ORDER OF THE COURT OF FIRST INSTANCE (First Chamber)
4 November 1992 *

In Case T-8/89 REV,

DSM NV, a company incorporated under Netherlands law, having its registered office at Heerlen (Netherlands), represented by I. Cath, of the Hague Bar, with an address for service in Luxembourg at the Chambers of L. Dupong, 14 A Rue des Bains,

applicant for revision,

v

Commission of the European Communities, represented by B. J. Drijber, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of R. Hayder, of the Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for revision of the judgment delivered by the Court of First Instance on 17 December 1991 in Case T-8/89 *DSM* v *Commission* [1991] ECR II-1833,

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

composed of: H. Kirschner, President, C. W. Bellamy, R. Schintgen, R. García-Valdecasas and K. Lenaerts, Judges,

Registrar: H. Jung,

makes the following

* Language of the case: Dutch.

Order

Facts

1 By application lodged at the Court Registry on 26 May 1992, DSM NV (hereinafter 'DSM') applied, under Article 41 of the Protocol on the Statute (EEC) of the Court of Justice (hereinafter the 'Statute of the Court') and Article 125 of the Rules of Procedure of the Court of First Instance (hereinafter 'the Rules of Procedure'), for revision of the judgment delivered by the Court of First Instance on 17 December 1991 in Case T-8/89 *DSM* v *Commission* [1991] ECR II-1833 (hereinafter 'the judgment of 17 December 1991').

2 By that judgment the Court of First Instance dismissed DSM's application for annulment of the Commission's decision of 23 April 1986 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.149 — Polypropylene, OJ 1986 L 230, p. 1, hereinafter 'the decision').

Forms of order sought by the parties

3 The applicant for revision claims that the Court should:

(1) declare that the application for revision was introduced in good time;

(2) order measures of inquiry, more particularly those referred to in Article 64(2)(c) and (d) of the Rules of Procedure;

(3) revise the judgment of the Court of First Instance of 17 December 1991 in Case T-8/89 *DSM* v *Commission* so as to declare non-existent, or at least void, Decision IV/31.149 — Polypropylene of the Commission of 23 April 1986;

(4) annul, or at least reduce, the fine imposed on the applicant for revision by that Commission decision.

(5) order the Commission to repay immediately the fine paid to it on 19 February 1992 by the applicant for revision pursuant to a non-existent, or at least void, instrument, including interest and costs, as set out in the letter which the applicant for revision addressed to the Commission on 5 May 1992;

(6) order the Commission to pay the costs of these proceedings, including the costs of the proceedings which led to the judgment of the Court of First Instance of 17 December 1991 (Case T-8/89).

4 The defendant contends that the Court should:

(1) (a) declare the claims inadmissible;

(b) alternatively, and in any event, declare the claims unfounded;

(2) order the applicant to pay the cost of the proceedings.

Admissibility

Arguments of the parties

5 In support of its application DSM submits that the combination of facts and evidence mentioned in point 2.1 of its application for revision constitute a new fact within the meaning of Article 41 of the Statute of the Court. The elements constituting the new fact are, first, the request it made to the Commission by letter of 5 May 1992 for repayment, as an undue amount, of the fine which it had paid to the Commission and of the costs and interests related to the bank guarantee which it

had to provide for the purposes of the proceedings in Case T-8/89 and the explanations before 19 May 1992 in the event that the Commission considered that the fine had not been unduly paid. The second element is the Commission's refusal to meet, in the time set by the applicant for revision, the abovementioned request. Thirdly, the applicant for revision discovered that a number of amendments and additions were subsequently made to the text of the decision which was notified to it, compared with the text adopted by the College of Commissioners at the meeting on 23 April 1986. As evidence of those amendments and additions, DSM points to certain discrepancies in the text of the decision notified to it: typographical differences, discontinuous page numbering, the words 'Draft decision of 23 May 1986' appearing on the first page of that text, the exceptionally long period of time which elapsed between the date of the alleged adoption of the decision (23 April 1986) and the date on which it was notified to it (30 May 1986) and the Commission's refusal to reply to its request of 5 May 1982, which prevented it from verifying the existence of the decision. The fourth element is the judgment delivered by the Court of First Instance on 27 February 1992 in Joined Cases T-79/89, T-84/89, T-85/89, T-86/89, T-89/89, T-91/89, T-92/89, T-94/89, T-96/89, T-98/89, T-102/89 and T-104/89 [1992] ECR II-315, hereinafter 'the PVC judgment', in which the Commission decision at issue in those cases was declared non-existent by reason of the particularly serious and manifest defects which it exhibited.

