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Complementary provisions of the EC Treaty

Cases reported in the present issue fortuitously illustrate the way in which a number of provisions of the EC Treaty help, among their other functions, to complement the impact of the rules on competition. In other words, while these provisions are not specifically or exclusively deigned with the application of the competition policy in mind, they may play an important part in the determination of competition cases.

For example, Article 10 of the EC Treaty provides that Member States should not introduce or maintain laws running counter to the implementation of the Treaty's objectives. This Article applies across the board, from agriculture to transport and from competition to social policy. In the *CIF* case, on page 231 of this issue, the Article was called in aid in support of the proposition that an Italian law, which in effect encouraged certain firms to commit what would normally be infringements of the rules on competition, should be disregarded. The proposition succeeded, on the basis that, taken in conjunction with the EC Treaty rules on competition, Article 10 provided the necessary justification.

In another case in this issue, the *Milk Marque* case on page 237, Article 234 serves the interests of the European Community's competition policy. This is the provision enabling national courts to refer questions of Community law to the Court of Justice of the European Communities for a "preliminary ruling". It applies to almost any sector of European Community law; and it is sometimes used when litigants in the national courts raise matters involving, or threatening to involve, the rules on competition.

One of the cases reported in this issue, the *Moser* case on page 233, combines two strands of European Community law: the provisions in competition law governing the making of complaints and the provisions of Article 232 of the EC Treaty enabling aggrieved parties to take legal action against certain Institutions of the Community for their "failure to act". Complaints in competition matters may be pursued by the administrative methods prescribed in procedural regulations; but it is sometime necessary, as the reported case shows, for the general rule on "failure to act" to reinforce the particular rules on complaints.

More rarely, it may be possible in a competition case to rely on Articles 235 and 288 of the EC Treaty in support of legal action against the Commission. This Article allows aggrieved parties to claim damages for injuries sustained as a result of action by the Community. It was held in the *Philip Morris* case earlier this year (Case T-377/00, not a competition case) that claims for non-contractual liability may be made under the two Articles in question. In principle, this ruling applies to wrongful actions by the Commission in the course of its conduct of a competition case, where those actions cause actual damage to a party. ■

PRICE FIXING (SORBATES): THE SORBATES CARTEL CASE

Subject: Price fixing
Quotas
Fines

Industry: Sorbates; chemical preservatives
(Implications for most industries)

Parties: Hoechst AG
Chisso Corporation
Daicel Chemical Industries Ltd
The Nippon Synthetic Chemical Industry Co Ltd
Ueno Fine Chemicals Industry Ltd

Source: Commission Statement IP/03/1330, dated 2 October 2003

(Note. Here is another in the succession of cartels discovered in recent years, due mainly in this case, as in several others, to the readiness of a member of the cartel to take advantage of the Leniency Notice and be the first to reveal the existence of the infringing arrangements.)

In a decision adopted on 2 October 2003, the Commission concluded that [the five companies listed above] operated a cartel in the sorbates market between 1979 and 1996. Sorbates are one of the most widely used chemical preservatives in Europe to prevent the development of moulds, bacteria and other micro-organisms in foods; for example, in mayonnaise and sausages as well as beverages. They are also used for the coating of cheese wrapping paper or in cosmetics. The Competition Commissioner, Mario Monti, said: "Because of this conspiracy, European consumers paid more for many everyday products than if the companies had competed against each other. I am determined that participation in a cartel should not pay. The only way for companies to avoid high fines is to come clean and stop participating in cartels whose only purpose is to extort from unknowing consumers, intermediate or final, illicit profits".

The Commission's decision follows an investigation, which showed beyond any doubt that, between the end of December 1978 and 31 October 1996 (30 November 1995 for Nippon), Hoechst, Chisso, Daicel, Nippon and Ueno operated a cartel by which they agreed prices and allocated volume quotas for each other. In 1995 the five companies controlled about 85% of the sorbates market in the European Economic Area (EEA). Until it transferred its sorbates business to Nutrinova in 1997, Hoechst was the largest producer of sorbic acid, the main type of sorbates, followed by Daicel. Hoechst is based in Germany. The other four companies all have their headquarters in Japan.

Sorbates are anti-microbial agents capable of retarding or preventing the growth of micro-organisms, such as yeast, bacteria and moulds. primarily in foods and

beverages. They are also used as stabilisers in pharmaceutical products and cosmetics. There are three types of sorbates: sorbic acid, used in margarine, mayonnaise, beverages and bakery products, among other things; potassium sorbate used in products with a high water content; and calcium sorbate used for the coating of cheese wrapping paper in France and Italy.

The investigation began in the autumn of 1998 when the Commission was approached by representatives of Chisso under the Commission's Leniency policy, which enables companies to obtain full immunity, if they are the first to provide information on a cartel, or a reduction from fines. The evidence gathered by the Commission clearly established the existence of a cartel in breach of Article 81(1) of the EC Treaty and Article 53 of the EEA Agreement.

The participants in the infringement usually met twice a year to discuss prices for each country and volume allocations. These meetings alternated between various locations in Europe and Japan. The Japanese producers would hold preparatory meetings to agree on prices and volumes to be discussed at the joint meetings, most of which took place in Tokyo.

Calculation of the fines

The Commission takes the view that the cartel agreement was a very serious violation of EC competition law. When calculating fines in cartel cases the Commission takes account of the gravity of the infringement, its duration and the existence of any aggravating or mitigating circumstances. It also takes account of a company's share of the market concerned and its overall size. The fine can never go beyond 10% of a company's total annual turnover, as set out in the applicable Regulation.

Chisso fulfilled the conditions for full immunity and, therefore, did not receive a fine. Hoechst was given the highest fine because of its overall size as well as its share of the relevant market and the fact that it had committed a similar violation in the past. The fine also reflects its position as co-leader in the cartel together with Daicel. However, the final amount for Hoechst also includes a 50% reduction for co-operating in the investigation. The fines imposed on the Japanese producers also include different levels of reductions according to the degree of cooperation provided to the Commission.

The following is a list of the individual fines (in € million).

Hoechst AG:	99.0
Daicel Chemical Industries, Ltd:	16.6
Ueno Fine Chemicals Industry, Ltd:	12.3
The Nippon Synthetic Chemical Industry Co, Ltd:	10.5

The United States and Canada have also investigated, and imposed penalties in respect of price fixing and other restraints of trade by certain producers of sorbates, though the companies concerned in the different proceedings are not exactly the same. ■

ABUSE OF DOMINANT POSITION (TYRES): THE MICHELIN CASE

Subject: Abuse of dominant position
Discounts / Rebates
Fines

Industry: Tyres
(Implications for other industries)

Parties: Manufacture Française des Pneumatiques Michelin
Commission of the European Communities

Source: Judgment of the Court of First Instance, dated 30 September, 2003, in Case T-203/01 (*Manufacture Française des Pneumatiques Michelin v Commission of the European Communities*); Court Press Release 80/03

(Note. The Court of First Instance has upheld the Commission's Decision to fine Michelin for practices which were unfair to its dealers: a company in a dominant position, which operated a system of loyalty rebates and bonuses for its dealers, thereby strengthened its position to the detriment of other operators and impeded normal competition. At the time of writing, the judgment is not available in English.)

