JUDGMENT OF THE COURT OF FIRST INSTANCE
18 September 1992 *

In Case T-24/90,

Automec srl, a company incorporated under Italian law, having its registered office at Lancenigo di Villorba (Italy), represented by Giuseppe Celona, of the Milan Bar, and Piero A. M. Ferrari, of the Rome Bar, with an address for service in Luxembourg at the Chambers of Georges Margue, 20 Rue Philippe II,

applicant,

v

Commission of the European Communities, represented by Enrico Traversa, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Roberto Hayder, of the Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of the Commission's decision of 28 February 1990 rejecting the application made by the applicant pursuant to 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 1959-62, p. 87), in regard to the conduct of the companies BMW AG and BMW Italia SpA,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES,

composed of: J. L. Cruz Vilaça, President, H. Kirschner, B. Vesterdorf, R. García-Valdecasas and K. Lenaerts (Presidents of Chambers), D. P. M. Barrington, A. Saggio, C. Yeraris, R. Schintgen, C. P. Briët and J. Biancarelli, Judges,

Advocate General: D. A. O. Edward,
Registrar: H. Jung,

* Language of the case: Italian.

having regard to the written procedure and further to the hearing on 22 October 1991,

after hearing the Opinion of the Advocate General at the sitting on 10 March 1992,

gives the following

Judgment

Facts

1 The applicant is a private limited liability company governed by Italian law, whose registered office is at Lancenigo di Villorba in the province of Treviso. In 1960 it entered into a concession contract with BMW Italia SpA (hereinafter 'BMW Italia') for the distribution of BMW cars in the city and province of Treviso.

2 By letter of 20 May 1983, BMW Italia informed the applicant of its intention not to renew that contract, which was due to expire on 31 December 1984.

3 The applicant thereupon brought proceedings before the Tribunale di Milano (District Court, Milan), in which it sought an order that BMW Italia should continue the contractual relationship. The Tribunale dismissed that action and the applicant appealed to the Corte d'Appello (Court of Appeal), Milan. BMW Italia, in turn, applied to the President of the Tribunale di Treviso for an order sequestrating all supplies belonging to Automec and bearing the BMW trade mark. The application was dismissed.

4 Whilst the case was pending before the Corte d'Appello, Milan, the applicant made application to the Commission on 25 January 1988 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 1959-62, p. 87, hereinafter referred to as 'Regulation No 17').

5 In that application, after describing the course and the substance of its contractual relations with BMW Italia and setting out the substance of the proceedings between it and BMW Italia in the national courts, the applicant claimed that the conduct of BMW Italia and its German parent company BMW AG constituted an infringement of Article 85 of the EEC Treaty. The applicant maintained that BMW Italia was not entitled to refuse to supply it with BMW vehicles and spare parts or to prevent it from using BMW trade marks, on the ground that BMW's distribution system, which had been approved for the Federal Republic of Germany by Commission Decision 75/73/EEC of 13 December 1974 relating to a procedure under Article 85 of the EEC Treaty (OJ 1975 L 29, p. 1, hereinafter 'the Decision of 13 December 1974'), was a selective distribution system and that the applicant satisfied the requisite qualitative criteria. On the basis of the judgment in Case 75/84 *Metro* v *Commission* [1986] ECR 3021, at 3091, the applicant considered that BMW Italia was obliged to appoint it as a distributor.

6 The applicant therefore considered that BMW was bound to:

— meet orders for vehicles and spare parts forwarded by the applicant, at the prices and on the terms applicable to dealers, and

— authorize the applicant to use the BMW trade marks in so far as was necessary for the normal information of the public and in accordance with customary practice in the motor trade.

7 The applicant therefore requested the Commission to take a decision ordering BMW Italia and BMW AG to bring the alleged infringement to an end and to comply with the measures set out above and with such other measures as the Commission might deem necessary or appropriate.

8 By letter of 1 September 1988, the applicant complained of recent action taken by BMW vis-à-vis its Italian distributors with a view to preventing them from selling vehicles to potential dealers on pain of their losing their commission. The applicant

added that it was being boycotted by BMW and that it had become impossible for it to purchase vehicles from Italian and foreign BMW distributors, even though vehicles were available. Consequently, it had recently been unable to meet several orders which it had received.

9 On 30 November 1988, the Commission sent the applicant a registered letter, signed by a director in the Directorate-General for Competition ('DG IV'), informing the applicant, first, that the Commission considered that it had no power to grant its application on the basis of the information received from the applicant. In that regard, it was pointed out in the letter that, although such circumstances could be taken into consideration by the national courts in an action for damages for the loss which the applicant considered that it had sustained, the Commission could not rely on them in order to oblige BMW to resume deliveries to the applicant. Secondly, the letter drew the applicant's attention to 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, hereinafter 'Regulation No 123/85'), which came into force on 1 July 1985. The Commission added that 'the various European motor vehicle manufacturers appeared to have amended their respective distribution agreements to comply with the regulation. There is nothing in the information available to suggest that BMW Italia has not in turn taken steps to ensure that its own distribution network complies with the aforementioned Community rules on competition'.

10 On 17 February 1989, the applicant brought an action for the annulment of that letter (Case T-64/89).

11 On 26 July 1989, the Commission sent the applicant a second registered letter, signed this time by the Director-General for Competition. After explaining that the letter of 30 November 1988 was not a definitive statement of its position, the Commission formally notified the applicant that it did not intend to give a favourable response to the application of 25 January 1988. The reason given by the Commission was that under Article 85 of the EEC Treaty it did not have the necessary

powers to find that the termination of the distribution agreement had no legal effect or to order the resumption of the contractual relationship between the parties on the basis of the standard-form agreement currently used by BMW Italia in its relations with its distributors. The Commission added that, assuming that the distribution agreement used by BMW was contrary to Article 85(1) of the Treaty, it could at most find that there was an infringement and that the agreement was therefore void. Furthermore, it observed that one party to an agreement had no right to prevent the other party from terminating the agreement in the normal way by giving the contractual notice, as had in fact been done in this case. Since this information was given 'pursuant to and for the purpose of' 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; hereinafter 'Regulation No 99/63'), the Commission requested the applicant to submit observations within two months.

12 The applicant replied to that request by letter of 4 October 1989, in which it stated that in its complaint it had merely claimed the right to belong to the selective distribution system which it claimed BMW had set up, and not the continuation of the former distribution agreement. It pointed out that its representatives had mentioned that an action was pending before the national courts concerning matters relating to the agreement. With regard, in contrast, to its right to belong to the distribution system, they had indicated that that right did not ensue from the agreement but from the 'innumerable principles which had regularly been laid down by the Commission and the Court of Justice with regard to selective distribution', since the applicant had shown over a period of twenty-five years that it satisfied BMW's requirements. The applicant went on to state that since, in its letter of 30 November 1988, the Commission had stated that there was no evidence that BMW's selective distribution system was not compatible with Regulation No 123/85 on block exemptions, the Commission had given BMW the benefit of an unlawful presumption of innocence in view of the evidence of BMW's conduct which it had provided. The applicant also stated that it was astonished at the Commission's claim that it had no power to order the resumption of contractual relations between the applicant and BMW when it had not asked for anything of the sort. The applicant claimed 'its right to be supplied once again with BMW products, not on the basis of a sole distributorship, but as a distributor fulfilling all the conditions required to be selected as a member of the network'. It therefore objected to the Commission attributing to its application a meaning which it did not possess.

