

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 28 January 1998

relating to a proceeding under Article 85 of the EC Treaty

(Case IV/35.733 — VW)

(Only the German text is authentic)

(Text with EEA relevance)

(98/273/EC)

Structure of the Decision

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THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (*) (1), as last amended by the Act of Accession of Austria, Finland and Sweden, and in particular Article 3, Article 15(2) and Article 16(1) thereof,

Having regard to the Commission Decision of 24 October 1996 to open a proceeding in this case,

Having given the parties concerned the opportunity to make known their views on the objections raised by the Commission, pursuant to Article 19(1) of Regulation No 17 and 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 (2),

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

Chapter 1:

THE FACTS

A. Background

I. Procedure

- (1) From the beginning of 1994 onward the Commission received a growing number of letters from German and Austrian consumers complaining of difficulties encountered with the purchase in Italy of new motor vehicles of the Volkswagen and Audi makes for re-export to Germany or Austria. These complaints gave grounds for the suspicion that at least since the beginning of 1994 Volkswagen AG and Audi AG, together with their joint importer for Italy, Autogerma SpA, and their dealers in Italy, had entered into agreements according to which motor vehicles, and passenger cars in particular, were not to be sold to final consumers resident in other Member States than Italy. A market-partitioning strategy of this kind would fall under Article 85(1) of the EC Treaty.

(*) All the notes and the translations of passages quoted in languages other than English appear at the end of this Decision.

- (2) On 17 October 1995, in order to establish whether it could be concluded on the basis of that evidence that the suspected conduct had in fact taken place, the Commission adopted a decision ordering investigations under Article 14(3) of Regulation No 17. The investigations ordered were carried out on 23 and 24 October 1995. The present Decision is founded on documents discovered in the course of those investigations and on consumer complaints lodged with the Commission.
- (3) The investigations were carried out on the premises of the following undertakings: Volkswagen AG, Wolfsburg; Audi AG, Ingolstadt; Autogerma SpA, Verona; Auto Brenner SpA, Bolzano/Bozen; Auto Pedross Herbert & Co., Silandro/Schlanders; Dorigoni SpA, Trento; Eurocar SpA, Udine; IOB Silvano & Co. SRL, Gemona; Adriano Mansutti, Tricesimo; Günther Rabanser, Pontegardena/Waidbruck; Muttschlechner SAS, Brunico/Bruneck; and Franz Nitz, Vipiteno/Sterzing.

II. The undertakings

- (4) Volkswagen AG, with its registered office in Wolfsburg, is the parent company of the Volkswagen group, and the largest and most important company in the group. The group's business includes the manufacture of motor vehicles of the Volkswagen, Audi, Seat and Skoda makes, and the manufacture of components and parts for its worldwide group structure. The group also has industrial motors, spare parts, financial services and insurance operations.
- (5) Volkswagen AG has a 98,99 % holding in Audi AG (Audi), Ingolstadt, and a 100 % holding in Autogerma SpA (Autogerma), Verona. Audi's main business is the manufacture and distribution of vehicles of the Audi make, and the manufacture of vehicle parts and engines. Autogerma is the Italian importer of Volkswagen and Audi vehicles and of spare parts and accessories for those vehicles.
- (6) This Decision is consequently addressed to Volkswagen as the parent company of Audi and Autogerma.

III. Position of the makes on the relevant market

- (7) In the three years 1993, 1994 and 1995, according to the Commission's information, sales of Volkswagen and Audi passenger cars in the Member States were as follows (numbers of units, with market shares shown in brackets).

Year	Volkswagen		Audi	
1993	1 231 844	(11,1 %)	312 920	(2,8 %)
1994	1 253 750	(10,7 %)	314 095	(2,7 %)
1995	1 276 900	(10,5 %)	370 712	(3,0 %)

- (8) In the same period sales of the two makes in Italy were as follows (numbers of units, with market shares shown in brackets).

Year	Volkswagen		Audi	
1993	169 738	(9,0 %)	40 812	(2,2 %)
1994	129 063	(7,0 %)	45 095	(2,4 %)
1995	157 463	(8,3 %)	46 997	(2,5 %)

- (9) Sales of the two makes in Germany were as follows (numbers of units, with market shares shown in brackets).

Year	Volkswagen		Audi	
1993	665 496	(20,8 %)	169 861	(5,3 %)
1994	677 274	(21,3 %)	156 998	(4,9 %)
1995	677 307	(20,7 %)	156 484	(4,8 %)

- (10) Sales of the two makes in Austria were as follows (numbers of units, with market shares shown in brackets).

Year	Volkswagen		Audi	
1993	48 384	(16,9 %)	12 303	(4,3 %)
1994	49 199	(17,5 %)	9 713	(3,5 %)
1995	50 851	(16,9 %)	11 366	(3,8 %)

B. *Parallel trade in Volkswagen and Audi motor vehicles*

Volkswagen and Audi models from Italy to Germany amounted to about 19 000 vehicles.

I. Scale of parallel exports

- (11) Documents found on Audi's premises put the number of vehicles of all makes re-exported from Italy in the period from January to June 1994 at 131 472 (about 12 % of all vehicles delivered to customers in Italy). On the basis of this figure, re-exports for the whole of 1994 were estimated at some 250 000 vehicles, (about 13 % of deliveries to customers in Italy). There were 19 429 Volkswagen and Audi vehicles re-exported from Italy in the first half of 1994, giving a total of about 39 000 vehicles for the year⁽³⁾. Other documents found on the premises of Volkswagen and Audi show that reimports of Volkswagen and Audi vehicles from Italy into Germany amounted to some 19 000 vehicles in 1993⁽⁴⁾. In 1994 the figure for corresponding reimports of those two makes was substantially higher, at 22 000⁽⁵⁾. In their comments on the Commission's statement of objections, the undertakings said that in 1995 re-exports of

- (12) Until May 1993 the number of vehicles reimported was evidently small, but from June and July 1993 onward it rose considerably, for all Volkswagen and Audi models. Between December 1992 and June 1995 the Audi vehicles reimported into Germany accounted for between 17,4 % and 20,3 % of deliveries to Italy⁽⁶⁾. In Volkswagen's case the figure was lower, at 13,0 % in January 1994 and 15 % in March 1995⁽⁷⁾. The proportion of re-exports to deliveries in Italy was substantially higher in the case of Volkswagen and Audi than it was in the case of their competitors, with the exception of the Italian manufacturers and Seat⁽⁸⁾.
- (13) Looked at on a monthly basis, re-exports of Volkswagen vehicles from Italy to Germany showed a strong upward trend from June 1993 onward, reaching a climax in November 1993, and were appreciably lower again from February 1994. There was a fresh increase in August 1994, and this continued into 1995, although without reaching the high levels of the second half of 1993⁽⁹⁾.

- (14) The monthly figures for re-exports of Audi vehicles from Italy to Germany increased substantially from May 1993, and reached their high point in October 1993. Thereafter, that is to say in the course of 1994, they fell to a much lower level, before rising appreciably once again from February 1995 ⁽¹⁰⁾.

Commission's objectives in publishing this study is to achieve a measure of price transparency, so as to encourage consumers to buy motor vehicles in those Member States in which prices and other terms are most advantageous. The Commission has not set out to establish price parity throughout the Community. The Commission does hope, however, that greater price transparency will release market forces which will reduce price differentials.

II. Price differentials

- (15) Twice a year the Commission publishes a study of car prices in the European Union ⁽¹¹⁾. The data are supplied by motor manufacturers. One of the

- (16) On the basis of the prices reported in these studies, the price differentials between Italy, Germany and Austria for the biggest-selling Volkswagen and Audi models have been as follows ⁽¹²⁾.

Reference date	Model	Italy	Germany	Austria
1. 5. 1993	VW Polo	100,0	147,0	n.a.
	VW Golf	100,0	121,9	n.a.
	VW Vento	100,0	128,2	n.a.
	VW Passat	100,0	131,6	n.a.
	Audi 80	100,0	123,5	n.a.
	Audi 100	107,5	125,0	n.a.
1. 11. 1993	VW Polo	101,2	126,3	n.a.
	VW Golf	106,3	119,4	n.a.
	VW Vento	110,0	131,3	n.a.
	VW Passat	100,0	129,6	n.a.
	Audi 80	102,1	119,8	n.a.
	Audi 100	105,0	128,0	n.a.
1. 5. 1994	VW Polo	106,3	125,7	n.a.
	VW Golf	106,2	117,0	n.a.
	VW Vento	108,9	114,6	n.a.
	VW Passat	102,9	117,1	n.a.
	Audi 80	102,7	115,6	n.a.
	Audi 100	100,2	118,2	n.a.
1. 11. 1994	VW Polo	101,6	125,0	n.a.
	VW Golf	100,6	115,6	n.a.
	VW Vento	105,8	113,5	n.a.
	VW Passat	100,0	120,1	n.a.
	Audi 80	100,0	116,5	n.a.
	Audi A 6	100,0	112,9	n.a.
1. 5. 1995	VW Polo	100,0	136,6	128,9
	VW Golf	100,0	126,5	130,5
	VW Vento	100,0	123,0	132,0
	VW Passat	100,0	131,2	128,9
	Audi A 4	100,0	132,5	133,7
	Audi A 6	100,0	123,9	125,8
1. 11. 1995	VW Polo	106,5	135,9	125,6
	VW Golf	100,0	118,1	115,7
	VW Vento	100,0	114,6	108,1
	VW Passat	101,3	130,6	106,7
	Audi A 4	100,0	120,8	120,6
	Audi A 6	100,0	119,8	118,0

- (17) It can be concluded from these figures that for the selected models the price differentials between Italy and Germany were generally sufficiently wide to provide an incentive for parallel exports from Italy to Germany at least from 1 May 1993 until 1 November 1995, and that the same is true of Italy and Austria from 1 January 1995.

C. *The agreements and conduct identified*

- (18) An overall strategy can be discerned in the agreements concluded and conduct engaged in by Volkswagen, Audi, Autogerma and their authorised Italian dealers: this strategy is aimed at preventing or substantially restricting parallel exports from Italy to Germany and Austria. The agreements and conduct in question, even considered in isolation, have the object and the effect of appreciably restricting trade between Member States.
- (19) Parallel trade in the motor vehicle business (in this case parallel exports or parallel imports) is the sum of all cross-border sales. These sales are of two kinds: on the one hand sales by dealers in the official distribution network to dealers outside the network ('independent dealers') in other Member States, and on the other hand sales to final consumers in other Member States, whether direct or through an intermediary. That distinction also underlies Commission Regulations (EEC) No 123/85 and (EC) No 1475/95 on the application of Article 85(3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements⁽¹³⁾.

I. Overall strategy

- (20) In the course of its investigations the Commission has found documents listing some of the component measures in the overall strategy.
- (21) A letter from the chairman of Autogerma, Mr Schlesinger, to Volkswagen, dated 21 September

1944⁽¹⁴⁾ (1994 is meant, compare the date given in the Annex to the letter) describes the measures, and tabulates them in an Annex:

‘... Bei der gesamten italienischen Verkaufsorganisation besteht große Sorge um die Erreichung der Verkaufsziele und die Notwendigkeit der Aufrechterhaltung der bisherigen Verkaufserfolge. Diese Notwendigkeit hat dazu geführt, daß einige Partner, gedrängt von außenstehenden Verkaufsorganisationen (darunter zahlreiche ausländische Volkswagen- und Audi-Händler), Verkaufsaktivitäten auch in Gebieten tätigen, die weit von der vertraglich festgelegten Zone liegen, manchmal sogar bis ins Ausland.

Das Eingreifen der Autogerma hat daher den Sinn und Zweck, die Volkswagen-Audi-Händler in die vertraglich festgelegten Gebiete zu verweisen, wobei Kontrollen hinsichtlich der Vertragserfüllung, insbesondere was die Verkaufsaktivitäten im Vertragsgebiet selbst betrifft, bei jeder einzelnen Firma durchgeführt werden (wobei bei Nichterfüllung der Vertragsbedingungen 6 Händlerverträge gekündigt worden sind unter Berücksichtigung der vorgesehenen Termine, die das Vertragsende per Ende 1994/Mitte 1995 vorsehen). Bei anderen Händlern beabsichtigen wir, aufgrund einiger "Auditing-Ergebnisse" bezüglich Auslieferungen, die Nichterfüllung zu beanstanden, um genauere Daten über die Endverbraucher der Fahrzeuge selbst zu erfahren.

Dieses Vorgehen werden wir weiter in der Verkaufsorganisation ausarbeiten; das Projekt sieht eine neue Margenstruktur mit noch größerem Wichtigkeitsgrad vor, wobei der Prozentsatz der "maggiori-sconti" (Bonus) — dem die Erreichung der Vertragsverpflichtung mengen- und qualitätsmäßig unterliegt — erhöht und der feste Prozentsatz auf Fahrzeugrechnungen reduziert wird. Hierdurch wird eine bessere Verteilung der belastenden Margen erreicht.

Anlage zum Schreiben COMIORG/EP/st., vom 21. September 1994:

Verkäufe außerhalb Vertragsgebiet und/oder über nicht autorisierte Kanäle

<i>Vorbeugende Maßnahmen</i>	<i>Kontrollmaßnahmen</i>	<i>Strafmaßnahmen</i>
1. Generelle Hinweise jeder Besprechung	1. Kontrolle der Zulassungen/Verkäufe	1. Ermahnungsgespräch
2. Direkte Hinweise anlässlich jeder Unterredung	2. Auditing	2. Verwarnungsschreiben
3. Schriftliche Ermahnung zur Einhaltung der Vertragsvereinbarungen	3. Untersuchungen außerhalb Vertragsgebiet	3. Blockierung des maggior-sconto (Bonus)
		4. Kündigung des Händlervertrags ...

(22) A memo (in English) from Autogerma to Volkswagen, dated 26 September 1994 and entitled *Measures to control and prevent re-export*⁽¹⁵⁾, includes the following:

- '... With reference to the discussion we had in Verona on Thursday 15 and Friday 16 September (Mr Schlesinger, Bertino, De Simone, Wichmann, Kuhn) and the following phone calls on the subject, we confirm herewith the main measures taken by Autogerma to control and prevent re-export.
- circular letters explaining to the dealers, the limits set by the EC guidelines contained in Regulation (EEC) No 123/85,
- overproportional list price increase (with the well-known consequences in terms of price index and volumes),
- auditings at the suspected dealerships,
- strong recommendation of the President of Autogerma at the Verona dealers meeting of 14 July 1994 to sell the imported cars in Italy and in particular in their territory,
- same recommendation to the marketing dealer group meeting held in Verona on 27 July,
- the concept has been resumed once again by the President of Autogerma on the occasion of the New Polo congress of 3 and 4 September in Paris,
- also in the dealer council meeting which took place in Paris on 4 September, clear sentences were said by Mr Schlesinger in order to avoid the re-export of the New Polo and in general of the cars imported by Autogerma,
- with an internal note of 28 June addressed to the management of Autogerma, the President takes upon himself the approval of the quarterly bonus for all the extra-territory sales,
- the quarterly bonus, blocked for all the extra-territory sales, will be paid, starting from the next quarter, only on the basis of car registration,
- also for the promotional actions which are mostly in favour of the final customer, the registration in Italy is required for the payment of the support generally consisting in accessories, buy-back promise of financing opportunities,
- dealer orders are daily controlled. Orders exceeding 10 % of the demand need special approval to be accepted,
- specific letters are sent to dissuade dealers involved with re-export,
- suspected foreign buyers have to sign an obligation not to resell the car before a minimum number of months; penalties are set in the contract,
- recidivous dealers receive notice to leave (up to date six have received notice). In any case this measure will be applied carefully in order to

avoid trials and the costs with them involved also in terms of damage of image. Furthermore replacements at the present time could be difficult or impossible. This brings additional problems in the territory coverage,

- increment of the Autogerma stock to reduce the dealers' financial investments. This avoids that dealers look for undesired selling channels,
- due to this policy we still have in Autogerma the following very old unsold stock:

cars older than 14 months	41
cars older than 13 months	48
cars older than 12 months	323
cars older than 11 months	656
cars older than 10 months	915
cars older than 9 months	1 460
Total	3 443

- all the promotional actions are developed adding value to the cars mounting accessories. This avoids dealers to use additional marge in the re-export,
- field representatives are also monitoring the various situations reporting, where is the case, re-export activities of the dealers,
- the distribution of the New Polo will be strictly controlled. The dealers with past re-export activities will be cut in supplying,
- our marketing is studying new action models specific for Italy and unknown abroad. These action models could be launched in 1995,
- we are convinced that with these measures we shall possibly reduce drastically the re-export if also in Germany actions are taken with the German dealers which are continuously looking for new cars getting in touch directly with our dealers and Companies like VAGAS are prohibited to make interesting offerings to our dealers which are in this moment in red figures....'.

(23) A Volkswagen memo, *Maßnahmen durch Autogerma zur Vermeidung von Re-Exporten* (Measures taken by Autogerma to avoid re-exports), dated 6 February 1995⁽¹⁶⁾, includes this:

'...

- Schriftliche Information (Handel) zur EU-Richtlinie 123/85.
- Wiederholtes Auditing verschiedener Händler. Abmahnungen, Bonuskürzungen, 11 Kündigungen (gefährdetes Volumen ca. 8 800 Fzg. in 1995) — siehe Anlage.

- Bonus (Trimester) wird gezahlt auf Basis Fahrzeug-Zulassungen im Vertragsgebiet.
- Überproportionale Listenpreis-Erhöhungen.
- Vermeidung "Überlagerung" auf Einzelhandelsebene.
- "Margen-Splitting" beim Polo A 03
- 8 % sofort bei Rechnung
- 5 % Nachweis NZ im Vertragsgebiet
- 3 % Bonus (Zielsetzung, Kundenzufriedenheit, Betriebsstandards).
- Sonstiges (siehe Schreiben AG vom 26. September 1994). . .

(24) With reference to its German distributors, Audi stated that in the light of Regulation (EEC) No 123/85 parallel imports could not legally be prevented by manufacturers, and that it would be 'somewhat risky' to connect the measures taken in Italy with the prevention of reimports 'and to document this in a letter to the German dealers' organisation'. Audi consequently proposed that the measures taken in Italy 'should be communicated orally between regions' ⁽¹⁷⁾.

(25) An Autogerma memo (in English), *Measures to control and prevent re-export*, dated 15 March 1995 ⁽¹⁸⁾, includes this.

'Measures to control and prevent re-export'

Time	Prevention measures	Time	Control Measures	Time	Sanctions
15.10.1991-28.1.1993-1.7.1993 11.8.1993-12.10.1993-15.10.1993 6.6.1994-21.3.1995 (ready)	Circular letters contained limits set by Regulation (EEC) No 123/85	since 2° F.M.P. 1994	Delivery and N.C.R. control	Periodic	Meeting with dealer and recall
Periodic	Strong recommendation in general meeting	since 2° F.M.P. 1994	Auditing at the suspected dealers	7.12.1993 & 24.2.1995	Warning letters (76-20)
Periodic	Strong recommendation in meeting with dealer	since 2° F.M.P. 1994	Dealers orders daily controlled	since 3° F.M.P. 1993	Quarterly bonus blocked for extra-territory sales
		since 2° F.M.P. 1994	N.C.R. documents are requested for payment promotion actions	since 1° F.M. 1995	Quarterly sales bonus paid only for N.C.R.
		since 3° F.M.P. 1994	Polo and A4 distribution is controlled	since 6.1994	Dealer contract cancellation (11)

ORGANIZZAZIONE 15. 3. 1995 GD control'

(26) By comparing deliveries to the importer with new car registrations in Italy and Germany, Volkswagen and Audi were able to establish the precise volume of reimports into Germany from Italy for each model on a monthly basis ⁽¹⁹⁾. The corresponding information was supplied to Audi by the Kraftfahrt-Bundesamt ('KBA', the German Federal Office for Motor Traffic). Audi had to give the Office an undertaking that it would not use the data to identify or monitor foreign authorised dealers ⁽²⁰⁾.

(27) For the issue of manufacturers' certificates of conformity which had hitherto been free of charge, Volkswagen now introduced a fee of DEM 150 'to

make reimports difficult'; in addition to this fee, Audi also demanded evidence of purchase (invoice, contract of sale or the like) ⁽²¹⁾.

(28) In order to be able to monitor re-exports, Volkswagen and Audi instructed Autogerma to maintain systematic surveillance of the Italian dealers' sales activities and to report its observations back to the manufacturers ⁽²²⁾. In this connection, Volkswagen and Audi provided Autogerma with chassis numbers they had noted, mainly in Germany ⁽²³⁾, and asked Autogerma to trace the supplying Italian dealers and customers ⁽²⁴⁾. This system of surveillance made it possible to establish a breakdown of reimports by dealer, customer and model ⁽²⁵⁾.

- (29) Volkswagen told Autogerma, when it carried out what were known as 'audits' 'audittings' of Italian dealers, to note deliveries to German and Austrian Volkswagen and Audi dealers, and to investigate sales to unauthorised dealers ⁽²⁶⁾.
- (30) In one case in which an Audi employee had bought an Audi A 4 in Italy and had sought a manufacturer's certificate with a view to registration in Germany, the employee gave Audi a statement confirming that the vehicle would be used for private purposes only and would not be sold within six months, on the ground that in the event of a check on the statistics issued by the KBA the vehicle 'would show up as a reimport and would cause trouble' ⁽²⁷⁾.
- (31) Audi asked its German dealers to note and report the chassis numbers of reimported vehicles offered for sale by independent dealers in Germany ⁽²⁸⁾. The Austrian main importer Porsche Austria ⁽²⁹⁾ monitored reimportation into Austria, even by private customers ⁽³⁰⁾. The steps taken by Audi were successful: in the first quarter of 1995 there was 'not a single A 4 imported from Italy to Austria' ⁽³¹⁾.
- (32) In January 1994, in view of an increasing number of letters it had received from customers complaining of difficulties with re-exports, Audi decided to adopt a uniform formulation for replies to consumers. They were to be told that reimported vehicles often had different specifications, and had to be re-equipped, which could increase the cost. Audi would also point to the much longer time which had to be spent on the purchase of a reimported vehicle, 'as special approvals are often required by the authorities'. Lastly, reference was to be made to advantages in terms of inspections and guarantees if the vehicle was bought from a domestic dealer ⁽³²⁾.
- (33) In answers to customer complaints Audi referred among other things to the different specifications of the models intended for the Italian market, the longer delivery times for those models, and the fact that Audi had no power to tell dealers which consumers to sell to ⁽³³⁾.
- (34) In the event of enquiries from final consumers Volkswagen recommended: 'in keinem Fall den Eindruck entstehen (zu) lassen, daß auf Anweisung der VW AG, der Autogerma oder einzelnen Personen dieser Unternehmen keine Informationen an Privatkunden oder zulässige Vermittler herausgegeben werden dürfen'. Instead it was to be expressly emphasised that there were no instructions or trade restrictions which had been imposed in order to obstruct reimports contrary to Community law ⁽³⁴⁾.
- (35) Volkswagen instructed Autogerma as to how to reply to customers who asked the importer for assistance. Autogerma was to say that as the importer it could not accept orders, since it did not sell to private customers, and that a dealer could not be forced to sell to a particular customer ⁽³⁵⁾.
- (36) From records of the correspondence between manufacturers and consumers it is clear that in some cases the manufacturers gave the importer or dealers the 'green light' for a sale to a consumer, but only after considering the circumstances of the case ⁽³⁶⁾.
- (37) Autogerma received a large number of letters from customers complaining of obstacles to the purchase of vehicles from Italian dealers, and asking Autogerma for assistance ⁽³⁷⁾. In its replies Autogerma referred especially to long delays for the delivery of certain models such as the new VW Polo, which depended on the manufacturer's capacity to deliver, but it did not give a binding commitment to deliver by a particular date ⁽³⁸⁾. In certain cases Autogerma asked customers to confirm in advance that they intended 'to acquire the car in Italy direct or through a reliable intermediary' ⁽³⁹⁾.
- (38) It was Autogerma's intention 'to warn [the Italian dealers] to stay in the territories designated by their contracts'; if it were shown that a dealer had sold outside the contract territory, or through unauthorised channels, Autogerma would take measures on a graduated scale of intensity ⁽⁴⁰⁾.
- (39) In order to keep a check on sales, Volkswagen and Audi supplied Autogerma with the chassis numbers which they had ascertained for vehicles offered for sale in Germany, especially by independent dealers, and instructed Autogerma to use these numbers to establish which Italian dealers had supplied the vehicles and to report this information back to them ⁽⁴¹⁾. Autogerma also kept the manufacturers regularly informed of the results of checks on dealers and of measures to restrain unwanted sales.
- (40) To ensure the success of the overall strategy, Autogerma stepped up the monitoring of registrations in Italy. Dealers were called on generally for all deliveries to indicate the registration number with the delivery notification. From September 1994

onward Autogerma also monitored the orders received on a daily basis⁽⁴²⁾; dealers wishing to depart from their planned requirements by more than 10 % had to have special authorisation from Autogerma. When Italian dealer's export business expanded Autogerma evidently reacted by delaying or limiting supplies to them⁽⁴³⁾.

