

ORDER OF THE COURT OF FIRST INSTANCE (Fourth Chamber)  
23 January 1995 \*

In Case T-84/94,

**Bundesverband der Bilanzbuchhalter eV**, an association governed by German law, established in Bonn (Germany), represented by Joachim Müller, Rechtsanwalt of Munich, with an address for service in Luxembourg at the Chambers of Jean Wagener and Alain Rukavina, 10A Boulevard de la Foire,

applicant,

v

**Commission of the European Communities**, represented by Marie-José Jonczy, Legal Adviser, and Norbert Lorenz, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Georgios Kremlis, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of the Commission's decision of 4 November 1993 rejecting the applicant's complaint seeking a declaration that the German

\* Language of the case: German.

legislation on tax advisors infringes Articles 59 and 86 of the EC Treaty and that, by failing to take the necessary measures in order to comply with the EC Treaty, the Federal Republic of Germany has infringed Articles 5 and 90 of the EC Treaty,

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

composed of: K. Lenaerts, President, R. Schintgen and R. García-Valdecasas,  
Judges,

Registrar: H. Jung,

makes the following

**Order**

**Facts and Procedure**

- 1 On 21 August 1992 the applicant, the Bundesverband der Bilanzbuchhalter eV, a professional association governed by German law, established in order to defend the economic and socio-professional interests of accountants, lodged a complaint with the Commission in which it called in question the Steuerberatungsgesetz (Law on Tax Advice — StBerG) of 4 November 1975 (BGBl. 1975 I, p. 2735), amended at various times, most recently by the Law of 13 December 1990 (BGBl. 1990 I, p. 2756), inasmuch as it reserves the right to pursue the activity of adviser on tax and related matters to tax advisers, auditors, lawyers and sworn accountants. The applicant considered that legislation to be contrary to the Treaty, in particular to

Articles 59 and 86 of the EEC Treaty (which has become the EC Treaty, hereinafter referred to as 'the Treaty'), and complained that the Federal Republic of Germany, by failing to amend that legislation, had infringed the second paragraph of Article 5 and Article 90(1) and (2) of the Treaty. It therefore requested the Commission to ensure, pursuant to Article 155 of the Treaty, that the provisions of the Treaty were applied.

2 By letter of 22 April 1993, the Directorate-General for the Internal Market and Financial Services (DG XV) informed the applicant that its complaint had been registered under No 93/4155.

3 By memorandum of 26 May 1993, DG XV informed the applicant of its reasons for considering that, in this case, there had been no infringement of Community law and announced its intention to suggest that the Commission should not proceed to examine the complaint.

4 On 4 November 1993 the Commission took the decision not to act on the applicant's complaint on the ground that Community law had not been infringed. By letter of 13 December 1993, which was received by the applicant on 17 December 1993, the Commission informed the applicant of its decision of 4 November 1993.

5 It is in those circumstances that, by application lodged at the Registry of the Court of First Instance on 23 February 1994, the applicant has brought the present action.

6 By a separate document lodged at the Registry of the Court of First Instance on 4 May 1994, the Commission raised an objection of inadmissibility under Article 114 of the Rules of Procedure and asked the Court of First Instance to rule upon that objection without examining the substance of the case. The applicant lodged its observations on the objection of inadmissibility on 13 June 1994.

7 By a decision of 7 July 1994, the Court of First Instance referred the case to a Chamber composed of three judges.

8 The applicant claims that the Court should:

— annul the Commission's decision of 13 December 1993, notified to it on 17 December 1993, for breach of Article 155 of the Treaty and Article 3 of Regulation No 17 of the Council of 6 February 1962, First regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-62, p. 87), in conjunction with Articles 5, 59, 86 and 90(1) of the Treaty.

9 The defendant contends that the Court should:

— dismiss the action as inadmissible,

— order the applicant to pay the costs of the proceedings.

10 Under Article 114(3) of the Rules of Procedure, the remainder of the proceedings concerning the objection of inadmissibility are to be oral unless the Court of First Instance decides otherwise.

11 Article 111 of the Rules of Procedure provides that, where the action is manifestly inadmissible, the Court of First Instance may give a decision on the action by reasoned order, without taking further steps in the proceedings. In this case, the Court of First Instance (Fourth Chamber) considers that the documents before it are sufficient to elucidate this matter and decides that there is no need to open the oral procedure.

