

JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)

27 September 2006*

In Case T-153/04,

Ferriere Nord SpA, established in Osoppo (Italy), represented by W. Viscardini and G. Donà, lawyers,

applicant,

v

Commission of the European Communities, represented by A. Nijenhuis and A. Whelan, acting as Agents, and by A. Colabianchi, lawyer,

defendant,

ACTION for annulment of the Commission decisions notified by letter of 5 February 2004 and by facsimile of 13 April 2004 concerning the outstanding balance of the fine imposed on the applicant by Commission Decision 89/515/EEC of 2 August 1989 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.553 — Welded steel mesh) (OJ 1989 L 260, p. 1),

* Language of the case: Italian.

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

composed of R. García-Valdecasas, President, J.D. Cooke, and V. Trstenjak, Judges,
Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 7 February 2006,

gives the following

Judgment

Legal context

- 1 Regulation (EEC) No 2988/74 of the Council of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (OJ 1974 L 319, p. 1) provides, inter alia, as follows:

'Article 4

Limitation period for the enforcement of sanctions

1. The power of the Commission to enforce decisions imposing fines, penalties or periodic payments for infringements of the rules of the European Economic Community relating to transport or competition shall be subject to a limitation period of five years.

2. Time shall begin to run on the day on which the decision becomes final.

Article 5

Interruption of the limitation period for the enforcement of sanctions

1. The limitation period for the enforcement of sanctions shall be interrupted:

- (a) by notification of a decision varying the original amount of the fine, penalty or periodic penalty payments or refusing an application for variation;
- (b) by any action of the Commission, or of a Member State at the request of the Commission, for the purpose of enforcing payments of a fine, penalty or periodic penalty payment.

2. Each interruption shall start time running afresh.

Article 6

Suspension of the limitation period for the enforcement of sanctions

The limitation period for the enforcement of sanctions shall be suspended for so long as:

- (a) time to pay is allowed ...'

Background to the dispute

- 2 On 2 August 1989, the Commission adopted Decision 89/515/EEC relating to a proceeding under Article 85 of the EEC Treaty (IV/31.553 — Welded steel mesh) (OJ 1989 L 260, p. 1; ‘the Welded steel mesh decision’), by which, inter alia, it held that Ferriere Nord SpA had participated in a series of infringements on the Community market in welded steel mesh and imposed on it a fine of ECU 320 000.
- 3 Pursuant to Article 4 of the Welded steel mesh decision, the fine imposed on the applicant was to be paid within three months of the date of notification of that decision. It was further stated that interest would automatically accrue on the amount of the fine on expiry of that period at the rate charged by the European Monetary Cooperation Fund on its ecu operations on the first working day of the month in which the Welded steel mesh decision was adopted, plus 3.5 percentage points, i.e. 12.50%.
- 4 The Welded steel mesh decision was notified to the applicant by letter of 9 August 1989. That letter stated that, on expiry of the period for payment fixed in the decision, the Commission would take steps to recover the debt with interest being added automatically, calculated at the rate of 12.5% from the date of expiry of the period for payment. The letter specified that, in the event of legal proceedings seeking annulment of the decision, no steps to recover the fine would be taken as long as the legal proceedings were pending, provided that, before the date of expiry of the period for payment:

‘— ... interest shall accrue on the debt from that date ... at the rate ... of 10.5%;

— ... a bank guarantee, acceptable to the Commission, in accordance with the example attached and covering both the principal sum owed and interest or surcharges, shall be furnished by that date, by registered letter addressed ... [to the] Commission's accounting officer'.

5 On 18 October 1989, the applicant brought an action before the Court of First Instance seeking annulment of the Welded steel mesh decision (Case T-143/89).

6 On 26 October 1989, on the instructions of the applicant, the Banco di Roma issued bank guarantee No 1957 ('the bank guarantee'), in accordance with the example attached by the Commission to its letter of 9 August 1989, and gave an undertaking in the following terms:

'... we confirm to you that we will act as guarantor for the payment by Ferriere Nord ... to the Commission ...:

— of the fine of ECU 320 000 imposed on Ferriere Nord ...

— of interest on that amount, calculated from 15 November 1989 to the date of effective payment of the fine, on the basis of an interest rate ... of 10.5%.

The present undertaking may not be revoked without the Commission's agreement ...

Insofar as necessary, the guarantor waives any right to contest or divide liability.

This guarantee shall be enforceable on your first demand on notification of a certified copy of a decision of the Court of Justice of the European Communities in the case *Ferriere Nord ... v Commission*, sent by registered letter.

