

OPINION
OF JUDGE EDWARD
ACTING AS ADVOCATE GENERAL
delivered on 10 March 1992 *

Mr President,
Members of the Court,

national courts, that there is insufficient Community interest in pursuing the case, or that the Commission does not have the staff to deal with minor complaints?

1. I propose to deal in a single Opinion with Case T-24/90 *Automec v Commission* and Case T-28/90 *Asia Motor France and Others v Commission*. Although not formally joined, these cases were heard in plenary session on successive days and they raise, or at any rate appear to raise, the same issue of principle. For brevity, I shall refer to them as *Automec* and *Asia Motor France*, but I will sometimes refer to the first as *Automec II* to distinguish it from *Automec's* earlier case (*Automec I*) which was dismissed as inadmissible on 10 July 1990.¹

3. In order to put the precise issues raised by the cases in context, I propose to begin by looking at the Treaty and implementing regulations, the case-law of the Court of Justice and of this Court and certain concessions made by the Commission in the course of the hearings.

The Treaty

2. The issue of principle raised by these cases concerns the nature and extent of the Commission's obligation to act on a complaint by a private party under Article 3 of Regulation No 17/62 (hereafter 'Regulation 17'). Must the Commission investigate? If so, in what depth? Does it have a discretion not to proceed on the ground that it is not opportune to do so? Must it take a decision which the complainant can challenge before the Court under Article 173? Can the complainant use Article 175 to prod the Commission into action? Can the Commission justify inaction on the ground that relief is available in the

4. There is nothing in the Treaty which explicitly requires the Commission to act on individual complaints. Article 155, however, provides that

'the Commission *shall ensure* that the provisions of the Treaty and the measures taken by the institutions pursuant thereto are applied'.

5. In the field of competition, Article 87(1) provides for the Council to adopt regulations

* Original language: English.

1 — Case T-64/89 *Automec v Commission* [1990] ECR II-367.

or directives 'to give effect to the principles set out in Articles 85 and 86'. Article 87(2) then provides that such regulations and directives

Regulation 17/62 and comparable regulations

'shall be designed ... (a) to *ensure compliance* with the prohibitions laid down in Article 85(1) and in Article 86 ...'.

6. When the Treaty came into force, Article 89(1) laid on the Commission the duty

'as soon as it takes up its duties, [to] *ensure* the application of the principles laid down in Articles 85 and 86. On application by a Member State or on its own initiative, and in cooperation with the competent authorities of the Member States, who shall give it their assistance, the Commission *shall investigate* cases of suspected infringement of these principles. If it finds that there has been an infringement, it *shall propose* appropriate measures to bring it to an end.'

7. Under the Treaty, the Commission has an active and positive duty of ensuring compliance with its terms and, as one aspect of that general duty, the duty of ensuring that the competition rules are applied. Although the Treaty envisages that the Commission will be the principal watchdog, it is not to be the only one. The complementary role of the national legal systems is implicit in Article 85(2) and explicit in Article 87(2)(e). Regulation 17 completes the textual basis by making Articles 85(1) and 86 directly effective and therefore enforceable in the national courts.²

8. Under Article 3 of Regulation 17, the Commission is empowered to proceed, on application or on its own initiative, to take decisions to bring infringements to an end. Natural and legal persons who claim a legitimate interest are declared to be entitled to make application — in other words, to submit complaints to the Commission about the anticompetitive activity of others. Use of the word 'application' (rather than 'complaint') relates the action taken by the complainant to the action which the Commission is empowered by Article 3 to take. The application is a request that the Commission exercise its power. But what must the Commission do, if anything?

9. It is helpful to compare Regulation 17 with Regulation No 1017/68 which was adopted six years later to apply the rules of competition to transport by rail, road and inland waterway, and with the anti-dumping regulation (Regulation No 2423/88).

10. Article 3(1) of Regulation 17 provides that:

'Where the Commission, upon application or on its own initiative, finds that there is infringement of Article 85 or Article 86 of the Treaty, it *may* by decision require the undertakings ... to bring such infringement to an end'.

² — Case 127/73 *BRT v Sabam* [1974] ECR 51, 62 at point 15.

11. Articles 10 and 11 of Regulation 1017/68 reach the same point in two stages. Article 10 provides that:

‘Acting on receipt of a complaint or on its own initiative, the Commission *shall initiate procedures* to terminate any infringement of Article 2 or Article 8 or to enforce Article 4(2)’ (i. e. to enforce the competition rules as adapted to the transport sector by the earlier provisions of the Regulation).

Article 11 then goes on to provide that:

‘Where the Commission finds that there has been an infringement ..., it *may by decision require* the undertakings ... to bring such infringement to an end’.

12. Thus, Regulation 1017/68 imposes a *duty* on the Commission to act on a complaint but confers a *discretion* as to the taking of a decision. Regulation 17 confers a discretion without, on the face of it, imposing a duty. At the hearing in *Automec*, the Commission’s agent explained this difference by reference to the inherently international character of rail, road and water transport and to the gravity of any infringement of the competition rules in this sector. Whatever the explanation, Regulation 1017/68 shows that there is no technical difficulty in imposing a duty to act on a complaint, while conferring a discretion to proceed thereafter to a decision.

13. The anti-dumping regulation also imposes on the Commission a duty to act on complaints, but only where they contain sufficient evidence of the existence of dumping or subsidization and the injury resulting therefrom (Article 5(2)). The existence of ‘sufficient evidence’ is, in all cases, a precondition of the Commission’s duty to act (see Article 7(1), and compare Article 5(5)).

14. Although, for this reason, the anti-dumping regulation is not directly in point, it is useful to be reminded that a duty to act on a complaint presupposes that the complaint has disclosed something that calls for action to be taken. It would be absurd to impose a duty on a public authority to adopt some formal procedure in response to every complaint, however frivolous, vexatious or manifestly ill-founded.

15. Finally, as regards Regulation 17, the Commission has exclusive jurisdiction, not shared with the national courts, to apply Article 85(3). It was accepted by the Commission at the hearing in *Automec* (where the applicants say a block exemption regulation is in issue) that the Commission’s duty will be different where it alone has power to act.

