JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)

8 November 2000 *

In Case T-509/93,

Glencore Grain Ltd, formerly trading as Richco Commodities Ltd, established in Hamilton (Bermuda), represented by M. Slotboom, 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 M. Loesch, 11 Rue Goethe,

applicant,

v

Commission of the European Communities, represented initially by B.J. Drijber and N. Khan, of its Legal Service, and, subsequently, by M.-J. Jonczy, Legal Adviser, and H. van Vliet, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the Chambers of C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: Dutch.

APPLICATION for annulment of the Commission's decision of 12 July 1993 addressed to the State Export-Import Bank of Ukraine, refusing to approve the contract entered into between the applicant and Ukrimpex,

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

composed of: J. Pirrung, President, A. Potocki and A.W.H. Meij, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 23 February 2000,

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), Article 4(3) of which provides as follows:

'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 recognised standards of quality.'

2 By Regulation (EEC) No 1897/92 of 9 July 1992, the Commission adopted detailed rules for the implementation of the loan granted by Decision 91/658 (OJ 1992 L 191, p. 22). According to Article 4 of that regulation, the loans granted by the Community to the Republics of the former Soviet Union were to finance only the purchases and supplies under contracts that had been recognised by the Commission as complying with the provisions of Decision 91/658 and with the agreements concluded between those Republics and the Commission with a view to the grant of those loans. Article 5 of Regulation No 1897/92 provided that such recognition was to be given only if the following condition, *inter alia*, were fulfilled:

'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. This provided for the Community, as lender, to grant to Ukraine, as borrower, through the intermediary of the latter's financial agent, the State Export-Import Bank of Ukraine ('the SEIB'),

a medium-term loan of ECU 130 million for a maximum term of three years. The 13th indent of clause 7 of the Memorandum of Understanding reproduces the provision of Article 5 of Regulation No 1897/92 set out above.

4 On the same date the Community, Ukraine and the SEIB signed the loan agreement provided for by Regulation No 1897/92 and by the Memorandum of Understanding (hereinafter 'the loan agreement'). That agreement sets out the machinery for disbursement of the loan.

Facts

5 In response to an informal invitation to tender issued in May 1993 for the purchase of wheat, Ukrimpex, an organisation acting on behalf of Ukraine, received seven tenders, including that of the applicant. The applicant's tender in fact contained four offers, the prices of which varied according to, *inter alia*, the time allowed for delivery. Ukrimpex accepted the first of the applicant's offers, which, following the withdrawal of another offer, 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. By a contract concluded on 26 May 1993, the applicant therefore 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.

6 Following notification of the contract by the SEIB to the Commission for approval by the latter, and after the personal intervention of the 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 the Vice-Prime Minister 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 30 United States dollars (USD) per tonne lower than that proposed by the applicant. That delivery subsequently formed the subject of a fresh invitation to tender in which the applicant's tender was accepted.

7 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.

8 By letter of 12 July 1993, addressed to the SEIB, the Agriculture Commissioner officially informed the SEIB of the Commission's refusal to approve the contract which had been submitted to it. He stated in that regard: 'The Commission can only recognise 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. Since 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: '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

9 By application lodged at the Registry of the Court of First Instance on 10 September 1993, the applicant brought the present action.

10 By judgment delivered on 24 September 1996 in Case T-509/93 *Richco* v *Commission* [1996] ECR II-1181, the Court of First Instance dismissed the action as inadmissible.

11 By application lodged at the Registry of the Court of Justice on 23 December 1996, the applicant brought an appeal against the judgment of the Court of First Instance.

12 By judgment of 5 May 1998 in Case C-404/96 P *Glencore Grain* v *Commission* [1998] ECR I-2435, the Court of Justice set aside the judgment of the Court of First Instance, referred the case back to the Court of First Instance for judgment on the substance and reserved the costs.

13 The written procedure before the Court of First Instance was resumed at the stage which it had reached, in accordance with Article 119(2) of the Rules of Procedure of the Court of First Instance.