Summary of Judgment

Michelin enjoys a dominant position on the French market for replacement tyres for trucks and buses, a market which includes both new replacement tyres and retreaded tyres. In 2001 the Commission adopted a decision by which it found that Michelin had abused its dominant position, in that, in France, Michelin's commercial and pricing policy towards its dealers was based on a complex system of discounts, refunds and/or other financial advantages. The main objective of the policy was to tie dealers to the company and to maintain the company's market share and consequently to undermine competition in the common market. The Commission fined Michelin €19.76 million.

The following were specifically found to be abuses: quantitative discounts (or "quantity rebates") and discounts calculated by reference to the quality of the service provided by the dealer to its customers ("service bonuses"). These preferential prices were not stipulated when the dealer was invoiced but were generally applied in the year following the reference period.

Michelin brought an action before the Court of First Instance of the European Communities for annulment of the Commission's Decision. It denied that the discounts and bonuses in question were loyalty-inducing, challenged the Commission's allegation that the cumulative effect of the various systems of rebates amounted to a further abuse and disputed the Commission's economic

analysis and the size of the fine imposed on it. The Court of First Instance upheld the Commission's decision, accepting that a company in a dominant position, which operated loyalty discounts and bonuses, impeded normal, price-based competition and infringed Community law.

Quantity rebates were unfair since dealers were unable to estimate the real unit purchase price of Michelin tyres, the rebates not being calculated and paid until about a year after the first purchases were made. Dealers were placed in a position of uncertainty until recovery of the rebates and this prompted them to minimise their risks by taking advantage of the terms offered and purchasing from Michelin. The Court of First Instance observed, first, that it has consistently held that although it is not necessarily contrary to Community law for a company in a dominant position to grant a system of discounts under which the rate of the discount increases with the volume of purchases made, the system must be based on a countervailing advantage which is economically justifiable (for example, economies of scale which are passed on to the customer).

However, Michelin gave no economic justification for its system of quantity discounts, which, because it was loyalty inducing, tended to prevent French dealers in truck and bus tyres not only from ascertaining the price at the time of purchase but also from obtaining supplies from competing manufacturers. Similarly, in the Court of First Instance's view, the service bonuses operated by Michelin, which supposedly rewarded after-sales services provided by dealers, had an abusive effect: they were unfair since they were based on subjective criteria, were loyalty-inducing and were in the nature of a tied sale in that they encouraged dealers to give priority to Michelin when having tyres retreaded. The grant of such discounts by a company in a dominant position is not consistent with normal competition based on prices and is consequently prohibited by Community law.

The terms on which certain dealers entered into partnership with Michelin helped to strengthen Michelin's position and to remove competition on the market for new truck and bus tyres and are thus prohibited by the EC Treaty. The system of preferential prices linked to the "Michelin Friends Club" also amounted to an abuse. Conditions of Club membership included requiring dealers to give undertakings relating to market share, to stock a certain number of Michelin tyres and to promote the brand, in return for which Michelin provided dealers with training and financial support towards investment. The Court of First Instance found that the Commission was right in concluding that overall those conditions were intended to eliminate competition on the part of other manufacturers as well as to ensure that Michelin's position was maintained and that competition on the market in new replacement truck and bus tyres was restricted.

The Court of First Instance endorsed the Commission's analysis and upheld the fine imposed on Michelin. Given that these infringements had lasting and harmful effects for consumers, the Court of First Instance rejected Michelin's arguments challenging the Commission's economic analysis and the level of the fine, which was high because of aggravating circumstances. ■

NATIONAL LAW (MATCHES): THE CIF / AGCM CASE

Subject: National law

Industry: Matches
(Implications for other industries)

Parties: Consorzio Industrie Fiammiferi (CIF)
Autorità Garante della Concorrenza e del Mercato (AGCM)

Source: Judgment of the Court of Justice of the European Communities, dated 9 September 2003, in Case C-198/01 (Consorzio Industrie Fiammiferi v Autorità Garante della Concorrenza e del Mercato)

(Note. Where undertakings engage in conduct contrary to Article 81(1) of the EC Treaty and where that conduct is required or facilitated by national legislation which legitimises or reinforces the effects of the conduct, a national competition authority, one of whose responsibilities is to ensure that Article 81 is observed, has a duty to "disapply" - that is, disregard - the national legislation. The report below consists of a selection of key paragraphs and of the ruling itself.)

1. By order of 24 January 2001, received at the Court on 11 May 2001, the Regional Administrative Court, Lazio, referred to the Court for a preliminary ruling under Article 234 of the EC Treaty two questions on the interpretation of Article 81.

2. Those questions have arisen in proceedings by which the Consorzio Industrie Fiammiferi, the Italian consortium of domestic match manufacturers (the CIF), challenges a decision of the Autorità Garante della Concorrenza e del Mercato, the Italian national competition authority (the Authority) of 13 July 2000, which declared the legislation establishing and governing the CIF contrary to Articles 10 and 81 of the EC Treaty, found that the CIF and the undertakings which were members of it (the member undertakings) had infringed Article 81 through the allocation of production quotas and ordered them to terminate the infringements found.

45. ... although Articles 81 and 82 of the EC Treaty are, in themselves, concerned solely with the conduct of undertakings and not with laws or regulations emanating from Member States, those articles, read in conjunction with Article 10, which lays down a duty to cooperate, none the less require the Member States not to introduce or maintain in force measures, even of a legislative or regulatory nature, which may render ineffective the competition rules applicable to undertakings (see Case 13/77, *GB-Inno-BM*, paragraph 31; Case 267/86, *Van Eycke*, paragraph 16; Case C-185/91, *Reiff*, paragraph 14; Case C-153/93, *Delta Schiffahrts- und Speditionsgesellschaft*, paragraph 14; Case C-96/94, *Centro Servizi Spediporto*, paragraph 20; and Case C-35/99, *Arduino*, paragraph 34).

46. The Court has held in particular that Articles 10 and 81 are infringed where a Member State requires or favours the adoption of agreements, decisions or concerted practices contrary to Article 81 or reinforces their effects, or where it divests its own rules of the character of legislation by delegating to private economic operators responsibility for taking decisions affecting the economic sphere (see *Van Eycke*, paragraph 16; *Reiff*, paragraph 14; *Delta Schiffahrts- und Speditionsgesellschaft*, paragraph 14; *Centro Servizi Spediporto*, paragraph 21; and *Arduino*, paragraph 35).

47. Moreover, since the Treaty on European Union came into force, the EC Treaty has expressly provided that in the context of their economic policy the activities of the Member States must observe the principle of an open market economy with free competition (see Articles 4(1) and 98).

