JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)
18 May 1994 *

In Case T-37/92,

Bureau Européen des Unions des Consommateurs, whose headquarters are in Brussels,

and

National Consumer Council, whose headquarters are in London,

represented by Konstantinos Adamantopoulos and George Metaxas, of the Athens Bar, with an address for service in Luxembourg at the Chambers of Arsène Kronshagen, 12 Boulevard de la Foire,

applicants,

v

Commission of the European Communities, represented by Julian Currall, a member of its Legal Service, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: English.

APPLICATION for the annulment of a Commission letter of 17 March 1992 concerning an application made by the applicants pursuant to Article 3(2) of Regulation No 17 of the Council of the EEC of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (Official Journal, English Special Edition 1959-1962, p. 87), in relation to an agreement restricting the importation into the United Kingdom of Japanese motor cars,

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

composed of: J. L. Cruz Vilaça, President, A. Kalogeropoulos, D. P. M. Barrington, A. Saggio and J. Biancarelli, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 8 December 1993,

gives the following

Judgment

The facts

1 The Bureau Européen des Unions des Consommateurs (hereinafter 'BEUC') is a non-profit-making association established under Belgian law, recognized by Royal Decree of 20 October 1990, whose objective is in particular to group consumer

organizations in the Community and other European countries in order to promote, defend and represent the interests of consumers in relation to Community institutions. The National Consumer Council (hereinafter 'NCC') was set up by the United Kingdom Government in 1975 to identify the interests of consumers and to represent those interests to central and local government, public utilities, business, industry and the professions.

2 On 16 September 1991 BEUC, NCC and the Association for Consumer Research submitted a complaint to the Commission pursuant to Article 3(2) of Regulation No 17 of the Council of the EEC of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (Official Journal, English Special Edition 1959-1962, p. 87, hereinafter 'Regulation No 17'). The complaint concerned the agreement concluded between the British Society of Motor Manufacturers and Traders (hereinafter 'SMMT') and the Japan Automobile Manufacturers Association (hereinafter 'JAMA') restricting the export of Japanese cars to the United Kingdom to 11% of the total annual car sales in that country. The complainants asserted that the agreement was contrary to Article 85(1) of the EEC Treaty and that the restrictions on access to the market resulting from the agreement constituted an abuse by SMMT of a dominant position, contrary to Article 86 of the EEC Treaty.

3 In its reply of 13 January 1992 the Commission drew the complainants' attention to the commercial consensus reached on 31 July 1991 between the Community and Japan, whereby all bilateral agreements concerning quantitative restrictions on the importation of cars from Japan and restrictions on registration were to be replaced, by the end of 1992, by a common Community policy. The Commission stated that in the circumstances there was not, in its view, a sufficient Community interest in opening a formal investigation procedure. However, it went on to say that if there were any evidence that the restrictions on importation were continuing after 1 January 1993, or that there were any agreements or concerted practices concerning imports from other Member States, the Commission would take up the complaint again immediately. Finally, it informed the complainants that the appropriate steps would be taken to close the file unless they provided, within four

weeks, material grounds for further consideration of their complaint.

4 By letter of 17 January 1992 the applicants acknowledged receipt of the Commission's reply, stated that they would be making more detailed observations, and requested, in order so to do, a copy of the consensus between the Community and Japan upon which the Commission relied.

5 The Commission sent to the applicants, by letter of 31 January 1992, the text of the official statements made at the time when the consensus was reached, while stating that the full text of the consensus was confidential.

6 By letter of 13 February 1992 BEUC, acting both in its own name and in the name of the two other complainants, confirmed its initial complaint and contended, contrary to the view expressed by the Commission, that there was a Community interest in investigating the alleged agreement, despite the consensus reached between the Community and Japan. It submitted certain additional arguments which it requested the Commission to consider before reaching a final decision.

7 By letter of 19 February 1992 the Commission acknowledged receipt of the applicants' letter and asked whether they were willing to agree to the despatch of a copy of it to SMMT, with a view to obtaining its comments.

8 By letter of 21 February 1992 the applicants supplemented their analysis, set out in their letter of 13 February 1992, of the effect of the consensus between the Community and Japan on the continuation or termination of the agreement challenged in their complaint of 16 September 1991. In conclusion, they again requested the Commission to open a full investigation.

9 By letter of 26 February 1992 the applicants refused to agree to the Commission's request, dated 19 February 1992, that their letter of 13 February 1992 be divulged to SMMT.

10 In its letter of 17 March 1992, the subject-matter of these proceedings, the Commission set out its reasons for considering that there was no Community interest in investigating the measure in question under competition law at that stage.

11 That letter read as follows:

'Thank you for your letters of 13 February and of 21 February 1992.

I think it may be useful if I comment as follows.

...

(i) The Commission, on behalf of the Community, and the Japanese authorities agreed last July on an arrangement on motor vehicles. Under this, the Community committed itself to abolishing national restrictions of any kind by 1st January 1993 at the latest, while the Japanese authorities accepted a transitional period to facilitate the adjustment of Community producers to adequate levels of international competitiveness. The United Kingdom, like the other Member States, accepted this agreement, which of course applies to the current arrangement between the SMMT and JAMA.

