

## II

*(Acts whose publication is not obligatory)*

## COMMISSION

## COMMISSION DECISION

**of 20 September 2000**

**relating to a proceeding under Article 81 of the EC Treaty**

**(Case COMP/36.653 — Opel)**

*(notified under document number C(2000)2707)*

**(Only the Dutch text is authentic)**

**(Text with EEA relevance)**

(2001/146/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

## CHAPTER 1: THE FACTS

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty<sup>(1)</sup>, as last amended by Regulation (EC) No 1216/1999<sup>(2)</sup>, and in particular Article 3 and Article 15(2) thereof,

Having regard to the Commission Decision of 21 April 1999 to open a proceeding in this case,

Having given the parties concerned the opportunity to make known their views on the objections raised by the Commission, pursuant to Article 19(1) of Regulation (EC) No 17 and Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearings of parties in certain proceedings under Articles 85 and 86 of the EC Treaty<sup>(3)</sup>, on the hearings provided for in Article 19(1) and (2) of Council Regulation (EC) No 17,

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

Whereas:

## A. BACKGROUND

## I. Procedure

- (1) It appeared from information which the Commission had received that Opel Nederland BV was pursuing a strategy of systematically obstructing exports of new motor vehicles from the Netherlands to other Member States. Agreements or concerted practices which aim at preventing or diminishing sales of new motor vehicles to end consumers resident in another Member State thereby restricting competition, fall under Article 81(1) of the EC Treaty. Pursuant to Commission Regulations (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<sup>(4)</sup>, and (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<sup>(5)</sup>, manufacturers and/or their importers

may prevent their dealers from selling new motor vehicles to unauthorised resellers not belonging to their dealers' network, whereas sales to end consumers, either directly or indirectly through an authorised intermediary, and sales to other dealers belonging to the same dealers' network, must not be restricted.

- (2) On 4 December 1996, in order to determine whether this information was evidence of an infringement, the Commission adopted a decision ordering investigations under Article 14(3) of Council Regulation (EC) No 17. The investigations ordered were carried out on 11 and 12 December 1996 on the following firms located in the Netherlands: Opel Nederland BV in Sliedrecht and van Twist, an Opel dealer located in Dordrecht.
- (3) In its Statement of Objections of 21 April 1999 addressed to Opel Nederland BV and General Motors Nederland BV, the Commission gave the undertakings the opportunity to submit their comments. In their written reply dated 21 June 1999 to the Commission's Statement of Objections (hereinafter: reply by Opel Nederland), as well as in their oral and written comments made during the hearing on 20 September 1999, Opel Nederland BV and General Motors Nederland BV made known their views on the allegations made by the Commission<sup>(6)</sup>.

## II. The undertakings

- (4) Opel Nederland BV, Sliedrecht was established on 30 December 1994 as a 100 % subsidiary of General Motors Nederland BV, Sliedrecht, taking over from the latter the commercial activities of General Motors within the Netherlands. General Motors Nederland BV's activities were thus reduced to that of a controlling holding company, fully owned by General Motors Corporation, Detroit, Michigan (USA)<sup>(7)</sup>. Both Opel Nederland BV and General Motors Nederland BV, and also General Motors (Europe) and Adam Opel AG which are mentioned in this Decision, are part of the General Motors organisation in Europe. This organisation consists of a large number of companies which, as a rule, are 100 % owned by General Motors Corporation.
- (5) Opel Nederland BV is the sole 'National Sales Company' for the Opel brand in the Netherlands. Its business activities comprise import, export and wholesale trade in motor vehicles and associated spare parts and accessories. It is however not involved in the production of Opel vehicles. It has concluded 'dealer sales and service agreements' with about 150 dealers who, as a result, qualify as authorised resellers within the Opel dealer network in Europe.

- (6) The employees of Opel Nederland BV named in the documents cited in evidence occupied the following positions on 1 October 1996<sup>(8)</sup>:

R.A.H.M. Leeuw	de	Managing Director	(Algemeen Directeur)
J.J. Naval Solanas		Treasurer	
G. Hagen		Systems and audit manager	
L.O.M. Aelen		Finance staff manager	
W. de Heer		Director of sales and marketing	
T.A. de Jong		Sales manager	
H.H.C. Notenboom		Sales staff manager	
W.P.C. Kreber		Metropolitan district manager	
G.X. Pot		District manager	
A.A. Vasen		District manager	
R.A. van der Sluis		District manager	
R.F.B. de Roy		Marketing manager	
L.W.M. Wenekers		Marketing services supervisor	
I.M. Aukema		Merchandising manager	
C.A. Braun		Senior merchandising specialist	
O.M. Wegner		Dealer organisation and development manager	
R. Liefhebber		Retail IT support manager	
J.P. Verdonk		Managing Director, General Motors Nederland BV (1995)	
H.-J. Rose		Sales operations, Adam Opel AG, Bochum	
Van Os		Secretary	
Kleveringa		Secretary sales manager	
Schaap		Director after sales	

- (7) General Motors Corporation is, among other things, the sole shareholder in the motor vehicle manufacturer Adam Opel AG, Rüsselsheim (Germany), which owns *inter alia*, two further manufacturing plants in Germany (Opel Automobilwerk Eisenach-PKW GmbH in Eisenach and the Adam Opel factory in Bochum). Opel Nederland BV obtains the vehicles intended for distribution in the Netherlands from these or other manufacturing plants belonging to the General Motors Group.
- (8) This Decision is addressed to Opel Nederland BV and to General Motors Nederland BV.

### III. Position of the Opel brand

- (9) In 1996 and 1997 respectively, a total of 12 796 000 and 13 007 400 new passenger vehicles were registered in the European Union (EU). In the period 1995 to 1997 the General Motors Group, with the brand names Opel (marketed under the brand name of Vauxhall in the United Kingdom and Ireland), Saab and the US-American GM brand names, accounted for a share of between 12 % and 13 % on the basis of new registrations issued, thus making it the second-largest provider of private motor vehicles behind the Volkswagen Group with their brand names Volkswagen, Audi, Seat and Skoda, which accounted for about 17 % of all new registrations. With a total of 1 532 000 registrations in 1996 and 1 559 000 in 1997, the Opel brand (including Vauxhall) was the market leader in the EU and the European Economic Area ahead of Volkswagen, for which 1 418 000 registrations took place in 1996 and 1 386 000 in 1997<sup>(9)</sup>.
- (10) The market for private motor vehicles can be divided into numerous segments. Characteristics such as purchase price or vehicle length are relevant for this classification. Other factors such as the size and power of the engine on the one hand or quality and prestige, on the other, play a smaller role for allocation of a vehicle to a particular segment. Usually the following segments are differentiated: A: mini cars; B: small cars; C: medium cars; D: large cars; E: executive cars, F: luxury cars; G: multi-purpose vehicles and sports cars. The final segment G is sometimes further subdivided.
- (11) The annexed overview (Annex 1), which is part of this Decision, shows the shares of the most important Opel models according to segment. It should be noted that this overview is based on the number of vehicles sold, since it is usual practice in the automobile industry to calculate shares on this basis and not on the basis of the value (turnover). The second table (see Annex 2) shows the main competitors of Opel models in the segments B to E. Opel is also represented in segment G with its models Tigra, Zafira and Frontera; total sales in this segment, which can be further divided into multi-purpose vehicles, off-road vehicles, convertibles and coupés, are, however, much lower than those in segments B to E.

## B. PARALLEL TRADE IN OPEL VEHICLES

### I. Scale of parallel exports

- (12) According to the documents found during the inspections<sup>(10)</sup>, the total number of re-exports of new Opel

vehicles from various Member States to Germany, for example, increased noticeably during the period 1992 to 1996. Re-exports from the Netherlands to Germany had risen since 1994 and in 1996 reached a level which was substantially higher than in the previous years.

### II. Price differentials

- (13) According to the Commission's regularly published reports on car prices within the European Union<sup>(11)</sup>, which are based on recommended list prices before tax provided by the manufacturers, the price differentials between the Netherlands and other Member States during the period 1995 to 1997 with respect to certain Opel models were sufficiently large to provide an incentive for exporting from the Netherlands, in particular to Germany<sup>(12)</sup>.
- (14) In 1996, the price differential for new Opel vehicles between the Netherlands and other Member States was, depending on the model, was up to 20 % and later up to 24 %. The price advantage towards Germany attained in 1996, depending on the model, was up to 16 %. In 1997, this price advantage in the Netherlands, as compared with other Member States, amounted to up to 25 %, depending on the model, and increased later to up to 28 %. As compared with Germany, the advantage was between about 16 % and 19 %.
- (15) In a draft letter dated 10 September 1996, Opel Nederland BV stated that existing price differentials would provide an incentive for parallel export, particularly to Germany. It is equally stated that price adjustments, for example price increases in the Netherlands, would have a negative effect on the competitiveness of Opel on the Dutch market:
- ' ... The different tax burdens on new cars and the competition conditions within Europe can result in prices in certain countries being more advantageous than in others. ... Currently, the prices of Opels in the Netherlands are in competition with Volkswagen and Ford which creates an imbalance with, *inter alia*, German prices. When this, however, leads to excessive exportation, you can imagine that the German Opel dealers will complain. Questions will arise about the prices and as a consequence thereof about the competitive position of Opel in the Netherlands. Thus, the competitive position of yourself and your colleagues will be diminished to the advantage of other importers on the Dutch market ...'<sup>(13)</sup>

- (16) An internal memo of Opel Nederland BV dated 23 September 1996 emphasises this evaluation:

'... In general in Holland the net catalogue prices for vehicles are lower than abroad in countries without a specific tax on new motor vehicles (specifically in Germany). To a large extent this is caused by the pricing strategy of the car importers as this leads to a lower consumer price which is in the interest of the general public ...' <sup>(14)</sup>

#### C. THE AGREEMENTS AND CONDUCT IDENTIFIED

##### I. Overall strategy vis-à-vis dealers

- (17) On 26 September 1996, the management of Opel Nederland BV adopted a decision (see the document quoted below), which proves the existence of a general strategy, aiming at preventing and/or restricting exports from the Netherlands into other Member States. This strategy comprised, *inter alia*, measures of a restrictive supply policy, a restrictive bonus policy and instructions to dealers to refrain from export sales in general, and was then operated at least during a certain time, as will be shown in the following:

#### '... CONCLUSIONS MEETING ON EXPORT

Slidrecht, 26 September, 1996

Participants:

I.M. Aukema

C. Brown

W. de Heer

T.A. de Jong

R.A.H.M. de Leeuw

J.J. Naval

H.H.C. Notenboom

O.M. Wegner

L.W.M. Wennekers

L.O.M. Aelen

Decisions made:

1. All known export dealers (20) will be audited by Opel Nederland BV Priority is top-down as indicated on the list "Export dealers", dated 26 September 1996. Mr Naval will organise this.
2. Mr de Heer will respond to all dealers who answered the first letter on export activities which Opel sent to them. They will be advised about the audits and that product shortage will result in limited allocation.

3. The district sales managers will discuss the export business with the export dealers within the next two weeks. The dealers will be informed that due to restricted product availability they will (until further notice) only receive a number of units which equals their sales evaluation guide. They will be asked to indicate to the district manager which units from their outstanding orders they really want to receive. The dealers themselves will have to solve any problem with their purchaser.

4. Dealers who inform the district manager that they do not want to stop exporting vehicles on a large scale will be requested to meet Messrs de Leeuw and de Heer on 22 October 1996.

5. Mr Notenboom will ask GMAC to audit the dealer stock to establish the right number of units still present. It is expected that an important part could meanwhile have been exported.

6. In future sales campaigns vehicles which will be registered outside Holland will not qualify. Competitors are applying similar conditions.

7. Mr Aukema will delete the names of the exporting dealers from the campaign lists. The audit results will determine future qualification.

8. Mr Aelen will draft a letter to the dealers informing them that as of 1 October 1996 Opel Nederland BV will charge NLG 150 for supplying upon request for official importers declarations, like type approval, and the preparation of customs documents for certain tax-free vehicles (e.g. diplomats).

L.O.M. Aelen

26 September, 1996 <sup>(15)</sup>.

- (18) As early as July 1996, Opel Nederland BV had considered adopting some of these measures to prevent and/or restrict exports. In an e-mail of 15 July 1996 <sup>(16)</sup>, the sales manager proposed to his managers in charge, in view of high export sales, to have individual talks with dealers, to modify the provisions for granting bonuses, and to carry out dealer audits, as he believed that certain dealers had sold cars to unauthorised resellers in Germany. In this e-mail, the Director of sales and marketing confirmed the need to talk to the dealers concerned, and proposed, *inter alia*, an allocation restricted to the contract territory. As explained in more detail

below, the decision of 26 September 1996 was also preceded by measures restricting exports of individual dealers, which to a certain extent anticipated that decision.

- (19) In the course of September 1996, Opel Nederland BV developed through internal discussions the general strategy of restricting or preventing export sales, which was formally adopted on 26 September 1996 (see recital 17), with the intention of halting the entire export business. The envisaged measures can be inferred from the following document, in which the Managing Director recommended to the Director of sales and marketing, on 18 September 1996, a number of measures vis-à-vis certain dealers, who had made themselves conspicuous through high export figures:

'... I am very concerned about the export business. Especially when we do not reach the registration forecast and have a product shortage. Big amounts of money intended for the stimulation of sales in Holland end up in the dealers' pockets without any effect. I want strong measures against dealers who export on a large scale. Today I have summoned all the divisions which have anything to do with this business to prepare further action against these dealers. I have the following suggestions:

1. Dealer allocation on the basis of sales guide and performance in their own territory, export dealers do not get the requested cars anymore
2. Audit on all the dealers with a substantial amount of exports
3. In case of infringement of the contract, debit everything
4. Exclude exports from the campaigns (Excellence club, etc.)
5. Letter with my signature to all the dealers
6. Invite dealers who mess around with us for a discussion with undersigned.

Next Monday at 2 p.m. in my office for discussing definite action.<sup>(17)</sup>

- (20) Further proposals for measures are found in an internal memo of Opel Nederland BV drafted shortly afterwards, on 23 September 1996:

'... Subject: Destination-based registration bonuses ...

The discussion on abovementioned subject is not a new one. But as long as there is no clear advice on what is and is not allowed, questions are still arising. Since our export sales to other EEC countries are strongly increasing this year, we are not only concerned about this development but we want to stop it. The only

question in this respect is: what kind of action can we take towards these exporting dealers? In attached memo Luc Aelen has drafted some possibilities ... By the way, Ford and VW in the Netherlands allow their dealers bonuses only on cars registered in the Netherlands! This is exactly what we want! ...

#### EXPORT OF NEW VEHICLES

In this memo, some alternative measures are briefly discussed which could be taken to regulate the relatively important export of new vehicles currently undertaken by Dutch dealers.

Possible alternatives to regulate export:

1. Limited acceptance of dealer orders
2. No bonus paid for exported vehicles
3. Bonus only paid to dealers with 100 % registration in own area
4. Dealer audits regarding delivery to end-user
5. Contractual obligation for dealers not to actively solicit customers located outside dealers area...<sup>(18)</sup>

- (21) The document dated 26 September 1996 shows that a decision was taken at the highest management level of Opel Nederland BV. This decision followed internal considerations about all three parts of the strategy, namely the supply policy, the bonus policy, and the direct restriction of export sales, as well as some individual measures (see recitals 23 to 30, recitals 47 to 51 and recitals 59 to 73).

- (22) In the following recitals 23 to 99, these measures are set out in detail:

- the supplying of dealers by the importer was stipulated in such a way that only vehicles needed for sale to customers in the respective contract area were to be delivered and these orders were to be treated with priority,
- the bonus policy introduced in connection with various sales promotion programmes was structured in such a way that sales to foreign end consumers were excluded from the bonus entitlement,
- through the auditing of dealers, their sales activities abroad were inspected. Finally, dealers were repeatedly and urgently instructed to cease carrying out exports in general. Many dealers expressly undertook to Opel Nederland BV to waive such business in future.



## II. The agreements and conduct in detail

### 1. Restrictive supply policy

(23) As part of its strategy to limit and/or prevent exports mentioned above, Opel Nederland BV discussed, in the second half of the year 1996, the question of allocating vehicles for the Dutch market only.

(24) In this context, Opel Nederland BV had found, on 15 July 1996, that total export sales of Opel vehicles in the first half of 1996 had reached 1 121 units, representing 3 % of total sales of all of its dealers in this period. It identified five dealers to whom 937 of these exports could be attributed, and proposed limiting vehicle allocation to these dealers to sales in their own contract territory, with the aim of restricting thereby the scope for export sales:

'Urgently discuss with dealer. Consequences! Allocation for own market, etc. W. de Heer.'<sup>(19)</sup>

(25) A limited allocation for the dealer van Zijll, one of the five dealers mentioned in the e-mail of 15 July 1996 (see recital 24), had already been discussed ten days before, on 5 July 1996 (see also recital 61). Similar deliberations concerning other dealers had been undertaken shortly afterwards on 11 July 1996 (see recital 62). The dealer van Zijll had made 514 export sales during the first half of the year 1996. After this dealer had subsequently transacted more unusually high sales (272) in the first week of September 1996, which were possibly a result of high exports, the Director of sales and marketing suggested to the sales staff manager, on 8 September 1996, the introduction of a quota system for this dealer:

'... Of the 1 000 or so retails of last week, 272 of them are from van Zijll Arnhem ... Can't we use an allocation system to force this idiot to stop? Are the Germans also in the order intake?...'<sup>(20)</sup>

(26) In the draft letter of 10 September 1996 (see recital 15), the Director of Sales and Marketing, referring to the price differentials in particular in relation to the German market, envisaged informing the dealers in writing that the number of vehicles mentioned in the '*verkooprichtlijn*' (sales directive) were to be sold in the Netherlands. At the same time he wanted to announce to the dealers that owing to supply shortage, priority would be granted to orders intended for the Dutch market. Dealers were also

to be informed that they would be prohibited, on the entry into force of the new dealership contract on 1 October 1996<sup>(21)</sup> from acquiring customers outside their contract territory through personalised advertising. The relevant part of this draft letter is phrased as follows:

'... Beside it, is the number of Opels as described in your sales directive due to be sold in the Netherlands. In view of the regular shortage of Opel products, we will give priority to orders intended for the Dutch market. Apart from that, the contract that will be valid from 1 October is very clear on the issue of acquisition of clients; this can take place only in your territory of sale and service responsibility'.