(41) From 1993 at the latest Autogerma instructed one of its divisions, SEVO, to monitor the Italian dealer network, and in particular sales activities and the number of vehicles sold abroad⁽⁴⁴⁾. The first monitoring reports contained lists of foreign customers, and referred to warnings to dealers not to sell abroad⁽⁴⁵⁾.

(42) In a letter to Audi, Autogerma confirmed that every effort was being made to stop all exports by dealers including sales to other authorised dealers and to final consumers⁽⁴⁶⁾. All vehicles supplied by Autogerma were invoiced including VAT⁽⁴⁷⁾, with the clear intention of encouraging sale inside Italy and making exportation more difficult administratively. For the new VW Polo strict checks were carried out on sales, and deliveries were reduced in the case of dealers who had in the past been noted for their high volumes of re-export⁽⁴⁸⁾.

II. The agreements and practices in detail

The agreements and practices which together form the overall strategy described in recital 1 are as follows.

1. Terminology

(a) Definitions

(43) In its correspondence both inside and outside the company Volkswagen has not used uniform terms to define parallel trading. It has usually referred to sales to unauthorised dealers as the 'grey market', but has often spoken of the grey market and the reimport market in the same breath, or referred generally to 'reimports' or 're-exports'.

(44) In its marketing plan for 1995 Volkswagen referred, in connection with its distribution strategy, on the subject of 'reimports' to countermeasures aimed at 'stopping reimports by exercising influence with dealers' and to 'targeted measures against "grey importers"'. In internal memos of September 1994 and February 1995, discussing measures that had been taken, Volkswagen spoke generally of

're-export activities'⁽⁴⁹⁾. In a handwritten memo of July 1995 discussing the case of a 'genuine intermediary' who had threatened to complain to the Commission after Autogerma had evidently obstructed the purchase of a vehicle, Volkswagen recommended giving in 'on political grounds', in order to avoid the 'withdrawal of the Block Exemption Regulation'⁽⁵⁰⁾.

(45) Audi has likewise used various terms (such as the 'grey market', 'reimports', the 'reimport market', the 'illegal reimport market', and 'supply by unauthorised dealers') especially in connection with analyses of the problem of parallel trading between Italy and Germany or Austria and the measures to be taken, or already taken.

(46) At the end of 1994 Audi set up a 'task force', with authority to combat the grey or reimport market, and the necessary human and material resources⁽⁵¹⁾. This officially began its work — which was to last for no more than two years — on 1 January 1995⁽⁵²⁾. Audi sent its dealers and importers a circular informing them of the 'objectives and terms of reference' of the task force, and asked its dealers to cooperate⁽⁵³⁾.

(47) The 'objectives and terms of reference' were, first, 'to combat reimports' (primarily 'supply into Germany' but also 'into other countries of the European Union'), and, second, 'to prevent supply by unauthorised dealers'⁽⁵⁴⁾. Elsewhere the unit's objective was described as 'lasting limitation and prevention of the grey or reimport market'⁽⁵⁵⁾, or its restriction to a normal competitive level. Reference was also made here to the competitors (BMW and Mercedes).

(48) In a memo on the subject of the project for combating the 'grey market/reimports', Audi defined the terms of reference and objectives of the project (i.e. of the task force) as '1. to combat reimports' and '2. to prevent supply to unauthorised dealers'⁽⁵⁶⁾. Elsewhere Audi used the term 'reimports' to refer only to 'cross-purchases abroad by authorised German dealers' and supply to dealers outside the organisation (grey market dealers)⁽⁵⁷⁾.

(49) The task force's immediate working objective was to limit exports to less than 100 vehicles a month⁽⁵⁸⁾, or reduce the grey market/reimport volume by half within six months, the results to be visible by September 1995⁽⁵⁹⁾. A series of measures was decided with a view to achieving the task force's objectives⁽⁶⁰⁾.

- (50) Thus, Audi presents the grey market as a part of the broader reimport market, but the measures it takes are often aimed at the grey and reimport markets together, as is clear here. The inconsistent terminology has consequently had the effect, or the object, of giving the Italian dealers the impression that export bans and other measures to stop parallel trading, including penalties, also apply to sales to and re-exports by non-Italian final consumers.
- (51) This choice of terminology has confused the distinction between sales to dealers outside the distribution network, trading for their own account, on the one hand, and sales to final consumers, intermediaries acting on consumers' behalf, or dealers belonging to the network, on the other, and made that distinction harder to apply, or indeed deliberately blurred it.
- (52) The main distinction Autogerma had made in its correspondence with the authorised dealers is a distinction between sales inside and sales outside the contract territory.
- (53) At least from 1993 onward Autogerma sent the Italian dealers instructions, cautions and warnings intended to influence their sales activities. Thereafter Autogerma repeatedly urged the Italian dealers, both verbally and in writing, not to engage in grey imports. In view of their increased efforts to achieve their sales targets, and the numerous enquiries reaching them from authorised VW and Audi dealers, Italian dealers were emphatically told to sell in their own contract territories⁽⁶¹⁾.
- (54) Autogerma repeatedly cautioned the Italian dealers, both verbally and several times in writing, not to sell outside their contract territory, that is to say outside their territory either inside or outside Italy⁽⁶²⁾. The dealers in Trento, Bolzano/Bozen and Silandro/Schlanders at whose premises the investigations were carried out stated to the Commission that Autogerma had repeatedly given them verbal instructions not to export. The instructions related in particular to unauthorised dealers, but expressly included sales to final consumers⁽⁶³⁾. It was made clear to dealers⁽⁶⁴⁾ that if they failed to comply with this instruction they could expect to have their contract terminated⁽⁶⁵⁾.
- (55) Similar instructions and warnings were also given in respect of particular models (the Audi A 4, the new VW Polo, the VW Golf Berlina and the VW Golf Variant)⁽⁶⁶⁾. As regards the new VW Polo, the dealers were cautioned in September 1994 not to give discounts and not to sell for export⁽⁶⁷⁾.
- (56) Autogerma forbade the dealers from selling to 'salonisti'⁽⁶⁸⁾. In Italian usage this expression (which might be translated 'showroom operators') contrasts with 'concessionari', or dealers belonging to the distribution network, but it does not distinguish between independent dealers and intermediaries. The importer repeatedly referred in this connection to Regulation (EEC) No 123/85, which in its view prohibited such sales⁽⁶⁹⁾, and warned dealers that any infringement could be expected to result in withdrawal of the exemption by the Commission. Autogerma was here giving a truncated account of the position which would necessarily leave dealers under the false impression that also if they sold to intermediaries they would be breaking Community competition law, and would leave themselves open to penalties.
- (57) Autogerma and Audi were aware that dealers were telling customers that they were unable or were not allowed to sell abroad or to foreigners ('they tell customers they cannot sell abroad'). Dealers were accordingly instructed, especially with a view to possible investigation by the Commission, not to speak of a ban imposed by Autogerma or the manufacturers, but instead to accept orders and subsequently to invoke difficulties with stocks and deliveries⁽⁷⁰⁾.
- (58) Autogerma repeatedly confirmed its determination to take the necessary steps 'to achieve the goal of stopping exports from Italy'⁽⁷¹⁾. Lists of measures in pursuit of this objective were drawn up in agreement with the manufacturers⁽⁷²⁾. Autogerma was aware that some aspects of its strategy would not be compatible with the future Community rules on motor vehicle distribution⁽⁷³⁾.
- (b) Security classification of documents
- (59) Volkswagen, Audi and Autogerma have included a confidentiality clause in many documents dealing with limitation measures. For example, correspondence concerning the list of measures to control and prevent re-export was classified 'highly confidential' (in English) or 'riservato' (confidential)⁽⁷⁴⁾. Documents concerning the introduction of margin splitting⁽⁷⁵⁾, cautions to or supervision of dealers⁽⁷⁶⁾ and cancellation of dealership contracts⁽⁷⁷⁾ were often classified 'riservato' or 'vertraulich' (confidential).

(c) Effects on dealers

- (60) As a result of the terminology used by the group, and especially by Autogerma in correspondence with the Italian dealers, the impression has frequently been given that all re-exports were prohibited. The terminology necessarily left dealers in a state of uncertainty which in many cases led them to avoid dealing with final consumers or intermediaries acting on consumers behalf. Whether or not there is in fact an established terminology of parallel trading, careful distinctions ought to have been drawn, as they are in Regulations (EEC) No 123/85 and (EC) No 1475/95 on motor vehicle distribution.
- (61) Inconsistent and imprecise terminology in relation to parallel trading has led to uncertainty inside the group, that is to say in conversations and correspondence between Volkswagen, Audi and Autogerma. The terminology has also had an effect on relations between the group and its dealers, and left the dealers uncertain as to which sales are permissible and which are not. It has thus reduced the dealers' margin of discretion with regard to sales outside their contract territories.

2. Margins

(a) Volkswagen AG

- (62) In October 1994 Volkswagen announced the introduction of a 'split-margin' for sales of the new VW Polo in Italy; this was to be linked to sales inside the contract territory⁽⁷⁸⁾. As a general rule the manufacturer or importer gives the dealer a discount on the amount invoiced for every vehicle ordered; for the old VW Polo model the discount was 13 %. For the new VW Polo the discount was split into a basic discount of 8 %, to be paid on the invoice, and a further 5 % to be paid later, upon registration of the vehicle in the dealer's contract territory⁽⁷⁹⁾.
- (63) Volkswagen was aware that the introduction of this split margin system would not be compatible with Regulation (EC) No 1475/95 or with Regulation (EEC) No 123/85, 'because it aims to put an end to cross-border trading, when cross-border trading is precisely what the Commission wants.' The measure was described as 'sehr bußgeldverdächtig' (very likely to attract a fine), and was to remain 'internal'. Volkswagen therefore suggested to Autogerma that they should 'agree on a formulation and method that would be defensible in dealings with the Commission too'⁽⁸⁰⁾. Volkswagen several times confirmed that the split-margin system was in operation⁽⁸¹⁾.

(b) Audi AG

- (64) In view of the high level of sales by Italian dealers outside their contract territories, Audi, after consulting Autogerma, the dealers' association Unione Concessionari Audi Volkswagen ('UCAV'), and Volkswagen, decided in October 1994 to introduce a new scheme for the payment of dealers' margins on new models (the first such new model being the A 4).
- (65) The new scheme involved the division of the 15 % basic margin, which was paid on the invoice for such old models as the Audi 80 into a 10 % component payable at once, that is to say on the invoice, and a 5 % 'split margin component' payable after a two-month interval upon presentation of registration certificates.
- (66) This scheme was changed with effect from 18 October 1994: the entire 15 % basic margin was now to be payable on the invoice, but the 5 % split margin component could be claimed back later⁽⁸²⁾. The scheme enabled the manufacturer or importer as a first step to check systematically all vehicle registrations, and in particular to distinguish between registrations inside and outside the contract territory. As a second step, the 5 % split margin component was to be recovered from the dealer in the event of sales outside the contract territory.

(c) Autogerma SpA

- (67) Contracts between Autogerma and Italian dealers included an Annex (Allegato A) setting out the dealer's margin (sconto in fattura) for each model. On Volkswagen models the margin was 13 % or 15 %, and on Audi models it was 15 % or 16 %⁽⁸³⁾. With effect from 1 January 1994 an agreement (Convenzione) was added which expressly excluded new models from the scope of this dealer's margin⁽⁸⁴⁾.

(1) Measures in respect of Volkswagen

- (68) In October and November 1994 Autogerma informed the Italian dealers of the new margins scheme for sales of the new VW Polo. The new scheme first of all covered Polo demonstration vehicles, for which the previous basic margin of 13 % was divided into two parts, a 10 % component and a 3 % component which would be allowed only if the vehicle was registered in the dealer's name, that is to say inside the contract territory, for at least six months. For all other orders of the new Polo, Autogerma followed Volkswagen's instruction to divide the previous basic 13 % margin into an 8 % component payable immedi-

ately and a 5 % discount allowed only in the event of sale inside the contract territory⁽⁸⁵⁾. In the course of the Commission's investigations it was confirmed that since 1994 the split dealer's margin had been applied in such a way that part was paid only if the vehicle was registered in the contract territory⁽⁸⁶⁾.

(2) Measures in respect of Audi

- (69) When the new Audi A 4 was being launched Autogerma decided to change the system of dealer's margins. In place of the basic discount of 15 % that had applied to the old Audi 80 model, which was payable immediately, that is on the invoice, the new basic margin, known as the 'sconto in fattura' (invoice discount) or 'sconto base/immediato' (basic/immediate discount), would amount to only 10 %. The remaining 5 % 'sconto differito a breve' (short-term deferred discount) would be paid after two months only on vehicles delivered and registered in the contract territory⁽⁸⁷⁾. The use of the expression 'short-term deferred discount' to designate the separate 5 % component was intended to avoid any direct reference to the condition that the sale or registration had to be inside the contract territory⁽⁸⁸⁾.
- (70) The new system of margins was to be included in the Italian dealership contracts in the form of a supplementary agreement which would entitle Autogerma to redebit the 5 % split-margin component to the dealer immediately if Autogerma became aware of sales outside the dealer's area⁽⁸⁹⁾.
- (71) In November 1994 Autogerma informed Audi that the new system of margins had been introduced for the Audi A 4 in Italy, initially for a trial period running to 30 April 1995. The 5 % discount component would initially go on being paid until that date, at which point a final decision would have to be taken.
- (72) A margins policy that provides for lower dealer's margins on sales or registrations outside the contract territory reduces the dealer's revenue and the profit remaining to him. It consequently reduces the commercial latitude he enjoys to engage in such business.

3. Bonuses

- (73) The 3 % bonus payable over and above the dealer's margin was generally to remain as before. Audi emphasised here that 'sales outside the dealer's own area were allowed up to a maximum of 15 %', and that the 3 % bonus would not be paid on sales above that proportion⁽⁹⁰⁾.
- (74) As this bonus was made dependent on sales, and later also on registrations⁽⁹¹⁾, inside the 'area of

market responsibility'⁽⁹²⁾, a dealer would suffer a financial disadvantage equal to 8 % of the basis of calculation on sales outside his own contract territory. Audi expressly noted that given the distribution costs, which could be estimated at 10 %, and which in general had to be borne by the dealer, dealers selling outside their contract territory would in future suffer negative cash flow⁽⁹³⁾.

- (75) Under an agreement that had been attached to dealership contracts since 1987 at the latest (Convenzione 'B'), there was a quarterly bonus of 3 %, made up of sub-bonuses for 'target registrations', 'standards', and 'customer satisfaction'⁽⁹⁴⁾. This bonus was paid in addition to the customary dealer's margin. The mode of calculation centred on the number of vehicles sold inside the contract territory, but it was also paid in respect of sales outside the contract territory, provided that those sales did not exceed 15 % of total deliveries by the dealer.
- (76) No later than 1993 Autogerma suspended payment of this bonus on all sales outside the contract territory⁽⁹⁵⁾, and from January 1994 at the latest it refused to pay it on those sales⁽⁹⁶⁾. In September 1994, with the declared intention of preventing parallel exports, Autogerma decided that in future it would pay the bonus only on registrations inside the contract territory⁽⁹⁷⁾.
- (77) The agreement attached to the dealer contract which was referred to in recital 75 (Convenzione 'B') was therefore amended accordingly. The bonus was previously paid only on sales inside the contract territory; as amended on 31 December 1994 the agreement now also required that the vehicle be registered in the contract territory⁽⁹⁸⁾. The 15 % restriction on sales or registrations outside the contract territory was maintained⁽⁹⁹⁾.
- (78) The dealers' association UCAV doubted whether the planned measures would be legally compatible with the Community regulations on motor vehicle distribution and dealership contracts⁽¹⁰⁰⁾.
- (79) Audi confirmed that the new bonus scheme with the 3 % bonus made conditional on registration in Italy was being introduced and implemented⁽¹⁰¹⁾. The fact that the new scheme was actually in force was later repeatedly confirmed by Autogerma: 'With regard to bonus payments for the period January to April 1994, it was decided that 63 dealers would receive no bonus on deliveries to customers outside the territory designated in their contracts'⁽¹⁰²⁾. And from the last quarter of 1994 or the first quarter of 1995 onward this bonus was in fact paid only on registrations in the contract territory. Autogerma also refused to pay what was known as the 'contribution to organisation' on vehicles sold outside the contract territory⁽¹⁰³⁾.

(80) It must be concluded that the newly introduced margin and bonus scheme was an effective means of exerting pressure, particularly financial pressure, on the dealers, to avoid sales (or registrations) outside their contract territories. Dealers who sold outside their contract territories could expect a substantial reduction in their profit on the transaction. In such transactions the dealer in any event loses the after-sales business, which is generally very profitable. The new margin and bonus policy substantially reduced the financial incentive to make such sales. For this reason many dealers refrained altogether from such business, regardless of whether the potential sale was to an independent dealer or a final consumer. That the new arrangements were in fact being applied was confirmed by Audi on several occasions⁽¹⁰⁴⁾.

(81) A policy under which there is a smaller margin or bonus on sales or registrations outside the contract territory reduces the dealer's revenue and the profit remaining to him from sales of that kind. It consequently reduces the commercial latitude he enjoys to engage in such business.

4. Restricted supply to the Italian market

(82) Volkswagen and Audi formulated initial guidelines for limiting grey market deliveries as long ago as August 1993, dividing them into 'formal steps' and 'practical measures'⁽¹⁰⁵⁾. The formal steps were aimed primarily at ensuring compliance with the dealership contracts; the main practical measure proposed was a reduction in the level of stocks in Italy.

(a) Volkswagen AG

(83) At the end of 1993, with a view to restricting re-exports from Italy, Volkswagen decided upon an 'adjustment of production for the Italian market in line with requirements', 'supply to the retail trade in line with requirements' and measures to 'reduce dealers' stocks'⁽¹⁰⁶⁾. The supply policy for Italy led to shortages and long delivery times for almost all models at least in the year 1995.

(84) In the first quarter of 1995 Volkswagen 'adapted supplies of the Vento, Valiant and Passat models to demand in Italy, so that there ought no longer to be any pressure from stocks'⁽¹⁰⁷⁾. Volkswagen's policy of reducing the scope for re-export by restricting supply to the Italian market thus proved successful.

(b) Audi AG

(85) Many customers who had ordered an Audi car cancelled their orders on the grounds that the de-

livery times were too long: (between 1 January and 10 April 1995 more than 9 % of them did so)⁽¹⁰⁸⁾. And yet in February 1995 the manufacturer decided to cancel a delivery of 8 000 extra A 4 cars that had been promised by Autogerma to the Italian dealers and were clearly intended for re-export⁽¹⁰⁹⁾. In April 1995 Audi gave as its justification for restricting deliveries of the new A 4 that 'only Italian demand can be met'⁽¹¹⁰⁾. In the course of the same year, too, Audi and Autogerma argued that restricted supply to the Italian market should be maintained with an eye to the grey market⁽¹¹¹⁾.

(86) A supply policy which is based on the anticipated or actual demand from Italian customers, and does not take special account of what is clearly strong demand from abroad, restricts the supply available for sales to customers from other Member States, or leads to long delivery times, especially for sales to customers from other contract territories, or both. This appreciably narrows dealers' latitude to make such sales, especially to customers from abroad.

5. Restrictions on deliveries inside the distribution network

(87) Increased grey imports effected by unauthorised dealers, and reimports offered by authorised VW and Audi dealers at prices appreciably below those of the German authorised dealers, evidently led to substantial falls in orders placed with authorised VW and Audi dealers in some areas. Some authorised dealers, especially in Germany, consequently found it necessary to reimport cars from Italy through authorised Italian dealers, or direct through Autogerma, but complained of unusually long delivery times⁽¹¹²⁾.

(88) Volkswagen explained the situation by saying that measures had been taken to ensure 'supply tailored to the requirements of the Italian market... with the consequence that the Italian dealers sell in the first place to their traditional local clientele'. In September 1993 the VAG dealer's association told Volkswagen 'that cross-purchases in Europe, whether by dealers or by our customers, must be combated by all available means'⁽¹¹³⁾.

(89) German dealers also told Audi that 'the possibility of reimporting export cars subsidised by the manufacturer into Germany must be closed off urgently', as 'the selling price of these cars in Germany is below the dealer's cost price in the German organisation' and would ultimately 'destroy the livelihood of the German dealers'⁽¹¹⁴⁾. Reimports by authorised German dealers were discovered by other authorised German dealers, who notified Audi of the chassis numbers and the names of the Italian dealers who had supplied the vehicles⁽¹¹⁵⁾.

(90) Autogerma asked Audi to take steps to ensure that German dealers who were interested in the possibility of parallel imports, and who had written to Autogerma, would not be constantly 'bothering' Italian dealers⁽¹¹⁶⁾. German authorised dealers who approached Autogerma with enquiries about the possibility of supplies (known as 'cross-deliveries' inside the VAG distribution network) were turned away with references to insufficient stocks, delivery shortages and long delivery times⁽¹¹⁷⁾.

(91) As a possible solution it was suggested that there should be clear agreements with the importer stating that the vehicles imported were intended for the importer's market only, and that in the event of any breach contractual penalties or termination of the contract should be threatened or indeed put into effect⁽¹¹⁸⁾. Thus the manufacturers were under pressure from the German authorised dealers to stop reimports into Germany.

(92) Restriction of cross-deliveries inside the distribution network, that is to say the acquisition by an authorised dealer of vehicles from an authorised dealer in another Member State, reduces the latitude enjoyed by the dealer in the procurement of stocks of vehicles.

6. Termination of contracts

(93) At the end of 1993 Autogerma cautioned 50 dealers (including Brenner Garage in Bolzano/Bozen, whose turnover was very high) to cease organised sales activity outside their contract territories at once or face penalties in accordance with their contracts⁽¹¹⁹⁾. These cautions continued in 1994 and 1995⁽¹²⁰⁾.

(94) In 1993 three dealers had their contracts terminated⁽¹²¹⁾, and in May 1994 Autogerma decided to terminate its contract with Brenner Garage, too⁽¹²²⁾. By February 1995 the number of dealers whose contracts had been terminated had risen to 12⁽¹²³⁾.