We would add that the Japanese authorities only agreed to cooperate with the Community on a transitional period, on condition that the national restrictions would be abolished by 1st January 1993.

We have no reason, therefore, to doubt that the arrangement between SMMT and JAMA will end by 1st January 1993.

(ii) If we were to "investigate and evaluate" the effects in the past of the arrangements, we would have to take into account the fact that while they were in operation the Community had no common policy on direct exports of cars from Japan. The Commission therefore did not object to Member States' measures restricting those imports. The SMMT-JAMA arrangements were known to, and permitted by, the UK authorities. Also, the Commission does not consider itself obliged to investigate possible past infringements of competition law if the main purpose of such an investigation would be to facilitate possible claims for compensation by private parties.

(iii) We do not accept your argument ... that commercial policy considerations should not be taken into account when deciding whether to carry out an investigation under EC competition rules into arrangements concerning direct

exports to the Community from a third country, which are now certain to end in 9 months at the latest. The situation would have been different if the SMMT-JAMA arrangements had not been known to, and permitted by, the UK authorities, or if they had primarily concerned trade between EC Member States, or if the arrangement was likely to continue after the Community policy comes into effect. We would, in any case, like to clarify the commercial policy considerations in this case. An essential aim of the arrangement is to eliminate barriers to trade within the Community (as part of the single market programme) and to liberalize the Community market. The transitional period will be completely terminated by 31st December 1999 after which the Community market will be fully liberalized in accordance with the rules of international trade.

(iv) We did not suggest that the consensus with Japan legitimated past arrangements retroactively. What we said is that the consensus means that the SMMT-JAMA arrangements will come to an end this year, and that in the circumstances we are not obliged to investigate them or to put an end to them before then.

(v) Any criticisms which you may wish to make of the validity or enforceability of the consensus between the Community and Japan or any issues concerning any legal effects within the Community which that agreement may have, are not, it seems to us, questions of Community competition law.

(vi) It does not seem to us that the arguments raised in point 6 of your letter significantly alter the position.

As the SMMT-JAMA arrangements were permitted by the UK authorities for commercial policy reasons, we do not think that there is a Community interest in investigating the arrangements under competition law at this stage.

The UK authorities will not be in a position, in the future, to permit any such arrangements. For these reasons we do not think that if we do not investigate these arrangements, this will make it significantly more likely that the motor industry will engage in anticompetitive practices in the future.

Your letter of 21 February seems to relate to the future rather than to the past or the present. We do not see how an investigation would help to clarify the answers to the further questions you raise, which concern what you see as aspects of the consensus with Japan. The way in which that consensus will be implemented is still being considered, and it seems to me that it would be better if I were to reply to your letter of 21 February when that has been decided.

The fact that we do not propose to investigate the past and present SMMT-JAMA arrangements does not, of course, alter your association's rights, whatever they may be, to make claims in national courts. Nor does it constitute an expression of opinion as to the lawfulness of any possible aspect of the arrangements, such as those suggested in point 6 of your letter of 13 February.

We note that you reserve the right to take the matter further if you wish to do so.

Signed

J. Temple Lang

Director.'

Procedure before the Court and forms of order sought by the parties

12 By application lodged at the Registry of the Court of First Instance on 20 May 1992 the applicants brought an action contesting the Commission's letter of 17 March 1992.

13 By a separate document filed on 25 June 1992 the Commission raised an objection of inadmissibility.

14 By a document filed on 4 August 1992 the applicants submitted their observations with a view to the rejection of that objection.

15 By order of 9 November 1992 the Court of First Instance (Second Chamber) ordered that the objection of inadmissibility should be reserved for the final judgment.

16 The written procedure was completed on 2 April 1993 with the lodging of the Commission's rejoinder.

17 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Second Chamber) decided to open the oral procedure. It first requested the defendant to produce certain documents and to reply to certain written questions. The parties presented oral argument and replied to the Court's questions at the hearing in open court on 8 December 1993.

18 The applicants claim that the Court of First Instance should:

(i) declare void, pursuant to Articles 173 and 174 of the EEC Treaty, the Commission's decision, addressed to the applicants by letter of 17 March 1992, not to open a procedure under Article 3 of Regulation No 17 in relation to an industry-to-industry agreement restricting the importation of Japanese cars into the United Kingdom and the abuse of a dominant position by SMMT and JAMA in imposing restrictions on the importation of Japanese cars into the United Kingdom;

(ii) order the Commission to pay the costs.

19 The defendant contends that the Court of First Instance should:

(i) declare the application inadmissible;

(ii) alternatively, dismiss it as unfounded;

(iii) order the applicants to pay the costs.

Admissibility

Summary of the arguments of the parties

20 The Commission pleads that the action is inadmissible, first on the ground that the letter of 17 March 1992 is a first reaction forming part of the initial stage of the investigation procedure prior to the sending of a notification under Article 6 of Regulation No 99/63/EEC of the Commission of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (Official Journal, English Special Edition 1963-1964, p. 47, hereinafter 'Regulation No 99'), and cannot therefore be regarded as a measure open to challenge under Article 173 of the Treaty (judgment of the Court of First Instance in Case T-64/89 *Automec* v *Commission* [1990] ECR II-367, hereinafter '*Automec I*', paragraph 45).