(27) On 12 September 1996, the Sales staff manager addressed an e-mail to the management of Opel Nederland BV concerning the possibility of restricting deliveries to dealers selling for export. However, he expressed his doubts as to the compatibility of such measure with European competition rules:

'... The conclusion is clear: no restrictions/impediments are possible for cars which eventually end up with an end-consumer in another EU Member State. His reference to the pending Bayer case, in which Bayer hindered export through product allocation, is interesting but does not offer security at all yet. If the case does turn out positively (which is not very likely), we could try to limit in the same way orders by Opel dealers who export a great deal, by introducing a limited allocation. In practice, however, this seems to me difficult to realise properly without the allocation being interpreted as an impediment to export. For models in short supply we would have to be able to prove that we are doing this with complete impartiality.'<sup>(22)</sup>

(28) On several letters from dealers, replying to a standard letter from Opel Nederland BV of 28/29 August 1996 (see recital 71 and the documents referred to therein in footnote 63 and recital 72 and the documents referred to therein in footnote 65), wherein dealers declared that all their export sales had been carried out in accordance with their dealership contract and exclusively to end consumers, handwritten notes by the Director of sales and marketing dated 16 September 1996 were found.

(29) For example, on the letter from the dealer Wolves Autoservice BV, the following was noted:

'... Guido Pot. Please discuss with dealer that he is primarily appointed for his own territory (how is that going?), that because of this kind of export our Dutch (tight) pricing will be endangered. Availability based on Dutch market. Priority lies in the Netherlands.'<sup>(23)</sup>

(30) On similar replies from the dealers Hemera, Staals and Nedam, there were handwritten instructions: 'allocatie' (allocation) or 'beschikbaarheid' (availability) by the Director of Sales and Marketing, who suggested that the dealers Wolves, Hemera and Nedam be instructed to give priority to their own contract territory. Furthermore, it was to be pointed out to the dealers Wolves, Hemera, Staals and Nedam, that exports were endangering the price position of Opel on the Dutch market<sup>(24)</sup>. The documents referred to in recital 19 and 20, which were drawn up on 18 September 1996 and on 23 September 1996 respectively, mention this measure of allocating supplies to exporting dealers, and thus confirm that it was destined to stop all export business. This is also confirmed by the document of 18 September 1996 mentioned in footnote 73 of recital 80.

(31) On 26 September 1996, the management of Opel Nederland BV decided (see recital 17) to inform its dealers that, owing to 'product shortage', delivery volumes would be limited in the future and that each dealer would only be allocated the number of vehicles specified in the 'sales evaluation guideline' (hereinafter SEG):

'...They will be advised about the audits and that product shortage will result in limited allocation ... The dealers will be informed that due to restricted product availability they will (until further notice) only receive the number of units specified in their sales evaluation guideline ... They will be asked to indicate to the district manager which units from their outstanding orders they really want to receive. The dealers themselves will have to solve any problem with their purchaser ...'<sup>(25)</sup>.

(32) In this context, it is to be noted that the 1992 Opel Nederland Dealer Sales and Service Agreement (hereinafter DSSA), which was in force until 31 December 1996, provided that Opel Nederland BV and the individual dealer were to agree on an SEG, whose purpose was to indicate how many new motor vehicles the dealer in the year concerned might reasonably be expected to sell to customers. This guideline represented a sales target setting forth a number of units to be sold, against which the dealer's sales performance was assessed. This sales performance was determined by

expressing the total number of motor vehicles sold during a certain period (generally a calendar year) as a percentage of his individual guideline and by comparing that percentage with the corresponding percentage determined for all dealers together in the Netherlands<sup>(26)</sup>.

(33) In practice, the sales target refers to the dealer's territory of primary responsibility<sup>(27)</sup>. Under the 1992 standard DSSA, a dealer's obligations are determined in respect of his contract territory ('speciale invloedssfeer'), which is, *inter alia*, the basis for the fixing of his individual sales target<sup>(28)</sup>.

(34) The Opel Nederland dealership contract of 1 January 1997 contained the following provisions in an appendix: 'Beoordelingsrichtlijnen' (ordering directives):

'... STEP 1

Opel sets up yearly a directive, wherein the number of new motor vehicles is given which Opel reasonably expects to be sold through all Opel dealers in the year concerned. In establishing this directive, Opel shall among other things take into account the trend in national registrations of new motor vehicles and other new motor vehicles (including the development per segment) ...

STEP 2

Opel shall annually assign to each Opel dealer a share of the total number of expected sales on the basis of the percentage of the total number of registrations of new motor vehicles within the special sphere of influence of the dealer in the current and the previous calendar year ...<sup>(29)</sup>.

(35) This dealership contract also envisaged that, where there are special circumstances, supply can be adapted in the respective contract territory<sup>(30)</sup>. Although Step 3 of the relevant appendix to the dealership contract envisages that, in the case of changes in demand within the contract territory, deliveries can be adapted, this possibility actually relates only to the demand from Dutch customers and not to export demand. Thus, the arrangements concerning restrictive delivery, as defined in the decision of 26 September 1996, meant in practice that those dealers had to be prepared to that their supply would be limited to the number of vehicles they were expected to sell to Dutch customers, which would leave them no room for additional export sales.

(36) Opel Nederland BV does not contest that, following its decision of 26 September 1996, 'the dealers concerned may have been wrongly advised or brought under an erroneous impression' that Opel Nederland BV intended

to apply a restrictive supply policy or expected the dealers concerned to reduce or discontinue exports without a proper distinction being made between the different types of transaction. Opel Nederland BV admits that some of their district managers may have given oral advice to certain dealers, or brought them under an impression, that the sales targets indicated in their respective SEG were intended first and foremost for the Dutch market<sup>(31)</sup>.

(37) In this context, it is worth noting that the district manager's role is to establish and maintain direct and personal contacts between the importer and the dealers (examples for this can be found in recital 31 and footnote 24 thereof, in recitals 59 and 63 and in footnotes 50 and 56 thereof). The district managers are subordinated to the sales manager, whose superior is the Director of sales and marketing. Accordingly, it must be concluded that the action taken by the district managers, and referred to by Opel Nederland BV, were the direct consequence of the decision of 26 September 1996, and that this decision was thus implemented. This is also confirmed by the fact that the individual audits were effectively operated, and by the fact that the district managers reported from their introductory visits. It is also worth noting that Opel Nederland BV considered it necessary to take corrective actions, in October and December 1996<sup>(32)</sup>.

(38) Opel Nederland BV also argues that the SEG did not fix any number of vehicles to be supplied, but the number of vehicles to be sold (sales target) in the next calendar year<sup>(33)</sup>.

(39) However, the present problem is not about the sales targets as such. It concerns the fact that, as a consequence of Opel Nederland BV's intervention, the contractual supply to the dealers was to be adapted to that target (see also the considerations below concerning the existence of an agreement; (see recital 112).

(40) Opel Nederland BV further submits that this decision of 26 September 1996 in respect of restrictive allocation of vehicles was limited to 21 dealers. Opel Nederland BV is of the view that product shortage can be invoked as an 'objective reason' possibly justifying such measure<sup>(34)</sup>.

(41) The Commission underlines that these 21 dealers, out of a total of about 150 Opel dealers in the Netherlands, were all those who had been found to be engaging in exportation (see recital 17; the dealer Spoomaker was

added later to the initial figure of 20 mentioned in the decision<sup>(35)</sup>). The Commission also considers that such allocation of delivery quotas to dealers cannot be justified on grounds of supply shortages, which may occasionally arise, for example when a new model is introduced<sup>(36)</sup>, as this measure applied in principle to all models included in the contract programme without any distinction and was clearly adopted following the increase of exports. Moreover, Opel Nederland BV does not submit any concrete data supporting the conclusion that real supply problems existed at the time.

(42) In circumstances of strong export demand, as in this case, the decision by Opel Nederland BV taken on 26 September 1996, to refer its dealers to their individual SEG, represented therefore a measure aimed at limiting the number of motor vehicles to be supplied to the dealer for export purposes. As a result of this measure, the sales target mentioned in that SEG became a maximum number of motor vehicles to be supplied to, and to be sold by, the dealer. In such circumstances, the dealer was to lose any leeway for transacting export sales in addition to his local sales, as he would have otherwise jeopardised the achievement of his individual sales target fixed for his contract territory, and consequently his sales performance.

## 2. Bonus policy

(43) Bonus payments are, in addition to the dealer margin, the dealer's most important source of revenue and profit from the sale of vehicles. The dealer margin is the difference between the recommended list price of a given car and the price at which the dealer buys this car from his supplier. Through this difference, which is generally between 10 % and 20 %, the dealer disposes of a financial leeway for covering his administrative and financial cost, and to grant rebates to customers, as the case may be. In practice, the margin is often used entirely to cover such cost and rebates, so that dealers' profits result from bonus payments and other services granted in association with car sales.

(44) Bonuses are generally calculated as a proportional or lump-sum remuneration which is paid to the dealer by his supplier at regular intervals for each vehicle sold in accordance with the relevant conditions. Bonus payments depend on the achievement of certain qualitative and quantitative targets. Commonly used quantitative targets are a stated market share and the achievement of the dealer's sales forecast within his contract territory. Qualitative targets are usually customer related, or refer to certain standards of the dealers' sales premises.



- (45) Between August 1995 and January 1998, Opel Nederland BV conducted several sales programmes ('campaignes'), often designed for a particular model. Initially, the conditions for participation in these sales campaigns provided for the exclusion of bonus payment for sales to certain customers groups (other Opel dealers, international car rental companies and unauthorised resellers).
- (46) Such conditions were applied for the sales promotion programme 'Star Wars Astra Actie'<sup>(37)</sup>, which was designed for the Opel Astra model and operated between 16 August 1995 and 31 January 1996, and for two other programmes operated between 1 June 1996 and 30 September 1996, named 'Paradepaarden'<sup>(38)</sup>, which provided for a bonus payment for all sales of the models Opel models Omega, Tigra, Cabrio, Calibra, Frontera and Monterey, and 'Astra Zomer'<sup>(39)</sup>, which again concerned the Opel Astra model (including Cabrio and Van).
- (47) From May 1996 onwards, Opel Nederland BV began to reflect about the possibility of excluding export sales in general from bonus payments. In this connection, it stipulated in an internal memo of 23 May 1996, that the bonuses envisaged within the framework of sales promotion programmes should not be offered for sales abroad, even if the customers were end consumers:
- '... Concerning the export cars of Smit Zwolle/Nefkens Trading:
- ... In case:
1. it continues to concern supplies by Nefkens to an end consumer
  2. that it is possible to follow the entire transaction in the dealer's administration ... there actually is no problem. However, confirmed once more that the dealer cannot claim any campaign money on this. My advice is to approve future identical transactions as such ...'<sup>(40)</sup>
- (48) On 5 July 1996, the Marketing manager informed the Director of sales and marketing that the dealer Van Zijl, Arnhem, had, within the framework of the current campaign 'Paradepaarden', already made 36 sales and was thus entitled to NLG 35 000 in bonuses. However, since 31 of these sales were clearly to foreign customers, he stressed:
- '... Export is not in the spirit of the Dutch campaign support. In itself export is OK, but to pay bonuses on that ... Can something be done about that one way or another ??? ... In my opinion amend drastically his (campaign) sales directives in future.'<sup>(41)</sup>
- (49) On 23 August 1996, it became clear that Opel Nederland BV wanted definitely to modify the bonus policy measures, and to grant in future bonus payments only for vehicles registered in the Netherlands:
- '... With regard to the current 1996 period and the submitted RIP Proposal, we need to discuss the introduction of registration into the retail campaign system by October 1996 (like Ford, based on the official RAI RDC registrations), so that at least exports will be excluded from campaign support.'<sup>(42)</sup>
- (50) Opel Nederland BV stated on 18 September 1996 that so-called 'cross-border sales' was in principle undesirable both for the national sales companies (in the following quotation: NSC) and for General Motors Europe (in the following quotation: GME). The importer suggested discussing this matter at central level with General Motors (Europe), in order to ensure that, as far as possible, arrangements were compatible with EC competition rules:
- '... Cross-borders sales are a pain in the ass for many NSC'S and GME as an organisation.
- Limiting cross-borders sales (exports) by revised campaign support structures is not just of interest for NSC's, but also for GME. It might help to consult GME (EC-regulations experts) in this, to make it "EC legal proof" as much as possible.'<sup>(43)</sup>
- (51) Opel Nederland BV was aware, however, that the exclusion of exports from the bonus award scheme amounted to an indirect hindrance to trade between Member States and was therefore not compatible with European competition rules:
- '... Conclusion: Requiring that a Dutch registration number be demanded for cars which are to be exported in order to be considered for a retail bonus seems to be indirect pressure on the dealer not to export. This is not allowed by EC legislation.'<sup>(44)</sup>
- (52) Despite this awareness of the illegality of bonus schemes discriminating against exports, the management of Opel Nederland BV decided on 26 September 1996 (see recital 17) to award bonuses only for vehicles registered in the Netherlands, and thus to exclude from such payments vehicles sold to residents from other Member States:
- '... 6. In future sales campaigns vehicles which will be registered outside Holland will not qualify. Competitors are applying similar conditions.

7. Mr Aukema will delete the names of the exporting dealers from campaign lists. The audit results will determine future qualification.'<sup>(45)</sup>

- (53) Following this decision, a new bonus award scheme was introduced for the two subsequent campaigns. These sales promotion programmes, operated from 1 October 1996 to 31 January 1997, related to the Opel models Astra ('Astra Bonuscampagne') and Corsa ('Corsa Inruil Ander Merk Campagne'). The conditions for participation in both programmes provided for awarding bonuses only for sales to domestic end consumers and for linking bonuses to registration in the name of the buyer in the Netherlands. The bonus amounted to NLG 600 or NLG 900 for each Astra model (and to NLG 1 100 for each Corsa model) sold during the respective programme, the payment being linked to the achievement of set sales targets:

'... The bonus is applicable to all new Opel Astras, including Cabrios and Vans, which have been sold during the campaign period and have been supplied to and registered in the name of an end consumer in the Netherlands, and for which the dealer can produce a fully completed and signed sales contract and/or sales invoice. Exclusion covers sales to other Opel dealers, cars which have been supplied to international leasing companies and all sales which are not in conformity with the Dealer Sale and Service Contract. ... The bonus will be paid on condition that registration of the car occurs within three weeks after the closing date of the campaign (Friday, 21 February 1997).'<sup>(46)</sup>

- (54) As regards the clause excluding sales to non-resident end consumers from bonus payment, Opel Nederland BV admitted that it was also applied in all sales promotion programmes run after 31 January 1997 and until 20 January 1998 (see recital 57).<sup>(47)</sup>

- (55) A policy under which bonus payments are excluded on sales or registrations outside the contract territory reduces the dealer's revenue and the profit accruing to him from sales of that kind. It consequently reduces the commercial latitude he enjoys to engage in such business<sup>(48)</sup>. The refusal of bonus payments, or merely the threat that they will not be paid or will be withdrawn, usually reduces the financial incentive for dealers to sell to customers from abroad. The document mentioned in

footnote 44 in recital 51 proves that Opel Nederland BV was aware of this circumstance. Given that dealers' overall profitability often depends to a large extent on bonus payments, such measure, or merely the threat, can induce the dealer to comply with the conditions and instructions imposed by his supplier.

- (56) The dealers participated in all the sales campaigns operated between 1 October 1996 and 31 January 1997, as well as after 31 January 1997 until 20 January 1998 (see recital 57), within the framework of their contractual relationships with their supplier, Opel Nederland BV. The sales made during these campaigns, and the resulting bonuses, have been detailed in several documents. The conditions and in particular the restrictive bonus provisions of the respective programmes were thus accepted by the dealers.

#### Reply by Opel Nederland BV

- (57) Opel Nederland BV considers that the provision excluding bonus payments for export sales may be justified by the existence of a special automobile tax in the Netherlands, to which each resident customer is liable. It admits that such clause had been maintained in all campaigns operated since 1 October 1996 and until 20 January 1998, but underlines that this clause had been retroactively abolished on 20 January 1998, by informing all dealers in writing thereof, and by granting back any bonuses which had been withheld during the currency of the measure. Opel Nederland BV stresses that the measure did not apply generally to sales to customers resident outside a dealer's contract territory, but only to sales to customers from outside the Netherlands, and argues that the measure did not prevent export sales from taking place<sup>(49)</sup>.

#### The Commission's view

- (58) With regard to the exclusion of bonus payment for sales to non-resident final consumers, the Commission considers that the retroactive abolition of this policy, on 20 January 1998, cannot be regarded as a measure rectifying the object or the effect of the measure on competition during the term of its application. Opel Nederland BV itself confirmed that bonus schemes are generally aimed at encouraging dealers to sell to final consumers. It follows that dealers who would have preferred to sell cars to non-resident customers during the validity of the two sales campaigns in question<sup>(50)</sup> were discouraged from doing so, knowing that no bonus

could be claimed for such deals. As to the argument submitted by Opel Nederland BV that the existence of a special automobile tax justified the exclusion of bonus payment for export sales, see the considerations under point 133.

### 3. *Direct export ban and direct restriction of export sales in general*

#### (1) **First phase: Internal reflections and instructions**

- (59) There is evidence that, in at least one individual case, efforts were made as early as the end of June 1995 to stop export activities in general. At this time, one of Opel Nederland BV's managers had informed his colleagues in charge that he had instructed the dealer Lathouwers Den Bosch, BV, in Hertogenbosch, on the occasion of a sale to a Belgian Opel dealer, to sell the Tigua model only within his contract territory and not to export it:

'... I have told the dealer that the Tigras assigned to him are to be sold in his sphere of influence. This in order to achieve our registration aim and in order not to be exported ...' <sup>(51)</sup>.

- (60) In the course of 1996, Opel Nederland BV found that the export sales of Dutch dealers had considerably increased during the first half-year <sup>(52)</sup>. Between January and June 1996, Dutch Opel dealers had sold a total of 1 121 vehicles (3 % of sales in that period) to customers from other Member States. 937 of these sales were alone attributable to five dealers resident close to the German or Belgian border. Between 37 % and 52 % of their respective sales in that period consisted of exports. These figures were described by the Sales Manager, in his e-mail to a number of responsible manager colleagues, as 'shocking' and 'sickening' <sup>(53)</sup>.

- (61) In view of the high proportion of export sales reported by the biggest exporter, Van Zijll, Arnhem, the Director of Sales and Marketing decided to instruct the dealer to cut back his sales to customers from abroad, and informed other responsible managers of Opel Nederland BV hereof:

'... In the following you see the consequences of Mr Kirp's activities. I also hold the view that where we currently do not have enough Opels, we should give Mr Kirp product allocation, based on his Sales Evaluation Guideline. In addition, we should discuss the matter that we have appointed him for Arnhem and that he, consequently, has to ensure that an adequate number of Opels are sold in Arnhem. Have once a look at the

performance in his territory. To sell at purchase prices in Germany, Wageningen, Veenendaal, Oosterbeek etc. is not fair play; for such a thing we do not need Kirp. Unsocial behaviour. Try to imagine the opposite happening through a German dealer. This export and other nonsense outside our pitch must stop, it has a disturbing effect on the entire organisation. Anyhow I want a discussion with Kirp about this in order to reduce this trade to normal.' <sup>(54)</sup>

- (62) On 15 July 1996, the Sales Manager recommended to Opel Nederland BV's other responsible managers, in addition to amendments to the rules under which bonuses are awarded under the sales promotional programmes, that additional dealer auditing be carried out, given that vehicles had possibly been sold to non-authorised resellers. In a handwritten note on this e-mail, the Director of Sales and Marketing instructed the Sales Manager to interview the dealers in Arnhem (Van Zijll), Brunssum (Welling), Sittard (Göttgens), Echt (Hemera) and Hengelo (Bleeker), who had been found to have particularly high export volumes. At the same time he announced that deliveries to these dealers would be limited <sup>(55)</sup>.

