OPINION OF ADVOCATE GENERAL TIZZANO

delivered on 22 May 2003 [1]

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1 — Original language: Italian.

I — Facts and procedure

1. These cases concern an appeal brought by the Bundesverband der Arzneimittel-Importeure e.V. ('BAI') and by the Commission against the judgment of 26 October 2000 of the Court of First Instance in Case T-41/96 *Bayer* v *Commission* ('the contested judgment')[2] annulling Commission Decision 96/478/EC of 10 January 1996 'relating to a proceeding under Article 85 of the EC Treaty' ('the contested decision').[3]

Background to the dispute

2. The contested judgment sets out the background to the dispute as follows:

'1. The applicant, Bayer AG (hereinafter "Bayer" or "the Bayer Group"), is the parent company of one of the main European chemical and pharmaceutical groups and has a presence through its national subsidiaries in all the Member States of the Community. For many years, it has manufactured and marketed under the trade name "Adalat" or "Adalate" a range of

2 — [2000] ECR II-3383.

3 — OJ 1996 L 201, p. 1.

medicinal preparations whose active ingredient is nifedipine, designed to treat cardio-vascular disease.

2. In most Member States, the price of Adalat is directly or indirectly fixed by the national health authorities. Between 1989 and 1993, the prices fixed by the Spanish and French health services were, on average, 40% lower than prices in the United Kingdom.

3. Because of those price differences, wholesalers in Spain exported Adalat to the United Kingdom from 1989 onwards. French wholesalers followed suit as from 1991. According to Bayer, sales of Adalat by its British subsidiary, Bayer UK, fell by almost half between 1989 and 1993 on account of the parallel imports, entailing a loss in turnover of DEM 230 million for the British subsidiary, representing a loss of revenue to Bayer of DEM 100 million.

4. Faced with that situation, the Bayer Group changed its delivery policy, and began to cease fulfilling all of the increasingly large orders placed by wholesalers in Spain and France with its Spanish and French subsidiaries. That change took place in 1989 for orders received by Bayer Spain and in the fourth quarter of 1991 for those received by Bayer France.'

The contested decision

3. Following complaints by some of the wholesalers concerned, the Commission undertook an administrative investigation into possible infringements of Article 85(1) of the EC Treaty (now Article 81(1) EC).[4] Upon completion of that investigation, the Commission adopted the contested decision, by which it:

— found that 'the prohibition on the exportation to other Member States of the products Adalate and Adalate 20 mg LP from France and on that of the products Adalat and Adalat-Retard from Spain, as... agreed as part of their ongoing business relations, between Bayer France and its wholesalers since 1991, and between Bayer Spain and its wholesalers since at least 1989' con-

4 — According to that well-known provision, '[t]he following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market...'.

stituted an infringement of Article 85(1) of the Treaty (Article 1);

— ordered Bayer to bring the infringement to an end and in particular: (a) to 'send, within two months of notification of [the decision], a circular to the wholesalers in France and in Spain stating that exports are allowed within the Community and are not penalised', (b) to 'include this clarification, within two months of notification of [the decision], in the general terms and conditions of sale for France and Spain' (Article 2); and

— imposed a fine of ECU 3 000 000 on Bayer (Article 3).

4. In the grounds of the decision, the Commission sought to show in particular: (i) that Bayer France and Bayer Spain had made an agreement with the wholesalers providing for an export ban (recitals 156 to 188); (ii) that the object and effects of that agreement were restrictive of competition (recitals 189 to 197); and (iii) that it had an appreciable effect on trade between Member States (recital 198).

5. As far as the first point is concerned, the Commission sought to show the existence of an agreement within the meaning of Article 85(1) of the Treaty by arguing that the documents it had obtained disclosed: first, that Bayer France and Bayer Spain had imposed an export ban on the wholesalers (recitals 156 to 170); and secondly, that the imposition of the ban did not constitute merely unilateral conduct since it formed part of the framework of continuous commercial relations which the two Bayer group companies maintained with their clients (recitals 171 to 185).

6. That an export ban had been imposed on the wholesalers was in turn deduced by the Commission from two 'additional factors': the system for detecting exporting wholesalers implemented by Bayer France and Bayer Spain; and the subsequent reductions in the amounts supplied by those companies where wholesalers export all or part of the products delivered.

7. With regard to the latter, the Commission stated in particular that the evidence in its possession 'show[ed] that supply of the quantities allowed by Bayer France and Bayer Spain [was] subject to compliance with an export ban. Bayer France and Bayer Spain [made] the extent of the reduction in the amounts they suppl[ied] dependent on the wholesalers' conduct in response to the export ban. If the whole-

salers infringe[d] the export ban, this entail[ed] a further automatic reduction in the supplies they receive[d]'. [5] Following an analysis of the relevant documents, the Commission therefore concluded that 'the conduct of Bayer France and Bayer Spain show[ed] that the two companies ha[d] subjected their wholesalers to a permanent threat of reducing the quantities supplied, a threat which was repeatedly carried out if they did not comply with the export ban'. [6]

8. Having thus found that an export ban had been imposed by Bayer France and Bayer Spain, and to show that this was incorporated into the continuous commercial relations with the wholesalers (and was thus not merely unilateral conduct), the Commission went on to state that:

— the 'regular orders placed by the wholesalers, and regularly renewed, show[ed] that commercial relations [were] continuous and ongoing as regards Adalat'; [7]

— 'Bayer Spain and Bayer France imposed a ban applicable systematically and consistently to all sales transactions between them and their respective wholesalers where the two companies knew that the wholesalers were exporting'; [8]

— the 'wholesalers' conduct reflected an implicit acquiescence in the export ban. [9]

9. This implicit acquiescence was inferred in particular from the conduct of the wholesalers, which 'show[ed] that they... not only understood that an export ban applie[d] to the goods supplied, but also that they... aligned their conduct on this ban'. [10] In this regard, the Commission explained that '[b]y using various devices in order to obtain supplies, in particular that of spreading orders intended for export among the various agencies and the order placed with other "non-supervised" wholesalers, the wholesalers adjusted the way in which their orders were presented so as to bring them into line with Bayer France and Bayer Spain's requirement that export of the product was to be prohibited. They began to present their orders to their supplier, Bayer France or Bayer Spain, in such a way as to suggest that the orders were intended to cover only domestic requirements. Once the two companies had seen through this initial ploy, the

5 — Recital 163 of the decision.
6 — Recital 170.
7 — Recital 174.
8 — Recital 175.
9 — Recital 176.
10 — Recital 180.

wholesalers even began to comply with the national "quotas" imposed by their supplier, negotiating as far as they could to increase them to the maximum, thus bowing to the strict application of and compliance with the figures regarded by Bayer France and Bayer Spain as normal for the supplying of the domestic market'. [11] According to the Commission, '[t]his attitude demonstrates that the wholesalers were aware of the real motives of Bayer France and Bayer Spain and of the tactics deployed by the two companies to thwart parallel exports: they adapted to the system established by their supplier so as to comply with its requirements. This behaviour thus demonstrates their compliance with the export ban which was incorporated into the continuous commercial relations between Bayer France and Bayer Spain and their wholesalers'. [12]

Proceedings before the Court of First Instance and the contested judgment

10. By application lodged at the Registry of the Court of First Instance on 22 March 1996, Bayer sought the annulment of the Commission's decision.

11. On 1 August 1996, BAI (a German association of importers of medicinal products) applied for leave to intervene in support of the form of order sought by the Commission. On 26 August 1996, the European Federation of Pharmaceutical Industries' Associations (a European industry federation representing the interests of 16 national pharmaceutical industry associations, 'the EFPIA') applied for leave to intervene in support of the form of order sought by Bayer. By orders of 8 November 1996, the President of the Fifth Chamber (Extended Composition) of the Court of First Instance granted both bodies leave to intervene.

12. By judgment of 26 October 2000, the Court of First Instance upheld Bayer's first plea in law concerning the applicability of Article 85(1) to the case and annulled the contested decision on the basis that, in its view, 'the Commission incorrectly assessed the facts of the case and made an error in the legal assessment of those facts by holding it to be established that there was a common intention between Bayer and the wholesalers referred to in the Decision, which justified the conclusion that there was an agreement within the meaning of Article 85(1) of the Treaty, designed to prevent or limit exports of Adalat from France and Spain to the United Kingdom'. [13]

13. In considering the applicant's case, the Court of First Instance first reviewed Community case-law on the concept of an agreement within the meaning of

11 — Recitals 182 and 183.

12 — Recital 184.

13 — Paragraph 183.