13 On 28 February 1990, the Member of the Commission responsible for competition sent the applicant a letter on behalf of the Commission which read as follows:

'This letter concerns the application which you submitted to the Commission on 25 January 1988 under Article 3(2) of Council Regulation No 17 against BMW Italia, referring to an alleged infringement of Article 85(1) of the EEC Treaty by that company.

The Commission has examined the factual and legal aspects set out by you in your complaint and has given you an opportunity to submit your observations concerning the Commission's intention not to give a favourable response to the said complaint. You were notified of such intention by a preliminary letter of 30 November 1988 and subsequently by the "Article 6 letter" of 26 July 1989.

In your reply of 4 October 1989 you did not indicate any new facts and you did not furnish any new arguments or legal references in support of your application. It follows that the Commission sees no reason for altering its intention to reject your application for assistance on the following grounds.

1. In the first place with reference to the first request set out in your complaint (page 7, para. 2, indents 1 and 2: that BMW be enjoined to deliver to Automec vehicles and spare parts and to authorize Automec to use the trade mark BMW), the Commission considers that it has, under Article 85(1), no power of injunction which would allow it to require a car manufacturer to deliver, in the circumstances of this case, its own products, even on the assumption that it had been established that the distribution system of the said producer (BMW Italia) was incompatible with Article 85(1). Moreover, Automec has provided no evidence of the existence of a dominant position held by BMW Italia or of any abuse thereof in breach of Article 86 of the Treaty; it is on the basis of that article that the Commission might, if it thought fit, require BMW Italia to enter into commercial relations with Automec.

2. As regards Automec's second request (page 7, para. 3 of the complaint: that the Commission put an end to the infringement that Automec alleges against BMW

Italia), the Commission finds that Automec has already seised the Italian courts, both at first instance and on appeal, of the litigation between it and BMW Italia seeking to set aside the concession contract which previously bound the two companies. There is nothing, as far as the Commission can see, to stop Automec submitting to the same national court the question of the conformity of BMW Italia's existing distribution system with Article 85. It seems all the easier to seise the national court of this problem given that the court is already aware of the contractual relations established by BMW Italia with its distributors.

In that regard, the Commission would remind you that the Italian court not only has concurrent jurisdiction with the Commission to apply Article 85 to the facts of the case, but also has a power which the Commission does not have, namely that of ordering BMW Italia to pay damages to Automec if Automec were able to show that the producer's refusal to sell had caused Automec to suffer loss. Article 6 of Regulation 99/63/EEC confers on the Commission power of discretion in relation to the assessment of "the information in its possession" following examination of a complaint. This power allows it to apply different degrees of priority in dealing with the examination of alleged infringements brought to its notice.

For the reasons set out in head 2 of this letter, the Commission has come to the conclusion that there is no interest of the Community sufficient [to justify] going more deeply into the examination of the fact set forth in the present complaint.'

14 On 10 July 1990, the Court dismissed as inadmissible an application by Automec for the annulment of the Commission's letter of 30 November 1988 (judgment in Case T-64/89 *Automec srl* v *Commission* [1990] ECR II-367) on the ground that the letter did not amount to a decision on the applicant's complaint, but formed part of an informal exchange of views during the first of the three successive stages

in the course of a procedure governed by Article 3(2) of Regulation No 17 and Article 6 of Regulation No 99/63. That judgment has become final.

15 The applicant stated at the hearing with regard to the course of the subsequent proceedings between it and BMW Italia in the Italian courts, first, that, following the dismissal by the Tribunale di Milano and the Corte d'Appello di Milano of its action for an order requiring BMW Italia to continue contractual relations, it had appealed on a point of law to the Corte Suprema di Cassazione (Supreme Court of Cassation). Secondly, the action brought by BMW Italia seeking to prevent the applicant from using BMW's trade marks in order to advertise parallel imports had been allowed by the Tribunale di Milano following its dismissal by the Pretore (Magistrate) and the President of the Tribunale di Treviso. The applicant had appealed against the latter's decision to the Corte d'Appello di Treviso.

Procedure

16 Those are the circumstances in which the applicant brought this action by application lodged at the Registry of the Court of First Instance on 3 May 1990.

17 The written procedure followed the normal course. On the proposal of the First Chamber, and after hearing the parties, the Court referred the case to the full court. An Advocate General was appointed by the President of the Court.

18 Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry. It decided of its own motion, however, to take account of the following documents which had been produced by the parties in Case T-64/89 (*'Automec I'*):

— the application submitted by the applicant to the Commission on 25 January 1988 under Article 3(2) of Regulation No 17 (Annex 5 to the application in Case T-64/89);

— the applicant's letter of 1 September 1988 to the Commission (Annex 18 to the application in Case T-64/89);

— the applicant's letter of 4 October 1989 to the Commission (annex to the observations submitted by the applicant on the Commission's objection in Case T-64/89).

19 The parties were heard in oral argument and answered questions put to them by the Court at the hearing on 22 October 1991. After the Advocate General had lodged his Opinion in writing on 10 March 1992, the President closed the oral procedure on that date.

20 In its application, the applicant claimed that the Court should:

— order the joinder of these proceedings to Case T-64/89 which was pending;

— declare the application admissible, subject to the applicant's reserving the right to withdraw it after a judgment annulling the alleged individual decision of 30 November 1988 void has become final;

— annul the individual decision of the Directorate for Competition and, in so far as it is the inevitable premiss for that decision, Regulation No 123/85;

— declare that the Commission is required, under Article 176 of the Treaty, to take the necessary measures to comply with the judgment to be delivered;

— order the Commission to make good the damage;

— order the Commission to pay the costs.

In its reply, lodged after judgment had been delivered in Case T-64/89, it claimed that the Court should:

— annul the decision of 28 February 1990 of the Directorate-General for Competition, if necessary after declaring that Regulation No 123/85 is not applicable to selective distribution systems; or, in the alternative, if that regulation should be held to be applicable both to exclusive distribution systems and to selective distribution systems, annul that regulation on the ground that it is contrary to its legal basis, Council Regulation No 19/65, and, in any event, on the ground that it is vitiated by manifest injustice because it lays down identical rules in respect of two entirely different situations;

— declare that the Commission is required under Article 176 of the EEC Treaty to take the necessary measures to comply with the judgment to be delivered;

— order the Commission to make good the damage;

— order the Commission to pay the costs.

