ORDER OF THE COURT OF FIRST INSTANCE (Second Chamber)

28 April 1994 *

In Joined Cases T-452/93 and T-453/93,

Pesquería Vasco-Montañesa, SA (Pevasa), a company incorporated under Spanish law, established in Bermeo (Spain), represented by Maria Iciar Angulo Fuertes, of the Biscay Bar, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 8-10 Rue Mathias Hardt,

and

Compañía Internacional de Pesca y Derivados, SA (Inpesca), a company incorporated under Spanish law, established at Bermeo (Spain), represented by Maria Iciar Angulo Fuertes, of the Biscay Bar, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 8-10 Rue Mathias Hardt,

applicants,

* Language of the case: Spanish.

Commission of the European Communities, represented by Franciso Santaolalla, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Georgios Kremlis, also of the Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for, first, the annulment of the Commission decisions of 18 December 1990 and 8 November 1991 refusing the applicants the financial aid they had sought pursuant to Council Regulation (EEC) No 4028/86 of 18 December 1986 on Community measures to improve and adapt structures in the fisheries and aquaculture sector, secondly, for recognition of the applicants' entitlement to the said financial aid and, thirdly, for an order that the Commission pay interest on the arrears,

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

composed of: J. L. Cruz Vilaça, President, C. P. Briët, A. Kalogeropoulos, A. Saggio and J. Biancarelli, Judges,

Registrar: H. Jung,

makes the following

Order

Legislation, facts and procedure

1 By applications lodged at the Court Registry on 30 July 1992, the applicants both instituted proceedings under Articles 173 and 174 of the EEC Treaty, against the Commission decisions of 18 December 1990 and 8 November 1991 refusing to grant the Community financial aid provided for by Council Regulation (EEC) No 4028/86 of 18 December 1986 on Community measures to improve and adapt structures in the fisheries and aquaculture sector (OJ 1986 L 376, p. 7, 'Regulation No 4028/86') in respect of projects for the construction of fishing vessels.

2 Article 6(1) of Regulation No 4028/86 provides that the Commission may grant Community financial aid for material investments relating to the purchase or construction of new fishing vessels. Article 6(2)(a) provides that to qualify for the aid, the projects must form part of a multiannual guidance programme approved by the Commission.

3 Pursuant to Article 35(1)(a) of Regulation No 4028/86, the Commission twice yearly takes decisions on applications relating to projects for the construction of vessels, 'the first decision being taken not later than 30 April and covering applications submitted not later than 31 October of the preceding year and the second decision being taken not later than 31 October and covering applications submitted not later than 31 March of the current year'. Article 37(1) of Regulation

No 4028/86 provides that where an application for aid is not granted owing to lack of funds, that application is to be carried forward, once only, to the following budgetary year.

4 On 29 June 1989, the Commission received an application for financial aid from the Compañía Internacional de Pesca y Derivados, SA ('Inpesca'), for the construction of a tuna fishing vessel with freezer facilities. On 31 October 1989, it received a similar application from Pesquería Vasco-Montañesa, SA ('Pevasa').

5 On 18 December 1990, the Commission sent both Inpesca and Pevasa identical letters drafted as follows:

'In accordance with Article 35 of Regulation (EEC) No 4028/86 of 18 December 1986, you submitted to the Commission, before 31 March 1990, through the intermediary of the Spanish Government, an application for financial aid from the Commission with a view to carrying out the aforementioned project.

I regret to have to inform you that your project has not been awarded financial aid for the following reason: the budget item available for financing 1990 projects was insufficient.'

6 The Commission accepts that in accordance with Article 35(1)(a) of Regulation No 4028/86, the decision on the application for aid should have been taken on 30 April 1990 at the latest. It stated that in April 1990 it had been obliged, however, to suspend the award of new aid on the ground that some Member States, including Spain, had sent it incomplete or contradictory information regarding the development of their fleet, and that that information was necessary in order to decide

whether the applications for aid submitted formed, for each of the relevant Member States, part of a multiannual guidance programme which it had approved.

