JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)
29 June 1993 *

In Case T-7/92,

Asia Motor France SA, established at Livange (Luxembourg),

Jean-Michel Cesbron, a trader, residing at Livange (Luxembourg),

Europe Auto Service SA (EAS), established at Livange (Luxembourg),

Monin Automobiles SA, established at Bourg-de-Péage (France),

Somaco SA, established at Fort-de-France (France),

represented by Jean-Claude Fourgoux, of the Paris and Brussels Bars, with an address for service in Luxembourg at the Chambers of Pierrot Schiltz, 4 Rue Béatrix de Bourbon,

applicants,

v

Commission of the European Communities, represented by Berend Jan Drijber, of its Legal Service, and Virginia Melgar, a national civil servant seconded to the Commission, acting as Agents, with an address for service in Luxembourg at the office of Nicola Annecchino, also of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of the Commission's decision of 5 December 1991 rejecting the applicants' complaints relating to practices under agreements alleged to be contrary to Article 85 of the EEC Treaty,

* Language of the case: French

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

composed of: J. L. Cruz Vilaça, President, D. P. M. Barrington, J. Biancarelli, A. Saggio and A. Kalogeropoulos, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 22 April 1993,

gives the following

Judgment

Facts

1 The applicant undertakings import and market in France vehicles of Japanese makes which have been cleared for free circulation in other Member States of the Community, such as Belgium and Luxembourg.

2 One of the applicants, namely J.-M. Cesbron, lodged a complaint with the Commission on 18 November 1985 alleging that Articles 30 and 85 of the EEC Treaty had been infringed, in which he claimed that he was the victim of an unlawful cartel between five importers of Japanese cars into France, namely Sidat Toyota France, Mazda France Motors, Honda France, Mitsubishi Sonauto and Richard Nissan SA. The complaint was followed on 29 November 1988 by a fresh complaint against the same five importers which was lodged by four of the five applicants (J.-M. Cesbron, Asia Motor France SA, Monin Automobiles SA and Europe Auto Service SA (EAS)) on the basis of Article 85 of the EEC Treaty.

3 In that complaint, the complainant undertakings maintained in essence that the five abovementioned importers of Japanese cars had given the French administration an undertaking not to sell on the French domestic market any cars in excess of a number equal to 3% of the motor vehicles registered in the whole of France during the preceding calendar year. It is also alleged that those importers agreed to divide that quota amongst themselves in accordance with pre-established rules, thereby excluding any other undertaking wishing to distribute in France vehicles of Japanese origin of makes other than the makes distributed by the parties to the alleged agreement.

4 The applicants further maintained in this complaint that, in return for this voluntary limitation, the French administration had increased the obstacles to the free movement of Japanese vehicles of makes other than the five distributed by the importers party to the alleged agreement. In the first place, a registration procedure differing from the normal system had been introduced for parallel imports. Those parallel imports were deemed to be second-hand vehicles and were therefore subject to a dual roadworthiness test. Secondly, it was alleged that instructions had been given to the Gendarmerie Nationale to prosecute purchasers of Japanese vehicles driving with foreign registration plates. Finally, on commercial vehicles, which attract a lower rate of value added tax than private cars, an increased rate of value added tax had been charged upon importation into France; the higher rate was only subsequently reduced to the rate normally applicable, thereby involving disadvantages for the distributor *vis-à-vis* the purchaser.

5 Pursuant to Article 11(1) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-62, p. 87, hereinafter 'Regulation No 17'), the Commission, by letter dated 9 June 1989, asked the importers in question for information. By letter dated 20 July 1989 the General Directorate for Industry of the French Ministry for Industry and Regional Development instructed the said importers in the following terms not to reply to one of the Commission's questions:

'You have been so good as to forward to me for information purposes a letter from the Commission dated 9 June 1989.

In that letter the Commission asks you to provide information concerning the policy pursued by the French public authorities with regard to the importation of Japanese vehicles.

It is not for you to reply to the Commission in the place of those authorities.'

6 It was in those circumstances that, by letter dated 16 October 1989, the Commission's departments sought information from the French authorities. On 28 November 1989, the French authorities, through their Permanent Representation to the European Communities, replied to that request for information by stating, in essence, that '... the questions concerning the conduct of the undertakings mentioned in the Commission's letter are ... irrelevant in this context in so far as that conduct is connected with regulatory rules laid down by the public authorities: those undertakings have no autonomy in operating the regulatory system'.

7 Having received no reply from the Commission, the four applicants concerned sent a letter on 21 November 1989 requesting it to adopt a position on their complaints. When that letter evoked no response either, the four undertakings brought an action before the Court of Justice on 20 March 1990 for failure to act and for damages. By order of 23 May 1990 in Case C-72/90 *Asia Motor France* v *Commission* [1990] ECR I-2181, the Court declared the action for failure to act and for damages inadmissible in respect of the Commission's inaction with regard to the alleged infringement of Article 30 of the Treaty, and remitted to the Court of First Instance the application concerning the Commission's failure to act in respect of the alleged infringement of Article 85 of the Treaty and its ensuing liability.

