JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)

25 June 1997 *

In Case T-7/96,

Francesco Perillo, trading as ITAM SIDER, residing in Altamura, Italy, represented by Mario Spandre, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Pierre Thielen, 21 Rue de Nassau,

applicant,

v

Commission of the European Communities, represented by Étienne Lasnet, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: French.

APPLICATION under Article 178 and the second paragraph of Article 215 of the EC Treaty for compensation for the damage allegedly suffered by the applicant in connection with a programme financed by the European Development Fund,

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

composed of: A. Saggio, 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 29 January 1997

gives the following

Judgment

Legislative background and facts

1 By Decision 91/400/ECSC, EEC of 25 February 1991, the Council and the Commission approved the Fourth ACP-EEC Convention, signed at Lomé on 15 December 1989 (OJ 1991 L 229, p. 1, hereinafter 'the Convention'). Under Article 222 of the Convention, action financed under the Convention is to be imple-

mented by the ACP States and the Community in close cooperation. That obligation of cooperation *inter alia* places on the ACP States the responsibility of preparing and presenting dossiers for projects and programmes, on the Community the responsibility of taking financing decisions for the projects and programmes and on the ACP States and the Community the joint responsibility of ensuring that such projects and programmes are implemented properly, promptly and efficiently.

2 To that end Article 316 of the Convention provides that the Commission is to be represented in each ACP State or regional grouping of ACP States by a delegate. Article 317 of the Convention gives the delegate the task of facilitating and expediting the preparation, appraisal and execution of projects and programmes, in close cooperation with the national authorizing officer of the ACP State to which he is assigned. According to Article 312 of the Convention the national authorizing officer is to be appointed by the government of the ACP State concerned and represents it in all financial operations involving ACP-EEC cooperation, such as those relating to resources of the European Development Fund (hereinafter 'the EDF').

3 In 1993, ITAM SIDER, an undertaking constituted under Italian law and owned by the applicant, was awarded a supply contact under a programme financed by the EDF. The contract was for the supply of 40 000 empty gas bottles to Société Mauritanienne de Gaz (Somagaz, established in Nouakchott, Mauritania), which thus assumed the role of contracting authority.

4 The contract was signed on 27 June 1993 and the contract price was fixed at 66 384 000 ouguiyas (agreed as equivalent to ECU 457 144). The contract provided: 'in consideration of the payments to be made by the contacting authority to the other party under the conditions laid down in the contract, the successful tenderer undertakes ... to perform the contract in accordance with the terms thereof' and 'the contracting authority undertakes ... to pay to the successful tenderer, for performance of the contract, the sums provided for in the contract'.

5 Article 43 of the general conditions stipulates that any failure by a party to discharge any of his obligations under the contract constitutes a breach of contract and that in such circumstances the aggrieved party is entitled to claim compensation and/or terminate the contract. Article 44 lays down the conditions governing termination by the contracting authority.

6 It is common ground that the final date for performance of the contract was set as 13 September 1993.

7 In July 1993, ITAM SIDER provided Somagaz with a performance guarantee issued by a bank, covering 10% of the contract price. At the end of the same month, ITAM SIDER informed Somagaz that it had commenced production of the bottles and announced that its factory would be closed from 5 to 28 August 1993.

8 On 22 August 1993 Somagaz asked ITAM SIDER to send its request for an advance payment of 60% of the contract price, accompanied by a bank bond to cover that advance. ITAM SIDER sent the request, but sent with it a bank bond covering only 25% of the contract price. Somagaz then paid ITAM SIDER an advance corresponding to 25% of the contract price.

9 On 5 October 1993 ITAM SIDER sent 7 007 bottles to Mauritania. On 1 December 1993 it sent a second batch of 24 381 bottles, followed by a third batch of 6 779 bottles on 7 February 1994 and a last batch of 1 889 bottles on 14 February 1994.

10 On 6 December 1993 Somagaz received the first batch and made a number of criticisms about the quality of the bottles. By faxes of 7 and 13 December 1993 Somagaz informed the applicant of those criticisms. By letter of 14 December 1993

it also gave notice of those criticisms to the Mauritania authorizing officer, asking him to arrange for an expert to assess the quality of the bottles.