## Admissibility

### *Summary of the parties' arguments*

12 In its objection of inadmissibility the Commission observes that the application, in so far as it complains that the Commission did not take action against the Federal Republic of Germany and misinterpreted Articles 59, 86 and 90(1) of the Treaty, in fact seeks the annulment of the decision adopted by the Commission on 4 November 1993 not to bring infringement proceedings against the Federal Republic of Germany.

13 None the less, the Commission emphasises that the application is inadmissible in any event, whether it is directed against the decision of 4 November 1993 or against the letter of 13 December 1993.

14 The Commission points out, first, that the decision of 4 November 1993, which concerns infringement proceedings against the Federal Republic of Germany, was not addressed to the applicant. As the Court of Justice has consistently held, the Commission is not bound to commence proceedings under Article 169 but in this regard has a discretion which excludes the right for individuals to require that institution to adopt a specific position (see Case 247/87 *Star Fruit v Commission* [1989] ECR 291, paragraph 11, and Case C-87/89 *Sonito and Others v Commission* [1990] ECR I-1981, paragraphs 6 and 7, and the order in Case C-72/90 *Asia Motor France v Commission* [1990] ECR I-2181, paragraph 11).

15 The Commission further maintains that the decision of 4 November 1993 is not of individual concern to the applicant. In that respect, the Commission notes that, according to the case-law of the Court of Justice, persons other than those to whom a decision is addressed may claim to be individually concerned only if that

decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them individually just as in the case of the person addressed (Case 25/62 *Plaumann v Commission* [1963] ECR 95 and Case 11/82 *Piraiiki Patraiki and Others v Commission* [1985] ECR 207). According to the Commission, an organization formed for the protection of the collective interests of a category of persons, such as the applicant, cannot be regarded as being directly and individually concerned by a measure affecting the general interests of that category (Case 72/74 *Union Syndicale and Others v Council* [1975] ECR 401, paragraphs 16 and 17).

- 16 The Commission submits that the letter of 13 December 1993 cannot be described as an actionable measure within the meaning of Article 173 of the Treaty. Where, as in this case, a complaint is made seeking a declaration that a Member State has failed to fulfil its obligations under the Treaty, the communication to the complainant informing him of the steps taken on that complaint does not constitute a decision which may be the subject of an action since the Commission in this regard has a discretionary power of assessment which excludes the right for individuals to require that institution to adopt a specific position.
- 17 The Commission adds that, even supposing that its decision not to act on the applicant's complaint, and consequently not to initiate infringement proceedings against the Federal Republic of Germany, is based on a misinterpretation of the Treaty, that circumstance cannot open the possibility to an individual to bring an action against the Commission's refusal to initiate proceedings under Article 169 of the Treaty and thus allow *in abstracto* review by the courts of the legality of Commission decisions, which is not provided for in the Treaty.
- 18 In its observations on the objection of inadmissibility, the applicant observes, first, that the subject matter of its application is indeed the decision of the Commission of 13 December 1993 as the sole decision of which it is aware. That decision constitutes a definitive decision on the part of the Commission addressed to the

applicant. Accordingly, it is an actionable measure within the meaning of Article 173 of the Treaty.

19 In that respect, the applicant claims that, under Articles 155 and 169 of the Treaty, the Commission is in principle bound to pursue any infringement of the Treaty brought to its attention (judgment in Case 337/82 *St. Nikolaus Brennerer v Hauptzollamt Krefeld* [1984] ECR 1051, paragraph 18). It points out, moreover, that Article 3 of Regulation No 17 requires the Commission to act where it finds an infringement of Articles 5, 86 and 90 of the Treaty. In the present case, there is a manifest infringement of Article 59 of the Treaty inasmuch as the freedom to provide services enshrined in that article is seriously hindered or even ruled out altogether by the contested German provision. According to the applicant, that provision also infringes Article 5 in conjunction with Articles 86 and 90 of the Treaty inasmuch as it grants a monopoly to the accounting undertaking DATEV and thus entails an abuse of a dominant position within the meaning of Article 86.

20 The applicant acknowledges that the Court of Justice has ruled out the possibility for an individual to bring an action for a declaration that the Commission has failed to act (*Star Fruit v Commission*, paragraphs 10 to 14) but points out that the present case is different, in view of the fact that the Commission, after having found that the contested German legislation infringed Article 59 of the Treaty, maintains that German accountants may not rely thereon. The applicant concludes that a decision of the Commission refusing to act against what it has found to be an infringement of the Treaty should not escape the review by the courts provided for by Article 173 of the Treaty since such a decision constitutes an infringement of Article 155 of the Treaty and misuse of the Commission's discretion.