- (63) By early August 1996, Opel Nederland BV had compiled a summary of the sales transacted by its dealers under the sales campaign 'ASTRA Zomer' between 1 June and 30 September 1996. As a result, the Director of Sales and Marketing felt compelled to report for auditing the dealers who had noticeably exceeded their sales targets and were thus entitled to receive bonus payments. This meant that the relevant dealers had sold more cars than anticipated in the discussions on sales targets. The dealer Van Zijll, Arnhem, who had topped his sales target during this campaign by 62 %, was to be the first to undergo an audit:

'... Be careful, export is getting out of hand. Illegal or legal. Audit is urgently required ...' <sup>(56)</sup>. Because it is becoming too important, I have requested an audit, to start at Van Zijll in the first place. In particular as it seems to relate to sales via unauthorised resellers. ... Apart from the fact that it is irresponsible for Opel Nederland BV from a business point of view, this leads to an obvious challenge of our sale systems. Once again, I hereby request again an audit urgently ... I am deadly serious as it undermines my trade. On Wednesday 14 August, Teus de Jong will talk to the sales personnel very seriously about this.' <sup>(57)</sup>

(64) In compiling this survey of export sales, Opel Nederland BV established on 13 August 1996 that, in the first seven months of the year, a total of 1 496 vehicles had been exported. Of these sales, 1 382 (92 %) could be attributed to 15 dealers, all of which were located in areas close to the border<sup>(58)</sup>.

(65) In view of the increasing exportation of Opel vehicles from the Netherlands, the Sales manager of Opel Nederland BV addressed a fax on 23 August 1996 to the Sales operations manager of the Bochum plant of Adam Opel AG, one of its suppliers in Germany. He reported that his company was investigating the entire export situation, and that it had decided to take measures with the aim of preventing exports altogether:

'... We are investigating the entire export situation at the moment. Dealer has been requested to take corrective action. Dutch Opel dealers are continuously receiving requests from German traders, leases etc. measurements (in coop. with legal dept) will be taken to "stop" export totally.'<sup>(59)</sup>

(66) The above fax was replying to a previous fax, in which the Sales operations manager of the Bochum plant had requested Opel Nederland BV to identify the Dutch dealer supplying a vehicle offered by a unauthorised reseller in Germany. Although this request referred to a non-allowed export sale, Opel Nederland BV informed the Bochum plant, by fax of 23 August 1996 mentioned in recital 65 about its intention to stop all export sales.

(67) As regards Opel Nederland BV's argument<sup>(60)</sup> that the dealer audits solely served to detect export sales carried out in breach of the dealer contract, and in particular sales to unauthorised resellers, the Commission does not contest the importer's rights in this respect. However, first instructions to dealers had already been given before the audits were completed, which would have revealed that all export sales were in compliance with the dealer contract.

(68) The documents found confirm that all exporting dealers were audited, regardless of the volume of their export sales<sup>(61)</sup>. According to information submitted by Opel Nederland BV, the share of export sales in total sales of each of the 21 dealers examined amounted to between 58,8 % (Van Zijl) and 1,9 % (Spoormaker). While during

the first nine months of 1996, eight of these dealers had exported more than 20 % of their total sales, the respective export shares of the other dealers were considerably lower, ranging from 0,5 % to 10,6 %<sup>(62)</sup>.

(69) The result of these dealer audits revealed that most of them were involved in both permitted and forbidden export sales. As is shown by a number of documents, the purpose of these audits was more far reaching than merely detecting the number of forbidden sales (see recitals 63 and 65 and the documents mentioned in footnotes 56 and 59 thereof and recital 75 and the document mentioned in footnote 69 thereof).

## (2) Second phase: The 'first warning letter' and the subsequent events

(70) On 27 August 1996, the Director of sales and marketing informed other responsible colleagues of the fact that those dealers who had carried out 10 or more export sales in the first half of the current year would receive a warning letter. Accordingly, measures were to be found to charge dealers the additional costs due to export sales:

'We are now, within the limited possibilities, trying to rectify. The suspected dealers, who have exported 10 or more Opels in the first half year, will receive a letter in which they will be accused. We will ask them in writing if all the exports are completely in conformity with the letter and the spirit of the contract. ... Further, ways are being sought for passing on the real extra costs that we have to pay for export.'<sup>(63)</sup>

(71) In this confidential letter, which was sent on 28/29 August 1996 to each of the 18 suspected dealers (hereinafter referred to as the 'first warning letter' to dealers), the importer expressed its doubts that the export sales carried out by these dealers were compatible with the provisions and the spirit of their dealership contract, and instructed them to focus on their contract territories:

'... We have noticed that your company has sold an important amount of Opels abroad during the first half of 1996. To us, the quantity is so large that we have a strong suspicion that the sales are not in accordance with the letter and spirit of the current and the coming Opel Dealer Sale and Service Contract. ... We intended to check your answer with the data that is registered about this in your books. We will subsequently inform



you about what happens next. The above does not change the fact that you are primarily responsible for a satisfactory sale performance in your special sphere of influence ...' <sup>(64)</sup>.

- (72) Most of the dealers (15 out of 18) <sup>(65)</sup> who had received that letter thoroughly rejected the allegation of having carried out unauthorised exports, and affirmed that export sales had been exclusively to end consumers and in accordance with the dealership contract <sup>(66)</sup>. The letter of reply from the Automobiëlbedrijf of Göttgens, Sittard, which had carried out 176 exports in the first seven months of the year 1996 reflects the position of many of the dealers who had received that letter:

'We have read your letter of 28 August with interest. We have indeed sold a number of Opels abroad. This amount for the first half of 1996 is partly due to the fact that supply arrangements were not respected and more Vectra's were delivered than planned. Naturally, we followed the correct procedures, which have been under discussion with Mr G. Bouwens of General Motors since 1994.

Besides this, there is also the fact that we are in a very small piece of the Netherlands (indeed, the smallest piece) with a lot of "abroad". Because of this, in the last few years huge numbers of cars have been imported to us, which has very much diminished our sales chances, especially in the field of used cars.

This woke up the consumers here and these buyers are now really looking across the border and the same is true for both Dutch and German buyers. This was also one of the starting points of a united Europe.

Also in the after-sales field, one can notice an increase of foreign customers.

Because of this, our contract territory (*speciale invloedsfeer*) is no longer limited to just the Netherlands.' <sup>(67)</sup>

- (73) In the weeks following the sending of this first warning letter, some dealers at least were approached by Opel Nederland BV and undertook to stop their export activities entirely; this was true of the dealers Van Zijll (recital 80), Staals (recital 83) and Spoormaker (recital 86) <sup>(68)</sup>. Moreover, on 18 September 1996, the Director of Sales and Marketing sent an e-mail to the Marketing Services Supervisor, where he made clear that his intention was to 'kill the export business'. He reported that the dealer Van Zijll 'has agreed to stop' and added: 'We're working on the others' (see recital 80).

### (3) Third phase: the decision of 26 September 1996 and the subsequent events

- (74) Following the dealers' replies to the first warning letter, Opel Nederland BV adopted the decision of 26 September 1996 (see recital 17 and the document cited in footnote 15 thereof). Reference is made in particular to point 1 to 4 of the decision:

- '1. All known export dealers (20) will be audited by Opel Nederland BV.
2. Mr De Heer will respond to all dealers who answered the first letter on export activities which Opel sent to them. They will be advised about the audits ... .
3. The District sales managers will discuss the export business with the export dealers within the next two weeks.
4. Dealers who inform the District manager that they do not want to stop exporting vehicles on a large scale will be requested to meet Messrs. De Leeuw and De Heer on October 22, 1996.'

- (75) On 27 September 1996, Opel Nederland BV decided the following details with regard to the audit:

'... Below please find the start-up of the export sales audit as agreed in different instances and conversations ... I hope it covers all the relevant aspects required prior to initiating the audit and fully satisfies our (ON) interest.

Additionally, I asked Luc Aelen to check ... about the legality of the suggested measures in the last meeting (although we are definite to firmly stop the practice, I would like us taking a controllable risk and avoiding surprises).

... Opel Nederland BV — Export sales audit

### Background

Opel Nederland (ON) management decided to run an intensive on-site dealer audit to find out volume and money involved in the export activities run by a number of identified dealers.

Acknowledging that ON's implicit intention when launching such support activities was to promote sales in the Dutch market (area of business responsibility and

concern of ON), the intent is that campaigns and sales support associated or triggered by those export units are returned to ON.

#### Scope

The audit is an initiative of ON ... and will be focused in 1995 and 1996 ytd. (August) sales ...

The audit will look for direct-sales of Opel Nederland BV dealers to abroad ...<sup>(69)</sup>

- (76) As stipulated in recital 2 of the decision of 26 September 1996, Opel Nederland BV sent the dealers concerned a second confidential letter dated 30 September 1996 (hereinafter referred to as 'second warning letter'), in which the importer emphasised its doubts as to the accuracy of the information given by the dealers in their letters of reply. At the same time it announced further measures, for example:

'... With reference to your letter of 3 September concerning the sale of Opels abroad, please find the following. Your answer was disappointing to us, as it means that you do not have any understanding of the common interests of all Opel dealers and Opel Nederland. Our Audit department will be instructed to investigate your statements. Pending the investigation, you will not receive the information on the campaigns, as we doubt whether your retail figures are correct.'<sup>(70)</sup>

- (77) The audits of the 19 suspected dealers were scheduled to take place between 4 October and 5 November 1996<sup>(71)</sup>. In fact, the audits were carried out between 19 September (Van Zijll) and 27 November 1996 (Van Twist)<sup>(72)</sup>.

- (78) Moreover, it appears that the District managers approached the so-called 'export dealers' in line with points 3 and 4 of the decision of 26 September 1996. Indeed, many dealers undertook not to export any more; reference is made in particular in recitals 84 and 87.

#### (4) Evidence for the instructions given to individual dealers and for the existence of undertakings received from dealers

- (79) From the documents quoted hereafter, it becomes evident that instructions were given to dealers to stop or limit exports and that dealers undertook towards their importer not to carry out further export sales:

#### Van Zijll

- (80) Immediately after receiving the first warning letter of 29 August 1996, the dealer Van Zijll undertook in writing to Opel Nederland BV on 31 August 1996 not to accept any more export orders<sup>(73)</sup>. On the occasion of a meeting with the Director of Sales and Marketing on 17 September 1996, this dealer renewed his promise not to carry out any further exports.

'... Within our possibilities, we are trying to kill the export business; Van Zijll, the major one has agreed to stop. Were working on the others.'<sup>(74)</sup>

'... We agreed on discontinuing the export activities immediately, since it disrupts Opel Nederland and dealer operations and product allocations seriously. Due to shortage of product, the dealer has set priorities, meaning no product available for export, but rather for his own operation...'<sup>(75)</sup>

- (81) After a first audit had been carried out on 19 September 1996, a second audit of this dealer took place at the beginning of October 1996 (see recital 77). One month later (on 4 November 1996), Van Zijll informed the importer by letter about two orders that he had accepted from end consumers from abroad, despite his undertaking given to Opel Nederland BV, since he was of the opinion that he was acting in accordance with the dealership contract and the circular of 24 October 1996<sup>(76)</sup> (the content of this circular is quoted in Annex 3 to this Decision):

'... On 31 August ... we wrote to you confirming that we do not accept export orders anymore ... Contrary to this, but in accordance with your letter of 24 October 1996, concerning sales to end consumers abroad, we have very recently recorded two orders. Since, from the beginning, we have put all our cards on the table, also with regard to export, and we intend to continue doing this, we enclose a copy of the abovementioned orders...'<sup>(77)</sup>

#### Wolves Autoservice

- (82) On 2 September 1996, the dealer Wolves Autoservice, Rijssen, replied to the first warning letter from Opel Nederland BV of 29 August 1996 (see recital 71), submitting that the exports concerned sales to German end consumers in accordance with the dealership contract. In a hand-written note on this letter, the Director

of Sales and Marketing asked the responsible District Manager to instruct the dealer to concentrate on his own contract territory, since this export would endanger the price position of Opel on the Dutch market <sup>(78)</sup>:

‘Guido Pot

please discuss with dealer that he is primarily employed for his own territory (how is that going?). That through this kind of export our Dutch (sharp) price position is jeopardised. Availability is based on Dutch market. Priority lies in the Netherlands.’

This request to the District manager was given before the audit of this dealer took place (12 November 1996). The result of the audit revealed that all (in total 10) export sales of this dealer were in compliance with his dealer contract <sup>(79)</sup>. Opel Nederland BV does not contest that the District managers effectively approached the dealers, as requested by the Director of sales and marketing.

*Staals*

- (83) The dealer Staals, Eindhoven, assured the importer in a letter of reply dated 2 September 1996, that all export sales carried out by him had been to end consumers. On 20 September 1996 however, he undertook to Opel Nederland BV to make no more exports in the future:

‘... After internal consultation, we concluded that the car company Staals will not export new cars any more. This is due to the disadvantages that this can both of us.’ <sup>(80)</sup>

Despite this promise, even this dealer received the second warning letter of 30 September 1996 from Opel Nederland BV. The dealer gave his commitment before his audit took place on 1 November 1996 <sup>(81)</sup>.

*Hemera, Göttgens-Beek, Loven, Canton Reiss, Welling, Nedam*

- (84) The dealers Hemera, Göttgens-Beek, Göttgens-Sittard, Loven, Canton Reiss and Welling had reassured the importer, in response to the first warning letter of 28/29 August 1996, that they had not carried out any unauthorised export sales, yet they still received the second warning letter dated 30 September 1996. As a result of so-called ‘introductiebezoek(en)’ (introductory visits) which the responsible District Managers of Opel Nederland BV had made at the beginning of October 1996 to a number of dealers in ‘district 5’, the importer noted on 5 October 1996, that six dealers (Hemera, Göttgens-Beek, Loven, Canton Reiss, Welling and Nedam) had undertaken to cease all export sales immediately.

These commitments were given before any of these dealers had been audited (see recital 77). All these dealers were resident in the south of the Netherlands where, according to Opel Nederland BV, most of the business with end consumers was transacted <sup>(82)</sup>.

‘... During every introductory visit we did this week, we told the dealers exhaustively “the export story” ... these dealers mentioned below have in consequence of our visits committed themselves to ceasing export activities immediately.’ <sup>(83)</sup>

- (85) In its letter of reply of 29 August 1996 to Opel Nederland BV, the Opel dealer Canton-Reiss, Heerlen confirmed that in the period from 1 September 1993 to 1 January 1996, and unlike other dealers in the area, he had carried out hardly any export sales. In this respect, the dealer repeatedly pointed out to the importer the market conditions giving rise to export sales. He finally informed Opel Nederland BV that, since 1 January 1996, he had authorised his sales staff to carry out sales to a moderate extent to end consumers abroad:

‘... During your visit to our company on 29 May 1996 this issue (sale of Opel passenger cars abroad by Automobielbedrijf Canton-Reiss BV, note by the Commission) has been discussed by me. Since my appointment at Automobielbedrijf Canton-Reiss from 1 September 1993 until 1 January 1996 almost no Opel passenger cars have been sold abroad, whereas export sales have been made through our neighbouring colleague dealer companies.

In your reaction to the above you have explained that, due to the applicable rules within the European Community, sales campaigns by Opel Nederland BV are also bound by stricter rules and that it is not possible to exclude sales by Opel dealers which are conducted according to the permitted guide lines/directives, to residents of the EC. The operative retail bonuses thus also support the export transactions.

During my conversations on this issue with your District sales manager, Mr R. Liefhebber, and the conversation with you on 29 May 1996, I have repeatedly made known my displeasure with the disruptive effects these (...) retail bonuses on export cars have on our special area of influence.

As at 1 January 1996 I have given the sales managers permission, (...) according to the conditions of the Dealer Sales and Service Contract, to sell Opel passenger cars abroad to end consumers on a modest scale. In addition, I have informed your District sales manager at that time of my approach...’ <sup>(84)</sup>.

However, following the 'introductory visit' of the importer in the first week of October 1996, this dealer undertook to cease export sales in the future, too<sup>(85)</sup>.

*Spoormaker*

(86) Opel Nederland BV was aware that the dealer Spoormaker, Rotterdam, like many other Dutch Opel dealers, regularly received supply inquiries from Opel dealers from other Member States. However, the dealer was not initially listed among the 20 dealers with high export sales resident close to the borders of Germany and Belgium, since it had obviously only carried out such business in the first half of 1996. However, in July 1996, it had received an inquiry from an Austrian Opel dealer for a large delivery. The importer then forbade the dealer Spoormaker, Rotterdam, to comply with this request:

'... Jan Spoormaker (like many other dealers) is regularly approached by, *inter alia* foreign colleague dealers to deliver new Opels (see also weekly report of 18 August 1996) ... Although it concerned deliveries to an authorised reseller, I forbade Jan Spoormaker end of July, beginning of August, to comply with this request ... Despite the fact he has delivered to a colleague dealer and he promised not to do it anymore, I would however suggest sending him a letter similar to the one that the other exporting dealers received...' (86)

(87) It was stated in this memo that this dealer also received the second warning letter dated 30 September 1996. The dealer then undertook on 1 October 1996, before his audit on 15 November 1996<sup>(87)</sup>, vis-à-vis the importer to refrain completely in future from carrying out exports:

'... On 1 October I once again discussed the above subject with Jan Spoormaker in detail. As mentioned in my lotus notes of 22 September last, it was a one-off supply of 14 Astras and he promised me again very strongly he would not export cars anymore, that means that consequently he does not have export orders anymore. Since he had delivered the cars to a colleague dealer, he claimed not to have contravened the Opel Dealer Sale and Service Contract.' (88)

Reply by Opel Nederland BV

(88) In its reply, Opel Nederland BV rejects the Commission's allegation that it had embarked on a policy of direct hindrance or restriction of exports<sup>(89)</sup>. The undertaking

submits in particular that the action of sending a standard letter (see recital 71) to a limited number of dealers, with the intention of verifying whether their export sales were in compliance with their dealer contract, and the subsequent dealer audits (see recital 77), could not be considered a part of such policy.

