it maintains, demonstrates that an agreement exists within the meaning of Article 85(1) of the Treaty even if one of the parties to that agreement is forced to conclude it against its own wishes.

115 Bayer and EFPIA argue that this plea is inadmissible in that, essentially, it calls into question the factual findings of the Court of First Instance. By assimilating the declared wishes of the wholesalers to an instruction in accordance with which they ordered the medicinal products concerned only for the needs of the national market, the appellants are seeking to circumvent the findings of the Court of First Instance, in paragraphs 151 to 153 of the judgment under appeal, that the documents referred to in the contested decision did not establish any propensity on the part of the wholesalers to comply with Bayer's policy in one way or another.

116 On the substance, Bayer argues that, where a party expressly declares its wishes, that alone is relevant, whereas wishes that have not been manifested or a 'mental

reservation', differing from the wishes expressly declared, play no part. On the contrary, where, as in this case, 'implied statements of a party's wishes' are present, the only thing to be taken into consideration is the genuine wish of the party concerned, as expressed by its conduct.

Findings of the Court

117 Concerning the objection of inadmissibility raised by Bayer and EFPIA, the Court finds that the plea concerning absence of a meeting of minds does not in any way amount to calling into question the factual findings of the Court of First Instance. On the contrary, it seeks to challenge the legal value that the latter attributed to the genuine wishes of the wholesalers in spite of their purported declared intention. Therefore, the objection of inadmissibility is unfounded.

118 On the substance, it should be recalled that the Court of First Instance set out from the general principle that 'in order for there to be an agreement within the meaning of Article 85(1) of the Treaty it is sufficient that the undertakings in question should have expressed their joint intention to conduct themselves on the market in a specific way' (paragraph 67 of the judgment under appeal). Having concluded, when examining the alleged intention of Bayer to impose an export ban, that the latter had not imposed such a ban, the Court of First Instance proceeded to make an analysis of the wholesalers' conduct in order to determine whether there was nevertheless an agreement prohibited by Article 85(1) of the Treaty.

119 In that context, it first rejected the argument that an agreement was established by reason of a tacit acceptance by the wholesalers of the alleged export ban, since, as it had just held, the Commission had not sufficiently established in law either that Bayer had imposed such a ban or that the supply of medicinal products was conditional on compliance with that alleged ban (see paragraphs 119 and 122 of the judgment under appeal).

120 In those circumstances, the Court of First Instance went on to examine whether 'having regard to the actual conduct of the wholesalers following the adoption by the applicant of its new policy of restricting supplies, the Commission could legitimately conclude that they acquiesced in that policy' (paragraph 124 of the judgment under appeal).

121 The Court of First Instance thus sought to determine whether, in the absence of an export ban, the wholesalers nevertheless shared the intention of Bayer to prevent parallel imports. In the context of that analysis, the Court of First Instance did not make any error of law by referring to the 'genuine' wishes of the wholesalers to continue ordering medicinal products for export and for the needs of the national market.

122 In any event, as the Advocate General points out in point 108 of his Opinion, the plea concerning the absence of a meeting of minds presupposes that there was a declared intention on the part of the wholesalers to join in with the intention of Bayer to prevent parallel imports. However, as has been pointed out in paragraphs 52 and 53 of this judgment, the Court of First Instance held that the documents supplied by the Commission do not establish that the wholesalers wished to give Bayer the impression that, in response to its declared wish, they were proposing to reduce their orders to a given level.

123 The wholesalers' strategy was, on the contrary, by distributing orders for export amongst the various branches, to make Bayer believe that the needs of the national markets had grown. Far from establishing the existence of a meeting of minds, that strategy merely constituted an attempt by the wholesalers to turn to their advantage the application of Bayer's unilateral policy, the implementation of which did not depend on their cooperation.

124 It follows that the Court must dismiss as unfounded the plea that the Court of First Instance was wrong to find a lack of concordance between the wishes of Bayer and the wishes of the wholesalers concerning Bayer's policy seeking to reduce parallel imports.

