JUDGMENT OF THE COURT OF FIRST INSTANCE
(Fourth Chamber)
26 October 1995 *

In Case T-185/94,

Geotronics SA, a company incorporated under French law, with its registered office at Lognes (France), represented by Tommy Pettersson, of the Swedish Bar, with an address for service in Luxembourg at the Chambers of Arendt and Medernach, 8-10 Rue Mathias Hardt,

applicant,

v

Commission of the European Communities, represented by Karen Banks and, at the hearing, John Forman, both of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of the Commission's Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for, first, annulment of the Commission's decision of 10 March 1994 rejecting the applicant's tender for the supply of electronic tacheometers

* Language of the case: English.

under the PHARE Programme, and, second, compensation under Articles 178 and 215 of the EC Treaty for the damage which the applicant claims to have suffered as a result of the contested decision,

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

composed of: K. Lenaerts, President, R. Schintgen and R. García-Valdecasas, Judges,

Registrar: B. Pastor, Administrator,

having regard to the written procedure and further to the hearing on 21 June 1995,

gives the following

Judgment

Facts and procedure

1 The PHARE Programme, which is based on Council Regulation (EEC) No 3906/89 of 18 December 1989 on economic aid to the Republic of Hungary and the Polish People's Republic (OJ 1989 L 375, p. 11), as amended by Council

Regulations (EEC) Nos 2698/90 of 17 September 1990 (OJ 1990 L 257, p. 1), 3800/91 of 23 December 1991 (OJ 1991 L 357, p. 10), and 2334/92 of 7 August 1992 (OJ 1992 L 227, p. 1), in order to extend economic aid to other countries of Central and Eastern Europe, is the means whereby the European Community channels economic aid to the countries of Central and Eastern Europe in order to implement measures intended to support the process of economic and social reform under way in those countries.

2 On 9 July 1993 the Commission, acting 'on behalf of the Government of Romania', and the Romanian Ministry for Agriculture and Food Industry jointly issued a restricted invitation to tender through the intermediary of the 'EC/PHARE Programme Management UNIT-Bucharest' (hereinafter 'PMU-Bucharest'), the Romanian State authority to which the project was entrusted, for the supply of electronic tacheometers ('total stations') to the Romanian Ministry of Agriculture and Food Industry for use in the Romanian land reform programme. Under Article 2 of the general conditions of the restricted invitation to tender, the equipment to be supplied had to originate in a Member State of the European Community or in one of the beneficiary countries under the PHARE Programme.

3 On 16 July 1993 the French company Geotronics SA (hereinafter 'Geotronics' or 'the applicant'), a wholly-owned subsidiary of the Swedish company Geotronics AB, submitted a tender for the supply of 80 total stations of the Geodimeter 510 N type ('electronic total stations with inbuilt memory for data storage').

4 By fax letter of 18 October 1993, PMU-Bucharest informed the applicant that its tender had been successful and that a contract would be submitted to the contracting authority for approval.

5 By fax letter of 19 November 1993, the Commission informed the applicant that the evaluation committee had recommended that it be awarded the contract, but expressed doubts as to the origin of the products tendered by Geotronics and asked for further clarification in that respect.

6 By letter of 14 December 1993, Geotronics supplied the Commission with further details as to the assembly of the tacheometers and informed it that they were manufactured in the United Kingdom.

7 On 2 March 1994 the applicant informed the Commission that it had heard that its tender would be rejected because the equipment was of Swedish origin. The applicant considered that the criteria concerning the origin of the goods had changed following the entry into force on 1 January 1994 of the Agreement on the European Economic Area (OJ 1994 L 1, p. 3, hereinafter 'the EEA Agreement'), and asked the Commission to reopen the restricted tendering procedure.

8 By fax letter to the applicant of 10 March 1994, the Commission rejected its tender on the ground that, contrary to the conditions applicable to the restricted invitation to tender, Geotronics' equipment did not originate in a Member State of the Community or a beneficiary country under the PHARE Programme.

9 On 11 March 1994 the Commission informed PMU-Bucharest that, having examined the two tenders received on completion of the restricted tendering procedure for the electronic tacheometers, it had decided that only the tender by a German

firm satisfied the tender conditions and was acceptable. The Commission therefore requested PMU-Bucharest to contact the German firm to finalize the contract.

