JUDGMENT OF THE COURT (Second Chamber)

9 December 2004 *

In Case C-123/03 P,

APPEAL under Article 56 of the Statute of the Court of Justice, lodged at the Court on 19 March 2003,

Commission of the European Communities, represented by K. Wiedner, acting as Agent, with an address for service in Luxembourg,

appellant,

the other party to the proceedings being:

Greencore Group plc, established in Dublin (Ireland), represented by A. Böhlke, Rechtsanwalt,

* Language of the case: English.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, C. Gulmann (Rapporteur), J.-P. Puissochet, N. Colneric and J.N. Cunha Rodrigues, Judges,

Advocate General: F.G. Jacobs,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 1 April 2004,

after hearing the Opinion of the Advocate General at the sitting on 6 May 2004,

gives the following

Judgment

1 By its appeal the Commission of the European Communities requests the Court to set aside the order of the Court of First Instance of the European Communities of 7 January 2003 in Case T-135/02 *Greencore Group* v *Commission*, not published in the European Court Reports ('the order appealed against'), in which the Court of First Instance declared admissible the action for annulment brought by Greencore Group plc ('Greencore') against a letter of the Commission of 11 February 2002.

The facts giving rise to the dispute

2 By Decision 97/624/EC of 14 May 1997 relating to a proceeding pursuant to Article 86 of the EC Treaty (IV/34.621,35.059/F-3 Irish Sugar plc) (OJ 1997 L 258, p. 1), the Commission imposed on Irish Sugar plc ('Irish Sugar'), a subsidiary of Greencore, a fine of ECU 8 800 000. That fine was paid by Irish Sugar on 22 August 1997.

3 On 4 August 1997, Irish Sugar brought an action before the Court of First Instance seeking annulment of that decision.

4 By judgment of 7 October 1999 in Case T-228/97 *Irish Sugar* v *Commission* [1999] ECR II-2969 the Court of First Instance reduced the amount of that fine to EUR 7 883 326, dismissing the remainder of the action.

5 Greencore's application before the Court of First Instance (Case T-135/02) shows that in the month of October 1999 an official of the Commission made contact by telephone with Irish Sugar's lawyer, who is also Greencore's lawyer, in order to prepare reimbursement of that part of the fine that had been annulled. According to Greencore, during that telephone conversation the matter of interest on the sum to be refunded was discussed on the initiative of Irish Sugar's lawyer, and it appeared unlikely that the Commission would pay interest on the sum it owed to the company, such a thing having never previously been done.

6 Greencore has also acknowledged that both Irish Sugar's lawyer and the Commission's official were aware that the issue of whether or not the Commission was obliged to pay interest when reimbursing a principal sum was at that moment pending before the Court of First Instance in Case T-171/99 *Corus UK* v *Commission* [2001] ECR II-2967.

7 On 26 October 1999 Greencore was told by its lawyer of his conversation with the official of the Commission, of the unlikelihood of the Commission's paying interest and of the action brought in *Corus UK* v *Commission*. In addition, he advised that interest ought not to be renounced but rather that it should be claimed expressly.

8 By fax of 27 October 1999 Greencore sent the Commission details of Irish Sugar's bank account into which the principal sum of EUR 916 674 payable pursuant to the *Irish Sugar* judgment was to be repaid. In addition it then made the following request of the Commission: 'Please also confirm that you will pay interest on the sum refunded for the period from its payment to you by Irish Sugar plc until the date of refund. Please advise the amount of interest'.

9 On 4 January 2000 the Commission transferred the sum of EUR 916 674 to Irish Sugar's account without paying any interest.

10 In its application to the Court of First Instance Greencore acknowledged that the payment made by the Commission on 4 January 2000 was the only reply to its fax of 27 October 1999 and that it had not subsequently pressed for an answer on the matter of interest, preferring to await the outcome of the *Corus* case before returning to the Commission on that point.

