JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
24 April 2002 *

In Case T-220/96,

Elliniki Viomichania Oplon AE (EVO), established in Athens (Greece), represented by T. Fortsakis, lawyer, with an address for service in Luxembourg,

applicant,

v

Council of the European Union, represented by S. Kyriakopoulou, acting as Agent,

and

Commission of the European Communities, represented by M. Condou-Durande, acting as Agent, with an address for service in Luxembourg,

defendants,

* Language of the case: Greek.

APPLICATION for compensation for the damage allegedly suffered by the applicant as a result of the adoption of Council Regulation (EEC) No 2340/90 of 8 August 1990 preventing trade by the Community as regards Iraq and Kuwait (OJ 1990 L 213, p. 1),

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

composed of: P. Mengozzi, President, V. Tiili and R.M. Moura Ramos, Judges,
Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 12 July 2001,

gives the following

Judgment

Facts

1 The applicant, Elliniki Viomichania Oplon AE (EVO), is a company incorporated under Greek law which manufactures and markets arms and ammunition nationally and internationally.

2 On 12 January 1987, the applicant concluded with the Ministry of Defence of the Republic of Iraq a contract ('the contract') to provide a number of lots of ammunition for a price, calculated per item free on board, totalling (USD) 65 124 000 United States dollars. On 25 September 1987, the contracting parties signed an annex under which the applicant agreed to supply an additional quantity of ammunition for a price of USD 18 090 000. Under the terms of payment fixed in Article 3 of the contract, 10% of the price of each lot of ammunition was payable on shipment, upon presentation of the bill of lading and a commercial invoice. The remainder, that is, 90%, was to be paid 24 months after each shipment, plus interest calculated at an agreed rate of 4% per annum. Payment was to be made by means of a letter of credit issued by the Central Bank of Iraq to the Commercial Bank of Greece in favour of the applicant. By telex of 21 January 1987, the Central Bank of Iraq informed the Commercial Bank of Greece that a letter of credit, expiring on 25 March 1990, had been issued in favour of the applicant. The validity of that letter of credit was extended several times; the last extension, until 30 May 1991, was communicated to the Commercial Bank of Greece by telex from the Central Bank of Iraq of 23 April 1989.

3 Article 12(1) of the contract stipulates that all disputes arising in connection with the contract were to be finally settled by the International Chamber of Commerce, Geneva.

4 Between 25 October 1987 and 30 May 1989, the applicant sent 10 lots of ammunition under the contract and received after each shipment 10% of the price for each lot. Under the terms of the contract the remaining 90% was to be paid 24 months after each shipment.

5 On 2 August 1990, the United Nations Security Council adopted Resolution 660 (1990) to the effect that there had been a breach of international peace and security resulting from Iraq's invasion of Kuwait and that Iraqi forces should withdraw immediately and unconditionally from the territory of Kuwait.

6 On 6 August 1990, the United Nations Security Council adopted Resolution 661 (1990) in which, declaring that it was 'mindful of its responsibilities under the Charter of the United Nations for the maintenance of international peace and security' and noting that the Republic of Iraq had not complied with Resolution 660 (1990), it decided to impose an embargo on trade with Iraq and Kuwait. The embargo was subsequently confirmed by the United Nations Security Council in Resolutions 670 (1990) of 25 September 1990 and 687 (1991) of 3 April 1991.

7 On 8 August 1990, the Council, referring to the 'serious situation resulting from the invasion of Kuwait by Iraq' and to United Nations Security Council Resolution 661 (1990), adopted, on a proposal from the Commission, Regulation (EEC) No 2340/90 preventing trade by the Community as regards Iraq and Kuwait (OJ 1990 L 213, p. 1).

8 Article 1 of Regulation No 2340/90 prohibits as from 7 August 1990 the introduction into the territory of the Community of all commodities or products originating in, or coming from, Iraq or Kuwait and the export to those countries of all commodities or products originating in, or coming from, the Community. Article 2 of the same regulation prohibits as from 7 August 1990: (a) all activities or commercial transactions, including all operations connected with transactions which have already been concluded or partially carried out, the object or effect of which is to promote the export of any commodity or product originating in, or coming from, Iraq or Kuwait; (b) the sale or supply of any commodity or product, wherever it originates or comes from, to any natural or legal person in Iraq or Kuwait or to any other natural or legal person for the purposes of any commercial activity carried out in or from the territory of Iraq or Kuwait; and (c) any activity the object or effect of which is to promote such sales or supplies.