(89) The commitments given by a number of dealers (see recitals 80 to 87) to Opel Nederland BV to stop any export sales, were to be regarded either as unilateral actions, to be explained by the circumstance that the dealers in question had previously breached their dealer contracts by selling to unauthorised resellers, or as the result of some District Managers' false instructions given to these dealers. Opel Nederland BV stresses that, in any case, such actions had been countermanded by various 'corrective' measures, starting as early as 24 October 1996, by the sending of a circular to all its dealers<sup>(90)</sup>.

(90) As to the second and third phase<sup>(91)</sup> which, according to the Commission, comprised warnings and direct instructions to dealers and, as a consequence, undertakings given by certain dealers not to export any more, Opel Nederland BV denies having developed a policy of direct hindrance or restriction of exports<sup>(92)</sup>. Instead, the undertaking underlines that it had merely requested 18 of its dealers for information about the nature of their export sales. Since Opel Nederland BV considered their replies to be wholly inadequate, it decided thereafter to check the dealers' sales records. These audits had revealed that a large majority of the dealers had breached their dealer contracts. The Commission's allegation made in the statement of objections, of Opel Nederland BV's having instructed dealers to stop or restrict exports in general, is therefore rejected by Opel Nederland BV, as none of the documents quoted could prove such a measure.

(91) With particular regard to the 10 dealers whose situation is explained in more detail in points 80 to 87, and who were instructed by their District Managers to refrain from any export sale in future and/or who undertook to do so, Opel Nederland BV submits the following comments<sup>(93)</sup>:

— Van Zijl gave this commitment on 31 August 1996, in the knowledge that the major part of its export sales had been made in breach of their dealer contract,

— Wolves Autoservice gave no such commitment at all,



- Staals decided to discontinue exports at its own initiative, knowing that all its export sales were in breach of their dealer contract,
- Hemera, Göttgens-Beek, Loven, Canton-Reiss, Welling and Nedam had indeed given such commitment, in the first week of October 1996; this commitment was however not valid any more, on or after 6 November 1996,
- Spoormaker gave a commitment, although all its export sales were in compliance with its dealer contract; Opel Nederland BV does not contest that incorrect instructions were given to this dealer by one of its managers, namely to stop making export sales to other Opel dealers, deals which had to be allowed under Commission Regulation (EC) No 1475/95.

(92) In conclusion, Opel Nederland BV maintains that, with some exceptions, dealers had not been instructed, nor had given commitments following such instructions, to stop all export sales without distinction.

(93) Opel Nederland BV further refers to a number of measures that they have undertaken on and after 24 October 1996, with the aim of clarifying to dealers the distinction between exports which are allowed under the provisions of their dealer contracts, and those which are not allowed. These measures included:

- a circular letter dated 24 October 1996,
- a decision of 23 December 1996 not to take action against dealers that had violated their dealer agreement,
- regional dealer meetings in November and December 1996,
- a clarification issued to prospective middlemen in November and December 1996,
- dealer guidelines of 12 December 1996,
- the provisions of the 1997 Opel Nederland Dealer Sales and Service Agreement,
- the withdrawal of the retail bonus restrictions as regards retail sales to final consumers resident outside the Netherlands,
- correction of erroneous press reports in March 1998,
- circular letters to dealers of 29 July 1998.

- the annual dealer meeting on 8 October 1998,
- clarifications given at the Franchise Board meeting on 4 March 1999,
- dealer meetings 'Doing business in Euroland' on 7 and 9 April 1999<sup>(94)</sup>.

#### The Commission's view

(94) In respect of Opel Nederland BV's comments on the second and third phase of action, the Commission found a large number of documents supporting its view<sup>(95)</sup>. These documents refer to a total of 10 dealers, out of a total of 21 dealers who had been found to be involved in export sales. In response to the comments given by Opel Nederland BV, the Commission asserts the following:

- Van Zijll's commitment in writing, given on 31 August 1996 in reply to the standard letter by Opel Nederland BV of 29 August 1996, concerned all export sales, and the dealer indirectly confirmed this in his letter of 4 November 1996 to Opel Nederland BV<sup>(96)</sup>, in which he informed his supplier that he had recently accepted two export orders in accordance with the circular letter of 24 October 1996<sup>(97)</sup>;
- the circumstance that the dealer may have known that the major part of his export sales was in breach of his dealer contract, cannot, however, explain his reaction, namely a commitment covering every kind of export sale. In this context, it should be noted that, according to information submitted by Opel Nederland BV, a considerable portion of Van Zijll's export sales was in fact in compliance with his dealer contract (see also recital 81).
- Wolves Autoservice had replied to the standard letter of 29 August 1996 from Opel Nederland BV, claiming that all his exports were in compliance with his dealer contract. Despite this explanation, and without having verified the dealer's declaration (the audit of this dealer took place only on 12 November 1996), the dealer was instructed to focus on his contract territory<sup>(98)</sup>. The information submitted by Opel Nederland BV confirms that in fact all of this dealer's export sales had been in compliance with the dealer contract<sup>(99)</sup>;
- Staals had confirmed to Opel Nederland BV that he would not export new cars any more, in view of the inconveniences that would result from this type of business for both sides. In this context, the dealer announced to the importer that care would be taken that all documents mentioned in his letter of

2 September 1996, which were to prove that all his sales were made to final consumers, were available. In the Commission's view, the dealer's statement thus showed that the dealer intended to promise more than not to infringe the dealer contract, namely to stop exports totally;

- following the visits by the responsible District Manager of Opel Nederland BV during the first week of October 1996 (see recital 84), the dealers Hemera, Göttgens-Beek, Loven, Canton-Reiss, Welling and Nedam committed themselves to cease with any export activity. On 6 November 1996, the audits of all these dealers were completed. The commitments were consequently given before any of the these dealers had been audited;
- the comment by Opel Nederland BV concerning Spoomaker confirms the Commission's view that the dealer had undertaken not to export any more.

sales (see recitals 80, 81, 83 and 86), and that the action taken following the decision of 26 September 1996, in particular the introductory visits, had to be considered as an implementation of that decision (see recital 37).

- (99) As a result of these measures, nine of those dealers, including the main one as regards exports, Van Zijll, expressly undertook vis-à-vis the importer to refrain from future exports in general. These dealers accounted, for example on 26 September 1996, for about 65 % of such exports<sup>(103)</sup>. On the basis of these assurances alone, Opel Nederland BV could therefore be sure of achieving a considerable reduction in the volume of exports.

The arguments concerning measures taken to clarify the situation, from October 1996 on, are taken into account in assessing the duration of the infringement (see recitals 163 to 170).

- (95) Even on the basis of the information submitted by Opel Nederland BV, it appears that a considerable number of the exports of these dealers were permissible sales<sup>(100)</sup>. In this context, it is important to note that Opel Nederland BV intervened in the manner described, without knowing the precise figures as to permissible and impermissible sales.

- (96) In conclusion, the Commission found that Opel Nederland BV had discovered that export sales from the Netherlands had substantially increased during 1996. The importer was able to identify the dealers who had carried out these exports, and submitted these dealers to an audit with the aim of verifying the nature of these exports.

- (97) The exports of Opel vehicles in 1996 essentially involved a total of 20 dealers, who are almost all resident in border areas, where usually the bulk of export deals takes place<sup>(101)</sup>. These dealers were instructed, whether repeatedly or in writing or in direct conversations, to refrain in future from such business.

- (98) The argument put forward by Opel Nederland BV, whereby no general instructions were given to exporting dealers, but, following the decision of 26 September 1996, 'some District Managers may have given erroneous information to their dealers'<sup>(102)</sup>, does not hold. There is sufficient evidence confirming that even before that date, responsible managers of Opel Nederland BV had instructed dealers to refrain from export

## CHAPTER 2: LEGAL ASSESSMENT

### A. ARTICLE 81(1)

- (100) General Motors Corporation sells its Opel-brand vehicles in the Netherlands through its importer, Opel Nederland BV, in accordance with an exclusive and selective distribution system. Opel Nederland BV concludes individual distribution contracts with dealers located in the Netherlands on the basis of a standard dealership contract covering sale of motor vehicles of the Opel brand and other contract goods (in particular spare parts).

- (101) According to the established case-law of the Court of Justice of the European Communities (hereinafter: ECJ)<sup>(104)</sup>, agreements between economic participants which are active at different economic levels — so-called vertical agreements such as selective and exclusive distribution agreements, like the ones for car distribution — constitute agreements which may fall under the prohibition of Article 81(1).

## I. The undertakings

- (102) Opel (Opel Nederland BV and General Motors Nederland BV) and the Opel dealers are undertakings within the meaning of Article 81(1).

## II. The agreement

### 1. Overall strategy

- (103) Although the overall strategy pursued by Opel Nederland BV (see recitals 17, 19 and 20) was not in itself agreed between the importer and the dealers, such an overall strategy nevertheless became apparent as an integral part of the distribution agreements between these companies, as becomes evident from the individual measures undertaken by Opel Nederland BV. These measures consisted in arrangements concerning the restrictive delivery to dealers, the restrictive bonus policy, implemented through the operation of several sales campaigns which became an integral part of the dealer contract, and in the direct warnings and instructions implementing the export ban, addressed to a number of its dealers. These measures pursued a single aim of restricting and/or preventing exports and became part and parcel of Opel Nederland BV's distribution agreements with its dealers.

### 2. Individual measures

- (104) The elements referred to in recitals 17 to 87 show that Opel agreed with its dealers on a policy of market partitioning, within the framework of their common exclusive and selective distribution system.
- (105) This policy is expressed in the form of an export ban and certain restrictions imposed on the dealers. They are to be found in a bundle of preventive and control measures. The documents mentioned above are evidence of this. Specifically, these measures relate to the restrictive supply policy set out in recitals 23 to 42, to the bonus policy set out in recitals 43 to 58, and to the measures concerning a direct export ban and/or restriction described in recitals 59 to 99. The success of these measures became evident in particular from the reactions of the dealers who had sold cars to foreign consumers and who undertook to refrain from exporting in general.
- (106) The above measures were designed with the aim of limiting and/or preventing exports of cars in reaction to the increase of such sales noted for the year 1996.

- (107) The documents found by the Commission during the investigation, and referred to in recitals 23 to 42, show that Opel Nederland BV decided a policy of restrictive delivery in September 1996, with the aim of restricting or preventing export sales, and communicated this policy to the dealers concerned.

- (108) The measures practised by Opel Nederland BV since 1 October 1996, when it refused to grant bonus payments for sales to customers from other Member States, are described in recitals 43 to 58. The decision adopted by Opel Nederland BV on 26 September 1996 to introduce this measure in respect to sales to non-resident end consumers, and to link bonus payment with a registration in the Netherlands, as well as its implications as to export sales, is described in recitals 51 to 56. This measure constitutes an obstruction of export sales.

- (109) The above bonus policy was integrated into several sales promotion programmes operated by Opel Nederland BV between 1996 and 1998. Through these campaigns, each running for a reasonably long period, the importer removed from its dealers an essential part of their remuneration resulting from the sale of cars to foreign consumers.

- (110) Finally, the third measure consisted of a direct ban and/or restriction of exports. Dutch Opel dealers were urged not to supply cars to other Opel dealers, nor to end consumers from other Member States, and/or they were expressly forbidden to do so. Many dealers then undertook to the importer to refrain from such export sales in future. Evidence of this practice is set out in recitals 59 to 99 and, in particular, within the framework of the description of the third and subsequent phase. Following this decision of Opel Nederland BV, many dealers concerned by the exports undertook to stop carrying out any export sales.

### 3. The agreement

- (111) The measures adopted by Opel Nederland BV for restricting and/or preventing export sales are not unilateral action outside the scope of Article 81(1). They form part of the contractual relationships which Opel Nederland BV maintained with its dealers belonging to its selective and exclusive dealer network in the Netherlands, for the sale of Opel models and other contract goods. They were carried out by mutual agreement as part of the practical implementation of the dealership contracts. The ECJ has already held<sup>(105)</sup> that the inclusion of a dealer in a distribution network means

that the dealer expressly or tacitly accepts the policy pursued by the manufacturer and its supplier. The adopted measures were agreed with the dealers partly in writing, partly orally.

(112) As regards the restrictive supply policy, Opel Nederland BV referred dealers to the SEG, which is integral part of each dealership contract and which specifies the number of vehicles to be sold annually by the dealer<sup>(106)</sup>. Opel dealers were told that priority was to be given to those orders intended for the Dutch market and that, accordingly, supplies would be limited to the number of vehicles specified in the SEG (see recitals 31 to 42). This measure became thus part of the contractual relationship between Opel Nederland BV and its dealers. According to established case-law, such instructions given to dealers do not constitute unilateral acts outside the scope of Article 81, but an agreement within the meaning of that Article, if they intervene in the course of a current commercial relationship which underlies an existing general agreement<sup>(107)</sup>.

(113) As regards the second measure, Opel Nederland BV operated the system for awarding bonuses, by incorporating specific provisions in the conditions for participation in a number of sales promotion programmes (*campagnes*).

(114) In two campaigns, 'Astra Bonuscampagne' and 'Corsa Inruil Ander Merk Campagne', both run between 1 October 1996 and 31 January 1997, as well as in further campaigns operated after that date until 20 January 1998, bonus payments for export sales to end consumers were excluded<sup>(108)</sup>. These campaigns and their relevant conditions for participation were accepted by the dealers, since they transacted sales as part of these programmes (see recitals 53 and 54).

(115) As regards the third measure, the instructions given to a number of dealers (see recitals 59, 73 and 78, as well as recitals 80 to 87), and the documents referred to therein) were sufficient to establish an agreement within the meaning of Article 81. After the decision of 26 September 1996, some of Opel Nederland BV's District Managers approached their dealers through so-called 'introductory visits' beginning of October 1996, as a consequence of which dealers agreed individually to stop export sales. As early as the end of August 1996, Opel Nederland BV's sending of the first warning letters (see recital 71) to all those dealers who had carried out more than 10 export sales in the first half of 1996, in which the

importer expressed its concerns as to whether the dealers were behaving in accordance with the letter and spirit of their dealership contract<sup>(109)</sup>, set to put pressure on these dealers to restrict or stop exportation. Opel Nederland BV repeated its concerns and instructions one month later in the second warning letter, in late September 1996 (see recital 76). Moreover, a number of dealers who had, in their opinion, carried out exports in accordance with their dealership contract, were compelled by the importer to refrain in future from carrying out any export sales (see recitals 80 to 87).

(116) One dealer (Van Zijl, see recital 81), who had undertaken repeatedly to stop export sales, informed the importer about two individual orders placed for foreign end consumers; another dealer (Canton-Reiss, see recital 85) informed Opel Nederland BV about his intention to restrict himself to sporadic exports.

(117) It should be pointed out that, for the present purposes, it is not relevant whether the dealers accepted the export ban and/or restriction merely on the basis of pressure exerted by the importer<sup>(110)</sup>.

### III. Restriction of competition

#### 1. The object or effect of restricting competition

##### (1) Object

(118) The measures described above taken by Opel Nederland BV had as their object the restriction of 'intra-brand' competition. They targeted not only sales to unauthorised resellers, but also sales to other Opel dealers and to end consumers from other Member States, including sales via authorised intermediaries. Competition was thus hampered, in particular between Dutch Opel dealers and Opel dealers located in other Member States. The aim was to prevent Opel dealers in the Netherlands from exploiting competitive advantages they enjoyed over Opel dealers in other Member States, by selling vehicles to customers who were not resident in the Netherlands. The distinction drawn was whether the customer was resident within, or outside, the Netherlands. That the object was to restrict competition is apparent both from the combination of measures and from the individual measures considered separately. Such measures normally fall under Article 81(1).



(a) *Overall strategy to restrict competition*

(119) Opel Nederland BV developed and finally adopted, during the second half of the year 1996, a strategy aiming at preventing and/or limiting export sales. That the object of the combination of measures was the prevention of exports, emerges clearly from the e-mail: 'Destination based registration bonuses' from Opel Nederland BV to General Motors (Europe) of 23 September 1996 (see recital 20) and from the document of 18 September 1996 mentioned in recital 19. Even before 23 September 1996, managers of Opel Nederland BV considered, and implemented, individual measures with the same objective of reducing export sales (see recitals 24 to 31 concerning the supply policy, recitals 47 to 50 concerning the bonus policy, and recitals 59 to 73 concerning instructions to individual dealers).

(120) The determination of Opel Nederland BV to formally introduce these measures became evident from the decision adopted on 26 September 1996: 'Conclusions meeting on export' (see recital 17). In this document, the author records the decision taken at that day's meeting on the highest management level, with the aim of limiting export sales by various measures, including the three measures mentioned in recitals 104 to 110.

(121) That document proves that the combination of measures was based on a strategy developed by Opel Nederland BV, which was aimed at assuring that exports from the Netherlands were drastically reduced. Through these measures, the importer intended to intervene on the market and determine how that market would develop. The express goal of Opel Nederland BV was to achieve the maximum possible reduction in exports by utilising a combination of measures and thereby to restrict intra-brand competition between Dutch and foreign Opel dealers, and also to maintain price differentials between the other Member States and the Dutch market. Such a strategy is tantamount to a partitioning of the markets, incompatible with Article 81 <sup>(11)</sup>.

(122) Moreover, that the object of the combination of measures was to restrict competition can be illustrated by the combination of bonus payments and restrictive delivery. The object of the combination of the measures was to exacerbate the disadvantage for the dealer in export sales.

(123) Together with the dealer margin, the bonus forms the basis of the calculations which each dealer carries out in order to determine how he can economically provide for the sale of vehicles and the associated operating costs

(sales staff, showrooms, advertising, etc.) linked to his business. The dealer margin and the bonus condition the dealer's room for manoeuvre on prices in his negotiations with customers.

(124) A dealer who knows that he will lose the bonus if he sells a vehicle abroad will refrain from such sales, at least if he is able to dispose of his allocated vehicles within the Member State where he is established (the Netherlands in this case), and in particular within his own territory. In the case of sales to non-domestic customers, the dealer therefore makes a smaller profit. He cannot increase the selling price of the vehicle correspondingly, because he does not want to risk his competitiveness against other domestic dealers.

(125) At the same time, the dealer knows that he will only receive a certain number of vehicles from the importer, in accordance with his individual sales target for the period in question <sup>(112)</sup>.

(126) When the contractual delivery volume is tailored to meet Dutch demand only, or when priority is given to orders from domestic customers, the individual dealer has only limited or no scope for exports. In the case of sales to non-domestic customers, the dealer must expect that the importer will not increase his annual pre-determined sales volume to the necessary level, thus producing an insufficient number of vehicles to satisfy domestic customer demand. The dealer would thus jeopardise his annual sales target, which he is called upon to achieve in his contract territory under his dealership contract. In this situation, the dealer would understandably prefer to serve only domestic customers, in particular those resident in his contract territory, since for those sales he does not have to worry about supply problems or financial disadvantages, or take the risk of termination of his dealer contract owing to poor performance as compared to his sales target.

