JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)
14 February 2001 *

In Case T-26/99,

Trabisco SA, established in Cognac (France), represented by J.-C. Fourgoux, lawyer, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented initially by G. Marenco and L. Guérin and subsequently by Mr Marenco and F. Siredey-Garnier, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for annulment of the Commission decision of 17 November 1998 rejecting a complaint by the applicant based on Article 85 of the EC Treaty (now Article 81 EC),

* Language of the case: French.

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

composed of: J. Pirrung, President, A. Potocki and A.W.H. Meij, Judges,
Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 20 September 2000,

gives the following

Judgment

Facts and procedure

1 According to the extract from the register of companies of the Tribunal de commerce de Saintes (Commercial Court, Saintes) which the applicant, Trabisco SA, lodged in accordance with Article 44(5) of the Rules of Procedure of the Court of First Instance, the applicant is engaged in the sale and purchase of all types of vehicle and spare parts and in repair work.

2 On 4 July 1994, after it had been summoned by Peugeot and Citroën dealers to appear before the Tribunal de commerce in proceedings seeking an order, under national law relating to unfair competition, prohibiting it from engaging in parallel imports of new and second-hand vehicles which have been driven less than 3 000 kilometres, 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') and against some of its dealers and agents.

3 In that complaint PSA and its dealers were accused of colluding to bring actions against the applicant and against other undertakings engaged in similar activities in order to obtain information on their sources of supply and pricing, so as to preclude, to the detriment of consumers, competitive pricing by parallel importers. The complaint referred to other complaints of similar matters lodged by Massol and SGA.

4 On 18 August 1994 the applicant sent to the Commission documents from PSA concerning the 'dual system' of model-year dates for motor vehicles and newspaper articles concerning complaints lodged with the Commission by other garages.

5 On 6 November 1995 the Commission sent the applicant a communication under 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 1963-1964, p. 47).

6 On 4 December 1995 the applicant submitted its comments on that communication and produced further documents.

7 On 17 December 1997 the Commission sent the applicant's representative a letter in which it requested the applicant and two other undertakings represented by the

same lawyer to consider, in the light of Case C-226/94 *Grand Garage Albigeois and Others* [1996] ECR I-651, whether to withdraw their complaints so that the Commission could take no further action on them. By letter of 26 January 1998 the applicant's lawyer objected to that course of action, stating that the complainants agreed to their complaints being joined in order to assist the work of the Commission.

8 In the dispute at the origin of the applicant's complaint, the Tribunal de commerce delivered a judgment on 7 May 1998 ordering the dealers, who had abandoned the proceedings alleging unfair competition, to pay damages to the applicant. An appeal against that judgment is pending before the Cour d'appel de Poitiers (Court of Appeal, Poitiers).

9 By decision of 17 November 1998 the Commission dismissed the applicant's complaint ('the contested decision').

10 By application lodged at the Registry of the Court of First Instance on 25 January 1999 the applicant brought an action for annulment of that decision.

11 By decision of the Court of First Instance of 6 July 1999, the Judge-Rapporteur was assigned to the Second Chamber, to which this case was itself then assigned.

12 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Second Chamber) decided to open the oral procedure. The parties presented oral argument and replied to the Court's questions at the hearing on 20 September 2000.

Forms of order sought by the parties

13 The applicant claims that the Court should:

— annul the contested decision;

— take formal note that the applicant reserves the right to bring an action against the Commission under Article 215 of the EC Treaty (now Article 288 EC);

— order the Commission to pay the costs.

14 The Commission contends that the Court should:

— dismiss as inadmissible the request that the Court of First Instance should take formal note that the applicant reserves the right to bring an action under Article 215 of the Treaty;

— dismiss the action as unfounded;

— order the applicant to pay the costs.

Admissibility

15 The Commission claims that the request that the Court should take formal note that the applicant reserves the right to bring an action for damages against the Commission is inadmissible. The applicant states that it does not understand why that should be the case.

16 The Court finds that in proceedings before the Community judicature there is no remedy whereby the Court can 'take formal note' that one of the parties reserves the right to bring an action. This form of order is therefore inadmissible.

Substance

17 The applicant relies on three main pleas.

The first and third pleas, alleging infringement by the Commission of its obligations in dealing with the complaint and the obligation to state reasons

Arguments of the parties

18 The first plea is divided into six main limbs. In the first limb, the applicant contends that the Commission failed to comply with its obligations to pursue

infringements of competition law and to investigate its complaint and that it interpreted its discretion in that respect too broadly.