Conversion into ecus of a payment made in national currency shall be made at the rate on the day preceding the transfer.

The Court of Justice of the European Communities in Luxembourg shall have sole jurisdiction to hear disputes relating to this bank guarantee.'

- 7 By judgment in Case T-143/89 *Ferriere Nord v Commission* [1995] ECR II-917, the Court of First Instance dismissed the action referred to in paragraph 5 above.
- 8 On 19 June 1995, the applicant brought an appeal against the judgment of the Court of First Instance. By its judgment of 17 July 1997 in Case C-219/95 P *Ferriere Nord v Commission* [1997] ECR I-4411, the Court dismissed that appeal.
- 9 By letter of 28 July 1997, the applicant asked the Commission to consider reducing the amount of the fine and interest. The applicant argued that as a result, firstly, of the severe devaluation of the Italian Lira (ITL) which occurred between the date of the Welded steel mesh decision and the judgment of 17 July 1997 in *Ferriere Nord v Commission*, paragraph 8 above, and, secondly, of the duration of the legal

proceedings of almost eight years, it was not fair to require it to pay the total amount of the fine and interest as fixed by the Welded steel mesh decision.

- 10 By letter of 11 September 1997, notified on 18 September 1997, the Commission rejected the applicant's request.
- 11 By registered letter of 2 December 1997, received on 10 December 1997, the applicant asked the Commission to reconsider its request on the ground, *inter alia*, that the Italian Lira's exit from the European monetary system, which led to its devaluation, was not foreseeable at the time of issue of the bank guarantee.
- 12 In the same letter, the applicant stated that it had, moreover, transferred the sum of ITL 483 840 000, corresponding to the amount of the fine, that is, ECU 320 000, at the exchange rate applicable in 1989. That sum was credited on 15 December 1997 to the Commission's account with a value of ECU 249 918.
- 13 The Commission did not respond to the letter of 2 December 1997.
- 14 By letter of 5 February 2004 ('the letter of 5 February 2004'), the Commission informed the applicant that the amount still owed by it on 27 February 2004 amounted in total to EUR 564 402.26 (the principal amount of the fine, less ECU 249 918 paid on 15 December 1997 and including interest for the period from 17 November 1989 to 27 February 2004). The Commission put the applicant on notice to settle the debt as quickly as possible and stated that, once payment had been made, it would agree to the cancellation of the bank guarantee.

- 15 By letter of 25 February 2004, the applicant replied to the Commission that the demands contained in the letter of 5 February 2004 were unjustified and out of time. The applicant argued in particular that the limitation period of five years under Article 4 of Regulation No 2988/74, applicable to the enforcement of sanctions, had expired on 18 September 2002 and that in those circumstances the Commission could no longer recover a debt owed to it or claim against the bank guarantee.
- 16 By facsimile of 13 April 2004 ('the fax of 13 April 2004'), the Commission replied to the applicant that, with regard to limitation under Article 4 of Regulation No 2988/74, that provision did not apply in the present case because of the existence of the bank guarantee which could be called in at any time and which had the effect of provisional payment so that enforcement was not necessary. The Commission also accepted that it had not reminded the applicant to pay its debt once the judgment of the Court of Justice had confirmed the Welded steel mesh decision and, on that basis, agreed that interest should accrue for only five months after delivery of that judgment, until 17 December 1997. As a result, the Commission was claiming from the applicant only the sum of EUR 341 932.32 instead of the sum of EUR 564 402.26 demanded in the letter of 5 February 2004. Finally, the Commission stated that, failing payment before 30 April 2004, it would call on the bank to honour the guarantee.

Procedure and forms of order sought by the parties

- 17 By application lodged at the Registry of the Court of First Instance on 23 April 2004, the applicant brought the present action.
- 18 Upon hearing the report of the Judge-Rapporteur, the Court (First Chamber) decided to open the oral procedure. The parties presented oral argument and replied to the Court's oral questions at the hearing on 7 February 2006.

19 The applicant claims that the Court should:

- annul the decisions contained in the letter of 5 February 2004 and the fax of 13 April 2004 ('the contested acts');
- order the Commission to pay the costs.

20 The Commission contends that the Court should:

- primarily, declare the application inadmissible insofar as it is founded on Article 230 EC;
- in the alternative, dismiss the application as unfounded;
- order the applicant to pay the costs.

Arguments of the parties

Admissibility

21 The Commission pleads, principally, that the present action is inadmissible on the ground that the contested acts do not constitute decisions, within the meaning of Article 249 EC, by which the applicant is adversely affected. The contested acts cannot therefore be challenged.

