ORDER OF THE COURT OF FIRST INSTANCE (Second Chamber)

4 May 2005 *

In Case T-86/03,

Holcim (France) SA, previously Groupe Origny SA, established in Paris (France), represented by M.-P. Hutin-Houillon, lawyer, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by R. Lyal and C. Ingen-Housz, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION under Articles 233 EC and 288 EC for compensation for the damage allegedly suffered by the applicant following the Commission's refusal to pay it default interest on the sum refunded in compliance with a judgment of the Court of First Instance annulling the decision by which a fine was imposed on it,

* Language of the procedure: French.

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

composed of: J. Pirrung, President, N.J. Forwood and. S. Papasavvas, Judges,

Registrar: H. Jung,

makes the following

Order

Facts giving rise to the dispute

1 On 30 November 1994 the Commission adopted Decision 94/815/EC relating to a procedure under Article 85 of the EC Treaty (Cases IV/33.126 and 33.322 — Cement) (OJ 1994 L 343, p. 1, 'the Cement decision'), by which it, inter alia, found that Cedest SA had participated in a series of infringements on the Community market in cement and imposed on it a fine of ECU 2 522 000.

2 By application lodged at the Registry of the Court of First Instance on 17 February 1995 and registered under Case T-38/95, Groupe Origny SA ('Origny'), successor to Cedest, brought an action for annulment of that decision.

3 On 5 May 1995, Origny paid the entire fine imposed on Cedest.

4 In Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others* v *Commission* [2000] ECR II-491, ('the Cement judgment') the Court, inter alia, annulled Article 1, Article 3(3)(a) and Article 9 of the Cement decision in so far as they concerned Origny and ordered the Commission to pay the costs of Case T-38/95.

5 By fax of 24 May 2000, Origny communicated to the Commission, together with detailed information concerning the bank account into which repayment of the principal amount of EUR 2 522 000 was to be made following the Cement judgment, a statement detailing the default interest payable, in its opinion, on that amount for the period running from 7 May 1995 until repayment of the principal.

6 On 27 July 2000 the Commission transferred the sum of EUR 2 522 000 into the abovementioned account. It did not however respond to the claim concerning default interest.

7 By letter of 16 November 2000 to the Commission, Origny reiterated its claim for payment of the default interest and presented a new statement as of 27 July 2000.

8 By letter of 29 December 2000, the Commission replied to Origny that it considered that it was not entitled to pay the interest claimed, because there was no Community provision nor general legal principle prescribing the payment of default interest in such a case.

9 In Case T-171/99 *Corus UK* v *Commission* [2001] ECR II-2967, ('the Corus judgment'), the Court of First Instance held that in the case of a judgment annulling or reducing the fine imposed on an undertaking for infringement of the ECSC Treaty competition rules, the Commission is obliged, under the second sentence of the first paragraph of Article 34 CS, to repay not only the principal amount of the fine overpaid, but also default interest on that amount (see paragraphs 52 and 53).

10 By letter of 21 March 2002 to the Commission Origny, referring to the Corus judgment, maintained that, by not paying it default interest on the principal amount repaid following the Cement judgment, the Commission had failed to take a measure to comply with that judgment, as required by Article 233 EC. Consequently, it asked the Commission to re-examine its claim.

11 The Commission did not respond to that letter, or to a reminder of 3 June 2002.

Procedure and forms of order sought by the parties

12 By application lodged at the Registry of the Court on 6 March 2003, the applicant brought the present action, on the basis of Articles 233 EC and 288 EC.

13 The applicant claims that the Court should:

— order the Commission to pay EUR 1 488 287.50, corresponding to the amount of interest to be repaid to it;

— order it to pay, in addition, default interest for the period running from 27 July 2000 until judgment is delivered;

— declare that both those amounts are to bear interest from the date judgment is delivered until full payment is made.

14 By separate document, lodged at the Registry of the Court on 10 June 2003, the Commission raised an objection of inadmissibility under Article 114(1) of the Rules of Procedure of the Court of First Instance, in which it contends that the Court should:

— dismiss the action as inadmissible;

— order the applicant to pay the costs.

15 In its observations on the objection of inadmissibility, lodged at the Registry of the Court on 21 July 2003, the applicant claimed that the objection of inadmissibility should be rejected and maintained the other forms of order sought in its action.

