ORDER OF THE COURT OF FIRST INSTANCE (Third Chamber)

18 July 1997 *

In Case T-44/96,

Oleifici Italiani SpA, a company incorporated under Italian law, established at Ostuni, Italy, represented by Antonio Tizzano and Gian Michele Roberti, both of the Naples Bar, 36 Place du Grand Sablon, Brussels,

applicant,

v

Commission of the European Communities, represented by Eugenio de March, Legal Adviser, acting as Agent, assisted by Alberto Dal Farro, of the Vicenza Bar, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION under Articles 178 and 173 of the EC Treaty for compensation for the damage alleged to have been suffered by the applicant as a result of the

* Language of the case: Italian.

delay in collection by the carrier designated by the Commission of the olive oil made available by the applicant under a tendering procedure for the free supply thereof to the peoples of Georgia and Armenia and for annulment of the Commission's refusal to grant compensation,

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

composed of: B. Vesterdorf, President, C. P. Briët and A. Potocki, Judges,

Registrar: H. Jung,

makes the following

Order

Legal background

1 The Council adopted Regulation (EC) No 1999/94 of 27 July 1994 on actions for the free supply of agricultural products to the people of Georgia, Armenia, Azerbaijan, Kyrgyzstan and Tajikistan (OJ 1994 L 201, p. 1) in order to improve the food supply situation for those people.

2 Under Article 2(3) of that regulation, supply and, where applicable, processing costs are normally to be determined by invitation to tender. Article 4 makes the Commission responsible for the execution of those measures and for monitoring the supply operations, and empowers it to adopt the detailed rules necessary for applying the regulation.

3 Commission Regulation (EC) No 2065/94 of 16 August 1994 laying down detailed rules for the free supply of agricultural products held in intervention stocks to Georgia, Armenia, Azerbaijan, Kyrgyzstan and Tajikistan pursuant to Regulation No 1999/94 (OJ 1994 L 213, p. 3) laid down the common rules for participation in tenders for the execution of the supplies and the obligations to be met by successful tenderers.

4 In particular, Article 2(3) of Regulation No 2065/94 provides that invitations to tender may relate to the quantity of products to be removed from intervention stocks as payment for the supply and for any costs of processing, packaging and marking of a lot or group of lots. Article 5(2) specifies that in such a case tenders are to cover the quantities of products to be removed from intervention stocks as payment.

5 Article 6(1) of Regulation No 2065/94 provides, *inter alia*, that tenders are valid only where they quote the precise reference to the regulation announcing the individual invitation to tender and indicate, where Article 2(3) applies, the proposed quantity of product, expressed in tonnes (net weight), to be exchanged for a tonne (net) of finished product. Under Article 6(2), tenders not submitted in accordance with that article or stating terms other than those laid down in the regulation are to be rejected. Finally, under Article 6(3) tenders submitted may be neither changed nor withdrawn after expiry of the time-limit laid down for their submission.

6 Article 7(2) of Regulation No 2065/94 provides that, on the basis of the tenders submitted, the Commission may decide, with regard to each lot, either not to make any award or to award the supply contract on the basis of the price or quantities offered and other elements of the tender which provide the best assurances that the delivery will take place in good technical and hygienic conditions within the time-limits laid down. Article 7(3) specifies that the Commission is to notify successful tenderers of the supply contract awarded to them.

7 Article 10(4) of Regulation No 2065/94 provides that, if takeover at the delivery stage is delayed owing to circumstances beyond the control of the successful tenderer, the additional costs may be reimbursed by the Commission on the basis of supporting documents.

8 Article 12(2) of Regulation No 2065/94 provides that, before taking over the product, the successful tenderer is to lodge a security with the intervention agency or the Commission of an amount per tonne (net weight) fixed in the notice of invitation to tender, in respect of the quantities to be taken over for each lot, and Article 12(6) makes release of that security dependent upon the successful tenderer's providing proof of compliance with his obligations.

9 Article 1 of Commission Regulation (EC) No 2494/94 of 14 October 1994 on the supply of olive oil intended for the people of Georgia and Armenia pursuant to Regulation No 1999/94 (OJ 1994 L 265, p. 30) initiated a tendering procedure for the supply costs of 3 000 tonnes (net) of olive oil, in six lots of 500 tonnes each, in accordance with the provisions of Regulation No 2065/94, to be made available, under Article 2(1), for loading on board ship at the port of Athens (Piraeus) as from 28 November 1994.

10 Article 3(2) of Regulation No 2494/94 specifies that tenderers' offers are to include the quantity of olive oil (virgin and lamp oil) to be taken over from the intervention stocks referred to in Annex II as the payment necessary to cover all costs of the supply as specified in Article 2 to the delivery stage laid down. Offers are to be expressed in tonnes of olive oil (net weight) to be exchanged for a tonne of finished product (net weight).

11 Article 3(4) of Regulation No 2494/94 fixes the security referred to in Article 12(2) of Regulation No 2065/94 at ECU 2 300 per tonne of olive oil (finished product), and Article 3(5) specifies that those securities are to be lodged in national currency in favour of the Commission.

