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

In Joined Cases T-9/96 and T-211/96,

Européenne Automobile SARL, a company incorporated under French law, established in Carcassonne, France, represented by Jean-Claude Fourgoux, of the Paris Bar, with an address for service in Luxembourg at the Chambers of Pierrot Schiltz, 4 Rue Béatrix de Bourbon,

applicant,

v

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

defendant,

* Language of the case: French.

APPLICATION for annulment of the Commission's decision of 9 October 1996 dismissing a complaint made by the applicant under Article 85 of the EC Treaty (now Article 81 EC) and for compensation for damage,

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

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

Registrar: A. Mair, Administrator,

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

gives the following

Judgment

Facts and procedure

1 According to the information it has provided, the applicant, Européenne Automobile SARL, sells second-hand vehicles and is also an authorised intermediary in France for the purposes of Commission Regulation (EEC) No 123/85 of 12 December 1984 on the application of Article 85(3) of the

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

2 On 31 January 1994 Auto Cité, a Peugeot concessionaire in Carcassonne, France, obtained judgment against the applicant in the Tribunal de Commerce de Carcassonne (Carcassonne Commercial Court) in a matter of unfair competition on the ground that the applicant failed to comply with the requirements of Regulation No 123/85 in relation to parallel imports of cars from another Member State.

3 On 27 July 1994 the applicant lodged a complaint with the Commission under Article 3(2) of Council Regulation No 17 of 6 February 1962: First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition, First Series 1959-1962, p. 87), against the manufacturer of Peugeot and Citroën cars (hereinafter 'PSA').

4 On 8 June 1995 the Cour d'Appel (Court of Appeal) of Montpellier overturned the judgment of the Tribunal de Commerce de Carcassonne of 31 January 1994 and gave judgment against the concessionaire.

5 By letter of 27 September 1995 the applicant formally called upon the Commission to pursue its complaint. On 24 January 1996 the applicant brought an action in the Court for a declaration that the Commission had failed to act and for compensation for damage (Case T-9/96).

6 On 28 March 1996 the Commission sent the applicant a letter pursuant to Article 6 of Regulation No 99/63/EEC of the Commission of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (OJ, English Special Edition, First Series 1963-64, p. 47). On 26 April 1996 the applicant submitted its comments thereon.

7 By decision of 9 October 1996 the Commission dismissed the applicant's complaint.

8 By an application registered at the Court Registry on 17 December 1996 the applicant brought an action for annulment of that decision and for compensation for damage (Case T-211/96).

9 By order of 21 January 1999 the President of the First Chamber of the Court of First Instance decided to join the cases for the purposes of the oral procedure and judgment.

10 The parties presented oral argument and answered the questions put to them by the Court at the hearing in open court on 2 March 1999.

Forms of order sought

11 In Case T-9/96 the applicant claims that the Court should:

— declare that the Commission failed to act;

— order the Commission to pay it EUR 200 000 by way of damages;

— order the Commission to pay the costs.

12 The Commission contends that the Court should:

— dismiss the application as inadmissible;

— in the alternative, declare the application devoid of purpose and, furthermore, unfounded;

— order the applicant to pay the costs.

13 In Case T-211/96 the applicant claims that the Court should:

— annul the decision of 9 October 1996;

— find the Commission liable for non-contractual damage and award the applicant the sum of EUR 246 000;

— order the Commission to pay the costs.

14 The Commission contends that the Court should:

— dismiss the action as inadmissible as regards non-contractual liability of the Commission;

— hold the other pleas in the action to be unfounded;

— order the applicant to pay the costs.

The applicant's withdrawal in Case T-9/96

15 In response to a question put by the Court, the applicant's representative stated at the hearing that he would withdraw in writing the claims for a declaration of failure to act and for compensation in Case T-9/96. By letter of 23 March 1999 the applicant stated that it was 'resigned to the fact that the Court of First Instance would not determine the action for a declaration for failure to act (a failure which has caused it serious harm)'.

16 In the light of the statements made by the applicant's representative at the hearing, the Court considers that that letter must be interpreted as meaning that the applicant withdraws its applications for a declaration of failure to act and for damages in Case T-9/96.

The substance of Case T-211/96

The action for annulment of the decision of 9 October 1996

17 In its pleadings the applicant essentially put forward four pleas in law: first, breach of essential procedural requirements and, more particularly, of procedural guarantees; secondly, infringement of the Treaty; thirdly, manifest error of assessment by the Commission in exercising its power to adopt interim measures; and fourthly, misuse of powers.

