JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber, Extended Composition)
27 June 1995 *

In Case T-186/94,

Guérin Automobiles, a company incorporated under French law, having its offices in Alençon (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,

applicant,

v

Commission of the European Communities, represented by Francisco Enrique González-Díaz, of the Legal Service, and Géraud de Bergues, a national civil servant on secondment to the Commission, acting as Agents, with an address for service in Luxembourg at the office of Georgios Kremlis, of the Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for a declaration under Article 175 of the EC Treaty that the Commission has failed to address to the applicant a decision on the complaint

* Language of the case: French.

lodged by it under Article 3(2) of Regulation No 17 of the Council of 6 February 1962, the first regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87), and in the alternative the annulment of the Commission's letters of 21 January 1993 and 4 February 1994,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES
(Third Chamber, Extended Composition),

composed of: J. Biancarelli, President, R. Schintgen, C. P. Briët, C. W. Bellamy and J. Azizi, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 7 March 1995,

gives the following

Judgment

Facts

1 On 10 September 1987 the applicant entered into a dealership contract of indefinite duration with Volvo France SA (hereinafter 'Volvo France'). On 16 May 1988 Volvo France wrote terminating the contract with effect from 16 August 1988.

2 On 3 August 1992 the applicant wrote to the Commission requesting a finding of breach of Article 85 of the EEC Treaty, as provided for in Article 3(2) of Regulation No 17 of the Council of 6 February 1962, the first regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87, hereinafter 'Regulation No 17'). In that complaint the applicant alleged that Volvo France had wrongfully terminated the dealership contract on the ground that the applicant had been unable to reach the sales targets fixed in clause 1.5 of the contract.

3 On 29 October 1992 Mr Temple Lang, Director of the Directorate-General for Competition in the Commission (DG IV), wrote to inform the applicant that 'it was difficult to see, on the basis of the documents in the file, sufficient Community interest in the matter to justify it being dealt with by the Commission. Accordingly, if no new evidence is furnished by you within four weeks of the date you receive this letter, the matter will be regarded as closed'.

4 The applicant submitted its observations on the Commission's letter of 29 October 1992 in a letter of 11 December 1992. At the hearing the applicant maintained that those observations constituted a fresh complaint.

5 Mr Temple Lang's reply of 21 January 1993 to the applicant's letter of 11 December 1992 stated that it was clear from the latter that 'the complaint is not based on the factual circumstances in which Volvo France terminated the contract in question but is in reality based on the refusal to sell now applied to Guérin Automobiles solely by reason of a network of exclusive and selective distribution contracts which, according to Guérin, are null and void because they lie substantially outside the scope of exemption under Regulation (EEC) No 123/85 and are not covered by an individual exemption.' He added: 'I must tell you that the problem you have

raised, which is in fact the subject-matter of other complaints, is at present being examined by the Commission and the results will be communicated to you when the examination is complete.'

6 On 6 January 1994 the applicant wrote to ask the Commission for the results of the examination referred to in the letter of 21 January 1993. On 24 January 1994 it addressed a formal letter of notice to the Commission referring expressly to Article 175 of the EEC Treaty.

7 Mr Temple Lang replied to the formal notice by letter of 4 February 1994 to the applicant which ran as follows:

'Your complaint concerns the restriction of competition inherent in the selective and exclusive distribution system for cars applied *inter alia* by Volvo France and which is the subject of your complaint, and which is based on the model offered by Regulation No 123/85, to which you refer. You were informed in my letter of 21 January 1993, to which you also refer, that an instance of that kind is already the subject of an individual examination under the Treaty competition rules. I repeat that that examination is still in progress and will, if appropriate, be applicable as a precedent for the problems which you have raised. Finally, and in response to your formal letter of notice, I renew the assurance that you will be informed as soon as that examination has made significant progress.'

8 On 13 June 1994 the Director General of DG IV sent to counsel for the applicant a communication referring 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 1963-1964, p. 47, hereinafter 'Regulation No 99/63'). The letter reads as follows:

'Subject: Case IV/34-423 — Volvo France/Gûerin

Re: Your letter of 24.1.94 (Formal notice)

Letter under Article 6 of Regulation (EEC) 99/63

Dear Sir,

I acknowledge receipt of your letter of 24 January 1994, concerning the position of your client Guérin Automobiles following its complaint of 11 December 1992 against Volvo France's standard distribution contract alleging extensive trespass over the bounds of the exemption provided for by that regulation, and your request under Article 175 of the Treaty that the Commission define its position on the matter within two months. I have the following observations to make on that letter.