7 The Commission also explained that the applications submitted by the applicants, after having been refused in December 1990, were automatically carried forward to the 1991 budgetary year, in accordance with Article 37(1) of Regulation No 4028/86.

8 Owing to the overcapacity of the fishing fleet in the Community, the Commission decided in April 1991 to suspend all decisions on applications for Community aid for the construction of fishing vessels. The Commission made it known, however, by notice published in the Official Journal of 20 June 1991, that all construction projects would be reconsidered when it was preparing its decisions, at the second round of the 1991 financial year (OJ 1991 C 160, p. 3).

9 By letters of 8 November 1991, the Commission informed the applicants that their projects had not been granted funds. They were drafted as follows:

'In accordance with Article 35 of Regulation (EEC) No 4028/86 of 18 December 1986, you submitted to the Commission, before 31 March 1991, through the intermediary of the Spanish Government, an application for financial aid from the Commission with a view to carrying out the aforementioned project.

I regret to have to inform you that your project has not been awarded financial aid for the following reason: the budget item available for financing 1991 projects was insufficient.'

10 In a letter of 7 January 1992 to the Commission, Pevasa raised several objections to the communications of 18 December 1990 and 8 November 1991. It also asked the Commission to inform it whether its application for aid had been carried forward to the 1992 budget and to notify it, in the event of a definitive refusal, of the grounds on which that refusal was based, when, as Pevasa maintained, the project submitted fulfilled all the necessary conditions to obtain a grant of Community financial aid. Inpesca sent the Commission an identical letter on 27 January 1992.

11 Pevasa did not receive a reply to that letter and, on 18 March 1992, sent the Commission a letter formally calling upon it to act, prior to bringing an action under Article 175 of the EEC Treaty, in accordance with the second paragraph of that article. Inpesca sent an identical letter of notice on 31 March 1992.

12 By letters of 18 May 1992, the Commission informed the applicants, in response to their letters of 18 and 31 March 1992, that 'the Commission's notifications of 18 December 1990 and 8 November 1991 ... both constituted, of themselves, notifications including a statement of reasons for the decision, in accordance with the provisions of Article 35 of Council Regulation No 4028/86'. The applicants received that letter on 25 May 1992.

13 Finally, by letters of 21 May 1992, the Commission replied as follows to the letters of 7 and 27 January 1992:

'With regard to your first question, as to whether your project could be carried forward to the 1992 financial year, the reply follows from Article 37(1) of Regulation (EEC) No 4028/86, which provides that aid applications in response to which no grant has been awarded for lack of funds may be carried forward to the following budgetary year once only.

With regard to your second question, I must point out to you that, pursuant to Commission communication 91/C 331/03 (OJ C 331), a list of projects retained is available on request. The list enables interested parties to examine, and if need be to request the Court of Justice to verify the lawfulness of, the Commission's decision to grant Community finance as a priority to projects accepted, on the basis of the criteria laid down in Community legislation.'

14 These are the circumstances in which the applicants each brought an action before the Court of Justice, registered on 30 July 1992.

15 By order of 27 September 1993, the Court of Justice referred the cases to the Court of First Instance, under Article 4 of Council Decision 93/350/Euratom/ECSC/EEC of 8 June 1993, amending Decision 88/591/ECSC/EEC/Euratom establishing the Court of First Instance of the European Communities (OJ 1993 L 144, p. 21).

16 By order of the President of the Second Chamber of the Court of First Instance of 29 March 1994, Cases T-452/93 and T-453/93 were joined.

