protection of legitimate expectations must be strictly construed and can concern only exceptional circumstances in which, in particular, the conduct of the institution concerned has been, either alone or to a decisive extent, such as to give rise to a pardonable confusion in the mind of a party acting in good faith and exercising all the diligence required of a normally experienced trader.

3. For an applicant whose action is time-barred to avoid the effects of that bar, as provided for in the second paragraph of Article 42 of the Statute of the Court of Justice of the EEC, by reason of the existence of unforeseeable circumstances or force majeure, there must be abnormal difficulties, independent of the will of the person concerned and apparently inevitable, even if all due care is taken.

JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)
29 May 1991 *

In Case T-12/90,

Bayer AG, a company incorporated under German law, whose registered office is at Leverkusen, Federal Republic of Germany, represented by J. Sedemund, Rechtsanwalt, Cologne, 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 Bernhard Jansen, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of Guido Berardis, a member of its Legal Department, Wagner Centre, Kirchberg,

defendant,

concerning, at this stage of the procedure, the admissibility of an application under Article 173 of the EEC Treaty, for a declaration that Commission Decision 90/38/EEC of 13 December 1989 relating to a proceeding under Article 85 of the EEC Treaty (IV/32.026, Bayo-n-ox, Official Journal 1990 L 21, p. 71) is void,

* Language of the case: German.

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

composed of: A. Saggio, President of the Chamber, C. Yeraris, C. P. Briët, B. Vesterdorf and J. Biancarelli, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 6 December 1990,

gives the following

Judgment

The factual background to the application

1 By Decision 90/38/EEC of 13 December 1989 (Official Journal 1990 L 21, p. 71, hereinafter referred to as 'the decision'), the Commission found that there were agreements in force from 10 July 1986 to 13 November 1989 between Bayer AG, the company to which the decision is addressed (hereinafter referred to as 'Bayer') and its customers, under which such customers were required to use 'Bayo-n-ox Premix 10%' solely to cover their own requirements in their own works. In the Commission's view, those agreements constituted infringements of Article 85 of the EEC Treaty, and on that account the Commission imposed a fine of ECU 500 000 on Bayer, on the basis of Article 15(2) of Regulation No 17 of the Council of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (Official Journal, English Special Edition 1959-1962, p. 87, hereinafter referred to as 'Regulation No 17').

2 That decision was sent to Bayer by mail on 20 December 1989, in the form of a registered letter with postal acknowledgment of receipt. It is established by the documents in the case-file, the accuracy of which has not been disputed, that the letter was received by Bayer's mail office on 28 December 1989.

3 The envelope containing the decision bore on the front, first, a franking mark; secondly, an adhesive label bearing both the name and address of the Commission and the name and address of Bayer, in the form 'An die — BAYER AKTIEN-GESELLSCHAFT — D-5090 LEVERKUSEN — REPUBLIQUE FEDERALE D'ALLEMAGNE'; thirdly, an ink stamp in the upper left-hand corner, reading 'A. R. — RECOMMANDÉ Avec Accusé de réception — AANGETEKEND Met Ontvangstbewijs' (registered with acknowledgment of receipt); and, fourthly, a label affixed in the lower left-hand corner bearing, within a red rectangle, the terms 'R (in red) — BRUXELLES 4 — BRUSSEL 4 — 663 (in red)'. A detachable red card, bearing the words 'avis de réception/de paiement/d'inscription' (acknowledgment of receipt/payment/registration), was affixed to the reverse of the envelope at each end. The card was removed from the envelope, leaving visible traces, in the course of handling by the mail office.

4 An authorized representative of Bayer in the company's mail office entered the date of 28 December 1989 in the space provided for the 'date and signature of the recipient' and added his signature. The post office in Leverkusen stamped the form, again with the date of 28 December 1989, and returned it to the Commission where it was duly received.