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

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

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

— Arguments of the parties

20 By its first plea, the applicant is criticising the Commission for having failed to carry out a careful and impartial examination of its complaint which it was under a duty to do.

21 The second plea falls into four parts. The first is the applicant's argument that the Commission committed a manifest error of assessment of the probative value of the evidence produced to it.

22 The second part of the plea alleges that the Commission committed a manifest error of assessment of the Community interest.

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

24 The fourth part of the plea alleges that the Commission committed a manifest error as regards the measures adopted by PSA in conjunction with the programme for State aid for the purchase of new cars, known as the 'Balladur bonus'.

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

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

— Findings of the Court

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

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

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

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

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

32 In this case the Court finds that the decision of 9 October 1996 clearly sets out the considerations of law and fact which led the Commission to the conclusion that there was not a sufficient Community interest. Consequently the complaint of breach of the duty to provide reasons is unfounded.

33 As for the ground of challenge, raised under the first plea, that the Commission failed in its duty to examine the complaint with the requisite care, it is clear from the contested decision, read in conjunction with the letter sent to the applicant under Article 6 of Regulation No 99/63 of 25 July 1963, that the Commission carefully examined the facts put forward by the applicant. It is also clear from the file that the Commission, in accordance with what was required in order to achieve an impartial analysis in this case, also examined the comments made by PSA at its behest on the criticisms in the complaint. Accordingly, this ground of challenge is not founded.

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

35 Next, as regards the first part of the second plea, namely failure to take account of the probative value of the evidence submitted by the applicant, each of the various allegations in the complaint must be analysed separately.

36 As regards the legal proceedings brought against the applicant and other companies carrying on similar activities, the fact that substantial litigation is pending on the activities of intermediaries and independent resellers is not sufficient, in the absence of other evidence, to show that the basis of those proceedings is a concerted practice between PSA and its agents.

37 As regards, next, refusals to sell, of which the applicant and other undertakings carrying on similar activities stand accused, and measures intended to discourage sales by PSA's foreign concessionaires to such undertakings, the evidence adduced by the applicant is not in itself sufficient to show that there is an agreement designed to impede the activities of authorised intermediaries acting under Article 3(11) of Regulation No 123/85. In addition, PSA provided a plausible explanation of the matters raised by the applicant, namely that PSA was merely opposing the activities of independent resellers, which is not contrary to competition law. The Commission was therefore not entitled to consider that a breach was established in this case (see Joined Cases T-185/96, T-189/96 and T-190/96 *Riviera Auto Service and Others* v *Commission* [1999] ECR II-93, paragraph 47).

38 Nor is the contested decision vitiated by manifest error as to the applicant's activities. The reason for the Commission's dismissal of the complaint was not that it found the applicant to be acting not only as an intermediary but also as an independent reseller. It merely considers that both are possible.

39 As regards the ground of challenge concerning the exposition by PSA and its concessionaires of French rules on vintage cars, it must be observed that the problems raised by the complaint are not sufficient to establish an unlawful agreement in that connection.

40 Finally, as regards the argument relating to the large number of complaints filed against PSA, the applicant has not produced any specific information from which it may be concluded that the Commission failed to have regard to the evidence adduced in relation to those complaints or that it failed in its obligations when it examined them. On the contrary, the Commission, having received a large number of complaints not only against PSA but also against other manufacturers, took action in the sector in question by its Decision 98/273/EC of 28 January 1998 relating to a proceeding under Article 85 of the EC Treaty (Case IV/35.733 — VW) (OJ 1998 L 124, p. 60, hereinafter 'the *VW* case').

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

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

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

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

45 In order to be able to determine whether or not there was a breach of the competition rules in this case, the Commission would also have to have procured further evidence, which would probably have necessitated measures of investigation under Article 11 et seq. of Regulation No 17 and, more particularly, verifications under Article 14(3). The Commission's finding that it would have to deploy substantial resources to carry out the investigations necessary to enable it to rule on the existence of the infringements alleged by the applicant in this case does therefore not appear to be manifestly erroneous.

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

47 In this case, as is rightly stated in the contested decision, the respective rights and obligations of the authorised agents, car manufacturers and dealers were defined and set out in block exemption Regulations Nos 123/85 and 1475/95 of 28 June 1995, cited above, by Commission communication 91/C 329/06 of 4 December 1991 entitled 'Clarification of the activities of motor vehicle intermediaries' (OJ 1991 C 329, p. 20) and by the judgments of the Court of First Instance in Case T-9/92 *Peugeot* v *Commission* [1993] ECR II-493 and of the Court of

Justice in Case C-322/93 P *Peugeot* v *Commission* [1994] ECR I-2727). That being so, the Commission was entitled to reach the conclusion, and did not commit any manifest error in so doing, that the national courts and administrative authorities were capable of dealing with the infringements alleged in the applicant's complaint and of protecting the applicant's rights under Community law.