16 By letter from the Registry of the Court of 20 December 2004, the parties were invited to make written observations on the possible relevance, to the outcome of the present case, of Case C-123/03 P *Commission* v *Greencore* [2004] ECR I-11647 ('the Greencore judgment'). The applicant and the Commission replied to this request by letters lodged at the Registry on 14 and 18 January 2005 respectively.

Admissibility

17 Under Article 114(1) of the Rules of Procedure, where a party so requests, the Court of First Instance may decide on inadmissibility without going into the substance of the case. Under Article 114(3) of those Rules, the remainder of the proceedings are to be oral unless the Court decides otherwise. In the present case the Court considers that it has sufficient information from the documents of the case and that there is no need to open the oral procedure.

Arguments of the parties

18 The Commission maintains that, while it is true that an action for compensation based on the second paragraph of Article 288 EC is an independent action in the context of the legal remedies available under Community law, so that the fact that an application for annulment is inadmissible does not in itself render a claim for damages inadmissible, an action for damages must nevertheless, according to case-law, be held to be inadmissible when it is in fact aimed at securing the withdrawal of an individual decision which has become definitive, and would, if successful, cause the legal effects of that decision to be nullified (Case 175/84 *Krohn* v *Commission* [1986] ECR 753, paragraphs 32 and 33; Case T-514/93 *Cobrecaf and Others* v *Commission* [1995] ECR II-621, paragraphs 58 and 59; Case T-180/00 *Astipesca* v *Commission* [2002] ECR II-3985, paragraph 139; and Joined Cases T-44/01, T-119/01 and T-126/01 *Vieira and Vieira Argentina* v *Commission* [2003] ECR II-1209, paragraph 213).

19 In the present case, an individual decision rejecting the applicant's claim for payment of default interest was adopted by the Commission on 29 December 2000. That decision became definitive as the applicant did not bring an action for annulment under Article 230 EC within the time-limit of two months of its notification, as extended on account of distance.

20 In accordance with the abovementioned case-law, the present action for damages must therefore be rejected as inadmissible, as it is aimed at nullifying the effects of that decision by obliging the Commission to pay the default interest refused.

21 In its observations on the Greencore judgment, the Commission maintains that the latter confirms, a contrario, its argument in the present action. As it did not react in sufficient time to the decision of 29 December 2000, by which the Commission expressly refused to pay the default interest claimed in the letter of 16 November 2000, the applicant could no longer object to the refusal, whether by means of an action for annulment or an action for damages directed against the absence of a response to the new claim made on 21 May 2002.

22 In its application, the applicant submits that payment of default interest on the principal amount repaid following a judgment ordering annulment constitutes a measure complying with that judgment which the Commission is obliged to take pursuant to Articles 233 EC and 288 EC, even in the absence of any fault such as to give rise to the liability of the Community. The Commission's failure to adopt such a measure consequently gives rise to the remedy of an action for damages pursuant to the second paragraph of Article 233 EC and to Article 288 EC.

23 In its observations on the objection of inadmissibility, the applicant disputes the relevance of the *Vieira and Vieira Argentina* v *Commission* judgment, paragraph 18 above, raised by the Commission. In the case which led to that judgment, in fact, the action for damages brought by Vieira Argentina was dismissed as inadmissible on the grounds that the action was in fact aimed at securing the payment of an amount intended to offset the legal effects inherent in a decision to suspend aid against which the applicant did not bring an action for annulment in sufficient time, even though such an action, crowned with success, would have effaced the legal effects in question, given the measures which the Commission would have been required to take under Article 233 EC in order to comply with the annulling judgment (see paragraph 215 of the judgment). In the present case, the applicant did in fact bring,

within the time-limit, an action for annulment of the Cement decision. That decision was annulled by the Cement judgment and payment of the interest claimed was only one of the measures which the Commission was obliged to take to comply with that judgment. The action for damages is therefore designed to penalise the Commission's non-respect of the obligation laid down in the first sentence of Article 233 EC, and differs from an application for annulment in that its end is not the abolition of a particular measure but compensation for damage caused by an institution (see Case T-178/98 *Fresh Marine* v *Commission* [2002] ECR II-3331, paragraph 45).