Article 85(1) of the Treaty. It noted, in particular, that 'where a decision on the part of a manufacturer constitutes unilateral conduct of the undertaking, that decision escapes the prohibition in Article 85(1) of the Treaty', [14] since the concept of an agreement as contemplated in that provision 'centres around the existence of a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties' intention'. [15] In order to apply the provision in question, therefore, 'a distinction should be drawn between cases in which an undertaking has adopted a genuinely unilateral measure, and thus without the express or implied participation of another undertaking, and those in which the unilateral character of the measure is merely apparent. Whilst the former do not fall within Article 85(1) of the Treaty, the latter must be regarded as revealing an agreement between undertakings and may therefore fall within the scope of that article. That is the case, in particular, with practices and measures in restraint of competition which, though apparently adopted unilaterally by the manufacturer in the context of its contractual relations with its dealers, nevertheless receive at least the tacit acquiescence of those dealers'. [16]

14. Having said that, the Court of First Instance, turning to consider the applicability of Article 85(1) to the case in hand, then observed that the 'applicant acknowledge[d] having introduced a unilateral policy designed to reduce parallel imports' but 'denie[d] having planned and imposed an export ban. In that regard, it denie[d] ever having had discussions with the wholesalers, let alone making an agreement with them, in order to prevent them from exporting or to limit them in the export of the quantities delivered. Moreover, it state[d] that the wholesalers did not adhere in any way to its unilateral policy and had no wish to do so'. [17] Given those denials by the applicant, the Court of First Instance decided that 'in order to determine whether the Commission ha[d] established to the requisite legal standard the existence of a concurrence of wills between the parties concerning the limitation of parallel exports, it [was] necessary to consider whether, as the applicant maintain[ed], the Commission [had] wrongly assessed the respective intentions of Bayer and the wholesalers'. [18]

15. Regarding first the 'alleged intention of the applicant to impose an export ban', the Court of First Instance concluded, after a thorough examination of the documents referred to in the decision, 'that the Commission ha[d] not proved to the requisite legal standard either that Bayer France and Bayer Spain [had] imposed an export ban on their respective wholesalers, or that Bayer [had] established a systematic monitoring of the actual final destination of the packets of Adalat supplied after the adoption of its new supply policy, or that the applicant [had] applied a policy of threats and sanctions against exporting wholesalers, or that it [had] made supplies of

14 — Paragraph 66.
15 — Paragraph 69.
16 — Paragraph 71.
17 — Paragraph 76.
18 — Paragraph 77.

this product conditional on compliance with the alleged export ban'. Nor, indeed, in the view of the Court of First Instance, did 'the documents reproduced in the Decision show that the applicant [had] sought to obtain any form of agreement from the wholesalers concerning the implementation of its policy designed to reduce parallel imports'. [19]

16. Next regarding the 'alleged intention of the wholesalers to adhere to the applicant's policy designed to reduce parallel imports', the Court of First Instance first of all noted that:

— as had been held, 'the Commission ha[d] not sufficiently established in law that Bayer adopted a systematic policy of monitoring the final destination of the packets of Adalat supplied, that it applied a policy of threats and penalties against wholesalers who had exported them, that, therefore, Bayer France and Bayer Spain imposed an export ban on their respective wholesalers, or, finally, that supplies were made conditional on compliance with the alleged export ban'; [20]

— 'there [was] nothing in the documents before the Court to show that Bayer France or Bayer Spain required any particular form of conduct on the part of the wholesalers concerning the final destination of the packets of Adalat supplied or compliance with a certain manner of placing orders, its policy having consisted simply in limiting supplies unilaterally by determining in advance the quantities to be supplied, using traditional needs as the basis'; [21]

— 'the Commission ha[d] not established that the applicant made any attempt to obtain the agreement or acquiescence of the wholesalers to the implementation of its policy' and, indeed, had 'not even claimed that Bayer sought to get the wholesalers to change their way of formulating orders'. [22]

17. In the light of those considerations, the Court of First Instance concluded that the Commission's claim 'that the wholesalers aligned their conduct in accordance with the alleged export ban, fail[ed] on factual grounds, because [it was] based on factual circumstances that ha[d] not been established'. [23]

19 — Paragraphs 109 and 110.
20 — Paragraph 119.
21 — Paragraph 120.
22 — Paragraph 121.
23 — Paragraph 122.

18. The Court of First Instance next 'determined whether, having regard to the actual conduct of the wholesalers following the adoption by the applicant of its new policy of restricting supplies, the Commission could legitimately conclude that they acquiesced in that policy'. [24] After reviewing the documents referred to in the decision, the Court of First Instance held:

'151 Examination of the attitude and actual conduct of the wholesalers shows that the Commission has no foundation for claiming that they aligned themselves on the applicant's policy designed to reduce parallel imports.

152 The argument based on the fact that the wholesalers concerned had reduced their orders to a given level in order to give Bayer the impression that they were complying with its declared intention thereby to cover only the needs of their traditional market, and that they acted in that way in order to avoid penalties, must be rejected, because the Commission has failed to prove that the applicant demanded or negotiated the adoption of any particular line of conduct on the part of the wholesalers concerning the destination for export of the packets of Adalat which it had supplied, and that it penalised the exporting wholesalers or threatened to do so.

153 For the same reasons, the Commission cannot claim that the reduction in orders could be understood by Bayer only as a sign that the wholesalers had accepted its requirements, or maintain that it is because they satisfied Bayer's requirements that they had to procure extra quantities destined for export from wholesalers who were not "suspect" in Bayer's eyes and whose higher orders were therefore fulfilled without difficulty.

154 Moreover, it is obvious from the recitals of the Decision examined above that the wholesalers continued to try to obtain packets of Adalat for export and persisted in that line of activity, even if, for that purpose, they considered it more productive to use different systems to obtain supplies, namely the system of distributing orders intended for export among the various agencies on the one hand, and that of placing orders indirectly through small wholesalers on the other. In those circumstances, the fact that the wholesalers changed their policy on orders and established various systems for breaking them down or diversifying them, by placing them through indirect means, cannot be construed as evidence of their intention to satisfy Bayer or as a response to any request from Bayer.

24 — Paragraph 124.

On the contrary, that fact could be regarded as demonstrating the firm intention on the part of the wholesalers to continue carrying on parallel exports of Adalat.

155 In the absence of evidence of any requirement on the part of the applicant as to the conduct of the wholesalers concerning exports of the packets of Adalat supplied, the fact that they adopted measures to obtain extra quantities can be construed only as a negation of their alleged acquiescence. For the same reasons, the Court must also reject the Commission's argument that, in the circumstances of the case, it is normal that certain wholesalers should have tried to obtain extra supplies by circuitous means since they had to undertake to Bayer not to export and thus to order reduced quantities, not capable of being exported.

156 Nor, finally, has the Commission proved that the wholesalers wished to pursue Bayer's objectives or wished to make Bayer believe that they did. On the contrary, the documents examined above demonstrate that the wholesalers adopted a line of conduct designed to circumvent Bayer's new policy of restricting supplies to the level of traditional orders.

157 The Commission was therefore wrong in holding that the actual conduct of the wholesalers constitutes sufficient proof in law of their acquiescence in the applicant's policy designed to prevent parallel imports.'

19. In response to the Commission's arguments based on Community case-law (paragraphs 160 to 170), the Court of First Instance then analysed the cases cited by the defendant institution to show that the latter could not 'effectively rely on the case-law precedents referred to in order to call into question the analysis, which ha[d] led the Court to conclude that in this case acquiescence of the wholesalers in Bayer's new policy ha[d] not been established and that the Commission ha[d] therefore failed to prove the existence of an agreement'. [25]

20. Finally, the Court of First Instance rejected the proposition on which the Commission's reasoning was predicated,

25 — Paragraph 159.

namely that 'the mere finding of fact that the wholesalers did not interrupt their commercial relations with Bayer after the latter established its new policy designed to restrain exports [was] a sufficient ground for it to hold that the existence of an agreement between undertakings within the meaning of Article 85(1) of the Treaty [was] established'. [26]

21. In that regard, the Court of First Instance observed in particular that the 'proof of an agreement between undertakings within the meaning of Article 85(1) of the Treaty must be founded upon the direct or indirect finding of the existence of the subjective element that characterises the very concept of an agreement, that is to say a concurrence of wills between economic operators on the implementation of a policy, the pursuit of an objective, or the adoption of a given line of conduct on the market, irrespective of the manner in which the parties' intention to behave on the market in accordance with the terms of that agreement is expressed'. In its view, the Commission had misapplied 'concept of the concurrence of wills' in holding that 'the continuation of commercial relations with the manufacturer when it adopts a new policy, which it implements unilaterally, amounts to acquiescence by the wholesalers in that policy, although their *de facto* conduct is clearly contrary to that policy'. [27]

22. The Court of First Instance further observed, in relation to the Commission's proposition, that the aim of Article 85(1) 'is not to eliminate obstacles to intra-Community trade altogether; it is more limited, since only obstacles to competition set up as a result of a concurrence of wills between at least two parties are prohibited by that provision'. [28] On that basis, the Court of First Instance therefore concluded that 'provided he does so without abusing a dominant position, and there is no concurrence of wills between him and his wholesalers, a manufacturer may adopt the supply policy which he considers necessary, even if, by the very nature of its aim, for example, to hinder parallel imports, the implementation of that policy may entail restrictions on competition and affect trade between Member States'. [29]

23. In the light of all of the above considerations, the Court of First Instance annulled the decision without considering Bayer's alternative pleas in law, which were based on: erroneous application of Article 85(1) of the Treaty, the legitimacy of the conduct complained of under Article 47 of the Act of Accession of Spain to the European Communities, and mis-

26 — Paragraph 172.
27 — Paragraph 173.
28 — Paragraph 174.
29 — Paragraph 176.

application of Article 15 of Council Regulation No 17 of 6 February 1962 [30] in imposing a fine on Bayer.

Proceedings before the Court of Justice

24. By applications lodged on 5 January 2001, BAI (Case C-2/01 P) and the Commission (Case C-3/01 P) requested the Court of Justice to quash the judgment of the Court of First Instance and to dismiss directly the action brought at first instance or, in the alternative, refer the case back to the Court of First Instance. By order of the President of the Court of 28 March 2001, the two cases were joined for the purposes of the written and oral procedure and the judgment.

