

JUDGMENT OF THE COURT OF FIRST INSTANCE
(First Chamber, Extended Composition)
28 January 1999 *

In Case T-230/95,

Bretagne Angleterre Irlande (BAI), a company incorporated under French law, based in Roscoff, France, represented by Jean-Michel Payre, of the Paris Bar, with an address for service in Luxembourg at the Chambers of Aloyse May, 31 Grand-Rue,

applicant,

v

Commission of the European Communities, represented by Gérard Rozet, Legal Adviser, and Anders Christian Jessen, of its Legal Service, acting as Agents, 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 compensation for the damage allegedly suffered by the applicant by reason of the delay on the part of the Commission in communicating to it the text of the decision of 7 June 1995 terminating the procedure initiated under Article 93(2) of the EC Treaty, concerning aid to Ferries Golfo de Vizcaya SA,

* Language of the case: French.

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

composed of: B. Vesterdorf, President, C. W. Bellamy, R. M. Moura Ramos,
J. Pirrung and P. Mengozzi, Judges,

Registrar: B. Pastor, Principal Administrator,

having regard to the written procedure and further to the hearing on 16 June 1998,

gives the following

Judgment

Facts and procedure

- 1 For several years the applicant has operated, under the trading name of Brittany Ferries, a ferry service between the ports of Plymouth in the United Kingdom and Santander in Spain. By letter of 21 September 1992 it sent a complaint to the Commission concerning the large subsidies to be granted by the Regional Council of Biscay and the Basque Government to Ferries Golfo de Vizcaya SA, a company incorporated under Spanish law and formed by Vapores Surdiaz Bilbao SA, a company incorporated under Spanish law, and P&O European Ferries (Portsmouth) Ltd, a company incorporated under English law, with a view to operating a regular ferry service between the ports of Portsmouth and Bilbao from March 1993.

- 2 Accordingly, the applicant gave the Commission certain information in its possession concerning the agreement which was to be signed by Ferries Golfo de Vizcaya and the Basque regional authorities for the purpose of subsidising the operation of the Bilbao-Portsmouth line during the first three years of operation. In addition, the applicant formally requested the Commission to initiate a procedure pursuant to Articles 92 and 93 of the EC Treaty.
- 3 On 11 February 1993 the applicant sent the Commission additional observations concerning the aid granted to Ferries Golfo de Vizcaya, pointing out the urgent need to initiate the review procedure requested in its complaint in view of the imminent starting-up of transport services on the Bilbao-Portsmouth route. The applicant pointed out that, as that service competed directly with the service operated by it, its opening under the conditions agreed upon with the Spanish authorities was likely to cause serious damage to its own economic interests.
- 4 On 29 September 1993 the Commission decided to initiate the procedure laid down in Article 93(2) of the Treaty. In the light of the information which had been passed on to it, the Commission considered that the financial aid given to Ferries Golfo de Vizcaya constituted aid within the meaning of Article 92 of the Treaty and did not fulfil the conditions for it to be declared compatible with the common market. The Spanish Government was notified of this decision by letter of 13 October 1993 and was requested to confirm that it would suspend all payments under the aid scheme in question until the Commission adopted a final decision, to submit observations and to provide all the information necessary for assessing the scheme.
- 5 The decision to initiate a procedure concerning the aid granted by Spain to Ferries Golfo de Vizcaya was the subject of a communication of the Commission addressed to the other Member States and the interested parties, which was published in the *Official Journal of the European Communities* (OJ 1994 C 70, p. 5), so that they could submit their observations.

- 6 As the applicant received no specific information on the progress of the procedure, on 28 February 1995 it formally requested the Commission, pursuant to the second paragraph of Article 175 of the Treaty, to adopt a final decision.

- 7 By letters of 12 and 16 June 1995, the applicant asked the Commission to send it the text of the decision adopted in the procedure, of which it had not yet been officially notified. It was disturbed by the fact that the Spanish press was reporting the adoption by the Commission of a final decision in the matter, following the conclusion of a new agreement between Ferries Golfo de Vizcaya and the regional authorities. According to the press reports, this agreement was comparable with that of 1992. The Spanish authorities undertook to purchase a large number of tickets from the applicant's competitor for a period of three years, which would enable it to make up for losses arising during the off-season. Consequently the applicant asked to be informed of the measures which the Commission proposed to take with regard to the new agreement.

- 8 By fax of 19 June 1995, the Commission transmitted to the applicant press release IP/95/579 of 7 June 1995, and undertook to send it the text of its decision as soon as possible. The press release announced that the Commission had decided on the same day to terminate the procedure concerning the aid to Ferries Golfo de Vizcaya. It contained a summary of the reasons for the decision which showed, *inter alia*, that the agreement between the authorities and the Spanish carrier had been modified so as to take account of the Commission's concerns. The Commission then stated that it was satisfied that Ferries Golfo de Vizcaya was not receiving State aid. The Spanish Government was notified by letter of 11 July 1995 of the decision reported by the press release.