21 The Commission submits, secondly, that the letter at issue does not affect the applicants' legal position. It considers that the letter gave them assurances regarding the imminent termination of the alleged infringement, so that their rights could

not be adversely affected by it and that they remain free to challenge any final rejection of their complaint, or to bring proceedings for failure to act.

22 The Commission asserts, thirdly, that the consensus reached between the Community and Japan is such that it was reasonable to anticipate that the alleged infringement would in all probability be brought to an end by the end of 1992. In those circumstances, given that it cannot be required to open an investigation into past matters, the Commission considers that both the complaint and these proceedings are devoid of purpose.

23 Finally, and in the alternative, the Commission submits that the letter at issue, signed by a Director in Directorate-General IV, cannot be regarded as a decision rejecting the complaint, because it was not signed by a person empowered to take such a decision, namely the Member of the Commission responsible for competition matters. Given its particular role, BEUC should have known the difference between a letter signed by a Director and a letter signed by a Member of the Commission.

24 The applicants state in reply that the abovementioned letter of 13 January 1992 contains a preliminary appraisal to the extent that the Commission states that in its view there was not a sufficient Community interest in opening a formal procedure and that the appropriate steps would be taken to close the file unless the complainants provided, within four weeks, material grounds for further consideration of their complaint. Consequently, that letter bears all the hallmarks of a notification under Article 6 of Regulation No 99, even though it was not presented as such by the Commission. The applicants infer from this that the contested letter of 17 March 1992 must relate to a subsequent stage in the investigation procedure. For that reason, they consider that it ill becomes the Commission to argue that the complaints procedure never went beyond the first stage of the investigation procedure. The applicants further submit, on the basis of a substantive analysis of the content of the letter of 17 March 1992 and of the context in which it came to be

written, that it constitutes a final decision not to open an investigation procedure pursuant to Article 3 of Regulation No 17.

25 The applicants further submit that the letter of 17 March 1992 affects their interests in that it precludes them from participating in an investigation procedure or from challenging any final decision before the Court. They emphasize that there are no grounds for concluding that the effects of the allegedly anticompetitive agreement would cease and note that the Commission acknowledges, in the letter at issue, that the way in which the commercial consensus reached between the Community and Japan was to be implemented was at that point still under consideration. Furthermore, the question whether the infringement has effectively come to an end remains, in their view, a question of substance.

26 Finally, the applicants consider that the letter of 17 March 1992 is no less a final decision rejecting the complaint by reason of the fact that it was signed by a Director rather than by a Member of the Commission. Under neither the applicable regulations nor the case-law of the Court of Justice and the Court of First Instance is the definition of a decision within the meaning of Article 173 of the Treaty conditional on the status of its signatory.

Findings of the Court

27 As regards the first of the Commission's arguments, to the effect that the contested letter did not amount to a decision, it is settled case-law that any measure the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position is an act or decision against which an action for annulment may be brought under Article 173 of the Treaty. More specifically, in the case of acts or decisions adopted by a procedure involving several stages, in particular where they are the culmination of an internal procedure, an act is open to review only if it is a measure definitively laying down

the position of the institution on the conclusion of that procedure, and not a provisional measure intended to pave the way for that final decision (judgment of the Court of Justice in Case 60/81 *IBM* v *Commission* [1981] ECR 2639; judgment of the Court of First Instance in *Automec I*, cited above).

28 For the purpose of determining the legal status of the contested letter in the light of those principles of case-law, that letter must therefore be considered in the context of the procedure for investigating complaints brought under Article 3(2) of Regulation No 17.

29 As the Court of First Instance has observed, in paragraphs 45 to 47 of its judgment in *Automec I*, cited above, there are three successive stages in the procedure for considering a complaint. During the first stage, following the submission of the complaint, the Commission collects the information on the basis of which it decides what action it will take on the complaint. That stage may include an informal exchange of views between the Commission and the complainant with a view to clarifying the factual and legal issues with which the complaint is concerned and to allowing the complainant an opportunity to expand on his allegations in the light of any initial reaction from the Commission. During the second stage, the Commission may indicate, in a notification to the complainant, the reasons why it does not propose to pursue the complaint, in which case it must offer the complainant the opportunity to submit any further comments within a time-limit which it fixes. In the third stage of the procedure, the Commission takes cognizance of the observations submitted by the complainant. Although Article 6 of Regulation No 99 does not explicitly provide for the possibility, this stage may end with a final decision.

30 As the Court of First Instance has already held in *Automec I* (cited above, paragraphs 45 and 46), neither any preliminary observations made in the context of the first stage of the procedure for considering complaints, nor notifications under Article 6 of Regulation No 99, can be regarded as measures open to challenge. However, the decision definitively rejecting the complaint and closing the file may

be challenged before the Court (judgments of the Court of Justice in Case 210/81 *Demo-Studio Schmidt* v *Commission* [1983] ECR 3045, Case 298/83 *CICCE* v *Commission* [1985] ECR 1105 and Joined Cases 142/84 and 156/84 *BAT and Reynolds* v *Commission* [1987] ECR 4487).

