JUDGMENT OF THE COURT (Sixth Chamber)
14 January 1993 *

In Case C-257/90,

Italsolar SpA, a company governed by Italian law, whose registered office is in Milan, represented by Mario Siragusa, of the Rome Bar, Massimo Nicolazzi, of the Milan Bar, and Giuseppe Scassellati-Sforzolini, of the Bologna Bar, with an address for service in Luxembourg at the Chambers of Messrs Arendt & Medernach, 8-10 Rue Mathias Hardt,

applicant,

v

Commission of the European Communities, represented by its Legal Advisers Eugenio de March and Hans-Peter Hartvig, acting as Agents, with an address for service in Luxembourg at the office of Roberto Hayder, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATIONS under the second paragraph of Article 173, the third paragraph of Article 175, Article 178 and the second paragraph of Article 215 of the EEC Treaty in relation to the restricted invitation to tender (No 6100.20.94.216 (REG/6116)) for the supply and installation of photovoltaic solar equipment for the countries comprised in the Interstate Permanent Committee for Drought Control in the Sahel (ICDCS), financed by the European Economic Community through the European Development Fund (EDF),

* Language of the case: Italian.

THE COURT (Sixth Chamber),

composed of: C. N. Kakouris, President of the Chamber, J. L. Murray, G. F. Mancini, F. A. Schockweiler and M. Diez de Velasco, Judges,

Advocate General: C. O. Lenz,
Registrar: D. Triantafyllou, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 7 May 1992, at which Italsolar SpA was represented by Mario Siragusa, of the Rome Bar, and Giuseppe Scassellati-Sforzolini, of the Bologna Bar,

after hearing the Opinion of the Advocate General at the sitting on 30 June 1992,

gives the following

Judgment

1 By application lodged at the Court Registry on 22 August 1991, Italsolar SpA brought an action under the second paragraph of Article 173, the third paragraph of Article 175, Article 178 and the second paragraph of Article 215 of the EEC Treaty for the annulment of the Commission measure communicated to the applicant by letter of 12 June 1990 from the Directorate General for Development in which the latter confirmed that the executive secretary of the Interstate Permanent Committee for Drought Control in the Sahel (hereinafter 'the ICDCS') had not accepted the tender submitted by the applicant in a tendering procedure for a contract for the supply and installation of photovoltaic solar equipment for the countries comprised in that organization. The applicant also seeks declaration that the

Commission failed to adopt the measures that it was required to take to enable the applicant to be readmitted to the tendering procedure. Finally, the applicant seeks compensation for the damage suffered by it as a result of its exclusion from that procedure.

2 The contract in question relates to a regional programme for the use of solar energy, financed by the European Development Fund in accordance with the Third ACP-EEC Convention signed at Lomé on 8 December 1984 (OJ 1986 L 86, p. 3, hereinafter 'the Convention').

3 Pursuant to Article 222 of the Convention, a financing agreement was concluded between the Community, represented by the Commission, and the nine Sahel countries concerned, represented by the ICDCS.

4 Following Notice No 2731 concerning a prequalification procedure (OJ 1988 S 62), Italsolar submitted an application to take part in the restricted invitation to tender identified as Project No 6100.20.94.216 (REG/6116).

5 By letter of 6 July 1989 signed by the executive secretary of the ICDCS, Italsolar was invited to take part in the restricted invitation to tender and to send its tender before 6 November 1989, drawn up in accordance with the tender dossier annexed to the invitation, to the Directorate General for Development. It was stated, *inter alia*, that the contract would be subject to the general conditions for public works and supply contracts financed by the EDF (JO 1972 L 39, p. 3).

6 The applicant submitted its tender within the prescribed period. After the envelopes containing the tenders received were opened and examined, tenderers were asked to submit information and explanations of various kinds and the applicant did so within the period allowed.

7 At a later stage in the procedure the ICDCS proposed that the contract be awarded provisionally to tenderers other than Italsolar and that the technical trial phase should be proceeded with in respect of those undertakings, in accordance with the tender dossier. That proposal was approved by the Commission on 30 April 1990.