11 By letter of 20 December 1993, the Mauritanian authorizing officer asked the Commission delegate in Mauritania to appoint an expert to examine the quality of the bottles. The delegate complied by asking an independent expert, of French nationality, to examine the bottles and give his views on the nature and extent of any discrepancies between the technical characteristics of the bottles delivered and the technical specifications prescribed under the contract. To that end, a consultancy contract was concluded between the Commission and the firm of specialized consultants to which the expert appointed belonged. The contract was signed on 18 February 1994 in Paris by a representative of that firm and on 20 February 1994 in Nouakchott by the Commission delegate in Mauritania.

12 By fax of 20 February 1994, Somagaz informed the applicant that the expert appointed by the Commission would start work in Mauritania on 21 February 1994 and invited him to attend. On 24 February 1994, the applicant replied to Somagaz that because of flight reservation problems he could only be in Mauritania on 5 and 6 March 1994 and asked for the expert's visit to be arranged for those dates. His request was not granted. On 1 March 1994, the expert determined that the bottles did not meet the prescribed technical specifications in numerous respects and that because of the attendant risks their use could not be contemplated.

13 By fax of 8 March 1994, Somagaz informed that applicant that it refused to accept the first batch because it did not conform to the specifications and formally advised him that he should deliver the balance of the bottles before 23 March 1994 otherwise the contract would be terminated. On 21 April 1994, Somagaz terminated the contract by a fax addressed to the applicant. The grounds for termination were failure to deliver the number of bottles asked for and the defects found by the expert in the first batch of bottles.

14 The other batches of bottles were held at the port of Nouakchott, upon their arrival in Mauritania, for a considerable period. The expert noted in a postscript to his report that 27 000 bottles had been held in that port for almost three months. By faxes of 26 June and 7 August 1994, Somagaz informed the applicant that it was prepared to accept the batches of bottles held at the port of Nouakchott provided that ITAM SIDER arranged for them to be taken from the port to its premises.

15 By fax of 30 June 1994, the applicant informed Somagaz that he would appoint an expert to give a second opinion on the first batch of bottles. By fax of 17 July 1994, Somagaz indicated that it had no objection to a second opinion being obtained. The applicant did not ultimately appoint an expert and therefore no second opinion was obtained.

16 On 18 September and 13 December 1994, Somagaz acknowledged receipt of the other batches of bottles. According to the applicant, those bottles and also those in the first batch were used by Somagaz.

17 By letter of 24 January 1995, the applicant expressed the view to the Commission that the termination of contract notified by Somagaz by fax of 21 April 1994 had not been effected in accordance with the conditions laid down by Article 44 of the general conditions.

18 The applicant submitted invoices for its supplies to Somagaz but the latter has not to date paid the balance of the contract price (75%). According to the applicant, the general manager of Somagaz told him that, in return for a commission of 10%,

he would raise no further objection to payment for the bottles. The applicant claims that he can produce witnesses to prove that attempted bribery.

19 In 1995 ITAM SIDER found itself unable to pay its Italian creditors, who applied for it to be made bankrupt. The undertaking was not declared bankrupt but its workforce was reduced considerably. In addition a number of banks cancelled the credit facilities which they had granted to the applicant. Somagaz sought to recover the advance corresponding to 25% of the contract price but was unable to do so since the bank guarantee covering that amount had expired on 31 December 1993. Somagaz was, however, able to execute the performance bond representing 10% of the contract price.

Procedure and forms of order sought

20 In those circumstances the applicant, by application lodged at the Registry of the Court of First Instance on 17 January 1996, brought this action.

21 To prove his allegation that Somagaz used the bottles delivered to it by him, the applicant attached to his reply the transcript of a telephone conversation between him and the general manager of Somagaz which he recorded on a cassette.

22 Upon hearing the report of the Judge-Rapporteur, the Court decided to open the oral procedure without any preparatory inquiries. However, by way of measures of organization of procedure, the parties were asked to reply in writing to a number of questions before the hearing.

23 The parties presented oral argument and answered the questions put to them orally by the Court at the public hearing on 29 January 1997.