25. By applications lodged on 9 April and 23 April 2001 the European Association of European Pharmaceutical Companies (a European association which represents the interests of Pharmaceutical Companies; hereinafter 'EAEPC') and the Kingdom of Sweden [31] applied for leave to intervene in support of the forms of order sought by the appellants. Leave to intervene was granted by the President of the Court by orders of 25 June 2001 (Kingdom of Sweden) and 26 September 2001 (EAEPC).

30 — Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87).

31 — To be precise, EAEPC sought leave to intervene in support of the forms of order sought by BAI and the Commission, while the Kingdom of Sweden sought leave to intervene only in support of the forms of order sought by the Commission.

26. In the course of the proceedings before the Court of Justice, both Bayer and EFPIA lodged responses in accordance with Article 115 of the Rules of Procedure, in each case seeking dismissal of the appeals.

II — Legal analysis

Preliminary remarks

27. In support of its challenge, BAI raises three grounds of appeal. These are: failure to take full account of the facts on which the decision was based; infringement of the burden of proof rules; and an error of law as to the legal criteria for determining whether there is an agreement within the meaning of Article 85(1) of the Treaty.

28. The Commission, for its part, first makes a general criticism of the restrictive approach followed by the Court of First Instance in the contested judgment, claiming it would have grave consequences for its efforts to prevent restraints on competition arising from the compartmentalisation of national markets. It then goes on to raise five grounds of appeal, which essentially concern the unduly restrictive

interpretation of the concept of agreement within the meaning of Article 85 of the Treaty, an error of law in the application of that provision, and a distortion of the clear sense of the evidence.

29. In the interests of proper structure and clarity of exposition, I believe it appropriate to consider first the arguments concerning the findings of fact by the Court of First Instance, so that the issues of law can be dealt with after any doubts about the relevant questions of fact have been resolved.

The grounds of appeal relating to the findings of fact

30. Both BAI and the Commission contest the findings of fact made in the contested judgment, alleging respectively: (i) a failure to take full account of the facts concerning Bayer's alleged monitoring of the final destination of the goods supplied; and (ii) distortion of the clear sense of the evidence or failure to take account of the evidence in regard to the wholesalers' intention to give Bayer the impression that they were henceforth ordering for domestic market needs only.

31. The admissibility of these grounds of appeal is, however, disputed by Bayer and EFPIA, who maintain that it is not open to the appellants to challenge before the Court of Justice findings of fact made at first instance by the Court of First Instance.

32. It should be observed first and foremost that, under Article 225 EC and Article 51 of the Statute of the Court, an appeal lies from a decision of the Court of First Instance 'on points of law only'. From this it follows, according to settled case-law, that the Court of First Instance 'has exclusive jurisdiction, first, to establish the facts except where the substantive inaccuracy of its findings is apparent from the documents submitted to it and, second, to assess those facts. When the Court of First Instance has established or assessed the facts, the Court of Justice has jurisdiction under Article 168a of the Treaty [now Article 225 EC] to review the legal characterisation of those facts by the Court of First Instance and the legal conclusions it has drawn from them... The Court of Justice thus has no jurisdiction to establish the facts or, in principle, to examine the evidence which the Court of First Instance accepted in support of those facts. Provided that the evidence has been properly obtained and the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence

have been observed, it is for the Court of First Instance alone to assess the value which should be attached to the evidence produced to it... The appraisal by the Court of First Instance of the evidence put before it does not constitute, save where the evidence has been fundamentally misconstrued, a point of law which is subject, as such, to review by the Court of Justice'. [32]

33. It is therefore only within the narrow limits laid down in that settled case-law that the two grounds of appeal concerning the findings of fact made by the Court of First Instance may be examined by the Court.

(i) Failure to take full account of the facts concerning Bayer's alleged monitoring of the final destination of the goods supplied

34. By its first ground of appeal, BAI contests the finding by the Court of First Instance that the Commission failed to prove 'that Bayer [had] established a systematic monitoring of the actual final destination of the packets of Adalat supplied after the adoption of its new supply policy'. [33] That finding stemmed from a failure to take full account of the facts, since there were two documents referred to in the decision to indicate that in a number of cases Bayer had succeeded in tracing the Spanish wholesalers from the batch numbers of lots found in the United Kingdom. [34] In the light of those documents, according to BAI, it ought to have been found that Bayer had carried out monitoring (albeit, perhaps, by samples only) of the final destination of the Adalat packets supplied.

35. Both Bayer and EFPIA maintain that this ground of appeal is inadmissible, on the basis that it purports to challenge the finding of fact made by the Court of First Instance. Bayer further argues that even if it was possible to trace the exporting wholesalers from the batch numbers, that would not mean that monitoring actually took place in this case. In any event, it denies that the batch numbers are capable of identifying individual operators, since the same number will usually appear on packets supplied to different wholesalers.

36. The objection of inadmissibility appears to me well founded. In reality, BAI is not contending that the documents in the case-file submitted to the Court of

32 — Case C-7/95 P *John Deere* [1998] ECR I-3111, paragraphs 21 and 22. To the same effect see, among many others, the judgments in Case C-53/92 P *Hilti* v *Commission* [1994] ECR I-667, paragraphs 42 and 43, and Case C-8/95 P *New Holland Ford* v *Commission* [1998] ECR I-3175, paragraph 26.

33 — Paragraph 109.

34 — BAI refers here to the documents referred to by the Commission in recitals 140 and 180 of the decision.

First Instance disclose a substantive inaccuracy in its findings, nor that facts or evidence were fundamentally misconstrued. Rather, it is disputing the finding made by that Court regarding the probative value of certain documents relied upon by the Commission and, in particular, regarding the possibility of inferring from those documents that Bayer systematically monitored the final destination of the Adalat packets supplied to the wholesalers. Given therefore that the appellant is challenging a finding of fact made by the Court of First Instance (which clearly took into consideration the content of the documents referred to), [35] I conclude that this ground of appeal must be declared inadmissible.

(ii) Distortion of the clear sense of the evidence or failure to take account of the evidence in regard to the wholesalers' intention to give Bayer the impression that they were henceforth ordering for domestic market needs only

37. By its third ground of appeal, the Commission claims that the Court of First Instance fundamentally misconstrued or failed to take into account particular pieces of evidence. It was contrary to the clear sense of the documents in the case-file for that Court to hold that it had not been shown that the wholesalers' intended to give Bayer the impression that they were henceforth ordering for domestic market needs only. [36]

38. Referring to the wholesalers' strategy of 'spreading orders intended for export among the various agencies', [37] the Commission observes: first, that the Court of First Instance failed to consider the fact that, following the refusal by Bayer France to fulfil orders expressly intended for export, the local agencies were asked to act discreetly; [38] secondly, that that Court failed to consider that spreading the orders among the local agencies could have had no other purpose than to deceive Bayer regarding the intention to export. With regard to the latter point, the Commission observes in particular that the documents cited in the

35 — See in particular paragraphs 103 and 104 of the contested judgment.

36 — In its appeal, the Commission refers essentially to the finding set out in paragraph 126 of the contested judgment that the documents cited in recitals 97 to 101 of the decision, 'which are devoted to setting out the strategy put in place by the wholesaler CERP Rouen in order to circumvent Bayer's policy of restricting supplies', 'are not capable of proving that that wholesaler agreed to cease exporting, reduce its orders or limit its exports, *or that it tried to give Bayer the impression that it was going to do so*. The only illustration they provide is that of the reaction of an undertaking in trying to continue its export activities as far as possible. There is no direct mention or evidence of an intention to support Bayer's policy of preventing exports, of which the wholesaler was perfectly aware, as is indicated in recital 94 of the Decision' (emphasis added). In its reply, the Commission refers instead to paragraph 156 of the judgment, where the Court of First Instance concludes that '*the Commission [has not] proved that the wholesalers wished to pursue Bayer's objectives or wished to make Bayer believe that they did*' (emphasis added).

37 — Recital 182 of the contested decision.

38 — The Commission here refers to a letter written by a French wholesaler, quoted in recital 98 of the contested decision, which reads: 'URGENT
To help the Boulogne agency meet 20 000 Adalate LP 20 mg, code PHON:TE 360, please issue the following order:
...
As soon as the order is received, please forward to Boulogne.
Thank you for your cooperation and your discretion' (emphasis added).

decision show not only that the wholesalers intended to deceive Bayer [39] but that they needed to do so, [40] because they believed that they would not be supplied or that they would have difficulty in obtaining supplies if their intention to export became known.

39. To this, Bayer and EFPIA respond first that the Court of First Instance cannot be criticised for having failed to consider particular items of evidence, given that in the contested judgment it examined in minute detail all the documents cited by the Commission. As for the claim of distortion of the clear sense of the evidence, Bayer and EFPIA further argue: first, that in various passages of the contested judgment the Court of First Instance clearly stated that certain wholesalers had exaggerated their domestic market needs, [41] and thus it did not distort the clear sense of the items of evidence cited by the Commission; secondly, that the Commission had also failed to show the effect of the alleged 'distortion' on the outcome of the case and had done no more than call into question the findings of fact made by the Court of First Instance.

