

JUDGMENT OF THE COURT (Sixth Chamber)  
15 December 1994 \*

In Case C-195/91 P,

**Bayer AG**, a company incorporated under German law, having its registered office in Leverkusen (Federal Republic of Germany), represented by J. Sedemund, Rechtsanwalt, Cologne, with an address for service in Luxembourg at the Chambers of A. May, 31 Grand-Rue,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities on 29 May 1991 in Case T-12/90 *Bayer v Commission* [1991] ECR II-219 seeking to have that judgment set aside,

the other party to the proceedings being

**Commission of the European Communities**, represented by B. Langeheine, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of G. Kremlis, also of the Commission's Legal Service, Wagner Centre, Kirchberg,

THE COURT (Sixth Chamber),

composed of: F. A. Schockweiler, President of the Chamber, G. F. Mancini (Rapporteur) and C. N. Kakouris, Judges,

\* Language of the case: German.

Advocate General: C. Gulmann,  
Registrar: L. Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 25 June 1992,

after hearing the Opinion of the Advocate General at the sitting on 15 September 1992,

gives the following

### Judgment

- 1 By application lodged at the Registry of the Court of Justice on 29 July 1991, Bayer AG (hereinafter 'Bayer'), a company incorporated under German law, brought an appeal under Article 49 of the Statute of the Court of Justice of the EEC against the judgment of the Court of First Instance of 29 May 1991 in Case T-12/90 *Bayer v Commission* [1991] ECR II-219 in so far as it dismissed Bayer's application as inadmissible and ordered it to pay the costs.
- 2 The Court of First Instance found in its judgment (paragraphs 1 to 7) that:
  - By 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, OJ 1990 L 21, p. 71, hereinafter referred to as 'the decision'), the Commission found that there were agreements in force between Bayer and its customers which required those customers to use 'Bayo-n-ox Premix 10%' 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 it accordingly 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 (OJ, English Special Edition 1959-1962, p. 87).

- That decision was sent to Bayer by mail on 20 December 1989, in the form of a registered letter with postal acknowledgement of receipt which was received by Bayer's mail office on 28 December 1989.
  
- The envelope containing the decision bore on the front, *inter alia*, an ink stamp in the upper left-hand corner, reading 'A. R. — RECOMMANDÉ Avec Accusé de réception — AANGETEKEND Met Ontvangstbewijs'. A detachable red card, bearing the words 'avis de réception/de paiement/d'inscription', 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 Bayer's mail office.
  
- 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 form was then returned to the Commission, where it was duly received.
  
- An employee in Bayer's mail office forwarded the Commission's package to the company's patent department without either opening the envelope or indicating on it the date on which it had been received by the mail office. The patent department stamped the front of the envelope 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.

— The envelope in question contained, *inter alia*, the text of the decision 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.

— 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.

3 Before the Court of First Instance, Bayer sought primarily the annulment of the Commission's decision; in the alternative, the annulment of the fine imposed on it; and, in the further alternative, a reduction of that fine.

4 By a separate document the Commission raised before the Court of First Instance an objection of inadmissibility. It submitted that the application had been made out of time since it had been lodged on 9 March 1990, that is to say, after the expiry of the two-month period laid down in Article 173 of the EEC Treaty extended by six days on account of distance pursuant to the second indent of Article 1 of Annex II to the Rules of Procedure. That period, the Commission argued, began to run on the day after Bayer had received notification of the contested measure, that is to say, 29 December 1989, and expired on 6 March 1990.

5 Bayer submitted three pleas in law against that objection of inadmissibility. The first was based on the alleged irregularity of the notification of the decision, the second on the existence of circumstances of such a kind as to render excusable its error concerning the starting-point of the period within which proceedings had to be brought, and the last on the existence of unforeseeable circumstances or *force majeure* within the meaning of Article 42 of the Statute of the Court of Justice of the EEC.

- 6 The Court of First Instance rejected those three pleas in law.
  
- 7 So far as the first plea is concerned, the Court of First Instance found, at paragraph 19 of its judgment, that the Commission had sent the decision to Bayer by registered letter with postal acknowledgement of receipt, that that letter had duly arrived at Bayer's registered office on 28 December 1989 and 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. The Court added, at paragraph 20, that the envelope containing the form headed 'Acknowledgement of Receipt/Accusé de réception' could not in any event constitute a second notification separate from that duly effected by postal delivery.
  
- 8 Secondly, in rejecting the plea based on the existence of an excusable error by Bayer, the Court of First Instance pointed out that, in the context of time-limits for initiating proceedings, which had been consistently 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 had to be strictly construed and could concern only exceptional circumstances in which, in particular, the conduct of the institution concerned had 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 the light of those considerations, the Court of First Instance took the view (paragraphs 31 to 40) that the circumstances relied on by Bayer did not justify the conclusion that Bayer had committed an excusable error.
  
