JUDGMENT OF THE COURT (Second Chamber)
1 April 1993 *

In Case C-25/91,

Pesqueras Echebastar SA, a company incorporated under Spanish law, established in Bermeo (Spain), represented by Antonio Ferrer López, of the Vizcaya Bar, with an address for service in Luxembourg at the Chambers of Messrs Arendt and Harles, 4 Avenue Marie-Thérèse,

applicant,

v

Commission of the European Communities, represented by Francisco José Santaolalla, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of Nicola Annecchino, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for a declaration that the Commission of the European Communities has failed, in infringement of the Treaty, to address to the applicant an act other than a recommendation or an opinion,

THE COURT (Second Chamber),

composed of: J. L. Murray, President of the Chamber, G. F. Mancini and F. A. Schockweiler, Judges,

Advocate General: C. Gulmann,
Registrar: H. A. Rühl, Principal Administrator,

* Language of the case: Spanish.

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 15 October 1992,

after hearing the Opinion of the Advocate General at the sitting on 26 November 1992,

gives the following

Judgment

1 By application lodged at the Court Registry on 25 January 1991, Pesqueras Echebastar SA (hereinafter 'Echebastar'), established in Bermeo (Sp) submitted a number of claims: the first seeks a declaration under Article 175 of the EEC Treaty that the Commission, by failing to adopt a decision on the grant to Echebastar of Community financial aid for the construction of a new fishing vessel, has failed to fulfil its obligations under 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); the second claim seeks a declaration that Echebastar was entitled, under the provisions of the aforesaid regulation, to Community financial aid for the construction of a new fishing vessel; the third claim seeks compensation, under Article 178 and the second paragraph of Article 215 of the Treaty, for the damage which the company has allegedly suffered by reason of the Commission's failure to act.

2 In October 1987, Echebastar made an application to the Commission, through the Spanish authorities, for the grant of Community financial aid for a project for the construction of a vessel of the tuna-freezer type.

3 On 22 November 1989, the Commission informed Echebastar that the project in question could not receive Community financial aid because 'the appropriations in the budget which were available for financing projects in 1989 were insufficient'.

4 By letter of 30 November 1989 to the Commission, Echebastar contended in particular that by virtue of the provisions of Article 37(1) of Regulation No 4028/86, it was entitled, in the event of the rejection of its application, to have it carried forward to the first apportionment of the following budgetary year, not later than 30 April 1990.

5 On 17 May 1990, the Commission replied to Echebastar that its project was under consideration, that 'a decision on that project will be taken not later than 31 October 1990' and that the undertaking would be informed without delay of the purport of the decision.

6 By letter of 20 September 1990, received by the Commission on 2 October 1990, Echebastar called upon the Commission, in pursuance of Article 175 of the Treaty, to define its position on the application for the grant of financial aid in accordance with the provisions set out in Article 35(1)(a) of Regulation No 4028/86.

7 When, at the end of November 1990, the Commission had at its disposal all the information supplied, *inter alia*, by the Spanish authorities, it informed the applicants whose projects fulfilled the conditions laid down by Regulation No 4028/86 that they had not been accepted for aid because the appropriations provided in the budget had been exhausted. Thus, by a letter dated 18 December 1990, received by Echebastar on 21 January 1991, the Commission referred to its letter of 17 May 1990 and informed Echebastar that '... your project was not granted the aid for the following reason: the appropriations provided in the budget for 1990 were insufficient'.

8 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the relevant regulations, the procedure and the pleas in law and arguments of the parties, which are hereinafter referred to only in so far as is necessary for the reasoning of the Court.

9 According to Echebastar, it called upon the Commission to act, as provided by Article 175 of the Treaty, by its letter of 20 September 1990, received by the Commission on 2 October 1990. Thus the period of two months prescribed by that article expired on 2 December. As the Commission did not react to that request within that period, Echebastar considers its application to be admissible. It adds that the Commission's letter of 18 December 1990 does not constitute a definition of its position within the meaning of Article 175, since it contains no information making it possible to discover the view of the institution from which it comes with regard to the action it was asked to take.

10 The Commission takes the view, with reference to its letter of 18 December 1990, which reached the addressee on 21 January 1991, that the action for failure to act, which was brought on 25 January 1991, is inadmissible, as the conditions for bringing it are not met.

11 In considering the admissibility of the claim for a declaration that the Commission has failed to act, it must be noted that the defendant defined its position, after being called upon to act, after the expiry of the period of two months referred to in the second paragraph of Article 175 of the Treaty, but before the action was brought. It follows that the Commission did not fail to adopt a decision on Echebastar's application and that the conditions prescribed by Article 175 of the Treaty are not met.

12 In that respect, it is irrelevant that the position thus defined by the Commission does not satisfy Echebastar. According to the Court's case-law, Article 175 of the Treaty relates to a failure to act in the sense of failure to take a decision or to define a position and not to the adoption of a measure different from that desired or considered necessary by the persons concerned (see the judgment in Joined

Cases C-15/91 and 108/91 *Josef Buckl & Söhne and Others* v *Commission* [1992] ECR I-6061, paragraphs 16 and 17).

13 It follows that the application is inadmissible in so far as it seeks a declaration that the Commission has failed to act.

14 As regards the claim seeking a declaration that Echebastar is entitled to financial aid, it is sufficient to point out that the Court cannot, in proceedings under Article 175 of the Treaty, direct a Community institution to make a payment. The application is therefore inadmissible in so far as that claim is concerned.

15 Finally, as regards the claim for compensation for the damage alleged, it should be pointed out that in this case the Commission cannot be charged with any failure to act. The application must therefore be dismissed in so far as that claim is concerned.

16 Echebastar's application must therefore be dismissed in its entirety.

Costs

17 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. As Echebastar has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT (Second Chamber)

hereby:

1. Dismisses the application;

2. Orders the applicant to pay the costs.

Murray Mancini Schockweiler

Delivered in open court in Luxembourg on 1 April 1993.

J.-G. Giraud J. L. Murray

Registrar President of the Second Chamber