GEMA, Metro I, Demo-Studio Schmidt and CICCE

16. In *GEMA* the Court of Justice confirmed that Article 3(1) of Regulation 17 confers a

discretion but does not impose a duty on the Commission to proceed to a decision requiring an infringement of the competition rules to be brought to an end.³ However, in *Metro I* the Court asserted the right of complainers, if their request is not complied with either wholly or in part, to institute proceedings in order to protect their legitimate interests.⁴ Then in *Demo-Studio Schmidt* the Court said that

'the Commission, having received the applicant's complaint, was under a duty to examine the facts put forward by the applicant in order to decide whether [the conduct complained of] was capable of distorting competition within the common market and of affecting trade between Member States'.⁵

17. The nature of the Commission's duty was made yet more precise in *CICCE* where the Court held that

'the Commission had a duty to examine [the elements of fact and law brought to its notice by *CICCE*] in order to decide whether the competition rules of the Treaty were infringed in this case'.⁶

18. The effect of these judgments is, to put it shortly, that the Commission must take com-

plaints seriously: its discretion as to the action it will take in response to a complaint is not unfettered.

19. The Commission also conceded at both hearings that a complainer is entitled to a decision which he can challenge before the Court under Article 173. That concession could hardly have been withheld since it follows from *Metro I*.

20. The 'decision' to which the complainer is entitled may be addressed to the undertaking against which the complaint was directed (as in *Metro I*) or to the complainer. However, for the reasons explained in *Automec I* and earlier in *IBM*,⁷ an attackable decision can only come at the end of the administrative procedure when the procedural guarantees laid down in Regulation 17 and Regulation No 99/63 (hereafter 'Regulation 99') have been complied with. It follows that neither the complainer nor the undertaking complained against can insist that the Commission proceed at once to a decision except, perhaps, at a stage where all possible procedures have been completed.

Article 6 of Regulation 99/63 and Automec I

21. Article 6 of Regulation 99 requires the Commission, where it considers that there are insufficient grounds for acceding to a

3 — Case 125/78 *GEMA v Commission* [1979] ECR 3173, 3189 at points 17 and 18.

4 — Case 26/76 *Metro v Commission* [1977] ECR 1875, 1901 at point 13.

5 — Case 210/81 *Demo-Studio Schmidt v Commission* [1983] ECR 3045, 3065 at point 19.

6 — Case 298/83 *CICCE v Commission* [1985] ECR 1105, 1122 at point 18.

7 — Case 60/81 *IBM v Commission* [1981] ECR 2639.

complaint, to inform the complainer of its reasons and to fix a time limit for the submission of further comments in writing. In *Automec I*, the Court held that an 'Article 6 letter' is not a reviewable decision.

Article 175

22. The judgment in *Automec I* has been criticized on the ground that it deprives the complainer of legal protection since Regulation 99 does not require the Commission, after issuing an Article 6 letter, to proceed to a final, attackable decision.⁸ The criticism seems to arise from a misunderstanding. Regulation 99 does not *require* the Commission to proceed to an attackable decision after issuing an Article 6 letter because the complainer may be satisfied with the explanation given in the letter or may simply decide that it is not worth taking the matter further. To issue a formal decision to a complainer who does not want one would be otiose.

23. It does not follow that the complainer cannot insist on an attackable decision if he wants one, or that, having received the complainer's observations in reply to the Article 6 letter, the Commission can simply remain inactive. It is here that Article 175 of the Treaty comes into play since it is the only procedural means by which the complainer can force the Commission to take further action.

24. Article 175 has given rise to much debate and a good deal of misunderstanding. One reason is that it uses in successive paragraphs the concepts of 'failure to act' (paragraph 1), 'failure to define the position of the institution' (paragraph 2) and 'failure to address to a natural or legal person an act other than a recommendation or an opinion' (paragraph 3). There is a further complication for readers of the English text in that it uses the same word, 'act', to translate words which, in other language texts, are different: 'failure to act' in the first paragraph, and 'called upon to act' in the first sentence of the second paragraph. In spite of these complications, Article 175 can, I believe, be applied to competition procedure in a perfectly coherent way.

25. Article 175, like Article 173, is drafted primarily with Member States and institutions in mind. The right of action granted to them is then adapted to give limited *locus standi* to private parties. Paragraph 1 defines the substantive precondition of the action: that the defendant institution must be under an obligation to proceed to an 'act'⁹ and have failed to do so. Paragraph 2 then defines the procedural preconditions for raising an action: that the defendant institution must

⁸ — See the annotation by Stephen O. Spinks in (1991) 28 CML-Rev 453 at pp. 459-62.

⁹ — The original German and Dutch texts seem to be more explicit than the French and Italian, and certainly more explicit than the English, in referring to an 'act' (... einen Beschluß zu fassen .../... een besluit te nemen ...).

have been called upon to act and have failed, within two months, to define its position. Paragraph 3 defines the precondition of *locus standi* for private parties: that the applicant must be the potential addressee of an 'act'.

26. It is worth stressing that the scheme of Article 175 is to avoid actions being raised unnecessarily. If an action would be successful, service of the warning letter under paragraph 2 should produce the desired result without any action having to be raised. If the institution would have a good defence, its 'definition of position' should make that clear.

27. Applying Article 175 to the present context, it is not in dispute that a person who has made a complaint to the Commission under Regulation 17 is entitled to a decision, favourable or unfavourable. Failure on the part of the Commission to proceed to such a decision is a 'failure to act' within the meaning of paragraph 1. *Metro I* establishes that a complainant is the potential addressee of 'an act other than a recommendation or an opinion' and therefore has *locus standi* under paragraph 3. *Prima facie*, Article 175 should be available to a complainant faced with inaction on the part of the Commission. The complainant cannot, however, raise an action unless the procedural preconditions of paragraph 2 have also been fulfilled. It is here that the problem arises. There seem to be two possible approaches.

28. The first approach is to say that the procedural requirements of paragraph 2 can be

satisfied only where the applicant is in a position to call upon the institution to take, *there and then*, an attackable decision: the institution must, in response, either take that decision or explain why it declines to do so. If there is any intervening procedure to be gone through before a decision can be taken, the warning letter is premature and a subsequent action inadmissible.

29. The consequence of that approach in the field of competition would be that Article 175 cannot, for procedural reasons, be invoked by a complainant, since a complainant cannot require the Commission to take one decision rather than another and cannot, in particular, require it to take a decision against the undertaking complained against (see *GEMA*). The same reasoning would apply to the undertaking complained against since it too cannot require the Commission to take a decision in its favour. Effectively, the Commission would be immune from attack by way of Article 175 except, perhaps, in a situation where all the procedure required by Regulations 17 and 99 has been gone through and nothing remains to be done before a decision can be taken.