5 An employee in Bayer's mail office, believing that the envelope was intended for the company's patent department, forwarded it to that department without either opening it or indicating on it the date on which it was received by the mail office. The patent department stamped it with a red ink stamp bearing the words '*NICHT* K-RP Patentabteilung' (not addressed to the patent department) and returned it via the internal mail service to the mail office. On 3 January 1990, an employee in Bayer's mail office opened the envelope, the front of which he stamped with an ink stamp bearing that day's date. He then forwarded the envelope and its contents to Bayer's legal department.

6 The envelope in question contained the text of the abovementioned Commission decision, a covering letter dated 19 December 1989, together with a standard bank guarantee form and a printed form headed 'Acknowledgement of receipt/ Accusé de réception'. The secretarial service in Bayer's legal department stamped the text of the decision with the date 3 January 1990. Two members of the legal department completed and signed the 'acknowledgement of receipt', dating it 3 January 1990. The form was then returned to the Commission, where it was duly received.

7 On 15 January 1990, Bayer's legal department sent a letter concerning the contested decision to Sir Leon Brittan, Vice-President of the Commission. In that letter, the date of notification of the decision was mentioned as 3 January 1990.

Procedure

8 By application lodged at the Registry of the Court of First Instance on 9 March 1990, Bayer sought a declaration that the abovementioned Commission decision was void; in the alternative the annulment of the fine of ECU 500 000 imposed upon it; and, in the further alternative, the reduction of that fine.

9 By a separate document lodged on 30 March 1990, the Commission submitted, on the basis of Article 91(1) of the Rules of Procedure of the Court of Justice, which apply *mutatis mutandis* to the procedure before the Court of First Instance by virtue of the third paragraph of Article 11 of the Council Decision of 24 October 1988 establishing a Court of First Instance of the European Communities (hereinafter referred to as 'the Rules of Procedure of the Court of Justice'), a request that, without examining the substance of the case, this Court should rule on an objection that the application was inadmissible because it was out of time. On 7 May 1990, Bayer submitted its observations concerning that request.

10 Upon hearing the report of the Judge-Rapporteur, the Court (Second Chamber) decided to open the oral procedure on that objection of inadmissibility. The parties were asked to answer certain questions, and the applicant was requested to produce the original envelope in which the notification had been sent. The parties complied with those requests within the time allowed. The production of the envelope, which complemented the information provided by the parties in their written observations, provided the Court with the evidence necessary for the findings of fact set out above in paragraphs 3 to 7.

11 The hearing on the objection of inadmissibility was held on 6 December 1990, and the President declared the oral procedure closed at the end of the hearing.

12 The Commission claims that the Court should:

— declare the application inadmissible on the ground that it was not submitted within the period prescribed for that purpose;

— order the applicant to pay the costs.

13 Bayer maintains that the application was submitted within the prescribed period. In the alternative, it submits that it cannot be held responsible for the failure, if any, to comply with the time-limit laid down in the third paragraph of Article 173 of the EEC Treaty.

Admissibility of the application

14 The Commission points out that the application lodged by Bayer on 9 March 1990 seeks the annulment of a decision notified to it on 28 December 1989. Since the period within which annulment proceedings must be brought is laid down in the third paragraph of Article 173 of the EEC Treaty as two months, since under Article 81(1) of the Rules of Procedure of the Court of Justice that period is to run from the day following the receipt by the person concerned of notification of the measure and since under Article 81(2) of the Rules of Procedure of the Court of Justice, read in conjunction with the second indent of Article 1 of Annex II to those rules, the applicable time-limit is to be extended by six days in order to take account of distance because the applicant's registered office is in the Federal Republic of Germany, the period within which an action for annulment could be brought expired on 6 March 1990. Consequently, the application lodged on 9 March 1990 must be regarded as out of time and thus inadmissible.

