JUDGMENT OF THE COURT
18 March 1997 *

In Case C-282/95 P,

Guérin Automobiles, a company incorporated under French law, having its offices in Alençon (France), represented by Jean-Claude Fourgoux, of the Paris Bar, with an address for service in Luxembourg at the Chambers of Pierrot Schiltz, 4 Rue Béatrix de Bourbon,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities of 27 June 1995 in Case T-186/94 *Guérin Automobiles* v *Commission* [1995] ECR II-1753, seeking to have that judgment set aside,

the other party to the proceedings being:

Commission of the European Communities, represented by Giuliano Marenco, Legal Adviser, and Francisco Enrique Gonzáles-Díaz, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, G. F. Mancini, J. C. Moitinho de Almeida and J. L. Murray (Presidents of Chambers), C. N. Kakouris, P. J. G. Kapteyn, C. Gulmann, D. A. O. Edward, J.-P. Puissochet, G. Hirsch, P. Jann, H. Ragnemalm and M. Wathelet (Rapporteur), Judges,

Advocate General: G. Tesauro,
Registrar: R. Grass,

* Language of the case: French.

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 14 May 1996,

after hearing the Opinion of the Advocate General at the sitting on 26 November 1996,

gives the following

Judgment

1 By application lodged at the Registry of the Court of Justice on 24 August 1995 the French company Guérin Automobiles ('the appellant') sought the annulment of the judgment of the Court of First Instance of the European Communities of 27 June 1995 in Case T-186/94 *Guérin Automobiles* v *Commission* [1995] ECR II-1753 in so far as the Court of First Instance declared that it was not necessary to give a ruling on the action for failure to act and dismissed the application for the annulment of the Commission's letters of 21 January 1993 and 4 February 1994 as inadmissible.

Facts and procedure before the Court of First Instance

2 According to the contested judgment the appellant submitted to the Commission by letter of 3 August 1992 a complaint 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), requesting that the Commission find Volvo France in breach of Article 85 of the Treaty. It alleged that Volvo France had wrongfully terminated the dealership contract between them (paragraph 2).

3 On 29 October 1992 the Commission wrote to inform the appellant that on the basis of the documents in the file at that time the case did not present sufficient Community interest to justify being dealt with by the Commission. Accordingly, it invited the appellant to submit its observations within four weeks, failing which the matter would be regarded as closed (paragraph 3).

4 The appellant submitted its observations on the Commission's letter of 29 October 1992 in a letter dated 11 December 1992 (paragraph 4).

5 In a letter to the appellant dated 21 January 1993 the Commission stated that the complaint was in fact based on the refusal to sell applied to Guérin Automobiles under a network of exclusive and selective distribution contracts which, it maintained, lay outside the scope of exemption under Commission Regulation (EEC) No 123/85 of 12 December 1984 on the application of Article 85(3) of the EEC Treaty to certain categories of motor vehicle distribution and servicing agreements (OJ 1985 L 15, p. 16). It added that the same problem had been raised in a different matter and was being examined by the Commission. It promised to communicate the results of its examination to the appellant (paragraph 5).

6 Almost a year later, on 6 January 1994, the appellant wrote to ask the Commission for the results of the examination to which it had referred in its letter of 21 January 1993. Since it received no reply, it addressed a formal letter of notice to the Commission on 24 January 1994 in accordance with Article 175 of the Treaty (paragraph 6).

7 By letter of 4 February 1994 the Commission informed the appellant that the examination was still in progress and that the results would, if appropriate, be applicable as a precedent for cases such as the appellant's. It renewed the assurance that the appellant would be informed as soon as that examination had made significant progress (paragraph 7).

8 On 5 May 1994 the appellant lodged an application at the Registry of the Court of First Instance seeking a declaration that the Commission had failed to act and, in the alternative, the annulment of its letters of 21 January 1993 and 4 February 1994, should they express a decision not to investigate its complaint (paragraphs 10 and 13).

9 On 13 June 1994 the Commission sent the appellant a notification referring to Article 6 of Commission Regulation No 99/63/EEC 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) (paragraph 8). Article 6 provides as follows:

'Where the Commission, having received an application pursuant to Article 3(2) of Regulation No 17, considers that on the basis of the information in its possession there are insufficient grounds for granting the application, it shall inform the applicants of its reasons and fix a time-limit for them to submit any further comments in writing.'

