JUDGMENT OF THE COURT OF FIRST INSTANCE
18 September 1992 *

In Case T-28/90,

Asia Motor France SA, having its registered office at Saint-Georges-des-Gardes (France),

Jean-Michel Cesbron, a trader, trading as JMC Automobile, residing at Livange (Grand Duchy of Luxembourg),

La Maison du Deux Roues SA, trading as Monin Automobiles, having its registered office at Romans (France),

EAS SA, having its registered office at Livange (Grand Duchy of Luxembourg),

represented by Jean-Claude Fourgoux, of the Paris Bar, with an address for service in Luxembourg at the Chambers of Pierrot Schiltz, 4 Rue Béatrix de Bourbon,

applicants,

v

Commission of the European Communities, represented by Berend Jan Drijber and Edith Buissart, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Roberto Hayder, a representative of the Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION, pursuant to the third paragraph of Article 175 of the EEC Treaty, for a declaration that the Commission failed to take a decision in regard to the

* Language of the case: French.

applicants on the basis of Article 85 of the EEC Treaty and, pursuant to Article 178 and the second paragraph of Article 215 of the EEC Treaty, for compensation for the damage allegedly caused by that failure to act,

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. Briët and J. Biancarelli, Judges,

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

having regard to the written procedure and further to the hearing on 23 October 1991,

the Advocate General having delivered his Opinion in writing on 10 March 1992,

gives the following

Judgment

Facts

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

2 One of the applicants, namely Jean-Michel Cesbron, lodged a complaint with the Commission on 18 November 1985 on the basis of Articles 30 and 85 of the EEC Treaty alleging that he was the victim of an unlawful cartel between five importers of Japanese cars into France, namely Sidat Toyota France, Mazda France Motors, Honda France, Mitsubishi Sonauto and Richard Nissan S. A., which he alleges was

under the protection of the French Government. The complaint was followed on 29 November 1988 by a fresh complaint against the same five importers which was lodged by the four applicants on the basis of Article 85 of the EEC Treaty.

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

4 In return for that voluntary limitation, the French administration is said to have increased the obstacles to the free movement of Japanese vehicles of makes other than the five distributed by the importers party to the alleged agreement. In the first place, a registration procedure differing from the normal system was introduced for parallel imports. Those parallel imports were deemed to be second-hand vehicles and were therefore subject to a dual roadworthiness test. Secondly, it is alleged that instructions were given to the Gendarmerie Nationale to prosecute purchasers of second-hand Japanese vehicles driven with foreign registration plates. Lastly, a discriminatory rate of value added tax of 28%, subsequently reduced to 18.6%, was charged on the vehicles even though they were commercial vehicles, which attract a lower rate of value added tax than private cars, upon importation into France, entailing disadvantages for the distributor vis-à-vis the purchaser.

5 Pursuant to Article 11(1) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-62, p.87, hereinafter 'Regulation No 17'), the Commission, by letter dated 9 June 1989, asked the importers in question for information. By letter dated 20 July 1989 the General Directorate for Industry of the Ministry for Industry and

Regional Development instructed the said importers not to reply to the Commission's questions, on the ground that they concerned 'the policy pursued by the French public authorities with regard to the importation of Japanese vehicles'.

6 Having received no reply from the Commission, on 21 November 1989 the applicants sent it a letter requesting it to adopt a position on the complaints lodged on the basis of Articles 30 and 85 of the Treaty.

7 By letter dated 8 May 1990 the Director-General for Competition notified the applicants that the Commission intended not to proceed with their complaints.

That letter concluded in the following terms:

'I can inform you in this connection that on the basis of the considerations set out hereinafter the Commission intends not to proceed with the various complaints.

In the first place, the investigations carried out by the services of DG IV with a view to a possible application of Article 85 have established that the five importers whose conduct is put in question have no operational leeway in this matter having regard to the system for restricting Japanese imports into France.

