ORDER OF THE COURT OF FIRST INSTANCE (Third Chamber)
3 October 1997 *

In Case T-186/96,

Mutual Aid Administration Services NV, a company incorporated under Belgian law, established in Antwerp (Belgium), represented by Jan Tritsmans, of the Antwerp Bar, with an address for service in Luxembourg at the Chambers of René Faltz, 6 Rue Heinrich Heine,

applicant,

v

Commission of the European Communities, represented by Blanca Vilá Costa, a national civil servant on secondment to the Commission, and Hubert van Vliet, of its Legal Service, 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 payment of the full costs claimed for the transport of free supplies of fruit juice and fruit jams to the people of Armenia and Azerbaijan,

* Language of the case: Dutch.

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

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

Registrar: H. Jung,

makes the following

Order

Legal background

1 The Council adopted Regulation (EC) No 1975/95 of 4 August 1995 on actions for the free supply of agricultural products to the peoples of Georgia, Armenia, Azerbaijan, Kyrgyzstan and Tajikistan (OJ 1995 L 191, p. 2) in order to improve the food supply situation for those peoples. Article 2(3) of that regulation provides that transport costs are to be determined by invitation to tender or by direct agreement procedure.

2 By Regulation (EC) No 2009/95 of 18 August 1995 laying down detailed rules for the free supply of agricultural products held in intervention stocks to Georgia, Armenia, Azerbaijan, Kyrgyzstan and Tajikistan pursuant to Council Regulation (EC) No 1975/95 (OJ 1995 L 196, p. 4, hereinafter 'Regulation No 2009/95'), the Commission laid down the common conditions for participation in tenders for the execution of the supplies and the obligations to be met by successful tenderers.

3 In particular, Article 6(1)(d)(1) provides that offers submitted by tenderers must indicate the total amount or amounts, expressed in ecus, for the complete supply or for a lot (net weight), and the amount in ecus per tonne (gross) tendered for each destination.

4 Under Article 7(1) the Commission may award the supply contract on the basis of the price offered and the other elements of the tender which provide the best assurances that the delivery will take place in good technical and hygienic conditions within the time-limits laid down.

5 According to Article 9, except in cases of *force majeure*, successful tenderers are to bear all risks to which the goods may be subject, and in particular their loss or deterioration, up to the appointed supply stage.

6 Finally, Article 12(5) provides that in the event of a delay in the takeover or in the delivery of the goods by the transporter, a penalty of up to ECU 0.75 per tonne per day is to be imposed, that amount being increased to ECU 1.00 per tonne with effect from the 11th day.

7 By Regulation (EC) No 228/96 of 7 February 1996 on the supply of fruit juice and fruit jams intended for the people of Armenia and Azerbaijan (OJ 1996 L 30, p. 18, hereinafter 'Regulation No 228/96'), the Commission initiated a tendering procedure relating to the supply of 1 000 tonnes of fruit juice, 1 000 tonnes of concentrated fruit juice and 1 000 tonnes of fruit jams.

8 Article 2 of that regulation provides that the supply is to include delivery of the goods, free on board, stowed on board ship, at a loading rate of at least 500 tonnes per day and that the packaging of the products must comply with the instructions in Annex I to the regulation.

9 By Regulation (EC) No 472/96 of 15 March 1996 on the supply of common wheat flour intended for the people of Georgia, Armenia, Azerbaijan, Kyrgyzstan and Tajikistan (OJ 1996 L 66, p. 4), the Commission initiated a tendering procedure relating to the supply of 16 lots of common wheat flour.

10 Finally, by Regulation (EC) No 449/96 of 12 March 1996 on the transport for the free supply to Armenia and Azerbaijan of fruit juice, fruit jams and common wheat flour (OJ 1996 L 62, p. 4, hereinafter 'Regulation No 449/96') it initiated a tendering procedure for the transport of 2 000 tonnes of fruit juice, 1 000 tonnes of fruit jams and 800 tonnes of common wheat flour, in accordance with the provisions of Regulation No 2009/95.

11 According to the first subparagraph of Article 1(2) of Regulation No 449/96 the supply costs are to relate to the takeover and transport by the appropriate means to the places of destination, namely Beiuk-Kesik in Azerbaijan and Airum in Armenia, and within the time-limits indicated in Annex I to the regulation. According to that annex, the goods must arrive on the appointed dates in the ports of Poti or Batumi (Georgia); the remainder of the transport is to be carried out by train, at flat rates per tonne agreed between the Commission and the Georgian authorities and published in Annex V to that regulation.