24 The applicant adds that, under its second paragraph, Article 233 EC requires the institution concerned to make good further damage which may be caused by the unlawful measure which has been annulled. In this connection, Article 233 EC does not make compensation for the damage dependent on the existence of a new fault distinct from the original unlawful measure, but provides for compensation for the damage which results from the measure and which continues after its annulment and compliance by the administration with the judgment whereby it was annulled (Case C-259/96 P *Council* v *de Nil and Impens* [1998] ECR I-2915, paragraph 2).

25 In the present case, the action brought by the applicant specifically seeks compensation for the damage resulting not from the decision of 29 December 2000 refusing the payment of the default interest claimed but from the Cement decision. The damage continued after the annulment of the latter decision, because of the lack of compliance, having regard to the first paragraph of Article 233 EC, with the Cement decision by the Commission. Logically, such lack of compliance can be sanctioned only in the context of the action for damages referred to in the second paragraph of Article 233 EC.

26 In its observations on the Greencore judgment, the applicant submits that the latter is not relevant to the outcome of the present action, given that the Court gave its decision in the context of an action for annulment pursuant to Article 230 EC and not, as in the present case, in the context of an action for damages pursuant to Articles 233 EC and 288 EC.

27 The applicant adds that the admissibility and validity of an action for damages, in circumstances such as those of the present case, are confirmed by the Corus judgment, given the equivalence between, on the one hand, the second sentence of the first paragraph of Article 34 CS and Article 233 EC and, on the other hand, the second paragraph of Article 34 CS and Article 288 EC. By contrast, in the light of the said judgment, an action for annulment is not the appropriate legal remedy to seek the payment of default interest in such a case.

28 The right to bring an action for damages being barred after a period of five years from the occurrence of the act giving rise thereto, which, in the present case, is the Commission's failure to comply with the Cement judgment, the present action is in its view admissible.

Findings of the Court

29 To rule on the admissibility of the present action for damages, it is necessary, first, to determine, on the one hand, the Commission's obligations, pursuant to Article 233 EC, regarding compliance with a judgment annulling or reducing a fine imposed on an undertaking for infringement of the Treaty competition rules and, on the other hand, the legal remedies available to the said undertaking in the case of alleged disregard of the obligations in question by the Commission.

30 Concerning, first of all, the determination of the Commission's obligations pursuant to Article 233 EC, regarding compliance with a judgment annulling or reducing the fine imposed on an undertaking for infringement of the Treaty competition rules, the former include, primarily, the Commission's obligation to repay all or part of the fine paid by the undertaking in question, in so far as that payment must be

considered as a sum unduly paid following the decision to annul. That obligation applies not only to the principal amount of the fine overpaid, but also to default interest on that amount (see, by way of analogy, concerning the equivalent provision contained in the second sentence of the first paragraph of Article 34 CS, the Corus judgment, paragraphs 52 and 53).

31 It follows that, in not paying any default interest on the principal amount of the fine repaid following such a judgment, the Commission has failed to take a step necessary to comply with that judgment and has disregarded, in so doing, its obligations under Article 233 EC (see, by way of analogy, the Corus judgment, paragraph 58).

32 In this connection, it should be specified that, while the damage relied on by the applicant, which lies in the loss of use of EUR 2 522 000 from 5 May 1995 until 27 July 2000, arises from the adoption of the Cement decision, the alleged fault, in the context of the present action, is not the adoption of that decision, but rather the Commission's failure to pay default interest on that amount, in compliance with the Cement judgment (see, by analogy, the Corus judgment, paragraph 42 et seq.).

33 As regards the establishment of the legal remedies available to the party concerned in the case of alleged disregard of the obligations in question by the Commission, it is apparent from case-law that these are, according to its choice, either the action for failure to act referred to in Article 232 EC (see, to that effect, Joined Cases 97/86, 99/86, 193/86 and 215/86 *Asteris and Others* v *Commission* [1988] ECR 2181, paragraphs 22 to 24 and 32, and the Greencore judgment, paragraph 46; Opinion of Advocate General Jacobs in the Greencore judgment [2004] ECR I-11649, paragraph 22; Case T-387/94 *Asia Motor France and Others* v *Commission* [1996] ECR II-961, paragraph 40 and Joined Cases T-297/01 and T-298/01 *SIC* v *Commission* [2004]