8 The ICDCS therefore informed Italsolar by telex message of 3 May 1990 that its tender had been rejected and confirmed that fact by letter of 7 May 1990.

9 Taking the view that its tender had been economically the most advantageous and had been unlawfully rejected, the applicant, by letter of 7 May 1990, informed the Commission that if the communication of 3 May were to be sent to it as a definitive notification, it would regard it as unlawful for very serious reasons which it would not fail to make known. The applicant also reserved the right to safeguard its rights before the appropriate courts. The letter ended: 'trusting that the communication that we have received is the result of a misunderstanding, we should be obliged to receive your prompt reply'.

10 By letter of 12 June 1990, the Commission replied that the power to award the contract in question was vested in the executive secretary of the ICDCS and that the applicant should address its reservations concerning the procedure for the award of contract to that body. The Commission stated that in any event it had monitored the matter carefully and that the ICDCS had obtained the assistance of international experts in order to assess the technical specifications of the various tenders.

11 By letter of 9 July 1990 to the executive secretary of the ICDCS, the applicant requested withdrawal of the decision excluding it and authorization to participate in the subsequent stages of the procedure until the contract was definitively awarded. In the absence of measures favourable to it, it would initiate the arbitration procedure provided for in Article 238 of the Convention in order to secure

recognition of its right to participate in the procedure and to have the contract awarded to it by reason of its most economically advantageous tender, or else to obtain damages.

12 By a document lodged at the Registry of the Court on the same day as the originating application, Italsolar requested the adoption of interim measures under Articles 185 and 186 of the EEC Treaty suspending the enforcement of the contested measure or such other interim relief as might bring about the applicant's readmission to the tendering procedure. That application was dismissed by order of the President of the Court of 25 October 1990.

13 On 4 December 1990, the applicant submitted to the International Chamber of Commerce an application for arbitration proceedings against the ICDCS.

14 At the request of the applicant, the Court asked the Commission to produce the documents concerning the invitation to tender at issue. The Commission produced them on 7 February 1992, stating, however, that they were confidential.

15 By decision of 20 February 1992, the President of the Sixth Chamber ordered that the documents in question be withdrawn from the file and returned to the Commission by reason of their confidential nature. Consequently, those documents have not been taken into account by the Court for the purposes of the present judgment.

16 Reference is made to the Report for the Hearing for a fuller account of the facts, the procedure and the pleas in law and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

The admissibility of the action for annulment

17 The applicant maintains, essentially, that by the contested measure the Commission approved the provisional award of the contract by the ICDCS to the other tenderers and therefore tacitly agreed to the exclusion of the applicant from the invitation to tender, whilst at the same time refusing to take the measures requested by the applicant to safeguard its interests.

18 The provisional award of the contract and, therefore, the exclusion of the applicant are, in the applicant's view, attributable to the Commission, which had itself conducted the pre-selection procedure on behalf of the ICDCS. The latter was entirely dependent on the Commission for the financing of the project and its decision to exclude the applicant was purely formal.

19 The applicant also considers that the provisions of the Convention on financial and technical cooperation entrusted joint responsibility to the ICDCS and the Commission for the tendering procedure, including the award of the contract, and that the exclusive authority of the ICDCS related only to the conclusion of the contract with the successful tenderer.

20 The Commission contends that the action for annulment is inadmissible and that, on the contrary, by virtue of the rules concerning the division of powers as between the Commission and the authorities of the ACP States for the purposes of tendering procedures, as consistently interpreted by the Court, no measure emanating from the Commission can, as far as tenderers are concerned, constitute a decision against which an action for annulment may be brought.

21 In order to determine whether an action for annulment is admissible, the nature of the contested measure must be examined. The Court has consistently held that the only measures against which an action for annulment may be brought are those which are binding on, and are capable of affecting the interests of, the applicant (see, in particular, the judgment in Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 9).