48. It is appropriate to bear in mind, second, that in accordance with settled case law the primacy of Community law requires any provision of national law which contravenes a Community rule to be disapplied, regardless of whether it was adopted before or after that rule.

49. The duty to disapply national legislation which contravenes Community law applies not only to national courts but also to all organs of the State, including administrative authorities (see, to that effect, Case 103/88, *Fratelli Costanzo*, paragraph 31), which entails, if the circumstances so require, the obligation to take all appropriate measures to enable Community law to be fully applied (see Case 48/71, *Commission* v *Italy*, paragraph 7).

The Court hereby rules: 1. Where undertakings engage in conduct contrary to Article 81(1) EC and where that conduct is required or facilitated by national legislation which legitimises or reinforces the effects of the conduct, specifically with regard to price-fixing or market-sharing arrangements, a national competition authority, one of whose responsibilities is to ensure that Article 81 EC is observed: has a duty to disapply the national legislation; may not impose penalties in respect of past conduct on the undertakings concerned when the conduct was required by the national legislation; may impose penalties on the undertakings concerned in respect of conduct subsequent to the decision to disapply the national legislation, once the decision has become definitive in their regard; and may impose penalties on the undertakings concerned in respect of past conduct where the conduct was merely facilitated or promoted by the national legislation, whilst taking due account of the specific features of the legislative framework in which the undertakings acted.
2. It is for the referring court to assess whether national legislation such as that at issue in the main proceedings, under which competence to fix the retail selling prices of a product is delegated to a ministry and power to allocate production between undertakings is entrusted to a consortium to which the relevant producers are obliged to belong, may be regarded, for the purposes of Article 81(1) EC, as precluding those undertakings from engaging in autonomous conduct which remains capable of preventing, restricting or distorting competition. ■

COMPLAINTS (PUBLISHING): THE MOSER CASE

Subject: Complaints
Concentrations
"Community dimension"
"Failure to act"

Industry: Publishing; newspapers

Parties: (See the list in the Court's Ruling below)
Commission of the European Communities

Source: Judgment of the Court of Justice of the European Communities, dated 25 September 2003, in Case C-170/02 P (Schlüsselverlag J.S. Moser GmbH et al v Commission of the European Communities)

(Note. This case arose from the dismissal of a complaint by a number of publishers that the Commission had failed to act on their complaint about a concentration involving the newspaper publishing industry in Austria. It illustrates the relationship between the procedure envisaged under the rules on competition for making formal complaints and the provisions of the Treaty enabling aggrieved parties to take legal action against an Institution of the European Communities if it has, in their view, "failed to act". In effect the Court's judgment in this case was to uphold the claim that the Commission was under a duty to explain its position. But the case was rejected as inadmissible as it was out of time. The essential paragraphs of the judgment are reproduced below.)

Judgment

1. [The appellants in this case appealed] against the order of the Court of First Instance of 11 March 2002, in Case T-3/02 *Schlüsselverlag J.S. Moser and Others* v *Commission* (hereinafter the contested order), by which the Court of First Instance dismissed as manifestly inadmissible their action for a declaration that, by unlawfully failing to adopt a decision on the compatibility of a concentration with the common market, the Commission had failed to act.

[Paragraphs 2 to 6 set out the legal background, with particular reference to Article 232 of the EC Treaty (on "failure to act") and the relevant provisions of the Mergers Regulation. Paragraphs 7 to 15 set out the facts of the dispute, which turn principally on the fact that, following the Austrian authorities' handling of a concentration, the Commission took the view that the concentration had no "Community dimension" and that it did not therefore propose to intervene. The appellants claimed that there was, on the contrary, a "Community dimension" to the case. Paragraphs 16 to 20 summarise the position adopted by the Court of First Instance, which had held the action to be inadmissible. Paragraphs 21 to 25 set out the grounds of the appeal.]

Findings of the Court

25. The Commission's response to the ground of appeal that the Court of First Instance was wrong in holding the letter of 7 November 2001 [regarding the lack of "Community dimension"] to be a definition of its position putting an end to the failure to act is that it was under no obligation, in such a situation, formally to define its position on the appellants' complaint and that no failure to act could therefore be imputed to it.

26. That argument of the Commission cannot be accepted.

27. First, the Commission cannot refrain from taking account of complaints from undertakings which are not party to a concentration capable of having a Community dimension. Indeed, the implementation of such a transaction for the benefit of undertakings in competition with the complainants is likely to bring about an immediate change in the complainants' situation on the market or markets concerned. That is why Article 18 of the Merger Regulation provides that interested third parties are entitled to be heard by the Commission, if they so request. Commission Regulation EC/447/98 on the notifications, time-limits and hearings provided for in Regulation EEC/4064/89 also provides, in Article 11(c), that third parties, that is, natural or legal persons showing a sufficient interest, including customers, suppliers and competitors have the right to be heard pursuant to Article 18.

28. Furthermore, the Commission cannot validly maintain that it is not required to take a decision on the very principle of its competence as supervising authority, when it is solely responsible, under Article 21 of the Merger Regulation, for taking, subject to review by the Court of Justice, the decisions provided for by that regulation. If the Commission refused to adjudicate formally, at the request of third party undertakings, on the question whether or not a concentration which has not been notified to it falls within the scope of the regulation, it would make it impossible for such undertakings to take advantage of the procedural guarantees which the Community legislation accords them. The Commission would, at the same time, deprive itself of a means of checking that undertakings which are parties to a concentration with a Community dimension comply properly with their obligation to notify. Moreover, the complainant undertakings could not challenge, by means of an action for annulment, a refusal by the Commission to act which, as was stated in the previous paragraph, is likely to do them harm.

29. Finally, nothing justifies the Commission in avoiding its obligation to undertake, in the interests of sound administration, a thorough and impartial examination of the complaints which are made to it. The fact that the complainants do not have the right, under the Merger Regulation, to have their complaints investigated under conditions comparable to those for complaints within the scope of Regulation 17/62 does not mean that the Commission is not required to consider whether the matter is within its competence and to draw the necessary conclusions. It does not release the Commission from its obligation to

give a reasoned response to a complaint that it has specifically failed to exercise its competence.

30. In those circumstances, the Commission is not entitled to maintain that it could decline to define its position in this case and that, therefore, no failure to act could, in any event, be attributed to it.

31. On the other hand, the Commission argues correctly that the request to act, which was sent to it on 25 May 2001, was in any event out of time.

32. The Merger Regulation is based on the principle of a clear division of powers between the supervisory authorities of the Member States and those of the Community. The 29th recital in its preamble provides that concentrations not covered by this Regulation come, in principle, within the jurisdiction of the Member States. Conversely, the Commission has sole jurisdiction to take all the decisions relating to concentrations with a Community dimension and, under Article 9 of that regulation, to decide to refer to the competent authorities of a Member State the file on certain transactions affecting more particularly a market, within that Member State, which presents all the characteristics of a distinct market.

