JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)
13 December 1999 *

In Joined Cases T-189/95, T-39/96 and T-123/96,

Service pour le Groupement d'Acquisitions (SGA), a company incorporated under French law, established in Istres, France, represented by Jean-Claude Fourgoux, of the Paris Bar, with an address for service in Luxembourg at the Chambers of Pierrot Schiltz, 4 Rue Béatrix de Bourbon,

applicant,

v

Commission of the European Communities, initially represented by Giuliano Marenco, Legal Adviser, and Guy Charrier, a national civil servant on secondment to the Commission, and subsequently by Mr Marenco and Loïc Guérin, a national civil servant on secondment to the Commission, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: French.

APPLICATION for annulment of the Commission's decision of 5 June 1996 dismissing a complaint by the applicant under Article 85 of the EC Treaty (now Article 81 EC), and of an alleged implied refusal by the Commission to adopt interim measures following that complaint, and for compensation for damage,

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

composed of: B. Vesterdorf, President, J. Pirrung and M. Vilaras, Judges,

Registrar: A. Mair,

having regard to the written procedure and further to the hearing on 2 March 1999,

gives the following

Judgment

Facts and Procedure

1 According to the information it has provided, the applicant, Service pour le Groupement d'Acquistions (hereinafter 'SGA'), is an authorised intermediary for final consumers in France under Article 3(11) of Commission Regulation (EEC)

No 123/85 of 12 December 1984 on the application of Article 85(3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements (OJ 1985 L 15, p. 16), which was replaced, as from 1 October 1995, by Commission Regulation (EC) No 1475/95 of 28 June 1995 (OJ 1995 L 145, p. 25).

2 On 24 June 1994 the applicant lodged a complaint with the Commission under Article 3(2) of Council Regulation No 17 of 6 February 1962: First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition, Series I (59 — 62), p. 87). The complaint, which was registered on 4 July 1994, was directed against the manufacturer of Peugeot and Citroën motor vehicles (hereinafter 'PSA').

3 In its complaint, the applicant requested the Commission to order PSA provisionally to desist from obstructing the application of Article 3(11) of Regulation No 123/85 by pressurising dealers in other Member States, particularly Belgium, Spain, Italy and the Netherlands, to refuse orders placed with them.

4 In a letter of 11 August 1994 the Commission informed the applicant, *inter alia*, that: 'it will not be possible ... to assess whether there is any need to adopt interim measures you have requested ... Your application must contain more detail for such an assessment to be made ... '.

5 On 24 April 1995 the applicant sent the Commission a letter of formal notice under Article 175 of the EC Treaty (now Article 232 EC) calling upon it to inform PSA of the potential complaints against it and to grant the application for interim measures.

6 On 9 October 1995 the applicant brought an action against the Commission before the Court for a declaration of failure to act, for annulment of an alleged implied decision by the Commission not to act on the application for interim measures and for compensation for damage (Case T-189/95).

7 On 6 November 1995 the Commission sent to the applicant a letter pursuant 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 (OJ, English Special Edition, Series I (63 — 64) p. 47). On 4 December 1995, the applicant submitted its comments thereon.

8 On 8 January 1996 the applicant sent the Commission a further letter of formal notice calling for the adoption of interim measures and for an actionable decision to be adopted.

9 On 15 March 1996, since the Commission had taken no action, the applicant brought another action (Case T-39/96), again for a declaration of failure to act by the Commission, for annulment of a possible refusal to adopt interim measures and for an order against the Commission to pay compensation for damage.

10 By a decision of 5 June 1996 the Commission dismissed the applicant's complaint.

11 By application registered at the Court Registry on 8 August 1996 the applicant brought an action for annulment of that decision and for compensation for damage (Case T-123/96).

12 By order of 30 January 1997 the decision on the plea of inadmissibility raised by the Commission in Case T-189/95 by separate document in accordance with Article 114 of the Rules of Procedure was reserved for the final judgment.

13 By order of 1 February 1999 the President of the First Chamber of the Court of First Instance decided to join the three cases for the purposes of the oral procedure and judgment.