- 9 On 21 June 1995 the applicant acknowledged receipt of the press release and confirmed that it awaited the text of the Commission decision to which it referred. In reply, the Commission, after indicating that the decision would be published in the *Official Journal of the European Communities* within the next few weeks, reaffirmed that it would send the applicant a copy of the text as soon as possible.

- 10 In those circumstances, on 28 November 1995, when the text of the decision had still not been received by the applicant or been published, the applicant sent by post the application initiating the present proceedings. However, because of strikes affecting the dispatch of mail in France at the time, the application was not registered at the Court Registry until 18 December 1995.
- 11 In the meantime the Commission's decision of 7 June 1995 was published in the *Official Journal of the European Communities* on 1 December 1995 (OJ 1995 C 321, p. 4). On 8 December 1995 the Commission sent the applicant by fax the text of the decision as published.
- 12 By application received by the Court Registry on 1 February 1996, the applicant then brought a second action, registered under number T-14/96, for the annulment of the Commission decision terminating the procedure concerning the aid to Ferries Golfo de Vizcaya.
- 13 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (First Chamber, Extended Composition) opened the oral procedure. The parties presented oral argument and their replies to the Court's questions at the hearing on 16 June 1998.

Forms of order sought

- 14 The applicant claims that the Court should:

— order the Commission to make good the damage suffered by the applicant as a result of the delay in communicating to it the decision of 7 June 1995;

- fix a period within which the parties must transmit to the Court particulars in figures of the compensation established by common accord or, failing agreement, a period within which the parties must lodge their submissions on quantum of damage at the Court;

- order the Commission to pay the costs.

15 The Commission contends that the Court should:

- dismiss the applicant's action for compensation as unfounded;

- order the applicant to pay the costs.

Law

Arguments of the parties

- 16 The crux of the applicant's case is that, by failing to notify it immediately, in spite of several requests and a formal notice, of the terms of the decision adopted following the complaint lodged by the applicant, the Commission committed a fault giving rise to the non-contractual liability of the Community within the meaning of the second paragraph of Article 215 of the Treaty.
- 17 The applicant submits that the Commission's delay in transmitting its decision, which was adopted on 7 June 1995 and notified to the Spanish Government on 11 July 1995, is unreasonable. The fact that the text of the decision was not available

in all the Community languages could not constitute a valid justification for such a delay. It maintains, first, that arguments founded on manifest failure in the functioning of the internal services of an institution find no acceptance in the case-law (see Case 13/83 *Parliament v Council* [1985] ECR 1513) and, second, that the text of the decision was certainly available in Spanish because it was notified to the Member State concerned. The applicant also contends that it ought to have been available in French, the language of the procedure which the applicant had caused to be initiated. According to the applicant, the absence of any proper justification shows that the Commission deliberately refrained from communicating to it the final decision, when there was no practical obstacle to doing so and the Commission communicated the decision to the other parties to the procedure.

- 18 The applicant states that the Commission's wrongful conduct prevented it from challenging the validity of the decision in question as soon as possible because it had no knowledge of the reasons on which it was based (see Case 236/86 *Dillinger Hüttenwerke v Commission* [1988] ECR 3761, paragraph 14). It was essential for it to be in possession of the actual text of the decision and not merely a press release summarising the decision. In order to ascertain whether the press release set out the main points of the decision, as the Commission has claimed in its defence, it was necessary for the applicant to be in possession of the actual text, and it was precisely this that it did not have. To contest the decision, it was necessary to know the grounds on which it was based and, in particular, why the Commission had taken the view that the new agreement between the Spanish authorities and Ferries Golfo de Vizcaya did not contain any element of State aid.
- 19 In this connection, the applicant points out in its reply that the Commission has still not responded to its letter of 21 December 1995, in which it asked the Commission to transmit the text of the new agreement, considering that the implications of the decision could not be understood or assessed without the text of the agreement.
- 20 The applicant adds that the Commission's conduct of which it complains caused it serious and certain damage in that its new, and only, competitor, Ferries Golfo de

Vizcaya, has continued to receive aid unlawfully. That aid enables it to secure its position in the market. Since only the first three years of operation are predicted to show a loss, and even assuming that one day Ferries Golfo de Vizcaya may be required to repay the subsidies unlawfully granted to it, it has been able to take advantage of the procedural delays to establish itself in the market and to gain the loyalty of customers. The delay of several months on the part of the Commission in notifying the applicant of its final decision denied it the opportunity for the same length of time to put an end to the improper competition of which it is the victim.

