Reports of Cases

JUDGMENT OF THE GENERAL COURT (First Chamber)

10 April 2013 *

(Financial assistance for an ecological tourism project — Repayment of the amounts recovered — Decision taken following the annulment by the General Court of the earlier decision cancelling the assistance — Compensatory interest — Default interest — Calculation)

In Case T-671/11,

IPK International – World Tourism Marketing Consultants GmbH, established in Munich (Germany), represented by C. Pitschas, lawyer,

applicant,

v

European Commission, represented by F. Dintilhac, G. Wilms and G. Zavvos, acting as Agents,

defendant,

APPLICATION for partial annulment of the Commission's decision of 14 October 2011 (ENTR/R1/HHO/lsa — entre.r.l(2011)1183091) to pay to the applicant a total amount of EUR 720 579.90, including the sum of EUR 158 618.27 by way of compensatory interest,

THE GENERAL COURT (First Chamber),

composed of J. Azizi (Rapporteur), President, S. Soldevila Fragoso and S. Frimodt Nielsen, Judges,

Registrar: K. Andová, Administrator,

having regard to the written procedure and further to the hearing on 28 November 2012,

gives the following

Judgment

Background to the dispute

1 The present action is one of a series of cases which have involved the same parties and which, since 1994, have been the subject of a number of disputes before the General Court and the Court of Justice.

* Language of the case: German.

2 The last of those disputes was definitively settled by the judgment of 15 April 2011 in Case T-297/05 *IPK International* v *Commission* [2011] ECR II-1859 ('the judgment of 15 April 2011'), which has acquired the authority of *res judicata*, by which the General Court annulled the Commission's decision of 13 May 2005 (ENTR/01/Audit/RVDZ/ss D(2005) 11382) to cancel the Commission's decision of 4 August 1992 (003977/XXIII/A3 — S92/DG/ENV8/LD/kz) to grant the applicant, IPK International — World Tourism Marketing Consultants GmbH ('IPK'), financial assistance in the amount of ECU 530 000 within the framework of the Ecodata project ('the decision of 13 May 2005'). In that judgment, the Court held, in essence, that the Commission had been correct in finding that IPK had committed irregularities which, in principle, justified the cancellation of the financial assistance (paragraphs 128 to 145), but that the decision of 13 May 2005 had nevertheless to be annulled on account of the failure to act within the relevant prescribed period (paragraphs 147 to 166).

3 By letter of 27 July 2011, IPK applied to the Commission Directorate-General for Enterprise and Industry for the payment of a total amount of EUR 911 987.86. That amount was divided into three tranches: (i) a first tranche of EUR 212 000 not paid over to IPK, that is to say, 40% of the financial assistance granted to IPK in 1992; (ii) a second tranche of EUR 318 000, which IPK had meanwhile repaid before delivery of the judgment of 15 April 2011, that is to say, 60% of the financial assistance; and (iii) a third tranche of EUR 31 961.63, corresponding to the default interest that IPK had paid over to the Commission together with the repayment of the second tranche. IPK also applied in that letter for the payment of default interest, amounting to EUR 252 394.36 as of 1 January 1994 in relation to the first tranche and EUR 97 631.87 as of 18 May 2007 in relation to the second tranche, the calculation of which is set out in an annex to the letter. Lastly, IPK set a deadline – 26 August 2011 – for the Commission to meet its request for payment.

4 By email of 26 August 2011, IPK reminded the Commission of its request for payment.

5 By letter of 2 September 2011, the Commission informed IPK that it was undertaking a detailed analysis of the file and that it intended to meet any obligations arising in consequence of the judgment of 15 April 2011, referred to in paragraph 2 above. The Commission also informed IPK that the administrative procedure to implement any possible obligation pursuant to that judgment could take a considerable time.

6 By letter of 4 September 2011, IPK expressed, inter alia, its failure to understand the delay caused by the Commission's consideration of the judgment of 15 April 2011, referred to in paragraph 2 above, and set the Commission a deadline – 16 September 2011 – for notifying IPK of the action that it intended to take.

