ORDER OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
3 February 1998 *

In Case T-68/96,

Dimitrios Polyvios, residing in Piraeus (Greece), represented by Vassilios Zangas, of the Athens Bar, with an address for service in Luxembourg at the Chambers of Catherine Thill-Kamitaki, 15 Avenue du Bois,

applicant,

v

Commission of the European Communities, represented by Maria Condou Durande and Hubertus van Vliet, of its Legal Service, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, also of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for compensation for the material damage which the applicant allegedly suffered by reason of the Commission's negligence when adopting a decision approving an application for financial aid for the establishment of a joint enterprise in Senegal,

* Language of the case: Greek.

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

composed of: P. Lindh, President, K. Lenaerts and J. D. Cooke, Judges,

Registrar: H. Jung,

makes the following

Order

Legal and terminological framework

1 Tonnage expresses the internal volume of a commercial vessel. It serves as the basis for calculating various charges, including pilot and towing charges. Various rules (tonnage rules) exist which govern the manner in which tonnage is calculated. These rules differ as regards both principles and application.

2 A number of States have concluded international conventions for the purpose of establishing uniform principles and rules for calculating tonnage. Two are at present in force: the Convention for a Uniform System of Tonnage Measurement of Ships, signed in Oslo on 10 June 1947 ('the Oslo Convention') and the International Convention on Tonnage Measurement of Ships, signed in London on 23 June 1969 ('the London Convention'). Those two conventions feature two methods for measuring tonnage, known respectively as the 'Oslo method' and the

'London method', which lead to different results in regard to tonnage calculation. Thus, the tonnage resulting from application of the London method is higher, since it takes account of spaces excluded by the Oslo method.

3 Structural policy in the fisheries sector, based on Council Regulation (EEC) No 4028/86 of 18 December 1986 on Community measures to improve and adapt structures in the fisheries and aquaculture sector (OJ 1986 L 376, p. 7), as amended, in particular, by Council Regulation (EEC) No 3944/90 of 20 December 1990 (OJ 1990 L 380, p. 1) ('Regulation No 4028/86'), seeks in particular to achieve a balanced exploitation of fishery resources in Community waters and to extend the Community's sources of supply.

4 Within the framework of that policy, the Commission grants Community financial aid to projects by joint enterprises, consisting of one or more Community shipowners and one or more partners from a non-member country, set up for the purpose of exploiting and, where appropriate, using the fishery resources of waters falling within the sovereignty and/or jurisdiction of that non-member country, primary consideration being given to the supply of the Community market (Article 21a and Article 21b(1) of Regulation No 4028/86).

Facts of the dispute

5 By Decision C(86) 406/196 (unpublished) of 29 April 1986, based on Council Regulation (EEC) No 2908/83 of 4 October 1983 on a common measure for restructuring, modernising and developing the fishing industry and for developing aquaculture (OJ 1983 L 290, p. 1) ('Regulation No 2908/83'), the Commission approved the grant of aid for the applicant to build a new fishing boat, the *Maistrali II*, replacing his previous boat.

6 Following completion of its construction, the *Maistrali II* was definitively measured on 23 February 1988 pursuant to Rule No 1 of Greek Decree-Law No 973/71. The nationality certificate, dated 26 February 1988, indicated as follows with regard to tonnage: 'Gross (g. r. t.) 297.60'.

7 On 7 October 1988 a new measurement was taken, this time on the basis of the London Convention. The certificate of international tonnage (1969), dated 7 October 1988, indicated: 'Gross tonnage 479'. The nationality certificate of 8 December 1988 indicated: 'Gross (g. r. t.) 479'.

8 On 9 January 1992 the applicant lodged with the Greek Ministry of Agriculture an application for financial aid for a project to create a joint enterprise in Senegal ('the application of 9 January 1992') pursuant to Regulation No 4028/86. In that application, he stated that the tonnage of the *Maistrali II* was 479 grt (gross registered tonnes). The Ministry sent his application for a grant, together with supporting documents, to the Commission on 25 February 1992, recommending that financial aid should be granted on the basis of the tonnage of 297.60 grt.

9 By decision of 5 July 1993 (Decision C(93) 1823 final/20) ('the decision of 5 July 1993'), the Commission granted financial aid for the applicant's joint enterprise project in a maximum amount of ECU 1 267 800. It was stated in the annex to that decision that the tonnage of the *Maistrali II* was 297.60 grt.

