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

In Case T-176/95,

Accinauto SA, a company incorporated under Belgian law, established in Brussels, represented by Helmut Glassen, Rechtsanwalt, Leimen, with an address for service in Luxembourg at the Chambers of Loesch and Wolters, 11 Rue Goethe,

applicant,

v

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

defendant,

APPLICATION for the annulment of Commission Decision 95/477/EC of 12 July 1995 relating to a proceeding pursuant to Article 85 of the Treaty (Case IV/33.802 — BASF Lacke+Farben AG, and Accinauto SA) (OJ 1995 L 272, p. 16),

* Language of the case: German.

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

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

Registrar: J. Palacio González, Administrator,

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

gives the following

Judgment

Background

Parties and products concerned

1 Accinauto SA ('Accinauto' or 'the applicant') is a Belgian company, established in Brussels. Since 1937, it has distributed the BASF group's motor vehicle refinishing paints in Belgium and Luxembourg. Since 1974, it has been the exclusive

distributor of Glasurit products for the same contract territory. Its turnover for the tax year 1991 was BEF 738 000 000, some 85% of which was accounted for by BASF products.

2 BASF Coatings AG, formerly called 'BASF Lacke und Farben AG' ('BASF'), is a German company established in Münster-Hiltrup (Germany) which manufactures, amongst other things, motor vehicle refinishing paints under the trade name Glasurit. Its turnover for 1991 was DEM 1 668 000 000, of which DEM 314 000 000 was accounted for by worldwide sales of motor vehicle refinishing paints and DEM 243 000 000 by sales of those products within the Community.

3 Glasurit products are distributed by:

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

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

— five regional exclusive distributors in Germany;

— an independent non-exclusive distributor in Greece.

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

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

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

Administrative procedure

7 On 28 January 1991, Ilkeston Motor Factories Ltd ('IMF') and Calbrook Cars Ltd, two United Kingdom-based distributors of vehicle refinishing paints, lodged a complaint with the Commission alleging that BASF and Accinauto had infringed Community competition rules.

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

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

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

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

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

13 After consulting the Advisory Committee on Restrictive Practices and Dominant Positions, the Commission adopted Decision 95/477/EC of 12 July 1995 relating to a proceeding pursuant to Article 85 of the Treaty (Case IV/33.802 — BASF Lacke+Farben AG, and Accinauto SA) (OJ 1995 L 272, p. 16; 'the contested decision'). That decision was notified to the applicant on 24 July 1995.

Content of the contested decision

14 In the operative part of the contested decision, the Commission found that the agreement between BASF and Accinauto, under which Accinauto was required,

from 8 October 1982 to 31 December 1991, to pass on to BASF any customer enquiries coming from outside the contract territory, infringed Article 85(1) of the EC Treaty (now Article 81(1) EC). For having participated in that infringement, the Commission fined BASF ECU 2 700 000 and Accinauto ECU 10 000.

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

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

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

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

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

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

21 As from that date, Accinauto complied unreservedly with the 1982 agreement. According to the Commission, the infringement of the competition rules did not end until 1 January 1992, when a new distribution agreement, signed by the parties on 14 December 1992 and 22 January 1993, entered into force with retroactive effect. That agreement no longer contains the contested clause requiring Accinauto to pass on to BASF any customer enquiries not originating in its contract territory.

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

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

Procedure

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

25 In its application, the applicant requested the Court to order, as a measure of organisation of procedure, that complete minutes, in French, of the hearing of 23 September 1993 be communicated to it.

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

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

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

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

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

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

Forms of order sought

32 The applicant claims that the Court should:

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

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

— order the Commission to pay the costs;

— order the Commission to repay to the applicant, in addition to the fine, interest at the same rate (9.5%) as that fixed by the Commission in the second subparagraph of Article 2(2) of the contested decision.

