JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)
25 May 2004 *

In Case T-154/01,

Distilleria F. Palma SpA, in liquidation, established in Naples (Italy), represented by F. Caruso, avocat,

applicant,

v

Commission of the European Communities, represented by L. Visaggio and C. Cattabriga, acting as Agents, and A. Dal Ferro, avocat, with an address for service in Luxembourg,

defendant,

* Language of the case: Italian.

APPLICATION under Article 235 EC and the second paragraph of Article 288 EC for compensation for damage allegedly suffered as a result of the Commission's allegedly unlawful conduct arising from the letter of 11 November 1996 sent by the Commission to the Italian authorities,

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

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

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 17 December 2003,

gives the following

Judgment

Legal and factual background

1 By Regulation (EEC) No 3390/90 of 26 November 1990 opening a special sale by tender of vinous alcohol held by intervention agencies for use as motor fuel within

the Community (OJ 1990 L 327, p. 21) the Commission opened tender procedure No 8/90 EC for the sale of 1.6 million hectolitres of alcohol, divided into five lots of 320 000 hectolitres, from the distillation operations referred to in Articles 35, 36 and 39 of Council Regulation (EEC) No 822/87 of 16 March 1987 on the common organisation of the market in wine (OJ 1987 L 84, p. 1) ('the tender procedure').

2 Article 1 of Regulation No 3390/90 states, inter alia, that the alcohol put out for sale by tender must be used as motor fuel within the Community.

3 Article 3 of Regulation No 3390/90 provides that the sale is to take place in accordance with the provisions of Commission Regulation (EEC) No 1780/89 of 21 June 1989 laying down detailed rules for the disposal of alcohol obtained from the distillation operations referred to in Articles 35, 36 and 39 of Regulation (EEC) No 822/87 and held by intervention agencies (OJ 1989 L 178, p. 1).

4 Article 4 of Regulation No 3390/90 states that the specific conditions relating to the tender procedure are to be given in special notice of invitation to tender No 8/90 EC (OJ 1990 C 296, p. 14) ('the notice').

5 Article 24(2) of Regulation No 1780/89, as amended many times, and in particular by Commission Regulation (EEC) No 3391/90 of 26 November 1990 (OJ 1990 L 327, p. 23), states that the tenderer is obliged to provide proof that a performance

guarantee has been lodged with the intervention agency of the Member State where the successful tenderer has his principal place of business, in order to ensure that the alcohol for which a contract is awarded is in fact used for the purposes specified in the notice.

6 Under Article 28(4) of Regulation No 1780/89, in the version in force at the time the tender procedure was opened, and section X of the notice, the alcohol must be used within one year from the date of the last removal of each lot.

7 Article 30(1)(e) of Regulation No 1780/89, to which section I, point 5(c), of the notice refers, provides that in order to be considered tenders must be submitted in writing and must include an undertaking from the tenderer to the effect that he will comply with all the rules relating to the tendering procedure in question.

8 Following a tender by Distilleria F. Palma SpA ('Palma', now Fallimento Distilleria F. Palma SpA (Distilleria F. Palma in liquidation), 'the applicant') for ECU 3 per hectolitre of alcohol at 100% vol., the amount of alcohol put up for sale in special invitation to tender No 8/90 EC was awarded to it in January 1991.

9 In the course of that tender procedure Palma lodged a bank guarantee with San Paolo di Torino Bank in favour of the competent intervention agency, Azienda di Stato per gli interventi nel mercato agricolo (State agency for interventions on the agricultural market, 'AIMA').

10 Palma experienced a number of difficulties in removing and disposing of the alcohol and informed the Commission thereof. In the light of those difficulties, inter alia, the Commission adopted Regulation (EEC) No 2710/93 of 30 September 1993 concerning certain special sales by tender of vinous alcohol held by intervention agencies, for use as motor fuel within the Community (OJ 1993 L 245, p. 131).

11 By Article 6 of Regulation No 2710/93, the Commission partially cancelled special invitation to tender No 8/90 EC as regards the lots of alcohol not yet taken out of intervention storage by Palma, that is, three of the five lots concerned. The performance guarantee relating to those three lots was released.

12 Under Article 2 of Regulation No 2710/93, the use of the first two lots under special invitation to tender No 8/90 EC (640 000 hectolitres) was to cease save in cases of *force majeure* by 1 October 1995.

