

Decision of the European Ombudsman on complaint 829/22.8.96/FDR/D/PD against the European Commission

Decision

Case 829/96/PD - Opened on 17/12/1996 - Decision on 29/07/1998

Strasbourg, 29 July 1998 Dear Mr R., On 12 July 1996 you lodged a petition with the European Parliament concerning the European Commission's dealing with complaints you had lodged with the Commission, concerning alleged infringements of Community competition rules by certain car manufacturers and car importers. On 7 August 1996 you lodged a complaint with the European Ombudsman concerning largely the same matter. On 25 August 1996 you sent a further submission. On 6 September 1996 I acknowledged receipt of your complaint dated 7 August 1996. On 9 September 1996 you sent me a submission concerning largely the same matters as those put forward in your petition to the European Parliament, dated 12 July 1996. As your petition to the European Parliament appeared to concern an alleged instance of maladministration in the activities of the Commission, the Parliament forwarded your submission to me to be dealt with as a complaint, on 10 September 1996. On 17 December 1996 I sent you a letter declaring your complaint admissible and at the same time, I regretted the delay of my assessment in this respect. On the same day, I forwarded your complaint to the Commission for an opinion. On 2 February 1997 you sent me a submission with largely the same allegations as those already put forward in your previous submissions. On 17 February 1997 you sent me a letter stating that you had received no further correspondence from me after the acknowledgment of receipt mentioned above. A member of my staff replied by letter on 24 February 1997, enclosing a copy of the above mentioned letter of 17 December 1996, and confirming that your case was being dealt with. On 24 April 1997 I forwarded the Commission's opinion to your complaint to you for observations. Further to the Commission's opinion you have submitted extensive observations; in 1997, by letters of 6 May, 21 May, 22 May, 31 May, 23 July, 4 September, 5 September, 18 September (two letters), 19 September, 24 September (three letters), 25 September (two letters), 27 September (three letters), 12 October, 14 October, 15 October, 16 October, 1 November, 5 November, 7 November, 17 November, 21 November, 25 November, 28 November, 2 December, 3 December, 17 December, 20 December, 22 December and 28 December. In 1998, you have lodged observations by letters of 1 January, 7 January, 9 January, 13 January (two letters), 16 January, 20 January, 21 January, 31 January, 2 February, 3 February, 8 February, 11 February, 18 February, 3 March, 4 March, 5 March, 9 March and 10 March. Furthermore, it shall be noticed that beside your complaint, I have also received letters, dated 19 and 29 October 1997, 10 November 1997 and 13 February 1998, concerning largely the same matters, sent by Mr R., who lives at the same



address as you and whom you in a telephone conversation told a member of my staff is your son. During the same call, you stated that there was no obstacle against dealing with your son's submissions within the framework of your complaint. Consequently, your son will receive a copy of this decision. I am writing now to let you know the results of the inquiries that have been made. I am genuinely sorry that the dealings with your complaint have taken much more time than expected.

THE COMPLAINT

The background to your complaint is in brief the following: It appears that cars produced by German car manufacturers often is more expensive in Germany than in some other Member States, for instance Denmark, the Netherlands and Finland. Given this fact, it occurs that consumers, domiciled in Germany, address car dealers in other Member States in order to buy their car there. When they do so, it seems that it occurs that they run into obstacles such as for instance plain refusal to sell to consumers, domiciled in Germany, excessive time limits for delivery or artificially increased prices. On a number of occasions, you, who are domiciled in Germany, addressed individual car dealers in other Member States, with a view to buying a car. It appears that you ran into obstacles of the kind mentioned. Considering that refusals or reluctance to sell cars to consumers on the grounds that they are domiciled in another Member State are contrary to the European Community's rules on competition, you addressed the Commission. Subsequently, there was considerable correspondence between you and the Commission; it appears that the Commission did in principle not contest your perception of law that the reported instances would be contrary to the competition rules, as amongst others laid down by Regulation N° 1475/95 on the application of Article 85 (3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements, published in the Official Journal of the Communities, OJ 1995 L 145, p. 25, which replaces an earlier Regulation on the matter, Regulation N° 123/85, OJ 1985 L 15, p. 16 . However, you considered that the Commission did not take steps to enforce the competition rules. Therefore, you lodged the complaint with the European Ombudsman. You expressed in particular discontent with a letter that the Commission had addressed to you on 28 June 1996. In the letter the Commission refers to the exchange of correspondence between you and the Commission and seeks to explain its policy on the matter. The relevant paragraphs read as follows: *"... The Commission, as the responsible administrative authority acting in the public interest, is required to ensure compliance with EC competition policy and, when infringements occur, take the requisite organizational measures and, in particular, determine priorities. In making that choice the Commission gives precedence to those cases which are particularly significant from the political, economic or legal point of view. This principle also applies, of course, to the receipt and handling of complaints. In this connection I must point out, however, that the European competition rules do not enable the Commission to help private persons to enforce their subjective rights. This is basically the function of national courts which - unlike the Commission - are also able to determine entitlement to damages The Commission is aware that in individual cases there may be difficulties with purchasing a car in Finland or Denmark, the possible reasons for which have already been explained to you in writing by the relevant department. The fairly comprehensive exchange of correspondence to date arising from your case shows that the*



