

ORDER OF THE COURT OF FIRST INSTANCE (Third Chamber)

19 February 1997 *

In Case T-117/96,

Intertronic F. Cornelis GmbH, a company incorporated under German law, established at Emden (Germany), represented by Detlef Schumacher, Professor in Bremen, and Wilhelm Wiltfang, of the Aurich Bar,

applicant,

v

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,

defendant,

APPLICATION for a declaration that the Commission has failed to fulfil its obligations under Article 175 of the EC Treaty,

* Language of the case: German.

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

composed of: B. Vesterdorf, President, C. P. Briët and A. Potocki, Judges,

Registrar: H. Jung,

makes the following

Order

Background to the dispute

- 1 The German company Intertronic F. Cornelis GmbH (hereinafter 'Intertronic') uses fax as a means of advertising in order to generate orders.
- 2 In its judgment of 25 October 1995, the Bundesgerichtshof (German Supreme Federal Court of Justice) held that it was contrary to Article 1 of the Gesetz gegen den unlauteren Wettbewerb (Law on Unfair Competition, hereinafter 'the UWG') to send advertising by fax to a trader, if that trader had not expressly or impliedly consented to the receipt of such communications.

- 3 Intertronic submits that, as a result of this judgment, proceedings have 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.
- 4 Intertronic considered that the judgment of the Bundesgerichtshof and the subsequent actions by the associations for the promotion of commercial interests were contrary to Community law and sent two virtually identical letters to the Commission, dated 28 March 1996 and 2 May 1996, asking it to take the necessary steps to put an end to the alleged infringement.
- 5 In the letters, Intertronic 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.
- 6 In the letters it also requested the Commission to declare, with respect to the Federal Republic of Germany, that the use of Article 1 of the UWG as the legal basis for a prohibition on advertising by fax was contrary to Community law and that the prohibition could therefore not be enforced. Secondly, it requested the Commission to prohibit three private associations (Bund internationaler Detektive, Verband Wirtschaft und Wettbewerb, Zentrale zur Bekämpfung unlauteren Wettbewerbs) from continuing to rely on coercive measures to enforce the prohibition on advertising by fax.

- 7 Both letters refer to Article 3 of Council Regulation No 17 of 6 February 1962, the first regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87, hereinafter 'Regulation No 17').

Procedure and form of order sought

- 8 Those are the circumstances in which the applicant brought the present action, which was registered at the Registry of the Court of First Instance on 29 July 1996.
- 9 In a separate document lodged at the Registry of the Court of First Instance on 4 September 1996, the Commission raised a preliminary plea of inadmissibility under Article 114(1) of the Rules of Procedure. The applicant lodged its observations on that preliminary plea on 25 October 1996.
- 10 In its application, the applicant claims that the Court should:
- 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;
 - order the Commission to pay the costs.

11 In its preliminary plea of inadmissibility, the Commission contends that the Court should:

— declare the action inadmissible;

— order the applicant to pay the costs.

12 In its observations on the preliminary plea of inadmissibility, the applicant claims that the Court should:

— dismiss the application on a preliminary issue.

Admissibility

13 Article 114 of the Rules of Procedure provides that if a party applies to the Court for a decision on admissibility which does not go to the substance of the case, the remainder of the proceedings relating to the question of admissibility are to be oral unless the Court decides otherwise.

14 Article 111 of the Rules of Procedure provides that where the action is manifestly inadmissible, the Court may, by reasoned order, and without taking further steps in the proceedings, give a decision on the action. In the current proceedings, the Court of First Instance (Third Chamber) considers there to be sufficient information in the file and holds that it is not necessary to take further steps in the proceedings.

Arguments of the parties

- 15 The Commission considers that the action is manifestly inadmissible.
- 16 Firstly, the Commission claims that there has been a breach of the essential procedural requirements set out in Article 175 of the Treaty in so far as it was not called upon to act, contrary to the second paragraph of that article.
- 17 In support of that argument, the Commission submits that it must be called upon, with express reference to Article 175 of the Treaty, to take the requisite measures and that an institution which is so called upon to act should be able to avoid proceedings for a declaration of failure to act by defining its position in an appropriate manner (Case 13/83 *Parliament v Council* [1985] ECR 1513, and the Opinion of Advocate General Lenz in that case, p. 1515).
- 18 The Commission also observes that the second letter sent to it by the applicant merely reproduced the first, apart from requesting acknowledgment of receipt and a rapid response. The Commission stresses that neither letter refers to Article 175 of the Treaty or to the two-month time-limit set out in that article.
- 19 Secondly, the Commission claims that the measures the legality of which is challenged by the applicant (Article 1 of the UWG and the case-law of the Bundesgerichtshof which prohibits solicitation of customers by fax on the basis of that Law) are State measures. Therefore, the only way in which these measures could be challenged would be for the Commission to bring an action for failure to fulfil obligations under Article 169 of the Treaty, which it cannot be obliged

to do because it has a discretion in this respect (see, in particular, the orders in Case C-371/89 *Emrich v Commission* [1990] ECR I-1555 and Case T-126/95 *Dumez v Commission* [1995] ECR II-2863).

