JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
17 December 1997 *

In Case T-152/95,

Odette Nicos Petrides Co. Inc., a company governed by Greek law, established in Kavala (Greece), represented by Edouard Didier and Joël Grangé, of the Paris Bar, with an address for service in Luxembourg at the Chambers of Carlos Zeyen, 67 Rue Ermesinde,

applicant,

v

Commission of the European Communities, represented by Gérard Berscheid, of its Legal Service, 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,

APPLICATION for an order requiring the Commission to pay damages under Article 178 and the second paragraph of Article 215 of the EC Treaty as compensation for the damage resulting from certain action taken by it in managing the common organization of the market in raw tobacco in the period 1990 to 1991,

* Language of the case: French.

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

composed of: K. Lenaerts, President, P. Lindh and J. D. Cooke, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 2 May 1997,

gives the following

Judgment

Legislative background

1 On 21 April 1970 the Council adopted Regulation (EEC) No 727/70 on the common organization of the market in raw tobacco (OJ, English Special Edition 1970 (I), p. 206). The principal mechanisms of that common market organization (hereinafter 'CMO') include the obligation of the intervention agencies of the Member States to purchase at the intervention price leaf tobacco harvested in the Community and not disposed of through normal commercial channels. The tobacco so purchased is to be disposed of in such a way as to avoid any disturbance of the market and to ensure equal access to goods and equal treatment of purchasers (second subparagraph of Article 7(2) of Regulation No 727/70).

2 Article 3 of Regulation (EEC) No 327/71 of the Council of 15 February 1971 laying down certain general rules relating to contracts for first processing and market

preparation, to storage contracts and to disposal of tobacco held by intervention agencies (OJ, English Special Edition 1971 (I), p. 78) provides that the tobacco is to be disposed of on price terms determined case by case, on the basis of, *inter alia*, market trends and demand.

3 Article 1 of Regulation (EEC) No 3389/73 of the Commission of 13 December 1973 laying down the procedure and conditions for the sale of tobacco held by intervention agencies (OJ 1973 L 345, p. 47), a regulation which has been amended several times, provides:

'1. Baled tobacco held by intervention agencies shall be remarketed by invitation to tender or by sale by public auction.

2. "Invitation to tender" means a procedure whereby all prospective buyers are invited to submit offers and the contract is awarded to the person making the best offer being an offer in accordance with this regulation.'

4 Article 6(1) provides with regard to the conduct of tendering procedures:

'Within 15 days following the closing date for submission of tenders, a decision shall be taken, on the basis of the tenders received and under the procedure laid down in Article 17 of Regulation (EEC) No 727/70, either fixing a minimum selling price for each lot or awarding no contract.'

5 Originally, Article 5(1) provided:

'Every tenderer shall provide the intervention agency concerned with security in an amount of 0.28 unit of account per kilogramme of raw tobacco.'

6 The amount of the security was raised to ECU 0.339 per kilogramme by Commission Regulation (EEC) No 3263/85 of 21 November 1985 amending Regulation No 3389/73 (OJ 1985 L 311, p. 22). By way of derogation from Article 5(1) of Regulation No 3389/73, it was raised to ECU 0.7 per kilogramme of baled tobacco by Commission Regulation (EEC) No 3040/91 of 15 October 1991 amending Regulation (EEC) No 2436/91 opening an invitation to tender for the sale of baled tobacco held by the German, Greek and Italian intervention agencies (OJ 1991 L 288, p. 18).

Facts

7 The applicant is a Greek company whose main business is processing and dealing in tobacco in Greece and elsewhere. At the material time, it had a tobacco processing and storage centre and an additional storage unit. Depending on its needs, it also rented various small factories and offices. It worked with intermediaries and other agents in Greece and abroad.

8 The period to which these proceedings relate extends from April 1990 to the end of 1991. During that period, the Commission organized three tendering procedures for tobacco held by the Greek intervention agency and a fourth procedure for tobacco held by three intervention agencies of Member States, including the Greek intervention agency. On 15 October 1991, it also adopted Regulation No 3040/91 increasing the amount of the security which each tenderer was required to lodge with the intervention agency concerned.

9 The first tendering procedure at issue (hereinafter 'the first tendering procedure') was organized by Commission Regulation (EEC) No 899/90 of 5 April 1990 which opened an invitation to tender for the sale for export of baled tobacco held by the Greek intervention agency (OJ 1990 L 93, p. 7) and involved four lots of baled raw tobacco from the 1986 and the 1987 harvests, divided by varieties and totalling 5 271 428 kg. The deadline fixed for the Commission decision on the award of contract was 14 June 1990. The first lot comprised 1 805 903 kg of tobacco and was made up of the varieties Mavra, Kaba Koulak Classic and Elassona, Kaba Koulak Non-Classic, Katerini, Burlay EL and Basmas. The second lot comprised 1 519 836 kg of tobacco and was composed of the same varieties, with the exception of Basmas. The third lot comprised 1 519 991 kg of tobacco, and was made up of the same varieties as the second lot. The fourth lot comprised 425 698 kg of tobacco and was made up of the Mavra and Basmas varieties only. The applicant submitted a tender for the first and second lots (in the amounts of DR 76.11 and DR 63.11 per kilogramme respectively). However, on 14 June 1990 the Commission decided not to accept any of the tenderers' bids on the ground that, in view of the prices offered, there was a risk that the market might be disturbed.