From the point of view of the competition rules your complaint raises the question of the compatibility with Regulation (EEC) No 123/85 of a selective and exclusive distribution contract for motor vehicles such as that applied by Volvo France. On that subject, and referring once again to my letter of 21 January 1993 to which you also refer, I confirm that an individual case is currently being considered by the Commission concerning the compatibility with the regulation of a standard distribution contract for motor vehicles in use by another manufacturer.

A number of the clauses or practices referred to in your complaint are at issue in that other case. As you are aware, the Commission must be guided by overriding requirements in its choice of priorities owing to lack of resources. It is therefore in the Community interest that the most representative cases should be selected for consideration where a number of similar cases are brought before it. For that reason I confirm, with reference to Article 6 of Regulation (EEC) No 99/63, that in the circumstances your complaint cannot be given individual consideration at present.

I would add that Regulation No 123/85 is directly applicable by the national courts; consequently, your client may bring his dispute, and the question of the applicability of that regulation to the contracting question, directly before those courts.

You may submit observations on this letter. Should you wish to do so, they should reach me within two months.'

9 The applicant submitted its observations on the letter of 13 June 1994 to the Commission on 20 June 1994.

Procedure and forms of order sought by the parties

10 It was in those circumstances that this application was lodged by the applicant at the Registry of the Court of First Instance on 5 May 1994.

11 Upon hearing the Report of the Judge-Rapporteur the Court of First Instance (Third Chamber, Extended Composition) decided to open the oral procedure without any preparatory measures of inquiry.

12 The parties presented oral argument and their replies to the Court's oral questions at the hearing in open court on 7 March 1995.

13 The applicant claims that the Court should:

— declare, in accordance with Article 175 of the Treaty, that the Commission has failed to take a decision in its case;

— in the alternative, annul the Commission's letters of 21 January 1993 and 4 February 1994, should they express a decision not to investigate the applicant's complaint;

— order the Commission to pay the costs.

14 The Commission contends that the Court should:

— declare the application under Article 173 of the EEC Treaty inadmissible;

— dismiss the application under Article 175 as unfounded, or in the alternative as having become without object following the dispatch of the letter under Article 6 of Regulation No 99/63;

— order the applicant to pay the costs.

The principal claims, based on Article 175 of the Treaty

As regards their subject-matter

Arguments of the parties

15 The Commission relies on the judgment of the Court of Justice in Case 125/78 *GEMA* v *Commission* ([1979] ECR 3173, paragraph 21) and of the Court of First Instance in Case T-28/90 *Asia Motor France and Others* v *Commission* ([1992] ECR II-2285, paragraphs 35 and 36, hereinafter '*Asia Motor I*') in support of its argument that by sending the letter of 13 June 1994 pursuant to Article 6 of Regulation No 99/63 it has defined its position within the meaning of Article 175 of the Treaty. It concludes that there is no need to proceed to judgment on the matter.

16 It adds that the fact that that letter is not a measure against which an action for annulment may be brought is irrelevant, since the Court of Justice has held that failure to act covers not only failure to adopt an act capable of producing legal effects and, therefore, open to an action for annulment, but likewise failure to adopt acts which do not have such effects, if such failure itself creates legal effects and in particular if the act in question is a prerequisite for conducting a procedure which will culminate in a legal act which is open to challenge under Article 173 of the Treaty (judgments of the Court of Justice in Case 377/87 *Parliament* v *Council* [1988] ECR 4017 and Case 302/87 *Parliament* v *Council* [1988] ECR 5615). That definition by the Court does not, according to the Commission, deprive complainants of judicial relief because if the Commission fails to adopt a final decision rejecting the complaint after notification under Article 6 of Regulation No 99/63 the complainant will be able to bring a fresh action for failure to act in order to obtain such a final decision.

17 At the hearing the Commission stated that the applicant could not have been mistaken as to the precise effect of the letter of 13 June 1994 because Article 6 of Regulation No 99/63, the legal basis for the letter, provides expressly that the Commission shall issue such a letter to the complainant where it considers that the application cannot be granted.

18 The applicant replies that the letter of 13 June 1994 cannot constitute a definition of the Commission's decision in view of both its express reference to Article 6 of Regulation 99/63 and the terms in which it is written. It is illogical, it maintains, to claim on the one hand that the Commission's letter of 29 October 1992, which stated that 'within four weeks of the date of receipt of this letter the matter will be regarded as closed' is merely a holding letter and on the other hand that the letter of 13 June 1994, which contains no express rejection of the complaint, constitutes a definition of the Commission's position. It adds that the Commission's statement in its letter of 13 June 1994 that the complaint 'cannot be given individual consideration at present' indicates its intention of restricting its effects in time, thus making it provisional.