### *Findings of the Court*

21 The Court of First Instance finds, first, that the claims for annulment directed against the letter of the Commission of 13 December 1993 in fact seek the

annulment of the Commission's decision of 4 November 1993, communicated to the applicant by a letter of 13 December 1993, to take no action on the complaint of 21 August 1992.

- 22 The decision of the Commission to take no action on the applicant's complaint must be interpreted as an expression of the Commission's intention not to commence proceedings under Article 169 of the Treaty against the Federal Republic of Germany. The only favourable response which the Commission could have given to the applicant's complaint would have been to commence proceedings against the Federal Republic of Germany for failure to fulfil its obligations under the Treaty.
- 23 It should be noted that the Court of Justice has consistently held that the Commission is not bound to commence proceedings under Article 169 of the Treaty but enjoys discretionary power which precludes any right on the part of individuals to require it to adopt a specific position (*Star Fruit v Commission*, paragraphs 10 to 14). Accordingly, 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.
- 24 It follows that, in the present case, it is not open to the applicant to challenge a refusal by the Commission to commence proceedings against the Federal Republic of Germany (order of the Court of Justice in Case C-29/92 *Asia Motor France and Others v Commission* [1992] ECR I-3935, paragraph 21; orders of the Court of First Instance in Case T-29/93 *Calvo Alonso-Cortés v Commission* [1993] ECR II-1389, paragraph 55, and in Case T-5/94 *J v Commission* [1994] ECR II-391, paragraph 15).
- 25 It should be added that, in requesting the Commission to commence proceedings pursuant to Article 169 of the Treaty, the applicant is in fact seeking the adoption

of an act which would not be of direct and individual concern to it within the meaning of the fourth paragraph of Article 173 of the Treaty and which it could not therefore challenge by means of an action for annulment in any event (see *Star Fruit v Commission*, paragraph 13).

26 Moreover, in so far as the action is to be construed as seeking a declaration that the Federal Republic of Germany has infringed certain provisions of Community law, it should be observed that, according to Articles 169 and 170 of the Treaty, the power to apply to the Community judicature for a declaration that a Member State has failed to fulfil its obligations does not extend to legal or natural persons, but is held solely by the Commission and the other Member States.

27 The Court of First Instance further notes that the applicant described its complaint as an application under Article 3 of Regulation No 17 inasmuch as it refers to an infringement of Articles 5, 86 and 90(1) and (2) of the Treaty. The applicant has not called in question the conduct of undertakings, but only the conduct of the Federal Republic of Germany. It maintains, however, that the said conduct is such as to fall within the scope of Article 90(3).

28 The Court of First Instance deduces from the foregoing that the applicant's complaint may also be regarded as an application submitted to the Commission for the purpose of calling on it to make use of its powers under Article 90(3).

29 However, the Court of First Instance considers that, even supposing that the decision not to act on the complaint could be regarded as a refusal by the

Commission to adopt a decision under Article 90(3) of the Treaty, the fact remains that this action for annulment is inadmissible.

30 It should be observed that Article 90(3) of the Treaty gives the Commission the task of ensuring that the Member States observe the obligations incumbent upon them as regards the undertakings referred to in Article 90(1) and expressly confers upon it the power to take action where necessary to that end under the conditions and by means of the legal instruments envisaged therein.

31 As is apparent from Article 90(3) and the scheme of Article 90 as a whole, the power of supervision of the Commission with regard to Member States which are responsible for infringements of the rules of the Treaty, in particular those relating to competition (judgment of the Court of Justice in Joined Cases C-48/90 and C-66/90 *Netherlands and Others v Commission* [1992] ECR I-565, paragraph 32), necessarily implies a wide margin of discretion for that institution. Consequently, the exercise of the power to assess the compatibility of State measures with the Treaty rules, conferred by Article 90(3) of the Treaty, is not coupled with an obligation on the part of the Commission to take action (judgment of the Court of First Instance in Case T-32/93 *Ladbroke Racing v Commission* [1994] ECR II-1015, paragraphs 36, 37 and 38). Consequently, 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).

32 Accordingly, the applicant cannot challenge the Commission's refusal to address a directive or a decision to the Federal Republic of Germany under Article 90(3) of the Treaty.

33 It follows from all the foregoing that the application must be dismissed as inadmissible.

## 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 and the Commission has applied for costs, the applicant should be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby orders:

- 1. The application is dismissed as inadmissible;**
- 2. The applicant shall pay the costs.**

Luxembourg, 23 January 1995.

H. Jung

Registrar

K. Lenaerts

President