OPINION OF ADVOCATE GENERAL LA PERGOLA
delivered on 11 July 1996 *

I — Introduction

1. In this appeal the Court is called upon to establish whether it is open to individuals to bring an action for annulment, as provided for in Article 173 of the Treaty, against decisions of the Commission refusing to take action on complaints seeking to have it exercise the powers conferred upon it by Articles 169 and 90(3) of the Treaty.

II — Background to the dispute and arguments of the parties

2. The Bundesverband der Bilanzbuchhalter eV, an association governed by German law and the appellant in the present case, is challenging before this Court the order of inadmissibility which the Court of First Instance of the European Communities made on 23 January 1995. [1]

3. The background to the dispute is set out in the abovementioned order of the Court of First Instance. The appellant association had lodged a complaint with the Commission calling in question the Steuerberatungsgesetz (German Law on Tax Advice), alleging infringement of Community law, inasmuch as that Law reserved the right to pursue the activity of adviser on tax and related matters to a number of specific categories of professionals. In the view of the appellant, the legislation was contrary to Articles 59 and 86 of the EC Treaty. By maintaining that legislation in force the Federal Republic of Germany had thus failed to fulfil its obligations under the Treaty as provided for in the second paragraph of Article 5 and Article 90(1) and (2) thereof. The Commission should have taken steps to remedy the situation and ensure the application of the provisions of the Treaty.

The appellant claimed that the Court of First Instance should annul, pursuant to Article 173 of the Treaty, the Commission's decision not to take any action on the appellant's complaint. The reason given in the decision challenged at first instance for that refusal was that, in the circumstances, there was no infringement of Community law.

* Original language: Italian.

1 — Case T-84/94 *Bundesverband der Bilanzbuchhalter* v *Commission* [1995] ECR II-101.

4. The Court of First Instance declared the action inadmissible. Referring to the case-law of the Court of Justice, [2] it held that it was not open to the appellant to challenge the Commission's refusal to commence proceedings under Article 169 of the Treaty against the Federal Republic of Germany. The Commission had 'a discretionary power which precludes any right on the part of individuals to require it to adopt a specific position'. The Court of First Instance further stated that, 'in the context of proceedings under Article 169 of the Treaty, persons who have lodged a complaint do not have the possibility of bringing an action before the Community judicature against the decision of the Commission not to take action on their complaint'.

5. The Court of First Instance adjudged the action to be inadmissible also in so far as concerned the alleged infringement of Article 90(3) of the Treaty, having regard again in this respect to the wide margin of discretion which that article conferred on the Commission. The exercise of the power to assess the compatibility of State measures with the Treaty rules, conferred by Article 90(3) of the Treaty, was not coupled with an obligation on the part of the Commission to take action. The Court of First Instance concluded that 'legal and natural persons who request the Commission to act under Article 90(3) do not have the right to bring an action against a decision of the Commission refusing to use powers conferred upon it under Article 90(3)'. In the instant case, it was found that it was not open to the appellant to challenge the refusal of the Commission in question.

6. Now the appellant claims that the Court of First Instance allegedly infringed Community law inasmuch as it did not take into consideration the Commission's alleged misuse of powers. According to the appellant, the Commission had misassessed the facts set out at first instance and put forward in support of the complaint lodged by the appellant seeking action under Article 169 of the Treaty. In this regard, the Bundesverband argues that, where there is a misassessment of the facts, there is a misuse of powers when the Commission has no latitude to exercise discretion. That is the case here. Infringement of Article 59 of the Treaty, as set out in the complaint, is manifest. There is therefore, in the view of the appellant, an obligation on the part of the Commission to take action which, in the present case, would necessarily have led to commencement of the procedure under Article 169, notwithstanding the fact that, according to the case-law of the Court of Justice, the Commission enjoys a broad discretion in deciding whether to initiate the Article 169 procedure and individuals have no possibility of challenging before the Community judicature any refusal to commence that procedure. The Court of First Instance infringed Community law as well, inasmuch as it did not find that the Commission lacked in substance any discretionary power and did not correctly assess the facts which gave rise to the dispute.

