JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber, Extended Composition)

18 September 1996 *

In Case T-387/94,

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

Jean-Michel Cesbron, a trader, trading as JMC Automobiles, residing at Livange (Luxembourg),

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

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

Somaco SARL, established at Fort-de-France (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,

applicants,

* Language of the case: French.

Commission of the European Communities, represented by Berend Jan Drijber, of its Legal Service, acting as Agent, assisted by Hervé Lehman, of the Paris Bar, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of the Commission's Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of the Commission's decision of 13 October 1994 rejecting the applicants' complaints relating to cartel practices alleged to be contrary to Article 85 of the EEC Treaty, and for compensation for the damage which the applicants maintain they sustained by reason of the manner in which the Commission dealt with their complaints,

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

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

Registrar: B. Pastor, Principal Administrator,

having regard to the written procedure and further to the hearing on 20 March 1996,

gives the following

Judgment

Facts underlying the dispute

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

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

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

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

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

'You have been so good as to forward to me for information purposes a letter from the Commission dated 9 June 1989. In that letter the Commission asks you to provide information concerning the policy pursued by the French public authorities with regard to the importation of Japanese vehicles. It is not for you to reply to the Commission in the place of those authorities.'

6 It was in those circumstances that, by letter dated 16 October 1989, the Commission's departments sought information from the French authorities. On 28 November 1989, the French authorities, through their Permanent Representa-

tion to the European Communities, responded to that request for information by stating, in essence, that 'the questions concerning the conduct of the undertakings mentioned in the Commission's letter are ... irrelevant in this context in so far as that conduct is connected with regulatory rules laid down by the public authorities: those undertakings have no autonomy in operating the regulatory system'.

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

8 In the meantime, by letter dated 8 May 1990 the Director General of the Commission's Directorate General for Competition notified the four parties concerned, in accordance with Article 6 of Regulation No 99/63/EEC of the Commission of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (OJ, English Special Edition 1963-1964, p. 47, hereinafter 'Regulation No 99/63') that the Commission did not envisage taking any action on their complaints, and invited them to submit any observations in that regard. On 29 June 1990 the parties submitted their observations to the Commission, in which they reasserted that their complaints were well founded.

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

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

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

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

13 The complaints were rejected on two grounds. According to the first ground, the conduct of the five importers against which the complaints were made constituted an integral part of the policy followed by the French public authorities with regard to imports of Japanese cars into France. Under that policy, the public authorities not only set the total quantities of vehicles allowed into France each year, but also determined the rules for the allocation of those quantities. According to the second ground, there was no connection between the interest of the applicants and the alleged infringement in that any application of Article 85 would be unlikely to remedy the situation by which the applicants considered themselves to have been

wronged. (The complete text of the two grounds of the decision of 5 December 1991 rejecting the complaints is incorporated in the decision attacked in this case, see paragraph 24, below.)

14 An action for annulment was brought against the decision of 5 December 1991 by application received at the Court Registry on 4 February 1992.

15 By judgment of 29 June 1993 in Case T-7/92 *Asia Motor France and Others* v *Commission* [1993] ECR II-669 (hereinafter '*Asia Motor France II*') the Court annulled the decision of 5 December 1991 in so far as it related to Article 85 of the Treaty, on the grounds, first, that the first ground for rejecting the complaints was based on an incorrect factual and legal assessment of the evidence submitted for the Commission's appraisal and, secondly, that the second ground for rejecting the complaints was vitiated by an error of law.

16 Following that judgment, on 25 August 1993, the Commission requested the French authorities and the Martinique dealers who were the subject of Somaco's complaint of 5 June 1990 to provide information pursuant to Article 11(1) of Regulation No 17. In its requests it asked in particular for an explanation of the apparent contradictions between the information provided by the French authorities, on the one hand, and the documents produced by the applicant companies which the Court had analysed in considering the first ground of the decision of 5 December 1991 rejecting the complaints, on the other.

17 On 19 October 1993 the applicants sent the Commission a letter of formal notice pursuant to Article 175 of the Treaty.

18 The Martinique dealers replied to the Commission's request for information in October 1993. Four of them provided in support of their explanations copies of documents which, they maintained, showed that the import quotas applied to their makes had been allocated by the administration and were not the outcome of an agreement between them.

19 The French authorities responded to the request for information by letter dated 11 November 1993.

20 On 10 January 1994 the Commission sent to the applicants a notification pursuant to Article 6 of Regulation No 99/63. It also provided them with a copy of the replies to the requests for information and offered them an opportunity to examine the documentary evidence which had been submitted to it.

21 By letter dated 9 March 1994 the applicants submitted their observations on the Commission's letter of 10 January 1994.

22 On 2 August 1994 the applicants sent a further letter of formal notice to the Commission.

23 By letter dated 13 October 1994, signed by the member of the Commission responsible for competition matters, the Commission notified to the five applicants a new decision rejecting their complaints (hereinafter 'the contested decision'). That decision relied solely on the first ground of the decision of 5 December 1991 rejecting the original complaints.

24 The contested decision reads as follows:

'I refer to the following complaints:

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

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

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

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

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

For the reasons set forth below and having regard to the observations set out in your letter dated 9 March 1994, the Commission has decided to adhere to its decision rejecting your complaints which was notified to you by letter of 5 December 1991. I would remind you that your complaints were rejected on the basis of the features of the situation prevailing at the time of the facts set out by yourselves. The relevant features and the conclusions drawn from them by the Commission were summarized as follows in its decision rejecting the complaints:

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

In the light of the foregoing findings, the Commission considers that there is no connection between your interest and the alleged infringement of Article 85 in that any application of Article 85 would be unlikely to remedy the wrong of which you feel you are the victim. The fixing of overall limits by the public authorities does not fall within Article 85, whilst the application of that provision to the allocation of the quota would not be capable of bringing about the authorization of your company as an importer. On the one hand, it is difficult to see how you could be authorized to participate in an allocation which you yourselves describe as an unlawful agreement. On the other hand, as has already been pointed out, the national regulatory system does not authorize importers other than the five whose conduct is impugned to be included in the breakdown. In those circumstances, a finding that Article 85 had been infringed would not alter your position in any way vis-à-vis the importers in question.