12 The second subparagraph of Article 1(2) of Regulation No 449/96 refers to Annex I to Regulation No 228/96 in order to describe the packaging of the fruit juice and fruit jams and states that the tenderer for the transport is responsible for informing himself from the manufacturers on the technical details of the materials employed and their stowage possibilities, particularly for stacking.

13 Finally, the second subparagraph of Article 1(3) of Regulation No 449/96 provides that, after the expiry of five days following the dates on which the products were to be made available at the loading ports, the successful tenderer for the transport is required to reimburse to the Commission the expenses incurred by the institution in covering all the costs referred to in Article 6(1)(e)(4) of Regulation No 2009/95.

Facts

14 On 22 February 1996 the Commission decided to award the major part of the contract for the supply of the fruit juice and fruit jams under the tendering procedure initiated by Regulation No 228/96 to the Italian undertaking Trento Frutta. A contract for 500 tonnes of fruit juice was awarded to the German company Loma.

15 On 21 March 1996 Mutual Aid Administration Services NV (hereinafter 'MAAS') submitted a tender in the context of the tendering procedure for the transport of the goods initiated by Regulation No 449/96 in respect of all the lots of fruit juice, fruit jams and common wheat flour set out in Annex I to that regulation, in accordance with the provisions of Regulation No 2009/95. MAAS's tender was based on estimated takeover and transport costs of ECU 225 133.53, or a unit price per tonne (gross) of ECU 54.47 for Beiuk-Kesik and ECU 54.86 for Airum.

16 The Commission considered that, in accordance with the second indent of Article 7(1) of Regulation No 2009/95, and on the basis of the tenders submitted, the contract for the transport should be awarded on the basis of the price offered and other elements of the tender which provided the best assurances that the delivery would take place under the specified conditions and, on 27 March 1996, decided to award the contract for the transport of the goods to MAAS.

17 It notified MAAS of this by fax dated 28 March 1996, to which it attached an extract from the agreements entered into between the Community and the Georgian authorities concerning discharge, rail transport and administration costs. Furthermore, it informed the successful tenderer by telex on the same day that the two parts of the shipment of fruit juice and fruit jams would be made available on 10 and 20 April 1996, in the port of Ravenna. It added that it would inform MAAS as soon as it knew the port in which the flour was to be loaded and the necessary checks had been carried out by Inspection Services International (hereinafter 'ISI').

18 Since Trento Frutta was not able to deliver the fruit juice and fruit jams on the stipulated dates, the Commission agreed, by fax of 1 April 1996, to MAAS's request to defer loading of the two parts of the shipment and to postpone accordingly the dates on which they were to arrive in one of the two Georgian ports.

19 By fax dated 3 April 1996, which was sent to MAAS on 16 April 1996, the Commission stated that it had no objections in respect of the packaging for the products proposed by Trento Frutta, in so far as the pallets complied with the requirements of Annex I to Regulation No 228/96.

20 It informed MAAS by fax of 12 April 1996 that it had awarded the contract for the supply of the flour to Grandi Molini Italiani and that the goods would be loaded in the port of Trieste. It added that the transport costs would be paid on the basis of the price per tonne (gross) indicated in the tender submitted by MAAS.

21 By fax of 29 April 1996 Trento Frutta, confirming a fax of 15 March 1996, informed MAAS that its products could not be loaded on more than two levels. MAAS replied by fax on the same day that it would take full responsibility for loading the pallets of fruit juice and jams on three levels. The following day, the Commission pointed out to MAAS that it had never agreed to the goods being stacked on three levels and that any decision to do so would be taken at the transporter's own risk and expense.

22 By fax of 2 May 1996 to the Commission, MAAS observed that, contrary to the information provided by the supplier, it did not even appear to be possible to load the cargo on two levels of pallets and, consequently, the transporter considered that it would be necessary to use a third vessel. The Commission replied that the problem should be resolved between MAAS and Trento Frutta, since Trento Frutta was liable for all the additional costs resulting from inaccurate information. On 6 May 1996 the Commission wrote to MAAS and Trento Frutta as follows:

'On the basis of the ISI report, the Commission accepts that the fruit juice, to which the supply and transport contracts relate, cannot be stacked on two levels.

You are therefore requested to take all necessary measures to ensure that the goods are transported under the optimum conditions, that is to say without being stacked.

The Commission will, temporarily, meet any necessary costs which may be incurred, without prejudice to the determination of blame and the ultimate funding of this additional supply.'

23 By fax of 20 May 1996 MAAS subsequently informed the Commission that the goods had been damaged as a result of inappropriate packaging.

24 After the goods had left the Community, the Commission made an initial payment to MAAS of 90%, amounting to approximately BFR 7 500 000, in accordance with Article 13 of Regulation No 2009/95.