8 In the meantime, by letter dated 8 May 1990 the Director General of the Commission's Directorate General for Competition notified the four parties concerned, in accordance with 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 1963-1964, p. 47, hereinafter 'Regulation

No 99/63') that the Commission did not envisage taking any action on their complaints, and invited them to submit any observations in that regard. On 29 June 1990 the parties submitted their observations to the Commission, in which they reasserted that their complaints were well founded.

9 In those circumstances, the Court of First Instance held, by judgment of 18 September 1992, that there was no need to give a decision on the form of order sought in the application in so far as the application was based on Article 175 of the Treaty. For the rest, the Court dismissed the applicants' claims for compensation as inadmissible (Case T-28/90 *Asia Motor France and Others* v *Commission* [1992] ECR II-2285).

10 On 5 June 1990, Somaco also lodged a complaint with the Commission concerning the practices of the CCIE, SIGAM, SAVA, SIDA and Auto GM companies, all based at Lamentin (Martinique), which are dealers for Toyota, Nissan, Mazda, Honda and Mitsubishi, respectively, and importers of those makes in Martinique. The complaint, which was based on Articles 30 and 85 of the Treaty, also took issue with the practices of the French administration, on the ground that their aim was to prevent the complainant from carrying out parallel imports of vehicles of certain Japanese makes and of vehicles of the Korean make Hyundai.

11 By letter dated 9 August 1990, in which it referred to its letter of 8 May 1990 to the other four applicants, the Commission informed Somaco that it did not envisage taking any action on its complaint and asked it to submit its observations pursuant to Article 6 of Regulation No 99/63. By letter dated 28 September 1990, Somaco reasserted that its complaint was well founded.

12 By letter dated 5 December 1991, signed by the Member responsible for competition, the Commission notified to the five applicants a decision rejecting the complaints lodged on 18 November 1985, 29 November 1988 and 5 June 1990.

13 That letter reads as follows:

'I refer to the following complaints:

1. Complaints lodged on behalf of J.-M. Cesbron (JMC Automobiles, Luxembourg), Asia Motor France (Luxembourg), Monin Automobiles (Bourg-de-Péage) and EAS (Luxembourg):

— on 18 November 1985, based on Article 30 of the Treaty, against practices attributable to the French administration;

— on 29 November 1988, based on Article 85 of the Treaty, against practices of the French importers of the five Japanese makes Toyota, Honda, Nissan, Mazda and Mitsubishi and also taking issue with the French State on the basis of Article 30;

— on the ground that those practices were intended to prevent parallel imports into France by the complainant undertakings of vehicles — chiefly of the Isuzu, Daihatsu, Suzuki and Subaru makes — released for free circulation in other Member States, in particular Belgium and the Grand Duchy of Luxembourg.

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2. Complaint lodged on 5 June 1990 on behalf of the Somaco company, Lamentin, based on Articles 30 and 36 and on Article 85 of the Treaty, against the practices of the companies CCIE, SIGAM, SAVA, SIDA and Auto GM, all based at Lamentin, which are dealers for the Japanese makes Toyota, Nissan, Mazda, Honda and Mitsubishi, respectively, and importers of those makes in Martinique, and also taking issue with the practices of the French State, on the ground that those practices were designed to prevent the complainant from carrying out parallel imports of vehicles of those makes and also of vehicles of the Korean make Hyundai.

The Commission has examined the factual and legal particulars set out in those complaints and has investigated this case at the premises of the undertakings in question. Following that examination, the Commission — by means of prior notifications of 8 May 1990 and 9 August 1990 under Article 6 of Regulation (EEC) No 99/63 — gave the complainant undertakings an opportunity to submit their observations with regard to its intention of and its reasons for adopting a decision rejecting their complaints.

In the replies sent to the Commission on behalf of the complainants on 29 June 1990 and 28 September 1990, no new fact or new argument or legal reference was adduced in support of their request. It follows that the Commission can see no reason to alter its intention to reject the said complaints on the grounds already set out in its communications of 8 May 1990 and 9 August 1990:

— As regards the possible application of Article 85, the investigations carried out by the Commission's departments have established that the conduct of the five importers in question constitutes an integral part of the policy followed by the French public authorities with regard to imports of Japanese cars into France. In that regard, it should be borne in mind that such imports are regulated at national level. In the context of such regulation, the French public authorities not only set the total quantities of vehicles allowed into France each year, but also determine the rules for the allocation of those quantities, in particular by reserving them solely to the importers in question. The French authorities informed the Commission accordingly by memorandum of 28 November 1989, in which it was stated that the conduct of the five importers is "connected with the regulatory rules laid down by the public authorities" and that the importers "have ... no autonomy in administering the regulatory system". Consequently, those importers have no freedom of action in this case.

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In the light of the foregoing findings, the Commission considers that there is no connection between your interest and the alleged infringement of Article 85 in that any application of Article 85 would be unlikely to remedy the wrong of which you feel you are the victim. The fixing of overall limits by the public

authorities does not fall within Article 85, whilst the application of that provision to the allocation of the quota would not be capable of bringing about the authorization of your company as an importer. On the one hand, it is difficult to see how you could be authorized to participate in an allocation which you yourselves have described as an unlawful agreement. On the other hand, as has already been pointed out, the national regulatory system does not authorize importers other than the five whose conduct is impugned to be included in the breakdown. In those circumstances, a finding that Article 85 had been infringed would not alter your position in any way *vis-à-vis* the importers in question.