30. The second approach is to say that paragraph 2 means no more than it says. It lays down a purely procedural precondition designed to avoid unnecessary actions. That procedural precondition is exhausted once an admissible action is raised. If it has not been fulfilled, the action is inadmissible; if it has been fulfilled, the action is admissible and paragraph 2 is no longer relevant.

31. On the second approach, Article 175 is a generally available judicial means by which a laggard institution can be prodded into activity. Before raising an action, the applicant must have called upon the institution 'to act' — to become active rather than inactive¹⁰ — the action to be taken being dependent on the circumstances of the particular case. The institution then has two months within which to define its position with respect to that demand — i. e. to state what it proposes to do or to justify its refusal to do anything. The action which the institution is called upon to take is not necessarily the same (though it may be the same) as the 'act' envisaged in paragraphs 1 and 3.

32. Applying the second approach to competition procedure, we can start from the point that, as *IBM* and *Automec I* explain, the procedure leading to a competition decision involves a series of preparatory acts. These may include service of an Article 6 letter addressed to the complainant (which will not put an end to the case if the complainant can persuade the Commission that its reasoning is unsound), service of requests for information or the institution of investigations under Articles 11 and 14 of Regulation 17, service of a statement of objections, organization of an oral hearing, and so on. At certain stages, strict formalities must be observed. The Commission cannot proceed to a formal, attackable decision without going through the procedural gates. But at each stage there may be some step which the

Commission could be taking, but is not taking, along the road towards a decision.

33. The second approach would allow the complainant — or for that matter the undertaking complained against — to prod the Commission into activity.

When the Commission is called upon to act, the action to be taken will depend on the stage the case has reached. Correspondingly, when the Commission comes to define its position, the position and the way it is defined must depend on the circumstances. The *legal* question in each case will be whether the complainant's request for action and the Commission's response were legally justified.

34. This approach allows both the Commission and the Court to deal with each case on its own terms without excessive formalism and without depriving the private party of the protection of judicial control. If the complaint is manifestly frivolous, vexatious or ill-founded in law, the Commission can respond to a request for action in a brief letter, and the Court is hardly likely to say that that is an insufficient 'definition of position'. By contrast, a serious complaint backed up by reliable evidence of a breach of the competition rules must receive a serious, considered response. In this way the Commission can be forced to comply with *Demo-Studio-Schmidt* and *CICCE*.

35. Against that background, I turn to the facts of the two cases before the Court.

¹⁰ — This idea seems to come out particularly strongly in the German text: Diese Klage ist nur zulässig, wenn das in Frage stehende Organ zuvor aufgefordert worden ist, tätig zu werden.

The facts of Automec

36. The applicant, Automec SRL, is a motor car distributor based in Lancenigo di Villorba, in the north of Italy. It is run by its largest shareholder, Mr Paolo Mattarollo, the other shareholders being members of his family. In January 1964, an earlier company also called Automec acquired a non-exclusive concession to distribute BMW cars in the city and province of Treviso. In fact, Mr Mattarollo had operated a concession since 1960. The distinction between Mr Mattarollo and his various companies seems to be of no importance for the case and, in what follows, I shall simply refer to 'Automec'.

37. In the course of its relationship with BMW, Automec had to adapt its business to comply with the contractual requirements of BMW including provision of an after-sales service and of a guarantee to the final purchaser, maintenance of a stock of cars and spare parts, and recruitment of suitably qualified staff. Automec says that it was induced by BMW to buy 12 000 m² of ground and to build a new 4 000 m² display and maintenance centre.

38. Subsequently, the subsidiary in charge of BMW's distribution network in Italy, BMW Italia SpA, told Automec that it would not renew the distribution agreement beyond 31 December 1984. Since that date BMW has not supplied any motor cars or spare parts to Automec. BMW Italia tried unsuccessfully to get an order from the Tribunale di Treviso to prevent the continued use by Automec of the BMW trademarks.

39. Automec's reaction to its exclusion from the BMW network was to bring an action in the Tribunale di Milano seeking an order that the previous contractual relations be maintained. The Tribunale rejected the application. We were told at the hearing that that judgment was upheld on appeal and has been submitted for review by the Corte di Cassazione. We were also told that the Tribunale di Milano has, at first instance, prohibited Automec from using a BMW trademark, and that that case is now before the Corte d'Appello.

40. On 25 January 1988 the applicant complained to the Commission alleging a breach by BMW of Article 85. The complaint contained explicit reference to Article 3(2) of Regulation 17 and sought an order against BMW Italia SpA and BMW AG (its German parent company) requiring them to put an end to their breach of Article 85.

41. In its complaint, Automec claimed that the length and success — in sales terms — of its previous relationship with BMW demonstrated that it met the objective requirements of BMW's distribution network. BMW had nonetheless refused to admit it to the network and to supply it with cars and spare parts. This refusal, dating from 31 December 1984, had continued despite the 'pressing requests' of Automec. BMW was therefore in breach of Article 85 and should be ordered to execute, at the price and conditions applicable to other resellers, any orders for vehicles and spare parts placed by Automec. BMW should also be ordered to authorize Automec

to use its trademarks within the normal usage of the automobile sector.

42. A preliminary exchange of views took place between Automec and the Commission. A letter forming part of this exchange subsequently became the subject of *Automec I*. On 26 July 1989, the Commission sent Automec an Article 6 letter, in response to which Automec submitted further observations.

43. Then, on 28 February 1990, the Commissioner responsible for competition matters, Sir Leon Brittan, wrote the letter notifying the decision which Automec now asks the Court to annul.¹¹ The Commissioner's letter gives two reasons for taking no further action on Automec's complaint:

'1. In the first place and with reference to the first request set out in your complaint (... that BMW be enjoined to deliver to Automec vehicles and spare parts and to authorize Automec to use the trademark 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 (... 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 that 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.

¹¹ — Details of earlier events are set out in *Automec I* [1990] ECR 373-5, at points 8 to 16.

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 facts set forth in the present complaint.'

