II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 10 October 2001

relating to a proceeding under Article 81 of the EC Treaty

(Case COMP/36.264 — Mercedes-Benz)

(notified under document number C (2001) 3028)

(Only the German text is authentic)

(Text with EEA relevance)

(2002/758/EC)

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 Regulation (EC) No 1216/1999 of 10 June 1999 [2], and in particular Articles 3, 15(2) and 16(1) thereof,

Having regard to the Commission decision of 30 March 1999 to initiate proceedings in this case,

Having given the parties concerned the opportunity, pursuant to Article 19(1) of Regulation No 17 and Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles 85 and 86 of the EC Treaty [3], to make known their views on the objections raised by the Commission,

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

Having regard to the final report of the Hearing Officer,

Whereas:

1. FACTS

1.1. *PROCEDURE*

(1) Since the beginning of 1995 the Commission had been receiving letters from consumers complaining about restrictions on the export of new motor vehicles of the Mercedes-Benz make by affiliates of Daimler-Benz AG in various Member States. The Commission thus had indications that firms belonging to the Daimler-Benz group were operating a foreclosure of the market in contravention of Article 81(1) of the EC Treaty.

(2) On 4 December 1996 the Commission issued a decision ordering investigations pursuant to Article 14 of Regulation No 17. These investigations were carried out on 11 and 12 December 1996 at the premises of the following companies:

- Germany: Daimler-Benz AG, Stuttgart; Mercedes-Benz AG, Stuttgart,
- Belgium: Mercedes-Benz Belgium SA/NV; Van Steen SA/NV, Mechelen,
- Netherlands: Mercedes-Benz Nederland NV, Utrecht; Autocentrum Pordon BV, Utrecht; Van Kooy BV, Hilversum,

(1) OJ 13, 21.12.1962, p. 204 (Special edition 1959 to 1962, p. 87).
(2) OJ L 148, 15.6.1999, p. 5.
(3) OJ L 354, 30.12.1998, p. 18.

— Spain: Mercedes-Benz España SA, Madrid; Itarsa, Madrid; Itra SL, Madrid.

(3) On 21 October 1998 the Commission addressed a request for information under Article 11 of Regulation No 17 to Daimler-Benz AG. This was replied to on 10 November 1998. On 15 June 2001 the Commission addressed a further request for information to DaimlerChrysler AG, which was replied to on 9 July 2001.

(4) On 31 March 1999 the Commission sent a statement of objections to DaimlerChrysler AG.

(5) DaimlerChrysler AG commented on the Commission's objections in writing by letter dated 14 June 1999 and orally at a hearing on 29 June 1999. Moreover, on 7 December 1999 it presented a report by Professor Ulmer which assessed the marketing of motor vehicles via dealers in Germany pursuant to Article 81(1). On 4 September 2000 DaimlerChrysler sent a further letter on the subject of the assessment of evidence in which it referred to the assessment of evidence by the Court of First Instance of the European Communities in its judgment in Case T-62/98 *Volkswagen* v *Commission* [2000] ECR II-2707.

(6) This Decision is based on documents found during the investigations, answers to requests for information and the comments presented by DaimlerChrysler AG.

1.2. *THE FIRMS IN QUESTION AND THEIR MARKETING NETWORK*

1.2.1. DAIMLERCHRYSLER AG

(7) Daimler-Benz AG merged with DaimlerChrysler AG on 21 December 1998 on the basis of the 'Business combination agreement' of 7 May 1998. DaimlerChrysler AG thus became the legal successor to Daimler-Benz AG. Under section 20(1) of the Conversion Act (*Umwandlungsgesetz* (UmwG)) ([4]), all of the latter's rights, assets, liabilities and obligations were transferred to DaimlerChrysler AG ([5]). In 2000 DaimlerChrysler's worldwide turnover came to EUR 162,384 billion, and its Community-wide turnover to EUR 50,348 billion.

(8) In 2000, with world sales of 1 052 742 passenger cars, the Mercedes-Benz make accounted for a turnover of EUR 43,133 billion. In 2000, 666 198 Mercedes-Benz passenger cars were sold in the Community, worth EUR 25,050 billion ([6]).

1.2.2. DAIMLER-BENZ AG AND MERCEDES-BENZ AG

(9) Until 21 December 1998 Daimler-Benz AG was the umbrella company of the Daimler-Benz group. Together with its subsidiaries, it was active worldwide in manufacturing and marketing motor vehicles, motor-vehicle electronics, railway vehicles, diesel engines, aircraft, spacecraft and defence systems, and in the financial-services, insurance-brokerage, information-technology, telecommunications-technology, commercial and property-management services sectors.

(10) In 1997 the consolidated worldwide group turnover of Daimler-Benz AG was ECU 64 963 million, while its turnover in the Community was ECU 37 995 million. In the same year, the group's worldwide turnover in respect of passenger cars was ECU 21 955 million.

(11) Until 1989, passenger cars and commercial vehicles of the Mercedes-Benz make were manufactured and marketed by Daimler-Benz AG and its subsidiaries. From 1989 until 26 May 1997, passenger cars were manufactured by Mercedes-Benz AG, a subsidiary of Daimler-Benz AG. In Germany, they were marketed directly by Mercedes-Benz AG, in Belgium and in Spain via the subsidiaries of Daimler-Benz AG, Mercedes-Benz Belgium SA/NV and Mercedes-Benz España SA.

(12) Mercedes-Benz AG was merged into Daimler-Benz AG on 25 May 1997. Since that date, Mercedes-Benz has been the motor-vehicle division within Daimler-Benz AG, now DaimlerChrysler AG. For the sake of simplicity, the expression 'Mercedes-Benz' is used below where appropriate, irrespective of whether the reference is to Daimler-Benz AG (up to 1989), Mercedes-Benz AG (up to 1997), Daimler-Benz AG (1997/98) or Daimler Chrysler AG (from 1998).

(13) In 2000 the turnover achieved with Mercedes-Benz passenger cars, including sales to company employees, in Germany came to EUR 15,494 billion ([7]).

(14) The car trade in Germany may be portrayed in figures as follows ([8]):

([4]) Conversion Act of 28 October 1994, Bundesgesetzblatt I 1994, p. 3210; corrigendum in Bundesgesetzblatt I 1995, p. 428.

([5]) See Commission decision of 22 July 1998 in Case IV/M.1204 *Daimler-Benz/Chrysler* (OJ C 252, 11.8.1998, p. 8).

([6]) Reply from DaimlerChrysler AG to question 1.3 in the request for information of 15 June 2001.

([7]) Information supplied by DaimlerChrysler on 13 July 2001.

([8]) Information supplied by DaimlerChrysler on 13 July 2001.

(in EUR million)

Turnover less sales to company employees	1998	1999	2000
	10 900	12 291	13 154

Sales	1993	1994	1995	1996	1997	1998	1999	2000
Total sales less sales to company employees	[...] (*)	[...]	[...]	[...]	[...]	[...]	[...]	[...]
Sales by branches	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
— of which sales to DC-Leasing			[...]	[...]	[...]	[...]	[...]	[...]
— of which sales to outside leasing companies			[...]	[...]	[...]	[...]	[...]	[...]
Sales through agents	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
— of which sales to DC-Leasing			[...]	[...]	[...]	[...]	[...]	[...]
— of which sales to outside leasing companies			[...]	[...]	[...]	[...]	[...]	[...]

(*) Business secret.

(15) Mercedes-Benz passenger cars are marketed [9] in Germany essentially via 43 (1996), 41 (1998) or 35 (2000) branches belonging to the group, 237 (1996), 208 (1998) or 110 (2000) agents (also known as contracting partners) with the status under German law of commercial agents appointed to negotiate business transactions (section 84(1), first sentence, first alternative, of the Commercial Code), and via three commission agents ('principal agents') [10], one of which is a firm within the Mercedes-Benz group [11]. Although the principal agents act in their own name, they operate on the same footing [12] as the other agents in their internal relationship with Mercedes-Benz. Since the contracts with principal agents and agents are broadly identical in content, the following information concerning agents also applies, unless otherwise stated, to the principal agents. There are also some 500 contracted workshops in Germany. These can act as commercial agents as a sideline under section 92b of the Commercial Code, negotiating sales of new vehicles on behalf of the agent or Mercedes-Benz branch responsible for their area.

Of all Mercedes-Benz passenger cars sold in Germany, on average during the period 1996-2000 around [...] % were sold through Mercedes-Benz branches and around [...] % through contracting partners acting as commercial agents (hereinafter referred to as 'agents'). Even if the criterion is the level of turnover achieved with new vehicles sold through these marketing companies, the same percentage figures are obtained [13]. The sales/turnover of the German contracted workshops that negotiate sales contracts for new vehicles on behalf either of a branch or of an agent are included in these percentages and amount to some [...] % in all.

(9) See the note of the legal department of Mercedes-Benz AG, file, p. 594.
(10) Reply from Daimler-Benz AG of 10 November 1998 to question 1.6.
(11) Reply from Daimler-Benz AG of 10 November 1998 to question 1.6, file, p. 3253.
(12) Reply from Daimler-Benz AG of 10 November 1998 to question 1.6, file, p. 3253.
(13) Reply from DaimlerChrysler AG to the request for information of 15 June 2001.

(16) The German (principal) agents of Mercedes-Benz bear a number of risks under the agency agreement [14] which are intrinsically linked to their work in negotiating the sale of new vehicles. These are described in detail in recital 153 et seq.

1.2.3. MERCEDES-BENZ BELGIUM SA/NV

(17) Mercedes-Benz Belgium SA/NV (hereinafter referred to as 'MBBel') was a subsidiary of Daimler-Benz Holding Belgium SA, which was in turn controlled directly or indirectly by Daimler-Benz AG. MBBel had since an unknown date been a wholly owned subsidiary of Daimler-Benz AG. Since 21 December 1998 it has been a wholly owned subsidiary of DaimlerChrysler AG.

(18) Turnover/sales with Mercedes-Benz passenger cars in Belgium:

(in EUR million)

Turnover	1997	1998	1999	2000
	353	511	560	644

(individual vehicles)

Sales	1997	1998	1999	2000
	12 572	17 587	19 300	20 394

(19) The passenger-car sales network in Belgium consists of the importer, MBBel, which during the period at issue here itself sold new vehicles via at least two branches [15], and of approximately 45 dealers [16]. There are also approximately 44 agencies/workshops in Belgium which also negotiate new-vehicle sales contracts.

1.2.4. MERCEDES-BENZ ESPAÑA SA

(20) Mercedes-Benz España SA (hereinafter referred to as 'MBE') is a wholly owned subsidiary of the national holding company Daimler-Benz España SA, 99,88 % of which was owned by Daimler-Benz AG. Since 21 December 1998 this holding company has been a wholly owned subsidiary of DaimlerChrysler AG. MBE operates body and assembly plants for transporters and V-class (large-capacity) passenger cars, manufactures engines, transmissions and axle components for transporters, and sells Mercedes-Benz vehicles and Daimler Benz products.

(21) Passenger cars are sold in Spain via three branches of MBE and approximately 70 dealers. There are also contracted workshops in Spain [17], although these do not sell vehicles but only negotiate sales contracts.

(22) Turnover/sales with Mercedes-Benz passenger cars in Spain:

(in EUR million)

Turnover	1996	1997	1998	1999	2000
		312	450	594	708

[14] File, p. 3360.

[15] The branches bearing the name MB Europa in Brussels and Anderlecht have always been in the ownership of MBBel. In 1994 the branches in Antwerp, Ghent and Waterloo, which had hitherto been owned by MBBel, were sold, as was (on 1 February 1995) the branch in Charleroi. On 1 February 1998 the dealer Dean Auto Brussels was purchased by MBBel, as was (on 23 October 1999) the MB dealer in Mechelen and (on 31 March 2000) the MB dealer in Ghent. These have since been run as branches.

[16] File, p. 3004: letter from MBBel to the Public Prosecutors Office at the Court of Appeal in Brussels, undated; however, since Commission Regulation (EC) No 1475/95 (OJ L, 29.6.1995, p. 25) is mentioned, the letter must have been written in 1995 or later; reply from Daimler-Benz AG of 10 November 1998 to question 1.6; reply from DaimlerChrysler AG to the request for information of 15 June 2001.

[17] There were 58 contracted workshops in 1996, 63 in 1998 and 118 in 2000; see reply from DaimlerChrysler AG to question 1.3 in the request for information of 15 June 2001.

(individual vehicles)

Sales	1996	1997	1998	1999	2000
Total sales		11 572	15 843	20 186	21 943
— of which to group-owned leasing companies (MB Credit)	[...]	[...]	[...]	[...]	[...]
— of which to non-group-owned leasing companies (1)	[...]	[...]	[...]	[...]	[...]

(18) These figures are based on a DaimlerChrysler estimate according to which in Spain some [...] % of the new-car leasing business is accounted for by the group member company MB Credit and [...] % by independent leasing companies.

1.3. *THE IMPORTANCE OF THE COMPANIES INVOLVED IN THE AREA OF PASSENGER CARS*

(23) The market for passenger cars can be divided into a number of segments based on factors such as purchase price and vehicle length. By contrast, other factors, such as engine capacity, quality and brand image play a smaller role in determining the segment to which a vehicle belongs. A distinction is normally made between the following segments: A: very small cars; B: small cars; C: medium cars; D: upper-medium cars; E: executive cars; F: luxury cars; and G: multi-purpose vehicles and sports cars. Segment G is occasionally subdivided still further. The following tables show the market share of Mercedes-Benz cars in the Community and in Member States on the basis of the number of vehicles sold. There are strong indications that, if market share were calculated on the basis of vehicle price, the share of Mercedes-Benz, which mainly offers expensive vehicles, would be even larger.

(24) Market share of Mercedes-Benz cars in 1995

Country	Segment C Medium	Segment D Upper-medium	Segment E Executive	Segment F Luxury	Segment M Multi-purpose	Segment S Sports cars	All cars
Austria	0	[0-10] %	[10-20] %	[20-30] %	0	[10-20] %	[0-10] %
Belgium	0	[0-10] %	[10-20] %	[30-40] %	0	[10-20] %	[0-10] %
Denmark	0	[0-10] %	[10-20] %	[20-30] %	0	[0-10] %	[0-10] %
Finland	0	[0-10] %	[10-20] %	[40-50] %	0	[0-10] %	[0-10] %
France	0	[0-10] %	[10-20] %	[30-40] %	0	[0-10] %	[0-10] %
Germany	0	[10-20] %	[20-30] %	[30-40] %	0	[20-30] %	[0-10] %
Greece	0	[0-10] %	[20-30] %	[40-50] %	0	[0-10] %	[0-10] %
Ireland	0	[0-10] %	[10-20] %	[30-40] %	0	[30-40] %	[0-10] %
Italy	0	[0-10] %	[10-20] %	[30-40] %	0	[0-10] %	[0-10] %
Luxembourg	0	[0-10] %	[10-20] %	[20-30] %	0	[0-10] %	[0-10] %

Country	Segment C Medium	Segment D Upper-medium	Segment E Executive	Segment F Luxury	Segment M Multi-purpose	Segment S Sports cars	All cars
Netherlands	0	[0-10] %	[10-20] %	[20-30] %	0	[0-10] %	[0-10] %
Portugal	0	[0-10] %	[10-20] %	[40-50] %	0	[0-10] %	[0-10] %
Sweden	0	[0-10] %	[0-10] %	[20-30] %	0	[20-30] %	[0-10] %
Spain	0	[0-10] %	[10-20] %	[20-30] %	0	[0-10] %	[0-10] %
United Kingdom	0	[0-10] %	[10-20] %	[10-20] %	0	[10-20] %	[0-10] %
EU total	0	[0-10] %	[10-20] %	[20-30] %	0	[10-20] %	[0-10] %

(25) Market share of Mercedes-Benz cars in 1996

Country	Segment C Medium	Segment D Upper-medium	Segment E Executive	Segment F Luxury	Segment M Multi-purpose	Segment S Sports cars	All cars
Austria		[0-10] %	[30-40] %	[20-30] %	[0-10] %	[10-20] %	[0-10] %
Belgium	0	[0-10] %	[20-30] %	[10-20] %	[0-10] %	[0-10] %	[0-10] %
Denmark	0	[0-10] %	[20-30] %	[10-20] %	[0-10] %	[0-10] %	[0-10] %
Finland	0	[0-10] %	[10-20] %	[50-60] %	[0-10] %	[10-20] %	[0-10] %
France	0	[0-10] %	[10-20] %	[20-30] %	[0-10] %	[10-20] %	[0-10] %
Germany	[0-10] %	[10-20] %	[30-40] %	[30-40] %	[0-10] %	[10-20] %	[0-10] %
Greece	0	[0-10] %	[40-50] %	[30-40] %	[0-10] %	[0-10] %	[0-10] %
Ireland	0	[0-10] %	[20-30] %	[30-40] %	[0-10] %	[20-30] %	[0-10] %
Italy	0	[0-10] %	[20-30] %	[20-30] %	[0-10] %	[0-10] %	[0-10] %
Luxembourg	0	[0-10] %	[10-20] %	[20-30] %	[0-10] %	[10-20] %	[0-10] %
Netherlands	0	[0-10] %	[10-20] %	[20-30] %	[0-10] %	[0-10] %	[0-10] %
Portugal	0	[0-10] %	[30-40] %	[20-30] %	[0-10] %	[10-20] %	[0-10] %
Sweden	0	[0-10] %	[0-10] %	[20-30] %	[0-10] %	[10-20] %	[0-10] %
Spain	0	[0-10] %	[20-30] %	[20-30] %	[0-10] %	[0-10] %	[0-10] %
United Kingdom	0	[0-10] %	[10-20] %	[10-20] %	[0-10] %	[0-10] %	[0-10] %
EU total	0	[0-10] %	[20-30] %	[20-30] %	[0-10] %	[10-20] %	[0-10] %

(26) Market share of Mercedes-Benz cars in 1997

Country	Segment C Medium	Segment D Upper-medium	Segment E Executive	Segment F Luxury	Segment M Multi-purpose	Segment S Sports cars	All cars
Austria	[0-10] %	[0-10] %	[20-30] %	[10-20] %	[0-10] %	[20-30] %	[0-10] %
Belgium	[0-10] %	[0-10] %	[20-30] %	[10-20] %	[0-10] %	[20-30] %	[0-10] %
Denmark	[0-10] %	[0-10] %	[10-20] %	[20-30] %	[0-10] %	[10-20] %	[0-10] %
Finland	[0-10] %	[0-10] %	[10-20] %	[40-50] %	[0-10] %	[40-50] %	[0-10] %
France	[0-10] %	[0-10] %	[10-20] %	[20-30] %	[0-10] %	[20-30] %	[0-10] %
Germany	[0-10] %	[10-20] %	[30-40] %	[20-30] %	[0-10] %	[30-40] %	[0-10] %
Greece	[0-10] %	[0-10] %	[40-50] %	[30-40] %	[0-10] %	[20-30] %	[0-10] %
Ireland	[0-10] %	[0-10] %	[20-30] %	[30-40] %	[0-10] %	[20-30] %	[0-10] %
Italy	[0-10] %	[0-10] %	[20-30] %	[20-30] %	[0-10] %	[10-20] %	[0-10] %
Luxembourg	[0-10] %	[0-10] %	[10-20] %	[10-20] %	[0-10] %	[30-40] %	[0-10] %
Netherlands	[0-10] %	[0-10] %	[20-30] %	[10-20] %	[0-10] %	[20-30] %	[0-10] %
Portugal	[0-10] %	[0-10] %	[30-40] %	[10-20] %	[0-10] %	[30-40] %	[0-10] %
Sweden	[0-10] %	[0-10] %	[0-10] %	[10-20] %	[0-10] %	[20-30] %	[0-10] %
Spain	[0-10] %	[0-10] %	[20-30] %	[20-30] %	[0-10] %	[20-30] %	[0-10] %
United Kingdom	[0-10] %	[0-10] %	[10-20] %	[10-20] %	[0-10] %	[10-20] %	[0-10] %
EU total	[0-10] %	[0-10] %	[20-30] %	[20-30] %	[0-10] %	[20-30] %	[0-10] %

(27) Market share of Mercedes-Benz cars in 1998

Country	Segment C Medium	Segment D Upper-medium	Segment E Executive	Segment F Luxury	Segment M Multi-purpose	Segment S Sports cars	All cars
Austria	[0-10] %	[0-10] %	[20-30] %	[10-20] %	[0-10] %	[30-40] %	[0-10] %
Belgium	[0-10] %	[0-10] %	[10-20] %	[10-20] %	[0-10] %	[20-30] %	[0-10] %
Denmark	[0-10] %	[0-10] %	[10-20] %	[10-20] %	[0-10] %	[10-20] %	[0-10] %
Finland	[0-10] %	[0-10] %	[10-20] %	[20-30] %	[0-10] %	[40-50] %	[0-10] %
France	[0-10] %	[0-10] %	[10-20] %	[10-20] %	[0-10] %	[20-30] %	[0-10] %

Country	Segment C Medium	Segment D Upper-medium	Segment E Executive	Segment F Luxury	Segment M Multi-purpose	Segment S Sports cars	All cars
Germany	[0-10] %	[10-20] %	[20-30] %	[20-30] %	[0-10] %	[20-30] %	[0-10] %
Greece	[0-10] %	[0-10] %	[30-40] %	[20-30] %	[0-10] %	[20-30] %	[0-10] %
Ireland	[0-10] %	[0-10] %	[20-30] %	[20-30] %	[0-10] %	[10-20] %	[0-10] %
Italy	[0-10] %	[0-10] %	[20-30] %	[20-30] %	[0-10] %	[20-30] %	[0-10] %
Luxembourg	[0-10] %	[0-10] %	[10-20] %	[10-20] %	[0-10] %	[20-30] %	[0-10] %
Netherlands	[0-10] %	[0-10] %	[10-20] %	[10-20] %	[0-10] %	[10-20] %	[0-10] %
Portugal	[0-10] %	[0-10] %	[20-30] %	[10-20] %	[0-10] %	[20-30] %	[0-10] %
Sweden	[0-10] %	[0-10] %	[0-10] %	[10-20] %	[0-10] %	[10-20] %	[0-10] %
Spain	[0-10] %	[0-10] %	[10-20] %	[20-30] %	[0-10] %	[10-20] %	[0-10] %
United Kingdom	[0-10] %	[0-10] %	[10-20] %	[0-10] %	[0-10] %	[0-10] %	[0-10] %
EU total	[0-10] %	[0-10] %	[20-30] %	[20-30] %	[0-10] %	[20-30] %	[0-10] %

