

ORDER OF THE COURT OF FIRST INSTANCE (First Chamber)
26 March 1992 *

In Case T-4/89 Rev.,

BASF AG, a company incorporated under German law, having its registered office in Ludwigshaven (Germany), represented by F. Hermanns, Rechtsanwalt, Cologne, with an address for service in Luxembourg at the Chambers of J. Loesch et Wolter, 8 Rue Zithe,

applicant for revision,

v

Commission of the European Communities

defendant,

APPLICATION for the revision of the judgment of the Court of First Instance (First Chamber) of 17 December 1991 in Case T-4/89 *BASF AG v Commission* [1991] ECR II-1523,

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

composed of: H. Kirschner, President, R. García-Valdecasas, K. Lenaerts, R. Schintgen and C. Bellamy, Judges,

Registrar: H. Jung,

makes the following

* Language of the case: German.

Order

- 1 By application lodged at the Court Registry on 12 March 1992, BASF Aktiengesellschaft (hereinafter referred to as 'BASF') applied, under Article 41 of the Statute of the Court of Justice (EEC) and Article 125 of the Rules of Procedure of the Court of First Instance (hereinafter referred to as 'the Rules of Procedure'), for revision of the judgment of the Court of First Instance (First Chamber), of 17 December 1991 in Case T-4/89 *BASF v Commission* [1991] ECR II-1527).
- 2 By that judgment the Court of First Instance upheld in part the application for the annulment of the Commission's decision of 23 April 1986 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.149-Polypropylene, Official Journal L 230, p. 1) and reduced the fine imposed on the applicant for revision.
- 3 The applicant for revision claims that the Court of First Instance should:
- (1) revise the judgment in accordance with Article 125 of the Rules of Procedure;
 - (2) order measures of inquiry, in accordance with Articles 65 and 66 of the Rules of Procedure, and clarify the facts proved hereinafter;
 - (3) annul the judgment of 17 December 1991 and
 - (a) annul the decision adopted by the defendant on 23 April 1986, notified on 28 May 1986, relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/31.149-Polypropylene);

(b) in the alternative, annul or reduce the fine imposed on the applicant in Article 3 of the aforesaid decision;

(c) in the alternative, declare non-existent the decision in question adopted by the defendant;

(4) order the defendant to pay the costs.

4 In support of its application BASF contends that new matters of fact and of law were brought to its attention after the closing of the oral procedure on 10 July 1991 and after the service of the judgment of 17 December 1991. In its judgment of 27 February 1992 *BASF and Others v Commission* (Cases T-79/89, T-84/89, T-85/89, T-86/89, T-89/89, T-91/89, T-92/89, T-94/89, T-96/89, T-98/89, T-102 and T-104/89, [1992] ECR II-318, the Court of First Instance (Second Chamber) found that the decision submitted to it was non-existent owing to procedural defects by which it was vitiated and which emerged following measures of inquiry ordered by the Court. In view of the results of the measures of inquiry ordered in the PVC case (referred to above), the applicant for revision considers that it is virtually certain the principles laid down in Article 12(1) of the Commission's Rules of Procedure were infringed in the polypropylene case as in the PVC case and that the text of the decision notified in the polypropylene case does not correspond in every respect with the text of the decision adopted by the Commission.

5 As proof BASF points out that, at the hearing on 10 December 1991 in the PVC case, Commission officials stated that the procedure adopted in that case reflected a consistent practice. It claims that this is also clear from the statements made by the Commission to the press on 28 February 1992 (Information Service 'Vereinigte Wirtschaftsdienste' News 2802 111), according to which:

'The Commission also considers that the requirement laid down by the Court of Justice (sic) that all acts must be signed or initialled by the President of the Commission of the Communities or the Secretary General is not feasible. The

number of legal acts adopted each year by the Commission is in the order of 8 000. As Commission sources have emphasized, no third party may rely on rights arising from the judgment in question until the appeal proceedings have been decided. Consequently, for the moment there is no risk of a wave of new cases calling in question the legal practice of the Commission.'

It deduces from this that there is no reason to doubt the truth of the statements made by the Commission's officials since at the press conference the Commission confirmed the statements of its officials.

- 6 The applicant for revision also asserts that these facts are decisive for the judgment whose revision it seeks since, in accordance with the principles laid down in the judgment of 27 February 1992 referred to above, they should entail its annulment. BASF was not in a position to raise these grounds earlier because it did not become aware of them until the hearing held on 10 December 1991 and it was only from the judgment of 27 February 1992 that it became aware of the significance, both factual and legal, of the defects affecting the Commission's decision-making process.

- 7 BASF asks the Court to order various measures of inquiry in order to ascertain whether the Commission's decision in the polypropylene case is affected by the same defects as the decision which was declared non-existent by the judgment of 27 February 1992.

- 8 In assessing the admissibility of this application it should be borne in mind that, according to the first paragraph of Article 41 of the Statute of the Court of Justice (EEC), made applicable to the procedure before the Court of First Instance by the first paragraph of Article 46 of that Statute,

'an application for revision of a judgment may be made to the Court only on discovery of a fact which is of such a nature as to be a decisive factor, and which, when the judgment was given, was unknown to the Court and to the party claiming the revision'.

