JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)
26 October 2000 *

In Case T-154/98,

Asia Motor France SA, established in Chemille (France), in liquidation, represented by A.F. Bach, liquidator,

Jean-Michel Cesbron, carrying on business under the name of JMC Automobiles, residing in Chemille, the subject of a court order in bankruptcy, represented by A.F. Bach, receiver,

Monin Automobiles SA, established in Bourg-de-Péage (France), in liquidation, represented by N. Grandjean, liquidator,

Europe Auto Service (EAS) SA, established in Livange (Luxembourg), in liquidation, represented by P. Schiltz, receiver,

all represented in these proceedings by J.-C. Fourgoux, of the Brussels and Paris Bars, with an address for service in Luxembourg at the Chambers of P. Schiltz, 4 Rue Béatrix de Bourbon,

applicants,

v

Commission of the European Communities, represented by G. Marenco, Principal Legal Adviser, and L. Guérin, national expert seconded to the

* Language of the case: French.

Commission, and, subsequently, by G. Marenco and F. Siredey-Garnier, national expert seconded to the Commission, acting as Agents, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for annulment of the Commission's decision of 15 July 1998 rejecting the complaints lodged by the applicants as to the existence of cartel practices alleged to be contrary to Article 85 of the EC Treaty (now Article 81 EC),

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

composed of: R. García-Valdecasas, President, P. Lindh and J.D. Cooke, Judges,

Registrar: B. Pastor, Principal Administrator,

having regard to the written procedure and further to the hearing on 4 May 2000,

gives the following

Judgment

Facts and background to the dispute

1 The applicants imported and marketed in France Japanese makes of vehicle cleared for free circulation in other Member States of the Community, such as Belgium and Luxembourg. They are currently in court-supervised liquidation.

2 Considering himself to be the victim of an unlawful cartel operated by five importers of Japanese cars into France, namely Sidat Toyota France, Mazda France Motors, Honda France, Mitsubishi Sonauto and Richard Nissan SA, one of the applicants, Jean-Michel Cesbron, lodged a complaint with the Commission on 18 November 1985 alleging infringement of Article 30 of the EC Treaty (now, after amendment, Article 28 EC) and Article 85 of the EC Treaty (now Article 81 EC).

3 On 29 November 1988 the applicants lodged a fresh complaint against the five importers, this time under Article 85 of the Treaty.

4 In the latter complaint the applicants claimed, essentially, that the five importers had given an undertaking to the French administrative authorities not to sell on the French domestic market more than 3% of the total number of motor vehicles

registered on French territory in the preceding calendar year. The importers were said to have reached an agreement on sharing that quota between them in accordance with certain rules established in advance, excluding any other undertaking wishing to distribute in France Japanese makes of vehicle other than those distributed by the parties to the alleged agreement.

5 The applicants went on to allege in the complaint that, in return for that voluntary limitation, the French administrative authorities had increased the obstacles to the free movement of makes of Japanese vehicle other than the five distributed by the importers who were parties to the alleged agreement.

6 On the basis of Article 11(1) of Regulation No 17 of the Council of 6 February 1962, First regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87), the Commission, in a letter dated 9 June 1989, requested information from the five importers. The French Directorate-General for Industry and Regional Development instructed them in a letter dated 20 July 1989 not to reply to one of the questions asked by the Commission, whereupon the Commission, by letter dated 16 October 1989, sought information from the French authorities. On 28 November 1989 the French authorities replied, essentially, that 'the questions concerning the conduct of the undertakings mentioned in the Commission's letter [were] irrelevant in this context in so far as that conduct [was] connected with the regulatory arrangements desired by the public authorities; those undertakings [had] no autonomy in the implementation of those arrangements.'

7 The Commission failed to reply to the applicants and they therefore sent a letter on 24 November 1989 requesting the Commission to adopt a position on the complaints. When it still failed to reply, the applicants 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 and Others* v

Commission [1990] ECR I-2181, the Court of Justice declared the action for failure to act and for damages inadmissible in so far as it concerned the Commission's lack of response to the alleged infringement of Article 30 of the Treaty and referred the case to the Court of First Instance in so far as it concerned the Commission's lack of response to the alleged infringement of Article 85 of the Treaty and the ensuing liability.

8 Meanwhile, by a letter dated 8 May 1990, the Director-General of the Commission's Directorate-General for Competition informed the applicants 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) that it did not envisage acting on their complaints and invited them to submit any observations they might have in that regard. On 29 June 1990 the applicants submitted their observations to the Commission, in which they reaffirmed that their complaints were well founded.

9 It was in those circumstances that the Court of First Instance held in its judgment in Case T-28/90 *Asia Motor France and Others* v *Commission* [1992] ECR II-2285 ('*Asia Motor France I*') that there was no need to give a decision on the application in so far as it was based on Article 175 of the EC Treaty (now Article 232 EC). As for the remainder, the Court dismissed the applicants' claim for damages as inadmissible.

10 On 5 June 1990 Somaco likewise lodged a complaint with the Commission concerning the practices engaged in by CCIE, SIGAM, SAVA, SIDA and Auto GM, all established in Lamentin (Martinique, France), dealers for Toyota, Nissan, Mazda, Honda and Mitsubishi respectively, and importers of those makes in Martinique. That complaint, which was based on Articles 30 and 85 of the Treaty, also challenged the practices of the French authorities on the ground that they were intended to prevent parallel imports by the complainant of certain makes of Japanese vehicle, and of Korean-made Hyundai vehicles.

11 By letter of 9 August 1990, and with reference to its letter of 8 May 1990 to the applicants, the Commission informed Somaco that it did not intend to act on its complaint and invited it to submit observations in accordance with Article 6 of Regulation No 99/63. By letter of 28 September 1990 Somaco reaffirmed that its complaints were well founded.

