JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)
10 July 1990 *

In Case T-64/89,

Automec Srl, whose registered office is at Lancenigo di Villorba (Italy), represented by Giuseppe Celona, of the Milan Bar, and Piero M. Ferrari, of the Rome Bar, with an address for service in Luxembourg at the Chambers of Georges Margue, 20 rue Philippe-II,

applicant,

v

Commission of the European Communities, represented by Enrico Traversa, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of its Legal Department, Wagner Centre, Kirchberg,

defendant,

APPLICATION for a declaration that a letter of the Commission of 30 November 1988 is void

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES
(First Chamber)

composed of: J. L. Cruz Vilaça, President, H. Kirschner, R. Schintgen, R. García-Valdecasas and K. Lenaerts, Judges,

Registrar: H. Jung

* Language of the case: Italian.

having regard to the written procedure and further to the hearing on 6 March 1990,

gives the following

Judgment

The factual background to the application

1 The applicant is a private limited company governed by Italian law, whose registered office is at Lancenigo di Villorba in the province of Treviso. In 1960 it entered into a dealership agreement with BMW Italia SpA (hereinafter referred to as 'BMW Italia') for the distribution of BMW vehicles in the city and province of Treviso. By letter of 20 May 1983, BMW Italia informed the applicant of its intention not to renew that contract, which was due to expire on 31 December 1984. The applicant brought proceedings before the Tribunale di Milano (District Court, Milan), in which it sought an order that BMW Italia should continue the contractual relationship. The Tribunale dismissed that action, and the applicant appealed to the Corte d'Appello (Court of Appeal), Milan. BMW Italia, in turn, brought two actions before the Tribunale di Treviso, in which it sought to prevent the applicant from using BMW's registered trade marks in order to advertise vehicles which were parallel imports. In both cases, BMW Italia's actions were dismissed.

2 On 25 January 1988, the applicant made application to the Commission under Article 3(2) of Regulation No 17 of 6 February 1962, first regulation implementing Articles 85 and 86 of the Treaty (Official Journal, English Special Edition 1959-62, p. 87, hereinafter referred to as 'Regulation No 17'). In support of that application, it claimed that the conduct of BMW Italia and its German parent company BMW AG constituted an infringement of Article 85 of the EEC Treaty. BMW's distribution system, which was approved for the Federal Republic of Germany in Commission Decision 75/73/EEC of 13 December 1974 relating to a proceeding under Article 85 of the EEC Treaty (Official Journal 1975 L 29, p. 1), is — the applicant claims — a selective distribution system. The applicant considers itself to meet the required qualitative criteria and claims that BMW Italia is not entitled to refuse to supply it with BMW vehicles and spare parts or to prevent it from using BMW trade marks. On the contrary, in accordance with the judgment of the Court of Justice in Case 75/84 *Metro SB-Großmärkte GmbH & Co. KG* v

Commission [1986] ECR 3021, especially at p. 3091, BMW Italia is obliged to accept the applicant as its authorized distributor.

3 It therefore considers that BMW has a duty to:

(i) meet orders for vehicles and spare parts forwarded by the applicant, at the prices and on the terms applicable to dealers; and

(ii) authorize the applicant to use the BMW trade marks in so far as is necessary for normal information of the public and in accordance with customary practice in the motor trade.

4 The applicant therefore requested the Commission to take a decision ordering BMW Italia and BMW AG to bring the alleged infringement to an end and to comply with the measures set out above and with such other measures as the Commission might deem necessary or appropriate.

5 By letter of 1 September 1988, the applicant provided the Commission with further particulars of BMW's alleged boycott.

6 On 30 November 1988, the Commission sent the applicant a registered letter signed by Mr Temple Lang, Director in the Directorate-General for Competition. That letter, which was received by the applicant on 10 December 1988, was couched in the following terms:

'I refer to the abovementioned application and to the various telephone conversations which your lawyer, Mr Ferrari, has had with my colleagues, Mr Stöver and Mr Locchi. I regret to inform you that the Commission has no power in this case to adopt a decision to the effect which you desire on the basis of the information received.

Your company refers to the contract concluded with BMW Italia, which entered into effect in 1960: that contract was terminated by BMW with effect from 31

December 1984, and you do not claim that BMW acted contrary to the terms of the contract.

However, on the strength of the fact that BMW has set up a selective distribution system in Italy, you requested the Commission to adopt a decision against BMW for an infringement of Article 85 of the EEC Treaty, ordering it to resume deliveries to your undertaking and to allow you to use the BMW trade mark, as it does for the three other distributors in the province of Treviso.

In short, I gather that your company is complaining that, owing to imposed prices and the obligation of complying, as you have always done, with the investment, advertising and distribution conditions laid down by BMW, your company has not been able to implement an independent economic policy of sufficient dynamism to maintain the volume of sales at the level demanded by BMW.

Although such circumstances may be taken into consideration by the ordinary national courts in order to determine what damage you have suffered, the Commission cannot rely on them in order to oblige BMW to resume deliveries to your undertaking.

Furthermore, the Community rules on competition, as they apply to the market in cars, were modified with effect from 1 July 1985 following the adoption of Regulation (EEC) No 123/85. The various European motor vehicle manufacturers appear to have amended their respective distribution contracts to comply with that regulation. There is nothing in the information available to suggest that BMW Italia has not in turn taken steps to ensure that its own distribution network complies with the aforementioned Community rules on competition.'

