

JUDGMENT OF THE COURT (Sixth Chamber)
17 May 1990 *

In Case C-87/89

- (1) **Société nationale interprofessionnelle de la tomate (Sonito)**, a French firm whose registered office is in Avignon (France),
- (2) **Beaudoux SA**, a company incorporated under French law whose registered office is in Lambesc (France),
- (3) **Coopérative agricole de transformations et de ventes**, of Camaret (France),
- (4) **Cuisine et conserves des régions de France (CCRF)**, a company incorporated under French law whose registered office is in Casseneuil (France),
- (5) **Conserve-Gard**, a French firm whose registered office is in Nîmes (France),
- (6) **Conserveries du Midi**, a French firm whose registered office is in Sarrians (France),
- (7) **Conserveries réunies de Bergerac**, a French firm whose registered office is in Bergerac (France),
- (8) **Francal**, a company incorporated under French law whose registered office is in Boé (France),
- (9) **Gaston Jouval**, a company incorporated under French law whose registered office is in Cavaillon (France),
- (10) **Giraud Ainé**, a company incorporated under French law whose registered office is in Sarrians (France),
- (11) **Conserves P. Guintrand**, a French firm whose registered office is in Carpentras (France),
- (12) **Larroche frères**, a company incorporated under French law whose registered office is in Saint-Sylvestre-sur-le-Lot (France),

* Language of the case: French.

- (13) **Conserves alimentaires Louis Martin**, a company incorporated under French law whose registered office is in Monteux (France),
- (14) **Otra**, a company incorporated under French law whose registered office is in Tarascon (France),
- (15) **Piquet Paul et Pierre**, a company incorporated under French law whose registered office is in Monteux (France),
- (16) **Promosud**, a company incorporated under French law whose registered office is in Cahors (France),
- (17) **Société de conserves alimentaires méridionales, provençales et italiennes (Scampi)**, a French firm whose registered office is in Orange (France),
- (18) **Société industrielle de transformation de produits agricoles (Sitpa)**, a French firm whose registered office is in Auxonne (France),

represented by Coutrelis et associés SCP, in the persons of Nicole Coutrelis and André Coutrelis, of the Paris Bar, with an address for service in Luxembourg at the Chambers of Marc Loesch, 8, rue Zithe,

applicants,

v

Commission of the European Communities, represented by Patrick Hetsch, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of Georgios Kremliis, also a member of its Legal Department, Wagner Centre, Kirchberg,

defendant,

APPLICATION for a declaration that the Commission Decision of 17 January 1989 is void and for compensation for the damage caused by the Commission,

THE COURT (Sixth Chamber)

composed of: C. N. Kakouris, President of Chamber, F. A. Schockweiler, G. F. Mancini, T. F. O'Higgins, and M. Díez de Velasco, Judges,

Advocate General: C. O. Lenz

Registrar: J. A. Pompe, Deputy Registrar

having regard to the report for the hearing and further to the hearing on the 7 February 1990,

after hearing the opinion of the Advocate General delivered at the sitting on 7 March 1990,

gives the following

Judgment

- 1 By an application lodged at the Court Registry on 16 March 1989, the *Société nationale interprofessionnelle de la tomate* (hereinafter referred to as 'Sonito') and 17 undertakings which are affiliated to it brought an action pursuant to the second paragraph of Article 173 of the EEC Treaty for the annulment of the Commission decision notified to them on 17 January 1989 by which the Commission decided to take no action on a complaint made by the applicants, and an action to establish the Community's non-contractual liability pursuant to Article 178 and the second paragraph of Article 215 of the EEC Treaty.
- 2 By a complaint of 17 October 1986, Sonito drew the Commission's attention to frauds committed within the context of the aid scheme for tomato processing by processors pursuing their activities in Greece and Italy. The processing figures supplied by those two Member States for the marketing years 1983/84, 1984/85 and 1985/86 were considerably inflated, which harmed French processors both in

terms of competition and in terms of the reduction in aid for the marketing years following that in which the guarantee threshold laid down in the Community rules was exceeded. Sonito took the view that the Commission could have brought an action pursuant to Article 169 of the EEC Treaty for a declaration that the Member States in question had failed to fulfil their obligations and that it had a duty to correct the wrong figures supplied by those Member States, pursuant to the applicable Community provisions.

- 3 In its letter of 17 January 1989 the Commission stated that it had no evidence suggesting that Italy or Greece had failed to carry out their duties of inspection and supervision and that its own investigations had not revealed any irregularities.
- 4 Reference is made to the report for the hearing for a fuller account of the facts of the case, the course of the procedure and the submissions and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

Action for annulment

- 5 The action brought pursuant to the second paragraph of Article 173 of the EEC Treaty seeks the annulment of both the Commission's decision not to act upon Sonito's request for an action for failure to fulfil an obligation to be brought against Italy and Greece and its refusal retroactively to rectify the figures supplied by the Member States and, consequently, the amounts of aid granted to French processors.
- 6 As regards the Commission's decision not to bring an action for failure to fulfil obligations, it is clear from the scheme of Article 169 of the EEC Treaty that the Commission has no obligation to commence proceedings under that article; it has

a discretionary power precluding the right of individuals to require it to adopt a particular position and to bring an action for annulment against its refusal to take action.