7 During a telephone conversation of 14 September 2011, an agent of the Commission notified the IPK Board that the Commission intended, through payments or reimbursement, to make over the full amount of the financial assistance and to pay back the default interest of EUR 31 961.63. However, the Commission had still not decided whether – and, if so, to what extent – it would be necessary also to pay interest on those amounts.

8 On 11 October 2011, during another telephone conversation with the IPK Board, the Commission notified IPK, informally, that it had taken the decision to pay IPK the financial assistance amounting in total to EUR 530 000, as well as to pay back the default interest of EUR 31 961.63 that IPK had paid. Furthermore, the Commission had decided to pay IPK interest totalling EUR 158 000. Within one month, therefore, IPK would receive a total amount of approximately EUR 720 000.

9 On 14 October 2011, the Commission adopted a decision bearing the reference ENTR/R1/HHO/lsa — entre.r.l(2011)1183091 ('the contested decision'), and notified IPK accordingly.

10 In the contested decision, the Commission specified, first, the total amount, including interest, to be paid to IPK (EUR 720 579.90) and, secondly, the amount of compensatory interest that it had decided to pay (EUR 158 618.27), calculated in accordance with the interest rates of the European Central Bank (ECB) and the European Monetary Institute (EMI), the ECB's predecessor, for their main refinancing operations. Moreover, the Commission stated that, in relation to the amounts of EUR 318 000 and EUR 31 961.63, it had calculated that interest as of 18 May 2007 and, in relation to the amount of EUR 212 000, as of 1 January 1994; and that all the interest had been calculated up until 31 October 2011.

11 By letter of 17 October 2011, IPK disputed the lawfulness of the contested decision – in the light of Article 296 TFEU, in particular – and requested that it be informed, before 31 October 2011, of the legal basis for that decision, the reasons for treating the interest as 'compensatory' interest rather than as 'default' interest, the specific interest rates applied to each of the tranches of the amount to be paid, and the reason why the interest rates applied by the ECB and the EMI for their main refinancing operations had not been increased by 3.5 percentage points.

12 By letter of 25 October 2011, the Commission stated that the legal basis for the contested decision was Article 266 TFEU. It also stated that it is not required to pay default interest, as the 'Financial Regulation (FR) of 1977' – applicable to the financial assistance at issue and as amended by Council Regulation (Euratom, ECSC, EEC) No 610/90 of 13 March 1990 amending the Financial Regulation of 21 December 1977 applicable to the general budget of the European Communities (OJ 1990 L 70, p. 1) – did not lay down any rules on the payment of interest by the Commission to beneficiaries. Likewise, Commission Regulation (Euratom, ECSC, EC) No 3418/93 of 9 December 1993 laying down detailed rules for the implementation of certain provisions of the Financial Regulation of 21 December 1977 (OJ 1993 L 315, p. 1) had not entered into force until after the financial assistance agreement was signed and, in any event, Article 94(1) of that regulation applies only to requests for payment made by the Commission and not to requests made to the Commission (see also Title XIV and Article 92 of that regulation). Furthermore, Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1) and Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Regulation No 1605/2002 (OJ 2002 L 357, p. 1) are not applicable to contracts signed before 1 January 2003, the date on which those regulations entered into force. It is nevertheless clear from the case-law that the Commission has an obligation to pay compensatory interest in accordance with a judgment annulling a measure. The Commission had therefore decided to pay interest, in accordance with the ECB and EMI interest rates, on each of the tranches of the total amount payable according to the calculation set out in the table appended to the letter. In that table, the Commission calculated interest on each of the tranches of the claim referred to in paragraph 3 above in the light of the ECB's interest rate for its main refinancing operations, and up until 13 July 2011. In that regard, the Commission stated that, as there was no rule authorising the application of default interest, it was inappropriate to raise the interest rates by 3.5 percentage points. Lastly, the Commission stated that payment had been suspended pending IPK's reply to its letter.

13 By letter of 3 November 2011, IPK informed the Commission that it regarded the reasons set out by the Commission as sufficient to comply with Article 296 TFEU and asked the Commission 'to proceed with the payment to [it]'.