The barrier to trade between Member States which may arise as a result of the inability to import into France Korean vehicles of the Hyundai make must be regarded as of no significance in view of the low market share of that make in the Community.

— The possible application of Article 30 must be rejected on the ground of the lack of any Community public interest, having regard to the common commercial policy.

I therefore wish to inform you that, for the reasons set out above, the Commission has decided to reject the aforementioned requests submitted on 18 November 1985 and 29 November 1988 on behalf of the undertakings JMC Automobiles, Asia Motor, Monin and EAS and on 5 June 1990 on behalf of Somaco.'

Procedure and forms of order sought by the parties

14 By application received at the Court Registry on 4 February 1992, the applicants brought an action against the Commission's aforementioned decision of 5 December 1991.

15 The written procedure followed the usual course and was completed on 17 November 1992.

16 Upon hearing the report of the Judge Rapporteur, the Court (Second Chamber) decided to open the oral procedure. Prior to that, by way of measures of organization of procedure, it asked the parties to produce certain documents and answer certain written questions on 13 February and 2 April 1993. The applicants and the defendant produced the documents requested and answered the questions put by the Court, by documents which were received at the Registry on 22 March 1993, on the one hand, and on 23 March and 15 April 1993, on the other. Oral argument was heard from the parties and they answered oral questions from the Court at the hearing held in open court on 22 April 1993.

17 In their application, the applicants claim that the Court should:

— declare that the agreements complained of both in Metropolitan France and in Martinique constitute an infringement of Article 85(1) of the Treaty;

— consequently annul the Commission's decision of 5 December 1991 in so far as it is based on Article 85 of the Treaty.

18 The Commission contends that the Court should:

— dismiss the first part of the application as inadmissible in so far as it claims that the Court should declare that the agreements complained of both in Metropolitan France and in Martinique constitute an infringement of Article 85 of the Treaty;

— dismiss the whole of the application for annulment as unfounded;

— order the applicants to pay the costs.

19 In their reply, the applicants claim that the Court should:

— declare their action for annulment admissible;

— take formal note that, following the express remarks of the Commission, they have amended the wording of their claim so that they no longer seek a declaration that the agreement complained of is unlawful, but solely the annulment of the letter of 5 December 1991 in order that the Commission should draw the appropriate consequences.

Scope of the application

20 It should be observed *in limine* that in their reply the applicants have relinquished the form of order they had initially sought in so far as it asked the Court to declare that the agreements complained of constituted an infringement of Article 85 of the Treaty. In those circumstances, it is for the Court to rule only on that part of the form of order sought which remains before it, namely the claim for annulment of the Commission's decision of 5 December 1991 in so far as it is based on Article 85 of the Treaty, the admissibility of which is not contested.

The claim for annulment

21 Formally, the applicants raise five pleas in support of their application. The first alleges infringement of essential procedural requirements; the second alleges infringement of the Treaty; the third alleges infringement of the principle of proportionality; the fourth alleges infringement of the principle of non-discrimination and the fifth alleges misuse of power.

The first plea alleging infringement of essential procedural requirements

Arguments of the parties

22 The applicants assert that the decision of 5 December 1991 is insufficiently reasoned in so far as it does not specify on which legal basis, Community measures or interpretation of the case-law of the Court of Justice, the Commission relies in refusing to find against the agreement complained of. They maintain that, according to the case-law of the Court of Justice, the reasons on which a decision is based must bring out clearly and unequivocally the reasoning of the Community authority

which drew up the contested measure so as to enable the parties affected to know the justification for the measure taken and the Court to carry out its review.

23 In their reply, the applicants enlarge on two specific aspects of their plea alleging that the statement of reasons is insufficient.

24 In the first place, they claim that the Commission failed to respond to the complaints set out and, in particular, to justify, in the light of the facts put forward in argument, the finding that the five importers in question do not have any freedom of action. They assert in particular that the fact that the Commission maintains that the situation on the markets in question is entirely the result of a policy of the public authorities without showing, by structured reasoning, how it arrived at that postulate means that its decision lacks a statement of reasons.

25 Secondly, the applicants claim that the Commission accepted the statements of the French Government without having carried out the measures of inquiry necessary in order to check that they were well founded. In fact, there is no evidence that the distribution of the import quota — 3% in Metropolitan France and 15% in Martinique — resulted solely from a unilateral act of the French Government, whereas on the contrary it appears from the documents furnished to the Commission that the five importers in question actively participate in sharing the market through continuing concertation within their trade association. The applicants point out that the French Government instructed those importers not to answer one of the questions put to them by the Commission when it asked for all documents relating to the introduction and allocation of the import quota to be produced. They also state that the regulatory system introduced by the French public authorities is not based on any binding legislation or regulation, but appears to be merely an administrative practice. Citing several extracts from the specialized press, which allegedly show that the five importers have freedom of action in this regard, the applicants claim that, in accordance with the case-law of the Court of Justice, the Commission was bound to examine the facts which they had put forward in order to check that the statements of the French authorities were correct. Consequently, in their view, the statement of reasons for the decision is open to challenge in so far as it did not adduce any evidence that the statements made by the French authorities were correct, but confined itself to reporting them.