Commission has taken action within the sphere of its responsibilities. In view of the understandable desire of millions of drivers in the EU to buy their cars as cheaply as possible, and also in view of the difficulties that sometimes occur when they do so, the Commission cannot take action in each individual case involving a personal interest ..." (The Ombudsman's underlining) You considered the Commission's reference to cases of personal interest ("Partikularinteresse") inadequate, as you pursued this matter in the interest of the general public. Against this background, you have put forward six grievances in your complaint: a) the Commission is inactive in pending procedures, b) the Commission tolerates illegal practices and continuous and systematic violation of Regulation N 1475/95, c) the Commission fails to monitor the applicable rules, d) the Commission does not take seriously proved violations of the law, e) the Commission has wrongly assessed whether procedures should be initiated against the car manufacturers who allegedly violate the relevant competition rules, and f) the Commission ignores the citizen's right to complain. In brief, your complaint is to the effect that the Commission has been passive in the matter complained of or that the course of action taken by the Commission has been inappropriate.

THE INQUIRY

The Commission's opinion In its opinion the Commission has stated as follows: "1.

Background The overall matter concerns alleged obstacles to parallel exports of new motor vehicles from certain Member States. Pursuant to Commission Regulation (EC) No 1475/95 (1), a manufacturer and/or his importer must not restrict the freedom of final consumers - and/or intermediaries having prior written authority from such consumers - to obtain a new motor vehicle from whichever authorized dealer they choose within the Common Market, which is one of the fundamental achievements of the European Community. Although the consumer's right is not accompanied by an obligation to impose on the dealers to sell, a dealer may not reject a consumer's offer to buy or ask for a higher price simply because the consumer is a resident of another Member State. On the other hand, a manufacturer may take measures against sales by its dealership to so-called 'non-authorized' or grey market dealers acting as resellers. 2. The issue The exchange of correspondence between Mr R. and the Commission's Directorate-General for Competition began in August 1994, when Mr R. complained about alleged hindrances to buying a car of the BMW make in Denmark. In the following period, the Commission received further correspondence concerning other manufacturers, such as Audi, Volkswagen/Audi (VAG), Mercedes-Benz, General Motors/Opel and Ford, i.e. all important German car manufacturers. The Member States where, according to Mr R., alleged hindrance of parallel exports has taken place, were Denmark and in particular Finland. Mr R. also referred in certain cases to Spain, the Netherlands and Italy. 3. The Commission's reactions In the first of the above-quoted cases, which concerned the behaviour of BMW in Denmark and which was raised in August 1994, the Commission intervened in the same month. In October 1994, Mr R. informed the Commission that, thanks to its efforts, the problem was solved. In the next case, which concerned Audi and Denmark and in which correspondence between Mr R. and the Commission began in September 1995, the Commission requested Audi for information in October and addressed letters to Mr R. in October and November 1995, explaining to him that the Commission cannot act as intermediary on behalf of final consumers. It referred, at the same time, to the particular