14 The parties were requested by the Court under Article 64 of its Rules of Procedure to produce certain documents before the hearing, which they did. At the hearing in open court on 2 March 1999 they presented oral argument and answered the questions put to them by the Court.

15 At the hearing, the Commission stated that it had mistakenly included a document with the papers produced at the Court's request. The applicant argued against removal of that document. Following the hearing, the President of the First Chamber decided that it should be removed from the file and returned to the Commission.

16 By letter of 22 March 1999 addressed to the Registrar of the Court the applicant's representative requested that the minutes of the hearing of 2 March 1999 be corrected on the ground that they were not an accurate reflection of his comments concerning that document. Having heard the defendant, the Court decided to rule on that request in its judgment.

Forms of order sought

17 In Case T-189/95 the applicant claims that the Court should:

— declare that the Commission failed to act;

— annul the implied decision not to act on its request for interim measures;

— find the Commission liable for non-contractual damage and award SGA EUR 200 000; and

— order the Commission to pay the costs.

18 The Commission contends that the Court should:

— dismiss the application as inadmissible;

— in the alternative, declare the application:

— otiose and, furthermore, unfounded so far as failure to act and the putting in issue of the Commission's non-contractual liability are concerned; and

— unfounded as regards the application for annulment of the alleged implied refusal to adopt interim measures; and

— order the applicant to pay the costs.

19 In Case T-39/96 the applicant claims that the Court should:

— declare that the Commission failed to act;

— to the extent that the Court finds that the Commission's inaction as regards the request for interim measures amounts to a decision of refusal, annul that decision;

— award SGA the sum of EUR 150 000 by way of further compensation; and

— order the Commission to pay the costs.

20 The Commission contends that the Court should:

— dismiss the application as inadmissible and, in the alternative, as unfounded in so far as it puts the Commission's liability in issue and inadmissible in so far as it seeks the annulment of the supposed refusal to adopt interim measures, and unfounded as regards the failure to act; and

— order the applicant to pay the costs.

21 In Case T-123/96 the applicant claims that the Court should:

— annul the decision of 5 June 1996;

— find the Community liable in non-contractual damage and award SGA EUR 360 000 by way of compensation; and

— order the Commission to pay the costs.

22 The Commission contends that the Court should:

— dismiss the application as inadmissible in so far as it puts the Commission's liability in issue and unfounded in so far as it seeks the annulment of the decision dismissing the complaint; and

— order the applicant to pay the costs.

23 After the applicant had been invited at the hearing to state whether it intended to maintain its claims in Cases T-189/95 and T-39/96, it withdrew its claims for declarations of failure to act by letter of 6 April 1999. By letter of 23 April 1999 the Commission took formal note of those withdrawals but maintained its application for costs to be awarded against the applicant in both cases.

The application for rectification of the minutes of the hearing

24 The Court considers that in this case it is not appropriate to rectify the minutes of the hearing as requested by the applicant. The sentence which the applicant asks to be amended is worded as follows: 'The applicant's representative is opposed to removal of the document which the Commission filed by mistake'. That sentence accurately sums up the essence of the applicant's representative's statements, namely his objection to the document being removed. The words 'which the Commission filed by mistake' merely identify the document concerned, but do not mean that the applicant's representative accepts that they reflect the truth. The Court, on the other hand, having reached the view, in the light of all the

Commission's representatives' reactions at the hearing, that the contested document was indeed produced by mistake, was entitled to refer to it in those terms. Finally, the Court considers that it is not necessary that the minutes contain the plea put forward by the applicant's representative to the effect that the rights of the defence were infringed since consideration was given to that plea by the President of the Chamber in his decision ordering removal of the document in question from the file.

Admissibility of the application for annulment of the alleged implied refusal of the request for interim measures (Cases T-189/95 and T-39/96)

25 Although it is only in Case T-39/96 that the Commission is challenging the admissibility of the application in as far as it seeks the annulment of the alleged implied refusal of the request for interim measures, the Court must of its own motion consider whether, in Case T-189/95 too, the Commission's inaction in the face of such a request formulated in the complaint amounted to an actionable decision.