6 The applicant for revision deduces from the combination of facts and evidence mentioned above that the College of Commissioners did not deliberate on the text of the decision notified to it and that it did not have the Dutch version of the decision. It concludes that there is justification for doubting the existence of the decision which was the subject of the judgment of which it seeks revision since there is every reason to believe that the decision is affected by the same defects as those found in the PVC judgment (application for revision, point 2.3).

7 It considers that if that were to be the case, it would exert a decisive influence on that judgment, since this would be confirming a non-existent decision. That is why it has asked the Court of First Instance to order various measures of inquiry in order to establish whether the decision, which was the subject of the judgment of which it seeks revision, exists (application for revision, point 2.2).

8 The Commission points out that under Article 41 of the Statute of the Court the first condition which must be satisfied in order for an application for revision to be admissible is that it must be based on a fact which, before pronouncement of the judgment, was unknown to the Court and to the party seeking revision.

9 The Commission contends in this regard that the alleged amendments to the texts were known to the applicant for revision after 30 May 1986 since it was on that date that the decision was notified to it. Therefore, this cannot be a fact that came to light after delivery of the judgment of 17 December 1991.

10 The Commission goes on to argue that the PVC judgment cannot be regarded as a new fact either, since that judgment merely defined the legal effect of the statements made by the Commission's agents at the hearing held on 10 December 1991 in the cases then before this Court but without ruling on the truth of those statements (PVC judgment, paragraph 92) and cannot in any event constitute by itself a fact capable of giving rise to the revision of the judgment of 17 December 1991, as the Court held in its order of 26 March 1992 in Case T-4/89 REV *BASF* v *Commission* [1992] ECR II-1591.

11 The Commission adds that, as the Court held in the same order (paragraph 14), the applicant for revision could, on the basis of the abovementioned statements of the Commission's agents, have asked for the oral procedure to be re-opened before pronouncement of judgment.

12 Finally, the Commission contends that the letter which the applicant for revision addressed to it on 5 May 1992 may not be relied on to seek revision of a judgment which has acquired the force of *res judicata*, otherwise it would be sufficient, in order to apply for revision of a judgment, to address a letter to the Commission setting out a number of claims and demands and then make an application for revision to this Court if those claims and demands were not met immediately.

Finding of the Court

13 In assessing the admissibility of this application it should be borne in mind that, according to the first paragraph of Article 41 of the Statute of the Court of Justice, made applicable to the procedure before the Court of First Instance by the first paragraph of Article 46 of that Statute,

'An application for revision of a judgment may be made to the Court only on discovery of a fact which is of such a nature as to be a decisive factor, and which, when the judgment was given, was unknown to the Court and to the party claiming the revision'.

14 It is clear from that provision that revision is not an appeal procedure but an exceptional review procedure that allows an applicant to call in question the authority of *res judicata* attaching to a judgment bringing the proceedings to an end on the basis of the findings of fact relied on by the Court. Revision presupposes the discovery of elements of a factual nature which existed prior to the judgment and which were unknown at that time to the court which delivered it as well as to the party applying for revision and which, had the Court been able to take them into consideration, could have led it to a different determination of the proceedings (see, most recently, the order of the Court of Justice in Case C-185/90 P-REV *Gill* v *Commission* [1992] ECR I-994 and the order of the Court of First Instance in Case T-4/89 REV *BASF* v *Commission*, cited above).

15 In the present case, the question which the Court must determine is whether the applicant for revision has proved that it was not aware of the facts alleged in point 2.3 of its application for revision and mentioned in paragraph 6 of this order until the judgment of 17 December 1991 was delivered.