24 The applicant claims that the Court should:

— order the defendant to pay compensation of ECU 838 776, subject to increase or decrease during the proceedings,

— order the defendant to pay interest on the amounts due as from 14 April 1994,

— order the defendant to pay the costs;

— declare the judgment provisionally enforceable notwithstanding any appeal.

25 The defendant contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

Law

Arguments of the parties

26 The applicant objects to the conduct of the Commission delegation in Mauritania, in that it supported Somagaz and declined to examine the case impartially. In so far as he gave specific evidence for that accusation in his pleadings and at the hearing, the applicant criticizes the delegation for failing to inform the Commission of Somagaz's bad faith and the attempted bribery by its manager, for organizing a sham expert's report, for not ensuring that the expert's examination was carried out in the presence of both parties and was of a high standard and, finally, for not noticing the procedural irregularity in the way the contract was terminated.

27 As regards in particular the arrangements for the expert's report, the applicant states that he was invited, by fax of 20 February 1994, to an examination that was to begin on 21 February 1994. He stresses that, as a result, the arrangements precluded the involvement of both parties because, in view of the time needed to obtain a visa and make reservations for air travel to Mauritania, it was impossible for him to be in Nouakchott on 21 February 1994. According to the applicant, that disregard of his rights is attributable to the Commission delegation since it appointed the expert and made all the arrangements with him.

28 The applicant stated in the course of the proceedings that he evaluated the loss caused by that conduct at ECU 838 776. That amount is broken down as follows: ECU 338 775 (representing the 75% of the contract price remaining unpaid) as compensation for the loss arising from non-payment of his invoices, ECU 500 000 as compensation for the economic and financial loss arising otherwise than from non-payment, comprising the expenses of his visits to Mauritania in relation to the contract and the structural damage suffered by ITAM SIDER, and the provisional sum of ECU 1 as compensation for harm other than that described above. As

regards the sum of ECU 500 000, the applicant states that the failure to settle his invoices caused him to be unexpectedly deprived of financial resources, thereby rendering him insolvent, and brought about the loss of the bank credit facilities which he had enjoyed previously and the laying off of 15 of ITAM SIDER's 21 specialized staff.

29 The applicant adds that no fault is attributable to him. First, the delays in performing the contract were attributable, in part, to Somagaz's repeated promises, the fulfilment of which was always deferred, to visit the ITAM SIDER plant in order to inspect the production of the bottles and, in part, to a series of strikes by Italian hauliers in the period when the bottles were to be dispatched. The applicant considers that Somagaz's announcements of forthcoming visits were tantamount to a tacit extension of the time-limit for performance and observes that strikes are treated as *force majeure* by Article 46 of the general conditions. Secondly, the bottles delivered were of good quality. That applies both to the bottles in the first batch, the quality of which was criticized but which were nevertheless used by Somagaz, and to those in the other batches which were also used and whose quality was not even criticized.

30 The defendant states that it cannot guarantee the financing of EDF supplies unless the contractual conditions are fulfilled by the supplier concerned. However, the goods supplied by the applicant could not qualify for EDF financing since Somagaz rejected them and did so on the basis of an impartial expert's report. The defendant considers that, in those circumstances, the non-payment of the invoices and any other harm which arose are in no way imputable to the Commission delegation.

31 The defendant also contends that the applicant has not in any way refuted the expert's conclusions. It observes that the applicant does not criticize the numerous technical findings made in the report and that he abandoned his intention of obtaining a second opinion.

32 As regards bad faith or indeed the intent to bribe of which the applicant accuses the general manager of Somagaz and to which the Commission delegate was allegedly an accomplice, the defendant observes that no supporting evidence has been produced. The same applies, it says, to the applicant's allegation that the bottles were in fact used by Somagaz.

33 The defendant emphasizes, making a point entirely secondary to its arguments concerning the legality of its conduct, that the applicant's undertaking itself acted negligently by delaying performance of the contract without even asking for an extension of the period for performance. It also emphasizes that ITAM SIDER could have limited the damage by taking back the first batch of bottles rejected by Somagaz and refraining from delivering bottles after the contract was terminated by Somagaz.

34 Finally, the defendant states that ITAM SIDER was in financial difficulty long before the bottles were supplied, as shown by the fact that it was unable to obtain a bank guarantee covering 60% of the contract price. It infers that the possibility of ITAM SIDER's being declared bankrupt cannot be linked with non-payment for its supplies.