26 It must be borne in mind that acts or decisions against which an action for annulment may be brought under Article 173 of the EC Treaty (now, after amendment, Article 230 EC) are measures which produce binding legal effects capable of affecting the applicant's interests by bringing about a significant change in his legal position (see Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 9). Mere silence on the part of an institution cannot produce such effects unless express provision is made for it to do so by Community law.

27 Community law provides that, in certain specific instances, silence on the part of an institution is deemed to amount to a decision where the institution has been called upon to express its view and has not done so by the end of a given period.

Where there are no such express provisions laying down a deadline by which an implied decision is deemed to have been taken and prescribing the tenor of the decision, an institution's inaction cannot be deemed to be equivalent to a decision without calling into question the system of remedies instituted by the Treaty.

28 Regulation No 17 or Regulation No 99/63 of 25 July 1963 contain no provision to the effect that the Commission's failure to respond to a request to act may amount to a decision.

29 It is true that it has been held that a decision in which the Commission states its view on some of the breaches in relation to which a complaint under Article 3 of Regulation No 17 is made, but does not indicate how it intends to deal with the other allegations in that complaint, may be interpreted as a partial and implied rejection of that complaint (see Case C-19/93 P *Rendo and Others* v *Commission* [1995] ECR I-3319, paragraphs 28 and 29). In this case, however, when the applications in Cases T-189/95 and T-39/96 were made, the Commission had not adopted any partial decision capable of being interpreted as an implied refusal of the application for interim measures. Accordingly, the claim for annulment of an alleged implied refusal of the application for interim measures is inadmissible.

Application for annulment of the decision of 5 June 1996 dismissing the complaint (Case T-123/96)

30 In its submissions, the applicant essentially put forward four pleas in law: first, breach of essential procedural requirements and, more particularly, of procedural guarantees; secondly, infringement of the Treaty; thirdly, manifest error of

assessment by the Commission in exercising its power to adopt interim measures; and fourthly, misuse of powers.

31 At the hearing the applicant raised two new pleas in law, namely that the unreasonable length of time which elapsed between its complaint and the contested decision is sufficient to justify annulling that decision and that the decision did not contain an adequate statement of reasons.

32 It is appropriate to begin by considering together the first and second pleas and the two pleas raised at the hearing which are basically that the Commission failed to fulfil its obligations as regards treatment of the complaint.

The Commission's failure to fulfil its obligations as regards treatment of the complaint

Arguments of the parties

33 By its first plea, namely breach of essential procedural requirements, and in particular of procedural guarantees, the applicant is criticising the Commission for having failed to carry out a careful and impartial examination of its complaint which it was under a duty to do.

34 The second plea falls into three parts. The first part is the applicant's argument that the Commission committed a manifest error by distorting the sense of the evidence submitted to it. The Commission did not examine that evidence seriously nor, furthermore, did it give it adequate weight. The Commission therefore committed a manifest error of assessment of the probative value of that evidence.

35 The second part of the plea is the applicant's claim that the Commission committed a manifest error of assessment of the Community interest.

36 The third part of the plea alleges manifest error as regards the location of the centre of gravity of the infringement and as to the jurisdiction of the French courts and administrative authorities.

37 The Commission points out that it is entitled, even under a duty, to prioritise its resources and to allocate them only to cases where there is a sufficient Community interest.

38 It further challenges the admissibility of the plea of breach of essential procedural requirements and of procedural guarantees on the ground that the applicant's complaints are not substantiated.

Findings of the Court

39 The Commission's obligations when a complaint is referred to it have been laid down in settled case-law of the Courts of Justice and First Instance, most recently confirmed by the Court of Justice in Case 119/97 P *Ufex and Others* v *Commission* [1999] ECR I-1341, paragraph 86 et seq.