33. The Merger Regulation also contains provisions whose purpose is to restrict, for reasons of legal certainty and in the interest of the undertakings concerned, the length of the proceedings for investigating transactions which are the responsibility of the Commission. Thus, under Article 4 of that regulation, the Commission must be notified of a transaction with a Community dimension within one week. Articles 6 and 10(1) of the regulation provide that the Commission then has a period equal, as a general rule, to one month in which to decide whether or not to initiate a formal investigation of the compatibility of the transaction with the common market. Under Article 10(3) of the regulation, the Commission must give a decision on the file at the end of a period of four months in principle, which runs from the decision to initiate the proceeding. Article 10(6) provides that, [w]here the Commission has not taken a decision ... within the deadlines ..., the concentration shall be deemed to have been declared compatible with the common market.

34. It follows from the provisions referred to in paragraphs 32 and 33 of this judgment that the Community legislature intended to lay down a clear division between the activities of the national authorities and those of the Community authorities, by avoiding successive definitions of positions by those different authorities on the same transaction, and that it wished to ensure scrutiny of concentrations within periods compatible both with the requirements of sound administration and those of commercial life.

35. In addition, the actions which the undertakings concerned, be they parties to the transaction or third parties, may take against decisions taken by the Commission are subject to the general condition of the time-limit fixed by the fifth paragraph of Article 230 of the EC Treaty and must therefore be made within a period of two months.

36. The requirements of legal certainty and of continuity of Community action which are at the origin of all those provisions would be disregarded if the Commission could, pursuant to the second paragraph of Article 232 of the EC Treaty, be requested to make a determination, outside a reasonable period, on the compatibility with the common market of a concentration which was not notified to it (see, to that effect, Case 59/70, *Netherlands* v *Commission*, paragraphs 15 to 24). Undertakings could thus lead the Commission to call in question a decision taken by the competent national authorities with regard to a concentration, even after the exhaustion of the possible legal remedies against such decision in the legal system of the Member State concerned.

37. In this case, the concentration in issue was notified on 5 September 2000 to the Oberlandesgericht Wien, which approved it on 26 January 2001. The appellants were entitled at any time during that period to request the Commission to examine whether the transaction had a Community dimension. On 25 May 2001, the date on which they made a complaint to the Commission, nearly four months had elapsed since the national authorities' decision approving completion of the transaction, that is to say, a period similar to that which is afforded the Commission, under Article 10(3) of the Merger Regulation, to undertake an investigation of a notified transaction, where the formal proceeding provided for that purpose has been initiated.

38. In those circumstances, the period of time at the end of which the Commission was seised of a complaint and subsequently called upon to act by the appellants could not, in this case, be regarded as reasonable and it was therefore no longer open to the appellants to bring an action for a declaration of failure to act in that respect.

39. The appellants' action for a declaration of failure to act was therefore, in any event, manifestly inadmissible.

40. It follows from all the foregoing that the appeal must be dismissed.

[Paragraph 41 deals with costs, as set out in the ruling below.]

Court's Ruling

The Court hereby:
1. Dismisses the appeal;
2. Orders Schlüsselverlag J.S. Moser GmbH, J. Wimmer Medien GmbH & Co. KG, Styria Medien AG, Zeitungs- und Verlags-Gesellschaft mbH, Eugen Ruâ Vorarlberger Zeitungsverlag und Druckerei GmbH, Die Presse Verlags-Gesellschaft mbH and Salzburger Nachrichten Verlags-Gesellschaft mbH & Co. KG to pay the costs. ■

The Court cases reported in this Newsletter are taken from the website of the Court of Justice of the European Communities. The contents of this website are freely available. Reports on the website are subject to editing and revision.

AGRICULTURE (MILK): THE MILK MARQUE CASE

Subject: Agriculture
Pricing policy

Industry: Milk; milk products

Parties: (See Case citation below)

Source: Judgment of the Court of Justice, dated 9 September 2003 in Case C-137/00 (*R v The Competition Commission, the Secretary of State for Trade and Industry and the Director General of Fair Trading, ex parte Milk Marque Ltd and the National Farmers Union; third party, the Dairy Industry Federation*)

(Note. Here is a classic illustration of the relationship – in some ways, the clash, - between competition policy and the Common Agricultural Policy. The English Court submitted four questions to the Court of Justice, of which the two most important may be summarized as follows. Do the provisions of the EC Treaty on the CAP preclude the application of national competition laws; and does the existence of "target prices" under the CAP preclude the application of national rules on price-fixing? Broadly, the Court answers in the negative. Excerpts from the Court's judgment, including its formal ruling, are set out below.)

Judgment

1. ... the High Court of Justice of England and Wales, Queen's Bench Division (Crown Court), referred for a preliminary ruling ... four questions on the interpretation of Articles 12, 28 to 30, 32 to 38, 49 and 55 of the EC Treaty, of Council Regulation No 26 applying certain rules of competition to production of and trade in agricultural products and of Regulation EEC/804/68 of the Council on the common organisation of the market in milk and milk products ...

2. Those questions were raised in proceedings ... relating to a report by the Competition Commission recommending that measures be adopted against Milk Marque because of allegedly anti-competitive conduct engaged in by it and to decisions subsequently taken by the Secretary of State on the basis of that report.

[Paragraphs 3 to 12 set out the relevant terms of the CAP regulations.]

Questions referred for a preliminary ruling

13. Milk Marque is a farmers' cooperative society engaged in the collection, distribution and supply of milk. Immediately after the deregulation of the milk market in the United Kingdom in 1994 the members of Milk Marque had some 60% of the supply of milk in Great Britain. In the period 1997/98 to which the

Competition Commission's report relates, that figure was 49.6%. During the period from April 1999 to September 1999, it fell still further to 40.8%.

[Paragraphs 14 to 30 describe the circumstances in which the UK Competition Commission, on a reference from the Director General of Fair Trading, issued a reported finding a scale monopoly in Milk Marque's activities, criticizing the prices resulting from those activities and recommending to the Secretary of State certain action designed to curb the monopoly and lower prices. Milk Marque took action in the High Court against the official parties concerned; but the High Court decided to refer to the Court of Justice four questions for a preliminary ruling on the application to the case of Community law.]