- 22 According to the Commission, the contested acts in fact constitute a mere invitation to settle the outstanding balance of the debt resulting from the Welded steel mesh decision and from the letter of 11 September 1997 and have no additional legal effect with regard to the amount of the fine owing pursuant to those earlier documents, which they merely confirm, except with regard to the reduction, not challenged by the applicant, of the amount of interest as set out in the fax of 13 April 2004 (paragraph 16 above).
- 23 Essentially, the applicant submits that, by application of Article 4(1) of Regulation No 2988/74, the limitation period relating to the Commission's power to enforce the Welded steel mesh decision had expired before the adoption of the contested acts (see paragraphs 24 to 27 below). Consequently, by sending the contested acts to the applicant urging it to settle the balance of the debt and stating that it would enforce the bank guarantee if payment were not made, the Commission sent it an informal demand for payment, constituting a new element with regard to the Welded steel mesh decision and the letter of 11 September 1997. The contested acts therefore do not confirm that decision and letter.

Substance

- 24 In support of its action, the applicant relies on a single plea alleging infringement of Article 4(1) of Regulation No 2988/74, in that the Commission's power to enforce the Welded steel mesh decision was time-barred when the contested acts were adopted.
- 25 The Welded steel mesh decision became definitive on the day of delivery of the judgment in *Ferriere Nord v Commission*, paragraph 8 above, that is to say on 17 July 1997. Thus, it is on the date of notification of that judgment that, by application of Article 4 of Regulation No 2988/74, the limitation period of five years first began to run. However, by application of Article 5(1)(a) of that regulation, the limitation

period was interrupted by the Commission's letter of 11 September 1997, notified on 18 September 1997, such that the limitation period recommenced with effect from that date. In the absence of any other interruption or suspension, the Commission's power to enforce the Welded steel mesh decision expired five years later, on 18 September 2002.

26 It follows that, at the date of the adoption of the contested acts, the Commission's right to take steps to enforce the Welded steel mesh decision was out of time not only in respect of the applicant but also against the Banco di Roma.

27 In that regard, considering the Commission's line of argument artificial and devoid of any legal basis, the applicant disputes the contention that Article 4 of Regulation No 2988/74 does not apply to the present case. It argues in particular that, according to case-law, the obligation to provide a bank guarantee is accessory, in the sense that the creditor cannot bring proceedings against the guarantor unless the debt covered by the guarantor is payable (Case C-266/01 *Préservatrice foncière TIARD* [2003] ECR I-4867, paragraph 29).

28 The Commission submits that the applicant's argument alleging that the limitation period, within the meaning of Article 4 of Regulation No 2988/74, governing the Commission's power to enforce the Welded steel mesh decision has expired is unfounded and application of that regulation to the present case should be excluded because of the existence of the bank guarantee.

29 In that regard, the Commission takes the view, firstly, that the procedure to enforce the bank guarantee against the Banco di Roma cannot be treated in the same way as the procedure to enforce the Welded steel mesh decision. The obligation on the guarantor bank is contractual in nature, on which basis any dispute relating to the bank guarantee should be referred to the Court of Justice pursuant to Article 238 EC, whilst the obligation on the applicant arises under Article 256 EC.

- 30 Secondly, the Commission submits that the bank guarantee constitutes an autonomous obligation distinct from that on the applicant to pay the fine. It states in that regard that the bank guarantee is payable on the Commission's first demand, that the Banco di Roma undertook, insofar as necessary, to waive any right to contest or divide liability and that the latter's undertaking may not be revoked without the Commission's written consent. The Commission concludes that its relationship with the Banco di Roma is independent of the relationship linking it to the applicant.
- 31 Thirdly, the Commission asserts that the principle of legal certainty does not require the application by analogy of the limitation laid down in Regulation No 2988/74 to contractual relationships. The contractual relationship in itself meets the requirements of legal certainty with regard to limitation. Were Italian law applicable to the bank guarantee at issue, the limitation period would be ten years. It is therefore no longer necessary for the Commission to enforce the *Welded steel mesh* decision since it can require payment of its debt from the Banco di Roma on the basis of the bank guarantee.
- 32 Finally, the Commission submits that the bank guarantee cannot be regarded as purely accessory with regard to the initial relationship between it and the applicant. In that regard, the *Préservatrice foncière TIARD* judgment referred to by the applicant, paragraph 27 above, is irrelevant to the present case since it relates to a system of guarantees to which the bank guarantee at issue, because of the particular nature of its clauses, cannot be linked. It maintains, further, that it would not have been in its interest to accept such an accessory guarantee instead of provisional payment of the fine.
- 33 In the alternative, the Commission submits that even if the limitation period under Regulation No 2988/74 were applicable to the bank guarantee, which is not the case, there are grounds for regarding the acceptance of that guarantee as allowing time to pay within the meaning of Article 6(a) of the regulation, which has the effect of suspending the limitation period. Such acceptance constitutes allowance of time to pay in several respects: it relieves the company of the obligation of making