12 Finally, by Regulation (EC) No 2693/94 of 4 November 1994 (OJ 1994 L 286, p. 16), the Commission invited tenders for transport for the free supply of the 3 000 tonnes of olive oil to Georgia and Armenia. According to Article 1(3)(b), the 3 000 tonnes of olive oil (delivery stage FOB, stowed on the boat) were to be made available in the port of Athens (Piraeus) as from 28 November 1994.

Facts

13 On 31 October 1994, under the tendering procedure initiated by Regulation No 2494/94, the Commission decided to award Oleifici Italiani ('Oleifici') a contract for the supply of 1 500 tonnes of olive oil, namely lots Nos 3, 4 and 6,

of 500 tonnes each. The three remaining lots were awarded to the Greek company Nutria.

14 Pursuant to Article 3(4) of Regulation No 2494/94, Oleifici lodged the security referred to in Article 12(2) of Regulation No 2065/94 — a total of LIT 8 072 896 500 on the basis of ECU 2 300 per tonne of olive oil (finished product) — in favour of the Commission.

15 Oleifici proceeded to collect the relevant quantities of olive oil from the intervention agency and package them on its premises at Bari. It completed the packaging in casks on 25 November 1994 and announced that it was ready to deliver them to the Port of Piraeus within the time-limit set by the Commission.

16 On 23 November 1994, the Commission awarded the contract for the transport of the supplies to the firm Calberson under the tendering procedure initiated by Regulation No 2693/94, and informed Oleifici thereof by letter of 30 November 1994.

17 By letter of 29 November 1994, the Commission informed Oleifici that '... failing any last-minute changes, the ship which is to carry the goods will be in the port of Piraeus on 5 December 1994'. It further requested Oleifici to take every step to ensure that that date was respected, so that the operation could proceed smoothly.

18 Delivery of the olive oil was subsequently delayed several times, for reasons relating to, *inter alia,* the unavailability of a ship, poor weather conditions and problems with the facilities in the countries of destination. Finally, it was collected by

the carrier in two consignments of 750 tonnes each, on 5 and 26 January 1995, and the security lodged by Oleifici was released in full in February 1995.

19 Oleifici pointed out to the Commission that the successive postponements of the date of shipment, decided upon unilaterally by the Commission, had caused it to incur significant expense in the form of the costs of the bank guarantee, warehousing, insurance and the unavailability of its lorries, which it estimated at LIT 562 880 215.

20 It further pointed out that the delay in collection had also given rise to a delay in the release of the supply securities which it had lodged to guarantee performance. It had thereby been deprived of the use of the corresponding credit lines and consequently unable to engage in normal oil purchase and resale transactions. Oleifici estimated the loss of earnings suffered as a result at LIT 500 000 000.

21 Following that request for compensation, Oleifici received a transfer of LIT 444 908 307 from the Commission on 29 September 1995.

22 By letter of 16 January 1996, at Oleifici's request, the Commission gave Oleifici the list of the expenses which it had agreed to reimburse. It stated that it could not accept the sum of LIT 500 000 000 claimed in respect of the unavailability of credit lines 'because the EC cannot be held liable for loss claimed by a trader who does not have a credit facility'.

23 By letter of 31 January 1996, Oleifici objected to the Commission's refusal of compensation, pointing out that it had found it even more difficult to obtain additional credit for other commercial transactions because the amounts committed to lodge a security in favour of the Community had been particularly high in this case. It therefore asked the Commission to reconsider its position and make good the loss caused by the fact that it had been unable to use the bank credit lines reserved for the securities lodged in favour of the Community.

Procedure before the Court and forms of order sought

24 When the Commission did not respond to that request, Oleifici brought the present action by application lodged at the Registry of the Court of First Instance on 27 March 1996.

25 It claims that the Court should:

— grant the application for annulment and the application for damages; and

— order the Commission to pay the costs.

26 The Commission contends that the Court should:

— find the actions brought by the applicant under Articles 173, 178 and the second paragraph of Article 215 of the EC Treaty inadmissible and in any event unfounded; and

— order the applicant to pay the costs.

Admissibility of the claim for compensation

27 By virtue of Article 111 of the Rules of Procedure, where it is clear that it has no jurisdiction to take cognizance of an action, the Court may, without taking further steps in the proceedings, give a decision by reasoned order. In the present case, the Court considers that it has sufficient information from the documents before it and that there is no need to take any further steps in the proceedings.

The nature of the liability in issue

28 Before any possible decision that the Court clearly has no jurisdiction to settle this dispute, it must be determined whether any liability which the Community could incur as a result of the organization of the free supplies in question is not, contrary to the procedural position adopted by the parties, of an obviously contractual nature.

29 It is clear from the legal context of the present dispute and from the documents produced before the Court that the supplies in question have their basis in contracts and that the Commission's duty on which the claim for compensation is grounded is contractual in origin; nor, moreover, has it been alleged at any stage in the written procedure that the Commission has acted in breach of any non-contractual duty separable from the contractual relationship between the parties.

30 The date on which the product was to be made available was fixed as 28 November 1994 by Regulation No 2494/94, and that aspect of the Commission's offer was accepted by Oleifici. Consequently, as it states in point 17 of its application, Oleifici expected the Commission to ensure collection of the olive oil on 28 November 1994.