16 The 'new fact' on which the applicant for revision relies in support of its application is formed by a combination of different facts and evidence, which all occurred at different times (see paragraph 5 above). It must therefore be examined whether, from those facts and evidence, the applicant for revision was aware of the facts

mentioned in paragraph 6 above before the judgment of 17 December 1991 was delivered.

17 As regards the alleged amendments and actual additions to the text of the decision notified to the applicant for revision — which it describes itself in its application as 'particularly serious and manifest' within the meaning of the PVC judgment — the typographical differences pointed out by the applicant for revision appeared in the text of the decision notified to it on 30 May 1986. Consequently, owing to their manifest character, the applicant was aware of them as from the date of that notification. The same applies as regards the discontinuous page numbering in the decision, the fact that the front page of the notified decision was marked '*Draft* Decision of 23 May 1986' and the length of time elapsing between the date on which the decision was adopted — which the applicant now puts at 23 April 1986 although in its application originating the proceedings it refers to the annulment of the decision of 23 May 1986 — and the date of its notification which was 30 May 1986.

18 Furthermore, the effect of the amendments and additions pointed out by the applicant for revision was sufficiently clarified at the hearing of 10 December 1991 in the PVC cases in which the agents of the Commission stated that the procedure adopted in those cases corresponded to regular practice. The applicant for revision was at that hearing and was represented there by the same lawyer as in the procedure which led to the judgment of 17 December 1991. Consequently, before the judgment was delivered, it could have lodged an application for the re-opening of the oral procedure, relying on the facts mentioned in paragraph 6 above. It is true that the applicant for revision still did not have, unlike the applicants in Cases T-9/89 to T-15/89 (see the judgments of 10 March 1992 in Case T-9/89 *Hüls* v *Commission*, paragraphs 382 to 385; Case T-10/89 *Hoechst* v *Commission*, paragraphs 372 to 375; Case T-11/89 *Shell* v *Commission*, paragraphs 372 to 374; Case T-12/89 *Solvay* v *Commission*, paragraphs 345 to 347; Case T-13/89 *ICI* v *Commission*, paragraphs 399 to 401; Case T-14/89 *Montedipe* v *Commission*, paragraphs 389 to 391 and Case T-15/89 *Linz* v *Commission*, paragraphs 393 to 395 [1992]

ECR II-499), the legal evaluation of the PVC decision which the Court rendered in its judgment of 27 February 1992. That circumstances does not, however, alter the fact that the applicant for revision was aware of the facts in question before the judgment was delivered (see the judgment of the Court of Justice in Case C-403/85 REV *Ferrandi* v *Commission* [1991] ECR I-1215, paragraph 13).

19 It follows that the various amendments and additions mentioned by the applicant for revision and their significance were sufficiently obvious for it to gain knowledge, upon reading the text of the decision notified to it, or at any rate at the hearing held in the PVC cases on 10 December 1991, of the facts mentioned in paragraph 6 above. Consequently, those facts can in no event constitute facts unknown to the applicant for revision before delivery of the judgment of the Court of First Instance on 17 December 1991, within the meaning of the first paragraph of Article 41 of the Statute of the Court and, consequently, they are not capable of giving rise to revision of that judgment.

20 Furthermore, the PVC judgment as such as well as the letter sent by the applicant for revision to the Commission on 5 May 1992 and the fact that it remained unanswered are not material. Neither of those events brought to the applicant's attention facts which were previously unknown to it.

21 It follows from all the foregoing that the facts put forward by the applicant for revision in its application cannot constitute, either on their own in combination with one another, a new fact within the meaning of Article 41 of the Statute of the Court and, consequently, that the application for revision must be dismissed a inadmissible.

Costs

22 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for. Since the applicant for revision has failed in its submissions and the Commission has asked for costs to be awarded against it, the applicant must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby orders:

1. The application for revision is dismissed as inadmissible.

2. The applicant for revision is ordered to pay the costs.

Luxembourg, 4 November 1992.

H. Jung — Registrar

H. Kirschner — President