JUDGMENT OF THE COURT OF FIRST INSTANCE
(Third Chamber, Extended Composition)
22 October 1996 *

In Case T-330/94,

Salt Union Ltd, a company established under English law in Cheshire (United Kingdom), represented by Jonathan Scott and Craig Pouncey, Solicitors, with an address for service in Luxembourg at the Chambers of Georges Baden, 8 Boulevard Royal,

applicant,

supported by

Verein Deutsche Salzindustrie eV, an association governed by German law, established in Bonn (Germany), represented by Thomas Jestaedt, Rechtsanwalt, Düsseldorf, and Walter Klosterfelde and Karsten Metzlaff, Rechtsanwälte, Hamburg, with an address for service in Luxembourg at the Chambers of Philippe Dupont, 8-10 Rue Mathias Hardt,

intervener,

v

Commission of the European Communities, represented initially by Nicholas Khan and Jean-Paul Keppenne, then by Nicholas Khan and Paul Nemitz, 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,

* Language of the case: English.

supported by

Frima BV, a company governed by Netherlands law, established in The Hague (Netherlands), represented initially by Tom Ottervanger, of the Rotterdam Bar, and Harold Nyssens, of the Brussels Bar, and then by Tom Ottervanger only, with an address for service in Luxembourg at the Chambers of Carlos Zeyen, 67 Rue Ermesinde,

intervener,

APPLICATION for annulment of the decision contained in a letter of 5 August 1994 in which the Commission stated that it had found no reason to propose 'appropriate measures' pursuant to Article 93(1) of the EC Treaty with regard to the Netherlands regional aid scheme 'Subsidieregeling regionale investeringsprojecten 1991',

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

composed of: C. P. Briët, President, B. Vesterdorf, P. Lindh, A. Potocki and J. D. Cooke, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 2 July 1996,

gives the following

Judgment

Facts

1 By letter of 24 September 1990, the Netherlands Government notified to the Commission, pursuant to Article 93(3) of the EEC Treaty, a general regional aid scheme for the period 1991 to 1994, called 'Subsidieregeling regionale investeringsprojecten 1991' (hereinafter 'the Netherlands scheme'). After carrying out an examination, the Commission informed the Netherlands Government, by letter of 27 December 1990, that it considered the Netherlands scheme to be compatible with the common market by virtue of Article 92(3)(c) of the Treaty (hereinafter 'the approval decision').

2 A summary of the approval decision was published in the *XXth Report on Competition Policy* (paragraph 330) in the following terms:

'In December the Commission also reached a decision on the overall plans of the Dutch Government in regional policy for the period 1991-94, which provide for a decrease in the rate of aid and in the coverage of assisted areas [or] regions eligible for investment aid.

The Commission agreed to investment aid up to 20% gross throughout the entire four-year period for the provinces of Groningen and Friesland, and for Lelystad. In the case of the south-east of Drenthe, however, the Commission's approval is restricted to two years; the situation in that region will be reviewed in 1992.'

3 In May 1991, the Netherlands company Frima BV (hereinafter 'Frima') requested the Netherlands authorities to grant it HFL 12.5 million of aid under the Netherlands scheme, that is to say 10% of the eligible costs, for the construction of a new salt plant in Harlingen, in the province of Friesland. During 1993 and at the beginning of 1994, Frima supplied details relating to its application for aid.

4 In October 1993 an article in the specialist press drew to the attention of Salt Union Ltd, a salt producer in the United Kingdom (hereinafter 'Salt Union'), the possibility that the Netherlands Government might grant aid to Frima under the Netherlands scheme.

5 Subsequently, Salt Union entered into correspondence with the Commission concerning that aid and the Netherlands scheme. It asked the Commission to propose appropriate measures to the Netherlands Government pursuant to Article 93(1) of the Treaty in respect of the Netherlands scheme.

6 On 5 August 1994, the Commission wrote a letter to Salt Union in these terms:

'The Commission has found no reason to propose appropriate measures pursuant to Article 93(1) EC regarding the scheme. Friesland still meets the criteria the Commission uses in its method to assess whether a region is eligible for the derogation provided for in Article 92(3)(c) EC [...] The scheme in question was found compatible with the common market in 1990, with the exception of its applications in certain specific sectors (which do not include the salt industry). The aid decided by the Dutch authorities in favour of Frima respects the criteria set out in the scheme — indeed, the aid is clearly lower than what the authorities could have awarded — and is therefore compatible under the 1990 decision.'

