Judgment of the Court of Justice, Cimenteries CBR, Joined Cases 8 to 11/66 (15 March 1967)

Caption: Excerpt from the Cimenteries CBR judgment relating to the admissibility of action for annulment. It emerges that action for annulment may be brought against a measure, the legal effects of which are binding on those to whom it is addressed and affect their interests.

Source: Reports of Cases before the Court. 1967. [s.l.].

URL:
http://www.cvce.eu/obj/judgment_of_the_court_of_justice_cimenteries_cbr_joined_cases_8_to_11_66_15_march_1967-en-3a476537-74ad-4b45-874a-faa4b6f8b030.html
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Judgment of the Court of 15 March 19671

Société Anonyme Cimenteries CBR Cementbedrijven NV and others, Cementfabriek IJmuiden (Cemij) NV, Eerste Nederlandse Cementindustrie (ENCI) NV, and Alsen'sche Portland-Cement-Fabriken KG and others v Commission of the EEC2

Joined Cases 8 to 11/66

Summary

1. Measures adopted by an institution - Decision - Concept
(EEC Treaty, Article 189)

[…]

1. When a Community institution unequivocally adopts a measure the legal effects of which are binding on those to whom it is addressed and affect their interests, this measure by its very nature constitutes a decision.

[…]

In Joined Cases

8/66
SOCIÉTÉ ANONYME CIMENTERIES CBR CEMENTBEDRIJVEN NV,

[…]

9/66
CEMENTFABRIEK IJMUIDEN (CEMIJ) NV,

[...]

10/66
EERSTE NEDERLANDSE CEMENT INDUSTRIE (ENCI) NV,

[...]

11/66
The undertakings:

[...]

applicants,

v

COMMISSION OF THE EUROPEAN ECONOMIC COMMUNITY,

[…]

defendant,

Application for the annulment of the decisions allegedly constituted by the communications addressed to the various applicants on 3 January 1966 by the Director-General of the Directorate-General for Competition of

the EEC concerning the applicability of Article 85 of the Treaty to the agreement entitled ‘Noordwijks Cement Accoord’, made by the applicants in 1956;

THE COURT

composed of: A. Trabucchi (President of Chamber), President, R. Monaco, President of Chamber, A. M. Donner, R. Lecourt (Rapporteur) and W. Strauß, Judges,

Advocate-General: K. Roemer
Registrar: A. Van Houtte

gives the following

JUDGMENT

[…]

Grounds of the judgment

The applicants notified the Commission of the EEC of the agreement of 6 July 1956 known as ‘Noordwijks Cement Accoord’ and the Commission, in the terms of the minutes of its 343rd meeting, ‘took on 14 December 1965 a decision’ worded as follows: ‘A notice under Article 15 (6) of Regulation No 17 shall be addressed to the undertakings which are parties to the agreement registered with the Commission under No IV/A-00581; the Chairman of the Working Party on Competition is hereby authorized to have the notices sent by the Director-General for Competition’. On 3 January 1966 the Director-General for Competition carried out this instruction by sending the undertakings a registered letter, with a form of acknowledgment of receipt, in which the Commission informed them, that, after a preliminary examination ‘the provisions of Article 15 (5) of ... Regulation No 17, whereby the application to the agreement notified of the provisions concerning fines set out in Article 15 (2) (a) of the said Regulation was provisionally suspended, will cease to apply to the agreement as from the date of receipt of this letter’.

Admissibility

The Commission claims that the applications for annulment lodged by the said undertakings are inadmissible, on the ground that it has issued a mere opinion and not a decision within the meaning of Article 189 of the Treaty, and that Article 15 (6) of Regulation No 17 does not make provision for any measure in the nature of a decision.

Regulation No 17, under which the measure of 14 December 1965 was taken, empowers the Commission to impose fines on undertakings which intentionally or negligently infringe Article 85 (1) of the Treaty. However, by virtue of Article 15 (5) undertakings which have notified their agreements and which keep within the limits of the activity described in the said notification are exempted from this system of fines. Finally, Article 15 (6) empowers the Commission to withdraw the benefit of this exemption from fines if, after preliminary examination, it is of the opinion that Article 85 (1) of the Treaty applies and that application of Article 85 (3) is not justified.

The effect of the measure of 14 December 1965 and 3 January 1966 was that the undertakings ceased to be protected by Article 15 (5) which exempted them from fines, and came under the contrary rules of Article 15 (2) which thenceforth exposed them to the risk of fines. This measure deprived them of the advantages of a legal situation which Article 15 (5) attached to the notification of the agreement, and exposed them to a grave financial risk. Thus the said measure affected the interests of the undertakings by bringing about a distinct change in their legal position. It is unequivocally a measure which produces legal effects touching the interests of the undertakings concerned and which is binding on them. It thus constitutes not a mere opinion but a decision. Any doubt which might be raised by the question whether the notification of the said decision was made in proper form in no way alters the nature of that decision and cannot affect the

admissibility of the application.