26 The Commission states in response that the contested decision is duly reasoned and that the Court is in a position to review its legality. It notes that the decision refers to the Treaty articles with regard to which it assessed the complaint, recapitulates the complaints submitted and sets out the investigatory measures taken and the correspondence exchanged together with a statement of reasons and a conclusion. The Commission contends that the reasoning which prompted it to reject the complaints is clear from the statement of reasons, and argues that it is clearly shown that that reasoning is based on the finding that no action should be taken on the complaints in so far as the facts alleged are the result of a policy pursued by the public authorities and not of an agreement between the five importers. The Commission also argues that it is not under an obligation in a decision rejecting a complaint to refer to the relevant case-law of the Court of Justice.

27 Furthermore, in its view, the applicants are confusing the question whether the contested measure complies with the requirements set out in Article 190 of the Treaty with whether the findings of fact made in the decision are sufficiently substantiated. It appears from the reply that the applicants had no difficulty in following its reasoning, even though they allege that it is not well founded.

28 Lastly, the Commission states that it formally questioned the French Government, and points out that, whilst Regulation No 17 authorizes it to request a Member State for information, it does not provide it with the necessary means of checking whether the answer given is correct. The Commission takes the view that it may not ignore the answer provided by a Member State or treat it as inaccurate.

Findings of the Court

29 The Court observes *in limine* that, in their first plea, the applicants not only argue that the contested decision is insufficiently reasoned but also seek to call in question the lawfulness of the first ground on which the Commission rejected their complaints, that is to say, that the importers in question enjoy no autonomy in sharing the market.

— Insufficient statement of reasons

30 First of all, as the Court of Justice and the Court of First Instance have consistently held, the statement of reasons of a decision adversely affecting a person must be such as to enable the person concerned to ascertain the matters justifying the measure adopted so that he can if necessary defend his rights and verify whether or not the decision is well founded (Case T-44/90 *La Cinq* v *Commission* [1992] ECR II-1) and to enable the Community judicature to exercise its power of review.

31 Secondly, as the Court of Justice and the Court of First Instance have consistently held, the Commission is not obliged to adopt a position, in stating the reasons for the decisions which it is required to take in order to apply the competition rules, on all the arguments relied on by the parties concerned in support of their request. It is sufficient if it sets out the facts and legal considerations having decisive importance in the context of the decision (see, most recently, *La Cinq* v *Commission*).

32 The Court finds, on reading the contested decision, that it sets out the essential factual and legal particulars on which it is based, thus enabling the applicants to allege that it is not well founded and the Court to review its legality. It follows that the contested decision is not vitiated by any defect as regards its statement of reasons.

— Whether the reasoning of the first part of the decision is well founded

33 In this connection, judicial review of Commission measures involving an appraisal of complex economic matters must be limited to verifying whether the relevant rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or a misuse of powers (see Joined Cases 142/94 and 156/84 *BAT and Reynolds* v *Commission* [1987] ECR 4487 and most recently, Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraphs 23 and 25).

34 Furthermore, where the Commission has a power of appraisal in order to carry out its duties, respect for the rights guaranteed by the Community legal order in administrative procedures is of even more fundamental importance. Those guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case (Case C-269/90 *Hauptzollamt München-Mitte* v *Technische Universität München* [1991] ECR I-5469; *La Cinq* v *Commission*).

35 Thus, in the context of investigating applications submitted to the Commission pursuant to Article 3 of Regulation No 17, the Court has held that 'although the Commission cannot be compelled to conduct an investigation, the procedural safeguards provided for by ... Article 6 of Regulation No 99/63 oblige it nevertheless to examine carefully the factual and legal particulars brought to its notice by the complainant in order to decide whether they disclose conduct of such a kind as to distort competition in the common market and affect trade between the Member States' (Case T-24/90 *Automec* v *Commission* [1992] ECR II-2223 and the case-law of the Court of Justice referred to therein).

36 Lastly, although in accordance with the case-law of the Court of First Instance cited above the Commission is not obliged to investigate each of the complaints lodged with it, in contrast, once it decides to proceed with an investigation, it must, in the absence of a duly substantiated statement of reasons, conduct it with the requisite care, seriousness and diligence so as to be able to assess with full knowledge of the case the factual and legal particulars submitted for its appraisal by the complainants.

37 It is in the light of those considerations that, in order to assess the legality of the first ground for rejecting the complaints, first the evidence adduced by the complainants should be verified and secondly the contested decision should be checked to determine whether it contains an appropriate examination of the factual and legal particulars submitted for the Commission's appraisal.