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

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

By judgment of 29 June 1993, the Court of First Instance annulled the aforementioned decision in so far as Article 85 of the Treaty was concerned. The Court cast doubt on the conclusions which the Commission had reached, on the basis primarily of the documents from the Department of Martinique. Taken out of context, those documents might seem to contradict the Commission's view that there had been an insufficient degree of concertation within the meaning of Article 85 between the importers in question. The fresh requests for information made pursuant to Article 11 of Regulation No 17 to both the French authorities and the importers in Martinique therefore related to those documents and that apparent contradiction, and you could have consulted the replies to those requests at the Commission's offices. You could also have submitted written observations on those replies and on the conclusions which the Commission was proposing to draw in the following terms set out in its notice given on 10 January 1994 in accordance with Article 6 of Regulation No 99:

"Examination of them confirms that the French authorities introduced in 1977 a State import scheme for vehicles from third countries throughout the territory of the French Republic — but specifically in the Department of Martinique — as part of its commercial policy in relation to motor vehicles, which, at the time, was conducted at the national level. It was in this context that the Ministry for Industry in Paris authorized five importers to act as exclusive representatives of the five makes Honda, Toyota, Mazda, Mitsubishi and Nissan, respectively. Each of them was as such notified each year by the Ministry of the maximum total number of vehicles of its make authorized to be imported and the total number authorized by the

State in this way was limited in the case of metropolitan France to 3% of the market and in the case of Martinique to 15%. Starting in 1981, each of the five importers in question was directed to inform the representative of its particular make in Martinique — who was appointed by the relevant Japanese manufacturer — each year of the number of sales authorized for that make in Martinique, and to send it precisely the same number of registration documents. It appears from the case-file that the average market share in Martinique of the five makes in question, which was approaching 30% before the import scheme was introduced, was reduced progressively to about 15% in 1984, and that all attempts at resistance deployed by interested parties, who considered themselves to have been injured by this imposed diminution of their turnover, were fruitless.

In that context, a meeting was in fact held in Martinique on 19 October 1987, resulting in minutes accompanied by a 'draft agreement', which were produced to the Court of First Instance as being relevant to the substance of the case now in question. But in actual fact that meeting was called by the Prefect and its sole purpose was the allied question of the arrangements for the 'restitution', as ordered by the Administration, by CCIE — the local Toyota representative — of 487 vehicles sold since 1982 over and above the number of imports assigned to it. Up to the end of 1986, CCIE had not in fact reduced its sales. Accordingly, it was the way in which that restitution was to be made which prompted that meeting and gave rise to the draft agreement, and not the question as to how the local market should be divided up; if CCIE had had to make restitution for those 487 vehicles excessively abruptly, this might have caused redundancies in that company.

In those circumstances, the minutes of that meeting of 19 October 1987 and the 'draft agreement' referred to by the complainants and mentioned by the Court may admittedly give rise to confusion if taken out of context. But, if they are placed in their proper context, they do not alter the exclusively State nature, not only of the import scheme which is in fact central to this case, but also of the arrangements with which Asia Motor's complaint expressly takes issue. This is

also true of the letter from the Ministry for Industry of 1 July 1987 and of the judgment of 16 March 1990 cited by the Court of First Instance in support of its findings:

— the former simply confirms the 'de facto exclusivity' actually organized by a State scheme and the reluctance of the persons affected — who in the final analysis were controlled with no possibility of appeal, as in the case of CCIE; in any event, the expression 'the Ministry for Industry cannot accede to such a request' leaves no room for ambiguity;

— whilst the latter presumes the existence of a cartel, it does not provide probative or even relevant factual or legal evidence to that effect: in particular its assessments are based on a state of affairs in which, unlike the case under consideration, a cartel existed before the public authorities intervened: in any event, the judgment is only a stay of execution.

Consequently, it has been sufficiently made out that the importers challenged, in particular those from Martinique, had no freedom of action in implementing the import scheme in question. In any event, it has also been made out that the view that there is a cartel dividing up the market is contradicted by two facts: on the one hand, type approval was reserved to the aforementioned five makes, not as a result of any action on the part of their importers, but because there was no official authorization of other makes or other importers: on the other hand, the companies implicated could have no interest in an import control which cut back their market by 50%."

Your new written observations, which I received by letter of 9 March 1994, are not such as to change the Commission's conclusions with regard to the State character of the import scheme in question and the lack of freedom of action on the part of the importers in the division of the market which excluded your clients from the French market. In contrast, by Decision No 94-D-05 of 18 January 1994, the Council for Competition in Paris has also concluded in this same case that there is a "policy of quotas implemented by the public authorities". Among other things, in the second part of its decision concerning the arrangements for dividing up the

market between the Martinique importers, the Council for Competition states as follows with regard to the draft agreement signed on 8 November 1987 to which you refer:

"Substance:

Import quotas:

In particular, whilst the draft agreement signed on 8 November 1987 between the dealers could constitute evidence of independent behaviour on the part of those undertakings, it was concluded pursuant to directives given, inter alia, by a technical adviser in the private office of the Minister for the Overseas Departments and Territories, the Director of Overseas Economic, Social and Cultural Affairs of the Ministry for Overseas Departments and Territories and the Deputy Director of the Capital Goods Department of the Ministry for Industry at the meeting held on 19 October 1987 at the Ministry for Overseas Departments and Territories and it has not been corroborated by any sufficiently probative evidence of the existence of practices put into effect by those undertakings independently of action taken by the Prefecture of Martinique."

In these circumstances, the Commission adheres, in the same terms set out above, to its decision to reject the applications made to it on 18 November 1985 and 29 November 1988 on behalf of the undertakings JMC Automobiles, Asia Motor, Monin Automobiles and EAS and on 5 June 1990 on behalf of the Somaco company in so far as those applications sought a finding that there was an agreement within the meaning of Article 85.'

Procedure and forms of order sought

25 Those were the circumstances in which the applicants brought these proceedings by application received at the Court Registry on 12 December 1994.

26 Upon hearing the report of the Judge-Rapporteur, the Court (Fourth Chamber, Extended Composition) decided to open the oral procedure and take measures of organization of procedure under Article 64 of the Rules of Procedure by asking the defendant to produce certain documents and to answer certain questions. The defendant complied with those requests within the period laid down.

27 At the hearing held on 20 March 1996, oral argument was heard from the parties and they answered oral questions put by the Court.

28 The applicants claim that the Court should:

— declare that the agreements complained of constitute an infringement within the meaning of Article 85 of the Treaty;

— declare that the Commission's departments refused to give effect to the judgment of the Court of First Instance of 29 June 1993 and that they are guilty of a failure to act within the meaning of Article 176 of the Treaty;

— annul the Commission's decision of 13 October 1994 pursuant to Article 173 of the Treaty;

— order the European Community, under Articles 178 and 215 of the Treaty, to make good the damage caused to the complainants by the institutions and, consequently, to fix the quantum of damages at the amount of interest at the rate of 9.75% on the sums at which the main damage is evaluated since the decision of 5 December 1991 deciding not to pursue the case up to the date of judgment;

— order the Commission to pay the full costs, both of these proceedings and of the proceedings which led to the judgment of the Court of First Instance of 29 June 1993.

29 The Commission claims that the Court should:

— dismiss the application brought by the applicant companies for annulment, for failure to act and for damages;

— order the applicant companies to pay the costs.