Procedure

7 This action for the annulment of the decision which the applicant claims is contained in the abovementioned letter was brought by an application lodged at the Registry of the Court of Justice on 17 February 1989. The applicant relies on seven submissions in support of its claims. It maintains, first, that the Commission

has infringed Article 3(2)(b) of Regulation No 17 and, secondly, that it has infringed Article 155 of the EEC Treaty. In the words of its own notice 85/C 17/03 concerning Regulation (EEC) No 123/85 (Official Journal 1985 C 17, p. 4), the Commission should have examined the application 'with all due diligence' instead of 'sweeping it quickly under the carpet'. Thirdly, the applicant claims that the Commission infringed Article 1 of Regulation (EEC) No 123/85 of 12 December 1984 on the application of Article 85(3) of the Treaty to certain categories of motor-vehicle distribution and servicing agreements (Official Journal 1985 L 15, p. 16) inasmuch as that regulation does not apply to the selective distribution system operated by BMW. Fourthly, the applicant alleges that the grounds on which the decision was based were not sufficiently stated and that the decision itself was based on mere assumptions as far as BMW's conduct was concerned. It adds, fifthly, that the Commission, which appears to be concerned solely with 'not incommoding BMW', misused its powers. Sixthly, it alleges that, if Regulation No 123/85 had been applicable, the Commission should, in accordance with Article 10 thereof, have withdrawn the benefit of its application to the distribution system set up by BMW. Seventhly, and in the alternative, the applicant contests the validity of Regulation No 123/85. It claims that, in so far as the Commission's attitude is a direct and inevitable consequence of that regulation, the regulation is contrary to Article 85 of the Treaty and thus void.

8 On 26 July 1989, after the application had been lodged, the Commission sent the applicant a second registered letter signed, this time, by the Director-General for Competition. In that letter, the Commission explained that the applicant had misinterpreted the previous letter of 30 November 1988. The Commission had not intended, by that first letter, to close the file. It had merely expressed the opinion that the dispute between the applicant and BMW Italia was a matter, first and foremost, for the ordinary Italian courts. The letter did not, therefore, embody the Commission's final position. This was clear from the fact that nowhere had the Commission made any reference to Article 6 of Regulation No 99/63/EEC of the Commission of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (Official Journal, English Special Edition 1963-64, p. 47).

9 In that same letter of 26 July 1989, the Commission formally informed the applicant that it did not intend to grant the application of 25 January 1988. That information was given 'pursuant to and for the purposes of' Article 6 of Regu-

lation No 99/63. The Commission invited the applicant to submit its comments in that regard within a period of two months. It added that the second letter annulled any effects which the previous letter of 30 November 1988 might have had.

10 On 27 July 1989, one day after it had sent the applicant the second registered letter, the Commission raised a preliminary objection in accordance with Article 91(1) of the Rules of Procedure of the Court, without lodging a defence on the substance of the application. It requested the Court of Justice to rule on that issue without examining the substance of the case. In its submission, the subject-matter of the proceedings had ceased to exist as a result of the letter of 26 July 1989 and the applicant should withdraw its action. The Commission requested that, if the applicant maintained its submissions, the Court should rule that it was unnecessary to give a decision on the application and order the parties to pay their own costs pursuant to Article 69(5) of the Rules of Procedure of the Court.

11 The applicant submitted observations to the effect that the preliminary objection should be dismissed. It considered that, since the Commission had not changed its decision to close the case, the subject-matter of the proceedings had not ceased to exist as a result of the second letter.

12 By a letter of 4 October 1989, in parallel with the procedure before the Court of Justice and in accordance with Article 6 of Regulation No 99/63, the applicant submitted to the Commission its comments on the letter of 26 July 1989 and supplied certain details concerning the purpose and scope of its application.

13 By order of 15 November 1989, the Court of Justice referred the case to the Court of First Instance pursuant to Article 14 of the Council Decision of 24 October 1988 establishing a Court of First Instance of the European Communities.

14 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (First Chamber) decided to grant the Commission's request that it should rule on the preliminary objection without examining the substance of the case.

15 Counsel for the applicant and the Commission presented oral argument and replied to the questions put by the Court at the hearing on 6 March 1990.

16 At the hearing, the Commission's representative sought and obtained permission to lodge with the Registrar a copy of a letter dated 28 February 1990 in which Sir Leon Brittan, Vice-President of the Commission responsible for competition, informed the applicant in the name of the Commission that the Commission had decided to reject the application submitted on 25 January 1988. The reasons given for that decision may be summarized as follows.

17 The Commission considers that it cannot grant the first part of the application, that the Commission should order BMW to resume deliveries to the applicant and authorize it to use its trade mark, because it does not have the power to make such orders in connection with an infringement of Article 85(1) of the Treaty. The Commission observes that such measures may in certain cases be justified in the context of the application of Article 86 of the Treaty, but that in this case the applicant has provided no evidence from which a breach of that article can be inferred.

18 With regard to the second part of the application, to the effect, more generally, that the Commission should order BMW Italia to bring the infringement of Article 85 alleged by the applicant to an end, the Commission has reached the conclusion that, in this case, there is not a sufficient Community interest to justify going any further with the case. It considers that the applicant can submit the question whether BMW Italia's distribution system is compatible with Article 85 to the national courts before which it has already brought proceedings relating to the termination of the dealership agreement by which it was previously bound to that undertaking. It adds that, unlike the Commission, the national courts may be able to order BMW Italia to make good any damage suffered by the applicant as a result of BMW Italia's refusal to sell to it.