The need for subsequent acquiescence with measures forming part of continuous business relations governed by pre-established general agreements

Arguments of the parties

125 In its fifth plea in law, the Commission, supported by EAEPC, accuses the Court of First Instance of erroneously applying Article 85(1) of the Treaty by requiring, contrary to the judgment in *Sandoz*, that there be proof of the wholesalers' intention to align their conduct on the measures adopted by Bayer even where those measures formed part of continuous business relations between the wholesalers and the manufacturer. The Commission further maintains that the Court of First Instance erred in law in refusing it the right to rely on the judgments in *AEG*, *Ford* and *BMW Belgium* in order to interpret the conduct adopted by the wholesalers after the implementation of Bayer's new policy on supplies of medicinal products as a de facto acquiescence in that policy.

126 Similarly, BAI, in subparagraph (iii) of the first part, and the second part of its third pleas, accuses the Court of First Instance of failing to check whether the measures adopted by Bayer were not unilateral in appearance only, given that they formed part of its permanent business relations with the wholesalers. More particularly, it maintains that ordinary business relations in the wholesale

pharmaceutical products sector are comparable with the selective distribution system that was at issue in *AEG*, *Ford* and *BMW Belgium*, and therefore blames the Court of First Instance for holding those judgments inapplicable to this case.

127 The Commission adopts a similar position, maintaining that the sale of medicinal products bears certain characteristics of selective distribution. In that respect, the appellants maintain that the admission of a wholesaler to the distribution system concerned implies that it has given its consent to the manufacturer's instructions.

128 In BAI's submission, wholesalers occupy a key position in supplying the medicinal products market similar to that of a reseller in a selective distribution system. Emphasising the close interdependency of the business partners in the medicinal products market, BAI argues that the wholesalers are bound by the manufacturer's supply policy. Whilst pointing out that wholesalers are dependent upon the manufacturers of pharmaceutical products because they cannot replace Adalat with other medicinal products, BAI argues, in its reply, that they are obliged to conclude a compromise in order to maintain their profits at a maximum level, even if in consequence third parties established outside the national territory served by the wholesalers concerned can no longer be supplied. The wholesalers are therefore victims of the supply restrictions established by the manufacturer, and their consent to the anti-competitive agreement constitutes for them the means of ensuring the maintenance of their business relations.

129 In the light of those considerations, BAI concludes that the consent of the wholesalers to the restriction on quantities supplied by the manufacturer is sufficient for a finding that there is an agreement aimed at artificially partitioning the markets and thus distorting competition within the common market in breach

of Article 85(1) of the Treaty. Had the Court of First Instance assessed the facts in a legally correct manner, it would necessarily have had to conclude that there was an agreement between Bayer France and Bayer Spain and the wholesalers concerned.

130 EAEPC supports that position, arguing that actual conduct — namely compliance with the agreement by the wholesalers without challenge on their part — is not necessary according to the judgment in *Sandoz*. That judgment, contrary to the interpretation given to it by the Court of First Instance, merely held that continuing to place new orders, after the amendment of the conditions relating to them, is sufficient to establish tacit acquiescence by the wholesalers. In this case, by continuing to place their orders, the wholesalers submitted to the wish of Bayer to limit supplies of Adalat. That change in their behaviour was a clear indicator of their acquiescence in Bayer's new commercial policy.

131 Moreover, in *Sandoz*, a determination of the actual conduct of the wholesalers was not necessary because the Commission and the Court of Justice limited themselves to determining the objective of the clause prohibiting export of the products concerned and did not take the effects of such a clause into consideration. In so far as the objective is already shown in the manufacturer's offer, tacit acquiescence in the decisive clause is sufficient because the wholesaler recognises that contractual condition also by placing a new order.

132 Concerning the arguments alleging misinterpretation of the case-law, both Bayer and EFPIA argue that the Commission is trying to create the impression that the factual circumstances that gave rise to the judgments in *AEG*, *Ford* and Case C-70/93 *BMW* v *ALD* [1995] ECR I-3439 are identical to those in the present case. In those cases, however, the 'apparently unilateral' measures of the manufacturers fell in reality within the framework of long-standing and continuous distribution agreements, so that no express or tacit consent of the distributors was necessary. EFPIA relies on that argument in pointing out that, in all those cases, selective distribution systems were at issue. In the present dispute,

such agreements do not exist; Bayer obviously does not use a distribution system of that kind. Both Bayer and EFPIA further note that the statutory conditions of national law concerning the activities of wholesalers do not in any way constitute an extensive, pre-established and continuous contractual framework between the manufacturer and the wholesalers.