19 The second limb of the plea alleges a manifest error regarding the evidence before the Commission and the assessment of the Community interest in investigating the complaint. The applicant contends that a number of complaints against PSA had been referred to the Commission alleging similar conduct to that mentioned in its own complaint. It submits that the Commission failed to recognise that the cumulative effect of the evidence brought to its attention by all the complainants warranted the initiation of an investigation. The Commission was wrong in 'partitioning' the cases and not joining them, as the applicant had suggested in its letter of 26 January 1998. The applicant is thereby claiming in essence that the Commission committed a manifest error in its assessment of the evidence and of the Community interest in pursuing the complaint because it investigated it in isolation without taking into account the many other complaints against PSA which had been made to it. The applicant also contends that the Commission underestimated the seriousness of the conduct aimed at partitioning the markets.

20 The third limb of the plea alleges a manifest error in the assessment of whether there was collusion as regards the legal actions brought against the applicant and against other undertakings in the same situation in order to prevent them from having access to the market as parallel importers. The applicant contends that the evidence available to the Commission in this connection did not call for costly investigations to establish an infringement, but merely an objective analysis.

21 The fourth limb of the plea alleges a manifest error of assessment of the evidence of market-partitioning and barriers to supplies to parallel importers. The applicant cites numerous examples of such barriers. In particular, refusals to sell, termination of contracts, delays in deliveries, pressure exerted on PSA's foreign dealers in order to dissuade them from selling vehicles for subsequent reimportation into France, halting exports of certain models which are

particularly sought after in France and discrimination against foreign dealers as regards prices, discounts and bonuses, depending on the final destination of the vehicles sold. It contends that such practices persist and that intervention by the Commission is justified in the light of the principle of subsidiarity.

22 In its reply the applicant complains that the Commission treated it as an independent reseller and not as an authorised intermediary, although there is no evidence on the file that it is an independent reseller. It contends therefore that the Commission cannot infer from the information on the file that members of the PSA network only refuse to sell to independent resellers.

23 In the fifth limb of its plea the applicant alleges a manifest error of assessment on the part of the Commission concerning the measures accompanying the 'Balladur bonus', which, according to the applicant, constituted a concerted practice on the part of manufacturers and their dealers designed to discriminate against parallel imports of vehicles.

24 The sixth limb of the first plea alleges a manifest error of assessment by the Commission concerning the use of the French system of model-year dates as a barrier to parallel imports. The applicant contends that the concessions made by France to the Commission in that connection were not sufficient to prevent French motor vehicle manufacturers from providing misleading information on this matter to the customers of parallel importers. It provides an example of such incorrect information and notes that the file is still open as regards model-year dates.

25 In its third plea the applicant contends that the contested decision does not contain an adequate statement of reasons.

26 The Commission considers that the complaint that it did not deal jointly with the various complaints lodged by the applicant and by other undertakings in a similar situation could be made in the context of an action for damages, but cannot constitute a plea for annulment of a decision rejecting a complaint.

27 As regards the allegations of various manifest errors of assessment, the Commission contends that the evidence adduced by the applicant does not show that the alleged infringements were committed and that an investigation into whether the applicant's complaints were founded would have required it to deploy resources which it was not prepared to deploy in the light of the importance of the case and the likelihood of its success. It adds that the national courts were perfectly capable of establishing whether there had been an infringement of Article 85(1) of the EC Treaty (now Article 81 EC).

28 The Commission contends that the third plea, alleging that the obligation to state reasons was infringed, is inadmissible since it is not supported by any factual evidence or legal submissions.

Findings of the Court

29 The Commission's obligations when a complaint is referred to it have been laid down in settled case-law (see in particular Case C-119/97 P *Ufex and Others* v *Commission* [1999] ECR I-1341, paragraph 86 et seq.).

30 It is apparent in particular from that case-law that when it decides to assign different priorities to the examination of complaints submitted to it, the Commission may not only decide on the order in which they are to be examined but also reject a complaint on the ground that there is insufficient Community interest in further investigation of the case (see Case T-5/93 *Tremblay and Others* v *Commission* [1995] ECR II-185, paragraph 60).

31 The discretion which the Commission has 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 those reasons must be sufficiently precise and detailed to enable the Court effectively to review the Commission's use of its discretion to define priorities (see *Ufex and Others* v *Commission*, cited above, paragraphs 89 to 95). That review must not lead the Community judicature 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 and Joined Cases T-9/96 and T-211/96 *Européenne Automobile* v *Commission* [1999] ECR II-3639, paragraph 29).