40. For my part, I agree with Bayer and EFPIA that the Court of First Instance did not fail to consider the documents cited by the Commission, which are in fact clearly referred to in those passages of the judgment that are concerned with determining 'whether, having regard to the actual conduct of the wholesalers following the adoption by the applicant of its new policy of restricting supplies, the Commission could legitimately conclude that they acquiesced in that policy'. [42]

39 — The Commission is here referring to two documents.

(i) First, it refers to minutes taken by a Spanish wholesaler of a meeting with Bayer Spain (recital 127 of the decision) and quotes the following passages in particular:
'Following the latest conversation with Bayer management, they stated that they could not accept the quantities requested by HUFASA because they accounted for 50% of the domestic market and were much higher than those of other firms in the same area... This led them to believe that a substantial proportion of the product was intended for export...

Faced with these statements, I pointed out that HUFASA needed substantial quantities of Adalat V because...

... it was better not *to submit figures* that would not be accepted as possible for Hufasa and which revealed *our interest in exporting significant amounts*. That is why I took the view that it was more important to obtain a quantity of ADALAT for export with *very plausible figures* rather than to maintain a very high level of orders which would not be supplied. The important thing was actual receipts rather than the order. That is no doubt why... orders less than forecast' (emphasis added by the Commission).

(ii) Secondly, the Commission refers to a letter written by a Spanish wholesaler, quoted in recital 129 of the decision, noting in particular the following passage: 'I give you my word that I am doing my utmost to obtain supplies *greater than our requirements*' (emphasis added by the Commission).

40 — The Commission is here referring to a letter written by a Spanish wholesaler, quoted in recital 129 of the decision, noting in particular the following passage: '... if we want a product that sells well on our market, we could order it along with the usual orders, but if it is rare, *we will not be able to hide it*' (emphasis added by the Commission).

41 — Bayer and EFPIA specifically mention paragraphs 125, 128, 131 and from 143 to 152.

42 — Paragraph 124. The documents relied on by the Commission are specifically adverted to in paragraphs 126, 129, 130, 144, 146 to 150.

41. Secondly, as regards the alleged distortion of the clear sense of the documents in question, I must point out that the Court of First Instance did not deny that various wholesalers attempted to react to Bayer's new policy of supplying only the quantities of Adalat necessary to cover domestic requirements. In particular, it did not deny that, in order to react to that policy, a number of wholesalers chose to place orders which, at the same time as enabling them to accumulate a certain number of Adalat packets for export, would have a better chance of being fulfilled in that they would be regarded by Bayer as in line with domestic requirements. In other words, the Court of First Instance did not deny that, in order to circumvent Bayer's policy, some wholesalers intended to make the company think that the orders placed by them corresponded to their domestic market. Nor did that Court deny that to this end a number of wholesalers enlisted the assistance of other traders for whom it would be easier to place orders that Bayer would regard as in line with domestic needs.

42. On the contrary, the Court of First Instance expressly acknowledged that the purchasing strategies used by a number of large wholesalers were intended 'to circumvent Bayer's policy of restricting supplies'.[43] In that regard, it notes in particular that 'the wholesalers continued to try to obtain packets of Adalat for export and persisted in that line of activity, even if, for that purpose, they considered it more productive to use different systems to obtain supplies, namely the system of distributing orders intended for export among the various agencies on the one hand, and that of placing orders indirectly through small wholesalers on the other'.[44]

43. That being so, I do not believe the Court of First Instance can be said to have distorted the clear sense of the documents cited by the Commission, which reveal nothing more than the concern of various wholesalers to order such quantities of Adalat as Bayer would regard as in line with domestic requirements. In my view it follows that this ground of appeal must be held unfounded.

44. Furthermore, this ground of appeal should also be held inadmissible in part, if, in addition to alleging that the documents in question were fundamentally misconstrued, it were also meant to contest the view taken by the Court of First Instance of their probative value, thus calling into question the findings of fact made in the contested judgment. In other words, this ground of appeal should be held inadmissible in part if, by raising it, the Commission were also contesting the finding by the Court of First Instance that the documents in question were not capable of

43 — Paragraph 126 of the judgment. To the same effect, see paragraph 135 of the judgment, where it is stated that some wholesalers had 'a strategy for circumventing Bayer's policy', and paragraph 156, where it is noted that the documents examined by the Court of First Instance 'demonstrate[d] that the wholesalers adopted a line of conduct designed to circumvent Bayer's new policy of restricting supplies to the level of traditional orders'.

44 — Paragraph 154 of the judgment.

proving that the wholesalers had acquiesced (or wished to give the impression of having acquiesced) in an alleged export ban imposed by Bayer, by agreeing to order only the quantities strictly necessary to cover domestic requirements.

The grounds relating to questions of law: general considerations

45. Having examined (and rejected) the grounds of appeal relating to the findings of fact, I now turn to the grounds relating to the alleged errors of law by the Court of First Instance, which — it is worth repeating — cannot call into question the findings of fact made in the contested judgment.

46. Let me observe at once that most of these grounds raise — with differing degrees of clarity and directness — an important and difficult question of interpretation of Article 85(1) of the Treaty, in particular of the concept of 'agreement' used therein. Essentially, what has to be determined is whether the Court of First Instance adopted an excessively restrictive interpretation of the provision in question by holding that an 'agreement' comprising an export ban cannot be regarded as having been entered into in circumstances of the kind which concern us here.

47. More specifically, what has to be determined is whether an 'agreement' comprising an export ban can be regarded as having been entered into if:

(a) in order to prevent or restrict parallel imports, a manufacturer puts in place a system of sales quotas, under which it supplies to the wholesalers of certain countries only those quantities of product it deems necessary to service their traditional domestic markets without, however: in any way asking the wholesalers not to export; requiring from them any particular form of conduct concerning the final destination of the products supplied; requiring compliance with a certain manner of placing orders; carrying out systematic monitoring of the actual final destination of the products supplied; applying or threatening to apply sanctions against exporting wholesalers; making supplies of the product conditional on compliance with an export ban; or seeking to obtain any form of agreement from the wholesalers concerning the implementation of its policy designed to reduce parallel imports;

(b) the wholesalers and the manufacturer in question have longstanding continuous commercial relations which are not governed by a distribution agreement but embodied in a series of contracts of sale for the quantities of product that are ordered from time to time;

(c) following the introduction of the sales quota system described above, the wholesalers, although aware of its purpose, continue to order supplies from the manufacturer concerned, negotiating with it from time to time the quantities of product to be acquired;

(d) in order to continue exporting, the wholesalers attempt to circumvent the quota system put in place by the manufacturer, going to some lengths to obtain the greatest possible quantity of product.

48. While it is clearly bound up with the facts of this case (as found by the Court of First Instance), the question of interpretation of Article 85(1) of the Treaty referred to above is one of far-reaching significance, in terms of precedent, for the application of that provision to arrangements between manufacturers and distributors. In particular, the Commission submits, by departing from the previous case-law, the contested judgment may well be redefining over-restrictively the criteria for proving the existence of agreements involving export bans, and to such an extent as to call into question the Commission's policy of opposing restraints on competition resulting from the creation of obstacles to parallel imports. Moreover, to underline the practical importance of the question, the Commission relates that various manufacturers (and not only in the pharmaceutical sector) are already copying the sales quota system put in place by Bayer in order to be able to compartmentalise national markets with impunity.

49. Before considering individually the various grounds of appeal relied on by the appellants in relation to this question, it seems to me appropriate therefore to undertake a general examination of the substantive question referred to above with a view to assessing in general terms the interpretation of the Court of First Instance in the light of the previous case-law of the Court of Justice. I would therefore now turn to consider whether, as the appellants submit, the interpretation given by the Court of First Instance to Article 85(1) is at variance with that adopted by the Court of Justice: (i) in *Sandoz*, [45] a case which concerned an export ban imposed by a manufacturer in the course of continuous commercial relations with its wholesalers; and (ii) in *AEG*, [46] *Ford* [47] and *Bayerische Motorenwerke*, [48] which concerned various measures adopted by manufacturers in a context of selective distribution agreements. [49]

45 — Case C-277/87 *Sandoz Prodotti Farmaceutici* v *Commission* [1990] ECR I-45 (summary publication).

46 — Case 107/82 *AEG* v *Commission* [1983] ECR 3151.

47 — Joined Cases 25/84 and 26/84 *Ford and Ford Europe* v *Commission* [1985] ECR 2725.

48 — Case C-70/93 *Bayerische Motorenwerke* [1995] ECR I-3439.

49 — The parties also refer here, directly and indirectly, to various decisions of the Court of First Instance which in their view followed the interpretation adopted in those judgments of the Court of Justice (in particular, Case T-43/92 *Dunlop Slazenger International* v *Commission* [1994] ECR II-441; Case T-49/95 *Van Megen Sports Group* v *Commission* [1996] ECR II-1799; and Case T-62/98 *Volkswagen* v *Commission* [2000] ECR II-2707). For the purposes of the present appeal, however, it may be well to concentrate solely on the case-law of the Court of Justice to determine whether in the contested judgment the Court of First Instance adhered to the interpretative criteria laid down therein.

(i) The *Sandoz* judgment

50. BAI and the Commission, supported by EAEPC on this point, argue first of all that the interpretation of Article 85(1) adopted by the Court of First Instance is in conflict with the *Sandoz* judgment, which held, they maintain, that an 'agreement' within the meaning of that provision arises by virtue of the mere fact that an export ban is imposed by a manufacturer in the course of continuous commercial relations with wholesalers, regardless of the actual conduct of the wholesalers and even in the absence of monitoring and sanctions on the part of the manufacturer.