31 In this case, it must therefore be ascertained whether, as claimed by the Commission, the letter of 17 March 1992 forms part of the first stage of the procedure for considering complaints or whether, as claimed by the applicants, it must be regarded as a decision definitively rejecting the complaint which they had submitted to the Commission.

32 The Court notes that the letter of 17 March 1992 concludes an exchange of correspondence between the applicants on the one hand and a Director in the Directorate-General of the Commission for competition on the other hand which began with a letter from that Director dated 13 January 1992. In that first letter the Director, having stated that the agreement between SMMT and JAMA would come to an end in the near future, after entry into force of the commercial consensus between the Community and Japan, continued as follows:

'Under these circumstances, there does not seem to be a sufficiently strong Community interest in opening a formal procedure. On the basis of this preliminary legal appraisal, it is therefore not intended to pursue your application.

However, if there were any evidence that the said restriction on the importation of Japanese cars into the UK was continuing after 1.1.1993, or if there were any evi-

dence of any agreement or concerted practice concerning imports from other Member States, we would take up your complaint again immediately.

The appropriate steps will be taken to close this file unless you give us, within 4 weeks of the date of receipt of this letter, material grounds for further consideration of your complaint.'

33 In the two letters dated 13 and 21 February 1992, mentioned above, the applicants replied to the observations made by the Commission in that first letter and again requested the Commission to open an investigation. The Commission replied to the applicants' observations by the letter at issue, dated 17 March 1992.

34 The Court observes that that letter clearly expresses the intention not to investigate the agreement in question under competition law at that stage and sets out the reasoning which led the Commission to take that position. The Court also notes that the letter of 13 January 1992 bears all the hallmarks of a notification under Article 6 of Regulation No 99 in that it indicates the reasons for which it considers that there are insufficient grounds for allowing the complaint, explicitly refers to closing the file and imposes a time-limit on the complainants for the submission of any observations. In those circumstances, the Court must reject the Commission's first argument, that the letter at issue must be regarded merely as a first reaction, written in the context of the first of the three stages of the investigation procedure.

In the light of its content and context, the disputed letter must be regarded as a decision rejecting the complaint, forming part of the last stage of the investigation procedure.

35 The finality of that decision is not called in question by the words 'at this stage', included in the sentence by which the author of the letter states: '..., we do not think that there is a Community interest in investigating the arrangements under competition law at this stage', which must, in the context, be regarded as referring to the penultimate paragraph of the letter of 13 January 1992 in which the Commission agreed to re-examine the complaint if there were any evidence that the restriction on the importation of Japanese cars into the UK was continuing after 1 January 1993, of if there were any evidence of any agreement or concerted practice concerning imports from other Member States. Such a reservation concerning the discovery of new evidence is inherent in any decision by an administrative authority (see the judgment in *Automec I*, cited above, paragraph 57).

36 As regards the Commission's second argument, that the letter at issue does not affect the applicants' legal position, the Court of Justice has consistently held that it is in the interests of the proper administration of justice and of the correct application of Articles 85 and 86 of the Treaty that natural or legal persons who are entitled to make a request pursuant to Article 3(2)(b) of Regulation No 17 should be able to institute proceedings in order to protect their legitimate interests if their request is not complied with either wholly or in part (judgment of the Court of Justice in Case 26/76 *Metro* v *Commission* [1977] ECR 1875, paragraph 13). The Commission does not deny that the applicants have a legitimate interest in making a request pursuant to Article 3(2)(b) of Regulation No 17 and it is common ground that the contested decision does not grant the request made by the applicants. That argument must therefore be rejected.

37 As regards the third argument, that the complaint and the action have been devoid of purpose since the entry into force of the consensus reached between the Community and Japan, the Court considers that that is a question of substance.

38 Finally, as regards the argument that the author of the act was exceeding his powers, the Court notes that in any event it is settled case-law that the form in which acts or decisions are cast is, in principle, immaterial as regards the question whether they are open to challenge under Article 173 and that it is necessary to look to their substance in order to ascertain whether they are acts within the meaning of Article 173 (judgment in *IBM* v *Commission*, cited above, paragraph 9). Although the Court of Justice has held that 'a letter such as that which was sent to [the notifying undertaking] by the Directorate-General for Competition ... [does not] constitute ... a decision ... within the meaning of Articles 2 and 6 of Regulation No 17' (Case 99/79 *Lancôme* v *Etos* [1980] ECR 2511, paragraph 10; see also the judgments in Joined Cases 253/78 and 1/79 to 3/79 *Procureur de la République* v *Giry and Guerlain* [1980] ECR 2327, paragraph 12, and Case 37/79 *Marty* v *Lauder* [1980] ECR 2481, paragraph 9), that finding by the Court of Justice took into account an accumulation of factors, arising from both the factual context and all the formal obligations of the Commission under Articles 2 and 6 of Regulation No 17, which quite clearly do not apply in the case of complaints under Article 3. In the present case, as has been shown, the contested decision contains a clear and definitive appraisal of the complaint submitted to the Commission; in these circumstances, its substantive nature cannot be called in question on the sole ground that it emanates from a member of the Commission's staff. To accept such an argument would render Article 3 of Regulation No 17 wholly ineffective. Consequently, the argument that the author of the act was exceeding his powers must, at this stage of consideration of the case, limited to the question of admissibility, be rejected.