32 It is not apparent from the contested decision that the Commission has failed to comply with the principles laid down in the case-law regarding the extent of its obligations. The contested decision shows that the Commission carefully examined the applicant's evidence. Nor do the arguments in that decision with regard to the assessment of the Community interest in continuing the investigation of the complaint justify a finding that the Commission failed to comply with the principles laid down in the case-law in that respect.

33 The second limb of the first plea, concerning 'partitioning' of the cases relating to the various complaints against PSA and its dealers, challenges the legality of the contested decision and can therefore, contrary to the Commission's contention, be put forward in support of an action for annulment.

34 As to the merits of that limb of the plea, it should be observed that when assessing the Community interest in investigating a complaint the Commission must not investigate it in isolation but rather in the context of the situation on the relevant market in general. The existence of a number of complaints alleging similar conduct by the same operators is one of the factors the Commission must take into account in its assessment of the Community interest.

35 Similarly, where the Commission assesses the likelihood of being able to establish the existence of an infringement and the extent of the investigative measures needed for that purpose, it must take into account all the evidence in its possession and not merely assess separately the individual items of evidence submitted by each complainant and conclude that each of the complaints taken in isolation is not supported by sufficient evidence.

36 However, the Commission is not required to 'join' the procedures for examining different complaints concerning the conduct of a particular undertaking, since the conduct of an investigation falls within the scope of its discretion. In particular, the fact that there are a number of complaints from operators belonging to different categories such as, in the context of this case, independent resellers, authorised intermediaries and dealers cannot preclude the dismissal of such of those complaints as appear, according to the evidence available to the Commission, to be unfounded or lacking in Community interest. Consequently, the fact of having treated the different complaints separately cannot be regarded

as such as being improper (see by analogy Joined Cases T-70/92 and T-71/92 *Florimex and VGB* v *Commission* [1997] ECR II-693, paragraphs 89 to 95).

37 In the present case, it is correct that the many complaints directed against PSA have given rise to cases before courts in the Community, and the evidence adduced in those cases may give rise to suspicion that illegal practices similar to those found in Commission 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), — and largely upheld in Case T-62/98 *Volkswagen* v *Commission* [2000] ECR II-2707, also exist within PSA's distribution network. Furthermore, that evidence shows that these may well not be isolated cases whose effects on competition and trade between Member States are negligible.

38 However, it has not been proved that the Commission failed to acknowledge the existence of that evidence in its decision. Admittedly, the wording of the contested decision is somewhat ambiguous in that respect: the Commission refers several times to the applicant's own situation and does not expressly mention the other complaints made to it. However, the various allegations are in every case rejected on general grounds which are not confined to the applicant's own situation.

39 It is not therefore apparent that the Commission failed to comply with its obligation to consider the Community interest in continuing the investigation of PSA in the more general context of PSA's conduct and the conduct of the members of its network with regard to parallel imports.

40 It should be added that the Commission, which had received a number of complaints directed not only against PSA but also against other manufacturers,

took action in the sector concerned by means of its Decision 98/273 (cited in paragraph 37 above) and that that decision was the subject of an action before the Court of First Instance. In those circumstances, it was legitimate for the Commission not to devote substantial resources to the investigation of a similar case.

41 It follows that the first two limbs of the plea are unfounded.

42 As regards the third limb of the plea, concerning the legal proceedings brought against the applicant and other companies engaging in similar activities, the fact that substantial litigation relating to the activities of intermediaries and independent resellers is pending is not sufficient, in the absence of other evidence, to prove that the reason for those proceedings is a concerted action by PSA and its dealers (see *Européenne Automobile* v *Commission*, cited in paragraph 31 above, paragraph 36). Nor has it been proved that the Commission committed a manifest error of assessment in taking the view that the national courts, in particular the Tribunal de commerce de Saintes, hearing the dispute concerning the applicant, are capable of protecting the applicant's rights under Community law. That finding cannot be invalidated by the fact that, in the contested decision, the Commission did not refer to the judgment given by that court on 7 May 1998. That judgment in fact confirms the Commission's arguments, although the validity of the reasoning in the contested decision does not depend on it. It has not therefore been established that the Commission ignored the Community interest in investigating the complaint in so far as that complaint concerns judicial proceedings brought against the applicant.