40 It is clear from that case-law, *inter alia*, that, where the Commission assigns different priorities to the complaints submitted to it, it is entitled not only to decide the order in which the complaints are examined but also to reject a complaint for lack of a sufficient Community interest in further investigation of the case. (See also judgment in Case T-5/93 *Tremblay and Others* v *Commission* [1995] ECR II-185, paragraph 60.)

41 The discretion enjoyed by the Commission for that purpose is not unlimited, however. Therefore, the Commission is under an obligation to state reasons if it declines to continue with the examination of a complaint, and the reasons stated must be sufficiently precise and detailed to enable the Court of First Instance effectively to review the Commission's use of its discretion to define priorities (*Ufex and Others* v *Commission*, cited above, paragraphs 89 to 95). That review may not lead the Court to substitute its assessment of the Community interest for that of the Commission but focuses on whether or not the contested decision is based on materially incorrect facts, or is vitiated by an error of law, a manifest error of appraisal or misuse of powers (Case T-24/90 *Automec* v *Commission* [1992] ECR II-2223, paragraph 80).

42 It is appropriate to examine the applicant's first and second pleas, and the pleas raised at the hearing, in the light of those principles.

43 As regards the admissibility of the first plea, it must be pointed out that the Court may of its own motion consider the question of infringement of essential procedural requirements and, in particular, of the procedural guarantees conferred by Community law (see Case C-291/89 *Interhotel* v *Commission* [1991] ECR I-2257, paragraph 14). This also applies to the plea raised at the hearing as to the inadequacy of the statement of reasons in the contested decision.

44 In this case, the Court finds that the decision of 5 June 1996 clearly sets out the considerations of law and fact which led the Commission to the conclusion that there was not a sufficient Community interest. Consequently, the complaint of breach of the duty to provide reasons is unfounded.

45 The statement of reasons in the contested decision also shows that the Commission carefully considered both the applicant's evidence and, as was necessary in this case for an impartial analysis, the observations it asked PSA to submit on the criticisms in the complaint. The complaint that the Commission failed in its duty to consider the complaint with due care is therefore unfounded.

46 As regards the plea raised at the hearing relating to the duration of the procedure before the Commission, it must be borne in mind that, under Article 48(2) of the Rules of Procedure, new pleas in law may not be introduced in the course of the proceedings unless they are based on matters of law or of fact which come to light in the course of the procedure. This plea, which cannot be regarded as elaborating directly or by implication on a plea already put forward in the original application and closely connected therewith, must be declared inadmissible. Nor is there any need in the circumstances of this case for the Court to examine this plea of its own motion.

47 As regards, next, the first part of the second plea, namely failure to take account of the probative value of the evidence submitted by the applicant, the applicant produced, annexed to its complaint and during its subsequent correspondence with the Commission, various documents demonstrating the difficulties it encountered in obtaining delivery of vehicles from PSA dealers established in other Member States, particularly Italy and the Netherlands, on the one hand,

and documents designed to show that PSA was attempting to partition the markets by placing its foreign dealers under pressure so as to dissuade them from supplying cars to authorised agents on the other.

48 To the extent that those documents were annexed to the complaint, PSA commented on them in detail in order to refute the applicant's claims. In particular, PSA denied impeding the activities of intermediaries acting in conformity with Article 3(11) of Regulation No 123/85.

49 In its assessment of the probative value of the evidence submitted by the applicant, the Commission did not express a view as to the difference of opinion between the applicant and PSA in relation to the interpretation of those documents. It considered that both cases were arguable, namely that the refusals to sell on the part of PSA's network could have applied to authorised agents or only to independent resellers. That assessment is not manifestly erroneous. In addition, PSA provided a plausible explanation of the matters put forward by the applicant, namely that PSA was merely opposing the activities of independent resellers, which is not contrary to competition law. The Commission was therefore not entitled to consider that a breach was established in this case (see Joined Cases T-185/96, T-189/96 and T-190/96 *Riviera Auto Service and Others* v *Commission* [1999] ECR II-93, paragraph 47).

