JUDGMENT OF THE COURT (Fifth Chamber)
15 December 1988 *

In Joined Cases 166 and 220/86

Irish Cement Ltd, a company governed by Irish law, having its registered office in Dublin, Ireland, represented by Philip Bentley, barrister of Lincoln's Inn, and John Ratliff, barrister of the Middle Temple, with an address for service in Luxembourg at the Chambers of Stanbrook and Hooper, 7 Val-Sainte-Croix,

applicant,

v

Commission of the European Communities, represented by Thomas F. Cusak, Legal Adviser, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of its Legal Department, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for a declaration that the Commission, in infringement of the EEC Treaty, has failed to address to the applicant a notice informing it of the opening of a procedure under Article 93 (2) of the Treaty, and for a declaration that the Commission's decision not to open a procedure under that article, which was taken after the first application was brought, is void,

THE COURT (Fifth Chamber)

composed of: F. Grévisse, President of the Third Chamber acting as President of the Fifth Chamber, Sir Gordon Slynn, J. C. Moitinho de Almeida, G. C. Rodríguez Iglesias and M. Zuleeg, Judges,

Advocate General: M. Darmon
Registrar: B. Pastor, Administrator

* Language of the Case: English.

having regard to the Report for the Hearing and further to the hearing on 18 October 1988,

after hearing the Opinion of the Advocate General delivered at the sitting on 8 November 1988,

gives the following

Judgment

1 By application lodged at the Court Registry on 10 July 1986, Irish Cement Ltd, a company having its registered office in Dublin, brought an action under the third paragraph of Article 175 of the EEC Treaty for a declaration that the Commission, in infringement of the Treaty, failed to address to it a notice informing it of the opening of a procedure under Article 93 (2) of the Treaty concerning the grant by the Northern Irish Development Board of a capital grant to Sean Quinn Quarries Ltd (hereinafter referred to as 'Quinn'), as the applicant had requested it to do by letter of 28 March 1986 (Case 166/86).

2 By application lodged on 12 August 1986, the same applicant brought an action under the second paragraph of Article 173 of the EEC Treaty for a declaration that the Commission's decision of 14 July 1986 not to open a procedure under Article 93 (2) of the Treaty in relation to the aforesaid grant of aid is void. In that same application, Irish Cement Ltd also asked the Court to declare, pursuant to the third paragraph of Article 175 of the Treaty, that the Commission has still failed to define its position on all the points raised in the letter which the applicant sent to it on 28 March 1986 (Case 220/86).

3 In a letter to the Director-General for Competition of the Commission dated 17 April 1985 and headed 'Articles 92 and 93 of the EEC Treaty', the applicant lodged a 'formal complaint' against the granting to Quinn of aid intended to cover 30 to 50% of the capital cost of building a cement manufacturing plant at Derrylin, County Fermanagh, Northern Ireland. In support of its complaint the applicant argued that the aid would distort competition in so far as it itself had

received aid from the Irish Government of only 10% of the capital cost of increasing cement production at its Limerick works. In addition, it referred to the surplus of cement production capacity in the island of Ireland as a whole and to the damage which it would suffer as a result of the implementation of the planned investment. The applicant offered to provide the Commission with additional information in order to enable it to assess that damage on condition that the information was kept confidential.

4 By letter of 14 May 1985 the Director-General for Competition informed the applicant that the aid in question had been granted in accordance with the principles of coordination of regional aid systems set out in the Commission's Communication to the Member States of 21 December 1978 (Official Journal 1979, C 31, p. 9). He stated that the national authorities were entitled to grant aids of up to 50% of investment projects without prior notification to the Commission, and that in those circumstances there would be little point in the applicant's submitting further details.

5 On 28 March 1986 the applicant sent to the Director-General for Competition a further letter in which it maintained that the Commission did not have sufficient information to assess the sectoral consequences of the aid in accordance with principle No 11 of the coordination principles. It enclosed with that letter a memorandum which, in its view, showed that the aid in question should not have been implemented without prior notification to the Commission in view of its sectoral implications. The aid would not create new employment but would simply transfer employment and therefore could not be considered compatible with the common market under Article 92 (3) of the Treaty. Consequently, the applicant asked the Commission first to initiate the procedure provided for in Article 93 (2) of the Treaty and to notify it that the procedure had been opened, and secondly to modify the coordination principles so that regional aid could not be granted without prior notification to the Commission and so that the sectoral implications must be taken into account in each case before a regional aid was declared compatible with the common market.