17 The applicants claim that the Court of First Instance should:

(1) declare admissible, under Articles 173 and 174 of the Treaty, their applications for the annulment of the Commission decisions of 18 December 1990 and 8 November 1991, refusing the applicants Community financial aid requested for their projects to construct a tuna fishing vessel with freezer facilities, in accordance with Regulation No 4028/86;

(2) declare the Commission's aforementioned decisions to be null and void for infringement of essential procedural requirements, infringement of the EEC Treaty and of the legal rules relating to its implementation, misuse of powers and breach of the general legal principles which are to be observed at all times;

(3) order that to comply with its judgment, under the first paragraph of Article 176 of the EEC Treaty, the Commission should immediately set in motion the necessary measures for the granting of Community financial aid in the amount of PTA 209 266 000 to Pevasa and of Community financial aid in the amount of PTA 216 286 200 to Inpesca, as requested, for the aforementioned projects, on the grounds that the budget appropriations necessary for the financing of those projects were available in 1990 and in 1991 and that the refusal set out in the contested decisions is devoid of any formal or legal basis;

(4) recognize the applicants' right, in accordance with the combined provisions of the second paragraph of Article 176, Article 178 and the second paragraph of Article 215 of the EEC Treaty, to obtain, as compensation for the damage and loss caused by the adoption of the contested decisions, the interest pertaining to that Community financial aid since 31 October 1990, the date on which it should have been granted, until the date on which it is to be received, in accordance with the general rules common to the laws of the Member States;

(5) order the Commission to pay the costs.

18 In their replies, the applicants rephrased the fourth point as follows:

— uphold the application for compensation in the present action, in accordance with the second paragraph of Article 176, Article 178 and Article 215 of the EEC Treaty, and accordingly recognize the applicants' right to compensation for damage and loss, by way of the granting of financial aid, together with interest in respect of late payment, payable from the date on which that Community financial aid should have been granted.

19 The Commission contends that the Court of First Instance should:

(1) declare the actions inadmissible;

(2) in the alternative, dismiss as unfounded the applications for annulment of the contested decisions;

(3) declare inadmissible and, in the alternative, unfounded the applications for a declaration from the Court of First Instance that the applicants are entitled to the aid they sought;

(4) declare the applications for interest inadmissible and, in the alternative, unfounded;

(5) order the applicants to pay the costs.

20 Article 113 of the Rules of Procedure of the Court of First Instance provides that the Court may at any time of its own motion consider whether there exists any bar to proceeding. Under Article 114(3) of that article unless the Court otherwise decides, the remainder of the proceedings are oral. The Court (Second Chamber) considers that it has sufficient information in the present case and that there is no need to commence oral proceedings.

Admissibility

Summary of the parties' arguments

21 With regard, first of all, to the forms of order seeking an annulment, the Commission maintains that proceedings were instituted outside the two-month time-limit

laid down in Article 173 of the EEC Treaty, as extended on account of distance. It states that the applicants, as recipients of the communications of 18 December 1990 and 8 November 1991, could not reasonably have had any doubts as to the fact that those measures, which informed them unequivocally and definitively that their applications had not been successful, were equivalent to decisions.

22 The applicants state that they only received formal notification of the Commission decisions, in a definitive form, by the letter of 18 May 1992. Therefore, the period for instituting proceedings only began to run from receipt of that letter, on 25 May 1992.

23 The Commission considers that the argument developed by Pevasa, in its letter of 7 January 1992, and by Inpesca, in its letter of 27 January 1992, should have been put forward in the course of proceedings brought in due time before the Community judicature and not in the course of a complaint such as that put to it. It considers that the applicants' request for action, on the basis of Article 175 of the Treaty, was also designed to obfuscate and conceal the expiry of the time-limit.

24 The applicants reply that the Commission's decisions regarding their requests are non-existent, on the ground that letters giving information, such as the Commission's letters of 18 December 1990 and 8 November 1991, can neither constitute nor replace formal decisions, in accordance with the requirements of Articles 189, 190 and 191 of the EEC Treaty, and that the Commission only expressly stated its position in its letter of 18 May 1992.