(28) Market share of Mercedes-Benz cars in 1999

Country	Segment C Medium	Segment D Upper-medium	Segment E Executive	Segment F Luxury	Segment M Multi-purpose	Segment S Sports cars	All cars
Austria	[0-10] %	[10-20] %	[20-30] %	[40-50] %	[0-10] %	[10-20] %	[0-10] %
Belgium	[0-10] %	[10-20] %	[10-20] %	[40-50] %	[0-10] %	[10-20] %	[0-10] %
Denmark	[0-10] %	[0-10] %	[20-30] %	[40-50] %	[0-10] %	[0-10] %	[0-10] %
Finland	[0-10] %	[0-10] %	[10-20] %	[60-70] %	[0-10] %	[20-30] %	[0-10] %
France	[0-10] %	[0-10] %	[10-20] %	[40-50] %	[0-10] %	[10-20] %	[0-10] %
Germany	[0-10] %	[10-20] %	[30-40] %	[50-60] %	[0-10] %	[20-30] %	[10-20] %
Greece	[0-10] %	[10-20] %	[30-40] %	[70-80] %	[0-10] %	[10-20] %	[0-10] %
Ireland	[0-10] %	[0-10] %	[30-40] %	[30-40] %	[0-10] %	[10-20] %	[0-10] %
Italy	[0-10] %	[10-20] %	[10-20] %	[40-50] %	[0-10] %	[10-20] %	[0-10] %
Luxembourg	[0-10] %	[10-20] %	[10-20] %	[40-50] %	[0-10] %	[20-30] %	[0-10] %
Netherlands	[0-10] %	[0-10] %	[10-20] %	[30-40] %	[0-10] %	[10-20] %	[0-10] %

Country	Segment C Medium	Segment D Upper-medium	Segment E Executive	Segment F Luxury	Segment M Multi-purpose	Segment S Sports cars	All cars
Portugal	[0-10] %	[10-20] %	[10-20] %	[40-50] %	[0-10] %	[10-20] %	[0-10] %
Sweden	[0-10] %	[0-10] %	[0-10] %	[50-60] %	[0-10] %	[10-20] %	[0-10] %
Spain	[0-10] %	[0-10] %	[10-20] %	[40-50] %	[0-10] %	[10-20] %	[0-10] %
United Kingdom	[0-10] %	[0-10] %	[10-20] %	[20-30] %	[0-10] %	[0-10] %	[0-10] %
EU total	[0-10] %	[10-20] %	[20-30] %	[40-50] %	[0-10] %	[10-20] %	[0-10] %

(29) Market share of Mercedes-Benz cars in 2000

Country	Segment C Medium	Segment D Upper-medium	Segment E Executive	Segment F Luxury	Segment M Multi-purpose	Segment S Sports cars	All cars
Austria	[0-10] %	[0-10] %	[20-30] %	[50-60] %	[0-10] %	[10-20] %	[0-10] %
Belgium	[0-10] %	[0-10] %	[10-20] %	[50-60] %	[0-10] %	[10-20] %	[0-10] %
Denmark	[0-10] %	[0-10] %	[20-30] %	[50-60] %	[0-10] %	[0-10] %	[0-10] %
Finland	[0-10] %	[0-10] %	[10-20] %	[70-80] %	[0-10] %	[10-20] %	[0-10] %
France	[0-10] %	[0-10] %	[10-20] %	[50-60] %	[0-10] %	[10-20] %	[0-10] %
Germany	[0-10] %	[10-20] %	[30-40] %	[50-60] %	[0-10] %	[10-20] %	[10-20] %
Greece	[0-10] %	[0-10] %	[50-60] %	[70-80] %	[0-10] %	[10-20] %	[0-10] %
Ireland	[0-10] %	[0-10] %	[30-40] %	[60-70] %	[0-10] %	[0-10] %	[0-10] %
Italy	[0-10] %	[0-10] %	[20-30] %	[50-60] %	[0-10] %	[10-20] %	[0-10] %
Luxembourg	[0-10] %	[10-20] %	[10-20] %	[60-70] %	[0-10] %	[10-20] %	[0-10] %
Netherlands	[0-10] %	[0-10] %	[10-20] %	[50-60] %	[0-10] %	[0-10] %	[0-10] %
Portugal	[0-10] %	[0-10] %	[20-30] %	[60-70] %	[0-10] %	[0-10] %	[0-10] %
Sweden	[0-10] %	[0-10] %	[0-10] %	[50-60] %	[0-10] %	[0-10] %	[0-10] %
Spain	[0-10] %	[0-10] %	[10-20] %	[50-60] %	[0-10] %	[10-20] %	[0-10] %
United Kingdom	[0-10] %	[0-10] %	[10-20] %	[30-40] %	[0-10] %	[0-10] %	[0-10] %
EU total	[0-10] %	[0-10] %	[20-30] %	[50-60] %	[0-10] %	[10-20] %	[0-10] %

1.4. *PARALLEL TRADING IN MERCEDES-BENZ PASSENGER CARS IN GERMANY, BELGIUM AND SPAIN, AND ITS CAUSES AND SCALE*

1.4.1. PRICE DIFFERENCES BETWEEN MEMBER STATES

(30) The Commission publishes a review of car prices in the Community ([19]) twice a year. Data are provided by manufacturers. One of the aims of the Commission in publishing these reviews is to increase price transparency so that final consumers are better able to purchase motor vehicles in those Member States in which prices and other purchasing conditions are most favourable. The Commission's purpose is not to establish equal prices within the Community, but rather, on the basis of price transparency, to reduce price differences through market forces.

(31) On the basis of these price data, differences in the prices of the most commonly sold models between the various Member States can be represented as follows (the pre-tax price in the country with the lowest prices is, in each case, 100):

(32) Segment D model: Mercedes C 180

Year	B	D	E	F	FIN	IRL	I	L	NL	P	UK	DK	GR	A	S
1.5.1993 190E 1,8	127,8	126,6	124,0	118,9		110,1	100	127,8	108,8	122,8	118,9				
1.11.1993	109,7	113,9	115,4	109,9		118,0	100,0	110,4	103,3	110,9	114,2				
1.5.1994	108,9	107,2	106,8	109,6		108,5	102,5	111,6	100	104,0	107,6				
1.11.1994	110,5	109,9	106,8	111,8		108,7	100,0	113,2	102,0	103,4	104,1				
1.5.1995	127,2	126,6	118,9	123,8		117,1	100,0	130,3	118,9	121,6	109,0			131,1	108,8
1.11.1995	118,3	118,3	113,9	111,0		108,5	100,0	119,6	105,9	111,5	107,1			121,7	107,1
1.5.1996	109,1	109,0	104,3	105,0		104,1	101,9	108,5	100,0	106,7	100,6			110,6	105,9
1.11.1996	109,1	109,3	103,2	103,2		106,5	104,6	108,6	100,0	102,2	105,7			106,2	111,4
1.5.1997	109,9	108,3	100,0	104,7		108,4	101,8	106,4	100,8	106,4	103,6			106,6	117,4
1.11.1997	108,1	107,2	101,1	105,2		111,1	102,0	105,4	100,0	105,6	102,9			108,3	118,3
1.5.1998	104,7	105,8	100,0	106,3		106,6	103,9	104,3	100,3	105,3	105,8			109,4	115,8
1.11.1998	107,6	108,7	100,0	105,7		108,9	106,5	107,8	100,4	106,2	107,3			108,5	101,6
1.5.1999	109,9	110,2	100,0	105,7	106,8	109,8	103,6	109,1	100,5	109,5	113,8	99,3	109,6	110,0	104,6
1.11.1999	107,3	107,6	100,0	103,3	104,4	105,1	103,9	107,4	100,2	106,2	113,1	98,6	107,6	107,5	103,5
1.5.2000	105,2	105,4	100,3	102,3	100,0	—	102,1	105,4	102,7	100,2	No data	99,7	103,0	105,4	107,5
1.11.2000	107,1	105,4	100,3	102,3	100,0	102,9	102,1	105,4	102,4	103,2	111,5	99,9	102,0	105,4	103,3

([19]) Car prices in the European Union, European Commission, DG Competition, various editions.

(33) Segment E model: Mercedes E 200

Year	B	D	E	F	FIN	IRL	I	L	NL	P	UK	DK	GR	A	S
1.5.1993	107,5	106,4	109,6	105,3		101,1	100	110,6	106,4	114,9	100				
1.11.1993	108,4	112,0	111,8	108,1		115,0	100,0	111,5	113,6	121,8	110,6				
1.5.1994	106,4	105,6	107,3	102,9		105,4	100,0	108,5	108,4	115,8	103,1				
1.11.1994	111,7	110,3	108,9	104,8		109,0	100,0	113,7	111,6	118,6	103,8				
1.5.1995	124,8	123,5	118,8	114,9		114,0	100,4	127,0	125,3	128,2	105,5			129,5	100
1.11.1995	111,9	110,5	112,3	107,2		102,9	100,5	113,6	108,5	112,4	100			114,2	108,8
1.5.1996	108,7	107,4	111,8	105,6		103,7	108,7	110,5	107,9	110,9	100			109,8	107,6
1.11.1996	101,8	100,7	106,2	102,3		100,0	103,9	103,4	100,9	109,6	100,6			103,0	101,4
1.5.1997	112,2	110,8	115,1	112,2		110,6	116,7	112,2	100,0	111,2	120,0			104,9	120,9
1.11.1997	111,1	109,6	114,7	111,7		112,4	116,7	111,0	100,0	112,2	118,1			112,4	126,2
1.5.1998 220 CDI	100,2	100,0	106,7	103,6		No data	104,2	100,2	100,6	101,8	108,0			105,9	No data
1.11.1998	101,9	101,8	110,0	105,4		103,5	105,8	102,0	101,8	109,8	110,0			103,6	100,0
1.5.1999	100,3	100,0	106,7	102,0	108,6	102,2	102,7	100,0	100,1	108,2	108,7	101,2	100,0	101,9	99,9
1.11.1999	100,3	100,0	104,0	101,1	104,6	103,8	103,0	101,0	101,3	103,7	110,8	101,8	101,7	101,9	101,7
1.5.2000	100,0	101,0	102,7	101,2	105,6	101,6	104,1	101,6	102,2	104,5	119,5	101,7	107,2	102,9	107,2
1.11.2000	100,0	100,6	103,5	100,8	105,1	100,6	103,7	101,2	101,6	105,2	110,1	101,5	103,9	102,6	102,9

(34) Segment F model: Mercedes S 320

Year	B	D	E	F	FIN	IRL	I	L	NL	P	UK	DK	GR	A	S
1.5.1993	109,7	107,5	115,1	111,8		102,1	100,0	109,7	112,9	122,6	106,4				
1.11.1993	107,8	111,2	116,5	111,7		105,1	100,0	108,0	120,0	126,0	110,2				
1.5.1994	105,7	102,6	112,1	115,9		101,1	106,4	105,4	112,2	No data	100,0				
1.11.1994	108,9	105,4	111,1	114,1		107,6	100,0	108,1	113,9	No data	103,5				
1.5.1995	118,0	114,5	119,3	117,7		103,7	100,0	117,2	124,3	122,3	105,0			121,1	110,0
1.11.1995	111,9	108,2	113,5	114,2		102,1	101,1	110,4	113,3	116,7	100,0			113,6	115,4

Year	B	D	E	F	FIN	IRL	I	L	NL	P	UK	DK	GR	A	S
1.5.1996	111,0	106,6	117,7	117,3		105,5	113,6	108,8	113,6	118,6	100,0			111,9	120,7
1.11.1996	103,9	100,0	109,1	108,1		102,9	108,8	101,9	107,6	113,0	103,3			105,1	115,7
1.5.1997	104,4	100,0	108,0	111,5		107,1	109,7	100,1	107,5	104,5	112,1			110,3	115,9
1.11.1997	103,9	100,0	107,9	111,2		110,4	111,0	100,1	106,4	104,4	110,2			102,6	112,4
1.5.1998	105,4	102,8	108,7	112,7		108,2	100,0	101,5	107,9	105,8	111,3			104,5	116,3
1.11.1998	102,2	101,1	104,2	103,2		No data	104,2	101,9	102,6	108,0	103,9			103,0	100,0
1.5.1999	103,4	101,1	102,9	102,9	108,4	100,0	102,9	101,8	102,8	108,7	108,5	102,4	112,2	103,1	101,7
1.11.1999	102,3	100,0	102,4	102,1	107,2	100,7	103,1	100,7	101,8	106,6	110,1	101,3	105,3	102,0	102,6
1.5.2000	101,4	100,0	101,5	102,1	107,1	101,8	102,9	100,7	102,5	107,0	100,3	104,3	104,3	102,0	108,2
1.11.2000	101,7	100,0	103,0	102,8	107,1	100,3	103,3	101,0	102,7	107,2	108,3	100,4	103,3	102,0	102,6

1.4.2. CAUSES AND SCOPE OF PARALLEL TRADING IN MERCEDES-BENZ PASSENGER CARS IN EUROPE, IN PARTICULAR IN GERMANY, BELGIUM AND SPAIN

1.4.2.1. ***Germany***

(35) Documents found during the investigations reveal that, in 1995 and 1996, a substantial number of new and new-value vehicles were sold by German Mercedes branches either directly or through German commercial agents to independent dealers not belonging to the official sales network and, in some cases, to final consumers, particularly from Belgium and Spain.

(36) In all, [...] new Mercedes cars were supplied from Germany to Belgium in 1992, [...] in 1993, [...] in 1994, [...] in 1995 [20] and [...] in the first six months of 1996 [21]. These vehicles were not delivered to Belgium via the official importer MBBel, but were sold by German branches/commercial agents to Belgian final consumers or parallel dealers. This high level of parallel imports, which MBBel openly denounced in 1996 [22], is attributed by MBBel and the Belgian dealers to the following circumstances.

(37) In MBBel's opinion, as expressed on 17 October 1995, the Mercedes-Benz price strategy in Belgium, with an index of 103 compared with the German index of 100, was responsible for the high level of parallel trading. It claimed that this was resulting in a price difference of some 7 % above the parallel market in Belgium [23]. Price differences had already been regarded previously as a cause of parallel trading: as early as 1992 MBBel pointed out to Mercedes-Benz that the sales planned by Mercedes-Benz for the Belgian market could not be achieved unless they succeeded in clearly suppressing the grey market by adjusting their prices. MBBel assumed that 'this could be achieved by greater price harmonisation, with a difference of only 2 % compared to domestic prices for all makes including those with special equipment' [24]. Apart from price differences, other reasons for the widespread parallel trading in new vehicles, particularly of class W 210 (new E-class), are mentioned in the extensive correspondence between MBBel and Mercedes-Benz, with MBBel speaking of 'an invasion of W 210s from Germany'. In MBBel's opinion, the reason for this was that various Mercedes branches could not sell their W 124 (old E-class) models and were offering them as a package together with new W 210s at a discount of 30 % on the W 124 and 10 % on the W 210. In addition, Belgian grey market dealers had a stock of W 210s and could deliver custom-made new vehicles within six to eight weeks, whereas the delivery times of the official Belgian distributors were more than

(20) File, pp. 2832, 2569; grey market Mercedes-Benz registrations (only new cars).
(21) File, p. 2663: Mercedes cars registered as 'new cars' and not imported by MBBel.
(22) File, p. 3031: 'the ugly monster came back to life and represents 15 % of the Belgian market'.
(23) File, pp. 3000 et seq.: letter from MBBel to Mercedes-Benz AG of 17 October 1995.
(24) File, p. 529; note from department VP/VEV1 to Mr Rau of Mercedes-Benz in preparation for the grey-market talks with MBBel on 26 June 1992.

18 weeks [25]. By April 1996, MBBel considered that the W 210 situation had worsened still further: official Belgian distributors were offering delivery times of six months for this vehicle, while the parallel market dealers could deliver vehicles with any equipment within four weeks. They felt that explained why a total of 411 W 210s had been supplied by German distributors to Belgium between June 1995 and the end of March 1996 [26].

(38) The Belgian Mercedes Dealers Association also wished to complain about the 'harmful and parasitic effects of the parallel market which have been experienced in Belgium for years'. In the draft of the letter which MBBel forwarded to Mercedes-Benz on 25 January 1993, they stressed their disappointment at the fact that, of the 2 000 vehicles that had again been delivered to Belgium 1992, 800 had been supplied by German distributors. Mercedes-Benz was asked to verify whether measures had been taken within the German distribution organisation to ensure the survival of the Belgian dealer network. The Belgian Dealers Association wrote several letters to MBBel complaining of the large number of grey imports and of the fact that the delivery times of Mercedes dealers would have to be 12 months because of small allocations, a fact which benefited the 'hunters of the grey market'. These delivery times, they said, were much longer than in Germany. Moreover, parallel importers could already 'boast' a new model (the Mercedes 300 S D), which not even all Belgian dealers had received [27].

(39) It is to be assumed that these circumstances are also the reason why German customers were purchasing new vehicles and immediately reselling them in Belgium. That this was happening is apparent from a large number of letters written in 1995 and 1996 about vehicles sold in Germany and registered in Belgium [28]. In some cases, customers would only resell one vehicle, while in others, they would repeatedly resell vehicles in Belgium [29]. However, some of the vehicles in question were demonstration cars. Occasional sales to final consumers were also identified in this research [30].

(40) German Mercedes branches also sold new vehicles to Spanish final consumers. According to MBE, this happened in 1994 in 'enough cases' with the knowledge of Mercedes-Benz and on terms which the Spanish distributors could not offer [31]. New vehicles were supplied directly to Spanish final consumers even more recently: in 1996, for example, an E 50 AMG was supplied by the Munich branch [32] and Mercedes E 300 D vehicles by Mercedes-Benz agent Hirschvogel [33].

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[25] File, pp. 3000 et seq.: letter from MBBel to Mercedes-Benz AG of 17 October 1995.

[26] File, p. 3032: fax from MBBel to Mercedes-Benz AG of 26 April 1996.

[27] File, pp. 2471 et seq.: two undated letters from the Amicale des Concessionnaires Mercedes-Benz.

[28] File, p. 2899: memo from MBVD/VPP to VP/M1 VP of 10 November 1995 concerning 'Belgium — W 210-deliveries in October 1995'; p. 2901: memo from LdB to Verkaufsst. concerning 'Form — vehicle deliveries, country of delivery: Belgium'; p. 2902: fax from Mercedes-Benz in Nuremburg to Region Süd VP of 16 November 1995 concerning: 'Vehicle deliveries to Belgium in October 1995'; p. 2903: fax from Mercedes-Benz Region Süd to Mercedes-Benz of 17 November 1995 concerning deliveries to Belgium in October 1995; p. 2904: memo from the Munich Branch to Region Süd concerning vehicle deliveries to Belgium in October 1995; p. 2905: letter from Karl Ahrendt, Mercedes-Benz agent, to Mercedes-Benz Region Nord of 22 November 1995; p. 2906: memo from the Bremen Branch of 27 November 1995 concerning vehicle deliveries to Belgium in October 1995, in which it was confirmed that a vehicle had been sold to Amsterdam in the Netherlands; p. 2907: memo from the Berlin branch and MBVD/Region Ost of 27 November 1995 concerning W 210 deliveries to Belgium; for further similar letters see pp. 2909, 2910, 2913, 2914, 2915, 2916, 2919, for 1996: memo from the Augsburg Branch to Region Süd of 29 November 1996 concerning deliveries to Belgium; p. 2930: letter from the firm Anton Hirschvogel, Mercedes-Benz agent, to Mercedes-Benz AG, Vertriebsorganisation Region Süd of 1 April 1996 concerning vehicle deliveries to Belgium; p. 2954: memo from the Regensburg Branch to Region Süd of 12 March 1996 on vehicle deliveries to Belgium in January 1996.

[29] See the vehicles which were initially sold to the firm Südfleisch but which were then registered in Belgium: file, p. 2918: one vehicle, p. 2931: seven vehicles; p. 2950: four vehicles, p. 2951 five vehicles; pp. 2961 et seq.: nine vehicles sold in January 1996 by Mercedes agent Auto-Henne in Munich to Südfleisch, registered for the first time in May 1996 and which, in May 1996, also appeared in Belgium; pp. 2963 et seq.: 37 vehicles supplied by the Munich branch to Südfleisch and which were also delivered to Belgium in May; p. 2955: Attinger, 11 vehicles delivered on to Belgium.

[30] File, p. 2976: fax from Region West to Mercedes-Benz AG of 10 November 1995, in which the sale of a vehicle to a Belgium customer was confirmed; p. 2956: Memo from Region Süd on W210 vehicle deliveries to Belgium in January/February 1996: four vehicles were delivered to final consumers in Belgium.

[31] File, p. 1316: fax from MBE to Mercedes-Benz AG of 19 May 1994.

[32] File, p. 1239: fax from VP/M Department to MBVD/VPP Department in Mercedes-Benz AG of 9 October 1996.

[33] File, p. 1255: invoice from the firm Anton Hirschvogel, Mercedes-Benz agent, to the Spanish customer in respect of a new MB E 300 D vehicle; pp. 1257 et seq.: note from Mercedes-Benz AG, Department VP/M2, fax from MBE to Mercedes-Benz AG, invoice of the firm Anton Hirschvogel.

(41) In a letter dated 2 September 1996 to the Spanish dealer Itra SL ([34]), MBE expressed regret that the Mercedes-Benz Berlin branch was advertising vehicles in Spain in the newspaper El País, the largest-circulation Spanish daily, and had even set up an 'export service hotline' on which Spanish could be spoken.

(42) In general, MBE assumes that 85 % of parallel vehicle imports into Spain come from Germany ([35]). For imports of new vehicles to Spain (see recital 52), this assumption would mean that approximately [...] new vehicles from Germany were subject to parallel import into Spain in 1993, approximately [...] in 1994, approximately [...] in 1995 and approximately [...] in the first 10 months of 1996.

1.4.2.2. ***Belgium***

(43) According to the available documents, only a few vehicles have been exported to Germany. In 1996, for example, a Mercedes 290 TD estate car sold from Belgium to Germany turned up at a parallel dealer's premises in Sörup ([36]). Two Mercedes 190 D cars were exported from Belgium to Germany as early as in 1993 ([37]) DaimlerChrysler ([38]) does not rule out the possibility that even more vehicles were supplied to Germany.