9 The documents before the Court show that the Central Bank of Iraq refused to pay the applicant the remaining 90% of the price of the goods plus the agreed interest, that is, USD 75 451 500, which was owed to it under the contract,

invoking United Nations Security Council Resolutions 661 (1990), 670 (1990) and 687 (1991).

10 Since the applicant had not received payment of the sum owed, it sought, jointly with another Greek company owed money by the Republic of Iraq, and obtained, on 30 August 1990, an order for the temporary seizure of the Iraqi oil tankers *Alfarahidi* and *Jambur* which were anchored in the port of Piraeus.

11 On 28 May 1991, the applicant brought proceedings before the Polimeles Protodikio Athinon (Court of First Instance (several judges), Athens) (Greece) against the Central Bank of Iraq. On 12 November 1992, that court delivered its judgment ordering the Central Bank of Iraq to pay the applicant the sum of USD 75 451 500, plus interest at the statutory rate. That judgment was declared provisionally enforceable in respect of the sum of USD 35 000 000. The applicant attempted to have it enforced in Iraq, but was prevented by the retaliatory measures taken by that country as a result of the embargo. The judgment of 12 November 1992 was upheld by the Efetio Athinon (Court of Appeal, Athens) on 19 June 1996.

12 On two occasions, namely from 10 to 14 July 1994 and from 22 to 24 July 1995, representatives of the applicant and of the Iraqi Government met in order to clarify any matters pending between the parties in relation to the contract. At the first meeting, the Iraqi Government proposed to pay its debt to the applicant by means of the Iraqi assets frozen in banks in the United States of America, on condition that the attachment on the Iraqi oil tankers anchored in the port of Piraeus be lifted and that the applicant abandon all proceedings before the Greek courts and the International Chamber of Commerce, Geneva. At the second meeting, the representatives of the applicant and of the Iraqi Government considered the possibility that the sum owed might be paid by means of crude oil and oil products and they agreed to meet again at a later date in order to fix the timetable and procedure for payment.

Procedure

13 In those circumstances, by application lodged at the Court Registry on 27 December 1996, the applicant brought the present action.

14 The written procedure was closed on 23 July 1997.

15 On 28 April 1998, the Court (Second Chamber) delivered its judgment in Case T-184/95 *Dorsch Consult* v *Council and Commission* [1998] ECR II-667 on an application for compensation analogous to the present application. Since that application was dismissed, the applicant in that case lodged an appeal before the Court of Justice, registered under number C-237/98 P.

16 By order of the President of the Fourth Chamber of the Court of First Instance of 29 October 1998, after the parties had been heard on that point, proceedings in the present case were suspended pending delivery of the judgment of the Court of Justice in Case C-237/98 P.

17 The Court of Justice delivered its judgment on 15 June 2000, dismissing the appeal (Case C-237/98 P *Dorsch Consult* v *Council and Commission* [2000] ECR I-4549).

18 In the context of the measures of organisation of procedure, the applicant was requested to give its views on the judgment of 28 April 1998 and on possible discontinuance of the proceedings. By letter of 19 July 2000, the applicant withheld its reply until the hearing.

19 The oral arguments of the parties and their replies to the Court's questions were heard at the hearing of 12 July 2001. The applicant stated, in particular, that it intended to continue with its application.

Forms of order sought

20 The applicant claims that the Court should:

— order the Community to pay it the sum of USD 75 451 500 or, in the alternative, the equivalent of that sum in euro at the highest rate of exchange between the USD and the euro on the date of payment or, in the further alternative, the sum of 60 478 770 euro, plus interest at 8% per annum as from the date on which the application was brought before the Court, in exchange for the transfer of the applicant's claim in that amount against the Central Bank of Iraq;

— order the defendants to pay the costs.

21 The Council contends that the Court should:

— dismiss the application as inadmissible;

— in the alternative, dismiss the application as unfounded;

— order the applicant to pay the costs.