33 The Commission contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

The grounds pleaded for annulment of the contested decision

34 In support of its action, the applicant puts forward two pleas in law as grounds for annulment. The first alleges infringement of essential procedural requirements, in that the rights of the defence were not respected. The second alleges

infringement of Article 85(1) of the Treaty, in that the Commission wrongly concluded that the 1982 agreement was in breach of that provision.

The plea alleging infringement of essential procedural requirements

Arguments of the parties

35 The applicant argues that, by failing to supply it with a full French version of the minutes of the hearing of 23 September 1993, the Commission infringed Article 3 of Council Regulation No 1 of 15 April 1958 determining the languages to be used by the European Economic Community (OJ, English Special Edition 1952-1958, p. 59). That article provides that '[D]ocuments which an institution of the Community sends to a Member State or to a person subject to the jurisdiction of a Member State shall be drafted in the language of such State.'

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

37 The fact that it had nothing in writing which contained a translation of the statements of other participants at the hearing who spoke in German or English, particularly those made by the representatives of BASF, the complainant undertakings and the Member States, prevented it from properly preparing its

defence in the administrative procedure. Even though the Commission provided simultaneous interpretation of those statements during the hearing, translation of the whole of the minutes into French was essential for an understanding of the objections raised against the applicant, and in particular to enable it to clarify the facts referred to on that occasion with its employees who were not present at the hearing. Its rights of defence were therefore infringed.

38 The Commission contends, on the contrary, that the minutes of the hearing do not constitute a 'document' within the meaning of Article 3 of Council Regulation No 1 of 15 April 1958. In cases concerning the application of the competition rules, that provision has been applied solely to statements of objections and decisions intervening during the administrative procedure. The Commission argues that the minutes serve to record the remarks of the representatives of the various parties, and are sent to them solely so that they may verify that their own statements have been correctly recorded (Case T-77/92 *Parker Pen* v *Commission* [1994] ECR II-549, paragraphs 72 to 75). The minutes are not, it submits, a document drawn up for the benefit of the undertakings participating in the procedure.

Findings of the Court

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

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

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

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

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

44 The plea alleging infringement of essential procedural requirements must therefore be dismissed.

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

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

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

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

— Arguments of the parties

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

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

48 In the applicant's submission, there is nothing in Article 2(2) of the agreement which requires, for sales outside its contract territory, the consent of BASF.

49 Under Article 4(1) and (2) of the 1982 agreement, Accinauto undertook to inform BASF regularly as to the general market situation and to draw up an annual sales report. However, since Article 4 applied only to information concerning business in the contract territory, information concerning enquiries addressed to it from outside that territory were covered only by Article 2(2) of the agreement. The applicant states that information on sales outside the contract territory were also of great interest to it, particularly in order to enable BASF to keep it informed of quality, training or admission requirements in export countries.

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

51 Bearing that precedent in mind, at the time of the negotiations which led to the 1982 agreement, the applicant received an assurance from the head of BASF's legal department that the new Article 2(2) complied with Community law. Since the parties had no doubts as to the lawfulness of that clause, they did not consider it necessary to notify the 1982 agreement to the Commission.

52 The Commission contends that the reasons put forward by the applicant to justify its interpretation of the passing-on obligation in Article 2(2) of the agreement are unconvincing. It reaffirms that that clause contains a disguised prohibition of

passive export sales without prior authorisation, and not a simple obligation to pass on information.

— Findings of the Court

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

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

55 In order to determine whether the parties to the 1982 agreement agreed upon a restriction on the authorised dealer's freedom to carry out passive sales of the products covered by the exclusive distribution contract to customers based in other Member States and whether, in consequence, they concluded an agreement prohibited by Article 85(1) of the Treaty, the Court must take a number of factors into account. Apart from examination of the wording of Article 2(2) and of the scope of the other clauses in the contract which relate to the authorised dealer's

obligation under that clause, those factors include the factual and legal circumstances surrounding the conclusion and implementation of that agreement which enable its purpose to be elucidated.