situation in Denmark, where the taxation policy may, in certain cases, prevent dealers from selling to non-residents. In April 1996, Mr R. complained about alleged obstacles to car sales created by VAG (Volkswagen and Audi) in Denmark and Finland. The Commission replied to Mr R. in the same month, saying that it would take the necessary steps in case of an infringement of competition rules, but referred again to the particular fiscal situation in both Member States. It also received copies of the parallel correspondence of May 1995 between Volkswagen and Mr R. In May 1996, Mr R. submitted allegations against Ford concerning Finland. The Commission reacted in June 1996, establishing a formal complaint and sending a formal request for information to Ford. In the same month, and following a request by Mr R. to Commissioner Van Miert, the Commission took the opportunity of explaining to the complainant, in some detail, its general attitude towards the different issues raised by him (2). From May 1996 onwards, the Commission received further submission from Mr R., who was then complaining about Mercedes-Benz, again in Finland, and also Spain. The Commission answered the letters concerning Finland in October and November 1996, and those concerning the Spanish market, which the Commission received in September and October 1996, in November 1996. In June 1996, Mr R. continued his allegations, this time with respect to General Motors/Opel concerning the Danish and Finnish markets, and later also the Netherlands. The Commission responded in July 1996, referring to the formal complaint concerning Ford and Finland, and assured him that the necessary procedural steps were being taken. The Commission wrote in July and August 1996 to Mr R., explaining to him that all of the cases concerning the Finnish market (i.e. involving Mercedes-Benz, Ford, General-Motors/Opel and VAG) had been concentrated in one formal complaint, as the problem appeared to be connected with the Finnish system of car taxation. The Commission informed Mr R. that, with regard to the pricing policy of Ford in Finland, the necessary investigations would be undertaken. In its various replies to Mr R., the Commission explained repeatedly and in a detailed manner its attitude towards the issue under consideration. In the above-mentioned letter signed by Mr Karel Van Miert of 28 June 1996, the Commissioner underlined in particular that it is the Commission's duty to monitor Regulation 1475/95 and to implement competition policy. He stressed that, in cases of infringements, the Commission would not hesitate to take the necessary organisational measures, in accordance with its priorities. On the other hand, it could not be the Commission's duty to help private persons in enforcing their subjective rights (or their so-called "Partikularinteresse"), which is, in fact, a task for national jurisdictions. Mr Van Miert assured Mr R., however, that the Commission would act according to its principles if it had sufficient evidence for infringements of competition law. It is for the Commission, nonetheless, to assess whether such evidence represents a proof, on the basis of which an infringement of competition rules can be stipulated. The approach chosen by the Commission corresponds to the principles confirmed by the Court of First Instance (3). In its judgment, the Court confirmed in particular that the Commission as an administrative authority has to act in public interest. This implies that, in determining the priority degree which it assumes to a case, the Commission considers the public interest involved, taking also into account its administrative resources. Beyond this, the existence of a group exemption regulation would facilitate, as in this case, the application of Community law by the national judge. 4. Further actions undertaken by the Commission In the total of 30 letters which Mr R. has addressed to the Commission since 1994, he complains about the conduct of the 6 main German car manufacturers BMW, Audi, Volkswagen, Ford, Mercedes-Benz and General-Motors/Opel. And of their importers in five other Member States, mostly Denmark and