12 By letter of 5 December 1991 the Commission notified to the applicants and to Somaco a decision rejecting the complaints lodged on 18 November 1985, 29 November 1988 and 5 June 1990.

13 The rejection was based on two grounds. The first was that the conduct of the five importers concerned formed part of the policy of the French public authorities in regard to imports into France of Japanese motor vehicles. Under that policy the public authorities not only determined the total number of vehicles admitted each year into France but also laid down the arrangements for sharing out that total. The second ground was that there was no link between the interest of the complainants and the alleged infringement owing to the fact that, even if Article 85 of the EC Treaty were applied, this could not remedy the situation of which the complainants considered themselves to be the victims.

14 By an application lodged at the Registry of the Court of First Instance on 4 February 1992 the applicants and Somaco brought an action for annulment of the abovementioned decision of 5 December 1991.

15 In its judgment in Case T-7/92 *Asia Motor France and Others* v *Commission* [1993] ECR II-669 ('*Asia Motor France II*'), the Court of First Instance annulled the Commission's decision of 5 December 1991 in so far as it related to Article 85 of the Treaty, since the first ground for rejection was based on an incorrect factual

and legal assessment of the particulars submitted by the applicants for the Commission's appraisal and the second ground was itself vitiated by an error of law.

16 Following that judgment the Commission requested information, on 25 August 1993, from the French authorities and the Martinique dealers concerned by Somaco's complaint of 5 June 1990, in accordance with Article 11(1) of Regulation No 17.

17 The Martinique dealers and the French authorities replied to that request, the former in the course of October 1993 and the latter by letter of 11 November 1993.

18 On 19 October 1993 the applicants and Somaco sent the Commission a letter of formal notice under Article 175 of the EC Treaty.

19 On 10 January 1994 the Commission sent to the applicants and Somaco a communication under Article 6 of Regulation No 99/63. It also provided them with copies of the replies to the requests for information and offered them an opportunity to examine the documentary evidence which had been submitted to it. By letter of 9 March 1994 the applicants and Somaco submitted their observations.

20 On 2 August 1994 the applicants and Somaco sent a new letter of formal notice to the Commission.

21 By letter of 13 October 1994 the Commission notified to the applicants and Somaco a fresh decision in which it rejected their complaints. That decision relied solely on the first ground of rejection stated in the decision of 5 December 1991.

22 By application lodged at the Registry of the Court of First Instance on 12 December 1994 the applicants and Somaco brought an action for failure to act, for annulment and for damages. That action was directed against the Commission and concerned its decision of 13 October 1994.

23 In its judgment of 18 September 1996 in Case T-387/94 *Asia Motor France and Others* v *Commission* [1996] ECR II-961 ('*Asia Motor France III*'), the Court of First Instance dismissed as inadmissible the claims for failure to act and for damages made by the applicants and Somaco. It also dismissed as unfounded the claim for annulment in so far as it related to the decision to reject Somaco's complaint of 5 June 1990. However, it annulled the Commission's decision of 13 October 1994 in so far as it rejected the complaints of 18 November 1985 and 29 November 1988.

24 Following that judgment the Commission undertook a supplementary investigation of the applicants' complaints by sending to the five importers concerned in metropolitan France, on 7 May 1997, new requests for information under Article 11(1) of Regulation No 17 which were worded as follows:

'1. For the years 1977 to 1988 inclusive, please provide all documents in your possession which emanate directly or indirectly from the French administrative authorities and deal with the distribution of a quota for the import of Japanese cars between the five importers in France of Honda, Mazda, Toyota, Mitsubishi and Nissan vehicles.

2. For the years 1977 to 1988 inclusive, please provide all documents in your possession which emanate from the Chambre Syndicale des Importateurs d'Automobiles [Committee of vehicle importers] (CSIAM, then of 33 Avenue Wagram) dealing with the quota distribution mentioned in question 1.

3. Please provide me with all such explanations as may show that the French authorities brought "irresistible pressure" to bear on you within the meaning of the judgment of the Court of First Instance of 18 September 1996 (paragraph 70 of [*Asia Motor France III*]).

4. Please explain why it was impossible for your particular company to resist such pressure.

5. Please indicate when, as far as you are concerned, the State importation system for motor vehicles from non-Member countries implemented by the French authorities in 1977 throughout French territory in the context of the French Republic's then commercial policy regarding motor vehicles ended.'

25 Toyota, Nissan, Mazda, Honda and Sonauto answered those requests for information on 6 June, 9 June, 9 June, 24 June and 11 September 1997 respectively.

26 On 7 October 1997 the Commission sent a communication to the applicants under Article 6 of Regulation No 99/63. The applicants submitted their observations on that communication by letter of 5 December 1997.

27 By letter of 16 July 1998 the Commission sent the applicants a decision which again rejected their complaints ('the contested decision'). In that decision the Commission stated that the replies which it had received to its requests for information of 7 May 1997 'confirm[ed] that, during the period in question, there [had] been no agreement'. In any event, the Commission added, there was no Community interest sufficient to justify fresh action on its part.

Procedure

28 By application lodged at the Registry of the Court of First Instance on 23 September 1998, the applicants brought the present action.

29 By separate document lodged on 29 October 1998, the Commission raised an objection of inadmissibility on the basis of the first paragraph of Article 19 of the EC Statute of the Court of Justice and Article 44(1)(c) of the Rules of Procedure of the Court of First Instance.

30 On 30 December 1998 the applicants submitted their observations on that objection of inadmissibility.

31 By order of 21 May 1999 (Case T-154/98 *Asia Motor France and Others* v *Commission* [1999] ECR II-1703) the Court of First Instance held the present action to be admissible in so far as it is based on a plea alleging a manifest error of assessment and a plea alleging infringement of Article 176 of the EC Treaty (now Article 233 EC), but dismissed the remainder of the action as inadmissible and reserved the costs.