14 On hearing the report of the Judge-Rapporteur, the Court of First Instance (Second Chamber) decided to open the oral procedure.

15 By order of the President of the Second Chamber of the Court of First Instance of 19 January 2000, made after hearing the parties, Cases T-485/93, T-491/93, T-494/93, T-61/98 and T-509/93 were joined for the purposes of the oral procedure, on account of the connection between them.

16 The parties presented oral argument and answered questions from the Court at the hearing on 23 February 2000.

Forms of order sought

17 The applicant claims that the Court should:

— annul the Commission's decision of 12 July 1993;

— order the defendant to pay the costs.

18 The defendant contends that the Court should:

— dismiss the application as inadmissible or, alternatively, as unfounded;

— order the applicant to pay the costs.

Admissibility

Arguments of the parties

19 The Commission observes that the action is directed against the letter of 12 July 1993. However, that letter merely confirmed the letter of 10 June 1993, which was not challenged by the applicant within the prescribed time-limit. Consequently, the action brought against that confirmatory act is inadmissible (see, in particular, the judgment of the Court of Justice in Joined Cases 166/86 and 220/86 *Irish Cement* v *Commission* [1988] ECR 6473, paragraph 16).

20 Moreover, the applicant no longer has a legal interest in bringing proceedings. Since the loan to Ukraine had been organised, the Commission was no longer in a position to issue a notice of confirmation, even if the contested decision were to be annulled. In addition, annulment could not form the basis of an action for damages, since such an action is now time-barred.

21 The applicant contends that it is no longer open to the Commission, at an advanced stage in the proceedings, to allege that the action is out of time and thus inadmissible.

22 In any event, the letter of 10 June 1993 was addressed to the Vice-Prime Minister of Ukraine. Under the loan agreement, the Commission had no legal relationship with Ukraine; its relationship was solely with the SEIB.

Findings of the Court

23 It is settled case-law that the time-limits for bringing proceedings are a matter of public policy (see, in particular, Joined Cases T-121/96 and T-151/96 *Mutual Aid Administration Services* v *Commission* [1997] ECR II-1355, paragraph 38). Consequently, the Court may examine of its own motion a plea of inadmissibility based on the action being allegedly time-barred.

24 In that regard, it should be recalled that an action for annulment of a decision which merely confirms a previous decision not contested within the time-limit for bringing proceedings is inadmissible (order of the Court of Justice in Case C-12/90 *Infortec* v *Commission* [1990] ECR I-4265, paragraph 10).

25 It is apparent from a comparison of the letters produced to the Court, dated 10 June 1993 and 12 July 1993, that the second of those letters contains nothing new in relation to the first letter and, in particular, that the reasons stated in them are the same. Moreover, neither the documents in the case-file nor the letter of 12 July 1993 show that there was any re-examination of the matter prior to the adoption of the decision contained in that second letter.

26 However, whilst it is apparent from the documents before the Court that the applicant already knew of the existence of the letter of 10 June 1993 on the following day, the case-file does not show that the applicant was informed of the reasons on which it was based.

27 Moreover, whilst it is true, as the Commission has pointed out, that the loan agreement does not expressly state the identity of the person to whom a decision refusing to approve a contract was to be addressed, it should be observed that, according to the loan agreement, it was for the SEIB to send to the Commission both the requests for approval of contracts and the requests for disbursement of the loan. Similarly, a 'Notice of Confirmation' of a supply contract which has been notified is defined in the loan agreement as a 'notice of approval to the Agent [the SEIB] from the Lender [the European Community]'. It must be inferred from this that the decision not to issue a notice of confirmation was also intended to be addressed to the SEIB. Since it was only by the letter of 12 July 1993 that the Commission informed the SEIB, the applicant was legitimately entitled to consider that only that official notification constituted the final decision.

28 In those circumstances, the present action cannot be rejected as time-barred.

29 As regards the alleged lack of interest in bringing proceedings, it must be recalled, first, that such an interest must be assessed as at the date on which the action is brought (see, in particular, the judgment of the Court of Justice in Case 14/63 *Forges de Clabecq* v *High Authority* [1963] ECR 357, at 371). It cannot be contested that, on that date, the applicant had an interest in bringing proceedings.

