JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)
9 July 2002 *

In Case T-333/00,

Rougemarine SARL, established in Paris (France), represented by T. Levy and O. Rezlan, lawyers, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities represented by K. Banks and M. Wolfcarius, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: French.

supported by

Council of the European Union, represented by A. Lopes Sabino, acting as Agent,

intervener,

APPLICATION for annulment of the Commission's decision, contained in a letter of 5 September 2000, refusing to grant the applicant financial support under the MEDIA II programme and for damages to compensate for the harm suffered as a result of that refusal,

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

composed of: J.D. Cooke, President, R. García-Valdecasas and P. Lindh, Judges,

Registrar: B. Pastor, Principal Administrator,

having regard to the written procedure and further to the hearing on 22 February 2002,

gives the following

Judgment

Legal background

1 On 10 July 1995 the Council adopted Decision 95/563/EC on the implementation of a programme encouraging the development and distribution of European audiovisual works (MEDIA II — Development and distribution) (1996- 2000) (OJ 1995 L 321 p. 25).

2 As the body responsible for implementation of the programme, the Commission awards financial support to undertakings whose projects it selects following calls for proposals, as provided for in Article 5 of Decision 95/563.

3 The fourth paragraph of Article 3 of Decision 95/563 identifies the businesses which are eligible for such aid:

'Without prejudice to the agreements and conventions to which the Community is a contracting party, the businesses benefiting from the programme must be in the possession and continue to be in the possession, whether directly, or by majority participation, of the Member States and/or of nationals from Member States.'

4 In Call for proposals No 3/2000, the Commission laid down guidelines (hereinafter 'the Guidelines') for the submission of proposals by independent European production companies seeking financial support for the development of audiovisual works (fiction, creative documentaries).

5 The second indent of paragraph 2 of the Guidelines defines a European production company as follows:

'A company whose main activity is audiovisual production and which is owned, whether directly or by majority participation, by nationals of the Member States of the European Union, the EEA or other European countries participating in the MEDIA programme, and registered in one of those countries.'

6 Paragraph 3.1.1 of the Guidelines lays down the following criteria for selecting proposed audiovisual works:

'— quality and originality of the concept (evaluated on the basis of treatment, script, storyboard etc.)

— track record of the applicant company and its staff...

— the project's production potential...

— suitability of the project for transnational exploitation...'.

7 The Guidelines state at the end of the first paragraph that the Commission has requested the European MEDIA Development Agency (EMDA) to assist it in evaluating proposals.

Facts of the dispute

8 The applicant is an audiovisual production company established in France. Its manager and majority shareholder, Mr S. Aloui, who is of Tunisian nationality, has been a French resident since 1991.

9 The applicant responded to a number of calls for proposals issued in the context of the MEDIA II programme, without success. On 30 March 2000, following publication of Call for proposals No 3/2000, its manager enquired as follows of the Commission:

'I should like to propose a project in response to Call No 3/2000 for proposals for the award of a grant for the development of audiovisual works.

Rougemarine is a French independent production company. It is majority owned by its manager, who is not a national of any of the Member States of the European Union or of any other European State that participates in the MEDIA programme.

I am uncertain whether [Rougemarine] is considered to be a European production company within the meaning of the definition in [the Guidelines].

...'

10 By an e-mail of 31 March 2000 the Commission replied that the applicant did not appear to fall within the definition of a European production company laid down in the Guidelines.

11 On 14 April 2000 the applicant submitted a project entitled 'Hôr' in response to Call for proposals No 3/2000. The Commission acknowledged receipt on 26 May 2000 and stated that projects would be evaluated by an independent group of experts.

12 By a letter of 5 September 2000 (hereinafter 'the contested decision') the Commission informed the applicant that it had decided not to select the 'Hôr' project, stating as follows:

'The assessment process in respect of the proposals we have received is now closed and the [Hôr] project has unfortunately not been selected.