10 It was in those circumstances that the applicant brought this action, by application lodged at the Registry of the Court of First Instance on 29 April 1994.

11 By a separate document lodged at the Registry of the Court of First Instance on the same day, the applicant submitted under Article 185 of the Treaty an application for interim measures suspending the operation of the contested decision.

12 On 17 May 1994 PMU-Bucharest informed the Commission that the Romanian Ministry of Agriculture and Food Industry, the contracting authority, had awarded the contract to the German firm by decision of 15 April 1994.

13 On the same day, PMU-Bucharest informed the applicant that, because its tender did not satisfy the criteria of origin laid down by the restricted invitation to tender, the Romanian authorities were unable to award the contract to it.

14 By decision of 7 July 1994, after hearing the observations of the parties, the Court of First Instance assigned the case to the Fourth Chamber, composed of three judges.

15 By order of the President of the Court of First Instance of 7 July 1994 (Case T-185/94 R *Geotronics* v *Commission* [1994] ECR II-519), the application for interim measures was dismissed.

16 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fourth Chamber) decided to open the oral procedure without any preparatory inquiry. As a measure of organization of procedure, however, the Court requested the Commission to produce the framework agreement between the Commission and Romania, which is a beneficiary country under the PHARE Programme.

17 The parties presented oral argument and replied to questions from the Court at the hearing on 21 June 1995.

Forms of order sought by the parties

18 The applicant claims that the Court should:

— annul the Commission decision addressed to Geotronics rejecting its tender, as notified in a fax letter received by Geotronics on 10 March 1994;

in the alternative,

— order the Commission to pay Geotronics compensation of ECU 500 400 plus interest for each calendar month at 1% above 30 days' LIBOR, as from the date on which Geotronics was notified of the Commission's decision until full payment is made;

— order the Commission to pay the costs.

19 The Commission contends that the Court should:

— dismiss the application as in part inadmissible and, for the rest, unfounded;

— order Geotronics to pay the costs.

Admissibility

Arguments of the parties

20 The Commission contends that the action for annulment is inadmissible because the disputed letter of 10 March 1994 does not constitute a decision capable of producing binding legal effects of such a kind as to affect the interests of the applicant (see the judgment of the Court of Justice in Case C-257/90 *Italsolar* v *Commission* [1993] ECR I-9, paragraph 21). Under the rules allocating responsibility for the tendering procedure between the Commission and the authorities of the beneficiary countries under the PHARE Programme, there can be no Commission decision, so far as tenderers are concerned, which is capable of forming the subject-matter of an action for annulment.

21 The Commission explains in that respect that the PHARE Programme is funded from the general budget of the European Union ('the general budget'), and that contracts are awarded pursuant to the Financial Regulation of 21 December 1977 applicable to the general budget (OJ 1977 L 356, p. 1), and more specifically pursuant to the provisions of Title IX thereof, relating to external aid, as amended by Council Regulation No 610/90 of 13 March 1990 (OJ 1990 L 70, p. 1). Under the Financial Regulation, it is for the Commission to give its agreement to proposals

for the award of contracts, whilst it is for the beneficiary country to sign estimates and to conclude contracts and supplementary agreements and then notify them to the Commission.

22 The framework agreements between the Commission and the beneficiary countries under the PHARE Programme reflect that division of roles. Moreover, the Programme Management Units responsible for starting up and managing each project do not form part of the Commission's administrative structure but are responsible, on behalf of their governments, for all the steps which are the responsibility of the recipient country under the Financial Regulation.

23 It follows, in the Commission's view, that the procedure for awarding contracts established by the PHARE Programme is comparable to that applied to contracts financed by the European Development Fund ('EDF') pursuant to the Third Convention between African, Caribbean and Pacific States and the European Communities (ACP-EEC) signed at Lomé on 8 December 1984 (OJ 1986 L 86, p. 3). In that respect, the Commission points out that, in accordance with the case-law of the Court of Justice on public contracts financed by the EDF (judgments in *Italsolar* v *Commission*, cited above, paragraph 22, and in Case C-182/91 *Forafrique Burkinabe* v *Commission* [1993] ECR I-2161, paragraphs 23 to 24), such contracts remain national contracts which only the authorities of the countries in receipt of aid have the power to prepare, negotiate and conclude and that measures by the Commission during the contract-awarding procedure are intended solely to establish whether or not the conditions for Community financing are met. In the present case, it is the letter from the Romanian Ministry of Agriculture and Food Industry of 17 May 1994, whereby the competent Romanian authority informed the applicant that it would not conclude a contract with it, which constitutes the decision adversely affecting the applicant.

