ORDER OF THE COURT
23 May 1990 *

In Case C-72/90

Asia Motor France, a company governed by French law, established in Luxembourg, and Others, represented by Jean-Claude Fourgoux, of the Paris Bar, and Pierrot Schiltz, of the Luxembourg Bar, with an address for service in Luxembourg at the latter's Chambers, 13, rue Aldringen,

applicants,

v

Commission of the European Communities,

defendant,

APPLICATION, pursuant to the third paragraph of Article 175 of the EEC Treaty, for a declaration that the Commission has failed to adopt a decision in regard to the applicants based on Articles 30 and 85 of the EEC Treaty and, pursuant to Article 178 and the second paragraph of Article 215 of the EEC Treaty, for compensation for the damage caused by that failure,

THE COURT

composed of: O. Due, President, Sir Gordon Slynn, C. N. Kakouris, F. A. Schockweiler and M. Zuleeg (Presidents of Chambers), G. F. Mancini, R. Joliet, T. F. O'Higgins, J. C. Moitinho de Almeida, G. C. Rodríguez Iglesias, F. Grévisse, M. Díez de Velasco and P. Kapteyn, Judges,

Advocate General: F. G. Jacobs
Registrar: J.-G. Giraud

after hearing the views of the Advocate General,

makes the following

* Language of the case: French.

Order

1 By application lodged at the Court Registry on 20 March 1990 and registered on 21 March 1990, Asia Motor France and three other companies brought an action seeking in the first place a declaration, pursuant to the third paragraph of Article 175 of the Treaty, that the Commission had failed to adopt a decision in regard to them based on Articles 30 and 85 of the Treaty and in the second place, pursuant to Article 178 and the second paragraph of Article 215 of the Treaty, an order for compensation for the damage arising from the said failure.

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

3 Since it considered that it was the victim of an unlawful agreement between five major Japanese importers into France who were protected by the French Government, one of the applicant undertakings lodged a complaint with the Commission on 18 November 1985 under Articles 30 and 85 of the Treaty. That first complaint was followed on 29 November 1988 by a fresh complaint by the four applicant undertakings under Article 85 against the five major importers.

4 The applicants allege that the five major Japanese importers have given the French administration an undertaking not to sell in any year more than 3% of the vehicles registered, that quota being shared between the big importers according to pre-established rules which exclude competing undertakings.

5 In return for that voluntary limitation the French administration has increased the obstacles to the free movement of Japanese vehicles not covered by that agreement. In the first place, a special registration procedure was established for vehicles the subject of parallel imports. Such vehicles are treated as second-hand and are therefore subject to a dual roadworthiness test. In the second place, directives were issued by the gendarmerie nationale to prosecute purchasers of

second-hand Japanese vehicles driving with foreign registration plates. Finally such vehicles are subject on importation into France to a discriminatory rate of VAT of 28%, which has since been reduced to 18.6%, with all the disadvantages that that entails for the distributor *vis-à-vis* the purchaser.

6 By letter dated 9 June 1989 the Commission requested information from the importers in question. By letter dated 20 July 1989 the French Minister for Industry and Regional Development instructed the said importers not to reply to the questions put by the Commission because they concerned the policy pursued by the French public authorities with regard to the importation of Japanese vehicles.

7 Furthermore, in August 1989 the Commission sent a request for information to the French Government, the reply to which, assuming there was one, has not been disclosed to the applicants.

8 Having received no reply from the Commission, on 21 November 1989, the applicants sent a letter formally requesting it to adopt a position on the procedures initiated under Articles 30 and 85 of the Treaty. The Commission still did not reply and the applicants brought the present action.

9 Article 92(1) of the Rules of Procedure provides 'where it is clear that the Court has no jurisdiction to take cognizance of an application lodged with it in pursuance of Article 38(1), the Court may by reasoned order declare the application inadmissible. Such a decision may be adopted even before the application has been served on the party against whom it is made'.