- 9 Finally, in excluding unforeseeable circumstances or *force majeure*, the Court of First Instance found, at paragraph 45 of the contested judgment, that Bayer had, in support of that plea, relied on arguments identical to those put forward in support of its plea based on the existence of excusable error. In the light of its findings with respect to the latter plea, the Court of First Instance took the view that, *a fortiori*, the circumstances of the case did not amount to unforeseeable circumstances or *force majeure* within the meaning of Article 42 of the Statute of the Court of Justice of the EEC.

- 10 In the light of those considerations, the Court of First Instance, by judgment of 29 May 1991, dismissed Bayer's application as inadmissible and ordered it to pay the costs.

### The appeal

- 11 Bayer puts forward four pleas in law in support of its appeal.

#### *The first plea in law*

- 12 Basing itself on considerations identical to those set out in paragraphs 71 to 77 of the judgment of the Court of First Instance of 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 *BASF and Others v Commission* [1992] ECR II-315, Bayer submitted for the first time at the hearing on 25 June 1992 that the Commission's decision was non-existent. Bayer argues in this connection that the decision does not exist in an original version and that it was not authenticated in accordance with the conditions laid down by the Commission's internal rules in force at the material time. Bayer adds that this new plea, based on matters of law of which it became aware only after delivery of the above judgment, is admissible on the basis of Article 42(2) of the Court's Rules of Procedure.
- 13 It should be noted in that regard that, in its judgment of 15 June 1994 in Case C-137/92 P *Commission v BASF and Others* [1994] ECR I-2555, the Court held that the defects found by the Court of First Instance did not justify the conclusion that the decision at issue in that case was non-existent. That conclusion must, for the same reasons, also apply to the alleged defects in the decision contested at first instance in the present case.

14 Moreover, if the object of Bayer's grounds of challenge is to obtain the annulment of the decision, those grounds cannot be put forward for the first time in the context of the appeal.

15 It follows that the first plea is inadmissible.

*The second plea in law*

16 According to Bayer, the Court of First Instance acted in breach of a principle of 'transparency of the forms of notification of measures adversely affecting those to whom they are addressed', derived from the principles of legal certainty and protection of legitimate expectations, by rejecting the pleas alleging three breaches of that requirement of transparency committed by the Commission at the time when the decision was notified.

17 First, the Commission mixed together two separate notification procedures: postal notification by registered letter with postal acknowledgement of receipt and notification by return of a form headed 'Acknowledgement of Receipt/Accusé de réception'.

18 Secondly, whereas during the prior administrative procedure all correspondence had been sent to Bayer by registered letter with postal acknowledgement of receipt, the contested decision was notified in a registered envelope containing a form headed 'Acknowledgement of Receipt/Accusé de réception'. This new circumstance, according to Bayer, was the cause of its confusion.

19 Thirdly, the Commission did not take advantage of several opportunities given to it to draw Bayer's attention to its mistake and thus failed to comply with the obligation of diligence incumbent on it by virtue of the same principle of transparency of the forms of notification of measures adversely affecting those to whom they are addressed.

20 It must be held in that regard that the Court of First Instance could properly find, without infringing Community law, that the decision was duly and validly served on Bayer.

21 First, the Court of First Instance found that the decision contested before it had been sent to Bayer by registered letter with postal acknowledgement of receipt, which, as the Court of Justice had consistently held, is a suitable method of giving notice. Since the envelope containing that decision arrived at Bayer's registered office on 28 December 1989, the Court of First Instance was entitled to take the view that Bayer was deemed to have taken cognizance of it on that date (paragraph 19). Furthermore, as the Court of First Instance observed (paragraph 20), the presence in the envelope of the form headed 'Acknowledgement of Receipt/Accusé de réception' was simply intended to ensure that the Commission would have an undisputable date on which the undertaking was deemed to have taken cognizance of the decision in case the postal authorities failed to return to it the postal acknowledgement of receipt. In those circumstances, the Court of First Instance was correct in its finding that notification had taken place in a clear and unequivocal manner.

22 Secondly, assuming that Bayer might have believed that the decision would be notified to it by registered letter with postal acknowledgement of receipt, the principle of the protection of legitimate expectations cannot have been infringed since the contested decision was notified precisely in that manner and, moreover, the postal acknowledgement of receipt was duly returned to the Commission. The Court of First Instance was therefore right to point out (at paragraph 36) that if Bayer had acted with normal diligence and if the functioning of its internal departments had not been defective 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.



23 Finally, with regard to the argument based on the alleged failure by the Commission to comply with an obligation of diligence, the Court of First Instance correctly pointed out that, in the circumstances of the case, the Commission was under no obligation to check that the dates on the postal acknowledgement of receipt and on the form headed 'Acknowledgement of Receipt/Accusé de réception' agreed (paragraph 39) and that the Commission could not reasonably be required spontaneously to correct all merely incidental errors as to dates appearing in correspondence sent to it by various economic operators (paragraph 40).