14 By letter of 18 November 2011, the Commission, first, acknowledged receipt of IPK's letter of 3 November 2011, in which IPK accepted the Commission's explanations and asked it to proceed with the payment in the amount of EUR 720 579.90, and, secondly, stated that the payment had been authorised on 16 November 2011. Lastly, the Commission stated its view that, with that payment, any claims that IPK could rely on in connection with the judgment of 15 April 2011, referred to in paragraph 2 above, were finally and fully satisfied.

15 On 22 November 2011, the amount of EUR 720 579.90 was credited to IPK's account with the Stadtsparkasse München.

16 By letter of 30 November 2011, IPK replied to the Commission's letter of 18 November 2011. In that letter, it first pointed out that its letter of 3 November 2011 could not be taken as an acceptance of the explanations given by the Commission; rather, it had merely stated that those explanations were sufficient to comply with Article 296 TFEU. IPK then claimed that the statement of reasons set out in the letter of 25 October 2011 was legally incorrect. According to IPK, the calculation of interest set out in that letter was not consistent with established case-law, as relied on by the Commission, according to which each of the ECB's interest rates for its main refinancing operations should be increased by 2 percentage points. IPK accordingly asked the Commission to adjust, by 9 December 2011, its method of calculating interest by increasing the interest rates applied by 2 percentage points, failing which IPK would bring an action for annulment of the contested decision.

17 The Commission did not reply to IPK by the deadline set.

Procedure and forms of order sought by the parties

18 By application lodged at the Court Registry on 22 December 2011, IPK brought the present action.

19 As a member of the Chamber was unable to sit in the present case, the President of the Court designated another judge to complete the Chamber, pursuant to Article 32(3) of the Court's Rules of Procedure.

20 On 16 April 2012, the Court decided, pursuant to Article 47(1) of the Rules of Procedure, not to authorise a second exchange of pleadings.

21 In the light of the arguments put forward by the Commission, IPK applied by separate document, lodged at the Court Registry on 30 April 2012, for leave to supplement the file with regard to compensatory interest and default interest. By letter of 8 May 2012, the Court informed IPK of its decision to grant leave to lodge a reply with regard to those points alone. IPK lodged that reply on 13 June 2012. The Commission lodged a rejoinder on 24 July 2012.

22 IPK claims that the Court should:

— annul the contested decision, in so far as the amount of interest to be paid to IPK thereunder is only EUR 158 618.27;

— order the Commission to pay the costs.

23 The Commission contends that the Court should:

— dismiss the action;

— order IPK to pay the costs.

24 Upon hearing the report of the Judge-Rapporteur, the General Court (First Chamber) decided to open the oral procedure.

25 At the hearing on 28 November 2012, the parties presented oral argument and replied to oral questions put by the Court.

Law

26 In support of its claim for partial annulment of the contested decision, IPK relies on a single plea in law, alleging infringement of Article 266 TFEU in that the Commission erred in its calculation of the interest payable.

27 IPK maintains that, in the contested decision, the Commission acknowledged its obligation arising in consequence of the judgment of 15 April 2011, referred to in paragraph 2 above, to pay IPK financial assistance in the amount of EUR 561 961.63, covering all the tranches. IPK claims that the Commission also acknowledged in that decision that it was under an obligation to pay IPK interest, as from 1 January 1994 for the tranche of EUR 212 000 and as from 18 May 2007 for the tranches of EUR 318 000 and EUR 31 961.63 respectively. According to IPK, the Commission's obligation to make those payments is not at issue in the present dispute and, to that extent, the contested decision has therefore become final. However, the manner in which the Commission calculated the interest payable was incorrect and in breach of Article 266 TFEU, in that, first, it did not increase by 2 percentage points the interest rates applied by the ECB and the EMI for their main refinancing operations, which were applied by the Commission to each of the three tranches referred to above, and, secondly, it made a manifest error in calculating default interest with effect from the delivery of the judgment of 15 April 2011, referred to in paragraph 2 above.