Finland, but also Spain, the Netherlands and Italy. Although it does not appear that Mr R. in each case finally would have the intention to buy the car referred to in his submission, he underlines that he as a consumer, in principle should be entitled to purchase a car for individual purposes wherever he wants. This, indeed, is an important part of the Regulation. For many years, the Commission services have received a great number of letters from individual consumers regarding the obstacles which they encounter when trying to buy a car in another Member State than the one in which they are residing. Frequently, such problems may be settled to the satisfaction of the complainants after a simple formal contact by the services of the Commission with the car manufacturer concerned. In other cases, however, the problem may be more serious, in particular where there are a great number of complaints and a formal action by the Commission may be called for. In such cases it is often very difficult to find sufficient evidence for a real violation of the competition rules and considerable efforts may be required in order to find such evidence. Thus, as an example, in October 1995, the Commission undertook an inspection on the basis of Article 14 (3) of Council regulation No 17/62 (case V/35.733/F-2-Volkswagen/Audi) at the premises of Volkswagen/Audi in Germany, with Autogerma, their common importer in Italy, and a number of North Italian authorized dealers. This inspection was motivated by the great number of individual complaints that the Commission had received in particular from Austrian, German and French consumers, reporting hindrances in buying Volkswagen and Audi cars in Italy. In November 1996, the Commission informed the public, by means of a press release, that it had sent a statement of objections to Volkswagen and Audi in October 1996, relating to alleged hindrance of parallel exports in Italy (4). At the same time, the Commission took the opportunity of clarifying the role of the national courts in cases where individual complaints occur in association with Regulation 1475/95. In October 1996, the Commission addressed, following complaints, inter alia, by Mr R., a formal request for information to four car manufacturers (Volkswagen, Audi, Mercedes-Benz and Opel) concerning their pricing policy for the Finnish market. In July 1996, the Commission had addressed a similar request to Ford and had, simultaneous, consulted the Finnish Office of Free Competition (5) about the car pricing policy in Finland in case of re-export. By November 1996, the Commission had received replies from the manufacturers addressed. Subject to a final assessment of the replies obtained by the manufacturers, it cannot be excluded that the issue has to be seen in a wider context of fiscal harmonisation, which would exceed the scope of competition policy. In addition, other actions to verify allegations regarding hindrance of parallel car exports from certain Member States have been and are being undertaken. 5. Conclusion As explained above, a great number of other submissions are being received from consumers and individuals regarding various aspects of car distribution in the European Union. The Commission's services responsible for the application of the competition rules in this sector devote considerable time and resources to the follow-up and investigation of these complaints. In this context, inter alia, Mr R.'s submissions have, since 1994, caused considerable work for the Commission's services responsible for dealing with these issues in the appropriate manner. Given the above circumstances, the Commission considers all the allegations raised by Mr R., pointing at the Commission's inactivity and the inappropriateness of the measures taken, as unfounded."

The complainant's observations In your observations, you have in particular emphasized that you had a right to complain and not only represented your own interest ("Partikularinteresse"); that the Commission was not replying to your correspondence nor acknowledging receipt of your letters; that infringements were taking place and that both the Commission and the



European Parliament easily could establish them through investigations; that the Commission however was not investigating these infringements but rather displaying almost complete inactivity; that the free movement of goods in fact was not protected anywhere in the Union; and finally, you have specified various actions that the Commission, in your opinion, should be obliged to take. You have further, generally speaking, recalled your allegations concerning the Commission's inactivity and tolerance towards the alleged infringements of the competition rules, and the ways in which it, in your opinion, evades its responsibility, to some extent even by means of fraud, for the upholding of the competition rules. In your opinion, the Commission supports the infringements and is completely biased in favour of the car industry. Furthermore, you have attached material, mainly newspaper articles and price lists from some of the companies complained of, which in your opinion show that infringements are taking place. You also appear to have asked the Ombudsman to investigate directly the car manufacturers and car importers. Furthermore, you appear to have complained to me of Commission Regulation N 1475/95 as such. **Subsequent developments** After lodging your complaint with the European Ombudsman, you continued to address the Commission directly. On 16 December 1997 the Commission addressed a letter to you under Article 6 of Regulation N 99/63. In this letter the Commission informed you that it had the intention of not opening formal investigations with regard to four of the files concerning your complaints, as the matters complained of were not of sufficient Community interest to merit such investigations. You were invited to submit observations on this preliminary conclusion of the Commission within a time limit of six weeks, if you so wished. The letter is divided into two titles, the first one called "Your submissions" and the second one "The Commission's opinion". This last title reads as follows:

"Pursuant to Article 3(2) of Regulation No 17/62, natural or legal persons who claim a legitimate interest may submit complaints. Even on the assumption that you have a legitimate interest, the points set out below need to be borne in mind. The opening of a formal investigation by the Commission would entail disproportionate expenditure in relation to the limited significance of the case. As the Community authority responsible for implementing the Community's competition policy, the Commission must serve the general interest. It has only limited administrative resources at its disposal to carry out its function, and it cannot deploy them in every case that is brought to its notice. In your letters to the Commission you complain about the alleged general refusal of dealers authorized by various car manufacturers in the Community Member States referred to sell you a car for the purpose of immediate re-export, or about the fact that they were only prepared to do so at an allegedly excessive price. In your letters you claim that your subjective rights have been violated. You are free to bring an action claiming violation of those rights before the national courts of the Member States. The national courts can apply the European competition rules and - unlike the Commission - may award damages. In addition, since 1985 the sale of motor vehicles has been subject to a group exemption regulation. Commission Regulation (EEC) No 123/85 of 12 December 1984 was in force from 1 July 1985 to 30 June 1995. It was replaced on 1 July 1995 by Commission Regulation (EC) No 1475/85 of 28 June 1995. The purpose - and one advantage - of group exemption regulations is, in part, to enable national courts to apply European competition law. Article 6(1)(7) of Regulation No 1475/95, for instance, provides that the benefit of exemption automatically lapses where the freedom of final consumers, authorized intermediaries or dealers to buy a motor vehicle from an undertaking belonging to the network of their choice within the common market is indirectly or directly restricted. Consequently, there is insufficient Community interest to warrant the