- 21 With regard to the actual existence of the alleged damage, the applicant contends that the Commission is not justified in maintaining that the two shipping lines in question are not in direct competition and that therefore the applicant has suffered no damage. In any case, the harm of which the applicant complains does not arise from unlawful competition but from the Commission's wrongful conduct. In failing to communicate immediately and spontaneously the text of the decision to the applicant, the Commission treated the applicant unfairly. Even if the damage caused in this way is only non-material, it is nevertheless certain and reparable, in accordance with the general principles common to the legal systems of the Member States.
- 22 Furthermore, according to the applicant, without the agreement whereby the Spanish authorities undertook to make good the losses of the new line for at least three years, the line would not have been set up because the demand was not sufficient. Although the decision to open a review procedure theoretically put an end to the payment of the aid, the applicant points out that its competitor, as the decision of 7 June 1995 shows, merely made provision for the first instalments of aid to be repaid, but it has not actually repaid them. As the new agreement provides for payments to Ferries Golfo de Vizcaya from 1995, it follows that the aid scheme was interrupted only from September 1993 to December 1994, that is to say, for one year and three months.

- 23 The applicant adds that the amount of the damage suffered by it cannot yet be quantified exactly. In its reply it argues that the amount depends largely on the outcome of the action for annulment which it has brought against the Commission's decision terminating the procedure initiated as a result of its complaint. However, as the damage is certain, it considers that the Court is in a position to give judgment (see Case 44/76 *Eier-Kontor v Council and Commission* [1977] ECR 393, Case 59/83 *Biovilac v EEC* [1984] ECR 4057, and Case 281/84 *Zuckerfabrik Bedburg and Others v Council and Commission* [1987] ECR 49). It is for the parties either to notify the Court of the amount of compensation established by common accord or to submit their own assessments, with supporting figures, within a specified period (see Case C-308/87 *Grifoni v Euratom* [1990] ECR I-1203).
- 24 The Commission, for its part, contends that the press release and the French-language version of the decision of 7 June 1995 were sent to the applicant without delay, having regard to the availability of the documents in question. The applicant has no justification for claiming that the Commission's conduct with respect to it was of an unlawful nature such as to render the Community liable.
- 25 The Commission adds that the applicant has adduced no specific evidence to show with sufficient certainty that there was actually any damage or that such damage was imminent and foreseeable. Therefore the applicant cannot rely on the settled case-law according to which an action may be brought before the Court of Justice in order to obtain a finding that the Community is liable for imminent damage foreseeable with sufficient certainty, even though the damage cannot yet be precisely quantified (see Joined Cases 56/74 to 60/74 *Kampffmeyer and Others v Commission and Council* [1976] ECR 711 and the judgment in *Grifoni v Euratom*, cited above).
- 26 The Commission maintains that the applicant has not succeeded in defining clearly and exactly the actual nature of its material damage or in identifying the non-material damage which is the subject of its secondary and alternative claim. In any case, the Commission denies that the applicant suffered any damage whatever.

- 27 Nor, it adds, has the applicant shown that the damage claimed was due to the Commission's alleged wrongful conduct. The establishment of Ferries Golfo de Vizcaya on the market by means of aid unlawfully received can only have been caused by the decision of 7 June 1995, assuming that it is proved to be unlawful, and not by the alleged delay with which the decision was communicated to the applicant. By indicating that the amount of the alleged damage depends on the success or failure of the action for annulment, the applicant itself shows that there is no direct causal link between the Commission's alleged delay and that damage, the nature of which is necessarily connected with the specific terms of the decision in question.
- 28 Finally, the Commission submits that any causal link was broken by the applicant's own conduct, since, as from 19 June 1995, it had sufficient knowledge of the decision to assert its rights of action.

Findings of the Court

- 29 By virtue of the second paragraph of Article 215 of the Treaty and the general principles to which that provision refers, in order for the Community to incur non-contractual liability a number of conditions must be met as regards the unlawfulness of the conduct alleged against the institutions, the actual existence of damage and the existence of a causal link between that conduct and the alleged damage (see Joined Cases 197/80 to 200/80, 243/80, 245/80 and 247/80 *Ludwigshafener Walzmühle and Others v Council and Commission* [1981] ECR 3211, paragraph 18, and Case T-199/96 *Bergaderm and Goupil v Commission* [1998] ECR II-2805, paragraph 48).
- 30 The present action seeks reparation for the damage said to have been caused to the applicant by the delay with which the Commission's decision of 7 June 1995 was communicated to it. It follows that the burden of proving a causal link between the alleged fault on the part of the institution and the injury pleaded falls on the applicant (see Joined Cases C-363/88 and C-364/88 *Finsider and Others v Commission* [1992] ECR I-359, paragraph 25, Case C-362/95 P *Blackspur DIY and*

Others v Council and Commission [1997] ECR I-4775, paragraph 31, and Joined Cases T-213/95 and T-18/96 *SCK and FNK v Commission* [1997] ECR II-1739, paragraph 98).

