JUDGMENT OF THE COURT OF FIRST INSTANCE
(Second Chamber, Extended Composition)
10 July 1997 *

In Case T-38/96,

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

applicant,

v

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

defendant,

* Language of the case: French.

APPLICATION for (i) a declaration that the Commission failed to act, by not addressing a statement of objections to Nissan France and (ii) compensation for the damage caused to the applicant by that failure to act,

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

composed of: C. W. Bellamy, President, C. P. Briët and A. Kalogeropoulos, Judges,

Registrar: A. Mair, Administrator,

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

gives the following

Judgment

Facts and procedure

1 The applicant, a car-dealer, was put into judicial liquidation (*liquidation judiciaire*) by judgment of 22 May 1995 of the Tribunal de Commerce, Alençon.

2 Prior to that, it had lodged a complaint with the Commission on 27 May 1994 against Nissan France SA, which imports Nissan vehicles and is a subsidiary of the Japanese manufacturer.

3 In the complaint it stated that it had been a dealer for Nissan France, which early in 1991 had unilaterally terminated its dealership agreement with effect from the beginning of 1992. Thereafter, Nissan France 'continued to invoke its exclusive distribution system in order to refuse any compensation for Mr Guérin, to discriminate in favour of another dealer and to refuse to sell to him on several occasions'. The applicant then challenged the compatibility of the standard dealership agreement used by Nissan France with Commission Regulation (EEC) No 123/85 of 12 December 1984 on the application of Article 85(3) of the EEC Treaty to certain categories of motor vehicle distribution and servicing agreements (OJ 1985 L 15, p. 16). The applicant claimed that the effects of the contract precluded its exemption under Article 85(3) of the Treaty and stated that it 'left the matter to the Commission, which has the power to rule on Nissan's practices, since Article 10 of Regulation No 123/85 enables it to withdraw the exemption'. To that end, it criticized several clauses in the standard agreement and practices of Nissan France following from it and declared that it based its complaint on the existence of an infringement of Article 85(1) of the Treaty.

4 By letter of 30 June 1994 the Commission sent a copy of that complaint to Nissan France and requested it to comment on the matters alleged; on the same day, the Commission informed the applicant that it had done so. Two months later Nissan France sent its reply to the Commission, which communicated it to the applicant in September 1994.

5 By letter of 21 February 1995 the applicant informed the Commission of its observations on Nissan France's reply. It stated in particular that 'a comparison of the evidence produced by Guérin Automobiles in support of [its] complaint, an analysis of the two versions of the contract and Nissan's response were already sufficient to enable the Commission to issue a statement of objections'. After

commenting in detail on Nissan France's replies, the applicant stated that it once again requested the Commission to issue Nissan with a statement of the objections which were clearly evident from a study of the file.

6 There was no response to that letter.

7 On 17 October 1995 the applicant brought an action seeking (i) a declaration under Article 175 of the EC Treaty that the Commission had failed to act and (ii) compensation from the Commission under Article 215 for the damage resulting therefrom.

8 By order of 11 March 1996 (Case T-195/95 *Guérin Automobiles* v *Commission* [1996] ECR II-171) the Court of First Instance dismissed the action as inadmissible in so far as it sought a declaration that the Commission had failed to act. It reserved for final judgment the decision on the Commission's plea that the claim for compensation was inadmissible.

9 By judgment of 6 May 1997 (Case T-195/95 [1997] ECR II-679) the claim for compensation was dismissed as inadmissible.

10 On 2 January 1996 the applicant wrote again to the Commission asking it to act by sending a statement of objections to Nissan France. There was no reply.

11 This action was brought by application lodged at the Registry of the Court of First Instance on 15 March 1996.

12 On hearing the report of the Judge-Rapporteur, the Court of First Instance (Second Chamber, Extended Composition) decided to open the oral procedure without any preparatory inquiry.