51. In those circumstances, the appellants argue, the Court held that the systematic dispatching to customers of invoices bearing the words 'export prohibited' did not constitute 'unilateral conduct' on the part of Sandoz PF, [50] since it formed 'part of a set of continuous business relations between the undertaking and its customers'. [51] In particular, the judgment emphasised that 'repeated orders of the products and the successive payments without protest by the customer of the prices indicated on the invoices, bearing the words "export prohibited", constituted a tacit acquiescence on the part of the latter in the clauses stipulated in the invoice and the type of commercial relations underlying the business relations between Sandoz PF and its clientele. The approval initially given by Sandoz PF was thus based on the tacit acceptance on the part of the customers of the line of conduct adopted by Sandoz PF towards them'. [52] On that basis, the Court therefore held that the 'Commission was justified in considering that the set of continuous commercial relations, of which the "export prohibited" clause formed an integral part, established between Sandoz PF and its customers, was governed by a pre-established general agreement applicable to the innumerable individual orders for Sandoz products'. [53]

52. On that basis, the appellants argue that, in light of the *Sandoz* judgment, the Court of First Instance was not entitled to hold that there was no agreement within the meaning of Article 85(1) in this case, given that Bayer's policy designed to prevent or restrict parallel imports was known to the wholesalers and formed part of the set of continuous commercial relations it maintained with them.

53. Bayer and EFPIA take quite a different view. For them, the interpretation given by the Court of First Instance to Article 85(1) is not in conflict with that adopted by the

50 — Sandoz Prodotti Farmaceutici, the Italian subsidiary of the Sandoz group.

51 — *Sandoz*, paragraph 10.

52 — Paragraph 11.

53 — Paragraph 12.

Court of Justice in *Sandoz*, because the facts of the two cases are quite different, there having been, in *Sandoz*, a written agreement on an export ban.

54. However, on the question of the differences between *Sandoz* and the present case, Bayer and EFPIA also cite the views expressed by the Court of First Instance in paragraph 163 of the contested judgment, which reads:

'Although the two cases resemble each other in that they concern attitudes of pharmaceutical groups designed to prevent parallel imports of medicinal products, the concrete circumstances characterising them are very different. In the first place, unlike the situation in the present case, the manufacturer in *Sandoz* had expressly introduced into all its invoices a clause restraining competition, which, by appearing repeatedly in documents concerning all transactions, formed an integral part of the contractual relations between Sandoz and its wholesalers. Second, the actual conduct of the wholesalers in relation to the clause, which they complied with *de facto* and without discussion, demonstrated their tacit acquiescence in that clause and the type of commercial relations underlying it. On the facts of the present case, however, neither of the two principal features of *Sandoz* is to be found; there is no formal clause prohibiting export and no conduct of non-contention or acquiescence, either in form or in reality'.

55. For my part, I share the view that the different attitudes taken by the Court of Justice in *Sandoz* and by the Court of First Instance in the contested judgment are justified by the different factual circumstances, albeit not exactly for the reasons suggested by Bayer and EFPIA.

56. Unlike them, I do not believe that in *Sandoz* there was a written agreement on an export ban, which is clear, besides, from the fact that the wholesalers' acceptance was 'tacit' only. Nor, in my opinion, is it relevant that Sandoz's intention regarding the export ban was expressed in writing since, as is well known, the form in which parties express their intention is unimportant for the purposes of Article 85(1). [54]

54 — See, in that regard, Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraph 112, and Joined Cases 209/78 to 215/78 and 218/78 *Van Landewyck and Others* v *Commission* [1980] ECR 3125, paragraph 86, which are also cited in the contested judgment in relation to this point (paragraph 68).

57. Where a material difference between the *Sandoz* case and this one does exist, in my opinion, is in the fact that by inserting the words 'export prohibited' in its invoices, Sandoz expressed its own intention regarding the conduct the wholesalers should adopt in relation to the final destination of the products supplied. In other terms, with those words Sandoz clearly requested (or required) the wholesalers to refrain from exporting the products supplied and hence, by that conduct, to cooperate with it in attaining its aim of eliminating or reducing parallel imports.

58. In this case, by contrast, the judgment at first instance has established, first, that 'there [was] nothing in the documents before the Court to show that Bayer France or Bayer Spain required any particular form of conduct on the part of the wholesalers concerning the final destination of the packets of Adalat supplied or compliance with a certain manner of placing orders, its policy having consisted simply in limiting supplies unilaterally by determining in advance the quantities to be supplied, using traditional needs as the basis'; and secondly, that 'the Commission ha[d] not established that the applicant made any attempt to obtain the agreement or acquiescence of the wholesalers to the implementation of its policy'. [55]

55 — Paragraphs 120 and 121.

59. There is thus a clear difference between the two cases, consisting principally in the fact that whereas Sandoz sought the cooperation of the wholesalers with a view to eliminating or reducing parallel imports (evidently because their cooperation was essential for the attainment of that objective), Bayer did not seek or require any conduct on the part of its wholesalers in regard to the final destination of the products supplied, but devised a strategy that enabled it autonomously to achieve the result of eliminating or reducing parallel imports, without the collaboration of the wholesalers being needed.

60. That seems to me to be the crucial point for our purposes. I am of the opinion that it was only the request (or requirement) by Sandoz not to export that enabled the Court to find a form of 'tacit acceptance' in the fact that the wholesalers continued to order supplies from the manufacturer as usual and without demur, because an offer or a requirement — however expressed, even implicitly — is to my mind always necessary in order for an agreement to be regarded as having been made by way of tacit acceptance.

61. While the *Sandoz* judgment interpreted the concept of agreement very broadly, I do not think that one can go still further, to the point of regarding an agreement on an export ban as having been made by virtue of the mere fact that wholesalers continue to obtain supplies from a manufacturer who is attempting to prevent the possibility of their exporting but without requiring

anything of them. In any event, doing so would lead to the absurd result that such an agreement could be formed even by the tacit acceptance of an offer that was never (even implicitly) made!

62. In the light of the foregoing considerations, I therefore take the view that the interpretation given by the Court of First Instance to Article 85(1) of the Treaty is not in conflict with that adopted by the Court in *Sandoz*.

(ii) *AEG*, *Ford* and *Bayerische Motorenwerke*

63. It is submitted by BAI and the Commission, and they are supported on this point by the Kingdom of Sweden and EAEPC, that the contested judgment is in conflict not only with *Sandoz* but with various other judgments of the Court of Justice, in which ostensibly unilateral measures adopted by manufacturers in the framework of various selective distribution systems were held to constitute 'agreements' within the meaning of Article 85(1). BAI and the Commission cite in particular:

— *AEG*, in which they claim that the Court deemed tantamount to an agreement a practice adopted by a manufacturer who 'with a view to maintaining a high level of prices or to excluding certain modern channels of distribution, refuses to approve distributors who satisfy the qualitative criteria of the system';[56]

— *Ford*, in which they claim that the Court deemed tantamount to an agreement the decision of a car manufacturer not to supply right-hand drive vehicles to German dealers in order to prevent them exporting to the UK market;

— *Bayerische Motorenwerke*, in which they claim that the Court deemed tantamount to an agreement a call made by a car manufacturer to its dealers 'to supply... independent leasing companies only if the vehicles are to be made available to lessees having their seat within the contract territory of the dealer in question'.[57]

64. In those cases also, BAI and the Commission argue, the Court held that there

56 — Paragraph 37.
57 — Paragraph 19.

were agreements within the meaning of Article 85(1) by virtue of the mere fact that the measures taken by the manufacturers formed part 'of the contractual relations between the undertaking and resellers' [58] or 'formed part of a set of continuous business relations governed by a general agreement drawn up in advance', [59] without attaching any significance, for that purpose, to the actual conduct of the resellers and to whether or not systems of monitoring and sanctions were adopted by the manufacturers.

65. In the light of those authorities, the Court of First Instance should therefore have recognised that in the instant case an agreement had been made within the meaning of Article 85(1), it having been established that Bayer's policy designed to prevent or restrict parallel imports formed part of its continuous commercial relations with the wholesalers. Moreover, the appellants submit, the close ties between Bayer and its wholesalers could be treated as equivalent to those found in a selective distribution system, since: for one thing, the company could use only wholesalers who had met the legal requirements relating to the sale of medicines; for another, the wholesalers had to buy from Bayer in order to comply with national regulations requiring them to hold adequate supplies of medicines in stock at all times.

66. Bayer and EFPIA counter that the precedents relied upon by the appellants are not in point since they concern measures adopted by manufacturers in the context of selective distribution systems. Whereas in those cases the relationship between manufacturers and wholesalers were governed by selective distribution agreements, into which the ostensibly unilateral measures adopted by the manufacturers became integrated, in this case there was no distribution agreement between Bayer and the wholesalers, whose relationship was embodied solely in the sales contracts entered into for the quantities of product ordered from time to time. Bayer and EFPIA also observe that the legal requirements to which the wholesalers are subject bear no relation to a selective distribution agreement between manufacturer and wholesalers.