19 The applicant, which denies that that letter constitutes a new decision, has claimed that it can be considered when the substance of the present dispute is examined. It considers that it may, in accordance with the case-law of the Court of Justice, amend its conclusions in order to apply, as it had already announced that it would

in its observations on the preliminary objection, for the annulment of that confirmation of the contested decision.

20 The applicant claims that the Court should:

(1) declare the application admissible;

(2) declare the individual decision of the Competition Directorate of 30 November 1988 void, together with those parts of Regulation No 123/85 which constitute the binding basis for that decision;

(3) declare that, pursuant to Article 176 of the Treaty, the Commission is required to take the measures necessary to comply with the judgment to be delivered;

(4) order the Commission to pay damages;

(5) order the Commission to pay the costs.

21 The Commission contends that the Court should:

(1) declare that it is unnecessary to give a decision on the application because the subject-matter of the proceedings has ceased to exist;

(2) order the parties to pay their own costs pursuant to Article 69(5) of the Rules of Procedure of the Court of Justice.

22 At the hearing the Commission added a conclusion to the effect that, if the Court were to decide to apply Article 92(2) of the Rules of Procedure in order to dismiss the application as inadmissible, the applicant should be ordered to pay the costs.

23 As regards the preliminary objection raised by the Commission, the applicant contends that the Court should:

(1) dismiss the preliminary objection raised by the defendant and examine the substance of the case;

(2) order the Commission to pay the costs in respect of the preliminary objection.

24 At the end of the hearing, the President declared the oral procedure on the preliminary objection closed.

Admissibility of the application for annulment

25 The Commission makes two submissions in support of its preliminary objection. First, it claims that the contested communication, the letter of 30 November 1988, cannot be regarded as a decision of the institution. Secondly, it states that the letters of 26 July 1989 and 28 February 1990 annulled the effects of the contested letter — if, indeed, that letter produced any legally relevant effect — and that they therefore rendered the action devoid of purpose.

26 In order to show that a definitive position, that is to say the institution's final decision, was not taken in the letter of 30 November 1988, the Commission refers to the contents of the letter, to the fact that it was not signed by the competent Director-General or Member of the Commission but by a director, and, above all, to the absence of any reference to Article 6 of Regulation No 99/63. The Commission stresses that that article explicitly lays down the procedure which it is to follow when it considers that it is unable to grant an application made under Article 3 of Regulation No 17. In contrast to a letter written on the basis of Article 6, the contested letter was intended, the Commission claims, solely to inform the applicant of the initial reaction of its services.

27 At the hearing, the Commission's representative enlarged on those arguments, adding that the contested letter formed part of the correspondence normally exchanged between the Commission and complainant undertakings before the communication provided for in Article 6 of Regulation No 99/63 is sent. He

added that undertakings are as familiar with that consistent practice as they are with the provisions of Article 6. The Commission considers that undertakings cannot, therefore, be under a misapprehension as to the preliminary nature of a position not preceded by the procedure provided for in Article 6. The Commission acknowledges that the letter contains a number of terms which might give rise to certain doubts as to the provisional nature of its contents, but considers that their effect is cancelled out by other phrases of a less definitive nature and that the letter, when viewed in its context, which must be defined by reference to Article 6 of Regulation No 99/63, does not have the appearance of a decision.

28 The Commission further considers that the applicant has not shown that the contested letter has produced any direct legal effects to its detriment. In particular, it claims that the applicant is wrong in maintaining that the letter, in so far as it expresses the Commission's refusal to take the requested steps against BMW, has deprived it of its principal source of income. First, the only refusal made to the applicant was that contained in the letter of 28 February 1990. Secondly, it was not the refusal of 28 February 1990 but BMW's decision to terminate its contractual relationship with the applicant which deprived it of a source of income.

29 In the Commission's submission, the procedure for the rejection of the complaint was not initiated until later, with the letter of 26 July 1989. That letter, duly signed by the Director-General, constituted the preliminary notification provided for in Article 6 of Regulation No 99/63. The final decision to reject the complaint was taken only in the letter of 28 February 1990, signed by the Member of the Commission responsible for competition.

30 In support of its second submission, the Commission refers to two judgments given by the Court of Justice on 5 October 1988 in connection with provisional anti-dumping duties (Case 56/85 *Brother Industries Ltd* v *Commission* [1988] ECR 5655 and Joined Cases 294/86 and 77/87 *Technointorg* v *Commission and Council* [1988] ECR 6077). The Commission considers that the reasoning followed by the Court of Justice in those two cases, to the effect that the legal effects of a provisional measure disappear when it is replaced by a definitive measure, should apply *a fortiori* in this case.

31 At the hearing, the Commission stressed that its conclusion to the effect that the Court should declare that it is unnecessary to give a decision on the application was made in a spirit of compromise and strict compliance with the procedural rules. It considers that it could have pleaded, *in limine*, that the application was inadmissible on the ground that it was obvious that the contested measure was not final. It refrained from doing so in order to allow the Court to order the parties to pay their own costs pursuant to Article 69(5) of the Rules of Procedure of the Court of Justice and thus avoid ordering the applicant to pay the costs.