In the second place, any possible application of Article 30 in this case is out of the question for lack of any Community public interest, having regard to the current negotiations in the context of the definition of a common commercial policy, with respect particularly to Japan, concerning motor vehicles.

However, before rejecting your complaint by means of a final decision, the Commission would ask you, pursuant to the provisions of Article 6 of Regulation No 99/63/EEC, to submit your observations on this letter. Your reply must reach me within two months of the date of receipt of this letter.

This letter has also been sent to J.-M. Cesbron, Monin Automobiles, Asia Motor, EAS and the Chambers of S. C. P. Fourgoux in Paris.'

8 On 29 June 1990 the applicants sent the Commission their observations, in which they reaffirmed that their complaints were well founded.

9 The applicants are at present in liquidation subject to court supervision.

Procedure and forms of order sought by the parties

10 By application received at the Court Registry on 20 March 1990 and registered on 21 March 1990, Asia Motor France and the three other applicants brought an action, first, pursuant to the third paragraph of Article 175 of the EEC Treaty, for a declaration that the Commission failed to take a decision in regard to them on the basis of Articles 30 and 85 of the EEC Treaty and, secondly, pursuant to Article 178 and the second paragraph of Article 215 of the EEC Treaty, for compensation for the damage allegedly caused to them by that failure to act.

11 By order of 23 May 1990 in Case C-72/90 *Asia Motor France* v *Commission* [1990] ECR I-1181, the Court of Justice ordered as follows:

'(1) The application is inadmissible in so far as it concerns the Commission's inaction with regard to Article 30 of the Treaty and the liability arising therefrom.

(2) For the rest, the application is referred to the Court of First Instance.

(3) The applicants are ordered to pay half of the costs incurred up to the date of this order.'

12 In accordance with Article 47 of the Protocol on the Statute of the Court of Justice of the EEC, the written procedure therefore took place before the Court of First Instance (Second Chamber).

13 By document received at the Court Registry on 3 August 1990 and registered on 7 August 1990, the Commission raised, by way of preliminary plea within the meaning of Article 91 of the Rules of Procedure of the Court of Justice, which were at that time applicable *mutatis mutandis* to proceedings before the Court of First Instance by virtue of Article 11 of the Council Decision of 24 October 1988 establishing a Court of First Instance of the European Communities (OJ 1989, C-215, p.1), an objection of inadmissibility against the form of order sought in the application remitted to the Court of First Instance by order of the Court of Justice of 23 May 1990, cited above.

14 By document received and registered at the Registry of the Court of First Instance on 26 September 1990, the applicants submitted the form of order sought and supporting pleas seeking the dismissal of the objection of inadmissibility.

15 By order of 7 November 1990, the Court of First Instance (Second Chamber) decided to reserve for final judgment the objection raised by the defendant.

16 The written procedure was completed on 18 March 1991 following the submission of the defence, since the applicants did not submit a reply within the prescribed time-limit.

17 At the request of the Second Chamber, the Court of First Instance decided on 6 December 1990 to appoint an Advocate General. On the proposal of that Chamber and after hearing the parties and the Advocate General, the Court of First Instance decided on 4 July 1991 to refer the case to the full 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.

19 By letter from the Registrar dated 27 September 1991, the Court submitted to the Commission a series of questions, to which it replied at the hearing on 23 October 1991.

20 In its objection of inadmissibility, the Commission contends that the Court should:

Dismiss the application as inadmissible;

Order the applicants jointly and severally to pay the costs.

21 In their observations on the objection of inadmissibility, the applicants claim that the Court should:

— Dismiss the objection of inadmissibility raised by the Commission;

— In the alternative, if, *per impossibile*, the Court should consider the Commission's letter of 8 May 1990 an act open to challenge, declare the application for failure to act admissible as an application for annulment;

— Declare that the Commission's conduct was wrongful;

— Uphold the claim for damages made by the applicants by way of reparation for the damage caused.