21 The Commission contended that the Court should:

— dismiss the claim that this action should be joined to Case T-64/89, which was pending at the time;

— dismiss the applicant's claim for the annulment of the Commission's decision of 28 February 1990 (SG(90)D/2816);

— dismiss the claim made against the Commission for damages;

— order the applicant to pay the costs.

The claim for annulment

1. *Purpose of the complaint*

Arguments of the parties

22 The applicant alleges that the Commission disregarded the purpose of its application, in so far as it took the view that the latter was confined to asking the Commission to require BMW to meet orders and to authorize the applicant to use its trade marks, when the purpose of the investigation sought by the applicant was to establish whether the boycott imposed on it resulted from BMW's distribution system or whether the boycott constituted a discriminatory application of that system.

23 Automec asserts that it had not only asked the Commission to find that BMW had infringed Article 85(1) and to adopt a decision ordering BMW to bring the infringements to an end, but that it had also asked the Commission to withdraw the benefit of the exemption granted to BMW's selective distribution system by the abovementioned Decision of 13 December 1974 and/or the benefit of the exemption provided for by Regulation No 123/85.

24 The applicant points out that the Commission is not bound by a complainant's specific requests, but may itself settle the terms of the order designed to terminate the infringement, provided that the order is appropriate for the purposes of attaining that aim and complies with the principle of proportionality.

25 For its part, the Commission contends that the main aim of Automec's application was to obtain an order requiring BMW to resume deliveries and authorizing the use of its trade marks, and that BMW's refusal to supply Automec is the main reason for the applicant's complaint and for its action before the Court. According to the Commission, that application merges with the application for an order requiring Automec to be admitted to BMW's distribution system.

26 In its rejoinder, the Commission challenges the applicant's claim that it asked the Commission to withdraw the exemption granted to BMW's selective distribution system, as provided for by Regulation No 123/85, thereby taking a decision which comes within its sole competence.

Findings of the Court

27 The Court finds that the applicant's complaint consisted, in the first place, of a request for the adoption of two specific measures in relation to BMW, namely an order requiring it to meet the applicant's orders and an order requiring it to authorize Automec to use certain of its trade marks. Secondly, it embodied a more general request for the adoption of a decision requiring BMW to bring the infringement complained of to an end and to take such other measures as the Commission deemed necessary or appropriate.

28 In the light of those requests, the contested decision is in two parts. In the first, the Commission refuses, on the ground that it has no power to do so, to order BMW to supply the applicant with its products and to authorize it to use the BMW trade mark. In the second, it refuses to carry out a more detailed examination of the case in so far as the complaint seeks to obtain a decision requiring BMW to bring the alleged infringement to an end, on the grounds of the proceedings pending between the applicant and BMW in the Italian courts, the Commission's discretion as to what priority to give to pursuing a complaint and lack of sufficient Community interest. The two parts of the contested decision therefore correspond to the two aspects of the applicant's complaint.

29 The letter sent to the applicant on 26 July 1989 pursuant to Article 6 of Regulation No 99/63 related to an application from Automec seeking the 'resumption' of its contractual relations with BMW. In its reply dated 4 October 1989, Automec disputed that interpretation of its application and stated that it intended to claim the right to be included in BMW's distribution system, which it described as a selective distribution system, independently of the previous contractual relationship. The Commission took account of that explanation by removing from the contested decision any reference to an alleged request from the applicant for the resumption of the former contractual relationship.

30 Moreover, nothing in the contested decision suggests that the Commission regarded itself as bound by the request for specific orders, as formulated by the applicant, and therefore overlooked the possibility of adopting other appropriate measures for bringing any infringement to an end, instead of the orders applied for. The first part of the contested decision merely responds to the request for specific orders, as formulated by the applicant, without prejudging the question as to whether the Commission could have taken other measures.

31 Accordingly, in the second part of the contested decision, the Commission responded to the more general request for the adoption of a decision requiring BMW to terminate the alleged infringement and ordering all appropriate measures to be taken to that end.

32 Lastly, the Court finds that the applicant's complaint did not seek the withdrawal of the block exemption provided for by Regulation No 123/85. Admittedly, in its application in Case T-64/89 (pp. 15 and 17), the applicant did charge the Commission with infringing Article 10(1) of Regulation No 123/85, which empowers the Commission to withdraw the benefit of the application of the regulation, in so far as the regulation was applicable. However, that reference — which was made in a document addressed to the Court and not to the Commission — cannot have the effect of enlarging the scope of the earlier complaint. In this regard, the applicant had the opportunity, in replying to the letter of 4 October 1989 pursuant to Article 6 of Regulation No 99/63, to specify the subject-matter of its complaint. However,

the reply to that letter, which was sent after the application was lodged in Case T-64/89, makes no reference to a possible withdrawal of exemption. In those circumstances, the complaint could not have been construed by the Commission as seeking withdrawal of the block exemption provided for by Regulation No 123/85.

33 It follows that the Commission did not disregard the purpose of the applicant's complaint.

2. *The first part of the contested decision*

Arguments of the parties

34 The applicant puts forward a single plea, alleging infringement of Community law, in particular Article 3 of Regulation No 17, against the first part of the contested decision, in which the Commission stated that it had no power to issue the specific orders sought by the applicant.

35 In its application, Automec contests the distinction made by the Commission between its powers under that article in the event of an infringement of Article 85(1) of the EEC Treaty, on the one hand, and an infringement of Article 86, on the other. The applicant argues that the wording of Article 3 of Regulation No 17 makes no such distinction and that that article therefore gives the Commission in both cases the power 'by decision to require the undertakings ... to bring such infringement to an end'. However, in the present case, the only way of bringing to an end the infringement of Article 85 consisting in a refusal to supply goods would be to order them to be supplied.

36 In its reply, the applicant argues in the first place that the absence of an agreement between BMW and itself does not preclude the application of Article 85(1) of the Treaty. Conduct which is on the face of it unilateral may fall within Article 85(1), in particular where it takes place in the context of a distribution system.

37 The applicant claims that BMW operates a selective distribution system. It appears from the case-law of the Court of Justice (judgment in Case 210/81 *Demo-Studio Schmidt* v *Commission* [1983] ECR 3045) that a dealer who is excluded without reason from a selective distribution system may ask the Commission to intervene on the basis of Article 3(2)(b) of Regulation No 17 and, if the Commission refuses, the dealer may refer such refusal to the Community judicature. The applicant considers that all the factors constituting the infringement mentioned in the judgment cited above are present here.