Scope of the application

30 Formally, the application is divided into three parts. In the first part, entitled 'action for failure to act', the applicants expound an argument relating to compliance with the judgment in *Asia Motor France II*, following which they claim that the 'attitude of the Commission's departments constitutes a failure to act within the meaning of Article 176 of the Treaty, since the refusal to give effect to the Court's judgment is manifest and unjust'. The second part of the application sets out pleas and arguments in support of the claims for annulment and the third part arguments in support of the claims for damages.

31 At the hearing, counsel for the applicants stated, in answer to a specific question from the Court, that the first part of the application had to be regarded as an action for failure to act 'based on Articles 175 and 176 of the EC Treaty' and not as a plea for annulment founded on an infringement of Article 176 of the Treaty.

32 As regards the applicants' first head of claim, it should be recalled that the Community courts have no jurisdiction to give a ruling, at an applicant's initiative, on the compatibility of natural or legal persons' conduct with the provisions of the Treaty (judgment of the Court of First Instance in Case T-575/93 *Koelman* v *Commission* [1996] ECR II-1, paragraph 30). It follows that the applicants' claims that the Court should declare that 'the agreements complained of constitute an infringement within the meaning of Article 85 of the Treaty' must be declared inadmissible.

Claims alleging failure to act

Arguments of the parties

33 The applicants point out that, according to Article 176 of the Treaty, the institution whose measure has been annulled by the Court is required to take the necessary measures to comply with the judgment annulling it. They also point out that that requirement means that the institution must have regard not only to the operative part of the judgment but also to the grounds which led to the operative part, and that, when it adopts a measure intended to replace the annulled measure, it must take the necessary steps to avoid a repetition of the illegalities identified in the grounds of the judgment declaring the original measure void (judgment of the Court of Justice in Joined Cases 97/86, 99/86, 193/86 and 215/86 *Asteris and Others* v *Commission* [1988] ECR 2181).

34 The applicants assert that the contested decision infringes Article 176 of the Treaty in so far as it repeats the factual and legal errors identified by the Court in the judgment in *Asia Motor France II*, and put forward three arguments in support of that claim. First, the Commission refused to admit the probative force of the documents appraised by the Court in paragraphs 39 to 53 of *Asia Motor France II*. Secondly, the Commission has adduced no new evidence capable of justifying its having taken over the first ground of its decision of 5 December 1991. Lastly, the Commission attached unwarranted probative force to the aforementioned decision of the French Council for Competition of 18 January 1994.

35 At the hearing the applicants argued that it follows from the judgment in *Asteris and Others* v *Commission*, cited above, that an action for failure to act is the proper remedy for challenging an infringement of Article 176 of the sort alleged in this case.

36 The Commission responds by stating, in essence, that it adopted a position on how it intended to give effect to the judgment in *Asia Motor France II* by adopting the contested decision, and that that decision complies with the requirements of Article 176 of the Treaty.

Findings of the Court

37 It should first be borne in mind that the Court can consider the applicants' arguments only to the extent of the claims set out in their application. In that regard, the applicants state that their claims to the effect that the judgment in *Asia Motor France II* has not been properly complied with must be construed as raising the issue of a failure to act within the meaning of Article 175 of the Treaty.

38 The Court points out that Article 175 of the Treaty refers to failure to act in the sense of failure to take a decision or to define a position, and not the adoption of a measure different from that desired or considered necessary by the persons concerned (Joined Cases 166/86 and 220/86 *Irish Cement* v *Commission* [1988] ECR 6473, paragraph 17).

39 In this case, the Court considers that, by adopting the contested decision to replace the measure annulled, the Commission defined a position, clearly and definitively, on how it was to give effect to the judgment in *Asia Motor France II*.

40 It should be emphasized, in the light of the applicants' argument, that whilst it appears from the judgment in *Asteris and Others* v *Commission* that an action for failure to act is the appropriate means of bringing before the Court a dispute relating to whether, in addition to replacing the measure annulled, the institution was also bound to take other measures relating to other acts which were not challenged in the initial action for annulment (paragraphs 22, 23 and 24), that is not the case where what is sought is solely to contest the legality of the measure adopted to replace the measure annulled. Such an issue must be raised in an action for annulment under Article 173 of the Treaty.

41 It follows from the whole of the foregoing that the claims for failure to act must be dismissed as inadmissible.

The claims for annulment

42 The applicants raise two pleas in support of their claims for annulment. One alleges manifest error of assessment, the other defective statement of reasons.

Preliminary observations

43 It should be borne in mind that the complaints made by Mr Cesbron, Asia Motor France, Monin Automobiles and EAS consisted in effect of two elements. The first alleged that there was an agreement between the importers in France of five Japanese makes (Toyota, Honda, Mazda, Mitsubishi and Nissan) and the French administration in order to limit their imports into the French market in return for a commitment on the part of the French authorities that the market in Japanese cars would be reserved to them alone. The second related to the existence of an agreement between those same undertakings dividing the quota fixed in this way amongst themselves. In so far as Somaco's complaint relates to the application of

Article 85 of the Treaty, it alleged, first, that there was an agreement between the Martinique dealers in those five makes of Japanese cars whose aim was to block the access of cars of other Japanese and Korean makes to the dealers' market and, secondly, that there was an agreement between the dealers in the aforementioned five Japanese makes dividing up an import quota fixed by the French administration.

44 The Court finds that, in the contested decision, the Commission rejected the various complaints essentially on the ground that the importers/dealers in question had 'no freedom of action in implementing the import scheme' with which the complaints take issue and which was 'exclusively [of a] State nature'. According to the contested decision, the claim that there is an agreement to divide up the quota is also 'contradicted by two facts: on the one hand, type approval was reserved to the aforementioned five makes (of Japanese cars in question), not as a result of any action on the part of their importers, but because there was no official authorization of other makes or other importers: on the other hand, the companies implicated could have no interest in an import control which cut back their market by 50%'.

45 The Court therefore considers that it may be inferred that the Commission rejected the complaints on the ground that there was no agreement within the meaning of Article 85(1) of the Treaty because the conduct complained of had been imposed on the undertakings concerned by the public authorities and did not reflect the exercise of a commercial choice.

46 Although it appears from settled case-law that, except where the subject-matter of a complaint falls within its exclusive purview, the Commission is under no obligation to rule on whether or not there has been an infringement of Article 85

of the Treaty alleged in a complaint (Case 125/78 *GEMA* v *Commission* [1979] ECR 3173, paragraph 17; Case T-24/90 *Automec* v *Commission* [1992] ECR II-2223, paragraphs 75 and 76; Case T-16/91 *Rendo* v *Commission* [1992] ECR II-2417, paragraph 98; Case T-186/94 *Guérin Automobiles* v *Commission* [1995] ECR II-1753, paragraph 23, and *Koelman* v *Commission*, cited above, paragraph 39); the Court considers that, where the Commission rejects a complaint on the ground that there has been no infringement of the competition rules of the Treaty, it is under a duty to set out in its decision the facts and considerations on which that conclusion is based. In such case, judicial review should involve verifying whether the facts have been accurately stated and whether there has been any manifest error in assessing the facts or a misuse of powers or any errors of law (Joined Cases 142/84 and 156/84 *BAT and Reynolds* v *Commission* [1987] ECR 4487, Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraphs 23 and 25, and *Asia Motor France II*, paragraph 33).