(44) Vehicles have also been supplied from Belgium to Spain. For example, according to its own data, the Garage Etoile in Wavre supplied at least 10 vehicles to Spanish final consumers in the first seven months of 1995 ([39]).

(45) As described, a considerable number of new vehicles have been imported into Belgium. In this connection, MBBel has drawn up monthly lists indicating the vehicles subject to parallel import with the name and address of the owner, the type, chassis number and country of origin ([40]). A separate list indicates the German distributor via which a vehicle was delivered to Belgium or, in the case of vehicles coming from other countries, the country in question. In 1995, a total of 1 314 vehicles were delivered, of which 599 came from Germany, 327 from Italy, 119 from the Netherlands, 105 from France, 97 from Luxembourg, six from Spain and two each from Austria and Sweden ([41]). In the first six months of 1996, a total of 1 003 new vehicles was imported into Belgium, of which 827 from Germany, 120 from Italy, 83 from the Netherlands, 102 from France, 45 from Luxembourg, two from Spain and one vehicle from Austria ([42]). DaimlerChrysler ([43]) confirms these figures and has verified in an impressive manner the extent of activity of some 45 unauthorised resellers operating in Belgium and dealing in new Mercedes-Benz vehicles.

(46) It is apparent from the available documents that new vehicles were constantly being supplied to Belgium from the Netherlands. In the first six months of 1996, there were [...] cases of this happening, with [...] in 1995, [...] in 1994, [...] in 1993 and [...] in 1992 ([44]).

(47) The reason for this was that prices in Belgium were 3 % to 6 % higher than in the Netherlands ([45]).

1.4.2.3. ***Spain***

(48) MBE has listed all vehicles exported abroad in 1994 and 1995, and for 1995 there is even data concerning exports reported by dealers (78 vehicles) and exports not reported (67 vehicles). According to the list 145 (243) vehicles were exported in 1995 (in 1994), of which 51 (169) went to Portugal. In 1995, 76 vehicles were also exported to the Netherlands, 10 to Austria and two to France ([46]).

(49) After the checks had started on 11 December 1996, the Spanish Mercedes dealer Louzao MBE stated in a fax of 11 December 1996 ([47]) that he had sold a total of eight vehicles to Portuguese final consumers. The Spanish Mercedes dealer Garza Automoción likewise reported to MBE in a fax of 11 December 1996 that four vehicles had been sold to Portugal ([48]). At the end of the letter, the dealer states that Mercedes-Benz does nothing to impede such transactions.

([34]) File, p. 1512.
([35]) File, p. 1316: fax from MBE to Mercedes-Benz AG of 19 May 1994.
([36]) File, p. 2128: Mercedes-Benz AG, Vertriebsorganisation Deutschland, Gebietsleitung Vertrieb PKW, Hamburg Nord to MBVD/VP of 6 November 1996.
([37]) File, p. 1027: fax from Mercedes-Benz to MBBel of 5 May 1993.
([38]) Point 103 of the reply to the statement of objections.
([39]) File, pp. 997 and 2879: letter from Garage de l'Etoile in Wavre to MBBel of 11 July 1995, in which it is confirmed that the transactions in question involved final consumers; p. 2878: fax from MBBel to Mercedes-Benz AG of 12 July 1995; see also p. 981: fax from MBE to Mercedes-Benz AG, forwarded to MBBel, in which enquiries are made concerning a vehicle; p. 1222: memo from MBE to Mercedes-Benz AG of 28 November 1995.
([40]) For example, file, pp. 2735 et seq.
([41]) File, p. 2569: grey market Mercedes-Benz registrations (only new cars) 1 January to 31 December 1995, Car sales division of Qui à Qui M.B.Bel Woluwé.
([42]) File, p. 2662: grey market Mercedes-Benz registrations (only new cars) 1 January to 30 June 1996.
([43]) Point 105 of the reply to the statement of objections.
([44]) File, p. 2569: grey market Mercedes-Benz registrations (only new cars) 1 January to 31 December 1995.
([45]) File, pp. 3031 et seq.: fax from MBBel to Mercedes-Benz AG on the 'grey market'.
([46]) File, p. 1447: memo from MBE on exports in 1994 and 1995; p. 1159: fax from MBE to MBP of 23 May 1996.
([47]) File, p. 1618.
([48]) File, p. 1814.

(50) In 1995, a total of six new vehicles were further supplied from Spain to Belgium, with 13 in 1994, and one in both 1993 and 1992.

(51) To explain the considerable scale of parallel imports of vehicles into Spain, MBE [49] recorded the registration figures for the Cadiz registration district for the first nine months of 1996. The following were registered in Cadiz:

Total of new Mercedes car registrations: [...]

of which those sold by Spanish Mercedes dealer: [...]

parallel imports of new Mercedes cars: [...]

(52) According to documents found during the investigations, the following numbers of new Mercedes vehicles were sold in Spain from January 1993 to October 1996 [50]:

Year	New cars sold by MBE	Parallel imports of new cars
1993	[...]	[...]
1994	[...]	[...]
1995	[...]	[...]
1.1996-10.1996	[...]	[...]

(53) MBE generally assumes that 85 % of the vehicles subject to parallel import into Spain come from Germany [51]. The documents do not indicate from which countries the remaining vehicles were supplied.

1.5. *TERMS RELEVANT TO CROSS-BORDER SALES OF MOTOR VEHICLES*

(54) This section examines the terms used in the notices to the individual distributors or to the entire distribution network of a Member State by the Mercedes-Benz group to denote the sale of vehicles to customers abroad, i.e. resellers and final consumers alike. Documents found during the investigations reveal three different terms that are used in connection with such business: grey market, parallel market and deliveries. For sales to foreign customers from a country within the European Economic Area (EEA), the term *Komm-Kunden* [52] is also used.

1.5.1. THE TERM 'GREY MARKET'

(55) The term 'grey market activities' was defined in a presentation given by Mr E. Herzog at a meeting of the passenger car sector on 17 February 1989 [53]. Mr Herzog observed that, 'As we understand it, the defining factor in grey market activities is that independent sellers (and I deliberately use the term "seller" rather than "trader", as they may very well be private individuals: many a diplomat and many a small supplier too has — perhaps during an economic downturn — used this method to earn himself a tidy little sum on the side), as I was saying, that independent sellers sell vehicles abroad outside the manufacturer's official dealer network in order to make a profit. The market segment served by such sellers is the "grey market".' [54]. He then went on to explain why the grey market existed (differences in prices and availability) and how big it was (around 30 000 units, including 14 000 in Italy and 8 000 in Japan). He also alluded to the fact that, on the suppliers' side, 'the VOI [55] is clearly dominant with, as it happens, also around 22 000 units per year'. Finally, making a general assessment of sales policy, Mr Herzog stressed that, 'a strict ban on grey market transactions of any kind, with the threat and application of extensive penalties, seems to me neither practicable nor useful. For one thing, each case would have to be proven beyond doubt, which would generally require an effort on the scale of a criminal investigation. Second, particularly bearing mind our present situation regarding capacity, we should be concentrating instead on a Europe-wide fine-tuning exercise (price harmonisation). One situation we can't do very much about is where, unbeknown to our organisation, individuals are actually "front men" making intermediate purchases. In such cases we are generally required to deliver. We can refuse only if we are able to obtain evidence — usually after arduous research — that the buyer is going to sell the vehicle on. Here, data-protection rules now impose tougher constraints on us than in the past'.

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[49] File, p. 1409: fax from MBE to Mercedes-Benz AG of 29 October 1996.

[50] File, p. 1717: overview for parallel market.

[51] File, p. 1316: fax from MBE to Mercedes-Benz AG of 19 May 1994.

[52] File, p. 2318: memo from the DBAG Legal Department and PR/P of 8 August 1995.

[53] File, pp. 2105 et seq.: presentation entitled '*Zum Verständnis und zur vertriebspolitischen Bewertung von Graumarktaktivitäten* (Understanding grey-market activities — a sales policy perspective').

[54] File, p. 2106.

[55] Commission note: VOI = *Vertriebsorganisation Inland* (domestic sales organisation).

(56) An internal letter from the VP/VEV1 department ([56]) to Mr Rau mentions that sales to final consumers were also discussed at the meeting on the grey market in Belgium on 26 June 1992. Among other things, it was established at the meeting that MBNL ([57]) had sold vehicles to final consumers who were Dutch nationals living in Belgium. It was also established that Meris, a Mercedes-Benz dealer in Luxembourg, had sold vehicles to frontier workers employed in Luxembourg, European officials with two places of residence and rental firms with registered offices in Luxembourg and Brussels ([58]).

(57) In a internal memo dated 16 January 1996 ([59]), Dr Schütz of Mercedes-Benz's legal department wrote that, on looking through the files of VP/M2, he was '(simply) struck by the fact that the term "grey market" is used somewhat vaguely or that no clear distinction is drawn between the activities of independent resellers and those of final consumers'. However, at the end of his memo, he stressed that, 'in the countries of supply, particularly Italy, the relevant circulars and instructions do carefully distinguish between independent resellers and final consumers'.

(58) The Commission believes that Mercedes-Benz's failure to distinguish clearly on all occasions between sales to resellers and to final consumers is also evident from the following facts. Two virtually identical handwritten memos ([60]) from Mr Stolberg of the VP/EM1 department of Mercedes-Benz to MBBel distinguish between grey market transactions and other transactions with final consumers. The first memo, dated 14 May 1995, calls on MBBel to check 'whether the parallel import of a vehicle into Spain may constitute a "grey market transaction" by a Mercedes-Benz dealer in Wavre'. In the second memo, dated 3 July 1995, MBBel is asked to check information given in an annex to determine 'whether these were purely tourist transactions or in fact "grey market re-exports". This might enable you to close down a previously undiscovered grey-market channel'. In both memos, the choice of words suggests that a distinction is being made between 'grey market transactions' and other transactions, with final consumers. Yet a letter from MBBel to Mr Roth of Mercedes-Benz dated 19 July 1995 concerning the sale of a second-hand Mercedes in Germany to a Rotary Club member in Belgium, i.e. a transaction with a final consumer, describes that deal as 'a grey import' ([61]).

(59) To sum up, it can be established that the term 'grey market' was sometimes used at Mercedes-Benz to denote sales to unauthorised resellers and sometimes also used to denote cross-border sales to final consumers. In any event, to the extent that the term was used in the context that is relevant here, it must be concluded from the circumstances that Mercedes also meant the term to cover sales to final consumers.

(60) Regarding the term 'grey market', DaimlerChrysler admits that there was no consistent terminology within the Mercedes-Benz organisation and no binding definition of the concept, which could have a wider or narrow meaning in individual documents. The uncertainty over the definition was compounded by the use of different languages. The meaning of the term in each individual case could be determined only from the overall context of the documents and in the light of past events. Thus, the term 'grey market' was used to describe sales to resellers or in classifying cross-border transactions, where it was not known whether they were admissible ('white') or inadmissible ('black') ([62]). Moreover, the term was — most importantly — not used in the countries of supply, but only in the countries of receipt, i.e. where it was not known whether the transaction was admissible or not. From a competition angle, the important thing was what terms were used in the country of supply.

(61) The Commission cannot agree with this last assertion. In a letter dated 14 September 1994 ([63]), Mercedes-Benz wrote that, 'Naturally we are ready and willing to investigate any further indications of professional grey market transactions', i.e. the term 'grey market' is used here in the country of supply to describe sales to independent resellers. By contrast, in the fax from Mercedes-Benz to MBE dated 29 July 1994 ([64]), the term 'grey market import' is used to describe two vehicle transactions with the footballer R. The first concerns a Mercedes 600 SEC, which was sold to him by Mercedes

([56]) VP/VEV denotes the sales companies in Europe within the Directorate for Sales and operational marketing. This department and its counterparts were responsible for directing sales; see Daimler-Benz AG's reply of 10 November 1998 to Question 1.5.
([57]) MBNL = Mercedes-Benz Nederland BV.
([58]) File, pp. 528 et seq., 531: documents for meeting with MBBel on the grey market on 26 June 1992.
([59]) Memo from the legal department dated 16 January 1996 and signed by Dr Schütz, file, p. 2309.
([60]) File, p. 3103: handwritten notes by Mr Stolberg on a translation of a letter from MBE to MBD dated 14 May 1995, forwarded to MBBel. Mr Stolberg forwarded this letter to Mr Uyttenhoven of MBBel. See also p. 3107 of the file: handwritten note from Mr Stolberg in reply to an internal letter addressed to him by Mr Roth of VP/EM1 on 3 July 1995, which Stolberg also forwarded to Mr Uyttenhoven of MBBel.
([61]) File, p. 3098: fax from MBBel to Mr Roth of the VP/M1 department (Northern European Marketing) dated 19 July 1995 and headed 'Grey import — H. Ludo Reynaert (Rotary)'.
([62]) Points 43 to 47.
([63]) Annex to point 48/2 of the reply to the statement of objections and file, pp. 1301 et seq.
([64]) Annex to point 48/2 of the reply to the statement of objections and file, p. 1305.

in a company deal, while the second concerns a second-hand SL 600 sold on to the footballer by a German customer who had used it at his second residence in Spain. These documents confirm that the term 'grey market' was also used by Mercedes-Benz itself in the countries of supply (the Mercedes 600 SEC was sold in Germany to a Spanish customer) to denote cross-border transactions with final consumers.

1.5.2. THE TERM 'DELIVERIES'

(62) In many documents cross-border sales of vehicles are described as *Einlieferungen* (deliveries) or *Fahrzeugeinlieferungen* (vehicle deliveries) [65] to the country of import. This term is used in subsequent inquiries into the whereabouts of vehicles which were delivered in Germany or in other Member States to foreign final consumers, unauthorised resellers or domestic final consumers who sold them on abroad [66]. The general report on 'Vehicle deliveries to Belgium — Situation at September 1995' [67] indicates — for each individual German region/branch — how many new vehicles and demonstration vehicles were delivered to *Komm-Kunde* or the 'grey market' in the first nine months of 1995. The same terminology was used in a memo from the Southern Region VP to the MBVD [68]/VP department of Mercedes-Benz dated 23 April 1996. The memo — headed 'W 210 vehicle deliveries to Belgium in January and February 1996' — points out that two thirds of vehicles delivered from the Southern Region to Belgium are sold on by customers and around one third are former demonstration vehicles. The memo states further that, 'In total only four vehicles were sold direct to *Komm-Kunde* in Belgium' [69].

(63) It can therefore be established that the term 'delivery' covers all kinds of cross-border transactions, including sales to foreign final consumers from an EEA country, who are known as *Komm-Kunde* (see recital 68).

(64) In its reply to the statement of objections [70], DaimlerChrysler states that this term was used indiscriminately for all forms of cross-border trade.

1.5.3. PARALLEL IMPORTS

(65) The term 'parallel imports' is used for example in an information memo on the Commission's proceedings in Case IV/35.733 — *VW*, in which one of the points at issue was that Volkswagen and Audi had forbidden their Italian dealers from selling new vehicles to final consumers from other Member States. The term was also used in a letter from MBBel to MBF [71] in connection with the sale of vehicles by French dealers to Belgian customers [72].

(66) Thus, the term 'parallel imports' was used by firms in the Mercedes-Benz group at least partly to describe cross-border transactions with final consumers.

(67) In its reply to the statement of objections [73], DaimlerChrysler states that this term was used indiscriminately for all forms of cross-border trade.

1.5.4. *KOMM-KUNDEN*

(68) An internal note dated 8 August 1995 from the legal department of Daimler-Benz to the PR/P department [74] suggests a text for an 'official reply' stating that *Komm-Kunde* are foreign customers from EEA countries who turn to a dealer on their own initiative. A letter from Mercedes-Benz to MBNL dated 23 October 1992 [75] and circular No 76/92 dated 9 November 1992 [76] show that the term *'Komm-Kunde'* is used in connection with cross-border sales to final consumers from another Member State of the Community.

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[65] File, p. 3107: internal letter from MBD VP/EM1 dated 3 July 1995 concerning deliveries of vehicles to non-European countries; p. 2968: fax from MBVD/VP to Mercedes-Benz AG Western Region dated 30 November 1995 concerning deliveries to Belgium; p. 2929: letter dated 29 March 1996 from Mercedes-Benz AG, Nürnberg Area Management to the firm Anton Hirschvogel concerning its deliveries to Belgium in February 1996; p. 2930: memo dated 29 March 1996 from GBL-VP to VP concerning vehicle deliveries to Belgium in February 1996; memos from Freiburg branch to Southern Region/VP dated 18 March 1996 and 27 March 1996 concerning vehicle deliveries to Belgium; p. 2948: Memo dated 1 April 1996 from Würzburg branch to Ms Ohlert, Southern Region/VP concerning reports of vehicle deliveries to Belgium; p. 2951: Memo from Munich branch to Southern Region VP concerning vehicle deliveries to Belgium in January 1996; p. 2961: fax from Mercedes-Benz AG's principal agent in Munich, Auto-Henne, to Southern Region dated 19 July 1996 concerning vehicle deliveries to Belgium in May 1996.

[66] File, p. 2956: memo dated 23 April 1996 from Southern Region to Mercedes-Benz AG, MBVD/VP department.

[67] File, p. 434: vehicle deliveries to Belgium — September 1995.

[68] MBVD = Mercedes-Benz Vertriebsorganisation Deutschland (sales organisation in Germany); see reply from Daimler-Benz AG dated 10 November 1998 to question 1.5.

[69] File, pp. 2982 et seq.: memo dated 15 March 1996 from MBVD/RNP department, Mercedes-Benz AG to all VLPs via branches and GBL-P of Northern Region.

[70] Point 48.

[71] MBF = Mercedes-Benz France.

[72] File, p. 3052: letter from MBBel to Mercedes-Benz France dated 21 June 1996.

[73] Point 48.

[74] File, p. 2318: memo from Daimler-Benz AG's legal department to Dr. Riecks, PR/P department dated 8 August 1995.

[75] File, pp. 2314 and 2315: letter from Mercedes Benz to MBNL dated 23 October 1992.

[76] File, pp. 2312 and 2313.

1.5.5. SUMMARY

(69) It can therefore be established that, within the Mercedes-Benz group, the terms 'deliveries' and 'parallel imports' were used to describe sales of vehicles to all kinds of foreign customers, i.e. sales to unauthorised resellers not belonging to the distribution network, but also sales to final consumers. The term 'grey market' also had this wide meaning. By contrast, the term '*Komm-Kunde*' was clearly used only in connection with sales of vehicles to final consumers from another Member State of the Community or the EEA established outside the contract territory.

1.6. *THE ANTI-COMPETITIVE MEASURES IN DETAIL*

1.6.1. EXPORT RESTRICTIONS (GERMANY)

1.6.1.1. ***Instruction to German distributors not to sell to customers outside their contract territory***

(70) It is apparent from documents in the Commission's possession that Mercedes-Benz has for a long time been taking steps to restrict the parallel trade.

(71) A memo dated 28 October 1985 concerning 'right-hand drive car sales in Germany' [77], sent by the VOI/VNM department in reply to a note from the legal department, states that:

'Now that we are not allowed to stop our contracting partners from arranging the sale of right-hand drive vehicles to British *Komm-Kunden*, we should also refrain from imposing any official ban on such deals on our branches. However, we should make it clear to both branches and contracting partners that they are entitled, but not obliged, to deal in or sell right-hand drive vehicles. We should also make it clear that, ultimately, it is in the interests of every branch and every contracting partner to use their available quotas exclusively to serve customers and interested parties from their own territory. Special emphasis should be placed here on the following points:

— quality of service,

— workshop capacity, and

— market penetration.

If the legal department has no objections, these instructions should be given in writing. Otherwise the information should be passed on at the forthcoming meetings for branch managers, sales managers and district managers.

Klein Dr Fahr'

(72) According to the minutes of an MBVD [78] department meeting on 28 July 1995 [79] under the heading 'Transactions involving demonstration vehicles', it was established that 'clear rules exist [for transactions involving demonstration vehicles] including the requirement that vehicles may be sold before the end of their useful life only in exceptional cases and then only in the firm's own territory. This rule must be observed more strictly. In exceptional cases the rules for new vehicle transactions apply.' These minutes prove that, even before 28 July 1995, there were clear rules for sales in Germany under which demonstration vehicles could be sold only after the end of their useful life and that, in exceptional cases, new vehicles too could only be sold in the firm's own contract territory.

(73) The following facts confirm that, at least in individual cases, Mercedes-Benz had directly impeded the sale of new vehicles to final consumers from other Member States already at an earlier date: in a fax from Mercedes-Benz, Western Region, dated 10 November 1995, the MBVD/VP department of Mercedes-Benz was informed of the sale of a vehicle by Hess, the Mercedes-Benz agent in Trier, to a Belgian *Komm-Kunde*, i.e. a final consumer [80]. The fax includes the following passage: 'Hess is requested by the area management to refrain from such actions in future'.

(74) Another letter which is clearly directed against the sale of new vehicles to foreign customers is that from Mercedes-Benz, Vertriebsorganisation Deutschland, Western Region, to Hess (the same agent in Trier) sent on 17 November 1995 [81]. The letter reads as follows:

'Transactions with Belgium

Dears Sirs,

We have been informed by central office that in September of this year your company supplied an E 300 D (W 210) vehicle to a Belgian national resident in Belgium.

[77] File, p. 616.

[78] MBVD = Mercedes-Benz Vertriebsorganisation Deutschland (Mercedes-Benz Sales Organisation Germany).

[79] File, p. 377: minutes of meeting of 28 July 1995 — Mercedes-Benz AG, MBVD/VPP department.

[80] File, p. 2976: fax from Mercedes-Benz AG, MBVD/VP department to Mercedes-Benz AG, Western Region, dated 10 November 1995.

[81] File, p. 2909.

The order number concerned was 05 231 05231.

We strongly disagree with your view, as already expressed by Mr Premm on the telephone, that this was a transaction with a *Komm-Kunde*.

The term *Komm-Kunde* is clearly defined for the purposes of MBVD, but not for other countries. As in the past, the tourist rules should be applied for new car purchases involving persons from other countries.

We urgently request that you follow this procedure.

We are particularly surprised that you should act in this way with a W 210, as you have always argued that you had too few vehicles for the customers in your territory.