19 It also argues that the letter of 13 June 1994 merely quotes a standard formula, namely the Community interest represented by the case and financial considerations, as justification for the possible rejection of the complaint, and as such lacks an adequate statement of reasons. It cannot therefore be regarded as defining the Commission's position on the complaint which led to these proceedings.

20 The applicant also considers that the letter of 13 June 1994 did not put an end to the failure to act because only two months after the complaint was submitted Commission staff wrote to it on 29 October 1992 indicating that the complaint was not to be pursued, which shows that the Commission failed to examine it carefully (judgments of the Court of First Instance in Case T-24/90 *Automec* v *Commission* [1992] ECR II-2223, hereinafter '*Automec II*', and Case T-7/92 *Asia Motor France*

and Others v *Commission* [1993] ECR II-669, hereinafter '*Asia Motor II*'). Moreover, by attaching the applicant's complaint informally to another the Commission abandoned or postponed *sine die*, without any justification, the analysis of the complaints specifically directed at Volvo France, thus depriving the applicant of the legal protection conferred on it by Article 85 of the Treaty.

21 It adds that allowing the letter of 13 June 1994 to bring an end to the failure to act would enable the Commission to avoid judicial review in the context of practices in restraint of competition. It considers that the Commission's replies are deliberately vague and seek to deprive it of recourse to the courts. DG IV is attempting to evade an action for annulment by describing the letters of 21 January 1993 and 4 February 1994 as mere 'holding letters', and an action for failure to act by declaring that its letter of 13 June 1994 defines its position. Such conduct, the applicant maintains, is evidence of a misuse of powers and a violation of the spirit of the EC Treaty on the part of the Commission staff sufficient to justify the action for failure to act brought by the applicant.

Findings of the Court

22 The Court finds that it is established and has not been contested that at the time the application was lodged it was admissible as regards the failure to act. It must be ascertained, however, whether the Commission's position has been defined while these proceedings were in progress thus depriving them of their initial subject-matter.

23 Before considering that question, it should be recalled that it has been consistently held that unless the subject-matter of the complaint falls within the exclusive competence of the Commission, Article 3 of Regulation No 17 does not confer on a complainant under that article the right to obtain a decision of the Commission, within the meaning of Article 189 of the EEC Treaty, regarding the existence or

otherwise of a breach of Article 85 and/or Article 86 of the Treaty (*GEMA*, cited above, paragraph 17; *Automec II*, cited above, paragraphs 75 and 76, and the judgment of the Court of First Instance in Case T-16/91 *Rendo and Others* v *Commission* [1992] ECR II-2417, paragraph 98). Moreover, there is nothing in that approach to prevent the applicant from obtaining a Commission decision on its complaint capable of forming the subject-matter of an action for annulment, in accordance with the general principle that there is a right of access to effective judicial review (see *inter alia* the judgments of the Court of Justice in Case 222/84 *Johnston* v *Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, paragraph 18, and Case C-249/88 *Commission* v *Belgium* [1991] ECR I-1275, paragraph 25).

24 As the Court of First Instance stated in paragraphs 45 to 47 of its judgment in Case T-64/89 *Automec* v *Commission* ([1990] ECR II-367, hereinafter '*Automec I*'), the procedure governed by Article 3(2) of Regulation No 17 and Article 6 of Regulation No 99/63 comprises three successive stages. During the first of those stages, following the submission of a complaint, the Commission examines the complaint in order to decide what action it will take on it. That stage may include an informal exchange of views between the Commission and the complainant in order to clarify the issues of fact and of law with which the complaint is concerned and to give the complainant an opportunity to expand his arguments and allegations, where appropriate in the light of any initial reaction from the Commission. The second stage starts with the notification to the complainant provided for in Article 6 of Regulation No 99/63 in which the Commission indicates the reasons for which, if such is the case, it considers that there are insufficient grounds for granting the application and invites the applicant to submit further comments within a stipulated time. The final rejection of the complaint constitutes the third stage in the procedure. It constitutes a decision within the meaning of Article 189 of the Treaty and is therefore a measure against which an action for annulment may be brought (judgments of the Court of Justice in Case 210/81 *Demo-Studio Schmidt* v *Commission* [1983] ECR 3045, Case 298/83 *CICCE* v *Commission* [1985] ECR 1105, Joined Cases 142/84 and 156/84 *BAT and Reynolds* v *Commission* [1987] ECR 4487; judgments of the Court of First Instance in *Automec I*, cited above, paragraph 47, and Case T-37/92 *BEUC and NCC* v *Commission* [1994] ECR II-285, paragraph 30).