32 Having regard to the report of the Judge-Rapporteur, the Court of First Instance (Fifth Chamber) opened the oral procedure and, by way of measures of organisation of procedure, called upon the Commission to produce its requests for information of 7 May 1997 and the replies of the five importers impugned in the complaints and to state whether or not the applicants had seen those documents. By letter of 9 July 1999 the Commission sent the required documents and gave the information asked of it.

33 On 23 March 2000 the Court decided to place on the case-file certain documents produced in *Asia Motor France III*, namely:

— the letter from the Ministry of Industry, Postal Services and Telecommunications and Tourism of 1 July 1987 (hereinafter 'the letter of 1 July 1987');

— the letter of 19 August 1982 from the Secretary of State at the Ministry of Overseas Departments and Territories addressed to the president of the Antilles-Guyana group of foreign vehicle importers;

— the judgment of the Tribunal de Commerce de Paris (Commercial Court, Paris) of 16 March 1990;

— Decision No 94-D-05 of the Competition Council of 18 January 1994.

34 The parties presented oral argument and replied to the questions put by the Court at the hearing on 4 May 2000.

Forms of order sought

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

— annul the contested decision;

— take formal note that they reserve the right to claim compensation for the harm sustained;

— order the Commission to pay the costs.

36 In their reply, they ask the Court to 'uphold their claims on the ground, so far as may be necessary, of the infringement of their fundamental rights resulting from the unreasonable time taken in the procedure, a plea to be raised by the Court of its own motion'.

37 The Commission contends that the Court should:

— dismiss the application as unfounded;

— order the applicants to pay the costs.

38 In its rejoinder the Commission also contends that the Court should:

— declare inadmissible the application for formal note to be taken that the applicants reserve the right to bring an action against the Commission on the basis of Article 215 of the EC Treaty (now Article 288 EC);

— declare inadmissible the plea alleging breach of the principle of a reasonable period.

The admissibility of the plea alleging breach of the principle of a reasonable period

Arguments of the parties

39 In their reply, the applicants maintain that the Commission took an inordinate amount of time to reach its decision on their complaints and that it thus infringed the general principle of Community law according to which everyone is entitled to fair legal process (Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417 and Joined Cases T-213/95 and T-18/96 *SCK and FNK* v *Commission* [1997] ECR II-1739).

40 They submit that the Court must raise the plea of breach of that principle of its own motion given that what is at issue is a fundamental right guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and one that must be protected by the European Union in accordance

with Article F(1) and (2) of the Treaty on European Union (now, after amendment, Article 6(1) and (2) EU).

41 The Commission argues that the applicants raised that plea for the first time in their reply and that it is not based on any matters of law or of fact which have come to light in the course of the proceedings. It must therefore be dismissed as inadmissible pursuant to Article 48(2) of the Rules of Procedure which prohibits the introduction of new pleas in law in the course of the proceedings.

Findings of the Court

42 It follows from Article 44(1)(c) read in conjunction with Article 48(2) of the Rules of Procedure that the application initiating the proceedings must contain, *inter alia*, a summary of the pleas in law relied on, and that new pleas in law may not be introduced in the course of the proceedings unless they are based on matters of fact or law which come to light in the course of the proceedings. However, a plea which may be regarded as amplifying a submission put forward previously, whether directly or by implication, in the originating application, and which is closely connected therewith, will be declared admissible (Case T-118/96 *Thai Bicycle Industry* v *Council* [1998] ECR II-2991, paragraph 142).

43 It must be observed that, in the present case, in its order of 21 May 1999 in *Asia Motor France and Others* v *Commission*, cited above, the Court of First Instance held that the pleas alleging manifest error of assessment and infringement of Article 176 of the EC Treaty are the only two pleas which were validly before it. The Court observed, *inter alia*, that it was not apparent from the application that the applicants were also relying on a plea alleging infringement of the rights of the defence.

44 The plea alleging breach of the principle of a reasonable period, which is not connected with either of the two pleas set out in the application, must therefore be regarded as having been made for the first time in the reply.

45 No new matters arose in the course of the procedure such as to justify the applicants submitting that plea out of time. The plea must therefore be declared inadmissible on the basis of the provisions of the Rules of Procedure just mentioned.

46 The Court may, admittedly, of its own motion consider the question of infringement of essential procedural requirements and, in particular, of the procedural guarantees conferred by Community law (Case C-291/89 *Interhotel* v *Commission* [1991] ECR I-2257, paragraph 14, and Joined Cases T-9/96 and T-211/96 *Européenne Automobile* v *Commission* [1999] ECR II-3639, paragraph 31). However, given that the Court has already been required to rule on which of the pleas set out in the application have been properly raised (see the order of 21 May 1999 in *Asia Motor France* v *Commission*, cited above), there is no reason for the Court to consider that question of its own motion.

The admissibility of the claim that the Court should take formal note that the applicants reserve the right to claim compensation for harm sustained

47 First, it should be observed that the applicants have submitted no observations on the Commission's objection of inadmissibility.

48 Next, in the context of an action brought under Article 173 of the EC Treaty (now, after amendment, Article 230 EC), the Community judicature is not required to take formal note of the fact that a party reserves the right to bring an

action for compensation for damage. The applicants' claim that the Court should make such a declaration must therefore be held to be inadmissible.

Substance

49 In support of their action, the applicants put forward two pleas in law alleging, first, a manifest error of assessment and, second, infringement of Article 176 of the Treaty.

Preliminary observations

50 It should be borne in mind that the complaints lodged by the applicants set forth, essentially, two grievances. The first concerned the existence of an agreement between the importers in metropolitan France of five makes of Japanese car (Toyota, Honda, Mazda, Mitsubishi and Nissan) and the French authorities with a view to limiting imports into the French market in exchange for an undertaking on the part of the French administrative authorities to reserve to those importers exclusively the entire quota for Japanese cars. The second grievance concerned the existence of an agreement between those same importers regarding the distribution between them of the quota thus fixed.