Commission opening an investigation."

In reply to this letter, you submitted observations to the Commission to the effect that it was wrong to consider that the complaints represented insufficient Community interest, and you submitted observations to the same effect to the Ombudsman. In your observations, you have repeatedly stated that the Commission by this letter has rejected all your complaints. However, it appears that the letter only concerns four of the files which the Commission opened pursuant to your complaints. Following your observations, the Commission will now have to reach a final conclusion whether to close those four files. Furthermore, it appears that the Commission is still investigating two other files that it opened pursuant to your complaints. **Other facts** It shall be recalled that the Commission yearly publishes a report on competition policy. In its report for 1996, the Commission stated in paragraphs 54 - 55, concerning the car sector:

".. A core principle [of Regulation N 1475/95] is the freedom for European consumers to purchase a new motor vehicle, either directly or through an authorized intermediary, wherever they wish in the European Union. Contractual provisions which restrict this freedom by the manufacturer, the supplier or another undertaking within the network are blacklisted and are automatically void. Where such infringements take place, consumers can take action before the competent national courts, which can - in contrast to the Commission - grant more easily injunctions and award damages. However, the Commission is likely to intervene where undertakings, through anti-competitive agreements or practices, isolate national markets by restricting parallel trade. It will be recalled that, in its bi-annual studies on car price differentials, the Commission found that car prices within the Community still differ substantially. As price differences is the strongest incentive for parallel trade, end consumers increasingly seek to purchase a vehicle in Member States where prices and other sale conditions are the most favourable. Since the beginning of 1994, the Commission has received numerous complaints from final consumers who have experienced major difficulties in buying cars outside their own Member State. As a result, the Commission has carried out inspections to find out whether some motor vehicle manufacturers have developed a strategy, together with their Italian contract partners, aimed at hindering German, French and, in particular, Austrian final consumers from acquiring a vehicle on favourable terms in Italy and thus benefiting from the advantages of the internal market. On the basis of documents collected during these inspections, the Commission has concluded, on a provisional basis, that the undertakings concerned pursued such a strategy. It therefore sent, in October, a statement of objections to two car manufacturers, charging them with infringement of the competition rules and giving them the opportunity to present their point of view. A final conclusion in this case is expected in 1997. Apart from complaints concerning the Italian market, the Commission has had to deal with a number of complaints by end consumers which concerned other Member States (such as Denmark, Finland, Sweden, the Netherlands and Spain), where dealers either refused to sell to non-residents or were prepared to sell only at a higher price or imposed certain requirements on end consumers or intermediaries acting on their behalf. Further complaints referred to dealers who refused to honour manufacturers' warranties for vehicles imported from other Member States. While some of these cases were settled after the Commission's active intervention, other required further investigation with manufacturers and/or their respective importers."

In accordance with normal practice, the European Parliament adopted a resolution on the Commission's report. The resolution is published in OJ 1997 C 358, p. 55 and the Parliament states i.a.:



The European Parliament "deplores the lack of a genuine internal market relating to the distribution and servicing of motor vehicles, as numerous complaints from consumers prove; calls on the Commission to ensure once and for all a free market where consumers can without any problems buy a car outside their own Member State and where no obstacles to parallel trade exist."