38 The applicant further argues that it is illogical to consider that the Commission could, if this is so, find that the entire distribution system is illegal and prohibit BMW from implementing it in the future, while it would not be able to object to the conduct adopted by the manufacturer towards the various dealers. If that were so, it would be easy to draw up 'on paper' contractual systems which are very positive from the point of view of competition and then not apply them, in the certainty that in practice the Commission has no power to intervene. In support of this argument the applicant relies upon the judgment of the Court of Justice in Joined Cases 25 and 26/84 *Ford* v *Commission* [1985] ECR 2725 from which it appears that, when examining a distribution agreement with a view to the possible grant of exemption, the Commission may take account of all the circumstances surrounding the implementation of the agreement, which may include a refusal to supply. Therefore the Commission should assess not only 'the systems in their entirety', but also their practical implementation, or even their non-implementation.

39 The applicant considers that the possible existence of an exemption would not preclude such an examination of the actual methods by which a distribution system is implemented. Whilst it accepts that the Commission could not secure the enforcement, by coercive means, of a decision ordering BMW to resume deliveries, the applicant argues that the Commission nevertheless has powers of dissuasion, in particular the imposition of fines, which would enable compliance with such a decision to be ensured.

40 For its part, the Commission contends that, as a result of the different approaches underlying Articles 85 and 86 of the Treaty, which have in its view been highlighted by the judgment of the Court of First Instance in Case T-51/89 *Tetra Pak* v *Com-*

mission [1990] ECR II-309, its powers under Article 3 of Regulation No 17 differ in scope depending on which of those two articles has been infringed. It points out that Article 86 prohibits an undertaking in a dominant position from engaging in unilateral conduct which restricts competition and may consist either of intentional acts or omissions. That is why the Court of Justice held, in Joined Cases 6 and 7/73 *Commercial Solvents* v *Commission* [1974] ECR 223, that Article 3 of Regulation No 17 had to be applied in relation to the infringement which had been established and might include an order to carry out certain acts or provide certain advantages which had been wrongfully withheld as well as prohibiting the continuation of certain activities, practices or situations which were contrary to the Treaty.

41 On the other hand, the Commission considers that, in the event of an infringement of Article 85(1) of the Treaty, both the subject-matter and the extent of its powers of intervention are different. As regards the subject-matter, namely the infringement which it could bring to an end, it points out that Article 85 prohibits agreements between two or more undertakings which have the object or effect of distorting competition. According to the Commission, the only agreement to which Article 85 could apply in this case is that between BMW Italia and its distributors for the time being, and the Commission's power of intervention under Article 3(1) of Regulation No 17 could be exercised only in relation to that agreement. In the Commission's view, the judgment of the Court of Justice in Joined Cases 228 and 229/82 *Ford* v *Commission* ('*Ford II*') [1984] ECR 1129 confirms that, in the context of a distribution system, only the agreement embodied in the distribution contract is capable of constituting an infringement of Article 85 of the Treaty.

42 As regards the extent of its powers in the case of an infringement of Article 85(1) of the Treaty, the Commission argues, again on the basis of *Ford II*, that the only decision which it can take under Article 3(1) of Regulation No 17 is one finding in an appropriate case that the distribution system in question is not compatible with Article 85(1) and requiring the supplier to terminate the application of the distribution agreement as a whole. It adds, likewise on the basis of the judgment in *Ford II*, that nevertheless it is not devoid of any possibility of responding to anti-competitive conduct adopted in the context of a distribution system, since it may, for example, impose a fine if the distribution agreement continues to be implemented.

43 The Commission observes that Automec does not seek to eliminate the distribution system but, on the contrary, claims the right to belong to it. However, that is a specific, individual right which the Commission has no power to enforce, except in the context of applying Article 86 of the Treaty.

44 In the rejoinder, the Commission adds that the judgment in *Demo-Studio Schmidt*, cited above, invoked by the applicant, referred to the case of a concurrent infringement of Articles 85 and 86, and that the two precedents cited by the Court of Justice in that judgment, namely its judgment in *Commercial Solvents*, cited above, and its order in Case 792/79 R *Camera Care* v *Commission* [1980] ECR 119, related to an infringement of Article 86 (*Commercial Solvents*) and a case in which both Articles 85 and 86 had been infringed (*Camera Care*).

45 The Commission contends that the prohibition of cartels and the powers conferred upon it to secure compliance therewith cannot enable it to curtail traders' freedom of contract by going so far as to compel a producer to accept a particular dealer within his distribution system. In this connection, it refers to the Opinion of Advocate General Rozès in *Demo-Studio Schmidt*, cited above.

46 Lastly, the Commission emphasizes that the contested decision in no way prejudges either the question whether BMW Italia's distribution system is selective or both exclusive and selective of the type contemplated by Regulation No 123/85, or the question whether or not the system in question is compatible with Article 85(1) of the Treaty. According to the Commission, even if it were to find that BMW Italia's distribution system infringed Article 85(1), neither Article 85 of the Treaty nor Article 3(1) of Regulation No 17 would give it the power to require BMW Italia to enter into a contract with Automec.

Findings of the Court

47 The Court considers that it is necessary to determine whether the Commission is in breach of Community law, in particular Article 3 of Regulation No 17, in far as it rejected the application for the issue of the specific orders referred to above, on the ground that it had no power to take such measures in the circumstances of the case.

48 It should be borne in mind that Automec asked the Commission to order BMW Italia to meet the orders which the applicant had forwarded and to authorize the latter to use certain BMW trade marks. The reason given for those demands was that Automec considered that it met all the requisite conditions for inclusion in the BMW distribution network. Consequently, it asked the Commission to adopt two specific orders in respect of BMW in order to secure compliance with its alleged right to be admitted to BMW's distribution network.

49 Since, in the first part of its decision, the Commission turned down the application for those two specific orders to be issued, it is necessary to consider whether Article 3(1) of Regulation No 17, which empowers the Commission to require the undertakings concerned to bring to an end infringements of competition law found by it, could have constituted, in conjunction with Article 85(1) of the Treaty, the legal basis for a decision granting such an application.

50 Article 85(1) prohibits certain anti-competitive agreements or practices. Among the consequences which an infringement of that prohibition may have in civil law, only one is expressly provided for in Article 85(2), namely the nullity of the agreement. The other consequences attaching to an infringement of Article 85 of the Treaty, such as the obligation to make good the damage caused to a third party or a possible obligation to enter into a contract (for the possibilities open to the national courts, see the national proceedings in connection with which the judgments of the Court of Justice in Case 126/80 *Salonia* v *Poidomani and Baglieri* [1981] ECR 1563, at 1774, and in Case 243/83 *Binon* v *AMP* [1985] ECR 2015, at 2035, were given) are to be determined under national law. Consequently, it is the national courts which, where appropriate, may, in accordance with the rules of national law, order one trader to enter into a contract with another.

51 As freedom of contract must remain the rule, the Commission cannot in principle be considered to have, among the powers to issue orders which are available to it for the purpose of bringing to an end infringements of Article 85(1), the power to order a party to enter into contractual relations, since in general the Commission has suitable remedies at its disposal for the purpose of requiring an undertaking to terminate an infringement.