50 Nor is the contested decision vitiated by manifest error as to the applicant's activities. The reason for the Commission's dismissal of the complaint was not that it found the applicant to be acting not only as an authorised intermediary but also as an independent reseller. It merely considers that both are possible. The applicant's explanations at the hearing of its relationship with Sodima are not sufficient to show that it acts as an authorised agent only, since those factors were only presented at the hearing and merely through statements by its lawyer; they do not emerge from the documents submitted to the Court.

51 Accordingly, the complaint that there was a manifest error of appraisal in regard to the probative value of the evidence submitted by the applicant is unfounded.

52 As regards the second part of the plea, alleging an error on the part of the Commission in its evaluation of the Community interest in investigating the complaint, the Court must, *inter alia*, examine whether it is clear from the decision that the Commission balanced the significance of the alleged infringement as regards the functioning of the common market, the probability of its being able to establish the existence of the infringement and the extent of the investigative measures required for it to perform, under the best possible conditions, its task of making sure that Articles 85 and 86 of the EC Treaty (now Articles 81 EC and 82 EC) are complied with (see *Automec* v *Commission*, paragraph 86, of the EC Treaty *Tremblay and Others* v *Commission*, paragraph 62 and *Riviera Auto Service and Others* v *Commission*, paragraph 46)

53 In that respect, it is not open to the Commission, when deciding the order of priority for dealing with the complaints brought before it, to regard as excluded from its field of action, without any analysis, certain situations which fall within the sphere of the task entrusted to it by the Treaty. The Commission is in particular required to assess in each case how serious the alleged interferences with competition are (see *Ufex and Others* v *Commission*, paragraphs 92 and 93).

54 However, the contested decision contains nothing to suggest that the Commission failed to appreciate that the conduct alleged against PSA in this case, namely conduct seeking to impede parallel imports of vehicles by authorised agents, would, if proven, amount to a particularly serious interference with competition.

55 In order to be able to determine whether or not there was any breach of the competition rules in this case, the Commission would also have had to procure further evidence, which would probably have necessitated measures of investiga-

tion under Article 11 et seq. of Regulation No 17 and, more particularly, verifications under Article 14(3). The Commission's finding that it would have to deploy substantial resources to carry out the investigations necessary to enable it to rule on the existence of the infringements alleged by the applicant in this case does therefore not appear to be manifestly erroneous.

56 Furthermore, it is legitimate for the Commission, when assessing the Community interest in investigating a complaint, to take account not only of the seriousness of the alleged infringement and of the extent of the measures of investigation required in order to prove it, but also of the need to clarify the legal position relating to conduct alleged in the complaint and to define the rights and obligations under Community law of the various economic operators affected by that conduct.

57 In this case, as is rightly stated in the contested decision, the respective rights and obligations of the authorised agents, car manufacturers and dealers were defined and set out in block exemption Regulations No 123/85 and No 1475/95 of 28 June 1995, cited above, by Commission Communication 91/C 329/06 of 4 December 1991 entitled 'Clarification of the activities of motor vehicle intermediaries' (OJ 1991 C 329, p. 20) and by the judgments of the Court of First Instance of 22 April 1993 in *Peugeot* v *Commission* (Case T-9/92 [1993] ECR II-493) and of the Court of Justice of 16 June 1994 in *Peugeot* v *Commission* (Case C-322/93 P [1994] ECR I-2727). That being so, the Commission was entitled to reach the conclusion, and did not commit any manifest error in so doing, that the national courts and administrative authorities were capable of dealing with the infringements alleged in the applicant's complaint and of protecting the applicant's rights under Community law.

58 The fact that, in the *Volkswagen* case (see Commission Decision 98/273/EC of 28 January 1998 relating to a proceeding under Article 85 of the EC Treaty (Case IV/35.733 — VW, OJ 1998 L 124, p. 60), the Commission took action against

conduct which at first sight appears similar to that which the applicant alleges against PSA and its network and which implicated another car manufacturer does not prove that it erred in its assessment of the Community interest in this case.