(95) Autogerma was clearly terminating dealers' contracts for selling outside their contract territories (or for 'grey imports'), but it emphasised that 'to the outside world these terminations of course took place for other reasons'⁽¹²⁴⁾. Sales to unauthorised dealers were in fact never given as the reason for the termination⁽¹²⁵⁾; the main grounds cited were failure to reach sales targets and breach of contract. In at least one case Regulation (EC) No 1475/95 was invoked to justify the termination of the contract⁽¹²⁶⁾.

(96) This conduct shows that Volkswagen, Audi and Autogerma were aware that the measures they were taking affected legally permissible reimports too,

that is to say sales to non-Italian final consumers or through intermediaries acting with authority from consumers.

(97) Termination or the threat of termination of a dealership contract by reason of sales outside the dealer's contract territory induces the dealers concerned to avoid effecting such sales.

7. Written undertakings

(98) As long ago as 1993, Autogerma recommended that Italian dealers should require consumers to sign what it called an undertaking⁽¹²⁷⁾. In March 1995 a further circular formulated this recommendation more strongly. All customers not known to the dealer, and foreign customers in particular, were at the same time as they signed the contract of sale to sign a written undertaking (*dichiarazione di impegno*) by which they undertook, on pain of a contractual penalty of 10 % of the purchase price, not to sell the vehicle they were purchasing within a period of three months after purchase, or in any event before it had travelled at least 3 000 km⁽¹²⁸⁾.

(99) A declaration required by the manufacturer, the importer or another enterprise in the distribution network whereby the final consumer undertakes not to sell the vehicle before the expiry of a stated period, or until it has travelled a stated distance, or both, restricts the final consumer's freedom of choice as to whether or not to sell a car in another Member State.

D. Result of the agreements and conduct of Volkswagen, Audi and Autogerma

(100) Autogerma, as party to the contracts with the Italian authorised dealers, has had the responsibility of applying these measures. Autogerma argued that Audi could not independently apply measures in Italy and that any such measures required Autogerma's consent⁽¹²⁹⁾.

(101) In various ways (letters, inspections, bilateral meetings, or verbal cautions) Autogerma has drawn dealers' attention to the consequences of selling outside their contract territories, and they have often refrained from such sales as a result. Many customers have refrained from buying a vehicle because dealers referred to supply problems and delays, and ruled out, verbally or in writing, exports or sales to non-Italians.

I. Consumer reactions

(102) Many customers have informed the Commission and the manufacturers of difficulties with the purchase of cars in Italy. From the documents

assembled it is clear that there have been refusals to sell to customers on grounds of their nationality. Many customers report similar reactions on the part of different dealers, as follows:

- '...erhalte ich von den Händlern dort immer wieder die Auskunft, daß sie zwar gerne an mich liefern würden, aber vom Importeur kein Auto bekämen, sobald ein Deutscher als Erwerber auftritt' ⁽¹³⁰⁾;
- '...bekam ich vom Firmenchef die telefonische Auskunft, daß er mir als Deutschem kein Auto verkaufen darf (eine Bestimmung der Volkswagen AG)' ⁽¹³¹⁾;
- '...wurde mir ... bei drei VW-Händlern mitgeteilt, daß der Export jeglicher Fahrzeuge nicht erlaubt sei und man sich an diese Anordnung strikt zu halten habe. Einigen Händler sei — wegen Mißachtung dieser Anordnung — bereits die Konzession entzogen worden' ⁽¹³²⁾;
- 'All dealers told me that it is not possible to buy a car for export. Some of them told me that it is not possible because they wouldn't become any car in the future if they order a car for an Austrian once more' ⁽¹³³⁾;
- 'Es wurde mir ... mitgeteilt, daß die jeweilige Werkstätte ein Verbot von der Generalvertretung v. Audi hätte, die Autos an Ausländer zu verkaufen' ⁽¹³⁴⁾;
- '...daß die italienischen Händler an Personen aus der Bundesrepublik Deutschland und Österreich, angeblich wegen einer Weisung des Fahrzeugherstellers, nichts verkaufen dürfen' ⁽¹³⁵⁾;
- '...wurde uns mitgeteilt, daß wir, auf Anordnung von Wolfsburg, als Deutsche keinen Wagen dieser Modelle bekommen könnten' ⁽¹³⁶⁾;
- 'Die Antwort ... lautete nämlich unisono, daß sie mit Repressalien seitens des Generalimporteurs zu rechnen hätten, wenn sie auch nur ein Auto nach Österreich liefern' ⁽¹³⁷⁾;
- 'Von ital. VW/Audi-Händlern wurde mir in den letzten Monaten aufgrund diverser Anfragen jeweils mitgeteilt, daß es ihnen vom VW/Audi-Konzern nicht gestattet ist, Fahrzeuge nach Österreich zu verkaufen' ⁽¹³⁸⁾;
- 'Mit "leichtem Hinterton in der Stimme" wurde mir überall gesagt, daß "keine Liefermöglichkeit" für Kunden aus Deutschland bestünde. Manchmal wurde auch etwas mehr gesagt' ⁽¹³⁹⁾;
- 'sobald wir aber dem Händler sagen, diese Fahrzeuge sind für einzelne Privatpersonen in Deutschland oder Österreich bestimmt und daß wir Ihnen ohne weiteres ein Vermittlungs- oder Einkaufsmandat mit einer vom Notar beglaubigten Unterschrift vorlegen, will kein Händler

nichts mehr wissen', bzw. 'Die Antwort der Händler ist folgende: was Audi, Ingolstadt (Deutschland) sagt, wissen sie nicht, sie haben von ihrem Generalimporteur Autogerma absolutes Exportverbot, auch an private Endkunden.' bzw. 'hat ca. vor einem Monat der österreichische Automobilclub (ÖMTC) auch probiert in Norditalien Fahrzeuge Ihrer Marke mit Mandat für Endkunden einzukaufen, auch die haben kein einziges Fahrzeug von dem Händler bekommen.' ⁽¹⁴⁰⁾;

- 'Er sagte mir, daß er von Seiten der Geschäftsführung von Auto Brenner gehalten sei, den Kaufvertrag nicht eher rauszuschicken, bis von Ihnen die ausdrückliche schriftliche Bestätigung vorliegt, daß (...) Frau ein Fahrzeug kaufen darf.' ⁽¹⁴¹⁾.

II. Conduct of dealers towards Autogerma

- (103) As a result of the instructions and warnings issued by Autogerma, several dealers gave the importer express assurances that they would not sell outside their contract territories, and more especially outside the country ⁽¹⁴²⁾. A number of dealers took practical measures to this end (no exports, or no more than 15 %; all vehicles to be registered in Italy; dismissal of employees who had sold to foreign buyers; or prior authorisation by Autogerma) ⁽¹⁴³⁾. Autogerma reported to Audi for example that the measure requiring the importer's prior authorisation for all sales had been successful.

III. Conduct of dealers towards customers

- (104) As a result of the strategy followed by the manufacturers and the importer aimed at stopping re-exports of new vehicles from Italy to Germany and Austria, Italian dealers in many cases refused to sell vehicles to customers from those Member States (see Section I). Dealers advised customers not to register the vehicle outside Italy, citing the threat of 'difficulties' with the manufacturer:

'Stiamo facendo tutto il possibile per tentare di riportare la vettura in Italia convincendo il cliente ad annullare la targatura. Siamo veramente spiacenti che questa vendita Vi abbia creato spiacevoli inconvenienti con la fabbrica' ⁽¹⁴⁴⁾.

- (105) This refusal was explained to foreign customers in various ways, one example being a standard reference to the intended re-export of the vehicle: 'Thank you for your fax (letter), but we do not (no longer) sell abroad' ⁽¹⁴⁵⁾ or 'we are sorry to say that we have stopped exporting' ⁽¹⁴⁶⁾.
- (106) In other cases dealers cited restricted supplies from the manufacturer and suggested that the customer

abandon the planned purchase. Dealers answered many customer enquiries with a standard letter:

‘da wir vom Werk nur eine kontingentierte Stückzahl an Fahrzeugen (VW-Audi) erhalten, ergeben sich unsichere Lieferzeiten, die sich bis über ein Jahr erstrecken können. Als Folge davon regelmäßige Preisänderungen und die Preisgarantie kann nicht mehr gewährt werden. Aus diesem Grund werden Sie wahrscheinlich davon absehen, Ihr Fahrzeug bei uns zu kaufen’⁽¹⁴⁷⁾.

- (107) Autogerma confirmed that this strategy had been successful, and told Audi:

‘...wie aus der Ihnen vorliegenden monatlichen Verkaufstatistik hervorgeht, ist der Verkauf von Audi-Neuwagen ins Ausland enorm zurückgegangen. ... Nach unseren Erkenntnissen behält sich der Händler im Rahmen seiner Verkaufspolitik vor, basierend auf den ihm zugeteilten Produktionsquoten Lieferzeiten zu nennen und seine Stammkundschaft zu bedienen’⁽¹⁴⁸⁾.

Audi accepted this, but nevertheless noted that: ‘leider ... nach wie vor von vielen italienischen Händlern die Aussage gemacht (wird), daß es ihnen vom Hersteller bzw. vom Importeur untersagt worden sei, Fahrzeuge an ausländische Endabnehmer zu verkaufen’⁽¹⁴⁹⁾.

Chapter 2:

LEGAL ASSESSMENT

- (108) Volkswagen and Audi distribute their vehicles in the Community through selective delivery networks. Volkswagen and Audi have appointed Autogerma as sole importer in Italy for their vehicles. Autogerma concludes distribution agreements with the dealers in the network on the basis of a standard dealership agreement covering sales of both VW and Audi vehicles. Volkswagen has indicated that it intends to distribute VW and Audi vehicles separately after 1997.
- (109) The Court of Justice of the European Communities has consistently held that agreements between traders at different levels in the economic process, also known as ‘vertical agreements’, may constitute agreements within the meaning of Article 85(1) of the Treaty and be prohibited by it (see for example Case C-266/93 Bundeskartellamt v. Volkswagen and VAG Leasing [1995] ECR I-3477).

A. Article 85(1)

I. The undertakings

- (110) Volkswagen AG, its subsidiaries Audi AG and Autogerma SpA, and the authorised dealers constitute undertakings for the purposes of Article 85(1).

II. The agreement

1. The export ban/restriction

- (111) An examination of the agreements and concerted practices entered into by Volkswagen, Audi and Autogerma and described in Chapter 1, Section C demonstrates that within the framework provided by the exclusive and selective distribution network they and their Italian dealers have agreed a policy for partitioning the market. That market-partitioning policy takes the form of an export ban/restriction imposed on Italian dealers.
- (112) The export ban/restriction derives from a system of measures consisting of preventive measures, monitoring measures and penalties. In the course of its investigations the Commission has found documents which list these various measures. The main evidence is provided by the documents specified in Chapter 1, Section C.I (see footnotes 14 to 18 and the *Maßnahmenprogramm* (Programme of measures) dated 10 February 1995 and referred to in footnote 123).
- (113) The specific measures include the warnings and instructions to dealers described in Chapter 1, Section C.II.1 (see the documents referred to in footnotes 14 and 61 to 70).
- (114) Surveillance of dealers through monitoring of incoming orders, monitoring of sales (including an obligation on authorised dealers to refrain from selling vehicles to non-Italian customers without Autogerma’s prior consent), monitoring of vehicle registrations and monitoring by means of ‘audits’ are described in Chapter 1, Section C.I (see the documents referred to in footnotes 40 to 48 and 143). The cooperation between the manufacturers and the importer in the surveillance of the sales activities of the Italian dealers is apparent from Chapter 1, Section C.I (see the documents referred to in footnotes 19 to 31).
- (115) Examples of penalties applied to Italian authorised dealers, such as cautions, warnings and termination of dealership contracts, are indicated in Chapter 1, Section C.II.6; reference may be made in particular to the documents listed in footnotes 71 and 120 to 127, and the document *Export aus Italien* (Exports from Italy) dated 13 June 1994 and referred to in footnote 62.

The clause to the effect that bonuses are in principle payable only for dealers' sales within their contract territories, which has been contained in Italian dealers' contracts since 1987 at least, is described in Chapter 1, Section C.II.3 (see the documents referred to in note 94). The clause was tightened up when the dealership contract was amended, with effect from 1 January 1995 (see the document referred to in note 98), to make payment of the bonus in principle conditional on the qualifying vehicles also being registered in the dealer's contract territory as is also described in Chapter 1, Section C.II.3. That bonuses were in fact withheld at least since 1993 is explained in Chapter 1, Section C.II.3 (see the documents referred to in footnotes 18, 95 and 96). The introduction of a split margin, beginning with the VW Polo and Audi A4 models, is shown by the documents referred to in footnotes 78 to 81, 84 and 85 relating to Volkswagen's marketing (Chapter 1, Section C.III.1. and Chapter 1, Section C.II.2.(c)) and the documents referred to in footnotes 82, 87, 88 and 89 relating to Audi's marketing (Chapter 1, Section C.II.2).

(116) The export ban/restriction incorporates a prohibition of cross-deliveries, that is deliveries within the distribution network. Italian authorised dealers are prohibited from supplying to VW and Audi authorised dealers in other Member States. This is evident from Autogerma's information to Audi regarding German authorized dealers 'bothering' their Italian counterparts, and its request to Audi to prevail upon German authorised dealers to refrain from cross-purchases. Evidence is listed especially in footnotes 112 and 113 (Chapter 1, Section C.II.5) and footnotes 14 and 116 (Chapter 1, Section C.II.5). In addition, Autogerma itself refused requests from non-Italian authorised dealers on the ground that it had insufficient stocks, rather than on the ground that as the importer it did not sell direct (see the document referred to in note 117, Chapter 1, Section C.II.6).

(117) The export ban/restriction has also been underpinned by the restriction of supply to the Italian market (see '*Maßnahmenprogramm*' of 10 February 1995, note 123). The documents found by the Commission in its investigations show that VW, since November 1993 (see the document referred to in footnote 106, *Maßnahmen zur Begrenzung von Re-Exporten aus Italien* (Measures to restrict re-exports from Italy), Chapter 1, Section C.II.4) and Audi, since at least December 1993 (see the memo *Gespräch am 14.12.93 in Wolfsburg, Marken Audi und VW: Preisplanung Italien/EG-Preisharmonisierung* (Discussion held on 14 December 1993 in Wolfsburg concerning Audi and VW vehicles: planning of prices for Italy/harmonisation of EC prices) referred to in note 106), have been compelling Italian authorised dealers to comply with the prohibition/restriction on exports by restricting deliveries to the Italian market.

(118) In its letter to Audi *Export aus Italien* dated 13 June 1994, Autogerma confirmed the existence of that restriction on deliveries (see footnote 62, with translation):

'... Obwohl die Lieferzeiten für den Audi 80 von bis zu 8 Monaten deutlich reduziert werden konnten, werden die Händler noch immer kontingentiert. Ein Händler, der eine übergroße Anzahl an Audi 80 bestellt, bekommt diese nicht geliefert...'

(119) Volkswagen stated in a discussion with Audi on 22 March 1995 (see the minutes of this discussion, dated 27 March 1995, referred to in footnote 107) that the supply of VW vehicles had been adapted to demand in Italy. Dealers received only the number of vehicles necessary to enable them to supply customers in their contract territory. And in an internal memo, *Stand Maßnahmen gegen Graumarkt, 25.11.1994* (The state of measures against the grey market at 25 November 1994), Audi indicated with regard to the new Audi A4 (see the document referred to in footnote 82, with translation):

'... Belieferung wird so gesteuert, daß nur die italienische Nachfrage befriedigt wird ...'

(120) Among the measures taken in connection with the export ban/restriction is the imposition of the rule that dealers should make the conclusion of sales contracts with final consumers conditional on such consumers giving a written undertaking (see Chapter 1, Section C.II.7 and the documents referred to in footnotes 127 and 128).

2. Agreement

(121) The export ban/restriction forms part of the contractual relations which Autogerma maintains with dealers in the selective distribution network in Italy for the VW and Audi makes. The export ban/restriction was agreed with the dealers partly by means of circulars and partly by word of mouth, and the dealers consented to this agreement.

(122) Autogerma sent dealers two circulars implementing Volkswagen's instructions regarding new arrangements for margins. It had already established the legal basis for this action with effect from 1 January 1994; an agreement (*convenzione*) appended to the dealership contract discontinued the application of the previous margins scheme for new models, without, however, determining new arrangements for such margins (see Chapter 1, Section C.II.2, in particular Chapter 1, Section C.II.2(c)). Autogerma subsequently provided the following details of a new margins scheme, by circulars dated 20 October and 2 November 1994 (see Chapter 1, Section C.II.2 and the documents referred to in footnote 85). In the circular of 20 October 1994, Autogerma set out the structure of the new scheme, giving the example of the new VW Polo, which was arriving on the market (see footnote 85, with translation):

‘...’

A. Tutti i Concessionari

lettera del: 20. 10. 1994

foglio: 2

Loro Sedi

COM1/ORG/EP/ad

Ciò premesso, nell'intento di trovare valide soluzioni di interesse vitale, per noi come per tutta la Organizzazione, in merito alle problematiche più volte emerse, che spingono talora alcune Aziende a comportamenti non in linea con i reciproci interessi (per esempio, vendite tramite rivenditori non autorizzati, sconti non motivati ed eccessivi, vendite fuori territorio, e altro) si è trattata — con il Presidente, i Vicepresidenti e alcuni Consiglieri dell'UCAV, presenti a Verona martedì 18.10 u.s. nell'ambito della riunione del Gruppo di lavoro ISC — una nuova strutturazione degli sconti per la Nuova Polo, così composta:

a- Sconto base/immediato in fattura = 8 %

b- Sconto “differito a breve” = 5 %

Totale (come per il modello precedente) = 13 %

c- Maggior Sconto (con stesse modalità) = 3 %

In particolare, lo sconto “differito a breve” di cui al punto b- verrà riconosciuto a posteriori ma in tempi brevi, e sarà basato specificatamente sul reciproco impegno, sia nostro come anche di ciascuna Azienda concessionaria della Autogerma, di curare il territorio contrattuale per cui entrambi — Autogerma e concessionaria — sono competenti per impostazione, per commercializzazione e vendita, nonché per l'obbligo della intensa cura reciproca dell'utilizzatore finale residente nel territorio affidato.

Rimane da valutare se opportuno, cioè di interesse comune per tutti noi, di modificare o meno (in su o in giù) la franchigia dell'attuale 15 % (di fuori territorio).

I Signori Delegati UCAV di area prenderanno quindi rapidamente contatto con Voi per approfondire quanto sopra nonché accogliere riflessioni, suggerimenti e migliorie in relazione.

I predetti Delegati si consulteranno quindi successivamente con urgenza con noi affinché la Autogerma possa prendere la propria decisione in via definitiva...’

(123) By the circular of 2 November 1994 (see footnote 85) dealers were informed that the new margins scheme, as set out in the circular of 20 October 1994 would apply with immediate effect and until at least 30 April 1995. Both circulars form part of the contractual relations between Autogerma and the dealers, since the purpose of the circulars was to flesh out the provisions of the dealership contract laid down in the ‘convenzione’ appended to the contract, which excluded the new models from the previous margins scheme. In its circular of 2 November 1994, Autogerma states that the new arrangements for margins are to apply forthwith. Since 2 November 1994, the new margins scheme has formed a part of the contractual relations between Autogerma and the authorised dealers. This interpretation is substantiated by the rulings of the Court of Justice of the European Communities in *Ford-Werke and BMW v. ALD* ⁽¹⁵⁰⁾.

an additional agreement (see Autogerma's letter to Audi dated 10 November 1994 Splitmargensystem — Audi A 4 (split margins scheme — Audi A 4) in footnote 87, Chapter 1, Section C.II.2(c)(2), and the document referred to in footnote 93).

(125) Furthermore, Autogerma has since 1987 been specifying in dealership contracts concluded with Italian dealers that bonuses would be paid in principle only on sales to customers in the contract territory (whether final consumers, intermediaries, other authorised dealers or independent dealers not being members of the distribution network). ‘Convenzione B’ covering the bonus arrangements was framed in more stringent terms with effect from 1 January 1995: the bonus was now payable only on vehicles which were registered in the dealer's contract territory. This is established by the document referred to in note 98.

(124) Autogerma acted on Audi's instructions regarding the margins scheme, bringing it into effect not later than November 1994; the scheme was embodied in the Italian dealership contracts by means of

(126) Authorised dealers have also given an express undertaking to the importer that they will refrain from making sales outside their contract territory, in particular abroad (see Chapter 1, Section D.II). This is shown by the documents referred to in footnote 142.

(127) The following conduct on the part of the authorised dealers likewise shows that they have consented to the export ban/restriction:

- on the basis of the export ban/restriction, authorised dealers have required subdealers to refrain from foreign sales. As evidence of this the Commission would point to the letter of 6 March 1995 from the VW/Audi dealer, Eurocar SpA, to its subdealers, Fantini, Mansutti, Torresan, Ciesse Car, Tonerio, Fantini and Autogris, in which it is stated that Autogerma absolutely prohibits foreign sales of vehicles and tolerates a volume of sales outside a dealer's contract territory only up to 15 % of total sales (see footnote 62, with translation):

‘Già in passato abbiamo avuto modo di intrattenervi sulla delicata questione delle vendite fuori zona.

Poiché l'Autogerma non intende più tollerare una eccessiva attività di vendita al di fuori della propria area di competenza, ribadiamo quanto segue:

- sono assolutamente vietate le vendite all'estero (anche di quelle vetture preventivamente immatricolate in Italia)
- saranno penalizzate tutte le vendite al di fuori della propria zona di competenza eccedenti il 15 % delle proprie consegne;
- authorised dealers have dismissed employees who have concluded foreign sales. This is shown by the memo *Oggetto: Colloquio con Sig. Beikircher-BZ*, (Subject: Conversation with Mr Beikircher of Bolzano/Bozen) dated 21 October 1994, referred to in footnote 143,
- authorised dealers have requested Autogerma for permission before they conclude sales contracts with final consumers abroad (see Chapter 1, Section D.II). Reference may be made to Brenner Garage's letter to Autogerma of 19 December 1994 and Dorigoni's letter of 22 June 1995, referred to in footnote 143,
- authorised dealers have refused sales to final consumers resident outside Italy, and to other VW/Audi dealers, on the grounds that they no longer sell abroad (see Chapter 1, Section D.III). This can be seen from the letters from the dealer Dorigoni referred to in footnotes 145 and 146,
- authorised dealers have suggested to final consumers and to other dealers in the distribution network that they would be wiser not to purchase, as delivery times can be longer than a year (see Chapter 1, Section D.III). This can be seen from the letters from Auto Brenner referred to in footnote 147,

- authorised dealers have requested the written undertakings from final consumers. This is established by the sales contracts indicated in footnote 128,

- authorised dealers have acquiesced in the withholding of bonuses on all sales outside their contract territory. Autogerma's chairman was able to claim the sole right to authorise bonuses without anticipating trouble from dealers. This is shown by the internal memo *Non riconoscimento/trattenuta del Maggiore Sconto per vendite fuori zona (compreso esportazioni parallele)* (Non-payment/withholding of the extra bonus for out-of-area sales (including parallel exports)) of 28 June 1994 (see footnote 97).