39 For all the above reasons, the objection of inadmissibility raised by the defendant must be rejected.

Substance

40 The applicants put forward six pleas in law in support of their action. The first is that the Commission is in breach of the obligations incumbent on it once a complaint has been submitted to it; the second is that the reasons given for the contested decision are insufficient; the third is that the decision is invalidated by an error of law; the fourth is that the assessment of the effects of the agreement complained of on trade between Member States is erroneous; the fifth is that the assessment of the purpose of the complaint was erroneous; and the sixth is that the Commission's refusal to open an investigation into the alleged anti-competitive practices on grounds relating to the commercial policy of the Community institutions is unlawful.

41 The Court considers that the contested decision is founded on three grounds. First, the Commission argues, in particular in point (i) of the decision, that, in view of the imminent entry into force of the commercial consensus reached between the Community and Japan, the alleged agreement which gave rise to the complaint would cease to have any effect on 1 January 1993. The Commission infers from this that, given the date of the contested decision, any investigation initiated by it would, for the most part, relate to past events. For this reason, it considers that there is no longer a sufficient interest in pursuing the complaint. The second ground, set out in points (ii), (iii) and (vi) of the decision, is to the effect that, whereas the agreement at issue in the present case was known to and permitted by the relevant national authorities, those authorities would no longer be able to give their approval to such an agreement in the future since they, like the authorities of the other Member States, had approved the terms of the commercial consensus reached between the Community and Japan. For this reason also, there is no sufficient interest to justify an investigation of the agreement complained of. Thirdly, in order to justify taking commercial policy considerations into account when assessing the Community interest in carrying out an investigation, the Commission relies on the fact that, in its view, the conduct in question did not primarily affect trade between Member States (see the second sentence of point (iii) of the decision). The Commission has stated, in its defence, that where the effect of conduct on trade between Member States is likely to be small, it is justified in assuming that there is insufficient effect on the functioning of the common market to justify pursuing the matter.

42 For the purpose of examining the lawfulness of those grounds in the light of the pleas put forward by the applicants, as set out above, the Court considers that it should examine, first, the applicants' second plea, by which, in substance, they dispute the validity of the first ground for rejecting the complaint, secondly the third plea, by which the applicants dispute the validity of the second ground for rejecting the complaint, and thirdly the fourth plea, by which the applicants dispute the third ground for rejecting the complaint.

The second plea: the first ground for rejecting the complaint is misconceived

43 In their second plea, the applicants submit that insufficient reasons are given for the contested decision, contrary to the requirements of Article 190 of the EEC Treaty. They submit that the agreement complained of, whose incompatibility with Community competition law is not explicitly disputed in the contested decision, has an adverse effect on the prices and marketing of cars and did not sufficiently explain the potential effect of the commercial consensus between the Community and Japan. The decision does not explain how that consensus will put an end to the alleged anti-competitive practices; the Commission is not in a position to specify the precise details of its implementation and it is apparent from the statements of the two contracting parties that a temporary restriction on exports to the United Kingdom is to continue until 1999, restricting exported vehicles to approximately 7% of total annual sales.

44 The Commission considers that the applicants' plea is based on an incorrect premiss, to the effect that it is under a duty to investigate complaints relating to presumed infringements. It maintains that it made it clear that the complaint was rejected because of insufficient Community interest and that sufficient reasons are given for that conclusion.

45 As the Court of First Instance held in Case T-24/90 *Automec* v *Commission* [1992] ECR II-2223 (hereinafter '*Automec II*'), the Commission is not under a duty to

carry out an investigation when a complaint under Article 3(2) of Regulation No 17 is submitted to it. However, the Court stated in that judgment that the Commission is under a duty to consider carefully the factual and legal issues brought to its attention by the complainant, in order to assess whether those issues indicate conduct which is liable to distort competition within the common market and affect trade between Member States. Where, as in this case, the Commission has decided to reject the complaint without holding an investigation, the purpose of judicial review by the Court of First Instance is to ensure that the challenged decision is based on a correct assessment of the facts and that it is not vitiated by any error of law, manifest error of assessment or abuse of power (*Automec II*, cited above, paragraphs 79 and 80).

46 In this case, the Court notes that the Commission does not deny that there was an 'arrangement' between SMMT and JAMA, concerning the importation into the United Kingdom of cars from Japan, but considers that there is no Community interest in investigating that 'arrangement' under competition law.