38 In this case, the infringements alleged by the complainants, as the three aforementioned complaints make clear, are as follows:

— first, existence of an agreement between the importers into France of cars of the Japanese makes Toyota, Honda, Nissan, Mazda and Mitsubishi, on the one hand, and the French administration on the other, under which the importers for France of the said makes allegedly agreed to limit their aggregate share of the French domestic car market to 3% in return for an undertaking on the part of the French authorities that the market in vehicles of Japanese origin would be reserved to them exclusively, and existence of an agreement between the undertakings in question allocating as between themselves their aggregate market share (complaint from Cesbron of 18 November 1985 and complaint from Cesbron, Asia Motor, Monin Automobiles and EAS of 29 November 1988);

— secondly, existence of an agreement between the dealers of the aforementioned makes of car in Martinique and the administration under which those dealers allegedly agreed to limit their share of the Martinique car market to 15% in return for an undertaking that the market in vehicles of Japanese origin would be reserved to them exclusively, and existence of an agreement between those undertakings allocating as between themselves their aggregate market share (complaint from Somaco of 5 June 1990).

39 The Court observes that, when they submitted their complaints or in the course of the investigation of their complaints, the applicants provided the Commission in support of their allegations, *inter alia*, with two documents whose probative force cannot, prima facie, be dismissed without an in-depth examination. The first of those documents is a copy of the minutes of an inter-ministerial meeting held on Monday, 19 October 1987, which was attended by the representatives of the undertakings whose conduct is impugned in the complaint of 5 June 1990 and certain representatives of the French public authorities (see Annex 23 to the application originating these proceedings). According to those minutes, the dealers present decided in particular, following discussion between all the participants, 'to agree to a voluntary limitation, all makes taken together, to 15% of the total market and to

abide imperatively by that voluntary limitation, if need be by monitoring it themselves'. That document also provides for the procedures for progressively working off a surplus, resulting from past exceeding of the quota previously granted by the signatories of the document to one of the dealers. Lastly, it stipulated that a 'draft agreement between Japanese car dealers in Martinique will be drawn up as a result'.

40 It appears from the case file, and in particular from the measures of organization of procedure ordered by the Court, that that document was annexed to a letter sent to the Commission on 25 August 1989 by the complainants Cesbron, Asia Motor, Monin Automobiles and EAS in the context of the investigation of the complaint of 29 November 1988. It was also annexed to the complaint lodged by Somaco on 5 June 1990. It was therefore brought to the Commission's attention before the contested decision was taken.

41 Secondly, a document headed 'draft agreement' (see Annex 24 to the application), bearing the signature of each of the legal representatives of the dealers, was annexed to the minutes of that inter-ministerial meeting; it reads as follows:

'The following has been agreed:

The signatories, binding their dealerships, undertake in agreement with the public authorities to abide by the quota for the importation of new vehicles of Japanese makes allocated by the administration and set at 15% of the total market in new vehicles in Martinique for all makes taken together.

They agree that the 15% should be broken down as in 1982, that is to say:

— Toyota: 46.93%

— Nissan: 26.01%

— Mazda: 15.00%

— Honda: 7.99%

— Mitsubishi: 4.07%

...

In addition, the signatories have taken cognizance of the minutes of the inter-ministerial meeting of Monday, 19 October 1987, a copy of which is appended to this draft agreement, and approve its terms.

Consequently, a meeting will be held at the Prefect's office in Martinique at the beginning of each year in order to fix the number of certificates of conformity (document required for the importation of a car) to which each Japanese car dealer in Martinique will be entitled for the current year in accordance with the rules set out in the said minutes and in this draft agreement.

In the event of non-compliance with one of the aforementioned clauses by one or other of the parties, this agreement shall lapse.'

42 That document was also annexed to the aforementioned letter sent to the Commission on 25 August 1989. Likewise, it was also annexed to Somaco's complaint of 5 June 1990.

43 In the light of that evidence, the Court considers in the first place that the 'draft agreement' constitutes, on an initial appraisal, firm evidence of the probable existence of a consensus as between the dealers of the importers in question operating

in the Department of Martinique with the aim of sharing between them the quota of 15% of the market imposed on traders by the French national authorities. The Court notes that the minutes of the inter-ministerial meeting, on the strength of which the draft agreement was drawn up, contain no reference to any sharing out by the public authority of that import quota, which, prima facie, seems to be the result solely of action taken by the undertakings party to the draft agreement. However, the Commission stated in answer to one of the written questions from the Court that, to its knowledge, the rules governing the distribution of the number of cars imported into Martinique had not been changed between 1987 and the end of 1991.

44 It appears therefore from the documents and information brought to the Court's notice that the system of allocation as between the five dealers, as set out in the draft agreement considered above, was, following its renewal, still in force on 5 December 1991, the date on which the Commission took the contested decision. Prima facie, those items in the case file constitute serious evidence of genuinely independent action on the part of the five importers in question in sharing the market. As such, it is capable of being caught by Article 85 of the Treaty.

45 The next step, at this stage in the reasoning, is to compare those findings of fact relating to the evidence furnished by the applicants with the grounds of the contested decision, so as to enable the Court to consider whether, in rejecting the complaints made to it, the Commission refuted with due cause the factual data analysed above which had been submitted to it by the complainants for its appraisal.