32 It was only in the alternative that the Commission raised the possibility at the hearing that the Court should apply Article 92(2) of the Rules of Procedure of the Court of Justice and dismiss the application as inadmissible because the contested measure was of a purely preparatory nature.

33 The applicant considers that the contested letter constitutes a final rejection of its application. It maintains that the subject-matter of the proceedings could not have ceased to exist as a result either of the letter of 26 July 1989 or of the letter signed by the competent Member of the Commission on 28 February 1990.

34 In answer to the Commission's first submission, the applicant claims that the Commission made it clear in its letter of 30 November 1988 that it would not even envisage the hypothesis that BMW might have infringed the rules on competition in the Treaty.

35 In the applicant's submission, the fact that the contested letter was signed by a director of the Commission was not enough to show clearly that the signatory had no power to take a decision in that regard or that the letter could therefore not be regarded as a measure against which proceedings could be brought. In support of that argument, it maintains that it is normal for the Commission to exercise its powers by delegating the authority to sign, and that the Court of Justice has recognized that practice. It refers to the judgment of the Court of Justice in Case 65/83 *Erdini* v *Council* [1984] ECR 211, in which an action contesting a document which, in view of the status of its author, could be regarded by the recipient as a decision of the competent authority was held to be admissible.

36 The applicant further observes that whilst failure to comply with Article 6 of Regulation No 99/63 constitutes a defect in the contested measure, that irregularity is neither sufficiently serious nor sufficiently obvious for the measure to be treated as non-existent.

37 The applicant considers that the question whether the contested letter constituted a definitive measure or merely an 'initial reaction' of the Commission is part of the substance of the case. That is also true, it considers, of the other question which in its opinion falls to be examined, namely whether the Commission could still modify either its decision to reject the complaint or the reasons on which that decision was based once that measure had become final. In that regard, it refers to the case-law of the Italian Consiglio di Stato (State Council), which answers that question in the negative and does not allow the administration to modify or add to the grounds on which an administrative measure is based unless it does so within a period which is short and reasonable and does not hinder any appeal.

38 With regard to the Commission's second submission, the applicant claims that the letter of 26 July 1989 did not cancel the contested decision by opening the procedure for investigating the claim that BMW had infringed the Community rules, but confirmed it, even though the reasons on which it was based were different. In the applicant's submission, the letter of 28 February 1990 signed by Sir Leon Brittan again constitutes not a new decision but a confirmation of the contested decision.

39 The applicant considers that letter to be a new fact which entitles it, in accordance with the case-law of the Court of Justice, to amend its conclusions and submissions in order to seek the annulment of that letter in the present proceedings. It adds that it would be contrary to the proper administration of justice and to the requirements of procedural economy to oblige it to bring a new application. It further claims that the case-law of the Court of Justice precludes the bringing of an action against a purely confirmatory measure alone. It repeated those arguments at the hearing.

40 Referring to the case-law of the Italian Consiglio di Stato in that regard, the applicant maintains that the cause of the dispute could not have been removed by the two acts on which the Commission relies unless the Commission had granted the applicant's requests in their entirety. It considers that the Court of Justice

applied the same principles in its judgment in Case 383/87 *Commission* v *Council* [1988] ECR 4051, especially at p. 4064.

41 It must be pointed out that, under Article 92(2) of the Rules of Procedure of the Court of Justice, which apply *mutatis mutandis* to the Court of First Instance by virtue of the third paragraph of Article 11 of the Council Decision of 24 October 1988, cited above, the Court of First Instance may at any time of its own motion consider whether there exists an absolute bar to proceeding with a case. The existence of the measure whose annulment is sought under Article 173 of the Treaty is an essential requirement for admissibility, the absence of which has been considered by the Court of Justice of its own motion on a number of occasions (order in Case 248/86 *Brüggemann* v *Economic and Social Committee* [1987] ECR 3963 and judgment in Case 78/85 *Group of the European Right* v *Parliament* [1986] ECR 1753, at p. 1757).

42 As the Court of Justice has consistently held, any measure the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position is an act or decision against which an action for annulment may be brought under Article 173. More specifically, in the case of acts or decisions adopted by a procedure involving several stages, in particular where they are the culmination of an internal procedure, an act is open to review only if it is a measure definitively laying down the position of the institution on the conclusion of that procedure, and not a provisional measure intended to pave the way for that final decision (judgment in Case 60/81 *IBM* v *Commission* [1981] ECR 2639, at p. 2651, paragraph 8 et seq.). It follows that the fact that the contested act is a preparatory measure constitutes one of the barriers to the admissibility of an action for annulment which the Court may consider of its own motion, as the Court of Justice acknowledged in its judgment in Case 346/87 *Bossi* v *Commission* [1989] ECR 303, especially at p. 332 et seq.

43 In order to determine the legal nature of the contested letter, it is necessary to consider it in the context of the procedure for examining applications made under Article 3(2) of Regulation No 17, to which Article 6 of Regulation No 99/63 refers.