10 The letter read as follows:

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

Re: Your letter of 24.1.94 (Formal notice)

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

Dear Sir,

...

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 contract in 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' (paragraph 8).

11 The appellant submitted his observations on the letter of 13 June 1994 to the Commission on 20 June 1994 (paragraph 9).

The judgment of the Court of First Instance

12 Before the Court of First Instance the appellant argued that the Commission's letter of 13 June 1994 could not constitute a definition of its position terminating the failure to act for three reasons. First, notification under Article 6 of Regulation No 99/63 is not a definition of position for the purposes of the second paragraph of Article 175 of the Treaty. Secondly, the letter does not amount to a rejection of the complaint: it contains no express declaration to that effect and, by stating that the complaint could not at that time receive individual consideration, the Commission sought to limit the effects in time of its letter of 13 June 1994, thus making it provisional (paragraph 18). Lastly, since it merely quoted a standard formula, the letter lacked an adequate statement of reasons (paragraph 19).

13 In a second plea, the appellant alleged that the Commission's replies were deliberately vague, seeking to deprive it of recourse to the courts. It was 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 in fact defined its position (paragraph 21).

14 After noting in paragraph 22 that at the time the application was lodged it was admissible as regards the failure to act, and in paragraph 25 that on the date of its judgment there was no evidence on the file that the Commission had adopted a decision within the meaning of Article 189 of the Treaty, the Court of First Instance found, in paragraph 30, that in the meantime the Commission had nevertheless made a notification under Article 6 of Regulation No 99/63. It observed in paragraph 28 that the letter of 13 June 1994 informed the appellant why the Commission did not intend to consider its case individually, gave it a period of two months within which to submit written observations and referred a number of times to Article 6 of Regulation No 99/63. The Court concluded, in paragraph 29, that at that time the Commission considered that the information in its possession indicated that there were insufficient grounds for acting on the complaint.

15 In paragraphs 26 and 32 the Court noted that although such notification could not form the subject-matter of an application for annulment (Case T-37/92 *BEUC and NCC* v *Commission* [1994] ECR II-285, paragraph 30), it nevertheless constituted a 'definition of its position' within the meaning of Article 175 of the Treaty (Case 125/78 *GEMA* v *Commission* [1979] ECR 3173, paragraph 21), and it went on to declare in paragraph 35 that it was therefore unnecessary to rule on the action for failure to act.

16 In paragraph 34 the Court likewise rejected the appellant's argument that that construction of the letter of 13 June 1994 would enable the Commission to evade judicial review. It pointed out that since the appellant had submitted observations in response to the letter within the time stipulated in the letter of 13 June 1994, it was entitled to obtain a definitive decision from the Commission on its complaint and that that decision could be challenged in an action for annulment.

17 In paragraph 42 the Court found that the claims for annulment of the letters of 21 January 1993 and 4 February 1994 were inadmissible. It pointed out, in paragraph 40, that since they were merely holding letters they could not produce binding legal effects such as to affect the interests of the applicant.

18 Finally, the Court found in paragraph 45 that it was the conduct of the Commission which led to the action for failure to act and for annulment and accordingly, in paragraph 46, that it should bear the costs of the action. It observed in that respect that the Commission had failed to respond within the time-limit laid down in Article 175 of the Treaty to the formal notice addressed to it by the appellant on 24 January 1994, even though it had been duly informed of the substance of the complaint since December 1992. Notification under Article 6 of Regulation No 99/63 was made only after the action for failure to act had been lodged.

The main appeal

19 The appeal is based essentially on five pleas:

— the Court of First Instance failed to consider the correspondence exchanged after the Commission's letter of 13 June 1994;

— the letter of 13 June 1994 was wrongly assessed in law;

— the Court of First Instance wrongly took into consideration information allegedly acquired by the Commission of which there was no trace in the file;

— the Court failed to sanction the Commission's breach of the principle *audi alteram partem*, and

— the Court breached the general principle of the right to a judicial remedy.

20 In the first place the Court's failure to analyse the letters sent by the appellant to the Commission on 13 June, 13 July and 20 July 1994 amounted to a procedural irregularity prejudicial to the interests of the appellant. In those letters the appellant sought information regarding the case similar to its own mentioned by the Commission. It also asked the Commission whether it would give instructions for the files to be joined in order to safeguard the rights of the defence. The appellant maintains that if the Court had taken those letters into consideration it would have been able to rule on the effects of the Commission's letter of 13 June 1994.