(b) *Individual measures restricting competition*

(127) The individual measures adopted by Opel Nederland BV with regard to its exporting dealers had as their object the restriction of competition, not only when they operate in combination, but also taken in isolation. Indeed, all these measures shared the object identified above, namely to prevent exports, thereby partitioning the markets.

(128) The arrangements providing for restrictive delivery to dealers had as their object, as was explained in recitals 23 to 42, to refer dealers to their contract territories, in order to limit and/or prevent sales to customers resident

abroad. Limited allocation (*allocatie*) of vehicles to those dealers, who in the past had carried out exports, formed part of the catalogue of measures which was agreed on 26 September 1996 by the managers of Opel Nederland BV, with the aim of restricting and/or preventing exports:

‘... Decisions made:

3. The District sales managers will discuss the export business with the export dealers within the next two weeks. The dealers will be informed that due to restricted product availability they will (until further notice) only receive a number of units which equals their Sales Evaluation Guide. They will be asked to indicate to the District manager which units from their outstanding orders they really want to receive. The dealers themselves will have to solve any problem with their purchaser<sup>(113)</sup>.’

(129) Opel Nederland BV recognises that the basic rights of the European consumer include the right to be able to purchase a motor vehicle within the common market in the Member State where it is offered at the most favourable price. This right includes, but is not limited to, new motor vehicles which are offered by the authorised dealers in the volumes and specifications which are required to satisfy the demand of end consumers in the respective contract territory of the dealer.

(130) This right is protected, in practice, by the Community competition rules on parallel trade. In the light of these rules, market partitioning through arrangements concerning restricted supply of motor vehicles to dealers in the distribution network cannot be accepted. Such arrangements have as their object a restriction of competition within the meaning of Article 81.

(131) The condition for bonus payments, which were set out in the conditions of participation in several sales promotion programmes operated from 1996 to 1998, removed the incentive from dealers for supplying end consumers resident in another Member State, either directly or through an authorised intermediary. As can be seen from the documents mentioned in recitals 20 and 50 to 52, this measure was adopted with the aim of restricting export sales, and therefore had the object of restricting competition. The Commission has already established<sup>(114)</sup> that agreements or practices relating to bonuses are prohibited if they are made conditional upon the recipient's not exporting the item concerned. Such a clause in itself has as its object the restriction of competition. It is not necessary, for an application of Article 81(1), that it is actually implemented<sup>(115)</sup>.

(132) Opel Nederland BV refers in particular to recital 8 of Article 6(1) of Regulation (EC) No 1475/95<sup>(116)</sup>, and submits that its decision of 26 September 1996 to exclude sales to non-resident consumers from bonus payment was taken in view of the legal uncertainty about the compatibility of this measure with European competition rules. Opel Nederland BV referred in this respect to the fact that it had obtained conflicting legal advice about this question and submits that major competitors applied a comparable bonus policy in respect of sales to non-resident final consumers<sup>(117)</sup>.

(133) The Commission considers, first, that the argument concerning legal advice and alleged practices of competitors does not affect the object of the measure, as it results clearly from the above analysis. Nor is this analysis affected by the mere existence of the special Dutch registration tax<sup>(118)</sup>, which is imposed on each new passenger car purchased for registration in the Netherlands. It is shown in recitals 51 to 53 that this measure was introduced in October 1996, as part of Opel Nederland BV's catalogue of measures decided on 26 September 1996, clearly with the aim of restricting or preventing export sales, and without reference to the Dutch registration tax<sup>(119)</sup>. This measure was therefore not related to the introduction of this registration tax in the Netherlands on 1 January 1993. In this context, it has to be noted that comparable taxes imposed on car purchase exist in other Member States, and that Opel Nederland BV does not submit that Opel applied in such Member States the same bonus policy as in the Netherlands.

(134) The expressly stated export ban and/or restriction (see recitals 59 to 99 and, in particular, the documents referred to therein in footnotes 51, 54, 78, 83 and 88) had as its object to obstruct the cross-border trade in cars between Dutch dealers and dealers in other Member States, and to partition the different markets. It thus sought to limit parallel trade of new cars and fulfilled the conditions of Article 81(1). In this way, it was possible to maintain existing price differences for motor vehicles of the Opel brand within the Single Market (see recitals 13 to 16 and the document mentioned in footnote 14). The Commission and the ECJ have repeatedly stressed the incompatibility with Article 81(1) of the obstruction or prohibition of cross-border deliveries<sup>(120)</sup>.

**(2) Effect**

(135) According to established case-law, it is sufficient, for the purposes of Article 81, to find that a measure has a restriction of competition as its object. The effect of such measure is an alternative, and not a necessary, condition for such infringement<sup>(121)</sup>. This Decision is primarily based on the object of restricting competition. As to the effect of the measures on competition, it is not possible to say how many exports were actually prevented by these measures. However, Opel Nederland BV submits that a certain effect on export sales may have occurred<sup>(122)</sup>. It must also be noted that its arguments allegedly showing that only few effects could be observed merely refer to sales to German end consumers. However, the contested measures related to all permissible export sales, which means to all end consumers and Opel dealers abroad, in any Community Member State. In any event, Opel Nederland BV did all that was in its power to obtain the greatest possible effect. In particular, at least for a time, it admonished or instructed the dealers concerned to sell only within their respective contract territory or in the Netherlands and it caused many dealers to undertake not to export any more (see recitals 115 and 116)<sup>(123)</sup>. In their undertakings, dealers made no distinction between sales to end consumers, either directly or through their authorised intermediaries, sales to other Opel dealers and sales to resellers not belonging to the distribution network.

**(3) Conclusion**

(136) Opel Nederland BV pursued a strategy aimed at limiting export sales. This strategy, as well as each of the measures considered in isolation, had as their object and, at least to a certain extent, the effect of a restriction of competition within the meaning of Article 81(1).

**3. Appreciable restriction of competition**

(137) Adam Opel AG in Germany is the most important European division of the General Motors group, which is an important provider of new private passenger cars both in the European Union as a whole and in the Netherlands and the other Member States (details are indicated in recitals 9 to 11). The price differences for Opel models between the Netherlands and other Member States, in particular Germany, were sufficient to present incentives for parallel trade<sup>(124)</sup>.

(138) The arrangements concerning restrictive deliveries to Dutch dealers, the bonus policy and the direct export ban and/or restriction aimed to confer on the Opel dealers in other Member States territorial protection from imports from the Netherlands.

(139) The restrictions of competition identified in this case are thus appreciable.

**IV. Appreciable restriction of trade between Member States**

(140) Trade between Member States was affected, since the export ban and/or restriction undertaken by Opel Nederland BV tended to limit cross-border trade. The Dutch market was excluded as a potential source of exports, while the destination markets for these exports, which generally have a significantly higher price level, such as the German and British markets, were protected against those imports (see also the reference to the market position of Opel in recital 137).

(141) Opel Nederland BV itself made occasional reference (for example in 1996) to the — in its view — high level of export sales actually carried out (see, for example, recitals 15, 18, 20, 24 and 25) and made substantial efforts to prevent even permissible exports. As shown in recitals 13 to 16, the scope for potential exports was substantial. Price differences (calculated on the basis of recommended list prices before tax) of more than 12 % constitute, in the view of many buyers, a sufficient financial incentive for acquiring a car in another Member State<sup>(125)</sup>. The export figures submitted by Opel Nederland BV showed that export demand for Opel models amounted at least to 3 526 in 1996, to 2 746 in 1997 and to 1 686 in 1998<sup>(126)</sup>. Opel Nederland BV's argument that some of these export sales had been carried out in breach of the dealer contract, is not relevant. First, a considerable part of the exports targeted by the contested measures were made in accordance with the dealer contract. Secondly, Opel Nederland BV is entitled to prevent export sales incompatible with the dealer contract, in which case the demand revealed by these sales should normally shift to permissible sales. The measures taken by Opel Nederland BV were thus capable of appreciably affecting trade between Member States.

## V. Conclusion

- (142) Opel Nederland BV agreed to restrict export sales in the context of a strategy and through the individual measures identified above.
- (143) The object of preventing or limiting parallel trade, which was developing because of existing price differentials, was inherent in the contested agreements between Opel Nederland BV and the dealers of its distribution network. Indeed, the measures taken by the importer formed part of the contractual relationship which the importer maintained with these.
- (144) These measures implied an appreciable restriction of competition. They were capable of appreciably affecting trade between Member States. Therefore, the conditions for the application of the prohibition set out in Article 81(1) are fulfilled.

### B. ARTICLE 81(3)

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

- (145) Regulation (EEC) No 123/85<sup>(127)</sup> was in force from 1 July 1985 to 30 June 1995. It was replaced on 1 July 1995 by Regulation (EC) No 1475/95 of 28 June 1995 on the application of Article 81(3) to certain categories of motor vehicle distribution and servicing agreements<sup>(128)</sup>. Article 13 of Regulation (EC) No 1475/95 provides that the provisions of Regulation (EEC) No 123/85 remained in force until 30 September 1995. Article 7 of Regulation (EC) No 1475/95 provides that the prohibition set out in Article 81(1) did not apply between 1 October 1995 and 30 September 1996 to agreements which had already been concluded on 1 October 1995, and which satisfied the requirements for an exemption pursuant to Regulation (EEC) No 123/85.
- (146) An exact assignment of the measures to the respective temporal scopes of Regulations (EEC) No 123/85 and (EC) No 1475/95 is not necessary in this case. Neither of these Regulations exempts agreements restricting export sales to end consumers, be it directly or through their authorised intermediaries, or to other dealers of the Opel distribution network resident in other Member States.

#### 1. Article 3(10)(a) of Regulations (EEC) No 123/85 and (EC) No 1475/95

- (147) Article 3(10)(a) of either Regulation permits the manufacturer and/or its importer to forbid dealers to supply contract goods, or corresponding goods, to resellers which are not part of the sales network. The block-exemption regulation thus takes into account the interests of the manufacturer in protecting his selective distribution system.
- (148) Regulation (EEC) No 123/85 was in force from 1 July 1985 to 30 June 1995. Regulation (EC) No 1475/95 has been in force since 1 July 1995 and applicable since 1 October 1996.
- (149) Were the measures restricting export sales imposed by Opel Nederland BV only designed to cover measures directed exclusively and expressly against sales to independent resellers outside the distribution network, then such measures would be exempt by virtue of Regulations (EEC) No 123/85 and (EC) No 1475/95. However, the measures adopted are not exempt because they also related to exports which a car manufacturer or supplier is not permitted to restrict or to prevent. These permissible exports are considered by the Regulations to be essential in order to produce effective intra-brand competition between dealers, and to give consumers the benefit of the Single Market. Opel Nederland BV's measures were directed against these permissible exports. This results from the following:
- (150) Opel Nederland BV referred, in most of the documents mentioned in this Decision, both in the terminology and in the actual formulation of measures, to exports in general. No distinction was made between sales to, on the one hand, resellers outside the Opel distribution network and, on the other hand, sales to end consumers, their authorised intermediaries or other contract dealers belonging to the Opel distribution network. In other documents, although these distinctions were made, the measures adopted expressly referred to business which may not be prohibited or restricted under the block exemption regulations. This applies in particular to cases where the dealer expressly claimed that the contentious exports were business which, in accordance with the dealership contract and the block exemption regulations, could not be prohibited (see recitals 80 to 87).

#### (1) Terminology

- (151) As was shown in recitals 17 to 20, Opel Nederland BV frequently used in its documents the expression 'export'



in general, without differentiating between different customer groups. In individual cases, however, a distinction was made, for example, between 'illegal' and 'legal' export sales, which obviously referred to restrictions which were exempt or not exempt under the block exemption regulations. The purpose was in all cases to stop 'legal' export sales as well.

(152) In connection with the measures undertaken, Opel Nederland BV frequently did not make a distinction between permissible and impermissible measures, but often referred expressly to all exports and export trade. Thus, for example, in the following documents, it ordered the exclusion of bonus payments for certain export sales which, pursuant to the block exemption regulations, must not be restricted:

'... In future sales campaigns, vehicles which will be registered outside Holland will not qualify ...'(129);

'... The bonus is applicable to all new Opel Corsas which have been sold during the campaign period and have been supplied to and registered in the name of an end consumer in the Netherlands ...'(130).

(153) In the document 'Conclusions Meeting on Export'(131), in which major decisions of the importer are recorded, no distinction was made between the different customer categories. The object of the agreed measures was thus the restriction or prevention of export sales to customers, including end consumers and other Opel dealers.

(154) The statements which dealers gave in response to the first warning letter of the importer dated 28/29 August 1996 (see recitals 70 to 72) differentiated sharply between 'permissible' and 'impermissible' sales in respect to the dealership contract. Almost all the dealers who received the letter (15 out of 18) referred the importer in their reply to the fact that the exports which they had been found to make were simply sales to end consumers or sales in conformity with their dealership contract(132). Nevertheless, many dealers, under pressure from the importer, undertook to refrain in future from carrying out any exports (see recitals 80 to 87). The reaction of dealers confirmed that they also understood Opel Nederland BV's measures as having as their object to restrict all export sales. The terminology used by Opel Nederland BV was thus unambiguous and confirmed its intention to restrict and/or prevent all types of exports including export sales which must not be restricted under the block exemption regulations.

## (2) Formulation of measures

(155) In its decision to carry out dealer audits (see recitals 17 and 19), Opel Nederland BV did not differentiate between dealers who had allegedly sold to unauthorised resellers and those having sold to other customers.

(156) The arrangements concerning restrictive supply of vehicles by Opel Nederland BV to its dealers were based on the expected demand from Dutch customers and/or expected registrations in the Netherlands or in the respective contract territories. These arrangements are described in recitals 23 to 42. The bonus policy provided for within the framework of a number of campaigns is described in recitals 43 to 58.

(157) Finally, recitals 59 to 99 show that Opel Nederland BV instructed dealers to refrain from, or limit, export sales in general and demonstrates how the dealers accepted these instructions.

## 2. Other provisions of Regulations (EEC) No 123/85 and (EC) No 1475/95

(158) The measures described above are not exempted by other provisions of Regulation (EEC) No 123/85 or Regulation (EC) No 1475/95.

## II. Individual exemption

(159) The Commission may, pursuant to Article 81(3), under certain conditions grant an individual exemption from the prohibition set out in Article 81(1).

(160) No such exemption has been requested nor granted. The agreements would not, in any case, have qualified for an exemption. Even if it could be assumed that such export restrictions helped to improve the distribution of goods, the end consumer does not share in the resulting benefit. Consumers are prevented from taking advantage of the Single Market and benefiting from the price differences for motor vehicles between the Member States, in that they are restricted in their right to buy goods of their choice wherever they want within the Single Market. The export restrictions adopted by Opel Nederland BV are thus in serious contradiction with the objective of consumer protection, which is, by virtue of Article 81(3), an integral part of the Community's competition rules.

### III. Conclusion

(161) The export restrictions imposed by Opel Nederland BV are not covered by Regulation (EEC) No 123/85 or Regulation (EC) No 1475/95.

(162) An individual exemption has not been and cannot be granted either.

#### C. DURATION OF THE INFRINGEMENT

(163) The Commission bases its determination of the duration of the infringement of Article 81(1) on the analysis made in recitals 17 to 99 and the respective documents referred to therein.

(164) The arrangements concerning restrictive delivery to dealers were formally adopted by the decision of Opel Nederland BV of 26 September 1996 (see recital 31). Even in July 1996 (see recitals 24 and 25), and in the weeks of September preceding the date of the decision (see recitals 26 and 30), reflections about such measure had been made by the responsible managers of Opel Nederland BV. However, the evidence found supports the view that the arrangements concerning restrictive delivery had been communicated to dealers in the weeks following the formal decision of 26 September 1996 (see recitals 36 and 37). The Commission therefore considers that these arrangements were put in place from the beginning of October 1996 onwards.

(165) As to the termination of this measure, the Commission accepts that it was partially countermanded by the general circular of 24 October 1996 to all dealers, as regards exports to end consumers including sales via their authorised intermediaries, and by the circular letter of 12 August 1996 to all dealers, which was intended to clarify the scope for permissible exports in general. Moreover, no evidence was found which could support the view that this measure continued after December 1996. It is true that it was not specifically addressed in the said circular letters. On the other hand, the letters made clear that exports identified therein were permissible. This may be understood as revoking also the covert export prohibition inherent in the contested arrangements relating to supply. This Decision is thus based on a duration of this measure from beginning of October 1996 until December 1996.

(166) The restrictive provisions on the bonus policy can be proven with certainty from 1 October 1996 (see recital 53). In two campaigns, 'Astra Bonuscampagne,

Deelnemingsvoorwaarden' and 'Corsa Inruil ander merk campagne, Deelnemingsvoorwaarden', which both were in force from 1 October 1996 to 31 January 1997, the award of bonuses was excluded for sales to end consumers not resident in the Netherlands, whether directly or through an authorised intermediary<sup>(133)</sup>.

(167) As to the termination of this policy, reference is made to recital 54, where it is stated that, according to Opel Nederland BV, the restrictive provision was no longer applied after 20 January 1998. As is explained in recital 58, the Commission does not accept the argument submitted by Opel Nederland BV that this measure was retroactively terminated by the circular of 20 January 1998 (see recital 57). The duration of this measure was therefore from 1 October 1996 until 20 January 1998.

(168) As regards the instructions given to dealers and the subsequent undertakings received from dealers, the evidence found shows that a first undertaking was received from the dealer Van Zijll on 31 August 1996 (see recitals 80 and 81), followed by corresponding commitments from other dealers (see recitals 83 to 87)<sup>(134)</sup>.

(169) As to the termination of this measure, the same argumentation as in recital 165 applies: the Commission considers that it was successively countermanded, by the general circular of 24 October 1996 to all dealers, as concerns exports to end consumers including sales via their authorised intermediaries, and by the general circular of 12 December 1996 to all dealers. The duration of this measure was consequently from the end of August or beginning of September until December 1996 at least. No evidence was found which could support the view that the measure continued after December 1996.

(170) In conclusion, the Commission holds the view that the infringement can be proven from the end of August or beginning of September 1996 (with the first undertaking received from a dealer) until January 1998 (withdrawal of the restrictive bonus provision), with an intensification during the months of October until December 1996. After December 1996, only the bonus provisions were in force until 20 January 1998. No evidence for a continuation of the infringement after that date could be found.

#### D. ARTICLE 3(1) OF REGULATION No 17

(171) Pursuant to Article 3(1) of Regulation No 17, the Commission may, if it has established that an infringe-

ment of Article 81 has taken place, oblige companies involved to terminate the established infringement. Opel Nederland BV has to a large extent contested the existence of the infringement. Moreover, it is not entirely certain whether, despite the countermanding measures adopted in October and December 1996, as well as in January 1998, the infringement has not, in fact, been continued. The Commission therefore requests the addressees of this Decision to terminate the established infringement, to the extent that this has not already been done, and to refrain from repeating or continuing the measures in question, and from adopting other measures with the same object or effect.