- 9 It is clear from that provision that revision is not an appeal procedure but an exceptional review procedure that allows an applicant to call in question the authority of *res judicata* attaching to a judgment bringing the proceedings to an end on the basis of the findings of fact relied upon by the Court. Revision presupposes the discovery of elements of a factual nature which existed prior to the judgment and which were unknown at that time to the court which delivered it as well as to the party applying for revision and which, had the court been able to take them into consideration, could have led it to a different determination of the proceedings. (See, most recently, the order of the Court of Justice of 25 February 1992 in Case C-185/90 P-Rev. *Gill v Commission* [1992] ECR I-994.)
- 10 In the present case, the Court finds that the only fact on which the party seeking revision may rely in support of its application consists of the statements made by Commission officials at the hearing held on 10 December 1991 in the PVC case.
- 11 It should be noted that in its application for revision BASF states that 'it was not able to raise these grounds (that is to say those which it raises in its application for revision) earlier because it only became aware of them at the hearing on 10 December 1991'.
- 12 Although BASF goes on to state that it was only through the judgment of 27 February 1992 that it became aware of the significance, both factual and legal, of the defects affecting the Commission's decision-making process, the Court notes that the judgment of 27 February 1992 merely defined the legal effect of the statements made by the Commission officials at the hearing on 10 December 1991 in this case which was then before this Court but without deciding on the truth of those statements (judgment of 27 February 1992, cited above, paragraph 92). Consequently, that judgment cannot in any event constitute by itself a fact capable of giving rise to the revision of the judgment of 17 December 1991 (see the judgment of the Court of Justice of 19 March 1991 in Case C-403/85 Rev *Ferrandi v Commission* [1991] ECR I-1215, at paragraph 13).

- 13 As regards the statements made by Commission representatives at the press conference which took place the day after the delivery of the judgment of 27 February 1992, the Court considers that they merely confirm the tenor of the statements made by the Commission's officials at the hearing on 10 December 1991; this is also clear from paragraph 2 of BASF's application for revision. Consequently, the statements made at the press conference likewise cannot, as far as BASF are concerned, constitute in themselves a fact capable of leading to the revision of the judgment of the Court of First Instance of 17 December 1991.
- 14 However, the Court notes that the only fact which BASF may rely upon in support of its application for revision of the judgment of this Court of 17 December 1991, namely the statements made by Commission officials at the hearing on 10 December 1991 in the PVC case, were obviously known to the applicant before the judgment of 17 December 1991 was pronounced. That party was present at the hearing on 10 December 1991 and was represented there by the same lawyer who represented it in the proceedings which led to the judgment of 17 December 1991. Furthermore, its main evidence for this contention is the recording of the hearing of 10 December 1991. Finally, the applicant for revision states that 'it only learnt of them at the hearing on 10 December 1991'. Consequently, the applicant for revision could have brought this fact to the knowledge of the Court before the judgment of 17 December 1991 was pronounced, as did the applicants in Cases T-9/89 to T-15/89 (see the judgments of 10 March 1992 in Case T-9/89 *Hüls v Commission* [1992] ECR II-499, paragraphs 382 to 385; Case T-10/89 *Hoechst v Commission* [1992] ECR II-629, paragraphs 372 to 375; Case T-11/89 *Shell v Commission* [1992] ECR II-757, paragraphs 372 to 374; Case T-12/89 *Solvay v Commission* [1992] ECR II-907 paragraphs 345 to 347; Case T-13/89 *ICI v Commission* [1992] ECR II-1021, paragraphs 399 to 401; Case T-14/89 *Montedipe v Commission* [1992] ECR II-1155, paragraphs 389 to 391 and Case T-15/89 *Linz v Commission* [1992] ECR II-1275, paragraph 393 to 395).
- 15 It follows from the foregoing that this fact cannot constitute, for the purposes of the first paragraph of Article 41 of the Statute of the Court of Justice (EEC), a fact unknown to the party seeking revision before the judgment of this Court of 17 December 1991 was delivered and, consequently, that it cannot give rise to revision of that judgment.

- 16 Needless to say, the facts relied upon by BASF are not of such a nature as to be a decisive factor for the judgment of 17 December 1991, as is clear from the aforementioned paragraphs of the judgment of 10 May 1992 in Cases T-9/89 to T-15/89.
- 17 It must be added that Article 111 of the Rules of Procedure applies to all actions brought before the Court of First Instance, including exceptional applications. Since the application for revision is manifestly inadmissible, it must, in accordance with that provision, be declared inadmissible as from its notification to the defendant.
- 18 Since the order was made before notification of the application to the defendant, it is sufficient for it to be decided, in accordance with Article 87(2) of the Rules of Procedure, that the applicant for revision is to bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1. **Dismisses the application for revision as inadmissible;**
2. **Orders the applicant for revision to bear its own costs.**

Luxembourg, 26 March 1992.

H. Jung
Registrar

H. Kirschner
President