10 The second tendering procedure at issue (hereinafter 'the second tendering procedure') was organized by Commission Regulation (EEC) No 1560/90 of 8 June 1990 opening an invitation to tender for the sale for export of baled tobacco held by the Greek intervention agency (OJ 1990 L 148, p. 7). It related to the same four lots of baled raw tobacco. The deadline fixed for the Commission decision on the award of contract was 9 August 1990. The applicant submitted a bid for the first and fourth lots (in the amounts of DR 91.11 and DR 101.11 per kilogramme respectively). On 7 August 1990 the Commission accepted the bid from another tenderer for the second lot (of DR 102 per kilogramme), but rejected all bids for the first, third and fourth lots, on grounds of risk of disturbance of the market.

11 The third tendering procedure at issue (hereinafter 'the third tendering procedure') was organized for the three remaining lots by Commission Regulation (EEC) No 2610/90 of 10 November 1990 opening an invitation to tender for the sale for export of baled tobacco held by the Greek intervention agency (OJ 1990 L 248, p. 5). The deadline fixed for the Commission decision on the award of contract

was 12 November 1990. The applicant submitted a bid for all three lots (of DR 152.26, DR 132.26 and DR 121.26 per kilogramme respectively). Its bid for the first lot was the highest of those received. On 16 November 1990, the Commission decided, once again, not to accept the tenderers' bids on the ground that the prices offered were liable to give rise to abnormal developments on the market.

12 The fourth tendering procedure at issue (hereinafter 'the fourth tendering procedure') was organized by Commission Regulation (EEC) No 2436/91 of 7 August 1991 opening an invitation to tender for the sale of baled tobacco held by the German, Greek and Italian intervention agencies (OJ 1991 L 222, p. 23). The total quantity of 105 486 276 kg was made up of 11 lots, divided into four groups. Each group of lots could be put up for sale only when a contract for the previous group of lots had been awarded. The aim was to obtain bids for all the varieties of tobacco, and dealings were to commence with the least popular varieties on the market. Each lot comprised tobaccos of a given variety held by the various intervention agencies of the various Member States concerned. The applicant took part in a number of sales in that series. Its bids, which were for a quantity lower than that fixed for the lots in question, were rejected as not fulfilling the tendering conditions.

13 After writing, on 13 September 1991, to the Member of the Commission responsible for agricultural matters, seeking suspension of Regulation No 2436/91 but without receiving what it regarded as a satisfactory response, the applicant brought an action before the Court of Justice for the annulment of that regulation and of Notice of invitation to tender No 91/C/213/04 issued by the Commission under that regulation (Case C-232/91). It also applied, by way of interim measure, for suspension of the operation of the contested regulation (Case C-232/91 R). Since the applicant was not individually concerned by the contested measures, its main application was declared inadmissible by order of 14 November 1991 in Joined Cases C-232/91 and C-233/91 *Petridi and Kapnemporon Makedonias* v *Commission* [1991] ECR I-5351. Its application for interim measures was also rejected, by order of 10 January 1992 (Joined Cases C-232/91 R and C-233/91 R, not published in the Reports of Cases before the Court).

14 By Commission Regulation (EEC) No 162/92 of 24 January 1992, amending Regulation No 2436/91 (OJ 1992 L 18, p. 16), the Commission divided into ten lots the three last lots of the fourth tendering procedure, on the ground that a distinction based on the harvest year would enhance the value.

Procedure and forms of order sought

15 By application lodged at the Registry of the Court of First Instance on 24 July 1995, the applicant brought proceedings against the Commission for compensation under the second paragraph of Article 215 of the EC Treaty.

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 inquiries. However, it invited the parties to reply in writing to a number of questions and they did so.

17 The parties presented oral argument at the public hearing on 2 May 1997.

18 The applicant claims that the Court of First Instance should:

— find that the defendant has incurred liability under the second paragraph of Article 215 of the Treaty;

— order the defendant to redress the damage suffered by the applicant and pay it the sum of ECU 20 403 788;

— order the defendant to pay the costs.

19 In its reply, it also asks that the Court of First Instance should order the defendant to produce the following documents:

— the reports of the Management Committee meetings of 25 July 1990 to 30 January 1992;

— all studies, internal memoranda, documents concerning analysis of market requirements and management of tobacco intervention stocks during the relevant period;

— all internal documents concerning the plan to sell tobacco to Russia, all correspondence between the Commission and Agrointorg and all supporting documents concerning Mr Ballot's role as intermediary;

20 It adds that it does not object to the appointment of an expert, to be paid for by the defendant, to assess the damage suffered by the applicant.