#### E. ADDRESSEES OF THIS DECISION

- (172) Opel Nederland BV committed the infringement established in this Decision. General Motors Nederland BV controls Opel Nederland BV and is thus equally responsible for this infringement. Both companies are therefore addressees of this Decision.

#### F. ARTICLE 15 OF REGULATION No 17

- (173) Compliance with Article 81 is enforceable by means of fines. Article 15(2) of Regulation No 17 empowers the Commission to impose such fines, within stated limits, on undertakings which infringe Article 81(1) either intentionally or negligently.

##### 1. The imposition of a fine

- (174) The Commission is of the opinion that, in the case under review, it is appropriate to impose a fine on Opel Nederland BV, which intentionally infringed Article 81, as well as on General Motors Nederland BV, which is equally responsible (see above). The Dutch Opel dealers, as participants together with Opel Nederland BV through agreements to prevent or limit exports, are victims of the restrictive policy decided by their contracting party, to which they had to agree under pressure. The dealers did not participate actively. The Commission is therefore of the opinion that no fine should be imposed on them.

##### 2. The amount of the fine

- (175) In determining the amount of the fine, the Commission follows the provisions laid down in Article 15 of Regulation No 17.

- (176) In fixing the amount of the fine, the Commission must have regard to all relevant circumstances and particularly to the gravity and duration of the infringement.

##### *Gravity:*

- (177) In assessing the gravity of the present infringement, the Commission takes account of its nature, its actual impact on the market, where this can be assessed, and the size of the relevant geographical market.
- (178) The Commission notes that all the measures in question were designed to prevent exports to end consumers and cross-deliveries within the Opel dealer network.
- (179) The document mentioned in recital 50 and in footnote 43 thereof, 'Cross-border sales and campaign structure' dated 18 September 1996, shows that the company considered 'cross-border business', meaning exports generally, as undesirable. With the intention of systematically preventing or limiting all exports, Opel Nederland BV compiled a catalogue of measures (see recitals 17 to 20 and the documents mentioned there).
- (180) In recitals 23 to 42, it is shown that Opel Nederland BV decided to implement a restrictive delivery to a number of its contract dealers. The bonus policy described in recitals 43 to 58 was practised by Opel Nederland BV within the framework of various sales promotion campaigns. In recitals 59 to 99, it is shown that Opel Nederland BV prohibited or obstructed exports in general, including sales to end consumers not resident in the Netherlands and sales to Opel dealers in other Member States.
- (181) The obstruction of export sales of vehicles to final consumers and of cross-deliveries between Dutch Opel dealers and Opel dealers outside the Netherlands hampers the objective of the creation of the Single Market, as set out in the EC Treaty, and is already therefore to be classified as a very serious infringement.
- (182) The Commission has already clarified in its decisions that the obstruction of exports constitutes an infringement of European competition rules<sup>(135)</sup>.

- (183) The Opel brand has an important position on the relevant markets of the European Union. As shown in recitals 9 and 11, the Opel brand holds important

market shares in the Member States of the European Union, both in the different segments and in the passenger car sector as a whole. Opel is at present the third best selling car brand in the European Union after Volkswagen and Renault<sup>(136)</sup>.

they were, again, cheaper than in Germany. The study concludes that a quantitative damage assessment based on the available information finds that under reasonable assumptions on the potential demand for imports of Opel cars the measures had no negative effect on German end consumers.

(184) The infringement concerned the Dutch market for the sale of new motor vehicles, by rendering considerably more difficult the sale of vehicles for export to end consumers and other Opel dealers. It conversely concerned markets for new motor vehicles in other Member States. The dealers in these markets, for example Germany, were to be protected against price competition from the Netherlands. Although in certain documents found, Opel Nederland BV explicitly referred to customers from Germany, in fact all those Member States in which prices, before tax, for Opel cars were substantially higher than in the Netherlands have to be regarded as potential sources of export demand. In addition, the Commission underlines that it is the right of consumers to purchase a car wherever they want within the Single Market, as is explained in recital 188.

(185) As is shown in recital 135, the object of a measure is already sufficient to demonstrate an infringement. Article 15 of Regulation No 17 does not specify that the infringement has to be assessed by reference to the actual results on the market or to the harm caused to purchasers of the relevant products<sup>(137)</sup>. The measures taken by Opel Nederland BV had as their object the restriction of competition within the meaning of Article 81 (see recitals 118 to 134). In addition to that, it has to be noted that Opel Nederland BV itself did not deny that there might have been a certain effect on the market.

(186) Opel Nederland BV has submitted a study concluding that there was little or no evidence of a major economic impact on the German market for new passenger cars<sup>(138)</sup>. The study suggests that the economic damage to German consumers would still have been quite limited, given the various alternative sources open to them. It considers that German Opel dealers could have bought Opel cars from Opel dealers in other Member States, and that German end consumers could have bought other brands of cars in the Netherlands where

(187) The Commission notes first, that the study does not cover all aspects of the case. It refers only to export sales to German end customers, although the measures also prevented exports to other Member States. Nor does the study examine the impact of the measures on cross-deliveries to Opel dealers abroad, whether in Germany or in any other Member State.

(188) Secondly, the argument that other options were available to German customers to buy Opel cars from other sources or to buy other brands than Opel, does not hold either. The Commission considers that it is the right of consumers to buy a car of the brand of their choice in any Member State<sup>(139)</sup>. By the measures undertaken, Opel Nederland BV restricted this very freedom to a considerable extent. As is shown, for example, in recitals 14 to 16, potential export demand was, even in the estimation of Opel Nederland BV, substantial. The fact that export sales to German customers continued after the introduction of the measures does not alter the seriousness of the infringement. Opel Nederland BV made considerable efforts, which, on an objective view, were all capable of seriously restricting exports. This applies to each of the three contested measures, and in particular to the action consisting in instructing dealers, and in inducing them to give individual commitments.

(189) It is plain that Opel Nederland BV acted intentionally. It could not have been unaware that the contested measures had as their object the restriction of competition<sup>(140)</sup>.

(190) As can be seen from the document mentioned in recital 27 and in footnote 22 thereof, 'Bonus bij export' dated 12 September 1996, Opel Nederland BV was aware that any restriction of exports, and also restrictive delivery to dealers, was prohibited. With respect to the bonus policy, reference is made to recital 52. From the documents quoted in recitals 20 and 50 ('Cross-border sales and campaign structure' dated 18 September 1996) and recital 51, it becomes clear that Opel Nederland BV was nevertheless prepared to introduce the contested export restrictions.



(191) Finally, the documents mentioned in recital 72 show that, in spite of the admonitions and instructions from the importer, the dealers invoked the dealership contract and rejected the accusation that they had pursued unauthorised business. Despite these assurances and references to the dealer contract, Opel Nederland BV committed the dealers to refraining from 'permissible' exports as well. Here again, Opel Nederland BV was aware of the illegality of its measures.

(192) The argument submitted by Opel Nederland BV, that it had received conflicting legal advice, and that major competitors used a comparable bonus policy, does not affect the above analysis. In any case, Opel Nederland BV did not contact the Commission, in order to receive clarification on this issue. As long ago as in 1988, the Commission had clarified its view on policies excluding new car sales to non-resident end consumers from special promotional offers<sup>(141)</sup>, where it said that export sales must not be treated in any less favourably than domestic sales.

(193) The Commission therefore concludes that Opel Nederland BV committed the infringement intentionally and in full knowledge of its illegality.

(194) In conclusion, the Commission considers that, taking into account all these considerations, the infringement committed by Opel Nederland BV is a very serious infringement of Article 81. This is true both of the bonus policy applied from October 1996 until January 1998, and of the other measures taken since the end of August 1996, in order to further impede or prevent export sales. Consequently, a fine has to be imposed which sanctions this very serious violation in an appropriate way and which excludes, by its deterrent effect, any repetitions.

(195) The Commission considers that an amount of EUR 40 million is an appropriate amount as a basis for the determination of the amount of the fine.

*Duration:*

(196) Another factor determining the amount of the fine is, pursuant to Article 15(2), the duration of the infringement.

(197) It follows from recitals 163 to 170 that the infringement committed by Opel Nederland BV lasted from the end of August 1996 or beginning of September 1996, until January 1998, thus totalled 17 months.

(198) Therefore, in this case, Opel Nederland BV committed an infringement of medium duration.

(199) In weighing the duration for the purposes of the fine, the Commission takes into account that:

- (a) from end of August 1996 until beginning of October 1996, the infringement only comprised individual measures taken against certain dealers;
- (b) during the month of October 1996, the infringement attained its highest intensity, given the systematic instructions to dealers and the subsequently undertakings received from dealers, the arrangements concerning supply, and the restrictive bonus policy;
- (c) from end of October 1996 until mid-December 1996, the infringement was not lifted yet as concerns the bonus policy nor was it lifted with regard to the two other elements, as far as these concerned sales to other Opel dealers;
- (d) from mid-December 1996 until end of January 1998, the infringement still covered the restrictive bonus provision.

Taking into account these considerations, the Commission considers that this justifies an increase of the above amount by 7,5 % (EUR 3 million euro) to a basic amount of EUR 43 million euro.

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

(201) In this case, the Commission has considered, in particular, whether the argument of Opel Nederland BV, saying that it had taken 'swift corrective action', could be accepted as an attenuating factor.

(202) The Commission has come to the conclusion that this argument should not be accepted. The objective duration of the infringement and its various elements have already been taken into account in respect to its duration. Moreover, although the Commission had carried out its inspections on 11 and 12 December 1996, Opel Nederland BV continued one major element of the infringement until 20 January 1998. Therefore, the Commission considers that in this case, no attenuating circumstances are in evidence,

HAS ADOPTED THE FOLLOWING DECISION:

*Article 1*

Opel Nederland BV has infringed Article 81(1) of the EC Treaty, by entering into agreements with dealers in the Opel distribution network in the Netherlands, in order to restrict or prohibit sales to end consumers from other Member States, whether in person or represented by intermediaries acting on their behalf, and to dealers of the Opel distribution network established in other Member States.

### Article 2

The undertaking mentioned in Article 1 shall henceforth bring to an end the infringement referred to in Article 1, to the extent that it has not already done so. To this end, it shall refrain from repeating or continuing any of the measures constituting this infringement and shall refrain from adopting any measures having equivalent object or effect.

### Article 3

In view of the gravity of the infringement of Article 81(1) of the EC Treaty, a fine of EUR 43 million is imposed on Opel Nederland BV and General Motors Nederland BV. They shall be jointly and severally liable for the fine.

### 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

Banco Bilbao Vizcaya Argentaria (BBVA)  
Avenue des Arts/Kunstlaan, 43  
B1040 Brussels

\* Parts of this text have been edited to ensure that confidential information is not disclosed; those parts are enclosed in square brackets and marked with an asterisk.

(1) OJ L 13, 21.12.1962, p. 204/62.

(2) OJ L 148, 15.6.1999, p. 5.

(3) OJ L 354, 30.12.1998, p. 18.

(4) OJ L 15, 18.1.1985, p. 16.

(5) OJ L 145, 29.6.1995, p. 25.

(6) The reply to the individual allegations made by the Commission in its Statement of Objections of 21 April 1999 are to be found in the following chapters of this Decision: 1A.I., 1C.I. and 1C.II. . There was a common reply on behalf of Opel Nederland BV and General Motors Nederland BV; references to arguments of Opel Nederland BV hereinafter are meant to concern both companies. The view of the Commission in respect of these replies can be found in the respective chapters of this Decision.

(7) However, certain cross-functions of staff existed between Opel Nederland BV and General Motors Nederland BV after that operation.

(8) Opel Nederland BV, Staff overview persons and functions, October 1996 (Doc. 59; original in English).

(9) Source: ACEA (Association des Constructeurs Européens d'Automobiles).

(10) Figures for 1992, 1993 and 1994: fax (including enclosures) from M. H. Klinke (Adam Opel AG, Rüsselsheim) to (distribution list): re-imports into Germany, dated 23 September 1994 (Doc. 14); figures for 1996: internal fax from [Marketing services supervisor]\* to various: export sales, dated 18 September 1996 (Doc. 17c; original in Dutch) and internal e-mails from [Sales staff manager]\* to [Treasurer]\*: export sales, dated 20 September 1996 (Doc. 53e).

After expiry of that period, interest shall become automatically payable at the rate applied by the European Central Bank to its main refinancing operations on the first working day of the month in which this Decision was adopted plus 3,5 percentage points, namely 8,18 %.

### Article 5

This Decision is addressed to:

1. Opel Nederland BV  
Baanhoek 188  
3361 GN Sliedrecht  
Netherlands  
and
2. General Motors Nederlands BV  
Baanhoek 188  
3361 GN Sliedrecht  
Netherlands.

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

Done at Brussels, 20 September 2000.

*For the Commission*

Mario MONTI

*Member of the Commission*

(11) Reports on car prices within the European Union, published by the Competition Directorate-General; see in particular press releases IP/96/145 of 15 February 1996, IP/96/722 of 29 July 1996, IP/97/113 of 14 February 1997, IP/97/640 of 11 July 1997, IP/98/154 of 13 February 1998 and IP/98/652 of 10 July 1998.

(12) It is often argued that a price differential of more than 12 % for a given model provides sufficient incentives for parallel trade; this percentage may vary according to the price of the car.

(13) (Draft) letter from Opel Nederland BV to dealers, dated 10 September 1996 (Doc. 58.22; original in Dutch) and internal e-mail from [Finance staff manager]\* to [Director of sales and marketing]\*: Export2 letter, dated 10 September 1996 (Doc. 58.23; original in Dutch) including enclosure (modified version of the above draft letter dated 10 September 1996).

(14) Internal note (draft) from [Finance staff manager]\*: export of new vehicles, dated 23 September 1996 (Doc. 60).

(15) Internal e-mail from [Finance staff manager]\* to [Merchandising manager]\*, [Senior merchandising specialist]\*, [Director of sales and marketing]\*, [Sales manager]\*, [Managing Director]\*, [Treasurer]\*, [Sales staff manager]\*, [Dealer organisation and development manager]\*, [Marketing services supervisor]\*: Conclusions meeting on export, dated 26 September 1996 (Doc. 17h; original in English).

(16) Internal e-mail from [Secretary]\* (signed [Sales manager]\* to [Director of sales and marketing]\* and others: Dealer Audits-Export, dated 15 July 1996 (Doc. 22; original in English).

- (17) Internal e-mail from [Managing Director]\* to [Director of sales and marketing]\*: Van Zijll Arnhem/export, dated 18 September 1996 (Doc. 43; original in Dutch).
- (18) E-mail from [Finance staff manager]\* to General Motors (Europe): Destination-based registration bonuses, dated 23 September 1996 and attached note from [Finance staff manager]\*: export of new vehicles, dated 23 September 1996 (Doc. 60; original in English). As concerns point 4 of this document ('dealer audits regarding delivery to end-user'), the Commission recognises the right of manufacturers or their importers to verify whether sales are compatible with the provisions of the dealer contract. Opel Nederland BV claimed that this document should be protected by legal privilege as it was based on written advice from an independent legal advisor and oral advice from an outside legal counsel (point 71 of the reply by Opel Nederland). The Commission rejects this argument, as the document in question is not confined to reporting the text or the content of legal counsel's communication, and the legal considerations contained therein are not used as evidence.
- (19) Handwritten note on internal e-mail from [Secretary]\* (signed [Sales manager]\*): Dealer Audits-Export, dated 15 July 1996 (Doc. 22; original in Dutch).
- (20) Internal e-mail from [Sales staff manager]\* to [Director of sales and marketing]\*: Retail (en delen I) September, dated 8 September 1996 and answer from [Director of sales and marketing]\* (Doc. 54a; original in Dutch).
- (21) Observation of the Commission: Adaptation of the standard dealership contract to the then new Block Exemption Regulation (EC) No 1475/95.
- (22) Internal e-mail from [Finance staff manager]\* to [Merchandising manager]\*, [Systems and audit manager]\*, [Director of sales and marketing]\*, [Sales manager]\*, [Sales staff manager]\*, [Marketing manager]\*: Bonus bij export, dated 12 September 1996 (Doc. 55a; original in Dutch).
- (23) Letter from Wolves Autoservice, Rijssen, to Opel Nederland BV, dated 2 September 1996 (Doc. 70; original in Dutch).
- (24) See letters to Opel Nederland BV from Wolves Autoservice BV, dated 2 September 1996 (Doc. 70b), Hemera (30 August 1996, Doc. 73b), Staals (2 September 1996, Doc. 75) and Nedam (30 August 1996, Doc. 77); all originals in Dutch).
- (25) Internal e-mail from [Finance Staff Manager]\* to all other staff of Opel Nederland BV participating in that meeting: Conclusions meeting on export, dated 26 September 1996 (Doc. 17h; original in English).
- (26) See point 54 of the reply by Opel Nederland.
- (27) See for example the quotation in recital 26 and the draft letter mentioned in footnote 12.
- (28) See Dealer Verkoop en Service Contract 2/92, General Motors Nederland BV, for example Artikel 2.2., Artikel 7.12. and Supplement Speciale Invloedssfeer (Doc. 110; original in Dutch).
- (29) Dealership contract: Opel Nederland BV, Dealer Verkoop en Service Contract, Supplement Beoordelingsrichtlijnen, ... van kracht vanaf 1 januari 1997, 2.1.1.1, steps 1 and 2 (Doc. 111; original in Dutch).
- (30) See dealership contract (footnote 29), steps 3 to 6.
- (31) See point 5 on page 4, and also points 20, 57, 82 and 119 of the reply by Opel Nederland.
- (32) See points 82 and 83 of its reply, and recitals 164 and 165 concerning the duration of this measure.
- (33) See points 53 and 54, 138 and 139 of the reply by Opel Nederland.
- (34) See points 75, 78 and 83 of the reply by Opel Nederland.
- (35) Of these dealers, a total of 18 dealers received the second warning letter.
- (36) See for example point 53 of the reply by Opel Nederland.
- (37) Document: Star Wars Astra Actie — Deelnemingsvoorwaarden, (correctie) dated 8 September 1995 (Doc. 93b; original in Dutch).
- (38) Document: Opel Paradepaarden, Deelnemingsvoorwaarden, undated (Doc. 99; original in Dutch).
- (39) Letters from Opel Nederland BV to dealers: Astra retail bonus actie 'Zomer' 1 June to 30 September 1996, dated 11 June 1996 (Doc. 90; original in Dutch) with enclosure: Astra 'Zomer' Deelnemingsvoorwaarden, undated (Doc. 99; original in Dutch); Overview: Status overzicht Astra Retail bonus actie 'Zomer', dated 8 August 1996 (Doc. 92; original in Dutch).
- (40) Internal e-mail from G. Pot [District manager]\* to [Sales manager]\* transito car — II, dated 23 May 1996 (Doc. 51; original in Dutch).
- (41) Internal e-mail from [Marketing Manager]\* to [Director of sales and marketing]\*: Paradepaarden-scores door export-van Zijll, dated 5 July 1996 (Doc. 54 b; original in Dutch).
- (42) Internal e-mail from [Marketing manager]\* to various: Export of retailed units, impact on market reason, dated 23 August 1996 (Doc. 54i; original in English).
- (43) Internal e-mail from [Marketing manager]\* to various: Cross-border sales and campaign structure, dated 18 September 1996 (Doc. 26; original in English); regarding the bonus policy, see also internal e-mail from [Merchandising manager]\* to various: Export, dated 23 August 1996 (Doc. 54h; original in Dutch), internal e-mail from [Marketing manager]\* to various: Export of retailed units, impact on market ratio, dated 23 August 1996 (Doc. 54i; original in English) and e-mail from Opel Nederland BV [Dealer Organisation and Development Manager]\* to General Motors (Europe) (M. Bergmann): Destination based Registration of bonuses, dated 23 September 1996 (Doc. 17i; original in English).
- (44) Internal e-mail from [Finance staff manager]\* to [Merchandising manager]\*: Bonuses bij export, dated 3 September 1996 (Doc. 27; original in Dutch).
- (45) Internal e-mail from [Finance staff manager]\* to various: Conclusions meeting on export, dated 26 September 1996 (Doc. 17h; original in English).
- (46) Document: Astra Bonuscampagne, Delnemingsvoorwaarden, undated (Doc. 108; original in Dutch); the same wording was used in the CORSA Inruil ander merk campagne, Deelnemingsvoorwaarden, undated (Doc. 99; original in Dutch).
- (47) See points 50, 51 and 101 of its reply; Opel Nederland BV incidentally admits that the restrictive clause was already applied in September 1996.



