ORDER OF THE COURT OF FIRST INSTANCE (Third Chamber)
13 November 1995 *

In Case T-126/95,

Dumez, a company governed by French law, established in Nanterre (France), represented by Alexandre Carnelutti and Jean-Pierre Spitzer, of the Paris Bar,

applicant,

v

Commission of the European Communities, represented by Hendrik van Lier, Legal Adviser, 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 annulment of the Commission's decision of 29 March 1995 not to take action against the Hellenic Republic for failure to fulfil its obligations under Community law with regard to the award of a public works contract in

* Language of the case: French.

connection with the new Athens airport at Spata and, in the alternative, for a declaration that the Commission failed to act,

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

composed of: C. P. Briët, President, B. Vesterdorf and A. Potocki, Judges,

Registrar: H. Jung,

makes the following

Order

Facts

1 On 20 June 1991 the Greek Government issued a contract notice relating to the design, construction and operation of the new Athens airport at Spata. That notice was published in the *Official Journal of the European Communities* of 10 August 1991 (OJ 1991 S 151, p. 16).

2 On receiving nine requests to participate, the Greek Government invited four consortia to submit tenders. According to the request for proposals, the public works

concession contract involved the creation of a company to operate the airport, 65% of whose share capital would be owned by a private concessionnaire and 35% by the Greek State. The concession contract was to last for 50 years. Under the procedure envisaged, contractual documents were to be drawn up jointly by the Greek State and each of the two finalists, after which the 'cash bid' — the amount offered for purchase of the private partner's share of the concessionnaire company's capital — would be the overriding award criterion.

3 The two consortia selected to participate in the final stage of the procedure are Hochtief and Athens Airport Associates ('AAA'). The applicant is a member of the latter consortium.

4 By letter of 28 June 1993, the Greek authorities informed the two finalists that they had amended the contract award criteria.

5 Towards the end of July 1993, an initial appraisal was made of the tenders submitted by the two consortia during the interim period, recommending that the contract be awarded to Hochtief. However, with the fall of the Greek Government, no formal decision was taken on the matter.

6 After the parliamentary elections, the new government decided to review and amend the conditions for the award of the Spata project. By letter of 18 February 1994, it asked each of the two finalists to submit by 18 March 1994 a fresh tender on a 'turnkey' basis, together with a contract for the operation of the airport over a ten-year term. Only AAA complied, since Hochtief was under the impression that it had already won the contract.

7 Returning to the concession principle, the Greek authorities appear to have favoured next a scheme under which the private partner would contribute approximately 10%. Once again, AAA alone responded to that proposal.

8 Then, in May 1994, Hochtief put a series of new proposals to the Greek authorities, suggesting public ownership of a majority holding (55%) in the company operating the airport and a reduction in the concession term from 50 years to 30 years, and accepting that there would be no special rights over the area surrounding the airport.

9 Alerted by letter of 26 August 1994 from AAA, the Commission approached the Greek authorities, who accordingly asked the two finalists, by letter of 14 September 1994, to clarify their proposals by 23 September 1994. According to the applicant, despite the expiry of that deadline, the Greek Government accepted a tender from Hochtief dated 3 October 1994.

10 The Greek authorities re-examined the tenders. This second appraisal, like the first, gave rise to concern and criticism on the part of AAA, which again alerted the Commission.

11 After a great deal of correspondence between the Commission and the Greek authorities, the latter suggested obtaining a second opinion in order to ascertain whether the award criteria had been applied in a non-discriminatory manner. In December 1994, the Greek authorities appointed three experts whose investigations led them to conclude that the criteria at issue had been correctly applied.

12 AAA expressed serious doubts as to the validity of those findings. By letter of 20 February 1995, AAA again called the Commission's attention to the conduct of the Greek authorities in awarding the contract.

13 The Commissioner responsible brought the matter of the Spata contract before the College of Commissioners. At their meeting on 29 March 1995, the Commission decided not to take action against the Hellenic Republic.

14 According to the applicant, the Greek Parliament approved the award of the concession to the Hochtief consortium, and the related contractual documents, thereby conferring legislative status under national law on both sets of legal acts.

Forms of order sought and procedure

15 Those are the circumstances in which, by application received at the Court Registry on 5 June 1995, the applicant brought the present proceedings, claiming that the Court should:

— annul the Commission's decision of 29 March 1995;

— in the alternative, declare that the Commission unlawfully omitted to initiate the procedure for failure to fulfil obligations against the Hellenic Republic, in view of its serious and repeated infringements of Community law in connection with the procedure for awarding the concession for the new Athens airport;

— order the Commission to pay the costs.