31 It is thus with reference to the date of 28 November 1994, fixed by Regulation No 2494/94 and agreed upon between the two parties as a result of Oleifici's offer and its acceptance by the Commission, then changed to 5 December 1994 by the Commission with Oleifici's tacit agreement, that Oleifici alleges both the existence and extent of the delay in the collection of the olive oil by the carrier designated by the Commission and, consequently, the occurrence of a loss which it seeks to have made good by the Commission.

32 By thus alleging, as the basis for its claim for damages, that the Commission failed to comply with its duty to ensure that the olive oil was collected without delay by the carrier it had designated, Oleifici is placing the legal issue squarely in the context of the contractual relationship between the parties.

33 In Case C-142/91 *Cebag* v *Commission* [1993] ECR I-553, at paragraphs 11 to 13, the Court of Justice held that, according to Council Regulation (EEC) No 3972/86 of 22 December 1986 concerning food-aid policy and food-aid management (OJ 1986 L 370, p. 1), such aid is provided on the basis of contractual undertakings. It noted that under Article 6(1)(c), the Commission is to decide on the conditions governing the supply of aid, in particular the general conditions applicable to recipients, the engagement of the mobilization procedures and the supply of products, as well as the conclusion of the corresponding contracts.

34 It considered that the respective rights and obligations of the Commission and successful tenderers are not determined entirely by Community regulations, since one essential element of the supply operation, namely the price, depends on the tenders put in by the tenderers and on the acceptance of the tenders by the Commission, as appears from the provisions of Article 9(1) and (3) of Commission Regulation (EEC) No 2200/87 of 8 July 1987 laying down general rules for the mobilization in the Community of products to be supplied as Community food

aid (OJ 1987 L 204, p. 1). The Court of Justice held that in those circumstances the supplies in question had been implemented by contracts.

35 It is therefore clear that Oleifici is likewise alleging, in support of its claim for damages, that the Commission failed to perform an obligation of contractual origin and that its action is thus brought on the basis of a contract.

Jurisdiction of the Court of First Instance

36 Under Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities (OJ 1988 L 319, p. 1), as subsequently amended, read in conjunction with Article 181 of the EC Treaty, this Court has jurisdiction to rule at first instance on disputes of a contractual nature brought before it by natural or legal persons only pursuant to an arbitration clause; however, there is no such clause in the present case.

37 The fact that the parties have submitted the present dispute to the Court cannot be accepted as an expression of their intention that the Community judicature should have jurisdiction over the contract, since Oleifici has specifically brought its action on the basis of Article 178 of the Treaty.

38 In the absence of an arbitration clause within the meaning of Article 181 of the Treaty, the Court cannot in fact rule on an action for compensation arising out of a contract when, as in this case, an action for damages based on Article 178 of the Treaty is brought before it. To do so would be to extend its jurisdiction beyond

the limits placed by Article 183 of the Treaty on the disputes of which it may take cognizance, since that article specifically gives the national courts ordinary jurisdiction over disputes to which the Community is a party (Joined Cases 133/85, 134/85, 135/85 and 136/85 *Rau and Others* v *Bundesanstalt für landwirtschaftliche Marktordnung* [1987] ECR 2289, paragraph 10).

39 It follows that this Court clearly lacks jurisdiction to take cognizance of the claim for damages, which must therefore be dismissed as clearly inadmissible.

Admissibility of the claim for annulment

40 The dispute stems from the Commission's refusal to compensate Oleifici for part of the damage which it claims that the Commission caused it as a result of the delay, attributable to negligence on the part of the Commission, in the collection of the lots of oil for which Oleifici was awarded the contract under Regulation No 2494/94.

41 The contested act cannot be regarded as separable from the Commission's alleged breach of its duty to ensure that the olive oil made available by Oleifici was collected within the period determined in the contract.

42 The pleas in law which Oleifici has put forward in support of its claim for annulment cannot be examined without first considering whether the conditions are met for the Community to have incurred contractual liability as a result of the delay in the collection of the olive oil.

43 At point 12 of its application, furthermore, Oleifici itself develops its pleas in law in support of its claim for annulment by referring to the arguments it puts forward in support of its claim for damages.

44 Since, therefore, it has been established that this Court clearly lacks jurisdiction to take cognizance of the claim for damages, Oleifici cannot unilaterally circumvent the division of jurisdiction as between this Court and the national courts by causing the Commission to reject its request for compensation and then describing that rejection as a decision within the meaning of Article 173 of the Treaty (Case 43/84 *Maag* v *Commission* [1985] ECR 2581, paragraph 26).

45 The claim for annulment is thus also clearly inadmissible.

46 It therefore follows from all of the foregoing that the application must be dismissed in its entirety as clearly inadmissible.

Costs

47 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful and the defendant has applied for costs, the applicant must be ordered to bear all the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby orders:

1. The application is dismissed as clearly inadmissible.

2. The applicant shall bear the costs.

Luxembourg, 18 July 1997.

H. Jung	B. Vesterdorf
Registrar	President