24 The applicant argues that since the letter addressed to it on 10 March 1994 reflects the Commission's decision to reject its tender after the Romanian authorities had preferred that tender to one submitted by a competitor, it produced, with respect to the applicant, binding legal effects that were capable of affecting its interests by

distinctly changing its legal position. Although the Commission is not the contracting authority as defined by the PHARE Programme, it played a decisive role in the procedure for funding the programme by determining the conditions on which a tender was to be acceptable and by assuming responsibility for the restricted tendering procedure. That conclusion is supported, first, by the terms used by the Commission in its letter to the applicant of 10 March 1994, in which it concluded that it could not 'endorse the awarding of the contract to Geotronics' and would 'not reissue the tender', and secondly, by the terms of the Commission's letter of 11 March 1994 asking the Romanian authorities to negotiate the contract with the other tenderer.

25 In reply to the Commission's argument that it was the Romanian authorities' letter to the applicant of 17 May 1994 which constituted the decision adversely affecting it, the applicant points out that the Romanian authorities had initially favoured the Geotronics tender, only to change their mind afterwards on the basis of the Commission's decision to reject that tender on account of the non-Community origin of the equipment. It was thus the Commission's decision to disqualify Geotronics which produced binding legal effects with respect to it and adversely affected its interests.

26 As regards the case-law cited by the Commission in support of its plea of inadmissibility, the applicant argues that any comparison with Community aid granted through the EDF under the Third Lomé Convention is irrelevant in this case. Unlike Articles 8, 9 and 10 of Regulation No 3906/89, which designate the Commission as the authority responsible for the entire aid scheme, the Third Lomé Convention confines the Commission's role to the financing of the aid projects. Thus, in the case of aid granted through the EDF, it is the national authorities alone that deal directly with the tenderers while the Commission merely cooperates with the ACP States as regards the financing of the aid projects, whereas, in the case of the PHARE Programme, the Commission deals directly with both the national authorities and the individual tenderers. Moreover, the PHARE Programme is

financed from the general budget and thus constitutes a Community activity, whereas the EDF is not included in the Community budget and is subject to special and separate budgetary provisions.

Findings of the Court

27 It should be noted, first, that under the basic regulation for the PHARE Programme, aid is granted by the Community either independently or in the form of co-financing with the Member States, the European Investment Bank, third countries or multilateral bodies or the recipient countries themselves.

28 Secondly, aid granted under the PHARE Programme is funded by the general budget, in accordance with the Financial Regulation, as amended in particular by Regulation No 610/90, Title IX of which relates to external aid.

29 By Articles 107 and 108(2) of Regulation No 610/90, measures and projects funded under the Community's cooperation policy are implemented by the beneficiary country in close collaboration with the Commission, which, as the body administering the aid, grants credits and ensures that participants in tendering procedures can compete on an equal footing, that there is no discrimination and that the tender selected is economically the most advantageous.

30 Nevertheless, under Article 109(2) of that regulation, it is for the beneficiary country to issue invitations to tender, receive tenders, preside over the examination of tenders and establish the results of the tendering procedure. It is also for that country to sign contracts, additions to contracts and estimates and notify the

Commission thereof. It follows that the power to award a contract lies with the beneficiary country under the PHARE Programme. In that respect, the applicant's representative conceded at the hearing that, in this case, the Romanian Government was free to award the contract to Geotronics, notwithstanding the Commission's refusal to grant it Community aid.

31 It follows from that division of roles that contracts financed by the PHARE Programme must be regarded as national contracts, which are binding only on the beneficiary country and the economic operator. The preparation, negotiation and conclusion of the contracts take place between those two partners only.

32 By contrast, no legal relationship arises between the tenderers and the Commission, since the latter restricts itself to taking funding decisions on behalf of the Community, and its measures cannot have the effect, in relation to tenderers, of substituting a Community decision for the decision of the beneficiary country under the PHARE Programme. In this area, therefore, there can be no Commission decision, so far as tenderers are concerned, which is capable of forming the subject-matter of an action under the fourth paragraph of Article 173 of the EC Treaty (see, by way of analogy, the judgments in Case 126/83 *STS* v *Commission* [1984] ECR 2769, paragraphs 18 and 19; Case 118/83 *CMC and Others* v *Commission* [1985] ECR 2325, paragraphs 28 and 29; *Italsolar* v *Commission*, cited above, paragraphs 22 and 26; and *Forafrique Burkinabe* v *Commission*, cited above, paragraph 23).