51 In the contested decision the Commission rejected those complaints on the grounds that there was no agreement within the meaning of Article 85(1) of the Treaty and that there was no Community interest sufficient to warrant continuing the procedure. In the present action the applicants challenge the legality of the Commission's first ground for rejecting its complaints.

52 As regards that first ground, the Commission stated in the contested decision that:

'... during the relevant period, the French public authorities would fix, at the beginning of each year and for each authorised importer, the number of vehicles authorised for import. The distribution of the overall quota of 3% was therefore a matter entirely for the French authorities. Contrary to the complainants' submission, the importers did not divide the quota amongst themselves, but were obliged to comply with the sales quotas imposed on them unilaterally by the authorities. Thus, as far as distribution of the quota is concerned, it is clear that there was no concurrence of wills between the five importers, and thus no agreement within the meaning of Article 85(1)'. (Point 6.)

'... the pressure brought to bear by the French administrative authorities was not directed against the importers as a group, in order to have them agree amongst themselves to adhere to the overall quota of 3%, but... against each importer individually, in order to ensure that each of them adhered to its share of that quota as established by the authorities themselves. There was no need for the importers to be in contact with one another in order for the authorities to attain that objective'. (Point 12.)

53 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 assessment or a misuse of powers (Joined Cases 142/84 and 156/84 *BAT and Reynolds* v *Commission* [1987] ECR 4487, paragraph 62, Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraphs 23 and 25, *Asia Motor France II*, paragraph 33 and *Asia Motor France III*, paragraph 46).

54 Furthermore, where the Commission has a power of assessment 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 *Technische Universität München* [1991] ECR I-5469, paragraph 14, and *Asia Motor France II*, paragraph 34).

55 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 3 of Regulation No 17 and 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, paragraph 79, and the case-law referred to therein, and *Asia Motor France II*, paragraph 35).

56 Lastly, although 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 for it to be able to assess with full knowledge of the case the factual and legal particulars submitted for its appraisal by the complainants (*Asia Motor France II*, paragraph 36).

57 It is in the light of those observations that the two pleas put forward by the applicants in support of their action must be considered.

The first plea, alleging a manifest error of assessment

Arguments of the parties

58 According to the applicants, it cannot be denied that there was an agreement between the five importers in question, the object of which was to exclude from the French market any undertaking wishing to distribute in France Japanese makes of car other than those which they themselves distributed. When invited by the Court at the hearing to expand on that statement, the applicants began by observing that it was common ground that the conduct of the five importers complained of was not imposed on them by any provision of a regulation. Next, they referred to the letter of 1 July 1987, in which the Ministry of Industry, Postal Services and Telecommunications and Tourism, referring to the dangers posed by parallel imports to the system involving voluntary limitation of sales of Japanese vehicles, stated that, since parallel imports directly competed with the activities of the five authorised importers, they were liable gradually to undermine the *de facto* exclusivity conferred on them in return for their undertakings of voluntary limitation. They also pointed out that, in the letter, the Ministry stated that 'the growth of such practices [was] liable rapidly to lead the authorised importers to call in question the whole system of voluntary limitation'.

59 In addition, the applicants point out that the Commission itself stated at the hearing in *Asia Motor France III* that the French authorities' decision not to authorise Japanese makes of car other than those marketed by the five importers in question was an integral part of the arrangement that was introduced and might be regarded as the 'quid pro quo' for the importers' acceptance of the policy desired by the authorities. They contend that the explanation for that statement given by the Commission in its defence is unacceptable, in that the exertion of irresistible pressure is a unilateral act, whereas bilateral relations imply a consensus. They add that the five importers clearly benefited from the system of limiting imports.

60 Next, the applicants claim that, as in the cases leading to the judgments in *Asia Motor France II* and *Asia Motor France III*, the Commission made a manifest error of assessment of the facts in finding that the conduct complained of lacked autonomy to such an extent as to cause it, by reason of that fact, to fall outside the scope of Article 85(1) of the Treaty.

61 They state in this connection that, as the Court held in *Asia Motor France III*, the Commission was entitled to reject the complaints on the ground of the importers' lack of autonomy only if it appeared, on the basis of objective, relevant and consistent evidence, that that conduct was unilaterally imposed upon them by the national authorities through the exertion of irresistible pressure.

62 However, the information gathered by the Commission during the supplementary investigation it carried out following the judgment in *Asia Motor France III* cannot, the applicants submit, be regarded as constituting evidence of that kind. As regards, more specifically, the statement made by the five importers in their replies to the requests for information of 7 May 1997 to the effect that the French authorities ensured compliance with individual quotas by blocking the issue of certificates of conformity, the applicants observe that neither the importers nor their dealers took any action to put a stop to that manifestly unlawful conduct.

63 Lastly, the applicants argue that the supplementary investigation was not carried out meticulously and impartially and that the evidence gathered was not properly analysed.

64 The Commission contends that the plea alleging a manifest error of assessment, as expounded by the applicants, is founded upon an incorrect reading of the contested decision.

65 It states that it is clear from the contested decision that the complaints were rejected because there was no anti-competitive agreement within the meaning of Article 85(1) of the Treaty, and not on the ground that the French authorities exerted irresistible pressure on the five importers in question to engage in the conduct complained of. At the hearing, the Commission nevertheless admitted that the statement it made in its two previous decisions rejecting complaints, to the effect that the importers in question had no 'autonomy' or 'room for manœuvre', was somewhat ambiguous and might be taken to imply that it considered that the importers had acted in an anti-competitive manner, but that their conduct fell outside the scope of Article 85(1) of the Treaty because it was imposed on them by the authorities.

66 The Commission states that neither the complaints nor its investigation of them in fact revealed any evidence of the existence of an anti-competitive agreement between the five importers in question.