67. I too take the view that the *AEG*, *Ford* and *Bayerische Motorenwerke* judgments do not support the appellants' case since, it seems to me, those authorities have a quite

58 — *AEG*, paragraph 38, and *Ford*, paragraph 21.

59 — *Bayerische Motorenwerke*, paragraph 16.

different scope from that which BAI and the Commission seek to ascribe to them.

68. It is not my view that the Court decided, in those judgments, that the measures adopted by the manufacturers in themselves constituted agreements, within the meaning of Article 85(1), solely because they formed part of continuous commercial relations with the resellers. In reality, the Court did not consider whether the measures adopted constituted agreements in themselves but rather whether they were separate and distinct with respect to the agreements by which the selective distribution systems were established and governed, and hence 'unilateral', or whether on the contrary they were in fact covered by those agreements, of which they effectively came to form an integral part. In other words, the Court's analysis was not directed at establishing whether the adoption of the measures in question was equivalent to the making of agreements within the meaning of Article 85(1), but simply whether those measures had to be taken into account for the purposes of assessing the compatibility with the rules on competition of the selective distribution agreements as operated by the parties in practice. Given that, according to settled case-law, the restraints on competition inherent in selective distribution systems may be justified only under certain conditions, what had to be decided in those cases was whether the agreements in relation to those systems, as operated by the parties, complied with the conditions laid down in the case-law. [60]

69. That point is brought out particularly clearly in *AEG* and *Ford*, where the issue was precisely whether the Commission could use the manufacturer's conduct in operating a selective distribution agreement as the basis for declaring *such an agreement* in 'the way... applied' to be contrary to Article 85(1) (in *AEG*) or that 'as applied' by the manufacturer it did not qualify for an exemption under Article 85(3) of the

60 — In this regard, in *AEG* the Court stated that 'agreements constituting a selective system necessarily affect competition in the common market. However, it has always been recognised in the case-law of the Court that there are legitimate requirements, such as the maintenance of a specialist trade capable of providing specific services as regards high-quality and high-technology products, which may justify a reduction of price competition in favour of competition relating to factors other than price. Systems of selective distribution, in so far as they aim at the attainment of a legitimate goal capable of improving competition in relation to factors other than price, therefore constitute an element of competition which is in conformity with Article 85(1). The limitations inherent in a selective distribution system are however acceptable only on condition that their aim is in fact an improvement in competition in the sense above mentioned. Otherwise they would have no justification inasmuch as their sole effect would be to reduce price competition. So as to guarantee that selective distribution systems may be based on that aim alone and cannot be set up and used with a view to the attainment of objectives which are not in conformity with Community law, the Court specified in its judgment of 25 October 1977 (*Metro* v *Commission* [1977] ECR 1875) that such systems are permissible, provided that resellers are chosen on the basis of objective criteria of a qualitative nature relating to the technical qualifications of the reseller and his staff and the suitability of his trading premises and that such conditions are laid down uniformly for all potential resellers and are not applied in a discriminatory fashion. It follows that the operation of a selective distribution system based on criteria other than those mentioned above constitutes an infringement of Article 85(1). The position is the same where a system which is in principle in conformity with Community law is applied in practice in a manner incompatible therewith' (paragraphs 33 to 36).

Treaty (in *Ford*).[61] That these were the terms of the issue was in fact expressly stated by the Court in *Ford*, where it noted that '[t]he applicants and the Commission all agree[d] that the main issue in [the] case [was] whether the Commission was entitled to refuse an exemption under Article 85(3) of the Treaty for Ford AG's main dealer agreement [that is the *selective distribution agreement*] by reason of the fact that that undertaking had discontinued supplies of right-hand-drive cars to its German distributors'.[62]

70. It was with reference to that issue, therefore, that the Court held, in *AEG* and *Ford*, that the manufacturer's conduct or decision did not 'constitute, on the part of the undertaking, unilateral conduct' or 'a unilateral act', that is to say, a separate and distinct act with respect to the selective distribution agreements, but instead formed part of the 'contractual relations between the undertaking and its dealers'.[63] To this end, the Court noted in particular that the adoption of the measures in question was in effect provided for in the agreements establishing and regulating the selective distribution systems, with the consequence that, by entering into those agreements, the dealers had effectively agreed to be bound by the measures that would be adopted by the manufacturers.

71. In *AEG*, the Court pointed out that 'in the case of the admission of a distributor, approval [was] based on the acceptance, tacit or express, by the contracting parties of the policy pursued by AEG which require[d] inter alia the exclusion from the network of all distributors who [were] qualified for admission but [were] not prepared to adhere to that policy'. The Court held that 'the view must therefore be taken that even refusals of approval [were] acts performed in the context of the contractual relations with authorised distributors inasmuch as their purpose [was] to guarantee observance of the agreements in restraint of competition which form[ed] the basis of contracts between manufacturers and approved distributors'.[64]

61 — *AEG* concerned an action challenging a Commission decision which stated that '*AEG... infringed Article 85(1) of the EEC Treaty by the way in which it ha[d] applied its selective distribution agreement*'; this was based on a finding that 'AEG had improperly applied its selective distribution system by discriminating against certain distributors and by influencing directly or indirectly dealers' resale prices... with a view to excluding in principle certain forms of distribution and maintaining prices at a given level' (paragraph 5 of the judgment, emphasis added). *Ford* concerned a challenge to a decision by which the Commission had, first, stated that 'Ford AG's main dealer agreement restrict[ed] competition and affect[ed] trade between Member States in the sense of Article 85(1) of the Treaty' and, secondly, refused 'to grant an exemption pursuant to Article 85(3) for that agreement *as applied by Ford AG since 1 May 1982, the date on which Ford AG's circular of 27 April 1982 came into force*' — *Ford AG notified the German Ford dealers by a circular dated 27 April 1982 that with effect from 1 May it would no longer accept their orders for right-hand-drive cars* (paragraph 10 of the judgment, emphasis added).

62 — Paragraph 12.

63 — Paragraph 38 of *AEG* and paragraph 21 of *Ford*.

64 — Paragraphs 38 and 39.

72. Likewise, the Court observed in *Ford* 'that agreements which constitute[d] a selective distribution system and which, as in [that] case, [sought] to maintain a specialised trade capable of providing specific services for high-technology products [were] normally concluded in order to govern the distribution of those products for a certain number of years. Because technological developments [were] not always foreseeable over such a period of time, those agreements necessarily ha[d] to leave certain matters to be decided later by the manufacturer.... [It] is precisely such later decisions that were provided for in Schedule 1 to Ford AG's main dealer agreement as far as the models to be delivered under the terms of that agreement [were] concerned'. As in *AEG*, the Court therefore noted that 'admission to the Ford AG dealer network implie[d] acceptance by the contracting parties of the policy pursued by Ford with regard to the models to be delivered to the German market'. [65] On that basis, it therefore concluded that 'the Commission was entitled, during its examination of the main dealer agreement with a view to the possibility of granting an exemption in respect of it under Article 85(3) of the Treaty, to take account of the discontinuance of deliveries of right-hand-drive cars by Ford AG to its German dealers'. [66]

73. Although the Court's analysis in *Bayerische Motorenwerke* does not bring out as clearly the terms of the issue and the reasoning followed, it seems to me that the same logic underlies that judgment, where the Court had to decide 'whether Article 85(1) of the EEC Treaty must be interpreted as meaning that it prohibits a motor vehicle manufacturer which sells its vehicles through a selective distribution system from agreeing with its authorised dealers that they are not to supply vehicles to independent leasing companies where, without granting an option to purchase, those companies make them available to lessees residing or having their seat outside the contract territory of the authorised dealer in question, or from calling on such dealers to act in such a way'. [67]

74. In order to decide that question, the Court referred to the *Ford* judgment and noted that 'the call to refrain from supplying independent leasing companies contained in the circular of 12 February 1988 was made in the context of the contractual relations between BMW and its dealers' and that 'the circular expressly refer[red] to the dealership agreement on numerous occasions'. [68] It may therefore be taken that in *Bayerische Motorenwerke*, too, the Court considered that the adoption of the measure in question was provided for under the selective distribution agreement and that, accordingly, as in the *AEG* and *Ford* cases, the measure adopted by the car

65 — Paragraphs 20 and 21.
66 — Paragraph 26.
67 — Paragraph 14.
68 — Paragraph 17.

manufacturer should be taken into account for the purposes of assessing the compatibility of that agreement, as operated in practice, with the rules on competition. It is in that sense, I believe, that one should therefore read the statement by the Court to the effect that the call by the car manufacturer must 'be regarded as an agreement within the meaning of Article 85(1) of the Treaty'. [69]

75. Contrary to the appellants' contention, therefore, the cases considered above are not authority for the proposition that an agreement within the meaning of Article 85(1) must be regarded as having been made by virtue of the mere fact that a manufacturer adopts measures imposing sales quotas in the context of continuous commercial relations with its distributors. As we have seen, in those cases the issue was not whether agreements within the meaning of Article 85(1) had been made (it was common ground that the contracts governing the selective distribution systems constituted agreements within the meaning of that provision), but only whether the measures adopted by the manufacturers were in some way covered by the selective distribution agreements and were therefore to be taken into consideration for the purposes of assessing the compatibility of those agreements with the rules on competition.