2 — See, in particular, Case 247/87 *Star Fruit* v *Commission* [1989] ECR 291.

7. As regards Article 90(3), the appellant argues that, although the Commission enjoys a margin of discretion, the decision not to take action under that article should be regarded as a reviewable act, particularly because, in the present case, the German legislation's incompatibility with Community law was obvious and could not in any event be denied by the Commission.

8. The Commission contends that the appeal should be dismissed, claiming that the Court's case-law on actions against refusals to bring proceedings under Article 169 knows of no exceptions whatsoever. The discretionary power which the Commission enjoys here rules out any possibility for individuals to influence its exercise or challenge it by way of judicial proceedings. It is a power to take action exercisable in relations between public bodies and based not on the principle of *compulsory prosecution*, but on the principle of *discretionary prosecution*.

The powers of the Commission under Article 169 of the Treaty, the defendant goes on to state, are parallel to the powers conferred on the Member States by Article 170 of the Treaty. Like the Commission, the Member States are in fact empowered, but not required, under Article 170, to take action in order to pursue any infringements of Community law committed by other Member States.

9. The Commission argues, furthermore, that, like Article 169 of the Treaty, Article 90(3) does not enable individuals to bring an action against any refusal to take measures which they have requested to be taken. The Commission enjoys under both Article 169 and Article 90(3) a wide margin of discretion and is not required, in either case, to adopt specific measures.

III — Analysis of the dispute

A — *The plea in law concerning Article 169*

10. In my view, the appeal is unfounded in so far as it concerns the possibility of challenging the Commission's refusal to commence the proceedings, provided for under Article 169, for failure to fulfil obligations, as requested by the appellant.

I shall disregard the fact that in previous judgments the Court [3] has refused individuals the right to bring proceedings before the Community judicature under similar circumstances, in view of the wide discretion which the Commission enjoys with regard to commencing and pursuing the procedure in issue

3 — See the judgment in *Star Fruit*, cited above, and in Case C-87/89 *Sonito* v *Commission* [1990] ECR I-1981.

in this case. Although the case-law is consistent, it requires further explanation. As a matter of principle, the mere provision of such discretionary power, however broad it may be, does not in fact exempt the Commission from the obligation to take action under the prosecution principle and, consequently, cannot be sufficient in the present case to prevent its conduct from being challenged by individuals before the Community judicature. This is confirmed by the extensive case-law of the Court in the field of State aid, [4] which reconciles the wide administrative discretion which the Commission enjoys in the field of Community law with the possibility of rendering its activity amenable to review by the Community judicature.

11. In my opinion, there is, in any event, another reason relating to the very nature of the provision in question which precludes the appellant from having the right it claims by way of this plea in law. Article 169 of the Treaty belongs, after all, to the provisions intended to govern the Community's institutional system and ensure its proper functioning. These are in fact provisions which exclusively concern relations between the Member States and the institutions.

12. Even though the Article 169 procedure, once put into motion, indirectly creates legal situations which may benefit individuals, it does not give them any right to intervene or any possibility of becoming involved in the procedure laid down by that provision: nor does it allow them to bring an action challenging the Commissions competences and decision-taking powers. The procedure under Article 169 thus operates at the level of inter-institutional relations, which is inaccessible for individuals.

13. It could certainly be stated that there is a *lacuna* in the system of judicial protection in that it does not enable individuals to bring an action for judicial review of decisions whereby the Commission decides not to initiate the procedure for failure to fulfil obligations.

None the less, to fill such a *lacuna* with the Court's power of interpretation would give rise, on closer examination, to far-reaching changes in the institutional framework, which is precisely the area in which the authors of the Treaty clearly intended to give the provision in question the role set out above: in the scheme of the Treaty Article 169 plays the part of governing relations between the Commission and the Member States. This is the conclusion to which a systematic interpretation of the provision leads: it need only be observed that the power to intervene in proceedings for failure to fulfil obligations initiated by the Commission, provided for in Article 37 of the Statute of the Court of Justice, is given only to the Member States and the Community institutions. The individual plays no part here, even in the initial pre-litigation stage. The

4 — See, *ex multis*, Case 169/84 *Cofaz* v *Commission* [1986] ECR 391 and, more recently, Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, in particular paragraph 41.

inference must be that the individual has no standing to challenge any refusal of the Commission to take action.