13 Article 3 of Regulation No 2710/93 provides that the performance guarantee relating to the first two lots of that invitation to tender is to be released by the intervention agency when all the alcohol from those two lots has been used as motor fuel within the Community.

14 Notwithstanding the adoption of Regulation No 2710/93, Palma was again faced with events which, it argued, constituted serious obstacles to the performance of its undertakings.

15 By letter of 18 September 1995, Palma requested the Commission to grant it a further extension of the time-limit fixed by Article 2 of Regulation No 2710/93 for using the alcohol. In that letter, Palma relied on circumstances which supposedly constituted a case of *force majeure*, preventing it from performing its undertakings in full within the time-limit fixed.

16 By letter of 27 November 1995, Palma repeated its request for the extension of the time-limit which had expired on 1 October 1995.

17 By letter of 19 December 1995, the Commission informed Palma that it would shortly define its position on a possible extension of the time-limit for using the alcohol.

18 Palma also sent two memoranda to the Commission dated 19 December 1995 and 5 January 1996, by which it requested permission to destroy the alcohol not yet used. That request concerned 34 000 hectolitres of alcohol.

19 By Commission Regulation (EC) No 416/96 of 7 March 1996 amending Regulation No 2710/93 (OJ 1996 L 59, p. 5), the time-limit for the use of the lots already removed was again amended. Article 3(1) of Regulation No 2710/93 as amended by Regulation No 416/96 provides:

'Notwithstanding Article 23 of Regulation (EEC) No 2220/85 and save in cases of *force majeure*, where the deadline [of 1 October 1995] referred to in Article 2 is not

met, the performance guarantee of ECU 90 per hectolitre of alcohol at 100% volume shall be forfeited in the following proportions:

(a) 15% in all cases;

(b) 50% of the amount remaining after the deduction of 15%, where the use referred to in that article has not taken place before 30 June 1996.

The entire guarantee shall be forfeited in the case of failure to complete use of the lots by 31 December 1996.'

20 By memorandum of 23 April 1996 AIMA called on Palma to pay it ITL 3 164 220 870 (EUR 1 634 183.70), allegedly representing 15% of the performance guarantee, on the ground that on 1 October 1995 all the alcohol from the first two lots of the tender had not been used as motor fuel in the Community. By letter of 3 June 1996, Palma contested the lawfulness of AIMA's request.

21 In that letter, Palma also repeated its request to the Commission for permission to destroy the residual quantity of alcohol, claiming that that solution was the most appropriate to guarantee the disposal of the alcohol without causing disturbance of the market.

22 The Commission sent a letter to AIMA on 11 November 1996 which stated that:

'The request by the Palma distillery for permission to destroy a residual quantity of alcohol from special invitation to tender No 8/90 EC because of problems connected with the quantity of alcohol in question cannot be accepted.

It is necessary to apply rigorously the provisions of Commission Regulation (EC) No 416/96 [relating to forfeiture of the guarantee].

... Palma has an obligation of proper performance, which means that the alcohol must be used as motor fuel, according to the conditions in the tender notice and that such an obligation does not disappear with forfeiture of the guarantee. The national authorities are obliged, if necessary by way of compulsory enforcement, to ensure compliance with that obligation after forfeiture of the guarantee. It is absolutely essential to avoid diverting the alcohol towards a sector not authorised by tender notice No 8/90, such as the spirituous drinks sector. ...'

23 That letter was forwarded by AIMA to Palma on 3 February 1997.

24 By memorandum of 20 November 1996, Palma again repeated its criticism of AIMA's request and offered to hand over the alcohol not yet used to AIMA, free of charge.

25 AIMA ordered Palma to pay it the whole of the guarantee. Palma contested that order before the national courts.

26 On 9 July 1999, Palma was declared bankrupt.

Procedure

27 By application lodged at the Registry of the Court of First Instance on 9 July 2001 the applicant brought the present action.

28 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Second Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure as laid down in Article 64 of the Rules of Procedure of the Court of First Instance, requested the parties to reply to written questions at the hearing.

29 The parties presented oral argument and replied to the Court's written and oral questions at the hearing on 17 December 2003.

Forms of order sought

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

— order the Commission to pay compensation for the damage suffered;

— order the Commission to pay the costs.

31 The Commission claims that the Court of First Instance should:

— dismiss the application as inadmissible or unfounded;

— order the applicant to pay the costs.