21 The Commission contends that the Court of First Instance should:

— declare the application for compensation inadmissible to the extent that it relates to facts and to acts of the defendant prior to 23 July 1990;

— declare inadmissible, for the purposes of these proceedings, the evidence and information concerning the proceedings of the Tobacco Management Committee;

— for the rest, dismiss the application as unfounded;

— order the applicant to pay the costs.

In its rejoinder, it also contends that the Court of First Instance should declare inadmissible, or otherwise dismiss, the new claims concerning disclosure of documents and advance payment of the costs of any expert's report.

Time-bar as regards Commission action taken before 24 July 1990

Arguments of the parties

22 The Commission contends that the application is inadmissible to the extent that it relates to action taken by it before 23 July 1990, given that the application was lodged on 24 July 1995. It observes that actions for compensation based on the second paragraph of Article 215 of the Treaty are time-barred five years after the occurrence of the material event. The limitation period starts to run when all the conditions triggering the obligation to make reparation are fulfilled. As regards the first tendering procedure, it observes that the decision not to award a contract dates from 14 June 1990. The alleged damage suffered by the applicant had thus sufficiently materialized by 23 July 1990. Accordingly, the application is time-barred at least as regards the first tendering procedure.

23 The applicant replies that this case is concerned with the subsequent circumstances in which its tenders were refused, and with the suspension of the procedure for the award of contracts and the conditions under which the tendering procedures were resumed. The various wrongful acts committed by the Commission all occurred after 23 July 1990. The damage had not crystallized at the time when its tender was rejected by the Commission on 14 June 1990.

Findings of the Court

24 Pursuant to Article 43 of the EC Statute of the Court of Justice, which is applicable to the Court of First Instance by virtue of Article 46 thereof, proceedings against the Community in matters arising from non-contractual liability are barred after five years from the occurrence of the event giving rise thereto.

25 In this case, the applicant has not sought to demonstrate in its pleadings how the rejection decision adopted on 14 June 1990 in connection with the first tendering procedure constituted unlawful conduct on the part of the Commission. All its submissions relate to other action taken by the Commission to which it objects.

26 Furthermore, contrary to its assertion regarding the admissibility of its application, it has not sought to demonstrate the existence of any link between the decision of 14 June 1990 and the other action taken by the Commission to which it objects. Nor has it alleged any causal link between the decision of 14 June 1990 and the damage for which it seeks compensation.

27 Finally, the calculation on which it relies in order to determine the amount of damages claimed (see the expert's report appended as Annex No 121 to the application) does not take account of the first tendering procedure as such.

28 Accordingly, it is not entitled to rely on the case-law to the effect that the limitation period does not start to run before the damage to be made good has materialized (Joined Cases 256/80, 257/80, 265/80, 267/80 and 5/81 *Birra Wührer and Others* v *Council and Commission* [1982] ECR 85, paragraph 10) without giving more details of the circumstances of this case which justify such reliance.

29 For the purposes of assessing the admissibility of the application, it is therefore inappropriate to treat the decision of 14 June 1990 as being inseparable from more general unlawful conduct on the part of the Commission.

30 It follows that the application must be declared inadmissible in so far as it relates to the first tendering procedure.

Substance

31 According to settled case-law of the Court of Justice and the Court of First Instance, the Communities' non-contractual liability is dependent on a series of conditions being satisfied as regards the unlawfulness of the acts alleged against the Community institution concerned, the fact of damage and the existence of a causal link between the wrongful act and the damage complained of (Joined Cases T-481/93 and T-484/93 *Exporteurs in Levende Varkens and Others* v *Commission* [1995] ECR II-2941, paragraph 80).

32 Before adjudicating on the question whether the Commission acted unlawfully, it is necessary to decide what treatment to accord the information concerning the proceedings of the Tobacco Management Committee, on which the applicant seeks to rely in this case.

The applicant's right to use certain information

Arguments of the parties

33 The Commission considers that the applicant is not entitled to use information concerning the proceedings of the Tobacco Management Committee, since Article 10 of the Rules of Procedure of that committee provides that its proceedings are

confidential. Moreover, under Article 214 of the Treaty, the members of committees are required not to disclose information covered by the obligation of professional secrecy. The applicant is thus entitled neither to obtain the information in question nor, *a fortiori*, to use it for the purposes of this action. Article 214 of the Treaty has direct effect, unlimited in time, and the applicant's possession of the minutes, whether obtained in good or bad faith, is irrelevant. The applicant must have known that they were not public and were not therefore intended to be disclosed.

34 The applicant denies any knowledge of the Rules of Procedure of the Tobacco Management Committee, since they were not published. Those rules cannot therefore be invoked against it. Moreover, it did not unlawfully obtain the minutes of the management committee meetings drawn up by the Greek authorities. The Greek Association of Tobacco Industries distributes those minutes regularly to its members, without informing them of the confidential nature thereof. The applicant is therefore entitled to produce those documents. Moreover, there is no sound reason for preserving such confidentiality more than four years after the event.

Findings of the Court

35 In this case, the only information contained in the proceedings of the Tobacco Management Committee which is relevant to the decision to be given in this case concerns the tenders submitted for the first, second and fourth lots in the second tendering procedure and the first lot in the third tendering procedure.