3. Conclusion

(128) The measures adopted by Volkswagen, Audi and Autogerma to prevent or obstruct parallel exports do not constitute unilateral conduct that falls outside the scope of the prohibition contained in Article 85(1); they form part of the contractual relations which the manufacturers maintain, through Autogerma, with the dealers in their selective distribution network, since they were adopted by mutual agreement for the practical application of the dealership contract. The Court of Justice has already held in Case 107/82 AEG v. Commission⁽¹⁵¹⁾, that admission of a distributor to a selective distribution system is based on acceptance, tacit or express, of the policy pursued by the manufacturer. The restrictive deliveries policy applied by Volkswagen and Audi, viewed in its economic and legal context, likewise produces its effects within the framework of the distribution agreements concluded with the authorised dealers. It alters the contractual relations between Volkswagen, Audi, Autogerma and the dealers. Orders placed by dealers are no longer met by the manufacturers. The Commission would refer to the judgment of the Court of Justice in Joined Cases 25 and 26/84 Ford-Werke, which is based on similar facts⁽¹⁵²⁾. Moreover, since at least September 1993 German and Austrian authorised dealers have urged Volkswagen and Audi to restrict supplies to the Italian market (see the document *Rede von Herrn Knief zur Plenum-Veranstaltung mit Herrn Dr. Piëch anlässlich des Europa-Kongresses am 8. September 1993 in Frankfurt* (Speech by Mr Knief to the full meeting with Dr Piëch at the European Congress on 8 September 1993 in Frankfurt) mentioned in footnote 113 and *Protokoll der 7. Konferenz des Europäischen Händlerbeirats VW/Audi vom 21. bis 23. April 1994 in Dublin* (Proceedings of the seventh conference of the European VW/Audi dealer council held in Dublin on 21-23 April 1994) referred to in footnote 105).

- (129) It is irrelevant whether or not the dealers have complied with the prohibition/restriction on exports as a result of pressure brought to bear by the manufacturers. In its Decision 82/367/EEC in *Hasselblad*⁽¹⁵³⁾, the Commission has stated that for a concerted practice to exist it is sufficient 'for ... an undertaking knowingly and of its own accord to adjust its behaviour in line with the wishes of another undertaking. The motive or the knowledge that the act is unlawful is irrelevant'.

III. Appreciable restriction of competition

1. The object or effect of restricting competition

(a) The object

- (130) The system for identifying authorised dealers engaging in exporting and the penalties associated with it, have as **their object** the restriction of intra-brand competition. The intention is to prevent Italian authorised dealers from exploiting competitive advantages they enjoy over authorised dealers from other Member States, as a result of currency fluctuations for example, by selling vehicles to customers who are not resident in their contract territory or in Italy. The only distinction drawn is whether the customer is resident or non-resident in the contract territory or in Italy; no distinction is made between final consumers, intermediaries acting on their behalf, other authorised dealers belonging to the distribution network, or independent dealers outside the network. Markets are thus being partitioned.

- (131) That the object is to restrict competition is apparent both from the combination of measures and from the individual measures in isolation.

(i) Restrictive object of the combination of measures

That the object of the combination of measures is the prevention of parallel exports (or, as Volkswagen, Audi and Autogerma frequently express it, 're-exports') emerges clearly from Volkswagen's internal memo *Re-exporte* (Re-exports) dated 1 March 1994 (see footnote 102, with translation):

'...

3. Trotz preislicher Verschlechterung unserer Produkte in Italien ergab sich durch den Lira-Verfall ein erhebliches Preisgefälle zu Deutschland und anderen Märkten. Diese Situation hat vor allem bei den Händlern im norditalienischen Raum zu Re-Exporten geführt (in Summe 1993 ca. 17 000 Volkswagen PKW nach Deutschland).

Stand: 20. Dezember 1993 KFZ-Zul.Amt Flensburg

4. Durch geeignete Maßnahmen

- Händleraudits
- Abmahnungen
- gezielte Zuteilung
- Bonuskürzungen
- Kündigungen (3 Händler in 1993)

wurde seitens Autogerma S.p.A. und Volkswagen AG Einfluß genommen.

Dadurch wurden die Re-Exporte erheblich eingeschränkt ...

- (132) Autogerma's letter to Volkswagen, *Measures to control and prevent re-export of 26 September 1994* (see Chapter 1, Section C.I and footnote 15), is very clear:

'with reference to the discussion we had in Verona Thursday 15 and Friday 16 of September ... we confirm herewith the main measures taken by Autogerma to control and prevent re-export.

We are convinced that with these measures we shall possibly reduce drastically the re-export if also in Germany actions are taken with the German dealers which are continuously looking for new cars getting in touch directly with our dealers and Companies like VAGAS are prohibited to make interesting offerings to our dealers which are in this moment in red figures ...

- (133) These documents show that the combination of measures is based on a strategy developed by Volkswagen, Audi and Autogerma intended to bring about drastic reductions in parallel exports from Italy. By taking these measures, the manufacturers intend to intervene on the market and determine how that market will develop. Audi's express object is to limit exports to less than 100 vehicles per month (see the handwritten memo referred to in footnote 58), or to reduce the grey market/reimport volume observed in February 1995 by half within six months. The combination of measures was to achieve this by September 1995 (see minutes of the departmental meeting dated 3 February 1995 referred to in footnote 59).

- (134) That the object of the combination of measures is to restrict competition is particularly clear from the example of the linkage between the bonus and margins schemes and the policy of restrictive deliveries (see the *Maßnahmenprogramm* (Programme of measures) dated 10 February 1995 referred to in footnote 123). The bonus and margin form the basis of the calculations which the dealer carries out in order to determine how he can economically sell a vehicle in the course of his business, taking account of the related expenditure on such things as his sales staff and his showroom. The bonus and margin also condition the dealer's room for manoeuvre on prices in his negotiations with customers. A dealer who knows that he will lose the 3 % bonus if he sells a vehicle outside his

contract territory will refrain from such sales, at least if he is able to dispose of his allotted vehicles within that territory. The margins scheme has the same objective, but is even more severe, since a dealer selling to customers who are not resident in his contract territory generates earnings which are lower by almost 40 % (5 % out of the 13 % margin) or together with the bonus 50 %, in the case of VW (see *Maßnahmenprogramm* dated 10 February 1995, footnote 123), and 33 % (5 % out of the 15 % margin) or together with the bonus 44 %, in the case of Audi. The dealer cannot increase the selling price of the vehicle correspondingly, so as to pass this financial disadvantage on to the customer, except at the risk of losing his competitive edge. Given the policy of restrictive deliveries practised by VW and Audi, therefore, authorised dealers have an incentive not to accept offers to purchase from final consumers outside their contract territory.

(ii) Restrictive object of the measures in isolation

(135) Not only do the measures adopted by Volkswagen, Audi and Autogerma with regard to authorised dealers in order to enforce the export ban/restriction hinder competition when they operate in combination; taken in isolation, too, they are objectively likely to make it unprofitable for Italian dealers to export.

(136) — The restriction of bonus payments to sales made within the dealer's contract territory, as agreed in 'Convenzione B' to the dealership contract, removes dealers' incentive to supply to final consumers, intermediaries acting on their behalf, or other authorised dealers belonging to the distribution network if the customer comes from another contract territory. In its Decision 85/617/EEC in *Sperry New Holland*⁽¹⁵⁴⁾, the Commission has already determined that agreements or practices concerning bonuses which are conditional on the goods in question not subsequently being exported by the customer are prohibited. For the measure to be considered to have the restriction of competition as its object it is enough that the relevant clause should have been included in the dealership agreement. It is unnecessary that the clause should have been applied⁽¹⁵⁵⁾. That the bonus was in fact withheld on sales outside the contract territory at least from September 1993 underlines the restrictive object. The withholding of the bonus is a penalty — and indeed is seen as such by Autogerma itself (see letter dated 21 September 1994 referred to in footnote 14 and Chapter 1, Section C.I) — which is intended to impede intra-Community trade.

(137) — The margins scheme comes on top of the withholding of bonuses, and pursues the same object. For the measures to be considered to

have the restriction of competition as their object, it is enough that they should have been introduced for a limited initial period (see circular dated 2 November 1994 referred to in footnote 85). This restricts authorised dealers' freedom of trade, since if they sell outside their contract territory they have reason to believe that Autogerma will act against them, for instance by claiming back their margins. The Commission has confirmed this view of the matter in a number of decisions⁽¹⁵⁶⁾. But in fact the margins scheme went on being applied after 30 April 1995 (see *Maßnahmen zur Reduzierung von Grauexporten* (Measures to reduce grey exports) dated 21 August 1995, in footnote 81, and the document referred to in footnote 86).

(138) In an internal Audi memo sent by Mr Diaz Ruiz to Dr Demel, the chairman of Audi's management board, on 23 November 1994, Audi makes the following statement on the objective of the margins and bonus schemes (see footnote 93, with translation):

‘... Anbei erhalten Sie die schriftliche Bestätigung von Herrn Schlesinger über die zusätzlich eingeführten Maßnahmen (Splitmarge), um Grauimporte zu verhindern.

Dies bedeutet, daß ein Händler, der Grauimporte vornimmt, 5 % Splitmargen-Anteil + 3 % Bonus verliert, was eine zusätzliche Preiserhöhung von 8 % darstellt.

Die Zustimmung der Händler zu dieser Splitmarge bedeutet, daß die Mehrzahl aller Händler bereit ist, Grauimporte zu verhindern, weil die Vertriebskosten beim Kauf eines Autos mehr als 10 % darstellen.

Das heißt, kurzfristig würde der Händler einen negativen Cash-flow für jedes Auto erzielen ...’.

(139) — The object of the prohibition on cross-deliveries is to impede cross-border trade in goods between Italian authorised dealers and authorised dealers in other Member States, and to segregate markets at that level of distribution. This makes it possible to maintain price differences for VW and Audi vehicles within the common market (see Chapter 1, Section B.II). The Commission and the Court of Justice have frequently pointed out that impeding or prohibiting cross-deliveries is incompatible with Article 85(1)⁽¹⁵⁷⁾.

(140) — Autogerma required dealers to enter into an obligation to obtain the prior consent of the importer before selling any vehicle outside their contract territory (see, in particular, the documents referred to in footnotes 70 and 143). It thereby limited dealers' contractual freedom in order to restrict competition within the distribution network.

- (141) — The object of the restriction by Volkswagen and Audi of deliveries to the Italian market is, as has been indicated in Chapter 2, Section A.II.1, to keep Italian dealers to their contract territories. There had been some measure of pressure, of stocks on Italian dealers (i.e. a high volume of vehicles which manufacturers required dealers to buy from them); the restriction of deliveries was not intended to reduce this pressure in order to provide financial relief for dealers, but rather to ensure that the pressure of stocks did not undermine the export ban/restriction. This is clear from the document referred to in footnote 107. In its letter to Audi *Export aus Italien* dated 13 June 1994 (see footnote 62 and the quotation in Chapter 2, Section A.II.1), Autogerma spoke of the anti-competitive object of reducing deliveries. Moreover, restricted deliveries cannot be justified on the grounds of difficulties in supplies, since the measure has applied to all models since the end of 1993, and was applied more stringently in the case of the new models, the VW Polo and the Audi A4. In February 1995 Audi cancelled a delivery of 8 000 Audi A4 vehicles. In response to a complaint from Autogerma, Audi confirmed its policy of restricted deliveries to the Italian market. An internal memo from the Task Force set up by Audi, dated 6 February 1995, states, in this connection (see footnote 109, with translation):

Lieferung von weiteren 8 000 Fahrzeugen für den italienischen Markt

Die italienischen Händler haben gefordert, daß weitere 8 000 Audi A4 1995 nach Italien geliefert werden sollen. Die Autogerma soll eine entsprechende Zusage bereits gegenüber den italienischen Händlern abgegeben haben.

Ursprünglich war vorgesehen, den italienischen Markt restriktiv und marktgerecht zu beliefern. Durch die Zusage von weiteren 8 000 Fahrzeugen können sich die italienischen Händler bereits im jetzigen Stadium auf den Reexport von Audi A4 einstellen und entsprechende Zusagen gegenüber freien Importeuren und Händlern abgeben. Die Marktbearbeitung mit den ursprünglich zugesagten Fahrzeugen könnte vernachlässigt werden.

Um in Italien ein Zeichen zu setzen, daß die von Ihnen angekündigte restriktive und marktgerechte Belieferung beibehalten wird, sollte die Zusage vom Ressortgespräch, daß die geforderten 8 000 Fahrzeuge nicht geliefert werden, umgehend dem Importeur bekanntgegeben werden.

Wir bitten Sie, diese Beschlußlage der Autogerma umgehend mitzuteilen und für eine

entsprechende Kommunikation im italienischen Handel zu sorgen...'. .

- (142) — With the knowledge of Volkswagen and Audi, Autogerma has used dealers' fear that their contracts might be terminated as a means of bringing pressure on them to comply with the export ban/restriction. A dealership contract can be terminated without giving reasons on notice of at least one year (see Article 1 of §XXI of the dealership contract, footnote 83). Autogerma has in fact terminated the contracts of dealers who sold vehicles for export (see the document *Export aus Italien* dated 13 June 1994, referred to in footnote 62); internally it was emphasised that 'to the outside world these terminations of course took place on other grounds' (see the document *Besuch bei Autogerma* (Visit to Autogerma) dated 10 February 1995 mentioned in footnote 125 and Chapter 1, Section C.II.6). The use by a manufacturer or importer of selective dealership contracts to reduce the contractual freedom and economic independence of dealers constitutes a restriction of competition for the purposes of Article 85(1) of the Treaty. The Commission has already taken this view in the Hasselblad Decision ⁽¹⁵⁸⁾.
- (143) — With the knowledge of the manufacturers, Autogerma has agreed with dealers that final consumers are to be required to provide a written undertaking accepting restrictions on their right to use their property as they saw fit. This conduct constitutes a restriction of competition for the purposes of Article 85(1). The Court of Justice has ruled that 'it is clear from previous judgments of the court that clauses in contracts of sale restricting the buyer's freedom to use the goods supplied in accordance with his own economic interests are restrictions on competition within the meaning of Article 85 of the Treaty' ⁽¹⁵⁹⁾.

(b) The effect

- (144) The effect of the measures is to restrict cross-border sales of vehicles. Authorised dealers were repeatedly told that they were free to sell vehicles only within their contract territories (see the letter *Measures to control and prevent re-export* dated 26 September 1994, mentioned in footnote 15 and referred to in Chapter 1, Section C.I; see also the document referred to in footnote 18 cited in Chapter 1, Section C.I). If they failed to comply, they were told to expect penalties. Dealers complied with Autogerma's instructions and refrained from sales to customers resident outside their contract territory, drawing no distinction between customers who were final consumers, intermediaries acting on behalf of such consumers, other authorised dealers forming part of the distribution network, or independent dealers outside that network. Chapter 1, Section D shows that authorised dealers have refused to sell consumers VW or Audi vehicles on

the grounds that the manufacturers or main importers had prohibited exports (see the documents referred to in Chapter 1, Section D.I and footnotes 130, 132, 134, 135, 136, 138 and 140). Authorised dealers have frequently refused to make sales to consumers on the ground that if they sold for export, there would be reprisals on the part of the main importer (*loc. cit.* and footnote 137), and indeed that their dealership contract might be terminated (*loc. cit.* and footnote 132). Authorised dealers responded to enquiries from outside their contract territory by a standard letter, even when the enquiries obviously came from final consumers; in that letter, they advised the customer not to purchase from them because of the long delivery time (see the documents referred to in Chapter 1, Section D.III footnotes 145 and 147). A document in the Commission's possession shows that an authorised dealer attempted to buy back a vehicle supplied to a final consumer resident outside his contract territory, and in giving an account of this to Autogerma apologised for the inconvenience caused to the manufacturer by the sale (see the document referred to in Chapter 1, Section D.III and footnote 144).

- (145) Autogerma informed Audi that the measures adopted had resulted in a large-scale fall in the volume of VW and Audi vehicles exported (*loc. cit.*, footnote 148). The Austrian main importer for Volkswagen, Audi and Porsche also noted, in a letter of 27 March 1995 to Audi, that the measure had had the effect of partitioning the market (see footnote 31, with translation):

‘... Aus den in der jüngsten Zeit mit den Händlern der betroffenen Gebiete geführten Gesprächen konnten wir feststellen, daß sich das Thema Grauimporte beruhigt hat. So ist bis zur Stunde kein einziger A4 aus Italien nach Österreich importiert worden.

Die von Ihnen gemeinsam mit dem italienischen Importeur eingeleiteten Maßnahmen scheinen also zu wirken. Dafür möchten wir uns bei Ihnen und allen, die daran mitgewirkt haben, sehr herzlich bedanken ...’.

(c) Conclusion

- (146) Volkswagen, Audi and Autogerma sought to implement an export ban/restriction by the measures they took and as regards Germany and Austria at least they achieved that aim. These measures, in combination and in isolation, are capable of restricting competition.

2. Appreciable restriction of competition

- (147) Volkswagen and Audi hold significant shares of the Community market in new vehicles (see Chapter I, Section A.III). The market shares of Volkswagen and Audi will be considered together, since Audi is a subsidiary of Volkswagen and pursues a market strategy determined by its parent. The Commission would refer here to the record of a discussion which it has found, entitled *Preisharmonisierung* (Price harmonisation) dated 30 August 1993 (see footnote 105). The record reports a discussion between Volkswagen and Audi on stopping the flow of grey-market products, mainly from Italy. Under heading IV, *Weiteres Vorgehen* (Further steps) the following is stated (see footnote 105, with translation):

‘... Ziel ist ein abgestimmtes, gleichgerichtetes Vorgehen der Marken VW und Audi ...’.

- (148) Since 1993 there have been significant differences in prices between Italy and the other Member States. Reference is made to the overview in Chapter 1, Section B.II. The differences in prices between Italy and in particular Germany and Austria decreased in the course of 1996. This can be attributed to the strengthening of the lira, among other factors (such as price increases by Volkswagen and Audi). The financial gains to be made from parallel trade in motor vehicles from Italy have thus been falling. Nevertheless, the object of the measures introduced by Volkswagen and Audi, through Autogerma, remains unaltered. The measures could come into play once again if currency fluctuations or other factors were to permit price differentials to develop. Potentially, therefore, the restriction of competition in the common market remains appreciable.

IV. Appreciable effect on trade between Member States

- (149) Trade between Member States is affected because the export ban/restriction applied by Volkswagen and Audi restricts cross-border trade. The Italian market is eliminated as a possible source of parallel exports, and at the same time markets for those exports where prices are significantly higher, such as the German and Austrian markets, are protected from parallel imports.
- (150) As has been indicated in Chapter 1, Section B.I, the volume of actual and potential parallel exports is considerable. There is consequently an appreciable effect on trade between Member States.

V. Conclusion

- (151) Volkswagen and Audi, through Autogerma, have agreed with the Italian authorised dealers an export ban/restriction under which those dealers are required to refrain from selling VW and Audi vehicles outside their contract territories.
- (152) The unlawful object of preventing or restricting parallel trade has been pursued by means of a written agreement. The measures adopted by the manufacturers and the importer form part of the contractual relations maintained by the manufacturers, through Autogerma, with the dealers in their selective distribution network.
- (153) These are appreciable restrictions of competition with an appreciable effect on trade between Member States. There is therefore an infringement of the prohibition in Article 85(1).

B. Article 85(3)

I. Block Exemption Regulations (EEC) No 123/85 and (EC) No 1475/95

- (154) Regulation (EEC) No 123/85⁽¹⁶⁰⁾ was in force from 1 July 1985 to 30 June 1995. It was superseded on 1 July 1995 by Regulation (EC) No 1475/95⁽¹⁶¹⁾. Article 13 of Regulation (EC) No 1475/95 lays down that the provisions of Regulation (EEC) No 123/85 continue to apply until 30 September 1995. Article 7 of Regulation (EC) No 1475/95 lays down that the provisions of Regulation (EEC) No 123/85 continue to apply until 30 September 1996 to agreements already in force on 1 October 1995 which satisfy the conditions for exemption laid down in the latter Regulation. Consequently, until 1 October 1996 this case falls to be assessed only under Regulation (EEC) No 123/85. From 1 October 1996 onwards, Regulation (EC) No 1475/95 applies without reservation.
- (155) Regulation (EEC) No 123/85 and Regulation (EC) No 1475/95 do not exempt an agreement imposing an export ban/restriction aimed at preventing parallel exports by final consumers, by intermediaries acting on their behalf or by other dealers in the dealer network.

1. Article 3(10)(a) of Regulation (EEC) No 123/85

- (156) Article 3(10)(a) of Regulation (EEC) No 123/85 allows the manufacturer to prohibit authorised dealers from supplying contract goods or corresponding goods to 'resellers' who are not part of the distribution network. In this way the Block Exemption Regulation acknowledges the manufacturer's interest in protecting his selective distribution system.

- (157) Regulation (EEC) No 123/85 was in force from 1 July 1985 to 30 June 1995. It can therefore be assumed that the distinction it makes between, on the one hand, sales to final consumers, intermediaries and dealers in the distribution network and, on the other, sales to independent dealers who are not part of the distribution network is a familiar one. The latter are also often referred to as 'grey importers'. Terminology, however, is not uniform: 'grey imports' sometimes includes parallel imports by final consumers or intermediaries or both. The term 'reimports' usually includes all types of parallel imports, whether by final consumers, intermediaries, other dealers in the network or independent dealers; even here, however, it cannot be assumed that there is a general recognised terminology.

- (158) If the export ban/restriction imposed by Volkswagen, Audi and Autogerma were to include only measures directed solely and explicitly at independent dealers, such measures would be exempted by Regulation (EEC) No 123/85. However, this does not apply to the measures in question, for the following reasons.

- (159) Volkswagen, Audi and Autogerma make no distinction, either in the language they use or in the actual form of the measures, between independent dealers on the one hand and final consumers, intermediaries acting on their behalf or other authorised dealers within the distribution network on the other.

(a) Terminology

- (160) — As explained in Chapter 1, Section C.II.1, Volkswagen was not consistent in its terminology, but referred to grey imports and reimports together. The documents mentioned in footnote 50 may be cited as evidence of this. This prompts the conclusion that all possible types of reimport are covered by the set of measures in the export ban/restriction.

- (161) That reimports by final consumers or intermediaries acting on their behalf are also to be prevented is confirmed by Volkswagen's conduct. In the internal memo *Verkauf an europäische Privatkunden und 'echte' Vermittler* (Sales to European private customers and 'genuine' intermediaries), of 4 July 1995 (see footnote 50, with translations), Volkswagen states that a genuine intermediary, i.e. a properly authorised intermediary for the purposes of Article 3(11) of the Regulation, intends to complain to the Commission because, on an internal instruction from Autogerma, no information is being given to him. In the memo, such behaviour towards the intermediary is seen as not in conformity with the Regulation:

‘... Achtung: Entzug der GVO möglich!’

- (162) There is no suggestion, however, that the anti-competitive behaviour should cease, only advice that

‘Aus politischen Gründen müssen hier Wogen geglättet werden ...’.

- (163) Volkswagen instructed Autogerma as to what words to use with final customers (see footnote 35). Autogerma was to point out that final customers could be supplied; if there had been a refusal to do so hitherto, this could only have been due to a regrettable misunderstanding; that said, no dealer could be forced to sell to a particular customer. The letter shows that Volkswagen wants to give the impression it is acting in accordance with competition law, but is in fact evading customers and failing to respect their right to buy the goods want anywhere in the single market. An internal Volkswagen memo confirms this objective (see footnote 34, with translation):

‘in keinem Fall den Eindruck entstehen lassen, daß auf Anweisung der VW AG, der Autogerma oder einzelnen Personen dieser Unternehmen keine Informationen an Privatkunden oder zulässige Vermittler herausgegeben werden dürfen...’.

- (164) Had Volkswagen wanted to exclude final consumers from the export ban/restriction, there would have been no need for guidance to Autogerma of this type, nor for the advice that the impression must not be given that parallel trading by final consumers or intermediaries was being restricted. An impression of that kind could arise only if there were large numbers of complaints on the part of consumers, in which case manufacturer and importer would have ample time to ensure that such ‘misunderstandings’ on the part of dealers did not occur. Consequently, there is no need for a certain formulation if the behaviour itself accords with competition law.