28 The Commission contends that the single plea relied on by IPK should be rejected.

29 The Commission argues that the payment of compensatory interest is designed only to offset losses arising as a result of inflation during the period from the date on which harm occurs until delivery of the relevant judgment. The ECB's main refinancing rates are applied with a view to calculating uniformly throughout the European Union interest intended to offset average inflation in the Member States, the rates of inflation varying from one Member State to another. Accordingly, in Case T-88/09 *Idromacchine and Others* v *Commission* [2011] ECR II-7833, the Court makes a clear distinction regarding the rate of interest applicable depending on the headquarters of the company, in that case Italy.

30 The Commission points out that IPK, on the other hand, is established in Germany, where average inflation was lower than the main refinancing rate. Over the period from 1994 to 2010, the main refinancing rate was sometimes markedly higher than the rate of inflation in Germany. According to the Commission, the average rate of inflation in Germany during that period was 1.6%, whereas the main refinancing rate was on average around 3.3%. The Commission concludes from this that, while application of the main refinancing rate already gives IPK a considerable advantage, which should be accepted in view of the need to apply a single interest rate, it would result in IPK being compensated at more than twice the inflation rate. Moreover, if the main refinancing rate were to be increased by 2 percentage points, IPK would be compensated, on average, at more than three times the rate of inflation (5.3% as opposed to 1.6%), without any legal basis. Furthermore, the economic situation in Germany is very different from that in Italy, where, from 1995 to 1996 and from 2002 to 2005, the rate of inflation was sometimes higher than the main refinancing rate.

31 However, the case-law contemplates only compensation for inflation; no provision is made for compensation necessitating an increase in the main refinancing rate or for a claimant to be able to derive a financial advantage from the annulment of a measure. That would be the position, however, if the rate of interest applied for IPK were to be higher than the main refinancing rate. According to the Commission, the fact that this would amount to unjust enrichment is all the more obvious because, in its view, IPK is a claimant in bad faith, and it would accordingly be contrary to the principles of justice and equity. In the judgment of 15 April 2011, referred to in paragraph 2 above, the Court held that IPK had entered into a collusive agreement with a Commission official in order to obtain or to be able to retain the financial assistance at issue (paragraphs 126, 144 and 145); that it had

irregularly obtained confidential information (paragraph 130); that it had made misleading statements; and that it had then sought to conceal the true circumstances behind the submission of the application for financial support (paragraph 134).

32 The Commission also disputes its liability to pay default interest. In the present case, the Commission neither acted improperly nor was ordered to pay compound interest. On the contrary, the Court found that IPK had engaged in several forms of misconduct, some over a long period, which meant that the application of compound interest would not be justified. It would even be contrary to the principle of sound financial management, under Article 310(5) TFEU, to reward such misconduct by applying that method of calculating interest, which would therefore lack a legal basis for the purposes of Article 310(3) TFEU.

33 The Court notes, first of all, that, in the contested decision, the Commission actually acknowledged that it owed IPK a principal amount of EUR 561 961.63, a point which the Commission confirmed at the hearing in answer to an oral question from the Court and note of which was made in the record of the hearing. In that context, the Commission acknowledged also that it owed IPK an amount of EUR 158 618.27 by way of compensatory interest, that is to say, that it owed IPK a total amount of EUR 720 579.90. Moreover, at the hearing, the Commission did not contest the ancillary nature of the interest payable in relation to the amount of the principal sum.

