

JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)
24 September 1996 *

In Case T-509/93,

Richco Commodities Ltd, a company incorporated under Bermudan law, established at Hamilton (Bermuda), represented by P. V. F. Bos and J. G. A. van Zuuren, of the Rotterdam Bar, with an address for service in Luxembourg at the Chambers of Marc Loesch, 11 Rue Goethe,

applicant,

v

Commission of the European Communities, represented by Berend Jan Drijber and Nicholas Khan, of its Legal Service, and, at the hearing, by Marie-José Jonczyk, Legal Adviser, acting as Agents, 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 for annulment of the decision of the Commission of 12 July 1993 addressed to the State Export-Import Bank of Ukraine,

* Language of the case: Dutch.

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

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

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 25 April 1996,

gives the following

Judgment

Legal background

1 On 16 December 1991, having established the need to provide food and medical aid to the Soviet Union and its constituent Republics, the Council adopted Decision 91/658/EEC granting a medium-term loan to the Soviet Union and its constituent Republics (OJ 1991 L 362, p. 89, hereinafter 'Decision 91/658'), which provides as follows:

'Article 1

1. The Community shall grant to the USSR and its constituent Republics a medium-term loan of not more than ECU 1 250 million in principal, in three successive instalments and for a maximum duration of three years, in order to enable agricultural and food products and medical supplies (...) to be imported.

Article 2

For the purposes of Article 1, the Commission is hereby empowered to borrow, on behalf of the European Economic Community, the necessary resources that will be placed at the disposal of the USSR and its constituent Republics in the form of a loan.

Article 3

The loan referred to in Article 2 shall be managed by the Commission.

Article 4

1. The Community is hereby empowered to finalize, in concert with the authorities of the USSR and its constituent Republics (...), the economic and financial conditions to be attached to the loan, the rules governing the provision of funds and the necessary guarantees to ensure loan repayment.

(...)

3. Imports of products financed by the loan shall be effected at world market prices. Free competition shall be guaranteed for the purchase and supply of products, which shall meet internationally recognized standards of quality.'

2 On 9 July 1992 the Commission adopted Regulation (EEC) No 1897/92 laying down detailed rules for the implementation of a medium-term loan to the Soviet Union and its constituent Republics (OJ 1992 L 191, p. 22, hereinafter 'Regulation No 1897/92'), which provides:

'Article 2

The loans shall be concluded on the basis of agreements entered into between the Republics and the Commission which shall include, as conditions for disbursement of the loan, the requirements set out in Articles 3 to 7.

(...)

Article 4

1. The loans shall only finance the purchase and supply under contracts that have been recognized by the Commission as complying with the provisions of Decision 91/658/EEC and with the provisions of the agreements referred to in Article 2.

2. Contracts shall be submitted to the Commission for recognition by the Republics or their designated financial agents.

Article 5

Recognition referred to in Article 4 shall only be granted subject to fulfilment of, in particular, the conditions referred to in this Article.

1. The contract was awarded following a procedure guaranteeing free competition.
(...)

2. The contract offers the most favourable terms of purchase in relation to the price normally obtained on the international markets.’

3. On 13 July 1992 the Community and Ukraine signed, pursuant to Regulation No 1897/92, a Memorandum of Understanding establishing the basis on which the Community was to grant to Ukraine the loan provided for by Decision 91/658. It was thereby provided that the Community, as lender, would grant to Ukraine, as borrower, through the intermediary of its financial agent, the State Export-Import Bank of Ukraine (‘the SEIB’), a medium-term loan of the principal sum of ECU 130 million for a maximum term of three years. The Memorandum of Understanding states:

‘6. The proceeds of the loan, less commissions and costs incurred by the EEC, shall be disbursed to the Borrower and applied, according to the terms and conditions of the Loan Agreement, exclusively to cover irrevocable documentary credits

issued by the agent of the Borrower in international standard form pursuant to delivery contracts provided that such contracts and documentary credits have been approved by the Commission of the European Communities as complying with the Council decision of 16 December 1991 and the present Memorandum of Understanding.'

According to clause 7 of the Memorandum of Understanding, approval of the conformity of the contract was subject to fulfilment of certain conditions. These included a requirement that the Ukrainian organizations were, when selecting suppliers established in the Community, to seek at least three offers from undertakings independent of each other.