76. The judgments cited by the appellants cannot therefore be relied upon in a case such as this (where the manufacturer and wholesalers have not entered into any distribution agreement) to argue that the existence of an agreement within the meaning of Article 85(1) can be shown simply by establishing that the measures adopted by the manufacturer to prevent or restrict parallel imports are part of its continuous commercial relations with its wholesalers. In the absence of a distribution agreement to which the measures adopted by the manufacturer may be ascribed, an agreement with regard to such measures can therefore be regarded as having been made only if the parties can be shown to have had a common purpose (however expressed).

77. I do not believe, furthermore, that a different conclusion can be reached by taking into consideration the requirements imposed on the wholesalers under the national rules governing the distribution of medicinal products, which — according to BAI and the Commission — effectively make Bayer's relations with its wholesalers equivalent to those obtaining under a selective distribution system. It seems clear to me that for the purposes of finding an agreement within the meaning of Article 85(1), the statutory obligations imposed on wholesalers are quite incapable of making up for the absence of a distribution agreement to which the measures adopted by the manufacturer could be ascribed.

78. In the light of the foregoing considerations, I therefore take the view that the interpretation given by the Court of First

69 — Paragraph 18.

Instance to Article 85(1) of the Treaty is not in conflict with that adopted by the Court of Justice in the cases relied upon by the appellants.

Individual examination of the various grounds of appeal relating to questions of law

79. Following that general discussion of the previous judgments of the Court relied upon by the appellants, I can now turn to deal briefly with the various grounds of appeal raised by them, referring back as far as possible to the preceding discussion.

(i) The requirement for a system of monitoring and sanctions before an agreement on an export ban can be regarded as having been made

80. By the Commission's first ground of appeal and subparagraph (i) of the first part, of BAI's third ground of appeal, the appellants, supported on this point by the Kingdom of Sweden, claim that the Court of First Instance adopted an excessively restrictive interpretation of Article 85(1) of the Treaty by wrongly holding that the existence of a system of monitoring and sanctions constituted a necessary condition for a finding of an agreement on an export ban.

81. In particular, the Commission complains that the Court of First Instance held that an agreement on an export ban exists only if a system of *ex post monitoring* of the actual final destination of the products supplied has been set up and *punitive sanctions* are applied to ensure that products are not exported. In the Commission's view, such an agreement exists also where the manufacturer limits supplies *prospectively* if evidence of exporting activity is found, *thus penalising possible exports ex ante*. With such a system, it was not necessary to prohibit exports directly, since an export ban was imposed indirectly at the time of ordering. The Commission further submits that by adopting an excessively restrictive interpretation of Article 85(1), the Court of First Instance departed from the *Sandoz* judgment, in which an agreement on an export ban was found to exist even in the absence of monitoring and sanctions by the manufacturer.

82. Similar arguments are put forward by BAI, which makes the point that, while it is true that a system of monitoring and sanctions can constitute evidence of the existence of an agreement on an export ban, it is not the case, conversely, that the absence of such a system automatically rules out the existence of an agreement. In support of this statement, BAI relies in

particular on *Sandoz* and *Ford* which, it argues, show that a system of monitoring and sanctions is not in fact necessary for a finding of an agreement on an export ban.

83. Bayer and EFPIA, for their part, first submit that by this ground of appeal the appellants are effectively seeking to challenge the findings of fact made by the Court of First Instance. However, their main objection to this ground is that it is based on a misreading of the judgment, given that the Court of First Instance did not by any means state that a system of monitoring and sanctions is an essential prerequisite for a finding of an agreement on an export ban.

84. For my part, let me say straight away that this ground of appeal if it is not to be held inadmissible, cannot purport to challenge the finding of fact by the Court of First Instance 'that the Commission ha[d] not proved to the requisite legal standard... that Bayer established a systematic monitoring of the actual final destination of the packets of Adalat supplied after the adoption of its new supply policy, or that the applicant applied a policy of threats and sanctions against exporting wholesalers, *or that it made supplies of this product conditional on compliance with the alleged export ban*'.[70]

85. That point made, I must concur with Bayer and EFPIA that the Court of First Instance did not by any means state that an agreement on an export ban can arise only if a system of monitoring and sanctions has been put in place by the manufacturer. It was the Commission itself that contended that in this case the imposition of an export ban 'may be deduced from the following additional factors: (a) a system for detecting exporting wholesalers, and (b) successive reductions in the amounts supplied by Bayer France and Bayer Spain where wholesalers export all or some of the products'.[71] In relation to that point, all the Court of First Instance did, therefore, was to assess the cogency of the Commission's assertions, examining in particular whether, as set out in the contested decision, '[t]he evidence in the Commission's possession show[ed] that supply of the quantities allowed by Bayer France and Bayer Spain [was] subject to compliance with an export ban'[72] and whether 'the conduct of Bayer France and Bayer Spain show[ed] that the two companies ha[d] subjected their wholesalers to a permanent threat of reducing the quantities supplied, a threat which was repeatedly carried out if they did not comply with the export ban'.[73] Contrary, therefore, to what the appellants maintain, in conducting its

70 — Paragraph 109 of the contested judgment; emphasis added.
71 — Recital 156 of the contested decision.
72 — Paragraph 163.
73 — Paragraph 170.

review of these specific matters, the Court of First Instance did not by any means hold, as a general proposition, that the adoption of a system of monitoring and sanctions is a necessary condition for a finding of an agreement on an export ban.

86. It follows that this ground of appeal is based on a misreading of the contested judgment and must therefore be held unfounded.

(ii) The requirement for the manufacturer to require a particular form of conduct on the part of distributors or to seek to obtain their compliance with its policy designed to prevent parallel imports before an agreement on an export ban can be regarded as having been made

87. By the Commission's second ground of appeal and subparagraph (ii) of the first part of BAI's third ground of appeal, the appellants claim that the Court of First Instance adopted an excessively restrictive interpretation of Article 85(1) of the Treaty by wrongly holding that an agreement on an export ban can be regarded as having been made only if the manufacturer requires a particular form of conduct on the part of wholesalers or seeks to obtain their compliance with its policy designed to prevent parallel imports.

88. In particular, the Commission submits that by adopting this interpretation the Court of First Instance departed from the *AEG* and *Ford* judgments, in which the Court of Justice did not look at whether the manufacturers had required a particular form of conduct on the part of the resellers or had sought to obtain their acquiescence in the measures adopted. The Commission further submits that the Court of First Instance failed to consider that in this case the wholesalers were well aware that, by its policy, Bayer was obliging them to limit their orders of Adalat to domestic market requirements only.

89. Similarly, citing *Sandoz* and *Ford* in support, BAI submits that an agreement within the meaning of Article 85(1) must be held to exist by virtue of the mere fact that the wholesalers continue to order from a manufacturer that has evinced its intention to prevent exports, since by so doing they are de facto accepting the manufacturer's policy.

90. Bayer and EFPIA, for their part, submit first that the ground of appeal is inadmissible, since, they claim, it purports to challenge findings of fact made by the Court of First Instance in the contested judgment. In any event, they argue that the ground of appeal should be dismissed because the Court of First Instance did not state, as a general proposition, that an agreement on an export ban can be held to exist only if the manufacturer requires a particular form of conduct on the part of wholesalers or seeks to obtain their com-

pliance with its policy designed to prevent parallel imports. Bayer and EFPIA submit that the present case differs from *Sandoz*, *AEG* and *Ford*, and consequently they deny that the Court of First Instance departed from the precedent established by the Court of Justice in those cases.

91. For my part, I would begin by observing that this ground of appeal, if it is not to be held inadmissible, cannot purport to challenge the finding of fact by the Court of First Instance that 'there is nothing in the documents before the Court to show that Bayer France or Bayer Spain required... on the part of the wholesalers... *compliance with a certain manner of placing orders*'. [74] The Commission cannot therefore argue that Bayer, with its policy, in effect required a change in the way wholesalers placed orders, by intimating to them that they must restrict themselves to ordering for their domestic markets only.

92. That point made, I must, so far as concerns the substance of the argument, concur with Bayer and EFPIA that the Court of First Instance did not by any means hold that an agreement on an export ban can be regarded as having been made only if the manufacturer requires a particular form of conduct on the part of wholesalers or seeks to obtain their compliance with its policy designed to prevent parallel imports. It was the Commission that maintained, in the contested decision, that Bayer France and Bayer Spain had imposed an 'export ban' on the wholesalers, in other words that they had required them not to export the Adalat packets supplied to them. The Court of First Instance therefore did no more than review the validity of the Commission's assertions.

93. Moreover, contrary to what the appellants maintain, I do not believe that by inquiring into whether Bayer had sought anything in return from its wholesalers the Court of First Instance departed from the precedents laid down by the Court of Justice.

94. As I stated above in relation to the *Sandoz* judgment (paragraphs 55 to 62), I believe that an offer or a requirement by the manufacturer — however expressed, even implicitly — is always necessary in order for an agreement to be regarded as having been made by way of tacit acceptance on the part of the wholesalers. Given therefore that the Commission has sought to show the existence of the agreement complained of by relying on the whole-

74 — Paragraph 120 of the contested judgment; emphasis added. In the following paragraph 121, the Court of First Instance added that the Commission had 'not even claimed that Bayer sought to get the wholesalers to change their way of formulating orders'.

salers' 'implicit acquiescence in the export ban' imposed by Bayer,[75] I take the view that the Court of First Instance was right to inquire into whether Bayer sought anything in return from its wholesalers.