- (48) Commission Decision 98/273/EC — Case IV/35.733 — Volkswagen — of 28.1.1998 (OJ L 124, 25.4.1998, p. 73, recital 81).
- (49) See for example points 3, 48 to 52, 86, 99, 101 and 162 to 165 of the reply by Opel Nederland.
- (50) See recital 53, referring to the sales campaigns 'Astra' and 'Corsa'.
- (51) Internal e-mail from [Secretary sales manager]\* to [Managing Director]\* (with copy to [Director of sales and marketing]\*, [Finance staff manager]\*, [Sales staff manager]\* and [Sales manager]\*): Kort geding, ..., dated 28 June 1995 (Doc. 58.15; original in Dutch) and regarding this procedure fax from Barents and Krans, Advocaten Notarissen, to Opel Nederland BV: Levering aan buitenlandse dealers, dated 7 June 1995 (Doc. 58.1; original in Dutch) and in particular the passage: Bij brief van 2 June j.l... and letter from Lathouwers Den Bosch BV to AGS Nederland Beheer bv: levering auto's, dated 2 June 1995 (Doc. 58.4; original in Dutch).
- (52) Internal e-mail from [Sales staff manager]\* to [Treasurer]\*: Export Sales, dated 20 September 1996 (Doc. 53e; original in English).
- (53) Internal e-mail from [Secretary]\* (signed by [Sales manager]\*) to various ([Treasurer]\*, [Systems and audit manager]\*, [Director of sales and marketing]\*, [Managing Director]\*, [After sales Director]\*, [Finance staff manager]\*): Dealer Audits — Export, dated of 15 July 1996 (Doc. 22; original in English).
- (54) Internal e-mail from [Director of sales and marketing]\* to [District manager]\* and [Sales manager]\*: Paradedpaarden-scoren door export-van Zijll, dated 5 July 1996 (Doc. 54b; original in Dutch) and answer from [Marketing manager]\*, dated 5 July 1996 (Doc. 54b; original in Dutch): (Note from the Commission: Mr Kirp (full name: J.H. Kirpestein), mentioned in this document, was Managing Director of Van Zijll and at the same time Manager of the NIMOX-Holding, a company through which the dealer Van Zijll conducted its export trade; see Document 17f mentioned in footnote 75).
- (55) Internal note from [District Manager]\* and [Sales manager]\*: Export, dated 11 July 1996 (Doc. 28 appendices, Doc. 28a; original in Dutch); internal e-mail from [Sales manager]\* (by [Secretary]\*) to [Treasurer]\*, [Systems and audit manager]\*, [Director of sales and marketing]\*, [Managing Director]\*, [After sales director]\*, [Finance staff manager]\*: Dealer audits-Export, dated 15 July 1996. (Doc. 22). From January to August 1996, the export share in total sales in the Netherlands had increased to 3,5 %; see internal e-mail from [Marketing Manager]\* to various: Export of retailled units, impact on market ratio, dated 23 August 1996 (Doc. 54i).
- (56) Handwritten note from [Director of sales and marketing]\* on an internal summary from [Senior merchandising specialist]\*: Status overzicht Astra Retail bonus actie 'Zomer', dated 8 August 1996 (Doc. 92; original in Dutch); see also the internal note dated 11 July 1996 (Doc. 28; original in Dutch).
- (57) Internal e-mails from [Director of sales and marketing]\* to [Systems and audit manager]\* and from [Sales staff manager]\* to [Sales manager]\*: Export, dated 13 August 1996 (Doc. 39; original in Dutch).
- (58) Internal e-mail from [Sales staff manager]\* to [Sales manager]\*: Export, dated 13 August 1996 (Doc. 39; original in Dutch).
- (59) Fax from [Sales manager]\* (with copy to [Managing director]\* and [Director of sales and marketing]\*) to [Sales operations manager]\*, Adam Opel AG, Bochum Plant: Yr. fax Aug. 13, '96, Violation of DSSA., dated 23 August 1996 (Doc. 19; original in English).
- (60) See for example point 106 of the reply by Opel Nederland.
- (61) See for example recital 75 below and Document 17k referred to therein.
- (62) See point 18 of the reply by Opel Nederland.
- (63) Internal e-mail from [Director of sales and marketing]\* to [Managing director]\*: Export, dated 27 August 1996 (Doc. 54g; original in Dutch).
- (64) Standard letters from Opel Nederland BV ([Director of sales and marketing]\*) to dealers, dated 28/29 August 1996; see internal e-mail from [Sales staff manager]\* to [Treasurer]\*: Export sales, dated 20.9.1996 (Doc. 42). The letter was sent to the following 18 dealers: Wieling's Automobielfabriek BV, Winschoten (Doc. 67a); Engelsma & Wijnia BV, Leeuwarden (Doc. 68c); Auto Bleeker BV, Hengelo (Doc. 69a); Wolves Autoservice BV, Rijssen (Doc. 70); Automobielmij. Canton Reiss BV, Heerlen (Doc. 71); Automobielfabriek of Göttgens Beek BV, Sittard (Doc. 72c); Hemera BV, Echt (Doc. 73); Auto Bakkenes BV, Apeldoorn (Doc. 74); Autobedrijf L. Staals BV, Eindhoven (Doc. 75); Autobedrijf Loven Kerkrade BV, Heerlen (Doc. 76); Nedam Automobielfabriek Mij. Roermond BV, Roermond (Doc. 77); Automobielfabriek of Göttgens CV, Sittard (Doc. 78); Welling Autobedrijf BV, Brunssum (Doc. 79); Gebra Garage BV, Venlo (Doc. 80); Vriens Autocenter BV, Breda (Doc. 80), Autocenter W. van Zijll BV, Arnhem (Doc. 80); Van Twist Opel BV, Dordrecht (Doc. 81); Auto Hendriks Goes BV, Goes (Doc. 82); original letters in Dutch.
- (65) With the exception of the dealers Van Zijll, Gebra and Vriens.
- (66) See letters from Wieling's Automobielfabriek BV, dated 3 September 1996 (Doc. 67b), letter from Engelsma & Wijnia, dated 3 September 1996 (Doc. 68b), letters from Auto Bleeker BV, dated 29 August 1996; Letters from Wolves Autoservice BV, dated 2 September 1996 (Doc. 70b) as well as further similar letters from the dealers Canton Reiss (29 August 1996, Doc. 71b), Göttgens Beek (30 August 1996, Doc. 72), Hemera (30 August 1996, Doc. 73b), Bakkenes (30 August 1996, Doc. 74b), Staals (2 September 1996, Doc. 75), Loven (30 August 1996, Doc. 76b), Nedam (30 August 1996, Doc. 77), Göttgens CV (30 September 1996, Doc. 78b), Welling (30 August 1996, Doc. 79b), Van Twist (4 September 1996, Doc. 81), Hendriks Goes (2 September 1996, Doc. 82); original letters in Dutch.
- (67) Letters from Automobielfabriek Göttgens, Sittard, to Opel Nederland BV, dated 30. September 1996 (Doc. 78b); a comparable argumentation is found in the letter of reply from Welling Autobedrijf BV, dated 30 August 1996 (Doc. 72b); original letters in Dutch.
- (68) It is interesting to note that, according to the results of the audits as presented by Opel Nederland BV (see points 24, 25 and 117(6) of its reply), at least the export sales of the dealer Spoormaker were entirely in compliance with his dealer contract.
- (69) Internal e-mail from [Treasurer]\* to [Managing Director]\* and [Director of sales and marketing]\*: Opel Nederland — Export sales audit, dated 27 September 1996 (Doc. 17k; original in English).
- (70) Letter from Opel Nederland BV ([Director of sales and marketing]\*) to Wieling's Automobielfabriek, dated 30 September 1996 (Doc. 67c) and identical letters to various other dealers, in each case dated 30 September 1996 (Doc. 68a ff); original letters in Dutch.



- (71) Internal e-mail: Opel Nederland-Export Sales Audit, dated 27 September 1996 (Doc. 17k) and memo [Director of sales and marketing]\* to Adam Opel AG, Bochum ([Sales operations manager]\*): Violation of DSSA or rental agreement — Your faxes dated 4.11.1996 — HJR-ha/re nl1, dated 6 November 1996 (doc. 4a). In the mentioned fax dated 4 November 1996 Opel Bochum had possibly identified sold vehicles to retailers.
- (72) In its reply (point 30), Opel Nederland BV stated that the dealer Van Zijll was audited on 19 September 1996 and on 1 October 1996, that 10 dealers were audited between 5 October and 5 November 1996, and that the audit of the remaining 10 dealers took place after 5 November and until 27 November 1996.
- (73) The existence and the date of this undertaking appear from a letter from Van Zijll to Opel Nederland BV, dated 4 November 1996 (Doc. 112p; original in Dutch).
- (74) Internal e-mail from [Director of sales and marketing]\* to [Marketing services supervisor]\*: Export sales, dated 18 September 1996 (Doc. 17a; original in English)
- (75) Internal e-mail from [Director of sales and marketing]\* to [Managing Director]\*: Van Zijll Arnhem/Export, dated 18 September 1996 (Doc. 17f; original in English).
- (76) Circular from Opel Nederland BV to all Opel dealers: Verkopen aan eindgebruikers in het buitenland, dated 24 October 1996 (Doc. 17).
- (77) Letter from the Opel dealer Van Zijll to Opel Nederland BV, dated 4 November 1996 (Doc. 112p; see footnote 73).
- (78) Letter to Opel Nederland BV: Wolves Autoservice BV, dated 2 September 1996 (Doc. 70b; original in Dutch).
- (79) See point 30 (16) of the reply by Opel Nederland.
- (80) Letter from Opel Staals to Opel Nederland BV: Export van nieuwe Opel's, dated 20 September 1996 (Doc. 75b; original in Dutch).
- (81) See point 30 (9) of the reply by Opel Nederland.
- (82) Memo from Opel Nederland BV ([Director of sales and marketing]\*) to Adam Opel AG, Bochum ([Sales Operations Manager]\*): Violation of DSSA or Rental Agreement - Your faxes of 4.11.1996 - HJR-ha/re nl1, dated 6 November 1996 (Doc. 4a)
- (83) Internal e-mail from [District manager]\* to [Sales manager]\*: Export dealers, dated 5 October 1996 (Doc. 63; original in Dutch).
- (84) Letter from Canton-Reiss BV to Opel Nederland BV, dated 29 August 1996 (Doc. 71b; original in Dutch).
- (85) Internal e-mail from [District manager]\* to [Sales manager]\*: Export dealers, dated 5 October 1996 (Doc. 63).
- (86) Internal e-mail from [Metropolitan district manager]\* to [Sales manager]\*: Export, dated 22 September 1996 (Doc. 45; original in Dutch) and internal e-mail from [Metropolitan district manager]\* to [Sales manager]\*: Export, dated 2 October 1996 (Doc. 46; original in Dutch); despite his very low export share (1,9 %), Spoormaker was added to the list of exporting dealers to be audited.
- (87) See point 30(19) of the reply by Opel Nederland.
- (88) Internal e-mail from [Metropolitan district manager]\* to [Sales manager]\*: Export, dated 2 October 1996 (Doc. 46; original in Dutch).
- (89) See points 1, 5, 68 to 74, 102 to 109 of the reply by Opel Nederland.
- (90) See recital 81.
- (91) See recitals 70 to 87.
- (92) See points 110 to 117 of the reply by Opel Nederland.
- (93) See point 117 of the reply by Opel Nederland.
- (94) See points 5, 23, 24, 31 to 33 and 36 to 41 of the reply by Opel Nederland. The circular letter of 24 October 1996 is quoted in Annex 3, and the dealer guidelines of 12 December 1996 are quoted in Annex 4 to this Decision.
- (95) See recitals 80 to 87.
- (96) See letter by Van Zijll to Opel Nederland BV, dated 4 November 1996, mentioned in footnote 73 (Doc. 112 p).
- (97) Letter to all dealers by Opel Nederland BV, dated 24 October 1996, mentioned in footnote 76 (Doc. 17).
- (98) See recital 82 of this Decision.
- (99) See points 24 and 117 of the reply by Opel Nederland.
- (100) See points 24 and 30 of the reply by Opel Nederland.
- (101) Internal e-mail from [Sales staff manager]\* to [Treasurer]\*: Export Sales, dated 20 September 1996 (Doc. 53e); see also the internal e-mail from [Finance staff manager]\* to various: Conclusions meeting on export, dated 26 September 1996 and the attached summary: Export dealers, dated 26 September 1996 (Doc. 65).
- (102) See points 57 and 191 of the reply by Opel Nederland.
- (103) See point 18 of the reply by Opel Nederland.
- (104) See for instance judgment in Case C-266/93 *Federal Cartel Office v Volkswagen AG and VAG Leasing GmbH* [1995] ECR I-3477.
- (105) Judgment in Case 107/82, *Allgemeine Elektrizitäts Gesellschaft AEG — Telefunken AG v Commission*, [1983] ECR 3151; judgment in Joined Cases 25 and 26/84, *Ford Werke AG and Ford of Europe Inc. v Commission* [1985] ECR 2725, point 21.
- (106) See footnote 25.
- (107) See judgment in Case T-62/98, *Volkswagen AG v Commission of the European Communities*, point 236, and the case-law mentioned therein. See judgment on Joined Cases 25 and 26/84, *Ford Werke AG and Ford of Europe Inc. v Commission* [1985] ECR 2725.
- (108) See points 47 to 52, 96, 101 and 162 of the reply by Opel Nederland. Opel Nederland BV incidentally admits that similar schemes had applied since 16 September 1996.
- (109) See the letters mentioned in recitals 70 and 71 and in footnotes 63 and 64 thereof.
- (110) See Commission Decision 82/367/EEC of 2 December 1981 (Hasselblad) (OJ L 161, 12.6.1982, p. 18), recital 47 and also Decision 98/273/EC of 28 January 1998 (Case IV/35.733 — VW) (OJ L 124, 25.4.1998, p. 79), recital 128.
- (111) See the references in footnote 120 and in particular, for a similar case, Decision 98/273/EC (Case IV/35.733 — Volkswagen), 28.1.1998, recitals 130 and 135 *et seq.*; upheld by the Court of First Instance, judgment in Case T-62/98, *Volkswagen AG v Commission*, not yet reported, at recital 334.