- 4 The Community, Ukraine and its financial agent, the SEIB, also signed on 13 July 1992 the loan agreement provided for by Regulation No 1897/92 and the Memorandum of Understanding (hereinafter 'the loan agreement'). That agreement sets out in precise terms the machinery for the disbursement of the loan. It establishes a facility to which recourse may be had during the drawing period (20 August 1992 to 20 April 1993), with a view to the advance of sums authorized for payment of the price of goods supplied.
- 5 The disbursement machinery, based on normal practice in international trade, is described in Part III of the loan agreement as follows:

'5. DRAWING

5.1 Procedure

- (a) The Agent, on behalf of the Borrower, shall notify the Lender of a proposed Disbursement by issuing an Approval Request (...)
- (b) If the Drawing Period has commenced and if the Lender is satisfied, on the basis of the information contained in the Approval Request and in its absolute discretion, that the purpose of the proposed Disbursement is in accordance

with Clause 3 and the Memorandum of Understanding and the Confirming Bank named in the Approval Request is acceptable to the Lender, it shall within a reasonable delay issue a Notice of Confirmation substantially in the form of Schedule 3.

- (c) Following receipt of a Notice of Confirmation in respect of a proposed Disbursement the Agent shall, on behalf of the Borrower, issue a Disbursement Request within the Disbursement Period in accordance with the provisions of Clause 5.3.

(...)

5.3 *Disbursement*

- (a) A Disbursement shall, subject to Clause 5.5, only be made available for drawing pursuant to a Disbursement Request received by the Lender from the Agent to meet a payment falling due from the Agent to an Approved Confirming Bank. All Disbursement Requests once given shall be irrevocable and shall (subject to Clauses 10 and 12) oblige the Borrower to become indebted in the stated amount on the stated day.

(b) Each Disbursement Request shall:

- (i) be in the form set out in Schedule 4;
- (ii) be signed by the Agent;
- (iii) request the relevant payment to be made not later than the last Business Day of the Drawing Period to the Approved Confirming Bank by having the account of such bank credited with the amount of such payment;
- (iv) be accompanied by documents as specified in Schedule 4.'

- 6 The irrevocable documentary credit machinery provided for is in accordance with the 'uniform customs and practices for documentary credits' elaborated by the Paris International Chamber of Commerce and adopted by the Community as the standard form of documentary credit to be used by issuing banks.

Facts

- 7 In response to an informal invitation to tender issued in May 1993 for the purchase of wheat, Ukrimpex, an organization acting on behalf of Ukraine, received seven tenders, including that of the applicant. Ukrimpex accepted that tender, which was the only one guaranteeing delivery of the wheat by 15 June 1993, even though it was not the most advantageous in terms of price. Under the contract, which was concluded on 26 May 1993, the applicant undertook to supply 40 424 tonnes of wheat at a price of ECU 137.47 per tonne, CIF free out one safe Ukrainian Black Sea port, with guaranteed shipment by 15 June 1993.
- 8 Following notification of the contract by the SEIB to the Commission for approval by the latter, and after the personal intervention of Mr Demianov, Vice-Prime Minister of Ukraine, who requested approval of the contract with the minimum of delay, the Commission stated in a letter of 10 June 1993 addressed to Mr Demianov that it was unable to approve the contract submitted to it by the SEIB. The Commission considered that that contract did not offer the best purchase terms, particularly as regards the price, which was regarded as exceeding the acceptable level. The Commission stated in the same letter that it was prepared, in view of the seriousness of the food situation, to open the Community stocks for immediate delivery to Ukraine of 50 000 tonnes of wheat at a price which could be as much as US \$30 per tonne lower than that proposed by the applicant. That delivery formed the subject of a fresh invitation to tender in which the applicant's tender was accepted.
- 9 On 11 June 1993 Ukrimpex informed the applicant of the Commission's refusal decision and requested it to defer the transportation of the goods. The applicant replied that it had already chartered a vessel. Thus nearly 40 000 tonnes of grain were in fact delivered.

- 10 By letter of 12 July 1993 addressed to the SEIB and signed by the Commissioner, Mr R. Steichen, the Commission officially informed the SEIB of its refusal to approve the contract which had been submitted to it. Mr Steichen stated in that regard: 'The Commission can only recognize delivery contracts if such contracts fulfil all the criteria listed in Council Decision 658/91, Commission Regulation 1897/92 and the Memorandum of Understanding. Furthermore, Clause 5.1(b) of the Loan Agreement concluded with Ukraine on 13 July 1992 provides that the Commission shall issue Notices of Confirmation at its "absolute discretion".' He continued as follows: 'The Commission concluded that the contract submitted with your Approval Request of 31 May did not satisfy all criteria stipulated and that it must, therefore, decline to exercise its discretion to issue a Notice of Confirmation.' He stated that the reason for that refusal was that the price agreed was well above the level that the Commission regarded as acceptable and that this was one of the conditions for the credit operation laid down in Article 4(3) of Decision 91/658 and Article 5(2) of Regulation No 1897/92. He concluded from this: 'In these circumstances, although I appreciate that Ukraine's requirements are urgent, the Commission, taking all the circumstances into account, cannot accept that the contract submitted offers the most favourable terms of purchase (...).'