- (165) From the internal memo *Reimporte Italien* (Reimports from Italy), dated 24 March 1995 (see footnote 91), it is clear that the attitude of Autogerma reproduced in the circular of 16 March 1995 (see footnote 68) describes only the latter’s ‘official’ position (see the memo *Reimporte Italien*, footnote 91). This is confirmed in the internal memo *Reimporte Italien* of 9 May 1995 (see footnote 70, with translation):

‘... Das anliegende Schreiben der EG-Kommission zeigt, daß man sich mit unserem Schreiben vom 30. März 1995 sowie dem letzten Rundschreiben der Autogerma nicht

zufrieden gibt. Der Inhalt des Rundschreibens muß auch praktiziert werden, wenn wir nicht das hohe Risiko eines Bußgeldes laufen wollen ...’.

- (166) — In the Audi memo *Projektbeschreibung Graumarkt/Reimporte* (Project description: grey market/reimports), dated 14 December 1994 (see footnote 56, with translation), which was also submitted to the Audi management board, a conceptual distinction is made between reimports and the activities of independent dealers, even though it is emphasised at the same time that all types of grey imports and reimports are to be combated:

Projektbeschreibung: Bekämpfung Graumarkt/Reimporte

Aufgaben und Zielsetzungen

1. Bekämpfung von Reimporten

- Einlieferung nach Deutschland
- Illegale Exporte aus Deutschland
- Andere Länder der Europäischen Union

2. Verhinderung der Belieferung von nicht-autorisierten Wiederverkäufen ...’.

- (167) In the paper of 9 February 1995 presented to the meeting of the management board on 13 February 1995, the following definition of reimports is given under the heading *Einleitung von Maßnahmen gegen den Graumarkt/Grauimportmarkt* (Introduction of measures to combat the grey market/grey import market) (see footnote 57, with translation):

‘...’.

2. Ausgangssituation

Reimporte unterscheiden sich in

- a: Quereinkäufe der deutschen Vertragshändler im Ausland
- b: Belieferung organisationsfremder Wiederverkäufer (= Graumarkt-Händler) ...’.

- (168) Although Audi was clear about the necessity of a conceptual distinction and, hence, of separate measures for cross-purchases or reimports by final consumers or intermediaries and for reimports by independent dealers outside the distribution network (see document entitled *Reimportsituation*, dated 23 October 1995, in footnote 104), such a distinction was not made in the documents which related directly to the combating of grey imports and reimports. This suggests that the combating of reimports by final consumers or intermediaries from Italy into Germany was at least part of the objective. As evidence of this, further documents can be adduced in addition to those cited above: in the

Situationsbericht Grauimporte K-VSK am 6. April 1995 (Situation report grey imports K-VSK, 6 April 1995), the following statement is to be found under the heading *Organisation* (see footnote 104, with translation):

‘Gründung einer Organisationseinheit im Vertrieb Audi zur dauerhaften Einschränkung des Grau-, bzw. Reimportmarktes. Ziel ist der langfristige Schutz des exklusiven Vertriebsweges und der Preis- und Wertstabilität der Produkte ...’.

- (169) In Audi’s survey *Graumarkt Italien* (Grey Market Italy), dated 5 February 1995 (see footnote 8), the Italian grey market was described as the difference between registrations on the Italian market and the deliveries declared by the importers, without a distinction being made between reimports by independent dealers outside the distribution network and those by final consumers or intermediaries and cross-deliveries. In the confidential *Graumarktbericht 9/95* (Grey Market Report 9/95), of 28 September 1995 (see footnote 104, with translation), under the heading *1. Derzeitige Graumarkt/Reimportsituation ... Deutschland* (1. Current grey market/reimport situation ... Germany), a statistic is quoted, *In D zugelassene Re-importfahrzeuge — Gesamt* (Reimport vehicles registered in Germany — total), preceded by the following introductory remark:

‘... Der Privatimport von Neufahrzeugen durch Endverbraucher nimmt stetig zu.

Eine Differenzierung nach Privatimport und Import durch nicht-autorisierte Wiederverkäufer ist nicht möglich ...’.

- (170) Audi’s strategy towards final customers is the same as Volkswagen’s: consumers who complained that Italian Audi dealers refused to sell vehicles to foreigners have been given a standard reply (see Chapter 1, Section C.I, and document in footnote 32). This refers to the different equipment of the vehicles, and also uses Volkswagen’s argument that the manufacturer cannot tell Italian dealers to which final consumers vehicles are to be sold (see the documents referred to in footnote 33). These formulations are superficially unobjectionable from the legal point of view, but in conjunction with the other documents found in the investigation they show that Audi also wanted to prevent the

parallel import of vehicles by final consumers and intermediaries. It was to be made clear to dealers that they were not to say that they had been forbidden by the manufacturer or importer to sell to final consumers (see document in footnote 149). It would not have been necessary to insist on this question of formulation if dealers had not actually been forbidden from selling to non-Italian final consumers.

- (171) — In various documents Autogerma and Audi that its dealers are forbidden to sell outside their contract territory. The latter *Parallelexporte* (Parallel exports), of 14 June 1994 (see footnote 65), the letter of the same title of 21 September 1994 (see footnote 14, cited in Chapter 1, Section C.I) and the letter from Autogerma *Measures to control and prevent re-export* of 26 September 1994 (see footnote 15, cited in Chapter 1, Section C.I), provide particular evidence of this. Further, Autogerma confirms, with regard to Audi, in its letter *Export aus Italien* dated 13 June 1994 (see footnote 62, with translation):

‘... Durch Autogerma wurden betreffende Händlerbetriebe mehrfach angemahnt ihr Geschäft ausschließlich auf dem Inlandsmarkt Italien abzuwickeln. Es erfolgten sogar zwei Händlerkündigungen ...’.

- (172) In internal memos, too, Autogerma emphasises that authorised dealers must sell their cars in Italy. No distinction is made between independent dealers and other purchasers, but only between sales outside and inside Italy. The memo from the chairman of Autogerma dated 28 June 1994 provides particular evidence of this (see footnote 97, with translation):

‘... Oggetto: Non riconoscimento/trattenuta del maggior sconto per vendite fuori zona (compreso esportazioni parallele).

A conferma di quanto già verbalmente anticipato, desidero approvare per iscritto (mia sigla e data), o meno, ogni singolo caso di eventuale successivo riconoscimento di accantonamento/trattenuta di maggior sconto per vendite fuori zona/esportazione parallela.

Ciò è tra l’altro di fondamentale importanza in connessione ai dati statistici sulle consegne ed immatricolazioni pubblicati dalla stampa che, oltre tutto, ci mette in cattiva luce nei confronti del pubblico e rende impossibile un’esatta valutazione della situazione del mercato.

Ricordo ancora una volta che la nostra rete deve vendere i nostri autoveicoli in Italia (cioè oltretutto affinché possa 'sopravvivere') e non svolgere attività di 'distribuzione' fuori zona.

Come è noto, la Autogerma da molto tempo richiede continuamente alle proprie case madri agevolazioni di forniture, prezzo, equipaggiamenti speciali, ecc. e ciò non può essere 'contraccambiato' con una rivendita dei nostri veicoli all'estero.

Qualora necessitassero ulteriori precisazioni in merito, prego rivolgersi al sottoscritto'.

- (173) Autogerma differentiates in the circulars to authorised dealers (see the documents cited in footnote 68) between final consumers or intermediaries and independent dealers outside the distribution network, but on other occasions makes it clear to the authorised dealers that sales outside the contract territory are undesirable, whoever the customer may be.

Reference may be made in particular to the *Protokoll der Sitzung der Arbeitsgruppe Marketing UCAV — Autogerma 27. Juli 1994* (Minutes of the meetings of the UCAV — Autogerma Working Party on Marketing held on 27 July 1994) (see footnote 67, with translation):

... (page 2)

'Scarabel:

Unterstreicht, daß Sonderrabatte für Verkäufe außerhalb des Vertragsgebiets bei einigen Händlern blockiert worden seien, die — zumindest in der Theorie — legal eingefordert werden könnten. Er betont ferner die Notwendigkeit, die für Verkäufe außerhalb des Vertragsgebiets tolerierte Quote von 15 % erneut zu diskutieren.

Dr. Schlesinger:

... Der Sonderrabatt sei einfach ein zusätzlicher Rabatt — etwas über das Übliche hinaus. In der Vergangenheit sei er sehr großzügig gehandhabt worden und wenn heute ungefähr 20 Händler von insgesamt 234 diesen Sonderrabatt nicht erhalten hätten dann deshalb, weil keine Großhändler oder Exporteure belohnt werden sollen. Früher haben wir ein Auge und mehr zuge-drückt, doch heute tendieren wir dazu, den Sonderrabatt beim Verkauf außerhalb des Vertragsgebiets zu verweigern, weil er auf Zulassungen und nicht auf Auslieferungen vergeben wird.'

(page 4)

'Dr. Schlesinger:

Fordert die U.C.A.V. auf, die Basis zu einem guten Anlauf des neuen Polo zu sensibilisieren (begrenzte Rabattgewährung, kein Export) ...'

- (174) By letter dated 21 January 1995, UCAV reported to the authorised dealers on the

meeting held with Autogerma on 20 January 1995 concerning the Golf Variant model (see document in footnote 66, with translation):

... (page 3)

'Nessuna di queste auto va venduta al di fuori dell'area di competenza Autogerma ...'.

- (175) In letters to authorised dealers, Autogerma asks dealers to confirm that they will refrain from selling outside their contract territory. In its investigation, the Commission found a large number of such letters to authorised dealers (see the documents cited in footnote 65). An example is the letter to Brenner Garage dated 15 November 1993 (see footnote 64, with translation):

'Oggetto: Attività di vendita organizzata fuori del territorio contrattuale.

...

Ci riferiamo alla nostra precedente ORG/EP/cb del 20 ottobre 1993 con oggetto pari alla presente.

Siamo piuttosto perplessi nel rilevare che non avete ancora riscontrato il contenuto della nostra lettera, che valutiamo estremamente importante ma anche determinante ai fini di una corretta impostazione dell'attività di vendita della Vostra azienda.

La mancata Vostra risposta — Vi ricordiamo —, e quindi la mancata conferma da parte Vostra della cessazione di qualsiasi attività di vendita organizzata fuori del territorio contrattuale demandato alla Vostra competenza, avrà come conseguenza quanto esposto nell'ambito del penultimo capoverso della nostra sopraccitata.

In attesa di Vostro riscontro che confermi pertanto anche la Vostra adesione alle normative in atto ...'

- (176) The term used here by Autogerma, 'vendita organizzata' (organised sales), is not found either in Article 3(10) of the Italian version of Regulation (EEC) No 123/85 or in Autogerma's standard dealership contract for authorised dealers (see footnote 83). The context in which the term 'vendita organizzata' is used by Autogerma makes it clear that the reference is not merely to a contractual obligation on the dealer not to sell contract goods to dealers who do not belong to the distribution network, an obligation which would be covered by Article 3(10)(a) of Regulation (EEC) No 123/85. Rather, Autogerma always combines the term 'vendita organizzata' with the words 'fuori del territorio contrattuale' (outside the contract territory).

This qualification serves no purpose if all that is meant is sales to independent dealers, since under the dealership contract sales to independent dealers are always inadmissible regardless of whether the independent dealer has his registered office inside or outside the authorised dealer's contract territory (see the last sentence of point 3 of the dealer contract with Eurocar referred to in footnote 83). In addition, in German-language letters, Autogerma also uses the term 'außenstehende Verkaufsorganisationen' (outside sales organisations), and makes it clear that non-Italian VW and Audi dealers are also meant. Reference may be made here to the letter of 21 September 1994 cited in Chapter 1, Section C.1, which states (see footnote 14, with translation):

'... Diese Notwendigkeit hat dazu geführt, daß einige Partner, gedrängt von aussenstehenden Verkaufsorganisationen (darunter zahlreiche ausländische Volkswagen- und Audi-Händler), Verkaufsaktivitäten auch in Gebieten tätigen, die weit von der vertraglich festgelegten Zone liegen, manchmal sogar bis ins Ausland ...'.

(177) In other standard letters to authorised dealers, Autogerma uses only the words 'Vendita al di fuori del territorio contrattuale' (sales outside the contract territory). This is evidenced by the letter to 20 dealers mentioned in footnote 65, *Vendita al di fuori del territorio contrattuale* (Sales outside the contract territory), dated 24 February 1995 (Autogerma, AG 000263), taken in conjunction with the memo *Elenco Concessionari ai quali è stata inviata lettera del 24.2.1995 per vendita fuori dal territorio contrattuale* (List of dealers to whom the letter of 24 February 1995 regarding sales outside the contract territory has been sent), dated 23 February 1995. In this standard letter, Autogerma threatens a number of authorised dealers, whose names are given in the list attached to the internal memo, with termination of the dealership contract if they sell outside their contract territory. This proves that Autogerma's concern is to prohibit without distinction all sales outside the contract territory, whether to final consumers, intermediaries, other authorised dealers or independent dealers.

(178) In addition, in the course of the investigation, the dealers in Trento, Bolzano/Bozen and Silandro/Schlanders at whose premises the investigations were carried out stated to the Commission that Autogerma had repeatedly given them verbal instructions not to export. The instructions included sales to final consumers (see the document referred to in footnote 63).

(179) The Commission is satisfied that Autogerma deliberately chose an unclear formula in order

to give authorised dealers the impression that the 'Vendita organizzata fuori del territorio contrattuale' prohibited by Autogerma included cross-deliveries within the distribution network and sales to final consumers or their intermediaries. Autogerma thus avoided a direct ban on selling to other authorised dealers, final consumers and intermediaries because it was aware — as explained in Chapter 1, Section C.1 — that certain elements of its strategy infringed Community competition law. Autogerma was encouraged in this approach by the manufacturers, who also advised caution (see document in 17).

(b) Form of the measures

(180) — In the supervision of dealers' activities no distinction is made between sales to independent dealers and other customers; the authorised dealer must as a general rule obtain Autogerma's approval for every sale outside his contract territory (see footnote 69). The reports to Autogerma on the results of audits on dealers always show all sales outside the contract territory (see documents in footnote 44).

(181) — In accordance with Convenzione B to the dealer contract, bonus payments have in principle been made, at least since 1987, only on sales within the contract territory, and, since January 1995, have also been made conditional on the vehicle being registered in the contract territory. This restriction is not exempted by Regulation (EEC) No 123/85. Nor does that Regulation exempt the 15 % clause contained in the Convenione, whereby the bonus is also paid for sales outside the contract territory provided these do not exceed 15 % of the dealer's total deliveries. The protection of the exclusive and selective distribution system does not require such a clause, since account is already taken of this interest of the manufacturer's by Article 3(10) of the Regulation. The manufacturer may prohibit the authorised dealer from making any sales to dealers outside the distribution network. He is prevented from prohibiting the authorised dealer from making sales to final consumers, intermediaries or other authorised dealers in the distribution network. The 15 % clause does not distinguish, however, between these groups of customers but applies equally to sales to dealers outside the distribution network, final consumers, intermediaries, and other authorised dealers in the distribution network.

In addition, since September 1993, bonus payments have in fact been withheld (see document in footnote 18), without regard to the type of customer (other authorised dealer, final consumer, intermediary, or independent dealer) to whom an export sale is made.

- (182) — The same applies to the margins scheme. Here, too, Autogerma makes no distinction as to whether the seller is an authorised dealer, a final consumer, an intermediary or an independent dealer. The only decisive factor for granting the full margin is whether or not the vehicle is registered within the contract territory of the authorised dealer making the sale (see documents in note 85). This shows that it is not just a question of preventing sales to independent dealers, but that all parallel exports are to be excluded.
- (183) — The restrictive supply of the Italian market is intended to ensure that only demand from Italian customers is satisfied (see document in footnote 107). Consequently, it is not only independent dealers who are cut off from the sources of supply, but also final consumers, intermediaries acting on their behalf and other authorised dealers.
- (184) — The ban on cross-deliveries is by definition concerned only with sales within the distribution network. Consequently, this measure, too, is inconsistent with Article 3(10)(a). Volkswagen was informed by Autogerma about the obstruction of cross-deliveries within the dealer network (see Autogerma's letter of 21 September 1994 in footnote 14, cited in Chapter 1, Section C.I) and did not put an end to Autogerma's anticompetitive behaviour. Audi agreed to the ban on cross-deliveries within the dealer network. Audi was asked by Autogerma to see that cross-deliveries within the dealer network did not occur (see document in footnote 116). German authorised dealers also notified Audi of reimports by other authorised dealers (see documents in footnote 115).

2. Article 3(11) of Regulation (EEC) No 123/85

- (185) Article 3(11) of Regulation (EEC) No 123/85 states that the manufacturer may oblige the authorised dealer to sell motor vehicles within the contract programme (i.e. range) or corresponding goods to final consumers using the services of an intermediary only if that intermediary has prior written authority to purchase a specified motor vehicle and, as the case may be, to accept delivery thereof on their behalf. Article 3(11) is the only provision of the Regulation which gives the manufacturer or importer the opportunity indirectly to impose an obligation on the final consumer by means of an

agreement between the manufacturer or importer and the dealer. No other obligations, such as the obligation requiring the written undertaking described in Chapter 1, Section C.II.7, may be imposed on the final consumer. This follows from the principle that exceptions to the ban on restrictive practices, such as the block exemption in Regulation (EEC) No 123/85, are to be interpreted strictly. Reference may be made in this context to the decision of the Court of First Instance in Peugeot⁽¹⁶²⁾. It must be concluded that Regulation (EEC) No 123/85 does not exempt the obligation to require the final consumer to give this written undertaking which is imposed on dealers by Volkswagen and Audi through Autogerma.

3. Article 3(10)(a) and (11) of Regulation (EC) No 1475/95

- (186) The assessment of the conduct of Volkswagen, Audi and Autogerma and the Italian authorised dealers in the light of Article 3(10)(a) and (11) of Regulation (EEC) No 123/85 holds good for the period from 1 October 1996, as the provisions of Article 3(10)(a) and (11) were incorporated without change into the new Regulation (EC) No 1475/95.

4. Article 6 of Regulation (EC) No 1475/95

- (187) Pursuant to Article 6(1)(3), (7) and (8) of Regulation (EEC) No 1475/95, the exemption is automatically inapplicable if the parties agree restrictions of competition that are not expressly exempted. In cases covered by Article 6(1)(3), the exemption does not apply to any of the clauses restrictive of competition contained in the agreement concerned; in cases covered by Article 6(1)(7) and (8), the exemption does not apply to those clauses restrictive of competition which are to the manufacturer's advantage (Article 6(2)). It is a matter for the national courts to determine the effects of Article 6 in civil law.

II. Individual exemption

- (188) Pursuant to Article 85(3), the Commission may, under certain conditions, grant an individual exemption from the ban in Article 85(1). This presupposes, however, that the agreement in question has been duly notified in advance to the Commission. But since Volkswagen, Audi and

Autogerma have not notified any of the agreements concluded with the authorised dealers under their market-partitioning policy and the agreements do not satisfy the tests of Article 4(2)(1) of Regulation No 17 (the parties are from several Member States, and the agreements relate to imports and exports between Member States), an individual exemption cannot be granted.

- (189) If the agreements had indeed been notified, they would not have qualified for exemption in any event. Even if it could be assumed that such an export ban/restriction helped to improve the distribution of goods, there would still be the fact that consumers do not share in the resulting benefit. Consumers are prevented from taking advantage of the single market and of differences in the price of motor vehicles between the Member States. The right of consumers to buy goods of their choice anywhere they want in the single market is restricted. The restriction is plain when one considers the content of the written undertaking. The export ban/restriction is in serious contradiction with the objective of consumer protection which Article 85(3) makes an integral part of the Community's competition rules.

III. Conclusion

- (190) The export ban/restriction imposed by Volkswagen, Audi and Autogerma is not covered by Regulation (EEC) No 123/85.
- (191) For the period from 10 October 1996, the export ban/restriction imposed by Volkswagen, Audi and Autogerma is not covered by Regulation (EC) No 1475/95.
- (192) An individual exemption cannot be granted.
- (193) Article 85(1) is therefore directly applicable.

C. Counter-arguments put forward by Volkswagen

I. Inconclusiveness of internal documents

- (194) In their comments of 12 January 1997 on the statement of objections, Volkswagen and Audi claim that in order to substantiate the alleged infringements of competition law the Commission is in part basing itself not on external evidence but on documents internal to the group in which such external actions are postulated. There were conflicts of interest within the group as a whole, in

particular between the sales and financial divisions, but also between Autogerma and the manufacturers. This sometimes led to biased reports or exaggerated proposals (see page 6, point 5 of the comments). The documents exchanged between VW, Audi and Autogerma, however, represented only an internal discussion, which is of no relevance in terms of antitrust law (see page 5, point 3 of the comments).

- (195) This argument fails to recognise that the Commission is not here objecting under Article 85(1) to the existence of an anti-competitive agreement between parent and subsidiary companies. Only in such a context would it have to be considered whether the correspondence between parent and subsidiary companies might be relevant for anti-trust purposes. This decision is concerned with the fact that Volkswagen and its subsidiaries, Autogerma and Audi, entered into anti-competitive agreements and anti-competitive concerted practices with other undertakings, namely the Italian Volkswagen and Audi authorised dealers. The correspondence between parent and subsidiary is therefore cited here as evidence of an anti-competitive concerted practices and anti-competitive agreements with those other undertakings.

- (196) Volkswagen's argument that there were conflicts of interest within the group is intended to show that Audi's and Autogerma's behaviour cannot be imputed to Volkswagen. The fact that it can is explained in detail in Chapter 2, Section F, to which reference is made here.
- (197) It should be noted, moreover, that the documents cited in Chapter 1, Section C.I (see footnotes 14, 15, 16 and 18), for example, are not discussion papers, but reproduce decisions that have already been taken. Thus, Autogerma's memo of 26 September 1994 (see recital 22) reads: 'we confirm herewith the main measures taken by Autogerma to control and prevent re-export.' Autogerma's memo *Measures to control and prevent re-export*, of 15 March 1995 (see footnote 18) likewise summarises the measures already taken in the past.

II. The lawyers employed by Audi can claim privilege

- (198) Audi claimed in the investigation — and repeated the claim in its letter of 2 November 1995⁽¹⁶³⁾ — that the documents copied in the course of the investigation in the legal department and in depart-

ment MI-11 should not be used. The staff of the legal department and the head of department MI-11 claimed 'attorney's privilege', since they were to advise the specialist departments as independent lawyers. Audi concedes, however, that all these staff are employees of Audi.

- (199) Pursuant to Article 14(1) of Regulation No 17, the Commission may in the course of an investigation examine the undertaking's business records. 'Business records' are those which relate to the activity of the undertaking on the relevant market. Written communications between lawyer and client are in this respect 'records' within the meaning of Article 14. Regulation No 17 protects the confidentiality of written communications between lawyer and client, but only on condition that, on the one hand, such communications are made for the purposes and in the interests of the client's rights of defence and, on the other hand, they emanate from independent lawyers, that is to say lawyers who are not bound to the client by a relationship of employment⁽¹⁶⁴⁾. Neither condition is met in the present case, and Audi cannot therefore invoke 'attorney's privilege'.

III. Volume of grey imports

- (200) In their comments of 12 January 1997 on the statement of objections, Volkswagen and Audi contend that by far the largest proportion of re-exports from Italy to Germany and Austria was accounted for by clearly inadmissible supplies to independent dealers. Sales to private individuals (direct or through intermediaries) and to other dealers in the VW-Audi sales organisation played no substantial part (see pages 12 *et seq.*, points 14 *et seq.* of the comments).
- (201) The decisive factor for the legal assessment of the case is whether or not there has been prevention of sales to final consumers, acting independently or via intermediaries, and to other VW/Audi dealers. This is the case (see Chapter 2, Section A and Chapter 2, Section B.I.1), even if it were to be assumed, in favour of Volkswagen, that the major proportion of re-exports were organised by dealers operating outside the distribution network. Even if only a small number of sales to final consumers, their intermediaries or other VW/Audi dealers is prevented, there is an infringement of Article 85(1). And as explained in Chapter 2, Section A.IV, the restriction of trade between the Member States is appreciable.