10 By letters of 21 July 1993, addressed to the Greek Ministry of Agriculture, and of 8 August 1993, addressed to Directorate D 'Structures and areas dependent on fisheries' of the Fisheries Directorate-General (DG XIV) ('Directorate XIV. D') of the Commission, the applicant stated that the decision of 5 July 1993 was based on an incorrect tonnage figure of 297.60 grt and not on the true tonnage, which he claimed to be 479 grt. By letter of 23 August 1993, the director of Directorate XIV.

D replied that that decision had been taken on the basis of the information supplied by the Greek authorities, including the tonnage of the *Maistrali II*, namely 297.60 grt.

11 Contacts were subsequently made between, on the one hand, the applicant and the Greek Ministry of Agriculture, and, on the other, Directorate XIV. D. The problem of determining the correct method for calculating the *Maistrali II's* tonnage was raised on those occasions. In particular, on 1 October 1993 the Greek Ministry of Agriculture sent a letter to Directorate XIV. D, and, on 22 November 1993, the applicant's representative sent a letter to the Head of Unit 2 'Greece, Portugal and Ireland' in Directorate XIV. D ('Unit XIV. D.2'). In that letter, the applicant's representative, relying on Council Regulation (EEC) No 2930/86 of 22 September 1986 defining characteristics for fishing vessels (OJ 1986 L 274, p. 1) ('Regulation No 2930/86') and Commission Regulation (EEC) No 1956/91 of 21 June 1991 laying down detailed rules for the application of Regulation No 4028/86 as regards measures to encourage the creation of joint enterprises (OJ 1991 L 181, p. 1), argued in substance that the tonnage to be taken into account for applying Regulation No 4028/86 was that calculated according to the provisions of the London Convention, and he accordingly requested that additional financial aid be granted to the applicant in order that the total amount of aid should correspond to that to which he was entitled.

12 By letter of 14 January 1994, addressed to the applicant, the Head of Unit XIV. D.2 informed him that '[his] request [was] under legal consideration and a fully reasoned reply [would be] sent [to him] as soon as possible'.

13 The Director-General of DG XIV replied to the letters of 1 October 1993 from the Greek Ministry of Agriculture and of 22 November 1993 from the applicant's representative by two letters dated 1 February 1994. He stated therein that the capacity of the *Maistrali II*, as measured in accordance with the provisions of the London Convention, could not be accepted for calculating the Community financial aid for the creation of the joint enterprise concerning that vessel, since Annex VII to Regulation No 4028/86 established the amounts of that aid on the basis of vessel measurement in grt. The Commission noted that, in accordance with Article 7 of

Regulation No 2930/86, that regulation was applicable only as and from 18 July 1994. Furthermore, the *Maistrali II* had been built with a capacity of 297.60 grt according to the Greek rules on tonnage measurement and had received construction aid on the basis of that capacity under Regulation No 2908/83. Its subsequent remeasurement in accordance with the London Convention in GT ('Gross tonnage') could not therefore be accepted for the calculation of the financial aid for the creation of a joint enterprise.

14 The Greek Ministry of Agriculture wrote to Directorate XIV. D on 11 May 1994, requesting it to change its position and to grant additional financial aid to the applicant by basing itself on the tonnage resulting from the London Convention. This was followed by a letter of 16 June 1994 stating that the difference between the tonnage on which the Commission had based its decision of 5 July 1993 and that resulting from application of the London Convention was 181.40 tonnes, which corresponded to financial aid on the Community's part amounting to some ECU 425 700 and to approximately ECU 85 140 on the part of the Hellenic Republic.

15 By letter of 4 July 1994, the Director-General of DG XIV replied to the letter of 11 May 1994 sent by the Greek Ministry of Agriculture. Referring to his letter of 1 February 1994, he stated that the Commission could not accept the tonnage of the *Maistrali II* measured 'according to the provisions of the London Convention (GT) for the calculation of the Community financial aid for the creation of joint enterprises'. Annex VII to Regulation No 4028/86, he stated, established the amount of that aid on the basis of the measurement of vessels according to gross registered tonnage (grt). The Director-General pointed out that, following the Council's adoption of the regulation amending Regulation No 2930/86, the Commission was required immediately to prepare a new draft regulation amending Council Regulation (EC) No 3699/93 of 21 December 1993 laying down the criteria and arrangements regarding Community structural assistance in the fisheries and aquaculture sector and the processing and marketing of its products (OJ 1993 L 346, p. 1) ('Regulation No 3699/93') in order to establish new premium scales per vessel category for each gross tonnage (GT) class in accordance with the

London Convention. In future, and once this amendment had been adopted by the Council, the Commission would be in a position to establish the amount of the premium on the basis of the grt or GT of vessels.