Law

32 Without raising an objection of inadmissibility by separate document, the Commission contests the admissibility of the action. It puts forward three absolute bars to proceedings. The first and principal bar to proceedings is that the Court of First Instance lacks jurisdiction. The second is that the application is out of time and the third is that Article 44(1)(c) of the Rules of Procedure have been misconstrued. The latter two bars to proceedings are relied on in the alternative.

33 The applicant submits that its application is admissible.

The bar to proceedings alleging lack of jurisdiction of the Court of First Instance

Arguments of the parties

34 The Commission argues that the whole dispute is connected to the objective fact that Palma did not comply with the specific obligation to use the alcohol acquired under special invitation to tender No 8/90 EC and the consequences of that failure of performance. The legal relationship at issue in this case is contractual in nature. It is therefore only by virtue of that contractual relationship that the Commission may be liable. Accordingly, the application is incorrectly founded on the second paragraph of Article 288 EC and it does not fall within the limited jurisdiction conferred on the Community Courts on the basis of Article 240 EC (see, to that effect, the order in Case T-44/96 *Oleifici italiani* v *Commission* [1997] ECR II-1331, paragraph 38).

35 The applicant submits that the Court of First Instance has jurisdiction to hear its application on the ground that it seeks to establish that the Commission is non-contractually liable. Contrary to the Commission's argument, the applicant submits that the issue in dispute is in no way part of a contractual relationship between Palma and the Commission. In this case, the damage suffered arises from the letter of 11 November 1996, which, as a unilateral act by the Commission, cannot fall within the sphere of contract.

36 Moreover, in so far as it rejects Palma's requests relating to the destruction of the residual alcohol and also the decision to recover the guarantee given in the context of invitation to tender No 8/90 EC, the letter of 11 November 1996 is a measure producing binding legal effects which are binding on and capable of affecting the interests of Palma by bringing about a distinct change in its legal position (see, to that effect, Case T-64/89 *Automec* v *Commission* [1990] ECR II-367, paragraph 42).

Findings of the Court

37 The jurisdiction of the Court of First Instance to decide the present dispute depends on the answer to the preliminary issue whether the liability which may be incurred by the Community in this case, on account of the Commission's conduct, is of a contractual nature (see, to that effect, the order in Case T-180/95 *Nutria* v *Commission* [1997] ECR II-1317, paragraph 28).

38 In that regard, it must be observed, first of all, that the applicant and the Commission are connected by a contract. It follows from Article 30(1)(e) of Regulation No 1780/89 that, by tendering for the sale opened by Regulation No 3390/90, Palma expressly undertook to comply with all the provisions relating to that tender. In the light of those conditions, Palma submitted an offer of ECU 3 per hectolitre of alcohol at 100% vol. for the 1.6 million hectolitres of alcohol at 100% vol. put out for sale by tender. By awarding the quantity of alcohol put out for sale, the Commission accepted the price proposed by Palma and Palma's other undertakings. Therefore, the effect of Palma's offer and its acceptance by the Commission is that the relevant provisions of Regulations No 1780/89 and 3390/90 and of the tender notice, and the price offered by Palma, have become the clauses of a contract between the two parties in the present dispute (see, to that effect, the order in Case T-186/96 *Mutual Aid Administration Services* v *Commission* [1997] ECR II-1633, paragraph 39, and the judgment in Case T-134/01 *Hans Fuchs* v *Commission* [2002] ECR II-3909, paragraph 53).

39 It must also be observed that the contract was amended after its conclusion. In response to Palma's requests, inter alia, the Commission adopted Regulations No 2710/93 and No 416/96, which partially cancel the tender and which amend the conditions concerning the use of the alcohol sold and the conditions for the release of the performance guarantee relating to that alcohol. Those amendments form an integral part of the contract.

40 Next, it must be considered whether the supposed infringements by the Commission which form the basis of the present application for compensation relate to the Commission's obligations under the contract (see, to that effect, *Mutual Aid Administration Services* v *Commission*, paragraph 40).

41 The applicant alleges three infringements. First, the Commission failed to take into account the existence of a case of *force majeure*, which exempts Palma from its own breach of the obligation to use the alcohol actually sold within a certain time-limit. That amounts to a failure to take account of the fact that *force majeure* releases a party from its obligations. Second, the Commission refused to make further amendments to the conditions governing use of the alcohol actually sold, which constitutes an infringement of the principle of proportionality. Third, the Commission did not justify that refusal, which constitutes an infringement of the obligation to state reasons incumbent on it pursuant to Article 253 EC.