21 In the second place, the Court committed an error of law regarding the legal status of the Commission's letter of 13 June 1994. To write to a complainant, under the aegis of Article 6 of Regulation No 99/63, that the Commission does not intend to consider its case because it has chosen to deal with another, over which the complainant has no control whatsoever, is merely a delaying tactic. Such an evasive letter cannot be regarded as a 'definition of a position' for the purposes of Article 175 of the Treaty. The appellant relies in that respect on the judgments in Case 6/70 *Borromeo and Others* v *Commission* [1970] ECR 815, Case 13/83 *Parliament* v *Council* [1985] ECR 1513, Case 302/87 *Parliament* v *Council* [1988] ECR 5615 and Case C-107/91 *ENU* v *Commission* [1993] ECR I-599.

22 In the third place, the Court wrongly decided that it was reasonable for the Commission to consider that the information it had was not sufficient to justify granting the application. Contrary to the requirements imposed by Article 6 of Regulation No 99/63, the Commission had in fact gathered no information at all before addressing its letter of 13 June 1994 to the appellant. The best proof of that is that the Commission merely referred to its consideration of a different case. It chose to rely on an external factor, without proceeding to examine the appellant's complaint.

23 In the fourth place, the Court failed to sanction the Commission's breach of the principle *audi alteram partem* by permitting the Commission to rely in its letter of 13 June 1994 on a similar procedure, whereas the Commission's officials had refused to supply the appellant, and subsequently the Court of First Instance, with any information whatsoever regarding that case.

24 Finally, in the fifth place, the Court breached the general principle of the right to a judicial remedy in two ways. In the first place, its decision that the notification under Article 6 of Regulation No 99/63 constituted a preparatory measure which amounted nevertheless to a 'definition of a position' deprives the appellant of any remedy so long as the Commission has not adopted a final decision. In the second

place, the Court wrongly decided that the appellant was entitled to obtain a definitive decision on its complaint which could be the subject of an action for annulment. In fact there is nothing to prevent the Commission from continuing its failure to act.

The cross-appeal

25 In addition to requesting that the appeal be dismissed, the Commission claimed that there was an error of law in the award of costs against it.

26 In the first place, it considers that the claim cannot be declared inadmissible on the ground that the second paragraph of Article 51 of the EC Statute of the Court of Justice states that no appeal shall lie regarding only the amount of the costs or the party ordered to pay them.

27 The Commission argues that the second paragraph of Article 51 is designed to ensure that the Court is not asked to rule solely on costs. Where an order to pay the costs in not the only point at issue, however, it may be challenged in an appeal. *A fortiori*, the provision does not apply where the Court must consider the case as a whole in the context of a main appeal and the issue of costs is raised by the respondent.

28 Finally, as regards the substance, the Commission claims that the Court of First Instance ordered it to pay the costs solely on the ground that it sent the appellant a notification under Article 6 of Regulation No 99/63 only after the expiry of the time-limit laid down in Article 175 of the Treaty. The Commission claims that the institutions are in no way bound to abide by that time-limit. Failure to observe it is merely a condition of admissibility for an action for failure to act. Consequently, the Court of First Instance ought to have considered at least prima facie whether the action for failure to act was well founded before ordering it to bear the costs.

As regards the main appeal

The first four pleas

29 As regards the second plea, it must be noted, first, that it was reasonable for the Court of First Instance to describe the Commission's letter of 13 June 1994 as a notification under Article 6 of Regulation No 99/63 for the reasons set out in paragraph 14 of this judgment.

30 Next, the Court of Justice held in paragraph 21 of its judgment in *GEMA*, cited above, that a letter addressed to a complainant which complies with the requirements of Article 6 of Regulation No 99/63 constitutes a definition of position within the meaning of the second paragraph of Article 175 of the Treaty.

31 Consequently, the Court of First Instance rightly held that the letter of 13 June 1994 had terminated the Commission's failure to act and deprived the action brought for that purpose by the appellant of its subject-matter.

32 Since the second plea must be rejected, the first, third and fourth must likewise be declared to have no purpose. Even if they were well founded they are not such as to invalidate the finding by the Court of First Instance that the Commission defined its position, within the meaning of Article 175 of the Treaty, in the letter of 13 June 1994.

The fifth plea (breach of the general principle of the right to a judicial remedy)

33 When the Court of First Instance held that the notification under Article 6 of Regulation No 99/63 constituted a definition of position and could not be the subject-matter of an action for annulment, it did not breach the principle of the right to a judicial remedy.