Procedure and forms of order sought

- 11 It was in those circumstances that, by application lodged at the Registry of the Court of First Instance on 10 September 1993, the applicant brought the present action.
- 12 By document lodged at the Registry on 30 November 1993 the Commission raised an objection of inadmissibility.
- 13 Upon hearing the Report of the Judge-Rapporteur, the Court of First Instance (Third Chamber) decided to open the oral procedure without any preparatory inquiry.

14 At the hearing on 25 April 1996 the parties presented oral argument and answered questions put to them by the Court.

15 The applicant claims that the Court should:

— annul the decision, or at least the act, of 12 July 1993 addressed by the Commission to the SEIB;

— order the Commission to pay the costs.

16 In its objection of inadmissibility, the Commission contends that the Court should:

— dismiss the action as inadmissible;

— order the applicant to pay the costs.

17 In its observations on the objection of inadmissibility, the applicant claims that the Court should:

— dismiss the objection of inadmissibility;

— alternatively, reserve its decision on the objection until final judgment;

— order the Commission to produce to the Court the full text of the two loan agreements and allow the applicant to submit its observations in that regard.

The objection of inadmissibility

- 18 In support of its objection of inadmissibility, the Commission advances two distinct pleas. It maintains, as its principal argument, that the contested measure does not constitute an act which is actionable within the meaning of the first paragraph of Article 173 of the Treaty. In the alternative, it asserts that the act which the applicant is seeking to have annulled is not of direct concern to it within the meaning of the fourth paragraph of Article 173 of the Treaty.

The objection concerning the absence of an actionable measure

Arguments of the parties

- 19 The Commission first points out that the legal machinery set up to assist Ukraine is based on two series of provisions: first, what it terms provisions of public law (Decision 91/658, Regulation No 1897/92) and, second, what it terms provisions of private law, namely the Memorandum of Understanding and the loan agreement. It observes that its status is that of a third party as regards the contractual relationship existing under private law between Ukrimpex and the applicant, and that the applicant's status is that of a third party as regards the relationship, based on the matters agreed, existing between the Community, Ukraine and its financial agent, the SEIB. The mere fact that the contested act was adopted on the basis of a Council decision and of a Commission regulation adopted pursuant to that decision is not enough for that act to be classified as an administrative measure.
- 20 The Commission notes that the contract between the applicant and Ukrimpex provides for disputes to be determined by private arbitration, whereas the loan agreement contains a jurisdiction clause. Consequently, the Community judicature is not competent to hear disputes either between the Ukrainian authorities and the Commission or between the parties to the supply contract.

- 21 Lastly, the Commission refers to the judgment in Case 118/83 *CMC and Others v Commission* [1985] ECR 2325, in which the Court of Justice held that, under the system set up by the Lomé Convention, there could be no actionable measure within the meaning of Article 173 of the Treaty.
- 22 The applicant asserts, first, that the relationship between the Commission and Ukraine cannot fall within the scope of private law, as the Commission claims, since the Commission is obliged, when credits are granted, to observe the rules published in the *Official Journal of the European Communities*.
- 23 Second, it maintains that actionable measures comprise all acts of the institutions which are intended to produce legal effects, even towards third parties. In the present case, according to the applicant, Article 5 of Regulation No 1897/92 is directly applicable and creates a right to recognition of contracts submitted to the Commission. The Commission's decision, which was based on that provision, produces *a fortiori* legal effects.
- 24 Third, in the present case, and in contrast to the judgment in *CMC and Others v Commission*, cited above, the collaboration between the Commission and the borrower was not confined to those two parties but extended, on the Commission's initiative, to the parties who were signatories to the sale contract. Thus, the Commission addressed itself directly to the applicant and Ukrimpex and actively intervened in the contractual relations between them, in particular by attempting to impose a price.

Findings of the Court

- 25 It is settled case-law that an action for annulment may be brought against all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects (judgment of the Court of Justice in Case 22/70 *Commission v Council* [1971] ECR 263).