22 The Commission contends that the Court should:

— dismiss the application as inadmissible;

— in the alternative, dismiss the application as unfounded;

— order the applicant to pay the costs.

Admissibility

23 The Council and the Commission raise the defence of the inadmissibility of the application for compensation because it is out of time. They rely on the five-year period of limitation prescribed by Article 43 of the EC Statute of the Court of Justice which provides that '[p]roceedings against the Community 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'.

24 Having regard to the pleas and arguments put forward by the parties as to the substance, the Court finds that there is a close link between them and limitation and that the latter issue can be analysed only after the merits of the claim of the Community's liability under Article 215 of the EC Treaty (now Article 288 EC) have been examined.

Substance

Arguments of the parties

25 The applicant submits that the Community must, on the basis of the principle of liability for an unlawful act, incur liability for the damage suffered by it as a result of the impossibility of enforcing its claim. In the present case, the unlawfulness consists in the failure of the Community legislature, when it adopted Regulation No 2340/90, to provide for compensation for the damage caused by that regulation to undertakings in the applicant's position.

26 In particular, the applicant submits that, in adopting Regulation No 2340/90, the Community institutions infringed a number of principles and fundamental rights laid down in the European Convention for the Protection of Human Rights and Fundamental Freedoms, the EC Treaty and the Treaty on European Union.

27 First, the Community institutions infringed the applicant's right to property in breach of Article 1 of Protocol No 1 to the abovementioned European Convention, according to which '[n]o one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law'. The adoption of Regulation No 2340/90 had the effect of depriving the applicant of part of his property. According to the applicant, that deprivation, which constitutes an infringement of his right to property equivalent to expropriation, was permitted only on condition of full compensation.

28 Second, the defendants infringed the principle of non-discrimination in that the consequences of the embargo against Iraq and Kuwait were borne only by a particular, limited category of undertakings which, when the regulation in question was adopted, had already entered into trade relations with those two countries. The defendants also infringed the principle of non-discrimination by adopting Council Regulation (EEC) No 3155/90 of 29 October 1990 extending and amending Regulation (EEC) No 2340/90 (OJ 1990 L 304, p. 1) and Council Regulation (EEC) No 3541/92 of 7 December 1992 prohibiting the satisfying of Iraqi claims with regard to contracts and transactions, the performance of which was affected by United Nations Security Council Resolution 661 (1990) and related resolutions (OJ 1992 L 361, p. 1). Those regulations introduced to the prohibition laid down for the purposes of the embargo derogations in favour of certain situations and not others.

29 Third, the applicant submits that, by failing to adopt measures to compensate the damage suffered by undertakings owed money by the Republic of Iraq when the embargo was imposed, the defendants exceeded the limits fixed by Article 113 of the EC Treaty (now, after amendment, Article 133 EC), which constituted the legal basis for the adoption of Regulation No 2340/90.

30 Fourth, the applicant submits that the defendants infringed the principle of proportionality in that the measures adopted with the embargo are not the mildest possible in respect of the Community undertakings concerned, taking account, in particular, of the lack of any measure ensuring even partial compensation of the damage suffered by such undertakings.

31 In the alternative, the applicant adds that, by adopting Regulation No 2340/90, the defendants infringed the principle of the protection of economic freedom in breach of the legitimate expectations of economic operators that the Community institutions observe that principle.

32 As to whether the damage is real, the applicant asserts that, according to the principle of good faith and equity recognised by the civil law of the Member States, the provisional impossibility of enforcing a claim must be considered to be definitive where it is foreseeable that it will persist for an indeterminate period and beyond any reasonable temporal limit. It claims to have attempted, as far as possible, to enforce its claim before approaching the institutions in order to obtain compensation. As to the possibility of reaching an agreement through negotiations with the Iraqi Government, the applicant points out that every solution proposed by that government presupposes the lifting of the embargo or is indeed prevented by the embargo's existence. In that regard, the applicant declares itself prepared to accept the settlement of its claim in oil on condition, however, that the Court recognise that the export of oil from Iraq to the Community, for the purposes of settling a debt of Iraq under a contract predating the imposition of the embargo, is not contrary to the prohibitions imposed by Regulation No 2340/90. Furthermore, the applicant points out that the damage which it has suffered is very substantial, particularly compared with its turnover, and that it exceeds the limits of the normal financial risks inherent in the economic sector concerned.