22 In their application bringing the proceedings, the applicants claim that the Court should:

— Declare, under Article 175 of the Treaty, that the Commission omitted to take a decision with regard to the complainants, even though they had submitted a prior request for it to do so in time;

— Order the European Economic Community under Articles 178 and 215 of the Treaty to compensate the complainants for the damage caused by its institutions and, consequently, fix the compensation as follows:

  — Asia Motor France: ECU 155 336 000,

  — Mr Cesbron (JMC Automobile): ECU 85 150 000,

  — Monin Automobiles: ECU 32 892 000,

  — EAS: ECU 76 177 000;

— Order the Commission to pay the costs.

23 In its defence, the Commission contends that the Court should:

— Dismiss the application as inadmissible and, in the alternative, as unfounded;

— Order the applicants jointly and severally to pay the costs.

24 By letter dated 5 December 1991 and signed by the Member responsible for competition matters, the Commission notified to the applicants a decision by which it maintained its provisional assessment set out in its letter of 8 May 1990, and consequently rejected the complaints submitted on 18 November 1985 and 29 November 1988. An action for the annulment of that decision, registered as Case T-7/92, is pending before the Court of First Instance (Second Chamber).

Form of order sought pursuant to Article 175 of the Treaty

Admissibility of the form of order sought

Arguments of the parties

25 The Commission objects that the action for failure to act, as remitted to the Court of First Instance, is inadmissible on the ground that the letter before action did not satisfy the requirements set out in Article 175 of the Treaty, according to which such an action is 'admissible only if the institution concerned has first been called upon to act'. The Commission claims that the applicants' letter of 21 November 1989 cannot be regarded as an invitation to act since, on the one hand, it does not state the legal basis creating the obligation for the institution to act and, on the other, it does not state what action is required of the institution.

26 The applicants state in response that their letter dated 21 November 1989 was indeed in the nature of a letter before action which satisfied the requirements set out in Article 175 of the Treaty. They note that it is clear from the complaints set out in that letter that they sought to rely on the provisions of Article 175 of the Treaty in order to call upon the Commission to act. According to the applicants, that invitation to act clearly stated that they wished to have either their complaints notified to the undertakings which were the subject of the complaints or a measure adopted declining to take any action, which would have enabled them to bring an action for annulment. They observe that the requisite content of the invitation to act is not defined in the provisions of the Treaty or in secondary legislation, and that the Court has rejected any superfluous formalism in that respect precisely in order to protect the rights of individuals. They refer in this respect to the Opinion of Advocate General Roemer in Joined Cases 22 and 23/60 *Elz* v *High Authority of the ECSC* [1961] ECR 191.

Findings of the Court

27 Given those factual and legal particulars, the Court of First Instance recalls that Article 175 of the Treaty provides as follows:

'Should the Council or the Commission, in infringement of this Treaty, fail to act, the Member States and the other institutions of the Community may bring an action before the Court of Justice to hear the infringement established.

The action shall be admissible only if the institution concerned has first been called upon to act. If, within two months of being so called upon, the institution concerned has not defined its position, the action may be brought within a further period of two months.

Any natural or legal person may, under the conditions laid down in the preceding paragraphs, complain to the Court of Justice that an institution of the Community has failed to address to that person any act other than a recommendation or an opinion.'

28 With regard to the admissibility of the application in so far as it is based on Article 175, the Court finds that the applicants rightly argue that the letter which their counsel sent on 21 November 1989 to the Commission constituted a letter before action for the purposes of Article 175 of the EEC Treaty. In that connection, the Court observes that that letter, which referred expressly to Article 175 of the EEC Treaty, unambiguously called upon the Commission to act so as to bring to an end all the alleged infringements of the Treaty which were described by the applicants in detail in the text of that letter. Accordingly, the Commission cannot claim to be unaware that the applicants intended, by means of that letter, to bring proceedings for failure to act under Article 175 of the Treaty in the event that the Commission remained silent for two months following receipt of that letter.