36 It should be noted, however, that the information referred to by the applicant regarding those tenders derives from other sources. The Commission itself confirmed in its reply to a written question from the Court that the applicant's tenders for the first lots in the second and third tendering procedures were the highest received for those lots. The amount of the tender accepted for the second lot in the second tendering procedure was disclosed by the Commission to the applicant in

its decision of 7 August 1990. The fact that the applicant's tender for the fourth lot in the second tendering procedure was the highest received was confirmed by the Court of Auditors in its Special Report No 8/93 concerning the common organization of the market in raw tobacco (OJ 1994 C 65, p. 1, hereinafter 'the Special Report'). Finally, the second and fourth lots in the second tendering procedure are discussed in detail in points 4.53 to 4.55 of that report.

37 All that information is thus available regardless of any action by Greek bodies or authorities.

38 The question whether the applicant was entitled to rely on the proceedings of the management committee is therefore irrelevant.

The illegality of the Commission's conduct

39 The applicant appears to consider that the unlawful conduct alleged against the Commission comprises a number of measures taken after various tendering procedures. It nevertheless considers each aspect of such conduct separately. It is therefore necessary to examine separately the alleged illegality of the various aspects of such conduct, with the exception of the decision of 14 June 1990 (see paragraphs 25 to 31 above). It will also be necessary to examine the applicant's complaints concerning the time which elapsed between the third and fourth tendering procedures and the increase in the amount of the security imposed by the Commission.

The second tendering procedure

— Arguments of the parties

40 The applicant claims that by rejecting, on 7 August 1990, its tenders in the second tendering procedure, the Commission infringed the principles of proportionality and equal treatment.

41 First of all, contrary to the Commission's assertion, rejection of the tenders was not, in the applicant's view, justified by any risk of disturbance of the market. The means employed by the Commission were not suitable for the purpose of achieving the objective pursued and went beyond what was necessary to achieve it, contrary to the requirements of the principle of proportionality laid down by the case-law (Case C-256/90 *Mignini* [1992] ECR I-2651, paragraph 16).

42 Rejection of the applicant's tenders was neither appropriate nor necessary and could not therefore be in conformity with the principle of proportionality.

43 The applicant states that its tender for the first lot was rejected despite being the highest. It also claims that, even if one accepted the argument put forward by the Commission in its reply to the Special Report to the effect that the values of the second and fourth lots were the same, the rejection of its tender for the fourth lot was ridiculous because the difference between the prices tendered was less than one drachma. In its view, on the contrary, its tender for the fourth lot was considerably better (by a factor of three) than that accepted for the second lot. In that connection, it cites the Special Report (point 4.55): '... the tender not accepted for the inferior quality lot [the fourth lot] represented a relatively better offer than that accepted for the higher quality lot [the second lot]'. It points out that the fourth lot was of only 425 tonnes and claims that the sale of such a quantity could not have provoked any disturbance of the market.

44 Secondly, the applicant alleges that, by rejecting its tender for the fourth lot and accepting another tenderer's offer for the second lot, the Commission manifestly infringed the principle of equal treatment, which is applicable to this case by virtue of Article 40(3) of the Treaty, Community case-law and Article 7(2) of Regulation No 727/70.

45 The Commission contends, in the first place, that it sought to make it clear to economic operators that it was prepared to resume the award of contracts when prices had increased sufficiently. Moreover, the prices finally received in other tendering procedures for the two varieties contained in the fourth lot fully justified its hesitation. On the other hand, the tender for the second lot was acceptable in view of its composition and the average prices of the varieties of which it was made up, and in comparison with the price tendered for the third lot, which was practically of the same composition as the second lot.

46 Second, the Commission replies that the applicant refers without distinction to the tobacco varieties in general without taking account of their respective prices. There was thus no breach of the principle of equal treatment as a result of rejection of the applicant's tender for the fourth lot, accompanied by acceptance of the tender of a different tenderer for the second lot.

— Findings of the Court

47 The principle of proportionality has been recognized in settled case-law as one of the general principles of Community law. According to that principle, measures imposed by Community legislation must be appropriate for achieving the objective pursued and must not go beyond what is necessary to that end. Moreover, where there is a choice between several appropriate measures, recourse must be had to the least restrictive one and the disadvantages it entails must not be disproportionate to the aims pursued (see *Exporteurs in Levende Varkens and Others* v *Commission*, cited above, paragraph 119).

48 In this case, the applicant alleges that the Commission's decision to reject its tenders for the first and fourth lots was pointless and inappropriate, but it does not specify the objective in relation to which that decision displayed those characteristics, nor does it produce any evidence of those characteristics.

49 It maintains that the Commission decision of 7 August 1990, based on the right conferred on it by Article 6(1) of Regulation No 3389/73 not to award a contract (see paragraph 4 above), was motivated not by a concern not to disturb the market, in the light of the level of prices tendered, but by its ignorance of market prices, as evidenced by its decision not to award a contract for the fourth lot but to accept the lower offer of another tenderer for the second lot.