25 The Court finds that on the date of this judgment there is no evidence on the file that the Commission adopted a decision within the meaning of Article 189 of the

Treaty in response to the applicant's complaint. That finding is not sufficient, however, to justify the conclusion that the defendant institution has failed to act because in certain circumstances an act which itself is not open to an action for annulment may nevertheless constitute a 'definition of position' terminating the failure to act if it is the prerequisite for the next step in a procedure which is to culminate in a legal act which is itself open to an action for annulment under the conditions laid down in Article 173 of the Treaty (Case 377/87 *Parliament* v *Council*, cited above, paragraphs 7 and 10, and Case 302/87 *Parliament* v *Council*, cited above, paragraph 16). It is therefore necessary for the Court of First Instance to determine whether in the circumstances of this case there occurred an act of the Commission which, even if it was not a measure against which an action for annulment could be brought, terminated the failure to act.

26 In that context it should be noted that the Court of Justice held in *GEMA* v *Commission* (cited above, paragraph 21), that a letter addressed by the Commission to the complainant in accordance with Article 6 of Regulation No 99/63 constitutes a 'definition of its position' within the meaning of Article 175 of the Treaty, even though it is not open to an action for annulment (*BEUC and NCC* v *Commission*, cited above, paragraph 30). The applicant's argument that the letter of 13 June 1994 cannot constitute a definition of the Commission's position on the complaint within the meaning of Article 175 of the Treaty because it refers expressly to Article 6 of Regulation No 99/63 is therefore wrong.

27 As regards the status of the letter of 13 June 1994 it must first be recalled that Article 6 of Regulation No 99/63 provides that 'where the Commission, having received (a complaint) ..., considers that on the basis of the information in its possession there are insufficient grounds for granting the application, it shall inform (the complainants) of its reasons and fix a time-limit for them to submit any further comments in writing'.

28 The Court finds that the letter of 13 June 1994, the heading of which refers expressly to Article 6 of Regulation No 99/63, satisfies all the formal requirements laid down in that article. In the first place it informs the complainant, after recalling the individual heads of complaint in its application of 11 December 1992, of

the reasons for rejecting the latter, namely that (i) the Commission is already considering an individual case which concerns a number of clauses and practices of the same kind referred to in the complaint, (ii) that when a number of similar cases are referred to the Commission the Community interest demands that the latter deal with those which are most representative and (iii) that 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 No L 15, p. 16) is directly applicable by the national courts; secondly, the communication of 13 June 1994 prescribes a time-limit, two months in this case, for the complainant to submit comments in writing. It should also be noted that in the text of the letter itself the Director General of DG IV refers for a second time expressly to Article 6 of Regulation No 99/63.

29 Consequently, although as the applicant rightly points out the letter of 13 June 1994 does not expressly indicate that the complaint is to be rejected, the two references to Article 6 of Regulation No 99/63, the fact that the letter meets the formal requirements laid down by that provision, the content of the letter and the context in which it came about make it clear that on the date on which the Commission addressed that communication to the applicant the information in its possession indicated that there were insufficient grounds for granting the application.

30 Accordingly, the Commission's letter of 13 June 1994 constitutes notification under Article 6 of Regulation No 99/63.

31 The fact that the letter of 13 June 1994 states that the complaint cannot be examined individually 'at present' is not sufficient to alter that: an Article 6 letter does not fix the Commission's definitively (see *inter alia* the judgment of the Court of Justice in Case C-39/93 P *SFEI and Others* v *Commission* [1994] ECR II-2681, paragraph 28, and *Automec I*, cited above, paragraph 46). Consequently, the words

'at present' in the letter of 13 June 1994 merely confirm that it defines the position adopted by the Commission at the time the letter was written, even if that act does not constitute a decision definitively rejecting the complaint.

32 Consequently, the Commission's notification to the complaint of 13 June 1994 under Article 6 of Regulation No 99/63 must be regarded as a definition of its position on the complaint within the meaning of the second paragraph of Article 175 of the Treaty (*GEMA* v *Commission*, cited above).

33 Even if, as the applicant maintains, the letter of 13 June 1994 did not contain an adequate statement of reasons and there were irregularities in the procedure which led up to it, such complaints are irrelevant to the question whether the Commission defined its position within the meaning of Article 175 of the Treaty, although they might be relevant in an action under Article 173.

