OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 14 December 1988 *

Mr President,
Members of the Court,

1. The case on which I deliver my opinion today essentially concerns the question whether traders may bring proceedings against the Commission if, in spite of requests to do so, it has not commenced proceedings against a Member State for failure to fulfil its obligations.

A — Facts

2. This case also concerns the importation into France of bananas in free circulation in a Member State. The applicant is a company having its registered office in Brussels whose business is *inter alia* trading in fruit (and which incidentally must be the main supplier of the applicant in Case 206/87).

3. The applicant maintains that it has repeatedly received orders from French customers but has not been able to export the required goods to France. Its lorries have been repeatedly turned back at the frontier (only twice was it possible to effect imports in this way) and in import allocations its French customers have not managed to obtain licences from the French authorities since these have been systematically allocated to the groupement d'intérêt économique bananier (which also figured prominently in Case 206/87) since this body has undertaken to observe a particular price discipline.

4. Consequently, on 17 April 1987, the applicant approached the Commission and reported the conditions on the French banana market (already described in detail in Case 206/87). In the applicant's view, the conduct of the French Republic is contrary to both Article 30 of the EEC Treaty and Article 2 of the Lomé Convention of 28 February 1975 and it is therefore obliged to compensate it for loss of business in the period from October 1986 to October 1987. It formally requested the Commission to bring proceedings under Article 169 of the EEC Treaty for the purpose of:

(i) having it declared that the French Republic had failed to fulfil its obligations under Article 30 *et seq.* of the EEC Treaty and Article 2 and Protocol 6 of the Lomé Convention;

(ii) requiring the French Republic to abolish the quotas which it applies to bananas originating in or coming from the European Economic Community or Associated States and to bananas orig-

* Original language: German.

inating in non-member countries in free circulation in the Community;

(iii) requiring the French Republic to compensate the applicant for losses amounting to BFR 87 451 400 incurred in respect of certain non-deliveries.

5. In response the applicant received only a letter from a Head of Division in the Commission dated 4 May 1987, notifying it that the competent departments of the Commission would take the necessary measures and inform the applicant thereof; consequently, the applicant brought this action by application lodged at the Court Registry on 14 August 1987.

6. In its application, which is based on Articles 173 and 175 of the EEC Treaty, the applicant seeks a declaration that the Commission failed to reach a decision against the French State in respect of the applicant's request of 17 April 1987 (which it repeats verbatim in the application).

7. The Commission and the French Republic, the intervener, consider that this application is also inadmissible. The Commission's response was therefore merely to raise an objection of inadmissibility under Article 91 of the Rules of Procedure.

B — Analysis

My views on the question of the admissibility of this application, which is the only matter to be considered today, are as follows:

8. *1.* It is quite clear to me that the reference in the application to *Article 173* of the EEC Treaty is irrelevant. There is no ground for an action for annulment in this case since the applicant has not specified any act of the Commission which could possibly be annulled. After this was pointed out it appears that even the applicant realized this fact since it responded simply by saying that it was leaving the question of the admissibility of its application under Article 173 for the Court to determine.

9. Consequently, the admissibility of the application has to be considered only with reference to the third paragraph of *Article 175*, according to which any natural or legal person may, under the conditions laid down in the first and second paragraphs of that article, complain to the Court of Justice that an institution of the Community has failed to address to that person any act other than a recommendation or an opinion.

10. *2.* Following objections made by the Commission to the *third and fourth points of the application*, that is to say the claims that the French Republic be required to abolish the quotas and to indemnify the applicant, it was made clear that these were not independent claims but were to be regarded as linked to the first heads of claim and examined in the same way.

11. We do not therefore need to dwell on the Commission's view that such applications are not admissible because they are not provided for in the system of legal protection established by the Treaty, which

is undoubtedly true. Rather, the question is whether natural and legal persons may bring proceedings under Article 175 of the EEC Treaty with the aim of causing the Commission to commence proceedings under Article 169 of the Treaty for breach of obligations.

12. *3.* That proposition raises serious doubts.