44. As I have said, *Automec I* was dismissed as inadmissible on 10 July 1990. The present action seeks annulment of the decision notified by the Commissioner's letter just quoted, and also seeks damages under Article 178 of the Treaty. I shall return to the admissibility and substance of these claims after setting out the facts of *Asia Motor France*.

The facts of Asia Motor France

45. The problems of this case begin with total confusion as to the identity of the applicants and their relationship to those who earlier made complaints to the Commission. The applicants are designated in the Application as Asia Motor France, M. Jean-Michel Cesbron trading as JMC Automobile, Monin Automobiles and EAS. Asia Motor France and Monin Automobiles appear to be French companies, although Asia Motor France is said to have a Luxembourg address. EAS is a Luxembourg company. Asia Motor France and JMC Automobile are said to be in the hands of a judicial administrator. Asia Motor France, JM Cesbron Automobile and EAS belong to the 'Cesbron Group' controlled by M. Jean-Michel Cesbron and his family. Their relationship with Monin Automobiles, if any, is not specified.

46. Fortunately, it was agreed at the hearing that the precise status and identity of the applicants are not material to the case.

47. The applicants belonging to the Cesbron Group are engaged in importing, marketing and distributing Japanese cars in France. The vehicles, principally four wheel drive models manufactured by Suzuki, Daihatsu, Isuzu and Subaru, are imported from other Member States, in particular Belgium and Luxembourg, where they are already in free circulation. Monin Automobiles specializes in the parallel importation of Suzuki motorbicycles.

48. On 18 November 1985 'Etablissements Cesbron' complained to the Commission about an agreement between the French Minister of Transport and the five major importers of Japanese cars into France — Sidat Toyota France, Richard Nissan SA, Mazda France Motors, Honda France and Mitsubishi Sonauto. The complaint alleged that the agreement set a quota on imported Japanese cars fixed at 3% of national sales. The quota was shared between the five according to a pre-established formula related to their respective imports in 1975. In return for acceptance of the quota, the French government agreed not to accredit any new Japanese car manufacturers. The letter of complaint concluded:

'Accordingly, the writers formally lodge this complaint against the French State in respect of infringement of Articles 30 et 85 of the Treaty of Rome, and ask that you act appropriately.'

49. Three years later, on 29 November 1988, the four applicants lodged a fresh complaint with the Commission against the five major importers. This letter, addressed to Directorate General IV, complained of an 'illicit cartel within the meaning of Article 85(1) of the Treaty of Rome'. The complaint alleged that in return for restricting the five importers to the 3% quota, the French government had introduced a number of discriminatory measures with the object and effect of preventing parallel importers of Japanese vehicles entering the French market. The letter enumerated these measures as follows:

1. refusing to accredit the applicants, thus preventing them from importing free from government intervention;
2. subjecting parallel import vehicles to special, and more lengthy registration procedures normally applied to secondhand cars;
3. issuing directives to the Gendarmerie Nationale to follow and prosecute owners of Japanese cars with foreign licence plates outwith the usual two month limit;
4. imposing a discriminatory VAT rate of 28% (later reduced to 18.6%) on parallel import vehicles; and
5. complicating the registration procedures, causing secondary insurance and resale problems for purchasers.

The letter concluded by asking the Commission rapidly to dismantle the cartel and to impose penalties in terms of Article 85(1).

50. In a series of letters dated 12 and 25 April, 25 May and 22 June 1989, the applicants provided further documentary evidence of the alleged cartel and pressed the Commission to investigate their complaint.

51. On 9 June 1989 the Commission requested the five major French importers to provide information on the agreement. On 20 July 1989, the French Ministry of Industry and Regional Development instructed the five firms not to reply to the Commission's request on the ground that it concerned 'the policy of the French public authorities with regard to importation of Japanese cars.'

52. During August 1989 the Commission requested the French government to supply information on the agreement. If the Commission received a reply to this letter, it was not communicated to the applicants.

53. On 25 August 1989 the applicants wrote again to DG IV with further information including the annual percentage share-out of the 3% 'cake' between the five major importers, and evidence that markets were shared at a regional as well as national level. The letter concludes:

'The absence of any measure of investigation on the part of the Commission up to now constitutes a *failure to act* which is all the more serious in that it encourages the maintenance of an anticompetitive situation, which could be fatal to the complainant undertakings, and allows the cartel which has control of the files to do some housekeeping and destroy the evidence ...

further informed the applicants that it was inviting the French government to send its observations. In a letter to the applicants on 16 October 1989, the Commission explained that the letter to the French government was intended to allow the Commission 'to know whether the conduct of the undertakings affected by the complaint was indeed adopted by them at the request of the French public authorities.'

We would therefore insist that the Commission, without waiting for the response of the various interested parties, should give notice of the objections which have been clearly established, that it should in any event set about gathering such additional evidence as it may think useful by making investigations at the premises of the undertakings and of their trade association, and that it should adopt interim measures to reestablish competition straight away.'

54. The Commission replied to this letter on 3 October 1989 in the following terms:

'As regards your reactions to the way in which investigations are proceeding, I can well understand your clients' feelings when faced with the different stages of the preliminary investigation which is currently being undertaken and which must, as you know, also take into account the interests of those against whom the complaint has been made.'

The Commission appended to this letter the letters it had received from the major importers in answer to its request for information (see paragraph 51 above). The Commission

55. By letter of 25 May 1989, the applicants informed the Commission of two decisions of the Cour d'Appel d'Aix-en-Provence in actions brought by purchasers of parallel import cars who had been unable to register their vehicles due to the French government's restrictions. In both cases, the court had stayed the proceedings pending a decision by the Commission. The letter concluded:

'It will not escape your notice that it is urgent that there be a decision of the Commission in order to enable the French courts to unblock litigation kept in being by the organizers of the practices of which we complain and which, because of the delay, is cheerfully going on for ever.'

56. On 5 July 1989, the Tribunal de Commerce d'Angers, in proceedings brought by the Procureur de la République against two of the applicants, condemned the French state for its part in the agreement, but refused to issue final judgment until the Commission took its decision.

57. On 21 November 1989 the applicants wrote again to the Commission complaining of the discriminatory hurdles erected against them by the French government and stressing that the agreement was public knowledge. In conclusion the letter stated:

'Since the first complaint goes back to December 1985, the complainant undertakings are entitled to ask the Commission to put an end to the breaches of the Treaty and, in particular, of Articles 5(2), 30, and 85 ...