15 Bayer has submitted three pleas in law in its defence against that objection of inadmissibility. The first of those pleas is based on the irregularity of the notification by the Commission; the second, in the alternative, on the existence of circumstances such as to render excusable its error as regards the starting-point of the time allowed for initiating proceedings; and the last on the existence of unforeseeable circumstances or *force majeure*. Those three pleas in law submitted by the applicant must be considered in turn.

16 The Court observes, *in limine*, that it is common ground that under the third paragraph of Article 173 of the EEC Treaty, read in conjunction with Article 81 of the Rules of Procedure of the Court of Justice and Article 1 of Annex II to those rules, the period for initiating proceedings in the present case was two months and six days, and began to run from the day following that on which Bayer received notification or took cognizance of the contested decision.

Irregularity of the notification

17 Bayer maintains, first of all, that the two-month period laid down in the third paragraph of Article 173 of the EEC Treaty for the initiation of annulment proceedings did not start to run until 3 January 1990 and did not expire, in view of the extension on account of distance provided for in Article 1 of Annex II to the Rules of Procedure of the Court of Justice, until 9 March 1990. The fact that the contested decision, addressed merely to 'BAYER AKTIENGESELLSCHAFT — D-5090 LEVERKUSEN', was received at its mail office on 28 December 1989 does not mean that the document was notified to it or that it took cognizance thereof on that date. Bayer points out that under Article 10 of Regulation No 99/63/EEC of the Commission of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (Official Journal, English Special Edition 1963-1964, p. 47) such a decision is to be sent to its addressee by registered letter with acknowledgment of receipt or delivered by hand against receipt. By placing the form headed 'Acknowledgement of Receipt/ Accusé de réception' inside the registered envelope, the Commission used both of those methods of notification. The simultaneous use in this case of both of those methods of notification rendered the notification irregular. Consequently, the period for initiating proceedings did not start to run until the date on which Bayer actually took cognizance of the decision, namely, as, moreover, it considers it has established, on 3 January 1990. It adds that since the Commission accepted, without comment, the acknowledgment of receipt bearing the date 3 January 1990, the principles of the protection of legitimate expectations and legal certainty preclude the Commission from subsequently referring to the existence of a postal acknowledgment of receipt signed at an earlier date.

18 With regard to the regularity of the notification, this Court notes that, according to the settled case-law of the Court of Justice, a registered letter with acknowledgment of receipt is a suitable method of giving notice inasmuch as it enables the date from which time begins to run to be determined. Furthermore, a decision is

duly notified once it has been communicated to the person to whom it is addressed and that person is in a position to take cognizance of it (judgment in Case 42/85 *Cockerill-Sambre* v *Commission* [1985] ECR 3749).

19 In the present case, this Court has found that the Commission sent the decision to Bayer by registered letter with postal acknowledgment of receipt and that that letter duly arrived at Bayer's registered office at Leverkusen on 28 December 1989. It follows that Bayer was in a position on that date to take cognizance of the contents of the letter and thus of the tenor of the decision.

20 In no event can the fact that the envelope contained the form headed 'Acknowledgement of Receipt/Accusé de réception' constitute a second notification separate from that effected by postal delivery. Without there being any need, at this stage in the reasoning, to rule on the consequences of the presence of that form as regards the concepts of excusable error, unforeseeable circumstances or *force majeure*, it is sufficient to note that notification effected using the 'Acknowledgement of Receipt/Accusé de réception' form would have presupposed delivery of the decision by hand to one of Bayer's employees by a duly authorized agent of the Commission, which was not the case here. In fact, as the Commission has stressed, the purpose of sending that form concomitantly with the decision, and actually inside the envelope, is simply that the Commission is thereby assured of ascertaining an undisputable date by which the undertaking has taken cognizance of the decision in cases where the relevant postal authorities fail to return the postal acknowledgment of receipt to the Commission, which was not the case here. The contested decision was therefore duly and validly notified to Bayer on 28 December 1989.