33 Therefore, despite the terms used by the Commission, the letter of 10 March 1994 in which it informed the applicant that it was obliged to reject its tender on account of the non-Community origin of the equipment cannot be regarded as a Commission decision which produced binding legal effects capable of affecting the legal position of the applicant.

34 A further point, moreover, is that the annulment of the Commission's letter of 10 March 1994 would not avail the applicant in any event, since it could not in itself call in question the contract between the Romanian Government and the German firm to which the contract was awarded.

35 The claim for the annulment of the Commission's letter of 10 March 1994 must therefore be rejected as inadmissible.

Substance

The claim for compensation

Basis of liability

— Arguments of the parties

36 The applicant argues that, by rejecting Geotronics' tender on grounds of the products' origin, the Commission infringed the EEA Agreement, committed a fault giving rise to non-contractual liability, and must therefore pay compensation for the damage suffered.

37 The Commission maintains, with reference to its argument concerning the claim for annulment, that there has been no unlawful act on its part, and that it cannot therefore be held liable for the damage allegedly suffered by the applicant. In any event, there is no causal link between its conduct and the damage alleged.

— Findings of the Court

38 It should be noted, first, that the fact that the action for annulment is inadmissible does not necessarily mean that the claim for compensation is inadmissible also, since the latter constitutes an autonomous form of action (see the judgment in Case 175/84 *Krohn* v *Commission* [1986] ECR 753, paragraph 32).

39 Furthermore, under the PHARE Programme, responsibility for funding projects is entrusted to the Commission. It would therefore be wrong to dismiss the possibility that acts or conduct by the Commission or its officials or agents in connection with the allocation or implementation of projects funded under the PHARE Programme might cause damage to third parties. Any person who claims to have been injured by such acts or conduct must have the possibility of bringing an action for compensation under Article 178 and the second paragraph of Article 215 of the Treaty, provided that he is able to establish the unlawfulness of the conduct alleged against the Community institutions, the existence of damage, and a causal link between that conduct and the damage alleged (see, by way of analogy, the judgment in *CMC and Others* v *Commission*, cited above, paragraph 31).

40 It is therefore necessary to establish whether the Commission has committed a fault capable of giving rise to liability under the second paragraph of Article 215 of the Treaty and to examine, in that regard, whether it acted in breach of the EEA Agreement.

The alleged infringement of the EEA Agreement

— Arguments of the parties

41 The applicant points out, first, that the EEA Agreement, which entered into force on 1 January 1994, extends the geographical area of application of EC legislation

and case-law, concerning the free movement of goods, persons, services and capital, competition and other common rules, to those countries belonging to the European Free Trade Association ('EFTA') which have signed the EEA Agreement.

42 The applicant maintains that this case falls within the scope of the EEA Agreement in so far as it concerns an external aid scheme affecting private persons and products to which the provisions of the EEA Agreement apply.

43 It argues that the exclusion of products on account of their non-Community origin constitutes discrimination within the meaning of Article 4 of the EEA Agreement which, in the same way as Article 6 of the Treaty, applies independently to all situations governed by Community law in the absence of any specific prohibition of discrimination (see the judgments in Case 293/83 *Gravier* v *City of Liège* [1985] ECR 593 and in Case C-305/87 *Commission* v *Greece* [1989] ECR 1461).

44 The applicant also alleges that, by rejecting a tender on account of the non-Community origin of the goods in question, the Commission is discriminating in a manner likely to distort competition between products originating in the Community and EFTA products by giving a competitive advantage to the former. Furthermore, such discrimination hinders the free movement of goods, contrary to Articles 8 and 11 of the EEA Agreement, and in breach of the public procurement rules under Article 65(1) of the Agreement.

45 The Commission contends in the first place that the EEA Agreement cannot apply to the present case, because the restricted invitation to tender was issued before the Agreement entered into force and, by reason of the principle of non-retroactivity,

its entry into force did not imply any obligation to reopen the tendering procedure in question. Moreover, a decision on a given tender must always be in conformity with the terms of the invitation to tender, which in this case had closed before the entry into force of the Agreement, so that the decision could not make any waiver in favour of a particular tenderer.