47 As the Court of First Instance has held, the Commission is entitled to determine the relative priority to be accorded to the different cases pending before it by reference to their Community interest. This possibility does not have the effect of removing such determinations from the scope of judicial review since, as a result of the requirement to state reasons, set out in Article 190 of the Treaty, the Commission may not confine itself to referring in the abstract to that interest. On the contrary, a decision by which the Commission rejects, on the ground of insufficient or no Community interest, a complaint submitted to it is required, by virtue of Article 190 of the Treaty, to set out the legal and factual considerations which led the Commission to conclude that there was no sufficient Community interest to justify an investigation. It is by reviewing the lawfulness of those reasons that the Court exercises its responsibility for judicial review of the Commission's action (*Automec II*, cited above, paragraph 85).

48 In this case, in order to deal with the second plea which, as put forward by the applicants, in fact concerns the validity of the first ground for rejecting the complaint, the Court must therefore examine the lawfulness of that ground.

49 First, the Court notes that in this case the alleged anti-competitive practice is an agreement concluded between two associations of undertakings, one of which has its headquarters in one of the Member States. Consequently, it is prima facie not impossible that that agreement, whose objective is to restrict imports from a non-member country into one of the Member States, falls within the scope of Article 85(1) or Article 86 of the Treaty.

50 In order to determine whether the first ground for rejecting the complaint is valid, the Court must accordingly consider whether, as stated in the decision, the conclusion of a commercial consensus between the Community and Japan will put an end to the agreement at issue before 1 January 1993, so that the question arises whether there is a sufficient Community interest in investigating practices which essentially relate to past events.

51 The Court notes that the statement in the decision that the agreement at issue will end before 1 January 1993 is based on the fact that the Community undertook, in the context of the commercial consensus reached with Japan, to abolish all national restrictions concerning the importation of Japanese cars, including the agreement at issue in this case, by 1 January 1993 at the latest.

52 In order to demonstrate that that statement was substantially correct, the Commission relies on two series of documents. The first precede the contested decision, while the others post-date it. With regard, in the first place, to the documents preceding the contested decision, the Commission, in answer to a written question by which the Court requested it to produce the material on which it based its statement that there was no reason to doubt that the alleged agreement would end by 1 January 1993, produced the text of a notification to the General Agreement for Tariffs and Trade (hereinafter 'GATT') made jointly by the Community and Japan and referred the Court to three documents, already lodged by the applicants, namely the two statements dated 31 July 1991 made by the Member of the Commission responsible for external relations and the Japanese Minister for International Trade and Industry respectively, concerning the results of conversations

between the Community and Japan concerning cars, and an extract from the report of a House of Commons debate on 17 July 1991.

53 As regards, first, the statements made by the representatives of the Community and Japan on 31 July 1991, the Court notes that the first paragraph of the statement by the Member of the Commission, listing the measures which the Community had agreed to take in the context of the commercial consensus reached with Japan, contains nothing to indicate that that consensus in itself entails the termination of the agreement at issue, although it states that 'France, Italy, Spain and Portugal will ease the levels of quantitative restrictions (including restrictions on registration) imposed upon vehicles imported from Japan from now and totally abolish them by the end of 1992 at the latest.' To the same effect, the statement by the Japanese Minister, although it says in its first paragraph that 'the Japanese side welcomes the liberalization of motor vehicle imports from Japan in France, Italy, Spain and Portugal through elimination of all existing quantitative restrictions (including restrictions on registration) ...', makes no reference to the abolition of possible restrictions on imports into the United Kingdom.

54 What is more, in its second paragraph the statement of the Japanese Minister envisages expressly, as the applicants point out, that a restriction on exports of Japanese cars to the four abovementioned Member States, and to the United Kingdom, would be provisionally maintained until 31 December 1999. The Minister stated: 'The Japanese side will monitor motor vehicle exports to the market of the Community as a whole and the markets of its specific member countries: i. e. France, Italy, Spain, Portugal and the United Kingdom. Such monitoring will be completely terminated at the end of 1999.' In the fourth paragraph of the ministerial statement it is stated that the volume of Japanese exports to the United Kingdom

should reach 190 000 cars in 1999, a figure which was based on an estimated demand of 2 700 000 cars. In those circumstances, it was for the Commission to specify, in the contested decision, the extent to which the transitional regime, envisaged up to 31 December 1999 and involving, moreover, as the applicants point out, a restriction of exports to approximately 7% of the total volume of sales, would be based on anything other than the agreement which gave rise to the complaint. In the absence of any specific information on that point, it cannot be excluded that the restriction of Japanese exports to the United Kingdom, expressly permitted during the transitional period expiring on 31 December 1999, would be the result of the simple renewal and the maintenance in force of the agreement between the trade associations, as concluded before the consensus of 31 July 1991. It is therefore not impossible that the arrangements for implementing the transitional regime, applicable during the period from 1 January 1993 to 31 December 1999, are incompatible with Community competition law, particularly if it is borne in mind that the Member of the Commission expressly accepted, in his statement of the same date, that restrictions on imports which, as has just been shown, the Community-Japan consensus in itself does not bring to an immediate end are incompatible with the Community rules on competition.