50 However, even if it were accepted that the Commission was in fact unaware of the market prices when adopting the contested decision, having regard to its decision to make up lots comprising different varieties of tobacco, as the applicant maintains, that inconsistency is of no relevance whatsoever in assessing whether the institution infringed the principle of proportionality on that occasion.

51 In any event, one of the main objectives pursued by the applicable legislation is to avoid disturbance of the market concerned (see the second subparagraph of Article 7(2) of Regulation No 727/70). It is common ground that the Commission's decision prompted the operators concerned to tender, in the third procedure, prices which were higher than those tendered for the same lots in the second tendering procedure (see paragraphs 10 and 11 above). The applicant cannot therefore allege ignorance of prices on the part of the Commission in support of the assertion that the decision of 7 August 1990 is not consonant with the objective of not disturbing the market.

52 It follows from the foregoing that the plea alleging breach of the principle of proportionality is unfounded.

53 As regards the principle of equal treatment, which is also alleged to have been infringed, it must be borne in mind that, according to settled case-law, it too is one of the fundamental principles of Community law and requires that comparable

situations are not treated in a different manner unless the difference in treatment is objectively justified (see Case C-280/93 *Germany* v *Council* [1994] ECR I-4973, paragraph 67).

54 In this case, the second and fourth lots, as compared by the applicant, did not contain the same tobacco varieties. As indicated in Regulation No 1560/90, the second lot comprised Mavra, Kaba Koulak Classic and Elassona, Kaba Koulak Non Classic, Katerini and Burley EL, whereas the fourth lot comprised Mavra and Basmas, the only tobacco variety common to both lots thus being Mavra. Moreover, the quantities concerned differed considerably: the second contained 1 519 836 kg of tobacco whereas the fourth contained only 425 698 kg.

55 Furthermore, on the basis of the information in its possession at the time, the Commission considered that the applicant's tender for the fourth lot was low, whereas that submitted for the second lot was acceptable, particularly when compared with the price tendered for the third lot, the composition of which was almost identical to that of the second lot, as regards both the tobacco varieties included and their respective weights.

56 Finally, the Commission took the view that if the Mavra in the second and fourth lots, the quantity of which was almost the same (306 491 kg in the second lot and 333 872 kg in the fourth), was disregarded, it became apparent that the applicant was tendering a lower price per kilogramme for the Basmas variety in the fourth lot than the price per kilogramme tendered for the other tobacco varieties in the second lot by the tenderer to which the contract for the latter was awarded, when the Basmas variety was more sought after than the other varieties in the second lot, a fact not disputed by the applicant. In these proceedings, the applicant has not established in what respect that assessment is manifestly incorrect but has merely cited an extract from the Special Report to the effect that the tender not accepted for the fourth lot was better than that accepted for the second lot (see paragraph 44 above) without convincingly answering the Commission's arguments set out above, which contradict the conclusion reached in the extract cited from the Special Report.

57 In that connection, it must be emphasized that, in managing the CMO for tobacco, the Commission is required to adopt a commercial approach. It must decide whether or not to accept tenders for lots offered for sale by tender, having regard to all the information in its possession when it makes its decision. It is settled case-law that it enjoys considerable latitude in that regard since the decisions concerned must balance various factors, such as the prices tendered for the various lots and the costs of storing unsold lots. In those circumstances, even decisions which may subsequently prove to be open to criticism do not necessarily cause the Commission to incur liability in the absence of a manifest error of assessment on its part (see, to that effect, Case 27/85 *Vandemoortele* v *Commission* [1987] ECR 1129, paragraphs 31 to 34).

58 In short, having failed to show that the Commission treated two comparable situations differently, the applicant has no grounds for alleging any breach of the principle of equal treatment in this case.

59 It follows from all the foregoing that the Commission's decision of 7 August 1990 rejecting the applicant's tenders for the first and fourth lots in the second tendering procedure is not unlawful in any way. The Community cannot therefore, as a result of that decision, have incurred non-contractual liability vis-à-vis the applicant.

The third tendering procedure

— Arguments of the parties

60 Alleging breach of the principle of proportionality in relation to the third tendering procedure, the applicant also claims that the Commission's rejection, on 16 November 1990, of the tenders submitted, again purportedly justified by risks

of disturbing the market, contributed to an abnormal increase in prices, gave rise to additional storage expenses and deprived the Community of substantial resources. It considers that the increase in the tenders was neither abnormal nor excessive having regard to the export sales price, contrary to the Commission's contention. On the contrary, it was a logical consequence of the rejection of the tenders in the previous tendering procedure.

61 The Commission replies that it rejected all the tenders in that procedure, first in order to sell all the stocks at once and, second, with a view to organizing sales of separate varieties at a later stage in order to determine their actual commercial value. Furthermore, since the market was uncertain at that time, it preferred to reject all the tenders in order to draw up new proposals.

— Findings of the Court

62 As in the case of the second tendering procedure, whilst the applicant maintains in support of its plea as to breach of the principle of proportionality that the Commission decision of 16 November 1990 was pointless and inappropriate, it does not clearly specify the objective in relation to which that decision displayed those characteristics, referring either in general terms 'to the objectives laid down for tendering procedures for the sale of tobacco' or to the fact that 'tendering procedures must take account of market requirements'.