44 That procedure applies to the complaint submitted by the applicant not only in so far as it seeks a decision of the Commission obliging BMW to bring the infringements alleged by the applicant to an end but also in so far as it must be

interpreted as seeking the withdrawal of the benefit of the block exemption provided for in Regulation No 123/85 from BMW's distribution system. It is true that the provisions of Regulation No 17, detailed rules for the application of which are laid down in Regulation No 99/63, do not explicitly refer to such a decision of withdrawal. However, Article 7 of Regulation No 19/65/EEC of the Council of 2 March 1965 on application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices (Official Journal, English Special Edition 1965-66, p. 35) provides that block exemptions are withdrawn by an individual decision of the Commission, issued in accordance with Articles 6 and 8 of Regulation No 17. In the procedure leading up to such decisions, Article 19 of Regulation No 17 guarantees the undertakings concerned and other persons showing a sufficient interest the opportunity of being heard by the Commission. Article 6 of Regulation No 99/63 regulates such hearings.

45 Three successive stages must be distinguished in the course of the procedure governed by Article 3(2) of Regulation No 17 and Article 6 of Regulation No 99/63. During the first of those stages, following the submission of the complaint, the Commission collects the information referred to in Article 6 of Regulation No 99/63, on the basis of which it will decide what decision it will take on the complaint. That stage may include *inter alia* an informal exchange of views and information between the Commission and the complainant with a view to clarifying the factual and legal issues with which the complaint is concerned and to allowing the complainant an opportunity to expand on his allegations in the light of any initial reaction from the Commission. Preliminary observations made by Commission officials in the context of informal contacts cannot be regarded as measures open to challenge.

46 In the second stage, the Commission informs the complainant, in the notification prescribed in Article 6 of Regulation No 99/63, of the reasons for which it considers that there are insufficient grounds for granting the application and gives the applicant the opportunity to submit any further comments within a time-limit fixed by the Commission. That notification is similar to the statement of objections provided for in Article 2 of Regulation No 99/63, which is also the result of a preliminary examination of the elements of the case on the basis of which the Commission fixes a time-limit for the undertakings to which it is addressed to make their views known. By the position it occupies in the procedure, therefore, the notification provided for in Article 6 of Regulation No 99/63 is analogous to that statement of objections. It must be added that, as the Court of Justice ruled in its judgment in Case 60/81 *IBM* v *Commission*, cited above, the statement of objections must guarantee the observance of the right to a fair hearing, whereas the notification provided for in Article 6 of Regulation No 99/63 is intended to

defend the procedural rights of the complainants, which are, however, not as far-reaching as the right to a fair hearing of the companies which are the object of the Commission's investigation (judgment in Joined Cases 142/84 and 156/84 *British American Tobacco Company Ltd and R. J. Reynolds Industries Inc.* v *Commission* [1987] ECR 4487, especially at p. 4573). However, it is clear from the judgment in *IBM* v *Commission* that the statement of objections is not a decision but merely a procedural measure preparatory to the final decision. If that is true of the statement of objections, the legal importance of which is greater than that of the notification provided for in Article 6 of Regulation No 99/63, it follows that the latter cannot be treated as a decision either. An application for a declaration that such a notification was void might make it necessary, as in the case of an action against the statement of objections, for the Court of Justice and the Court of First Instance to arrive at a decision on questions on which the Commission had not yet had an opportunity to state its position. As the Court of Justice pointed out in its judgment in *IBM* v *Commission*, the result would be to anticipate the arguments on the substance of the case and confuse different administrative and judicial procedural stages; that would be incompatible with the system of the division of powers between the Commission and the Courts of the European Communities, with the system of remedies laid down by the Treaty and also with the requirements of the sound administration of justice and the proper course of the administrative procedure to be followed by the Commission.

47 In the third stage of the procedure, the Commission takes cognizance of the observations submitted by the complainant. Although Article 6 of Regulation No 99/63 does not explicitly provide for the possibility, this stage may end with a final decision. The Court of Justice has acknowledged on several occasions that the Commission may take the final decision to reject the complaint and close the file. Proceedings may be brought against that final decision (judgments in Case 210/81 *Demo-Studio Schmidt* v *Commission* [1983] ECR 3045, in Case 298/83 *Comité des industries cinématographiques des Communautés européennes* v *Commission* [1985] ECR 1105 and in *British American Tobacco Company Ltd and R. J. Reynolds Industries Inc.* v *Commission*, cited above).

48 In the present case, it is necessary therefore to determine whether the letter of 30 November 1988 falls within the first or the last stage in the procedure for investigating complaints.

49 In order to do so, it is necessary first to analyse the import of the contested letter. That analysis shows that the letter addresses two questions. First, it deals with the

applicant's request that the Commission should take a decision requiring BMW to resume deliveries to, and permit the use of the BMW trade mark by, the applicant. The terms in which the Commission's reaction to that request are couched resemble those of a definitive rejection.

50 The letter states, first, that the Commission has no powers to adopt the measures sought. Admittedly, it does point out that that conclusion is based only on the information provided by the applicant. Nevertheless, the Commission's position as regards its own lack of powers could be interpreted as the definitive outcome of an appraisal of that information in the light of the Community law on competition. That impression of a definitive rejection might be strengthened by the statement that while the applicant's assertions might be taken into consideration by the national courts in an action seeking compensation for the damage allegedly suffered, the Commission could not rely on them in order to oblige BMW to resume deliveries to the applicant. That statement could be interpreted by the applicant as embodying a definitive appraisal in law of the facts which it had reported to the Commission in support of its request that the Commission should oblige BMW to take specific action towards the applicant.

51 It appears possible, moreover, from what the Commission's representative stated at the hearing, that those terms may have already reflected the Commission's final position in that regard; its officials did not feel the need to seek any further information.