55 As regards, secondly, the joint notification of the consensus made to GATT on 16 October 1991, as produced to the Court by the Commission, the Court notes that, although it envisages the abolition of 'national restrictions of any kind' on the importation of motor vehicles from Japan, it refers solely to the States in which those restrictions are the result of State measures and contains no reference to the abrogation of any agreements between economic agents or groupings of such agents. Moreover, although that document confirms the restriction on Japanese exports to, in particular, the United Kingdom during the transitional period from 1 January 1993 to 31 December 1999, it none the less, like the documents considered above, contains no information as to the arrangements for implementing that restriction.

56 As regards, finally, the Parliamentary debate to which the Commission refers, the Court considers, in the light of the statements analysed above, which were made by the high contracting parties themselves after the debate in question and after the consensus had been reached, that an uncorroborated assertion made in the course of a debate before the Parliament of a Member State by a member of that Parliament cannot, taken by itself, be regarded as evidence of the precise content of a commercial consensus concluded by the Commission, on behalf of the Community, with a non-member country.

57 In the light of all the documentary evidence to which the Commission refers, the Court considers that, contrary to what is said in the contested decision, it has not been established that the commercial consensus between the Community and Japan would necessarily cause the alleged agreement, which is at the origin of these proceedings, to come to an end before 1 January 1993.

58 As regards the documents produced by the Commission which post-date the contested decision, the Court finds that in any event they do not invalidate that conclusion. That is particularly true of the press statement dated 9 April 1992 in which the President of SMMT and the President of JAMA publicly announced that, 'in view of the implementation of the EC-MITI agreement from 1/1/93, both sides agreed that these would be the last SMMT/JAMA presidential talks concerned with JAMA's policy of prudent marketing in the UK.' That statement, made on behalf of economic operators, cannot validate in law an act of a Community institution to which it makes no reference. Similarly, the actual terms of the implementation of the restriction on exports during the transitional period, which were expressly agreed by the parties, are in no way apparent from the press release issued by the Communities press office in Tokyo, dated 1 April 1993, confirming that the Community had abolished national restrictions on the importation of cars from Japan.

59 Finally, the Commission's representative stated at the hearing, in reply to the questions put by the Court, that the commercial consensus between the Community and Japan was not recorded in writing and that it was not an official agreement for the purposes of Article 113 of the EEC Treaty but rather a political commitment. In those circumstances, and in the light of all that has been said above, the Court considers that an unwritten commitment, purely political in import and not made within the context of the common commercial policy, coupled with a transitional period of application expiring at the end of 1999, did not entitle the Commission to reply that the commitment would necessarily put an end to the agreement complained of by the applicants.

60 In those circumstances, the termination of the agreement at issue could not be regarded as assured, contrary to what is said in the contested decision, solely by reason of the existence of the commercial consensus reached between the Community and Japan.

61 Accordingly, the first of the three grounds relied on by the Commission for rejecting the complaint is, as submitted by the applicants by means of the first plea considered by the Court, vitiated by a manifest error of assessment. In those circumstances, the Court must uphold the second plea set out in the application.

62 However, as stated above, that second plea relates solely to the validity of the first ground on which the Commission considered that it had to reject the complaint submitted to it. Since, as mentioned above, the decision is based on two further grounds, the Court must consider whether those grounds are such as to justify in law the contested decision.

63 The Court notes that the Commission's second ground for rejecting the complaint is based on intervention by the national authorities. That ground is disputed by the applicants in the third plea on which they rely in support of their claims. The Court must accordingly consider whether that third plea is well founded.

The third plea: the error of law vitiating the second ground for rejecting the complaint

64 The applicants submit that, in stating that the 'situation would have been different if the SMMT-JAMA arrangements had not been known to, and permitted by, the UK authorities', the contested decision is founded on an error of law. They consider that, according to settled case-law of the Court of Justice, neither national law nor practices may have the effect of preventing the application of Community competition law to businesses (judgments of the Court of Justice in Case 155/73 *Sacchi* [1974] ECR 409, Case 13/77 *INNO* v *ATAB* [1977] ECR 2115, Case 311/85 *VVR* v *Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten* [1987] ECR 3801 and Case 30/87 *Bodson* v *Pompes Funèbres des Régions Libérées* [1988] ECR 2479).

65 The Commission responds by stating that the Court of First Instance has held, in paragraphs 75 to 77 of the judgment in *Automec II*, cited above, that the Commission has the power to determine priorities in discharging its administrative duties, that it is not obliged to take a view on whether or not an alleged infringement occurred and that it cannot be required to undertake an investigation, since such an investigation could have no purpose other than to seek evidence that an infringement did occur. The Commission maintains that it has not exceeded its discretion and contends that the decision not to initiate a formal procedure was based on the lack of interest for the Community in pursuing the complaint, a valid criterion, according to the judgment in *Automec II*, for the determination of the Commission's priorities. It adds that the writer of the letter at issue took care to point out that the Commission was not taking any view at all about 'the lawfulness of any possible aspect of the arrangements'. He did not in any way suggest that there was a connection between the applicability of Articles 85 or 86 of the Treaty and the fact that the United Kingdom Government knew of the matters complained of. He merely explained that, when the problem was direct exports from a third country, it was not possible to disregard commercial policy in evaluating the Community interest inherent in the matter. The Commission considers that questions such as those in point in the contested decision form part of commercial policy, unless they concern measures adopted by economic agents or their groupings.