31. In that legal and factual context, the High Court of Justice of England and Wales, Queen's Bench Division (Crown Office), decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
1 Are Articles 32 to 38 ... EC, Council Regulation [No 26 of 4 April 1962] and Council Regulation (EEC) No 804/68, as amended, to be interpreted as precluding a Member State from applying national laws such as the Fair Trading Act 1973 and the Competition Act 1998 to the manner in which producers of milk choose to organise themselves into co-operatives and conduct themselves in regard to the sale and processing of their milk:
(a) in all circumstances; or
(b) where the intended or actual effect is to deprive such producers of the ability to increase the price obtained for their milk; or
(c) where the intended or actual effect is to reduce the price that producers obtain for their milk in circumstances where that price is already below the target price fixed pursuant to Article 3 of Regulation No 804/68; or
(d) in a way which is not consistent with any one or more of the following:
(i) the objectives set out in Article 33 EC ...; and/or
(ii) the policy, aims or functioning of the common organisation of the market in milk and milk products: and /or
(iii) the policy of Article 36 EC ... and Regulation No 26?
2 Does the function of the target price for milk set by the Council under Regulation (EEC) No 804/68 preclude a Member State from:
(a) making use of the target price as an indicator of the actual price movements due to the common agricultural policy; and
(b) treating the fact that a milk producers' co-operative in that State has achieved for its members milk prices that are below the target price, but are nearer to the target price in one period of time than another, as supporting a conclusion that the co-operative exercises market power which contributes to prices being higher than they would have reached under more competitive conditions?
3 Are Articles 28 to 30, EC ... and Articles 49 and 55 EC ... to be interpreted as precluding a Member State from applying national laws such as the Fair Trading Act 1973 and the Competition Act 1998 in such a way as to prohibit a milk producers' co-operative which has been found to enjoy market power from sending milk produced by its members to be processed by contractors on its behalf, including in other Member States, as a step being taken by the co-operative for the purpose of exploiting its position in the market in its favour?

4 Where large vertically-integrated dairy co-operatives exist and are permitted to operate in other Member States, is the general principle of non-discrimination, whether independently or as a given specific effect in Articles 12 and/or 34 EC ..., to be interpreted as precluding a Member State from applying national laws such as the Fair Trading Act 1973 and the Competition Act 1998 to prohibit a milk producers' co-operative which has been found to enjoy market power from:
(a) acquiring or building further plants for the processing of milk produced by its members, which would give the co-operative the ability to exploit still further its position in the market in its favour; or
(b) sending milk produced by its members to be processed by contractors on its behalf, whether within the Member State concerned or in other Member States, as a step being taken by the co-operative for the purpose of exploiting its position in the market in its favour?

[Paragraphs 32 to 42 deal with the admissibility of the reference, which the Court accepted. Paragraphs 43 to the end of the judgment go into detail on the four questions raised by the High Court and are fully summarized in the Court's formal ruling. However, paragraphs 85 to 89 are of particular interest.]

85. As the Court has already held, the essential aim of the machinery of the common organisation of the market in milk and milk products is to achieve price levels at the production and wholesale stages which take into account both the interests of Community production as a whole in the relevant sector and those of consumers and which guarantee market supplies without encouraging overproduction (see *Irish Creamery Milk Suppliers Association and Others*, cited above, paragraph 20).

86. In consequence, the objectives of that common organisation cannot be compromised by national measures such as those at issue in the main proceedings since they do not as such affect the fixing of prices but rather seek to safeguard the proper working of the machinery for setting prices in order to achieve price levels which serve the interests of both producers and consumers.

87. With regard, in particular, to the question whether national measures such as those at issue in the main proceedings infringe the relevant Community legislation because the milk price of Milk Marque producers was lower than the target price laid down by Regulation No 1190/97 before the national authorities took action, it must be observed that that fact alone is not sufficient to render those measures unlawful under Community law.

88. First of all, this sort of price guideline is a political objective at Community level and is not a guarantee to all producers in every Member State that they will earn an income corresponding to the target price.

89. Secondly, given that, as is clear from paragraphs 57 to 60 of this judgment, the maintenance of effective competition is one of the objectives of the common organisation of the market in milk and milk products, Article 3(1) of Regulation EEC/804/68 cannot be interpreted as meaning that producers of milk have the

right to seek to earn an income corresponding to the target price by any means, including those that may constitute abuses or be anti-competitive.

The Court's Ruling

The Court hereby rules:

1 Articles 32 to 38 EC, Council Regulation No 26 of 4 April 1962 applying certain rules of competition to production of and trade in agricultural products and Regulation (EEC) No 804/68 of the Council of 27 June 1968 on the common organisation of the market in milk and milk products, as amended by Council Regulation (EC) No 1587/96 of 30 July 1996, must be interpreted as meaning that, in the sector governed by the common organisation of the market in milk and milk products, the national authorities in principle retain jurisdiction to apply national competition law to a milk producers' cooperative in a powerful position on the national market.

Where the national competition authorities act in the sector governed by the common organisation of the market in milk and milk products, they are under an obligation to refrain from adopting any measure which might undermine or create exceptions to that common organisation. Measures taken by national competition authorities in the sector governed by the common organisation of the market in milk and milk products may not, in particular, produce effects which are such as to impede the working of the machinery provided for by that common organisation.

However, the mere fact that the prices charged by a dairy cooperative were already lower than the target price for milk before those authorities intervened is not sufficient to render the measures taken by them in relation to that cooperative in application of national competition law unlawful under Community law.

Furthermore, such measures may not compromise the objectives of the common agricultural policy as set out in Article 33(1) EC. The national competition authorities are under an obligation to ensure that any contradictions between the various objectives laid down in Article 33 EC are reconciled where necessary, without giving any one of them so much weight as to render the achievement of the others impossible.

2 The function of the target price for milk laid down in Article 3(1) of Regulation No 804/68, as amended by Regulation No 1587/96, does not preclude the national competition authorities from using that price for the purposes of investigating the market power of an agricultural undertaking by comparing variations in actual prices with the target price.

3 In the context of the application of national competition law, the Treaty rules on the free movement of goods do not preclude the competent authorities of a Member State from prohibiting a dairy cooperative which enjoys market power from entering into contracts with undertakings, including undertakings

established in other Member States, for the processing, on its behalf, of milk produced by its members.

4 Article 12 of the EC Treaty and the second subparagraph of Article 34(2) do not preclude the adoption of measures such as those at issue in the main proceedings against a dairy cooperative which enjoys market power and exploits that position in a manner contrary to the public interest, even though large vertically-integrated dairy cooperatives are permitted to operate in other Member States. ■

Cross-Channel Transport Services

Following press inquiries, the Commission's spokesman for Competition has confirmed that, on 3 September, Commission officials carried out simultaneous unannounced inspections at the premises of a number of operators of cross-Channel transport services. The officials were helped by officials of the Member States concerned.

The purpose of these inspections is to ascertain whether there is evidence of suspected cartel agreement and related illegal practices concerning fixing of prices and trade conditions for cross-Channel transport services. The purpose is also to ascertain whether there is evidence of suspected market sharing agreements in relation to the provision of ferry services to and from the UK.

Surprise inspections are a preliminary step in investigations into suspected cartels. The fact that the Commission carries out such inspections does not mean that the companies are guilty of anti-competitive behaviour nor does it prejudge the outcome of the investigation itself. The Commission respects the rights of defence, in particular the right of companies to be heard in antitrust proceedings.

There is no strict deadline to complete cartel inquiries. Their duration depends on a number of factors, including the complexity of each case, the exercise of the right of defence and the implementation of the Commission's consultation and other procedures.