34 It has been consistently held that in the case of acts or decisions adopted by a procedure in stages, in particular where they are the culmination of an internal procedure such as that set up by Regulation No 99/63, a measure is in principle open to review only if it is a measure definitively laying down the position of the Commission or the Council on the conclusion of that procedure, and not a provisional measure intended to pave the way for the final decision (Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 10). The notification under Article 6 of Regulation No 99/63 must be regarded as a provisional measure within the meaning of that case-law.

35 Consequently, although the complainant may not bring an action challenging that notification it is entitled under Article 6 of Regulation No 99/63 to submit written observations thereon. The purpose of that intermediate phase in the administrative procedure before the Commission is, in fact, to safeguard the rights of the complainant, to whom an unfavourable decision should not be addressed without first giving him the opportunity to submit observations on the grounds upon which the Commission intends to rely.

36 Furthermore, contrary to the argument put forward by the appellant, that does not authorize the Commission to persist in its failure to act. Once that stage of the procedure has been completed the Commission is bound either to initiate a procedure against the subject of the complaint — a procedure in which the complainant is entitled to participate in accordance with the second paragraph of Article 19 of Regulation No 17 and Article 5 of Regulation No 99/63 — or to adopt a defini-

tive decision rejecting the complaint, which may be the subject-matter of an action for annulment before the Community courts. In the context of such an action the complainant may rely on any legal defects in the provisional measures preceding the definitive decision (*IBM*, cited above, paragraph 12).

37 It must also be noted that the Commission's definitive decision must, in accordance with the principles of good administration, be adopted within a reasonable time after it has received the complainant's observations.

38 If the Commission fails either to initiate a proceeding against the subject of the complaint or to adopt a definitive decision within a reasonable time the complainant may rely on Article 175 of the Treaty in order to bring an action for failure to act. The fact that he has already brought an action for failure to act in order to obtain the notification provided for by Article 6 of Regulation No 99/63 in no way prevents him from later bringing a fresh action for failure to act with a different object. In that case, if the Commission has not acted in due time it may be ordered, as a result of its failure to act, to pay the costs incurred by the complainant.

39 It must also be noted that any undertaking which considers that it has suffered damage as a result of restrictive practices may rely before the national courts, particularly where the Commission decides not to act on a complaint, on the rights conferred on it by Article 85(1) and Article 86 of the Treaty, which produce direct effect in relations between individuals (Case 127/73 *BRT* v *SABAM* [1974] ECR 51, paragraph 16.

40 The fifth plea, breach of the general principle of the right to a judicial remedy, is therefore unfounded.

41 Since none of the pleas relied on by the appellant can be upheld the main appeal must be dismissed.

As regards the cross-appeal

42 It is not necessary to rule on the admissibility of the Commission's appeal limited to the order as to costs since it is clear from the outset that it is unfounded.

43 The Commission defined its position on 13 June 1994, more than two months after the time-limit laid down by Article 175 of the Treaty and after the action was lodged, thereby causing the appellant, whose first letter to the Commission was sent on 3 August 1992, to incur unnecessary costs (Joined Cases C-15/91 and C-108/91 *Buckl and Others* v *Commission* [1992] ECR I-6061, paragraph 33).

Costs

44 The first paragraph of Article 122 of the Rules of Procedure of the Court of Justice states that where the appeal is unfounded the Court shall make a decision as to costs. Article 69(2) of the Rules of Procedure provides, first, that the unsuccessful party shall be ordered to pay the costs if they have been applied for in the successful party's pleadings, and, secondly, that where there are several unsuccessful parties the Court shall decide how the costs are to be shared. Article 69(3) of the Rules of Procedure provides that the Court may order the parties to bear their own costs where they fail on one or more heads.

45 Since both the appellant and the Commission have been unsuccessful in their arguments and pleas they must be ordered to bear their own costs.

On those grounds,

THE COURT

hereby:

1. **Dismisses the appeals;**

2. **Orders Guérin Automobiles and the Commission of the European Communities to bear their own costs.**

Rodríguez Iglesias Mancini Moitinho de Almeida

Murray Kakouris Kapteyn

Gulmann Edward Puissochet

Hirsch Jann Ragnemalm Wathelet

Delivered in open court in Luxembourg on 18 March 1997.

R. Grass G. C. Rodríguez Iglesias

Registrar President