25 With regard, secondly, to the application for an order from the Court that the Commission adopt the necessary measures to meet their requests for financial aid, the applicants explain, in their application, that they are 'asking the Court to annul

the contested decisions by its judgment and to declare that the grant of the requested Community aid to the applicant undertaking is justified'. The Commission considers that such an application is inadmissible, in the context of an action for annulment.

26 With regard, thirdly, to the applicants' application for compensation, the Commission submits that it is inadmissible on the ground that it is subordinate to an application which is itself inadmissible, namely the application for a declaration from the Court recognizing the applicants' entitlement to the financial aid they had requested.

27 The applicants consider that their application for compensation is admissible in the light of the cases decided by the Court of Justice, according to which an application for compensation is an autonomous form of action (see judgment of the Court of Justice in Case 175/84 *Krohn* v *Commission* [1986] ECR 753, paragraph 32).

Findings of the Court

The claims with regard to the annulment of the correspondence dated 18 December 1990 and 8 November 1991

28 In order to determine the admissibility of the claims for the annulment of the contested measures, it is necessary, first of all, to consider whether the application is for the annulment of an act which is open to challenge, within the meaning of Article 173 of the EC Treaty. If the letters of 18 December 1990 and of 8 November 1991, the annulment of which is sought, do not constitute, as is claimed by the applicants, formal decisions, the claims for their annulment are inadmissible.

29 It has been consistently held that any measure the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position is an act or decision against which an action for annulment may be brought under Article 173 (see, *inter alia*, judgment of the Court of Justice in Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 9 and judgment of the Court of First Instance in Case T-64/89 *Automec* v *Commission* [1990] ECR II-367, paragraph 42). However, the form in which such acts or decisions are cast is, in principle, immaterial as regards the question whether they are open to challenge under that article (judgment in *IBM* v *Commission*, cited above, paragraph 9, and judgment of the Court of Justice in Case 22/70 *Commission* v *Council* [1971] ECR 263, paragraph 42).

30 The Court observes that, by letters of 18 December 1990, the applicants were informed that their applications for financial aid could not be granted out of the 1990 budget since funds were insufficient. In accordance with Article 37 of Regulation No 4028/86, the applications were carried forward to the following budgetary year. By letters of 8 November 1991, the applicants were informed that their applications had been refused for the second time, funds being insufficient.

31 The Court considers that the letters of 8 November 1991 are, in any event, legal acts having definitive legal effects vis-à-vis the applicants. By those letters, which are drafted in precise and unequivocal terms, the Commission took a definitive position with regard to the applicants' applications, since Article 37(1) of Regulation No 4028/86 provides for applications to be carried forward once only in the event of their being refused Community aid for lack of funds.

32 Therefore, the letters of 8 November 1991 are to be regarded as acts open to challenge for the purposes of Article 173 of the EC Treaty. Since the letters of 8 November 1991 came after the letters of 18 December 1990 and the Commission

based its plea of inadmissibility on the lateness of the applications for annulment, the Court considers that there is no need, at this stage, to rule on the legal status of the letters of 18 December 1990.

33 Secondly, it is necessary to consider whether the procedural time-limits were complied with. The third paragraph of Article 173 of the EEC Treaty, in force on the day the application was lodged, and restated in the fifth paragraph of Article 173 of the EC Treaty, sets the time-limit for bringing an action for annulment under that article at two months from the date of the publication of the measure or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be. Pursuant to Article 42 of the Statute of the Court of Justice of the EEC, that time-limit may be extended by a period of grace based on considerations of distance, as determined by the Rules of Procedure.

34 In that connection, the applicants state that the letters of 8 November 1991, like those of 18 December 1990, did not amount to a notification such as to make time start to run, and that the Commission's decisions concerning their applications for financial aid were only communicated to them by the letters of 18 May 1992, mentioned above.