Yours faithfully,

Mercedes-Benz Aktiengesellschaft

Western Region — Mannheim Office

Niedorff Scheele'

(75) The instruction contained in this letter to apply the 'tourist rules' instead of the *Komm-Kunden* rules laid down for sales to EU customers has the effect of raising a serious practical obstacle to the sale of vehicles to EU customers. A 1985 circular from Mercedes-Benz to the entire German sales organisation [82] states that a tourist must submit the order for a new car in person and pick up the new car in person. Furthermore, in such cases, the agent or branch carrying out the sale must pay a customer service commission of 3 % [83]. By contrast, EU customers are covered by the much more lenient *Komm-Kunden* arrangements (see recital 68), which allow them to order a vehicle via an agent who has written authorisation and to have it picked up by that agent. Moreover, in this case the agent or branch carrying out the sale need not pay any customer service commission when the vehicle is brought into the contract territory of another dealer within six months of the sale.

(76) In its reply to the statement of objections [84], DaimlerChrysler admitted that the instruction to use the tourist rules rather than the *Komm-Kunde* rules for the sale of vehicles to final consumers from other Member States of the Community was inappropriate.

(77) In a fax from Mercedes-Benz, Western Region, dated 24 November 1995, MBVD/VP was told with respect to another new car sale by Hess to a Belgian: 'This case clearly involves inappropriate behaviour on the part of Hess, the agent in Trier. The vehicle was delivered direct to a Belgian. You will find attached a letter from Western Region to the sales manager of Hess, clearly and unambiguously reminding his company once again of the rules' [85]. The annex was not found during the investigations. A similar warning letter from Western Region to Hess dated 17 November 1995 is mentioned at recital 74, although it concerns a different transaction involving a Belgian customer.

(78) On 6 February 1996 Mercedes-Benz proceeded to urge all German distributors without exception to refrain from selling outside their contract territory. In a memo from Mercedes-Benz's MBVD/VP department, written by Mr Panka and Dr Fahr on 6 February 1996 and addressed to heads of branches, owners/managing directors, agents and principal agents, the entire German distribution network was informed of the following [86]:

'Dear Sir/Madam,

Since its introduction on the market, demand for the W 210 series has been high and stable. In 1995 we received 390 orders for the new E-class per working day. This year we have started well — with 326 orders per working day.

The worldwide picture is similar. We shall therefore be suffering from a clear shortfall in production, particularly in the first half of 1996, and there may be considerable problems with delivery times.

In these circumstances we shall have no sympathy for retail firms which, in selling their allocation of the W 210 series, fail to concentrate on their own territory and seek to attract customers not through the service they provide but by engaging in competition on prices and conditions.

We would therefore ask you, in your day-to-day transactions, to consider the prices laid down in the target agreements for 1996 as the mandatory basis for your decisions in individual cases.

(82) This is summarised in Daimler-Benz AG circular No 52/85 of 12 September 1985, which came into force from 1 July 1985; see file, pp. 582 et seq.
(83) Regarding the amount of the commission, see file, p. 671.
(84) Point 62.
(85) File, p. 2911; see also p. 2966.
(86) File, p. 395 et seq.

We are convinced that, by adhering strictly to this policy, we can effectively combat internal competition not only in the W 210, but also in other series. We therefore count on your unconditional support.

With respect to the W 210 series, we would also like to draw your attention to the notable increase in reselling activities. Already last year we detected grey-market exports, particularly bound for Belgium and Turkey, which caused appreciable problems for our sales organisation there, especially as they have very limited quotas of vehicles in the W 210 series. The situation has not changed this year. We therefore ask you to do your utmost to put a complete stop to reselling transactions, particularly involving the W 210 series. In the event of any clear breaches of this ban on supplying vehicles to resellers, we reserve the right to reduce the W 210 quotas of the retail firms involved by the number of units that are delivered abroad via resellers which could have been recognised as such had the firms properly discharged their duty of care.

Nothing would please us more than to see all firms receive their full production allocations. But we shall not hesitate to withhold vehicles in the W 210 series, should we discover that an allocation is not warranted by the absorption capacity of a specific territory. It is entirely up to you to prevent this happening.

Yours faithfully,

Mercedes Benz Aktiengesellschaft

Panka Dr Fahr'

(79) DaimlerChrysler points out that the first five paragraphs of this memo, which are directed solely at the German sales organisation, relate only to internal German competition and that only the sixth paragraph relates to the activities of resellers, inter alia, in Belgium. It claims that the instruction in the last paragraph to stop such sales and the threat to withhold vehicles in the W 210 series when production allocations are not warranted by the absorption capacity of individual areas, relate to the activities of resellers and cannot therefore be the subject of an objection [87].

(80) With regard to DaimlerChrysler's claims that the text in the sixth paragraph ('With respect to ... duty of care.') relates to transactions with resellers, the Commission does not contradict this (see paragraph 82, fourth indent of the statement of objections).

(81) In other respects, however, the Commission cannot agree with DaimlerChrysler's interpretation. The second paragraph of the memo refers to 'worldwide' demand for the W 210 and not to sales trends in Germany. The third paragraph follows on from this statement ('In these circumstances we shall have no sympathy ...') and calls on distribution partners in Germany to concentrate on their own areas and not to entice customers from outside their contract territory by offering more favourable conditions. The fourth paragraph too refers to the fact that the target agreements [88], i.e. agreements on the vehicles to be marketed by branches in their own territory, should serve as a reference for day-to-day transactions. As stated in the fifth paragraph, this would make it possible to 'combat [effectively] internal competition not only in the W 210, but also in other series'. Thus, in the first five paragraphs of the memo, German distribution partners are referred to their own contract territory. The inevitable consequence of this is that they can also be encouraged to sell vehicles belonging not only to the W 210 series, but also to other series exclusively to customers from their own contract territory, and not to customers from other contract territories in Germany or abroad. The document of 26 February 1996 cited in recital 84 confirms this.

(82) The seventh paragraph of the memo cannot in any way refer solely to the previous, sixth paragraph criticising transactions with resellers, which has not prompted any objections from the Commission.

(83) This is because, in the last paragraph, the threat of withholding W 210s is made in general terms for cases where it is found that the absorption capacity of individual territories does not warrant the production allocation of W 210s. In terms of both wording and meaning, this paragraph does not refer solely to the transactions with resellers mentioned in the sixth paragraph, but to all the statements that precede it, i.e. also to paragraphs one to five, which call on distribution partners to concentrate on their own contract territory and to sell their vehicle allocation for all series there. In this respect the memo contains at the very least an instruction to distribution partners to avoid a reduction in deliveries of new vehicles in the W 210 series in their contract territory, i.e. not to sell them to customers who do not reside in or are not established in their contract territory. The document dealt with below, which refers expressly to the memo of 6 February 1996 described in recital 78, confirms the Commission's interpretation.

(87) Point 59 of the reply to the statement of objections.

(88) In reply 2.3 to the Commission's request for information, DaimlerChrysler stated on 10 November 1998 that target agreements existed only in relation to branches. No central targets were imposed on agents, although agents, who are required systematically to exploit their own contractual territory, taking Mercedes-Benz's interests into account, are also included in distribution and production plans.

(84) At the LVP [89] meeting on 26 February 1996, attention was once again drawn to the importance of abiding by the memo of 6 February 1996. Under item 4(c) of the minutes of the meeting (Deliveries to Belgium) the following statement is recorded:

'Mr Bruhn distributed the list of deliveries to Belgium in January 1996 (over 100 W 210s) and spoke about the plan to give MB Bel 200 W 210s to cut delivery times. If the reductions were carried out, the breakdown by region would be determined by MB Bel. Each region would then break the cuts down further by individual branches.

Attention was once again explicitly drawn to the need to comply with the memo from Mr Panka and Dr Fahr.' [90].

(85) As described at recital 63, the term 'delivery' covers all kinds of cross-border sales, including sales to final consumers. All passenger car sales managers (VLPs) and passenger car area managers (GBL-Ps) in the Northern Region — with branches in Bielefeld, Braunschweig, Bremen, Dortmund, Emden, Hamburg, Hannover, Kassel, Kiel and Lübeck — were informed in an annex to a memo dated 15 March 1996 from the MBVD/RNP department (title of annex — 'Grey market registrations (new cars) — Deliveries to Belgium at 2/96') [91] that, once again, a total of 23 vehicles were delivered to Belgium in January and February 1996. The annex goes on to state that:

'Once again we call on you urgently to do everything in your power to prevent such deliveries. If evidence is found that branches in the Northern Region are responsible for any future deliveries, such infringements will be punished accordingly.'

(86) Although the memo was addressed only to branches in the Northern Region, the wording suggests that the aim was not just to prevent branches dealing with Belgium — an internal company matter and hence not a valid reason for objections under restrictive practices law. Instead, the expression 'If ... branches in the Northern Region are responsible' suggests that the ban should also extend to transactions conducted by contracting partners or agents with Belgian customers of any kind, i.e. also with Belgian final consumers.

(87) It is possible for branches to take such action, since they check offers to customers for the purchase of new cars — which must be passed on to them by the contracting partners/agents — and, where appropriate, confirm them by sending the purchaser an order confirmation [92]. The memo also targets these order confirmations by branches, thereby ensuring that branches do not confirm orders from foreign final consumers (known as *Komm-Kunden*) submitted by agents.

(88) This is not contested by DaimlerChrysler in the reply to the statement of objections [93]. DaimlerChrysler claims, however, that the term 'deliveries' used indiscriminately in both documents refers only to sales to resellers and that the memo to branches in the Northern Region relates only to sales to Belgian resellers. These branches are said to have supplied Belgian resellers on a large scale. There was no reason for any measures whatever against final consumers.

(89) The Commission would point out here that, at the LVP meeting on 26 February 1996, reference was made to the memo of 6 February 1996 to the German distribution network (see recital 84). Indeed, 'attention was once again explicitly drawn to the need to comply with [that] memo', which, as pointed out above (recital 81), relates to cross-border transactions of any kind. The message conveyed in the memo of 6 February 1996 was therefore reinforced by the instructions given on 26 February 1996.

(90) The instruction in the memo of 15 March 1996 to 'prevent deliveries' to Belgium also means that all types of transactions with a foreign country were to be stopped. The question of whether or not there were substantive reasons for such an instruction is irrelevant to the interpretation of the content of such a memo, which was addressed to a broad circle of recipients, who were not necessarily familiar with the background. Nor did the memo contain any allusion to that background or explain clearly that deliveries to Belgium only meant sales to independent resellers.

[89] LVP = *Leiter Vertrieb Personenwagen* (passenger car sales managers).
[90] File, p. 3534
[91] File, p. 2982.

[92] File, p. 2954: memo from the Regensburg branch to Southern Region of 12 March 1996 concerning vehicle deliveries to Belgium, last paragraph. See also in this connection the correspondence between Mercedes-Benz and German branches, according to which only branches can determine which customers are supplied with a particular vehicle, of which the order number is known. If Mercedes-Benz were aware of the names of customers, because it had confirmed their orders, such investigations by the branches would be pointless. See also for example the letters from branches (case file pp. 2954, 2955, 2960 et seq., 2963, 2965, 2968, 2980); and internal correspondence between Mercedes-Benz and branches or regions on the identity of vehicle buyers.
[93] Point 60 of the reply to the statement of objections.

(91) The Commission considers that a memo advising against the supply of independent resellers must be clearly and unambiguously worded. Only then can its recipients establish immediately and with the requisite clarity what they must cease to do and what is still permitted. The Commission notes that DaimlerChrysler itself admits ([94]) that it cannot be ruled out that measures directed against sales to resellers were worded in a way that 'overstepped the mark' and, with hindsight at least, could be construed as covering admissible sales to final consumers.

(92) It is apparent, moreover, from the abovementioned documents that Mercedes-Benz repeatedly reinforced these instructions to German agents directed against parallel exports by advising the German distribution network, including agents, to avoid 'internal competition' between distributors as much as possible.

Thus in the memo — reproduced in its entirety above (recital 78) — of 6 February 1996 from Mercedes-Benz's MBVD/VP department to heads of branches, owners/managing directors, agents and principal agents ([95]), the addressees were informed that there would be 'no sympathy for retail firms which ... fail to concentrate on their own territory and seek to attract customers not through the service they provide but by engaging in competition on prices and conditions.' The memo goes on to say: 'We are convinced that, by adhering strictly to this policy, we can effectively combat internal competition not only in the W 210, but also in other series. We therefore count on your unconditional support.'

(93) The rule, already mentioned above in recital 72, on transactions involving demonstration vehicles is referred to in a letter dated 26 June 1996 from BVMB eV (the Federal Association of Mercedes-Benz Agents) ([96]) to Mercedes-Benz, which mentions the sale of an S 500 demonstration vehicle by the Regensburg branch to a customer from the contract territory of a Mercedes agent at a 31,5 % discount (apparently discounts of up to 38 % are granted in comparable cases). BVMB argues that such discounts restrict or rule out the possibility of agents using S-class vehicles as company or demonstration cars. This also reduces their scope for concluding deals in their own contract territory. In the interests of maximum geographical coverage of the S-class and the safeguarding of sales as a result, Mercedes-Benz is asked 'to take specific action to ensure compliance with the agreed rules in order to thwart internal competition in the retail organisation as a whole.'

The letter adds:

> 'Once again we would stress that the agents' committee has always supported measures to curb internal competition and appropriate steps against retail firms, whether they be branches or agents, which pursue other aims and in so doing undermine exclusive marketing rights by engaging in aggressive competition.'

(94) In the reply from Mercedes-Benz dated 22 July 1996 ([97]), BVMB was informed that the sale of demonstration vehicles on attractive or excessively attractive terms was allowed only in individual cases and must be confined to an agent's own territory: 'Otherwise there will indeed be internal competition, which we firmly reject and oppose as much as you do. We believe we have already proven this on several occasions in the past.'

(95) In its reply to the statement of objections ([98]), DaimlerChrysler claims that the restrictions mentioned referred only to domestic sales, not to sales abroad and that, consequently, the facts in question are not relevant to the export restrictions being investigated by the Commission.

(96) The Commission cannot agree with this view: the instructions to agents to sell the vehicles in question only in their own contract territory are designed to prevent all customers whose place of residence lies outside the agent's contract territory — including, therefore, foreign customers — from acquiring such advantageously priced vehicles; that is to say, Mercedes-Benz wishes to avoid a situation where Mercedes customers are induced by attractive prices and conditions to purchase a vehicle from a distributor other than that in whose contract territory they reside. As is apparent from the wording of Mercedes-Benz's reply of 22 July 1996, the 'internal' competition was duly rejected and combated, as was already alluded to, moreover, in the fifth paragraph of the memo of 6 February 1996 ([99]).

(97) In order to emphasise the above instructions to German distributors, Mercedes-Benz also reduced, or at least threatened to reduce, vehicle deliveries to German distributors, as is apparent from the following:

([94]) Point 27 of the reply to the statement of objections.
([95]) File, p. 395.
([96]) File, pp. 409 et seq.: letter from the Federal Association of Mercedes-Benz Agents (Bundesverband der Vertreter der Mercedes-Benz AG eV) to Mercedes-Benz AG dated 26 June 1996 concerning 'Internal competition — Offer/delivery of new Mercedes-Benz cars to unauthorised resellers'. The passages quoted are concerned with internal competition. Only the last paragraph of the letter relates to an offer of a new car to a second-hand car dealer by Regensburg branch at an extremely large discount.
([97]) File, pp. 404 et seq.
([98]) Point 68.
([99]) See recital 78.

(98) The memo from Mercedes-Benz, MBVD department, dated 5 March 1996 [100] to all regions and car sales managers runs:

'W 210 cuts

for MB Belgium

As agreed at the LVP meeting on 26 February 96, allocations of series W 210 to a number of branches are being cut.

This is because of deliveries of vehicles to Belgium in January.

The attached document gives an overview of the cuts for June and July.

Unless deliveries to Belgium are reduced, we will extend this measure to the new series.'

(99) In its reply to the statement of objections, DaimlerChrysler stated that this memo was addressed only to the branches, which raised no legal problems [101]. It asserted that the deliveries to Belgium were almost exclusively sales to unauthorised resellers and that cuts were applied only to branches that had done business with resellers. It denied having taken measures against agents, as the Commission asserts in paragraph 114 of the statement of objections.

(100) In response the Commission would point out that the Regensburg branch, as already stated in paragraph 102 of the statement of objections, informed the Southern Region in a memo dated 12 March 1996 that a vehicle that had arrived in Belgium had been sold on by a German customer. This customer had never previously sold on a vehicle. The branch therefore contested the cut [102]. This document clearly shows that Mercedes-Benz made general and sweeping cuts in the allocations of new vehicles to branches on the basis of exports to Belgium without clearing up the details in advance, rather than only in cases where new vehicles had been proved to have been sold on to resellers.

(101) DaimlerChrysler's assertion that measures had not been taken against agents [103] is not valid. In view of the interests involved it is inconceivable that foreign sales lead only to reductions of supplies at the branches and not also at agents. The following documents confirm this. In documents obtained during the investigations, the principal agents in Munich (Auto Henne) and Karlsruhe (Schönperlen) were also described as 'branches' that had delivered vehicles to Belgium [104]. Secondly, a comparison of the order numbers of the vehicles delivered to Belgium by the agent Hirschvogel in Straubing [105] with the lists drawn up by MBBel shows that the vehicles delivered by the agents are attributed by MBBel on the basis of the order numbers to the branches, even if a vehicle sale was negotiated by an agent [106]. Lastly, the handwritten note from Mr Bruhn dated 4 March 1996 [107] indicates that 200 additional W 210 vehicles were to be delivered to Belgium, and that they would be deducted from the allocations for the branches or agents: 'Cuts agreed with the LVPs must be applied to branches/agents that deliver to Belgium!'. All this serves to refute DaimlerChrysler's objection that only the allocation to the branches, but not to the agents, was to be cut.

1.6.1.2. ***Instruction to agents to require a 15 % deposit in cases of parallel exports***

(102) The instructions to agents to require in cases of parallel exports, i.e. business with *Komm-Kunden*, a 15 % deposit is also a measure which makes parallel exporting more difficult.

(103) It can be seen from Mercedes-Benz circular No 52/85 [108] (Effects on the domestic sales structure) on the EC block exemption Regulation, dated 12 September 1985 and sent, among others, to the principal agents and agents and to the authorised workshops, that, in cases of sales to *Komm-Kunden* from the Community or the EEA, a deposit of 15 % of the purchase price was to be required. This applies to nearly all transactions with *Komm-Kunden*, as can be seen from the circular, where it is stated:

'...

In the case of EC customers, in accordance with the new agency contracts and in conformity with the provisions of the EC block exemption Regulation the following rules apply:

...

...

(100) File, p. 2953.
(101) Point 64 of the reply to the statement of objections.
(102) File, p. 2954.
(103) End of point 64 of the reply to the statement of objections.
(104) File, pp. 2970, 3034, 3058 where under the heading 'branches' two principal agents in Germany are also listed; also p. 2929, where the order numbers of four vehicles are listed with the number xx 203 xxxx. In the overviews of vehicles delivered to Belgium on p. 2984 of the file, these orders were attributed to the Regensburg branch (see first four vehicles on p. 2984), although these four new vehicles were sold via the Mercedes agent Hirschvogel in Straubing. See also the overview on p. 2918.
(105) File, p. 2929.
(106) See, for example, overview in file, p. 2918.
(107) File, p. 2912.
(108) File, pp. 582, 585 and 2088.

Deposits for business with EC customers

As was previously customary in tourist transactions worldwide, we think that a deposit should be required in the following cases — including from EC customers.

1. Orders of non-domestic specification vehicles, on account of the difficulty of selling the vehicle at home if it is not purchased by the customer.

2. Multiple orders by an EC customer for his own commercial use.

3. For vehicles with extensive special fittings, as in the event of non-purchase, a discount might have to be granted on resale. This corresponds to established practice for domestic customers.

4. We also think a deposit should be required from EC customers who order vehicles in domestic specifications. This is because it is necessary to have evidence of a foreign customer's serious intention to purchase. In addition, in view of his residence abroad, the financial risk is higher if, for example, difficulties arise with the purchase of the vehicle and its payment such as may entail more extensive processing for us and the possibility of proceedings for collection of the debt.

In all of the above cases, a deposit of 15 % of the purchase price must be required (corresponding to the fixed amount for non-purchase in the terms of sale for new vehicles).

...

We would ask you to inform all your sales staff of the new rules in full. If you have any further questions, please contact us.'

(104) DaimlerChrysler confirms the accuracy of the comments in recital 103 on the content of the circular ([109]).

1.6.2. RESTRICTIONS ON SUPPLY TO LEASING COMPANIES (GERMANY AND SPAIN)

(105) Article 2(1)(d) of Mercedes-Benz's German agency agreement in the July 1987 version ([110]) contains the following rules on the procurement of vehicles for leasing companies ([111]). It states:

'The agent is not authorised to procure business with

...

(d) leasing companies, except in the following circumstances:

— the vehicle is intended for the leasing company's own use,

— the vehicle is for a lessee (final consumer) within the contract territory,

— a purchase contract negotiated by the agent with a final consumer within the contract territory is subsequently changed to a leasing contract,

— the lessee contacted the branch/agent on his own initiative.'

(106) On 6 August 1996 the Mercedes-Benz MBVD/VP department sent a memo to the branch heads and all agent owners and managing directors regarding outside leasing companies ([112]). These are leasing companies which are independent of the Daimler-Benz group. The memo runs:

'Dear Sirs,

Outside leasing companies

We are unfortunately increasingly finding that outside leasing companies are making leasing offers to Mercedes-Benz customers and potential buyers that include discounts even in individual transactions, which we would not be prepared to grant in the respective cases. We have evidence and specific examples of leasing offers that are granted on condition that the customer obtain the vehicle from the leasing company and not from his distribution intermediary.

([109]) Points 73 et seq. of the reply to the statement of objections.

([110]) File, p. 1099.

([111]) File, p. 1099 (Mercedes-Benz AG's agency agreement); file, p. 3360 (Daimler-Benz AG's agency agreement).

([112]) File, pp. 2882 et seq.

The attractiveness of the outside leasing company's offer is therefore not derived from its being granted on terms agreed between intermediary and customer or from the fact that high residual values and low own margins confer advantages over leasing companies belonging to MB or its agents. Rather, it derives from the fact that outside leasing companies acquire stocks of vehicles or have general supply agreements with intermediaries belonging to our organisation, under which corresponding discounts are also granted.