63 Even if the Commission was in fact unaware of market prices when adopting its decision of 16 November 1990, as the applicant again alleges, that fact is of no relevance whatsoever in assessing whether the institution infringed the principle of proportionality on that occasion (see paragraphs 50 and 51 above).

64 Moreover, the applicant has produced no evidence to show that by deciding on 16 November 1990 to reject all the tenders in order not to disturb the market, the Commission failed to take account of market requirements, in spite of being required to do so by Article 3(c) of Regulation No 327/71. Unless proof to the contrary is produced, the fact that the Commission sought not to disturb the market indicates that it took account of changes in market requirements, at least as it saw them at the time.

65 In any event, it must be borne in mind that the concern not to disturb the market is one of the objectives laid down in the applicable legislation (see paragraph 52 above) and that, pursuant to Article 6(1) of Regulation No 3389/73, the Commission was entitled not to accept the applicant's tender for the first lot, even if it was the highest, or any other tender received by it.

66 The plea as to breach of the principle of proportionality is thus unfounded.

67 Furthermore, it is of little importance that the decision of 16 November 1990 was taken outside the period of 15 days laid down by Article 6(1) of Regulation No 3389/73 for the adoption of a decision regarding the award of a contract. Since no sanction is imposed for failure to comply with that time-limit, it cannot be regarded as mandatory and failure to comply with it does not, according to the case-law, cause the Commission to incur liability unless it is the outcome of negligence on its part (Case C-55/91 *Italy* v *Commission* [1993] ECR I-4813, paragraph 69). However, in this case the applicant does not even allege that the Commission was guilty of any such negligence, but merely refers to failure to observe that time-limit, and even then only in its reply to written questions put to it by the Court.

68 It follows from all the foregoing that the Commission decision of 16 November 1990 rejecting the applicant's tenders for the three lots in the third tendering procedure is not unlawful in any respect. It cannot therefore cause the Community to incur non-contractual liability vis-à-vis the applicant.

The delay between the third and fourth tendering procedures

— Arguments of the parties

69 The applicant claims that the delay between the third and fourth tendering procedures was not reasonable since it caused stocks to accumulate and therefore seriously disturbed the market. It asserts that, by trying to set up a deal with the USSR in breach of the rules laid down in Article 7 of Regulation No 727/70 and in disregard of the market requirements referred to in Article 3(c) of Regulation No 327/71, the Commission infringed the principle of proportionality as that operation was neither necessary nor appropriate. It rejects the various arguments put forward by the Commission to justify the delay complained of.

70 The Commission states that the period which elapsed between the third and fourth tendering procedures was attributable to several causes, in particular enormous price fluctuations as between the third tendering procedure and the earlier procedures, discussions held by the Commission and the former USSR to consider the possibility of selling all the stocks to the latter, and the Commission's wish to dispose of all the intervention stocks in order to give the new CMO a fresh start, having stabilized the situation with regard to intervention.

— Findings of the Court

71 Omissions by the Community institutions can give rise to liability on the part of the Community only when the institutions have failed to comply with a legal obligation to act imposed by a provision of Community law (see Case C-146/91 *KYDEP* v *Council and Commission* [1994] ECR I-4199, paragraph 58).

72 In this case, no applicable legislative provision required the Commission to award a contract within a specified period, nor has the applicant claimed that such was the case.

73 In those circumstances, without any need to examine the merits of the Commission's explanations, the Court holds that the period of 11 months between the third and fourth tendering procedures was not unlawful. The Community did not therefore incur non-contractual liability vis-à-vis the applicant.

The fourth tendering procedure

— Arguments of the parties

74 In the first place, the applicant considers that the manner in which the Commission organized the fourth tendering procedure manifestly and blatantly infringed the principle of proportionality because it *de facto* excluded small and medium-sized undertakings. The lots of tobacco offered in the fourth tendering procedure were held by intervention agencies in several Member States and represented such a large volume that the procedure was accessible only to multi-national groups with sufficient facilities to export from each of the Member States holding part of the stocks put up for sale in that tendering procedure. The Commission implicitly recognized that state of affairs by dividing the three last lots not to have been awarded in the fourth tendering procedure into 10 new lots for the fifth tendering procedure decided upon on 24 January 1992 (see paragraph 14 above).

75 Similarly, the requirement that security be lodged in accordance with the conditions laid down by several intervention agencies made the tendering procedure inaccessible to small and medium-sized undertakings. The purchase of such large

quantities would also have given rise to storage costs incompatible with the size of such undertakings, including the applicant. The volume of tobacco put up for sale in the fourth tendering procedure represented one year's production in Greece and one-third of annual Community production.

76 The applicant complains that the regulation organizing the fourth tendering procedure set a period of 20 days between the date of publication of the notice of invitation to tender and the date for submission of tenders, instead of the normal period of 45 days laid down in Article 3 of Regulation No 3389/73, as amended by Commission Regulation (EEC) No 1344/75 of 27 May 1975 (OJ 1975 L 137, p. 20). That reduction made matters even worse for small and medium-sized undertakings.

