

JUDGMENT OF THE COURT (Second Chamber)
14 February 1989 *

In Case 247/87

Star Fruit Company SA, whose registered office is in Brussels, represented by J. Cloetens, of the Brussels Bar with an address for service in Luxembourg at the Chambers of P. Schleimer, 26 rue Philippe-II,

applicant,

v

Commission of the European Communities, represented by its Legal Adviser, M. J. Jonczy, acting as Agent, with an address for service in Luxembourg at the office of G. Kremlis, a Member of its Legal Department, Wagner Centre, C 254, Luxembourg,

defendant,

supported by the

French Republic, represented by E. Belliard and Géraud de Bergues, acting as Agents, with an address for service in Luxembourg at the French Embassy,

intervener,

APPLICATION under Articles 173 and 175 of the EEC Treaty for a declaration that the Commission has failed to commence proceedings under Article 169 of the Treaty to establish the French Republic's failure to fulfil its obligations,

* Language of the case: French.

THE COURT (Second Chamber)

composed of: T. F. O'Higgins, President of Chamber, G. F. Mancini and F. A. Schockweiler, Judges,

Advocate General: C. O. Lenz

Registrar: D. Louterman, Administrator

having regard to the Report for the Hearing and further to the hearing on 30 November 1988,

having heard the Opinion of the Advocate General delivered at the sitting on 14 December 1988,

gives the following

Judgment

1 By application lodged at the Court Registry on 14 August 1987, the Belgian company Star Fruit Company, which specializes in the importation and exportation of fresh bananas, brought an action under the second paragraph of Article 173 and the third paragraph of Article 175 of the EEC Treaty essentially for a declaration that the Commission of the European Communities had failed to commence proceedings against the French Republic under Article 169 of the Treaty.

2 The applicant considers that the system for supplying the banana market in France is incompatible with Article 30 *et seq.* of the EEC Treaty and with Article 2 of the Lomé Convention of 28 February 1975 (Official Journal 1976, L 25, p. 1). It therefore requested the Commission, by letter of 17 April 1987, to commence proceedings under Article 169 of the EEC Treaty against the French Republic in order to determine that the system in question is incompatible with the aforementioned provisions, to call upon that Member State to abolish import quotas on bananas originating in non-member States which are in free circulation in the other Member States of the Community and to pay it compensation for the damage which it has allegedly suffered as a result of the impossibility of fulfilling

the orders of its French customers and the loss of goods resulting from the import bans applied by the Member State in question.

- 3 By a letter dated 4 May 1987 the Commission acknowledged receipt of the applicant's letter and informed it that it would adopt the measures needed in the matter.
- 4 It was after receiving that communication that the applicant brought this action.
- 5 By a separate document received at the Court on 9 November 1987 the Commission raised an objection of inadmissibility pursuant to Article 91 of the Rules of Procedure and requested the Court to rule on its objection without considering the substance of the case.
- 6 In support of its objection the Commission, supported on all points by the French Republic which was granted leave to intervene in support of its conclusions, contends in substance that the application is inadmissible under the second paragraph of Article 173 because the applicant has failed to specify the act of the Commission which it seeks to have declared void. The application is also inadmissible, in the Commission's view, under the third paragraph of Article 175, the wording of which excludes the possibility of an action for failure to act being brought by a private individual for non-application of the procedure provided for in Article 169 against a Member State.
- 7 The applicant leaves it to the Court to decide whether its application is admissible under the second paragraph of Article 173. It maintains that its application is admissible under the third paragraph of Article 175 of the Treaty.
- 8 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the submissions and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

9 It appears that the applicant has not even identified the act adopted by the Commission against which the action is directed. Consequently, the application is inadmissible in so far as it is based on the second paragraph of Article 173 of the EEC Treaty.

10 In so far as it is based on the third paragraph of Article 175 of the Treaty, the purpose of the application is to obtain a declaration that in not commencing against the French Republic proceedings to establish its breach of obligations the Commission infringed the Treaty by failing to take a decision.

11 However, it is clear from the scheme of Article 169 of the Treaty that the Commission is not bound to commence the proceedings provided for in that provision but in this regard has a discretion which excludes the right for individuals to require that institution to adopt a specific position.

12 It is only if it considers that the Member State in question has failed to fulfil one of its obligations that the Commission delivers a reasoned opinion. Furthermore, in the event that the State does not comply with the opinion within the period allowed, the institution has in any event the right, but not the duty, to apply to the Court of Justice for a declaration that the alleged breach of obligations has occurred.

13 It must also be observed that in requesting the Commission to commence proceedings pursuant to Article 169 the applicant is in fact seeking the adoption of acts which are not of direct and individual concern to it within the meaning of the second paragraph of Article 173 and which it could not therefore challenge by means of an action for annulment in any event.

14 Consequently, the applicant cannot be entitled to raise the objection that the Commission failed to commence proceedings against the French Republic pursuant to Article 169 of the Treaty.

15 It follows that the application is inadmissible in its entirety.

Costs

- 16 Under Article 69 (2) of the Rules of Procedure the unsuccessful party must be ordered to pay the costs if they have been asked in the successful party's pleadings.
- 17 Since the applicant has failed in its submissions, it must be ordered to pay the costs.
- 18 Since only the Commission has pleaded to that effect, the order for costs must be limited to those incurred by the Commission.

On those grounds,

THE COURT (Second Chamber)

hereby:

- (1) Dismisses the action as inadmissible.
- (2) Orders the applicant to pay the costs incurred by the Commission.
- (3) Orders the French Republic to bear its own costs.

O'Higgins

Mancini

Schockweiler

Delivered in open court in Luxembourg on 14 February 1989.

J.-G. Giraud

Registrar

T. F. O'Higgins

President of the Second Chamber