29 The Court therefore considers it appropriate to examine whether, in accordance with the third paragraph of Article 175 of the Treaty, the applicants' complaint to

the effect that the Commission failed to address to them an act other than a recommendation or an opinion is admissible. As the Court has consistently held, '... the applicant, for his application to be admissible, must be in a position to establish either that he is the addressee of a measure of the Commission having specific legal effects with regard to him, which is, as such, capable of being declared void, or that the Commission, having been duly called upon to act in pursuance of the second paragraph of Article 175, has failed to adopt in relation to him a measure which he was legally entitled to claim by virtue of the rules of Community law' (judgment of the Court of Justice in Case 246/81 *Lord Bethell* v *Commission* [1982] ECR 2277, paragraph 13). In this case, in view of the time which expired between the lodging of the complaint and the sending of the letter before action, the applicants were entitled to obtain from the Commission a provisional communication under 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), and hence they were entitled, as natural or legal persons, to claim to be the addressees of an act other than a recommendation or an opinion in accordance with the third paragraph of Article 175 of the Treaty.

30 The Court infers from the foregoing and from the Commission's failure to respond to the invitation to act which was duly addressed to it by the applicants that, when it was brought, the action was admissible in so far as it is based on Article 175 of the Treaty, irrespective of whether a definition of its position by the Commission subsequently deprived it of its initial subject-matter. An institution's definition of its position has no bearing on the admissibility of the form of order sought in the application, which has to be assessed as at the date on which the action was brought.

Subject-matter of the form of order sought

Arguments of the parties

31 The Commission argues that the application has become devoid of purpose since it informed the applicants by letter dated 8 May 1990, in accordance with Article 6 of Regulation No 99/63, that it intended to reject their complaints. The Commission refers in this respect to the judgment of the Court of Justice in Case 125/78 *GEMA* v *Commission* [1979] ECR 3173, paragraph 21, by which the Court held that a letter sent to the complainant under Article 6 of Regulation No 99/63 con-

stituted the definition by the sender of its position within the meaning of the second paragraph of Article 175 of the Treaty. Consequently the Commission argues that there can no longer be any question of any failure to act on its part and that the application has thus become devoid of purpose and is therefore inadmissible.

32 For their part, the applicants contest the claim that their application for failure to act has become devoid of purpose following the Commission's letter of 8 May 1990. More specifically, by reference to the wording of that letter, they deny that the letter can be construed as a 'definition by an institution of its position' within the meaning of the judgment of the Court of Justice in *GEMA* v *Commission*, cited above.

33 In the alternative, they argue that, even if the Court should construe the letter of 8 May 1990 as a valid definition by the Commission of its position, it would not necessarily bring its failure to act to an end having regard to the alleged infringement of Article 85 of the Treaty. In that event, their application for failure to act would no longer be directed against the absence of a clear definition of its position on the part of the Commission but against the Commission's refusal to take adequate measures against the importers of Japanese cars and the French authorities in so far as they are in breach of Articles 30 and 85 of the Treaty. To that end, the applicants refer to the judgment of the Court of Justice in Case 302/87 *Parliament* v *Council* [1988] ECR 5615, paragraph 17.

Findings of the Court

34 The Court observes that, after the action was brought, the Commission sent the applicants on 8 May 1990 a communication pursuant to Article 6 of Regulation No 99/63, stating, first, that it intended not to proceed with their complaints and, secondly, asking the applicants to submit their observations on the matter to it. Subsequently, on 5 December 1991, the Commission notified to the applicants a decision definitively rejecting their complaints. The applicants have brought an action for the annulment of that decision, on which the Court will rule at a later date.

35 It has therefore been established that the Commission not only satisfied the procedural requirements incumbent upon it under Article 6 of Regulation No 99/63, but that it also adopted a definitive decision rejecting the complaints made to it by the applicants, thus enabling them to protect their legitimate interests (judgment of the Court of Justice in Case 26/76 *Metro* v *Commission* [1977] ECR 1875, paragraph 13), even though the decision of 5 December 1991 was taken after a considerable delay. It must therefore be concluded from this that the application has become devoid of purpose, at least and in any event following the decision of 5 December 1991, and that there is therefore no longer any need to give a decision on it.