D. Duration of the infringement

- (202) The infringement can be established with certainty from 30 December 1987. The Commission bases its case on the following documents, cited in footnote 94: Annex to the dealership contract: 'Convenzione "B" aggiunta al Contratto di Concessione Autogerma — Prodotti Audi e Volkswagen,' 30 December 1987 (Autogerma/Brenner Garage; and Annex to the dealership contract: 'Convenzione "B" aggiunta al Contratto di Concessione Autogerma,' 28 April 1994 (Autogerma). These documents set out the bonus scheme. Under that scheme the bonus is in principle granted for sales within the contract territory. The bonus for sales outside the contract territory is paid only on condition that such sales do not exceed 15 % of the dealer's total deliveries. The measures to prevent or obstruct parallel exports were intensified from 1 September 1993. In the internal memo *Measures to control and prevent re-export*, of 15 March 1995 (document quoted in Chapter 1, Section C.I and footnote 18), Autogerma summarises the measures and concedes that, from 1 September 1993, the bonus was no longer paid on any sales outside the contract territory.

From other proceedings against Volkswagen AG, the Commission is aware that the written undertaking (see Chapter 1, Section C.II.7) has no longer been required for any models of the VW group in any Member State since 13 June 1996.

E. Article 3(1) of Regulation No 17

- (203) Article 3(1) of Regulation No 17 states that where the Commission, upon application or upon its own initiative, finds that there is infringement of Article 85 of the Treaty, it may require the undertakings concerned to bring such infringement to an end.

In order to bring the infringements established in this case to an end, taking into account the fact that they still persist today (see Chapter 2, Sections A.III.2, B.I.4 and D), the Italian authorised dealers must be informed that the warnings, instructions and penalties have been declared invalid. Furthermore, the contracts with the Italian dealers must be amended with respect to the bonus and margins schemes. All authorised dealers within the Community must be told that cross-deliveries within the Community are allowed and not to be penalised in any way.

- (204) In view of the gravity of the infringement, which constitutes obstruction of parallel trading, the undertaking concerned should be faced with the threat of a periodic penalty payment in order to ensure the effectiveness of these measures.

F. Addressee of the decision

- (205) The Commission holds Volkswagen responsible. Audi is 98,99 % owned by Volkswagen, and Autogerma is a wholly owned subsidiary of Volkswagen. Thus Volkswagen is responsible for their actions⁽¹⁶⁵⁾. In addition, the activities of its subsidiaries were known to Volkswagen: Chapter 1, Section C.II. 2 explains that both Volkswagen and Audi wanted to split the dealer margin; Autogerma's bonus policy was approved by Volkswagen (see the letters to Volkswagen cited in Chapter 1, Section C.I and footnotes 15, 16 and 17, and Chapter 1, Section C.II.2); the policy of restricted supply of the Italian market was followed by both Volkswagen and Audi, and hence approved by Volkswagen (Chapter 1, Section C.II.4); the ban on cross-deliveries was approved by Volkswagen (see letter in Chapter 1, Section C.I, note 15 and Chapter 1, Section C.II.5). Volkswagen and Audi monitored reimports of their respective models (see Chapter 1, Section C.I). The use of written undertakings in relations with final consumers was agreed by Autogerma and the authorised dealers with Volkswagen's knowledge (see Chapter 1, Section C.II.7). Uniform evasive tactics were adopted towards final consumers (see Chapter 1, Section C.I). Autogerma's approach to the authorised dealers was known to Volkswagen and approved by it.

G. Article 15 of Regulation No 17

- (206) Article 15(2) of Regulation No 17 empowers the Commission to impose fines, within stated limits, on undertakings which have infringed Article 85(1) either intentionally or negligently.
- (207) The Commission takes the view that in the present case it is appropriate to fine Volkswagen. No fine should be imposed on Audi and Autogerma, since their behaviour is imputable to Volkswagen.
- (208) The Italian authorised dealers, as parties with Volkswagen, Audi and Autogerma to an agreement aimed at preventing or restricting parallel exports, are victims of the restrictive policy introduced by

the other parties to their contracts, to which they consented under pressure. The dealers did not actively cooperate. The Commission is therefore not imposing a fine on them.

- (209) In fixing the amount of the fine, the Commission must have regard to all relevant circumstances and in particular to the gravity and duration of the infringement. The gravity depends on the type of infringement, on its effects on the market and on the size of the market concerned.
- (210) The obstruction of parallel exports of vehicles by final consumers and of cross deliveries within the dealer network hampers the objective of the creation of the common market, a principle of the Treaty, and is already for that reason to be classified as a particularly serious infringement.
- (211) The Commission has already examined numerous cases of obstruction of parallel imports; the relevant rules have been settled for many years.
- (212) The Volkswagen group has the highest market share of any motor vehicle manufacturer in the Community.
- (213) The infringement has had direct effects on the Italian market for the sale of new motor vehicles, by rendering considerably more difficult, and even temporarily impeding altogether, sales of vehicles for parallel export by final consumers. Correspondingly, the infringement has also had effects on the markets for new motor vehicles, in particular in Germany and Austria, but also on the markets in all other Member States. The dealers in these markets have been sheltered against price competition from Italy.
- (214) Volkswagen knew that the measures aimed to or at least were liable to obstruct parallel exports of vehicles from Italy by final consumers, and intermediaries, and restrict competition. Volkswagen was also aware that its behaviour was infringing Article 85. This is evident from the internal memo 'Reimporte Italien' (Reimports from Italy) of 23 February 1995 (see footnote 80). According to this, Volkswagen was aware of the effect of the margins policy and regarded the scheme itself as 'very likely to attract a fine'. The deliberate nature of this policy can be seen further in the measures for monitoring and penalising dealers. A memo from Audi (see footnote 17) states that it would be 'somewhat risky' to 'connect' the measures taken in Italy 'with the obstruction of reimports...', and suggests that the measures 'should be communicated orally

between the regions'. In addition, the documents concerning or connected with the export ban/restriction were always classified as 'confidential' or 'highly confidential' (see Chapter 1, C.II.1.(b) and the documents referred to in footnotes 74 to 77). Altogether, it can be concluded from this that Volkswagen has committed the infringement against Article 85(1) deliberately⁽¹⁶⁶⁾.

(215) The infringement committed by Volkswagen is, all in all, a very serious infringement of Article 85. This is true both for the bonus scheme introduced from 31 December 1987 (see recital 73 *et seq.*), and for the reinforcing measures (see recitals 82 to 99) taken in the years 1993 to 1995 in order to further impede or prevent parallel trade. Consequently, a fine has to be imposed which penalises this very serious violation in an appropriate way and which excludes, by its deterrent effect, any repetitions. The Commission considers that an amount of ECU 50 million is an appropriate amount as a basis for the determination of the amount of the fine.

(216) Another factor determining the amount of the fine is, pursuant to Article 15(2) of Regulation No 17, the duration of the violation. The infringement committed by Volkswagen can be established at least from 30 December 1987. It has not been completely terminated at the present date.

(217) The infringement lasted more than 10 years and was therefore of very long duration. In accordance with the guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and of Article 65(5) of the ECSC Treaty (OJ C 9, 14.1.1998, p. 3), the amount fixed for the gravity of an infringement can be increased by a percentage of up to 10 % per year of the infringement. For the period between 1988 and 1992, and for the year 1997, the Commission considers that an increase of 5 % per year is appropriate. The infringement was intensified during the period between 1993 and 1996, during which a great number of reinforcing measures were introduced. For each of those years, the Commission considers that an increase of the maximum percentage of 10 % is appropriate. This justifies an increase of the amount mentioned in paragraph 215 of ECU 35 million — which results in a base figure of ECU 85 million.

(218) Further, the determination of the fine must take into account aggravating and attenuating factors.

(219) With regard specifically to the situation in Italy, the Commission actually pointed out to Volkswagen, in two letters (letters from DG IV dated 24 February 1995 ('D/12803) and 2 May 1995 ('D/15797)), that the prevention and/or obstruction

of parallel imports from Italy would be an infringement of the Community's competition rules. It is clear from the memo *Reimporte Italien* (Reimports from Italy) dated 24 March 1995, found by the Commission in the course of the investigation (see footnote 91), that at least the first letter from the Commission was the subject of discussions at VW and Audi, but that the two firms did not draw the legally necessary conclusions. It is true that Auto-germa addressed a circular to the dealers dated 16 March 1995 (see footnote 68), of which a copy was also sent to the Commission, in which the dealers were reminded of the provisions of Regulation (EEC) No 123/85 and of their dealer contracts. In fact, however, steps were not taken to ensure that the previously imposed impediments to sales to final consumers and intermediaries were removed. In particular, the dealer contracts have not been modified accordingly. The fact that Volkswagen has not terminated the infringement following the letters of the Commission, and at the same time has given the Commission to believe that the violations had been ended, is being regarded as an aggravating factor in determining the amount of the fine.

(220) A further aggravating factor is that Volkswagen has used the economic dependence existing between a motor vehicle manufacturer and its dealers for obstructing and preventing sales by the dealers to final consumers who are not resident in their contract territory. Thus, a great number of Italian contract dealers, who are legally and economically independent undertakings, have suffered, in some cases quite substantial, turnover losses. The pressure exerted on the dealers by Volkswagen and the companies in the group culminated in more than 50 contract dealers being threatened with the termination of their contract in the event that they continued to sell vehicles to foreign customers, including final consumers. Finally, dealer contracts were terminated in 12 cases, substantially endangering the existence of the businesses concerned (see recitals 93, 94, 142 and 177).

(221) With regard to these aggravating factors, an increase of the basic amount of the fine by 20 %, i.e. ECU 17 million, appears justified.

(222) The Italian lira suffered two major devaluations in September 1992 and in March 1995.

In its communication⁽¹⁶⁷⁾ concerning the impact of monetary fluctuations on the internal market, the Commission noted that the car sector is particularly sensitive to monetary fluctuations, and that exporters in countries whose currency has appreciated have faced difficulties in countries whose currency has been devalued.

However, in the same communication the Commission clearly established that the implementation of anti-competitive practices, in the form of restrictions of parallel imports, linked to movements in exchange rates, would clearly contravene Community competition rules.

Consequently, this devaluation of the Italian lira did not permit Volkswagen under any circumstances to evade competition law.

Consequently this cannot be regarded as a mitigating factor for the calculation of the fine,

HAS ADOPTED THIS DECISION:

Article 1

Volkswagen AG and its subsidiaries Audi AG and Autogerma SpA 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.

Article 2

Volkswagen AG shall bring to an end the infringements established in Article 1 immediately upon notification of this Decision and shall not replace restrictions of that kind with restrictions having similar objectives. In particular, Volkswagen AG shall, within two months of notification of this Decision:

- (a) amend the contract with the authorised Italian dealers so that bonus payments are not granted according to whether sales are made within the contract territory or to another Member State;
- (b) inform the authorised Italian dealers by circular that the margins scheme introduced in the circulars of 20 October and 2 November 1994 has been abolished wherever the margins are smaller for a sale concluded within the contract territory;
- (c) inform the authorised Italian dealers by circular that all restrictions on cross-deliveries to network dealers in the other Member States have been abolished, pointing out that it is no longer necessary to obtain the prior consent of the importer and that no penalties in the form of restricted supply or termination of the dealer's contract need be feared if the dealer sells to final consumers from other Member States who act either for themselves or through an intermediary appointed by them;

- (d) inform all authorised dealers in the VW/Audi distribution network in the European Community, by circular, that all restrictions on cross-deliveries from Italy to the other Member States are abolished;
- (e) instruct its subsidiary, Audi AG, to send circulars setting out points (a) to (d) to its contract dealers in the European Community and shall instruct its subsidiary Autogerma SpA to send circulars setting out points (a) to (c) to its Italian contract dealers.

Article 3

In view of the gravity of the infringement of Article 85(1) of the EC Treaty a fine of ECU 102 million (one hundred and two million ecus) is imposed on Volkswagen AG.

Article 4

The fine determined in Article 3 shall be paid in ecus within months following the date of notification of this Decision into the following bank account of the Commission of the European Communities:

310-0933000-43
Banque Bruxelles Lambert
Agence Européenne
Rond Point Schuman 5
B-1040 Bruxelles.

After the expiry of that period, interest shall become payable. The rate applicable shall be that which the European Monetary Institute applies for transaction in ecus. The interest shall be payable from the first working day of the month in which this Decision was adopted. A supplement of 3,5 (three and a half) percentage points shall be charged. In total, the interest rate shall be 7,75 %.

Article 5

With regard to the obligations mentioned in Article 2, a penalty payment of ECU 1 000 shall be imposed on Volkswagen AG for each day of delay in implementing this Decision. Such delay shall start from the expiry of the two-month period specified for their implementation.

Article 6

This Decision is addressed to Volkswagen AG, D-38436 Wolfsburg.

This Decision shall be enforceable pursuant to Article 192 of the EC Treaty.

Done at Brussels, 28 January 1998.

For the Commission

Karel VAN MIERT

Member of the Commission

Footnotes

(The documents referred to in these notes marked with * were classified as confidential by the parties and those marked with ** were classified by them as highly confidential)

(¹) OJ 13, 21.2.1962, p. 204/62.

(²) OJ 127, 20.8.1963, p. 2268/63.

(³) Memo, *Italia*, 19 September 1994 (Audi, AU-MW D 32).

(⁴) Internal memo, *Reimporte*, 3 March 1994 (Volkswagen, AU-GK D 3); internal memo, *Reimporte Audi*, 10 May 1994 (Volkswagen, AU-VE G D 38).

(⁵) Survey, *In Deutschland zugelassene Re-Importfahrzeuge (Italien)*, 6 April 1995 (Volkswagen, VW-DB B 9 Sekretariat Santelmann, file 'Re-Importe'); internal memo: *Re-Importe Audi*, 8 May 1995 (Volkswagen, AU-VE D 106).

(⁶) Internal memo, *Reimporte*, 3 March 1994 (Volkswagen, AU-GK D 3); internal memo, *Reimporte Audi*, 10 May 1994 (Volkswagen, AU-VE G D 38); internal memo, *Re-Importe Audi*, 9 February 1995 (Volkswagen, AU-VE C D 78); internal memo, *Re-Importe Audi*, 8 May 1995 (Volkswagen, AU-VE D 106); internal memo, *Re-Importe Audi*, 21 August 1995 (VW, AU-KS B 6).

(⁷) Internal memo, *Reimporte*, 3 March 1994 (Volkswagen, see note 4); internal memo, *Re-Importe VW*, 8 May 1995 (Volkswagen, AG 000345).

(⁸) Survey, *Graumarkt/Projekt*, January 95 (Audi, AU-VE C D 85); survey, *Graumarkt Italien*, 5 February 1995 (Audi, AU-VE C D 86); survey, *Vendite veicoli nuovi fuori territorio*, 17 February 1995 (Audi, AU-VE G D 28).

(⁹) Internal memo, *Reimporte*, 3 March 1994 (Volkswagen, see footnote 4); survey, *In Deutschland zugelassene Re-Importfahrzeuge (Italien)*, 6 April 1995, (Volkswagen, see footnote 5); internal memo *Re-Importe VW*, 8 May 1995 (Volkswagen, see footnote 7).

(¹⁰) Internal memo, *Reimporte*, 3 March 1994 (Volkswagen, see footnote 4); internal memo, *Re-Importe Audi*, 8 May 1995 (Volkswagen, see footnote 6).

(¹¹) Commission of the European Communities, DG IV — Competition, *Car Price Differentials in the European Union*, various editions.

(¹²) Details of models and calculations are given in the press releases announcing the reports: IP(93) 545, 1 July 1993; IP(93) 1201, 22 December 1993; IP(94) 704, 26 July 1994; IP(95) 50, 19 January 1995; IP(95) 768, 24 July 1995; IP(96) 145, 15 February 1996. Figures for Austria have been available only since Austria's accession on 1 January 1995.

(¹³) OJ L 15, 18.1.1985, p. 16, and OJ L 145, 29.6.1995, p. 25).

(¹⁴) Letter to Volkswagen, *Parallelexporte*, 21 September 1994 (Autogerma, AG 000878); translation:

"There is great concern throughout the whole Italian sales organisation with regard to the achievement of sales objectives and the need to maintain the sales successes of the past. This necessity has led some of our partners, under pressure from outside sales organisations, including a number of foreign Volkswagen and Audi dealers, to sell in places far from those designated in their contracts, and in some cases indeed outside the country.

The steps taken by Autogerma are therefore intended to warn the Volkswagen/Audi dealers to stay in the territories designated by their contracts; checks have been carried out on all dealers individually in order to establish that they are complying with their contract, with particular reference to sales activities outside the contract territory (six dealers have had their contracts terminated for breach of contract, subject to the provisions of the clauses regarding notice, which provide that the contracts are to come to an end between the end of 1994 and the middle of 1995). With other dealers we intend to raise allegations of breach of contract, on the basis of certain "audits results" regarding deliveries, in order to obtain more detailed data on the final purchasers of the vehicles.

We will be developing this approach further in the sales organisation; the plan calls for a new and even more important margins structure, with a higher percentage for the "maggiori sconti" bonus, which depends on the achievement of the quantity and quality obligations in the contract, and a lower fixed percentage on vehicle invoices. This will give a better distribution of the margins ...

Annex to the letter COMIORG/EP/st. of 21 September 1994

Sales outside contract territory and/or through unauthorised channels

Preventive measures

Monitoring

Penalties

- | | | |
|--|--|--|
| 1. General reference in every conversation | 1. Check on registrations/sales | 1. Verbal caution |
| 2. Direct reference in every conversation | 2. Audit | 2. Letter of warning |
| 3. Written caution to comply with the contractual agreements | 3. Investigations outside the contract territory | 3. Withholding of the maggior sconto bonus |
| | | 4. Notice of termination of dealership contract... |

(¹⁵) Letter ** to Volkswagen, 26 September 1994 (Autogerma AG 000905).

(¹⁶) (Volkswagen, VW-KH HDK Re-Exporte). The extract quoted here translates as follows:

‘...’

- written information (trade) on Directive (EEC) No 123/85,
- repeated auditing of various dealers. Cautions, reduced bonuses, 11 terminations (volumes endangered: about 8 800 vehicles in 1995) — see Annex,
- bonus (quarterly) is paid on the basis of vehicle registrations in the contract territory,
- disproportionate list price increases,
- avoidance of excessive stocks at retail level,
- margin splitting for the Polo A 03,
 - 8 % immediately upon invoice
 - 5 % proof of new registration in contract territory
 - 3 % bonus (targets, customer satisfaction, business standards)
- miscellaneous (see letter AG, 26 June 1994) ...’.

(¹⁷) Memo, *Grauimporte Italien*, 12 December 1994 (Audi, AU-DH C Doc 1).

(¹⁸) (Autogerma, AG 000253). The indications of time in this memo are to be read as follows: ‘2/F.M.P.94’ means ‘second four-month period 1994’, so that these measures begin on 1 May 1994; ‘3/F.M.P.94’ means ‘third four-month period 1994’, so that these measures begin on 1 September 1994;

‘1/F.M.95’ means ‘first four months’ — ‘period’ has clearly been omitted — so that these measures begin on 1 January 1995.

⁽¹⁹⁾ See for example letter to Audi, *Ermittlung von Reimporten*, 3 May 1994 (KBA, AU-VE D 113).

⁽²⁰⁾ Letter to Audi, *Ermittlung von Reimporten*, 20 April 1994 (KBA, AU-VE D 114).

⁽²¹⁾ E-mail message, *(Re-) Importe, Herstellerbescheinigungen*, 26 January 1995 (Audi, AU-KS B 9).

⁽²²⁾ See for example the survey *Reexporte VW 1993*, 30 March 1994 (Autogerma, AG 000184).

⁽²³⁾ A manufacturer's certificate of conformity had to be submitted in order to register a vehicle with the German authorities; one way in which the chassis numbers could be ascertained was from applications for such manufacturer's certificates made by customers, or by dealers outside the distribution network acting on customers' behalf: see for example memo to Autogerma, *Von Privatpersonen (Firmen oder verdächtigten Personen) angeforderte Herstellerbescheinigungen*, undated (Audi, AU-VE G D 19); memos to Autogerma, both entitled *Reimporte*, 12 January and 17 January 1995 (Audi, AU-MW 11). A manufacturer's certificate or what is known as an 'information document' was required for every imported or reimported vehicle from 1 December 1994 onward, under a rule laid down by the Federal Ministry of Transport: see e-mail message, *(Re-) Importe, Herstellerbescheinigungen*, 26 January 1995 (Audi, AU-KS B 9); but this rule clearly was not applied in all *Länder*: fax to Audi, *Verfahren gegen Reimporteure*, 24 March 1995 (Volkswagen, AU-GK E 4).

⁽²⁴⁾ See for example e-mail message to Autogerma, *Re-Import*, 26 April 1994 (Audi, AU-GK 3); memo, *Re-Import Italien*, 19 August 1994 (Audi, AU-GK D 3); memo to Autogerma, *Fahrzeug-Kaufverträge*, 26 January 1995 (Audi, AU-MW D 27); e-mail message to Autogerma, *fabrgestellnr*, 15 March 1995 (Audi, AU-VE D 63); e-mail message to Autogerma, *fabrgestellnr*, 21 March 1995 (Audi, AU-VE G D 62).

⁽²⁵⁾ Letter (fax) to Audi: *Parallel-Markt*, 21 March 1995 (Autogerma, AU-VE C D 60).

