ORDER OF THE COURT
12 June 1992 *

In Case C-29/92,

Asia Motor France, a company incorporated under French law and established in Luxembourg, and Others, represented by Jean-Claude Fourgoux, of the Paris bar, with an address for service in Luxembourg at the Chambers of P. Schiltz, 4 Rue Béatrix de Bourbon,

applicants,

v

Commission of the European Communities, represented by R. Wainwright, Legal Adviser, and V. Melgar, a national civil servant seconded to the Legal Service of the Commission, acting as Agents, with an address for service in Luxembourg at the office of Roberto Hayder, a representative of the Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of the Commission decision of 5 December 1991 refusing to find that certain French administrative practices should be regarded as measures having an effect equivalent to a quantitative restriction on imports and obstructing the free movement of goods, contrary to Article 30,

* Language of the case: French.

THE COURT,

composed of: O. Due, President, R. Joliet, F. A. Schockweiler, F. Grévisse and P. J. G. Kapteyn (Presidents of Chambers), G. F. Mancini, C. N. Kakouris, J. C. Moitinho de Almeida, G. C. Rodríguez Iglesias, M. Diez de Velasco, M. Zuleeg, J. L. Murray and D. A. O. Edward, Judges,

Advocate General: G. Tesauro,
Registrar: J.-G. Giraud,

after hearing the Opinion of the Advocate General,

makes the following

Order

1 By application lodged at the Court Registry on 4 February 1992, Asia Motor France and four other companies brought an action under the second paragraph of Article 173 of the EEC Treaty for the annulment of the Commission decision of 5 December 1991 refusing to find that certain French administrative practices should be regarded as measures having an effect equivalent to a quantitative restriction on imports and obstructing the free movement of goods, contrary to Article 30.

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, namely Belgium and Luxembourg.

3 Since it considered that it was the victim of an unlawful agreement between the five major Japanese importers in 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 complaint was followed, on 29 November 1988, by a further complaint from four of the applicant undertakings under Article 85 against the five major importers. The fifth applicant having lodged a complaint relating to the conduct of different undertakings, on 9 August 1990 the Commission decided to deal with all the cases together.

4 By letter of 9 June 1989, the Commission requested information from the importers in question. By letter of 20 July 1989, the French Ministry for Industry and Regional Development instructed the importers not to reply to the questions put to them by the Commission.

5 In October 1989, the Commission informed the applicants that it had sent a request for information to the French Government.

6 Having heard nothing further 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 on 20 March 1990 four of the applicants brought an action before the Court of Justice for failure to act and for compensation. By order of 23 May 1990 in Case C-72/90 *Asia Motor France and Others* v *Commission* [1990] ECR I-2181, the Court declared the action for failure to act and for compensation inadmissible in so far as it related to Article 30 of the Treaty and referred the case to the Court of First Instance in so far as it related to Article 85 and to the question of liability in that regard.

7 On 8 May and 9 August 1990, the Commission informed the applicants that their complaints were likely to be rejected and invited them to submit their comments under Article 6 of Regulation No 99/63/EEC of the Commission of 25 July

1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (OJ, English Special Edition 1963, p. 17). On 29 June and 28 September 1990, the applicants submitted to the Commission their arguments challenging the position that the latter intended adopting.

8 On 5 December 1991, the Commission wrote to the applicants rejecting both the complaint under Article 30 and the one under Article 85. The letter ruled out any application of Article 30 on the ground that there was 'no public Community interest, having regard to the common commercial policy'. It is against that letter, in so far as it relates to Article 30, that the present action has been brought. A parallel action has been brought before the Court of First Instance in relation to Article 85.

9 By a document lodged on 18 March 1992, the Commission raised an objection of inadmissibility under Article 91(1) of the Rules of Procedure of the Court of Justice.

10 The Commission puts forward three pleas in law. First, it contends that such applications for annulment are inadmissible as a matter of principle since the commencement of proceedings under Article 169 is part of the pre-litigation phase during which no measure taken by the Commission has any binding force (Case 48/65 *Lütticke* v *Commission* [1966] ECR 19). The subject-matter of the action is not therefore a decision within the meaning of Article 173 of the Treaty.

11 Secondly, the Commission states that it is not under any obligation to commence proceedings under Article 169 but has a discretionary power which excludes the right of private individuals to require it to adopt a specific position or to bring proceedings against its refusal to act (judgments in Case 247/87 *Star Fruit* v *Commission* [1989] ECR 291 and Case C-87/89 *Sonito and Others* v *Commission* [1990] ECR I-1981 and the order in Case C-72/90 *Asia Motor France* v *Commission*, cited above).

12 Finally, the Commission contends that the contested measure is not of individual concern to the applicants. The refusal to commence proceedings against France under Article 169 for failure to fulfil its obligations under the Treaty and the letter of 5 December 1991 informing the applicants of the position taken by it are of concern only to the French State.

13 The applicants maintain that, exceptionally, although the Commission enjoys a discretionary power in the phase prior to litigation under Article 169, the atypical nature of the facts of the present case renders an action for annulment admissible.