ECR II-743, paragraph 31), or the action for damages referred to in Article 233 EC and the second paragraph of Article 288 EC (see, to that effect, Case T-84/91 *Meskens* v *Parliament* [1992] ECR II-2335, paragraph 81, confirmed by Case C-412/92 P *Parliament* v *Meskens* [1994] ECR I-3757; Case T-48/97 *Frederiksen* v *Parliament* [1999] ECR SC p. I-A-167 and II-867, paragraph 96, and Case T-11/00 *Hautem* v *EIB* [2000] ECR II-4019, paragraphs 43 and 51; Order of the President of the Second Chamber of the Court of First Instance of 4 November 2003 in Case T-161/03 *Cascades* v *Commission*, not published in the European Court Reports; see, in addition, by way of analogy, the second paragraph of Article 34 CS and the Corus judgment, paragraph 49).

34 Both of these alternative legal remedies are subject to conditions and to specific procedural constraints.

35 If the party concerned chooses the remedy of an action for failure to act, he must meet the requirements of the second paragraph of Article 232, which provides:

'[The action for failure to act] shall be admissible only if the institution concerned has first been called upon to act. If, within two months of being so called upon, the institution has not defined its position, the action may be brought within a further period of two months.'

36 It follows, moreover, from settled case-law that an institution's refusal to act in accordance with such an invitation constitutes the adoption of a position putting an end to the failure to act, and that such a refusal may be challenged pursuant to

Article 230 EC (see, for example, *Asteris and Others* v *Commission*, paragraph 33 above, paragraphs 32 and 33).

37 If, on the other hand, the party concerned chooses the alternative legal remedy of an action for damages, he must meet the requirements of Article 46 of the Statute of the Court of Justice, which provides:

'Proceedings against the Communities in matters arising from non-contractual liability shall be barred after a period of five years from the occurrence of the event giving rise thereto. The period of limitation shall be interrupted if proceedings are instituted before the Court or if prior to such proceedings an application is made by the aggrieved party to the relevant institution of the Communities. In the latter event the proceedings must be instituted within the period of two months provided for in Article 230 ... EC ...; the provisions of the second paragraph of Article 232 ... EC ... shall apply where appropriate.'

38 This provision cannot, however, be interpreted as meaning that a person who makes a prior application to the relevant institution within the five-year time-limit which it lays down, must be considered as barred if he does not bring an action for damages either within the two-month time-limit laid down in Article 230 EC where a decision rejecting the application is notified to him, or within the two-month time-limit laid down by the second paragraph of Article 232 where the relevant institution has not adopted a position within two months of that application.

39 It follows, in fact, from the actual wording of the second and third sentences of Article 46 of the Statute of the Court of Justice that the intention of this provision is not to shorten the limitation period of five years, but that it is intended to protect those concerned by preventing certain periods from being taken into account in the calculating of that period. Consequently, the aim of the third sentence of Article 46

of the Statute of the Court is merely to postpone the expiration of the period of five years when proceedings instituted or a prior application made within this period cause time to start running in respect of the periods provided for in Articles 230 EC and 232 EC. In no case can the application of these provisions have the effect of cutting-down the five-year period of limitation laid down by the first sentence of Article 46 of the Statute [see, concerning the identical provision contained in Article 43 of the previous Statute (EC) of the Court, Joined Cases 5/66, 7/66 and 13/66 to 24/66 *Kampffmeyer and Others* v *Commission* [1967] ECR 245, 260 'the Kampffmeyer judgment', and Case 11/72 *Giordano* v *Commission* [1973] ECR 417,'the Giordano judgment', paragraphs 5 to 7; Order of the Court of First Instance of 4 August 1999 in Case T-106/98 *Fratelli Murri* v *Commission* [1999] ECR II-2553, paragraph 29].

40 The alleged fault in this case consisting of the Commission's failure to adopt a measure complying with the Cement judgment, the five-year limitation period laid down in the first sentence of Article 46 of the Statute of the Court expired after 15 March 2005, taking into account the reasonable time which the institution concerned must have to meet its obligations under Article 233 EC (see, by way of analogy, the second paragraph of Article 34 CS and the Corus judgment, paragraph 44).

41 It is true that, rather than bring an action for damages directly before the Court, as Article 46 of the Statute of the Court authorises it to do, the applicant chose to address the Commission first, first by its fax of 24 May 2000, then by its letter of 16 November 2000, in which that institution was requested to pay the default interest.