36 As the Court of Justice held in its judgment in Case 377/87 *Parliament* v *Council* [1988] ECR 4017, paragraph 9, the remedy provided for in Article 175 of the Treaty is founded on the premiss that the unlawful inaction on the part of the Commission enables the other institutions and the Member States and, in circumstances such as the present, private persons, to bring the matter before the Court of Justice or the Court of First Instance in order to obtain a declaration that the failure to act is contrary to the Treaty, in so far as it has not been repaired by the institution concerned. The effect of that declaration, under Article 176, is that the defendant institution is required to take the necessary measures to comply with the judgment of the Court of Justice or of the Court of First Instance holding that the institution has failed to act, without prejudice to any actions to establish non-contractual liability to which the aforesaid declaration may give rise.

37 In circumstances such as those of this case, where the act whose absence constitutes the subject-matter of the proceedings was adopted after the action was brought but before judgment, a declaration by the Court of Justice or by the Court of First Instance to the effect that there was a failure to act can no longer bring about the consequences prescribed by Article 176 of the Treaty. It follows that in such a case, as in cases where the defendant institution has responded within a period of two months after being called upon to act, the subject-matter of the action has ceased to exist. Consequently, the situation in this case is different from that considered in the judgment in Case 302/87 *Parliament* v *Council*, cited above and relied upon by the applicants, in which the Court of Justice held that a refusal to act, no matter how explicit, may be referred to it under Article 175 when it does not bring the failure to act to an end. In this case, the Commission, which definitively rejected the applicants' complaint after sending the communication provided for in Article 6 of Regulation No 99/63, cannot be regarded as having refused to act.

38 It follows from the foregoing that the form of order sought by the applicants pursuant to Article 175 became devoid of purpose after the proceedings were brought and that there is therefore no need to give a decision on it.

Transformation of the form of order sought for failure to act into a claim for annulment

Arguments of the parties

39 The applicants argue that, on the assumption that the Commission's letter of 8 May 1990 constitutes a definition of its position within the meaning of Article 175 of the Treaty, that definition of its position should be open to challenge by means of an action for annulment under the conditions laid down in Article 173 of the Treaty. In that connection, the applicants refer to the actual wording of the judgment in *GEMA* v *Commission* in which, in their submission, the Court did not rule out the possibility that an action for annulment might lie against a definition by an institution of its position under Article 6 of Regulation No 99/63. They likewise refer to the Opinion of Advocate General Sir Gordon Slynn in *Lord Bethell* v *Commission* (cited above).

40 From that, the applicants conclude that the form of order sought for failure to act ought to be able to be transformed into a claim for the annulment of the Commission's letter of 8 May 1990, in the interests of the sound administration of justice and in order to avoid a denial of justice. They cite in this respect the Opinion of Mr Advocate General Mayras in *National Carbonising Company* v *Commission* (order of the Court of Justice in Joined Cases 109 and 114/75 *National Carbonising Company* v *Commission* [1977] ECR 381, at 382) and the judgment of the Court of Justice in Case 14/81 *Alpha Steel* v *Commission* [1982] ECR 749. In the event that such a reclassification of the form of order sought in the application is authorized by the Court, the applicants base their action for annulment on the Commission's alleged misuse of power in failing to find against the unlawful agreement between the five importers challenged in their complaints, thus endorsing the division of the market determined by the French Government.

41 For its part, the Commission, albeit without raising a formal objection, merely asserts that, in any event, it appears from the judgment in *GEMA* v *Commission*, cited above, that a communication under Article 6 of Regulation No 99/63 does not constitute an act against which an action for annulment will lie.

