ORDER OF THE COURT OF FIRST INSTANCE
16 February 1998 *

In Case T-182/97,

Smanor SA, a company incorporated under French law, established at Saint-Martin-d'Ecublei, France, and

Hubert Ségaud and Monique Ségaud, residing at Saint-Martin-d'Ecublei,

represented by Laurence Roques, of the Val de Marne Bar, 7-9 Rue du Général de Larminat, Créteil, France,

applicants,

v

Commission of the European Communities, represented by Richard Wainwright, Principal Legal Adviser, and Olivier Couvert-Castera, a national official on secondment to the Commission, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: French.

APPLICATION for annulment of the Commission's decision of 21 May 1997 not to initiate infringement proceedings against the French Republic,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES,

composed of: A. Kalogeropoulos, President, C. W. Bellamy and J. Pirrung, Judges,

Registrar: H. Jung,

makes the following

Order

Facts

1 Smanor SA ('Smanor'), the managers and principal shareholders of which are the joint applicants Hubert and Monique Ségaud, is a French company formerly specialising in the production and sale of fresh and deep-frozen dairy products, in particular yoghurt which it deep-froze by a patented process of its own invention.

2 From 1977 onwards, the French authorities took a number of steps, including bringing criminal proceedings, to prevent it, on the basis of the then applicable French regulations, from marketing such products under the name 'yaourt' or 'yoghourt'.

3 In 1986, taking the view that the various proceedings brought against it had been the cause of its financial difficulties and that the regulations on which they were based were unlawful, it brought an action against the French State seeking compensation for the damage it had thereby suffered and also lodged a complaint with the Commission against the French Republic, claiming that French Decree No 82-184 of 22 February 1982 amending Decree No 63-695 of 10 July 1963 on the prevention of fraud with regard to fermented milk and yoghurt was contrary to Council Directive 79/112/EEC of 18 December 1978 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer (OJ 1979 L 33, p. 1). In response to that complaint, the Commission informed Smanor, by letter of 3 April 1988, that a letter of formal notice would be sent to the French Republic under Article 169 of the EEC Treaty.

4 In 1987, judicial settlement proceedings were brought against Smanor before the Tribunal de Commerce (Commercial Court), L'Aigle, which considered that Smanor's financial problems stemmed from the French rules relating to yoghurt and, by judgment of 21 September 1987, requested the Court of Justice to give a preliminary ruling on the interpretation of Articles 30 to 36 of the Treaty and Articles 5, 15 and 16 of Directive 79/112 in the light of Decree No 82-184.

5 In its judgment of 14 July 1988 in Case 298/87 *Smanor* [1988] ECR 4489, the Court of Justice ruled:

'(1) Article 30 of the Treaty precludes a Member State from applying to products imported from another Member State, where they are lawfully manufactured and marketed, national rules which reserve the right to use the name "yoghurt" solely to fresh yoghurt, to the exclusion of deep-frozen yoghurt, when the characteristics of the latter product are not substantially different from those of the fresh product, and when appropriate labelling, together with an indication of the date by which the product should be sold or consumed, is sufficient to ensure that consumers are properly informed.

(2) The provisions of Directive 79/112/EEC, in particular Article 5, must be interpreted as precluding the application of national rules which refuse to allow imported or domestic products which have been deep-frozen to bear the name "yoghurt", where those products, for the rest, comply with the requirements laid down by the national rules for fresh products to bear that name.'

6 Decree No 82-184 was subsequently repealed and replaced by Decree No 88-1203 of 30 December 1988.

7 By judgment of 16 October 1990 given in the context of the action for damages brought in 1986 against the French State, the French Cour de Cassation (Court of Cassation) dismissed Smanor's appeal against a judgment of the Cour d'Appel (Court of Appeal), Caen, of 21 April 1988 rejecting its claim for damages on the ground that the food inspectorate had not been guilty of any serious fault in bringing proceedings against the company.

8 Following its first complaint lodged against the French Republic in 1986 (see paragraph 3 above), Smanor lodged further complaints in 1990, 1991, 1993 and 1995 concerning the unlawfulness of the French regulations relating to yoghurt and the French Republic's alleged violation of its right to reparation. In its last complaint dated 11 January 1995, registered by the Commission as No 95/4059, it again challenged the refusal of the French courts to uphold its claims for compensation for the damage which it claimed to have suffered as a result of the French Republic's application of measures contrary to Community law.