35 In reply to that argument it should be stated that, as the Court has just observed (see paragraphs 30, 31 and 32 above), the letters of 8 November 1991 were precise unequivocal and contained the Commission's definitive decision regarding the applicants' applications for aid. Those letters must therefore be regarded as a proper notification of the contested decisions, within the meaning of Article 173 of the Treaty (see in particular the order of the Court of Justice in Case C-12/90

Infortec v *Commission* [1990] ECR I-4265, paragraph 9). Furthermore, in the event that the letters of 18 December 1990 also constituted measures open to challenge within the meaning of Article 173, they should be regarded, for the same reasons, as proper notification of the Commission's decision contained therein.

36 The precise dates on which the applicants received those letters have, indeed, not been established. However, since Pevasa's letter of 7 January 1992 and Inpesca's letter of 27 January 1992 to the Commission both refer expressly to the contested acts, it follows that Pevasa and Inpesca were necessarily aware of the letters of 18 December 1990 and 8 November 1991, respectively, at the latest on 7 January 1992 and 27 January 1992.

37 Therefore the applications, which were registered on 30 July 1992, in so far as they contain claims for annulment, were submitted well after the expiry of the two-month time-limit laid down in Article 173 of the EEC Treaty, extended by 10 days on account of distance, and, for that reason, must be dismissed as inadmissible.

The claims for an order that the Commission take the necessary measures for granting the aid requested

38 In proceedings for annulment brought under Article 173 of the EC Treaty, the power of the Community judicature is limited to verifying the lawfulness of the contested act. If the action is well founded, in accordance with Article 174 of the EC Treaty the Court will declare the act concerned to be void. Pursuant to Article 176 of the EC Treaty, the institution whose act has been declared void is required to take the necessary measures to comply with the judgment of the Court.

39 The present applications, based on the first paragraph of Article 176 of the EEC Treaty, restated in the first paragraph of Article 176 of the EC Treaty, are for recognition by the Court of the applicants' entitlement to the aid requested. Those applications are inadmissible since they exceed the powers conferred on the Court in the context of actions for annulment.

The claims for interest for late payment

40 The claims contained in the applications initially sought recognition of the applicants' entitlement, as compensation for damage and loss suffered as a result of the contested decisions, to interest payable on the Community financial aid they had requested, to run from 31 October 1990, on which date it should have been awarded to them, until the actual date of payment. In their replies the applicants broadened their claims by asking the Court to recognize their right 'to compensation for damage and loss, by way of the granting of financial aid, together with interest in respect of late payment, payable from the date on which that Community financial aid should have been granted'.

41 Under Article 48(2) of the Rules of Procedure 'no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure'. It has been consistently held that that provision cannot in any way be construed as authorizing applicants to introduce new claims (judgment of the Court of Justice in Case 125/78 *GEMA* v *Commission* [1979] ECR 3173, paragraph 26, judgment of the Court of First Instance in Case T-28/90 *Asia Motor France and Others* v *Commission* [1992] ECR II-2285, paragraph 43). Likewise, the applicants may not, during the proceedings, broaden the claims formulated in the originating application.

42 Consequently, the Court's examination in the present case must be limited to the question whether the claims for interest, as formulated in the originating application, are admissible.

43 The Court notes that, in the present case, the applications for compensation do not stand alone. As the Commission rightly maintains, the applications for compensation, which are only for payment of interest on the amount of aid requested, are subordinate to the applications based on the first paragraph of Article 176 of the EEC Treaty seeking recognition by the Court of the applicants' right to the award of the aid requested. Since those applications are inadmissible, the applications for interest relating to the principal applications are also inadmissible.

44 It follows that, as the Commission maintained, the actions should be dismissed as inadmissible in their entirety.

Costs

45 Under the second subparagraph of Article 87(3) 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 applicants were unsuccessful, they must each be ordered to pay their own costs together with half of the costs incurred by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby orders:

1. **The actions are dismissed as inadmissible.**

2. **Each of the applicants shall pay its own costs and one-half of the costs incurred by the Commission.**

Luxembourg, 28 April 1994.

H. Jung

Registrar

J. L. Cruz Vilaça

President