Findings of the Court

42 The Court observes in the first place that, in accordance with well-established case-law (judgment of the Court of Justice in *GEMA* v *Commission*, cited above; judgment of the Court of First Instance in Case T-64/89 *Automec* v *Commission* [1990] II-367), communications by which the Commission rules provisionally, under the conditions set out in Article 6 of Regulation No 99/63, on a complaint referred to it under Article 3 of Regulation No 17 are not in the nature of decisions capable of having adverse effects within the meaning of Article 189 of the Treaty, and are not therefore open to challenge by means of an action for annulment on the basis of Article 173 of the Treaty. In this case, the applicants have directed their claim for annulment exclusively against the provisional communication of 8 May 1990. Consequently and in any event, the applicants' claim for the annulment of the letter of 8 May 1990 is inadmissible.

43 The Court points out in the second place that, whilst Article 42(2) of the Rules of Procedure of the Court of Justice in the wording which was applicable *mutatis mutandis* to proceedings before the Court of First Instance when the action was brought, and the equivalent provisions of Article 48(2) of the Rules of Procedure of the Court of First Instance authorize, in certain circumstances, new pleas in law to be introduced in the course of proceedings, those provisions cannot in any circumstances be interpreted as authorizing the applicants to bring new claims before the Community judicature and thereby to modify the subject-matter of the proceedings (judgments of the Court of Justice in Case 232/78 *Commission* v *France* [1979] ECR 2729; in *GEMA v Commission*, cited above; in Case 124/81 *Commission* v *United Kingdom* [1983] ECR 203; in Case 205/84 *Commission* v *Germany* [1986] ECR 3755; and in Case 278/85 *Commission* v *Denmark* [1987] ECR 4069). That solution is not called in question by the fact that, in proceedings for annulment, where the measure against which the initial form of order sought was directed has been withdrawn during the proceedings by the institution which enacted it, the Community judicature allows that initial form of order to be regarded, in the interests of the sound administration of justice, as being directed against the new measure substituted for the one withdrawn by the defendant institution (judgment in *Alpha Steel*, cited above). That substitution, which does not alter the nature of the proceedings initially brought under Article 173 of the Treaty, cannot be interpreted, as the applicants maintain, as authorizing a claim for annulment to be substituted for a form of order sought for failure to act which was initially submitted to the Court, as the Court of Justice has moreover expressly held in the judgment in *GEMA* v *Commission*, cited above.

44 It follows from the foregoing that the applicants, who initially brought an action before this Court on the basis of Article 175 of the Treaty, may not seek to transform the initial form of order sought into a claim for annulment based on Article 173 of the Treaty and directed against the provisional communication of 8 May 1990.

Form of order sought on the basis of Articles 178 and 215 of the Treaty

Arguments of the parties

45 In their application introducing the proceedings, the applicants claim that they should be compensated for the damage caused to them by the alleged anti-competitive practices. In this connection, they distinguish between the damage attributable to the attitude of the undertakings belonging to the alleged cartel and that of the French Government, on the one hand, and the damage which is directly attributable to the Commission's failure to act, on the other. According to the applicants, the latter damage may be quantified as the amount of the losses sustained by them over the last two years, since the damage was aggravated over that period as a result of the Commission's failure to act.

46 The Commission submits, for its part, that, in view of the complexity of the case and the need for an inquiry before defining its position, it did not infringe any rule of Community law. Consequently, there is no liability on its part for any damage which the applicants might have sustained. It observes in addition that the application does not satisfy the minimum requirements set out in Article 38(1)(c) of the Rules of Procedure of the Court of Justice, which were applicable — at the date when the application was lodged — *mutatis mutandis* to proceedings before the Court of First Instance; that provision requires *inter alia* that the application should indicate the subject-matter of the proceedings and a summary of the pleas in law on which the application is based. It also observes that the figures set out in the application and in the annexes thereto are not connected with any damage which the applicants might have sustained as a result of its alleged inaction following the submission of their respective complaints.

47 The Commission concludes that, in so far as the claim for damages is not inadmissible for lack of precision, it is at least, for that reason as well, unfounded.

