ORDER OF THE COURT OF FIRST INSTANCE (Second Chamber)
3 July 1997 *

In Case T-201/96,

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

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

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 Jean-Francis Pasquier, 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, first, for a declaration that, by failing to bring infringement proceedings against the French Republic under Article 169 of the EC Treaty, the Commission has failed to act, and, second, for compensation for the damage arising out of that failure,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Second Chamber),

composed of: C. W. Bellamy, President, B. Vesterdorf and A. Kalogeropoulos, Judges,

Registrar: H. Jung,

makes the following

Order

Facts

1 Smanor SA, the managers and principal shareholders of which are the joint applicants Hubert and Monique Ségaud, is a French company formerly specializing 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 to prevent it, on the basis of the then applicable French regulations, from marketing such products under the name 'yaourt' or 'yoghourt'.

3 On 6 November 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.

4 In addition, by letter dated 24 November 1986 to the Commission, it lodged a complaint 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 Community law and in particular 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 EC Treaty.

5 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/EEC in the light of Decree No 82-184. However, by judgment of 5 April 1988, upheld by judgment of the Cour d'Appel (Court of Appeal), Caen, of 27 April 1989, the Tribunal de Commerce, L'Aigle, finding, *inter alia*, that there was no reconstruction plan and insufficient cash to

pay social security charges, ordered the company to be wound up with provisional enforcement, without staying proceedings until the Court of Justice had given its ruling.

6 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.'

7 Decree No 82-184 was subsequently, according to the applicants, repealed and replaced by Decree No 88-1203 of 30 December 1988.

8 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, 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.

9 Following its first complaint lodged against the French Republic on 24 November 1986 (see paragraph 4 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.

10 By letter dated 9 October 1996, referring to its letter of 30 July 1996 in which it had already requested that the Commission state its definitive position on those complaints, Smanor, through its manager Mr Ségaud, called upon the Commission to initiate infringement proceedings against the French Republic. In its letter, it essentially asked the Commission, with a view to enabling it to bring an action for damages against the French State, to find that the French Republic had committed the infringements alleged, consisting of the failure to transpose Directive 79/112 within the prescribed period, of the failure of the French courts in the judicial settlement proceedings to respect the preliminary ruling procedure laid down in Article 177 of the Treaty and of the refusal to pay compensation following the judgment in *Smanor*, cited above.

11 The applicants brought the present action by application lodged at the Registry of the Court of First Instance on 9 December 1996.

12 By separate document registered at the Court on 10 February 1997, the Commission raised an objection to admissibility under Article 114(1) of the Rules of Procedure. The applicants submitted their observations on that objection on 18 March 1997.

13 By document lodged at the Court Registry on 7 May 1997, the French Republic sought leave to intervene in support of the form of order sought by the Commission.

Forms of order sought

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

— declare that the Commission has failed to act;

— rule, on the basis of Article 215 of the Treaty, that the Commission has thereby incurred non-contractual liability towards both Smanor SA and the joint applicants Hubert and Monique Ségaud, its founders, salaried managers and majority shareholders, and that it should pay them compensation for the damage suffered in the sum of ECU 4 562 884; and

— order the Commission to pay the costs.

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

— find the action brought by Smanor and the joint applicants Hubert and Monique Ségaud inadmissible;

— order the applicant to pay the costs.

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

— declare that the Commission has failed to act;

— rule that the Commission has thereby incurred non-contractual liability towards the applicants and should thus pay them compensation, on the basis of Article 215 of the Treaty, for the damage suffered, assessed at ECU 4 562 884; and

— order the Commission to pay the costs.

Admissibility

17 The applicants have not specifically sought an order dismissing the objection to admissibility or joining it to the merits. Nevertheless, since in their observations on the objection to admissibility they claim that the Court should declare that the Commission has failed to act and rule that the Commission has thereby incurred non-contractual liability, they must necessarily be considered to have sought the dismissal of the objection raised.

18 Under Article 114 of the Rules of Procedure, if a party applies to the Court for a decision on admissibility, the remainder of the proceedings on the objection to admissibility are to be oral, unless the Court decides otherwise. 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.

The claim seeking a finding that the Commission has failed to act

Arguments of the parties

19 The Commission notes that it has consistently been held that where an action is brought by a natural or legal person for a declaration of failure to act in that, by not initiating infringement proceedings against a Member State, the Commission

has failed, in breach of the Treaty, to take a decision, that action is inadmissible (Case 247/87 *Star Fruit* v *Commission* [1989] ECR 291; Case C-371/89 *Emrich* v *Commission* [1990] ECR I-1555; and Joined Cases T-479/93 and T-559/93 *Bernardi* v *Commission* [1994] ECR II-1115).

20 Firstly, natural or legal persons may have recourse to the third paragraph of Article 175 of the Treaty only for a declaration that an institution has failed, in breach of the Treaty, to adopt acts of which they are the potential addressees (*Bernardi*, cited above, paragraph 31), a condition which is not met in this case. Secondly, the Commission is not obliged to commence proceedings under Article 169 of the Treaty; on the contrary, it has a discretion in that regard which excludes the right for individuals to require it to adopt a specific position (*Star Fruit*, cited above, paragraph 11).