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

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

58 As regards the insertion of Article 2(2) into the agreement and the determination of its purpose in relation to that of other clauses providing for exchanges of information between the parties, it is necessary, first, to reject the applicant's argument that the passing-on obligations in Article 2(1) and (2) are of the same kind as the obligations to provide information contained in Article 4 of the agreement. Although under Article 4(1) and (2) Accinauto undertakes to inform BASF regularly on sales and the market situation in the contract territory, that information is of a general nature and detailed particulars of it are to be given only by means of summary reports, drawn up at the end of each calendar year. By

contrast, Article 2(1) and (2) provide that the authorised dealer or the manufacturer are to be informed immediately of the receipt of enquiries according to whether they emanate, respectively, from customers based in the contract territory or from those based outside it. The Court therefore finds that the passing-on obligations in Article 2, by providing for reciprocal notification of specific supply enquiries, are different in kind from the obligations to provide information laid down by Article 4.

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

60 Since the passing-on obligation imposed on the authorised dealer by Article 2(2) of the agreement covers only enquiries coming from outside the contract territory, it cannot be that the sole purpose of that clause is to enable the manufacturer to achieve better planing of its distribution organisation and its commercial strategy. The Commission has rightly pointed out that, if BASF wished to be informed as to the quantity and quality of the products concerned by the enquiries addressed to the applicant, the passing-on obligation should have applied equally to enquiries from customers based in the contract territory. Such information could, moreover, have been supplied to BASF on a regular basis in a general manner or in the context of summary reports, as envisaged in Article 4 of the agreement, and not as a preliminary to each supply. Nor was it necessary for BASF to have advance notice of the destination of the goods ordered from the applicant in order to be in a position to allocate limited supply quantities uniformly between its

authorised dealers. Its interest in obtaining information on export sales, particularly for the purpose of calculating the advertising subsidies which it granted to each dealer, could also have been satisfied by an obligation to draw up summary reports concerning those sales. Moreover, the applicant's interest in obtaining information on conditions in the markets for which the products were destined, even if that interest were relevant, could be satisfied by means other than prior notification of exports to the manufacturer.

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

62 Moreover, the history of the agreement offers an explanation for the ambiguous terms in which the parties to the 1982 agreement drafted the clause complained of and for the disguised nature of the export ban which it contains. The parties were sufficiently aware, through their earlier experience, of the fact that an express restriction on the authorised dealer's freedom to carry out passive sales outside the contract territory is contrary to Community competition law. Nevertheless, they clearly expressed their intention to make enquiries from outside the contract territory subject to a specific system of recording which enabled the manufacturer to influence the dealer's conduct with respect to exports, should these prove to be necessary.

63 In those circumstances, it needs to be considered whether, as the Commission maintains, its interpretation of Article 2(2) of the 1982 agreement is further confirmed by the fact that the parties implemented an agreement with a view to preventing parallel imports of Glasurit products into the United Kingdom.

Second part: implementation of the agreement

— Arguments of the parties

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

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

66 The applicant delivered the desired quantities to IMF and business relations between the two companies subsequently developed successfully. Until 1990, orders from IMF increased consistently, as did the discounts granted to it by the applicant.

67 As from June 1989, the sales by the applicant to IMF were invoiced in the name of Technipaint solely in order to separate the exports from the Belgian operations. That separation became possible in 1989, after the entry into service of a new

computer system. It enabled the applicant to increase the transparency of its operations and to limit the payment of bonuses due to its collaborators. BASF was also keen on the separate registration of operations, since it contributed to the advertising costs concerning sales in the contract territory.

68 Contrary to what is stated in points 75 and 76 of the preamble to the contested decision, the applicant did not cease to supply IMF at the end of May 1990 but only in December 1990. The first order which reached the applicant since the delivery at the end of May 1990 was dated 4 December 1990. IMF did not place any new orders between those two dates, despite the reference to a future order in the letter from IMF's lawyers to the applicant of 3 July 1990.