24 Since the second plea is therefore unfounded, it must be rejected.

*The third plea in law*

25 Bayer considers that the Court of First Instance should have declared its application admissible by recognizing the excusable nature of its error regarding the date from which the period for initiating proceedings began to run and should not have limited that concept only to those cases in which the conduct of the institution concerned had been such as to give rise to a pardonable confusion in the mind of a party acting in good faith. Such a limitation, Bayer contends, is at variance with the case-law of the Court of Justice cited by the Court of First Instance (judgments in Case 25/68 *Schertzer v Parliament* [1977] ECR 1729 and in Case 117/78 *Orlandi v Commission* [1979] ECR 1613), according to which it is sufficient to determine whether the error as to the point from which time started running is excusable in the particular circumstances of the case.

26 It should be pointed out in this connection that the Court of First Instance held, at paragraph 29, that the concept of excusable error could concern only exceptional circumstances in which, 'in particular', the conduct of the institution concerned had been, either alone or to a decisive extent, such as to give rise to a pardonable confusion in the mind of the party concerned. It follows from the use of the adverbial construction 'in particular' that, by not limiting the concept of excusable error, the Court of First Instance correctly applied the case-law cited.

27 Furthermore, Bayer's argument that the Court of First Instance infringed the law in rejecting the claim that the company's error was excusable is unfounded.

28 The Court of First Instance found first of all (paragraphs 32 and 33) that four errors had been committed within the Bayer company at the time of receipt of the registered letter. It added (paragraph 34) that, when faced with those 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 had first been received, something which it failed to do. It correctly concluded (paragraph 35) that Bayer could 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.

29 It follows that the third plea must also be rejected.

*The fourth plea in law*

30 According to Bayer, the Court of First Instance infringed the second paragraph of Article 42 of the Statute of the Court of Justice of the EEC, according to which no right may be prejudiced in consequence of the expiry of a time-limit if the party concerned proves the existence of unforeseeable circumstances or of *force majeure*. Those two concepts, Bayer claims, are distinct and refer to impediments which, in the one case, have no connection and, in the other, do have a connection with the party concerned. In the present case, the fault committed by the mail office has a connection with Bayer and constitutes an unforeseeable circumstance. The Court of First Instance should therefore not have based its decision on judgments of the Court of Justice relating to *force majeure*.

31 It must be pointed out in this regard that the Court of First Instance, in giving its reasons for rejecting the plea based on the second paragraph of Article 42 of the Statute of the Court of Justice of the EEC, first reviewed the conditions which

must be satisfied before it can find that there is a case of unforeseeable circumstances or *force majeure*. As the Court of Justice had consistently held, there must be abnormal difficulties, independent of the will of the person concerned and apparently inevitable, even if all due care is taken (paragraph 44). The Court of First Instance went on to hold that since the circumstances relied on by Bayer did not constitute an excusable error, they could not, *a fortiori*, be regarded as satisfying those conditions (paragraph 45).

- 32 It follows from the foregoing that the concepts of *force majeure* and unforeseeable circumstances contain an objective element relating to abnormal circumstances unconnected with the trader in question and a subjective element involving the obligation, on his part, to guard against the consequences of the abnormal event by taking appropriate steps without making unreasonable sacrifices. In particular, the trader must pay close attention to the course of the procedure set in motion and, in particular, demonstrate diligence in order to comply with the prescribed time-limits.
- 33 In that respect, it need only be observed that the malfunctioning of Bayer's departments, noted by the Court of First Instance at paragraphs 34 and 35 of the judgment, is attributable to faults on the part of its employees. That being so, and without there being any need to consider whether the concept of unforeseeable circumstances in fact differs from that of *force majeure*, it must be held that Bayer has no ground for criticizing the Court of First Instance for not having found that there was a case of unforeseeable circumstances or *force majeure*, as described above.
- 34 The plea in law based on the infringement by the Court of First Instance of the second paragraph of Article 42 of the Statute of the Court of Justice of the EEC must also be rejected.
- 35 Since none of Bayer's pleas in law has been upheld, the appeal must be dismissed in its entirety.

## Costs

- <sup>36</sup> Under Article 69(2) of the Rules of Procedure, applicable to appeal proceedings by virtue of Article 118, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleadings. Since the appellant has been unsuccessful, it must be ordered to pay the costs of the present proceedings.

On those grounds,

### THE COURT (Sixth Chamber)

hereby:

1. Dismisses the appeal;
2. Orders the appellant to pay the costs.

Schockweiler

Mancini

Kakouris

Delivered in open court in Luxembourg on 15 December 1994.

R. Grass

F. A. Schockweiler

Registrar

President of the Sixth Chamber