21 The applicants contend that the Commission's failure to act has been demonstrated in this case since it implicitly admits that it did not adopt any position on the successive calls to act addressed to it on 30 July and 9 October 1996. They further stress that they brought to the attention not only of the Commission but also of the various French courts a series of instances typifying the conduct of the French legislature and public authorities. Finally, they claim, in substance, that the Commission, having dealt diligently with their first complaint lodged in 1986 by submitting observations critical of the French rules during the preliminary ruling procedure before the Court of Justice, was obliged following the judgment delivered by that Court on 14 July 1988 to ensure that the French Republic fulfilled its unconditional obligation to make good the damage caused by the infringements of Community law for which it was responsible.

Findings of the Court

22 It has consistently been held that where an action is brought by a natural or legal person for a declaration of failure to act in that, by not initiating infringement proceedings against a Member State, the Commission has failed, in breach of the Treaty, to take a decision, that action is inadmissible (*Star Fruit* and *Bernardi*, both cited above).

23 It is clear from the scheme of Article 169 that the Commission is not obliged to commence proceedings under Article 169 of the Treaty but has a discretion in that regard which excludes the right for individuals to require it to adopt a specific position (*Star Fruit*, cited above, paragraph 11; Case T-126/95 *Dumez* v *Commission* [1995] ECR II-2863).

24 Those principles expressed in the case-law cannot be conditioned by the nature of the infringement of Community law alleged against the Member State concerned (see, for example, Case T-13/94 *Century Oils Hellas* v *Commission* [1994] ECR II-431, paragraph 15).

25 Furthermore, by requesting the Commission to initiate a procedure under Article 169 of the Treaty, the applicants are in fact seeking the adoption of acts which would not be of direct and individual concern to them within the meaning of the fourth paragraph of Article 173 of the Treaty and which they would thus in any event be unable to challenge in annulment proceedings (*Star Fruit*, cited above, paragraph 13; *Century Oils Hellas*, cited above, paragraph 14; and Case T-47/96 *SDDA* v *Commission* [1996] ECR II-1559, paragraph 43).

26 The claim seeking a finding that the Commission has failed to act is therefore inadmissible.

The claim for damages

Arguments of the parties

27 The Commission considers that the claim for damages is clearly inadmissible, inasmuch as the applicants are seeking compensation for damage which they claim to have been caused by the Commission's alleged failure to act. That claim for damages, arising out of a failure to act alleged in a head of claim which has been held to be inadmissible, must also be declared inadmissible (*Bernardi*, cited above, paragraph 39).

28 The applicants contend that they are fully justified in seeking compensation for the damage which they consider to be attributable to the Commission's failure to act. The Commission persisted in its refusal to adopt a position whereas, had it carried out its duty to monitor compliance with Community law, it could have ensured both that the judicial settlement proceedings brought against Smanor were suspended and that compensation was granted as a result of the wrongful conduct of the French public authorities.

Findings of the Court

29 In their claim for damages, the applicants seek to have made good the damage which they consider they have suffered as a result of the Commission's failure to initiate infringement proceedings against the French Republic.

30 Since the Commission is under no obligation to commence infringement proceedings under Article 169 of the Treaty, its decision not to do so was not, in any event, unlawful and thus cannot give rise to non-contractual liability on the part of the

Community, the only conduct which might possibly be adduced as giving rise to damage being the conduct of the Member State concerned, in this case the French State (Case C-72/90 *Asia Motor France* v *Commission* [1990] ECR I-2181, paragraph 13; see also Case T-571/93 *Lefebvre and Others* v *Commission* [1995] ECR II-2379, paragraph 61).

31 Consequently, a claim for damages the real aim of which is to complain of the Commission's decision not to commence infringement proceedings against a Member State is inadmissible (see *Asia Motor France*, cited above, paragraph 15, and *Bernardi*, cited above, paragraph 39).

32 It follows from all of the foregoing that the application must be declared inadmissible.

33 The application having been dismissed as inadmissible, there is no need for a decision on the French Republic's request for leave to intervene.

Costs

34 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 bear their own costs and those of the Commission.

35 Under Article 87(4) of the Rules of Procedure, Member States which have intervened in the proceedings are to bear their own costs. Pursuant to that provision, if the French Republic had been granted leave to intervene, it would have borne its own costs. The same must apply, *a fortiori*, to any costs which it may have incurred for the purposes of its application for leave to intervene in the present case, which it is not necessary to examine.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby orders:

1. The application is dismissed as inadmissible.

2. There is no need for a decision on the application for leave to intervene.

3. The applicants shall bear their own costs and those of the Commission.

4. The French Republic shall bear the costs incurred by it in connection with the submission of its application for leave to intervene.

Luxembourg, 3 July 1997.

H. Jung — C. W. Bellamy

Registrar — President