25 By letter of 5 June 1996 MAAS asked the Commission to draw up the final account on the basis of the gross weight transported per ship, to which, according to the successful tenderer, should be added demurrage duties in the port of lading and the additional costs incurred as a result of chartering the third ship.

26 By fax of 12 June 1996 the Commission pointed out that, contrary to its instructions, MAAS had stocked some of the goods from the trucks on two levels, and furthermore, had failed even to take the necessary precautions. The Commission noted that serious damage had resulted and expressed extremely broad reservations as to the possible financial consequences, pending calculation of the exact amount of the damage. Finally, it stressed that two ships would not have been sufficient and that a third ship would have been required even if it had been possible to load the goods on two levels.

27 It subsequently informed MAAS, by letter of 26 September 1996, that it would only pay BFR 191 970 of the outstanding balance of 10% (amounting to BFR 836 328) which it should still normally have received.

28 First, the Commission considered that it could not meet the costs of chartering the third ship, on the ground that Trento Frutta had informed MAAS that the goods could be loaded on a maximum of two levels and, in those circumstances it would, in any event, have been necessary to charter a third vessel.

29 Second, it pointed out that, according to Article 9 of Regulation No 2009/95, the value of quantities lost or deteriorated were to be reimbursed to it. However, in order to avoid any disagreement concerning the allocation of blame between producer and transporter, in the light of MAAS's allegations concerning the defective packaging of the goods, it calculated the quantities found to be damaged only in respect of the fruit juice and concentrated fruit juice which had been loaded on two levels in the trucks, since it had become apparent that it was not desirable to stack the pallets in that way.

30 Third, and finally, the Commission pointed out that it had calculated the penalties in respect of the delay in loading, in accordance with the last subparagraph of Article 1(3) of Regulation No 449/96, in the light of the difficulties which had been encountered, such as the fact that no berth had been available. Furthermore, it credited MAAS with the penalties to be paid by the producer pursuant to the last indent of Article 12(4)(b) of Regulation No 2009/95 in respect of its failure to comply with the loading rates.

Procedure before the Court and forms of order sought

31 By application lodged at the Registry of the Court of First Instance on 22 November 1996 MAAS brought the present proceedings on the basis of Article 173 of the EC Treaty.

32 It claims that the Court should:

— annul the contested decision of 26 September 1996 and accordingly rule that when the account was settled, the applicant was entitled to BFR 836 328 and was entitled to reimbursement of $41 000 in respect of the costs of chartering the third ship;

— accordingly order the Commission to pay to the applicant BFR 644 385 (that is to say BFR 836 328 less the amount of BFR 191 970 already granted by the contested decision) and $41 000, together with interest calculated on the basis of the current statutory interest rate in Belgium of 7% *per annum* as from 1 September 1996;

— order the Commission to pay the costs.

33 The Commission contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs of the proceedings.

Admissibility of the action

34 By virtue of Article 111 of the Rules of Procedure, where it is clear that the Court of First Instance has no jurisdiction to take cognizance of an action or where the action is manifestly inadmissible, it may, by reasoned order, and without taking further steps in the proceedings, give a decision. In the present case, the Court considers that it has sufficient information from the documents before it and that there is no need to take any further steps in the proceedings.

The nature of the action

35 Although it was lodged on the basis of Article 173 of the Treaty, the application constitutes in reality an action for performance of a contract entered into between MAAS and the Commission for the performance of the transport operations in issue.

36 On the one hand, it is apparent from the facts that, by submitting a tender in the context of the tender procedure for the transport of the goods initiated by Regulation No 449/96, MAAS declared that it had examined all the provisions of Regulations Nos 2009/95 and 449/96 and expressly undertook to comply with the conditions laid down therein.

37 Taking into account those conditions, it offered to transport, by appropriate means, all the consignments of goods referred to in Regulation No 449/96 to their final destination and within the time-limits laid down in Annex I to that regulation, at a unit price per tonne (gross) of ECU 54.47 and ECU 54.86 respectively, giving a total price of ECU 225 133.53. Furthermore, pursuant to the second subparagraph of Article 1(2) of Regulation No 449/96, it also assumed responsibility for informing itself from the manufacturers of the products on the technical details of the materials employed and their stowage possibilities, particularly for stacking. Finally, it stated in the section 'Observations or Remarks' in Annex 1 to its tender that it would dispatch experts to Poti, Batumi, Airum and Beiuk-Kesik to take all the necessary measures in order to ensure that the goods were delivered safely.