47 It is in the light of those considerations that the two pleas raised by the applicants in support of their claims for annulment must be considered.

Plea alleging manifest error of assessment

Arguments of the parties

48 The applicants consider that the contested decision is vitiated by the same manifest error of assessment as the decision of 5 December 1991. They argue that the ground set out in the contested decision for rejecting their complaints is nothing more than a repetition of the first ground for rejection set out in the decision of 5 December 1991. They point out that the Court held in *Asia Motor France II* that the first ground for rejection was vitiated by a manifest error of assessment, and they assert that the Commission has not adduced any new evidence suggesting that this is not so in this case.

49 The applicants also consider that, in order to adopt the contested decision despite the clear wording of the judgment in *Asia Motor France II*, the Commission had to change the nature of some of the documents appraised by the Court in that case by attributing to them a meaning that they did not possess.

50 The Commission's response is that the contested decision cannot be regarded as simply 'taking over' the decision of 5 December 1991, but is a new decision taken in the light of new evidence which came to light after the first decision, including in particular the replies to the new requests for information. It takes the view that the new decision is based on the facts, corroborated by new evidence, which the Martinique dealers brought to its attention in response to the requests for information.

51 The Commission considers that it appears from the replies to the new requests for information that in 1977 the French administration introduced in metropolitan France a mechanism for limiting imports of Japanese vehicles, pursuant to which it informed the importers in question of the precise numbers of vehicles which they were authorized to import each year. Although the implementation of that mechanism was not based on any legislative text and was the subject of a purely oral procedure, the Commission considers that it can be seen from the administrative setting taken as a whole that, *de facto*, the importers had no possibility of disregarding instructions from the administration, which they treated as being, in effect, orders. It refers in this regard, particularly, to the sources of pressure available to the administration inasmuch as it could have excluded the authorized importers from the type-approval scheme for new models or even terminated their status of authorized importers.

52 The Commission considers that the documents lodged also confirm that a similar, but not identical, mechanism was introduced in Martinique in 1982 in order to moderate imports into that Department. As in metropolitan France, the market shares of the dealers in the five makes in question were frozen at the time when the system was brought into operation. It takes the view that the documents lodged

by the dealers confirm that they obtained from the importers only quantities of certificates of conformity corresponding to the quotas fixed by the administration. It adds in this regard that the authorized importers alone are competent to issue those documents, which must be held in order to put a vehicle on the road.

53 As regards more particularly the minutes of an interministerial meeting and the draft agreement appraised by the Court in paragraphs 39 to 44 of the judgment in *Asia Motor France II*, the Commission contends that it is clear from the replies to the requests for information and the documents produced in support of those replies that the purpose of the meeting and of the draft agreement was, first, to return to Toyota's competitors, proportionately to their respective shares in the allocation carried out since 1982, the amount by which Toyota had exceeded the quota and, secondly, to fix, in a broader perspective, the rules for the future so as to enable the administration to obtain formal, written commitments from the importers. It further maintains that the agreement simply carries forward the allocation formula applied since 1982 and that the only new feature consists in the arrangements designed to regularize the overshooting of the quota for which the Toyota dealer was responsible.

54 As far as the exceeding of the quota by the Toyota dealer is concerned, the Commission states that this was brought about by issuing provisional number plates for vehicles for which it could not hope to obtain certificates of conformity.

Findings of the Court

55 It should be borne in mind in the first place that amongst the reasons for the Commission's rejection of the applicants' complaints in its decision of 5 December 1991, was the fact that the traders with which issue was taken in those complaints

had no autonomy. In the judgment in *Asia Motor France II*, the Court found that, in so far as it was based on that ground for rejection, the decision was 'vitiated by a manifest error in the assessment of the facts' which 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 in the first place two documents relating to imports of Japanese cars into Martinique which had been produced by the complainants during the administrative procedure before the Commission. These were minutes of an interministerial meeting held on 19 October 1987 and a 'draft agreement' annexed to those minutes. After first finding that 'prima facie, those items in the case-file constitute serious evidence of genuinely independent action' on the part of the economic operators concerned (*Asia Motor France II*, paragraph 44), the Court went on to consider the grounds of the decision of 5 December 1991 in so far as it rejected, not only Somaco's complaint of 5 June 1990 as to the existence of an agreement between the Martinique dealers, but also the other applicants' complaints of 18 November 1985 and 29 November 1988 as to the existence of an agreement between the importers in metropolitan France. After analysing two other documents, namely a letter dated 1 July 1987 from the Ministry for Industry, Postal Services and Telecommunications and Tourism and a judgment of the Tribunal de Commerce (Commercial Court), Paris, of 16 March 1990, the Court concluded that the various items of the case-file did not corroborate the conclusion that the traders in metropolitan France and Martinique with whom issue was taken in the various complaints had no autonomy or 'leeway' (paragraph 55).

56 Following the annulment of the decision of 5 December 1991 by the Court's judgment in *Asia Motor France II*, the Commission continued with its examination of the complaints by taking measures of inquiry. To that end, the contested decision states that '[t] he Court cast doubt on the conclusions which the Commission had reached, on the basis primarily of the documents from the Department of Martinique. ... The fresh requests for information made pursuant to Article 11 of Regulation No 17 to both the French authorities and the importers in Martinique therefore related to those documents ...'.

57 It should next be noted that, in the contested decision, the Commission held that its examination of the replies to the requests for information 'confirms that the French authorities introduced in 1977 a State import scheme for vehicles from third countries throughout the territory of the French Republic — but specifically in the Department of Martinique — as part of its commercial policy in relation to motor vehicles, which, at the time, was conducted at the national level' and it concluded that 'it has been sufficiently made out that the importers challenged, in particular those from Martinique, had no freedom of action in implementing the import scheme in question'.

58 In order to review the legality of that ground for rejecting the complaints, the Court will consider separately the conduct impugned in the complaints of 18 November 1985 and 29 November 1988 relating to imports into metropolitan France, on the one hand, and the conduct impugned in the complaint of 5 June 1990 relating to imports into Martinique, on the other.

— The complaints of Mr Cesbron of 18 November 1985 and of Mr Cesbron, Asia Motor France, Monin Automobiles and EAS of 29 November 1988 against the importers in metropolitan France

59 The complaints in question allege, on the one hand, that there is an agreement between importers in France of cars of the Japanese makes Toyota, Honda, Nissan, Mazda and Mitsubishi and the French administration by virtue of which the importers of those makes for France allegedly agreed to limit their aggregate share of the French domestic car market to 3% in return for a commitment on the part of the French authorities to the effect that the market in cars of Japanese origin would be reserved to them alone and, secondly, that there is an agreement between the undertakings against which the complaints are made to divide up their aggregate market share amongst themselves.