This warning letter is delivered pursuant to Articles 3(c) and (f) and 175 of the Treaty ...

The Commission cannot continue to cover up the anticompetitive policy of a Member State within the meaning of Article 30, effected by means of a cartel between undertakings contrary to the provisions of Article 85, the consequence of which is to delay reparation of the loss suffered by the victim undertakings, which continues to get worse.'

58. Four months later, on 20 March 1990, having received no reply from the Commission, the applicants launched this action before the Court of Justice. The applicants ask the Court:

— To hold, pursuant to Article 175 of the Treaty, that the Commission has failed to

take a decision with respect to the applicants, albeit they duly called upon it to do so;

— To order the European Economic Community, pursuant to Articles 178 and 215 of the Treaty, to indemnify the applicants in respect of the loss caused by those institutions.

The Application sets out the sums in ECUs claimed by each of the applicants, but contains no specification of how those sums are arrived at. Under cover of a letter of 12 April 1990 written in response to a letter from the Court Registrar requesting legible copies of documents annexed to the Application, the applicants submitted a new eight-page 'Explanatory Note on the Calculation of Loss' in which the loss is calculated in French francs.

59. The action was brought before the Court of Justice because it was based in part on the alleged failure of the Commission to take action against France under Article 30. This aspect of the case was declared inadmissible and the case, so far as based on the competition provisions of the Treaty, was referred to this Court by Order of the Court of Justice dated 23 May 1990. It follows that this Court cannot consider whether the French government acted lawfully in setting a quota on the importation of Japanese cars, in assigning that quota to five French undertakings to be shared out between them, and (if such be the case) in taking steps to prevent, or at least make more difficult, the parallel importation of Japanese cars from other Member States.

60. Meanwhile, on 8 May 1990, shortly before the Court of Justice pronounced its Order, the Director-General of DG IV had written a letter to Asia Motor France. The Director-General's letter refers expressly to Article 6 of Regulation 99, to a letter of 3 April 1990 from Mr J.-M. Cesbron to Sir Leon Brittan informing him of the action which had been raised under Article 175, to the 'complaint' of 18 November 1985 pursuant to Article 30, and to the 'complaint' of 29 November 1988 pursuant to Article 85 and Article 30. The letter stated two reasons why the Commission did not intend to proceed with the complaints and invited observations within two months.

61. The reasons given for not proceeding with the complaint were:

'In the first place, the investigations conducted by the services of DG IV with a view to the 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 public Community interest, having regard to the current negotiations in the context of definition of the common commercial policy, with respect particularly to Japan, concerning automobiles.'

62. On 29 June 1990, the applicants submitted their observations in reply to the Director-General's letter.

63. On 3 August 1990, the Commission lodged an objection of inadmissibility on the grounds, first, that the applicants' letter of 21 November 1989 was, for several reasons, not a proper warning letter under Article 175(2); second, that the Director-General's letter of 8 May 1990 was a 'definition of position' putting an end to the failure to act; and, third, as regards the claim for damages under Article 178, that the pleadings did not meet the minimal standard of specification for such an action.

64. On 26 September 1990 the applicants lodged their observations on the objection of inadmissibility. While contesting the Commission's arguments, the applicants asked in the alternative that their Application be treated as an application for annulment of the Article 6 letter of 8 May 1990.

65. On 7 November 1990, the Court joined the objection to the substance. On 21 January 1991, the Commission lodged a very brief Defence, substantially repeating what it had said in its objection of inadmissibility. The applicants lodged no reply and the written procedure closed at that point. The oral hearing took place on 23 October 1991.

66. On 5 December 1991, Sir Leon Brittan wrote a letter to the applicant's lawyers rehearsing in marginally more detail the points made in the Director-General's letter of 8 May 1990. In conclusion, he stated that the Commission had decided to reject the complaints. On 4 February 1992, the applicants raised an action before the Court of

Justice (C-29/92) for annulment of the decision so notified.

67. In the meanwhile, by letter dated 31 January 1992, the Commission asked this Court to hold that the present case need not proceed to judgment except in relation to costs because the action has become devoid of purpose.

68. I now turn to consider the admissibility of the two actions.

Admissibility of Automec's action under Article 173

69. The Commission accepts that the decision notified to Automec by the Commissioner's letter of 28 February 1990 is a definitive, reviewable decision. In so far as Automec's action is based on Article 173 of the Treaty, the Commission raises no question of admissibility and there is no point that the Court need take *ex officio*.

Admissibility of both actions under Article 178

70. Automec and Asia Motor France claim damages under Article 178. The Application in *Automec I*, which contained one paragraph in support of the claim for damages, was annexed to the Automec's application in the present case, but the latter application contains no pleading in support of this head of claim. Automec's reply contains two brief paragraphs in support of the claim. The

Commission has taken no formal objection of inadmissibility, but raises the point in its rejoinder as one which the Court might take *ex officio*.

71. The pleadings in *Asia Motor France* contain little more than the pleadings in *Automec*. There is a claim for specific sums of money, apparently (but not clearly) backed up by a calculation lodged later (see paragraph 58 above). But there is no detailed pleading either on the nature of the fault giving rise to liability or as to the causal link between the fault and the loss alleged. The applicants content themselves with asserting that the Commission's inaction, which forms the basis of the action under Article 175, was '*inertie fautive*'. As I have mentioned (paragraph 63 above), the Commission has taken specific objection to the admissibility of this claim.

72. In *Automec I*, the claim for damages was held to be inadmissible on the ground that the applicant had failed to specify the conduct alleged to give rise to the claim, the loss allegedly suffered and the causal link between conduct and loss.¹² Precisely the same reasoning applies to *Automec II*, and I propose that Automec's claim under Article 175 be dismissed as inadmissible.

73. The reasoning of *Automec I* applies equally to the claim in *Asia Motor France* since the only significant difference between

¹² — [1990] ECR at pages II-390-391, points 72-77.

the two cases is that the claim in the latter is backed up by a document lodged late and expressed in a different currency. I therefore propose that this claim too be dismissed as inadmissible.

74. It would be desirable, for the future conduct of proceedings before this Court, to make it clear that applicants cannot simply add unspecific claims for damages as afterthoughts to actions of annulment. The Court must be able to deal with each case before it on the basis of a set of self-standing pleadings. Article 178 raises complex legal problems and calls for pleadings as precise and specific as any other form of action before the Court.