30 Moreover, to accept the Commission's argument would be tantamount to anticipating the consequences to be drawn by the Commission, pursuant to Article 176 of the EC Treaty (now Article 233 EC), from the judgment to be given in the case.

31 Lastly, it is not impossible that the annulment of a decision such as that contested in the present case may be capable, of itself, of having legal consequences, in particular that of preventing a repetition of the Commission's practice (see the order in Case T-256/97 *BEUC* v *Commission* [1999] ECR II-169, paragraph 18, and the case-law cited therein).

32 Consequently, the objections raised against the admissibility of the action must be rejected.

Substance

The plea alleging non-fulfilment of the obligation to provide a statement of reasons

Arguments of the applicant

33 According to the applicant, the decision was not supported by an adequate statement of reasons. It does not show the reasons which prompted the Commission to take the view that the price agreed was unacceptable. It is not sufficient, for that purpose, merely to refer to the provisions of Decision 91/658 and of Regulation No 1897/92.

34 Furthermore, the fact that the SEIB, to which the decision was addressed, or Ukrimpex may have had knowledge of the world market price is not enough to warrant the conclusion that, *vis-à-vis* the applicant, the decision contained a proper statement of reasons.

Findings of the Court

35 It is settled case-law that the statement of reasons required by Article 190 of the EC Treaty (now Article 253 EC) must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Community Court to exercise its power of review. The requirement to state reasons must be evaluated according to the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 190 of the Treaty must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see, in particular, Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraphs 63 and 67).

36 In the present case, the contested decision expressly states that the reason for the Commission's decision was that the price agreed between Ukrimpex and the applicant was well above the level that the Commission regarded as acceptable. Having regard to the express citation of Article 4(3) of Decision 91/658 and

Article 5(2) of Regulation No 1897/92, it is clear that the Commission took the view that the contract did not reflect the most favourable terms as required by the applicable rules.

37 Contrary to the applicant's assertion, the obligation to provide a statement of reasons did not require the Commission to state the price which it would have found acceptable.

38 It must therefore be concluded that the decision fulfils the requirements laid down by Article 190 of the Treaty.

39 In any event, the arguments expounded by the applicant concerning the justification for the decision show that it understood the Commission's reasoning perfectly well.

40 This plea must therefore be rejected.

Infringement of Decision 91/658 and Regulation No 1897/92

Arguments of the applicant

41 The applicant denies that the Commission has any discretion as regards the approval of contracts such as those at issue in the present case and maintains that

the price which it agreed with Ukrimpex offered the most favourable purchase terms in relation to the price normally obtained on the international markets. Thus, contrary to the decision reached by the Commission, the contract was in conformity both with Decision 91/658 and with Regulation No 1897/92.

42 According to the applicant, it is necessary in that regard to take account of the fact that the deadlines for shipment were tight. In response to the request by Ukrimpex for rapid delivery, given the urgency of the food situation, only two undertakings had offered shipment by the month of June; and since one of those two undertakings had ultimately withdrawn its offer, only that of the applicant was attractive to Ukrimpex.

43 Moreover, in deciding that the prices agreed were unacceptable, the Commission failed to take account of the fact that the June 1993 prices were higher than those of July 1993, which applied to the new harvest.

44 The contracts concluded by other undertakings to which the defendant refers are not comparable with the contract at issue in the present case. They were subject, in particular, to different delivery terms.

Findings of the Court

45 It is clear from the decision that the Commission refused to approve the contract concluded between the applicant and Ukrimpex on the ground that it did not offer the most favourable purchase terms in relation to the price normally obtained on the international markets.

46 The Commission thus applied one of the criteria laid down by the provisions governing the machinery of the Community loan. The parties are agreed that the condition relating to price was a fundamental term of the operation of that loan. Inasmuch as it guaranteed the optimum use of the funds made available, it was designed to protect both the Community as lender and Ukraine as recipient of the food aid.

