ORDER OF THE COURT OF FIRST INSTANCE (Fourth Chamber, Extended Composition)

10 June 1998 *

In Case T-116/95,

Cementir — Cementerie del Tirreno SpA, a company governed by Italian law, established in Rome, represented by Gian Michele Roberti and Antonio Tizzano, of the Naples Bar, with an address for service in Luxembourg at the Chambers of Alain Lorang, 51 Rue Albert 1er,

applicant,

v

Commission of the European Communities, represented by Giuliano Marenco, 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 the annulment of a letter of 2 March 1995 from the Commission rejecting a request for reduction of the fine imposed on the applicant by

* Language of the case: Italian.

Commission Decision 94/815/EC of 30 November 1994 relating to a proceeding under Article 85 of the EC Treaty (Cases IV/33.126 and 33.322 — Cement) (OJ 1994 L 343, p. 1),

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

composed of: P. Lindh, President, R. García-Valdecasas, K. Lenaerts, J. Azizi and M. Jaeger, Judges,

Registrar: H. Jung,

makes the following

Order

Facts of the case

1 On 30 November 1994, the Commission adopted Decision 94/815/EC relating to a proceeding under Article 85 of the EC Treaty (Cases IV/33.126 and 33.322 — Cement) (OJ 1994 L 343, p. 1), by which it penalised a group of European cement producers for infringement of Article 85 of the Treaty and imposed fines on them.

2 In the course of the procedure which led to the adoption of that decision, the Commission asked the applicant, on 2 February 1994, to inform it of its turnover relating to grey cement and clinker for the years 1992 and 1993.

3 On 22 February 1994, the applicant sent those data to the Commission.

4 On 22 February 1995, the applicant sent a letter to the Commission, informing it that, as the result of an accounting error discovered while studying Decision 94/815, the turnover communicated in the letter of 22 February 1994 was excessive, since it included sums relating to supplies and services which were entirely unconnected with sales of grey cement and clinker. The applicant annexed to its letter a certificate from the firm Arthur Andersen specifying the sums to be taken into consideration, namely LIT 288 929 million for 1992, instead of LIT 323 900 million, and LIT 222 161 million for 1993, instead of LIT 253 443 million. It accordingly asked the Commission to reduce the amount of the fine which the latter had imposed on it by Decision 94/815.

5 On 2 March 1995, the Commission rejected that request, stating *inter alia* that:

'It is for undertakings to choose between the ex-factory price system and the delivered price system. Once the latter system has been chosen, it does not seem possible to state that transport is unconnected with the sale of cement. The fact that the cost of that service appears separately on the invoice can be explained by the system of checking, and then supervising, the price of cement in Italy.

Likewise, the fact that, for sales of packaged cement, the price of the bags appears separately on the invoice can also be explained by the system of checking, and then supervising, the price of cement in Italy.'

6 On 14 March 1995, the applicant brought an action for the annulment of Decision 94/815 (Case T-87/95). In that action, which is currently pending, the applicant asks the Court, first, to declare that the Commission has calculated the amount of the fine on the basis of incorrect turnover and, secondly, to reduce the amount of the fine.

7 By letter of 13 April 1995, the applicant again asked the Commission to amend Decision 94/815 by reducing to an appropriate level the amount of the fine which the Commission had imposed on it.

8 On 25 April 1995, the Commission confirmed the content of its letter of 2 March 1995.

Procedure and forms of order sought by the parties

9 By application lodged at the Registry of the Court of First Instance on 10 May 1995, the applicant brought this action.

10 The applicant claims that the Court should:

— annul the rejection contained in the Commission's letter of 2 March 1995;

— order the Commission to pay the costs.

11 By document lodged on 15 June 1995, the Commission raised a plea of inadmissibility pursuant to Article 114 of the Rules of Procedure, contending that the Court should:

— dismiss the action as inadmissible;

— order the applicant to pay the costs.

12 On 24 July 1995, the applicant lodged its observations on the plea of inadmissibility.

Legal assessment

13 Under Article 114(3) of the Rules of Procedure, the remainder of the proceedings on a plea of admissibility is to be oral, unless the Court decides otherwise. Since the documents in this case provide it with sufficient information, the Court considers that there is no need to open the oral procedure.

Arguments of the parties

14 The Commission contends that its letter of 2 March 1995 is not an actionable measure, for the purposes of Article 173 of the Treaty, since it merely confirms, in one particular respect, the position adopted in Decision 94/815. According to the case-law, an act which is purely confirmatory cannot itself produce legal effects in so far as its effects result from the act which it confirms (Joined Cases 166/86 and 220/86 *Irish Cement* v *Commission* [1988] ECR 6473, paragraph 16, and Case C-199/91 *Foyer culturel du Sart-Tilman* v *Commission* [1993] I-2667, paragraph

24). Otherwise, it would be sufficient to provoke a 'decision' refusing to amend the initial decision and to challenge that refusal within two months in order to overcome the expiry of the time-limit within which proceedings for annulment must be instituted.