60 For the purposes of examining whether the ground for rejecting the complaints to the effect that the importers 'had no autonomy in operating the import scheme in question', the Court points out that, even if the conduct of an undertaking may escape the application of Article 85(1) of the Treaty on account of a lack of autonomy on its part (Joined Cases 40/73 to 48/73, 50/73, 54/73, 55/73, 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraphs 36 to 73), it does not follow, however, that all conduct sought or directed by the national authorities falls outside the scope of that provision. Thus, if a State measure encompasses the elements of an agreement concluded between traders in a given sector or is adopted after consulting the traders concerned and with their agreement, those traders cannot rely on the binding nature of the rules in order to escape the application of Article 85(1) (see, in particular, Case 123/83 *BNIC* v *Clair* [1985] ECR 391, paragraphs 19 to 23, Joined Cases 209/84 to 213/84 *Asjes and Others* [1986] ECR 1425, paragraph 77, and Case 311/85 *VVR* v *Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten* [1987] ECR 3801, paragraph 24).

61 In contrast, where a binding regulatory provision capable of affecting the free play of competition within the common market and of affecting trade between Member States has no link with conduct on the part of undertakings of the kind referred to in Article 85(1) of the Treaty, mere compliance by undertakings with such a regulatory provision falls outside the scope of Article 85(1) (see Case C-2/91 *Meng* [1993] ECR I-5791, paragraph 22, and Case C-245/91 *Ohra Schadeverzekeringen* [1993] ECR I-5851, paragraph 15). In such a case, the margin of autonomy on the part of economic operators implied by Article 85(1) of the Treaty is absent.

62 In this case, the Court finds that, in their reply of 11 November 1993 to the Commission's request for information of 25 August 1993, the French authorities confirmed that they decided in 1977 to take measures in order to limit sales of Japanese vehicles to 3% of the market in metropolitan France, and that, in that context, they decided to divide up the amount of authorized imports among the five authorized importers then operating on the market having regard to their market shares at that time and not to provide any new authorizations of importers of Japanese

makes. The French authorities also stated that, in order to implement that policy, they informed each importer every year of the precise quantity of vehicles corresponding to its quota, while instructing it not to import vehicles in excess of those quantities.

63 Having regard to the principles set out in paragraphs 60 and 61 above, it is necessary to examine whether the contested decision supports the conclusion that the French authorities imposed that import scheme on the undertakings mentioned in the complaints in such a way that they eliminated any margin of autonomy on the part of those undertakings.

64 It must immediately be concluded that the French authorities themselves confirmed that no provision of French law imposed on the importers of Japanese cars into metropolitan France the conduct with which issue is taken in the complaints. Indeed, the French authorities stated, in their reply to the request for information of 25 August 1993, that the 'machinery introduced by France for controlling imports of Japanese vehicles was the subject of a purely oral procedure'.

65 In the absence of any binding regulatory provision imposing the conduct at issue, the Court considers that the Commission is entitled to reject the complaints for want of autonomy on the part of the undertakings in question only if it appears on the basis of objective, relevant and consistent evidence that that conduct was unilaterally imposed upon them by the national authorities through the exercise of irresistible pressures, such as, for example, the threat to adopt State measures likely to cause them to sustain substantial losses.

66 It transpires, nevertheless, that the Commission based the contested decision, in so far as it relates to the complaints calling in question imports of Japanese cars into metropolitan France, on the same evidence used to support the conclusion reached in its earlier decision of 5 December 1991 that the economic operators in question had no autonomy or freedom of action. Accordingly, the evidence described by

the Commission as 'new evidence' in the defence (points 12 to 17) and in the rejoinder (points 8, 9 and 10) relates only to the situation in Martinique. In addition, the replies given by the French authorities in response to the new request for information merely describe in general terms the operation of the system for limiting imports and, in particular, afford no evidence capable of supporting or substantiating the statement that no reproach can be made against the importers in question, who merely applied measures resulting from decisions taken by the public authorities and did not have any freedom of action.

67 However, the Court held in the judgment in *Asia Motor France II* (paragraph 55), on the basis of the items in the case-file which the Commission had collected during the administrative procedure which led to the adoption of the decision of 5 December 1991 and of the evidence adduced by the parties during the proceedings before the Court in that case, that the Commission's conclusion that the importers of cars of Japanese makes into metropolitan France and Martinique had no freedom of action in implementing the import scheme was based on a manifest error in assessing the facts.

68 Admittedly, the Commission stated before the Court that the French administration could have put indirect pressure on the importers by withdrawing their authorization or by refusing them the benefit of the type-approval system for new models. Yet the Court finds that no item in the case-file enables it to be concluded that such pressures were in fact brought to bear on the importers and that that matter was not checked with the French authorities or the importers into metropolitan France during the administrative procedure. Consequently, in the absence of such an inquiry, the Commission was not entitled to conclude that such pressures were in fact brought to bear by the French authorities.

69 In addition, the Court observes that the Commission stated at the hearing that the administration's decision not to authorize Japanese makes other than those of the five importers in question is an integral part of the arrangement that was

introduced and may be regarded as the 'quid pro quo' for the importers' acceptance of the policy sought by the administration, which seems, at first sight, to rule out irresistible pressures exerted by the French authorities. This point is confirmed, moreover, by the letter from the Ministry for Industry, Postal Services and Telecommunications and Tourism of 1 July 1987 (Annex 27 to the application), according to which parallel imports of Japanese vehicles are liable steadily to erode the *de facto* exclusivity given to the five authorized importers in metropolitan France 'in return for their undertakings to exercise voluntary restraint'. That letter also states that that 'development ... is liable rapidly to lead to the authorized importers' calling in question the whole system of self-restraint'. The fact that it was possible for the traders to call in question the scheme for the importation of Japanese cars into metropolitan France indicates that those operators were not deprived of all autonomy in implementing the import scheme in question.

70 It must therefore be held that, in the light of the finding made by the Court in paragraph 55 of the judgment in *Asia Motor France II*, the contested decision is not based, in the absence of new evidence relating to the import scheme applicable in metropolitan France, on objective, relevant and consistent evidence such as to show that the French authorities unilaterally brought irresistible pressures to bear on the undertakings in question to adopt the conduct criticized in the complaints.

71 It follows from all of the foregoing that the Commission 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 authorized 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. In the absence of evidence of the existence of irresistible pressures, such as those described in paragraph 65 above, 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.

72 Consequently, the contested decision must be annulled in so far as it rejects the complaints of Mr Cesbron of 18 November 1985 and of Mr Cesbron, Asia Motor France, Monin Automobiles and EAS of 29 November 1988.