47 The applicant's objection that the Commission took account of the July 1993 prices and disregarded the higher prices applying in June 1993 must be rejected at the outset. It is apparent, first of all, that no support for that assertion by the applicant is to be found in the contested decision or in the documents in the case-file. Furthermore, since the Commission had indicated its opposition to the price agreed as early on as 10 June 1993, the applicant's argument is unfounded.

48 In any event, the applicant does not deny that the price offered by it did not in itself reflect the most favourable terms in accordance with the applicable rules. It is in fact apparent from a comparison of the prices proposed by the various tenderers that that agreed between the applicant and Ukrimpex was appreciably higher than those offered by the other undertakings.

49 The applicant nevertheless asserts that, having regard to the fact that it was the only tenderer guaranteeing shipment by 15 June 1993, the price offered did in fact represent the most favourable purchase terms.

50 Since Regulation No 1897/92 requires the contracts to offer the most favourable purchase terms, the price proposed must be assessed in the light of all the contractual conditions, in particular those concerning delivery.

51 In carrying out that overall assessment, the Commission enjoys a discretion. In those circumstances, review by the Community judicature must be limited to verifying whether the procedural rules have been complied with, the contested decision is properly reasoned, and the facts have been accurately stated, and whether there has been a manifest error of assessment of the facts or a misuse of powers (see, for example, Case T-145/98 *ADT Projekt* v *Commission* [2000] ECR II-387, paragraph 147).

52 It is therefore necessary to determine whether the applicant has succeeded in showing that the Commission committed a manifest error of assessment in taking the view that the price of ECU 137.47 per tonne, with guaranteed shipment by 15 June 1993, did not fulfil the condition laid down by Regulation No 1897/92.

53 In that connection, it should be noted, first, that, although the applicant has asserted that higher prices were justified in view of the special delivery terms, it has not produced any figures quantifying that excess or any prima facie evidence concerning that point. Thus, no explanation is given as to the reason for which guaranteed shipment by 15 June 1993 justified a price 10% higher than that which would have been payable for guaranteed shipment by the end of June 1993, as indicated in the applicant's second offer. Moreover, no explanation is given as to why that guaranteed delivery date justified a price some 20% to 25% higher than those respectively offered by the applicant's competitors for deliveries in 'June/July 1993', between 1 and 5 July 1993 and between 1 and 10 July 1993.

54 Furthermore, examination of the offers made by the applicant which are more directly comparable with those made by its competitors shows the applicant's price to be higher than those of its competitors. In actual fact, only the fourth of the applicant's offers, which merely provides for later delivery, between 15 July and 15 August 1993, inclusive of transportation as far as the border between Hungary and Ukraine, appears to be slightly more attractive than the offers made by other undertakings. It follows that the other tenders submitted by the applicant did not offer the most favourable purchase terms in accordance with the applicable rules.

55 It cannot therefore be concluded from the documents produced to the Court that the appreciable difference between the amount of the applicant's offer and that of the competing offers in fact represented a premium for a special service, namely earlier shipment of the goods.

56 Consequently, it must be concluded that the applicant has not shown that the Commission committed a manifest error of assessment in deciding that the agreed price of ECU 137.47 per tonne, with guaranteed shipment by 15 June 1993, did not offer the most favourable purchase terms in relation to the price normally obtained on the international markets.

57 In those circumstances, the action must be dismissed in its entirety.

Costs

58 Under Article 87(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, the Court may order that the costs be shared or that each party bear its own costs. In the circumstances of the present case, the Commission must be ordered to pay all the costs incurred up to delivery of the judgment of the Court of Justice of 5 May 1998. The applicant must pay all the costs incurred following delivery of that judgment.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders the Commission to pay the costs incurred up until delivery of the judgment of the Court of Justice of 5 May 1998 and orders the applicant to pay the costs incurred following delivery of that judgment.**

Pirrung Potocki Meij

Delivered in open court in Luxembourg on 8 November 2000.

H. Jung A. W. H. Meij

Registrar President