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

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

71 The applicant accuses the Commission of having failed to take account of the supply difficulties which it had mentioned, and of which, it maintains, it produced convincing evidence during the administrative procedure. For various

reasons, there were major bottlenecks in BASF's supply capacities during the period in question, and the main product ranges, especially the most used basic colours, were affected.

72 BASF had established an information network between itself and its distributors, including the applicant, in order to ensure regular supply to the European market in a time of shortage. In order to fulfil its delivery obligations towards customers for Glasurit products, it wished to be aware of product flows and the sales situation in the various national markets.

73 The applicant also maintains that it was under a duty to supply customers in its contract territory as best it could. Having been contacted by IMF, it was quite normal that it should first examine delivery possibilities with BASF in order to avoid committing a breach of its contractual obligations. It was not allowed to use slender resources to accept new orders or make deliveries outside its territory.

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

75 Accinauto further observes that, according to the statements of the complainant reproduced in point 22 of the preamble to the contested decision, BASF gave its consent in March 1986 to Accinauto supplying IMF, provided that the discount

was no more than 19% of Accinauto's published trade price. Those statements are contradicted by the fact that, at the time, IMF accepted an 8% discount and that during the whole of 1986 no discount of 19% was granted to it by Accinauto. It would be contrary to all business experience for IMF to have contented itself with an 8% discount if M. Dudouet had disclosed the prospect of BASF's agreeing to the grant of a discount of up to 19% of the published trade price. In Accinauto's submission, that is a convincing indication that the complainant was equally inaccurate in relaying the remainder of the telephone conversation between Accinauto and BASF.

76 It is also clear from an internal note signed by Mr Augustin dated 5 June 1990 that BASF was informed of all supplies made by Accinauto to IMF in 1989. Accinauto therefore challenges the Commission's assumption that it intended to conceal its exports to the United Kingdom by invoicing in the name of Technipaint.

77 The Commission reaffirms its conclusion that the parties' implementation of the agreement, especially after March 1986, confirms that Article 2(2) thereof did in fact reserve for the manufacturer a right to approve passive sales. It submits that the applicant's explanations are unconvincing, and not capable of invalidating the legal assessment of the conduct noted in the contested decision.

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

those sales through the intermediary of Technipaint in order to conceal them. Finally, following a tightening in control by BASF, Accinauto terminated the exports in May 1990.

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

80 The conclusions drawn by the applicant from an alleged error by the complainant concerning the maximum discount of 19% granted by BASF are, the Commission submits, exaggerated. In the first place, when Accinauto replied to a request for information, it confirmed having granted a 19% discount to IMF. It is therefore for the applicant to explain the contradiction between its reply to the Commission and its current statements. Moreover, as regards the maximum discount authorised by the manufacturer, it was normal for the applicant not to grant it to IMF from the outset, especially since the orders initially placed by that company were for small quantities. The applicant's objections concerning the accuracy of the complainant's statements are, the Commission submits, unfounded. The question whether and when the maximum discount of 19% was granted to IMF in full does not affect the fact that, in March 1986, the applicant obtained authorisation from BASF to supply the complainant and for the discounts to be applied.

81 The note made by a BASF employee, dated 5 June 1990, is not such as to establish that the manufacturer was informed in 1989 of the supplies effected through the intermediary of Technipaint. In the Commission's submission, the

internal memoranda referred to in points 47 and 50 of the preamble to the decision show that the applicant pursued its deliveries to IMF without the knowledge or authorisation of BASF.

82 The applicant is confusing cause and effect in its explanation of the reasons which led it to terminate supplies to IMF. The threat to bring a complaint which was made in the conversation of 5 June 1990 followed the statements of Mr Dudouet to IMF at the end of May 1990 to the effect that he had been put under pressure by BASF and was therefore no longer able to supply Glasurit products. The refusal to pay the account for May did not occur until July, following the dispute which arose between IMF and Accinauto. The Commission therefore reaffirms its findings concerning the date and circumstances of the halting of deliveries to IMF. It further maintains that Accinauto has not demonstrated that IMF demanded larger deliveries or more advantageous terms.