52 In particular, there cannot be held to be any justification for such a restriction on freedom of contract where several remedies exist for bringing an infringement to an end. This is true of infringements of Article 85(1) arising out of the application of a distribution system. Such infringements can also be eliminated by the abandonment or amendment of the distribution system. Consequently, the Commission undoubtedly has the power to find that an infringement exists and to order the parties concerned to bring it to an end, but it is not for the Commission to impose upon the parties its own choice from among all the various potential courses of action which are in conformity with the Treaty.

53 Accordingly, in the circumstances of the case, it must be held that the Commission was not empowered to issue specific orders requiring BMW to supply the applicant and to allow it to use BMW trade marks. It follows that the Commission has not infringed Community law by refusing to grant the application to issue such orders on the ground that it had no power to do so.

54 The Commission's power to adopt a decision capable of producing practical effects equivalent to those of the orders sought by the applicant and the option which the Commission had of redefining Automec's application as a request for the adoption of such a decision cannot invalidate this conclusion. The Commission did not plead its lack of power in order to justify the rejection of the entire complaint, but only in order to justify its refusal to take the specific measures sought. In so far as the subject-matter of the complaint goes beyond that specific request, the question is not dealt with in the first part of the decision but in the second.

3. *The second part of contested decision*

55 Essentially, the applicant raises four pleas against the second part of the contested decision. The first is that the Commission infringed Article 155 of the Treaty, Article 3 of Regulation No 17 and Article 6 of Regulation No 99/63 by refusing to exercise its powers. The second plea, raised at the hearing, relates to failure to fulfil the obligation to provide a statement of reasons, which is laid down by Article 190 of the Treaty. The third, which was put forward in the reply, is based on the inapplicability and illegality of Regulation No 123/85. The fourth plea alleges misuse of powers.

(a) *The first plea alleging infringement of Article 155 of the EEC Treaty, Article 3 of Regulation No 17 and Article 6 of Regulation No 99/63 and the second plea relating to the statement of reasons of the contested decision*

Arguments of the parties

56 The applicant alleges in the first place that the Commission waived the exercise of its powers, in favour of the national courts, with regard to the implementation of Article 85, whereas it stated in the specialist press that 'by reason of Article 85(2) no legal protection can be sought from national courts' against anti-competition clauses in distribution agreements.

57 Automec argues that Community law provides for a procedure for dealing with infringements, and that the Commission cannot avoid exercising the relevant powers. In that regard, it refers to the duty incumbent on the Commission under the Treaty and to its exclusive, specific powers with regard to infringements, exemptions and selective distribution on the basis of, *inter alia*, Regulation No 123/85. The applicant emphasizes that it is for it to choose whether to approach the national courts or the competent Community institutions, and that it is not for the Commission to impose its choice. It adds that the subject-matter of the proceedings pending before the Italian courts differs from that of its complaint.

58 Secondly, the applicant submits that the Commission cannot rely in this case on the discretionary nature of its powers. The power to reject a complaint, conferred on the Commission by Article 6 of Regulation No 99/63, covers only rejection on substantive grounds following an investigation which has enabled the Commission to collect the information which it needs in order to make its discretionary assessment. It follows that the Commission is bound to initiate an examination procedure for each complaint, provided that it is not manifestly unfounded. Article 6, according to which the Commission cannot 'grant the application', consequently refers to the order to end the infringement and not to the initiation of the procedure. The applicant relies on the judgment of the Court of Justice in *Demo-Studio Schmidt*, cited above, paragraph 19, in support of this argument.

59 Thirdly, in its reply the applicant denies that there is insufficient Community interest in carrying out a more detailed examination of the facts set out in the complaint. It points out that a circular sent by BMW Italia on 7 July 1988 to all its distributors, aiming to discourage sales to unauthorized dealers and sales 'outside the area' effected with the assistance of 'intermediaries or middlemen', is contrary to the requirements of Community law as regards both selective and exclusive distribution and indent 11 of Article 3 of Regulation No 123/85. The Commission itself has stated twice, namely in its Communication concerning Regulation No 123/85 (OJ 1985 C 17, p. 4, section 1(3)) and in the *Sixteenth Report on Competition Policy* (section 30, p. 37), that such conduct infringes fundamental rules.

60 For its part, the Commission considers that, because Article 85(1) is directly applicable, the Commission and the national court have in fact concurrent jurisdiction to apply it, as evidenced by the judgments of the Court of Justice in Case 127/73 *BRT* v *SABAM* [1974] ECR 51 and in Case 37/79 *Marty* v *Lauder* [1980] ECR 2481.

61 It adds that whilst interested parties are entitled to choose between applying to the Community or the national authorities in order to secure observance of their rights under Article 85 of the Treaty, the potential legal consequences of applying to one or other of those authorities differ. In this connection, moreover, the applicant does not deny that, unlike the Commission, the Italian courts have the power to order

BMW Italia to compensate Automec for any loss which may have been caused by the former's refusal to sell to the latter.

62 The Commission goes on to point out that the applicant likewise does not dispute that the Italian courts are in a better position to settle any dispute as to an alleged infringement of Article 85(1) of the Treaty by BMW Italia in so far as the courts of Milan or Vicenza are better placed than the Commission to examine Automec's claims and to apply Article 85(1) and, if appropriate, Regulation No 123/85 to BMW Italia's distribution system. The national courts were held to have jurisdiction to decide whether or not a given agreement benefits from block exemption by the Court of Justice in Case 63/75 *SA Fonderies Roubaix — Wattrelos* v *Société Nouvelle des Fonderies A. Roux and Another* [1976] ECR 111.

63 The Commission states that the question whether or not it has a discretion to reject complaints submitted to it without carrying out a prior investigation is an important question of principle as regards the exercise of its supervisory powers. This is the first time that the Community judicature has been called upon to adjudicate on a decision whereby the Commission rejected a complaint without going further into the complainant's factual allegations and assessing them. The decision is based on the existence of a power of the Commission to assign, in the Community public interest, different degrees of priority to the investigation of complaints.

64 The Commission does not deny that a complainant is entitled to a reply, that is to say, a definitive measure by which the institution takes a decision on his complaint. However, the Commission states that, according to the case-law of the Court of Justice (Case 125/78 *GEMA* v *Commission* [1979] ECR 3173, at 3179), it is nevertheless not required to adopt a final decision on the existence or otherwise of the alleged infringement. Since it therefore has wide leeway with regard to the adoption of a decision on the substance of the complaint, it has *a fortiori* some leeway with regard to the adoption of preparatory measures for the final decision, such as opening an investigation. The Commission accepts, however, that it is under a duty to examine complaints in a non-discriminatory manner, which it claims to have complied with in this case. In that connection, it contends that in order to check

whether BMW Italia's distribution system was compatible with Article 85(1) of the Treaty and Regulation No 123/85, it would have been necessary to carry out a very extensive, extremely complex investigation which would have had to be undertaken virtually from nothing, whereas the various Italian courts seised by Automec and BMW Italia were apprised of BMW Italia's contractual relations with its dealers, in particular the contractual relations which it had formerly had with the applicant. According to the Commission, those courts can therefore more readily carry out the necessary investigations in order to assess whether BMW Italia's distribution system is compatible with the Community competition rules.