All the projects submitted (577 applications altogether) were carefully examined in the light of the following selection criteria:

— quality and originality of the concept;

— experience of the applicant company and its team members;

— suitability of the project for production;

— suitability for transnational distribution.

In the light of the excellent quality of a large number of proposed projects the Commission selected 90 projects following this call, for a total budget of EUR 3.9 million, giving an acceptance rate of 16%.

Even though we have been unable to give you a positive response as regards the project referred to, we thank you for your interest in the MEDIA programme. We hope you will take part in a future call for proposals in the context of this programme.'

Procedure

13 By application lodged at the Registry of the Court of First Instance on 3 November 2000, the applicant brought this action.

14 By application lodged at the Registry of the Court on 27 December 2000, the Council requested leave to intervene in the proceedings in support of the Commission. By order of 29 January 2001, the President of the Fifth Chamber of the Court allowed that application.

15 The intervener lodged its statement in intervention on 6 March 2001.

16 Upon hearing the report of the Judge-Rapporteur, the Court (Fifth Chamber) decided to open the oral procedure.

17 The parties presented oral argument and answered questions put to them by the Court at the hearing on 22 February 2002.

Forms of order sought

18 The applicant claims that the Court should:

— uphold the plea of illegality against Decision 95/563;

— annul the contested decision;

— award it compensation for the harm caused by that decision;

— order the Commission to pay the costs.

19 The Commission contends that the Court should:

— dismiss the plea of illegality and the application for annulment as inadmissible or, in the alternative, unfounded;

— dismiss the application for compensation;

— order the applicant to pay the costs.

20 The intervener clams that the Court should:

— dismiss the plea of illegality in regard to Decision 95/563;

— order the applicant to pay the costs.

The application for annulment

21 The applicant relies on a single plea in law, alleging that the contested decision was discriminatory. It claims that the Commission refused to award it financial support on the ground that its majority shareholder is Tunisian. Whilst that ground is not made explicit in the contested decision, the applicant claims that it was in fact the decisive factor. The applicant considers that that it has suffered discrimination and challenges the legality of the contested decision and, in the alternative, raises a plea of illegality in respect of the nationality condition laid down in the fourth paragraph of Article 3 of Decision 95/563.

Admissibility

Arguments of the parties

22 The Commission contends that the application for annulment is inadmissible. It takes the view that the applicant does not have *locus standi* to bring proceedings against the contested decision by challenging reasons on which the decision was not based. The Commission denies the applicant's allegation that its project was not selected because it does not meet the eligibility criterion relating to European production company status (fourth paragraph of Article 3 of Decision 95/563). It states that the sole basis of the contested decision is the fact that, following an assessment by an independent expert, the applicant's project did not satisfy the selection criteria (paragraph 3.1.1 of the Guidelines) and was therefore not eligible for Community funding. In those circumstances, there is no question that there were any unstated grounds for rejection. The applicant accordingly does not have *locus standi* to challenge a ground on which the contested decision is not based.

Findings of the Court

23 The Commission's arguments go to the relevance of the applicant's pleas rather than its *locus standi*. Whether the contested decision is based by implication on the fact that the applicant is not a European production company within the meaning of the definition in the fourth paragraph of Article 3 of Decision 95/563 is a matter of substance rather than admissibility.

24 The action is therefore admissible.

Substance

Arguments of the parties

25 The applicant alleges first of all that the contested decision infringes Article 12 EC and the fundamental principle of equality.

26 The Commission's systematic opposition to the applicant's various projects is evidence that the real basis for the contested decision is the nationality of its majority shareholder.

27 The applicant states that, despite its best efforts, all the projects it has submitted under the MEDIA programme have been rejected by the Commission in exactly the same terms, which shows that the Commission is intent on eliminating it without further explanation before decisions are even taken.

28 Further, the Commission stated in its e-mail of 31 March 2000 that the applicant did not appear to fall within the definition of a European production company.