13 The parties presented their arguments and their replies to oral questions from the Court at the hearing on 20 November 1996 before a chamber composed of C. W. Bellamy, President, and H. Kirschner, C. P. Briët, A. Kalogeropoulos and A. Potocki, Judges. At the hearing the parties were authorized to lodge a letter addressed by the Commission to the applicant on 25 July 1996 in accordance with Article 6 of Commission Regulation No 99/63/EEC of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (OJ, English Special Edition 1963-1964, p. 47), the applicant's reply of 29 August 1996, and the judgment of 22 March 1996 delivered by the Tribunal de Commerce, Versailles, in an action brought by the applicant against Nissan France on 22 October 1992.

14 Following the death of Judge Kirschner on 6 February 1997 this judgment was deliberated by three judges, whose signature it bears, in accordance with Article 32(1) of the Rules of Procedure.

Forms of order sought

15 The applicant claims that the Court of First Instance should:

— declare that the Commission failed to act;

— under Article 215 of the Treaty, declare that the Commission is non-contractually liable to the applicant and must make good damage assessed at FF 1 660 912, or ECU 237 273.

16 The Commission contends that the Court of First Instance should:

— dismiss the application as inadmissible, or in the alternative as unfounded;

— order the applicant to pay the costs.

The alleged failure to act

Arguments of the parties

17 The applicant argues that the Commission's pleadings in Case T-195/95 confirm its intention not to pursue the matter and its continued refusal to adopt a position which would enable the applicant, a victim of the defect in the wording of the contract relied upon against it in the French courts, to obtain recognition of its rights more easily.

18 The Commission notes that it has been consistently held that it is not bound to conduct an investigation, or, *a fortiori*, to address a statement of objections with a view to establishing whether a breach of the rules contained in Article 85 and Article 86 of the Treaty has occurred, where it does not have exclusive powers. That being so, the applicant's letter of 2 January 1996, which does not ask that a decision be adopted rejecting the complaint or even that a position be taken on it, cannot be regarded as satisfying the requirements laid down in Article 175 of the Treaty. The Commission concludes that, in view of the absence of a formal invitation to act, which is a *sine qua non* for an action based on Article 175 of the Treaty, the action for failure to act is inadmissible.

19 The applicant contends that there is no obligation to use a particular form of invitation to the Commission to act. It is sufficient that it is adequately clear and precise.

20 Article 175 of the Treaty does not oblige the complainant to ask the Commission to reject its complaint. It would be absurd to require the complainant to manifest his pessimism by asking the institution to adopt a decision unfavourable to him.

21 The case-law cited by the Commission to the effect that it is not obliged to conduct an investigation of a complaint would appear to be far less clear-cut, in fact: it reserves to it merely the option of determining, in the light of actual Community interest, the order of priority to be given to cases.

22 In the sphere of Article 85(3) of the Treaty national courts have no powers and the Commission enjoys exclusive powers. Workload has been considered on more than one occasion as being no excuse for sacrificing the interests of individuals which the Treaty is intended to protect.

Findings of the Court

23 First of all, the subject-matter of this action for failure to act must be clarified. The application seeks a declaration that the Commission has failed to act, a failure explained (in paragraph 14 of the application) by a reference to a letter formally inviting the Commission to act which was sent on 2 January 1996. That letter merely requests that a statement of objections be addressed to Nissan France.

24 Article 175 of the Treaty provides that the persons it refers to may challenge the failure by the Parliament, the Council or the Commission to make a decision. However, they may not require the institution to act in the way they wish. More particularly, the institution may make a decision or adopt a position by adopting a measure different from that desired or considered necessary by the person concerned (Case 8/71 *Deutscher Komponistenverband* v *Commission* [1971] ECR 705, paragraph 2, and Joined Cases C-15/91 and C-108/91 *Buckl* v *Commission* [1992] ECR I-6061, paragraph 17; order of the Court of First Instance in Case T-47/96 *SDDDA* v *Commission* [1996] ECR II-1559, paragraph 40).