133 In its reply, the Commission argues that, contrary to Bayer's argument that it supplied wholesalers only on an individual basis, business relations between Bayer and French wholesalers had existed for decades and Bayer would not in any way have been able to terminate them overnight.

134 As for Bayer's objection concerning the incorporation of statutory conditions in its business relations with the wholesalers, as opposed to contractual conditions, the Commission argues that, according to the case-law of the Court of Justice, the admission of a wholesaler into a selective distribution system of long duration implies that that wholesaler acquiesces in certain measures of the manufacturer which, through that fact alone, lose their apparently unilateral character by forming part of existing contractual relations. The same can apply not just in the context of selective distribution systems but also in the case of other contractual relations of long duration.

135 In that respect, the Commission argues, it matters little whether what is at issue is compliance with contractual criteria or statutory requirements. Compliance with the statutory obligation to supply lies at the root of all contractual relations

between a manufacturer of medicinal products and a wholesaler in France or Spain given that the authorisation of the wholesaler depends upon it.

136 The Commission bases its argument by analogy on the circumstances of *Ford*. Emphasising that contractual relations between Bayer and French wholesalers had existed for decades, it argues that agreements must necessarily reserve certain aspects of those relations, such as supply volumes which are subject to oscillations and cannot therefore be determined in advance, to a subsequent decision of the manufacturer.

137 For that reason, the quantity supplied by the manufacturer of a given medicinal product, which has been ordered in the context of long-standing business relations which that manufacturer maintains with its wholesalers, does not therefore constitute a unilateral measure which may form the subject-matter of an agreement within the meaning of Article 85(1) of the Treaty. On the contrary, such a measure falls within such contractual relations.

138 In its rejoinder, Bayer argues that, in its complaint that the case-law of the Court has been 'circumvented', the Commission is really trying to argue that, even in the absence of such an 'agreement', a prior unilateral imposition of quotas must, as a 'preventive' hindrance to parallel imports, be treated in the same way as a 'repressive' ban on exports.

139 According to Bayer, that argument conceals an attempt to introduce into Community competition law a general prohibition on any 'hindrance to parallel

imports' which is foreign to the system created by Articles 85 and 86 of the Treaty but appears to have to be based generally on the objective of achieving the internal market. By contrast, the judgment under appeal held that, unlike a State measure adopted under Article 30 of the Treaty, unilateral preventative measures taken by a private undertaking, which, in the absence of an 'agreement', do not fall within the scope of Article 85(1) of the Treaty, are not affected by the competition rules set out in the Treaty.

Findings of the Court

140 By these pleas, the appellants are seeking to challenge the assessment by the Court of First Instance that the Commission could not effectively rely on the case-law precedents referred to in order to call into question the analysis which led the Court of First Instance to conclude that in this case acquiescence of the wholesalers in Bayer's new policy was not established (paragraph 159 of the judgment under appeal).

141 In that respect, it is important to note that this case raises the question of the existence of an agreement prohibited by Article 85(1) of the Treaty. The mere concomitant existence of an agreement which is in itself neutral and a measure restricting competition that has been imposed unilaterally does not amount to an agreement prohibited by that provision. Thus, the mere fact that a measure adopted by a manufacturer, which has the object or effect of restricting competition, falls within the context of continuous business relations between the manufacturer and its wholesalers is not sufficient for a finding that such an agreement exists.

142 The case of *Sandoz* concerned an export ban imposed by a manufacturer in the context of continuous business relations with wholesalers. The Court of Justice held that there was an agreement prohibited by Article 85(1) of the Treaty.