- 26 The Court finds in the present case that, as is apparent from the loan agreement, to which the SEIB is a party, where the Commission issues a notice of confirmation, the SEIB, to whom it is addressed, is entitled to issue a disbursement request. Conversely, the SEIB does not have that right if the Commission refuses to issue a notice of confirmation.
- 27 Consequently, an act by which the Commission refuses to recognize a contract as being in conformity with the Community financing conditions must be regarded as producing legal effects in relation to the SEIB. It therefore constitutes an actionable measure within the meaning of the first paragraph of Article 173 of the Treaty.
- 28 In so far as the objection of inadmissibility is founded on the absence of an actionable measure within the meaning of the first paragraph of Article 173 of the Treaty, it must therefore be rejected.

The objection that the act which the applicant is seeking to have annulled is not of direct concern to it

Arguments of the parties

- 29 In the Commission's view, the contested letter of 12 July 1993 cannot be regarded as being of direct concern to the applicant within the meaning of the fourth paragraph of Article 173 of the Treaty. That letter was not, and could not have been, intended to affect the validity and the performance of the contract concluded between the applicant and Ukrimpex. The Commission's role is solely to verify whether the financing conditions laid down by the provisions are fulfilled and, if so, to authorize disbursement of the loan.

30 The Commission refers in that regard to the judgment of the Court of Justice in Case 126/83 *STS v Commission* [1984] ECR 2769, which it claims raised comparable issues in the context of the Lomé Convention. In that case, the Court of Justice considered that undertakings which submit tenders or are awarded contracts are neither the addressees of the measures adopted by the Commission in relation to Community financing nor entitled to claim that those measures are 'of direct concern' to them. That analysis is applicable *a fortiori* in the present case, inasmuch as the Commission plays a much smaller role than in the context of the Lomé Convention.

31 The Commission denies the existence of any parallel with the decision in Joined Cases 41/70, 42/70, 43/70 and 44/70 *International Fruit Company and Others v Commission* [1971] ECR 411, in which it was held that a regulation is of direct concern to an undertaking where it confers on the national authorities no discretion to adopt decisions on the basis of that regulation. In the present case, Ukraine is not applying a Community regulation but is concluding a commercial contract on its own initiative, in its own name and for its own account.

32 Lastly, the Commission adds that the mere fact that Community financing is an essential condition of delivery is irrelevant in law and is not enough to warrant the conclusion that the applicant is directly concerned.

33 The applicant maintains that the contested decision of 12 July 1993 is of individual concern to it, and also of direct concern, for several reasons.

34 First, the Court of Justice held in Joined Cases 106/63 and 107/63 *Toepfer and Getreide-Import v Commission* [1965] ECR 405 that a decision of an institution is of direct concern to an individual where that decision takes the place of a decision of the national authorities. That ruling is applicable by analogy to the present case, on the ground that the Commission's recognition decision takes the place of the decision of Ukraine, of the SEIB or of Ukrimpex whether or not to proceed with

the purchase of wheat. Performance of the contract is totally dependent, in fact, on the grant of Community credits, as is apparent, moreover, from the sale contract, which contains a suspensory condition.

35 Second, the SEIB, as addressee of the decision of the Commission, has no discretion in the event that the Commission refuses to recognize the contract. In the light of the reasoning of the Court of Justice in *International Fruit Company and Others*, cited above, it is the Commission's decision, therefore, which is of direct concern to the applicant.

36 Third, the Commission has no discretion in applying the conditions laid down in Regulation No 1897/92, which produces direct effects. Consequently, the contracting undertakings are entitled to require the Commission to adopt a decision, whether favourable or unfavourable, concerning recognition of the contract. If those undertakings are deprived of that right, their interests are affected and they are therefore directly concerned.

37 Fourth, the very nature and scope of the Commission's decision are such as to lead to the conclusion that the applicant is directly concerned (judgment of the Court of Justice in Case 100/74 *CAM v Commission* [1975] ECR 1393, paragraph 5). The decision is in fact intended to enable Ukraine to acquire products of prime necessity on normal terms of supply. A refusal decision may result in the contract falling through or, as in the present case, in a supplier being required to deliver at prices which are not in line with market conditions.

38 Fifth, the case-law of the Court of Justice concerning the Lomé Convention is not applicable in the present case, since the Commission took an active part in the elaboration and progress of the contract, and indeed in the elaboration and performance of various other supply contracts concluded with the authorities of other central and eastern European countries.