25 In a case such as this, where a complaint has been lodged under Article 3 of Regulation No 17 of the Council of 6 February 1962, the first regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87), the Commission must make a preliminary examination of the matter and gather the information necessary to enable it to decide what course of action it should take. It must then adopt a position on the complaint within a reasonable time (Case T-28/90 *Asia Motor France and Others* v *Commission* [1992] ECR II-2285, paragraph 29). If it is well founded, it will initiate proceedings for breach of the Community rules by sending a statement of objections to the undertaking(s) mentioned in the complaint. If it is not, it addresses to the complainant a letter under Article 6 of Regulation No 99/63 stating why it is proposed to reject the complaint and inviting the complainant to submit observations. Thereafter, it must adopt a final decision (see Case T-37/92 *BEUC and NCC* v *Commission* [1994] ECR II-285, paragraph 29, Case T-74/92 *Ladbroke* v *Commission* [1995] ECR II-115, paragraph 61, and Case C-282/95 P *Guérin Automobiles* v *Commission* [1997] ECR I-1503, paragraph 36).

26 In this case, the time which lapsed between the lodging of the complaint (27 May 1994) and the dispatch of the formal letter requesting the Commission to act (2 January 1996) was sufficiently long for the applicant to have been entitled to obtain a definition of position from the Commission (*Asia Motor France*, cited above, paragraph 29) and therefore, at least, a notification under Article 6 of Regulation No 99/63.

27 Accordingly, the action for failure to act was admissible at the time it was brought.

28 However, it is necessary to consider whether the Commission's definition of a position in the course of the action has subsequently deprived it of its subject-matter.

29 It is common ground that on 25 July 1996 the Commission sent the applicant a letter, the heading of which referred expressly to Article 6 of Regulation No 99/63. It gave the reasons for which the Commission intended to reject its complaint and gave it one month to submit written observations.

30 That letter must be regarded as a notification under Article 6 of Regulation No 99/63.

31 It has been consistently held that a letter addressed to a complainant which complies with the requirements of Article 6 of Regulation No 99/63 constitutes a definition of a position within the meaning of the second paragraph of Article 175 of the Treaty. Such a letter thus terminates the Commission's failure to act and deprives the action for failure to act in that respect of its subject-matter (Case 125/78 *Gema* v *Commission* [1979] ECR 3173, paragraph 21, and *Guérin Automobiles* v *Commission*, cited above, paragraphs 30 and 31).

32 The letter of 25 July 1996 therefore terminated the alleged failure to act, contrary to the applicant's argument during the hearing that the failure to act persists until such time as the Commission adopts a definitive decision rejecting the complaint.

33 It must be emphasized that it is only after the Commission has addressed a letter under Article 6 of Regulation No 99/63, and provided that the complainant has made written observations on that letter, that there arises an obligation on the part of the Commission either to initiate proceedings against the party referred to in

the complaint or to adopt a definitive decision rejecting it (*Guérin Automobiles*, cited above, paragraph 38).

34 For those reasons, the letter of 25 July 1996, which was sent after this action was brought, has deprived the claim for a declaration of failure to act of its subject-matter. There is accordingly no need to rule on it (*Asia Motor France and Others* v *Commission*, cited above, paragraph 38).

The claim for damages

Arguments of the parties

35 The applicant claims that the Commission's failure to act led to its being placed in liquidation with liabilities amounting to FF 1 289 128.10, a situation attributable to the delay in obtaining compensation, for which the Commission and Nissan France, from whom the Commission may always claim a contribution, are therefore jointly and severally liable. The applicant states that the compensation sought in the proceedings concerning the termination of the dealership contract is FF 2 420 676. The delay in paying that compensation entitles it, for the period between May 1994 and 8 October 1995, to interest amounting to FF 288 060.43, to which must be added interest for late payment for the period between 9 October 1995 and the date of the application, FF 84 723.66, without prejudice to the interest accruing until such time as the failure to act is terminated.

36 The total damage to be made good by the Commission is therefore FF 1 576 188.53 + FF 84 723.66 = FF 1 660 912.19, or ECU 237 273.

37 The Commission claims that the grounds relating to both the nature and the extent of the alleged damage are not sufficiently precise to enable it to assert its rights. The application fails to meet the conditions laid down by Article 19 of the EC Statute of the Court of Justice and Article 44(1)(c) of the Rules of Procedure of the Court of First Instance, which require the application to state in particular, in addition to the subject-matter of the proceedings, a summary of the pleas in law

on which the application is based. In order to comply with those provisions, the applicant must include sufficient information to enable the Commission to submit argument on the substance of the case and the Community court to exercise its power of review.