67 In this connection it refers to paragraph 62 of the judgment in *Asia Motor France III* and points out, first of all, that the French authorities themselves admitted that they decided in 1977 to take measures in order to limit sales of Japanese vehicles to 3% of the market in metropolitan France.

68 Secondly, the Commission observes that the French authorities also acknowledged that they had decided to divide the volume of authorised imports between the five authorised importers then present on the market, having regard to their market shares at the time, and not to permit any new authorisation of importers of Japanese makes of vehicle (paragraph 62 of the judgment in *Asia Motor France III*). The system of limiting imports thus implemented therefore did not necessitate any agreement between the importers in question but was based solely on bilateral relations between each importer and the French authorities. On this point, the Commission explains that the stabilisation of sales at the level desired by the authorities was a result of their communicating information directly and verbally to each importer, as is indicated in the letter of 6 June 1997 from Toyota, the letters of 9 June 1997 from Nissan and Mazda and the letter of 24 June 1997 from Honda, and that it was incumbent upon the importers to keep within the limits imposed on each of them individually by the authorities. The

Commission adds that, as the French authorities stated in their reply of 11 November 1993 to its request for information, 'limiting the rate of penetration to a certain volume necessarily meant that the distribution of that volume as between the various makes of car also had to be established, for without that the French authorities would have had no means of checking and ensuring compliance with the total volume laid down'.

69 Thirdly, the Commission maintains that the French authorities ensured compliance with the quotas allocated to the five importers by blocking the issue of certificates of conformity for vehicles imported in excess of those quotas. The supplementary investigation it carried out following the judgment in *Asia Motor France III* enabled it to collect consistent statements regarding this point from the five importers in question and to obtain a copy of a particularly eloquent letter, dated 27 February 1981, from those importers to the director for metallurgical, mechanical and electronic industries at the Ministry of Industry, Postal Services and Telecommunications and Tourism.

70 According to the Commission, the view that the importers accepted the quota system only under pressure from the French authorities is further substantiated by the fact that that system ran counter to their interests in that it limited the growth of their market share despite the fact that, between 1970 and 1977, the rate of penetration of Japanese makes of vehicle had risen from 0.17% to 2.51%.

71 The Commission accepts that that system created a *de facto* barrier to new market entrants and thus protected the five authorised importers. Nevertheless, it maintains that that was the result not of any agreement between the importers, but was merely the consequence of the French authorities' intention to limit the number of Japanese vehicles registered. In any event, had the importers wished to prevent authorisation of any new importers, their only avenue would have been to turn to the French authorities, and any agreement entered into in that regard between the authorities and each importer would not have been an agreement between undertakings within the meaning of Article 85(1) of the Treaty. Similarly, whilst, in the context of the regulation of imports by public authorities, it will be in the interests of any importer who agrees to limit his sales also to have

any increase in the market share of his immediate competitors frozen, that does not imply the existence of an agreement between undertakings.

72 As regards the statement it made at the hearing in *Asia Motor France III* (see paragraph 76 of the present judgment), the Commission points out that it 'simply describes a system of bilateral relations'. By that remark it means to distinguish between, on the one hand, relations between the French authorities and each importer — which cannot be regarded as constituting an 'agreement between undertakings' within the meaning of Article 85(1) of the Treaty — and, on the other hand, any relations between importers.

Findings of the Court

73 It is appropriate to observe at the outset that, by its decision of 5 December 1991, the Commission had already rejected the complaints submitted by the applicants and Somaco, *inter alia*, on account of the lack of autonomy of the economic operators which were the subject of those complaints. In its judgment in *Asia Motor France II*, the Court of First Instance held that that decision, in so far as it was based on that ground for rejecting the complaints, was 'vitiated by a manifest error in the assessment of the facts' which had led the Commission 'to err in law as regards the applicability of Article 85 of the Treaty to the conduct of the traders in question' (paragraph 55). The Court reached that conclusion after examining, first of all, two documents relating to imports into Martinique of Japanese cars lodged by the complainants during the course of the administrative procedure before the Commission. After noting that, 'prima facie', those items in the case- file 'constitute[d] serious evidence of genuinely independent action' on the part of the economic operators concerned (paragraph 44), the Court went on to consider the grounds for the decision of 5 December 1991 in so far as it rejected not only Somaco's complaint concerning the existence of an agreement between Martinique dealers, but also the applicants' complaints concerning the existence of an agreement between importers in metropolitan France. After analysing two further documents, namely the letter of 1 July 1987 and the judgment of the Tribunal de Commerce de Paris of 16 March 1990, the Court

held that the various items in the case-file did not corroborate the conclusion that the economic operators in metropolitan France and in Martinique impugned in the various complaints had no autonomy or 'freedom of action' (paragraph 55).

74 Following the Court's annulment of the decision of 5 December 1991 in its judgment in *Asia Motor France II*, the Commission resumed its investigation of the complaints, sending requests for information to the French authorities and to the dealers impugned in Somaco's complaint (see paragraph 16 and 17 of the present judgment). In its subsequent decision of 13 October 1994, by which it again rejected the complaints, the Commission expressed the view that consideration of the replies to its requests for information 'confirm[ed] that in 1977 the French authorities had implemented a state importation system for motor vehicles from non-Member countries throughout French territory — albeit in a specific manner in the department of Martinique — in the context of the commercial policy regarding motor vehicles pursued at national level at the time.' The Commission concluded that 'it [was] amply confirmed that the importers in question, and in particular those in Martinique, had no leeway in the implementation of the importation scheme at issue'.

75 In its judgment in *Asia Motor France II*, in reviewing the legality of that ground of rejection, the Court of First Instance considered separately the conduct reported in the applicants' complaints in relation to imports into metropolitan France, and the conduct reported in Somaco's complaint in relation to imports into Martinique.