22 The contested measure is not such a measure. As the Court has held (see, in particular, the judgments in Case 126/83 *STS* v *Commission* [1984] ECR 2769, paragraphs 16 to 18, and Case 118/83 *CMC* v *Commission* [1985] ECR 2325, paragraph 28), public contracts financed by the EDF remain national contracts which only the representatives of the ACP States have the power to prepare, negotiate and conclude, the involvement of the Commission representatives in the procedure for the award of those contracts being confined to establishing whether or not the conditions for Community financing are met. Moreover, the undertakings which submit tenders for or are awarded the contract in question have legal relations only with the ACP State which is responsible for the contract and the measures adopted by representatives of the Commission cannot substitute, in relation to them, a Community decision for the decision of the ACP States.

23 It follows that the actual decision to award the contract falls within the powers reserved by the Convention to the ACP States, the role of the Commission representative in that regard being limited, with a view to ensuring the financial propriety of the transaction, to approving the proposal for the award of the contract made by the representative of the ACP States.

24 Moreover, those powers of the ACP States are confirmed by Article 45 of the abovementioned general conditions for public works and supply contracts, according to which the choice of the economically most advantageous tender is a matter for the administration of the ACP States.

25 It follows that, in the abovementioned letter of 12 May 1990, the Commission merely stated in reply to the applicant that the power to decide to whom the contract was to be awarded was vested in the executive secretary of the ICDCS and that it was incumbent on the applicant to inform that body of its reservations concerning the tendering procedure.

26 It follows from the foregoing that the contested measure cannot be regarded as producing legal effects as regards the applicant and cannot therefore be the subject of an action for annulment brought by the applicant.

27 Accordingly, the action for annulment must be dismissed as inadmissible.

The admissibility of the action for failure to act

28 The applicant maintains, essentially, in support of its action for failure to act, that the Commission failed to take the measures necessary to secure the applicant's readmission to the tendering procedure even though, since it was responsible for ensuring the propriety of the tendering procedure, it was under a duty to do so.

29 The Commission considers the action for failure to act to be inadmissible on the ground that, in view of the division of powers between it and the authorities of the ACP States, no omission on its part can, as far as tenderers are concerned, be the subject of an action for failure to act.

30 It need merely be pointed out that, by reason of the abovementioned division of powers as between the Commission and the ICDCS, the Commission could not in any event have adopted, in relation to the applicant, any measure other than a recommendation or opinion of the kind referred to in the third paragraph of Article 175 of the Treaty.

31 Accordingly, the action for failure to act must be dismissed as inadmissible.

The action for damages

32 The applicant claims that its unlawful exclusion from the tendering procedure, resulting from the conduct of the Commission, which it regards as, at the very least, negligent, caused it serous damage for which it is entitled to compensation.

33 The Court has consistently held (see, in particular, the judgment in Case C-55/90 *Cato* v *Commission* [1992] ECR I-2533, paragraph 18) that it is apparent from the second paragraph of Article 215 of the Treaty that the Community may incur non-contractual liability and the right to compensation for damage suffered may arise only if a series of conditions regarding the illegality of the alleged conduct of the Community institutions, the reality of the damage and the existence of a causal link between the conduct of the institution and the alleged damage have first been met.

34 As regards the illegality of the conduct for which the Commission is criticized, it must be stated that, in so far as the Commission's powers are limited to establishing whether or not the conditions for Community financing are satisfied, it was under no obligation to the applicant to oppose its exclusion from or to take action to obtain its readmission to the procedure.

35 Moreover, the applicant has not been able to show either that the Commission unlawfully influenced the ICDCS in order to exclude it from the tendering procedure or that it acted improperly by deciding that it had no reasonable grounds for considering that the conditions for Community financing of the project were not satisfied.

36 It follows that the action for damages must be dismissed, without its being necessary to give a decision concerning any damage or any causal link between such damage and the conduct for which the Commission is criticized.

Costs

37 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the applicant has been unsuccessful it must be ordered to pay the costs, including those relating to the application for interim measures.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. Dismisses the application for annulment as inadmissible;

2. Dismisses the application for failure to act as inadmissible;

3. Dismisses the application for compensation as unfounded;

4. Orders the applicant to pay the costs, including those relating to the proceedings for interim measures.

Delivered in open court in Luxembourg on 14 January 1993.

J.-G. Giraud
Registrar

C. N. Kakouris
President of the Sixth Chamber