9 By letter dated 9 October 1996, Smanor called upon the Commission to initiate infringement proceedings against the French Republic. In its letter, it asked the Commission, with a view to enabling it to bring an action for damages against the French State on the basis of the judgment in Joined Cases C-6/90 and C-9/90 *Francovich and Others* v *Italian Republic* [1991] ECR I-5357, to make a finding of

infringement against the French Republic, concerning the failure to transpose Directive 79/112 within the prescribed period and the refusal of the French courts to award it compensation following the judgment in *Smanor*, cited above.

10 On 9 December 1996, the applicants brought an action against the Commission before the Court of First Instance, for a declaration of failure to act and for damages, on the basis of the Commission's failure to initiate infringement proceedings against the French Republic under Article 169 of the EC Treaty.

11 That action was dismissed as inadmissible by order of 3 July 1997 in Case T-201/96 *Smanor and Others* v *Commission* [1997] ECR II-1081.

12 In the meantime, by letter of 18 February 1997, the Commission's Directorate-General for the Internal Market and Financial Services (DG XV) had informed Mr Ségaud of the reasons for which it was not considered possible, on the basis of the facts alleged in the complaint of 11 January 1995, to initiate infringement proceedings against the French Republic in this case. It appeared doubtful whether Community law had been infringed, having regard to the conditions set out in the *Francovich* judgment, cited above, for a Member State to incur liability and to the assessment made by the French courts in the light of those conditions. Mr Ségaud was therefore informed that it was intended to propose to the Commission that no further action should be taken on the complaint, although the complainant was at the same time invited to submit any observations.

13 By letters of 2 and 11 March 1997, Mr Ségaud submitted his observations to the Commission. He reiterated his belief that Smanor's complaint was justified and requested the Commission to examine the circulars in the possession of the French public authorities, sent by them to the criminal courts in the context of the court proceedings in which Smanor was involved.

14 By letter of 21 May 1997, DG XV informed Mr Ségaud that the Commission had decided to take no further action on the complaint.

Procedure and forms of order sought

15 By application lodged at the Registry of the Court of First Instance on 17 June 1997, Smanor and Hubert and Monique Ségaud brought the present action.

16 By separate document, registered at the Court on 22 July 1997, the Commission raised an objection to admissibility under Article 114(1) of the Rules of Procedure, on which the applicants submitted their observations on 16 September 1997.

17 In their application, the applicants claim that the Court should:

— annul in its totality the Commission's letter of 21 May 1997; and

— grant their request, addressed to the Commission, for communication of the documents held in the French administration's archives concerning the Smanor case.

18 In its objection to admissibility, the Commission contends that the Court should:

— find the action inadmissible; and

— order the applicants to pay the costs.

19 In their observations on the objection to admissibility, the applicants claim that the Court should:

— dismiss the objection to admissibility raised by the Commission;

— find the action well founded; and

— order the Commission to resume the exercise of its investigatory powers and to provide both the Court and the applicants with all the documents in the French administration's archives concerning the Smanor case.

Admissibility

20 Under Article 114 of the Rules of Procedure, if a party applies to the Court for a decision on admissibility not going to the substance of the case, the remainder of the proceedings on the objection to admissibility are to be oral, unless the Court decides otherwise.

21 In the present case, the Court considers that it has sufficient information from the documents before it to give a decision without opening the oral procedure.

Arguments of the parties

22 The Commission submits that the action for annulment is manifestly inadmissible. It has consistently been held that it is not open to individuals to bring proceedings challenging the Commission's refusal to initiate infringement proceedings against a Member State (judgments of the Court of Justice in Case 48/65 *Lütticke and Others* v *Commission* [1966] ECR 19 and Case C-87/89 *Sonito and Others* v *Commission* [1990] ECR I-1981; order of the Court of Justice in Case C-29/92 *Asia Motor France* v *Commission* [1992] ECR I-3935, paragraph 21; orders of the Court of First Instance in Joined Cases T-479/93 and T-559/93 *Bernardi* v *Commission* [1994] ECR II-1115 and in Case T-126/95 *Dumez* v *Commission* [1995] ECR II-2863). That case-law is based not only on the discretionary power conferred on the Commission by Article 169 of the Treaty but also on the fact that the act which the Commission was requested to adopt would be a reasoned opinion, which could not itself constitute a challengeable measure since it is an act preliminary to the introduction of an action before the Court of Justice for a declaration of failure to fulfil obligations.