16 By document received at the Court Registry on 20 July 1995, the Commission raised a plea of inadmissibility, claiming that the Court should:

— declare the application inadmissible;

— order the applicant to pay the costs.

17 In its observations on the plea of inadmissibility, received on 19 September 1995, the applicant claims that the Court should dismiss that plea, and in the alternative that it should reserve its decision on admissibility for the final judgment.

18 By document received at the Court Registry on 7 November 1995, the Hellenic Republic applied for leave to intervene in support of the form of order sought by the Commission.

Law

19 Pursuant to Article 114(3) of the Rules of Procedure, the remainder of the proceedings with regard to the plea of inadmissibility is to be oral, unless the Court decides otherwise. The Court (Third Chamber) considers that in the present case the information before it is sufficient and there is no need to open the oral procedure.

Admissibility

The pleadings based on Article 173 of the EC Treaty

— Arguments of the parties

20 In its plea of inadmissibility, the Commission argues first that its decision not to take action under Article 169 does not constitute a decision for the purposes of Article 173 of the Treaty. It points out that infringement proceedings under Article 169 of the EC Treaty commence with an administrative procedure during which no measure taken has binding force (Case 48/65 *Lütticke and Others* v *Commission* [1966] ECR 19, p. 27).

21 Secondly, the Commission maintains that, as regards initiation of the procedure under Article 169, it enjoys a discretionary power which in its view precludes any right on the part of individuals to challenge its refusal to take such action with regard to a Member State (*Lütticke*, cited above, p. 27; Case 247/87 *Star Fruit* v *Commission* [1989] ECR 291, paragraph 13; the orders of 14 December 1993 in Case T-29/93 *Calvo Alonso-Cortés* v *Commission* [1993] ECR II-1389, paragraph 55, of 27 May 1994 in Case T-5/94 *J* v *Commission* [1994] ECR II-391, paragraph 15, and of 4 July 1994 in Case T-13/94 *Century Oils Hellas* v *Commission* [1994] ECR II-431, paragraph 14).

22 Thirdly, the Commission argues that, even if a right of action lay against its decision not to initiate the procedure under Article 169, that decision is not of direct and individual concern to the applicant. The case-law on State aid and the application of Articles 85 and 86 of the EC Treaty — particularly the judgments in Case 169/84 *Cofaz and Others* v *Commission* [1986] ECR 391 and in Case C-39/93 P *SFEI and Others* v *Commission* [1994] ECR I-2681 — cannot be transposed to infringement procedures in view of the fact that Article 169 of the Treaty neither empowers the Commission to declare that a Member State has failed to fulfil its obligations nor confers on interested third parties the right to intervene in the administrative procedure.

23 Lastly, the Commission points out that Member States are under an obligation to ensure effective judicial control as regards compliance with the applicable provisions of Community law and that, in the sphere of public works contracts, further weight has been given to that obligation by the adoption of special directives concerning review procedures (Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, OJ 1989 L 395, p. 33, and Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, OJ 1992 L 76, p. 14). According to the Commission, the business concerns affected by those directives have access, consistent with the right to a judicial determination, to remedies available under national law in compliance with, and entailing the protection offered by, both the Treaty and the case-law of the Court of Justice.

24 The applicant submits that a statement by a spokesman for the Commission is adequate evidence of a decision taken by the Commission (Case T-3/93 *Air France* v *Commission* [1994] ECR II-121). It follows that, on 29 March 1995, the Commission adopted a decision not to take action under Article 169 with regard to the Hellenic Republic.

25 The applicant argues that the decision of 29 March 1995 constitutes an act producing definitive legal effects, since it terminated definitively the investigation initiated by the Commission on being alerted by the applicant's complaint of 26 August 1994 (*SFEI*, cited above, paragraph 27). Referring to the judgments in Case 26/76 *Metro* v *Commission* [1977] ECR 1875 and in Case 191/82 *Fediol* v *Commission* [1983] ECR 2913, the applicant points out that the decision not to initiate the infringement procedure is comparable to a decision terminating an investigation initiated in response to a complaint in the field of competition. In its observations on the plea of inadmissibility, the applicant adds that the fact that the Commission

is not obliged to bring the matter before the Court does not mean that acts adopted during the pre-litigation procedure have no legal effects.