38 In this case, it is not sufficient for the applicant to rely on mere hypotheses, by referring to liquidation, attributing, without any further argument, the entire amount of the undertaking's liabilities to the Commission, and adding an amount calculated *pro rata temporis* which is supposed to correspond to the delay in obtaining hypothetical compensation, assessed by the applicant in the context of proceedings concerning the termination of its contract.

39 The Commission also claims that there can be no liability on its part unless a link is established between the damage incurred — Guérin's liquidation — and the Commission's alleged failure to act. The relevant proof must be preceded by proof that the Commission was at fault and of the damage incurred. It is for the applicant to prove those matters, and it has not done so.

40 The Commission adds that even if an action brought on the basis of the competition rules were appropriate and necessary in order to avoid liquidation, it was open to the complainant to seek redress before the national courts, which have jurisdiction to decide such matters by virtue of the principle of decentralization in the application of those rules.

Findings of the Court

41 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 all applications must indicate the subject-matter of the proceedings and include a brief statement of the grounds relied on. The information given must be sufficiently clear and precise to enable

the defendant to prepare his defence and the Court of First Instance to decide the case, if appropriate without other 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, even if only stated briefly, provided 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).

42 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 that there is a causal link between the conduct and the damage it claims to have suffered, and the nature and extent of that damage (Case T-387/94 *Asia Motor France and Others* v *Commission* [1996] ECR II-961, paragraph 107).

43 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 a bar to proceeding which the Court may raise of its own motion at any time in accordance with Article 113 of the Rules of Procedure (*Asia Motor France*, cited above, paragraph 108).

44 In this case the application, even considered as a whole, does not enable a causal link between the Commission's alleged failure to act and the damage claimed by the applicant to be identified with the requisite clarity and precision.

45 The applicant claims that the damage consists principally in its having been placed in liquidation on 22 May 1995 with liabilities of FF 1 289 128.10. However, even if it can be established that the Commission was guilty of failure to act between 27 May 1994 (the date on which the complaint was lodged) or 21 February 1995

(the date of the applicant's last letter to the Commission before its liquidation) and 22 May 1995 (the date on which the applicant went into liquidation), the applicant has failed to provide any indication in its application capable of explaining to what extent the Commission was liable for the damage thus quantified. The Community court is therefore unable to ascertain how the alleged failure to act might have contributed to increasing Guérin's liabilities and hence to its being placed in liquidation.

46 The same applies with regard to the damage amounting to FF 288 060.43 which the applicant claims to have suffered, as a result of the delay in payment of compensation allegedly due to it as a result of the termination by Nissan France of its dealership contract. Again, the application supplies no indication of any causal link between the sums sought, FF 288 060.43 and FF 84 723.66, and an alleged failure of the Commission to act.

47 Accordingly, the claim for compensation must be dismissed as inadmissible.

Costs

48 Article 87(6) of the Rules of Procedure provides that where a case does not proceed to judgment, the costs shall be at the discretion of the Court of First Instance. Article 87(3) provides that, where each party succeeds on some and fails on other heads, or where the circumstances are exceptional, the Court may order that the costs be shared or that each party bear its own costs.

49 In this case, the Commission was largely responsible for the action brought by the applicant. It failed to comply within the time-limit laid down by Article 175 of the Treaty with the applicant's formal invitation to act of 2 January 1996, although it had been duly informed of the substance of the complaint since May 1994.

Furthermore, it was not until 25 July 1996, that is to say after this action was brought, that it notified the applicant of its position on the complaint, in accordance with Article 6 of Regulation No 99/63.

50 Consequently, the circumstances of the case will be fairly reflected by ordering the Commission to bear its own costs and half of those of the applicant.

On those grounds,

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

hereby:

1. Declares that there is no need to rule on the action for failure to act;

2. Dismisses the remainder of the application as inadmissible;

3. Orders the Commission to pay its own costs and half of the applicant's costs.

Bellamy Briët Kalogeropoulos

Delivered in open court in Luxembourg on 10 July 1997.

H. Jung C. W. Bellamy

Registrar President