Findings of the Court

35 The Court observes, at the outset, that it has no jurisdiction to determine what rights may be available to the applicant under the contract concerned with a view to securing payment of the invoices relating to it. That question and all other matters relating to performance of the contract between the applicant and Somagaz must be dealt with in accordance with Article 48 of the general conditions, namely by amicable settlement, conciliation or arbitration. Also, by virtue of Article 178 and the second paragraph of Article 215 of the Treaty, the Court's jurisdiction in relation to actions for compensation is limited to matters of non-contractual liability.

36 It is thus inappropriate to examine to what extent the applicant and Somagaz fulfilled the terms of the contract. In particular, questions concerning compliance with delivery times, the conformity of the bottles with the technical specifications of the contract, the acceptance and use of the bottles and the manner in which the contract was terminated fall outside the jurisdiction of the Court. Nor, for the same reason, should any ruling be given on the evidence offered by the applicant, such as the recording of a telephone conversation between him and the general manager of Somagaz (see paragraph 21 above).

37 On the other hand, there is nothing to prevent the Court from examining the conduct of the Commission delegation, in the light of the Commission's obligations, and giving a decision on any non-contractual liability which might arise from it

(Case 118/83 *CMC* v *Commission* [1985] ECR 2325, paragraph 31; and Case T-451/93 *San Marco* v *Commission* [1994] ECR II-1061, paragraphs 42, 43 and 86).

38 For that purpose, the Court considers it necessary to examine whether the Commission delegation in Mauritania in fact fulfilled its obligations when making arrangements for the expert's report. It must be pointed out in that connection that it was the delegation which chose the expert, defined his terms of reference and concluded the relevant contract with him, signing it on 20 February 1994. As stated above, that action was in response to a request made on 20 December 1993 by the Mauritanian authorizing officer. It thus formed part of the delegation's obligations to 'maintain close and continuous contacts with the national authorizing officer for the purpose of analysing and remedying specific problems encountered in the implementation of development finance cooperation' laid down by Article 317(m) of the Fourth ACP-EEC Convention, which was in force at the material time. As in the case of any task entrusted to the institutions by Community rules, the Commission delegation was required to discharge that obligation in accordance with the requirements of sound administration.

39 Against that legal background, and in view of the fact that the delegation drew up preparatory contracts with the expert and helped make the arrangements for the report in the period ending on 20 February 1994, the Court considers that the delegation knew, or in any event must have known, that the expert would arrive in Mauritania and commence work immediately after signing the consultation contract, namely on 21 February 1994. Also, being aware of the fact that the applicant lived in Italy and was bound to need several days to reach Mauritania, the Commission delegation was in a position to realize that the applicant would not be able to attend the expert's examination. It may be assumed that the Commission delegation was in a position to come to an arrangement with the expert not to start work immediately after signing the contract, thus enabling the applicant to be present, like Somagaz, when the examination was carried out.

40 It follows that, although it has not thereby been demonstrated that it intended to organize a sham examination or to favour Somagaz, the fact remains that, by not making certain, when organizing the examination, that the applicant would be able to be present when it was carried out, the Commission failed to observe the requirements of sound administration incumbent upon it.

41 However, that fault does not in itself establish the Commission's liability and entitle the applicant to the compensation he claims. In that connection, the Court observes that for the Community to incur liability the applicant must prove not only the illegality of the conduct of which the institution concerned is accused and the fact of the damage but also the existence of a causal link between that conduct and the damage complained of (see Joined Cases 197/80, 198/80, 199/80, 200/80, 243/80, 245/80 and 247/80 *Ludwigshafener Walzmühle and Others* v *Council and Commission* [1981] ECR 3211, paragraph 18; Case C-257/90 *Italsolar* v *Commission* [1993] ECR I-9, paragraph 33; and Joined Cases T-481/93 and T-484/93 *Exporteurs in Levende Varkens and Others* v *Commission* [1995] ECR II-2941, paragraph 80). Moreover, it is settled case-law that the damage must be a sufficiently direct consequence of the conduct complained of (Joined Cases 64/76, 113/76, 167/78, 239/78, 27/79, 28/79 and 45/79 *Dumortier Frères and Others* v *Council* [1979] ECR 3091, paragraph 21; Case T-175/94 *International Procurement Services* v *Commission* [1996] ECR II-729, paragraph 55).