52 However, the letter does not only contain observations on the request for specific measures but also deals with the applicant's second, more general, request that the Commission should find that BMW had infringed Article 85 of the Treaty and order it to bring that infringement to an end. It cannot be concluded from the way in which the letter deals with that second, more general, claim that a final decision had been reached on that point. The letter merely draws the applicant's attention briefly to the block exemption which had come into force after the termination of the contract binding it to BMW and to the absence of any information indicating that BMW's distribution system did not comply therewith. On the other hand, it is

clear from the letter that the Commission had not yet completed a legal assessment of that distribution system or of BMW's general conduct towards the applicant.

53 The contested letter, therefore, contains both passages which could suggest that a final decision had been reached as regards the first question, concerning the Commission's powers to adopt the specific measures requested by the applicant, and passages of a provisional nature concerning the second question, regarding the merits of the complaint of an infringement of Article 85 of the Treaty and the action to be taken in response to the applicant's more general request that appropriate steps should be taken to bring that infringement to an end.

54 The juxtaposition of such passages in the letter shows that the Commission had not yet taken a decision on the applicant's complaint; a decision may not, unless it is a partial decision, include both provisional and final assessments. In this case, however, the Commission did not indicate that it intended to split the procedure into two parts and conclude one of those parts immediately, so the possibility of a partial decision may be ruled out.

55 An analysis of the full text of the letter reveals, therefore, that it did not constitute a final answer to the complaint lodged by the applicant, but formed part of the first stage of the procedure for examining complaints, during which there is a preliminary exchange of views. That is clear, first, from the very wording of the letter which, unlike decisions which the Commission has adopted with regard to other complaints, contains no explicit statement that the complaint is rejected and that it has been decided to close the file relating thereto (see Case 210/81 *Demo-Studio Schmidt* v *Commission*, cited above, especially at p. 3049, Case 298/83 *Comité des industries cinématographiques des Communautés européennes* v *Commission*, cited above, especially at p. 1121 and Joined Cases 142/84 and 156/84 *British American Tobacco Company Ltd and R. J. Reynolds Industries Inc.* v *Commission*, cited above, especially at p. 4503 et seq.). Contrary to what the applicant maintained at the hearing, the first paragraph of the contested letter does not constitute the equivalent of such a decision. The language used is less categorical than that of the Commission's decisions in the abovementioned cases.

56 The fact that the letter falls within the first of the three stages of the procedure is confirmed by the fact that it did not fix the time-limit provided for in Article 6 of Regulation No 99/63 for the applicant to submit its comments.

57 The Court of Justice has had occasion to rule on both the content and the effect of decisions of rejection falling within the third stage of the procedure. It has held that such decisions are characterized by the fact that they close the investigation, contain (where appropriate) an assessment of the agreements in question and prevent the applicants from requiring the reopening of the investigation unless they put forward new evidence (Joined Cases 142/84 and 156/84 *British American Tobacco Company Ltd and R. J. Reynolds Industries Inc.* v *Commission*, cited above, especially at p. 4571). It is clear from the above that the import of the contested letter was not of that order, and that the letter did not, therefore, constitute the Commission's final position. Consequently, it does not fall within the third stage of the procedure.

58 This Court therefore finds that the letter of 30 November 1988 constituted a communication of preliminary observations falling within the first stage of the procedure provided for in Article 6 of Regulation No 99/63, which could have no effect on the applicant's procedural rights and which, therefore, cannot be treated as a measure against which an action can be brought.

59 It follows that the Commission's alternative argument that the letter was signed by a director in the Directorate-General for Competition and not by the Director-General or the competent Member of the Commission is immaterial to the determination of this dispute.

60 The same is true of the contrary argument put forward by the applicant based, in particular, on the judgment in Case 65/83 *Erdini* v *Council*, cited above, in which an application by an official for the annulment of a letter which did not come from the competent appointing authority was held to be admissible. It must be pointed out, moreover, that unlike that letter, which had been confirmed by the appointing authority, the letter of 30 November 1988 has not been acknowledged by the Commission to be a decision.

61 In support of its argument that the letter of 30 November 1988 is a decision against which an action may be brought, the applicant also relies on the presumption, expressed in the case-law of the Court of Justice, that acts of Community institutions are valid. According to that case-law, acts of the institutions cannot be deemed to be non-existent unless they exhibit particularly

serious and manifest defects (for example, judgments in Case 15/85 *Consorzio cooperative d'Abruzzo* v *Commission* [1987] ECR 1005, especially at p. 1036, in Joined Cases 15/73 to 33/73, 52/73, 53/73, 57/73 to 109/73, 116/73, 117/73, 123/73, 132/73 and 135/73 to 137/73 *Schots, née Kortner, and Others* v *Council and Commission and Parliament* [1974] ECR 177, especially at p. 191 and in Joined Cases 7/56 and 3/57 to 7/57 *Algera and Others* v *Common Assembly* [1957 and 1958] ECR 39, especially at pp. 60 and 61). The applicant considers that not to be the case as regards the letter which it is contesting.

62 That case-law of the Court of Justice concerns the question whether acts of the Community institutions which are intended to produce legal effects may exceptionally be deemed not to have those effects if they exhibit particularly serious and manifest defects. That question does not, therefore, arise in the present dispute, since the contested letter is not intended to produce legal effects.