We would remind you that supplies to leasing companies are permitted only in the following cases:

— the vehicle is intended for the leasing company's own use,

— the vehicle is for a lessee (final consumer) within the contract territory,

— a purchase contract concluded on the instructions of a branch or negotiated by an agent with a final consumer within the contract territory is subsequently changed to a leasing contract,

— the lessee contacted the branch/agent on his own initiative.

In cases where these conditions are not met, we will deduct the branch's or agent's full vehicle commission and reserve the right to take action at a personal level or under contract law.

We are sure that you share our basic position and will unreservedly support us in implementing it in the market.'

(107) The Spanish dealer agreement has also contained at least since 1 October 1996 a corresponding rule on the sale of vehicles to outside leasing companies, at Article 4(d) ([113]).

(108) In the new version of Daimler-Benz AG's agency agreement (July 1997 version), these rules are also set out, albeit in an expanded form: the agent may also negotiate the sale of a new vehicle to a leasing company in the following case:

'— the leasing company contacted an agent on behalf of a specific final consumer on its own initiative.'

([113]) File, p. 1748.

(109) The principal agency agreement contains, in Article 2(1)(d), a similar set of rules ([114]).

(110) It should be pointed out first of all that these contractual provisions on the supplying of leasing companies do not take account of whether under the leasing contracts used by the leasing company a leased vehicle may be acquired by the lessee immediately or only at the end of the leasing contract.

(111) The rules on the supplying of leasing companies mean, *inter alia*, that there can be no supplying of such companies with 'stocks' of vehicles. They thus prevent leasing companies from offering at short notice to a customer who needs a leased vehicle a vehicle which has already been ordered (and which may or may not have already been delivered).

(112) These rules, to which the memo of 6 August 1996 expressly refers, mean moreover that leasing companies do not receive quantity discounts because it is not they but the lessee that Mercedes-Benz regards as the final consumer. The quantity discount is accordingly determined by the number of vehicles needed by the individual lessee, which is considerably smaller than the number of vehicles which a leasing company acquires from Mercedes-Benz in the course of a single transaction.

1.6.3. SETTING SALES PRICES IN BELGIUM

(113) On 20 April 1995 nine members of the Belgian Association of Mercedes-Benz Dealers (Amicale des Concessionnaires Mercedes-Benz) met with the MBBel management, whose representatives included Dr Pfahls, Managing Director/Chairman, Mr Uyttenhoven, Director for passenger cars and eight other members of the MBBel management ([115]). At the meeting, 'action against price slashing' was discussed. One of the dealers present reported that this action had improved relations between the dealers, although another complained about the price slashing practised by the Mercedes branches in Brussels. As a result of the discussion, it was agreed that an external agency would carry out test purchases ('ghost shopping') in order to check the level of discounts for the W 210. If this should reveal that discounts of more than 3 % were being granted, the vehicle allocation for the rest of 1995 would be cut ([116]).

([114]) File, p. 3411.
([115]) File, pp. 2449 et seq.
([116]) The original French states:
'*Action anti-bradage*
Monsieur Kalscheuer estime que les relations entre concessionnaires se sont améliorées grâce à cette action.
Monsieur Goosens accuse les succursales de Bruxelles de bradage.
Il sera fait appel à une agence extérieure pour faire du "ghost shopping" pour tester les niveaux des remises sur la W 210. S'il y a plus de 3 % de remise accordée, la quantité de véhicules attribués jusqu'à fin '95 sera diminuée.'

(114) DaimlerChrysler argues that this action was a dealer initiative. MBBel, it said, had always rejected proposals by the Amicale to set sales prices. The proposal to commission an external agency to ghost shop and cut the vehicle allocation until the end of 1995 if discounts of more than 3 % were found was also suggested by the dealers and was not implemented.

(115) The Commission points out that a number of senior representatives of MBBel, which, according to the minutes, runs branches under the name Mercedes Europa in Brussels ([117]) and Antwerp ([118]), took part in this discussion ([119]). In the minutes of this meeting between MBBel and the Belgian dealers' association on 20 April 1995, drawn up by MBBel's manager for dealer development ([120]), Mr Rauw, it was stated that an independent agency should be commissioned to carry out ghost shopping. Mr Rauw also noted in the minutes that if discounts of more than 3 % were found, the vehicle allocation would be reduced. According to the minutes, it was decided at this meeting to commission an agency to carry out ghost shopping. MBBel was involved in this decision as the importer present at the meeting, but also as the owner of two branches, i.e. of companies with dealers' interests. Mercedes's active participation is evident from the fact that the penalties mentioned in the decision (reduction of the quota of new cars) could be applied only by MBBel as supplier of the dealers. It is also evident that MBBel was ready to actively support this price fixing, the price checks and any sanctioning of non-observance and that it did not reject the action, as subsequently claimed by DaimlerChrysler.

([117]) File, p. 2450 states: *Monsieur Goossens accuse les succursales de Bruxelles de bradage*.

([118]) See file, p. 3106, MBBel and Mercedes-Benz fax dated 12 July 1995.

([119]) See file, pp. 2406 and 2449: those present were Dr Pfahls, Chairman (Président Administrateur Délégué) of MBBel, Mr Uyttenhoven, passenger car sales and marketing manager (Vente & Marketing PKW), Mr Coppens, Dr Schneider, responsible for finance, control and administration (Finance, controlling et administration), Mr S. Geurts, Mr Urbain, responsible for spare parts (pièces détachées), Mr Baddé, responsible for communication and dealer development, as well as advertising and promotional campaigns (publicité et promotion), Mr Salamon, responsible for organisation and IT, Mr Ambrosi, responsible for technical aspects (technique) and Mr Rauw, responsible for dealer development.

([120]) File, p. 2406.

(116) DaimlerChrysler's objection that this was merely a suggestion by the dealers' association is at all events not convincing. Mr Rauw clearly distinguished in the minutes between statements made by individuals present and decisions or outcomes of the meeting. At the passage in question, he did not record that this was a proposal from the dealers' association. That the minutes were kept very precisely is clear from the way the previous statements are recorded, since they are even attributed to specific, named participants in the meeting.

(117) It is apparent from various documents that ghost shopping formed a perfectly normal part of MBBel's practices and that the announcement to that effect therefore had to be taken seriously. The minutes of the meeting of Mercedes dealers in the Antwerp region on 27 March 1996 ([121]), in which MBBel's district manager for the Antwerp region, Koen Van Hout, took part, reveal that prior to 27 March 1996 five Mercedes dealers from the region and a parallel trader had been visited by a ghost shopper. Their discount policy was checked and it was found that the dealers granted discounts of between 5 % and 7 % for the W 210 (Mercedes E 290 TD).

(118) Another check on discount practice covered the C-Class: on 26 November 1996 MBBel commissioned Tokata SA to carry out test purchases at all 47 Belgian dealerships ([122]). Discount practice in relation to the C-Class Estate 220 diesel and Estate 250 turbodiesel was to be checked. The ghost shopper was to try to obtain a discount of at least 7 %, irrespective of delivery times.

(119) The following are illustrations of the considerable store set by MBBel on moderate discounting by Belgian Mercedes dealers. In a message from MBBel to Mercedes-Benz dated 17 October 1995 it was stated that: 'we are doing all we can to carry out our work correctly (we are avoiding exports), we are attempting to keep our average price at a high level...' ([123]). A letter from MBBel to the Belgian dealer Garage de l'Avenue in Charleroi on 14 March 1996 ([124]) concerned a Mercedes W 210 model, type E 200 sold during the Brussels Car Show. The letter first criticises the conduct of the dealer's sales representative, who had introduced himself as the sales representative for the Namur region, which led the customer to order the vehicle from him. When it later turned out that the purchase contract was with the dealer in Charleroi, the customer complained to MBBel. In the abovementioned letter, MBBel not only complains about these facts, but also takes the opportunity to point

([121]) File, p. 3187.

([122]) File, p. 2576.

([123]) File, pp. 3061 et seq.

([124]) File, p. 2755.

out the discount of 6 % on the price of the new car. From the context it is clear that MBBel considers this discount to be too high.

(120) DaimlerChrysler confirms, moreover, in the reply to the statement of objections [125] that this discount was unusually high and that the Namur dealer responsible for the area had to take over this disadvantageous contract. In short, the Commission assumes that at the meeting of 20 April 1995, in which MBBel and nine representatives [126] of the Belgian dealers' association took part, a decision was taken on the monitoring of the discounts on the W 210 practised by the Belgian Mercedes dealers by a ghost shopper. Discounts of more than 3 % were not to be granted, otherwise supplies would be cut [127]. MBBel, according to the minutes, supported this procedure, including the imposition of penalties.

2. LEGAL ASSESSMENT

2.1. *ARTICLE 81(1)*

2.1.1. UNDERTAKING

2.1.1.1. ***DaimlerChrysler and the Mercedes dealers in Belgium and Spain***

(121) DaimlerChrysler AG and its predecessors Daimler-Benz AG/Mercedes-Benz AG, the companies MBBel and MBE belonging to the group, and the Mercedes-Benz dealers in Belgium and Spain all constitute undertakings within the meaning of Article 81(1).

2.1.1.2. ***Mercedes-Benz agents in Germany***

(122) Mercedes-Benz distributes cars in Germany via its own branches and via commercial agents in the form of agents appointed to negotiate business transactions (*Vermittlungsvertreter*) within the meaning of section 84(1), first sentence, first alternative, of the German Commercial Code.

(123) The Mercedes-Benz agents are undertakings within the meaning of Article 81(1). An undertaking is any legal subject which independently exercises a commercial or economic activity and, in so doing, bears the associated financial risks [128]. An agent appointed to negotiate business transactions is defined in Articles 1(2)(7) and 84(1), first sentence, first alternative, of the German Commercial Code as a trader and, as such, pursues an economic activity. The Mercedes-Benz agents also exercise their activity independently. DaimlerChrysler shares the view that the agents are independent businesses [129].

2.1.2. AGREEMENT BETWEEN UNDERTAKINGS

(124) The agreements concluded between Mercedes-Benz and its agents in Germany constitute agreements between undertakings. The same applies to the dealer agreements concluded between the subsidiary MBE linked to Mercedes-Benz on the one hand and its Mercedes-Benz contractual dealers on the other.

(125) Account should also be taken of the fact that the agency or dealer agreements between the companies belonging to the Mercedes-Benz group on the one hand and the agents and dealers on the other form part of an exclusive and selective marketing system which, as long-term commitments, often exist for several decades. Since, for example, the development of the model range, maintenance strategies or marketing strategy are not foreseeable when a commercial agency or dealer contract is concluded, agreements must of necessity leave certain aspects to a subsequent decision by the manufacturer. The licensing of an agent or dealer as business partner presupposes that each business partner is in agreement with the evolving sales policy of the manufacturer [130]. This applies to changes to the range of vehicles supplied to the dealer or agent for sale, but also to other changes to the manufacturer's sales policy affecting the dealer's or agent's sales opportunities, which are usually communicated to the sales partner by means of manufacturer's circulars or instructions, which the partner expressly or tacitly accepts. These circulars and instructions have therefore become part of Mercedes-Benz's agreements with agents since they form part of an ongoing business relationship based on an existing general agreement (agency agreement).

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[125] Point 130 of the reply to the statement of objections.

[126] For their position in the dealers' association see file, p. 3125.

[127] The original French states:
'Action anti-bradage
Monsieur Kalscheuer estime que les relations entre concessionnaires se sont améliorées grâce à cette action.
Monsieur Goosens accuse les succursales de Bruxelles de bradage.
Il sera fait appel à une agence extérieure pour faire du "ghost shopping" pour tester les niveaux des remises sur la W 210. S'il y a plus de 3 % de remise accordée, la quantité de véhicules attribués jusqu'à fin '95 sera diminuée.'

[128] See Case C-266/93 *Bundeskartellamt* v *Volkswagen AG und VAG Leasing GmbH* [1995] ECR I-3477, at paragraph 19.

[129] See the reference in the legal report by Professor Ulmer, p. 12, to Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents (OJ L 382, 31.12.1986, p. 17).

[130] See Case 107/82 *AEG* v *Commission* [1983] ECR 3151, at 3195; Joined Cases 25 and 26/84 *Ford-Werke AG and Ford of Europe Inc.* v *Commission* [1985] ECR 2725, at 2743.

(126) DaimlerChrysler itself states that the circulars it addressed to distributors have become part of the contractual agreements. This is apparent from the following: under section 15(3) of the agency agreements [131] and the principal agency agreement [132] in the July 1997 version, original spare parts cannot be sold to resellers with their place of business outside the agent's contract territory, even if they require these spare parts for the repair or maintenance of vehicles. The Commission objected to this wording in the statement of objections of 31 March 1999 [133].

(127) DaimlerChrysler commented on this point [134] that the misleading wording of this clause had been recognised since 1988. That is why it was made clear in a letter dated 10 October 1988 to the German agents and a letter dated 31 August 1988 to the general agents that the wording of the agreement was misleading and that original spare parts could be supplied to all resellers in the Community and associated countries. A situation corresponding to Article 3(10)(b) of Commission Regulation (EEC) No 123/85 of 12 December 1984 on the application of Article 85(3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements [135] and Commission Regulation (EC) No 1475/95 of 28 June 1995 on the application of Article 85(3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements [136] was brought about by the dispatch of the abovementioned letters to the German distribution network.

(128) The Commission agrees with this argument and assumes that the above letters did bring about a situation that substantively complied with Article 81(1) to the extent that the sales companies received the circular.

(129) The fact that circulars and instructions become part of the contractual relations is also apparent from the fact that failure to comply with them might result in the imposition of severe sanctions, including the possibility of the supply of new vehicles being cut.

(130) In the light of these principles, all the practices that are of relevance here are to be regarded as agreements, as is explained in greater detail below.

([131]) For the agency agreement with exclusive dealing rights: file, p. 3367; for the agency agreement with shared dealing rights: file, p. 3405.
([132]) File, p. 3427.
([133]) See, in particular, paragraphs 136, 183, 219 and 241.
([134]) Point 76 of the reply to the statement of objections.
([135]) OJ L 15,18.1.1985, p. 16.
([136]) OJ L 145, 29.6.1995, p. 25.

2.1.2.1. ***Export restrictions (Germany)***

(131) The instruction in the memo of 6 February 1996 to German agents to the effect that they should concentrate on their own territory and refrain from selling vehicles to customers from outside that territory if they did not want to jeopardise their vehicle allocation (see recital 78), which was essentially repeated in the memo of 15 March 1996 to the Northern Region with the threat that infringements would be 'punished accordingly' (see recital 85), and the various instructions to the effect that internal competition should be avoided, are indicative of marketing policy in Germany, which agents agreed to by concluding their agency agreement. The memos have thus become part of the agreements between Mercedes-Benz and its agents.

(132) In its letter of 22 July 1996 to the Federal Association of Mercedes-Benz Agents Mercedes-Benz not only commented on demonstration vehicle sales, but it also confirmed that it too firmly rejected and opposed internal competition, adding that 'we believe we have already proven this on several occasions in the past' (see recital 94). This letter confirms in general terms the intention, already declared on 6 February 1996, of excluding 'internal competition'. It renews the agreement of that date, at least vis-à-vis those agents who had knowledge of it.

(133) The fact that, according to circular No 52/85 of 12 September 1985 (see recital 103), which was addressed to, *inter alia*, branches, principal agents and agents in Germany, a deposit of 15 % is payable in practically all cases of sale to *Komm-Kunden* is indicative of business policy regarding the sale of vehicles to final customers from other Member States of the Community. This rule therefore forms part of the agreements concluded between Mercedes-Benz and the German agents.

(134) This is also apparent from point 4 of the circular, where express reference is made to the supply conditions for parallel exports in the Community, which were amended after Regulation (EEC) No 123/85 entered into force and which were incorporated in the agency agreements and set out once more in the circular. It is stated there that 'Under the new agency agreements, and in accordance with the provisions of the EC block exemption regulation, the following rules apply to EC customers: ...'. Immediately after the enumeration of the new agreements in the agency agreement, reference is made to the need to pay 15 % of the purchase price. Lastly, it is clear from the circular's penultimate sentence that, in Mercedes-Benz's view, the contents of the circular formed a binding part of the distribution agreements since it described them as 'rules' ('We would ask you to inform all your sales staff of the new rules in full').

(135) DaimlerChrysler takes the view that the measures referred to are unilateral measures and do not form part of the distribution agreements between Mercedes-Benz and its distribution partners. Moreover, it continues, they were not inserted in the distribution agreements because they would have contradicted the rules laid down in those agreements [137]. Mercedes-Benz also claims that it has not reserved the right to amend the distribution agreements by means of unilateral declarations. In this respect, it argues, this case differs from the distribution agreement which was the subject of the dispute in *Ford* v *Commission* [138]. In the Ford dealer agreement, Ford expressly reserved the right to determine which models of vehicle would be supplied. Mercedes Benz, so it claims, has, by contrast, not reserved that right.

(136) The Court of First Instance made it clear in its judgment in the *Volkswagen* case, with express reference to the judgments in *Ford* and *BMW*, that a call by a manufacturer to its authorised dealers constitutes an agreement if it is '[intended] to influence the ... dealers in the performance of their contract with [the manufacturer or importer]' [139]. This condition was clearly met in this case. It is therefore irrelevant whether the agreement contained a specific clause on which basis the Mercedes-Benz's call was made or whether this call was inconsistent with another clause in the agreement.

(137) Mercedes-Benz's agency agreements contain a rule according to which instructions are binding on agents: section 4(1) of the agency agreement [140] and of the principal agency agreement [141] stipulate that the agent is required to negotiate vehicle transactions in accordance with the current prices determined by Mercedes-Benz and 'according to its instructions'. On the basis of these contractual provisions, as illustrated by the memos described in recitals 78, 103 and 106, new rights [142], but also new obligations [143], have been created by Mercedes-Benz for the distribution partners and the distribution agreement has thus been supplemented. Express provision is thus made in the Mercedes-Benz distribution agreements, in a similar way as in the Ford distribution agreements, for introducing amendments to the agreement to take account of changing circumstances by means of circulars from the manufacturer or importer and other instructions.

[137] Point 50 of the reply to the statement of objections.
[138] Joined Cases 25 and 26/84 *Ford-Werke AG and Ford of Europe Inc.* v *Commission* [1985] ECR 2725, at 2743.
[139] Case T-62/98 *Volkswagen* v *Commission* [2000] ECR II-2707, at paragraph 236.
[140] File, p. 3362.
[141] File, p. 3414.
[142] For example, under section 2(1)(a) of the agency agreement, an agent is not entitled to sell vehicles to 'tourists', i.e. foreigners who are not resident in the Community. However, they are entitled to do so according to the Agents' Manual, and this entitlement was clarified by circular 112a/85 of 1 August 1985.
[143] For example, the requirement that a middleman acting on behalf of an EU customer must submit to the agent a written power of attorney from the final consumer in question; see circular 112a/85 of 1 August 1985.

2.1.2.2. ***Restrictions on supply to leasing companies (Germany and Spain)***

(138) The ban on supplying leasing companies where there is no lessee is laid down by the agency agreements (section 2(1)(d)) [144] and the Spanish dealer agreements (section 4(d)) [145] and thus forms part of the agreements between Mercedes-Benz and its distribution partners. German agents were reminded of these agreements once more by the memo of 6 August 1996. This circular's penultimate paragraph reads: 'In cases where these conditions are not met, we will deduct the branch's or agent's full vehicle commission and reserve the right to take action at a personal level or under contract law.' (underlining added). The threat of action under contract law demonstrates that the circular also forms part of the contractual relationship and is not merely a one-sided, non-binding appeal for agents and others to change their business practices.

2.1.2.3. ***Setting sales prices in Belgium***

(139) On 20 April 1995 nine representatives of the Belgian Association of Mercedes-Benz Dealers met with the MBBel management and reported on 'action against price slashing' by dealers (see recital 113). The dealers indicated that they were satisfied with the outcome of this action. It had improved relations among them. This indicates that the implementation of such action had already been agreed upon on an earlier occasion. At the meeting, MBBel supported the agreement, and a maximum rate of 3 % for discounts was decided on. To continue the action, it was agreed that a test buyer should check discounting conduct on the new E-class vehicle, the W 210, and that if discounts of more than 3 % were being granted, the vehicle allocation for the rest of 1995 would be cut.

(140) The decision of 20 April 1995 constitutes an agreement between MBBel and the association of dealers.

(141) In this connection MBBel behaved both as a competitor of the dealers, namely as operator of two branches, and as a supplier to the dealers. The latter, vertical aspect was clearly the focal point of the agreement, as is illustrated by various elements. Firstly, MBBel was represented at the meeting by members of its board. Secondly, it agreed to back and enforce the policy of limiting discounts with a cut in vehicle supplies to all

[144] File, p. 3361.
[145] File, p. 1748.

dealers (and not only to the nine association members present at the meeting). MBBel confirmed this, moreover, to Mercedes-Benz AG on 17 October 1995 (see recital 119: 'we are attempting to keep our average price at a high level').

(142) These express agreements were also binding on all Belgian dealers in their capacity as importers of Mercedes-Benz vehicles and as competitors of MBBel's branches.

2.1.3. RESTRICTION OF COMPETITION

2.1.3.1. ***Market definition***

2.1.3.1.1. **Relevant product market**

(143) The measures established in this case relate to the retailing of Mercedes passenger cars.

(144) The broadest relevant product market might be deemed to be the market for all cars. The relevant market would then extend from very small cars through luxury cars to sports cars. However, this cannot be accepted. It is obvious that, from the point of view of the buyer, very small cars are, for example, not interchangeable with medium-sized or luxury cars: a buyer (private customer, commercial user of passenger vehicles) will not regard the various segments to be interchangeable if the focus is on the characteristics relevant to the selection of a certain vehicle. The characteristics of a very small car are its small external dimensions, small engine, relatively low purchase price, low prestige value and the fact that many of these vehicles are purchased as second cars or for short journeys. Small cars are larger, have a more powerful engine, cost more and offer greater comfort. The same applies *mutatis mutandis* to the next category. Executive and luxury vehicles are, for example, purchased primarily by drivers who drive frequently and wish to cover large distances comfortably. The price, prestige value and comfort of these vehicles is decidedly greater than in the case of cars of the lower categories. Sports cars, whether coupé or cabriolet, differ from passenger cars primarily in the sporty design of their bodywork and the fact that they have only two doors. From the buyer's point of view, the general car market is therefore not the relevant product market.