The convertibility of Asia Motor France's action for failure to act under Article 175 to an action of annulment under Article 173

75. The applicants in *Asia Motor France* ask, in the alternative, that their application be treated as an application for annulment of the Article 6 letter sent to them on 8 May 1990. An action for annulment of an Article 6 letter would in any event be inadmissible — *Automec I* — but there is also a reason of principle why, at least in the field of competition, an action for failure to act should not be convertible into an action of annulment.

76. It is easy to argue on grounds of procedural economy that an action for failure to act should be convertible into an action for annulment of a subsequent act which puts an end to the failure to act. The purpose of an action under Article 175 is to force an institution to act. If the institution then acts, but in a way that the applicant wishes to challenge under Article 173, why should it be necessary to abandon the existing action and start a new action of annulment, repeating the same arguments and losing months of valuable time, not to speak of the cost to the parties and the Court? In my own country the courts have wide powers, where one party adopts a new stance, to allow the other party to amend his pleadings to focus the real issues. But there the context is different.

77. Both the Court of Justice and this Court are courts with limited jurisdiction in limited fields. We cannot always do what seems to be most just, desirable or economical because we are bound by the Treaty, the Statute of the Court and the Rules of Procedure. Thus, for example, we have no discretion to extend time limits laid down in the Treaty.

78. Article 19(1) of the Statute lays down in general terms, and Article 44(1) of the Rules of Procedure of this Court (Article 38 of the Rules of the Court of Justice) lays down in more detail, what the writ initiating an action must contain. It must, in particular, contain a statement of the subject-matter of the dispute, the order(s) sought, the pleas in law on

which the applicant relies and the main supporting arguments. These details must be published in the *Official Journal* (Article 24(6) of the Rules of this Court; Article 16(6) of the Rules of the Court of Justice). The reason is, I believe, clear.

79. Article 37 of the Statute recognizes the right of Member States, Community institutions and (where they can establish an interest) other persons to intervene in cases before the Court. Article 20 of the Statute provides for references under Article 177 to be notified by the Registrar of the Court of Justice to the parties, to the Member States, to the Commission and, in certain circumstances, to the Council. In the case of direct actions, there is no corresponding requirement of direct notification to the Member States and institutions (other than the defendant institution), far less to other potentially interested parties. They must (unless they have access to the pleadings in other ways) decide whether to intervene on the basis of the publication in the *Official Journal*. As interveners, they will be limited to supporting the conclusions of one of the parties (Article 37(3) of the Statute).

80. Interventions should not be multiplied without necessity. Potential interveners should be able safely to make their decision on whether to intervene on the basis of the publication in the *Official Journal*. If they cannot, they will be encouraged to intervene for safety's sake. That is a good reason why, in the Community system, the scope of a direct action is, in principle, fixed at the beginning, and why the right of parties to introduce new pleas in law in the course of proceedings is severely restricted (Article

48(2) of the Rules of Procedure of this Court; Article 42(2) of the Rules of the Court of Justice).

81. While there may be scope for some flexibility in staff cases where the nature of the Court's jurisdiction is different, the facts of *Asia Motor France* show that more than one Member State and a significant number of private undertakings may have an interest in the outcome of a competition case. They may be content to leave it to the Commission to defend an action for failure to act, but we cannot assume that they would be equally content to stand on the sidelines of an action seeking annulment of a positive decision by the Commission to take no action.

82. I therefore recommend that the Court confine the scope of the present case to the action for failure to act as originally presented.

The admissibility and continued purpose of Asia Motor France's action under Article 175

83. The Commission claims that *Asia Motor France's* action under Article 175 is inadmissible essentially on three grounds: first, that the letter of 21 November 1989 is not a proper warning letter; second, that there was no 'act' which the Commission was required to take and consequently no failure to act; and third that, in any event, the Director-General's letter of 8 May 1990 was a 'definition of position' which put an end to the fail-

ure to act and so deprived the action of its purpose. As I have noted, the Commission now says that, in view of the Commissioner's letter of 5 December 1991, it is no longer necessary to give judgment except on the question of costs.

84. The plea that the letter of 21 November 1989 was not a proper warning letter is supported by two arguments. First, it is said that the letter does not state the legal basis for requiring the Commission to act, since it refers only to Articles 3 and 175 of the Treaty. Second, it is said that the letter does not state what action the applicants wished the Commission to take.

85. In my opinion, both of these arguments are without foundation. The Director-General for Competition, when he wrote his letter of 8 May 1990, seems to have had no difficulty in identifying the letter of 21 November 1989 as a warning letter. Nor does he appear to have been in doubt as to what the applicants expected the Commission to do. Indeed the Commission's own objection of inadmissibility, after two pages of complaint about the adequacy of the warning letter, goes on under another head to quote the passage from the applicants' letter (cited above at paragraph 57) which makes specific reference to Articles 5, 30 and 85 of the Treaty. The Commission then says:

'It is not in dispute that the Commission opened an investigation the moment it received that warning letter and that that investigation has not yet been completed.'

To take such action immediately on receipt of the letter of 21 November 1989 is hardly consistent with the Commission's alleged perplexity as to what it meant.

86. The question is not whether the applicants were right about the law or whether their complaint was justified, but whether the letter of 21 November 1989 was a valid warning letter. In my opinion, it was.

87. The Commission's second plea amounts to saying that, since the Commission can never be required to proceed to a decision against the undertaking(s) complained against, an action under 175 is not available to a complainant. This is an extreme version of the first approach to the interpretation of Article 175 which I identified previously. If accepted, it would effectively make Article 175 a dead letter in competition proceedings.

88. For the textual and practical reasons set out in paragraphs 30-34 above, I prefer the second approach. I therefore propose that this plea also be rejected.

89. If that is accepted, then the action was admissible when raised since the applicants had properly called on the Commission to act and the Commission had, so far as they knew, done nothing. If it be the case that the Commission opened an investigation on receipt of the warning letter, the applicants were not informed, as they should have been.