77 The applicant rejects the Commission's suggestion that it could have joined other tenderers to submit a joint bid. It states that, in its Special Report, the Court of Auditors emphasized that group action by several operators laid the Commission open to the risk that cartels might be established.

78 Second, it claims that the manner in which the Commission organized the fourth tendering procedure also manifestly and blatantly infringed the principle of equal treatment, and more particularly Article 7(2) of Regulation No 727/70, because it *de facto* excluded small and medium-sized undertakings.

79 In the first place, the Commission considers that it did not in any way infringe the principle of proportionality since its approach was appropriate and necessary for sound management of the CMO. The composition of the lots reflected specific requirements given the state of the market at the time. The Commission questions the need to have facilities in the various Member States for the purposes of the submission of a single tender, as alleged by the applicant. Nevertheless, it is of

course easier to export from the country where the product is stored and it is rational to make such a choice in order to minimize management costs. The fact of having to lodge security with various intervention agencies is not, on the other hand, an obstacle for an undertaking experienced in international trade. Moreover, certain medium-sized undertakings did take part in the tendering procedures and some of them were successful.

80 The Commission contends that it was entitled to reduce the period from 45 to 20 days: the derogation from Regulation No 3389/73 in Regulation No 2436/91 was valid since both measures were based on Article 7(4) of Regulation No 727/70, which empowers the Commission to lay down procedures and conditions for sales by intervention agencies.

81 Moreover, there is a difference between a lawful grouping of traders temporarily cooperating to submit a joint bid and an illegal cartel. It is common for undertakings to form groups in order to bid jointly for a lot which none of them, individually, could cope with.

82 Finally, there are several reasons justifying the new approach adopted for the fourth tendering procedure.

83 First, there was strong demand from the USSR for lower-quality tobacco products, which made it possible to make up homogeneous lots, whereas at an earlier stage the prevailing surplus on the world tobacco market made it necessary to sell lots made up of different varieties. The conduct of the operations necessitated the submission of tenders for all lots, and it was only possible to achieve that aim satisfactorily by offering substantial lots for sale.

84 Moreover, the imminence of the reform of the CMO for tobacco played an important part, particularly the plan to abolish intervention, which entailed the disposal of stocks still held by the intervention agencies. A rapid clearance sale by tender was necessary owing to the favourable market conditions at the time. A homogeneous product was easier to evaluate and dispose of since it was suitable for specific types of purchasers and outlets.

85 Second, the Commission considers that, for the same reasons, it did not infringe the principle of equal treatment in organizing the fourth tendering procedure.

— Findings of the Court

86 The applicant relies on the same arguments in support of its pleas alleging breach of the principle of proportionality and breach of the principle of equal treatment.

87 None of the those arguments can be upheld.

88 In the first place, the applicant cannot claim that the volume of tobacco offered for sale in the various lots in the fourth tendering procedure prevented small and medium-sized undertakings from participating therein. It is clear from the Commission's answers to written questions from the Court that several medium-sized undertakings submitted tenders, and some were accepted by the Commission. Moreover, it is clear from those answers that 20 admissible tenders were submitted for the first sale in the procedure, 11 for the second, 14 for the third and 25 for the fourth.

89 Nor can the applicant claim that the geographical dispersion of the tobacco making up the lots prevented small and medium-sized undertakings from participating in the fourth tendering procedure. It is clear from Regulation No 2436/91 that six of the eleven lots of tobacco were held by a single intervention agency, four of the eleven were held by two different intervention agencies, and only one of the eleven lots was spread among three different intervention agencies: the practical difficulties arising from geographical dispersion of the tobacco put up for sale were not therefore of the magnitude alleged by the applicant.

90 Finally, there is no basis for the applicant's allegation that the reduction from 45 to 20 days of the period between the notice of invitation to tender and the date for submitting tenders was in any way illegal. The Commission was entitled to derogate from Article 3 of Regulation No 3389/73, as amended, in the exercise of the wide discretion granted to it in relation to the Common Agricultural Policy (Joined Cases C-104/89 and C-37/90 *Mulder and Others* v *Council and Commission* [1992] ECR I-3061, paragraph 12). The applicant has neither alleged nor demonstrated that the Commission committed a manifest error of assessment in taking the view that it was necessary to reduce the applicable period in order to sell lots expediously before the introduction of the new CMO. Moreover, the reduction of the time-limit affected all traders concerned, regardless of size. Furthermore, the applicant does not state to what extent the reduction might have favoured traders of a particular size as compared with others.

91 Since the Commission has shown that medium-sized undertakings participated in the tendering procedure, it is unnecessary to decide on the lawfulness of any joint tender by several traders for a single lot.