20 The applicant considers that it did call upon the Commission to act by submitting an application within the meaning of Article 3(2)(b) of Regulation No 17, and argues that the use of specific wording and a reference to Article 175 of the Treaty are not essential procedural requirements.

21 It also claims that Case C-13/83 is not relevant to this case.

22 Finally, the applicant points out that it is asking the Commission to take concrete action with regard to the Federal Republic of Germany and the three associations, and maintains that the proper legal basis for such action is Article 85 of the Treaty.

Findings of the Court

23 As a preliminary point, the Court notes that the applicant merely referred to Article 3 of Regulation No 17, without further observation, in its letters to the Commission, so demonstrating that it intended to rely on the provisions of that regulation. However, the Court considers that, when considering the admissibility

of proceedings for failure to act brought by an individual, it is not bound by the legal basis on which the applicant formally based its complaint against the institution in question.

- 24 In this respect, the Court considers that it should not be possible to circumvent the applicable rules by seeking to remove a procedure from the ambit of Article 169 of the Treaty by artificially subjecting it to the principles set out in Regulation No 17, which put the plaintiff in a better procedural position than Article 169 (Case T-16/91 *Rendo and Others v Commission* [1992] ECR II-2417, paragraph 52).
- 25 In this case, the fact that both letters sent to the Commission by the applicant refer to Article 3 of Regulation No 17 suggests that the complaint was intended to request the Commission to find an infringement of Article 85 of the Treaty.
- 26 However, in so far as the nature of the complaint must be determined with reference to its purpose and not only, a priori, with regard to its form, the Court considers that it is apparent from the two letters 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.
- 27 It should be noted that, according to the explanations given by the applicant, which were provided only in the application and therefore not in either letter, the alleged infringement of Article 85 of the Treaty, which was also raised in the com-

plaint, consists in the fact that 'the legal argument of the Bundesgerichtshof and the reliance placed on it by the various associations for the promotion of commercial interests favours (...) the printed press, radio and television as regards marketing at European level'. The applicant considers that it is thus 'being prevented from disposing of its products within the common market because as a small company it does not have the resources necessary to advertise in the press or on the radio' and is 'at the same time being pushed out of the market'. The applicant claims, without substantiating this view, that the restriction of competition is the result of agreements or concerted practices between the associations for the promotion of commercial interests, for the purpose of bringing proceedings before the national courts in order to have the prohibition laid down in the judgment of the Bundesgerichtshof applied.

28 The Court observes, however, that the alleged restriction on competition results directly and manifestly from the judgment of the Bundesgerichtshof and not from the conduct of the associations, which are merely relying on that judgment. This view is supported by the wording of the application, in which Intertronic claims that it 'can request the Commission to find that reliance on the prohibition on advertising by fax by the associations for the promotion of commercial interests constitutes an infringement of the prohibition on agreements (Article 3(2)(b) of Regulation No 17). This is also the case in respect of the Federal Republic of Germany, where the enforcement authorities are committing the infringement.'

29 In the light of these arguments relating to an alleged infringement of Article 85 of the Treaty, which were only developed in the application, the Court considers that, if the applicant did formally call upon the Commission to find an infringement of Article 85 of the Treaty, this aspect of the complaint, like the others, suggests that it actually intended to call upon the Commission to find that the Federal Republic of Germany failed to fulfil its obligations by virtue of case-law developed by its courts, and that the applicant consequently suffered damage.

- 30 As a result, the Court considers that the true purpose of the complaint is to call upon the Commission to find that the Federal Republic of Germany failed to fulfil its obligations under certain provisions of the Treaty within the meaning of Article 169.
- 31 Therefore, the Court considers that the purpose of the present action for a declaration for failure to act was to seek a declaration that, by not initiating the procedure set out in Article 169 of the Treaty against the Federal Republic of Germany, the Commission failed to fulfil its obligations under Article 175 of the Treaty.
- 32 The Court has consistently held that 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, for example, Case C-247/87 *Star Fruit v Commission* [1989] ECR 291). In fact, natural and legal persons may only rely on the third paragraph of Article 175 in order to challenge the Commission's failure to adopt measures of which they are potential addressees. In the context of an action for failure to fulfil obligations under Article 169 of the Treaty, the only measures which the Commission may adopt are measures addressed to Member States (orders in Cases T-479/93 and T-559/93 *Bernardi v Commission* [1994] ECR II-1115 and *Dumez v Commission*, cited above). Moreover, it is apparent from the scheme of Article 169 that 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 (order in *Bernardi v Commission*, cited above; judgment in *Star Fruit v Commission*, cited above; order in *Emrich v Commission*, cited above).
- 33 It follows from the above that, without its being necessary to consider whether the Commission was duly called upon to act within the meaning of the second paragraph of Article 175 of the Treaty, the action must be declared inadmissible in its entirety.

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 applicant has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby orders:

- 1. The application is dismissed as inadmissible.**
- 2. The applicant is ordered to pay the costs.**

Luxembourg, 19 February 1997.

H. Jung

Registrar

B. Vesterdorf

President