65 The Commission emphasizes that those considerations, together with the concern to avoid unnecessary proceedings, led it to the conclusion that Automec's complaint did not exhibit a sufficient degree of public interest in comparison with the thousands of proceedings pending before it to justify initiating an investigation additional to those already carried out by the Italian courts in which proceedings had been brought in the exercise of their 'freedom of choice' by the two undertakings concerned.

66 As regards the general principle that it has a discretion enabling it to assign priorities in this way, the Commission contends, in the first place, that there is no provision of Community law under which it is required to initiate an investigation whenever it receives a complaint. In the rejoinder, it observes that the applicant cannot rely on *Demo-Studio Schmidt*, cited above, in support of its argument, since that is an isolated judgment and hence cannot be said to constitute settled case-law.

67 Secondly, the Commission observes that, according to the Italian version of Article 6 of Regulation No 99/63, it may refrain from taking further action on a complaint on the basis of the information and evidence 'di cui dispone' [available to it], and not on the basis of that which it might obtain only after carrying out a protracted, complex and costly investigation; thirdly, it states that it is under a duty to ensure that regard is had to the public interest by proceeding primarily against conduct which, by reason of its extent, seriousness and duration, constitutes very serious interference with untrammelled competition. It maintains that if it always had to initiate an investigation following every complaint, the choice of cases in which an investigation was carried out would fall to the complainant undertakings rather than to the Commission itself and would therefore be determined by criteria of private interest rather than the public interest.

68 The Commission refers to statistics on the competition procedures pending before it in order to show that there is a need to lay down criteria for determining the priority to be given to examining the various cases, having regard to its limited staff numbers. It explains that it was because the number of cases was so great that it set out the following priority criteria in its *Seventeenth Report on Competition Policy* (section 9, pp. 23 and 24):

'In general where cases involve questions of broad political significance the Commission will afford them priority. For cases brought at the Commission's own initiative and for complaints, the seriousness of the alleged infraction will be considered. Additionally where complaints and notifications are involved the urgency of obtaining a quick decision requires to be taken into account. An example of this situation would be where national legal proceedings are pending. Cases brought under the opposition procedure provided for in block exemption regulations must always be given priority, on account of the six-month time-limit. Otherwise cases are treated chronologically'.

69 According to the Commission, it is obvious that the applicant's complaint does not satisfy any of those priority criteria either in relation to the seriousness of the infringement or the need for a decision of the Commission so as to enable the national court to adjudicate. With regard to the latter criterion the Commission points out, first, that a decision on its part was not necessary in order to enable the Italian courts to adjudicate in the proceedings which had already been instituted before them by the parties. Secondly, it explains that that criterion refers mainly to the situation in which the case pending before the national court relates to the validity or performance of a contract which has been notified to the Commission and for which the benefit of an exemption under Article 85(3) of the Treaty has been requested, as the application of that provision is exclusively a matter for the Commission. That is not the case here since the application of Article 85(3) to distribution agreements in the motor vehicle sector is governed by Regulation No 123/85. The application of that regulation, however, is entirely within the jurisdiction of the Italian courts, which, in the event of uncertainty as to the validity of its provisions, should refer the matter to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty (judgment of the Court of Justice in Case 314/85 *Foto Frost* v *Hauptzollamt Lübeck-Ost* [1987] ECR 4225).

70 The Commission further argues that the national courts' lack of jurisdiction to withdraw the exemption has no bearing on its own point of view since the applicant maintains, principally, that the block exemption provided for by Regulation No 123/85 is not applicable to BMW Italia's distribution system and, in the alternative, that that regulation is invalid.

Findings of the Court

71 The Court considers that the question raised by this plea asks in substance what the Commission's obligations are when it receives an application under Article 3 of Regulation No 17 from a natural or legal person.

72 It is appropriate to point out that Regulations Nos 17 and 99/63 confer procedural rights on persons who have lodged a complaint with the Commission, such as the right to be informed of the reasons for which the Commission intends to reject their complaint and the right to submit observations in this connection. Thus the Community legislature has imposed certain specified obligations upon the Commission. However, neither Regulation No 17 nor Regulation No 99/63 contain express provisions relating to the action to be taken concerning the substance of a complaint and any obligations on the part of the Commission to carry out investigations.

73 In determining the Commission's obligations in this context, the first point to note is that the Commission is responsible for the implementation and orientation of Community competition policy (see the judgment of the Court of Justice in Case C-234/89 *Delimitis* v *Henninger Bräu AG* [1991] ECR I-935, at I-991). For that reason, Article 89(1) of the Treaty gave the Commission the task of ensuring that the principles laid down by Articles 85 and 86 were applied, and the provisions adopted pursuant to Article 87 have conferred wide powers upon it.

74 The scope of the Commission's obligations in the field of competition law must be examined in the light of Article 89(1) of the Treaty, which, in this area, constitutes the specific expression of the general supervisory task entrusted to the Commis-

sion by Article 155 of the Treaty. However, as the Court of Justice has held with regard to Article 169 of the Treaty in Case 247/87 *Star Fruit* v *Commission* [1989] ECR 291, at 301, that task does not mean that the Commission is bound to commence proceedings seeking to establish the existence of any infringement of Community law.

75 In that regard, the Court observes that it appears from the case-law of the Court of Justice (judgment in *GEMA*, cited above, at 3189) that the rights conferred upon complainants by Regulations Nos 17 and 99/63 do not include a right to obtain a decision, within the meaning of Article 189 of the Treaty, as regards the existence or otherwise of the alleged infringement. It follows that the Commission cannot be required to give a decision in that connection unless the subject-matter of the complaint falls within its exclusive purview, as in the case of the withdrawal of an exemption granted under Article 85(3) of the Treaty.

76 As the Commission is under no obligation to rule on the existence or otherwise of an infringement it cannot be compelled to carry out an investigation, because such investigation could have no purpose other than to seek evidence of the existence or otherwise of an infringement, which it is not required to establish. In that regard, it should be noted that, unlike the provision contained in the second sentence of Article 89(1) in relation to applications by Member States, Regulations Nos 17 and 99/63 do not expressly oblige the Commission to investigate complaints submitted to it.