63 In reply to a question put by the Court at the hearing, the applicant further claimed that it considered it necessary to bring an action against the letter of 30 November 1988 as a precaution. It stresses that it was obliged to envisage the possibility that the Commission might refrain from taking any further action on its complaint. It considers that, in such an event, the protection of its rights could not be guaranteed by the availability of an action for failure to act, since it was to be feared that the Commission would claim such an action to be inadmissible on the ground that the letter of 30 November 1988 was a decision and that the period within which an action could be brought against it had expired.

64 There is no need, in the present proceedings, to explore the theoretical possibilities of an action for failure to act. In connection with the present action for annulment, it must be observed that the Commission's reaction to the applicant's complaint was ambiguous and could give rise to doubts as to its legal nature. The Court accepts that the applicant was in a state of legal uncertainty as to whether the act of the Commission was a decision and, consequently, as to the form of action through which it could obtain judicial review of the Commission's conduct. However, protection of its rights has been provided by the possibility of seeking a ruling from the Court on whether the communication addressed to it was a decision against which an action could be brought or not. While it is true that such an action must be dismissed as inadmissible in the absence of a decision against which an action can be brought, the Court must, when ruling on costs, take into account the applicant's legal uncertainty as to its position.

65 The application for a declaration that the letter is void, as it is presented in these proceedings, must therefore be dismissed.

66 During the written procedure, the applicant stated that it intended to amend the conclusions in its application in order to seek, in the present proceedings, the annulment of the letter of 28 February 1990, signed by the Member of the Commission responsible for competition. It relied for that purpose on the case-law of the Court of Justice, according to which an act which, during the proceedings, replaces or extends the validity of the contested act must be regarded as a new factor enabling the applicant to amend its pleadings (judgments in Case 14/81 *Alpha Steel Ltd* v *Commission* [1982] ECR 749, especially at p. 763, in Joined Cases 351/85 and 360/85 *Fabrique de fer de Charleroi SA and Another* v *Commission* [1987] ECR 3639, especially at p. 3672 and in Case 103/85 *Stahlwerke Peine-Salzgitter AG* v *Commission* [1988] ECR 4131, especially at p. 4149).

67 At the hearing, the applicant reiterated those arguments. However, it did not explicitly state that it was exercising the legal rights which it considered were available to it, nor did it amend its conclusions, as it had announced that it would, to seek a declaration that the confirming decision contained — in its submission — in the letter of 28 February 1990 was void. The Rules of Procedure contain no provisions governing the procedure for the amendment of a party's conclusions while the action is in progress. It requires, as a general rule, that conclusions should be submitted in the application or in the defence. In the three cases to which the applicant refers, the Court accepted amended conclusions contained in the applicants' replies — submitted, therefore, in writing in a procedural document. In the present case, where the act against which an amendment of the applicant's conclusions might be directed was adopted only a few days before the hearing, it cannot be required that such an amendment must be submitted in a written document. An oral declaration to that effect during the hearing would, in principle, be sufficient. However, it must be stressed that it is the conclusions of the parties — even if submitted orally — which define the subject-matter of the proceedings. Those conclusions must therefore state explicitly and unequivocally what the parties seek. In particular, in an action for annulment, the act whose annulment is sought must be clearly specified. The Court cannot take an implicit reference into consideration, lest its ruling be *ultra petita.* This applies both to conclusions contained in the parties' pleadings and to those submitted orally at the hearing. The applicant did not state at the hearing that it now sought the annulment of any act other than that to which it referred in its written pleadings, namely the letter of 30 November 1988; it must therefore be held that it did not amend its conclusions during the course of the procedure.

68 Although that finding is sufficient to dispose of any doubt as to the tenor of the applicant's conclusions, it is none the less relevant to point out also that, even if the applicant had amended its initial conclusions at the hearing, it would not have been entitled, under the case-law to which it referred in that regard, to extend the subject-matter of the present proceedings to seek a declaration that the letter of 28 February 1990 was void. The rules developed by the Court of Justice in that regard concern situations where an individual decision, whether explicit or implicit, has been replaced by another having the same subject-matter (Case 14/81 *Alpha Steel Ltd* v *Commission* and Case 103/85 *Stahlwerke Peine-Salzgitter AG* v *Commission*, both cited above), or those where the validity of a provision of secondary legislation is extended without affecting the principle which it lays down and which lies at the heart of the dispute (Joined Cases 351/85 and 360/85 *Fabrique de fer de Charleroi SA and Another* v *Commission*, cited above). The feature common to those situations is that they concern actions brought, from the very commencement of the proceedings, against definitive measures producing legal effects, against which an action for annulment is admissible. The extension of the subject-matter of the proceedings allowed by the Court of Justice therefore concerned cases of measures whose nature and essential subject-matter were identical to those referred to in the application.

69 In the present case, however, the letter of 30 November 1988 was only provisional; it did not constitute a definitive measure. It did not, therefore, produce any legal effects which could be replaced, or the validity of which could be extended, by a subsequent decision. It follows that a subsequent measure adopted while the action was in progress cannot be regarded as a new factor enabling the applicant to amend its conclusions without thereby altering the subject-matter of the proceedings. Article 19 of the Statute of the Court of Justice of the European Communities, applicable to procedure before the Court of First Instance under the first paragraph of Article 46 thereof, and Article 38 of the Rules of Procedure of the Court of Justice preclude such an alteration (judgment in Case 232/78 *Commission* v *France* [1979] ECR 2729, especially at p. 2737).