— Findings of the Court

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

84 In that respect, the applicant denies the existence of a causal link between the facts noted in the decision and the implementation of an alleged agreement contrary to Article 85(1) of the Treaty. In its submission, the conduct of the parties to the 1982 agreement is explained by the difficulties in supply

experienced by BASF during the period in question and by business decisions taken independently by Accinauto.

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

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

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

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

89 It follows that the difficulties affecting BASF's deliveries did not have a substantial impact in this case on the implementation of the 1982 agreement. That being so, Accinauto's arguments as to the lawfulness of its conduct in a situation of shortage, particularly in the light of the recitals in the preamble to

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

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

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

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

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

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

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

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

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

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

— Arguments of the parties

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

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

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

97 The applicant maintains, first, that the prices to be taken into account for competition purposes are the distributor's net selling prices, representing the relevant purchase price. The differences between the prices charged in Belgium and those charged in the United Kingdom diminish significantly if the net selling prices charged are considered. Moreover, there is, in addition to actual demand fully satisfied, no potential demand. The complainant companies declared themselves satisfied with their business relations with Accinauto and, by reason of the favourable terms granted to it, IMF was able to supply Glasurit products not only to Calbrook Cars Ltd but also to other British businesses.

98 Apart from the orders from IMF, the applicant received no other orders after 1986. It could not have refused non-existent orders, at the instigation of BASF or otherwise. It therefore challenges the validity of the Commission's finding that the objective scope for supplies by Accinauto was by no means exhausted by the quantities actually supplied to IMF and Calbrook Cars Ltd. Nor does the applicant understand how the existence in the agreement of a clause which, on the Commission's interpretation, does not prohibit passive exports but merely provides that they be authorised by the manufacturer, could have prevented those exports, when there was no known case in which Accinauto requested an

authorisation and did not obtain it. The company concludes that the exclusive distribution agreement has in any event not prevented parallel imports, and has had no repercussions whatsoever on the use made by Accinauto of objective opportunities to supply.

99 Nor, in the applicant's submission, did the 1982 agreement affect competition and trade between Member States in any other way. Parallel importers were perfectly well informed of the sources of supply existing in the various Community countries and made common purchases from distributors charging the most advantageous prices for each line of products. That is confirmed by the fact that IMF obtained certain products from Accinauto on behalf of Calbrook Cars Ltd, while the latter obtained other products on better terms in the Netherlands and Germany. Moreover, the supply and demand situation cannot be viewed statically. In the applicant's submission, it was constantly undergoing corrections, which parallel importers took into account when deciding to place an order with a distributor.

100 The Commission replies that the documents discovered at BASF's premises disclose the price differences found in the contested decision, and that those differences were capable of encouraging parallel exports from Belgium to the United Kingdom. In any event, the applicant has itself acknowledged in its application that the differences between the prices charged in the United Kingdom and those charged in the other Member States were one of the causes of the parallel imports.

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

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

102 The Commission also challenges the applicant's claim that there was no potential demand for Glasurit products on the British market during the period in question. Accinauto itself had stated that it expected an increase in the orders placed by IMF and Calbrook Cars Ltd, taking account of the fact that the capacity of the British market is far greater than that of the Belgian market.

103 Finally, the Commission argues, the obligation in Article 2(2) of the exclusive distribution agreement really constitutes a general ban on exports, coupled with a reservation for the possible granting of authorisation on a case-by-case basis by BASF. The applicant's objection that the agreement was incapable of producing effects in restraint of competition, since it imposed an obligation to obtain the manufacturer's authorisation for exports rather than prohibiting such sales, must be rejected.