- (²⁶) Letter to Autogerma, *Verkauf von Volkswagen und Audi Fahrzeugen an gewerbliche Wiederverkäufer*, 18 January 1995 (Volkswagen, AG 000333).
- (²⁷) E-mail message to Audi, *A4 Privat*, 24 February 1995 (Audi, AU-MW D 3).
- (²⁸) Memo, *Anschreiben Graumarkt*, 16 March 1995, and corresponding circular to dealers, 14 March 1995 (Audi, AU-GK D 3).
- (²⁹) Porsche Austria Gesellschaft m.b.H. & Co. is the main importer for Volkswagen, Audi and Porsche in Austria.
- (³⁰) Fax to Audi, *Graumarkt*, 18 May 1995 (Porsche Austria, AU-VE 2).
- (³¹) Fax to Audi, *Graumarkt*, 27 March 1995 (Porsche Austria, AU-VE 5 and WV-KH K-15 HDK, file *Re-exporte*); the extract quoted in recital 145 translates as follows:
- ‘In recent conversations with the dealers in the areas concerned we have found that the grey imports question has calmed down. So far not a single A4 has been imported from Italy to Austria.
- The measures you have taken jointly with the Italian importer seem to be working. We would like to extend our warmest thanks to you and all those who have worked along with you ...’.
- See also fax to Autogerma, 5 July 1995 (Porsche Austria, AU-VE D 137).
- (³²) Memo, *Reimporte; Standard-Schreiben*, 27 January 1994 (Audi, AU-DH C Doc 7).
- (³³) See for example letter to Wieser, 17 February 1995 (Audi, AU-KS A 2); letters to Petersen, 3 April and 10 April 1995 (AU-MW D 3).
- (³⁴) Memo, *Empfehlungen für Korrespondenzfälle und Auskünfte bei Anfragen europäischer Privatkunden*, undated (Volkswagen, VW-KH K 35 and 36); the extract quoted here and in recital 163 translates as follows:
- ‘under no circumstances should the impression be given that on instructions from VW AG, Autogerma or individual people at Autogerma no information can be given to private customers or intermediaries acting on customers’ behalf...’.
- (³⁵) Fax message to Autogerma, *Kunde N. Lenz*, 9 June 1995 (Volkswagen, VW-KH K 26).
- (³⁶) See for example letter to Autogerma, *Auto Pedross — Verkauf an deutsche Privatkunden*, 1 March 1995 (Volkswagen, VW-SR R 20); letter to Commission, *Beschwerde*, 27 April 1995 (Bernhard, VW-DB B 18); memo, *Anruf eines Kunden*, 7 July 1995 (Volkswagen, VW-KH K-38); letter to Audi, *Kauf eines Audi in Italien*, 8 August 1995 (Simon, AU-VE G D 12); fax to Autogerma: *Kunde Keppler*, 14 August 1995 (Volkswagen, AG 000530).
- (³⁷) See for example letter to Autogerma, 7 February 1995 (Friedrich, AG 000202).
- (³⁸) Letter to Friedrich, *Kauf eines Polo*, 24 February 1995 (Autogerma, AG 000200, see footnote 37); writing to Volkswagen in connection with this letter, Autogerma confirmed the supply situation: ‘we have dramatic shortages for many models, including the Polo and the Audi A4’; Autogerma consequently recommended that the customer should be referred to a German dealer (fax to Volkswagen, *Briefe von H. Dieter Friedrich*, 27 January 1995 (Autogerma, AG 000204, see footnote 37).
- (³⁹) See for example letter to Baur, *Autokauf in Italien*, 14 June 1995 (Autogerma, AG 000269).
- (⁴⁰) See for example letter to Volkswagen, *Parallelexporte*, 21 September 1994 (Autogerma, see footnote 14).
- (⁴¹) See for example fax message to Autogerma, *Händleraudits Re-Importe Italien*, 26 November 1993 (Volkswagen, AG 000054); letter to Audi, *Export von Parallelfahrzeugen*, 30 January 1995 (Autogerma, AG 000195).
- (⁴²) Memo, *Measures to control and prevent re-export*, 15 March 1995 (Autogerma, see footnote 18); letter ** to Audi: *Measures to control and prevent re-export*, 26 September 1994 (Autogerma, see footnote 15); memo, *Maßnahmen der Autogerma zur Unterbindung von Reexporten aus Italien*, 31 January 1994 (Autogerma, VW-SR R 6); report, *Besuch bei Autogerma*, 10 February 1995 (Audi, AU-MW D 37).
- (⁴³) See for example letter ** to Volkswagen, *Measures to control and prevent re-export*, 26 September 1994 (Autogerma, AG 000634).
- (⁴⁴) Internal memo * *Auditing sull'attività di vendita della Concessionaria BRENNER GARAGE BZ sino al 30 novembre 1994*, 13 January 1995 (SEVO, AG 000761); internal memo *: *Attività di vendita della Concia Autosacchetti di Gorizia dall' 1/1/94 al 20/5/94*; 4 June 1994 (SEVO, AG 000865); internal memo *: *Attività di vendita della Conc. ia Autosalone Catullo di Trieste dal 16/2/94 al 20/5/94*; 4 June 1994 (SEVO, AG 000867).

- (⁴⁵) See for example internal memo *: *Visita alla Conc. a NECKER di Milano/MI — controllo dell'attività di vendita*, 17 December 1993 (SEVO, AG 000223); internal memo, *Attività di vendita della Concessionaria Dorigoni di Trento*, 17 December 1993 (SEVO, AG 000480).
- (⁴⁶) Letter to Audi, *Attività di vendita in Paesi esteri*, 4 October 1993 (Autogerma, AG 000840).
- (⁴⁷) Report, *Besuch bei Autogerma*, 10 February 1995 (Audi, see footnote 42).
- (⁴⁸) Letter to Volkswagen, *Measures to control and prevent re-export*, 26 September 1994 (Autogerma, see footnote 15).
- (⁴⁹) Internal memo, *Ergänzung zur Rücksprache 027 vom 19.7.94*, 12 September 1994 (Volkswagen, see footnote 71); memo *Maßnahmen durch Autogerma zur Vermeidung von Re-Exporten*, 6 February 1995 (Volkswagen, see footnote 16).
- (⁵⁰) Internal memo, *Graumimporte Polo*, 7 February 1995 (Volkswagen, VW-DB B 25); internal memo, *Abmahnaktion gegen Reimporteure*, 13 January 1995 (Volkswagen, AU-GK E 1); *Marketingplan Deutschland 1995, Volkswagen Pkw*, 10 January 1995 (Volkswagen, VW-SD S1 and S2); handwritten memo, *Verkauf an europäische Privatkunden und 'echte' Vermittler*, 4 July 1995 (Volkswagen, VW-KH K-37); the extract from this memo quoted in recital 161 translates as follows:
 'caution: withdrawal of the Block Exemption Regulation possible!' and the extract in recital 162 as follows: 'For political reasons oil will have to be poured on troubled waters.'
- (⁵¹) Presentation, *Vorlage zur Vorstandssitzung am 13.2.1995: Einleitung von Maßnahmen gegen den Graumarkt/Graumportmarkt*; 9 February 1995 (Audi, AU-MW 1); fax, *Beschluß des Vorstands Audi am 13.2.1995*, 20 February 1995 (Audi, AU-VE C D 79); extract from minutes, 6/95, meeting of the management board 13 February 1995, *Einleitung von Maßnahmen gegen den Graumarkt/Graumportmarkt* (Audi, AU-KS C).
- (⁵²) Circular to dealers, *Graumarkt*, 20 January 1995 (Audi, AU-KS B 14); memo, *Information über Händleranschreiben*, 23 January 1995 (Audi, AU-VE G D 87).
- (⁵³) Circular to importers, *Graumarkt/Reimport*, 6 February 1995 (Audi, AU-VE G D 27); letter to Autogerma, *Graumarkt/Reimport*, 15 March 1995 (Audi, AU-VE G D 72).
- (⁵⁴) See for example memo, *Projektbeschreibung: Bekämpfung Graumarkt/Reimporte*, 14 December 1994 (Audi, AU-VE C D 49).
- (⁵⁵) Presentation, *Vorlage zur Vorstandssitzung am 13.2.1995*, 9 February 1995 (Audi, AU-KS C 12); memo, *Graumarkt*, undated (Audi, AU-KS B 10).
- (⁵⁶) See for example memo, *Bereich Graumarkt Analyse/Unterbindung Reimporte/Graumarkt*, 4 October 1995 (Audi, AU-VE D 128); internal memo, *Sachbearbeiter Graumarkt*, 9 February 1995 (Audi, AU-VE D 103); memo, *Projektbeschreibung Graumarkt/Reimporte*, 14 December 1994 (Audi, AU-VE D 130).
 The extract from this memo quoted in recital 166 translates as follows:
 'Project description: measures to combat grey market/reimports
Tasks and objectives
 1. Combating reimports
 — supply into Germany,
 — illegal exports from Germany,
 — other countries of the European Union.
 2. Prevention of supply to unauthorised dealers...'
- (⁵⁷) Presentation, *Vorlage zur Vorstandssitzung am 13.2.1995*, 9 February 1995 (Audi, AU-KS C 12); the extract quoted in recital 167 translates as follows:
 '2. Initial position
 Reimports are divided into
 (a) cross-purchases abroad by German authorised dealers
 (b) supplies to dealers outside the organisation (=grey market dealers) ...'
- (⁵⁸) Handwritten memo, undated (annexed to another memo, *Stand Maßnahmen gegen Graumarkt*, 25. 11. 1994) (Audi, AU-VE C D 71).
- (⁵⁹) Minutes of departmental meeting, *Maßnahmen gegen Graumarkt/Reimporte*, 3 February 1995 (Audi, AU-KS B 11); presentation, *Vorlage zur Vorstandssitzung am 13.2.1995*, 9 February 1995 (Audi, see footnote 57).
- (⁶⁰) See for example memo, *Re-Import*, 29 September 1994 (Audi, AU-KS B 15).
- (⁶¹) See for example letter to Volkswagen, *Measures to control and prevent re-export*, 26 September 1994 (Autogerma, see footnote 15).
- (⁶²) See for example letter * to Baldan Auto, *Attività di vendita organizzata fuori del territorio contrattuale*, 20 October 1993 (Autogerma, AG 000293); letter * to Silemotori Negro, *Attività di vendita organizzata fuori del territorio contrattuale*, 9 March 1994 (Autogerma, AG 000296); letter to Audi, *Export aus Italien*, 13 June 1994 (Autogerma, AG 000852); the extract from this last letter quoted in recital 118 translates as follows:
 'Although the delivery times for the Audi 80, which were up to eight months, have been reduced considerably, the dealers are still being rationed. A dealer who orders too many Audi 80s will not receive them ...'

and the extract quoted in recital 171 translates as follows:

'Autogerma has repeatedly cautioned these dealers to do business only on the Italian domestic market. Indeed two dealers have had their contracts terminated ...'.

Letter to Fantini and others, *Vendite fuori zona*, 6 March 1995 (Eurocar, EU-GV 249): 'sono assolutamente vietate le vendite all'estero (anche di quelle vetture preventivamente immatricolate in Italia)' (sales to foreign countries are strictly prohibited) (even where the vehicle is first registered in Italy)); the extract from this letter quoted in recital 127 translates as follows:

'We have already had occasion to speak to you on the delicate question of sales outside the dealer's area. As Autogerma no longer intends to tolerate excessive sales activities outside dealers' own areas of responsibility, we would like to make the following clear: sales to foreign countries are strictly prohibited (even where the vehicle is first registered in Italy); all sales outside the dealer's area of responsibility exceeding 15 % of the dealer's own deliveries will be penalised.'

⁽⁶³⁾ Record, *Compte rendu de l'inspection menée chez les revendeurs de Bolzano, Trento et Silandro*, October 1995 (Commission).

⁽⁶⁴⁾ See for example letters * to Brenner Garage: *Attività di vendita organizzata fuori del territorio contrattuale*, 20 October 1993 and 15 November 1993 (Autogerma, AG 000724 und 000723); the extract from the letter of 15 November 1993 quoted in recital 175 translates as follows:

'Subject: *Organised sales activities outside contract territory*

We refer to our earlier letter on the same subject, ref. ORG/EP/cb of 20 October 1993.

We are somewhat puzzled to see that you have not yet replied to what was said in our letter, which in our view is extremely important, and vital to a correct approach to your firm's sales activity.

We would remind you that a failure on your part to reply, and thus a failure on your part to confirm that you will discontinue any organised sales activity outside the contract territory entrusted to your responsibility, will have the consequences spelt out in the second-last paragraph in our earlier letter.

In the expectation of a reply confirming your acceptance of the rules referred to ...';

separate letters to Autocommerciale SpA., Beikircher srl., and F.lli Zicari SpA., *Attività di vendita organizzata fuori del territorio contrattuale*, 20 October 1993 (Autogerma, AG 000289, 000294, 000838); separate letters to Dr. Guy Beretich SpA., F.lli Negro srl., Walter Bonazzi, *Attività di vendita organizzata fuori del territorio contrattuale*, 26 November 1993 (Autogerma, AG 000287, 000631, 000836); letter to Brenner Garage SpA.-AG: *Attività di vendita organizzata fuori del territorio contrattuale*, 29 November 1993 (Autogerma, AG 000721); separate letters to Silvano IOB&C. srl. and Eurocar SpA., *Attività di vendita organizzata fuori del territorio contrattuale*, 9 March 1994 (Autogerma, AG 000285, EU 182); letter to Bemì Auto srl., *Attività di vendita organizzata fuori del territorio contrattuale*, 4 May 1994 (Autogerma, AG 000503); letter to Di Viesto SpA., *Attività di vendita organizzata fuori del territorio contrattuale*, 18 July 1995 (Autogerma, AG 000502).

⁽⁶⁵⁾ Letter to Volkswagen, *Parallelexporte*, 14 June 1994 (Autogerma, AG 000665 und 000666); letter to 50 dealers, *Attività di vendita organizzata fuori del territorio contrattuale con diffida a cessare immediatamente l'attività stessa*, 20 October 1993 (Autogerma, see footnote 64), in conjunction with memo, *Elenco Concessionari cui è stata inviata la lettera con oggetto 'Attività di vendita ...'*, 24 November 1993 (Autogerma, AG 000975) and memo, *Elenco Concessionari ...*, 11 March 1994 (Autogerma, see footnote 62); letter to 20 dealers, *Vendita al di fuori del territorio contrattuale*, 24 February 1995 (Autogerma, AG 000263) in conjunction with memo, *Elenco Concessionari ai quali è stata inviata lettera del 24.2.1995 per vendita fuori dal territorio contrattuale*, 23 February 1995 (Autogerma, AG 000261).

⁽⁶⁶⁾ Circular to dealers, *Relazione su Riunioni 20.1.1995*, 21 January 1995 (UCAV, DO-SG 80 to 84); the quotation in recital 174 translates: 'None of these cars may be sold outside Autogerma's area of responsibility ...'.

⁽⁶⁷⁾ Original Italian minutes *Verbale della riunione del gruppo di lavoro marketing UCAV — Autogerma del 27.7.1994*, (Autogerma, see footnote 97), German version *Protokoll der Sitzung der Arbeitsgruppe Marketing UCAV — Autogerma/27.7.1994*. The extract quoted in recital 173 translates as follows:

... (page 2)

Scarabel:

said that special rebates for sales outside the contract territory had been withheld in the case of some dealers who would be legally entitled to demand payment, at least in theory. He stressed the need for a fresh discussion of the 15 % quota for tolerated sales outside the contract territory.

Dr. Schlesinger:

... The special rebate was just a supplementary rebate, something over and above what was customary. It had been operated very generously, and if now about 20 dealers out of 234 had not received this special rebate, the reason was that it was not intended as a reward for wholesalers or exporters. In the past we turned a blind eye, but now we are inclined to refuse the special rebate for sales outside the contract territory, as it is given on the basis of registrations rather than deliveries.

(page 4)

Dr. Schlesinger:

asked the UCAV to sensitise the base to a good launch for the new Polo (restricted grant of rebates, no exports)...

The warning was expressly confirmed in letter to Volkswagen, *Measures to control and prevent re-export*, 26 September 1994 (AG, see footnote 15).

⁽⁶⁸⁾ Various circulars to dealers in 1993, *Regolamento CEE 123/85*, 28 January 1993, 1 July 1993, 11 August 1993 *, and 12 October 1993 * (Autogerma, AG 000106, 000094, 000977 and 000978, 000080); circular to dealers: *Regolamento CEE 123/85 Distribuzione selettiva dei veicoli*, 16 March 1995 (Autogerma, EU-1 to 3), memo, *Measures to control and prevent re-export*, 15 March 1995 (Autogerma, AG 000620).

⁽⁶⁹⁾ See for example memo, *esportazioni parallele*, 2 May 1995 (Autogerma, AG 000282).

⁽⁷⁰⁾ Record of conversation, *Colloquio con S.Engmann/Audi*, 22 September 1995 (Autogerma, AG 000001); internal memo, *Reimporte Italien*, 9 May 1995 (Volkswagen, AU-VE D 23); the extract from this memo quoted in recital 165 translates as follows:

‘...The enclosed letter from the European Commission shows that they are not satisfied with our letter of 30 March 1995 or Autogerma’s recent circular. The circular must be put into practice if we are not to run a high risk of being fined...’.

⁽⁷¹⁾ Internal memo, ... *Ergebnis aus den Maßnahmen zur Unterbindung von Re-Export-Aktivitäten*, 12 September 1994 (Volkswagen, VW-UD PC Piening).

⁽⁷²⁾ See for example e-mail message ** to Audi, *Grey market/Measures to control and prevent re-export*, 23 September 1994 (Autogerma, AG 000880 and 000881); (handwritten) internal memo, *Riesportazioni dall'Italia alla Germania*, undated (Autogerma, AG 000498).

⁽⁷³⁾ Evidence for example in e-mail message *, *Visita Botbe*, 22 March 1995 (Autogerma, AG 000388).

⁽⁷⁴⁾ See the documents referred to in footnotes 15, 42, 43 and 102 and marked ** or *.

⁽⁷⁵⁾ See the documents referred to in footnotes 73, 78, 80, 87, 96 and 97 and marked *.

⁽⁷⁶⁾ See the documents referred to in footnotes 44, 45, 62 and 64 and marked *.

⁽⁷⁷⁾ See the documents referred to in footnotes 123 and 126 and marked *.

⁽⁷⁸⁾ Internal memo *, *Condizioni di fornitura per i veicoli Audi A 4 e Volkswagen Polo*, 6 October 1994 (Autogerma, AG 000026 and 000027); circular to dealers, *Fatturazione Nuova Polo*, 20 October and 2 November 1994 (Autogerma, VW-KH K-6 and 7, see also footnote 85).

⁽⁷⁹⁾ Letter to Volkswagen, *Fakturierung des neuen Polo und Einführung des ‘Split-Margin’*, 24 October 1994, and circular to dealers, *Fatturazione Nuova Polo*, 20 October 1994 (Autogerma, VW-SR R 13).

⁽⁸⁰⁾ Internal memo *, *Reimporte Italien*, 23 February 1995 (Volkswagen, VW-SR R 21).

⁽⁸¹⁾ Memo, *Maßnahmen zur Reduzierung von Grauexporten (VW PkW-Italien)*, 6 April 1995 (Volkswagen, VW-DB B 7 Sekr. Santelmann, file ‘Re-Importe’, or Volkswagen, VW-DB B 16), and especially memo, *Maßnahmen zur Reduzierung von Grauexporten (VW PkW-Italien)*, 21 August 1995 (Volkswagen, VW-SR R 18); both documents include the points ‘Splitting der Händlermarge beim Polo’ (splitting of the dealer’s margin for the Polo) and ‘Bonuszahlungen in Abhängigkeit vom Bestimmungsort des Fahrzeugs (aber: mit neuer GVO nicht vereinbar)’ (bonus payments dependent on place of destination of vehicle (but: not compatible with new block exemption)).

⁽⁸²⁾ Memo, *Stand Maßnahmen gegen Graumarkt*, 25.11.1994 (Audi, AU-VE D 26); the extract quoted in recital 119 translates as follows:

‘... deliveries are being regulated in such a way that only Italian demand is being met...’.

⁽⁸³⁾ Annex to dealership contract, *Allegato ‘A’ al Contratto di Concessione Autogerma — Prodotti Volkswagen e Audi*, 31 December 1991 (Autogerma, BR 33 to 44); Eurocar’s dealership contract, *Contratto di Concessione per la Vendita e il Servizio di Assistenza*, 30 December 1987 (Autogerma/Eurocar, EU 55-113).

⁽⁸⁴⁾ Agreement, *Convenzione aggiunta al Contratto di Concessione Autogerma — Prodotti Volkswagen e Audi*, 28 December 1993 (Autogerma, DO 26 to 32).

⁽⁸⁵⁾ Circular to dealers, *Fatturazione Nuova Polo*, 20 October 1994 (Autogerma, BR-MF 229) and 2 November 1994 (Autogerma, BR-MF 231); see also the negotiations between the dealers’s association and Autogerma, *Riunione Consiglio Direttivo UCAV*, 27 February 1995 (UCAV, EU 48, 49 and 51) and *Riunione UCAV/Autogerma*, 27 February 1995 (UCAV, EU 54, 56 and 57). The extract from the circular of 20 October 1994 which is quoted in recital 122 translates as follows:

To: All authorized dealers

Letter of: 20 October 1994

Page: 2

Their head offices

COM1/ORG/EP/ad

That said, in order to identify valid solutions, of vital interest to us and the whole organisation, to problems which have arisen repeatedly and have sometimes led some firms into behaviour which is not in line with our mutual interest (such as sales through unauthorised dealers, unjustified and excessive discounts, sales outside the dealer's territory, and the like), there has been discussion, together with the president, vice-presidents and some members of the council of UCAV, who were in Verona on Tuesday 18 October for the meeting of the ISC working party, of a new structure for discounts on the New Polo, made up as follows:

(a) Basic/immediate discount on invoice	= 8 %
(b) Short-term deferred discount	= 5 %
Total (as for previous model)	= 13 %
(c) Extra discount (same mechanism)	= 3 %

The short-term deferred discount referred to at point (b) will be given shortly after the sale, and will be based specifically on the mutual commitment of ourselves and every Autogerma authorised dealer to look after the contract territory in which both Autogerma and the dealer are responsible for general approach, marketing, and sales, and for the obligation to make strenuous efforts jointly to attend to the needs of the final consumers resident in the territory.

It remains to be decided whether it is advisable, that is to say whether it is in the interests of all of us, to alter the present 15 % authorisation for out-of-territory sales, either upward or downward.

Your UCAV area delegates will be contacting you shortly to discuss this matter, and to hear any thoughts, suggestions and improvements.

They will then consult us urgently so that Autogerma can take a final decision'.

⁽⁸⁶⁾ Record, *Vérification du 23 et 24 octobre 1995 en Italie/Mutschlechner KG, Bruneck*, 26 October 1995 (Commission).

⁽⁸⁷⁾ See for example internal memo *, *Condizioni di fornitura per i veicoli Audi A4 e Volkswagen Polo*, 6 October 1994 (Autogerma, see footnote 78); report, *Stand Maßnahmen gegen Graumarkt*, 12 October 1994 (Autogerma, AU-VE G D 51); letter to Audi, *Splitmargensystem — Audi A4*, 10 November 1994 (Autogerma, AG 000661).

⁽⁸⁸⁾ Internal memo, *Condizioni di fornitura per i veicoli Audi A4 e Volkswagen Polo*, 6 October 1994 (Autogerma, see footnote 78).

⁽⁸⁹⁾ Letter to Audi, *Splitmargensystem — Audi A4*, 10 November 1994 (Autogerma, see footnote 87).

⁽⁹⁰⁾ Report, *Besuch bei Autogerma am 12.10.1994, Stand Maßnahmen gegen Graumarkt* (Audi, AG 000895); memo, *Stand Maßnahmen gegen Graumarkt*, 8.11.1994, 14 November 1994 (Audi, AU-VE D 133).

⁽⁹¹⁾ Memo, *Reimporte Italien*, 24 March 1995 (Volkswagen, VW-KH K-16 and 17); memo, *Eingeleitete Maßnahmen durch Autogerma zur Vermeidung von Re-Exporten, verursacht durch Wiederverkäufer*, 22 November 1994 (Volkswagen, VW-KH K-55 HDK file 'Re-Exporte').

⁽⁹²⁾ Circular to dealers, *Graumarkt; Margensystem in Italien*, 8 December 1994 (Audi, AU-DH C).

⁽⁹³⁾ Memo, *Grauimporte Italien*, 23 November 1994 (Audi, AU-VE D 131); the extract from this memo quoted in recital 138 translates as follows:

'... I enclose Mr Schlesinger's written confirmation of the supplementary measures (split margins) to prevent grey imports.

This means that a dealer engaging in grey imports loses the 5 % split margin component plus the 3 % bonus, equivalent to a further price increase of 8 %.

The dealers' acceptance of this split margin means that the majority of dealers are prepared to prevent grey imports, because the distribution costs on the sale of a car amount to more than 10 %.

The dealer would very quickly have a negative cash flow for every car...'

⁽⁹⁴⁾ Annex to dealership contract, *Convenzione 'B' aggiunta al Contratto di Concessione Autogerma — Prodotti Audi e Volkswagen*, 30 December 1987 (Autogerma/Brenner Garage, BR 168 to 171); Annex to dealership contract, *Convenzione 'B' aggiunta al Contratto di Concessione Autogerma*, 28 April 1994 (Autogerma, BR-MF 160 to 167).