33 Finally, as to the existence of a causal link between the damage complained of and the conduct alleged against the Community institutions, the applicant asserts that Iraq's refusal to pay is the consequence of its adoption of measures of retaliation against the embargo. It also submits that the Iraqi Government's non-payment is not based on reasons other than the embargo since, when that was imposed, Iraq was solvent and it could not be accused of any late payment since the validity of the guaranteed credit had been extended to 30 May 1991.

34 The Council and the Commission contend that the conditions under which the Community incurs non-contractual liability are not fulfilled in the present case.

35 As regards, first, the condition as to the existence of unlawful conduct on the part of the institutions, the Council and the Commission recall that, in the case of legislative measures involving choices of economic policy, the Community can incur liability only if there has been a sufficiently serious breach of a superior rule of Community law for the protection of individuals. In the case-law of the Court of Justice, the fundamental rights which the applicant claims have been infringed are not, according to the defendants, presented as absolute prerogatives, since their exercise may be subject to restrictions justified by objectives in the public interest pursued by the Community. The Commission adds that, in general, in the case-law of the Court of Justice, omissions can found the liability of the Community only to the extent that the institutions have acted in breach of a statutory obligation to act under a Community provision. In the present case, no Community provision imposes on the institutions the obligation to adopt measures protecting economic operators against the risks of reprisals on the part of a non-Member State which is subject to sanctions imposed at international level. Finally, the Council states that, by adopting Regulation No 2340/90, it did not exercise any discretion either as to the fact of imposing the embargo or as to the definition of its conditions and scope. Since, under Articles 25 and 103 of the Charter of the United Nations and under Article 224 of the EC Treaty (now Article 297 EC), the compulsory decisions adopted by the United Nations Security Council are binding on the Member States, the Community had no choice but to comply with Resolution 661 (1990) and related resolutions.

36 Second, the Council and the Commission contend that there is no actual damage in the present case. In particular, the damage resulting from the fact of having a claim which has little chance of being satisfied during an indeterminate period does not have that characteristic. Moreover, since the applicant did not refer the matter to the International Chamber of Commerce, Geneva, as stipulated in Article 12 of the contract, it has not exhausted the legal remedies which were open to it for the purpose of the recovery of its debt and, consequently, its damage cannot be regarded as having been incurred. Finally, according to the defendants, the damage alleged falls within the limits of the normal economic risks inherent in the applicant's activities.

37 Third, the defendants submit that there is in this case no causal link between the damage alleged and an act of the Community. In that regard, the Council and the

Commission state, first, that Regulation No 2340/90 is not applicable to payments from Iraq to Community nationals and that, consequently, the applicant's claim does not fall within the scope of that act. Next, they state that the Central Bank of Iraq's refusal is the consequence of the United Nations Security Council resolutions and not of the application of the regulation. Finally, they point out that, when the embargo was imposed, the Central Bank of Iraq was already in a position of non-payment and that the impossibility of satisfying the applicant's claim results from administrative, legal or practical difficulties in the performance of the contract in Iraq.

Findings of the Court

38 By the present application, the applicant seeks to obtain compensation for the damage resulting from the adoption by the Council of Regulation No 2340/90 imposing a trade embargo against Iraq and Kuwait. The damage alleged by the applicant consists, in particular, in the alleged temporary impossibility, linked to the duration of the embargo, for it to receive the money owed to it by the Iraqi Government. The applicant submits that the Council and the Commission acted unlawfully when the regulation in question was adopted to the extent that they did not provide for a mechanism for compensating economic operators whose claims against Iraq were going to become unenforceable because of the imposition of the embargo.