By this I do not mean that the Community legal system otherwise leaves the individual totally bereft of protection. That is not the case. The individual may plead before national courts the unlawfulness of the State's conduct which he claims to be in breach of Community obligations, propose, if necessary, to the national court questions to be referred to the Court for a preliminary ruling under the Article 177 procedure and use the remedies available to him if his claims are upheld, including an action for damages. For these reasons also I consider that the appellant's first plea in law should be rejected.

B — *The plea in law concerning Article 90(3)*

14. As regards the second plea in law, I would state from the outset that the Commission — and the Court of First Instance, in view of the reasoning which underlies the contested order — appear to consider Article 90(3) and Article 169 as parallel provisions, so to speak. Article 90(3) confers on the Commission powers of review and supervision over the Member States, with regard to public undertakings and other undertakings treated as such for the purposes set out therein, which are discretionary in substantially the same sense as are the measures which the Commission may adopt pursuant to Article 169. It is therefore this wide margin of discretion which, here again, makes it impossible, according to the Court of First Instance (which refers on this point to its earlier judgment in *Ladbroke Racing* [5]), for individuals to bring actions for annulment of *negative* decisions, such as that adopted by the Commission in the present case. This is the only decisive argument in the grounds of the order which is the subject of the present appeal. It should therefore be examined more closely.

15. Unlike Article 169, Article 90(3) forms part of the framework of provisions specifically designed to protect competition and to govern the conduct of undertakings in the market. Admittedly, a particular kind of undertaking is involved. Article 90 of the Treaty in fact covers cases in which a Member State upsets the normal functioning of competition by means of the influence it exerts over undertakings it controls or on which it has conferred special rights. The provision is thus intended to protect economic operators from any interference from the Member State, by means of the relations it maintains with the undertakings of the type described, which would jeopardize the fundamental economic freedoms enshrined in the Treaty. That provision thus protects competition, albeit in consonance with the

5 — Case T-32/93 *Ladbroke Racing* v *Commission* [1994] ECR II-1015.

performance in law and in fact of the specific task entrusted to the undertakings in question. It could not be otherwise.

16. It should, however, be pointed out that it is the economic operators who benefit under Article 90. In so far as the rules intended to protect competition are applicable, they apply in exactly the same way to the categories of undertakings referred to in Article 90 as to all the others. Article 90(3) provides, moreover: 'The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States'.

17. However, I do not consider that the letter and the spirit of Article 90 rule out, as the Court of First Instance holds, the possibility of making subject to judicial review Commission decisions refusing to act on complaints submitted by individuals which it does not consider worthwhile taking up.

Article 90 is placed among the other rules on competition under Title V of the Treaty. The *sedes materiae* is significant. The provision forms part of others which concern the conduct of undertakings in the field of competition, in particular those which govern State aid. The place and aim of the provision attest to the fact that the individual may not, in the present case, be deprived of the judicial protection which he enjoys in the vital area of competition. It is clear, in any event, that the provision in question cannot properly be compared to Article 169 and the other provisions specifically, or rather, exclusively intended to govern institutional relations at Community level. The argument, advanced by the Commission, that Article 90(3) and Article 169 are comparable does not stand up to scrutiny.

18. Nor, in my opinion, is it possible to uphold the view adopted by the Court of First Instance, which declared inadmissible the action brought by the person concerned against the decision not to act, basing that conclusion, here again, on the underlying discretionary power of the institution.

According to the Court of First Instance, the Commission's discretion is so broad, that it is under no obligation to take action or, therefore, to give reasons for any refusal to take action on complaints lodged with it by the undertakings concerned. This means that the latter have no right to bring an action against measures whereby the Commission refuses to issue directives or adopt decisions addressed to the States whose unlawful conduct is complained of by individuals. The Commission would thus be deciding not to make use of a power which the Court of First Instance defines as a true *prerogative* reserved to it by Article 90(3).