— Findings of the Court

104 Article 85(1) of the Treaty prohibits all agreements between undertakings which have as their object or effect the restriction of competition within the common market, provided they are capable of affecting trade between Member States. It is settled case-law that, by its nature, a clause designed to prevent a buyer from reselling or exporting goods he has bought is liable to partition the markets and consequently to affect trade between Member States (*Miller*, paragraph 7; Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and Others* v *Commission* [1993] ECR I-1307, known as the '*Woodpulp*' cases, paragraph 176). When it is evident that the sales

of at least one of the parties to an anti-competitive agreement constitute a not inconsiderable proportion of the relevant market, Article 85(1) of the Treaty should be applied (*Miller*, paragraph 10; *Parker Pen*, paragraph 44).

105 In this case, the applicant has disputed neither the Commission's definition of the relevant market, namely the British market in vehicle refinishing products, nor the fact that BASF's share of that market in 1991 was 16%, including 12% for Glasurit products. Its criticisms are limited to the volumes of parallel imports which the Commission took into account and the latter's statements concerning the existence of potential demand that might be satisfied by the applicant. Bearing in mind the position which BASF held on the relevant market and the fact, confirmed by the applicant itself, that Glasurit prices on that market between 1986 and 1991 were, on average, higher than those charged on the markets of other Member States, particularly Belgium, the Commission was right in concluding that the agreement in question was capable of affecting intra-Community trade.

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

107 The applicant's other objections to the Commission's finding of infringement of Article 85(1) of the Treaty are therefore inoperative, since, even if upheld, they

cannot lead to the conclusion that an agreement having the object and scope of the one in point in that case does not infringe the Community competition rules.

Fourth part: date on which the infringement ceased

— Arguments of the parties

108 The applicant argues that, even if there were an infringement of the competition rules, it ended not later than the end of June 1990. The Commission should have held that BASF's letter to Accinauto of 21 June 1990 clearly indicated to the latter that it was free to take its own sales decisions. In any event, the Commission itself acknowledged that BASF's letter to IMF's lawyers of 22 June 1990, a copy of which was sent to Accinauto, was sufficiently comprehensible and clear in that respect.

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

— Findings of the Court

110 Since the infringement found by the contested decision was the conclusion of, and participation by the parties in, an exclusive distribution agreement in which one

of the clauses pursued an object contrary to Article 85(1) of the Treaty, the Commission was right in holding that that infringement did not end until the two parties removed the clause in question. Under the case-law, the fact that a clause whose object is to restrict competition has not been implemented by the contracting parties is not sufficient to remove it from the ambit of the prohibition laid down in Article 85(1) of the Treaty (*Miller*, paragraph 7; *Ahlström Osakeyhtiö*, paragraph 175). In this case, the letters from BASF relied on by the applicant do not establish that the parties genuinely intended to renounce the offending clause. Indeed, as the Commission found, the clearer terms used in the letter of 22 June 1990 were really aimed at weakening the accusations of anti-competitive conduct which had been addressed to the parties by the complainant IMF.

Fifth part: determination of the amount of the fine

— Arguments of the parties

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

112 Accinauto contends that the seriousness of the infringement is to be measured in relation to the effects which the allegedly anti-competitive agreement had on trade. In this case, the agreement had no effect, not having been implemented by the parties. Even if it had been applied, the agreement would not have affected the flow of parallel imports into the United Kingdom from Belgium. There was only one refusal to supply, in December 1990, which was determined not by the agreement but by an independent decision of the applicant. Moreover, the volume of parallel imports affected by the 1982 agreement was insignificant in comparison with the total sales of Glasurit products in the United Kingdom.