(a) In saying that I am not thinking so much of arguments that might be obvious having regard to the wording of Article 175 of the Treaty ('address to that person any act') on which great stress was laid by the Commission which observed that the procedure under Article 169 concerns only acts to be addressed to the Member State concerned (and not therefore acts which by their nature and purpose are addressed to a private applicant) and does not concern binding acts in the nature of decisions (which Mr Advocate General Gand, in his Opinion in Case 48/65, regarded as essential for the purposes of Article 175).[1]

13. In reply it might, however, be pointed out that under Article 169 (which is the key provision) the Commission may certainly take actions which produce *legal effects*, since the procedure often ends in an action being brought before the Court in order to obtain a binding ruling. It might also be pointed out that militating against a narrow interpretation relying heavily on the wording ('address to that person any act') is the fact that, according to that view, the only purpose which actions for failure to act may have is to obtain the adoption of administrative acts favourable to the applicant, not of certain specific acts detrimental to a third party, in which an interest might obviously exist.

14. (b) However, I see considerable objections in two other respects.

15. Under the system of judicial protection instituted by the Treaty private individuals clearly have no general right of action but only a limited right depending on their individual interests. As regards actions for annulment, Article 173 expresses this principle by the requirement of direct and individual concern. The criterion 'address to that person any act' in Article 175 should be understood in that sense, that is to say it may only involve acts in which the applicant has a particular interest but in no case acts with a general scope. (As Daig states on p. 239 of his book *Nichtigkeits- und Untätigkeitsklagen im Recht der europäischen Gemeinschaften*, it is not sufficient that an applicant is collectively concerned together with other persons belonging to a group identified by general characteristics. The measures concerned must be measures which relate specifically to the person or to the position of the applicant).

16. In the final analysis, Article 169 proceedings, which is what the applicant envisages when seeking a declaration that France has acted in breach of Article 30 *et seq.* of the EEC Treaty and the Lomé Convention, undoubtedly involve (if we

1 — Judgment of 1 March 1966 in Case 48/65 *Alfons Lütticke GmbH and Others* v *Commission* [1966] ECR 19.

bear in mind the consequences which the French Republic would have to draw following the judgment sought by the applicant) an act *of general scope*, namely a modification of the current import system which restricts intra-Community trade. As Mr Advocate General Römer pointed out in his Opinion in Case 103/63,[2] private individuals can hardly be allowed to pursue such a goal.

17. Perhaps still more compelling points are that, under the system instituted by the Treaty as discernible from Articles 169 and 170, only the Commission and the Member States have the power to bring the matter of a breach of the Treaty by a Member State before the Court, that discretionary power plays an important part in this regard (as Mr Advocate General Gand emphasized in his Opinion in Case 48/65) and that it is also necessary to observe a pre-litigation procedure which allows the Member State to bring its law and practice into conformity with the Treaty without the institution of legal proceedings.

18. It would scarcely be compatible with those requirements to allow a private individual to require the Commission to instigate proceedings for failure to fulfil obligations and, in the event of its refusal, to bring the matter before the Court. An important condition laid down in Article 175 of the EEC Treaty — failure to reach a decision in breach of the Treaty — is not met precisely because the Commission is not obliged to instigate such a procedure but has a discretion in this regard. Furthermore, if the Commission did not see any reason for commencing proceedings, the disputed conduct of the Member State would in a way directly become the subject-matter of judicial scrutiny (in an action brought so as to compel the Commission to bring proceedings in which action the question whether there was sufficient evidence of a breach of the Treaty would at least be considered). That means that the Member State concerned would not have the opportunity provided for in Article 169 to submit its views beforehand and to remedy the alleged breach of obligations. In his Opinion in Case 48/85 Mr Advocate General Gand made the same point and, as Daig points out at p. 240 op. cit., this is the predominant view.

C — Conclusion

19. *4.* In the light of the foregoing considerations, it can only be concluded that the Star Fruit Company's application must be dismissed with an order for it to pay the costs, except for those of the intervener, which have not been asked for.

2 — Judgment of 2 July 1964 in Case 103/63 *Rhenania, Schiffahrts- und Speditionsgesellschaft mbH and Others* v *Commission* [1964] ECR 425, at p 433