21 It follows from the foregoing that the applicant's first plea in law in defence must be dismissed.

Excusable error

22 In the alternative, Bayer submits that, even if it is accepted that the period laid down by the third paragraph of Article 173 of the EEC Treaty started to run on

28 December 1989, the application cannot be dismissed as inadmissible in the light of the case-law of the Court of Justice holding that a failure to comply with time-limits laid down in legislation does not prevent an action from being admissible where the applicant has been in excusable error as to the point from which time started running (judgments in Case 25/68 *Schertzer* v *Parliament* [1977] ECR 1729 and Case 117/78 *Orlandi* v *Commission* [1979] ECR 1613, especially at p. 1620). In that connection, Bayer has put forward four arguments to prove that its error was excusable in the circumstances.

23 First, Bayer submits that during the administrative procedure prior to the adoption of the decision the Commission had addressed all communications intended for Bayer, without exception, directly to its legal department in the form of registered letters with acknowledgment of receipt. The applicant could therefore assume that the final decision would also be sent directly to the legal department. However, breaking with its previous consistent practice, the Commission addressed the decision to 'BAYER AKTIENGESELLSCHAFT' with no further indication as to the department for which it was intended.

24 Secondly, Bayer states that it had taken every step within its power to avoid any error in the forwarding of mail received. It admits, however, that its authorized representative in charge of the mail office disregarded internal instructions requiring employees in that office to open any envelope not bearing a sufficiently clear indication as to the department for which it is intended, to stamp it with the date on which the document reached the mail office and, finally, to forward the document to the relevant department, together with its envelope bearing that date stamp.

25 Thirdly, in Bayer's submission, the fact that the envelope contained an acknowledgment of receipt form inserted by the Commission with the text of the decision clearly demonstrates the excusable nature of the error made. In view of the provisions of Article 10 of Regulation No 99/63, the legal department was entitled to assume that that form constituted the sole document used by the Commission for notification of the receipt of the decision and could therefore not suspect that a postal acknowledgment of receipt had already been filled in and returned by the mail office.

26 Fourthly, and finally, Bayer states that the fact that the Commission at no time — neither on receipt of the acknowledgment of receipt nor during the subsequent correspondence, in particular on receipt of the letter of 15 January 1990 — drew the applicant's attention to its error undeniably supports the argument that the error was excusable. By thus remaining silent, the Commission disregarded both the principle of legal certainty and that of the protection of legitimate expectations which it was under an obligation to observe in its relations with the applicant.

27 At the hearing, the Commission answered all those arguments by submitting, essentially, that in view of the importance of the rules governing time-limits for initiating proceedings, an error resulting from serious negligence within an undertaking for which the employees of that undertaking are alone responsible cannot be accepted as capable of postponing the starting-point of the period for initiating proceedings.

28 In the Court's view, it is first of all necessary to define more closely the scope of the concept of excusable error which may, in exceptional circumstances, have the effect of prolonging the period prescribed for initiating proceedings, as the Court of Justice held in its judgment in *Schertzer* v *Parliament*. That concept, which is distinct from those of unforeseeable circumstances or *force majeure* explicitly provided for in Article 42 of the Protocol on the Statute of the Court of Justice of the European Economic Community (hereinafter referred to as 'the Statute of the Court of Justice'), arises directly out of a concern that respect of the principles of legal certainty and the protection of legitimate expectations should be upheld.

29 In the context of time-limits for initiating proceedings, which have consistently been held to be a matter of public policy and not subject to the discretion either of the court or of the parties, the concept of excusable error must be strictly construed and can concern only exceptional circumstances in which, in particular, the conduct of the institution concerned has been, either alone or to a decisive extent, such as to give rise to a pardonable confusion in the mind of a party acting in good faith and exercising all the diligence required of a normally experienced trader. In such an event, the administration may not rely on its own failure to observe the principles of legal certainty and the protection of legitimate expectations out of which the party's error arose.

30 Those considerations must be borne in mind when determining whether the four circumstances on which the applicant relies in the present case are such as to render excusable the error which it made as to the starting-point of the period for initiating proceedings.