29 The applicant claims that the projects which it submitted in response to Call for proposals Nos 3/97, 3/98 and 3/2000 satisfied the selection criteria. It points, *inter alia*, to the factors indicating that the 'Hôr' project did meet the selection criteria as regards the quality and originality of the concept, the know-how of the production company and members of its team, the project's production potential and the possibilities of transnational production.

30 Moreover the Commission never mentioned the existence of an expert's report before this case was brought. The applicant argues that the Commission could not have rejected the 'Hôr' project without referring to the expert's report if it existed at the time of the contested decision. The applicant considers that that fact demonstrates that the Commission in reality rejected its application simply on the basis that its majority shareholder is Tunisian, although that is not expressly stated to be the reason in the contested decision.

31 In the applicant's view, the nationality criterion applied to it results in discrimination between European companies according to the nationality of their majority shareholder; such discrimination is contrary to the general principle of equal treatment laid down in the case-law and in Article 12 EC.

32 By its second plea, the applicant challenges the legality of the eligibility criterion relating to the nationality of shareholders in European production companies laid down in the fourth paragraph of Article 3 of Decision 95/563, in the light of Article 12 EC and the fundamental principle of equality.

33 The Commission rejects those allegations, claiming that the refusal contained in the contested decision is attributable to the intrinsic weakness of the applicant's project and not to discrimination of any kind. It takes the view that the action is unfounded because it complains of a ground for refusal of which the contested decision makes no mention and, moreover, that the decision contains a satisfactory statement of reasons.

34 In the alternative, the Commission argues that the nationality condition in question is compatible with the principle of non-discrimination.

35 The Council submits in that regard that the nationality criterion challenged by the applicant is objective and non-discriminatory. It points out that there is no general principle of Community law obliging the Community to accord the same treatment in all respects to third countries and their nationals as that accorded to Member States and their citizens (Case 52/81 *Faust* v *Commission* [1982] ECR 3745, paragraph 25; Case C-122/95 *Germany* v *Council* [1998] ECR I-973, paragraph 56; and Joined Cases C-364/95 and C-365/95 *T. Port* [1998] ECR I-1023, paragraph 76).

36 Furthermore, Article 12 EC is the basis for the principle of equal treatment of Community nationals; the principle does not as a rule apply to nationals of third countries (Case 223/86 *Pesca Valentia* [1988] ECR 83, paragraph 18; Joined Cases C-64/96 and C-65/96 *Uecker and Jacquet* [1997] ECR I-3171, paragraph 16).

Findings of the Court

37 It must be pointed out that the grounds for the contested decision relate solely to the shortcomings of the project for which the applicant sought the Community's financial assistance. The contested decision makes no mention of the applicant's eligibility for the MEDIA II programme or Call for proposals No 3/2000 in the light of the definition of a European production company. The alleged discriminatory nature of the eligibility criterion in the fourth paragraph of Article 3 of Decision 95/563 would therefore *prima facie* seem to be irrelevant, in that the grounds of the contested decision do not mention application of that criterion.

38 The applicant considers, however, that the basis for the contested decision is, by implication, the fact that it is not a European production company within the meaning of the fourth paragraph of Article 3 of Decision 95/563. Having regard to the clear wording of the contested decision, it is for the applicant to prove that the decision is in fact based on an implicit ground linked to the nationality of its main shareholder. In order to prove that, the applicant relies, first, on the rejections it received in response to Call for proposals Nos 3/97 and 3/98 and, second, on the Commission's letter of 31 March 2000 informing it that it did not appear to fall within the definition of a European production company.

39 However, it was because of their inherent quality, not for any reason relating to the applicant's ineligibility, that the Commission refused the applicant's applications for financial support in response to Call for proposals Nos 3/97 and 3/98.

40 It is true that the Commission told the applicant in its letter of 31 March 2000 that it '[did] not appear to fall within' the definition of a European production company laid down in the Guidelines.