48 The fact that, in the *VW* case, the Commission took action against conduct which at first sight appears to be similar to that which the applicant alleges against PSA and its network and which implicated another car manufacturer does not prove that it erred in its assessment of the Community interest in this case.

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

50 That being so, the fact that the Commission preferred to investigate the complaints which led to its decision in the *VW* case rather than the complaints

brought against PSA, which included that of the applicant, is not a ground for finding that it failed in its duty to examine on a case-by-case basis the seriousness of the alleged infringements and the Community interest in its taking action or that it committed an error of assessment.

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

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

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

54 Finally, as regards the fourth part of the second plea, alleging a manifest error relating to the measures adopted by PSA following the implementation by the French Government of the Balladur bonus, it is sufficient to observe that the fact that a manufacturer allows his concessionaires to give extra discounts without according like treatment to parallel imports cannot be considered to constitute an infringement of competition law.

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

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

56 The applicant's complaint contains no formal request for interim measures. It is true that in its letter of 27 September 1995 (cited at paragraph 5 above), the applicant requested the Commission 'formally to call upon PSA to desist from pressurising its Italian concessionaires'. However, that application does not explicitly refer to the adoption of interim measures. It could equally well be understood to mean that the applicant is requesting the adoption of a final decision under Article 3 of Regulation No 17. Furthermore, the letter of 26 April 1996 in which the applicant provided its comments on the Commission's letter under Article 6 of Regulation No 99/63 of 25 July 1963, does not, for its part,

contain any reference to any request for interim measures. Nor does the contested decision rule on such a request. In those circumstances, the plea of manifest error as regards an alleged request for interim measures is not founded.

Fourth plea: misuse of powers

57 The applicant has confined itself to referring, in the abstract, in its pleadings to principles of law and judgments on the concept of misuse of powers, without explaining why in its view that ground for annulment should be upheld in this case. The plea does not therefore meet the requirements of Article 19 of the EC Statute of the Court of Justice or of Article 44(1)(c) of the Rules of Procedure of the Court of First Instance. Accordingly it must be dismissed as inadmissible.

58 It follows that the claim for annulment of the contested decision is unfounded.

Claim for compensation

Arguments of the parties

59 The applicant claims that, by refusing to institute investigations to bring manufacturers' anti-competitive practices to light, and by failing to bring those

practices to an end, the Commission committed a wrongful act capable of attracting non-contractual liability on the part of the Community.

60 The Commission contends that the action does not comply with the requirements of Article 19 of the Statute of the Court of Justice and Article 44(1)(c) of the Rules of Procedure of the Court of First Instance.

Findings of the Court

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

62 In those circumstances, the claim for compensation must be rejected, and it is not necessary to consider whether the applicant's submissions on the nature and scope of the damage and the causal link between the conduct with which the Commission is charged and that damage are sufficient for the purposes of the

requirements of Article 19 of the Statute of the Court of Justice and Article 44(1)(c) of the Rules of Procedure of the Court of First Instance.

Costs

63 Under the second subparagraph of Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Under the first subparagraph of Article 87(5), a party who discontinues or withdraws from proceedings is to be ordered to pay the costs if they have been applied for in the other party's pleadings. However, upon application by the party who discontinues or withdraws from proceedings, the costs are to be borne by the other party if this appears justified by the conduct of that party.

64 In Case T-9/96, the applicant withdrew its action for a declaration of failure to act once it had become devoid of purpose by reason of the adoption of a definitive decision by the Commission on the complaint. In those circumstances it would appear justified that the Commission should bear the costs, in accordance with Article 87(5) of the Rules of Procedure.

65 Since the applicant has been unsuccessful in Case T-211/96, it must be ordered to pay the costs, as applied for by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1. **Dismisses the application in Case T-211/96;**

2. **Orders the applicant to pay the costs in Case T-211/96;**

3. **Orders Case T-9/96 to be removed from the register;**

4. **Orders the Commission to pay the costs in Case T-9/96.**

Vesterdorf Pirrung Vilaras

Delivered in open court in Luxembourg on 13 December 1999.

H. Jung B. Vesterdorf

Registrar President