11 In paragraph 53 of the *Corus* judgment the Court of First Instance held that, in the case of a judgment annulling or reducing a fine imposed on an undertaking for infringement of the competition rules of the EC Treaty, the Commission is obliged to repay not only the principal amount of the sum overpaid but also default interest on that sum.

12 By registered letter of 1 November 2001, referring to the *Corus* judgment, Greencore requested the Commission to pay to Irish Sugar the sum of EUR 154 892 corresponding to interest at 7.13% on the principal sum of EUR 916 674 for the period from 22 August 1997 to 4 January 2000.

13 The Commission replied by letter of 11 February 2002 that 'payment of the principal sum without interest on 4 January 2000 meant that the Commission refused to pay any interest' and that, Greencore not having challenged that 'decision not to pay interest within the two months laid down in Article 230 EC' and having 'chose[n] to await the outcome of the *Corus* judgment before [coming] back on this issue', it was therefore 'precluded from taking advantage of the *Corus* judgment after having originally accepted the payment of the principal sum without interest'.

The proceedings before the Court of First Instance and the order appealed against

14 By application lodged at the Registry of the Court of First Instance on 25 April 2002 Greencore brought an action in which it claimed that the Court should annul the letter of 11 February 2002 and order the Commission to pay the costs.

15 By separate document the Commission raised an objection of inadmissibility pursuant to Article 114(1) of the Court of First Instance's Rules of Procedure, arguing that the Court should, first, dismiss the action as manifestly inadmissible and, second, order Greencore to pay the costs.

16 In its written pleadings before the Court of First Instance the Commission denied that the letter of 11 February 2002 constituted a measure against which an action for annulment might lie, for it did not in any way change Greencore's legal position, the Commission having already refused to pay interest.

17 In that connection the Commission maintained that since Greencore had by its fax of 27 October 1999 supplied the Commission with the details of its bank account with a view to the reimbursement of the sum overpaid and had requested confirmation that interest would be paid, it is the Commission's reimbursement of the principal without interest on 4 January 2000 that constitutes the decision not to pay interest, which was not challenged by Greencore within the period prescribed by Article 230 EC.

18 According to the Commission, the letter of 11 February 2002 in no way constituted a decision and did no more than inform Greencore that, by not having challenged the earlier refusal to pay interest, Greencore had accepted that decision and could not return to the matter of interest after another undertaking had succeeded before the Court of First Instance after contesting the Commission's refusal to pay interest.

19 In paragraph 14 of the order appealed against the Court of First Instance found that it was apparent from the very terms in which the letter of 11 February 2002 was couched that it did not merely impart information but clearly expressed the Commission's refusal to pay the default interest requested by Greencore in favour of its subsidiary, and that the reason for that refusal was that Greencore had forfeited its right to request the payment of interest, since it had not raised the matter when the principal sum paid by way of fine was refunded on 4 January 2000.

20 In paragraph 15 of that order the Court of First Instance referred to Case 44/81 *Germany and Another* v *Commission* [1982] ECR 1855, paragraph 6, noting that 'where an institution, by refusing to make a payment, disputes a prior commitment or denies its existence, it commits an act which in view of its legal effects may give rise to an action for annulment under Article 230 EC. If the action leads to the annulment of the refusal to make the payment, the applicant's right is established and it will be for the institution concerned, pursuant to Article 233 EC, to ensure that the payment which has been unlawfully refused is made. Moreover, if an institution fails to reply to a request for repayment, the same result may be obtained by means of Article 232 EC.'

21 In paragraph 16 of that order the Court of First Instance considered that that case-law was applicable in circumstances such as those in question, where the

Commission, by refusing to make a payment, denied the existence of an obligation owed by it under a provision of the Treaty.

22 It therefore dismissed the objection of inadmissibility raised by the Commission as unfounded and made an order for the further conduct of the action.

The forms of order sought before the Court of Justice

23 In its appeal the Commission claims that the Court should:

— annul the contested order and declare the action inadmissible;

— order the applicant to bear the costs incurred before the Court of First Instance as well as the Court of Justice.