Furthermore, it shall be noted that in January 1998, the Commission adopted a decision establishing infringement of the competition rules, committed by Volkswagen and imposing a fine of 102 million ECU on the company. The decision is published in OJ 1998 L 124, p. 60. In the press release that the Commission issued, when adopting the decision, it is stated: *"Commenting on the decision, Mr van Miert said that the Commission would not hesitate to take the necessary measures against motor manufacturers who did not comply with the Regulation [N 1475/95] governing motor trade..... The size of the fine is an indication that the Commission will not tolerate practices of this kind and will act with similar determination against other manufacturers who set out to partition the market."*

THE DECISION

The Ombudsman's competence 1. Given the fact that in your observations, you appear to have asked the Ombudsman to investigate directly the car manufacturers and car importers concerned and to scrutinize the merits of Regulation N 1475/95, it is necessary to recall the limits of the mandate of the European Ombudsman. The Treaty establishing the European Community and the Statute of the European Ombudsman set precise conditions as to the admissibility of a complaint. The Ombudsman can only start an inquiry if these conditions are met. One of these conditions is, according to Art 2.1 of the Statute:

"Within the framework of the Treaties (...) the Ombudsman shall help to uncover maladministration in the activities of the Community institutions and bodies (...) No action by any other authority or person may be subject of a complaint to the Ombudsman ."

Thus, the Ombudsman cannot inquire into infringements allegedly committed by the car manufacturers and importers, but only into the Commission's investigations of those infringements. Furthermore, Art 2.2 of the Statute provides:

"Any citizen of the Union (...) may (...) refer a complaint to the Ombudsman in respect of an instance of maladministration ..."

As stated in the European Ombudsman's report for 1995, this means that it is not the task of the Ombudsman to examine the merits of legislative acts of the Communities such as regulations and directives. Thus, the Ombudsman cannot deal with your allegation concerning the merits of Regulation N 1475/95. *The Commission's passivity and the adopted course of action* 2. Firstly, it is necessary to recall the legal framework within which your complaint shall be assessed. 3. As for the substantive law, Art 85 (1) of the Treaty prohibits anticompetitive agreements and behaviour which can affect trade between the Member States. Art 85 (3) provides that under



certain circumstances, Art 85 (1) can be declared inapplicable. Under Regulation N 19/65, the Commission is empowered to make such a declaration of inapplicability by means of a general regulation, a so-called exemption regulation. The effect of such a general regulation is thus that agreements that meet the conditions laid down by the regulation, are not prohibited by Art 85 (1) of the Treaty. On the contrary, if an agreement does not meet the conditions or violates these, it is in principle caught by the prohibition in Art 85 (1). As concerns the motor vehicle sector, the Commission has, under Regulation N 19/65, adopted Regulation N° 1475/95 of 28 June 1995 on the application of Article 85 (3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements. Art 6 of Regulation N° 1475/95 entails that it does not apply where a manufacturer, the supplier or another undertaking directly or indirectly seeks to restrict the freedom of final consumers to obtain a new motor vehicle from whichever authorized dealer they choose within the Community. Thus, such a behaviour is in principle prohibited by Art 85 (1) of the Treaty. 4. As for the procedural law laid down to make the substantive law operational, it shall be recalled that Art 85 (1) can be applied both by the Commission and national authorities, including national jurisdictions. On the contrary, Art 85 (3) can only be applied by the Commission. The relation between the Commission and national authorities is the object of a Commission notice on cooperation between national competition authorities and the Commission in handling cases falling within the scope of Articles 85 and 86 of the EC Treaty, which has been published in the Official Journal of the Communities, OJ 1997 C 313, p. 3, and the cooperation with national courts is likewise the object of a Commission notice, published in OJ 1993 C 234, p. 89. As for the Commission's procedures, the main provisions are to be found in Council Regulation N° 17/62 and under Article 24 of this Regulation, the Commission has adopted more detailed Regulations, amongst others Regulation N° 99/63. Article 3 in Regulation N 17/62 provides i.a.: Regulation N 17/62 provides i.a.:

"1. Where the Commission, upon application or upon its own initiative, finds that there is infringement of Article 85 or Article 86 of the Treaty, it may by decision require the undertakings or associations of undertakings concerned to bring such infringement to an end. 2. Those entitled to make application are: a) Member States b) natural or legal persons who claim a legitimate interest."

Article 6 of Regulation N° 99/63 is related to this provision. Article 6 provides:

"Where the Commission, having received an application pursuant to Article 3 (2) of Regulation 17, considers that on the basis of the information in its possession there are insufficient grounds for granting the application, it shall inform the applicants of its reasons and fix a time limit for them to submit any further comments in writing."