Findings of the Court

48 Having regard to those arguments, the Court observes that Article 38(1)(c) of the Rules of Procedure of the Court of Justice, which were applicable at the time *mutatis mutandis* to proceedings before the Court of First Instance, requires that the application introducing the proceedings should state the subject-matter of the proceedings and a summary of the pleas in law on which the application is based.

49 The Court finds, in the first place, that the application introducing the proceedings, which was lodged at the Registry of the Court of Justice on 20 March 1990, contained no justification of the respective amounts of compensation claimed by each of the applicants and, in the second place, that it was only in their reply dated 12 April 1990 to a letter from the Registry of 21 March 1990 that the applicants produced a 'note explaining the calculation of the damage'.

50 In order to justify the alleged damage, the applicants submit that it corresponds to the commercial damage resulting from the Commission's failure to act. Consequently, the Court considers that, in any event, the applicants would be able to claim compensation only for damage sustained after 21 January 1990, the earliest date on which the Commission might possibly be held to have failed to act. However, the damage alleged in the application of 20 March 1990 introducing the proceedings, as specified in the 'note explaining the calculation of the damage', refers only to financial losses sustained during the 1985 to 1989 financial years. It therefore predates the period during which the Commission might possibly have incurred liability for an alleged failure to act.

51 It follows from those considerations that the application is inadmissible in so far as it is based on Articles 178 and 215 of the Treaty.

Costs

52 In order to determine the amount of the costs on which it is to make an order, the Court of First Instance points out that the Court of Justice decided in its order of 23 May 1990 that the applicants should pay one-half of the costs incurred up to

the date of that order, and that it would be for the Court of First Instance to make an order in relation to the remainder of the costs incurred before the Court of Justice and the costs incurred before the Court of First Instance.

53 In the light of the above considerations, the Court of First Instance has found, on the one hand, that there is no need for it to give a decision on the form of order sought in the application in so far as the application is based on Article 175 of the Treaty and, on the other, that the action must be dismissed as inadmissible in so far as it is based on an alleged transformation of the form of order sought for failure to act into a claim for annulment and on Articles 178 and 215 of the Treaty.

54 The Court of First Instance points out, in the first place, that according to Article 87(6) of its Rules of Procedure, where a case does not proceed to judgment, the costs are to be in the discretion of the Court of First Instance and, secondly, that under Article 87(3) of its Rules of Procedure it may order that the costs be shared or that each party bear its own costs where each party succeeds on some and fails on other heads, or where the circumstances are exceptional.

55 The Court finds that the circumstances were exceptional in this case.

56 It observes that initially the Commission did not act on the letter before action which the applicants sent it on 21 November 1989, even though it had been duly informed of the substance of their complaints since 18 November 1985 and, in any case, since 29 November 1988, and that contributed to the initiation of these proceedings. The Court further observes that it was after these proceedings were brought that the Commission notified the applicants, first, on 8 May 1990 of a provisional definition of its position on their complaints in accordance with Article 6 of Regulation No 99/63 and, subsequently, on 5 December 1991 of a decision definitively rejecting their complaints.

57 It follows from the whole of the foregoing that in order for a just assessment of the circumstances of the case to be made, the Commission must be ordered, with regard to the costs on which the Court of Justice did not make an order in its order of 23 May 1990, to bear its own costs and pay three-quarters of the applicants' costs as so defined. The applicants must be ordered, as regards the costs on which the Court of Justice did not make an order in the order of 23 May 1990, jointly and severally to pay one-quarter of their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE

hereby:

1. **Declares that there is no need to give a decision on the form of order sought in the application in so far as the application is based on Article 175 of the Treaty.**

2. **Dismisses the remainder of the form of order sought in the application as inadmissible.**

3. **Orders the Commission to bear its own costs and pay three-quarters of the applicants' costs as regards the costs on which the Court of Justice did not make an order in its order of 23 May 1990. The applicants are ordered jointly and severally to pay one-quarter of their own costs as so defined.**

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