76 Thus, with regard to the applicants' complaints, the Court held that 'the Commission [had] made a manifest error in assessing the facts in so far as it considered, in the light of the evidence available to it, that the conduct of the authorised importers in metropolitan France lacked autonomy to such an extent as to cause it, by reason of that fact, to fall outside the scope of Article 85(1) of the Treaty' and that 'in the absence of evidence of the existence of irresistible pressures... forcing the importers to agree to limit their imports, the importers' conduct in complying with the wishes of the French administration must be

regarded as being the exercise of a commercial choice, having regard to all the relevant risks and advantages' (paragraph 71). The Court reached that conclusion after finding, in particular, first that the Commission had based its decision on the same evidence as that used to support the first ground of rejection in its decision of 5 December 1991. It thus pointed out that the evidence described by the Commission as 'new evidence' in the defence and in the rejoinder related only to the situation in Martinique, and also that the replies given by the French authorities in response to the request for information of 25 August 1993 afforded no evidence capable of supporting or substantiating the statement that no reproach could be levelled at the importers in question, who merely applied measures resulting from decisions taken by the public authorities and did not have any freedom of action (paragraph 66). That being so, the Court found that there was nothing in the documents before it to enable it to conclude that pressure had in fact been brought to bear on the importers and that that matter had not been checked with the French authorities or the importers into metropolitan France during the administrative procedure (paragraph 68). Secondly, the Court observed that 'the Commission stated at the hearing that the administration's decision not to authorise Japanese makes other than those of the five importers in question [was] an integral part of the arrangement that was introduced and [might] be regarded as the "quid pro quo" for the importers' acceptance of the policy sought by the administration, which [seemed], at first sight, to rule out irresistible pressures exerted by the French authorities', and that that point was confirmed by the letter of 1 July 1987 (paragraph 69).

77 By contrast, as regards Somaco's complaint, the Court held that the Commission's rejection of the complaint on the ground of the Martinique dealers' lack of autonomy in implementing the importation system at issue was not based on a manifest error in assessing the facts. It observed that new evidence collected during the inquiry conducted following the judgment in *Asia Motor France II* permitted a different interpretation of the documents to which, following an initial analysis, it had, in that judgment, attached strong probative force in relation to the probable existence of a consensus.

78 In the present case, it is appropriate to consider whether the supposed absence of any agreement of the type prohibited by Article 85 of the Treaty, which

constituted the ground relied upon in the contested decision for rejecting the applicants' complaints, is sufficiently corroborated by the evidence gathered by the Commission, including that obtained during the supplementary investigation it carried out following the judgment in *Asia Motor France III*.

79 It must be observed, first of all, that several new pieces of evidence confirm the French authorities' assertion that in 1977 they adopted a policy to limit the penetration of Japanese vehicles into metropolitan France to the level, reached at that time, of 3% of all vehicles registered in that territory, and that that policy continued until 1993. It is appropriate to mention, by way of illustration, an 'open letter to the Minister for Industry' drafted in 1981 by the five importers in question, a copy of which was annexed to Toyota's letter of 6 June 1997 and Nissan's letter of 9 June 1997, an article appearing in the newspaper *Le Monde* of 6 February 1981, a copy of which was also annexed to the letters just mentioned, and a letter of 27 February 1981 sent jointly by the five importers in question to the director of the 'Metallurgical, Mechanical and Electronic Industries' directorate of the Ministry of Industry, Postal Services and Telecommunications and Tourism, a copy of which was annexed to Honda's letter of 24 June 1997.

80 Second, the new evidence confirms the French authorities' assertion that they then imposed an overall quota of 3% on the importers in question. That assertion is in fact corroborated by the 'open letter to the Minister for Industry' and the article in *Le Monde* of 6 February 1981, which mentions 'the unilateral decision of the French Government to limit the number of Japanese cars registered to 3% of all vehicles registered each year in France' and states that, 'after several months of negotiations, the French authorities [had] informed the Japanese Ambassador to France, M Kitahara, that sales of Japanese cars must never exceed the [then] present level of 3% of the market, failing which sundry "non-tariff barriers" would be put in place'.

81 Third, the new evidence corroborates the French authorities' assertion that the distribution of the overall quota between the five importers was not the result of any concerted action between them, with or without the support of those authorities, but was imposed on them unilaterally by the authorities. Accordingly,

Toyota explained in its letter of 6 June 1997 that 'the Ministry for Industry would summon the five authorised Japanese importers in order to inform them verbally of the quota allotted to them for the year on the basis of the number of vehicles registered during the preceding year and, on the basis of trends on the French market, would, should the need arise, adjust the individual quotas allocated for each of the makes of vehicle, following the same verbal procedure.' Similarly, in its letter of 9 June 1997, Nissan explained that 'the distribution between the five importers authorised at the time by the Ministry for Industry of the 3% quota allocated for Japanese cars from 1977 onwards was always effected peremptorily and individually on a make-by-make basis, and always verbally' and that 'all those importers, having their registered office in the Paris region, were thus in the vicinity of the Ministry for Industry which did not hesitate to summon them at the beginning of each calendar year in order to impart the estimate for the annual quota, and on various subsequent occasions, in order to inform them of changes to the initial estimate made by the Ministry to reflect the trend in vehicle registrations on the domestic market'. In its letter of the same date, Mazda stated that 'the quota was fixed verbally, make by make'. Lastly, in its letter of 24 June 1997, Honda stated that 'it is... common knowledge that the 3% quota was distributed verbally by the Ministry for Industry between the five Japanese importers authorised in 1977 individually, and always in dictatorial fashion'.