24 Greencore lodged a response at the Court Registry, in which it contended that the Court should dismiss the appeal and order the Commission to pay the costs.

On the appeal

Pleas in law and arguments of the parties

25 The Commission claims that the Court of First Instance infringed Article 230 EC by declaring admissible an action for annulment of an act that is not open to such challenge.

26 In that respect, citing the Court's case-law according to which a letter that merely confirms an initial decision does not constitute a decision against which an action for annulment may be brought, for it does not bring about a distinct change in its addressee's position (see, inter alia, Case C-199/91 *Foyer culturel du Sart-Tilman* [1993] ECR I-2667, paragraph 23), the Commission argues that that is the case with regard to the letter of 11 February 2002 which did not re-examine the merits of the case and contained nothing capable of bringing about a distinct alteration in Greencore's legal position.

27 The Commission maintains that it is the fact that it refunded the principal sum alone to Greencore's subsidiary, while refraining from any pronouncement on the payment of interest, that constitutes the original decision rejecting Greencore's request for the payment of interest.

28 According to the Commission, it was when it refunded the principal sum alone to Greencore that the latter ought to have brought an action for annulment of the refusal to pay interest, as other undertakings did. Instead, Greencore preferred to await the outcome of the *Corus* case, deciding that it would act only if Corus UK Ltd. were held to be entitled to the payment of interest.

29 Furthermore, the Commission argues that, if Greencore considered that refunding the principal sum without interest did not constitute a decision refusing to pay interest, it ought, in accordance with the procedure for failure to act laid down in Article 232 EC, to have called upon the institution to act within a reasonable period. Now, as its application before the Court of First Instance makes clear, Greencore chose not to bring an action of that kind.

30 Lastly, the Commission is of the view that the judgment in *Germany and Another* v *Commission* cannot serve as a precedent for dismissing the objection of inadmissibility and that that decision was, in any case, misapplied.

31 Greencore claims, first, that the Commission's plea that the Court of First Instance infringed Article 230 EC by declaring admissible an action for annulment of an act that is not open to challenge must be dismissed without its even being necessary to consider the case-law on which it is based.

32 In this regard, Greencore argues, in essence, that by continuing to claim that the letter of 11 February 2002 was merely a letter imparting information the Commission overlooks the fact that the order appealed against has deprived that thesis of its factual basis. The Court of First Instance did not uphold the premiss that the non-payment of interest constituted a decision which that letter merely recalled. It found, in paragraph 14 of the order appealed against, that the letter of 11 February 2002 expresses clearly the refusal to pay the default interest requested by Greencore in favour of its subsidiary. Moreover, the Court of First Instance made no finding of any earlier refusal.

33 Greencore states that the Court of First Instance's appraisal of the facts does not constitute a question of law which is subject, as such, to review by the Court of Justice.

34 Second, according to Greencore, there is no rule of Community law according to which an institution's silence is tantamount to a refusal, except where that is expressly stated. The silence maintained by the Commission when Greencore had, by fax of 27 October 1999, specifically requested confirmation of the fact that interest would be paid, cannot therefore constitute a decision refusing to pay interest.

35 Third, Greencore submits that the Court of First Instance was right in relying, in paragraph 15 of the order appealed against, on the case-law flowing from *Germany and Another* v *Commission*, when deciding whether or not the letter of 11 February 2002 was an act against which an action could be brought, and in holding that there could be no difference in law between an institution's denying that any prior commitment existed and its denying that it was bound by an obligation imposed by the Treaty.

Findings of the Court

36 Although, as Greencore argues, the Court of Justice has no jurisdiction to review the assessment of the facts made by the Court of First Instance, it does have jurisdiction pursuant to Article 225 EC to review the definition of the legal nature of those facts

and the determination of the legal consequences made by the Court of First Instance (see, to that effect, Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others* [1994] ECR I-1981, paragraph 49, and Case C-7/95 P *John Deere* v *Commission* [1998] ECR I-3111, paragraph 21).