(145) The automobile industry and market analysts traditionally categorise cars into 'segments' on the basis of objective criteria such as car length, purchase price, body type, performance, in particular engine performance, and brand image [146]. A distinction is normally made between the following 'segments': A: very small cars; B: small cars; C: medium cars; D: upper-medium cars; E: executive cars; F: luxury cars; and G: multipurpose vehicles and sports cars. segment G is occasionally subdivided still further, sometimes into the segments low-priced sports cars, high-priced sports cars, multipurpose vehicles and off-road vehicles [147], and sometimes into the segments multipurpose vehicles, coupes, cabriolets and off-road vehicles [148]. The Commission's six-monthly reports on car prices in the Community are also based on this classification and contain price data on car models grouped according to the abovementioned seven segments A to G so as to be able to represent together models which are comparable from the consumer's standpoint.

(146) In its reply to the Commission's request for information of 21 October 1998, Daimler-Benz AG indicated that it did not agree with the subdivision of the car market into segments.

(147) However, a brochure on the Daimler-Chrysler merger entitled 'Expect the extraordinary' [149], issued by Mercedes-Benz on 17 November 1998, presents the broad product range of the new company and divides it into individual segments, whereby yet a further distinction is made regarding the pricing of vehicles in the individual segments (premium, mid-price and economy). Moreover, MBE documents found during the investigations reveal that an assumption is made within the company that there are certain categories of comparable vehicles with regard to the positioning of C-, E- and S-class models compared with the competition. In 1996, in a comparison of Mercedes volume models (the A-class was not yet on sale), MBE distinguished between three different segments: the lowest segments contained the C-class, the Audi A4, the BMW 3-series and the Volvo 400 series, followed by a segment containing the E-class, the Audi A6, the BMW 5-series and the Volvo 800/900. The highest segment contained the S-class Mercedes, the Audi A8 and the BMW 7 and 8-series [150]. In addition, a price comparison between Spain, Germany and Italy prepared by MBE for volume models also divided

(146) See Commission decision of 24 May in Case IV/M.741 — *Ford/Mazda* (OJ C 179, 22.6.1996, p. 3); Commission decision of 14 March 1994 in Case IV/M.416 — *BMW/Rover* (OJ C 93, 30.4.1994); Intra-EC car price differential report, 1992, p. 29.
(147) Intra-EC car price differential report, 1992, p. 29.
(148) *Auto, Motor und Sport*, Volume 22, 21.10.1998, pp. 126 et seq.
(149) Pages 16 et seq.
(150) File, p. 1492.

vehicles into three segments. The first segment comprises the Mercedes C 180, the Audi A4 and the BMW 316, the second the Mercedes E 200, the Audi A 6 and the BMW 520 i, and the third the Mercedes S 320, the BMW 730 I and the Volvo 960 ([151]). Mention should also be made of the 23rd best-car survey conducted by the magazine '*Auto, Motor und Sport*' ([152]). This shows that the segmentation of the passenger vehicle market is relevant from the consumer's point of view. In it, 277 passenger vehicle models are divided into a total of 10 categories ([153]). The six categories A (very small cars), B (small cars), C (lower medium-sized cars), D (medium-sized cars), E (upper medium-sized cars) and F (luxury cars) correspond to the first six of the segments referred to in recital 144, as can be seen from a comparison of the passenger car models listed in the respective category or segment. Coupés, cabriolets, off-road vehicles and vans were listed separately in separate segments.

(148) The fact that there may be a degree of overlapping or difficulty in distinguishing between vehicles at the edge of adjoining segments and that vehicles must be allocated on the basis of an analogy between similar vehicle types, as Daimler-Benz states in its letter of 8 December 1998, does not contradict the assumption that the car models allocated to a given segment form a relevant product market in each case.

(149) It is not necessary in these proceedings to decide conclusively what the exact segmentation between markets is. As will be explained, a restriction of competition is appreciable not only if account is taken of the market position of Mercedes-Benz in the individual segments. It is also appreciable if account is taken of the fact that competition exists between each of the segments relevant to these proceedings and one or both of the adjoining segments, particularly at the edge of each segment, or if the segments relevant in this case are even combined with both adjoining segments to form one relevant product market.

2.1.3.1.2. **Relevant geographic market**

(150) There are grounds for considering the relevant geographic market to comprise the Community. The technical barriers between Member States have, for example, disappeared since the introduction of the Community certificate of conformity. Any passenger vehicle purchased in the Community can now be registered in any Member State without being resubmitted for technical checks.

(151) However, there is much to be said in favour of the view that, from a geographic standpoint, every Member State forms a separate relevant market in the case of passenger cars. There are still considerable differences between Member States as regards the competitive and material conditions of passenger car supply. This is apparent from the Commission's six-monthly price surveys, in which car prices, adjusted for differences in equipment levels, are compared. Although price differentials have recently narrowed, as can be seen from the comparison of prices for three Mercedes models in recitals 32 to 34, they remain sizeable. They stem partly from national rules and regulations, such as the heavy registration, luxury and environmental taxes that are imposed in some countries, and partly from the fact that, in the event of currency fluctuations between Member States, manufacturers make no, or insufficient, price adjustments. They can also be explained in terms of manufacturers' marketing strategies with regard to customers' differing purchasing power. In addition, manufacturers offer very different standard equipment and equipment packages for new cars from one Member State to another. What is more, it remains difficult for final consumers or their appointed agents to purchase new cars in a Member State other than that in which the customer is resident or domiciled, the expense always being greater than when buying from a dealer belonging to the domestic network. Many agents and dealers prefer to serve local customers, especially if they consider a sale possible to customers in their contract territory and even more so in the case of popular models. Moreover, they often require large deposits from foreign customers, as is apparent from the large number of complaints submitted to the Commission from consumers wishing to buy a car abroad. All this suggests that the relevant geographic markets for passenger cars are still national markets.

(152) The question whether the markets for passenger cars are Community-wide or whether each Member State constitutes a separate relevant geographic market can be left open here since the restriction of competition is appreciable irrespective of the definition of the geographic market.

([151]) File, p. 1716, *Estudio Precios CE*.
([152]) *Auto, Motor und Sport*, Volume 22, 21.10.1998, pp. 126 et seq.
([153]) Mini cars, small cars, lower-medium cars, medium cars, upper-medium cars, luxury cars, sports cars, cabriolets, off-road vehicles and vans.

2.1.3.2. *The applicability of Article 81 to the restrictions agreed with the Mercedes-Benz agents*

(153) In the statement of objections (point 152), the Commission indicated that the Mercedes-Benz agents have to bear a number of commercial risks ([154]) inextricably linked to their function as agent which result in Article 81 being applicable to the agreements between Mercedes-Benz and the agents in the same way as with regard to dealers.

(154) In DaimlerChrysler's view ([155]), even if account is taken of the aspect of risk allocation, the Mercedes-Benz agents should not be equated with dealers. It claims that agents do not bear any of the contractual risks associated with new-vehicle business, such as the risks of marketing, transport, storage, price, guarantee or default. If the contracting partner offers customers concessions by passing on some of its commission or accepting used vehicles in part exchange at inflated prices, it does so in the context of the leeway it is granted in respect of its commission. Agents therefore bear only the commission risk and thus not any other price risk directly associated with the sale of new vehicles, as dealers do. Agents do not bear the guarantee risk either since claims made by the buyer under the guarantee exist solely vis-à-vis Mercedes-Benz and not against the contracting partner. Even the fact that the contracting partner is required to buy and sell demonstration and business vehicles for its own account and at its own risk does not constitute a contractual risk associated with the negotiation of contracts concerning the purchase of new vehicles but is one of the obligations entered into by the contracting partner under Article 7 ([156]) of the agency agreement ([157]). It is one of the advertising and sales-development activities which an agent has to perform at his own risk. This also applies to the business vehicles used by the agent's staff for business purposes. The fact that 21,66 % of the turnover of branches and agents can be attributed to demonstration and business vehicles (the percentage is, according to DaimlerChrysler, even higher for agents) means that an agent with a turnover of 500 vehicles per year buys 70-80 vehicles per year and, in view of the fact that they are kept for three months and are driven for 3 000 km, an agent will always have approximately 20 vehicles in his possession so that he can allow all customers to use a demonstration vehicle on an hourly or daily basis. They form part of his fixtures and of his expenses as an independent trader. The associated risks are borne by the contracting partners even if vehicles are intended for use in their business to satisfy the intermediary and workshop functions ([158]).

(155) This argument must be rejected. The Mercedes-Benz agent bears a considerable share of the price risk associated with the vehicles whose sale he negotiates.

(a) If an agent makes price concessions on the sale of new vehicles to which Mercedes-Benz agrees, these are deducted entirely from the agent's commission (see list of commissions under the agency agreement ([159]). The same applies where, in connection with the sale of a new vehicle, the agent uses his commission in order to be able to accept a used vehicle in part exchange at a price higher than the market price ([160]).

(b) Volume or user discounts granted by agreement to large and certain other buyers, e.g. car-hire companies, taxi firms or journalists, can amount to as much as 6 % plus bonuses, and these are deducted from the agent's commission (see list of commissions under the agency agreement ([161]).

(156) According to these rules, in the first case the agent bears all, and in the second case a very considerable part, of the risk that the list price set by Mercedes-Benz cannot be enforced against a customer. Even if the agent does not have to keep any stocks of new vehicles, he is approximated by these payment rules from a financial point of view to a car dealer who by way of remuneration is granted by the manufacturer a margin ([162]) which he

([154]) See Case C-266/93, referred to at recital 19; Commission notice — Guidelines on Vertical Restraints (OJ C 291, 13.10.2000, p. 1), at points 12 et seq.

([155]) Point 89 of the reply to the statement of objections.

([156]) Article 4(7) states that: 'The agent is required to keep demonstration vehicles himself and for his own account. Where the parties fail to agree on the stock of vehicles necessary, Mercedes-Benz may determine what that stock should be on the basis of its experience and be proportional to the agent's turnover on new vehicles, taking account of his financial capabilities. The agent is obliged to use Mercedes-Benz vehicles as business vehicles unless he is authorised to deal also in the vehicles of another make.'

([157]) Point 92 of the reply to the statement of objections.

([158]) Report, p. 39.

([159]) File, p. 3374.

([160]) Point 89 of the reply to the statement of objections.

([161]) File, p. 3374.

([162]) In the car trade it is common practice for a dealer to be granted a margin which corresponds to a certain percentage of the list price and which may differ according to the model. Dealers are often also granted a 'variable margin' the amount of which may depend on such things as sales volume, customer satisfaction or compliance with the manufacturer's performance standards. See, for example, Commission of the European Communities, report on the evaluation of Regulation (EC) No 1475/95 on the application of Article 85(3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements, COM(2000) 743 final, published on the Internet at: http://europa.eu.int/comm/competition/car_sector/distribution/eval_reg_1475_95/report/

uses not only to finance his new-car sales business in general but also and above all to grant price concessions to car buyers.

(157) The agent also bears the transport and transport cost risk in respect of new vehicles. Pursuant to Article 4(4) of the agency agreement, he must deliver to the customer a new vehicle ready for delivery which the customer does not wish to collect at the factory. The agent has to agree with the customer the level of remuneration payable in order to cover the expenditure incurred in connection with the delivery, and in particular the cost of transport. Under the agency agreement, therefore, Mercedes-Benz does not assume the transport and transport cost risk, this being borne by the agent. Like a dealer, the agent is required to pass on the costs and the transport risk contractually to the customer.

(158) The agent must also use to a very considerable extent his own resources for purposes of sales promotion. In particular, he must acquire demonstration vehicles for his own account (Article 4(7) of the agency agreement). Either Mercedes-Benz and the agent have to agree on the number and type of these vehicles, or Mercedes-Benz stipulates the number itself. In so doing, it takes account of what is appropriate in its experience and what can be expected of the agent financially (Article 4(7) of the agency agreement). Including agents' business vehicles — these must be Mercedes-Benz vehicles and they are also used as demonstration vehicles — in 1998 an average of [...] % [163] of the turnover of branches and agencies was accounted for by demonstration and business vehicles. According to DaimlerChrysler, the share of these vehicles in turnover is somewhat higher for agents than for branches. Mercedes-Benz grants special conditions for the purchase of demonstration and business vehicles, and they are therefore subject to a minimum retention period of three to six months and a minimum running distance of 3 000 km. Thereafter, the agent can resell the vehicles second-hand, bearing the sales risk for this not inconsiderable number of vehicles.

(159) The activity of a Mercedes-Benz agent is also inevitably associated with a series of other commercial risks, acceptance of which is a precondition for becoming a Mercedes-Benz agent.

(a) Such contractual risks arise from the rules concerning the manufacturer's guarantee for new Mercedes-Benz vehicles (irrespective of whether their sale is arranged by an agent or the vehicle is purchased from another distributor). Under these rules, the agent (and, likewise, the Mercedes-Benz dealer outside Germany) is not liable for any claims which the buyer of a new vehicle may have under the guarantee. Under general civil law, such claims are effective vis-à-vis Mercedes-Benz as the guarantor. However, a different situation emerges from point VII.2(A) of the general terms of trade applicable to the sale of new vehicles by Mercedes-Benz [164]. Under that provision, Mercedes-Benz grants buyers of new vehicles a right to have any defects rectified within the manufacturer's guarantee period of one year from delivery of the vehicle. This right may be exercised 'with the seller [Commission note: i.e. in this case, Mercedes-Benz] or other operators approved by the manufacturer for the purpose of attending to the sold article ...'. This clause corresponds to the agent's obligation under Article 13(1) of the agency agreement 'to carry out guarantee work on the vehicles supplied by Daimler-Benz irrespective of where and via whom they have been sold'. When an agent carries out repairs under guarantee, the customer may not be invoiced any 'charge for the expenditure required to rectify defects' (Article 13(2) of the agency agreement). If an agent has carried out such repairs, he receives a 'guarantee indemnity' calculated on the basis of the average customer cost rate and the cost price of materials he has used, plus a materials cost premium [165]. The agent has to provide the necessary equipment and staff at his own cost and risk and initially to carry out the work also at his own cost and risk. Moreover, he is not completely discharged of the risk associated with providing this service: for carrying out defect-rectification work, he receives an indemnity based on standard rates which differ from and do not necessarily cover the currently applicable wages for carrying out ordinary repairs and the spare-part sales prices applicable to ordinary repairs which the agent himself fixes in the light of his commercial and competitive situation.

(b) Agents must set up a workshop for their own account and offer customer and guarantee services and, on request, take part in the emergency service. The workshop must be large enough, have sufficient staff and be adequately equipped to meet the requirements of the agent's contract. Agents must also acquire the necessary special equipment and adapt it to the latest production technology

(163) File, pp. 641 et seq; according to circular No 5/91 of 11 January 1991, in the case of agents entitled to sell passenger cars the share of annual deliveries accounted for by demonstration vehicles may as of 1 January 1991 be no higher than [...] %.

(164) File, p. 3447.

(165) See Article 13 of the agency agreement; file, p. 3366.

(Article 12(1) of the agency agreement). Agents must offer repair services and spare parts not only in respect of the vehicles sold via them but also in respect of the entire range of vehicles indicated in the agency agreement belonging to customers from the agent's own contractual area (see Article 12(1) the agency agreement) or from a district outside that area (Article 12(2) of the agency agreement).

(c) The agent must also keep a stock of spare parts for his own account (Article 14 of the agency agreement). The agent uses these parts to carry out repairs in his workshop. Under Article 15 of the agency agreement he may sell them to resellers.

(d) It should be pointed out lastly that from a financial point of view the agent's revenue from activities pursued on a self-employed basis exceeds many times over that from negotiating new-vehicle sales contracts. For his activity as an intermediary the agent receives a commission which in the case of passenger cars is made up of a basic commission of [...] % [166] and a service commission of up to [...] %. This commission income of at most [...] % constitutes the revenue from the agency activity. Out of this revenue the agent has to finance the discounts he grants to car buyers. The revenue actually earned from agency business is therefore lower than the abovementioned [...] %.

According to information supplied by Mercedes-Benz at the hearing on 29 June 1999 the revenue from acting as an intermediary amounts, if vehicle prices are regarded as part of this revenue, to approximately 50 % of the total revenue of an agent. But the agent's actual revenue from acting as an intermediary per se is the mentioned commission. If this is compared with the agent's revenue from activities contractually linked to dealing in new vehicles in respect of which the agent bears the entire risk, it becomes apparent that only about [...] of total revenue is derived from acting as an agent proper.

(160) In view of the number and quantitative scope of the risks that Mercedes-Benz agents have to bear, DaimlerChrysler's argument that the risks borne by agents are typical of those borne by a genuine commercial agent [167] cannot be accepted. The position would be different only if the agent could choose whether to assume in particular the considerable risks connected with demonstration and business vehicles, carrying out guarantee work, setting up maintenance and repair facilities and supplying spare parts, or simply to negotiate new-vehicle sales contracts. This is, however, not the case.

(161) In DaimlerChrysler's view, the agents form an integral part of DaimlerChrysler AG and are therefore genuine commercial agents.

(162) This stems from the requirements which the agent has to meet personally and commercially (his business activity generally involves selling exclusively Mercedes-Benz vehicles, acting as a 'Mercedes-Benz agent', setting up, equipping and staffing his business, advertising, maintaining a certain image, representing the interests of DaimlerChrysler, and complying with the Mercedes-Benz identification guidelines). Professor Ulmer's report stresses that agents form an integral part of Daimler Chrysler AG also by dint of the fact that, under the agency agreement [168], the parties sell only Mercedes-Benz vehicles and not those of its competitors [169], and are consequently agents of a single company [170].

(163) This argument must be rejected. The criterion of integration is, unlike risk allocation, not a separate criterion for distinguishing a commercial agent from a dealer [171].

(166) As at July 1997, see file, pp. 3378 et seq.

(167) Point 89 of the reply to the statement of objections.

(168) Article 9(3)(c).

(169) Under Article 9(3)(c), the agent may 'deal in new vehicles and chassis other than those offered by Mercedes-Benz only where all of the following conditions are met:
- other vehicles and chassis must be dealt in separate sales premises,
- by undertakings having their own legal personality,
- with neither fully nor partly identical management,
- in a manner which excludes the possibility of makes being confused, and
- the requirement to safeguard interests under Article 86(1) of the Commercial Code may not be undermined.

Mercedes will release the agent from this requirement if the agent demonstrates that there are objective grounds for so doing, whereby account should be taken of his legal status as commercial agent.'

(170) See points 87 et seq. of the statement of objections; see also Ulmer report, pp. 5 et seq., 27 et seq. and 43 et seq.

(171) See Case C-266/93 *Bundeskartellamt* v *Volkswagen AG and VAG Leasing GmbH* [1995] ECR I-3477, at paragraphs 4 and 19.

(164) The contractual rules cited by DaimlerChrysler as demonstrating that its agents do form an 'integral part' of the undertaking are, in substance, entirely the same and, even in their wording, sometimes the same as those in the dealer agreements of Mercedes-Benz and other car manufacturers. For example, Article 9(3)(c) of the agency agreement ([172]) contains provisions concerning brand exclusivity the wording of which is practically identical to that of, for example, Article 6(2)(b) of the Belgian MBBel dealer contract ([173]) and can also be found in Article 3(3), of Regulation (EC) No 1475/95. The same applies to the requirement on the part of commercial agents, as set out in the first sentence of Article 9(1) of the agency agreement, to take any action necessary to market Mercedes-Benz vehicles, which corresponds to the second sentence of Article 2(1) of the MBBel dealer agreement. Under the first sentence of Article 9(1) of the agency agreement, agents must also represent the interests of Mercedes-Benz. While such a requirement is not expressly contained in the MBBel dealer agreement, it is in, for example, the VW dealer agreements ([174]). Under Article 8 of the agency agreement, agents are required to described themselves to the outside world, on all documents and in advertising as Mercedes-Benz agents and to represent the Mercedes brand. Articles 10 and 12(2) of the MBBel agreement contain the same requirements. Moreover, the requirements on the part of agents contained in Article 10(1) and (4) of the agency agreement under the heading 'Integration' on the layout of business premises, technical equipment and staff and the use of computer systems in accordance with the DaimlerBenz guidelines and standards are also largely to be found in the MBBel dealer agreement in Annex III, sections 2, 3 and 4. The requirements contained in Article 10(2) and (3) of the agency agreement to provide information on individual transactions, cases in which the guarantee has been invoked and the agent's annual results are also dealt with in Annex III, section 5, of the MBBel dealer agreement. The prohibition contained in Article 10(5) of the agency agreement on setting up branches and display premises outside the agent's main premises without prior written authorisation from DaimlerChrysler is the same in terms of content as Article 5(2) of the MBBel dealer agreement. On the basis of all of the above, it can be assumed that all of the rules contained in Article 10 of the agency agreement can be found in the DaimlerChrysler dealer agreements or in the dealer agreements of other manufacturers. It can therefore not be deduced from those rules that the German agents of Mercedes-Benz form an integral part of the principal's undertaking. Lastly, the requirement on the agent's part, as set out in Article 16 of the agency agreement, to support Mercedes-Benz in its advertising efforts, to handle advertising material carefully and to use it correctly, and the right on DaimlerChrysler's part to lay down minimum requirements for advertising by the agent or for participation in exhibitions and competitions are regulated to an objectively equal extent in Annex III, Articles 10 and 11, of the MBBel dealer agreement. In particular, the wording of Article 16(3) of the agency agreement, whereby

> 'It is in the common interests of Daimler-Benz and the agent to present a uniform image of the sales organisation',

also appears in a word-for-word translation in Annex III, section 10(1), first sentence, of the MBBel dealer agreement. The same applies to the subsequent text of the paragraph.

(165) In conclusion, a comparison of the terms of the agency agreements with those of the dealer agreements reveals that the requirements placed on agents are identical to those placed on dealers and that both forms of distributor form an equally integral part of the Mercedes-Benz sales organisation. This aspect is thus not a suitable basis for distinguishing between commercial agents and dealers.

(166) Lastly, DaimlerChrysler points out ([175]) that the fact that an agent offers customer services and is required to purchase spare parts for his own account and at his own risk does not preclude his forming an integral part of the company because it constitutes a complementary and back-up activity which is closely linked to the agent's main activity and is carried on independently thereof.