34 In those circumstances, the Commission's arguments that, in essence, IPK was a claimant in bad faith and that, in the judgment of 15 April 2011, referred to in paragraph 2 above, the Court had found that IPK had engaged in misconduct, are not capable of calling into question the existence of the principal debt or the fact that, to that extent, the Commission is liable to pay interest which must be calculated in accordance with the relevant rules. Accordingly, those arguments must be rejected as ineffective, even supposing that they are intended to invoke the maxim *nemo auditur propriam turpitudinem suam allegans*, according to which nobody may rely on his own misconduct vis-a-vis another in such a way as to obtain an advantage, which the Commission denied moreover at the hearing, in answer to an oral question from the Court. In that regard, it should nevertheless be noted that the Commission's approach in the present case stems from a misinterpretation of the judgment of 15 April 2011, referred to above, which does not imply any obligation for the Commission to repay the financial assistance at issue to IPK. In that judgment, the Court confirmed the factual findings made in the decision of 13 May 2005, relating to irregularities committed by IPK which, in principle, justified the cancellation of the financial assistance at issue (paragraphs 128 to 145), and confined itself to annulling that decision on account of the Commission's failure to act within the relevant prescribed period (paragraphs 147 to 166). It follows, moreover, that the contested decision is the sole legal basis for the principal financial claim at issue.

35 As regards the first part of the single plea relied on by IPK – alleging that the compensatory interest had been incorrectly calculated – it should be noted that, according to IPK, that interest should have been calculated at a rate 2 percentage points higher than the ECB interest rate for its main refinancing operations. As it is, it is not contested that, in calculating that interest, the Commission took into account only the interest rate applied by the ECB to its main refinancing operations, and did not increase that rate by 2 percentage points – a calculation method which was to be maintained up until 31 October 2011, as stated in the contested decision.

36 As was noted in paragraph 33 above, the Commission does not dispute that it was under an obligation to pay IPK compensatory interest in accordance with established rules. However, in that regard, settled case-law has recognised that, regardless of the precise name used to describe that interest, it must always be calculated on the basis of the interest rate applied by the ECB for its main refinancing operations, plus 2 percentage points (Case T-171/99 *Corus UK* v *Commission* [2001] ECR II-2967, paragraph 64; Case T-160/03 *AFCon Management Consultants and Others* v *Commission* [2005] ECR II-981, paragraphs 130 to 132; and *Idromacchine and Others* v *Commission*, paragraph 29 above, paragraphs 77 to 80). As IPK has argued, that is a standard increase which is applicable to all sets of

circumstances, there being no need to determine in the specific case whether or not that increase is justified in the light of the inflation, during the period at issue, in the Member State in which the creditor is established.

37 Admittedly, in *Idromacchine and Others* v *Commission*, paragraph 29 above (paragraphs 77 to 79), the Court held, first, that it is necessary to take into account the inflation – reflected by the annual rate of inflation recorded, for the period at issue, by Eurostat (Statistical Office of the European Union) – in the Member State where the companies concerned are established. The Court nevertheless went on to apply, uniformly, the standard 2 percentage point increase to both the compensatory interest and the default interest granted – in the case of the compensatory interest, until the date of delivery of the judgment (8 November 2011), and, in the case of the default interest, for a longer period. Furthermore, in that regard, IPK correctly argues that the standard uniform increase, in *Idromacchine and Others* v *Commission*, of 2 percentage points did not depend on the actual inflation rate during the relevant period in Italy, where Idromacchine was established, since, as the Commission itself argues in its written pleadings, that inflation rate was higher than the ECB interest rate only during 2010 and 2011. Yet, if the argument put forward by the Commission – that the rate of compensatory interest to be allowed should depend on the actual rate of inflation – was correct, the Court should not have applied that standard 2 percentage point increase to the earlier period, given that, over that period, Idromacchine had received, solely through the application of the ECB interest rate, without any increase, sufficient compensation to cover inflation.

38 Furthermore, the Court has held, admittedly in the context of default interest, that failure to pay such interest could result in the unjust enrichment of the European Union, which would be contrary to the general principles of EU law (see *Corus UK* v *Commission*, paragraph 36 above, paragraph 55 and the case-law cited). Accordingly, the standard increase of the interest rates by 2 percentage points arose from the need to avoid such unjust enrichment in every possible situation.

39 In the light of the foregoing considerations, it must be held that the Commission acted wrongly in not increasing the compensatory interest rates applied to the three different tranches of the debt, as referred to in paragraph 3 above, and that the first part of IPK's single plea must be upheld.