59 Where the Commission is faced with a situation where numerous factors give rise to a suspicion of anti-competitive conduct on the part of several large undertakings in the same economic sector, the Commission is entitled to concentrate its efforts on one of the undertakings concerned, whilst at the same time indicating to the economic operators who may have suffered damage as a result of the anti-competitive conduct of the other parties concerned that it was open to them to bring an action in the national courts. If it were otherwise, the Commission would be forced to spread its resources across a number of separate wide-ranging investigations, with the attendant risk that none could be brought to a satisfactory conclusion. The benefit to the Community legal order stemming from the exemplary value of a decision with regard to one of the undertakings in breach of the competition rules would then be lost, in particular for the economic operators injured by the conduct of the other companies. In that context, it is also appropriate to point out that the Commission has already taken action against Peugeot in its Decision 92/154/EEC of 4 December 1991 relating to a proceeding under Article 85 of the EEC Treaty (Case IV/33.157 — *Eco System/Peugeot*, OJ 1992 L 66, p. 1) which was the subject of the judgments of 22 April 1993 and 16 June 1994 in *Peugeot* v *Commission*, cited above.

60 That being so, the fact that the Commission preferred to investigate the complaints which led to its decision in the *Volkswagen* case rather than the complaints brought against PSA, which included that of the applicant, is not a ground for finding that it failed in its duty to examine on a case-by-case basis the seriousness of the alleged infringements and the Community interest in its taking action or that it committed an error of assessment.

61 As regards the third part of the plea, alleging a manifest error as regards the location of the centre of gravity of the infringement, first of all the contested

decision cannot be construed to the effect that the Commission considered that there was no Community interest in its taking action on the sole ground that the centre of gravity of the conduct complained of was located in one Member State only. That is only one of the factors which it took into consideration in making its assessment, and it is clear from the wording of the contested decision that it is a factor which is mentioned as a subsidiary matter and for what it might be worth.

62 Next, it is clear from the contested decision that the Commission did not fail to appreciate the cross-border nature of the transactions in point. However, it rightly considers that the main protagonists in this case, that is to say the manufacturer, the applicant and the consumers who are the applicant's customers, are based in France and that the French courts and administrative authorities have competence to deal with the dispute between the applicant and PSA and its network. The national courts are, in particular, better placed than the Commission to carry out the investigation of the facts which is necessary in order to determine whether the applicant is acting only as an authorised intermediary or also as an independent reseller.

63 It is true that the applicant disputes the ability of the national courts to protect its rights, but it has not substantiated its case in this respect by concrete evidence showing that the rules on international jurisdiction and judicial cooperation do not enable the French courts to take the cross-border aspects of the dispute into account in this case.

64 Consequently the Commission's assessment of the Community interest in pursuing the applicant's complaint is not vitiated by manifest errors as regards the places where material facts arose.

65 It follows that the first and second pleas and the two pleas raised at the hearing must be dismissed.

Third plea: manifest error of assessment by the Commission in relation to the application for interim measures

66 It is for the Commission, in the performance of the supervisory task conferred upon it by the Treaty and Regulation No 17 in competition matters, to decide, pursuant to Article 3(1) of Regulation No 17, whether it is necessary to adopt interim measures. In order for such measures to be granted, two conditions must be met, namely, first, the practices of certain undertakings must be prima facie such as to constitute a breach of the Community rules on competition in respect of which a penalty could be imposed by a decision of the Commission. Secondly, there must be urgency in order to prevent the occurrence of a situation likely to cause serious and irreparable damage to the party applying for the measures or intolerable damage to the public interest (see Case T-44/90 *La Cinq* v *Commission* [1992] ECR II-1, paragraph 28).

67 In this case the applicant confined itself to requesting interim measures without indicating in what way the requirements for the grant of such measures were satisfied. Neither has it shown that its request was well founded after it received the Commission's letter of 11 August 1994 (referred to at paragraph 4 above). In those circumstances, there can be no finding that the Commission made an error of assessment. Consequently, the third plea in law is unfounded.