Procedure

7 In those circumstances Salt Union brought the present action on 13 October 1994.

8 By an application lodged at the Registry of the Court of First Instance on 19 January 1995, the Commission raised an objection of inadmissibility under Article 114(1) of the Rules of Procedure. By order of 13 July 1995, the Court (Third Chamber, Extended Composition) decided to reserve its decision on the application for the final judgment, pursuant to Article 114(4) of the Rules of Procedure.

9 By order of 17 November 1995 (T-330/94 *Salt Union* v *Commission* [1995] ECR II-2881), the Court (Third Chamber, Extended Composition) decided to grant Frima leave to intervene in support of the form of order sought by the Commission and to grant Verein Deutsche Salzindustrie eV (hereinafter 'VDS') leave to intervene in support of the forms of order sought by the applicant. In the same order, the Court also granted the interveners' requests for derogations from the rules on languages in the oral procedure.

10 Upon hearing the report of the Judge-Rapporteur, the Court decided to open the oral procedure without any preparatory inquiry.

11 The parties presented oral argument and answered the Court's questions at the hearing on 2 July 1996.

Forms of order sought

12 Salt Union claims that the Court should:

— annul the decision of the Commission, contained in its letter of 5 August 1994, in which it stated that it had found no reason to propose 'appropriate measures' pursuant to Article 93(1) of the EC Treaty regarding the Netherlands scheme;

— declare the Commission liable for any damage suffered by the applicant;

— order the Commission to pay the costs.

13 VDS supports in its entirety the form of order sought by Salt Union.

14 The Commission contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

15 Frima submits that the Court should:

— dismiss the application as inadmissible;

— order the applicant to pay the costs, including those incurred by Frima.

16 At the hearing, Salt Union withdrew its claim for a declaration that the Commission was liable for all damage suffered by the applicant. The Court took formal note thereof.

Admissibility

17 The Commission puts forward the following four pleas of inadmissibility. First, the action is time-barred. Second, Salt Union has no legal interest in obtaining the annulment of the contested decision. Third, the contested decision is not an actionable measure. Fourth, Salt Union is not directly and individually concerned by the contested decision.

18 In the circumstances, the Court considers it appropriate to examine first the plea of inadmissibility on the ground that the contested decision is not an actionable measure.

Arguments of the parties

19 The Commission observes that, under Article 173 of the EC Treaty, the Community judicature has jurisdiction to review 'acts' of the Commission. A decision to propose, or not to propose, appropriate measures under Article 93(1) of the Treaty does not constitute an act amenable to judicial review within the meaning of Article 173. The Commission points out in particular that the proposal of appropriate measures has no binding force, since the failure by a Member State to accept the measures proposed does not constitute a basis for the Commission to bring Court proceedings. For that purpose, the Commission must take the further step of adopting a decision under Article 93(2) of the Treaty.

20 Furthermore, the Commission submits that a request that it propose appropriate measures under Article 93(1) places it in a position analogous to its position when seised of a request that it take action against a Member State under Article 169 of the Treaty. It is settled case-law that an application for annulment of the measure by which the Commission arrived at a decision on such a request is inadmissible, since that is: 'an administrative stage intended to give the Member State concerned the opportunity of conforming with the Treaty (...) No measure taken by the Commission during this stage has any binding force' (judgment of the Court of Justice in Case 48/65 *Lütticke* v *Commission* [1966] ECR 19, at p. 31).

21 In addition, the Commission notes that in his Opinion in Case 48/65 *Lütticke* v *Commission* (cited above, p. 31), Advocate General Gand stated that:

'It is an established principle that a decision containing a refusal may only be the subject of an application [for annulment] if the positive act which the authority refuses to take might itself be contested. In the present case, the reasoned opinion which the Commission might issue in respect of a failure by the Federal Republic to fulfil its obligations, the request to that Member State to submit its observations and, more generally, the initiation of the procedure provided for in Article 169 are all stages which precede an application to you rather than legal measures capable by themselves of being the subject of an application.'

22 The Commission considers that that reasoning is equally applicable to the present case.

23 Finally, the Commission points out that its review of aid under Article 93(1) is of such an extensive and discretionary nature as not to be actionable. The Commission notes that, according to the case-law, it has a wide power of assessment in exercising its powers under Article 93(1). It refers in particular to the judgment of the Court of Justice in Case C-44/93 *Namur-Les Assurances du Crédit* v *OND* [1994] ECR I-3829, paragraphs 11, 15 and 34, in which the Court held that in the exercise of its powers under Article 93(1), the initiative lies with the Commission. The defendant considers that the existence of such a power of assessment is incompatible with the possibility for an individual to bring an action under Article 173.