— Somaco's complaint of 5 June 1990 against the dealers in Martinique

73 According to its complaint, Somaco was incorporated in June 1988 with a view to importing into Martinique Japanese and Korean vehicles of the makes Daihatsu, Isuzu, Hyundai, Suzuki and Subaru. In its complaint, Somaco claims that it is the victim of an unlawful agreement between the dealers in the Japanese makes Toyota, Honda, Mazda, Mitsubishi and Nissan, which is 'covered by the French administration, and aims to restrict the access of Japanese and Korean vehicles to the Martinique market to five Japanese makes'. It adds that those same dealers 'share (the) market, which is fixed by the administration at 15% of registrations, to the detriment of the Somaco company, which is excluded from the market'. In support of its complaint, it has produced two documents, namely the minutes of an interministerial meeting held on 19 October 1987 and the 'draft agreement' annexed to those minutes.

74 It should first be noted that the applicants do not challenge the contested decision in so far as it rejects, for want of Community interest, the complaint relating to the alleged impossibility of importing into Martinique Hyundai cars from Korea.

75 As far as imports of Japanese vehicles into France, of which Martinique is a Department, are concerned, the Court observes that the French authorities explained in their reply of 11 November 1993 to the Commission's request for information of 25 August 1993 that only five importers representing the Toyota, Honda, Mitsubishi, Mazda and Nissan makes, have been authorized in France. The

importers are those mentioned in paragraph 2 of this judgment, against which the complaints of 18 November 1985 and 29 November 1988 were brought.

76 The applicants do not contest the fact that only those five importers representing the aforementioned five makes were authorized by the French administration. Moreover, it is common ground that those authorized importers are the only ones empowered to issue certificates of conformity to the Martinique dealers, on the one hand, and that obtaining a certificate of conformity is a necessary condition in order to register an imported vehicle in Martinique, on the other.

77 Accordingly, the system described in paragraphs 74 and 75 of this judgment — irrespective of whether it was imposed unilaterally by the French authorities or whether it is based on an agreement concluded between the five authorized importers and the French authorities — prevents companies wishing to import into France (metropolitan France and Martinique) Japanese cars other than Toyotas, Hondas, Mazdas, Mitsubishis and Nissans from having access to the market. Consequently and in any event, the fact that it is impossible for Somaco to market in Martinique Daihatsu, Isuzu, Suzuki and Subaru cars does not stem from any agreement between the Martinique dealers referred to in the complaint.

78 It is necessary to hold, further, that, in the contested decision, the Commission examined the issues raised in the complaint, even though it appears from the foregoing that the Commission could have questioned Somaco's interest in having a finding made as to the alleged infringement. Thus, following the annulment of the decision of 5 December 1991, the Commission began a new inquiry (see paragraph 16 above). After considering the replies to the requests for information which it sent to the French authorities and to the dealers in Martinique, together with the applicants' observations on the Commission's letter of 10 January 1994

pursuant to Article 6 of Regulation No 99/63, the Commission rejected that complaint also on the ground that the dealers had no autonomy in implementing the import scheme in question.

79 The Court points out that in its judgment in *Asia Motor France II* it held that that ground for rejecting the complaint was based on a manifest error in assessing the facts (paragraph 55). It is therefore necessary to consider whether new evidence collected during the inquiry conducted following the Court's annulment of the Commission's decision of 5 December 1991 is capable of casting a new light on the documents to which, following an initial analysis, the Court attached strong probative force in relation to the probable existence of a consensus in its judgment in *Asia Motor France II*.

80 For the purposes of examining whether that ground for rejecting the complaint is well founded, the Court finds in the first place that no regulatory provision imposed the conduct taken issue with in the complaint on the Japanese car dealers in Martinique.

81 Next, it is necessary to consider whether it appears, on the basis of objective, relevant and consistent evidence that the national authorities unilaterally exerted irresistible pressures on the dealers in question to adopt the conduct which was the subject of the complaint.

82 From its examination of the evidence described by the Commission as 'new evidence' in the defence (points 12 to 17) and in the rejoinder (points 8, 9 and 10), the Court observes, first, that there was a letter dated 19 August 1982 from the State Secretary of the Minister responsible for the Overseas Departments and Territories to the President of the Antilles-Guyana Group of Importers of Foreign Vehicles which confirms that, in order to moderate the rate of penetration of vehicles of Japanese makes on the market of the Overseas Departments, the French administration set up in 1982 measures similar, but not identical, to those introduced in metropolitan France. The writer of the letter explains that '[i] n view of the specific

characteristics of those Departments and the high sales volumes reached in 1980 and 1981, the share of Japanese makes should be reduced ... initially to 15% in 1982'.

83 It further appears that, as far as the Martinique market is concerned, imports of Japanese cars were restricted to 15% of the total number of vehicles registered in that Department, at least until 1991. It is worth citing, by way of example, a letter from the Prefecture of the Martinique Region dated 29 December 1987 (Annex 3.1 to the rejoinder), and a letter, also from the Prefecture, of January 1991 to the Mazda dealer (Annex 2.3 to the rejoinder), which refer to the 15% ceiling.

84 Next, the Court finds that it appears from the documents in the case-file, in particular from the letter of 19 August 1982 from the State Secretary of the Minister responsible for the Overseas Departments and Territories, that the aggregate quota of 15% of vehicles registered in Martinique was imposed unilaterally on local importers by the French authorities. This point was not even contested in Somaco's complaint, which refers to a quota fixed by the French administration at 15%. Moreover, the lack of autonomy on the part of the dealers is further corroborated by the fact that the limitation of imports of Japanese cars to 15% of the Martinique market deprived the dealers of 50% of their market. It is undisputed that the market share of Japanese cars in Martinique was approaching 30% before the import scheme complained of was introduced.

85 It further appears from the documents produced by the Commission that, during the same period, the public authorities divided up the aggregate quota of 15% among the makes represented by the five dealers against which the complaint was made. The documents cited in points 13 to 16 of the defence and in point 12 of the rejoinder bear out the Commission's finding that the allocation of the overall quota among the Martinique dealers was not the outcome of concertation among those undertakings, possibly with the French authorities' support, but was

imposed unilaterally on the dealers by those authorities, in particular the Ministry for Industry, Directorate for Mechanical Engineering Industries (DIMME), on the proposal of the Prefect of the Martinique Region. The fact that individual quotas were fixed for each dealer by the public authorities is further borne out by the letter of 3 September 1986 from the Nissan car dealer to the Prefect of Martinique (Annex 1.6 to the rejoinder), according to which that dealer complained that 'the quota allocated [to it] is much too small and does not enable [its] undertaking to develop normally, especially since it is constantly declining'. If the dealers had been dividing up the Martinique market amongst themselves, the Nissan car dealer would have addressed itself directly to the other dealers with a view to obtaining an increase in its quota, and not to the public authorities.