23 The applicants reply that the Commission's letter of 21 May 1997 constitutes a challengeable decision definitively laying down the Commission's position, namely that no further action is to be taken on the complaint. They cite Case C-282/95 P *Guérin Automobiles* v *Commission* [1997] ECR I-1503, paragraph 36 of the judgment in which makes it clear that the Commission 'is bound either to initiate a procedure against the subject of the complaint ... or to adopt a definitive decision rejecting the complaint, which may be the subject-matter of an action for annulment before the Community courts.' They further argue that, having regard to the case-law of the Court of Justice concerning Member States' liability arising out of failure to transpose directives and to the infringements committed by the French

Republic, the Commission may not rely on its discretionary power to evade its duty to monitor compliance with Community law.

Findings of the Court

24 The present action seeks the annulment of the decision of 21 May 1997 in which the Commission expressed its intention not to initiate infringement proceedings against the French Republic and thus to take no further action on the applicants' complaint alleging breach of Community law by that Member State.

25 The Court of Justice and the Court of First Instance have consistently held, however, that it is not open to individuals to bring proceedings challenging the Commission's refusal to institute proceedings against a Member State for failure to fulfil its obligations (see, *inter alia*, the judgments in Case 48/65 *Lütticke and Others*, cited above, at p. 27, and Case C-107/95 P *Bundesverband der Bilanzbuchhalter* v *Commission* [1997] ECR I-947, paragraph 19; see also the orders in *Asia Motor France*, cited above, paragraph 21, and *Dumez*, cited above, paragraph 33).

26 It must be borne in mind that Article 169 of the Treaty provides: 'If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.'

27 The Commission is consequently not bound to initiate infringement proceedings; it has, rather, a discretionary power precluding the right of individuals to require it to adopt a particular position or to bring an action for annulment against its refusal to take action (see, for example, the judgment in *Sonito and Others*, cited above, paragraph 6, and the order in Case T-84/94 *Bilanzbuchhalter* v *Commission* [1995] ECR II-101, paragraph 23). The Commission does not deliver a reasoned opinion unless it considers that the Member State in question has failed to fulfil one of its obligations. Moreover, if that State does not comply with the opinion within the period laid down, the Commission may, but is not required to, bring the matter before the Court of Justice in order to obtain a declaration that the Member State has failed to fulfil its obligations.

28 In addition, since only the Court of Justice has jurisdiction to find that a Member State has failed to fulfil its obligations under Community law, the only act which an individual complainant could ask the Commission to adopt would be a reasoned opinion. Such an act, however, is merely a preliminary stage after which, if appropriate, an action may be brought before the Court of Justice for a declaration of failure to fulfil obligations; it cannot therefore be regarded as an act which could form the subject-matter of proceedings for annulment, so that a refusal to initiate infringement proceedings constitutes an act which is not open to challenge (judgment in *Lütticke*, cited above, and order in *Dumez*, cited above, paragraph 37).

29 In the present case, the judgment in *Guérin Automobiles*, cited above, is of no avail to the applicants since it concerned a procedure under Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87). The procedural position of parties who have submitted a complaint to the Commission is fundamentally different in the case of a procedure under Article 169 of the Treaty from their position in a procedure under Regulation No 17 (see, in particular, the order of the Court of First Instance in Case T-83/97 *Sateba* v *Commission* [1997] ECR II-1523, paragraph 32). In the latter procedure, complainants have procedural rights which are

clearly defined by Regulation No 99/63/EEC of the Commission of 25 July 1963 on hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (OJ, English Special Edition 1963-1964 (I), p. 47), in particular the right to be informed of the reasons for which the Commission intends not to uphold their complaint and the right to submit observations in that connection. In addition, they are entitled to judicial review of the decision adopted by the Commission at the end of that procedure (see, *inter alia*, Case 26/76 *Metro* v *Commission* [1977] ECR 1875, at p. 1902, and *Guérin Automobiles*, cited above, paragraph 36). In the case of a procedure under Article 169 of the Treaty, however, persons who have lodged a complaint have no comparable procedural rights.

30 It follows from the foregoing that the present action for annulment must be dismissed as inadmissible.

31 There is thus no need to rule on the applicants' request for the Commission to be ordered to communicate the documents allegedly held in the French administration's archives concerning the Smanor case.

Costs

32 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicants have been unsuccessful, they must be ordered to pay the costs, as applied for in the Commission's pleadings.

On those grounds,

THE COURT OF FIRST INSTANCE

hereby orders:

1. The application is dismissed as inadmissible.

2. The applicants shall pay the costs.

Luxembourg, 16 February 1998.

H. Jung

Registrar

A. Kalogeropoulos

President