10 Natural or legal persons may bring an action before the Court under the third paragraph of Article 175 of the Treaty only for a declaration that one of the institutions has failed, in breach of the Treaty, to adopt a measure of which it is the potential addressee. The complaint concerning the alleged infringement of Article 30 by the French authorities can in no event entail an obligation for the Commission to adopt a measure addressed to the applicants.

11 Even if the Commission had decided to initiate proceedings under Article 169 of the Treaty for a declaration that a State had failed to fulfil its obligations, it is clear from that article that none of the procedural measures would have had to be addressed to the applicants. That procedure thus excludes the right of private individuals to require the Commission to adopt a specific position in a measure addressed to them (judgment of 14 February 1989 in Case 247/87 *Star Fruit* v *Commission* [1989] ECR 291, and order of 30 March 1990 in Case C-371/89 *Emrich* v *Commission* [1990] ECR I-1555).

12 In those circumstances it should be held that the action for failure to act is patently inadmissible in so far as it concerns the Commission's inaction in relation to the alleged infringement of Article 30 by the French authorities.

13 In so far as the action for damages is based on liability arising from the Commission's failure to act under Article 30 of the Treaty, since the Commission is under no obligation to initiate proceedings under Article 169 (judgment of 14 February 1989 in Case 247/87 *Star Fruit*) the only conduct which may be challenged as the source of damage is that of the French State.

14 Clearly the Court has no jurisdiction to rule in an action brought under Article 178 of the Treaty on liability arising from the unlawfulness of conduct by a State. Such liability falls within the jurisdiction of national courts which may, if necessary, make use of the procedure under Article 177 of the Treaty.

15 In those circumstances it should be held that the application for damages is patently inadmissible in so far as it concerns liability arising from the Commission's inaction in relation to the alleged infringement of Article 30 by the French authorities.

16 In so far as the application concerns the Commission's inaction in relation to the alleged infringement of Article 85 of the Treaty and liability arising therefrom, it is to be observed that under Article 3(1)(c) of Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities (Official Journal 1988, L 319, p. 1), the Court of First

Instance is to exercise at first instance jurisdiction 'in actions brought against an institution of the Communities by natural or legal persons pursuant to the second paragraph of Article 173 and the third paragraph of Article 175 of the EEC Treaty relating to the implementation of the competition rules applicable to undertakings'.

17 Article 3(2) provides: 'Where the same natural or legal person brings an action which the Court of First Instance has jurisdiction to hear . . . and an action referred to in . . . Article 178 of the EEC Treaty . . . for compensation for damage caused by a Community institution through the act or failure to act which is the subject of the first action, the Court of First Instance shall also have jurisdiction to hear and determine the action for compensation for that damage'.

18 Article 47 of the Statute of the Court of Justice of the European Communities, as amended by Article 7 of the Decision of 24 October 1988, provides: 'where the Court of Justice finds that an action falls within the jurisdiction of the Court of First Instance, it shall refer that action to the Court of First Instance, whereupon that Court may not decline jurisdiction'.

19 It follows that in so far as the present action concerns the Commission's failure to act under Article 85 of the Treaty and the liability arising therefrom, it falls within the jurisdiction of the Court of First Instance.

20 It should therefore be declared that the action is in part clearly inadmissible and the remainder should be referred to the Court of First Instance.

21 The Court must rule on the costs relating to the claims declared inadmissible by the present Order. That part of the costs must be estimated on a flat-rate basis as half of the total costs incurred by the applicants up to the date of the present Order. Pursuant to Article 69(2) of the Rules of Procedure the applicants must be ordered to bear that part of the costs. It will be for the Court of First Instance to make an order in relation to the remainder of the costs incurred before the Court of Justice and the costs incurred before the Court of First Instance.

On those grounds,

THE COURT

hereby orders as follows:

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

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

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

Luxembourg, 23 May 1990.

J.-G. Giraud
Registrar

O. Due
President