42 As regards, first, the Commission's obligation to take into account the existence of a case of *force majeure*, it must be held that that obligation is imposed on the Commission pursuant to the contract. The obligation arises from the contractual provisions laid down in Articles 2 and 3 of Regulation No 2710/93, as amended by Regulation No 416/96. Accordingly, the supposed infringement of the obligation to take account of a case of *force majeure* falls within the sphere of contract and can only render the Community liable, if at all, in contract.

43 Second, as regards the claim that the Commission had an obligation to agree to amend the conditions governing use of the alcohol actually sold, on the ground that those amendments are required by the principle of proportionality, it must be held that, even assuming that it exists, that obligation may be imposed on the Commission only by virtue of the contract.

44 It is true that the third paragraph of Article 5 EC, which enshrines the principle of proportionality, is intended to regulate all the Community's means of action, whether contractual or non-contractual.

45 However, according to the principle *pacta sunt servanda,* which constitutes a fundamental principle of any legal order (Case C-162/96 *Racke* [1998] ECR I-3655, paragraph 49), the contract concluded between the Commission and Palma is, in principle, intangible. Therefore, any obligation on the part of the Commission to accept one of the amendments of the contract proposed by Palma can only arise from the contract itself or the general principles which govern contractual relations, among which is the principle of proportionality. The supposed infringement of that obligation to amend the contract, should the case arise, can only render the Community liable in contract.

46 Finally, as regards the obligation to state reasons which the applicant claims has been infringed, it is sufficient to observe that that obligation is imposed on the Commission by virtue of Article 253 EC. It applies, however, only to unilateral means of action by the Commission. It does not apply to the Commission by virtue of the contract which links it to Palma. Accordingly, in this case that obligation can only render the Community non-contractually liable.

47 It follows that, with the exception of the supposed infringement of the obligation to state reasons, the applicant relies in support of its application for compensation on

breach by the Commission of obligations which are contractual in nature, and therefore the action is brought on the basis of a contract (see, to that effect, *Nutria* v *Commission*, paragraph 36).

48 By virtue of the combined provisions of Articles 225 and 238 EC, the Court of First Instance has jurisdiction to give a ruling at first instance on contractual disputes brought before it by physical or legal persons only pursuant to an arbitration clause, which is lacking in this case.

49 In this case the reference by the applicant to the Court of First Instance cannot be regarded as the expression of the parties' joint intention to give the Community Courts jurisdiction in a contractual matter, since the Commission contests the jurisdiction of the Court of First Instance.

50 In the absence of an arbitration clause within the meaning of Article 238 EC, the Court of First Instance lacks jurisdiction, when a claim for compensation is brought before it, as in this case, on the basis of Article 235 EC, to adjudicate on this action inasmuch as it constitutes in reality a claim for contractual damages. To do so would be to extend its jurisdiction beyond the limits placed by Article 240 EC on the disputes of which it may take cognisance, since on the contrary that article specifically gives national courts jurisdiction over disputes to which the Community is a party (see, to that effect, Joined Cases 133/85 to 136/85 *Rau and Others* [1987] ECR 2289, paragraph 10, and the order in *Mutual Aid Administration Services* v *Commission*, paragraph 47).

51 It follows that the plea of inadmissibility based on lack of jurisdiction of the Court of First Instance must be accepted, in so far as the action is based on supposed

infringements of the obligation to take account of a possible case of *force majeure,* and the supposed obligation to accept the amendments to the contract put forward by Palma on the basis of the principle of proportionality.

52 Since the bar to proceedings relied on as the main plea cannot justify dismissing the action in its entirety, it is appropriate to examine the absolute bar to proceedings based on disregard of the provisions of Article 44(1)(c) of the Rules of Procedure, in so far as the applicant claims infringement of the obligation to state reasons.

The bar to proceedings alleging disregard of the provisions of Article 44(1)(c) of the Rules of Procedure

Arguments of the parties

53 The Commission submits that the action is inadmissible in so far as, contrary to the requirements of Article 44(1)(c) of the Rules of Procedure, it does not provide any precise and concrete information on the existence and amount of the damage

allegedly suffered. In that context, the Commission is not in a position to identify the damage on which the applicant founds its claim for compensation.