19. However, I believe that the Court of Justice is called upon in this case to reflect on the case-law, established by its judgments and those of the Court of First Instance, where a discretion, broad though it may be, is conferred on the Commission in a field in which, under the scheme of the Treaty, public interest considerations encroach on the interests of free competition, but not to the point of overwhelming them. I have in mind, for example, State aid. [6] Where there is free competition, there is protection of the individual; this is something which is at the foundations of the common market. Recognizing the unchallengeability of that discretion where review is sought by an individual is fully justified only inasmuch as the Community legal system is exclusively intended to regulate public interests and inter-institutional relations: as I said earlier, the present case concerns an area in which the requirements of competition are interlinked with, and are to be reconciled with, those taken into account by the Treaty in order to protect general superior interests, in particular State interests, in so far as they are relevant to Community law.

20. Consequently, I consider that the view to be taken of the present case should be different from that taken by the Court of First Instance. It is like where a party claims that judicial review of negative decisions in the field of State aid is admissible: a decision of that kind could take the following form: the Commission is requested by an undertaking to check whether aid granted to other competing undertakings is compatible with the Treaty and it refuses to take any such action. Both in that case and in the case now before the Court, it is for the Commission to adopt measures to be addressed to the Member States which are binding upon them in respect of specific requirements as to conduct. The Member State is thus the natural addressee of the decisions and of other acts adopted by the Commission, either under Articles 92 and 93 or under Article 90. [7] However, in my view, this does not stop individuals from challenging before the Community judicature measures adopted by the Commission inasmuch as Article 90 grants them the right to have applied in their regard Community rules intended to protect freedom to carry on business and freedom of competition.

21. The conclusion at which I arrive requires one further explanation. The subjective conditions governing the right to bring an action against measures which the Commission has adopted under Articles 92 and 93, as discernible from the case-law of the Court of Justice and of the Court of First Instance in this field, also apply, in my opinion, from the point of view from which I regard this case, notably as regards the individual whose position is protected by Article 90(3). However, the Court of First Instance did not deal with this aspect of the present case. It considered it sufficient, for the purpose of its decision, that the individual had absolutely no right to bring an action in view of the supposedly unchallengeable nature of the measure. The sole justification given in the contested order

6 — See, among the most recent, Case C-198/91 *Cook* v *Commission* [1993] ECR I-2487 and *Matra* v *Commission*, cited above.

7 — See Joined Cases C-48/90 and C-66/90 *Netherlands and Others* v *Commission* [1992] ECR I-565, in particular paragraphs 31 and 32.

for this decision is, as I have said, the breadth of the powers conferred on the Commission. The mistake lay in not seeing that, in the context of Article 90(3), that power is limited by individuals' subjective rights, disregard of which may be relied upon by the person concerned before the Community judicature.

22. In the light of the foregoing considerations, I therefore consider that the contested order should be annulled only in so far as it concerns the inadmissibility of the action against the Commission's refusal to initiate the proceedings provided for in Article 90(3) of the Treaty.

Moreover, since the present case largely concerns the assessment of facts, and in order to ensure access to both tiers of the judicature, I consider it appropriate that the Court of First Instance should assess whether the action in the present case fulfils other conditions of admissibility and possibly give a decision on the substance.

IV — Costs

23. Under Article 122 of the Rules of Procedure, the Court of First Instance must make a decision as to costs in respect of the appeal if it is upheld by the Court of Justice where the case is referred back to it for final judgment.

Since I propose that the contested order should be set aside and the case referred back to the Court of First Instance, it is for the latter to make a decision as to costs.

V — Conclusions

24. In the light of the foregoing I propose that the Court should:

— set aside the order of inadmissibility made by the Court of First Instance of the European Communities on 23 January 1995 in Case T-84/94;

— reserve the decision as to costs for the Court of First Instance.