86 Next, the Court finds that the watertight nature of the system put in place in this way by the public authorities was ensured by the fact that the five authorized importers of Japanese cars in metropolitan France, acting in compliance with instructions from the national authorities, sent the dealer for 'their' makes in Martinique only the number of certificates of conformity which corresponded precisely with the quota which DIMME had fixed for the dealer in question. This is confirmed, moreover, by the letter of 19 August 1982 from the State Secretary of the Minister responsible for the Overseas Departments and Territories, according to which 'the forecast sales volumes of each make are notified by the Ministry for Research and Industry to the importers in metropolitan France, which undertake to provide local importers with the corresponding number of certificates enabling the vehicles to be registered'.

87 In view of the fact that only the authorized importers of the five Japanese makes are competent to issue certificates of conformity to the Martinique dealers, on the one hand, and that obtaining a certificate of conformity is a necessary condition for registering an imported vehicle in Martinique, on the other, the Martinique dealers were bound to accept the consequences of the arrangement put in place as between the authorized importers and the French authorities.

88 It follows from the foregoing that the Commission's conclusion that the Martinique dealers against which Somaco's complaint was brought 'had no autonomy in implementing the import scheme in question' is based, prima facie, on objective, relevant and consistent evidence.

89 Next, it is necessary to consider whether the applicants have produced any 'conflicting' evidence capable of showing that the Japanese car dealers had a margin of autonomy with regard to the distribution of the overall quota fixed at 15% by the French authorities for imports of Japanese cars into Martinique.

90 The applicants rely in the first place on the minutes of the interministerial meeting of 19 October 1987 and on the 'draft agreement' annexed to those minutes.

91 It should be pointed out that the very wording used in those documents tends to suggest that the Japanese car dealers against which the complaint was brought concluded an agreement sharing out the 15% quota fixed by the French administration. On the basis of the wording of those documents, the Court held in its judgment in *Asia Motor France II* (paragraph 44) that '[p] rima facie, those [documents] constitute serious evidence of genuinely independent action' on the part of the traders in question.

92 In the contested decision, however, the Commission explains that, in the light of new evidence which was brought to its attention in the inquiry which it carried out following delivery of the judgment in *Asia Motor France II*, if the minutes of the interministerial meeting of 19 October 1987 and the 'draft agreement' annexed thereto are placed in their proper context, they do not alter the exclusively State nature of the import scheme. To this end, it contends that the meeting of

19 October 1987, which was called by the Prefect, had as 'its sole purpose ... the allied question of the arrangements for the "restitution", as ordered by the Administration, by CCIE — the local Toyota representative — of 487 vehicles sold since 1982 over and above the number of imports assigned to it'.

93 The Court finds that, between 1982 and 1986, the Toyota dealer in Martinique considerably exceeded the quota allocated to it (see, in particular, Annexes 3.2 and 3.6 to the rejoinder). The overshooting of the quota is not, moreover, disputed by the applicants. It is also uncontested that that dealer was able to sell vehicles over and above its annual quota by registering the excess vehicles under provisional number plates ('WW' plates).

94 It also appears from the documents in the case-file that, after finding abuses of the provisional registration system by the Toyota dealer, the French authorities decided at the latest in March 1987 to count the issue of provisional (WW) logbooks against the quota allocated to each make (see, in particular, letters from the Prefecture of the Martinique Region dated 11 March 1987 to the Mitsubishi dealer (extract quoted in the Commission's answers of 23 November 1995 to the Court's questions) and to the Mazda dealer (Annex 2.2 to the rejoinder)).

95 With regard to the readjustment of the excess of quota on the part of the Toyota dealer resulting from its abuse of the provisional registration system between 1982 and 1986, the Court considers that the Commission was reasonably entitled to conclude that the meeting of 19 October 1987 called by the Prefect of the Martinique Region (Annex 3.7 to the rejoinder) also constituted a manifestation by the public authority of its intention to enforce the import system which it had unilaterally imposed. Whilst the draft agreement admittedly refers to a 15% ceiling and to a formula for sharing out that 15%, this does not necessarily mean that the dealers concluded an agreement caught by Article 85(1) of the Treaty. The documents

found during the new inquiry are capable of supporting the view that the dealers considered it necessary to 'codify' the unwritten import policy unilaterally imposed by the public authorities since 1982, with a view to avoiding similar problems to those which had been experienced with the Toyota dealer in the future.

96 It follows that the applicants, which merely refer to the actual wording of the minutes of the interministerial meeting of 19 October 1987 and to the 'draft agreement' annexed thereto in order to prove the existence of an infringement of Article 85, have not established that there was a manifest error in assessing the facts on the part of the Commission when it concluded in the contested decision that, considered in context, those documents do not alter the exclusively State nature of the import scheme.

97 Next, it must be held that no other document relied on by the applicants is capable of displacing the Commission's view that the Martinique dealers 'had no autonomy in implementing the import scheme in question'.

98 Thus, as far as concerns in the first place the letter from the Ministry for Industry, Postal Services and Telecommunications and Tourism of 1 July 1987 (Annex 27 to the application), the Court finds that that document, albeit relevant for the purposes of examining the issues raised in the complaints brought against the Japanese car importers in metropolitan France, contains no indication regarding the import scheme applicable in Martinique.

99 As for the other documents mentioned in the application, such as the minutes of the meeting of the General Council of Martinique of 27 January 1983 and the statement of 26 February 1991 of the Director General of Sigam, the Nissan dealer, the Court notes that some of the extracts quoted are concerned solely with relations between the public authorities and the importers in metropolitan France. The letter sent in January 1981 to the President of the French Republic by the Antilles-Guyana Group of Importers of Foreign Vehicles describes the concern of local importers about the public authorities' intention to establish an overall import quota and is therefore not capable of proving that there was an agreement between

the dealers to share out an overall quota, which had not yet been fixed at that time. Other documents, such as the minutes of the meeting of 1 October 1987 at the Martinique Prefecture and the telex message of 22 September 1987 from the Prefect of Martinique, deal with the problem of the Toyota dealer's exceeding the quota which had been allocated to it. Although it is true that that question was 'discussed ... with the dealers' (telex message of 22 September 1987 from the Prefect of Martinique), it does not appear from this that those dealers had concluded an agreement falling within Article 85 of the Treaty. The proposal set out in the minutes of the meeting of 1 October 1987 in order to resolve the problem of exceeding the quota — which received the 'assent of all the dealers' — was not incorporated in the minutes of the meeting of 19 October 1987 or the 'draft agreement' relating thereto. This supports the view that the public authorities themselves not only fixed the overall quota of 15% for Martinique and the allocation of that quota among the dealers, but also unilaterally imposed the system for clearing the amount by which the Toyota dealer had exceeded the quota. The fact that irresistible pressures were brought to bear by the public authorities is also confirmed by the extract from the telex message sent by the Mazda dealer to Mr Géraud and Mr Archambault (undated document, not produced, of which an extract is reproduced on p. 29 of the application). The extract quoted by the applicants shows that the import scheme applied in Martinique is not based on an agreement between dealers, but was imposed unilaterally by the public authorities.