54 It also claims that as regards the criteria determining the damages, there are inconsistencies between the application and the reply. In the application, the costs of transport and storage for which the applicant claims reimbursement had been incurred before the letter of 11 November 1996 that the applicant regards however as the cause of the alleged damage. On the other hand, the reply refers to the costs of transport and storage supposedly incurred by Palma on account of the letter of 11 November 1996.

55 The applicant submits that its application satisfies the requirements of Article 44(1)(c) of the Rules of Procedure. In that regard, it argues that it duly indicated the damage suffered and that the application mentions the various aspects of the damage and the basic criteria on which to base its quantification. According to the case-law, those facts are sufficient to satisfy the requirements of Article 44(1)(c) of the Rules of Procedure (Case T-277/97 *Ismeri Europa* v *Court of Auditors* [1999] ECR II-1825, paragraph 67). Finally, the applicant argues that the criticisms made by the Commission fall within the determination of the substance of the action and must, accordingly, be examined in that context (Case T-554/93 *Saint and Murray* v *Council and Commission* [1997] ECR II-563, paragraph 59; Case T-38/96 *Guérin Automobiles* v *Commission* [1997] ECR II-1223, paragraph 42; and Case T-184/95 *Dorsch Consult* v *Council and Commission* [1998] ECR II-667, paragraph 23).

Findings of the Court

56 Pursuant to the first paragraph of Article 21 of the Statute of the Court of Justice, applicable to proceedings before the Court of First Instance in accordance with the

first paragraph of Article 53 thereof and Article 44(1)(c) of the Rules of Procedure, the application must state, inter alia, the subject-matter of the dispute and a brief statement of the pleas in law on which the application is based.

57 Since that requirement is mandatory, the issue of compliance with it may be raised by the Court of First Instance of its own motion (see, in particular, Case T-231/99 *Joynson* v *Commission* [2002] ECR II-2085, paragraph 154).

58 It must be recalled that the information referred to in paragraph 56 above must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the action, if necessary without any other supporting information. In order for an action to be admissible, it is necessary for the basic legal and factual particulars relied on to be indicated, at least in summary form, coherently and intelligibly in the text of the application itself (order in Case T-56/92 *Koelman* v *Commission* [1993] ECR II-1267, paragraph 21, and the judgment in Case T-195/95 *Guérin Automobiles* v *Commission* [1997] ECR II-679, paragraph 20).

59 In order to satisfy those requirements, an application seeking compensation for damage caused by a Community institution must state the evidence from which the conduct alleged against the institution can be identified, the reasons for which the applicant considers that there is a causal link between the conduct, the damage it claims to have suffered, and the nature and extent of that damage (Case T-387/94 *Asia Motor France and Others* v *Commission* [1996] ECR II-961, paragraph 107).

60 In this case, it is clear from the consideration of the first plea that the Court of First Instance does not have jurisdiction to hear and determine the allegation that the statement of reasons in the letter of 11 November 1996 containing the Commission's refusal to accept the amendment of the contract proposed by Palma is inadequate. In the context of the present plea, it must be held that the applicant's criticism of the Commission comes down to a supposed infringement of the obligation to state reasons in the letter of 11 November 1996, for which the Community cannot in any event incur liability (see, to that effect, Case 106/81 *Kind* v *Council and Commission* [1982] ECR 2885, paragraph 14, and Case C-76/01 P *Eurocoton and Others* v *Council* [2003] ECR I-10091, paragraph 98).

61 In the application the applicant claims to have suffered damage that it estimates at ITL 22 billion (EUR 11 382 051.78). However, it is clear that the application does not contain any indication of why the applicant believes that there is a causal link between the inadequate statement of reasons in the letter of 11 November 1996 and the damage that it claims to have suffered. At the stage of the application, the applicant merely claims that the supposed damage is the direct and obvious consequence of the letter of 11 November 1996.

62 It follows that the requirements of the first paragraph of Article 21 of the Statute of the Court of Justice and Article 44(1)(c) of the Rules of Procedure have not been satisfied.

63 In the light of all the foregoing, the application must be dismissed as inadmissible, without it being necessary to examine the other pleas and arguments put forward by the Commission in support of the plea of inadmissibility of the application.

Costs

64 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 defendant has applied for costs, the applicant must be ordered to bear all the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. Dismisses the application as inadmissible;

2. Orders the applicant to bear the costs.

Pirrung Meij Forwood

Delivered in open court in Luxembourg on 25 May 2004.

H. Jung

Registrar

J. Pirrung

President