16 By letter of 1 September 1994 addressed to the Director of Directorate XIV. D, the applicant pointed out to the Commission that it had not set out its views on the possibility of granting additional financial aid as outlined in a letter sent by the Greek authorities on 1 October 1993 setting out their position and calling on the Commission to reconsider its position. The applicant added that he would wait until 20 September 1994 before instituting legal proceedings against the Commission.

17 The Director of Directorate XIV. D replied by letter of 19 September 1994. He pointed out that the *Maistrali II* had been built with a gross registered tonnage of 297.60 tonnes calculated in accordance with the Greek rules on measurement and that the vessel had received construction aid on the basis of that capacity pursuant to Regulation No 2908/83. In the joint enterprise project submitted by the Greek authorities to the Commission on 25 February 1992, the *Maistrali II* was stated to be of 297.60 gross tonnage for the purpose of receiving ECU 1 267 800 of Community aid. After it had acknowledged receipt of that project on 2 March 1992, the Commission, by decision of 5 July 1993, granted aid of ECU 1 267 800, in accordance with the request submitted by the national authorities. From this the Director concluded that there were no grounds for reviewing that decision.

18 By application lodged at the Registry of the Court of First Instance on 13 May 1996, the applicant brought the present action.

Forms of order sought by the parties

19 Mr Polyvios, the applicant, claims that the Court should:

— declare the action admissible and well founded;

— order the defendant to pay the sum of ECU 510 840 or, in the alternative, the sum of ECU 425 700, plus interest at the statutory rate from 8 August 1993 to the date of payment;

— order the Commission to pay all costs.

20 The Commission, the defendant, contends that the Court should:

— dismiss the action as inadmissible;

— in the alternative, dismiss it as unfounded;

— order the applicant to pay the costs.

Admissibility

21 While not formally raising an objection of inadmissibility within the meaning of Article 114 of the Rules of Procedure, the Commission does challenge the admissibility of the action, arguing in substance that it is in fact seeking the withdrawal of an individual decision which has become definitive and that it is consequently designed to circumvent the procedure set out in Article 173 of the EC Treaty.

22 Under Article 111 of the Rules of Procedure, where an action is manifestly inadmissible, the Court of First Instance may, by reasoned order, without taking further steps in the proceedings, give a decision on the action. In this case, the Court considers that it has sufficient information from the documents on the case-file and decides that it is unnecessary to take further steps in the proceedings.

Arguments of the parties

23 The Commission first points out that, although the action provided for under Articles 178 and 215 of the Treaty is an autonomous form of action within the forms of action under Community law, by way of exception to that principle, the inadmissibility of an action for annulment leads to the inadmissibility of the claim for compensation where the action for damages seeks in fact the withdrawal of an individual decision which has become definitive and would, if accepted, have the result of neutralising the legal effects of that decision (Case 175/84 *Krohn* v *Commission* [1986] ECR 753, paragraphs 32 and 33, and Case C-25/91 *Pesqueras Echebastar* v *Commission* [1993] ECR I-1719).

24 By the present action, the applicant is seeking compensation for a Commission measure which could have been the subject of an action for annulment brought within the prescribed period. Those two actions have the same financial end in view.

25 The decision of 5 July 1993, which constitutes an individual measure, states clearly that the financial aid was granted under the conditions set out therein and on the basis of the financial data annexed thereto, which included the tonnage of 297.60 grt. Since he was aware of all the factors used to calculate the financial aid from the date on which he was notified of the decision, the applicant could have sought its annulment under Article 173 of the Treaty in order to secure review of the method by which the financial aid had been calculated. By the present action, brought three years later, he is, the Commission argues, seeking to achieve the same result.

26 If there was a mistake on the Commission's part, this would have been made in the individual decision. The applicant ought for that reason to have sought annulment of that decision giving rise to the alleged damage. The period within which an action for annulment should have been brought has long expired. That period, laid down in Article 173 of the Treaty, is a matter of public policy.

27 Since the present action is a direct substitute for the action which was not brought within the period specified in Article 173 of the Treaty, and since the applicant himself indicates that the two actions share the same legal and substantive basis and that their legal consequences are identical, the Commission infers that the action for compensation amounts to a breach of the rules governing the period within which an action for annulment must be brought.