77 In that connection, it should be observed that, in the case of an authority entrusted with a public service task, the power to take all the organizational measures necessary for the performance of that task, including setting priorities within the limits prescribed by the law — where those priorities have not been determined by the legislature — is an inherent feature of administrative activity. This must be the case in particular where an authority has been entrusted with a supervisory and regulatory task as extensive and general as that which has been assigned to the Commission in the field of competition. Consequently, the fact that the Commission applies different degrees of priority to the cases submitted to it in the field of competition is compatible with the obligations imposed on it by Community law.

78 That assessment does not conflict with the judgments of the Court of Justice in *Demo-Studio Schmidt*, cited above, in Case 298/83 *CICCE* v *Commission* [1985] ECR 1105 and in Joined Cases 142 and 156/84 *BAT and Reynolds* v *Commission* [1987] ECR 4487. In the judgment in *Demo-Studio Schmidt*, the Court of Justice held that the Commission 'was under a duty to examine the facts put forward' by the complainant, without prejudging the question whether the Commission could refrain from investigating the complaint because, in that case, the Commission had examined the facts set out in the complaint and had rejected it on the ground that there was nothing to suggest the existence of an infringement. Likewise this question did not arise in the later cases of *CICCE* (cited above) and *BAT and Reynolds* (cited above).

79 However, although the Commission cannot be compelled to conduct an investigation, the procedural safeguards provided for by Article 3 of Regulation No 17 and Article 6 of Regulation No 99/63 oblige it nevertheless to examine carefully the factual and legal particulars brought to its notice by the complainant in order to decide whether they disclose conduct of such a kind as to distort competition in the common market and affect trade between Member States (see the judgments in *Demo-Studio Schmidt*, *CICCE* and *BAT and Reynolds*, cited above).

80 Where, as in this case, the Commission has decided to close the file on a complaint without carrying out an investigation, the review of legality which the Court must undertake 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.

81 It is for the Court to verify, in the light of those principles, first, whether the Commission carried out the examination of the complaint which was required of it by evaluating, with all due care, the factual and legal particulars adduced by the applicant in his complaint and, secondly, whether the Commission has given a proper statement of reasons for closing the file on the complaint on the basis of its power to 'apply different degrees of priority in dealing with the examination of alleged infringements brought to its notice', on the one hand, and in the light of the Community interest in the case as a priority criterion, on the other.

82 In this connection the Court finds in the first place that the Commission carried out a careful examination of the complaint, during which it not only took account of the factual and legal particulars adduced in the complaint itself, but also conducted an informal exchange of views and information with the applicant and its lawyers. It was only after it had apprised itself of the further particulars given by the applicant on that occasion and of the observations submitted in response to the letter sent pursuant to Article 6 of Regulation No 99/63 that the Commission rejected the complaint. Therefore, having regard to the factual and legal particulars set out in the complaint, the Commission carried out an appropriate examination thereof and cannot be accused of lack of diligence.

83 Secondly, as regards the statement of reasons in the contested decision closing the file, the Court points out in the first place that the Commission is entitled to apply different degrees of priority in dealing with the complaints submitted to it.

84 The next point to consider is whether it is legitimate, as the Commission has argued, to refer to the Community interest in a case as a priority criterion.

85 In this connection, it should be borne in mind that, unlike the civil courts, whose task is to safeguard the individual rights of private persons in their relations *inter se*, an administrative authority must act in the public interest. Consequently, the Commission is entitled to refer to the Community interest in order to determine the degree of priority to be applied to the various cases brought to its notice. This does not amount to removing action by the Commission from the scope of judicial review, since, in view of the requirement to provide a statement of reasons laid down by Article 190 of the Treaty, the Commission cannot merely refer to the Community interest in the abstract. It must set out the legal and factual considerations which led it to conclude that there was insufficient Community interest to justify investigation of the case. It is therefore by reviewing the legality of those reasons that the Court can review the Commission's action.

86 In order to assess the Community interest in further investigation of a case, the Commission must take account of the circumstances of the case, and in particular of the legal and factual particulars set out in the complaint referred to it. The Commission should in particular balance the significance of the alleged infringement as regards the functioning of the common market, the probability of establishing the existence of the infringement and the scope of the investigation required in order to fulfil, under the best possible conditions, its task of ensuring that Articles 85 and 86 are complied with.

87 In that context, it is necessary to consider whether the Commission was right in this case to conclude that there was insufficient Community interest in further investigation of the case, on the ground that the applicant, who had already brought proceedings in the Italian courts concerning the termination of the distribution agreement, could also submit to those courts the question whether BMW Italia's distribution system was compatible with Article 85(1) of the Treaty.

88 In that regard, it should be observed that, in reaching that conclusion, the Commission did not merely state that as a general rule it ought not to proceed with a case simply on the ground that the national courts had jurisdiction. Related disputes between Automec and BMW Italia concerning the latter's distribution system had already been brought before the national courts and the applicant did not deny that the Italian courts were already apprised of the contractual relations between BMW Italia and its distributors. In the particular circumstances of the case, reasons pertaining to procedural economy and the sound administration of justice militate in favour of the case being considered by the courts to which related questions had already been referred.

89 However, in order to assess the legality of the contested decision closing the file, it necessary to determine whether, in referring the complainant undertaking to the national courts, the Commission failed to take account of the extent of the protection which national courts can provide in respect of the applicant's rights under Article 85(1) of the Treaty.

90 In this connection, it should be observed that Article 85(1) and Article 86 produce direct effects in relations between individuals and confer rights on the individuals concerned which the national courts must safeguard (see the judgment of the Court of Justice in *BRT*, cited above). The power to apply those provisions is vested concurrently in the Commission and the national courts (see, in particular, the judgment in *Delimitis*, cited above). That conferral of competence is moreover characterized by the duty of sincere cooperation between the Commission and the national courts, arising under Article 5 of the EEC Treaty (see the judgment in *Delimitis*, cited above).

91 It is therefore necessary to consider whether the Commission was entitled to rely upon such cooperation in order to ensure that the question of the compatibility of BMW Italia's distribution system with Article 85(1) of the EEC Treaty was assessed.

92 To that end, the Italian courts can examine, first, whether the system involves restrictions of competition within the meaning of Article 85(1). In the event of doubt, they may seek a preliminary ruling from the Court of Justice. If they find that there has been a restriction of competition contrary to Article 85(1), they must go on to consider whether the system qualifies for block exemption under Regulation No 123/85. That question also falls within their jurisdiction (see the judgment in *Delimitis*, cited above). If there is any doubt as to the validity or the interpretation of the regulation, the national court may also make a reference to the Court of Justice for a preliminary ruling under Article 177 of the Treaty. In each case the national court is in a position to give a ruling on the conformity of the distribution system with Article 85(1) of the Treaty.

93 Although the national courts do not have the power to order any infringement found by them to be brought to an end and to impose fines on the undertakings responsible, as the Commission can, it is nevertheless for the national courts to apply Article 85(2) of the Treaty in relations between individuals. In making express provision for that civil sanction, the Treaty presupposes that national law gives the national courts the power to safeguard the rights of undertakings which have been subjected to anti-competitive practices.