37 In the instant case, however, the Commission alleges that the Court of First Instance erroneously classified the letter of 11 February 2002 as a measure against which an action for annulment could be brought when it considered that that letter clearly expressed the refusal of that institution to pay the default interest requested.

38 None the less, as the Commission argues, correct classification of the legal nature of that letter presupposes an earlier determining of the classification to be made of the Commission's payment of the principal sum without interest on 4 January 2000.

39 Indeed, if, as the Commission maintains, payment of the principal without the interest requested had to be classified as an implied refusal to pay that interest, the consequence of that circumstance might be that the letter of 11 February 2002 must be held to be a measure merely confirming a previous decision which was not challenged within the prescribed period. In that case, in accordance with the Court of Justice's case-law, that letter would not be a measure against which an action for annulment could be brought (see, to that effect, Case C-480/93 P *Zunis Holding and Others* v *Commission* [1996] ECR I-1, paragraph 14).

40 Now, it has to be stated that, in its assessment of the admissibility of Greencore's action, the Court of First Instance did not examine the Commission's plea in law, since it did not consider whether payment of the principal without interest amounted to an implied refusal to pay such interest which might be classified as an actionable decision for the purposes of Article 230 EC.

41 By failing to examine that plea, the Court of First Instance committed an error of law which warrants setting aside the order appealed against.

42 Under the first paragraph of Article 61 of the Statute of the Court of Justice, if the appeal is well founded, the Court is to set aside the decision of the Court of First Instance. It may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the Court of First Instance for judgment.

43 In the circumstances of this case, the Court considers that it has available to it all the evidence necessary in order to give final judgment on the objection of inadmissibility.

44 First, it has to be stated that any measure which produces binding legal effects such as to affect the interests of an applicant by bringing about a distinct change in his legal position is an act or decision which may be the subject of an action under Article 230 EC for a declaration that it is void (see, inter alia, Joined Cases C-68/94 and C-30/95 *France and Others* v *Commission* [1998] ECR I-1375, paragraph 62, and Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 9).

45 It is next appropriate to observe that, as a rule, mere silence on the part of an institution cannot be placed on the same footing as an implied refusal, except where that result is expressly provided for by a provision of Community law. While not excluding that in certain particular circumstances that principle may not be applicable, so that an institution's silence or inaction may exceptionally be considered to constitute an implied refusal, the Court considers that in the circumstances of the present case the Commission's paying of the principal sum only without explicitly taking a position on the request for payment of interest does not amount to an implied decision rejecting that request. Indeed, in this case, such exceptional circumstances have not been invoked and have not arisen.

46 Finally, the fact that Greencore did not use the procedure provided for by Article 232 EC in order to oblige the Commission to pay interest has no bearing on the admissibility of the action for annulment that it brought after the *Corus* judgment had been given.

47 In so far as the Court has rejected the Commission's plea that the letter of 11 February 2002 did no more than confirm a decision previously made containing an implied refusal it has to be held that that letter, in which Greencore was refused the right to claim payment of interest on the sum refunded, contains a refusal to pay interest and accordingly constitutes an actionable measure for the purposes of Article 230 EC.

48 In consequence, the objection of inadmissibility raised by the Commission must be rejected as unfounded.

49 In those circumstances, first, the order appealed against must be set aside and, then, under the first paragraph of Article 61 of the Statute of the Court of Justice, the objection of inadmissibility raised by the Commission must be rejected as unfounded.

On those grounds, the Court (Second Chamber) hereby:

1. **Sets aside the order of the Court of First Instance of the European Communities of 7 January 2003 in Case T-135/02 *Greencore Group* v *Commission*;**

2. **Rejects the plea of inadmissibility raised by the Commission of the European Communities;**

3. **Reserves the costs.**

Signatures.