

Decision of the European Ombudsman on complaint 1076/97/(OV)PD against the European Commission

Decision

Case 1076/97/OV - Opened on 24/02/1998 - Decision on 03/09/1998

Strasbourg, 3 September 1998 Dear Mr G., On 15 November and 18 December 1997 you lodged complaints with the European Ombudsman. The complaints were directed against Volkswagen in Germany, Pon's Automobielhandel B.V. (the Dutch importer of Volkswagen cars), and the European Commission (DG IV). You sent a third letter on 6 February 1998 which appeared to concern Volkswagen and Pon's. By a fourth letter, dated 14 February 1998, you complained of the said companies, and you appear to have demanded that action be taken against them. Your complaints basically concerned infringements of the competition rules in the motor vehicle sector, of which you accused Volkswagen and Pon's. Furthermore, you considered that the Commission has a duty to take measures against these companies in order to bring the infringements to an end: a duty which the Commission neglects, as it, in your view, is passive. By letter of 24 February 1998 I informed you that according to Article 2.1 of the Statute of the European Ombudsman, I was unable to deal with the complaints against Volkswagen and Pon's, as neither of these are institutions or bodies of the European Communities. By the same letter I informed you that the complaint against the Commission was admissible and that I had forwarded your complaint to the Commission. I also informed you that I had received another complaint lodged by Mr R., complaint 829/22.8.96/FDR/D/PD, who appears to live at the same address as you. As Mr R.'s complaint appeared to concern largely the same matter as yours, I forwarded the Commission's opinion on that complaint to you with an invitation to make observations, if you so wished. On 9 March 1998, you sent me your observations. 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 are often 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. You considered 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. As you also considered that the Commission was passive towards these violations of Community law, you lodged the complaint with the European Ombudsman.

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 on 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 the public interest. This implies that, in determining the degree of priority which it gives 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 would finally have the intention to buy the car referred to in his submission, he underlines that he as a consumer should in principle 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, simultaneously consulted the Finnish Office of Free Competition (5) about the car pricing policy in Finland in cases 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 his observations, the complainant in substance maintained his complaint. **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, others 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

1. It shall be recalled that you have in substance just brought forward one allegation, that is that the Commission is passive in relation to suspected violations of the Community competition rules in the motor vehicle sector. It appears from the Commission's opinion as well as from the above-quoted annual report on competition policy that the Commission has investigated reported instances of violations and that it is attentive to compliance with the competition rules in the sector. Furthermore, it appears from the public declarations of the responsible Commissioner, that the Commission will not hesitate to take the necessary measures against car manufacturers who do not comply with the applicable rules. Against this background, the Ombudsman does not consider it justified to claim that the Commission is passive. *Conclusion*
2. On the basis of the European Ombudsman's inquiries into this complaint, there appears to be



no maladministration by the European Commission. The Ombudsman has therefore decided to close the case. 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."*