100 It follows from the foregoing that the plea alleging manifest error in assessing the facts is unfounded in so far as it relates to the Commission's decision to reject Somaco's complaint of 5 June 1990.

Plea alleging defective statement of reasons

Arguments of the parties

101 The applicants assert that the contested decision is insufficiently reasoned in that, on the one hand, it does not justify the re-adoption of the first ground for

rejecting the complaints as in the decision of 5 December 1991 in spite of the judgment in *Asia Motor France II* and, on the other, it fails to address the arguments put forward by the applicants in support of their complaints, in particular those put forward in their observations on the Commission's letter of 10 January 1994 pursuant to Article 6 of Regulation No 99/63.

102 The Commission states in response that the contested decision clearly identifies the reasons for which it held that the complaints should be rejected. It points out that it is not necessary for a decision rejecting a complaint to tackle each of the arguments raised by the complainants; rather, it is sufficient for it to set out the facts and considerations having decisive importance in the context of the decision (*BAT and Reynolds* v *Commission*, cited above).

Findings of the Court

103 It is settled case-law that the statement of reasons for a decision adversely affecting a person must be such as, first, to enable the person concerned to ascertain the matters justifying the measure adopted so that he can if necessary defend his rights and verify whether or not the decision is well founded and, secondly, to enable the Community courts to exercise their power of review (see, in particular, *Asia Motor France II*, paragraph 30).

104 In that respect, as the Court pointed out in the judgment in *Asia Motor France II* (paragraph 31), the Commission is not obliged to adopt a position, in stating the reasons for the decisions which it is led to take in order to apply the competition rules, on all the arguments relied on by the parties concerned in support of their request; it is sufficient if it sets out the facts and legal considerations having decisive importance in the context of the decision.

105 The Court points out that the contested decision rejected the complaints on the ground that the importers and dealers against which the complaints were made had 'no leeway in implementing the import scheme', which was of an 'exclusively State nature'. The contested decision indicates the evidence on which the position adopted was based, thus enabling the applicants to challenge the decision and the Court to review its legality. It follows that the plea alleging that the statement of reasons is defective must be rejected.

The claims for damages

106 The Court observes that, under 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, an application must state the subject-matter of the proceedings and a summary of the pleas in law on which it is based. The information given must be sufficiently clear and precise to enable the defendant to prepare his defence and the Court to give a ruling, if necessary without other supporting information. In order to ensure legal certainty and the sound administration of justice, if an action is to be admissible, the essential facts and law on which it is based must be apparent from the text of the application itself, at the very least summarily, provided that the statement is coherent and comprehensible (see, for example, the order of the Court of First Instance in Case T-56/92 *Koelman* v *Commission* [1993] ECR II-1267, paragraph 21).

107 It appears from the case-law that, in order to satisfy those requirements, an application seeking compensation for damage caused by a Community institution must state the evidence from which the conduct alleged against the institution can be identified, the reasons for which the applicant considers there is a causal link between the conduct, the damage it claims to have suffered, and the nature and extent of that damage (Case T-64/89 *Automec* v *Commission* [1990] ECR II-367, paragraph 73).

108 It also appears from the case-law that an application which lacks the necessary precision must be declared inadmissible and that an infringement of Article 19 of the Statute of the Court of Justice and of Article 44(1)(c) of the Rules of Procedure of the Court of First Instance is among the bars to proceeding which the Court may raise of its own motion at any time in accordance with Article 113 of the Rules of Procedure (*Automec* v *Commission*, cited above, paragraphs 73 and 74).

109 In this case, the Court notes that the argument set out by the applicants in their application in support of their claims for damages reads in its entirety as follows:

'The complainant undertakings draw a distinction between the damage imputable to the attitude of the undertakings party to the agreement and the French Government and the damage for which the Commission is directly responsible.

The total loss sustained by the undertakings to date as a result of the agreement may be quantified at:

Asia Motor France:	ECU 259 552 000
Mr Cesbron:	ECU 244 292 000
Monin Automobiles:	ECU 82 231 000
EAS:	ECU 76 177 000
Somaco:	ECU 2 153 500

The loss, together with interest recoverable in law, for which the Commission is responsible as a result of the delays and unlawful decisions taken, may be reasonably assessed at the usual interest applied to such sums by the Community (9.75%) between the decision on 5 December 1991 not to pursue the case and the date of the delivery of the judgment.'

110 The Court considers that neither that argument put forward by the applicants nor the application considered as a whole enables the wrongful conduct imputed to the Commission or the nature of the damage allegedly sustained to be identified with the requisite degree of clarity and precision.

111 It follows that the claims for damages must be rejected as inadmissible.

Conclusions

112 It follows from the whole of the foregoing that the contested decision should be annulled in so far as it rejects the complaints made by Mr Cesbron on 18 November 1985 and by Mr Cesbron, Asia Motor France, Monin Automobiles and EAS on 29 November 1988 and that the remainder of the application should be dismissed.

Costs

113 The applicants ask the Court to order the Commission to pay the costs both of these proceedings and of the proceedings which culminated in the judgment in *Asia Motor France II*.

114 It follows from Article 87(1) of the Rules of Procedure, which provides that a decision as to costs is to be given in the final judgment or in the order which closes the proceedings, that in this judgment the Court may make an order only as to the costs incurred in these proceedings. Consequently, the applicants' head of claim seeking an order that the Commission should pay the costs of the proceedings which culminated in the judgment in *Asia Motor France II* should be dismissed.

115 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. However, according to Article 87(3), the Court may order that the costs be shared where each party succeeds on some and fails on other heads. Since the application has been upheld in part and each of the opposing parties claimed that the other side should pay the costs, the Court considers that the circumstances are justly assessed by ordering the Commission to bear its own costs and half of the applicants' costs.

On those grounds,

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

hereby:

1. Dismisses as inadmissible the claims for a declaration of an infringement;

2. Dismisses the claims for failure to act as inadmissible;

3. Annuls the contested decision in so far as it rejects Mr Cesbron's complaint of 18 November 1985 and the complaint of Mr Cesbron, Asia Motor France, Monin Automobiles and EAS of 29 November 1988;

4. Dismisses the remainder of the claims for annulment as unfounded;

5. Dismisses the claims for damages as inadmissible;

6. Dismisses as unfounded the claims that the Commission should be ordered to pay the costs of the proceedings which culminated in the judgment of the Court of First Instance of 29 June 1993 in Case T-7/92 *Asia Motor France and Others* v *Commission* [1993] ECR II-669;

7. Orders the Commission to bear its own costs and to pay half the applicants' costs.

Lenaerts García-Valdecasas Lindh

Azizi Cooke

Delivered in open court in Luxembourg on 18 September 1996.

H. Jung K. Lenaerts

Registrar President