

## Case T-28/90

### Asia Motor France SA and Others

v

### Commission of the European Communities

(Action for failure to act — Admissibility — No need to give a decision —  
Action for damages — Payment of costs)

Opinion of Judge Edward, acting as Advocate General, delivered on 10 March  
1992 ..... II - 2287  
Judgment of the Court of First Instance, 18 September 1992 ..... II - 2288

#### Summary of the Judgment

1. *Actions against Community institutions for failure to act — Natural or legal persons — Actionable omissions — Failure to send the originator of a complaint alleging infringement of the competition rules a provisional communication under Article 6 of Regulation No 99/63 (EEC Treaty, Art. 175, third para.; Commission Regulation No 99/63, Art. 6)*
2. *Actions against Community institutions for failure to act — Failure to act remedied after the action was brought — Subject-matter of the application no longer in existence — No need to give a decision (EEC Treaty, Arts 175 and 176)*
3. *Actions for annulment — Actionable measures — Concept — Measures having adverse effect — Administrative procedure applying the competition rules — Communications provided for in Article 6 of Regulation No 99/63 — Excluded (EEC Treaty, Arts 173 and 189; Council Regulation No 17, Art. 3; Commission Regulation No 99/63, Art. 6)*
4. *Procedure — Subject-matter of the proceedings — Modification during the proceedings — Prohibited (Rules of Procedure of the Court of First Instance, Art. 48(2))*

1. An undertaking which has lodged a complaint with the Commission alleging that it is the victim of practices of other undertakings in breach of the Treaty rules on competition is entitled, on the expiry of a reasonable period following the lodging of the complaint, to obtain from the Commission a provisional communication under Article 6 of Regulation No 99/63 and hence if, in spite of a letter before action, no such communication is sent to it, the undertaking may bring an action for failure to act under the third paragraph of Article 175 of the Treaty as the addressee of an act other than a recommendation or an opinion.
 

adopted after the action was brought but before judgment, a declaration by the Court of Justice or by the Court of First Instance to the effect that there was a failure to act can no longer bring about the consequences prescribed by Article 176 of the Treaty. It follows that in such a case, as in cases where the defendant institution has responded within a period of two months after being called upon to act, the subject-matter of the action has ceased to exist and hence there is no need to give a decision.
2. The remedy provided for in Article 175 of the Treaty is founded on the premiss that the unlawful inaction on the part of the Commission enables the other institutions and the Member States and, in certain circumstances, private persons, to bring the matter before the Court of Justice or the Court of First Instance in order to obtain a declaration that the failure to act is contrary to the Treaty, in so far as it has not been repaired by the institution concerned. The effect of that declaration, under Article 176, is that the defendant institution is required to take the necessary measures to comply with the judgment of the Court of Justice or of the Court of First Instance holding that the institution has failed to act, without prejudice to any actions to establish non-contractual liability to which the aforesaid declaration may give rise.
3. Communications by which the Commission rules provisionally, under the conditions set out in Article 6 of Regulation No 99/63, on a complaint referred to it under Article 3 of Regulation No 17 are not in the nature of decisions capable of having adverse effects within the meaning of Article 189 of the Treaty, and are not therefore open to challenge by means of an action for annulment on the basis of Article 173 of the Treaty.
4. Whilst Article 48(2) of the Rules of Procedure of the Court of First Instance authorizes, in certain circumstances, new pleas in law to be introduced in the course of proceedings, that provision cannot be interpreted as authorizing applicants to bring new claims before the Community judicature and thereby to modify the subject-matter of the proceedings, for instance by transforming an application for failure to act into an application for annulment.

Where the act whose absence constitutes the subject-matter of the proceedings was