46 The Commission further points out that there can have been no infringement of Articles 4, 8, 11 and 65(1) of the EEA Agreement in this case, since the goods were intended for Romania, which is not a party to the Agreement, and there has therefore been no movement of goods or any public procurement transaction within the European Economic Area.

47 The Commission adds that those parties to the EEA Agreement which are not Member States of the European Community do not contribute to the Community budget and, consequently, do not contribute to the funding of the PHARE Programme. It would therefore be anomalous for those countries to be able to insist, in connection with Community aid programmes, on their own goods being accepted.

— Findings of the Court

48 The Court first points out that, in the absence of transitional provisions, the EEA Agreement takes effect in full as from its entry into force, namely 1 January 1994, and that it can therefore apply only to legal situations which came into being after its entry into force.

49 In this case, it was the restricted invitation to tender, issued by the Commission on behalf of the Romanian Government on 9 July 1993, which established the legal framework for the contract-awarding procedure, especially as regards the condition concerning the origin of the products in question.

50 Both the Commission, by laying down the general conditions for the invitation to tender on 9 July 1993, and the applicant, by submitting its tender on 16 July 1993, should reasonably have anticipated the possibility of the decision to award the aid granted by the Community on the basis of those conditions being taken before 1 January 1994, the date on which the EEA Agreement entered into force.

51 Nevertheless, when confronted with the doubts expressed by the Commission in its letter to the applicant of 19 November 1993 as to the Community origin of the products in question, the applicant alleged in its reply of 14 December 1993 that the products were manufactured in the United Kingdom. It was only as a result of the contacts which took place between the applicant and the Commission after 1 January 1994 that the latter was able to obtain confirmation of its doubts, by establishing that the products were principally of Swedish origin.

52 Moreover, the applicant's representative conceded at the hearing that the applicant caused the delay in the proceedings as, although not in bad faith, it misled the Commission as to the origin of the products. He also acknowledged that, had the Commission given its ruling before 1 January 1994, the applicant would have had no standing to raise the question of the applicability of the EEA Agreement to the contract-awarding procedure at issue in these proceedings.

53 The Court of First Instance therefore considers that the Commission was right, in reliance on the general conditions laid down by it in the restricted invitation to tender and accepted by the applicant before the entry into force of the EEA Agreement, to inform the applicant on 10 March 1994 that its tender had to be rejected on the ground that, contrary to the conditions applicable to the invitation to tender, the equipment tendered by it did not originate in Member States of the Community or in a beneficiary country under the PHARE Programme.

54 The letter of 10 March 1994 merely implemented the conditions laid down by the restricted invitation to tender and cannot be regarded as having created a new legal situation different from that which arose as a result of the restricted invitation to tender. Therefore, the fact that such implementation occurred at a time when the legal context had changed, on account of the entry into force of the EEA Agreement, cannot be such as to affect the legal framework established by the invitation to tender and confer upon the applicant rights which it could not have asserted at the time when the invitation to tender was issued.

55 Moreover, and in any event, the EEA Agreement cannot apply to contracts governed by legal relations to which a State that is not a signatory of the EEA Agreement is party. Contrary to the applicant's argument that, under the PHARE Programme, it is in fact the Commission which buys the products tendered in order subsequently to resell them to the beneficiary countries, it follows from the foregoing that the contracts in question are national contracts which fall exclusively within the sphere of the legal relations which exist between the tenderer and the beneficiary country, in this case Romania, which is not a party to the EEA Agreement.

56 Accordingly, the Commission cannot be held to blame for not applying the EEA Agreement to the contract-awarding procedure at issue.

57 Therefore, in the absence of any unlawful conduct whatever on the part of the Commission, the claim for compensation must be rejected as unfounded.

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

Costs

59 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, the applicant must be ordered to pay the costs, including those incurred in the proceedings for interim measures.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. Dismisses the application in its entirety;

2. Orders the applicant to pay all the costs, including those of the proceedings for interim measures.

Lenaerts Schintgen García-Valdecasas

Delivered in open court in Luxembourg on 26 October 1995.

H. Jung K. Lenaerts

Registrar President