39 It is settled case-law that non-contractual liability on the part of the Community under the second paragraph of Article 215 of the Treaty is subject to a number of conditions relating to the unlawfulness of the conduct alleged against the Community institutions, actual damage and the existence of a causal link between the conduct of the institution and the damage complained of (Case C-104/97 P *Atlanta* v *European Community* [1999] ECR I-6983, paragraph 65, and Joined Cases T-198/95, T-171/96, T-230/97, T-174/98 and T-225/99

Comafrica and Dole Fresh Fruit Europe v *Commission* [2001] ECR II-1975, paragraph 131). Since those three conditions must all be satisfied, if any one of them is not satisfied, the entire action must be dismissed and it is not necessary to consider the other conditions (Case C-146/91 *KYDEP* v *Council and Commission* [1994] ECR I-4199, paragraph 81, and *Atlanta* v *European Community*, paragraph 65).

40 Since the Community judicature is not required to examine in a particular order the conditions giving rise to the liability of an institution (Case C-257/98 P *Lucaccioni* v *Commission* [1999] ECR I-5251, paragraph 13), the condition relating to the existence of a causal link between the damage alleged and the adoption of Regulation No 2340/90 will be examined first.

41 According to settled case-law, there is a causal link for the purposes of the second paragraph of Article 215 of the Treaty where there is a direct link of cause and effect between the fault allegedly committed by the institution concerned and the damage pleaded, the burden of proof of which rests on the applicant (Case T-168/94 *Blackspur and Others* v *Council and Commission* [1995] ECR II-2627, paragraph 40, and Joined Cases T-213/95 and T-18/96 *SCK and FNK* v *Commission* [1997] ECR II-1739, paragraph 98).

42 The documents before the Court, in particular those relating to proceedings before the Polimeles Protodikio Athinon and the Efetio Athinon, show that the Central Bank of Iraq refused to pay the sum owed to the applicant, pleading compliance with United Nations Security Council Resolutions 661 (1990), 670 (1990) and 687 (1991). Believing itself bound by those resolutions, the Central Bank of Iraq justified its refusal by the impossibility of making that payment without acting in breach of the freeze on Iraqi funds imposed by the United Nations Security Council.

43 In those circumstances, the non-payment of the sum owed to the applicant cannot be regarded as the consequence of the adoption by the Iraqi Government of any measure of retaliation against Regulation No 2340/90 and the maintenance of the Community embargo. That conclusion, which was moreover confirmed by the applicant's representative at the hearing, is supported by the preparedness of the Iraqi Government to negotiate with the applicant in order to resolve their dispute, notwithstanding the permanence of the Community embargo, as is clear from the minutes of the meetings between the representatives of the contracting parties in July 1994 and July 1995. In the first set of minutes, the lifting of the embargo is not mentioned as one of the conditions to which Iraq stated the payment of its debts to the applicant by means of the Iraqi assets frozen in banks in the United States to be subject. In the minutes of the second meeting, the embargo is mentioned in the following terms: '[t]he two parties will meet again in Athens or Baghdad within three months with the aim [of fixing] the procedure and timetable of payment either through oil and oil products or by other means, taking [into] consideration the continuation or the lifting of [the] embargo and shall find the final solution for the legal matters [pending] between the two sides'. Contrary to the applicant's submission, those minutes do not show that the Iraqi authorities intended to make any negotiated solution conditional on the lifting of the embargo. They show rather that the intention of the representatives of the contracting parties was to underline the need to take account, in choosing the method of payment, of the limits imposed by the embargo. Moreover, that interpretation is confirmed by the applicant's declaration to the effect that it is prepared to accept from the Iraqi Government a compensatory payment by means of oil or oil products on condition that the Court confirm that, in doing so, it is not in breach of the rules imposed by the embargo (see paragraph 32 above). Quite clearly, that declaration implies that the applicant still considers an agreement with Iraq to that effect to be feasible.

44 Furthermore, even if the Central Bank of Iraq had relied on Regulation No 2340/90 to justify the non-payment of its debt to the applicant, the Court observes, as did the Commission, that the transaction at issue does not come within the scope of that regulation. Article 2(2) and (3) of that regulation prohibits 'the sale or supply of any commodity or product, wherever it originates or comes from... to any natural or legal person in Iraq or Kuwait' and 'any activity the object or effect of which is to promote such sales or supplies'. The Court finds that that prohibition does not apply to financial transactions relating

to supplies which, as in the present case, were wholly carried out more than a year before the date of entry into force of the regulation and which do not have as their object or effect to promote supplies after that date. The Community embargo imposed by Regulation No 2340/90 could not therefore in any event have constituted an obstacle to payment by the Central Bank of Iraq of the sum owed to the applicant by the Iraqi Government.

