ORDER OF THE COURT (First Chamber)

15 January 1998 *

In Case C-196/97 P,

Intertronic F. Cornelis GmbH, a company incorporated under German law, established at Emden, Germany, represented by Detlef Schumacher, Professor, Bremen, and Wilhelm Wiltfang, Rechtsanwalt, Aurich,

appellant,

APPEAL against the order of the Court of First Instance of the European Communities (Third Chamber) of 19 February 1997 in Case T-117/96 *Intertronic* v *Commission* [1997] ECR II-141, seeking to have that order set aside,

the other party to the proceedings being:

Commission of the European Communities, represented by Klaus Wiedner, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

* Language of the case: German.

THE COURT (First Chamber),

composed of: M. Wathelet, President of the Chamber, D. A. O. Edward and L. Sevón (Rapporteur), Judges,

Advocate General: N. Fennelly,
Registrar: R. Grass,

after hearing the Advocate General,

makes the following

Order

1 By application lodged at the Registry of the Court of Justice on 21 May 1997 Intertronic F. Cornelis GmbH brought an appeal pursuant to Article 49 of the EC Statute of the Court of Justice against the order of 19 February 1997 in Case T-117/96 *Intertronic* v *Commission* [1997] ECR II-141, hereinafter 'the contested order', in which the Court of First Instance held that the action brought by the applicant against the Commission for failure to act was inadmissible.

2 In that action, the applicant sought a declaration that the Commission had failed to act in so far as it did not respond to two letters of 28 March and 2 May 1996 in which the applicant complained that legal proceedings had been commenced against it in a number of national courts by associations for the promotion of commercial interests in order to oblige it to stop advertising by fax (paragraphs 3 and 4 of the contested order).

3 It appears from paragraph 2 of the contested order that, in a judgment of 25 October 1995, the Bundesgerichtshof held that it was contrary to Article 1 of the Gesetz gegen den unlauteren Wettbewerb (Law on unfair competition) to send advertising by fax to a trader, if that trader had not expressly or impliedly consented to the receipt of such communications.

4 In its two letters, the applicant claimed that the judgment of the Bundesgerichtshof and the conduct of the associations were contrary to the principle of the establishment of a common market enshrined in Article 2 of the EC Treaty, to the task entrusted to the Commission and the Member States by Articles 2 and 3(g) of the EC Treaty of establishing a system ensuring that competition in the internal market is not distorted and so preventing the introduction of protectionist restrictions on competition by the Member States or the national courts and to the prohibition on restrictive agreements set out in Article 85 of the EC Treaty (paragraph 5 of the contested order). The letters also referred to Article 3 of 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) (paragraph 7 of the contested order).

5 After having examined the two letters, the Court of First Instance held, at paragraph 26 of the contested order, that it was apparent that 'the purpose of the complaint was to obtain a declaration that the Federal Republic of Germany had failed to fulfil its obligations under certain provisions of the Treaty, namely Articles 2 and 3(g) of the Treaty, as stated in the complaint'.

6 Consequently, the Court of First Instance held that the action was inadmissible. At paragraph 32 of the contested order it recalled that, according to settled case-law, an action brought by a natural or legal person for a declaration that, in infringement of the Treaty, the Commission failed to act by not initiating proceedings for failure to fulfil Treaty obligations with regard to a Member State is inadmissible (see, in particular, Case 247/87 *Star Fruit* v *Commission* [1989] ECR 291).

The appeal

7 The appellant considers that the Court of First Instance committed an error of law by holding, contrary to its intention, that it was seeking a declaration that the Federal Republic of Germany had failed to fulfil its obligations as a result of the decisions of the German courts and the ensuing harm to the applicant, whereas it actually wanted the Commission to take action in order to enable it to use the 'Euromarketing' method of advertising and advertise by fax. According to the appellant, its request was clear from the pleadings in which it asked the Court of First Instance to 'declare that the Commission failed to act in so far as it did not find that the implementation, by the enforcement authorities of the Federal Republic of Germany and by the associations for the promotion of commercial interests, of the prohibition on advertising by fax constitutes a breach of the provisions prohibiting restrictive agreements'.

8 The Commission considers, first, that the appeal is inadmissible, since it fails to specify the contested elements of the order which it is seeking to have set aside, and the legal grounds in support of that claim. It claims that the appellant has essentially confined itself to repeating the pleas in law and arguments already presented before the Court of First Instance. In the alternative, the Commission considers that the appeal is unfounded. The appellant's two letters concerned a State measure, not the conduct of undertakings. The only proceedings which may be brought in respect of an infringement of the provisions of Articles 5 and 85(1) of the EC Treaty are for failure to act, which fall within the exclusive competence of the Commission.

Findings of the Court

9 Under Article 119 of its Rules of Procedure, where the appeal is clearly inadmissible or clearly unfounded, the Court may at any time dismiss the appeal by reasoned order.

10 It appears from the appellant's letters to the Commission that the fact that it was unable to advertise by fax resulted from the Law on unfair competition as interpreted by the Bundesgerichtshof, which considers advertising sent by fax without prior consent of the recipient to be contrary to that Law. The associations for the promotion of commercial interests are therefore merely exercising their rights under that Law.

11 The Court of First Instance was therefore correct not to rely on the formal presentation of the complaint and the legal basis pleaded by the applicant but rather, having considered the true purpose of the complaint, to requalify it and conclude that it was seeking a declaration by the Commission that the Federal Republic of Germany had failed to fulfil its obligations under certain provisions of the Treaty, within the meaning of Article 169 of the EC Treaty.

12 It is clear from Article 169 of the Treaty that, as the Court of First Instance rightly recalled at paragraph 32 of the contested order, the Commission is not bound to initiate the procedure provided for therein but has a discretion in this regard which excludes the right for individuals to require that institution to adopt a specific position (see, in particular, *Star Fruit* v *Commission*, cited above, paragraph 11).

13 In those circumstances, since the plea is clearly unfounded the appeal must be dismissed and there is no need to consider the grounds of inadmissibility raised by the Commission.

Costs

14 Under Article 69(2) of the Rules of Procedure, which apply to the procedure on appeal by virtue of Article 118, 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 Commission applied for the appellant to be ordered to pay the costs and the appellant has been unsuccessful, it must be ordered to pay the costs of the appeal.

On those grounds,

THE COURT (First Chamber)

hereby orders:

1. The appeal is dismissed.

2. The appellant shall bear the costs.

Luxembourg, 15 January 1998.

R. Grass — Registrar

M. Wathelet — President of the First Chamber