In support of that assertion, the Commission refers, first, to the judgment of the Court of Justice in Case C-87/89 *Sonito* v *Commission* [1990] ECR I-1981, at paragraph 6, concerning the Commission's refusal to bring infringement proceedings under Article 169 and, secondly, to the judgment of the Court of First Instance in Case T-32/93 *Ladbroke* v *Commission* [1994] ECR II-1015, paragraph 37, concerning a refusal by the Commission to take a decision under Article 90(3) of the Treaty.

24 Frima refers to the judgment of the Court of First Instance in Case T-83/92 *Zunis Holding* v *Commission* [1993] ECR II-1169, paragraph 31, in which it was held that 'when an act of the Commission amounts to a rejection it must be appraised in the light of the nature of the request to which it constitutes a reply [...] In particular, the refusal by a Community institution to withdraw or amend an act may constitute an act whose legality may be reviewed under Article 173 of the EEC Treaty only if the act which the Community institution refuses to withdraw or amend could itself have been contested under that provision'. Frima submits that, in the light of that case-law, Salt Union is not entitled to seek the annulment of the contested decision.

25 Salt Union notes that Article 93(1) *obliges* the Commission to keep under constant review all systems of aid. It then states that it does not seek to challenge in any way specific measures or their content, but only to obtain the annulment of an unlawful decision to bring to an end an incomplete mandatory review.

26 It maintains that, whilst the Commission may indeed have a power of assessment concerning the nature of the appropriate measures it may propose to Member States following a review under Article 93(1), it has no such power with regard to the extent of that review. It follows, according to Salt Union, that even if complainants have no right to challenge any proposals made by the Commission to Member States, they do have an interest in ensuring that the type of review carried

out by the Commission is sufficiently extensive to enable it to assess whether action is called for. In this case, the Commission did not undertake a complete review within the meaning of Article 93(1). On the contrary, it reached the conclusion that there was no need to propose appropriate measures on the basis of an incomplete review of the facts. Salt Union considers that where, as in this case, the Commission fails to propose appropriate measures following an incomplete review, the closing of the file on the matter has a legal effect, since the Commission has unlawfully placed itself in the position of being unable to propose appropriate measures although such measures might have proved to be necessary had the Commission carried out a complete review.

27 Salt Union observes that a distinction must be drawn between the procedure under Article 169 and the procedure under Article 93, because if the two were absolutely identical the special procedure under Article 93 would be pointless. It claims that the difference between the two procedures is that Article 169 does not require the Commission to review failures by Member States to fulfil their obligations under the Treaty, whereas under Article 93(1) the Commission is obliged constantly to review all systems of aid. According to Salt Union, the distinction is of crucial importance since, if the Commission fails to perform effectively its review functions in accordance with Article 93(1), interested persons such as Salt Union who might have benefited from the procedure under Article 93(2) are wrongfully prevented from doing so. It points out that there is no equivalent procedure under Article 169.

28 Salt Union next observes that, in accordance with the judgment of the Court of Justice in Case C-198/91 *Cook* v *Commission* [1993] ECR I-2487, paragraph 23, where, without initiating the procedure under Article 93(2), the Commission finds, on the basis of Article 93(3), that a new aid is compatible with the common market, the persons intended to benefit from the procedural guarantees provided for by Article 93(2) can secure compliance therewith only if they are able to challenge that decision by the Commission before the Court. Salt Union submits that, by analogy with the judgment in *Cook*, an applicant with an interest in taking part in

the Article 93(2) procedure which may result from the completion of the Article 93(1) procedure, can secure compliance with the procedural guarantees provided by Article 93(2) only if it is able to challenge a failure to carry out a proper mandatory review under Article 93(1).

29 VDS claims that it is apparent from the judgment of the Court of Justice in Case 169/84 *Cofaz and Others* v *Commission* [1986] ECR 391, paragraphs 20 to 32, that the rights of competitors of recipients of State aid are protected under the Treaty. It follows that competitors must always have the right to object to the grant of State aid to companies active in the same market. VDS considers that such a conclusion is necessary in order to secure efficient enforcement of the Treaty rules on State aids. Consequently, Frima's competitors ought to be in a position to demand that the Commission conduct an in-depth review of the aid to Frima under Article 93(1).