34 Finally, as regards the applicant's argument that allowing the letter of 13 June 1994 to terminate the failure to act would enable the Commission to evade judicial review, it should be emphasized that, having submitted within the time stipulated in the letter of 13 June 1994 comments in response to the Article 6 notification, the applicant is henceforth entitled to obtain a definitive decision from the Commission on its complaint; and that decision may, if the applicant sees fit, be challenged in an action for annulment before this court (see in that regard the Opinion of Judge Edward acting as Advocate General in *Automec II*, cited above, at p. 226, paragraphs 22 and 23).

35 The result of all the considerations set out above is that the Commission's letter of 13 June 1994, which was sent after the action for failure to act was lodged, has deprived the action of its initial purpose. It is therefore unnecessary to rule on it (see *Asia Motor I*, cited above).

36 Since the Court has not upheld the main claim, which is based on Article 175 of the Treaty, it must rule on the alternative one, based on Article 173 of the Treaty, seeking the annulment of the Commission's communications to the applicant of 21 January 1993 and 4 February 1994.

The alternative claim for annulment

Admissibility

Arguments of the parties

37 The applicant considers that its claim for the annulment of the communications dated 21 January 1993 and 4 February 1994 is admissible in the light of the judgment of the Court of Justice in Case 26/76 *Metro* v *Commission* ([1977] ECR 1875); it argues in that context that the Commission's letters constitute decisions rejecting its complaint. It adds that the position is the same even if the letter of 13 June 1994 terminated the failure to act, since the contested letters produce the same effects in law as the letter of 13 June 1994.

38 The Commission argues that the action seeking the annulment of the letters of 21 January 1993 and 4 February 1994 is manifestly inadmissible because they lack the character of decisions. It adds that even if they had such a character the action is inadmissible because it is out of time.

Findings of the Court

39 There is a consistent body of case-law to the effect that acts or decisions against which an action for annulment may be brought under Article 173 of the Treaty are measures which produce binding legal effects capable of affecting the applicant's interests and clearly altering his legal position (judgment of the Court of Justice in Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 9; judgments of the Court of First Instance in *Automec I*, cited above, paragraph 42, and Case T-3/93 *Air France* v *Commission* [1994] ECR II-121, paragraph 43). 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 an action for annulment 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 (*IBM*, cited above; *BEUC and NCC*, cited above, paragraph 27).

40 In this case it should be noted that the letters of 21 January 1993 and 4 February 1994 are merely holding letters which fall within the first of the three stages of the procedure governed by Article 3(2) of Regulation No 17 and Article 6 of Regulation No 99/63, as described above. The letters are therefore not acts producing binding legal effects capable of affecting the applicant's interests, but preparatory measures which, as such, are not open to challenge by an action (see *inter alia* *Automec I*, cited above, paragraph 45).

41 It should be added that that conclusion would not be altered if the letters of 21 January 1993 and 4 February 1994 were to be regarded as notifications under Article 6 of Regulation No 99/63, as the applicant maintains, because Article 6 notifications are not open to actions for annulment (*Automec I*, cited above, paragraph 46, and *BEUC and NCC*, cited above, paragraph 30).

42 It follows that the claim for annulment must be rejected as inadmissible.

43 In the light of all the considerations set out above there is no need to give a ruling on that part of the action based on Article 175 of the Treaty and the action must be dismissed as inadmissible in so far as it seeks the annulment of the Commission's letters of 21 January 1993 and 4 February 1994.

Costs

44 Article 87(6) of the Rules of Procedure of the Court of First Instance provides that where a case does not proceed to judgment the costs shall be in the discretion of the Court. Article 87(3) provides that where each party succeeds on some and fails on other heads, or where the circumstances are exceptional, the Court may order that the costs be shared or that each party bear its own costs.

45 In this case the Court finds that the Commission failed to respond within the time-limit laid down in Article 175 of the Treaty to the formal notice addressed to it by the applicant on 24 January 1994 even though it had been duly informed of the substance of the complaint since December 1992. Moreover, it was not until 13 June 1994, that is to say after this action had been lodged, that the Commission notified the applicant of its position on the complaint in accordance with Article 6 of Regulation No 99/63. It was also that conduct of the Commission which led the applicant to ask in the alternative that the contested decision be annulled.

46 Consequently, it is appropriate in the light of the circumstances of the case to decide that the Commission shall bear its own costs together with those of the applicant.

On those grounds,

THE COURT OF FIRST INSTANCE
(Third Chamber, Extended Composition)

hereby:

1. Declares that it is not necessary to give a ruling on the application in so far as it is based on Article 175 of the Treaty;

2. Dismisses the remainder of the application as inadmissible;

3. Orders the Commission to pay the costs.

Biancarelli Schintgen Briët

Bellamy Azizi

Delivered in open court in Luxembourg on 27 June 1995.

H. Jung J. Biancarelli

Registrar President