However, as the Court of First Instance points out in paragraphs 161 and 162 of the judgment under appeal, that conclusion was based upon the existence of an export ban imposed by the manufacturer which had been tacitly accepted by the wholesalers. In that regard, at paragraph 11 of the *Sandoz* judgment, the Court of Justice held that '[t]he repeated orders of the products and the successive payments without protest by the customer of the prices indicated on the invoices, bearing the words "export prohibited", constituted a tacit acquiescence on the part of the latter in the clauses stipulated in the invoice and the type of commercial relations underlying the business relations between Sandoz PF and its clientele'. The existence of a prohibited agreement in that case therefore rested not on the simple fact that the wholesalers continued to obtain supplies from a manufacturer which had shown its intention to prevent exports, but on the fact that an export ban had been imposed by the manufacturer and tacitly accepted by the wholesalers. Therefore, the appellants cannot usefully rely on the *Sandoz* judgment in support of their plea that the Court of First Instance erred in law by requiring acquiescence of the wholesalers in the measures imposed by the manufacturer.

143 Nor can the appellants rely on *AEG*, *Ford* and *BMW* v *ALD*, arguing that business relations in the wholesale trade in pharmaceutical products are comparable to a selective distribution system such as that which was at issue in those cases. As has been stated in paragraph 141 of this judgment, the relevant question is that of the existence of an agreement within the meaning of Article 85(1) of the Treaty.

144 As has been stated in paragraph 106 of this judgment, in the *AEG* and *Ford* judgments the need to demonstrate the existence of an agreement within the

meaning of Article 85(1) of the Treaty was not at issue. The existence of an agreement capable of infringing that provision having already been established, the question raised was whether the measures adopted by the manufacturer formed part of that agreement and therefore had to be taken into account when examining the compatibility of that agreement with Article 85(1).

In that regard, the Court of First Instance rightly pointed out that, in those judgments, the Court of Justice had held that, at the time of a distributor's admission, its authorisation was based on its adherence to the policy pursued by the manufacturer (see paragraph 170 of the judgment under appeal).

145 A similar analysis must be drawn from the judgment in *BMW* v *ALD*, in which the question was whether 'Article 85(1) of the EEC Treaty must be interpreted as [prohibiting] a motor vehicle manufacturer which sells its vehicles through a selective distribution system from agreeing with its authorised dealers that they are not to supply vehicles to independent leasing companies where, without granting an option to purchase, those companies make them available to lessees residing or having their seat outside the contract territory of the authorised dealer in question, or from calling on such dealers to act in such a way' (paragraph 14).

146 It follows that the Court of First Instance did not make any error in law by holding the case-law relied upon by BAI and the Commission inapplicable to the present case. Therefore, the pleas alleging misapplication of Article 85(1) of the Treaty must be dismissed.

147 Since all the pleas in law raised by BAI and the Commission have been rejected as inadmissible or unfounded, the appeals must be dismissed.

Costs

148 Under Article 69(2) of the Rules of Procedure, applicable to the procedure on appeal by virtue of Article 118 of those Rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since, in Case C-3/01 P, Bayer and EFPIA have asked for the Commission to be ordered to pay the costs, it must be ordered to pay the costs relating to the appeal proceedings which it has brought.

149 The first subparagraph of Article 69(4) of the Rules of Procedure, which also applies to the procedure on appeal by virtue of Article 118, provides that Member States and institutions which intervene in the proceedings are to bear their own costs. The Kingdom of Sweden must therefore be ordered to bear its own costs.

150 Concerning the appeal proceedings brought by BAI (C-2/01 P), since neither Bayer nor EFPIA have asked for BAI to be ordered to pay the costs, each party must be ordered to bear its own costs in relation to these proceedings.

On those grounds,

THE COURT

hereby:

1. Dismisses the appeals;

2. Orders the Bundesverband der Arzneimittel-Importeure eV, Bayer AG and the European Federation of Pharmaceutical Industries' Associations to bear their own costs in relation to Case C-2/01 P;

3. Orders the Commission of the European Communities to pay the costs in relation to Case C-3/01 P;

4. Orders the Kingdom of Sweden to bear its own costs.

Skouris	Jann	Timmermans
Cunha Rodrigues	Edward	La Pergola
Puissochet	Schintgen	Macken
Colneric		von Bahr

Delivered in open court in Luxembourg on 6 January 2004.

R. Grass

Registrar

V. Skouris

President