6 By letter of 14 July 1986, the Director-General for Competition replied as follows:

'As has already been stated in the previous letter . . . dated 14 May 1985 the grant to Sean Quinn Quarries Ltd to build a cement manufacturing plant in Northern Ireland falls under an aid system which the Commission has deemed to be compatible with the common market in accordance with Article 92 (3) of the EEC Treaty. The Commission is therefore unable to intervene in the award of this aid.'

7 It is against that decision of 14 July 1986 that the applicant brought on 12 August 1986 its action for annulment in Case 220/86.

8 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the submissions and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

9 It must be observed in the first place that by his letter of 14 May 1985 the Director-General for Competition took a decision on a 'formal complaint' against the grant of the contested aid to Quinn on the basis of Articles 92 and 93 of the Treaty. The objective of such a complaint could only be the opening of the procedure provided for in Article 93 (2) of the Treaty, a step which the Director-General for Competition refused to take, stating, as has already been mentioned, that the aid in question complied with the relevant coordination principles and could be granted without prior notification to the Commission.

10 The closing part of the letter of 14 May 1985 stating that there would be 'little point' in the applicant's submitting further details must be read in the light of those observations. The reasons given by the Commission prevented it in any event from intervening in the award of the aid in question and hence the applicant was not entitled to consider that if it provided further details the Commission would re-examine the question.

11 Consequently, the letter of 14 May 1985 constitutes a decision by the Commission rejecting the complaint relating to the aid granted to Quinn. It has definitive legal

effects as far as the applicant is concerned. It is common ground that that decision was not referred to the Court within the time-limit for bringing proceedings.

12 The applicant argues that in its letter of 14 July 1986 the Commission based itself on elements of fact and law not taken into account in its first letter. It states in particular that the Commission knew, when it sent its letter of 14 July 1986, that the system of aid under which the contested aid was granted was the 'standard capital grants scheme' and not the 'selective financial assistance scheme', referred to by mistake in the letter of 14 May 1985. Consequently, in its view, the letter of 14 July 1986 has to be regarded as a new decision against which a separate action lies under Article 173 of the Treaty.

13 That argument cannot be upheld, since the error in identifying the aid system provides no justification for regarding the 1986 decision as a new decision. Since the level of the aid in question did not exceed the limits laid down under the coordination principles the question as to which of the two systems applied in Northern Ireland had been used was of no consequence.

14 The applicant also maintains that the subject of the 1986 decision was different from that of the 1985 decision. In its first letter the Commission gave a decision on the applicant's complaint contesting the aid to Quinn in so far as that aid exceeded the level of the aid granted to the applicant by the Irish authorities. In its second letter the Commission gave a decision on a complaint with a more extensive subject-matter, since it referred to any aid granted by the Northern Ireland authorities in the cement sector.

15 That argument cannot be upheld either. According to the reasons stated therein, the decision of 14 May 1985 precluded any possibility of a review of the aid to Quinn, whether of the whole of the aid or only of the fraction of the aid exceeding the amount of aid granted to the applicant.

16 In those circumstances and without its being necessary to consider whether the decision of 14 July 1986 is of direct and individual concern to the applicant, it must be held that that decision merely confirmed the decision of 14 May 1985 and that the action brought against it is inadmissible.

17 As regards the action for failure to act (Case 166/86) and the corresponding conclusions formulated in the context of the second application (Case 220/86), it is sufficient to observe that, by its letter of 14 May 1985, the Commission defined its position with regard to the request, which the applicant reiterated in its letter of 28 March 1986, to initiate the procedure provided for in Article 93 (2) and that, as the Court held in its judgment of 13 July 1971 in Case 8/71 *Deutscher Komponistenverband* [1971] ECR 705, Article 175 refers to failure to act in the sense of failure to take a decision or to define a position, and not the adoption of a measure different from that desired or considered necessary by the persons concerned.

18 It follows that the application based on the third paragraph of Article 175 of the Treaty must also be dismissed as inadmissible.

Costs

19 Under Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleading. Since the applicant has been unsuccessful in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

(1) Dismisses the applications as inadmissible;

(2) Orders the applicant to pay the costs.

Grévisse Slynn

Moitinho de Almeida Rodríguez Iglesias Zuleeg

Delivered in open court in Luxembourg on 15 December 1988.

J.-G. Giraud
Registrar

F Grévisse
President of the Third Chamber
acting as President of the Fifth Chamber