26 The applicant asserts next that, as a member of the AAA consortium, it is directly and individually concerned by the contested decision. The members of the AAA consortium are the only legal persons adversely affected by the Greek authorities' infringements of Community law. The decision not to initiate the infringement procedure was brought about by a complaint from that consortium and therefore distinguishes its members individually just as in the case of a person addressed (Case 25/62 *Plaumann* v *Commission* [1963] ECR 95). Those members are also directly concerned by virtue of the fact that the Commission's decision directly affects their position as a business concern in relation to the award procedure.

27 The applicant argues that, in any event, the case-law cited by the Commission (see paragraph 21 above) does not seem in point here, since (i) the national measure in question is wholly individual in character; (ii) the Community rules infringed by the Member State concerned are constitutional principles of the Community legal order; and (iii) the infringement occurred during procedures for the award of public contracts destined to receive considerable Community financial support.

28 On that point, the applicant maintains that the purpose of the present proceedings is not to cause general legislation to be amended, but to bring about the withdrawal of an act whose scope is individual and limited, namely the award of a contract to a tenderer. Thus, the aim here is to refer to the Court a refusal on the part of the Commission to penalize a distortion of competition, and certainly not to have the Court review the wisdom of a decision concerning provisions of State legislation. The 'self-restraint' exercised by the Community judicature would only come into play if the latter prospect were contemplated.

29 According to the applicant, the action must also be admissible in view of the fundamental and constitutional character of the legal rules infringed, particularly the principle of equal treatment. The applicant points out that, in the sphere of public contracts, the Commission is entrusted with a special responsibility requiring it to ensure equality of conditions for those responding to invitations to tender and the elimination of discrimination (Case 118/83 *CMC and Others* v *Commission* [1985] ECR 2325, paragraph 44). The contested decision also prejudges the Commission's finding as to whether proper procedures had been followed in awarding the contract for the purposes of granting or approving Community financial assistance.

30 The applicant adds that the discretionary power conferred on the Commission by Article 169 of the Treaty cannot give it immunity from all forms of judicial review (*Fediol*, cited above, paragraph 30). That would be incompatible with the right to a judicial determination, as upheld by the Court of Justice in Case 222/84 *Johnston* v *Chief Constable of the RUC* [1986] ECR 1651, paragraph 18, and enshrined in the European Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms and in Article F(2) of the Treaty on European Union. Also, the availability of a judicial remedy is a necessary requirement where the Commission decides to close a file, since that involves individual measures which prejudice one of the fundamental rights recognized by the Treaty as accruing to individuals and undertakings.

31 The applicant argues that to dismiss the application as inadmissible would result in a denial of justice. It cannot obtain redress through the national courts since under Greek law there is no procedure for interim relief enabling an unsuccessful tenderer to obtain suspension of the unlawful award of a contract. Furthermore, the directives referred to by the Commission have not yet been implemented in Greece. In its observations on the plea of inadmissibility, the applicant adds that the

'legislative approbation' given by the Greek Parliament precludes any action before the national courts, since the Greek administrative courts will not criticize statutory law.

— Findings of the Court

32 The action brought under the fourth paragraph of Article 173 of the Treaty seeks annulment of the Commission's decision not to grant the request from the AAA consortium — of which the applicant is a member — to take action against the Hellenic Republic under Article 169.

33 It has consistently been held that individuals are not entitled to contest a refusal by the Commission to take action under Article 169 against a Member State (*Lütticke*, cited above, p. 27; the order of the Court of Justice of 12 June 1992 in Case C-29/92 *Asia Motor France and Others* v *Commission* [1992] ECR I-3935, paragraph 21; the orders of the Court of First Instance in *Calvo Alonso-Cortés*, cited above, paragraph 55, and of 29 November 1994 in Cases T-479/93 and T-559/93 *Bernardi* v *Commission* [1994] ECR II-1115, paragraph 27).

34 The case-law of the Community judicature concerning the non-actionable nature of a refusal by the Commission to initiate the procedure under Article 169 of the Treaty is based not only on the discretionary power conferred on the Commission by Article 169 itself, but also on the principle that, where the Commission's decision is negative, it must be appraised in the light of the nature of the request to which it constitutes a reply (Case 42/71 *Nordgetreide* v *Commission* [1972] ECR 105, paragraph 5).

35 In order to determine the nature of the act sought by the AAA consortium's complaint, it should be noted that Article 169 of the Treaty provides: 'If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.'