38 On the other hand, when it awarded the contract for the transport of the goods to MAAS on the basis of the price tendered by that undertaking and the other elements of its tender which, in the Commission's own view, provided the best assurances that the delivery would take place in accordance with the stipulated conditions, the Commission accepted the price proposed and rendered irrevocable the other undertakings entered into by the transporter.

39 Thus, the effect of MAAS's tender and of its acceptance by the Commission was to incorporate the relevant provisions of Regulations Nos 2009/95 and 449/96 and the price tendered by MAAS into a transport contract between the two parties to the present dispute.

40 Therefore, by claiming that the Commission should pay the full cost of the transport and reimburse the additional costs incurred in chartering the third ship, MAAS is in reality asking the Court to order the defendant institution to perform its obligations under that transport contract. The Commission, for its part, pleads, in support of its claim that the action should be dismissed, that MAAS did not properly perform its obligations under that contract. To that extent, the two parties are placing the proceedings at the very heart of their contractual relationship.

41 In that respect, it should be recalled that, in Case C-142/91 *Cebag* v *Commission* [1993] ECR I-553, paragraph 11, the Court of Justice held in a case identical to this that, according to Council Regulation (EEC) No 3972/86 of 22 December 1986 concerning food-aid policy and food-aid management (OJ 1986 L 370, p. 1), such aid is provided on the basis of contractual undertakings.

42 It pointed out that, under Article 6(1)(c) of that regulation, the Commission is to decide on the conditions governing the supply of aid, in particular the general conditions applicable to recipients and the engagement of the mobilization procedures and the supply of products, as well as the conclusion of the corresponding contracts.

43 The Court of Justice considered (at paragraph 12 of the judgment) that the respective rights and obligations of the Commission and successful tenderers in the context of those supplies had not been determined entirely by Community regulations, on the ground that one essential element of the supply operation, namely the price, depended, as in this case, on the tenders put in by the tenderers and on the acceptance of the tenders by the Commission, as is apparent from Article 9(1) and (3) of Commission Regulation (EEC) No 2200/87 of 8 July 1987 laying down general rules for the mobilization in the Community of products to be supplied as Community food aid (OJ 1987 L 204, p. 1). In those circumstances, it held (at paragraph 13) that the supplies in question had been implemented by contracts.

44 It follows clearly from the foregoing that the application by MAAS for payment of the transport costs therefore constitutes an action for performance of a contract between the two parties to the dispute.

Jurisdiction of the Court of First Instance

45 Under Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities (OJ 1988 L 319, p. 1), as subsequently amended, read in conjunction with Article 181 of the Treaty, this Court has jurisdiction to rule at first instance on disputes of a contractual nature brought before it, as in the present case, by natural or legal persons only pursuant to an arbitration clause within the meaning of Article 181 of the Treaty. No such arbitration clause exists in the present case.

46 The Court cannot accept that the fact that proceedings have been brought before it can, in the present case, be regarded as an expression of the parties' intention that it should have jurisdiction to adjudicate on a contractual dispute since, to the contrary, MAAS brought its action on the basis of Article 173 of the Treaty.

47 In the absence of any arbitration clause, the Court cannot adjudicate on what in reality is an action for performance of a contract entered into by the Community when an action for annulment is brought before it. To do so would be to extend its jurisdiction beyond the limits placed by Article 183 of the Treaty on the disputes of which it may take cognizance, since that article specifically gives national courts or tribunals ordinary jurisdiction over disputes to which the Community is a party (Joined Cases 133/85, 134/85, 135/85 and 136/85 *Rau and Others* [1987] ECR 2289, paragraph 10).

48 It follows from all the arguments set out above that the Court clearly lacks jurisdiction to take cognizance of the present claim for performance of the contract, which must therefore be dismissed as manifestly inadmissible.

The nature of the contested act

49 The decision in which the Commission refused to pay MAAS the full transport costs claimed cannot on any view be regarded as severable from the Commission's obligation to pay the transporter the price representing the consideration for the transport operations performed.

50 It follows that, with regard to the successful tenderer, the contested refusal to pay is not one of the unilateral decisions referred to by Article 189 of the Treaty, which the Commission must adopt under the conditions laid down by the Treaty.

51 In respect of the successful tenderer, that refusal cannot therefore constitute an act against which an action for annulment may be brought in accordance with Article 173 of the Treaty. Accordingly, in so far as the present action relates to such a refusal, it is, in any event, manifestly inadmissible.

52 It follows from all the considerations set out above that the action should be dismissed as manifestly inadmissible.

Costs

53 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, 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 applicants must be ordered to bear all the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby orders:

1. The application is dismissed as manifestly inadmissible.

2. The applicant shall bear the costs.

Luxembourg, 3 October 1997.

H. Jung — B. Vesterdorf

Registrar — President