113 The Commission was wrong in taking the duration of the infringement to be the whole of the period of validity of the agreement, between its conclusion on 8 October 1982 and the entry into force of the new agreement on 1 January 1992. In the first place, the Commission itself acknowledged that the effects of the agreement started to be felt only as from 1986. Moreover, Accinauto refused only one delivery to IMF, and the alleged infringement ended not later than June 1990, when BASF clearly informed the complainant and Accinauto that the latter was free to carry out passive sales in the Member States of the Community. The applicant therefore contends that to take the whole period of validity of the agreement into account is unjust, and seriously infringes the principle of proportionality.

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

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

116 The infringement began on the date on which the exclusive distribution agreement stipulating a right of approval for the manufacturer was concluded, and continued during the whole period of validity of that agreement (Joined

Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ* v *Commission* [1983] ECR 3369, paragraph 59). The mere silence of Accinauto which followed BASF's letters of 21 and 22 June 1990 could not validly have varied the 1982 agreement. Under Article 12(2) of that agreement, variations were valid only if made in writing.

117 The Commission challenges the applicant's argument that there was no deliberate intention to restrict competition because the parties were unaware that they were infringing Community law. Any error of law that may have been committed by BASF's lawyers did nothing to alter the fact that the intention of BASF was to impose a passing-on obligation on Accinauto and thereby to control parallel exports to the United Kingdom.

— Findings of the Court

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

119 For an infringement of the competition rules of the Treaty to be considered to have been committed intentionally, it is not necessary for the undertaking to have been aware that it was infringing a prohibition laid down by those rules; it is

sufficient that it was aware that the object of the offending conduct was to restrict competition (*IAZ*, paragraph 45; Case T-66/92 *Herlitz* v *Commission* [1994] ECR II-531, paragraph 45). As the Court has already found, the applicant cannot have been unaware that the object of the offending clause in the 1982 agreement was to restrict parallel imports, and, as a result, by partitioning the various national markets, to thwart the very objective of realising the single market which the Treaty seeks to attain. The advice of a lawyer, which the applicant pleads in its aid, cannot exonerate it in that respect (*Miller*, paragraph 18).

120 The Court finds in this case that the Commission complied with the ceiling laid down by Regulation No 17, which refers to the overall turnover of the undertaking concerned (*Musique Diffusion Française*, paragraph 119; Case T-83/91 *Tetra Pak* v *Commission* [1994] ECR II-755, paragraph 247). The amount of the fine thus represents only 0.05% of Accinauto's overall turnover in 1991, which amounted to around ECU 18 450 000 (BEF 738 000 000; see paragraph 1 above).

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

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

123 The Commission's assessment of the duration of the infringement is, furthermore, in no way erroneous, given that that infringement has been characterised as being

the conclusion by the parties of an agreement containing a clause pursuing an object contrary to Article 85(1) of the Treaty. Even if the Court were unable to find that such a clause was implemented, the fact remains that its mere existence was capable of creating a 'visual and psychological' effect which contributed to a partitioning of the market (*Miller*, paragraph 7; *Herlitz*, paragraph 40). The infringement which began when the 1982 agreement was concluded did not therefore end until the offending clause was effectively removed.

124 Finally, it should be noted that the Commission accepted as a mitigating circumstance the fact that the parties terminated the infringement on 1 January 1992, before the statement of objections was sent to them on 12 May 1993. It also took account of the fact that Accinauto is economically dependent on BASF, and that the latter took advantage of that dependence in order to impose its economic interests.

125 In those circumstances, this Court finds that, in setting the fine on the applicant at ECU 10 000, the Commission did not exceed the bounds of the discretion which it enjoys in determining the amount of fines.

126 In the light of all the foregoing considerations, the applicant's claims must be dismissed in their entirety, without its being necessary to examine its claim that the Commission should pay it interest at 9.5% on the amount of the fine.

Costs

127 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's

pleadings. Since the applicant has been unsuccessful and the Commission has applied for costs, the applicant must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1. **Dismisses the application;**

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

Vesterdorf Moura Ramos Mengozzi

Delivered in open court in Luxembourg on 19 May 1999.

H. Jung
Registrar

B. Vesterdorf
President