40 By the second part of its single plea, IPK submits that the Commission should have acknowledged the default interest as payable with effect from the delivery of the judgment of 15 April 2011, referred to in paragraph 2 above, and should have calculated it on the basis of the total amount of the debt plus the compensatory interest payable by that date. It is common ground, however, that the Commission did not take into account default interest, whether before or after the delivery of that judgment, and did not consider itself liable to pay such interest in the light of the applicable legislation and case-law.

41 In that regard, it is sufficient to recall the established case-law which has recognised that the Commission is under an unconditional obligation to pay default interest – in particular, in cases where it has incurred the non-contractual liability of the European Union – for the period following delivery of the judgment making such a finding (see, to that effect, Joined Cases C-104/89 and C-37/90 *Mulder and Others* v *Council and Commission* [2000] ECR I-203, paragraph 35, and *Idromacchine and Others* v *Commission*, paragraph 29 above, paragraph 79 and the case-law cited), as well as in the case of the repayment of an amount paid but not owed, following a judgment annulling a measure (*Corus UK* v *Commission*, paragraph 50 et seq.). None of the arguments put forward by the Commission justifies a departure from that basic obligation in the present case, in which, following the judgment of 15 April 2011, referred to in paragraph 2 above, which annulled the decision of 13 May 2005, the Commission acknowledged, in the contested decision, that it had to pay back to IPK the principal amount of the financial assistance at issue. On the contrary, at the hearing, in answer to an oral question from the Court, the Commission acknowledged that it owed default interest which would be payable as from delivery of the judgment of 15 April 2011, referred to in paragraph 2 above, a point which was noted in the record of the hearing. In those circumstances, it must be held that the Commission was obliged to pay default interest on the principal amount

payable, as acknowledged in the contested decision, and that, in the circumstances of the case – given the common agreement of the parties in this regard – that default interest is to be calculated as from delivery of the judgment of 15 April 2011, referred to in paragraph 2 above, irrespective of the fact that that decision is the sole legal basis for the principal financial claim at issue (see paragraph 34 above).

42 Furthermore, IPK correctly argues that the Commission was also required to calculate default interest on the basis of the principal amount payable plus such compensatory interest as had already accrued. Even though the Court's case-law does not, in principle, permit capitalisation either of compensatory interest accrued before, or of default interest accrued after, the delivery of a judgment recognising the existence of a debt, the Court nevertheless orders that default interest accruing until full payment be fixed on the basis of the principal amount of the debt plus such compensatory interest as has already accrued (see, to that effect, *Corus UK* v *Commission*, paragraph 36 above, paragraphs 64 and 65, and *AFCon Management Consultants and Others* v *Commission*, paragraph 36 above, paragraphs 132 and 133). That approach therefore makes a distinction between pre-litigation compensatory interest and post-litigation default interest, since the latter must take into account the entirety of the accumulated financial loss, including loss owing to inflation.

43 Consequently, the second part of IPK's single plea must be upheld, in so far as the Commission unlawfully failed to grant default interest, increased by 2 percentage points, which must be calculated on the basis of the principal amount of the debt plus such compensatory interest as has already accrued and in the present case, given the common agreement of the parties on that point, is to be calculated as from the delivery of the judgment of 15 April 2011, referred to in paragraph 2.

44 In the light of all the foregoing considerations, the action must therefore be upheld, without it being necessary to rule on the question whether the Commission infringed Article 266 TFEU, and the contested decision must be annulled to the extent that it limited the amount of interest to be repaid to EUR 158 618.27.

Costs

45 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 Commission has failed in its submissions, it must be ordered to pay the costs in accordance with the form of order sought by IPK.

On those grounds,

THE GENERAL COURT (First Chamber)

hereby:

1. **Annuls the Commission's decision of 14 October 2011 (ENTR/R1/HHO/lsa — entre.r.l(2011)1183091) in so far as it limits the amount of interest to be paid to IPK International – World Tourism Marketing Consultants GmbH to EUR 158 618.27;**

2. **Orders the European Commission to pay the costs.**

Azizi Soldevila Fragoso Frimodt Nielsen

Delivered in open court in Luxembourg on 10 April 2013.

[Signatures]