- (<sup>112</sup>) Dealership contract Opel Nederland BV, Supplement Beoordelingsrichtlijnen, section 2.1.1. (see Doc. 110 mentioned in footnote 28 and Doc. 111 mentioned in footnote 29). This contract determines that Opel specifies once a year the number of sales of all Opel dealers to be reasonably expected, so that trends in respect of national registrations and the introduction of new models or types are taken into account.
- (<sup>113</sup>) Internal e-mail from [Finance Staff Manager]\* to various: Conclusions meeting on export, dated 26.9.1996 (Doc. 17h, see footnote 25).
- (<sup>114</sup>) See Commission Decision 85/617/EEC (Sperry New Holland) (OJ L 376, 31.12.1985, p. 21) recitals 54 and 55.
- (<sup>115</sup>) See Commission Decision 84/405/EEC (Zinc Producers' Group) (OJ L 220, 17.8.1984, p. 27) recital 71; Decision 85/79/EEC (John Deere) (OJ L 35, 7.2.1985, p. 58) recital 26; Decision 98/273/EC (VW), (OJ L 124, 25.4.1998, p. 81) recital 136.
- (<sup>116</sup>) Article 6(1)(8) stipulates that the exemption shall not apply where 'the supplier, without any objective reason, grants dealers remunerations calculated on the basis of the place of destination of the motor vehicle resold or the place of residence of the purchaser'.
- (<sup>117</sup>) See for example points 96 to 98 and point 100 of its reply; see point 97 of the reply of Opel Nederland.
- (<sup>118</sup>) BPM Belasting Personenauto's Motorrijwielen, applicable since 1 January 1993; this tax is 45,2 % of the net list price of a car before VAT.
- (<sup>119</sup>) Opel Nederland BV has not explained either how the Dutch registration tax can be considered as an objective reason justifying its bonus policy.
- (<sup>120</sup>) See Commission Decision 73/322/EEC (Deutsche Philips), OJ L 293, 20.10.1973, p. 40; see judgment in Case 19/77, *Miller International Schallplatten GmbH v Commission*, [1978] ECR 131, p. 148, recital 7; judgment in Case 86/82, *Hasselblad (GB) Limited v Commission* [1984] ECR 883; Decision 98/273/EC (Case IV/35.733 — VW), OJ L 124, 25.4.1998, p. 81, pp. 130 and 135 *et seq.*, upheld by the Court of First Instance, judgment in Case T-62/98, *Volkswagen AG v Commission*, not yet reported, point 334.
- (<sup>121</sup>) See for example judgement of the Court of First Instance in Case T-143/89, *Ferriere Nord v Commission*, [1995] ECR II-917; judgement of the Court of First Instance in Case T-62-98, *Volkswagen AG v Commission*, not yet reported, point 178.
- (<sup>122</sup>) See points 142 and 143 of its reply, and p. 11, 12 and 19 of the study by NERA attached to that reply.
- (<sup>123</sup>) Such undertakings were given by the dealers Van Zijl (31 August and 17 September 1996), Staals (20 September 1996), Spoormaker (20 September and 1 October 1996), Hemera, Göttgens, Loven, Canton Reiss, Welling and Nedam (5 October 1996) and Smit & Co. (1 November 1996).
- (<sup>124</sup>) See also Commission Decision 98/273/EC (Case IV/35.733 — VW), OJ L 124, 25.4.1998, p. 60, recital 148, upheld by the Court of First Instance, judgment in Case T-62-98, *Volkswagen AG v Commission*, not yet reported.
- (<sup>125</sup>) See also the Commission's Notice of 12 December 1984, Section II, OJ C 17, 18.1.1985, p. 4.
- (<sup>126</sup>) See point 5 of its reply.
- (<sup>127</sup>) OJ L 15, 18.1.1985, p. 16.
- (<sup>128</sup>) OJ L 145, 29.6.1995, p. 25.
- (<sup>129</sup>) Internal e-mail from [Finance staff manager]\* to various: Conclusions meeting on export, dated 26 September 1996 (Doc. 17h, see footnote 25).
- (<sup>130</sup>) Document: Corsa Inruil ander merk campagne, Deelnemingsvoorwaarden, undated (Doc. 99, see footnote 46).
- (<sup>131</sup>) Internal e-mail from [Finance staff manager]\* to various: Conclusions meeting on export, dated 26 September 1996 (Doc. 17h, see footnote 25).
- (<sup>132</sup>) See the letters from the dealers mentioned in footnote 66 and the document mentioned in footnote 86 (e-mail dated 22 September 1996 concerning the dealer Spoormaker, Rotterdam).
- (<sup>133</sup>) See points 50, 51 and 101 of its Reply. Opel Nederland BV incidentally admits that the restrictive bonus provision had already been in place on 16 September 1996.
- (<sup>134</sup>) As is shown in recital 86, a first instruction, not to deliver cars to another Opel dealer, was given to the dealer Spoormaker end of July or beginning of August 1996. As the Commission, in its statement of objections, situated the beginning of the systematic instructions to dealers at a later date, this particular instruction is not taken into account in this Decision.
- (<sup>135</sup>) Reference is made to the following decisions: Hasselblad Decision of December, upheld by the European Court of Justice on 21 February 1984 in Case 86/82 Hasselblad (GB) Limited v Commission [1984] ECR 883, point 35; John Deere Decision; Sperry New Holland Decision; Volkswagen Decision, OJ L 145, 25.4.1998, p. 60.
- (<sup>136</sup>) Source: ACEA (for example for the year 1999 and for January to May 2000).
- (<sup>137</sup>) See judgment of the Court of First Instance in Case T-141/99, *Thyssen v Commission*, [1999] ECR II-347, point 636 and also the opinion of Advocate-General Mischo, delivered on 18 May 2000, Case C-283/98P, *Mo och Domsjö AB v Commission*, points 96 to 101, and the judgments referred to in points 98 and 99 thereof.
- (<sup>138</sup>) Document: Economic Impact of the Measures taken by Opel Nederland to control Exports, 21 June 1999, see point 144 of Opel Nederland BV's reply, and point 7 of the presentation by NERA on 20 September 1999 to the Commission.
- (<sup>139</sup>) See judgment of the Court of First Instance in Case T-62/98, *Volkswagen AG v Commission*, not yet reported, point 336; see also Commission Notice concerning Regulation (EEC) No 123/85, (OJ C 17, 18.1.1985, p. 1), and European Commission, Directorate-General Competition, Explanatory Brochure: Distribution of Motor Vehicles (Regulation (EC) No 1475/95), question 29.
- (<sup>140</sup>) See judgment of the Court of First Instance in Case T-62/98, *Volkswagen AG v Commission*, not yet reported, point 334.
- (<sup>141</sup>) See Commission Press Release IP(88) 778, 6.12.1988.

## ANNEX I

Member State	Segment: Model	1995	1996	1997
Germany	B: Opel Corsa	23,2 %	23,7 %	24,9 %
	C: Opel Astra	20,2 %	18,2 %	17,8 %
	D: Opel Vectra	10,1 %	15,0 %	15,8 %
	E: Opel Omega	23,0 %	14,5 %	12,4 %
United Kingdom	B: Opel Corsa	13,6 %	13,7 %	14,5 %
	C: Opel Astra	16,4 %	13,2 %	12,9 %
	D: Opel Vectra	16,7 %	17,6 %	17,3 %
	E: Opel Omega	16,6 %	15,4 %	12,9 %
Austria	B: Opel Corsa	17,1 %	15,1 %	17,3 %
	C: Opel Astra	14,4 %	11,1 %	10,0 %
	D: Opel Vectra	9,4 %	15,1 %	12,1 %
	E: Opel Omega	12,8 %	7,8 %	6,3 %
Belgium/Luxembourg	B: Opel Corsa	12,6 %	11,5 %	15,6 %
	C: Opel Astra	13,1 %	11,2 %	14,0 %
	D: Opel Vectra	6,5 %	9,8 %	9,9 %
	E: Opel Omega	8,7 %	5,3 %	4,7 %
Denmark	B: Opel Corsa	17,5 %	11,9 %	10,8 %
	C: Opel Astra	15,5 %	10,7 %	9,7 %
	D: Opel Vectra	8,8 %	12,5 %	10,5 %
	E: Opel Omega	3,7 %	2,9 %	3,0 %
Finland	B: Opel Corsa	15,6 %	11,9 %	13,0 %
	C: Opel Astra	16,0 %	14,4 %	13,1 %
	D: Opel Vectra	12,0 %	15,3 %	13,6 %
	E: Opel Omega	10,1 %	9,9 %	8,8 %
France	B: Opel Corsa	9,2 %	9,8 %	9,8 %
	C: Opel Astra	6,5 %	5,9 %	5,2 %
	D: Opel Vectra	4,8 %	8,3 %	7,5 %
	E: Opel Omega	5,4 %	4,7 %	4,3 %
Greece	B: Opel Corsa	13,9 %	9,9 %	8,6 %
	C: Opel Astra	3,4 %	5,2 %	4,0 %
	D: Opel Vectra	6,6 %	13,8 %	10,1 %
	E: Opel Omega	5,1 %	5,5 %	2,9 %
Ireland	B: Opel Corsa	14,4 %	13,4 %	12,2 %
	C: Opel Astra	17,3 %	14,8 %	12,0 %
	D: Opel Vectra	9,2 %	16,4 %	12,5 %
	E: Opel Omega	15,4 %	11,1 %	8,2 %
Italy	B: Opel Corsa	6,9 %	7,3 %	9,7 %
	C: Opel Astra	14,3 %	10,8 %	9,5 %
	D: Opel Vectra	2,0 %	7,6 %	9,8 %
	E: Opel Omega	4,2 %	3,0 %	1,8 %
Netherlands	B: Opel Corsa	16,8 %	15,1 %	17,1 %
	C: Opel Astra	18,5 %	15,8 %	16,3 %
	D: Opel Vectra	8,4 %	13,8 %	11,5 %
	E: Opel Omega	15,4 %	14,8 %	10,0 %

Member State	Segment: Model	1995	1996	1997
Portugal	B: Opel Corsa	19,0 %	17,8 %	18,3 %
	C: Opel Astra	13,5 %	10,1 %	10,9 %
	D: Opel Vectra	2,4 %	11,1 %	10,2 %
	E: Opel Omega	3,4 %	1,2 %	0,8 %
Spain	B: Opel Corsa	16,0 %	13,0 %	14,0 %
	C: Opel Astra	13,8 %	11,0 %	10,7 %
	D: Opel Vectra	5,4 %	11,1 %	10,9 %
	E: Opel Omega	11,8 %	8,0 %	6,8 %
Sweden	B: Opel Corsa	13,4 %	9,2 %	9,7 %
	C: Opel Astra	15,9 %	12,0 %	10,1 %
	D: Opel Vectra	3,6 %	5,9 %	5,8 %
	E: Opel Omega	3,0 %	2,0 %	1,3 %
European Union	B: Opel Corsa	13,5 %	13,5 %	14,1 %
	C: Opel Astra	15,3 %	12,8 %	12,4 %
	D: Opel Vectra	9,1 %	13,2 %	13,1 %
	E: Opel Omega	14,6 %	10,6 %	9,0 %

Source: Reply given by General Motors Europe dated 18 December 1998 to the request for information from the Commission dated 4 December 1998



## ANNEX II

Segment B:	Segment C:	Segment D:	Segment E:
-	Alfa Romeo 145	Alfa Romeo 156	Alfa Romeo 166
-	Audi A3	Audi A4	Audi A6
-	-	BMW 318i	BMW 520i
Citroen Saxo	Citroen Xsara	Citroen Xantia	-
Daihatsu Sirion	-	-	-
Fiat Punto	Fiat Bravo	Fiat Marea	-
Ford Fiesta	Ford Focus	Ford Mondeo	-
-	Honda Civic	Honda Accord	-
Lancia Y	-	Lancia Lybra	Lancia K
Mazda Demio	Mazda 323	Mazda 626	-
Smart	Mercedes A Klasse	Mercedes C 180	Mercedes E 220
Mitsubishi Space Star	-	Mitsubishi Carisma	-
Nissan Micra	Nissan Almera	Nissan Primera	-
Opel Corsa (*)	Opel Astra (*)	Opel Vectra (*)	Opel Omega (*)
Peugeot 106, 206	Peugeot 306	Peugeot 406	-
Renault Clio	Renault Mégane	Renault Laguna	Renault Safrane
-	Rover 214	Rover 414	Rover 75
Seat Ibiza	Seat Cordoba, Toledo	-	-
-	-	Subaru Legacy	-
Suzuki Swift	-	Suzuki Baleno	-
Toyota Yaris	Toyota Corolla	Toyota Avensis	-
-	-	Volvo S 40	Volvo S 70
VW Polo	VW Bora, Golf	VW Passat	-

(\*) Opel is marketed in the United Kingdom and in Ireland under the Vauxhall brand.

Source: Report: Car prices within the European Union, European Commission, Competition Directorate-General.

## ANNEX III

OPEL

Opel Nederland

Slidrecht, 24 October 1996

To all Opel dealers in the Netherlands

*Subject:* Sales to end users abroad

We felt it necessary to draw your attention to the main rules governing the sale of new Opels to end users abroad.

The basic principle is that you are quite free to determine which *end users* you sell an Opel to, and at what price. The Dealer Sales and Service Contract (Article 2.4.4.1) goes into this subject in greater depth.

End users may also use the services of an intermediary. Prior to the sale, intermediaries should provide the dealer with a written authorisation signed by the end user. The sale should be effected in the name and on behalf of the end user. The order form, invoice, guarantee and any other documents relating to the sale should be made out in the name of the end user. According to the Opel Dealer standards, delivery should be effected within the dealer's area.

As you are aware, sales to unauthorised retailers or to persons not resident in the European Union, Iceland, Liechtenstein or Norway are not permitted.

In this connection, we wish to bring the following to your attention. As a customer, an end user is entitled to Opel Assistance. However, when you sell a Dutch Opel to an end user resident abroad, you should bear in mind that the assistance provider will refuse to provide assistance in cases where the country of issue of Opel Assistance and the country of registration are not the same. In such cases, you will have to declare the Opel in question to the foreign assistance provider and pay a premium where required. Opel Nederland does not refund the amount charged for Opel Assistance.

As regards the date of entry into force of the guarantee on these cars, please note that in the case of retailed cars, the retail date generally marks the start of the guarantee period. The retail date is replaced by the date on which the car is registered. In cases where the car is registered abroad, you should, where necessary, send a copy of the original registration to the relevant Opel organisation abroad, which will then amend the date of entry into force to the date on which the car was registered abroad.

OPEL NEDERLAND BV

(Signed)

W. de Heer

Director of sales and marketing

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## ANNEX IV

OPEL

Opel Nederland

Slidrecht, 12 December 1996

To all Opel dealers in the Netherlands

For the attention of the management

*Subject:* Conditions for dealers regarding sales of new vehicles to retailers and via intermediaries

During our recent presentations of the new Dealer Sales and Service Contract between 27 November and 9 December 1996, we also discussed sales to foreign end users. As promised at the time, here is the new version of the aforementioned conditions.

This document builds on the guidelines which we sent you on 1 February 1993. A summary was sent on 24 October 1996.

Should you have any questions regarding these conditions, please do not hesitate to contact the Dealer Organisation and Development Department.

OPEL NEDERLAND BV

(Signed)

W. de Heer

Director of sales and marketing

**Conditions for Opel dealers regarding sales of new vehicles to retailers and via intermediaries**

**Sales to unauthorised retailers**

Opel believes that only authorised dealers can guarantee that the level of service provided to customers will meet their expectations throughout the lifetime of the car. Accordingly, Article 2.4.4.1 of the Additional Provisions of the Dealer Sales and Service Contract ('the Dealer Contract'), states that official Opel dealers may not sell new cars to unauthorised retailers. In the new Dealer Sales and Service Contract, valid with effect from 1 January 1997, this is Article 2.3.4.2 of the Additional Provisions.

A retailer is anybody who purchases a new car with a view to resale and proceeds to sell it on. Only official Opel dealers are authorised retailers; all other retailers are unauthorised.

**Sales via intermediaries**

End users are free to buy new cars via intermediaries. With a view to maintaining the distribution system, however, it is vital for Opel that the intermediaries used by end users are properly authorised and do not act as unauthorised retailers.

The Dealer Contract places restrictions on the sale of new cars via intermediaries with a view to preventing intermediaries from acting as unauthorised retailers. In particular, Article 2.4.4.1 of the Additional Provisions of the Dealer Contract specifies that a dealer may sell a new car to an end user who uses the services of an intermediary only on condition that he [the dealer] receives the following:

- the end user's original authorisation in writing, and;
- any other information which Opel may reasonably require.

### **Purpose of these guidelines**

These guidelines provide an overview of the information that the dealer must obtain pursuant to Article 2.4.4.1 of the Additional Provisions of the Dealer Contract with a view to preventing the sale of new cars to unauthorised retailers.

### **Requisite documents**

#### *Before accepting a customer order*

Before accepting a customer order, the dealer should obtain the following from the intermediary:

- a copy of the end user's passport, identity card, driving licence or other ID and, if that document does not indicate his place of residence, a copy of his residence permit,
- confirmation in writing that the transaction between the intermediary and the end user is transparent and that the intermediary will pass on to the end user the benefits he acquires in the course of negotiations with the dealer,
- an original authorisation in writing signed by the end user.

The authorisation should be recent and must comprise the following information:

- a declaration by the end user authorising the intermediary to effect the purchase and, if appropriate, to receive a given new car on behalf of the end user,
- the name, full address and telephone number of the end user and the intermediary and, if the intermediary is a company, its registration number in the trade register, and
- the new car's complete specifications, in particular the size of the engine, the colour, upholstery and any options.

The authorisation must be legally enforceable. For that reason, it must comply with all the relevant legal conditions. In some countries, that entails drawing up a notarial deed. If the end user or intermediary resides abroad, the authorisation should comply with the legal conditions applicable in the countries in which the dealer, the end user and the intermediary are resident. If the authorisation is drawn up in a language which the dealer does not know, he should request an accurate and comprehensive translation.

If the end user or intermediary resides in a country which is not a member of the European Union or part of the European Free Trade Association, the dealer should not proceed with the sale, which would be incompatible with Article 2.4.4.1 of the Additional Provisions of the Dealer Contract.

#### *Sales documents*

The sales contract should be drawn up by the dealer and the intermediary in the name and on behalf of the end user.

The order form, invoice, guarantee and any other documents relating to the sale should be made out in the name of the end user.



*Delivery of the car*

The car should be delivered to the intermediary only if he has been authorised to receive it by the end user. If the end user has not authorised the intermediary to receive the car on his behalf, the dealer must deliver the car direct to the end user.

*After the sale*

To enable Opel to monitor sales effected via intermediaries, the dealer should provide it with the following information after each sale:

- the name, full address and telephone number of the end user,
- the name, full address and telephone number of the intermediary and, if the intermediary is a company, its registration number in the trade register, and
- the new car's complete specifications, in particular the size of the engine, the colour, panelling, any options and the chassis number.

*Storage of documents*

As provided for in Article 2.4.4.1 of the Additional Provisions of the Dealer Contract, the dealer should keep all authorisations as well as the documentation and other information for at least three years after the new car is delivered. At Opel's request the dealer will examine the authorisations, documents and other information together with Opel.

**Unacceptable practices**

In general, intermediaries are free to determine their business relations with dealers. However, Opel will consider intermediaries as unauthorised retailers if they obtain conditions from a dealer which are not in line with market principles. In addition, an intermediary will be regarded as acting as an unauthorised retailer if he:

- concludes a purchase agreement with a dealer for new cars, or
- obtains reductions from a dealer which are not usual in the dealer's sector for sales to end users.

If a dealer sells more than 10 % of his annual turnover of new cars via a given intermediary, Opel will assume that the intermediary is acting as an unauthorised retailer, and will carry out an audit of the dealer accordingly.

By carrying out test purchases of new cars via intermediaries, Opel has established that unauthorised retailers use certain practices to buy and sell new cars. These practices include the following:

- The unauthorised retailer uses a forged authorisation. In reality, the unauthorised retailer buys new cars for himself with a view to resale. The authorisation is either (a) drawn up by the signatory for a purpose other than the purchase of a new car or (b) drawn up by the signatory for a new car which had already been purchased by, and delivered to, the signatory or (c) drawn up by the signatory as an attestation for services provided by the unauthorised retailer which do not involve the purchase of a new car or (d) forged by the unauthorised retailer.
- The unauthorised retailer orders a new car from the dealer on the basis that the car is to be used for his leasing or car-hire company. In practice, the car is offered for sale to the general public as a new car or supplied to an unauthorised retailer for resale.

If it comes to Opel's attention that a dealer has sold new cars to an intermediary or an unauthorised retailer which purchases and sells on new cars, it may carry out an audit of the dealer and request him to cease sales of new cars via that intermediary or to the unauthorised retailer.

**Consequences of non-compliance**

Dealers must ensure that new cars are not sold to unauthorised retailers.

If a dealer sells a new car to an unauthorised retailer, Opel can terminate the Dealer Contract pursuant to Article 4.1.2 of the Additional Provisions. Opel can also recover the amount of any claim, compensation, reduction or other payment made by it to the dealer for each car sold to an unauthorised retailer.

In accordance with the above, dealers must take extreme care when selling new cars via intermediaries and to what may be unauthorised retailers. In particular, dealers should carefully check all requests for information or customer orders received from an intermediary or possible unauthorised retailer, taking account *inter alia* of the buyer's name and place of residence and the number of cars ordered.

If dealers have any doubts, they should contact Opel for assistance.

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