31 The Court considers, first of all, in view of the obligations incumbent on any normally experienced trader, that the fact that the Commission notified the contested decision to the applicant's registered office, whereas it had previously addressed all its communications directly to the applicant's legal department, cannot constitute an exceptional circumstance such as to render excusable the applicant's error.

32 Secondly, the Court finds that the argument that Bayer had taken every step within its power to avoid any error in the forwarding of mail addressed to it is, assuming that it is true, entirely irrelevant in the present case inasmuch as it is clear from the documents before the Court, and it is not denied, that errors were in fact committed within the undertaking when the registered letter was received.

33 The first error, which Bayer does not deny, lay in the failure of its mail office to apply internal instructions requiring employees in that office to open any envelope when the identity of the person within the undertaking for whom it is intended is not clearly established. The second was the mail office's failure to stamp the envelope with the date of its receipt by the mail office. The third error, arising out of the first two, lay in not immediately forwarding the document in issue, together with its envelope, to the appropriate department. The fourth and final error was the failure of the undertaking's legal department to take account of the fact that the patent department had stamped the front of the envelope with the words '*NICHT* K-RP Patentabteilung' or of the clearly visible traces left on that envelope by the postal acknowledgment of receipt.

34 The Court considers that, had it not been for the three abovementioned errors committed by the mail office, Bayer's legal department would necessarily have been aware of the fact that the contested decision had been duly notified by the Commission on 28 December 1989 and, furthermore, that when faced with that

series of errors Bayer's legal department was under a duty to make, as any normally diligent department should have done, careful and diligent inquiry to ascertain the date on which the envelope, which had already passed through hands of the patent department, had first been received by the undertaking's mail office. Bayer has not, however, maintained either in its written observation or at the hearing that any such inquiry was made.

35 It follows from the foregoing that Bayer may not rely either on the inadequate functioning of its internal organization or on a failure to apply its own internal instructions in support of its claim that the error which it committed was excusable, inasmuch as it is undisputed that those instructions were not followed and that, in any event, the Commission in no way contributed to the inadequate functioning of Bayer's organization.

36 As regards Bayer's third argument, concerning the fact that the envelope contained an 'acknowledgment of receipt' inserted by the Commission with the text of the decision, it is not impossible that such a circumstance could have been capable of giving rise to some doubt in the mind of the addressee of the notification as to which method of notification was actually used by the Commission, in view of the fact that the Commission, as it explicitly admitted at the hearing, uses the same form both, in general, for the purposes of notification by delivery by hand against receipt and, as in the present case, for the purposes merely of the administrative classification of its own files. Nevertheless, in the present case, the fact that the form headed 'Acknowledgement of Receipt/Accusé de réception' was included in the envelope would not have given rise to any confusion on Bayer's part if the applicant had acted with normal diligence and if the abovementioned errors had not been committed by its various departments.

37 It follows from the foregoing that Bayer's third argument must be rejected.

38 Finally, with regard to the argument based on the fact that the Commission made no comment on receiving the form headed 'Acknowledgement of Receipt/Accusé de réception' on which Bayer had entered the date of 3 January 1990 as the date of notification and on the fact that the Commission did not draw the applicant's attention to its error as to the date of notification in the course of subsequent

correspondence, in particular after receiving Bayer's letter of 15 January 1990 bearing the same erroneous statement as to the date of notification, the Court considers that in the circumstances of the present case that argument is not relevant in support of the applicant's claim that its error was excusable or that the Commission infringed the principles of legal certainty and the protection of legitimate expectations as regards the methods used for calculating the period within which Bayer could initiate proceedings.