Findings of the Court

- 39 According to the fourth paragraph of Article 173 of the Treaty, any natural or legal person may institute proceedings against a decision which, although in the form of a decision addressed to another person, is of direct and individual concern to the former.
- 40 In the present case, inasmuch as the contested measure takes the form of a letter addressed by the Commission to the SEIB on 12 July 1993, it is necessary to determine whether that measure is of direct and individual concern to the applicant.
- 41 First of all, the Commission has not denied that the applicant is individually concerned. Having regard to the circumstances of the case, the Court considers that only the question whether the contested decision is of direct concern to the applicant need be examined.
- 42 The Community rules and the agreements concluded between the Community, Ukraine and the SEIB provide for a division of powers between the Commission and the agent appointed by Ukraine to arrange the purchase of wheat. It is for that agent — in the present case, Ukrimpex — to select the other contracting party by means of an invitation to tender and to negotiate and conclude the contract. The Commission's role is merely to verify that the conditions for Community financing are fulfilled and, where necessary, to acknowledge, for the purposes of disbursement of the loan, that such contracts are in conformity with the provisions of Decision 91/658 and with the agreements concluded with Ukraine and the SEIB. It is not for the Commission, therefore, to assess the commercial contract with reference to any other criteria.

- 43 It follows that the undertaking to which a contract is awarded has a legal relationship only with the party with whom it contracts, namely Ukrimpex, which is authorized by Ukraine to conclude contracts for the purchase of wheat. The Commission, for its part, has legal relations only with the borrower and its financial agent, the SEIB, which notifies it of commercial contracts so that their conformity can be recognized, and which is the addressee of the Commission's decision in that regard.
- 44 The action of the Commission does not therefore affect the legal validity of the commercial contract concluded between the applicant and Ukrimpex; nor does it modify the terms of the contract, such as the prices agreed by the parties. Thus, irrespective of the Commission's decision not to recognize the agreements as being in conformity with the applicable provisions, the contract of 26 May 1993 remains validly concluded on the terms agreed between the parties.
- 45 The fact that the Commission was in contact with the applicant or with Ukrimpex cannot affect that assessment of the legal rights and obligations which each of the parties involved has under the applicable legislation and contractual agreements. Moreover, as regards the admissibility of the application for annulment, the exchanges alleged by the applicant do not show that the Commission went beyond its proper role, which is to recognize, or to decline to recognize, the conformity of the contract. This is *a fortiori* the position as regards the alleged contacts between the Commission and subsidiaries of the applicant in relation to contracts which are distinct from the contract with which the present case is concerned.
- 46 Whilst it is true that, on receiving from the Commission a decision finding that the contract is not in conformity with the applicable provisions, the SEIB cannot issue a documentary credit capable of being covered by the Community guarantee, nevertheless, as stated above, the decision affects neither the validity nor the terms of the contract concluded between the applicant and Ukrimpex. The Commission's

decision does not take the place of a decision taken by the Ukrainian national authorities, since the Commission may only examine the conformity of contracts for the purposes of Community financing.

- 47 Furthermore, as regards the direct applicability of Regulation No 1897/92, on which the applicant relies, the Court observes that Article 5 of that regulation lists on a non-exhaustive basis — as is apparent from the use of the adverbial phrase ‘in particular’ — the conditions which contracts must fulfil in order to qualify for Community financing; in addition, Article 4(1) of the regulation expressly refers to the provisions of the agreements concluded between the Ukraine and the Commission. As regards the loan agreement, which sets out in precise terms the detailed rules pursuant to which Community financing is granted, Article 5.1 thereof refers to the absolute discretion of the Commission. In those circumstances, the applicant’s argument does not appear to be well founded.
- 48 Lastly, in order to establish that the contested decision is of direct concern to it, the applicant cannot rely on the presence in the commercial contracts of a suspensory clause making the performance of the contract and payment of the contract price subject to acknowledgement by the Commission that the criteria for disbursement of the Community loan are fulfilled. Such a clause is a link which the contracting parties decide to make between the contract concluded by them and a contingent future event: their agreement will be binding only if the latter occurs. The admissibility of an application under the fourth paragraph of Article 173 of the Treaty cannot, however, be made dependent on the intention of the parties. The applicant’s argument must therefore be rejected.
- 49 In view of the foregoing, the Court considers that the Commission’s decision of 12 July 1993, addressed to the SEIB, is not of direct concern to the applicant, within the meaning of the fourth paragraph of Article 173 of the Treaty. Consequently, the application for annulment of that decision must be declared inadmissible.

Costs

50 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 applicant has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. **Dismisses the action as inadmissible;**
2. **Orders the applicant to pay the costs.**

Briët

Vesterdorf

Potocki

Delivered in open court in Luxembourg on 24 September 1996.

H. Jung

C. P. Briët

Registrar

President