46 In that connection, it should be recalled at the outset that ten different undertakings were called in question in the complaints of 29 November 1988 and 5 June 1990: the complaint of 29 November 1988 concerned the French importers of the five Japanese makes Toyota, Honda, Nissan, Mazda and Mitsubishi and the complaint of 5 June 1990 the companies CCIE, SIDA, SIGAM, SAVA and Auto GM, which were dealers in Martinique for the makes at issue in the complaint of 29 November 1988. The contested decision rejects those two complaints as well as the

initial complaint of 18 November 1985, which the Commission interpreted as referring solely to Article 30 of the Treaty. However, in answer to one of the written questions from the Court, the Commission stated that it joined of its own motion the complaints of 29 November 1988 and 5 June 1990 'in view of the identical elements involved: the same products, the same conduct called in question, the same arguments, the same requests, and so on'. Accordingly, the Commission gave a common response, based on the same grounds, to the complaints made to it concerning both Metropolitan France and the Department of Martinique.

47 On page 2 of the contested decision, the Commission states that the investigations carried out by its departments established that the conduct of the 'five importers in question' constituted an integral part of the policy followed by the French public authorities with regard to imports of Japanese cars into France. In the context of that policy, the French public authorities not only set the total quantities of imported vehicles allowed into France each year, but also determined the rules for the allocation of those quantities, in particular by reserving them only to the importers in question.

48 The Court observes in the first place that the only factor mentioned by the Commission in support of the latter statement emerges from the memorandum considered above which the French authorities sent to the Commission on 28 November 1989. Yet the French authorities' statement (see paragraph 6 above), which was purely and simply incorporated in the contested decision, to the effect that the traders had no autonomy in operating the regulatory system established by the French public authorities, is not supported by any documentary evidence.

49 Secondly, the Commission itself admits that that statement applies both to the national importers and to their dealers in Martinique. Yet, as far as at least the latter are concerned, that statement is directly contradicted by an examination of the documents analysed above and, in particular, by the aforementioned draft agreement.

Lastly, the applicants have produced other documentary evidence supporting the presumption raised by the documents analysed above, which the Commission ought to have examined carefully and impartially. The Court refers in this connection, on the one hand, to a letter of 1 July 1987 from the Ministry for Industry, Postal Services, Telecommunications and Tourism and, on the other, to a judgment of the Tribunal de Commerce (Commercial Court), Paris, of 16 March 1990.

51 In the letter of 1 July 1987 (see Annex 41 to the application), which the applicants stated at the hearing, without being contradicted by the Commission, that they had submitted to the latter in the course of the investigation of the complaints, the ministry, referring to the dangers posed by parallel imports to the system involving voluntary limitation of sales of Japanese vehicles, states that, since parallel imports directly compete with the activities of the five authorized importers, they are liable gradually to undermine the *de facto* exclusivity conferred on them in return for their undertakings of voluntary limitation. It adds that 'the growth of such practices is liable rapidly to lead the authorized importers to call in question the whole system of voluntary limitation'. That document confirms, on an initial appraisal, that, in the opinion of the French public authorities themselves, the traders in question have not lost all freedom of action, contrary to the ground for rejecting the complaints.

52 Likewise, the existence of an anti-competitive agreement between the five importers in question was finally established by the Tribunal de Commerce, Paris, in a judgment of 16 March 1990, which was also brought to the Commission's attention by the complainants (see Annex 19 to the application), although that court decided to stay the proceedings until the Commission had ruled on the complaints submitted to it.

53 On this point, the Court considers that, having regard to all the documents submitted for its assessment, the precise findings of fact and law made by the national court — albeit not binding on the Commission — were such as to induce it to pursue its investigation in order to verify whether the information provided by the French public authorities was consistent with all the factual and legal particulars

submitted by the complainants for its appraisal. It was therefore for the defendant institution, using the means which it considered most appropriate in the light of the circumstances of the case, to try to establish, with a sufficient degree of certainty, the relevance of the facts alleged before taking the view, in the first ground of the contested decision, that the importers in question had 'no freedom of action in this case'.

54 However, it is sufficiently clear from all the documents which have just been examined, and in particular from the Commission's answer to one of the written questions put to it in this connection by the Court, that, despite the discrepancy between the answer from the French authorities dated 28 November 1989 and the documents submitted for the Commission's appraisal by the complainants, the Commission refrained from proceeding with any further measure of investigation after 28 November 1989 in order to seek out the information initially requested or to verify whether the answer given by the French authorities was correct. In particular, the Commission did not carry out any measure of inquiry after 5 June 1990, the date on which Somaco's complaint, which was directed specifically against the practices found to exist in Martinique, was lodged.

55 It follows from the foregoing that, in so far as the contested decision rejects the complaints on the ground that the traders in question had no autonomy or 'freedom of action' whereas that ground is gainsaid by precise, detailed evidence which was submitted for the Commission's appraisal by the complainants, it is vitiated by a manifest error in the assessment of the facts which led it to err in law as regards the applicability of Article 85 of the Treaty to the conduct of the traders in question.