90. The Commission's third plea is, in my opinion, more substantial. Assuming that an Article 175 action is admissible when it is launched, is its purpose exhausted if the defendant institution subsequently defines its position — for example, by sending an Article 6 letter? An Article 6 letter has been held by the Court of Justice to be a 'definition of position' within the meaning of Article 175(2).¹³

91. Here again there seem to be two possible points of view. The first is to say that an action under Article 175 loses its purpose only when the 'failure to act' (within the meaning of Article 175(1)) has been brought to an end. This approach might be supported by the *dictum* of the Court of Justice in the *Comitology* case¹⁴ to the effect that:

'a refusal to act, however explicit it may be, can be brought before the Court under Article 175 since it does not put an end to the failure to act'.

The alternative point of view is that the purpose of an action under Article 175 is to spur a laggard institution into taking action and that its purpose is exhausted when the defendant institution 'defines its position' (within the meaning of Article 175(2)).

92. On either view, the point is not one of admissibility. The admissibility of an action is to be tested at the moment it is raised, not by reference to some supervening event. The

proper question is whether the action has lost its purpose, making it unnecessary for the Court to proceed to judgment.

93. In my opinion, this case has indeed now lost its purpose since the Commission has definitively rejected the applicants' complaint and they have raised an action for annulment of that decision. But the point just discussed remains important in relation to costs since substantial costs will have been incurred since the Director-General for Competition sent his Article 6 letter on 8 May 1990.

94. I have suggested that there are two possible points of view. On the first, once an admissible action under Article 175 is in Court, its purpose will not be exhausted unless and until the defendant institution has proceeded to a formal 'act'. Since an Article 6 letter is not a formal act (*Automec I*), the present action retained its purpose until the Commission took its definitive decision to reject the applicants' complaint. When the Article 6 letter was sent on 8 May 1990, the proper course would have been to suspend the action until the outcome of the Article 6 procedure was known.

95. The advantage of adopting that solution would be that the continued existence of an action in Court, which could be revived at any time, would be a spur to the Commission to remain active. The disadvantage would be that a potentially unnecessary action would remain on the Court's lists, the parties rather than the Court having effective control over its disposal.

13 — See *GEMA* [1979] ECR at page 3190, point 21.

14 — Case 302/87 *Parliament v Council* [1988] ECR 5615, 5641, point 17.

96. The second point of view is, I think, theoretically less attractive since it presupposes that a failure to act, in the sense of a failure to proceed to an attackable act, can be brought to an end by action falling short of an attackable act. While it would have the advantage of clearing the Court's lists quickly, it would have the corresponding disadvantage of requiring a complainant to raise a series of actions to produce results if the Commission continued to prove sluggish in dealing with the case.

97. I will leave the choice between these two points of view to others since, in my opinion, it is not necessary to make the choice in order to deal with the costs of this case. It took just over six years from the date of the first complaint (which specifically mentioned Article 85), and just over three years from the date of the second, for the applicants to get the decision from the Commission to which they were admittedly entitled. I will not express any opinion on the merits of that decision which is subject to review in the new action of annulment. But it adds nothing of substance to what was said in the Director-General's Article 6 letter written nineteen months earlier.

98. If the reasons given in May 1990 and repeated in December 1991 were sufficient to dispose of the complaint, they could have been stated years earlier, so avoiding the present action. Given the history of the case, it is not likely that the applicants would, even now, have got a decision from the Commission if they had not raised and persisted with this action. Under Article 87(6) of our Rules

of Procedure, costs are entirely the Court's discretion. I think justice requires that the Commission be made to pay the costs of an action which, although now without purpose, has at least in part fulfilled its purpose in producing an attackable decision.

99. I therefore propose that the Court should hold, in the case of *Asia Motor France*, that there is no longer any reason to proceed to judgment except on the question of costs, and that the Commission be ordered to pay the costs of the applicants.

100. An Advocate General will normally express a view on the substance of a case, even if he has come to the conclusion that it should be disposed of on other grounds. In the present case, the substantive issues are before the Court in another, more appropriate action. I shall therefore say no more about *Asia Motor France*.

The substance of Automec

101. The Commissioner's letter to Automec of 28 February 1990 (quoted at paragraph 43 above) gives two reasons for rejecting Automec's complaint: first, that the Commission has no power under Article 85 to pronounce a positive injunction requiring BMW to resume supplies to Automec; and second, that Automec's complaint can be better pursued in the Italian courts. In relation to the second reason, the letter refers to the Commission's power to apply different degrees of priority to the examination of alleged infringements, and to the absence of any interest of the Community sufficient to justify going more deeply into Automec's complaint.

102. Since the Court is concerned with the reasons given, rather than reasons which might have been given, it is possible to dispose of two arguments advanced before us. The first argument, put forward hesitantly and intermittently, was that the Commission enjoys total discretion in dealing with competition complaints and is not subject to judicial review. *Demo-Studio Schmidt* and *CICCE* (cited above at paragraphs 16 and 17) are sufficient to dispose of that argument.

103. The second argument was that, whatever may have been the position in the past, the Commission no longer has the resources, including staff in DG IV, to follow up every competition complaint. We were told that DG IV now has 28 A-grade posts in Directorate A dealing with general questions; 90 posts (of which 4-5% are vacant) in the sectoral Directorates B, C and D; 44 in Directorate E dealing with state aids, and 28 in the merger task force. Shortage of staff in DG IV was already a matter of comment some years ago¹⁵ although, until very recently, the Commission was still issuing a booklet for the information of businessmen which stated:

'When a complaint is submitted by a party having a legitimate interest in the matter, the Commission will examine whether a violation of the competition rules is in fact taking place. If the complaint turns out to be well-

founded, the Commission can then take the necessary measures to put an end to the infringement.'¹⁶

104. It is not for the Court to decide whether the Commission is now short of staff. Shortage of staff, even if caused by budgetary constraints for which the Commission is not responsible, cannot justify a refusal to fulfil a legal obligation. It will, on the other hand, justify defining priorities, since fulfilment of the obligation may be more urgent in some cases than in others. That is what the Commission says it did in its Seventeenth Report on Competition Policy (1988), though the criteria there set out (at paragraph 9) are, to say the least, telegraphic.

105. A scheme of priorities fully and clearly defined would not, of itself, justify *rejecting* a complaint which set forth *prima facie* evidence of breach of the competition rules. That is clear from *Demo-Studio Schmidt* and *CICCE*. Nor, in my opinion, can the Commission's activities be withdrawn from judicial scrutiny by appeal to a vague concept of 'Community interest' defined, case by case, by the Commission itself. But the Commission has gone further than that in this case.