immediate payment of the fine and allows it to postpone that payment until the Commission demands it, without having to ask the Community Courts to suspend the enforceability of the decision imposing the fine. Moreover, if it were not recognised that a bank guarantee constitutes allowance of time to pay, that would amount to encouraging companies not to pay the fines imposed on them once they became definitive.

34 Furthermore, the Commission takes the view that enforcement of the bank guarantee does not constitute the exercise of a public power that is open to challenge on the basis of Article 230 EC, but rather the exercise of a contractual right judicial review of which has been entrusted to the Community Courts by the arbitration clause contained in the bank guarantee. Acts adopted by the Commission in the context of a contractual relationship falling under the jurisdiction of the Community Courts cannot in principle be the subject of annulment proceedings under Article 230 EC at the same time.

35 In that regard, 'in the interests of justice and procedural economy', the Commission requests the Court to reclassify the present action brought by an individual as an action brought pursuant to Article 238 EC relating to the application of the contractual guarantee.

Findings of the Court

36 Since the argument that the Commission's power to enforce the Welded steel mesh decision is time-barred, within the meaning of Article 4(1) of Regulation No 2988/74, is raised by the applicant in respect of both admissibility, to defeat the plea of inadmissibility made by the Commission (paragraph 23 above), and the substance (paragraph 24 above), it is necessary first of all to determine whether the limitation period has expired.

The limitation period

37 Firstly, it must be considered whether, as the applicant claims, Article 4(1) of Regulation No 2988/74 applies to the present case.

38 To that end, it is necessary firstly to determine whether the contested acts are administrative or, as the Commission asserts, contractual in nature.

39 In that regard, the Court notes from the outset that the contested acts refer expressly, in their heading 'Subject-matter', to the proceedings which led to the adoption of the Welded steel mesh decision. The demand for payment and the notice regarding enforcement of the bank guarantee which they contain thus constitute a form of enforcement of the Welded steel mesh decision. Accordingly, the contested acts, adopted on the basis of a Commission decision within the meaning of Article 249 EC, are administrative in nature.

40 Furthermore, although it is true that the underlying cause of the contractual relationship between the Banco di Roma and the Commission, consisting of the bank guarantee, was the applicant's obligation to the Commission and that that bank guarantee contains an arbitration clause within the meaning of Article 238 EC, it should, nevertheless, be noted that the fax of 13 April 2004 merely mentions enforcement of the bank guarantee in the event of non-payment of the sums claimed from the applicant and the letter of 5 February 2004 is silent on the subject of the bank guarantee.

41 It follows, firstly, that, contrary to the Commission's assertions, the present case is not a dispute of a contractual nature based on the bank guarantee which would mean that Regulation No 2988/74 did not apply in this case.

42 Secondly, an action for annulment brought pursuant to Article 230 EC constitutes the appropriate action for review of the legality of the contested acts (see, to that effect, the order in Case T-265/03 *Helm Düngemittel v Commission* [2005] ECR II-2009, paragraph 38, and case-law cited). Thus, the reclassification proposed by the Commission of the present action as an action based on of Article 238 EC, apart from the fact that it is incompatible with the subject-matter of the action as fixed by the applicant in the application and expressly confirmed in its reply, would therefore be legally incorrect.

43 The administrative nature of the contested acts, adopted in the context of the enforcement of the Welded steel mesh decision, is therefore established.

44 With regard to the arguments submitted by the Commission, set out in paragraphs 28 to 32 above, it suffices in rejecting them to point out once again (see paragraphs 40 and 41 above) that the subject-matter of the present case is unconnected to the enforcement of the bank guarantee.

45 With regard to the Commission's argument that the mere existence of the bank guarantee excludes any application to the relationship between the applicant and the Commission of Regulation No 2988/74 (see the end of paragraph 28), it is appropriate to point out that the existence of that contractual relationship between the Banco di Roma and the Commission cannot prevent the possibility of the Commission's power to enforce the Welded steel mesh decision on expiry of the time-limit laid down in Article 4 of that regulation being time-barred. Regulation No 2988/74 established a complete system of rules covering in detail the periods within which the Commission is entitled, without undermining the fundamental requirement of legal certainty, to enforce decisions imposing fines on undertakings which are the subject of proceedings under the Community competition rules (see, to that effect, Case T-213/00 *CMA CGM and Others v Commission* [2003] ECR II-913, paragraph 324).