92 In any event, the measures chosen by the Commission for the fourth tendering procedure in order to dispose of the tobacco held by the intervention agencies

were suitable for the purpose of attaining the aim pursued and did not go further than was necessary to achieve it (*Vandemoortele* v *Commission*, cited above, paragraph 34), since the stocks held by intervention agencies between 1991 and 1992 decreased appreciably and, for certain varieties at least, the prices obtained in the fourth tendering procedure were considerably higher than those tendered in the earlier procedures. In those circumstances, the Commission did not exceed the limits of its discretion in giving effect to the CMO for raw tobacco.

93 Furthermore, the fourth tendering procedure was open to all undertakings in the sector under the same conditions and in accordance with the same rules, and it was permissible for it to be organized differently from the earlier procedures, there being no limitation on the Commission's freedom to adjust its policy in step with changes in data reflecting the state of the market and with the objectives pursued (see in that connection Joined Cases 197/80 to 200/80, 243/80, 245/80 and 247/80 *Ludwigshafener Walzmühle and Others* v *Council and Commission* [1981] ECR 3211, paragraph 40).

94 It follows that the pleas alleging breach of the principle of proportionality and breach of the principle of equal treatment are unfounded.

95 It is clear from the foregoing that Regulation No 2436/91 is not vitiated by any illegality such as to cause the Community to incur non-contractual liability vis-à-vis the applicant.

The increase in the amount of the security

— Arguments of the parties

96 The applicant claims that by increasing the amount of the security, the Commission infringed the principle of proportionality: the increase was justified neither by market developments nor by the export refunds. The purpose of the security is to ensure that tenderers fulfil the obligations which they assume by participating in the tendering procedure and, in particular, that the goods are actually exported. By fixing the security at a uniform amount regardless of the tobacco variety and therefore regardless of its value, the Commission showed that the increase was not linked to market developments.

97 The applicant also considers that the purpose of the increase was to exclude certain potential buyers, which also demonstrates that the principle of equal treatment was infringed.

98 By way of reply, the Commission states that the amount of the security was not at all excessive and was needed to cover the difference between the export sale price and the Community market price and, at the very least, the effect of export refunds.

99 It also points out that the applicant took part in a fifth tendering procedure for which a security of ECU 0.7 was required: this shows that it was in no way excluded from intervention sales.

100 On that point, the applicant's reply is that its participation in a tendering procedure for which the amount of the security had been set at ECU 0.7 per kilogramme is accounted for by the fact that the tendering procedure was for a much smaller quantity of tobacco.

— Findings of the Court

101 In the first recital in the preamble to Regulation No 3040/91, the Commission stated that the increase in the amount of the security was justified by the need to take account of the trend on the market and in export refunds in the past. In these proceedings, the Commission has made it clear that the increase was justified by the need to satisfy itself that tenderers would fulfil the obligations assumed by them through their participation in a tendering procedure and, in the case of a tendering procedure for export, to satisfy itself that the goods would actually be exported outside the Community.

102 It is also clear from the Commission's reply to a written question from the Court that, even after the increase in the amount of the security, the sum of the security and the sale price obtained in the tendering procedures organized by the Commission was lower than the purchase price paid by the intervention agencies concerned for the tobacco in question, a fact not disputed by the applicant at the hearing.

103 In those circumstances, the increase in the amount of the security by Regulation No 3040/91 cannot be regarded as excessive.

104 Finally, it is necessary to emphasize that in its management of the CMO for tobacco the Commission is required in particular to ensure that disposal of tobacco does not disturb the market. The Commission's insistence on strict guarantees is in principle indicative of the fact that it is properly fulfilling its duty. Guarantee conditions of the kind laid down by Regulation No 3040/91 necessarily mean that undertakings not in a position to meet them are shut out. Such an effect, which is inherent in any guarantee condition, does not therefore constitute a breach of the principle of equal treatment (see Case C-358/90 *Compagnia Italiana Alcool* v *Commission* [1992] ECR I-2457, paragraph 54). In any event, since the successful tenderers in the fourth tendering procedure included small and medium-sized undertakings, the guarantee conditions did not in practice have the effect of preventing such undertakings from participating in that procedure.

105 It follows that the pleas alleging breach of the principle of proportionality and breach of the principle of equal treatment are unfounded.

106 It is clear from the foregoing that Regulation No 3040/91 is not, as a result of increasing the amount of the security, vitiated by any illegality such as to cause the Community to incur non-contractual liability vis-à-vis the applicant.

107 The request made by the applicant in its reply that an expert should be appointed and the Commission called on to produce further documents cannot be upheld. In the first place, the documents in question are not necessary in order to resolve the dispute and, secondly, it would serve no purpose to appoint an expert to assess the alleged damage in this case since the applicant has not established that the Commission's conduct of which it complained was illegal.

108 It follows from all the foregoing that the application must be dismissed in its entirety, and it is unnecessary to consider whether the other conditions of Community non-contractual liability are fulfilled, namely the fact of damage and the existence of a causal link between the Commission's conduct and the damage alleged.

Costs

109 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful and the Commission has applied for costs, the applicant must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. Dismisses the application;

2. Orders the applicant to pay the costs.

Lenaerts Lindh Cooke

Delivered in open court in Luxembourg on 17 December 1997.

H. Jung P. Lindh

Registrar President