15 Moreover, the pleas raised by the applicant in this action have, according to the Commission, already been relied upon in the application directed against Decision 94/815 (Case T-87/95), so that this action is also inadmissible on the ground of *lis pendens*.

16 The applicant challenges the two arguments put forward by the Commission.

17 In the first place, the decision of 2 March 1995 is not, according to the applicant, a purely confirmatory act, since it contains a reasoned assessment of new factual and legal circumstances (Case 28/72 *Tontodonati* v *Commission* [1973] ECR 779, Case 9/81 *Williams* v *Court of Auditors* [1982] ECR 3301, and Case T-82/92 *Cortes Jimenez and Others* v *Commission* [1994] ECR-SC II-237). Furthermore, even if the decision of 2 March 1995 was a purely confirmatory act, this action should be declared admissible. On this point the applicant refers to the judgment of the Court in Joined Cases 193/87 and 194/87 *Maurissen and European Public Service Union* v *Court of Auditors* [1989] ECR 1045, according to which an application directed against a confirmatory decision is inadmissible only if the decision confirmed has become final *vis-à-vis* the person concerned, without an action having been brought before the Court. Otherwise, the person concerned is entitled to contest either the decision confirmed or the confirmatory decision, or both. The applicant not only challenged Decision 94/815 within the prescribed time-limit in Case T-87/95, but also, in the same case, raised the problem of the erroneous turnover used as the basis for calculating the fine.

18 Secondly, the applicant argues that there is no *lis pendens* between this case and Case T-87/95, because the subject-matter of the two actions is not identical (Joined

Cases 172/83 and 226/83 *Hoogovens Groep* v *Commission* [1985] ECR 2831, and Joined Cases 358/85 and 51/86 *France* v *Parliament* [1988] ECR 4821). As long as there is no final determination as to whether the reasons stated by the Commission for rejecting the request for reduction of the fine can be reviewed by the Court in Case T-87/95, the action for annulment of the decision of 2 March 1995 cannot be declared inadmissible (order in Case T-29/91 *Castelletti and Others* v *Commission* [1992] ECR II-77).

Findings of the Court

19 A letter sent by a Community institution in response to a request made by the addressee does not constitute a decision for the purposes of Article 173 of the Treaty and thereby entitle the addressee to bring an action for annulment (order in Case C-25/92 *Miethke* v *Parliament* [1993] ECR I-473, paragraph 10). The only measures against which proceedings for annulment may be brought under Article 173 of the Treaty are acts or decisions the legal effects of which are binding on, and capable of affecting the interests of, the applicant by having a significant effect on his legal position (see, in particular, Joined Cases T-10/92, T-11/92, T-12/92 and T-15/92 *Cimenteries CBR and Others* v *Commission* [1992] ECR II-2667, paragraph 28). On the other hand, a decision which merely confirms a previous decision is not an actionable measure (see Case C-480/93 P *Zunis Holding and Others* v *Commission* [1996] ECR I-1, paragraph 14), with the result that an application directed against such a decision is inadmissible.

20 In this case, the letter of 2 March 1995, in so far as it refuses to reduce the amount of the fine set by Decision 94/815, does not affect the applicant's legal position resulting from the adoption of that decision. It simply confirms one particular aspect of that decision, namely the amount of the fine imposed on the applicant.

21 The applicant's argument that the contested letter contains a reasoned decision adopted after re-examination of a particular aspect of Decision 94/815 in the light of new factual and legal circumstances cannot be accepted. The letter merely stated the reasons underlying a particular point of the decision at issue. Moreover, the

applicant does not explain in what way the subtraction of certain items from the turnover constitutes a new factual or legal circumstance, when it was already aware of the different items of turnover before the adoption of Decision 94/815.

22 Accordingly, the letter of 2 March 1995 is a decision which merely confirms Decision 94/815.

23 As to the argument that the applicant has standing to contest either the decision confirmed or the confirmatory decision, or both, it must be stated that, in *Maurissen and European Public Service Union* v *Court of Auditors*, cited above, the applicant had brought an action against the confirmatory decision before the expiry of the time-limit prescribed for challenging the decision confirmed, while the present action was brought out of time. In the same judgment, moreover, the Court accepted that the applicant may contest the legality of both the decision confirmed and the confirmatory decision before the time-limit prescribed for challenging the first decision has expired and provided the applicant contests both decisions in the same proceedings. In this case, however, the decision confirmed is the subject of a separate application. Consequently, the applicant may not use the judgment in *Maurissen* as an argument in favour of the admissibility of this action.

24 The action must therefore be declared inadmissible.

25 For the sake of completeness, it must be pointed out that in Case T-87/95 the Court will examine the plea based on the error allegedly made by the Commission in calculating the amount of the fine imposed on the applicant by Decision 94/815. In its application, the applicant itself considered (p. 4) that, in those circumstances, 'this action would become wholly devoid of purpose'.

Costs

26 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, having regard to the form of order sought by the Commission, be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE
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hereby orders:

1. The action is dismissed as inadmissible.

2. The applicant shall pay the costs.

Luxembourg, 10 June 1998.

H. Jung — P. Lindh

Registrar — President