It is also necessary to consider whether the two requirements under Article 15 (6) of Regulation No 17 concerning 85 (1) and Article 85 (3) of the Treaty consecutively do not necessarily imply that the Commission must proceed by way of a decision.

To exclude an agreement from the benefit of the exemption from a fine under Article 15 (5) of Regulation No 17, the Commission must, according to Article 15 (6), first be of the opinion that Article 85 (1) of the Treaty applies. Therefore it must consider the facts of the case and apply to them the terms of Article 85 (1) and issue a finding that the various constituent elements described in this provision are present. The Commission is wrong when it objects that the agreement is prohibited without the necessity for any prior decision. Although under Article 1 of the Regulation agreements ‘of the kind described’ in Article 85 (1) of the Treaty ‘shall be prohibited, no prior decision to that effect being required’, the Commission must nevertheless find that the agreement submitted to it is indeed of the kind described in Article 85(1) and objectively considered does contain all the constituent elements prescribed in that Article. In particular the questions whether the agreement, notified under Article 5 of the Regulation, may affect trade between Member States, or has as its effect the distortion of competition, depends on the assessment of economic and legal factors. The presence of these factors cannot be presumed unless it is expressly found that the specific case in point contains all the constituent elements prescribed in Article 85 (1).

Under Article 15 (6) the Commission must also inform the parties that it is of the opinion that application of Article 85 (3) of the Treaty is not justified. This assessment by the Commission also presupposes an evaluation of elements of fact and of law which may involve various points of uncertainty and dispute. Although the Commission has some discretion in this matter, this only reinforces its obligation, when acting in the particular context of Article 15 (6) of the Regulation, to take a decision declaring that application of Article 85 (3) ‘is not justified’.

Finally, the procedure under Article 15 (6) calls for a decision within the meaning of the Treaty subject to the legal guarantees which the Treaty provides, all the more so because it is not disputed that the said procedure leads in practice to the question whether there clearly exists such a serious infringement of the prohibition laid down by Article 85 (1) that an exemption under Article 85 (3) appears to be out of the question.

Neither the fact that the word ‘decision’ is not used in Article 15 (6), nor the fact that the procedure provided for therein is of a preliminary nature justifies the conclusion that the Commission is empowered to proceed by a mere opinion, especially since the words ‘deliver an opinion’ are not found in the said provision either. The silence of the text in a matter which affects the protection of the rights of individuals cannot be construed in the manner most unfavourable to them. Notwithstanding its preliminary nature, the measure by which the Commission takes a decision in such a case constitutes the culmination of a special procedure which is distinct from the procedure under which, after Article 19 has been applied, a decision on the substance of the case can be taken. Therefore it is not possible to find, either in the absence of any express reference in Article 15 (6) to one of the measures set out in Article 189 of the Treaty or in the preliminary nature of the Commission’s examination, sufficient grounds for excluding the necessity for a decision.

The argument that the undertakings can exercise their right to institute proceedings when the final stage of the procedure provided for by Article 6 is reached also fails. If the preliminary measure were excluded from all review by the Court, there would be no other alternative for the undertakings, however righteous their cause might be, than to take the risk of a serious threat of a fine or to terminate against their own interests an agreement which, if proceedings had been instituted, might have had a chance of escaping the prohibition. The preliminary measure would thus have the effect of saving the Commission from having to give a final decision thanks to the efficacy of the mere threat of a fine. In the present case this practical effect has not escaped the notice of the Commission. It appears from the letter of 7 February 1966 addressed to Counsel for the undertakings by the Director-General for Competition that in fact the Commission threatened the undertakings with Article 15 (2) and invited them ‘first to examine how “Noordwijks Cement Accoord” can be dissolved’.

Finally the Commission is wrong in pleading that the procedure would be excessively cumbersome if applications to the Court could be made in the context of Article 15 (6) of the Regulation. It is an irrelevant objection in a case in which more than three years have gone by between the notification of the agreement and the preliminary decision. In any event it cannot prevail against the guarantees for the protection of individuals laid down by the Treaty and which take precedence over all regulations. These objections must therefore be dismissed.

It follows from all these factors that the measure which the Commission adopted under Article 15 (6) of Regulation No 17 constituted and was bound to constitute a decision within the meaning of Article 189 of the Treaty.

The objection of inadmissibility must thus be dismissed.

[…]

On those grounds,

[…]

THE COURT

hereby:

1. Annuls the decision of 14 December 1965, notice of which was given to the applicant undertakings by letter dated 3 January 1966;

2. Orders the Commission to pay the costs.

Trabucchi
Monaco
Donner
Lecourt
Strauß

Delivered in open court in Luxembourg on 15 March 1967.

A. Van Houtte
Registrar

A. Trabucchi
President of Chamber
President

1- Languages of the Case: German, French and Dutch.
2 – CMLR.