A similar statement has been made by the Commission's spokesman for Competition to the effect that, on 3 September, Commission inspectors assisted by officials from National Competition Authorities carried out simultaneous unannounced inspections at the premises of a number of ferry operators located in Sweden, Denmark and Germany.

Source: Commission Memoranda MEMO/03/168 and MEMO/03/167, both dated 3 September 2003

DISTRIBUTION (MOTOR VEHICLES): THE VW CASE

Subject: Distribution
Differential pricing

Industry: Motor vehicles

Parties: Volkswagen
Commission of the European Communities

Source: Judgment of the Court of Justice of the European Communities, dated 18 September 2003, in Case C-338/00P (Volkswagen AG v Commission of the European Communities)

(Note. This has been a long-running case; and, since the Court of Justice largely upheld the views of the Court of First Instance, the judgment has been strictly edited. The interest of the case lies mainly in the way in which VW sought to "partition the market"; that is, by trying to keep the Italian market separate from the market for VW cars in other Member States. The principal means by which VW sought to achieve this end was an arrangement, referred to here as "Convenzione B", requiring 85% of Italian sales of VW cars to be limited to the Italian market. The Court of First Instance had reduced to €90m the even heavier fine originally imposed by the Commission; the Court of Justice did not interfere with this assessment.)

Judgment

[Paragraph 1 indicates that the action is an appeal against a judgment of the Court of First Instance, which had dismissed in part an application to annul a Commission Decision finding an infringement by VW and imposing a fine. Paragraphs 2 to 10 set out the requirements of the Motor Vehicle Block Exemption Regulation (predecessor to the regulation described on page 250 of this issue) and the general legal framework of the proceedings.]

Facts and proceedings before the Court of First Instance

11. The facts underlying the dispute are set out as follows in the judgment under appeal:
1 The applicant is the holding company of the Volkswagen group. The group's business activities include the manufacture of motor vehicles of the Volkswagen, Audi, Seat and Skoda makes, and the manufacture of components and spare parts. ...
2 Motor vehicles of the Volkswagen and Audi makes are sold in the Community through selective distribution networks. The import into Italy of those vehicles, their spare parts and accessories, is carried out exclusively by Autogerma SpA (Autogerma), a company incorporated under Italian law, established in Verona (Italy), which is a wholly owned subsidiary of the applicant and which

accordingly constitutes, with the applicant and Audi, one economic unit. Distribution in Italy takes place through legally and economically independent dealers, who are nevertheless contractually bound to Autogerma.

...

8 From September 1992 and during 1993 the value of the Italian lira declined greatly in comparison with the German mark. However, the applicant did not make a proportionate increase in its sales prices in Italy. The price differences which resulted from that situation made it economically advantageous to re-export vehicles of the Volkswagen and Audi makes from Italy.

9 During 1994 and 1995 the Commission received letters from German and Austrian consumers complaining of obstacles to the purchase in Italy of new motor vehicles of the Volkswagen and Audi makes for immediate re-export to Germany or Austria.

10 By letter of 24 February 1995 the Commission informed the applicant that, on the basis of complaints from German consumers, it had concluded that the applicant or Autogerma had forced Italian dealers for Volkswagen and Audi makes to sell vehicles solely to Italian customers by threatening to terminate their dealer contracts. In the same letter the Commission gave formal notice to the applicant to put an end to that barrier to re-exportation and to inform it, within three weeks of the date of receipt of that letter, of the measures adopted in that regard.

...

13 On 17 October 1995 the Commission adopted a decision ordering investigations under Article 14(3) 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). The investigations took place on 23 and 24 October 1995 ...

14 On the basis of the documents found during those investigations the Commission reached the conclusion that the applicant, Audi and Autogerma had put in place, with their Italian dealers, a market-partitioning policy. On 25 October 1996 the Commission served a statement of objections to that effect on the applicant and Audi.

15 By letter of 18 November 1996 the applicant and Audi requested access to the file. They inspected the file on 5 December 1996.

16 On 19 December 1996 Autogerma, at the express request of the applicant, sent a circular to the Italian dealers stating that exports to final users (including those through intermediaries) and to dealers belonging to the distribution network were lawful and would therefore not be penalised. The circular also indicated that the discount granted to dealers on the sale price of vehicles ordered, known as the margin, and payment of their bonus did not depend in any way on whether the vehicles had been sold within or outside their contract territory.

...

20 On 28 January 1998 the Commission adopted [the contested decision]. The decision is addressed solely to the applicant. The Commission states that the applicant is responsible for the infringement found because Audi and Autogerma are its subsidiaries and their activities were known to it. As regards the Italian dealers, the Commission states that they did not participate actively in the barriers to re-export but, as victims of the restrictive policy introduced by the manufacturers and Autogerma, were forced to consent to that policy.

...

22 As regards the measures taken by the applicant and Audi, the Commission cites the introduction by the applicant of a split margin system ... The Commission also mentions the reduction by the applicant and Audi of dealers' stocks. That measure, accompanied by a policy of restricted supply, caused a considerable increase in delivery times and led some customers to cancel their orders. It also allowed Autogerma to refuse supplies requested by German dealers (cross-deliveries inside the Volkswagen distribution network). The Commission also refers to the conditions laid down by Audi and Autogerma for calculating the quarterly 3% bonus paid to dealers on the basis of the number of vehicles they had sold.

23 Among the penalties imposed by Autogerma on the dealers, the Commission refers to the termination of certain dealership contracts and the cancellation of the quarterly 3% bonus for sales outside the contract territory.

...

26 The Commission concludes that those measures, which all form part of the contractual relations which the manufacturers maintain, through Autogerma, with the dealers in their selective distribution network, are the result of an agreement or concerted practice and constitute an infringement of Article 85(1) of the Treaty since they represent the implementation of a market-partitioning policy. It explains that those measures are not covered by Regulation EEC/123/85 and Regulation EC/1475/95, since no provision of those regulations exempts an agreement which aims to prevent parallel exports by final consumers, by intermediaries acting on their behalf or by other dealers in the dealer network. It also states that an individual exemption cannot be granted in the present case, since the applicant, Audi and Autogerma did not notify any aspect of their agreement with the dealers, and that in any event the barriers to re-exportation are at variance with the objective of consumer protection set out in Article 85(3) of the Treaty.

...

28 In Article 1 of the decision the Commission finds that the applicant and its subsidiaries Audi and Autogerma have infringed Article 85(1) of the EC Treaty by entering into agreements with the Italian dealers in their distribution network in order to prohibit or restrict sales to final consumers coming from another Member State, whether in person or represented by intermediaries acting on their behalf, and to other authorised dealers in the distribution network who are established in other Member States. In Article 2 of the decision it orders the applicant to bring an end to the infringements and requires it to take, inter alia, the measures set out there.