- 46 In that regard, it makes no difference whether the bank guarantee may be classified, as the applicant submits, as accessory as regards the main relationship which it guarantees or, conversely, as independent, by reason of the clause regarding payment on first demand which it contains (paragraphs 27 and 32 above).
- 47 Accordingly it is appropriate for the Court to ascertain whether the Commission's power to enforce the Welded steel mesh decision was time-barred within the meaning of Article 4(1) of Regulation No 2988/74 when the contested acts were adopted.
- 48 In that regard, it is common ground that, apart from the Commission's letter of 11 September 1997, referred to in paragraph 10 above, there was no other act which interrupted the limitation period within the meaning of Article 5 of Regulation No 2988/74 after the judgment of 17 July 1997 in *Ferriere Nord v Commission*, paragraph 8 above.
- 49 It remains to be considered whether, as the Commission asserts, the limitation period was suspended on the ground that, essentially, the suspension of the requirement to pay the fine granted by the Commission to the applicant in exchange for the bank guarantee provided by the latter constitutes the allowing of time to pay within the meaning of Article 6(a) of Regulation No 2988/74 (paragraph 1 above).
- 50 Clearly, in that regard, the answer to that question is not decisive for the purposes of the present dispute.
- 51 Such suspension expired at the end of the period for which it was granted, namely, according to the Commission's letter of 9 August 1989 (see paragraph 4 above), 'as

long as the legal proceedings were pending'. In the present case, the suspension of the requirement to pay ended on the date of delivery of the judgment of the Court of Justice, namely on 17 July 1997 (see paragraph 8 above), on which date the limitation period began to run pursuant to Article 4(2) of Regulation No 2988/74.

52 Consequently, there was no suspension of the limitation period in the present case after the judgment of the Court of Justice of 17 July 1997.

53 It follows that, in accordance with Article 4(1) of Regulation No 2988/74, the Commission's power of enforcement pursuant to that provision was time-barred at the date correctly determined by the applicant (see paragraph 28 above), namely 18 September 2002. The contested acts dated 5 February and 13 April 2004 were therefore adopted and notified to the applicant when the Commission's power to enforce the Welded steel mesh decision was time-barred.

Admissibility

54 It should be borne in mind that a decision within the meaning of Article 249 EC is any act clearly and definitively altering its addressee's legal position (Case 22/70 *Commission v Council* [1971] ECR 263, paragraphs 33 to 43, and Case 60/81 *IBM v Commission* [1981] ECR 2268).

55 It follows from the reasoning relating to limitation (paragraphs 37 to 53 above) that, because the Commission's power to enforce the Welded steel mesh decision was time-barred, its right to claim from the applicant payment of the outstanding balance had been extinguished and the applicant could legitimately, from 18 September 2002, regard itself as protected from any claim made by the Commission relating to the enforcement of that decision.

56 By the contested acts, the Commission addressed to the applicant a demand for payment of the outstanding balance and threatened to take steps to enforce the bank guarantee. The contested acts, to which in principle a presumption of lawfulness attaches, thus clearly and definitely alter the applicant's legal position and on that basis constitute a decision within the meaning of Article 249 EC which by definition does not confirm earlier acts.

57 The plea of inadmissibility must therefore be rejected as unfounded.

Substance

58 It follows from the reasoning relating to the limitation period (paragraphs 37 to 53 above) that the Commission's power to enforce the Welded steel mesh decision was time-barred pursuant to Article 4(1) of Regulation No 2988/74 when the contested acts were adopted.

59 As a result, the plea based on infringement of Article 4(1) of Regulation No 2988/74 is well founded and the contested acts must be annulled.

Costs

60 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 Commission has been unsuccessful and the applicant has asked for costs, the Commission must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

- 1. Annuls the Commission decisions notified by letter of 5 February 2004 and by facsimile of 13 April 2004 concerning the outstanding balance of the fine imposed on the applicant by Commission Decision 89/515/EEC of 2 August 1989 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.553 — Welded steel mesh);**
- 2. Orders the Commission, in addition to bearing its own costs, to pay those of the applicant.**

García-Valdecasas

Cooke

Trstenjak

Luxembourg, 27 September 2006.

E. Coulon

R. García-Valdecasas

Registrar

President