Thus, it is clear that persons who have a legitimate interest may lodge a complaint with the Commission about supposed infringements of Article 85 of the Treaty. Bearing in mind that the Court of Justice has held that the complainant is not entitled to request the Commission to reach a final decision whether there is an infringement or not, the procedure following a complaint can roughly be summed up like this: If, after initial investigations, the Commission finds the complaint justified and the undertaking concerned is not disposed to resolve the matter, the Commission may start a formal infringement procedure, which involves strict observance of the rights of defence of the undertaking concerned. If, after initial investigations, the Commission considers the complaint unjustified, the complainant is informed under Article 6 of Regulation N 99/63 - a so-called Art 6 letter - and has the right to submit observations but cannot challenge the letter before the Community Courts. If the Commission, after considering



the observations, persists in its view, it takes a definitive stand which the complainant may challenge, see judgment of the Court of Justice of 18 March 1997 in case C-282/95 P, *Guerin Automobiles*, [1997] ECR I-1503. It shall be noted that in case the complainant considers that the Commission fails to act on his complaint, it follows from the case law that the Art 6 letter brings this failure to an end, see amongst others judgment of the Court of Justice of 18 October 1979 in case 125/78, *GEMA v Commission*, [1979] ECR 3173. 5. However, this briefly described system is complemented by the case law of the Community Courts, according to which the Commission may abstain from pursuing a complaint on the ground that it lacks sufficient Community interest, see judgment of the Court of First Instance of 18 September 1992 in case T-24/90, *Automec II*, [1992] ECR II-2223. The reasoning of the Courts is that the Commission's responsibilities in competition matters form part of its general obligation, as the Guardian of the Treaty, to monitor the application of Community law; in discharging this obligation, the Commission is obliged and entitled to give different degrees of priority to the matters before it; within the field of competition, the criterion "Community interest" is a relevant and lawful criterion. There appears to be a general understanding that in case the Commission rejects a complaint because of lack of Community interest, the rights of defence of the undertaking complained of bar the Commission from taking a stand on whether there is an infringement or not. (6) 6. Thus, in summary, the Commission has to act upon a complaint lodged by a person having a legitimate interest. It may find that the complaint shall be dismissed on the grounds that it lacks sufficient "Community interest" and shall then inform the complainant in a so-called Art 6 letter. This letter puts to an end a possible failure to act on the complaint. The complainant may submit observations on the Art 6 letter, maintaining the complaint. If the Commission persists in its view that the complaint lacks "Community interest", it shall adopt a final stand to that effect. When assessing the "Community interest", the Commission shall act within the limits of its legal authority. The Commission's final stand may be challenged by the complainant. 7. Hereafter, your complaint can be assessed. 8. It is common ground that over some years, you have brought suspected infringements to the Commission's attention. It appears that the Commission has considered that you qualify as a person with a legitimate interest in lodging complaints within the meaning of Art 3 (2) in Regulation N 17/62. It appears from the Commission's opinion that one of the alleged infringements was resolved pursuant to its intervention and that the other ones were investigated. 9. During the investigations, the Commission addressed the above mentioned letter of 1996 to you, in which it referred to cases of personal interest "Partikularinteresse". This letter appears to be in line with the Commission's general policy as it is amongst others described in the above mentioned quote from its annual report on the competition policy, which in turn rests upon the case law of the Community Courts. The claim that it constitutes maladministration does therefore not appear warranted. 10. The investigations initiated in some of your complaints are still on-going. For the present, there are no elements at hand indicating that the Commission should not be investigating these complaints with due care, in accordance with principles of good administration. 11. In four of the files opened by the Commission pursuant to your complaints, the investigations initiated led the Commission to the provisional conclusion that your complaints did not represent sufficient Community interest, and it informed you correspondingly in the so-called Art 6 letter that it addressed to you on 16 December 1997. As stated above, it follows from the case law of the Court that such a letter puts an end to a possible failure to act on a complaint. It remains now to be seen which final conclusion the



Commission will reach in due course, after having studied your extensive observations. Under these circumstances, it would not be appropriate for the Ombudsman to enter into an assessment of the merits of the letter. However, the letter has led the Ombudsman to formulate below further remarks to the attention of the Commission. 12. Thus, as things stand, the Ombudsman finds that it is not justified to claim that the Commission has been passive or taken an inappropriate course of action. Although you may want the Commission to deploy more resources to this matter, which is of high concern to you, there does not appear to be grounds for the claim that the Commission has been inactive or taken an inappropriate course of action. *Conclusion* 13. On the basis of the European Ombudsman's inquiries into this complaint, there appears to have been no maladministration by the European Commission. The Ombudsman has therefore decided to close the case.