(167) In the Commission's view, the contractual link between negotiating the sale of cars, on the one hand, and offering customer and spare parts services, on the other, contributes to the commercial agent activity, which typically involves only limited risks (in particular the commission risk in the event of failure of the activity of intermediary), being associated with the risks of a principal, unusual as these are for a commercial agent. The argument put forward by DaimlerChrysler must therefore be rejected.

(168) Consequently, Article 81(1) is applicable to the agreements between Mercedes-Benz and its German agents to the same extent as it is to an agreement with a dealer. Restrictions imposed on an agent must therefore be assessed in the same way as for a dealer.

([172]) File, p. 3364.
([173]) File, p. 3668.
([174]) See Case C 266/93 *Bundeskartellamt* v *Volkswagen AG und VAG Leasing GmbH* [1995] ECR I-3509, at paragraph 21.
([175]) Points 87 et seq. of reply to statement of objections; Ulmer report, pp. 27 et seq., 39 et seq. and 46.

2.1.3.3. ***Anti-competitive object of the measures***

2.1.3.3.1. **Export restrictions (Germany)**

(169) The available documents show that Mercedes-Benz was already interested before 1996 in restricting or preventing 'internal' competition ([176]). Even before that time Mercedes-Benz had instructed its agents on several occasions not to sell vehicles outside their contract territory ([177]) and had tried to make it more difficult for them to engage in parallel exporting ([178]).

(170) In connection with the introduction of the new W 210 (new E-class), clear instructions were sent as from 6 February 1996 to all members of the German distribution network, and in particular German agents. The instructions did not apply only to the W 210 model, but to sales of new vehicles in general. As is clear from the memo of 6 February 1996, agents were referred to their contract territory as follows:

'In these circumstances we shall have no sympathy for retail firms which, in selling their allocation of the W 210 series, fail to concentrate on their own territory and ...

We would therefore ask you, in your day-to-day transactions, to consider the prices laid down in the target agreements for 1996 as the mandatory basis for your decisions in individual cases.

We are convinced that, by adhering strictly to this policy, we can effectively combat internal competition not only in the W 210, but also in other series. We therefore count on your unconditional support.'

At the end of the memo of 6 February 1996 Mercedes-Benz threatened that it would not 'hesitate to withhold vehicles in the W 210 series, should we discover that an allocation is not warranted by the absorption capacity of a specific territory'. This lent particular emphasis to the instructions.

(171) The purpose of this memo was to ensure that contracting partners would sell the W 210 and other vehicles allocated to them solely within their contract territory. *Komm-Kunden* not from the agent's contract territory should not be supplied. In this way, 'internal competition', as the memo itself put it, i.e. 'intra-brand competition' between German agents and between them and the German and foreign branches, was to be limited. The memo of 6 February 1996 thus set out to restrict intra-brand competition.

(172) The cuts to supplies of the W 210 to branches in Germany, as threatened in the memo of 6 February 1996 and implemented at the LVP meeting on 26 February 1996 (see recital 84), which also restricted supplies to agents, were used to enforce this restriction of competition. The same applies to the threat to extend this measure if necessary to (other) new series.

(173) The instruction that *Komm-Kunden* from other Member States be required in almost all cases to pay a deposit of 15 % of the purchase price (see recital 102 et seq. above) makes parallel trading even more difficult as it restricts the freedom of agents to pursue their own marketing policy and, for example, to waive this deposit for the *Komm-Kunden* they know.

(174) DaimlerChrysler claims ([179]) that the 15 % deposit is merely a 'requirement' that does not have to be enforced in each case. It was necessary in order to reduce risk, in particular to offset possible claims for damages in the event of non-purchase, which, it claims, are difficult to enforce with foreign customers, and to serve as evidence of the customer's serious intention to purchase and, later, take delivery of the vehicle. The level of the deposit was equivalent to the 15 % non-acceptance payment customary in German terms of sale. It was based on reasonable business considerations, namely that the risks of sales to foreign customers, particularly in relation to legal action, were greater. It was therefore certainly lawful. Moreover, DaimlerChrysler could, it maintained, not bring a claim against the agents for losses that could have been avoided by payment of a deposit. This general instruction applies only to the sale of vehicles to foreign customers. Even if such deposits may sometimes be wise from a commercial point of view, it must be pointed out that such an instruction does not exist for domestic transactions despite the fact that, here too, there may in some cases be comparable justified concerns. The rule accordingly discriminates against parallel trading compared with German vehicle sales.

([176]) See recitals 71 et seq., memorandum of the VOI/VNM department of 28 October 1985.
([177]) See recitals 72 and 73 above.
([178]) See recital 74 above.
([179]) Points 73 et seq. of the reply to the statement of objections.

(175) The object of all of these measures is a partitioning of the market incompatible with Article 81(1).

2.1.3.3.2. **Restrictions on supply to leasing companies (Germany and Spain)**

(176) The purpose of prohibiting supplies to outside leasing companies in cases where there is no specific lessee is to restrict competition between the leasing companies of the Mercedes-Benz group [180] and outside leasing companies in Germany and Spain. The aim is to ensure that outside leasing companies receive Mercedes vehicles only on a case-by-case basis, i.e. when a specific lessee is already available, and cannot lease out vehicles from stock. This makes it impossible for leasing companies to supply a vehicle quickly. The marketing rules governing supplies to leasing companies also lead to their not receiving the same price advantage on the purchase of vehicles for leasing as other operators running a fleet of vehicles. As a result, discounts in favour of leasing companies are automatically restricted: as part of a single transaction, they can never acquire more vehicles than are allocated to a specific customer. On the whole, the relevant clauses worsen the conditions under which outside leasing companies can obtain supplies of Mercedes vehicles and hence can enter the neighbouring leasing market in competition with the leasing companies of the Mercedes-Benz group. The rules governing the leasing business of dealers and agents thus have as their object a restriction of competition on prices and delivery conditions for leasing vehicles.

2.1.3.3.3. **Setting sales prices in Belgium**

(177) An assessment is made below of the agreement reached on 20 April 1995 between MBBel and the dealers' association to limit discounts to 3 % and to have a test buyer check the level of discounts on E-class vehicles, whereby larger discounts would lead to cuts in allocations of the new E-class (see recital 113 et seq. above). The agreement had as its object a restriction of competition on prices in Belgium.

2.1.3.4. ***Anti-competitive effect of the measures***

(178) It is established case-law that, for the purposes of Article 81(1), it is sufficient that the relevant measure, as in this case, has the object of restricting competition. It is not necessary to show that it also has the effect of restricting competition [181].

2.1.3.5. ***Appreciability of the restriction of competition***

(179) The restrictions described above were aimed at eliminating essential factors of competition.

(180) This applies firstly to all the export-restricting measures. Their object was to restrict the cross-border sale of new passenger cars to final consumers by way of export from Germany and hence to grant territorial protection to distributors in the other Member States (and, in the case of the instruction not to sell outside the contract territory, to the other German distribution partners as well).

(181) Likewise:

(a) the restrictions on sales of new vehicles to leasing companies; and

(b) the setting of sales prices in Belgium;

were aimed at eliminating essential factors of competition [182]. Sales prices, which in Belgium were set, are for the final consumer one of the decisive factors when it comes to making a choice. The same applies to the restrictions concerning leasing companies. The latter were to be prevented from competing on prices with the leasing companies of the Mercedes-Benz group and from making vehicles quickly available (see recitals 118 et seq. above).

(182) From a quantitative point of view, the following should be noted:

[180] For example, MBL Mercedes-Benz Leasing GmbH & Co. oHG, Hennigsdorf, or Mercedes-Benz Leasing Nederland BV, Nieuwegen.

[181] See, for example, Case T-143/89 *Ferriere Nord* v *Commission* [1995] ECR II-917; Case T-62/98 *Volkswagen* v *Commission* [2000] ECR II-2707, at paragraph 178; Case T-176/95 *Accinauto* v *Commission* [1999] ECR II-1635, at paragraph 106; Commission notice on guidelines on vertical restraints (OJ C 291, 13.10.2000, p. 1), point 7.

[182] See in this connection the study by Taylor Nelson Sofres, *Perception de la distribution automobile en Europe, Rapport Europe, Phase Quantitative, Décembre 2000*, chapter on competition and prices in the motor industry: *b. Les pratiques de mise en concurrence*, answer to question 44: 65 % of all European consumers who, before buying a new vehicle, visited more than one dealer gave as their reason for so doing price comparisons or comparisons of discounts.

(183) Mercedes-Benz's market share in the segments of particular importance for this case, E and F, was [20 to 30] % within the Community (see tables at recitals 24 et seq. above). Even if the two segments were combined to form a relevant market, the market share would still be around this size. If segment D were also taken into account, Daimler-Benz's market share in the Community would still be more than [10 to 20] % and thus significant.

(184) It should also be borne in mind that Mercedes-Benz is a very renowned supplier of passenger vehicles, and in segments E and F was the largest or second-largest vehicle supplier in most Member States and in the Community as a whole in the years between 1995 and 1997 ([183]). In segment D, Mercedes-Benz was one of the 10 largest suppliers of passenger vehicles in most Member States, while in the Community as a whole it was in fifth place in this segment in these three years. Given the market shares of Mercedes-Benz and its position in the various market segments, the restrictions of competition established in this case are appreciable in the upper-medium, executive and luxury classes.

(185) Also when account is taken of the market situation in the three Member States where measures were taken either to prevent exports to other Member States or otherwise to restrict competition (see recital 118), it is evident that Mercedes-Benz had a market position of considerable importance. Mercedes-Benz's market share in Germany in the segments of particular importance for this case, E and F, in the years from 1995 onwards was always above [10 to 20] %, reaching a maximum of nearly [50 to 60] % (see recitals 24 to 29), and in segment D, above [10 to 20] %. In Spain, its share in the years from 1995 onwards in segments E and F was generally around [20 to 30] %, and in segment D, [0 to 10] %. In Belgium, its share in the years from 1995 onwards in segment E was above [20 to 30] %, in segment F, between [20 to 30] % and approximately [40 to 50] %, and in segment D, generally around [0 to 10] %, although in 2000 it was more than twice as high at nearly [10 to 20] %. Even if segments E and F were taken together, the market share in these countries would still be considerably more than [10 to 20] %. If its position in segment D were also taken into account, its market share in Germany would be around [20 to 30] %, and in Spain and Belgium around [0 to 10] %.

(186) In those Member States to which new Mercedes vehicles were parallel exported, i.e. primarily Belgium and Spain, Mercedes had substantial market positions, as can be seen from recital 185.

(187) As can be seen from the description of the facts, the parallel trade from Germany to Belgium relied mainly on the shorter delivery times (see, for example, recital 37), but also on the fact that purchase prices were in practice clearly much lower in Germany ([184]).

(188) The volume of parallel trade was considerable and, even in so far as it took place legally, was viewed by companies in the Mercedes-Benz group as a major interference in the distribution system, as is evident from a number of documents found during the investigations. Thus MBBel complained over a number of years about the 'ugly monster' of parallel imports from Germany (see recitals 36 et seq.). MBE stated that Spain had been suffering for some time from parallel imports; these had always been disapproved of by MBE ([185]).

(189) The restrictions on competition in the area of leasing were also appreciable. As is apparent from the survey in recital 14, each year during the period from 1996 to 2000 about [...] % of all new Mercedes passenger cars were sold in Germany by branches and agents to leasing companies, of which amount between [...] % ([186]) (1996) and [...] % ([187]) (2000) were sold each year to outside leasing companies. Whereas in 1996 over [...] % of the vehicles supplied to outside leasing companies were supplied by agents, this share fell to approximately [...] % in 1999 and [...] % in 2000, bearing in mind, however, that up until 1998 the number of agents was still in excess of 200 whereas in 2000 there were on average only 110 agents in Germany (recital 15). The German Mercedes-Benz agents are therefore an important supplier of Mercedes passenger cars to outside leasing companies in Germany. In Spain too the restriction of competition was considerable from a quantitative point of view, inasmuch as between [...] % (1997) and just under [...] % (2000) of all new vehicles were sold each year to leasing companies, with approximately [...] % thereof being supplied by the Spanish distribution network, consisting as it does largely of dealers, to outside leasing companies (recitals 21 and 22).

([183]) See tables, file, pp. 3645 et seq.

([184]) See also in this connection the tables at recitals 32 et seq.; the actual price differences were, however, according to the document found during the investigation, in some cases considerably higher (see recital 37).

([185]) File, p. 1339. The original Spanish reads '... *Por ello, consideramos que tampoco la Red Oficial debe hacer estas operciones en Portugal. Por otra parte, exportar vehiculos de la clase C cuando existe una fuerte demanda en el mercado nacional nos parece ún más inconveniente. Les informamos por el presente que, a partir de la próxima programación mensual recibirán únicamente 4 vehicluos de la clase C, conforme a nuestro escrito de 4 de novembre de 93, y les rogamos su utilización exclusiva para clientes pertenecientes a su zona contractual, absteniéndose de vender vehiclulos a empresas o ciundadanos portugueses*'.

([186]) [...] vehicles.

([187]) [...] vehicles.

(190) The restrictions on competition were therefore at all events appreciable [188].

2.1.4. LIKELIHOOD OF THE MEASURES HAVING AN APPRECIABLE EFFECT ON TRADE BETWEEN MEMBER STATES

(191) A further prerequisite for the applicability of Article 81(1) is that the contested measures must be capable of having an appreciable effect on trade between Member States.

(192) That is the case if, on the basis of a set of objective elements of law or fact, it is possible to foresee with a sufficient degree of probability that they may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States capable of hindering the attainment of the objectives of a single market between Member States [189].

(193) All the measures listed in recital 180 were capable of hindering cross-border trade in new motor vehicles to an appreciable extent. Their purpose was to prevent or restrict as far as possible the export of vehicles from Germany to other Member States where prices were higher and/or supply conditions less favourable (e.g. long delivery times). The imposition on parallel exports of a 15 % deposit which was not required for equivalent domestic sales was likewise intended to curb these transactions. The very nature of these measures therefore affects cross-border trade in new Mercedes passenger cars. As indicated in recitals 35 et seq. above, there was appreciable actual parallel trading due among other things to differences in prices and delivery times or, in any event, considerable scope for potential parallel trading.

(194) Even if a certain proportion of the parallel trading that was actually taking place involved the sale of vehicles to unauthorised resellers (see recitals 36 et seq.), the measures were designed to prevent any parallel trading which, in view of the differences in prices and delivery times, was of interest not only to unauthorised resellers but also to final consumers. Mercedes-Benz was at liberty, moreover, to take action exclusively against the transactions (with unauthorised resellers) which agents and dealers were forbidden to engage in, which would have switched export demand at least to some extent to lawful channels. The protests from distributors in other Member States, and in particular the Belgian and Spanish main importers MBBel and MBE, about the parallel trade from Germany also show that parallel trading was having an enormous impact on their sales and on the pursuance of different price and supply strategies. The measures designed to prevent this parallel trading therefore constitute measures capable of having an appreciable effect on trade between Member States.

(195) The measures listed in recital 181 have the object and effect of restricting competition on prices and conditions. They cover all or a large part of the exclusive and selective distribution of Mercedes passenger cars in one Member State or two Member States.

(196) The restrictions on supplies to outside leasing companies are deliberately aimed at leasing companies which wish to acquire a larger number of vehicles or whole leasing fleets for which they have not yet found any identifiable customers. Even more so than export transactions with (private) buyers of individual vehicles — where Germany and Spain are both actually and potentially exporting countries (see recitals 35 et seq. and 48 et seq.) — this type of larger-volume transaction is by its very nature capable of leading to cross-border parallel trade. The contractual provisions objected to systematically prohibit all distribution partners independent of Mercedes-Benz in two large Member States from engaging in such transactions and are therefore capable of having an appreciable effect on trade between Member States.

(197) The agreement on price setting by the Belgian distribution partners keeps the level of prices throughout Belgium high. As illustrated by the number of new vehicles imported from Germany to Belgium (to some extent, it is true, via unauthorised resellers), a measure designed to uphold high prices in Belgium has an appreciable effect on trade between Member States. As already indicated, in vehicle retailing price is one of the essential factors of competition. The Court of Justice of the European Communities has ruled that trade between Member States is affected not only where a measure restricts interState trade or compartmentalises markets, but also where an agreement leads to an increase, even a large one, in the volume of trade between Member States [190]. Accordingly, it only needs to be shown that

[188] See Case 19/77 *Miller International Schallplatten GmbH* v *Commission* [1978] ECR 131, at paragraphs 9 et seq.; Case 107/82 *Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunkten AG* v *Commission* [1983] ECR 3151, at p. 3201.

[189] Established case-law, see in particular Joined Cases C-215/96 and C-216/96 *Bagnasco* [1999] ECR I-135, at paragraph 47; Case T-62/98 *Volkswagen* v *Commission* [2000] ECR II-2707, at paragraph 179, and the case-law there cited.

[190] Joined Cases 56 and 58/64 *Grundig/Consten* v *Commission* [1966] ECR 299; Commission decision of 18 july 1988 (Napier Brown — British Sugar), OJ L 284, 19.10.1988, p. 41, at paragraph 80.

an agreement is capable of affecting trade between Member States ([191]), which is manifestly the case here.

(198) Overall, it can therefore be established that the above measures affect trade between Member States to an appreciable extent ([192]).

2.2. *ARTICLE 81(3)*

2.2.1. BLOCK EXEMPTION REGULATIONS (EEC) No 123/85 AND (EC) No 1475/95

(199) Commission Regulation (EEC) No 123/85 (OJ L 15, 18.1.1985, p. 16) was in force from 1 July 1985 to 30 June 1995. It was replaced on 1 July 1995 by the new Regulation (EC) No 1475/95. Under Article 7 of Regulation (EC) No 1475/95, the provisions of Regulation (EEC) No 123/85 continued to apply until 30 September 1996 to distribution agreements that were already in force on 1 October 1995 and that met the requirements of Regulation (EEC) No 123/85. The precise delimitation between the periods of application of the two Regulations can be left open in the present case since the assessment of the case does not depend thereon.

2.2.1.1. ***The export restrictions and the prohibition of sales to leasing companies: Article 3(10)(a) of Regulation (EEC) No 123/85 and Regulation (EC) No 1475/95***

(200) Article 3(10)(a) of the above Regulations allows Mercedes-Benz to prohibit its distribution partners from supplying contract goods or corresponding goods to resellers outside its distribution system. However, sales to final consumers or, where applicable, to intermediaries commissioned by them and to other members of the distribution network may not be prohibited or otherwise prevented or impeded. This means in particular that export transactions with such customers may not be restricted in any way, as happened in the present case in Germany.

(201) Sales of vehicles to leasing companies may likewise not be restricted to the extent that such companies are to be regarded as final consumers.

(202) The Commission bases its assessment of whether leasing companies are to be regarded in the present case as final consumers or as 'resellers' on Regulation (EC) No 1475/95. With respect to the agreements which such companies conclude, for the purposes of the present Decision only the period since 1 October 1996 is considered to be the infringement period (see recital 222 and Articles 7 and 13 of Regulation (EC) No 1475/95).

(203) Generally speaking, leasing companies become the owners of the vehicles and remain so for the entire duration of the leasing contract. They sell on the vehicles as second-hand cars only once the leasing contract has expired (or been terminated early). Sale as a second-hand car does not as such constitute resale (by a 'reseller') within the meaning of Article 3(10)(a) of Regulation (EC) No 1475/95. This follows clearly from Article 10(4) and (12), first sentence, of that Regulation.

(204) As far as the 'leasing contract' itself is concerned (i.e. the contract between the leasing company that has acquired the vehicle from a member of the distribution network and a lessee), reference must be made to the second sentence of Article 10(12) of Regulation (EC) No 1475/95. Such a contract can be equated with a 'resale' only where it 'provide[s] for a transfer of ownership or an option to purchase prior to the expiry of the contract'. Otherwise, no 'resale' can in fact be said to take place. The lessee does not acquire ownership of a new vehicle, the vehicle being instead made available to him for use for a given period in return for a fee.

(205) The relevant contractual clauses, however, make a distinction only according to whether the vehicle has been purchased for stock. In this case, the prohibition to sell applies even if the leasing contract does not provide for a transfer of ownership or for an option to purchase before the end of the leasing contract.

(206) For the purposes of Regulation (EC) No 1475/95, what matters is not whether the leasing company has bought the vehicle concerned 'for stock' or for an already identified lessee. The criterion used in the contracts with German and Spanish distribution partners cannot therefore be justified by the need to prevent sales to 'resellers' not belonging to the distribution system.

([191]) Case T-62/98 *Volkswagen* v *Commission* [2000] ECR II-2707, at paragraph 179, and the case-law there cited.

([192]) Joined Cases 100 to 103/80 *Musique Diffusion Française (Pioneer)* v *Commission* [1983] ECR 1825, at paragraph 86.

(207) Article 10(13) of Regulation (EC) No 1475/95 gives rise to the same conclusion: while 'distribute' and 'sell' are defined as including other forms of supply by the dealer such as leasing, DaimlerChrysler is right to point out that this definition relates exclusively to the relationship between manufacturer and dealer. It is meant to prevent dealers from resorting to leasing in order to circumvent some of their contractual obligations.

(208) DaimlerChrysler's argument that a leasing company, unlike a final consumer, does not bear the investment risk for the acquired vehicle and is thus, in economic terms, not the final consumer must be rejected. Regulation (EC) No 1475/95 focuses, not on the existence of an 'investment risk', but only on whether the person concerned disposes of a motor vehicle which is still in a new condition and which he had previously acquired in his own name and on his own behalf (see recital 203). Moreover, every purchaser bears an 'investment risk' irrespective of whether he is a private final consumer, a business final consumer or a reseller. The same applies to leasing companies. As the owner of the object to be leased the leasing company bears the investment risk from the time the vehicle is acquired, throughout the duration of the leasing contract and up to the time the vehicle is sold as a second-hand vehicle. Thus in the event of the lessee's inability to pay, and at the end of the leasing contract, it must take back the vehicle and either lease it again or sell it as a second-hand vehicle. In this respect, there is no relevant difference for the purposes of Regulation (EC) No 1475/95 between a leasing company and a car rental firm, which DaimlerChrysler accepts to be a final consumer ([193]).

(209) Nor is it relevant for the purposes of Regulation (EC) No 1475/95 that leasing companies generally pass on certain costs (in particular insurance costs) to lessees under agreements to that effect. As is clear from Article 10(12) of the Regulation, this does not make the leasing company a reseller (any more than it does a rental firm which, for example, passes certain [insurance] costs on to the hirer). Moreover, this general feature of leasing contracts has nothing to do with the question whether the leasing company acquires a vehicle 'for stock' or for a customer determined in advance.