56 Consequently, the first plea raised by the applicants must be upheld. However, in rejecting the requests submitted to it, the Commission also relied on the fact that a finding that the Community competition rules had been infringed, assuming that it were made out, could not, in the circumstances of the case, alter the complainants' situation. Although the second ground for rejecting the complaints is stated in the contested decision to have been established 'in the light of the findings' made by the Commission in connection with its first ground for rejecting the complaints, which, as the Court has just held, is vitiated by a manifest error with regard to the

assessment of the facts and an error of law, the Court considers that in fact that second ground is sufficiently autonomous in relation to the first ground considered above. The Court must therefore adjudicate on the second of the five pleas for annulment raised by the applicants, by which they take issue in fact with the legality of the second ground on which the Commission rejected their complaints.

The second plea alleging infringement of the Treaty

Arguments of the parties

57 In challenging the Commission's second ground for rejecting the complaints to the effect that 'the setting of total quantities by the public authorities does not fall within Article 85, whilst the application of that provision to the allocation would not be capable of bringing about the authorization' of the complainant companies, the applicants argue that they are not taking issue with the existence of an import quota but with their exclusion from the quota as a result of the agreement existing between the beneficiary undertakings, and with the disappearance of any competition as a result of the existence of inalterable sub-quotas. Furthermore, the refusal of the French authorities to grant them authorization as importers has never been called in question in the complaints lodged, since, even in the absence of such authorization, the makes excluded from the agreement should not have encountered any obstacle to their being marketed on account of the existence of parallel imports capable of allowing such marketing.

58 In response to the Commission's argument to the effect that the applicants seek to participate in an allocation of quotas which they themselves describe as unlawful, the applicants state that they have never sought to participate in the unlawful agreement and that their complaints seek solely to restore freedom of competition on the market in question so as to enable them to carry on trading freely by way of fair competition as between all Far Eastern makes.

59 The applicants further contest the Commission's argument that, in so far as the regulatory system established by the French public authorities does not allow importers other than the five whose conduct is impugned to be included in the

breakdown of the quota, a finding of an infringement of Article 85 would not alter the applicants' position *vis-à-vis* those five importers in any way. They point out in the first place that they do not seek to be included in the breakdown of the import quota and argue that the fact that a market is of a particular size does not warrant the number of traders operating on that market being limited by the authorities of a Member State. In addition, they contest the Commission's reasoning inasmuch as it presupposes that the importers had no choice other than to adopt anti-competitive conduct. In this regard, they argue that it appears from the evidence adduced that the agreement complained of is the result of a consensus between the undertakings at issue, which, in particular, engage in concertation at the beginning of each year as regards the sub-quotas and provide for penalties in the event that a party to the agreement exceeds the sub-quota allocated to it by the parties to the agreement.

62 Lastly, the applicants argue that, according to the consistent case-law of the Court of Justice, all unlawful agreements are open to criticism, even those connected with legislative provisions or practices of the Member States (see, in particular, Case 30/87 *Bodson* [1988] ECR 2479). The Commission itself has stated that the fact that an undertaking has agreed to a particular line of conduct under strong pressure and even against its own economic interest does not preclude a finding that there exists an anti-competitive agreement (see, in particular, Commission Decision 88/86/EEC of 18 December 1987 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.017 — Fisher-Price/Quaker Oats Ltd — Toyco, OJ 1988 L 49, p. 19)).

61 The Commission states that, in its view, there is no reason to cast doubt on the French authorities' statement to the effect that the undertakings in question have no autonomy in administering the system for regulating the market, laid down by the public authorities. Furthermore, the fact that the applicants were refused 'type' import authorization and that, as a result, their imports had to be carried out 'on an individual basis' does not ensue from the behaviour of the five importers whose conduct is called in question by the complainants.

Findings of the Court

62 In the second plea seeking the annulment of the contested decision, the applicants call in question the legality of the second ground for rejecting their complaints in the contested decision in which the Commission considers that, in view of the refusal to grant the applicants authorization, a finding that the competition rules had been infringed by the parties referred to in the complaints could not alter the complainants' position on the market (see paragraph 13 *in fine*).

63 In the course of the aforementioned measures of organization of procedure, the Court asked the Commission to provide it with certain particulars with regard to its interpretation of the expression 'authorization as an importer' to which it refers in the contested decision. In an initial series of written questions, it asked the Commission to specify the meaning of that expression and to indicate whether it considered that it referred to trade and might, as a result, be equated with an import licence, or whether, on the contrary, it fell within the sphere of French road traffic law and therefore took effect only as regards the manner of authorization and type-approval of vehicles, independently of the conditions for marketing them.

64 The Commission answered that first question as follows:

'According to the information provided by France which is available to the Commission, the concept of "authorization as an importer" comes under French road traffic law. Article 106 of the French Code de la Route provides as follows: However, as regards vehicles or vehicle components which are not manufactured or assembled in the territory of a Member State of the EEC, type approval shall be authorized only if the manufacturer has in France a representative specially authorized by the Ministry of Transport. In such case, it shall take place at the request of that representative.'