66 The Court notes that the second ground relied on by the Commission to justify its decision to reject the complaint is the fact that the agreement at issue was permitted by the United Kingdom authorities for reasons of commercial policy. As already stated, that fact is relied on in particular in points (ii), (iii) and (vi) of the contested decision.

67 The Court considers that, to the extent that it is based on the fact that the agreement at issue was known to the United Kingdom national authorities and permitted by them, the decision at issue is vitiated by an error of law.

68 First, it is not disputed that the agreement at issue is not a national measure of commercial policy, but is rather in the nature of a meeting of minds between groupings of economic operators operating on the market. As the Commission has itself pointed out, such practices are liable to fall within the scope of Article 85(1) and, possibly, of Article 86 of the Treaty if they have as their object or effect to restrict imports into a Member State.

69 Secondly, it is settled case-law — on which the applicants properly rely — that the fact that the conduct of undertakings was known, permitted or even encouraged by national authorities is, in any event, irrelevant to the question whether Article 85 of the Treaty or possibly Article 86 applies (judgments of the Court of Justice in Case 229/83 *Leclerc* v *Au Blé Vert* [1985] ECR 1 and Case 231/83 *Cullet* v *Leclerc* [1985] ECR 305; judgment of the Court of First Instance in Case T-7/92 *Asia Motor France* v *Commission* [1993] ECR II-669). Accordingly, that fact, to which the Commission refers four times in the contested decision, cannot provide justification in law for a decision by which the Commission rejects a complaint submitted to it.

70 It follows that the second of the Commission's three grounds for rejecting the complaint is vitiated by an error of law and that the Court must uphold the third plea in the application.

71 Since the decision at issue was also based on a third ground for the rejection, disputed by the applicants in the fourth plea in support of their claims, the Court must consider whether that fourth plea is well founded.

The fourth plea: the error of fact and law vitiating the third ground for rejecting the complaint

72 The applicants submit that the Commission's conclusion that the agreement between SMMT and JAMA does not primarily affect trade between Member States is unfounded in law and is based on an erroneous assessment of the facts. They point out, first, that an anti-competitive practice falls within Article 85(1) of the Treaty where it may affect trade between Member States, and, secondly, that they provided the Commission with various items of evidence showing that the agreement between SMMT and JAMA is likely to have an adverse effect on trade between Member States. They note that the letter of 17 March 1992 does not refer to any of the items of evidence or arguments submitted.

73 The Commission replies that it has made no statement as to the lawfulness of the agreement and that it has never suggested that the agreement did not affect trade between Member States. Its reasoning was merely that the impact of the agreement on trade between Member States appeared slight and that it had good reason to consider that it would not have a sufficient effect on the functioning of the common market to justify pursuing the investigation of the complaint.

74 The Court notes that, at point (iii) of the decision, the Commission relies on the fact that the arrangements in question do not primarily concern trade between Member States.

75 The Court considers that, as the applicants maintain, those arrangements are, by their very nature, liable to impair the functioning of the common market. As measures restricting imports into the Community and affecting the entire territory of a Member State, they are liable to interfere with the natural movement of trade, thus affecting trade between Member States, and to reinforce the compartmentalization of markets on a national basis, thereby holding up the economic interpenetration which the Treaty is intended to bring about (see the judgments of the Court of Justice in Case 71/74 *Frubo* v *Commission* [1975] ECR 563, paragraphs 33 to 38, and Case 42/84 *Remia and Others* v *Commission* [1985] ECR 2545). In those circumstances, the third ground for rejecting the complaint, namely that the alleged infringement did not significantly affect trade between Member States, cannot be justified solely by reference to the fact that that infringement does not primarily concern trade between Member States. It is common ground that the contested decision neither specifies the scale of the effects of the alleged infringement on trade nor states the reasons for which the Commission considers that those effects are not of sufficient magnitude to justify pursuing the investigation. The applicants are therefore correct in claiming that the decision does not answer any of their objections on that point and, in this respect, the decision is insufficiently reasoned.

76 Accordingly, the Commission's third ground for rejecting the complaint is wrong in law and insufficiently reasoned.

77 Since none of the Commission's three grounds for rejecting the complaint is capable of supporting the contested decision, that decision, which moreover — and as the Commission itself acknowledged during the proceedings in this case — was made by an authority not empowered to do so, must be annulled, without its

being necessary for the Court to consider the other pleas relied on by the applicants in support of their claims.

Costs

78 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful and the applicants have applied for costs, the Commission must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. Annuls the decision contained in the letter of the Commission of 17 March 1992;

2. Orders the Commission to pay the costs.

Cruz Vilaça Kalogeropoulos Barrington

Saggio Biancarelli

Delivered in open court in Luxembourg on 18 May 1994.

H. Jung

Registrar

J. L. Cruz Vilaça

President