(210) It may be the case that lessees today often decide what type of vehicle they wish to lease with what type of engine. There may also be lessees, however, who are prepared to limit their choice to one of the vehicles which the leasing company has available. These are especially people who are interested in obtaining a vehicle at short notice. A policy of preventing outside leasing companies from making such offers cannot be justified by the criteria in Article 10(12) of Regulation (EC) No 1475/95 or more generally by the desire to prevent the on-selling of new vehicles by resellers not belonging to the distribution system.

(211) As far as advertising by leasing companies is concerned, this concerns first and foremost the leasing conditions. These conditions naturally always relate to a specific model of vehicle. To this extent the advertising of the conditions and of the model cannot be separated. It follows from the clear wording of Regulation (EC) No 1475/95 that such practices, common as they are in the leasing business, do not make a leasing company a reseller.

(212) The argument must also be addressed according to which it follows from the explanations given by the Court of Justice ([194]) that a leasing company constitutes a reseller if it builds up stocks of vehicles for leasing ([195]). Then its advertising activities would cover not only its leasing services but also, according to DaimlerChrysler, the vehicle itself, making the leasing company a reseller ([196]). This means that contracting parties can be forbidden from carrying on such business.

(213) This argument cannot be upheld. As the Court of Justice expressly held in the judgments cited by DaimlerChrysler, the exceptions contained in a block exemption regulation should not be interpreted widely ([197]). In the present case, however, the interpretation advocated by DaimlerChrysler goes further than the clear wording of the second sentence of Article 10(12) of Regulation (EC) No 1475/95. It should be noted in this context that

([193]) As does Advocate General Tesauro in his opinion delivered on 8 June1995 in Case C-70/93 *BMW* v *ALD Auto-Leasing* [1995] ECR I-3439, at paragraphs 27 et seq. and 41 et seq.

([194]) Case C-70/93 *BMW* v *ALD Auto-Leasing* [1995] ECR I-3439, at paragraph 29 and Case C-266/93 *Bundeskartellamt* v *VW and VAG Leasing* [1995] ECR I-3477, at paragraph 34.

([195]) End of points 165 and 166 of the reply to the statement of objections.

([196]) End of point 165 of the reply to the statement of objections.

([197]) Case C-70/93 *BMW* v *ALD Auto-Leasing* [1995] ECR I-3439, at paragraph 28 and Case C-266/93 *Bundeskartellamt* v *VW and VAG Leasing* [1995] ECR I-3477, at paragraph 33.

the Court's reflections on the building-up of 'stocks' concerned only the legal position under Regulation (EEC) No 123/85, where such a clear wording was lacking ([198]).

2.2.1.2. *Scrutiny of the remaining agreements in the light of Regulation (EEC) No 123/85 and Regulation (EC) No 1475/95*

(214) The remaining restrictions of competition listed in recitals 180 and 181 are not exempt under any of the provisions of the block exemption regulations covering motor vehicle distribution.

2.2.2. INDIVIDUAL EXEMPTION

(215) There is no question of an individual exemption for the agreements concerned.

(216) In the case of the export restrictions on new vehicles, this is apparent from the fact that, even if it were argued that a restriction on exports would help to improve the distribution of goods within each Member State, consumers would not share in the resulting benefit. They are deprived of the possibility of exploiting the benefits of the single market and acquiring their vehicles in another Member State on more favourable terms.

(217) The obligation on agents to require a 15 % deposit in nearly all cases of parallel export does not always lead to an improvement in the distribution of goods. In particular where the customer is known to the agent or has purchased vehicles from him on several occasions, there is, as with a domestic transaction, no good economic reason for a deposit. Systematically requiring such a deposit is not imperatively connected with the justified concern to ensure that the vehicle will be purchased and the purchase price paid in full.

(218) The restrictions on the sale of new vehicles to leasing companies and the setting of prices in Belgium have as their object the restriction of competition on prices and conditions and seriously interfere with the freedom of contract of agents and dealers. It is not obvious that these restrictions could help to improve the distribution of goods or that consumers will have a fair share of the benefit resulting from the agreements.

2.3. *DURATION OF THE INFRINGEMENTS*

(219) The measures identified in this case were of differing durations. In some cases, they have already ended, in others they are still continuing.

(220) The direct restrictions on exports ([199]) were put into place on 6 February 1996 with the dispatch of the memorandum to the entire German distribution network. The cuts in supplies which were decided on 26 February 1996 at the LVP meeting and notified on 5 March 1996 to regions and passenger car sales managers were intended to enforce these restrictions. The exchange of letters between Mercedes-Benz and the Federal Association of Mercedes-Benz Agents (BVMB eV) on 26 June 1996 with the reply dated 22 July 1996 confirms the export restrictions. These measures ended in the main with the memo sent on 10 June 1999.

(221) The rules on deposits payable by *Komm-Kunden* on the basis of circular No 52/85 dated 12 September 1985 (see recital 103), which likewise restrict parallel exports, can be proved to have existed from that date. They have not yet been abolished.

(222) The German agency agreements and the Spanish dealer agreements have contained, since 1 August 1987 and 1 October 1996 respectively, provisions prohibiting supplies to leasing companies for the purpose of building up stocks. Distribution agreements falling under Regulation (EC) No 1475/95 are prohibited, as from 1 October 1996 at the latest, from containing such restrictions. The infringement therefore began at the latest on 1 October 1996. It has not been terminated to date.

(223) The setting of sales prices in Belgium can be proved to date from 20 April 1995. It was terminated only with the sending of the circular dated 10 June 1999.

(224) On the duration of the infringements DaimlerChrysler points to the managing board's letter of 7 May 1998 to the Member of the Commission, Karel Van Miert, regarding the setting up of a hotline for complaints from final consumers ([200]). It said that from this point in time the Commission could no longer claim that any

([198]) See the express references in the judgments in the abovementioned Cases C-70/93 *BMW* v *ALD Auto-Leasing* [1995] ECR I-3439, at paragraphs 25 and 30, and C-266/93 *Bundeskartellamt* v *VW and VAG Leasing* [1995] ECR I-3477, at paragraphs 30 and 35.

([199]) Recitals 70 et seq.

([200]) Point 174 of the reply to the statement of objections and enclosure.

infringements existed. This objection must be rejected. While the hotline is a sort of complaints office, it has no right to supervise or instruct the agents and dealers belonging to the Mercedes-Benz distribution system. In this respect, the setting-up of the Mercedes-Benz hotline did not put an end to the infringements.

(225) The following table summarises the duration of each of the individual infringements established.

Measure	Start	End
Export restrictions ([201])	15 % deposit rule: 12.9.1985;	15 % deposit obligation: not yet ended
	Other export restrictions: 6.2.1996	Circular 10.6.1999
Prohibition on sales to leasing companies in Germany and Spain	1.10.1996	Not yet ended
Setting sales prices in Belgium	20.4.1995	Circular 10.6.1999

([201]) Recitals 70 et seq.

2.4. *PARTY TO WHICH THIS DECISION IS ADDRESSED*

(226) This Decision is addressed to DaimlerChrysler AG.

(227) DaimlerChrysler AG became the legal successor to Daimler-Benz AG as a result of the abovementioned merger on 21 December 1998. Daimler-Benz AG became the legal successor to Mercedes-Benz AG on 26 May 1997 by way of a merger. Pursuant to section 20(1) of the Conversion Act (*Umwandlungsgesetz*) ([202]), these two mergers resulted in all rights, assets, liabilities and obligations of the company taken over being transferred to its legal successor.

(228) Daimler-Benz AG was responsible for the conduct of its wholly-owned subsidiary, Mercedes-Benz AG, since the latter's dependence under company law meant that it could not pursue an autonomous distribution policy. Daimler-Benz AG was also responsible for the conduct of its subsidiaries in Belgium (MBBel) and Spain (MBE), since it had a stake of at least 99,88 % in these companies ([203]). Furthermore, the activities of the above subsidiaries of Daimler-Benz were known to Daimler-Benz AG/Mercedes-Benz AG and, to a large extent, even actively promoted by it.

2.5. *ARTICLE 3(1) OF REGULATION No 17*

(229) Under Article 3(1) of Regulation No 17, where the Commission finds that there is infringement of Article 81(1), it may by decision require the undertakings concerned to bring to an end infringements that are still continuing. As explained, DaimlerChrysler sent a circular on 10 June 1999 to its distribution partners putting an end to some of the infringements established in this Decision. The agreements objected to by the Commission regarding the need for deposits of 15 % in parallel export transactions and the restrictions on supplies to leasing companies, however, were not terminated. In this respect, the infringements have therefore not been brought to an end. DaimlerChrysler must therefore be required to end the above measures immediately and not to replace them by other comparable restrictions.

(230) In view of the serious nature of the continuing infringements, a fine should be imposed in order to ensure the effectiveness of the measures prescribed.

2.6. *ARTICLE 15(2) OF REGULATION No 17*

(231) Article 15(2) of Regulation 17/62 empowers the Commission to impose fines, within the stated limits, on undertakings which have infringed Article 81(1) either intentionally or negligently.

(232) In the present case, the Commission considers it necessary to impose a fine on DaimlerChrysler AG. DaimlerChrysler AG is the direct legal successor to Daimler-Benz AG, which is the direct legal successor to Mercedes-Benz AG. DaimlerChrysler AG is therefore legally responsible for all the infringements of competition law perpetrated by Daimler-Benz AG and Mercedes-Benz AG themselves or by the Daimler-Benz subsidiaries MBBel and MBE.

([202]) Conversion Act of 28.10.1994, *Bundesgesetzblatt* I 1994, p. 3210; corrigendum in *Bundesgesetzblatt* I 1995, p. 428.

([203]) Case 107/82 *AEG* v *Commission* [1983] ECR 3151, at paragraph 50; Case 48/69 *Imperial Chemical Industries Ltd* v *Commission* [1972] ECR 619, at paragraphs 132/135; Emmerich in Immenga/Mestmäcker, *Europäisches Wettbewerbsrecht* Article 85(1), paragraph 59, with further references in footnote 120.

(233) Although the members of the Mercedes-Benz distribution network (i.e. the German agents and the Belgian and Spanish dealers) were likewise party to the anti-competitive agreements, it does not appear appropriate to impose fines on these undertakings also. The initiative in respect of the export restrictions and the restrictions on supplies to leasing companies lay with Mercedes-Benz; the observance of these restrictive agreements was urged upon the German agents, in some cases repeatedly. The setting of prices in Belgium was actively supported by Mercedes-Benz, cuts in vehicle supplies being threatened as a penalty should test purchases reveal that the Belgian dealers were granting discounts of more than 3 % on purchases of an E-class Mercedes. This shows that, without the initiative and the active cooperation of Mercedes-Benz against the financially weaker distribution partners, the infringements at issue here would not have been committed or at least would have remained largely ineffective. This finding is not altered by the fact that the German Federal Association of Mercedes-Benz Agents generally approved the measures to restrict internal competition. As far as the Belgian dealers are concerned, although a certain initiative on their part seemingly came out of the meeting of 20 April 1995, MBBel clearly took the lead on that date and agreed additional sanctions which only it could impose.

(234) In fixing the amount of the fine under Article 15(2) of Regulation No 17, the Commission has to take account of all relevant circumstances, and in particular the gravity and the duration of the infringement.

(235) In determining the gravity of the infringement, the Commission takes account of the nature of the infringement, its actual effects on the market, in so far as these can be measured, and the size of the relevant market. Depending on the duration, the amount initially determined for the gravity of the infringement may be increased. In what follows the Commission draws the necessary conclusions from these criteria for each of the three infringements.

(236) In the Commission's view, the measures aimed at restricting exports constitute a single infringement consisting of two elements (the instruction not to sell outside the contract territory and the 15 % deposit rule) which for a time had a cumulative effect. The same idea underlay these measures, namely that agents should restrict their sales activities as far as possible to their contract territory and should not compete with the other distribution partners in Germany, or with the branches and the distribution partners in other Member States of the Community. The measures had the object of restricting parallel trade. This infringement must be classified as very serious by its nature, since the measures infringed against a basic principle of the single market. The memo of 6 February 1996 (see recital 78) made particular reference to the W 210 series, but also to other series. This also applies to the memo of 15 March 1996, in which it is threatened to cut supplies of other series in addition to the cuts in the W 210 series. The importance of complying with this memo was again stressed at the LVP meeting on 26 February 1996. The Northern Region was again separately urged on 15 March 1996 to do all in its power to avoid deliveries to Belgium. The measure covered the territory of a large Member State, in which just under a half of all new vehicles are sold via independent contracting partners of DaimlerChrysler who are agents. The distribution partners outside the contract territory of an agent, especially in the potential target States of exports, were granted territorial protection.

(237) The same applies to the rule whereby in the case of parallel exports a 15 % deposit should normally be required from customers. This likewise results in parallel exports being discriminated against compared with domestic transactions, and this concerns all models.

(238) The share of Mercedes-Benz in the main relevant segments D (upper medium class), E (executive class), and F (luxury class) in the period 1995 to 1997 was between about 13 % and about 36 % (for details see recitals 23 et seq. and 183 et seq. above).

(239) The infringement was intentional since Mercedes-Benz could not have been unaware that by their very nature the abovementioned arrangements had as their object the restriction of competition [204].

(240) Furthermore, there are numerous documents proving that Mercedes-Benz knew that the sale of new vehicles to final consumers in other Member States should not be hindered directly or indirectly. That is why, from the mid-1970s, it abandoned the 'customer service commission' charged to a dealer or agent that had sold a vehicle to an EU customer [205]. Mercedes-Benz also knew with regard to German agents 'that MB can have

(204) Case 19/77 *Miller International Schallplatten GmbH* v *Commission* [1978] ECR 131, at paragraph 18.

(205) File, p. 1183; memo from the VP/A2 department to Mr Schmitt on the grey market discussion of the previous day. The memo bears the receipt stamp of the VP/M-4 department dated 16 November 1995; likewise the letter from the VMC department on 16 October 1995 on *Komm-Kunden* business, file, p. 375.

the exemption withdrawn by the Commission if even so much as one distribution partner continuously or systematically hinders purchases by *Komm-Kunden* from EU Member States or associated countries' [206]. Reference must also be made to the longstanding decision-making practice on export restrictions [207].

(241) Overall, the Commission views the infringement as particularly serious. It considers a starting amount of EUR 33 million to be appropriate.

(242) As regards the duration of the infringement, the following should be pointed out. If both elements of the infringement are taken together, the infringement began on 12 September 1985 and has not yet ended. It is therefore an infringement of long duration. However, the potential impact of the deposit rule was much smaller than that of the instructions aimed directly against exports. The latter were in force only during the period from 6 February 1996 to 10 June 1999, i.e. for three years and four months. The Commission therefore considers it appropriate to increase the starting amount by only 42,5 %, i.e. by EUR 14,025 million. The basic amount is therefore EUR 47,025 million.

(243) The ban on selling vehicles to leasing companies for stock, as contained in the German agency and Spanish dealer agreements, that covers all series and is today still considered by DaimlerChrysler to be lawful, restricts procurement possibilities for leasing companies. The measure has the object and effect of preventing leasing companies from being able to provide customers with immediately available vehicles and from benefiting from quantity discounts by ordering several vehicles, as is clear from the memo of 6 August 1996. It also has the effect of restricting price competition both for Mercedes-Benz agents and dealers and for the leasing companies. Although the measure concerns the sale of new vehicles in two large Member States, it extends only to vehicles intended for 'outside leasing companies' [208]. On the importance of Mercedes-Benz on the market, reference is made to recitals 23 et seq. and 183 et seq. In respect of this infringement also, Mercedes-Benz has been acting intentionally within the meaning of the case-law. As an illustration, reference is made to the memo of 6 August 1996, which states that the failure to observe contractual provisions meant that outside leasing companies had 'include[d] discounts in individual transactions, where we would not be prepared to grant discounts in the respective cases'. Overall, this infringement must be classified as serious. As a starting amount the Commission considers an amount of EUR 10 million to be appropriate.

(244) The infringement of Article 81 began on 1 October 1996 and has not yet ended. Its duration therefore amounts to five years, which corresponds to a medium duration. The Commission therefore considers it appropriate to increase the starting amount in the light of the duration of the infringement by 50 %, i.e. by EUR 5 million, to a basic amount of EUR 15 million.

(245) The measures adopted with the active involvement of MBBel with a view to setting sales prices in Belgium by their very nature constitute a very serious infringement of the competition rules. Account should be taken of the fact that the measure first demonstrably covered the W 210 model, but that subsequently discount practice in relation to other models was also checked. The measure was taken across an entire Member State of the Community, i.e. Belgium, which is, however, not a big Member State. On the importance of Mercedes-Benz on the market, see recitals 23 et seq. and 183 et seq. above. In respect of this infringement also, Mercedes-Benz acted intentionally within the meaning of the case-law. Overall, the Commission therefore regards this infringement as serious. It considers a starting amount of EUR 7 million to be appropriate.

(246) These measures were in force from 20 April 1995 to 10 June 1999, i.e. for a period of medium duration. The Commission therefore considers it appropriate to increase the starting amount by 40 %, i.e. by EUR 2,8 million, to EUR 9,8 million.

(247) Aggravating and mitigating circumstances must also be taken into account in calculating the fine.

(248) No aggravating circumstances are apparent.

(206) See footnote 239.

(207) Commission decision 83/367/EEC of 2 December 1981 in Case IV/25.757 *Hasselblad* (OJ L 161, 12.6.1982, p. 18) confirmed by the judgment of the Court of 21 Febraury 1984 in Case 86/82 *Hasselblad* v *Commission* [1984] ECR 883, at paragraph 35; Commission decision 85/79/EEC of 14 December 1984 in Case IV/30.809 *John Deere* (OJ L 35, 7.2.1985, p. 58); Commission decision 85/617/EEC of 16 December 1985 in Case IV/30.839 *Sperry New Holland* (OJ L 376, 31.12.1985, p. 21); Commission decision of 17 July 1987 in *Sandoz*, (OJ L 222, 10.8.1987, p. 28); Commission decision 98/273/EC of 28 January 1998 in Case IV/35.733 *Volkswagen* (OJ L 124, 25.4.1998, p. 60).

(208) In Germany approximately 7 % of the vehicles sold via agents are sold to outside leasing companies. In Spain dealers sell approximately 10 % of vehicles to outside leasing companies.

(249) DaimlerChrysler argues that a mitigating circumstance is the fact that members of the managing board and managers of the subsidiaries were not themselves among those taking action in the cases which are to be viewed critically. Those responsible were in subordinate positions. The sales, legal and contract departments always worked towards avoiding infringements of the law.

(250) The Commission rejects this argument. If staff at Mercedes-Benz or its subsidiaries send circulars or letters in the course of their duties to agents or dealers or even other distribution companies, then the manufacturer must take responsibility for this. This cannot be construed as a mitigating circumstance.

(251) DaimlerChrysler further argues that between 1995 and 1998 the Commission sent DaimlerChrysler only 27 consumer complaints. Four of them could not be examined owing to an insufficient description of the facts, 16 were unjustified and only seven were wholly or partly justified ([209]).

(252) Setting a fine depends on the points of view set out in recitals 232 et seq. and in particular on whether a company has taken measures with the object of restricting competition. The fact that these measures may not have been noticed by the final consumers concerned and that the latter may not have complained to the Commission about them is not an argument constituting a mitigating factor in the setting of the fine.

(253) The abovementioned amounts when added together give a total fine of EUR 71,825 million,

HAS ADOPTED THIS DECISION:

Article 1

DaimlerChrysler AG and its legal predecessors Daimler-Benz AG and Mercedes-Benz AG have themselves or through their subsidiaries Mercedes-Benz España SA and Mercedes-Benz Belgium SA/NV infringed Article 81(1) of the EC Treaty by taking the following measures to restrict parallel trade:

— as of 6 February 1996 all agents in Germany were instructed as far as possible to supply new vehicles supplied to them, and in particular those in the W 210 series, only to customers in their own contract territory and to avoid internal competition; these measures were in force until 10 June 1999,

— as of 12 September 1985 their agents in Germany were instructed to require a deposit of 15 % of the vehicle price for orders for new vehicles placed by *Komm-Kunden*; this measure has not yet been terminated,

— restricting, from 1 October 1996 until the present time, the supply of passenger cars to leasing companies for stock,

— participating in agreements to restrict the granting of discounts in Belgium, these agreements having been concluded on 20 April 1995 and terminated on 10 June 1999.

Article 2

DaimlerChrysler AG shall, immediately after this Decision is notified, bring to an end the infringements established in Article 1 to the extent that they are still continuing and shall not replace them with restrictions having the same object or effect; in particular, it shall at the latest within two months of notification of this Decision:

— withdraw circular No 52/85 of 12 September 1985 by sending a circular to the German agents and principal agents, in so far as it instructs them to require *Komm-Kunde* to pay a deposit of 15 % when ordering a passenger car,

— remove from the German agency agreements and the Spanish dealer agreements the rules prohibiting the sale of new vehicles to leasing companies for stock. It shall also inform its German agents by memo of the withdrawal of the memo of 6 August 1996.

Article 3

A fine of EUR 71,825 million is imposed on DaimlerChrysler AG in respect of the infringements referred to in Article 1.

Article 4

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

642-0029000-95 (Code IBAN: BE76 6420 0290 0095)
Banco Bilbao Vizcaya Argentaria (BBVA) (SWIFT Code: BBVABEBB)
Avenue des Arts/Kunstlaan 43
B-1040 Brussels

([209]) End of point 178 of the reply to the statement of objections.

After expiry of that period, interest shall become payable. The rate applicable shall be that which the European Central Bank applies to its main refinancing operations. The interest shall be payable from the first working day of the month in which this Decision was adopted. A supplement of 3,5 percentage points shall be charged. In total, the interest rate shall be 7,26 %.

Article 5

In respect of the obligations laid down in Article 2, Daimler-Chrysler AG shall be fined a penalty of EUR 1 000 for every day's delay in implementing this Decision. The delay shall be calculated from the expiry of the two month period laid down for implementation.

Article 6

This Decision is addressed to DaimlerChrysler AG, D-70546 Stuttgart.

This Decision shall be enforceable pursuant to Article 256 of the EC Treaty.

Done at Brussels, 10 October 2001.

For the Commission

Mario MONTI

Member of the Commission