65 In a second series of questions, the Commission was asked in particular to state the reasons for which, in its view, only the five importers in question participated in the distribution of the volume of cars imported when the system was introduced.

66 The Commission answered that question as follows:

'As regards the last part of the Court's question, the Commission can only confirm that, regard being had to the provisions of Article 106 of the French Code de la Route, only motor vehicles of authorized makes may be imported. As a result, importers who were not authorized when the system for moderating imports from Japan was set up could not participate in the said distribution.'

67 It appears from the documents in the case file that, in French law, any vehicle subject to compulsory registration must, in order to able to use public roads, be 'approved' by the Ministry for Industry. Japanese manufacturers fall within the provisions of Article R 106 of the Code de la Route, under which vehicles manufactured outside the territory of the European Economic Community may not be type-approved unless the manufacturer has an agent authorized by the public authorities. Vehicles from manufacturers who, as in the case of the vehicles imported by the applicants, do not have such an agent must be approved in accordance with the so-called 'individual' procedure laid down by Ministerial Decree of 19 July 1954, as amended. Unlike type-approval whereby a standard vehicle may be approved — with subsequent checks to verify that the vehicles manufactured actually are in conformity with the model which was type-approved — individual approval means that approval is granted vehicle by vehicle (see Decision No 91-D-52 of 20 November 1991 of the French Competition Council, appended to the application as Annex 10).

68 Furthermore, as regards the conformity with Article 30 of the Treaty of the French system of 'individual' approval, which is moreover not at issue in these proceedings, the Court of Justice has taken the view that an approval procedure laid down in a Member State for vehicles imported from another Member State and already approved or authorized for use in that State must allow the importer, as an alternative to the checking procedure, to produce documents issued in the exporting Member State in so far as, first, those documents provide the necessary information based on checks already carried out and, secondly, the checking procedure does not entail unreasonable cost or delay (Case 406/85 *Procureur de la République* v *Gofette and Gilliard* [1987] ECR 2525).

69 Consequently, the Commission is wrong to argue that only vehicles of authorized makes may be imported (see paragraph 66 above). The authorization system laid down by the applicable national legislation does not concern the right to import but simply the question whether the approval of imported vehicles, which is a necessary precondition for allowing a vehicle on to public roads, is granted by type or in accordance with the so-called 'individual' procedure. It follows that the aforementioned provisions of the French Code de la Route are not liable, in themselves, to impede direct imports of vehicles by importers representing Japanese manufacturers other than manufacturers with agents authorized by the French Ministry for Industry, Postal Services, Telecommunications and Tourism. That is precisely the situation of the manufacturers for whom the complainant undertakings are importers for France. Seen from that perspective, as the applicants argue, neither the imposition of quotas on vehicles of Japanese origin nor the authorization procedure, which were decided on by the French public authorities and which are not at issue in these proceedings, were liable in themselves to prevent the applicant undertakings, in compliance with the competition rules, from being allowed, in the same way as their competitors distributing authorized makes, to take part in the marketing of vehicles permitted, under the quota, to enter French territory.

70 In addition and contrary to the second part of the statement of reasons in the Commission's decision, the applicants have never sought to be allowed to participate in the anti-competitive agreement of which they complained.

71 Lastly, in accordance with settled case-law, the fact that the anti-competitive conduct of the authorized importers, if proved, was fostered or encouraged by the French authorities has in itself no bearing on the applicability of Article 85 of the Treaty (Case 229/83 *Leclerc* v *Au blé vert* [1985] ECR 1 and Case 231/83 *Cullet* v *Leclerc* [1985] ECR 305).

72 It follows that the cessation of the alleged anti-competitive practice at the behest of the Commission would, if proved, certainly have been capable of altering the

conditions governing the complainant undertakings' access to the motor vehicle distribution market in France, irrespective of the question of their authorization by the French public authorities.

73 Consequently, in the contested decision the Commission is wrong to hold that there is no link between the complainants' interest and the application of Article 85(1) to a practice whose purpose or effect is to limit access to the motor vehicle distribution market for Japanese makes to five specific makes. To that extent, the contested decision is vitiated by an error of law.

74 It follows from the whole of the foregoing that the first ground on which, in the contested decision, the Commission rejected the three complaints lodged by the applicants alleging infringement of Article 85 of the Treaty is based on an incorrect factual and legal assessment of the particulars submitted by the applicants for the Commission's appraisal and that the Commission's second ground for rejecting the complaints is itself vitiated by an error of law. The contested decision must therefore be annulled is so far as it relates to Article 85 of the Treaty, without there being any need for the Court to consider the other pleas raised by the applicants.

Costs

75 Under 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. Since the applicants did not apply for costs in their pleadings, they must bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. **Annuls the Commission's decision of 5 December 1991 in so far as it relates to Article 85 of the Treaty;**

2. **Orders each of the parties to bear its own costs.**

Cruz Vilaça Barrington

Biancarelli Saggio Kalogeropoulos

Delivered in open court in Luxembourg on 29 June 1993.

H. Jung J. L. Cruz Vilaça

Registrar President