30 VDS refers to the judgment of the Court of Justice in Case 323/82 *Intermills* v *Commission* [1984] ECR 3809, paragraph 16, in which the Court stated that the 'parties concerned' referred to in Article 93(2) include competitors of the recipient of the aid. VDS considers that if those competitors have *locus standi* in a procedure under Article 93(2) which is triggered by a procedure under Article 93(1), they must also have the right to challenge a Commission decision not to initiate the procedure under Article 93(1). In the absence of such a right, they would be deprived of the right to submit comments granted them by Article 93(2). According to VDS, such a situation is contrary to the principle of Community law that, wherever a party has substantive rights, the Treaty also provides for the procedural means to enforce those rights. It refers in this connection to the judgment of the Court of Justice in Case C-70/88 *Parliament* v *Council* [1990] ECR I-2041.

Findings of the Court

31 According to the settled case-law of the Court of Justice and the Court of First Instance, any measure which produces binding legal effects and is such as to affect the interests of the 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 173 for a declaration that it is void (judgment of the Court of Justice in Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 9; judgments of the Court of First Instance in Case T-64/89 *Automec* v *Commission* [1990] ECR II-367, paragraph 42, and Case T-3/93 *Air France* v *Commission* [1994] ECR II-121, paragraph 43).

32 Moreover, when an act of the Commission amounts to a rejection, it must be appraised in the light of the nature of the request to which it constitutes a reply (judgments of the Court of Justice in Case 42/71 *Nordgetreide* v *Commission* [1972] ECR 105, paragraph 5, and Joined Cases C-15/91 and C-108/91 *Buckl and Others* v *Commission* [1992] ECR I-6061, paragraph 22, and judgment of the Court of First Instance in *Zunis Holding*, paragraph 31). In particular, a refusal constitutes an act in respect of which an action for annulment may be brought under Article 173 of the Treaty provided that the act which the Community institution refuses to adopt could itself have been contested under that provision (judgments of the Court of Justice in Joined Cases 97/86, 193/86, 99/86 and 215/86 *Asteris and Others and Greece* v *Commission* [1988] ECR 2181, paragraph 17, and *Sonito*, paragraph 8).

33 In the present case, the act contested under Article 173 of the Treaty is the refusal of the Commission to propose to the Netherlands Government 'appropriate measures' pursuant to Article 93(1) of the Treaty with regard to the Netherlands scheme.

34 In the light of the case-law cited (paragraphs 31 and 32 above), that refusal cannot be considered to be a decision which may be the subject of an action for annulment unless, assuming that the Commission had, at Salt Union's request, proposed appropriate measures to the Netherlands Government in respect of the Netherlands scheme, that act would have constituted a measure which produced binding legal effects and was such as to affect Salt Union's interests, by bringing about a distinct change in its legal position.

35 It must be noted that, according to the actual wording of Article 93(1) of the Treaty, such appropriate measures are merely proposals. In particular, if such measures were proposed to the Netherlands Government or State, they would not be bound to adopt them. Should the Netherlands Government or State decide not to adopt them, the Commission, if it still saw fit to do so, would have to take a decision under Article 93(2) of the Treaty in order to require alteration of the Netherlands scheme. It is that decision alone which would be binding in character.

36 It follows that the act requested by Salt Union could not have constituted a measure which produced binding legal effects and was such as to affect its interests. Such an act could not therefore have been the subject of an action under Article 173 of the Treaty.

37 Consequently, the refusal by the Commission to adopt such an act does not constitute an act amenable to an action under Article 173.

38 The application must therefore be dismissed as inadmissible, without there being any need to consider the other pleas of inadmissibility put forward by the Commission, nor the substance of the case.

39 None the less, the Court would emphasize that the outcome of this action does not mean that in general undertakings are denied the right to challenge the grant of State aid to companies active on the same markets as themselves. It is open to those undertakings to contest, before the national courts, the decision of national authorities to grant State aid to an undertaking which competes with them. If the aid forms part of a general aid scheme, undertakings may call in question in such national proceedings the validity of the Commission's decision to approve that scheme. If a question as to the validity of that decision is raised before a national court, that court may or, in certain circumstances, must refer a question to the Court of Justice for a preliminary ruling under Article 177 of the Treaty.

Costs

40 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 Salt Union has been unsuccessful, it must, having regard to the Commission's pleadings, be ordered to pay the costs, including those incurred by Frima, which applied for costs in its pleadings. VDS is to bear its own costs.

On those grounds,

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

hereby:

1. Dismisses the application as inadmissible;

2. Orders Salt Union to pay the costs, including those incurred by Frima BV;

3. Orders Verein Deutsche Salzindustrie eV to bear its own costs.

Briët Vesterdorf Lindh

Potocki Cooke

Delivered in open court in Luxembourg on 22 October 1996.

H. Jung B. Vesterdorf

Registrar President