29 In Article 3 of the decision the Commission imposes a fine of ECU 102 million on the applicant in view of the gravity of the infringement found. The Commission contends that the obstruction of parallel imports of vehicles by final consumers and of cross-deliveries within the dealer network hampers the objective of creating the common market, which is one of the fundamental principles of the European Community, and the infringement found is therefore particularly serious. Moreover, it points to the fact that the relevant rules have been settled for many years and the fact that the Volkswagen group has the highest market share of any motor vehicle manufacturer in the Community. The Commission also refers to documents as proof that the applicant was fully aware

that its behaviour infringed Article 85 of the Treaty. It states, moreover, that the infringement lasted for more than 10 years. Lastly, the Commission took into account, as aggravating circumstances, the fact that the applicant, first, did not put an end to the measures in question even though it had received two letters from the Commission in 1995 pointing out that preventing or restricting parallel imports from Italy was an infringement of the competition rules and, second, had used the dependence of dealers on a motor vehicle manufacturer, and so caused, in this case, quite substantial turnover losses for a number of dealers. The decision explains that the applicant, Audi and Autogerma threatened more than 50 dealers that their contracts would be terminated if they continued to sell vehicles to foreign customers and that 12 dealership contracts were in fact terminated, endangering the existence of the businesses concerned.
30 The decision was sent to the applicant by letter dated 5 February 1998 and received by it on 6 February 1998.
... [This ends the paragraphs quoted from the judgment under appeal.]

12. By application lodged at the Registry of the Court of First Instance on 8 April 1998, the present appellant brought an action against that decision.

13. In support of its application for annulment, the present appellant relied essentially on five pleas in law. The first and second pleas respectively alleged errors of fact and of law in the application of Article 85 of the Treaty. The third, fourth and fifth pleas alleged infringement of the principle of proper administration, the obligation to state reasons, and the right to a fair hearing.

14. The present appellant also argued, by way of an alternative submission, that the fine imposed by the contested decision ought to be reduced on the ground that it was excessive.

[Paragraphs 15 to 32 set out the main points in the judgment of the Court of First Instance.]

33. The operative part of the judgment under appeal is worded as follows:
[The Court of First Instance hereby]
1 Annuls Commission Decision 98/273/EC of 28 January 1998 relating to a proceeding under Article 85 of the EC Treaty (Case IV/35.733 - VW) in so far as it finds that:
(a) a split margin system and termination of certain dealership contracts by way of penalty were measures adopted in order to hinder re-exports of Volkswagen and Audi vehicles from Italy by final consumers and authorised dealers in those makes in other Member States;
(b) the infringement had not completely ceased between 1 October 1996 and the adoption of the decision;
2 Reduces the amount of the fine imposed on the applicant by Article 3 of the contested decision to €90m;
3 Dismisses the remainder of the application;
4 Orders the applicant to bear its own costs and to pay 90% of the costs incurred by the Commission;
5. Orders the Commission to bear 10% of its own costs.

The appeal

34. By its appeal, the appellant claims that the Court should:
- set aside the judgment under appeal and declare the contested decision to be void;
- order the Commission to pay the costs of the proceedings before the Court of First Instance and the Court of Justice.

35. In its reply, the appellant states that the forms of order which it seeks are to be construed and interpreted in the light of the reasoning of the appeal, from which it follows that it is not seeking that the judgment under appeal be set aside in its entirety but only in so far as it adversely affects the appellant.

36. The Commission claims that the Court should:
- dismiss the appeal;
- set aside the contested judgment and refer the case back to the Court of First Instance in so far as it reduced to EUR 90 million the amount of the fine imposed on the appellant without taking into account, in fixing that fine, the 15% rule laid down in Convenzione B of the dealership contract concluded in 1988 for the period from 1988 to 1992;
- order the appellant to pay the costs of the proceedings before the Court of Justice and reserve to the Court of First Instance the decision on costs in the cross-appeal. The Commission claims that the Court should:
- dismiss the appeal;
- set aside the contested judgment and refer the case back to the Court of First Instance in so far as it reduced to EUR 90 million the amount of the fine imposed on the appellant without taking into account, in fixing that fine, the 15% rule laid down in Convenzione B of the dealership contract concluded in 1988 for the period from 1988 to 1992;
- order the appellant to pay the costs of the proceedings before the Court of Justice and reserve to the Court of First Instance the decision on costs in the cross-appeal.

[Paragraphs 37 to 43 set out the parties' arguments on the first ground of appeal.]

Findings of the Court on the first ground of appeal

44. It follows from paragraphs 49 and 189 of the judgment under appeal, read in conjunction with paragraph 343 thereof, that the 15% rule must, according to the Court of First Instance, be declared incompatible with Article 85(1) of the Treaty inasmuch as it was liable to induce Italian authorised dealers to sell at least 85% of available vehicles within their contract territory and therefore restricted opportunities for end-users and dealers in other Member States to acquire vehicles in Italy, and thus had the purpose of ensuring a degree of territorial protection and, to that extent, partitioning of the market. The Court of First Instance also found, in paragraph 49 of its judgment, that the Commission was entitled to conclude that that rule fell outside the exemption granted by Regulation EEC/123/85 on the ground that, although Regulation EEC/123/85 provided

manufacturers with substantial means of protecting their distribution systems, it did not authorise them to adopt measures contributing to a partitioning of the markets.

45. For the purpose of challenging the findings by the Court of First Instance in relation to the breach of Article 85(1) of the Treaty, the appellant merely reproduces the arguments which it set out in this regard in its application at first instance without calling into question either the reasoning on the basis of which the Court of First Instance concluded that the 15% rule amounted to a market-partitioning measure or the finding that such a rule had to be classified as a measure incompatible with Article 85(1) of the Treaty.

46. This first branch of the ground of appeal must therefore be dismissed as being inadmissible.

47. According to settled case-law, where an appeal merely repeats or reproduces verbatim the pleas in law and arguments previously submitted to the Court of First Instance, without even including an argument specifically identifying the error of law allegedly vitiating the judgment under appeal, it fails to satisfy the requirements under Article 58 of the EC Statute of the Court of Justice and Article 112(1)(c) of its Rules of Procedure. In reality, such an appeal amounts to no more than a request for re-examination of the application submitted to the Court of First Instance, which, under Article 56 of that Statute, falls outside the jurisdiction of the Court of Justice (see Case C-352/98 P, *Bergaderm and Goupil v Commission*, paragraph 35; Case C-210/98 P, *Salzgitter v Commission*, paragraph 42; and Case C-321/99 P, *ARAP and Others v Commission*, paragraph 48).

48. The appellant also claims that, in finding that the 15% rule was not covered by Regulation EEC/123/85, the Court of First Instance misconstrued and misapplied that regulation in so far as it failed to take proper cognisance of the specific responsibility which a distributor is recognised as having in relation to his contract territory by Article 4(1)(3) and (8) of that regulation, read in the light of recitals 1 and 9 in its preamble.

49. Suffice it to hold in this regard that a measure which is liable to partition the market between Member States cannot come under those provisions of Regulation No 123/85 that deal with the obligations which a distributor may lawfully assume under a dealership contract. The Court of First Instance properly held in paragraph 49 of the judgment under appeal that, although that regulation provided manufacturers with substantial means by which to protect their distribution systems, it did not authorise them to adopt measures which contributed to a partitioning of the market (*Bayerische Motorenwerke*, cited above, paragraph 37).