42 It is clear from the documents before the Court that the first head of damage alleged by the applicant derives, by its nature, from Somagaz's refusal to pay the balance of the contract price and that the other heads of damage invoked by the applicant are also linked with that non-payment. The Court notes in that connection that any influence which the Commission delegation's abovementioned fault had on Somagaz's decision not to pay the balance of the contract price is at most indirect and uncertain. Although it is true that, if the delegation had not committed that fault, the applicant could have been present for the expert's examination, there is on the other hand no certainty that the expert would have reached a

different conclusion. The Court also notes that the applicant did not, either in his written pleadings or in his oral submissions to the Court specifically challenge the actual content of the technical findings of the expert or the numerous divergences from the contractual technical specifications reported by the expert and that the applicant abandoned his initial intention of seeking a second opinion (see paragraph 15 above).

43 Furthermore, it is far from certain that, even if the expert's report had been favourable to the applicant, Somagaz would have paid the balance of the contract price. It must be borne in mind in that regard that, according to its fax of 21 April 1994, Somagaz's termination of the contract was motivated not only by the results of the expert's report on the bottles in the first batch but also by the delay in delivering the other bottles.

44 The existence of a sufficiently direct link between the Commission delegation's handling of the case and the non-payment of the balance of the contract price is made even more difficult to establish by the fact that the delegation was not approached to countersign invoices and was not informed by the applicant that invoices had been submitted to the competent Mauritanian authorities. That was confirmed by the defendant in reply to a question put to it by the Court at the hearing and was not denied by the applicant. There is also no certainty that invoices were actually submitted to the Mauritanian authorities since, in reply to a question from the Court on that point, the applicant merely asserted that he had submitted invoices to the contracting authority. That answer, far from showing that the Commission delegation bears responsibility for non-payment of the balance of the contract price, tends rather to raise doubts as to whether the applicant himself observed the payment procedures, in particular those laid down in Article 22 of the extract from the general terms and certain special conditions for calls for tenders for supply contracts financed by the EDF (part B) which formed an integral part of the contract.

45 Moreover, it is important to bear in mind that, according to settled case-law, where a contractual dispute between the successful tenderer and the contracting authority

in relation to a contract financed by the EDF has not been settled earlier on an amicable basis, by conciliation or by arbitration, the successful tenderer is unable to establish that the Commission's action caused it to sustain damage distinct from the damage in respect of which it ought to have sought compensation from the contracting authority in accordance with the abovementioned procedures (Case 33/82 *Murri Frères* v *Commission* [1985] ECR 2759, paragraph 38; *International Procurement Services,* cited above, paragraph 58). In this case it is common ground that the applicant has not to date contested Somagaz's refusal to pay it the balance of the contract price in accordance with the appropriate procedure.

46 Since no causal link has been established between the defendant's conduct and the damage complained of by the applicant, the application must be dismissed.

Costs

47 Under the second subparagraph of Article 87(3) of its Rules of Procedure, the Court may order a party, even if successful, to pay those costs which have arisen as a result of the conduct of that party (see, *mutatis mutandis,* Case 263/81 *List* v *Commission* [1983] ECR 103, paragraphs 30 and 31, and Case T-336/94 *Efisol* v *Commission* [1996] ECR II-1343, paragraphs 38 and 39).

48 In this case the applicant has been unsuccessful. However, account must be taken, in making an order as to costs, of the conduct of the defendant which, by making arrangements for an expert's examination without ensuring that the applicant could be present when it was carried out, did not satisfy the requirements of sound administration.

49 In those circumstances, the applicant cannot be taken to task for instituting proceedings before the Court for review of that conduct and assessment of any resultant damage. It must be observed that the defendant's conduct thus contributed to the emergence of the dispute. It is therefore appropriate to order the Commission to pay the costs in their entirety.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1. Dismisses the application;

2. Orders the defendant to pay the costs.

Saggio Tiili Moura Ramos

Delivered in open court in Luxembourg on 25 June 1997.

H. Jung A. Saggio

Registrar President