- 31 The applicant primarily alleges material damage, certain and serious in nature, although it cannot yet quantify it exactly. In the alternative and secondarily, it alleges damage of a non-material nature.
- 32 The applicant explains that its material damage arises from the fact that it was prevented from challenging as soon as possible the Commission's decision concerning the aid granted to Ferries Golfo de Vizcaya, which, the applicant claims, enabled that company to establish itself in the market by means of aid unlawfully received. The consequence of the delay in notifying the applicant of the decision is, it maintains, that it was unable to bring an action for annulment earlier and thus to put an end to the improper competition from which it has suffered.
- 33 According to the applicant, the determination of the amount of its damage depends on the outcome of the action which it brought on 1 February 1996 against the decision of 7 June 1995, in that annulment of the decision by the Court would confirm the existence of material damage. As the application to the Court was necessarily belated owing to the Commission's conduct, Ferries Golfo de Vizcaya benefited from an unlawful aid scheme for six months too long. Should the Court dismiss the action for annulment, the applicant would have to limit its claim to compensation for non-material damage.
- 34 It must be observed that the applicant has not proved the existence of a causal link between the conduct of the Commission of which it complains and the material damage which it claims to have suffered. It is clear from the applicant's argument as a whole that the cause of the material damage of which it complains is the decision adopted by the Commission on 7 June 1995 permitting the Spanish authorities to pay certain amounts to Ferries Golfo de Vizcaya, and not the fact that the

applicant was notified of the decision six months later. The applicant's delay in bringing the action for annulment, which, it claims, is due to the Commission's conduct, cannot, even assuming that that conduct can be characterised as wrongful, have caused the applicant independent material damage distinct from any damage which could arise from the decision which has been challenged in Case T-14/96. That decision, whose effects have been continuous since the date of its adoption, is the necessary cause of any material damage which the applicant may have sustained. If such a decision had not been adopted or implemented, any delay in communicating the Commission's position in relation to the aid at issue could not have harmed the applicant's business, as the applicant claims it has.

35 Those findings are not called in question by the applicant's argument that, if it had been notified of the decision immediately, it could have brought its action for annulment six months earlier and thus attempted to mitigate the damage which it claims to have sustained. The applicant's reasoning presupposes that the annulment of the decision and the possible repayment of the aid, on the completion of the procedures laid down by Community and national law, are not capable of making good in full the alleged material damage. In any event, having regard to the continuing nature of the damage alleged, the applicant cannot prove the existence of a causal link between the Commission's delay of which it complains and the part of that damage which is claimed to be irreparable. It is sufficient to observe that the temporal effects produced by the decision of 7 June 1995 flow in their entirety from its implementation and not from any delay in communicating it to the applicant.

36 Furthermore, the Court notes that the applicant has at no time submitted an application for a suspension of execution of the decision challenged in Case T-14/96. If it had applied for suspension of the effects of the decision of 7 June 1995, it could have brought about a reduction in the alleged material damage, provided that it showed that all the conditions for the grant of interim measures by the Community judicature were fulfilled.

- 37 As the Court has found that the conduct with which the Commission is charged is not the cause of the material damage of which the applicant complains, it remains to consider whether that conduct caused the applicant damage of a non-material nature.
- 38 In order to obtain reparation for the alleged non-material damage, the applicant must show that it has sustained actual and certain damage. Accordingly, it cannot, in principle, confine itself to pleading the allegedly wrongful nature of the Commission's conduct with respect to it (see, to this effect, Case T-230/94 *Farrugia v Commission* [1996] ECR II-195, paragraph 46).
- 39 Since the applicant has put forward nothing to show the existence of its non-material damage or to establish its extent, it falls to it, at the very least, to prove that the Commission's conduct of which it complains was, by reason of its gravity, such as to cause it damage of that kind. However, although the applicant does submit that it was treated unfairly, it bases itself entirely on its own conception of the way in which the Commission treats, or ought to treat, complainants in procedures relating to State aid. As the applicant has not specified the objective circumstances which might support its claim of unfair treatment, the existence of the non-material damage alleged by the applicant cannot be held to have been established.
- 40 It follows that none of the conditions which must be satisfied for the Community's liability to be incurred with respect to the applicant are fulfilled in the present case. The action for compensation must therefore be dismissed as unfounded, without there being any need for the Court to rule on the question whether the Commission's conduct, of which the applicant complains, was lawful.

Costs

- 41 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. As the applicant has been unsuccessful, it must be ordered to pay the costs as applied for by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber, Extended Composition)

hereby:

1. Dismisses the application;
2. Orders the applicant to pay the costs.

Vesterdorf

Bellamy

Moura Ramos

Pirrung

Mengozi

Delivered in open court in Luxembourg on 28 January 1999.

H. Jung

B. Vesterdorf

Registrar

President