- 7 It is only if the Commission considers that the Member State in question has failed to fulfil one of its obligations that it delivers a reasoned opinion. Moreover, in the event that the Member State does not comply with the opinion within the time allowed, the Commission has in any event the right, but not the obligation, to apply to the Court of Justice for a declaration establishing the failure the Member State is accused of (see, most recently, the judgment of 14 February 1989 in Case 247/87 *Star Fruit v Commission* [1989] ECR 291).
- 8 As regards the Commission's refusal to rectify retroactively the amount of aid granted, it is sufficient to point out that the applicants cannot claim that the refusal is of direct and individual concern to them, in accordance with the second paragraph of Article 173 of the EEC Treaty. The rectification requested would have had to be adopted in the form of a generally applicable regulation concerning in practice all economic operators in the Community in their sole capacity as tomato producers.
- 9 The action for annulment must therefore be dismissed as inadmissible with regard to both the Commission's decision not to commence proceedings under Article 169 of the EEC Treaty against Italy and Greece and its refusal to rectify retroactively the amount of aid granted.

Action to establish non-contractual liability

- 10 The applicants claim compensation under three heads: the difference between the amount of aid actually received during the marketing years 1984/85 to 1987/88 and the amount of aid which they would have received but for the abatement; commercial damage, and, in Sonito's case only, the reimbursement of legal costs incurred in Italy.

- 11 The Commission contends that the application for a declaration establishing non-contractual liability is inadmissible since the applicants are in reality calling in question failures to carry out controls and institute proceedings for which the national authorities alone are responsible; however, only the national courts have jurisdiction to award compensation for damage for which national authorities are liable.
- 12 The applicants claim that they have suffered damage caused by allegedly unlawful conduct, not on the part of the national authorities but on the part of the Commission, consisting in a failure to rectify the figures supplied by certain Member States and, consequently, the aid granted. Therefore, that objection of inadmissibility must be rejected.
- 13 As regards the claim for compensation for the damage resulting from the difference between the aid actually paid and the aid to which the applicants claim that they are entitled, the Commission raises a second specific objection of inadmissibility: it claims that the real object of this application is the payment of the amounts arising as a result of the withdrawal or annulment of the successive regulations adopted by the Commission; however, since the applicants may not pursue such an objective by means of an action under the second paragraph of Article 173 of the EEC Treaty, likewise they may not pursue it by means of an action to establish non-contractual liability under Article 178 and the second paragraph of Article 215 of the Treaty.
- 14 The action for compensation provided for by Article 178 and the second paragraph of Article 215 of the EEC Treaty was introduced as an autonomous form of action with a particular purpose to fulfil within the system of actions and subject to conditions on its use dictated by its specific nature. It differs from an action for annulment in particular in that its purpose is not to set aside a specific measure but to repair the damage caused by an institution (see the judgment of 26 February 1986 in Case 175/84 *Krohn & Co. Import-Export v Commission* [1986] ECR 763).
- 15 The claim for compensation submitted by the applicants must accordingly be considered by way of that action and may be upheld if it is well founded, without its being necessary for the Commission to adopt new legislative measures (judgment of 4 October 1979 in Joined Cases 261/78 and 262/78 *Interquell Stärke-Chemie GmbH & Co. KG and Another v Council and Commission* [1979] ECR 3045). In those circumstances, it must be declared admissible.

- ¹⁶ The Court has consistently held that Community liability depends on the coincidence of a set of conditions as regards the unlawfulness of the acts alleged against the institution, the fact of damage, and the existence of a direct link in the chain of causality between the wrongful act and the damaged complained of.
- ¹⁷ As regards the claim for compensation for the damage consisting in the difference between the aid provided for and actually paid and the aid which would have been paid and the commercial damage, it should be noted that the applicants have been unable to establish the existence of an unlawful act on the part of the Commission. It appears from the documents before the Court and from the oral argument at the hearing that, with regard to the frauds allegedly committed by economic operators in Italy and in Greece, the Commission possessed only isolated and unconfirmed information which had been communicated to it by the national authorities. The checks which the Commission itself carried out did not bring to light the existence of frauds of the type alleged by the applicants. In those circumstances, the Commission could not lawfully proceed to rectify the data supplied nor, consequently, adjust retroactively the amount of aids for the marketing years 1984/85 to 1987/88.
- ¹⁸ As for the claim for reimbursement of the legal costs incurred in Italy, Sonito has been unable to prove that the Commission was under an obligation to support it in proceedings in which it could not in any event have obtained compensation for the main damage allegedly suffered consisting in economic loss due to the non-rectification of the amounts of aid granted.
- ¹⁹ In those circumstances, the action to establish non-contractual liability must be dismissed as unfounded.

Costs

- ²⁰ Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the applicants have failed in their submissions, they must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

- (1) Dismisses the application for annulment as inadmissible;**
- (2) Dismisses the action to establish non-contractual liability as unfounded;**
- (3) Orders the applicants to pay the costs.**

Kakouris

Schockweiler

Mancini

O'Higgins

Díez de Velasco

Delivered in open court in Luxembourg on 17 May 1990.

J.-G. Giraud

C. N. Kakouris

Registrar

President of the Sixth Chamber