36 In view of the fact that, under Article 169 of the Treaty, the Court of Justice alone is competent to declare that, as alleged by the applicant, the Hellenic Republic has failed to fulfil the obligations incumbent upon it by virtue of the principle of equal treatment and other provisions of Community law, the act sought by the AAA consortium's complaint can only have been the Commission's delivery of a reasoned opinion (see, in particular, the judgment in *Lütticke*, cited above, p. 27, and the Opinion of Advocate General Gand in the same case, pp. 30 and 32).

37 It is clear from the scheme of Article 169 of the Treaty that the reasoned opinion is merely a preliminary stage following which an action may be brought before the Court of Justice for failure to fulfil obligations, and cannot therefore be regarded as an act which could form the subject-matter of proceedings for annulment. Consequently, the Commission's refusal to initiate the Article 169 procedure also constitutes an act which is not open to challenge, and there is no need to determine whether it was of direct and individual concern to the applicant.

38 It should be added that, in any event, neither the serious nature of the alleged infringement of Community law and the purportedly individual character of the

act of the Greek Government which was criticized in the complaint, nor the fact that no effective legal remedies may be available through the national courts constitute elements capable of influencing the legal classification of the act sought by the complainant.

39 It follows from the foregoing that the claims for annulment are inadmissible.

The alternative pleadings based on Article 175 of the EC Treaty

— Arguments of the parties

40 In its plea of inadmissibility, the Commission points out that, according to settled case-law, an action brought under Article 175 of the Treaty for a declaration that, in infringement of the Treaty, the Commission failed to act by not initiating the Article 169 procedure with regard to a Member State is inadmissible (*Star Fruit*, cited above, paragraphs 11 to 14; the order of the Court of Justice in Case C-371/89 *Emrich* v *Commission* [1990] ECR I-1555, paragraphs 5 to 7; the order of the Court of First Instance in *Century Oils Hellas*, cited above, paragraphs 12 to 16).

41 The applicant points out that on 20 February 1995 the AAA consortium called upon the Commission to take action against the Hellenic Republic. The applicant adds that, if the Court finds that the Commission took no decision at its meeting on 29 March 1995, it would follow that, as from 21 April 1995, the Commission had failed to act. However, in its observations on the plea of inadmissibility, the applicant states that its pleadings in this regard have been rendered irrelevant by the Commission's own affirmation that it had defined its position.

— Findings of the Court

42 In so far as the application is based on the third paragraph of Article 175 of the Treaty, it seeks a declaration that by not initiating the infringement procedure with regard to the Hellenic Republic the Commission failed to act, thereby infringing the Treaty.

43 The Court notes *in limine* that the Commission defined its position, for the purposes of Article 175, by adopting the contested decision of 29 March 1995. According to established case-law (Joined Cases 166/86 and 220/86 *Irish Cement* v *Commission* [1988] ECR 6473, paragraph 17), Article 175 refers to failure to act in the sense of failure to take a decision or to define a position, and not the adoption of a measure different from that desired or considered necessary by the persons concerned.

44 The Court also notes that the action for failure to act provided for by Article 175 of the Treaty is contingent on the institution concerned being under an obligation to act, so that its alleged failure to act is contrary to the Treaty. However, it is clear from the scheme of Article 169 of the Treaty that the Commission is not bound to initiate the procedure provided for therein but in this regard has a discretion which excludes the right for individuals to require that institution to adopt a specific position (*Star Fruit*, cited above, paragraph 11; the order in *Bernardi*, cited above, paragraph 31).

45 The application for a declaration that the Commission failed to act is therefore inadmissible.

46 It follows from all the foregoing that the action must be declared inadmissible in its entirety. In those circumstances, there is no need to take a decision on the application of the Hellenic Republic for leave to intervene.

Costs

47 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 in its pleadings, it must be ordered to pay its own costs, together with those incurred by the Commission.

48 Under Article 87(4) of the Rules of Procedure, Member States which have intervened in the proceedings are to bear their own costs. If the Hellenic Republic has incurred costs arising from its application to intervene in the present proceedings, it must bear those costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby orders:

1. The application is dismissed as inadmissible.

2. There is no need to take a decision on the application to intervene.

3. The applicant shall pay its own costs, together with those incurred by the Commission. The Hellenic Republic shall bear any costs which it has incurred in submitting its application to intervene.

Luxembourg, 13 November 1995.

H. Jung

Registrar

C. P. Briët

President