94 In this case, the applicant has not produced any evidence from which it might be inferred that Italian law provides no legal remedy enabling the Italian courts to safeguard the applicant's rights in a satisfactory manner.

95 A further point to note is that the existence in the present case of an exemption regulation — assuming that it applies — was a factor which the Commission was entitled to take into account in order to assess the Community public interest in carrying out an investigation into a distribution system of that kind. As the Commission has rightly observed, the main aim of a regulation on block exemption is to restrict the notification and individual examination of the distribution agreements in use in the sector of activity concerned. Moreover, the existence of such a regulation facilitates the application of competition law by the national courts.

96 Consequently, in referring the applicant to the national courts, the Commission did not fail to take into account the extent of the protection which those courts can afford to the applicant's rights under Article 85(1) and (2) of the Treaty.

97 It follows from the whole of the foregoing that the Court's examination of the contested decision has not disclosed any error of law or of fact or any manifest error of assessment. Accordingly, the plea alleging that Community law, in particular Article 155 of the Treaty, Article 3 of Regulation No 17 and Article 6 of Regulation No 99/63, has been infringed is unfounded.

98 Furthermore, it follows necessarily from the foregoing considerations that the statement of reasons in the contested decision is sufficient because the applicant has been able duly to assert its rights before the Court, and the Court has been able to carry out its review of legality.

(b) *The third plea alleging that Regulation No 123/85 is unlawful*

Arguments of the parties

99 In its application, Automec seeks the annulment of Regulation No 123/85 in so far as it constitutes 'the inevitable premiss' for the contested decision, without however putting forward any pleas in support of this claim. In its reply, it maintains that that regulation is not applicable to this case because it governs only exclusive distribution and not selective distribution. It adds that, if this were not so, the regulation would be invalid because it would be manifestly illogical and manifestly unjust if it regulated two widely differing economic situations, namely exclusive distribution and selective distribution, in an identical manner.

100 The Commission reiterates that it did not determine whether or not that regulation applies to BMW Italia's distribution system, with the result that the applicant wrongly imputes to it the view that the regulation is applicable in this case and might apply to exclusive and selective distribution systems alike. The Commission stresses that it could not determine the nature of the distribution system at issue until it had made an appropriate in-depth examination of the facts set out in the application, but that it did not consider that there was sufficient Community interest in doing so.

Findings of the Court

101 Since it is common ground that the contested decision, which moreover contains no reference to Regulation No 123/85 or to the compatibility therewith of BMW Italia's distribution system, does not determine whether Regulation No 123/85 is applicable to this case, the plea in question is inoperative. It must therefore in any event be rejected.

(c) *The fourth plea alleging misuse of powers*

Arguments of the parties

102 By this plea, Automec claims in its application that the Commission has used Community rules with the aim of protecting one undertaking rather than competition

in general. In its reply, it adds that the refusal to initiate an investigation — not even in the light of the abovementioned circular of 7 July 1988 in which BMW urged its distributors to refrain from selling vehicles to unauthorized dealers and 'intermediaries or middlemen' — confirms the Commission's intention of giving preferential treatment to BMW by 'relieving it even of the trouble of having to explain itself'. In addition, it argues that none of the three letters it received from the Commission indicates the true reasons which prompted the Commission not to take its complaint and the evidence which it produced into account.

103 The Commission denies that it failed to fulfil its obligation to examine the complaint absolutely impartially. It considers that it has exercised objectively its discretionary power in regard to the examination of the complaints that it receives and points out that the applicant must not only allege but also prove that in this case the Commission misused that power and/or was biased in exercising it, in so far as it had pursued an objective other than that for which the power was conferred on it by the Community legislature. The Commission maintains that it had no intention of 'clearing' BMW Italia in advance of the charge of infringing the competition rules, still less of giving it the benefit of what may be termed a presumption of innocence.

104 In its rejoinder, the Commission adds that Automec's claim that none of the Commission's successive letters indicated the true reasons for its decision amounts to impugning its motives, which is unacceptable, and that the 'true reasons' on which the second part of the contested decision is based are solely those set out in the letter of 28 February 1990.

Findings of the Court

105 The Court observes that an allegation of misuse of powers can be taken into account only if the applicant puts forward objective, relevant and consistent evidence providing sufficient support for its allegation (see, for example, the judgment

of the Court of Justice in Joined Cases 361/87 and 362/87 *Caturla-Poch and De la Fuente* v *European Parliament* [1989] ECR 2471, at 2489, and that of the Court of First Instance in Case T-156/89 *Valverde* v *Court of Justice* [1991] ECR II-407, at II-453).

106 Accordingly, it is necessary to examine whether the evidence adduced by the applicant suggests that the Commission used the decision-making power vested in it by Regulation No 17 for a purpose other than that for which the power was conferred, namely to supervise the application of the principles laid down by Articles 85 and 86 of the Treaty.

107 In this regard, it should be observed that the applicant has adduced no concrete facts from which it can be inferred that the reasons given by the Commission to justify the closing of the file concerning the complaint were mere pretexts and that the true aim was to avoid applying the competition rules to BMW. The fact that the Commission did not assess whether BMW's conduct was in conformity with Article 85 does not mean that it acted arbitrarily, in particular since the applicant does not deny that such an assessment would have necessitated a far-reaching, complex inquiry. BMW Italia's circular of 7 July 1988, to which the applicant has also referred, does not in any way reveal a misuse of powers on the part of the Commission. That letter merely sets out instructions from BMW Italia to all its distributors and in no way indicates that the Commission sought to protect companies in the BMW group when it adopted the contested decision. For the rest, the applicant adduces arguments seeking to show the existence of an infringement of Article 85 by BMW. However, those arguments do not amount to evidence from which it could be inferred that the Commission was guided by unlawful considerations in deciding not to check whether those allegations were well founded.

108 Consequently, it must be held that a misuse of powers has not been made out and this plea must therefore be rejected.

109 It follows from all of the foregoing considerations that the claim for the annulment of the contested decision must be dismissed. Since the claim for compensation is based entirely on the same pleas as those that were relied upon in support of the

claim for annulment, it must also be rejected in the absence of any illegality on the part of the Commission, without its being necessary to determine whether it is admissible.

Costs

110 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party must 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.

On those grounds,

THE COURT OF FIRST INSTANCE

hereby:

1. Dismisses the application;

2. Orders the applicant to pay the costs.

Cruz Vilaça Kirschner Vesterdorf García-Valdecasas

Lenaerts Barrington Saggio

Yeraris Schintgen Briët Biancarelli

Delivered in open court in Luxembourg on 18 September 1992.

H. Jung J. L. Cruz Vilaça

Registrar President