Fourth plea: misuse of powers

68 The applicant has confined itself to referring, in the abstract, in its pleadings to principles of law and judgments on the concept of misuse of powers, without explaining why in its view that ground for annulment should be upheld in this case. The plea does not therefore meet the requirements of Article 19 of the EC

Statute of the Court of Justice or of Article 44(1)(c) of the Rules of Procedure of the Court of First Instance. Accordingly, it must be dismissed as inadmissible.

69 It follows that the claim for annulment of the decision of 5 June 1996 is unfounded.

Claim for compensation (Cases T-189/95, T-39/96 and T-123/96)

Arguments of the parties

70 The applicant submits that the Commission committed a wrongful act capable of attracting non-contractual liability on the part of the Community by failing to fulfil its obligation under Article 3 of the Treaty and Article 3 of Regulation No 17 to ensure that a breach of Community law by an undertaking be brought to an end, and that the Commission's failure to act caused it damage.

71 The Commission challenges the admissibility of the claims for compensation on the ground that the applications do not comply with Article 19 of the Statute of the Court of Justice and Article 44(1)(c) of the Rules of Procedure of the Court of First Instance. Nor does it consider the applications for compensation to be founded. It contends that no wrongful conduct in the treatment of the complaint

can be imputed to it and that the applicant has failed to prove that there was damage or that there was a causal link between the damage and the alleged failure to act.

Findings of the Court

72 It is settled case-law that an application for compensation for damage must be dismissed where there is a close connection between it and an application for annulment which has itself been dismissed (*Tribunal Riviera Auto Service and Others* v *Commission*, paragraph 90 and Case T-150/94 *Vela Palacios* v *ESC* [1996] ECR II-877, paragraph 51). In any event it has consistently been held that where the Commission receives a complaint under Article 3 of Regulation No 17 it is not obliged to take a decision regarding the existence or otherwise of the alleged infringement unless the complaint falls within the exclusive purview of the Commission, which is not the case here (see, for example, *Tremblay and Others* v *Commission*, cited above, paragraph 59). It follows that the conduct on the part of the Commission to which this claim for compensation relates does not amount to a wrongful act capable of causing the Community to incur liability.

73 In those circumstances, the claim for compensation must be rejected, and it is not necessary to consider whether the applicant's submissions on the nature and scope of the damage and the causal link between the conduct with which the Commission is charged and that damage are sufficient for the purposes of the requirements of Article 19 of the Statute of the Court of Justice and Article 44(1)(c) of the Rules of Procedure of the Court of First Instance.

Costs

74 Under the second subparagraph of Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Under the first subparagraph of Article 87(5), a party who discontinues or withdraws from proceedings is to be ordered to pay the costs if they have been applied for in the other party's pleadings. However, upon application by the party who discontinues or withdraws from proceedings, the costs are to be borne by the other party if this appears justified by the conduct of that party. Finally, under the first subparagraph of Article 87(3), where each party succeeds on some but fails on other heads, or where the circumstances are exceptional, the Court of First Instance may order that the costs be shared or that each party bear its own costs.

75 As regards Case T-189/95, it must be observed that the action for failure to act which the applicant withdrew was brought out of time, since the applicant called upon the Commission to act on 24 April 1995, but its action was not brought until 9 October 1995. Since the other pleas in that action are inadmissible, it is appropriate to order the applicant to pay the costs.

76 In Case T-39/96, the action for failure to act withdrawn by the applicant has became otiose owing to the Commission's decision of refusal, and the other claims for relief put forward by the applicant are inadmissible. In those circumstances, it seems proper that the parties should bear their own costs.

77 Since the applicant has been unsuccessful in Case T-123/96, it must be ordered to pay the costs, as applied for by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1. **Dismisses the applications;**

2. **Orders the applicants to pay the costs in Cases T-189/95 and T-123/96;**

3. **In Case T-39/96, orders the parties to bear their own costs.**

Vesterdorf Pirrung Vilaras

Delivered in open court in Luxembourg on 13 December 1999.

H. Jung B. Vesterdorf

Registrar President