106. While the Commissioner's letter to Automec refers to the Commission's priorities and to the absence of any sufficient 'interest of the Community', the substance of

15 — See, for example, the Report of the House of Lords Select Committee on the European Communities, *European Union*, 14th Report of Session 1984-85, paragraph 51 at page xxi, and the evidence of Dr Ehlermann and Dr Glaesner at page 106, QQ.165-6.

16 — *EEC Competition Rules — Guide for Small and Medium Sized Enterprises*, November 1983, page 46, republished as *EEC Competition Policy in the Single Market*, March 1989, page 48.

the reasons for rejecting the complaint would be the same without those references. The substantive reasons given are, as I have said, the Commission's lack of power to issue a positive injunction and the availability of relief in the Italian courts.

107. I do not find the argument based on the lack of a power of injunction convincing. In effect, the Commission says to Automec: 'You ask us to pronounce an order requiring BMW to resume supplies; we cannot pronounce such an order; therefore we reject your complaint'. But the question for the Commission is not whether it has power to grant the order sought. The first question to be considered, as the Court said in *CICCE*, is whether the competition rules of the Treaty have been infringed. If, but only if, the Commission finds that the competition rules have been infringed, does any question arise as to the order to be pronounced. If the Commission, having established an infringement, cannot pronounce the order the complainant seeks, it can undoubtedly pronounce an order requiring the infringement to be brought to an end and impose fines and periodic penalty payments to enforce that order. Such an order may well have the same practical effect as a positive injunction.

108. I am therefore of opinion that the first reason for rejecting Automec's complaint is unsound and that it is unnecessary to consider whether the Commission has power under Article 85 to pronounce a positive injunction.

109. As regards the second reason for rejection, much has been said by the Commission in this case and elsewhere about the availability of relief in the national courts. But it is important to remember, even if it is obvious, that national courts are *national* courts. The Treaty confers no supranational jurisdiction on them.

110. If he is to rely on national remedies, the victim of anticompetitive behaviour must first find a court competent and willing to assert jurisdiction over the intended defendant in respect of the conduct in question. The Brussels or Lugano Conventions may apply, but it is not yet clear how private actions to enforce direct rights under Articles 85 and 86 are to be treated under those Conventions. It may be that, in a given situation, no court in a Community or EFTA state would be prepared to assert jurisdiction. The courts of countries outside the Community and EFTA, applying their own rules, might not be prepared to apply Community competition law.

111. Assuming that the aggrieved party has found a court prepared to deal with the substance of the dispute, will that court be able grant interim measures to protect his position before final judgment is given? The applicable national rules may not provide for interim measures operative, and it is not yet

clear how far the Conventions have made them operative, beyond the limits of national jurisdiction. If the aggrieved party is obliged to bring separate actions in each state in which he needs interim measures to be effective, he may be defeated by time, logistics and money.

for breach of the EEC competition rules fell within this provision.¹⁷ It therefore declined a request for assistance from a US court dealing with a private action involving allegations of breach of US antitrust law. The application of such a rule in the context of Article 85 or 86 actions could make practically all evidence impossible to obtain.

112. Then there is the problem of obtaining evidence. A court cannot normally conduct investigations on the territory of another state. Not all member states are signatories of the Hague Conventions of 1954 (on civil procedure) and 1970 (on evidence abroad), even assuming that Article 85 and 86 cases come within the scope of those Conventions. In so far as the Conventions do apply, they are subject to reservations. For example, Article 23 of the 1970 Convention permits a state to declare that it will not execute letters of request issued for the purpose of obtaining pre-trial discovery of documents. All the participating states except the USA have made this reservation in some form. Such reservations and uncertainty over their scope has made it very difficult to secure the production of documents in some countries.

114. Measures of compulsion to obtain testimony or the production of documents are in any event subject to national rules which may vary considerably in their scope and effect. Experience shows that, in competition cases, vital evidence is likely to be under the control of the potential defendant, hence the wide powers given to the Commission under Regulation 17. Without compulsion — or the threat of it — an undertaking in breach of Article 85 or 86 is unlikely to disclose. It will not always be the case that a national court is both able and willing to apply compulsion.

113. Execution of judicial requests for assistance is also subject to the national rules of the executing state. One such rule in England is that a person need not produce a document if this would expose him to proceedings for a criminal offence or for the recovery of a penalty. In 1977 the House of Lords ruled that the risk of fines imposed by the Commission

115. The enforcement of final judgment within the Community should not prove too difficult, provided the Brussels Convention applies. But that will be small comfort to a genuine victim of unlawful behaviour if he cannot find a court prepared to assert juris-

17 — *Rio Tinto Zinc Corporation v. Westinghouse Electric Corporation* [1978] AC 547, applying Section 14 of the Civil Evidence Act 1968.

diction or grant the necessary interim measures, or if he cannot obtain the evidence to prove his case.

116. The availability of relief in the national courts is not a straightforward matter. The Commission cannot, in response to a genuine complaint, simply repeat a ritual formula to the effect that relief is available in the national courts. The Commission must apply its mind properly to the question whether relief would indeed be available, or whether it has a duty to exercise its own powers.

117. In this case the Commission has applied its mind to the availability of relief in the Italian courts. In effect, it concluded that the dispute is an Italian dispute of which the Italian courts are already seised and with which they are better able than the Commission to deal. Counsel for the applicants was able to suggest only two substantive reasons why this is not so. One was that the BMW parent

company in Germany (BMW AG) cannot be sued in Italy. The other was that Automec's case involves application of block exemption regulations in respect of which the Commission has exclusive competence.

118. I was not persuaded that there is any necessity for Automec to bring proceedings against the BMW parent company in Germany in order to secure effective relief. I was also unable to understand in what way Automec's case would involve the national court in usurping the Commission's exclusive competence to apply Article 85(3).

119. My opinion therefore is that the Commission was entitled to decide not to proceed further with Automec's complaint for the reasons set out in paragraph 2 of the Commissioner's letter of 28 February 1990. I therefore propose that the action be dismissed.

Conclusion

For the foregoing reasons, I propose that the cases be disposed of as follows:

Case T-24/90 *Automec v Commission* should be dismissed and the applicants ordered to pay the costs.

Case T-28/90 *Asia Motor France v Commission* should be dismissed so far as based on Article 178 of the Treaty and, so far as based on Article 175, as being without further purpose. The Commission should be ordered to pay the costs.