39 As regards the first limb of Bayer's argument concerning the discrepancy, not pointed out by the Commission, between the date of 28 December 1989, the date of the notification by registered letter with postal acknowledgment of receipt, and that of 3 January 1990, erroneously mentioned by Bayer's legal department on the form headed 'Acknowledgement of Receipt/Accusé de réception', the Court is satisfied, first of all, that the Commission did receive the postal acknowledgment of receipt bearing the date 28 December 1989 and the signature of an authorized representative of Bayer. Secondly, having regard to the purpose of the form headed 'Acknowledgement of Receipt/Accusé de réception', which is, as the Commission has made clear, to enable the Commission at least to ascertain a date by which cognizance has indisputably been taken of the document where, exceptionally, the postal acknowledgment of receipt is not returned by the postal authorities, the Court considers that the Commission, in the circumstances of the case and at that stage of the procedure, when the postal acknowledgment of receipt had been duly returned to it, was under no obligation to check that the dates on the two documents agreed, since the only relevant date was that of the regular notification given on the postal acknowledgment of receipt. In particular, the Commission was under no obligation to make such a check because, in principle, there can be no discrepancy between the dates on the two documents other than where, in cases such as the present, such a discrepancy arises out of errors for which the undertaking is responsible.

40 As regards the second limb of the argument, based on the Commission's silence following its receipt of Bayer's letter of 15 January 1990, the Court considers that the Commission cannot reasonably be required, in cases such as the present where there is no actual dispute in a letter as to the starting-point of the period for initiating proceedings, spontaneously to correct all merely incidental errors as to dates appearing in correspondence sent to it by various economic operators.

41 It follows from all of the foregoing that the four arguments put forward by Bayer in support of its second plea in law must be rejected, and that the plea must itself therefore be dismissed.

Unforeseeable circumstances and *force majeure*

42 **Finally, Bayer considers that it may rely on the existence of unforeseeable circumstances or *force majeure*** within the meaning of the second paragraph of Article 42 of the Rules of Procedure of the Court of Justice. Having fulfilled in all respects its obligations of organization and control, it cannot be held to have been at fault or, therefore, in view of the Commission's conduct as a whole, to have been responsible for the failure to comply with the prescribed period.

43 The Commission has contended that the circumstances of the case are not such as to cause the Court to conclude that the derogating provisions concerning unforeseeable circumstances or *force majeure* should apply. Bayer's employees bear sole responsibility for the errors committed within the undertaking. The Commission considers that it bears no responsibility whatever in the chain of errors committed.

44 The Court observes that, for the purpose of determining whether the applicant has established the existence of unforeseeable circumstances or *force majeure*, there must, as the Court of Justice has consistently held, be abnormal difficulties, independent of the will of the person concerned and apparently inevitable, even if all due care is taken (judgments in Case 284/82 *Busseni* v *Commission* [1984] ECR 557 and Case 224/83 *Ferriera Vittoria* v *Commission* [1984] ECR 2349).

45 Bayer, however, in support of that plea in law, has relied on arguments identical to those put forward in support of its plea based on the existence in the circumstances of excusable error on its part. In view of what has been stated above in connection with the alleged existence of an excusable error, it appears clearly, and *a fortiori*, that the abovementioned conditions for the existence of unforeseeable circumstances or *force majeure*, within the meaning of Article 42 of the Rules of Procedure of the Court of Justice, such as to justify the transgression of the time-limit for initiating proceedings, are not fulfilled in this case.

46 It follows from all of the foregoing that the three pleas in law submitted by Bayer in its defence must be dismissed and, therefore, that the application, received at the Registry of the Court of First Instance on 9 March 1990, was registered after the expiry of the period of two months and six days available to the applicant in this case and must accordingly be dismissed as inadmissible.

Costs

47 Under Article 69(2) of the Rules of Procedure of the Court of Justice, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleadings. Since Bayer has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber),

hereby:

(1) Dismisses the application as inadmissible;

(2) Orders the applicant to pay the costs.

Saggio Yeraris

Briët Vesterdorf Biancarelli

Delivered in open court in Luxembourg on 29 May 1991.

H. Jung
Registrar

A. Saggio
President of the Second Chamber