41 However, the fact remains that the applicant did not consider itself bound by that letter and subsequently applied for financial support in response to Call for proposals No 3/2000. When it dealt with that application, the Commission did not check whether the applicant met the nationality criterion laid down in the fourth paragraph of Article 3 of Decision 95/563. It is clear from the file that the Commission did indeed consider the merits of the applicant's project. The Commission has produced the report of the independent expert responsible for evaluating applications for financial support. This pointed out the project's shortcomings and in particular the fact that the script did not seem to be developed to a sufficient degree and that the proposed budget was too large given the potential audience. In those circumstances there can accordingly be no doubt that the applicant's project was properly evaluated by the Commission against the selection criteria.

42 That finding cannot be called into question either by the fact that the contested decision does not state the particular factors which led the Commission to find that the applicant's project did not fulfil the selection criteria in Call for proposals No 3/2000, or by the fact that Commission did not, before this action was brought, produce or mention the expert's report on the basis of which it adopted the contested decision.

43 In so far as the applicant's complaints may be understood as also alleging that the reasoning in the contested decision was inadequate, the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed in the light not only of its wording but also of its context and of all the legal rules governing the matter in question.

44 In this case, the summary nature of the statement of reasons in the decision by which the Commission refused to award financial support under the MEDIA II programme seems to be an inevitable consequence of the large number of applications for support submitted in response to Call for proposals No 3/2000, on which the Commission had to give a decision in a short period. It is clear from the contested decision that the Commission rejected approximately 84% of the 577 applications for financial support which it examined. In those circumstances, providing more detailed reasons in support of each individual decision would have significantly slowed down the process of awarding the Community funds available under Call for proposals No 3/2000 (see by way of analogy Case C-213/87 *Gemeente Amsterdam and VIA* v *Commission* [1990] ECR I-221 (Summary publication), paragraph 2). Although terse, the statement of reasons in the contested decision did enable the applicant to defend its rights and the Court of First Instance to exercise its supervisory jurisdiction.

45 It follows that the applicant has not succeeded in proving that the contested decision is based by implication on the fact that the Commission took the view that it was not a company eligible for financial support under the MEDIA II programme.

46 Accordingly, the complaints alleging that the definition of a European production company is discriminatory are not relevant and must therefore be dismissed. There is therefore no need to assess the merits of the applicant's plea of illegality as regards the definition of a European production company contained in the fourth paragraph of Article 3 of Decision 95/563, since that too is irrelevant.

47 The application for annulment must therefore be dismissed.

The application for compensation

Arguments of the parties

48 The applicant claims compensation for the harm suffered as a result of the fact that it was, in its view discriminated against, which it provisionally evaluates at EUR 2 446 386.70.

49 The Commission contends that the applicant has not shown that the conditions giving rise to liability on the part of the Community are met in this case.

Findings of the Court

50 It is settled case-law that, in order for the Community to incur non-contractual liability, a number of conditions must be satisfied concerning the illegality of the conduct alleged against the Community institutions, the fact of the damage and the existence of a causal link between that conduct and the damage complained of (see, to that effect, Case C-87/89 *Sonito and Others* v *Commission* [1990] ECR I-1981, paragraph 16, and Case T-13/96 *TEAM* v *Commission* [1998] ECR II-4073, paragraph 68).

51 It is clear from an examination of the application for annulment that, since the Commission did not commit any illegal act capable of causing the Community to incur liability, one of the necessary conditions is not met.

52 Accordingly the application for compensation must be dismissed, without there being any need to consider whether the other conditions giving rise to liability on the part of the Community are met.

53 It follows from all the foregoing that the action must be dismissed in its entirety.

Costs

54 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, 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, and the Commission has applied for costs, it must be ordered to pay the costs incurred by the Commission in addition to its own costs.

55 Pursuant to Article 87(4) of the Rules of Procedure of the Court of First Instance, the Council, which intervened, must bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. **Dismisses the application;**

2. **Orders the applicant to pay the costs incurred by the defendant in addition to its own;**

3. **Orders the intervener to bear its own costs.**

Cooke García-Valdecasas Lindh

Delivered in open court in Luxembourg on 9 July 2002.

H. Jung J.D. Cooke

Registrar President