45 In those circumstances, the fact that, as the applicant has claimed, the maintenance of the Community embargo may possibly prevent payment of the debt at issue by a compensatory amount in oil or oil products is immaterial. The method of payment initially chosen by the contracting parties was that of bank credit guaranteed by the issue of a letter of credit by the Central Bank of Iraq. The fact that that method of payment has become, in fact, inoperative because of the Central Bank of Iraq's refusal, on the ground of the adoption of the abovementioned United Nations Security Council resolutions and not of the implementation of measures of retaliation against the Community embargo, is in itself sufficient to preclude the existence of a direct causal link between the adoption of Regulation No 2340/90 and the damage alleged by the applicant consisting in the temporary impossibility of recovering its debt from the Iraqi Government.

46 It follows from all the foregoing that the applicant has not demonstrated the existence of a direct causal link between the damage alleged and the adoption of Regulation No 2340/90.

47 In the absence of such a causal link, the applicant cannot successfully claim that the Community legislature failed to exercise its discretion to provide for compensation in favour of undertakings in the same position as the applicant.

48 Since one of the conditions to which non-contractual liability on the part of the Community under the second paragraph of Article 215 of the Treaty is subject is not satisfied, the applicant's claim for compensation must be rejected and it is not necessary to consider the other conditions giving rise to that liability.

49 However, taking account of the particular circumstances of the case, the plea alleging breach by the defendants of the principle of non-discrimination must be examined separately.

50 The applicant submits that the institutions have infringed that principle by adopting Regulations No 3155/90 and No 3541/92, which introduced derogations, in favour of certain situations, to the prohibition imposed by the embargo. Regulation No 3155/90, which, pursuant to United Nations Security Council Resolution 661 (1990), extends the embargo to the provision of non-financial services with the object or effect of promoting the economy of Iraq or Kuwait, provides in Article 1(2) that the prohibition imposed in Article 1(1) is not to apply to non-financial services resulting from contracts or amendments to contracts concluded before the entry into force of the ban laid down in Regulation No 2340/90, where their execution began before that date. Regulation No 3541/92, which was adopted in order to comply with United Nations Security Council Resolution 687 (1991), prohibits the satisfying of claims made by any natural or legal person in, or resident in, Iraq, or any body controlled by such persons, under or in connection with a transaction the performance of which was affected, directly or indirectly, wholly or in part, by the measures decided on pursuant to United Nations Security Council Resolution 661 (1990) and related resolutions.

51 According to settled case-law, for the Community institutions to be in breach of the principle of non-discrimination, they must be shown, in particular, to have treated like cases differently, thereby placing some traders at a disadvantage by comparison with others, without such differentiation being justified by the

existence of substantial objective differences (see, in particular, Joined Cases T-164/96 to T-167/96, T-122/97 and T-130/97 *Moccia Irme and Others* v *Commission* [1999] ECR II-1477, paragraph 188).

52 In that regard, suffice it to state that, as was found in paragraph 44 above, the applicant's situation does not fall within the scope of Regulation No 2340/90 and cannot therefore be equiparated to the situations which were taken into consideration in Regulations Nos 3155/90 and 3541/92. In those circumstances, the applicant cannot complain that the Community legislature has acted in breach of the principle of non-discrimination in so far as it failed to provide a mechanism for compensation in favour of undertakings in the same situation as the applicant.

53 It is clear from all the foregoing that the application must be dismissed in its entirety.

54 In the light of the foregoing, it is no longer necessary to analyse the issue of limitation raised by the Council and the Commission.

Costs

55 Under Article 87(2) of the Rules of Procedure, 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 defendants have applied for costs and the applicant has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. **Dismisses the application;**

2. **Orders the applicant to pay the costs.**

Mengozzi Tiili Moura Ramos

Delivered in open court in Luxembourg on 24 April 2002.

H. Jung
Registrar

P. Mengozzi
President