⁽⁹⁵⁾ Memo, *Measures to control and prevent re-export*, 15 March 1995 (Autogerma, see footnote 18); e-mail message to Audi, *Grey market/Measures to control and prevent re-export*, 23 September 1994 (Autogerma, see footnote 72).

⁽⁹⁶⁾ Letter to Volkswagen and Audi, *Parallelexporte*, 14 June 1994 (Autogerma, AU-VE C D 53); memo, *Measures to control and prevent re-export*, 15 March 1995 (Autogerma, see footnote 18); various letters * to dealers, for example to Eurocar, *Maggior sconto su consegne autoveicoli Volkswagen Audi*, 18 October 1994 (Autogerma, EU-GV 224) and 8 June 1994 (EU-GV 222); to Brenner Garage, *Maggior sconto su consegne autoveicoli Volks-*

wagen Audi, 8 June 1994 (Autogerma, BR-MF 228) and 31 January 1994 (Autogerma, AG 000713); letter to Autogerma, *Maggior sconto consegne autoveicoli III/ quadr. 93 — Concess. Ancona*, 25 January 1994 (Bonazzi, AG 000013); letter to Bonazzi, *Maggior sconto su consegne autoveicoli Volkswagen Audi 3/ quadr. '93*, 15 March 1994 (Autogerma, AG 000014).

- (⁹⁷) Memo *: *Elenco nostro fatturato ai Concessionari: totale 1993 e 01/01-30/06/1994*, 4 July 1994 (Autogerma, AG 000029); internal memo, *Non riconoscimento/trattenuta del Maggior Sconto per vendite fuori zona (compreso esportazioni parallele)*, 28 June 1994 (Autogerma, AG 000499); internal memo, *Verbale della Riunione del Gruppo di Lavoro Marketing UCAV. — Autogerma*, 27 July 1994 (Autogerma, AG 000023); e-mail message to Audi, *Grey market/Measures to control and prevent re-export*, 23 September 1994 (Autogerma, see footnote 72). The quotation in recital 172 from the internal memo of 28 June 1994 translates as follows:

'Subject: *Non-payment/withholding of the extra bonus for outside-area sales (including parallel exports)*

I am writing to confirm what I have already told you verbally, namely that I want every single case of subsequent payment of an extra discount that has been suspended or withheld for out-of-area sales/parallel exports to be submitted to me for approval (initials and date).

This is of vital importance in view of the statistics on sales and registrations published in the press, which apart from anything else put us in a bad light with the public and make it impossible to evaluate the market position precisely.

I would remind you once again that our network must sell our vehicles in Italy (above all in order to "survive") and must not carry on "distribution" activities outside our area.

As you are aware, Autogerma has for a long time been constantly asking its own parent companies for special terms for supplies, prices, special equipment, etc.; we cannot "return the favour" by selling our vehicles abroad.

For any further information please refer to me ...'.

- (⁹⁸) Annex to dealership contract, *Convenzione 'B' aggiunta al Contratto di Concessione Autogerma*, 31 December 1994 (Autogerma, AG 000305 und 000306).

- (⁹⁹) Report, *Stand Maßnahmen gegen Graumarkt*, 12 October 1994 (Autogerma, see footnote 87).

- (¹⁰⁰) Memo, *Verbal Riunioni UCAV. del 27.2.1995*, 27 February 1995 (UCAV, EU 48, see footnote 85).

- (¹⁰¹) See for example memo, *Stand Maßnahmen gegen Graumarkt*, 25 November 1994: 'die (seit 18. 10. fakturierte) 5 % Händlermarge, zahlbar alle 2 Monate bei Vorlage der Zulassungsscheine, werden nachträglich weggenommen' (5 % dealer's margins (invoiced since 18 October), payable every two months on presentation of the registration certificates, are being withdrawn retroactively) (Audi, see footnote 58); report, *Besuch bei Autogerma am 12.10.1994* (Audi, see footnote 90); report: *Stand Maßnahmen gegen den Graumarkt, 8.11.1994*, 14 November 1994 (Audi, see footnote 90).

- (¹⁰²) See for example letter to Volkswagen, *Parallelexporte*, 14 June 1994 (Autogerma, see footnote 96); e-mail message to Volkswagen and Audi, *Grey market/Measures to control and prevent re-export*, 23 September 1994 (Autogerma, see footnote 72); letter ** to Volkswagen, *Measures to control and prevent re-export*, 26 September 1994 (Autogerma, AG 000905); memo, *Maßnahmen durch Autogerma zur Vermeidung von Re-Exporten*, 6 February 1995 (Volkswagen, see footnote 16); memo, *Re-Exporte*, 1 March 1994 (Volkswagen, VW-SR R 22); the extract from this last letter quoted in recital 131 translates as follows:

'...3. Despite the damage to the price of our products in Italy, the falling lira meant that there was now a considerable price gap with the German and other markets. This situation gave rise to re-exporting, particularly by dealers in the north of Italy (a total of about 17 000 Volkswagen cars to Germany in 1993).

Position: 20 December 1993, Federal Motor Traffic Office registration, Flensburg.

4. Autogerma S.p.A. and Volkswagen AG exercised influence by means of

- dealer audits,
- cautions,
- targeted allocation,
- bonus discounts,
- terminations of contract (three dealers in 1993). This greatly reduced re-exports ...'.

- (¹⁰³) Letter * to Auto Herbert Pedross, 6 March 1995 (Autogerma, BR-MF 80); letter * to Auto Officina Lanz, *Contributo organizzativo per Sub-Concessionario*, 6 March 1995 (BR-MF 81).

- (104) See for example memo, *Reimportsituation*, 23 October 1995 (Audi, AU-KS B 4): 'Eingeleitete Maßnahmen ... Streichung der Restmarge' (Measures introduced ... cancellation of remainder of margin); memo *: *Graumarktbericht*, 11 October 1995, in conjunction with *Graumarktbericht 9/95*, 28 September 1995 (Audi, AU-VE G D 1): 4. *Bisherige Maßnahmen und Erfolge, Rückbelastung der zu unrecht erhaltenen Zuschüsse* (Measures and successes to date, recovery of undue allowances); the extract from this document quoted in recital 169 translates as follows:

'... Private imports of new vehicles by final consumers are growing constantly. It is not possible to distinguish between private imports and imports by unauthorised dealers ...'

Memo, *: *Graumarktbericht*, 8 September 1995 in conjunction with *Graumarktbericht-Statusbericht*, 15 May 1995 (AU-KS B 2): 'Erfolge 4. Konsequente Belieferungssteuerung/Quotierung mit Einführung des Audi A4 — Einführung eines Händlermargensystems in Italien'. (Successes 4. coherent regulation/quotas for Audi A4 imports — introduction of a dealer's margin system in Italy); *Situationsbericht Grauimporte K-VSK am 6.4.1995*, 5 April 1995 (Audi, AU-KS B 7): 'Auszahlung der Boni an den Händler nur für Italien zugelassene Fahrzeuge' (payment of bonuses to dealers only on vehicles registered in Italy); the extract from this document quoted in recital 168 translates as follows:

'... The setting up of an organisational unit in Audi's distribution department to secure a lasting reduction in the grey or reimport market. The objective is long-term protection of the exclusive distribution channel and price and value stability for the products...'

- (105) Record of discussion, *Preisharmonisierung*, 30 August 1993 (Volkswagen/Audi, AU-VE D 109); the extract from this record quoted in recital 147 translates as follows:

'... the purpose is a concerted, balanced approach on the part of the VW and Audi makes...';

see also *Protokoll der 7. Konferenz des Europäischen Händlerbeirats VW/Audi vom 21. bis 23. April 1994 in Dublin*, 22 April 1994 (European Dealer Council Volkswagen Audi, WV-KH K-58).

- (106) Memo: *Maßnahmen zur Begrenzung von Re-Exporten aus Italien*, 2 November 1993 (Volkswagen, VW-SR R 23); memo, *Gespräch am 14.12.1993 in Wolfsburg Marken AUDI und VW: Preisplanung Italien / EG-Preisharmonisierung*, 21 January 1994 (Audi, AU-VE D 502).

- (107) Minutes, *Besprechung am 22.3.1995 in Wolfsburg*, 27 March 1995 (Volkswagen/Audi, VW-SR R 2).

- (108) Letter to Audi: *Liefersituation Italien*, 20 March 1995 (Autogerma, AU-DH C); minutes, *Protokoll der Sitzung vom 23.3.1995*, 23 March 1995 (Audi/Autogerma, AU-DH C); letter to Audi, *Stornos Situation Italien*, 11 May 1995 (Autogerma, AG 000267).

- (109) Memo, *Lieferung von weiteren 8 000 Fahrzeugen für den italienischen Markt*, 6 February 1995 (Audi, AU-VE G D 82); the extract from this memo quoted in recital 141 translates as follows:

'Supply of a further 8 000 vehicles for the Italian market

The Italian dealers have asked for another 8 000 Audi A 4 1995s to be supplied in Italy. It is claimed that Autogerma has already made them a promise to this effect.

It was originally planned that the Italian market should be supplied restrictively and on the basis of the market. The promise of a further 8 000 cars puts the Italian dealers in a position to make preparations for the re-export of Audi A4s even at this stage, and to make commitments to independent importers and dealers. Efforts to sell the vehicles originally promised on the market might be neglected.

In order to give a signal in Italy that the restricted market-based system of supply that you announced is being maintained, the importer should be informed at once of the departmental meeting's agreement that the 8 000 vehicles requested will not be supplied.

Please inform Autogerma of this decision immediately, and see to it that the Italian dealers are informed accordingly too...'

Minutes of departmental meeting, *Maßnahmen*, 3 February 1995 (Audi, see footnote 59).

- (110) Memo: *Situationsbericht Grauimporte*, 4 April 1995 (Audi, AU-VE D 151) or memo: *Status report MI-11/Vertrieb Inland: Grey-market*, 7 April 1995 (Audi, AU-VE D 150); confirmed in memo: *Graumarktbericht*, 8 September 1995 (Audi, see footnote 104).

- (111) Letter (fax) to Audi, *Volumen Italien 1995*, 29 September 1995 (Autogerma, AU); letter (fax) to Audi, *Sales volume for Italy*, 1995, with handwritten memo, 6 October 1995 (Autogerma, AU-MW 3.1 4).

- (112) Letter to Volkswagen, *Reimporte*, 26 November 1993 (Autohaus Stadtberg, AG 000848); letter to Audi, 11 February 1994 (Walter Bechheim, Autohaus, AU-GK D 3).

- (113) Letter to Autohaus Stadtberg, *Reimporte*, 7 December 1993 (Volkswagen, AG 000847, see footnote 112); see also *Rede von Herrn Knief zur Plenum-Veranstaltung mit Herrn Dr Piëch anlässlich des Europa-Kongresses am 8. September 1993 in Frankfurt* (Volkswagen, VW-KH K-61).

- (114) Report, *Händlermeinung zu den Vertriebsaktivitäten von Audi*, 28 January 1994 (Audi, AU-GK D 4).

- (¹¹⁵) Faxes to Audi, *Information*, 4 April and 15 May 1995 (Auto-Reichart, AU-VE C D 69).
- (¹¹⁶) Fax to Audi, *Deutsche Audi Händler interessiert an Parallelimporte*, 5 October 1994 (Autogerma, AU-MW D 26); *Rede von Herrn Knief zur Plenum-Veranstaltung mit Herrn Dr. Piëch anlässlich des Europa-Kongresses am 8. September 1993 in Frankfurt* (Volkswagen, see footnote 113).
- (¹¹⁷) See for example fax to Autohaus Müller, *Autokauf in Italien*, 11 September 1995 (Autogerma, AG 000547).
- (¹¹⁸) Report, *Händlermeinung* (Audi, see footnote 114).
- (¹¹⁹) Fax to Volkswagen, *Elenco Concessionari*, 24 November 1993 (Autogerma, AG 000973 to 000975).
- (¹²⁰) See for example letter to Negro, *Vendita al di fuori del territorio contrattuale*, 24 February 1995 (Autogerma, see footnote 65); letter to Muzzatti, *Vendite organizzate fuori territorio contrattuale — Audi A8*, 12 October 1994 (Autogerma, AG 000651).
- (¹²¹) Letter to Volkswagen, *grey market*, 7 June 1994 1994 (Autogerma, AG 000851).
- (¹²²) E-mail message, *Eccel*, 29 May 1994 (Autogerma, AG 000795).
- (¹²³) E-mail message * to Volkswagen, *Kuendigungen*, 6 February 1995 (Autogerma, VW-KH K 52), and fax * to Volkswagen, *Massnahmen programm*, 10 February 1995 (Autogerma, VW-SR R 12).
- (¹²⁴) Memo: *Graumimporte aus Italien*, 20 February 1995 (Volkswagen, VW-SR R 17); internally, however, 'grey exports' were often the main ground of termination cited, for example in the cases of Conti, Beretich and Autosial memo to Volkswagen, *grey market*, 7 June 1994 (Autogerma, see footnote 121).
- (¹²⁵) Report: *Besuch bei Autogerma*, 10 February 1995 (Audi, AG 000039); handwritten note on e-mail message, *Italien*, 17 March 1995 (Volkswagen, VW-SR R 13).
- (¹²⁶) Letter *: to Eurocar, *Risoluzione Contratto di Concessione Volkswagen e Audi*, 15 September 1995 (Autogerma, EU-GV 54).
- (¹²⁷) Circular to dealers: *Regolamento CEE 123/85 Accordi distribuzione autoveicoli*, 15 October 1993 (Autogerma, AG 000078).
- (¹²⁸) Circular to dealers: *Regolamento CEE 123/85 Distribuzione selettiva dei veicoli*, 16 March 1995 1995 (Autogerma, VW-SR R 15 ; various contracts of sale, for example Wimschneider, 2 March 1994 (Iob Silvano & C.Srl); Ebenberger, 27 January 1995 (Iob Silvano & C.Srl, SI-GV A 211); Osina, 2 June 1995 (Iob Silvano & C.Srl, SI-CM A 57); Prieler, 16 August 1995 (Iob Silvano & C.Srl, SI-CM A 50).
- (¹²⁹) Letter to Autogerma, *Graumarkt/Reimport*, 15 March 1995 (Audi, AG 000632).
- (¹³⁰) Fax to Audi, 3 April 1995 (Petersen, AU-KS B 8); the extract translates as follows: '... I was constantly being told by the dealers there that they would be happy to sell to me but that they would not get a car from the importer if the buyer was a German.'
- (¹³¹) Letter to Commission, DG IV, *Beschwerde*, 27 April 1995 (Bernhard, AG 000343 and 000344); the extract translates as follows:

'... The boss told me on the telephone that as I was German he would not be allowed to sell me a car (a decision of Volkswagen AG).'
- (¹³²) Letter (fax) to Volkswagen: *Exportverbot Hier: Italien*, 27 April 1995 (Lenz, VW-KH K-32); the extract translates as follows:

'... at three VW dealerships I was told that the export of any vehicles whatsoever was not allowed, and that they had to comply strictly with this rule. Some dealers had already had their concessions withdrawn for failure to observe it'.
- (¹³³) Letter to Autogerma, 23 June 1995 (Schneider, AG 000444).
- (¹³⁴) Letter to Volkswagen, 19 July 1995 (Mosser, AU-KS A 1); the extract translates as follows:

'I was told in each case that the garage had been prohibited by Audi's main agents from selling the cars to foreigners'.
- (¹³⁵) Letter to Audi: *Audi A4*, 3 August 1995 (Bilogan, AU-VE G D 10); the extract translates as follows:

'... that the Italian dealers could not sell anything to persons from the Federal Republic of Germany and Austria, allegedly because of an instruction from the manufacturer'.
- (¹³⁶) Letter to Volkswagen, *Reimport von Polo und Audi A4*, August 1995 (Albrecht, AG 000566 and 000567); the extract translates as follows:

'... We were told that as we were Germans we would not be able to get any of these models, on instructions from Wolfsburg'.

- (¹³⁷) Letter to Audi, *Bestellung eines Audi A6 in Italien*, 18 May 1995 (Baur, AU-VE G D 8); the extract translates as follows:
 'The answer was always the same, namely that they could expect reprisals on the part of the main importer if they sold even one car to a buyer in Austria'.
- (¹³⁸) Letter to Volkswagen, *Ankauf eines KFZ in Italien*, 23 May 1995 (Gatt Autoreisen, AG 000597 to 000599); the extract translates as follows:
 'I have been told by various Italian VW/Audi dealers I have contacted in the last few months that the VW/Audi group does not allow them to sell vehicles to buyers in Austria'.
- (¹³⁹) Letter to Volkswagen, *VW-Vento aus Reimport*, 24 August 1995 (Bilogan, AG 000434); The extract translates as follows:
 'I was everywhere told, with a slight edge to the voice, that there was no possibility of selling to customers from Germany. Sometimes I was told other things too'.
- (¹⁴⁰) Letter to Autogerma, *Letzte Anfrage*, 8 September 1995 (Autohaus Jungmann, AG 000691 to 000697); the extract translates as follows:
 'As soon as we tell the dealers that these vehicles are intended for private individuals in Germany or Austria, and that we will gladly show them an intermediary's or purchase order with a signature authenticated by a notary, the dealers refuse to discuss the matter any further; or reply that that they do not know anything about what Audi in Ingolstadt in Germany says, but that their main importer Autogerma has imposed an absolute ban on exports, even to private customers; or that about a month beforehand the Austrian Automobile Club ÖMTC tried to buy cars of their make in the north of Italy for final customers, and even they had not had a single vehicle from the dealer'.
- (¹⁴¹) Letter to Autogerma, 8 September 1995 (Hülsdünker, AG 000527). The extract translates as follows:
 'He told me that he had instructions from the management of Auto Brenner not to send out the contract of sale until he had express confirmation in writing from them that Mrs... was allowed to buy a vehicle'.
- (¹⁴²) Various letters to Autogerma, for example *Vendita al di fuori del territorio contrattuale*, 6 March 1995 (Negro, AG 000016); *Attività di vendita organizzata fuori del territorio contrattuale*, 22 November 1993 (Brenner Garage, AG 000722); *Vs. rif. ORG/EP/cb int. n/320 del 20.10.1993*, 2 November 1993 (Auto quattro, AG 000290); *Attività di vendita*, 29 October 1993 (Mandolini, AG 000668); *Attività di vendita organizzata fuori dal territorio contrattuale*, 15 March 1993 (Iob Silvano, AG 000284).
- (¹⁴³) For examples of applications for authorisation see letter to Autogerma, *Fornitura Volkswagen Passat-Sig. Hampel Thomas*, 22 June 1995 (Dorigoni, AG 000468); letter to Autogerma, *Audi 80 Avant 1.6*, 19 December 1994 (Brenner Garage, AG 000707); memo, *Oggetto: Colloquio con Sig. Beikircher-BZ.*, 21 October 1994 (Autogerma, AG-RG 000650).
- (¹⁴⁴) Letter to Autogerma, *Audi A8 PRAT.AG 612845/94*, 5 September 1994 (Muzzatti, AG 000649); the extract quoted here translates as follows:
 'We are doing everything possible to have the car brought back to Italy, and to convince the customer to cancel the registration. We are extremely sorry that this sale has caused you such unfortunate difficulties with the manufacturer'.
- (¹⁴⁵) Various letters to customers, for example to *Aue*, 9 March 1995 (Dorigoni, DO-MF 14); *Nowak*, 17 May 1995 (Dorigoni, DO-SG 2); *Roederer*, 18 May 1995 (Dorigoni, DO-SG 10); *Rueß*, 18 May 1995 (Dorigoni, DO-MF 8); *Kleikamp*, 27 June 1995 (Dorigoni, DO-SG 4); *Autohaus Nordstadt*, 22 August 1995 (Dorigoni, DO-MF 6); *Gerson*, 6 October 1995 (Dorigoni, DO-SG 16).
- (¹⁴⁶) Letter to *Deeg*, 6 May 1995 (Dorigoni, DO-SG 12).
- (¹⁴⁷) See for example various letters to customers between July and October 1995 (Auto Brenner, Nos 40, 7, 47, 30, 9, 13, 45, 26, 6, 51, 20, 23, 10, 27, 29, 19, 5, 18, 32, 17, 3, 53, 36, 12, 43, 34, 38, 16, 25, 24, 55, 15, 8, 4, 28, 2, 11, 21, 49, 14); the extract quoted here translates as follows:
 'As we receive only a limited quota of vehicles (VW-Audi) from the works, delivery times are long, over a year long in some cases. Prices change regularly and the purchase price consequently cannot be guaranteed. For these reasons you will probably decide not to buy your vehicle from us'.
- (¹⁴⁸) E-mail message to Audi: *Neuwagenverkauf an ausländische Kunden*, 18 May 1995 (Autogerma, AU-DH A 2); the extract quoted here translates as follows:
 '... As you will see from the monthly sales statistics in your possession, there has been an enormous drop in sales of new Audi cars to foreign buyers... We find that dealers are quoting delivery times on the basis of their quotas, and serving their traditional clientele'.
- (¹⁴⁹) Letter to Autogerma, *Fahrzeugverkauf an EG-Bürger/Endabnehmer*, 19 July 1995 (Audi, AG 000336); the extract quoted here translates as follows:
 'Unfortunately many Italian dealers are still telling customers that the manufacturer or the importer has prohibited them from selling vehicles to foreign final consumers'.
- (¹⁵⁰) Joined Cases 25 and 26/84 *Ford-Werke AG and Ford of Europe Inc. v. Commission* [1985] ECR, p. 2725 and Case C-70/93 *Bayerische Motorenwerke AG v. ALD Auto-Leasing D GmbH* [1995] ECR I-3439.

- (¹⁵¹) Case 107/82 *Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG v. Commission* [1983] ECR p. 3151.
- (¹⁵²) See footnote 150.
- (¹⁵³) Commission Decision 82/367/EEC (Hasselblad), OJ L 161, 12.6.1982, p. 18, recital 47.
- (¹⁵⁴) Commission Decision 85/617/EEC (Sperry New Holland), OJ L 376, 31.12.1985, p. 21, recitals 54 and 55.
- (¹⁵⁵) Commission Decision 84/405/EEC (Zinc Producer Group), OJ L 220, 17.8.1984, p. 27, recital 71; Commission Decision 85/79/EEC (John Deere), OJ L 35, 7.2.1985, p. 58, recital 26.
- (¹⁵⁶) Commission Decisions 84/405/EEC and 85/79/EEC, see footnote 155.
- (¹⁵⁷) Commission Decision 73/322/EEC (Deutsche Philips), OJ L 293, 20.10.1973, p. 40; judgment of the Court of Justice in Case 86/82 *Hasselblad (GB) v. Commission* [1984] ECR p. 883.
- (¹⁵⁸) See Commission Decision 82/367/EEC (see footnote 153).
- (¹⁵⁹) Case 319/82 *Société de Vente de Ciments et Bétons de l'Est SA v. Kerpen & Kerpen GmbH & Co. KG* [1983] ECR, p. 4173.
- (¹⁶⁰) See footnote 13.
- (¹⁶¹) See footnote 13.
- (¹⁶²) Case T-9/92 *Peugeot v. Commission* [1993] ECR II-493.
- (¹⁶³) Letter to the Commission: *Attorney's privilege hinsichtlich der Nachprüfung K(95) 2476/17*, (Attorney's privilege with regard to investigation K(95) 2476/17), 2.11.1995 (Audi).
- (¹⁶⁴) Case 155/79 *AM & S Europe v. Commission* [1982] ECR 1575.
- (¹⁶⁵) See footnote 151.
- (¹⁶⁶) ECJ 11 July 1989 *S. C. Belasco et al. v. Commission* RS 246/86, Rec. 1989, p. 2181, 2191, point 41.
- (¹⁶⁷) COM(95) 503 final of 31 October 1995.
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