82 It is important to note that those consistent statements are confirmed by the findings of the Competition Council in its Decision No 94-D-05 of 18 January 1994 'on practices observed in the motor-vehicle market'. In that decision, the Competition Council stated, in particular, that

'... limitation of the market share of Japanese vehicles to 3% of the metropolitan market and 15% of the Martinique market is the result of quota-distribution measures implemented by the authorities;... in the context of that system of regulation, the authorities also organised the precise arrangements for distributing between the importers the number of vehicles admitted into France, adopting

a method that would enable the overall quota to be spread out over sales throughout the year;'

and

'... whilst the free play of competition has been distorted in that access to the French car market has been restricted for Japanese and Korean vehicles and in that the total market share for such cars has been distributed each year, with no element of competition, between Toyota, Nissan, Mazda, Honda and Mitsubishi, the initiative for those practices came from the administrative authorities and not from the undertakings concerned;... nothing emerged from the investigation ordered at the request of the President of the Competition Council to show that the conduct of the authorised importers or their Martinique dealers was separable from the decisions of the administrative authorities. Moreover, that was confirmed to the Council by the director for primary industries and capital goods at the Ministry for Industry and Foreign Trade, who stated that "any questioning of the conduct of those undertakings must take account of the fact that the administrative arrangements were not within their competence".'

83 Moreover, it should be observed that the Cour d'Appel (Court of Appeal), Paris, before which an action had been brought against that decision, confirmed in a judgment of 3 February 1995 that those statements of the Competition Council were valid.

84 Fourth, several new pieces of evidence show that the French authorities ensured compliance with individual quotas and, consequently, with the overall quota by delaying or refusing certificates of conformity, which are a prerequisite to putting vehicles into circulation on French territory. That is made expressly clear in the open letter to the Minister for Industry mentioned above, the principal aim of which was to obtain the issue of 'outstanding certificates of conformity', and from the letter of 27 February 1981 in which the five importers in question stated that the issue of certificates of conformity was dependent upon compliance with the 3% quota, and complained that certain certificates had been withheld by the

competent authorities since September 1980. Similarly, the *Le Monde* article of 6 February 1981 referred to 'obstructive behaviour on the part of the administrative authorities designed to delay the type-approval of new models of Japanese car', to complaints made to the Ministry of Foreign Affairs by importers of Japanese cars in France because 'their applications for type-approval [had been] suspended or [had] met with severe difficulties', and to the fact that the Japanese Government was contemplating bringing the matter before the competent GATT authorities. So much is clear also from a newspaper article a copy of which was annexed to Nissan's letter of 9 June 1997. That article stated that 'according to the news agency Kyodo, the Japanese Government has protested to France about discrimination against Japanese cars for which certificates of conformity have been refused and which, therefore, cannot be sold'. Furthermore, Mazda annexed to its letter of 9 June 1997 a copy of a letter of 19 February 1981 addressed by one of its dealers to the Ministry of Industry, Postal Services and Telecommunications and Tourism, in which the dealer complained that he had been waiting over four months for certificates of conformity and stressed the disastrous consequences for his business of that state of affairs. Lastly, an extract from a press review of 24 March 1981, annexed to Honda's letter of 24 June 1997, stated that:

'the sale of nineteen models of Japanese motor vehicle on the French market is currently prohibited in practice because reports from the Mining Department, which constitute proof of the vehicles' compliance with French type-approval standards, have not been obtainable from the Ministry for Industry'.

85 It follows from the foregoing that the Commission's conclusion that, in the absence of an agreement within the meaning of Article 85(1) of the Treaty, the applicants' complaints are unfounded is based upon objective, relevant and consistent evidence.

86 Furthermore, it should be observed that none of the arguments put forward by the applicants is capable of casting doubt upon that conclusion.

87 The new evidence collected during the supplementary investigation conducted following the judgment in *Asia Motor France III* does indeed permit a different interpretation of the evidence to which the Court of First Instance, in its judgments in *Asia Motor France II* and *Asia Motor France III*, attached strong probative force in relation to the probable existence of a concurrence of wills.

88 Thus, whilst the letter of 1 July 1987 refers to 'undertakings of voluntary limitation' on the part of the five importers in question, it is difficult, in light of the circumstances just mentioned, to regard those undertakings as having been given voluntarily. On the contrary, it is clear from the documents before the Court that the importers in question had no choice but to comply with the measures taken by the French authorities. For that same reason, the statement contained in the letter of 1 July 1987 to the effect that the authorised importers were in a position to question the system for importing Japanese cars into metropolitan France no longer seems credible.

89 As regards the point that the five importers in question are said to have benefited from a 'quid pro quo' in that the French authorities decided not to authorise any makes of Japanese car other than theirs (see the letter of 1 July 1987 and the statement made by the Commission at the hearing in *Asia Motor France III* mentioned in paragraph 76 of the present judgment), the explanation proffered by the Commission at the hearing to the effect that, by so doing, the French authorities meant to make the policy they implemented more palatable, can reasonably be accepted.

90 It must also be observed that the findings of the Tribunal de Commerce de Paris in its judgment of 16 March 1990 (see paragraphs 52 and 53 of the judgment in *Asia Motor France II*) have now been contradicted by the new evidence gathered by the Commission.

91 It follows from the foregoing that the plea alleging a manifest error of assessment of the facts is unfounded.

The second plea alleging infringement of Article 176 of the Treaty

Arguments of the parties

92 The applicants maintain that, in contravention of Article 176 of the Treaty, the Commission has not taken the necessary measures to comply with the judgment in *Asia Motor France III*.

93 They claim that the contested decision contains, once again, errors of fact and law identified by the Court of First Instance in that judgment.

94 First, they submit that the Commission's supplementary investigation of the complaints was not conducted diligently or in earnest. The Commission merely sent the importers concerned a fresh request for information which contained inappropriate and slanted questions relating to events which had occurred some 20 years earlier. Nor did the Commission analyse the replies to those questions seriously. Moreover, no further checks were made with the French authorities.

95 Second, they maintain that the Commission did not, in any event, obtain any new evidence of irresistible pressure having been exerted by the authorities upon the five importers in question in order to force them to engage in the conduct reported in the applicants' complaints.