FURTHER REMARKS

1. The European Ombudsman was created amongst others to enhance relations between the European Institutions and the European citizens. This task implies i.a. that the Ombudsman should also help secure the position of citizens by promoting good administrative practices and encourage administrative authorities to seek solutions that will improve their relations with citizens. Against that background, the European Ombudsman shall make the following suggestions : 2. Without prejudice to the non-binding nature of the so-called Article 6 letter, the Commission could on its own initiative seek to give comprehensive and adequate reasons for its intention to close the file on a complaint in the letter, thus enabling the citizen to fully comprehend the position of the Commission and to lodge adequate observations. This would appear to be in accordance with principles of good administration. 3. Furthermore, in matters which may be of general interest, the Commission could take account of the fact that European citizens may only have limited time and resources for bringing court proceedings in defence of their rights, and this even more when proceedings would have to be brought in another Member State than the one where the citizen lives. Yours sincerely Jacob Söderman Copy: Mr Santer, President of the European Commission Mr Eeckhout, Secretariat general of the European Commission

(1) The Commission's footnote: "*Commission Regulation (EC) No 1475/95 of 28 June 1995 on the application of Article 85 (3) of the Treaty to certain categories of motor vehicle distribution and servicing agreements; OJ L 145, 29.6.1995, p.25, the text of which is included in the Explanatory Brochure "Distribution of motor vehicles" which is attached as annex I to this letter. This Regulation replaced Commission Regulation (EEC) No 123/85 on 1.10.1996.*"

(2) The above quoted letter of 28 June 1996.

(3) The Commission's footnote: "*Case T-24/90- Automec Srl against Commission of the*



European Communities, Judgment of the Court of First Instance of 18 September 1992."

(4) The Commission's footnote: *"Announcement by Mr Karel van Miert to the press on 6.12.1995."*

(5) The Commission's footnote : *"Correspondence between Kilpailuvirast and the Commission, attached as annex IV."*

(6) As for the obligations incumbent on the Commission, when it evaluates the "Community interest", the Court of First Instance has in general stated:

"Where...the Commission has decided to close the file on a complaint without carrying out an investigation, the review of legality which the Court must undertake focuses on whether or not the contested decision is based on materially incorrect facts or is vitiated by an error of law, a manifest error of appraisal or misuse of powers. It is for the Court to verify, in the light of those principles, first, whether the Commission carried out the examination of the complaint which was required of it by evaluating, with all due care , the factual and legal particulars adduced by the applicant in his complaint, and, secondly, whether the Commission has given a proper statement of reasons for closing the file on the complaint .."(judgment in the above mentioned case Automec II, paragraphs 80 and 81; the Ombudsman's underlining).

More specifically, the Court of First Instance has stated:

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

As for the relevance that the Commission may accord to the existence of national possibilities of redress, when assessing the Community interest, the Court of First Instance has stated:

"The fact that a national court or national competition authority is already dealing with a case concerning the compatibility of an agreement or practice with Article 85 and 86 of the Treaty is a factor which the Commission may take into account in evaluating the extent to which a case displays Community interest.... The Court considers that where the effects of the infringements alleged in a complaint are essentially confined to the territory of one Member State and where proceedings have been brought before the courts and competent administrative authorities of that Member State ...the Commission is entitled to reject the complaint through lack of any sufficient Community interest in further investigation of the case provided however that the rights of the complainant or its members can be adequately safeguarded in particular by the national courts.."(judgment of the Court of First Instance of 24 January 1995 in case T-114/92, BEMIM, [1995] ECR II-147, paragraphs 80 and 86).

As for the relevance that the Commission may accord to the existence of a general exemption regulation when assessing the Community interest, the Court of First Instance has stated:

"...the existence in the present case of an exemption Regulation, assuming that it applies, was a factor which the Commission was entitled to take into account in order to assess the Community



public interest in carrying out an investigation..".(judgment in the above mentioned case Automec II, paragraph 95).