43 So far as the fourth limb of the plea is concerned, alleging a manifest error of assessment of the evidence of market-partitioning and barriers to supplies to parallel importers, the Commission correctly distinguishes in the contested decision between the situation of independent resellers and that of authorised

intermediaries. As regards the refusals to sell to the applicant and other undertakings carrying on similar activities, and measures intended to discourage sales by PSA's foreign dealers to such undertakings, the Court finds that 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 in accordance with Article 3(11) 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). In addition, PSA provided a plausible explanation of the evidence, 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 conclude that a breach had been 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, and *Européenne Automobile* v *Commission*, cited in paragraph 31 above, paragraph 37).

44 The objection made in this connection in the reply to the effect that the applicant was not operating as an independent reseller but solely as an authorised intermediary must be rejected. In its correspondence with the Commission the applicant never expressly stated that it was operating as an authorised intermediary. The description of its activity, as given on its notepaper, implies that it is an independent reseller. In its complaint it states that it is in the same situation as SGA and Massol, which it refers to as 'independent traders'. However, the Court of First Instance has held that it had not been established whether SGA operated as an authorised intermediary or as a reseller (Joined Cases T-189/95, T-39/96 and T-123/96 *SGA* v *Commission* [1999] ECR II-3587, paragraph 50). So far as Massol is concerned, the Court of Justice has held that it operated as an independent reseller (*Grand Garage Albigeois and Others*, cited in paragraph 7 above).

45 It cannot therefore be alleged that the Commission committed a manifest error in its assessment of the applicant's activity. Moreover, the Commission did not base its decision on a classification of the applicant's activities, but merely envisaged

the possibility that the applicant was an independent reseller or authorised intermediary.

46 As regards the fifth limb of the first 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 dealers to give extra discounts without according like treatment to parallel imports cannot be considered to constitute an infringement of competition law (see *Européenne Automobile* v *Commission*, cited in paragraph 31 above, paragraph 54).

47 As regards the sixth limb of the first plea, concerning the conduct of PSA and its dealers with regard to the French regulations on model-year dates for motor vehicles, the issues raised by the applicant are not sufficient to establish the existence of an unlawful concerted practice in that regard or a manifest error of assessment by the Commission.

48 Lastly, as regards the third plea, alleging infringement of the obligation to state reasons, it should be observed, with regard to the Commission's argument concerning the inadmissibility of that plea, that the Court of First Instance may examine the plea of its own motion. In that connection, the contested decision clearly sets out the considerations of law and of fact which led the Commission to conclude that there was insufficient Community interest. This plea is therefore unfounded.

49 It follows that the first and third pleas are unfounded.

The second plea, alleging that the length of the administrative procedure before the Commission was unreasonable

Arguments of the parties

50 In its second plea the applicant contends that, according to the case-law of the Court of Justice (Case C-282/95 P *Guérin Automobiles* v *Commission* [1997] ECR I-1503), the Commission is required to adopt a decision within a reasonable time. It submits that the period of over four and a half years between its complaint and the decision rejecting it is not reasonable and that this justifies the annulment of the contested decision.

Findings of the Court

51 Although it is true that the Commission is required, according to the case-law cited by the applicant, to adopt, within a reasonable time, a decision on a complaint under Article 3 of Regulation No 17, the fact that it exceeds a reasonable time, even if proven, does not necessarily in itself justify annulment of the contested decision.

52 As regards application of the competition rules, a failure to act within a reasonable time can constitute a ground for annulment only in the case of a decision finding an infringement, where it has been proved that infringement of that principle has adversely affected the ability of the undertakings concerned to defend themselves. Except in that specific circumstance, failure to comply with the principle that a decision must be adopted within a reasonable time cannot

affect the validity of the administrative procedure under Regulation No 17 (see Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission*, '*PVC II*', [1999] ECR II-931, paragraphs 121 and 122).

53 It must be added that, in a situation where a complainant in matters of competition law alleges that the Commission failed to adopt a decision dismissing its complaint within a reasonable time, the only effect of an annulment of the decision on that ground would be to further prolong the procedure before the Commission, which would be contrary to the complainant's own interests.

54 Consequently, the second plea is ineffective.

55 It follows that the application for annulment of the contested decision is unfounded.

Costs

56 Under the first subparagraph of Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs, if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. **Dismisses the application;**

2. **Orders the applicant to pay the costs.**

Pirrung Potocki Meij

Delivered in open court in Luxembourg on 14 February 2001.

H. Jung
Registrar

A.W.H. Meij
President