14 First, they claim that in dealing with the two complaints under Articles 85 and 30 of the Treaty, the Commission resorted to a joint procedure, namely the procedure provided for in Council Regulation No 17, the first regulation implementing Articles 85 and 86 of the EEC Treaty (OJ, English Special Edition 1962, p. 87). Under Article 6 of Regulation No 99/63, which supplements Regulation No 17, the Commission sent a letter on 5 December 1991 which constitutes the adoption of a definitive position. By virtue of the case-law of the Court of First Instance (Case T-64/89 *Automec* v *Commission* [1990] ECR II-367), the letter of 5 December 1991 is similar to a final decision against which an action may be brought. Whilst it is true that that case-law does not apply to complaints concerning agreements and abuses of dominant positions, the fact remains that, as far as the application of Article 30 is concerned, the Commission's rejection constitutes a definitive decision.

15 Secondly, the applicants claim that the effect of the letter of 5 December 1991 is to require them to submit to the policy of the French Government even though it runs counter to the attainment of the common market and even though France has not at any time openly applied for the application of a protective measure under Article 115 of the Treaty. The legitimation after the event of the unlawful conduct of the French State thus resembles the adoption of a protective measure without fulfilment of the relevant formal and substantive conditions. The applicants

consider that the Commission has thus stepped beyond the bounds of its role and distorted the purpose of the administrative procedure under Article 169 of the Treaty. They state that, in Case 59/84 *Tezi* v *Commission* [1986] ECR 887, the Court held that the derogations allowed under Article 115 constitute an exception to the provisions of Articles 9 and 30 of the Treaty and to the implementation of the common commercial policy and must therefore be interpreted strictly. The applicants also state that, in Joined Cases 2 and 3/62 *Commission* v *Belgium and Luxembourg* [1962] ECR 425, the Court held that applications for protective measures submitted after the Commission has issued a reasoned opinion concerning the conduct of a Member State cannot interrupt the procedure.

16 In the applicants' opinion, it must be possible for the Court of Justice to rule as to the merits of the content of the letter of 5 December 1991, the effects of which appear to run deliberately counter to the case-law of the Court of Justice according to which the Commission cannot, in the attitudes which it adopts and in the opinions which it is obliged to deliver under Article 169, exempt a Member State from compliance with its obligations under the Treaty and preclude individuals from relying, in legal proceedings, on the rights conferred upon them by the Treaty to contest any legislative or administrative measures of a Member State which may be incompatible with Community law (Joined Cases 142 and 143/80 *Amministrazione delle Finanze dello Stato* v *Essevi and Salengo* [1981] ECR 1413). In the present case observance of that principle can be ensured only by means of Article 169. Since the applicants are being wound up under court supervision, their liquidator has been obliged, through insufficiency of funds, to terminate all pending internal procedures, with the result that the Commission's position can no longer be examined in preliminary-ruling proceedings, even though it is recognized that such proceedings must provide an opportunity to offset the inadmissibility of actions for the annulment of decisions taken under Article 169 of the Treaty.

17 Finally, the applicants maintain that the decision, by virtue of its content and scope, is of direct and individual concern to them within the meaning of the second paragraph of Article 173 of the Treaty. The principle in Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, that persons other than those to whom a decision is addressed may be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances by which they are differentiated from all other persons and which, as a result,

distinguish them individually just as in the case of the person addressed, therefore applies to the present case. The applicants may be regarded as individually concerned as members of a limited group of traders identified by the Commission (Case 11/82 *Piraiki-Patraiki* v *Commission* [1985] ECR 207). Moreover, in Joined Cases 106 and 107/63 *Toepfer* v *Commission* [1965] ECR 405, the Court recognized that a Commission decision authorizing or rendering valid a measure for the protection of a market might be of direct concern to undertakings, thus entitling them to bring proceedings for its annulment.

18 Pursuant to Article 92(1) of the Rules of Procedure, 'Where it is clear that the Court has no jurisdiction to take cognizance of an action or where the action is manifestly inadmissible, the Court may, by reasoned order, after hearing the Advocate General and without taking further steps in the proceedings, give a decision on the action'.

19 The applicants seek from the Court the 'annulment of the Commission decision of 5 December 1991 refusing to find that certain French administrative practices should be regarded as measures having an effect equivalent to a quantitative restriction on imports and obstructing the free movement of goods, contrary to Article 30'.

20 It must be observed that the only way in which the Commission could have reacted favourably to the applicants' complaint would have been to commence proceedings against France for failure to fulfil its obligations.

21 However, as the Court has held (in Case 48/65 *Lütticke* v *Commission*, Case 247/87 *Star Fruit* v *Commission* and Case 87/89 *Sonito and Others* v *Commission*, cited above), private individuals are not entitled to bring proceedings against a refusal by the Commission to institute proceedings against a Member State for failure to fulfil its obligations.

22 It follows from the foregoing that, without its being necessary to consider the other pleas in law put forward, the action must be dismissed as inadmissible.

Costs

23 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the applicants have failed in their submissions, they must be ordered to pay the costs.

On those grounds,

THE COURT

hereby orders:

1. The application is dismissed as inadmissible.

2. The applicants shall bear the costs.

Luxembourg, 12 June 1992.

J.-G. Giraud — Registrar

O. Due — President