70 It follows that the Court would have had to dismiss the action for annulment brought by the applicant as inadmissible even if it had amended its conclusions to include the letter of 28 February 1990.

71 Since the application is inadmissible, it is not necessary for the Court to rule on whether the subject-matter of the proceedings has ceased to exist as a result of the measures which the Commission has adopted during the course of the proceedings. In accordance with the judgment of the Court of Justice in Case 42/71 *Nordge-*

treide GmbH & Co. KG v *Commission* [1972] ECR 105, especially at p. 108), a case in which, as in the present case, the defendant had contended that the Court should rule that there was no need to give a decision because the subject-matter of the proceedings had ceased to exist, it is enough for the Court to dismiss the application as inadmissible without ruling on whether a decision is necessary.

Admissibility of the claim for damages

72 In support of its claim for damages, the applicant asserts that the Commission's delay in reaching a decision on its complaint and its refusal, essentially, to take that complaint into consideration constitute negligence and led to the applicant's suffering serious damage as a result of the fact that, throughout the period in issue, its requests to be supplied with BMW vehicles and spare parts were unsuccessful.

73 In accordance with Article 19 of the Statute of the Court of Justice of the European Communities and Article 38(1)(c) of the Rules of Procedure of the Court of Justice, the application must contain, *inter alia*, the subject-matter of the dispute and a brief statement of the grounds on which the application is based. In order to meet those requirements, an application seeking compensation for damage caused by a Community institution must state the evidence from which the conduct alleged against the institution by the applicant may be identified, the reasons for which the applicant considers there is a causal link between the conduct and the damage which he claims to have suffered and the nature and extent of that damage. A claim for any unspecified form of damages, however, is not sufficiently concrete and must therefore be regarded as inadmissible (judgment in Case 5/71 *Zuckerfabrik Schöppenstedt* v *Council* [1971] ECR 975, especially at p. 984).

74 Such an infringement of Article 19 of the Statute and Article 38(1)(c) of the Rules of Procedure of the Court of Justice constitutes an absolute bar to proceeding with a case, which the Court may consider at any time of its own motion in accordance with Article 92(2) of the Rules of Procedure (judgment in Case 3/66 *Alfieri* v *Parliament* [1966] ECR 437, especially at p. 447).

75 It must be pointed out that the applicant has not quantified the amount of the damage which it claims to have suffered or stated the factual criteria on the basis of which the nature and extent of that damage might be assessed. It merely alleged

in general and abstract terms in its pleadings that it had suffered 'serious damage' because it was no longer supplied by BMW. It gave no indication of its turnover at the time when it still had a contractual link with BMW, or of the effect which the termination of the distribution contract had on its commercial activities or, in particular, of any changes to its turnover following the lodging of its complaint with the Commission.

76 It is true that the Court of Justice has acknowledged that, in special circumstances, it is not essential to specify the exact extent of the damage in the application and to state the amount of compensation sought. In the present case, however, the applicant has neither established nor even claimed the existence of such circumstances.

77 It follows from the foregoing that the claim for damages submitted by the applicant is also inadmissible. The application must therefore be dismissed in its entirety.

Costs

78 During the written procedure, the Commission contended that the Court should declare that there was no need to give a decision on the application and should order the parties to pay their own costs pursuant to Article 69(5) of the Rules of Procedure of the Court of Justice. At the hearing it also contended, in the alternative and in the event that the Court should decide to dismiss the application as inadmissible pursuant to Article 92(2) of the Rules of Procedure, that the applicant should be ordered to pay the costs in accordance with Article 69(2). Since the application has been dismissed as inadmissible, it must be decided whether the Commission's contention that the applicant should be ordered to pay the costs may be accepted.

79 It must first be observed that, as the Court of Justice has held, the fact that the successful party did not ask for costs until the hearing does not debar the Court from awarding them (judgment in Case 113/77 *NTN Toyo Bearing Company Ltd and Others* v *Council* [1979] ECR 1185, especially at p. 1210 et seq., and the Opinion of Mr Advocate General Warner delivered in that case, especially at p. 1274).

80 Consequently, the basic provision to be applied is Article 69(2) of the Rules of Procedure of the Court of Justice, which provides that the unsuccessful party is to be ordered to pay the costs. However, in accordance with the first subparagraph of Article 69(3), where the circumstances are exceptional, the Court may order that the parties bear their own costs in whole or in part. It must be held that the Commission itself contributed to the emergence of the dispute by the ambiguous wording of its letter of 30 November 1988. The applicant, however, maintained its action for annulment after the Commission had clarified the legal position by its letter of 26 July 1989, and submitted a claim for damages which was inadmissible for reasons unrelated to the Commission's conduct. In view of those circumstances, the Commission must be ordered to pay its own costs and half of the applicant's costs. The applicant must bear the remainder of its own costs.

On those grounds,

THE COURT (First Chamber)

hereby:

(1) Dismisses the application as inadmissible;

(2) Orders the Commission to pay its own costs and half of the applicant's costs. The applicant shall bear the remainder of its own costs.

Cruz Vilaça Kirschner

Schintgen García-Valdecasas Lenaerts

Delivered in open court in Luxembourg on 10 July 1990.

H. Jung J. L. Cruz Vilaça

Registrar President