96 The Commission states in reply that it took all necessary action consequent upon the judgment in *Asia Motor France III* by resuming its investigation of the complaints.

97 It explains that inquiries made earlier of the French authorities had already enabled it to collect information which appeared to be complete and relevant to the system of limiting imports of Japanese motor vehicles that those authorities had implemented. In this connection, it observes that the authorities twice stated, in reply to the requests for information sent to them, that the importers of Japanese cars in France had merely complied with decisions taken by the public authorities in the context of trade relations between France and Japan, and that they were in a position to impose adjustments should the authorised volume of sales be exceeded. The Commission adds that it is also clear from a letter of 19 August 1982 from the Secretary of State at the Ministry with responsibility for departments and overseas territories that the issue of certificates of conformity was the instrument used to give official recognition to the system of regulation, without which it would have been necessary to adopt formal provisions. The Commission explains that, in those circumstances, and in view of the fact that the import-limitation system had been based upon a purely verbal procedure, it saw no point in seeking further factual or legal information from the French authorities.

98 The Commission states that, in order to make good the omissions mentioned in paragraph 68 of the judgment in *Asia Motor France III*, it did, however, consider that it was necessary to obtain from the importers in question evidence of any pressure exerted by the French authorities in order to secure compliance with the

system of regulating imports, and an explanation of the reasons for which the importers had been unable to resist such pressure. It states that, to that end, on 7 May 1997 it sent them fresh requests for information pursuant to Article 11 of Regulation No 17.

99 The Commission observes that, in their replies, the importers gave consistent descriptions of the way in which the system of regulation implemented by the French authorities worked, confirming in every respect the statements made earlier by those authorities, and that this gave it ample assurance that its opinion was correct.

100 Lastly, the Commission submits that it cannot be criticised for lack of diligence or earnest in the manner in which it investigated the complaints. It points out that on two occasions it obtained information from the French authorities and that, under Article 14 of Regulation No 17, it is not permitted to make a Member State the subject of an investigation, but only undertakings and associations of undertakings. It adds that it was entitled to regard making the importers the subject of an investigation under that provision as disproportionate. Lastly, the way in which the questions in the request for information of 7 May 1997 were formulated was dictated by paragraph 68 of the judgment in *Asia Motor France III*.

Findings of the Court

101 When the Court of First Instance annuls an act of an institution, that institution is required, under Article 176 of the Treaty, to take the measures necessary to

comply with the Court's judgment. In that connection, both the Court of Justice and the Court of First Instance have held that, in order to comply with their judgments and to implement them fully, the institution is required to observe not only the operative part of the judgment but also to take full account of the grounds which led to the judgment and constitute its essential basis, inasmuch as they are necessary to determine the exact meaning of what is stated in the operative part. It is those grounds which, on the one hand, identify the precise provision held to be unlawful and, on the other, indicate the specific reasons which underlie the finding of illegality contained in the operative part and which the institution concerned must take into account when replacing the annulled measure (judgments in Joined Cases 97/86, 99/86, 193/86 and 215/86 *Asteris and Others* v *Commission* [1988] ECR 2181, paragraph 27, and in Case T-224/95 *Tremblay and Others* v *Commission* [1997] ECR II-2215, paragraph 72).

102 In the present case, the applicants criticise the way in which the Commission conducted its supplementary investigation of their complaints and dispute both the relevance of the evidence gathered during that investigation and the Commission's analysis of that evidence.

103 As regards the first of those criticisms, it should be borne in mind that it is clear from the grounds of the judgment in *Asia Motor France III* that the Court of First Instance annulled the Commission's decision of 13 October 1994, in so far as it rejected the applicants' complaints, after finding that the Commission made a manifest error in assessing the facts in that it considered, in the light of the evidence available to it, that the conduct of the five importers in question lacked autonomy to such an extent as to cause it, by reason of that fact, to fall outside the scope of Article 85(1) of the Treaty (paragraph 71). More specifically, in that judgment the Court criticised the Commission for not having checked 'with the French authorities or the importers into metropolitan France' (paragraph 68) whether pressure had been brought to bear on the importers by the authorities in order to force them to agree to limit their imports (paragraphs 68 and 71). Following that judgment, the Commission specifically called upon the importers to show, *inter alia*, that such pressure had been exerted upon them and that they had been unable to resist it (see paragraph 24 of the present judgment). The statement that the questions put by the Commission in this connection were 'inappropriate' and 'slanted' cannot be accepted, given that they were clearly formulated in the light of the grounds of the judgment in *Asia Motor France III*. Moreover, it cannot be inferred from the grounds of that judgment that, in the

context of its supplementary investigation, the Commission ought necessarily to have obtained, in addition, information from the French authorities. The applicants' criticism of the supplementary investigation is therefore unfounded.

104 The submission that the evidence gathered during the supplementary investigation was irrelevant and was not analysed by the Commission seriously is unfounded since the Court has found, in the context of this action (see paragraphs 78 to 90 of the present judgment), that that evidence, taken together with the evidence already available to the Commission, provides sufficient justification in law for the Commission's conclusion that the complaints must be rejected for lack of any agreement of the type prohibited by Article 85(1) of the Treaty.

105 For the reasons given above the plea alleging infringement of Article 176 of the Treaty must be dismissed as unfounded.

106 It follows that the application must be dismissed in its entirety.

Costs

107 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 have been unsuccessful, they must be ordered to pay the costs as applied for by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. Dismisses as inadmissible the claim that the Court should take formal note that the applicants reserve the right to bring an action in damages against the Commission;

2. Dismisses the remainder of the action as unfounded;

3. Orders the applicants to bear their own costs and, jointly and severally, to pay the costs of the Commission, including those reserved in the order of 21 May 1999.

García-Valdecasas Lindh Cooke

Delivered in open court in Luxembourg on 26 October 2000.

H. Jung P. Lindh

Registrar President