50. This second branch of the ground of appeal is consequently unfounded.

51. It follows that the first ground of appeal must be rejected in its entirety.

[Paragraphs 52 to 59 set out the parties' arguments on the second ground of appeal]

Findings of the Court on the second ground of appeal

60. It is settled case-law that a call by a motor vehicle manufacturer to its authorised dealers is not a unilateral act which falls outside the scope of Article 85(1) of the Treaty but is an agreement within the meaning of that provision if it forms part of a set of continuous business relations governed by a general agreement drawn up in advance (*Ford v Commission*, paragraph 21, and *Bayerische Motorenwerke*, paragraphs 15 and 16).

61. In paragraph 236 of the judgment under appeal, the Court of First Instance ruled that this case-law was applicable to the present case because all of the measures adopted by the appellant, including the 15% rule and the imposition of supply quotas, were intended to influence Italian dealers in the performance of their contract with Autogerma.

62. The appellant criticises the Court of First Instance for having wrongly concluded that this case-law was applicable in the present context. It argues that, in *Ford* and *Bayerische Motorenwerke*, the restrictions found to have occurred originated in the respective dealership contracts. In the present case, in contrast, even if the dealership contract provided for the possibility of a limitation of supplies to Italian dealers, the reason for that restricted supply, as established by the Court of First Instance, that is to say, the barrier to re-exports from Italy of vehicles supplied to Italian dealers, is not covered by the dealership contract as those dealers are free to sell those vehicles to foreign end-users and foreign distributors. In the absence of any expression by the dealers themselves of their agreement to the restrictions found to have been imposed, the appellant argues that those restrictions, in so far as they existed at all, constituted a unilateral measure which is not covered by Article 85(1) of the Treaty.

63. In this regard, it is clear from paragraphs 79 to 90 of the judgment under appeal that the appellant implemented a policy of imposing supply quotas on Italian dealers with the express aim of blocking re-exports from Italy and thus of partitioning the Italian market. It is also clear from paragraph 236 of that judgment that this policy was able to be imposed by virtue of the dealership contract.

64. The appellant does not deny that the dealership contract provided for the possibility of limiting supplies to Italian dealers and does not dispute the finding of the Court of First Instance that this limitation was imposed with the express aim of blocking re-exportation from Italy of the vehicles delivered to those dealers.

65. It follows that, by accepting the dealership contract, the Italian dealers consented to a measure which was subsequently used for the purpose of blocking re-exports from Italy and thus of restricting competition within the Community.

66. Regarding the appellant's assertion that the barrier to the re-exportation of vehicles delivered to Italian dealers was not desired by the latter, it is necessary to take account of paragraphs 90 and 91 of the judgment under appeal, to which paragraph 236 thereof refers. In those paragraphs, the Court of First Instance, after rejecting the appellant's arguments that the Italian dealers had of their own accord formed the view that it was of no interest to them to sell vehicles outside their contract territory, found that those dealers, faced simultaneously with both restricted supply and the 15% rule - which was also agreed within the framework of the dealership contract (see paragraphs 44, 48 and 342 of the judgment under appeal) - and being aware that re-exports were regarded with extreme disfavour by Autogerma and the manufacturers, clearly had every interest in selling the limited number of vehicles available entirely or almost entirely to purchasers residing in Italy and that their business conduct was therefore influenced by the manufacturers and Autogerma.

67. It follows that, contrary to what the appellant alleges, the Court of First Instance found that the limitation on re-exports, which was the objective pursued by the appellant, also resulted from the business conduct of the Italian dealers and that this conduct was influenced by the appellant, it being, furthermore, common ground that the means employed for that purpose, in particular the restricted supply of vehicles, resulted from clauses in the dealership contract and had thus received the agreement of the dealers.

68. That being so, the Court of First Instance proceeded correctly in law in applying in this case the case-law cited in paragraph 236 of the judgment under appeal.

69. The second ground of appeal must for that reason be rejected.

[Paragraphs 70 to 168 refer to a number of allegations of irregularities in procedure; the Court rejected all the allegations. Paragraphs 169 to 180 refer to a cross-appeal by the Commission, based mainly on an assessment of the extent of the infringement during the years 1988 to 1992; the Court rejected the cross-appeal. Paragraph 181 deals with costs.]

Court's Ruling

The Court hereby:

1. Dismisses the main appeal and the cross-appeal;
2. Orders each party to bear its own costs. ■

Note. The foregoing case was largely concerned with the incidence of Regulation EEC/123/85. This has now been replaced by Regulation EC/1400/2002, a reminder of whose general scope will be found in the report on the next page of this issue. The text of the current regulation was printed in our October 2002 issue at page 232. "Partitioning of the market" of the kind described in the VW case could still happen but will *a fortiori* be a serious infringement.

Motor Vehicle Distribution

There has already been wide exposure, here and elsewhere, of the new rules on competition governing car sales and servicing; but the Commission has provided a timely reminder that it was on 1 October, 2003, that a major part of the rules would become effective. The Block Exemption Regulation on Motor Vehicle Distribution had come into force twelve months previously, but allowed for an initial period of transition. After a further transitional period, on 1 October 2005, the so-called location clause will be abolished, finally making the new rules fully effective. The rules which became effective on 1 October 2003 open the way to new distribution techniques, such as Internet sales and multi-branding, and are intended to introduce more competition between different retail channels. The new rules also remove residual barriers to cross-border purchases and allow dealers to place advertisements or mail shots throughout the single market. Car owners will have a wider choice of after sales service providers, whether through authorised or fully independent repair shops. No repair shop may be prevented from servicing several brands and repair shops will no longer be obliged to operate a dealership as well.

The rules cover the sale and after-sales services of all motor vehicles (passenger cars, light commercial vehicles, trucks and buses). They allow car manufacturers to choose between exclusive distribution, under which each authorised dealer is given a sales territory, or selective distribution, under which dealers are selected according to a set of objective criteria but are not allocated a sales territory. Almost all manufacturers have chosen selective distribution throughout the single market.

The main features introduced by the new rules and coming into force on 1 October 2003 are:

multi-branding;
stand-alone repair shops;
independent repair shops not affiliated to a particular brand;
more liberal rules on the use of spare parts and
more opportunities for dealers to sell to customers from abroad.

Dealers in a *selective distribution* system may place advertisements throughout the single market and address mail shots and personalised e-mails to consumers located anywhere in the European Union. Dealers in an *exclusive distribution* system may actively sell to independent resellers within their exclusive territory and may also, if approached, sell to final consumers or resellers based outside their territory. It will, however, be two more years, from 1 October 2005, before new rules allow dealers in a selective distribution system to set up a secondary sales outlet or a delivery point in another part of their own country or in another Member State of the European Union.

Source: Commission Statement IP/03/1318, dated 30 September 2003