42 In so far as the applicant's fax of 24 May 2000 can be interpreted as an invitation to act, within the meaning of the first sentence of the second paragraph of Article 232 EC, and in the absence of the Commission's having defined its position within two

months of that invitation, the applicant could have brought an action for failure to act before the Court, within a further period of two months, in accordance with the second sentence of the second paragraph of Article 232 EC.

43 In any event, since the actual wording of the Commission's letter of 29 December 2000 (see paragraph 8 above) clearly expressed that institution's refusal to act in accordance with the request of 16 November 2000, the applicant could have brought an action for annulment of that act pursuant to Article 230 EC (see paragraph 36 above).

44 In this respect, it should be mentioned that, in the Greencore judgment (paragraph 47), the Court expressly ruled that a letter from the Commission refusing a company the right to claim the payment of default interest, in circumstances corresponding in substance to those described in paragraph 43 above, contained a refusal to pay interest and accordingly constituted an actionable measure for the purposes of Article 230 EC.

45 It should be added that, also in the Greencore judgment (paragraph 46), the Court held that the fact that the undertaking concerned did not use the procedure provided for by Article 232 EC, in circumstances corresponding in substance to those described in paragraph 42 above, had no bearing on the admissibility of the action for annulment subsequently brought.

46 However, having regard to the Court's case-law cited at paragraph 39 above, none of the three circumstances mentioned in paragraphs 41 to 43 above can be considered as relevant for the purposes of assessing the admissibility of the present action for damages.

47 In particular, it does not emerge from the Greencore judgment that the Court ruled on a case in which Article 46 applied nor, a fortiori, that it intended to make a reversal of precedent in relation to the Kampffmeyer and Giordano judgments.

48 It must therefore be considered as established that no plea of inadmissibility derived either from the time-barring of the action for failure to act available to the applicant in the absence of a response from the Commission to its fax of 24 May 2000, or from the time-barring of the action for annulment available to it following the explicit rejection of its request of 16 November 2000, can be set up against the present action for damages.

49 This conclusion cannot be called in question by the case-law, raised by the Commission (see paragraph 18 above), by virtue of which an action for damages must be declared inadmissible where it is in fact aimed at securing the withdrawal of an individual decision which has become definitive and would, if successful, cause the legal effects of that decision to be nullified.

50 As the applicant is fully entitled to point out (see paragraph 23 above), this case-law is, in very exceptional circumstances, having regard to the principle of the autonomy of an action for damages vis-à-vis other remedies, supported by the consideration that the applicant would have had standing, under Article 230 EC, to bring an action for annulment of the very act which he claims causes him damage, after the time-limit for bringing an action for annulment of that act had expired. This case-law is therefore applicable only where the alleged damage flows exclusively from an individual administrative measure which has become definitive, which the party concerned could have challenged by means of an action for annulment. In *Krohn* v *Commission*, paragraph 18 above, the Court held (paragraph 32) that the existence of an individual decision which has become definitive cannot act as a bar to the admissibility of an action for damages, while making a proviso (paragraph 33) with regard to the possibility of an exceptional case which is, at all events, extraneous to the present case.

51 In the present case, in fact, the damage alleged by the applicant does not flow from the Commission's letter of 29 December 2000, nor from any other individual administrative measure which it could have challenged, but from the Commission's wrongful failure to adopt a measure to comply with the Cement judgment, in disregard of its obligations under Article 233 EC. The remedy of an action for annulment not being available to the applicant in respect of such a failure, the case-law referred to by the Commission is not relevant in the present case.

52 Moreover, with regard to paragraph 46 of the Greencore judgment (see paragraph 45 above), the fact that the applicant did not use the procedure laid down by Article 232 EC in order to compel the Commission to pay the interest claimed, is not relevant to the admissibility of the present action for damages.

53 Therefore, the objection of inadmissibility raised by the Commission must be dismissed as unfounded and an order made for the action to proceed.

Costs

54 The costs should be reserved.

On these grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby orders:

1. **Dismisses the objection of inadmissibility raised by the Commission.**

2. **Orders a period to be fixed to enable the Commission to prepare its defence.**

3. **Reserves the costs.**

Luxembourg, 4 May 2005

H. Jung — Registrar

J. Pirrung — President