95. However, as far as the *AEG* and *Ford* judgments are concerned, I believe I have amply demonstrated that those decisions are not in point in this case, since the sales quota measures adopted by Bayer were not ascribable to any distribution agreement entered into with the wholesalers (see paragraphs 67 to 78).

96. In the light of those considerations, I therefore conclude that this ground of appeal must be dismissed.

(iii) The burden of proof

97. By its second ground of appeal, BAI submits that the Court of First Instance erred in law by imposing on the Commission the entire burden of proof in relation to the existence of an agreement within the meaning of Article 85(1) of the Treaty. By so doing, the Court of First Instance ignored the principle laid down by the Court of Justice in *Anic*,[76] which held that if the Commission adduces prima facie evidence of an agreement the onus then lies on the undertaking concerned to prove the absence of common intentions.

98. In the instant case, according to BAI, there was prima facie evidence of an agreement between Bayer and the wholesalers consisting, on the one hand, in the fact that at various meetings with the wholesalers Bayer had expressed its intention to prevent parallel imports by introducing sales quotas; and, on the other hand, in the fact that, following initial disagreements and tough negotiations, the wholesalers had effectively accepted the quotas by making do with lower purchases of Adalat. In the light of those facts, which were established by the Commission and not disputed by Bayer, the Court of First Instance should therefore have imposed on Bayer the onus of proving the absence of a concurrence of wills.

99. Bayer and EFPIA object to the admissibility of this ground of appeal also, arguing that BAI is in effect calling into question the findings of fact made by the Court of First Instance regarding whether or not the existence of an agreement was proven. As to the merits, they submit that the *Anic* judgment does not support the appellant's argument since there, unlike the present case, the existence of an agreement had been proved. In that case, all that the Court

75 — Recital 176 of the contested decision.

76 — Case C-49/92 P *Commission* v *Anic* [1999] ECR I-4125, paragraph 96.

of Justice had decided was that once it had been shown that an agreement within the meaning of Article 85(1) had been made in the course of a meeting of competing undertakings, an undertaking that was present at the meeting can assert that it did not intend to participate in the operation of the agreement only if it can prove it.

100. I take the view that this ground of appeal is admissible but unfounded.

101. On the question of admissibility, I would point out that BAI disputed *as a matter of law* the allocation of the burden of proof on which the contested judgment is based. Contrary to what Bayer and EFPIA have argued, BAI did not question the facts found by the Court of First Instance, but merely claimed that if those facts had been analysed in the light of a different rule as to the allocation of the burden of proof, the legal conclusion to be drawn concerning the existence of an agreement within the meaning of Article 85(1) would have been the opposite of that arrived at by the Court of First Instance.

102. However, I believe this ground of appeal to be unfounded on the merits, in that the Court of First Instance correctly applied the principle according to which '[w]here there is a dispute as to the existence of an infringement of the competition rules, it is incumbent on the Commission to prove the infringements which it has found and to adduce evidence capable of demonstrating to the requisite legal standard the existence of circumstances constituting an infringement'.[77] I do not think that the Court of Justice overturned that fundamental principle in *Anic*, by requiring the Commission only to adduce prima facie evidence of an agreement.

103. As rightly observed by Bayer and EFPIA, in that case the Commission had fully proved that in the course of certain meetings between competing undertakings 'price initiatives had been decided on, planned and monitored',[78] and thus that anti-competitive agreements contrary to Article 85(1) of the Treaty had been entered into. It was only in the presence of such proof, therefore, that the Court stated that if one of the undertakings that was at those meetings wished to assert that it had not subscribed to the price initiatives agreed there it would have to prove that assertion.

77 — *Anic*, paragraph 86.
78 — *Anic*, paragraph 96.

104. In the light of the foregoing considerations, I therefore take the view that this ground of appeal must be held unfounded.

(iv) The lack of correspondence between the stated intention and the actual intention of the wholesalers

105. By its fourth ground of appeal, the Commission, supported by EAEPC, submits that the Court of First Instance erred in law by having regard not to the stated intention of the wholesalers (to order for domestic market requirements only) but to their actual intention (to order for export purposes as well). Here the Commission relies on *Sandoz* and *Atochem*,[79] arguing that in those cases the Community judicature did not attach any importance to the actual intention of the undertakings or to any 'mental reservations' they may have had, on the basis that it is only the stated intention of the undertakings concerned that counts for the purposes of the existence of an agreement within the meaning of Article 85(1). In support of that argument, EAEPC also cites the *Courage*[80] judgment as authority for the proposition that an agreement within the meaning of Article 85(1) exists even if one of the parties is forced into it against its will.

106. According to Bayer and EFPIA, this ground of appeal also is inadmissible inasmuch as it effectively calls into question the finding by the Court of First Instance that the distributors, by their conduct in relation to placing of orders and by their efforts to obtain greater quantities of product, did not give their express or implied consent to an export ban.[81] As to the merits, Bayer adds that only if an 'explicit statement of intention' had been made would the 'stated intention' count and any 'mental reservation' not be taken into consideration. If instead, as here, it was a case of 'implicit statements of intention', then only the 'actual intention' as manifested by the conduct of the party concerned, should be taken into account. EFPIA, for its part, merely asserts that *Sandoz* and *Atochem* are not in point because they concern circumstances different from those here.

107. I would state, first, this ground of appeal is not inadmissible, since seeking to challenge not the findings of fact made by the Court of First Instance but rather the legal significance that that Court attached to the wholesalers' actual intention in the presence of a contrary stated intention.

79 — Case T-3/89 [1991] ECR II-1177.

80 — Case C-453/99 [2001] ECR I-6297.

81 — Bayer cites in particular paragraphs 151 to 153 of the contested judgment.

108. However, the ground of appeal appears to me to be unfounded inasmuch as it is predicated on the false assumption that in this case there was a 'stated intention' on the part of the wholesalers to enter into the agreement complained of (regarding Bayer's alleged export ban), as opposed to a contrary 'actual intention' or, in other words, a 'mental reservation'. This assumption seems to me to be contradicted by the finding of fact made by the Court of First Instance (which is not open to challenge here), according to which the documents cited in the contested decision did not show that the wholesalers had expressed to Bayer an intention to confine themselves in future to ordering only such volumes of Adalat as were strictly necessary to cover domestic requirements, thereby binding themselves to observance of Bayer's alleged export ban.

109. In other words, the Court of First Instance found that it was not proven in this case that the wholesalers had in any way 'stated' to Bayer that they would order for their domestic markets only or that they would not export the products supplied so as to bring their future conduct into line with an export ban allegedly imposed by Bayer. According to the finding of fact made by the Court of First Instance, there was therefore no 'stated intention' on the part of the wholesalers in relation to the agreement complained of.

110. The fact that, even without 'stating' to Bayer that they would order only for their domestic markets or that they would refrain from exporting, the wholesalers continued to order from Bayer, acquiring volumes of Adalat deemed by Bayer to be in line with their domestic requirements, could certainly be taken into consideration in order to show a 'tacit acceptance', within the meaning of the *Sandoz* judgment, of the export ban allegedly imposed by Bayer. But, as we have seen above (paragraphs 55 to 62), that would presuppose that Bayer had actually requested or required (even implicitly) the wholesalers to order for domestic requirements only or not to export, which, according to the findings of fact made by the Court of First Instance, has not been proved.

111. Since therefore, according to the findings of fact set out in the contested judgment, there was in this case no 'stated intention' on the part of the wholesalers in relation to the agreement complained of, I take the view that the Court of First Instance cannot be criticised for failing to take account of it. It follows that this ground of appeal should, in my opinion, be held unfounded.

(v) The argument that the measures adopted by Bayer were only apparently unilateral

112. By subparagraph (iii) of the first part, and the second part of its third ground of

appeal, BAI essentially claims that the Court of First Instance failed to inquire into whether the disputed measures were only apparently unilateral, given that they were part of continuous commercial relations with the wholesalers. In particular, BAI alleges that the Court of First Instance failed to take into account the fact that, following the introduction of Bayer's new policy, the wholesalers continued to order from Bayer, accepting lower purchase quantities of Adalat.

113. Likewise, by its fifth ground of appeal, the Commission argues that the Court of First Instance misapplied Article 85(1) of the Treaty by requiring proof of the wholesalers' intention in relation to the measures adopted by Bayer, even though those measures were part of continuous commercial relations between the manufacturer and distributors.

114. Since by those grounds the appellants are in effect arguing that the Court of First Instance in various ways departed from the precedents established by the Court of Justice in *Sandoz*, *AEG*, *Ford*, and *Bayerische Motorenwerke*, they must in my opinion be dismissed as unfounded for the reasons set out in the foregoing analysis of those cases.

Concluding considerations

115. Since all the grounds of appeal put forward by BAI and the Commission must, in my opinion, be dismissed as inadmissible or unfounded, I propose that the Court dismiss the appeals in their entirety.

III — Costs

116. In accordance with Article 69(2) and (4) of the Rules of Procedure, and in view of the conclusions I have reached in favour of a dismissal of the appeals, I am of the opinion that BAI and the Commission should be ordered to pay the costs, including those incurred by EFPIA. However, the Kingdom of Sweden and EAEPC should bear their own costs.

IV — Conclusion

In the light of the foregoing considerations, I propose that the Court should:

— dismiss the appeals;

— order BAI and the Commission to bear the costs;

— order the Kingdom of Sweden and EAEPC to bear their own costs.