28 The applicant submits that, since the action for compensation referred to in Article 215 of the Treaty is in principle independent of actions for a declaration of failure to act and actions for annulment, the case-law has adopted a more severe attitude solely when the use of this remedy is directly substituted for the operation of annulment proceedings which have deliberately not been utilised or have been unsuccessful (Joined Cases 15/73 to 33/73, 52/73, 53/73, 57/73 to 109/73, 116/73, 117/73, 123/73, 132/73 and 135/73 to 137/73 *Schots-Kortner and Others* v *Council, Commission and Parliament* [1974] ECR 177).

29 In this case, the Court ought to examine the probable reason why an action for annulment was not brought within the prescribed period. The Court would be able or entitled, by setting out in detail the grounds for 'this means of circumventing the procedure', to declare the action for compensation to be inadmissible only if the case-file, the pleas relied on by both parties, the facts and the procedural documents indicated that the applicant fraudulently omitted to bring proceedings for annulment in order thus to avoid the consequences of an unjustified failure to bring annulment proceedings.

30 The present action, the applicant claims, is neither a 'means of circumventing the procedure' nor the result of fraud. The applicant submits in this regard that, as from 17 July 1993, the date on which he was notified of the decision of 5 July 1993, he submitted a written complaint, asked that the decision be rectified, met the responsible persons in Brussels and sent a formal notice to the Greek authorities and to those of the Communities. The Greek authorities, he claims, were convinced, corrected their mistake and recommended to the Commission that it pay the additional aid. The Commission authorities, he alleges, unofficially promised him that they would probably accede to his request if the Greek authorities corrected their mistake and issued an opinion to that effect. The Commission, however, putting forward contradictory grounds of justification, rejected his request.

31 Furthermore, whether the action for annulment is held to be well founded or the action for compensation, by reason of the fact that the action for annulment was not brought, is held to be well founded, the resulting legal consequences are, he submits, the same, namely that the Commission must pay the additional aid to the applicant, since the two actions share the same legal and factual basis and the default interest began to accrue with effect from the letter of formal notice which the applicant sent to the Commission on 8 August 1993.

Findings of the Court

32 The Court has held that the action for damages provided for by Article 178 and the second paragraph of Article 215 of the Treaty was meant to be an autonomous form of action with a particular purpose to fulfil within the system of remedies provided for. It follows that, in principle, the inadmissibility of a claim for annulment cannot entail the inadmissibility of a claim for damages for alleged loss (Case T-514/93 *Cobrecaf and Others* v *Commission* [1995] ECR II-621, paragraph 58, and Case T-491/93 *Richco* v *Commission* [1996] ECR II-1131, paragraph 64).

33 However, although a party may take action by means of a claim for compensation without being obliged by any provision of law to seek the annulment of the illegal measure which causes him damage, he may not by those means circumvent the inadmissibility of an application which concerns the same instance of illegality and which has the same financial end in view (order in Joined Cases C-199/94 P and C-200/94 P *Pevasa and Inpesca* v *Commission* [1995] ECR I-3709, paragraph 27). The inadmissibility of a claim for annulment renders a claim for compensation inadmissible where the action seeking compensation is actually aimed at securing withdrawal of an individual decision which has become definitive (*Cobrecaf and Others*, cited above, paragraph 59, and *Richco*, cited above, paragraph 65), or, in other words, of a measure or decision capable of being the subject of an action for annulment brought by a natural or legal person and against which an action has not been brought within the specified period.

34 It should first be noted here that it is clear from the case-file that the illegal conduct of which the applicant claims that the Commission was guilty consists essentially of the following:

— the fact of having adopted the recommendation of the Greek authorities, without checking the calculations on which it was based and without examining the applicant's request of 9 January 1992 or the documents annexed thereto;

— the fact of not having calculated the financial aid on the basis of the tonnage of the *Maistrali II* resulting from application of the London Convention, contrary to the Community rules and to the principles of proper administration and equal treatment;

— the refusal to review its decision of 5 July 1993 following the recommendation of the Greek authorities contained in their letter of 1 October 1993;

— the contradictory reasoning in the decisions refusing to review its decision of 5 July 1993; and

— the fact of having unofficially promised the applicant that his request for additional financial aid would probably be met if the Greek authorities submitted a favourable recommendation.

35 The causal connection between those various factors, constituting the conduct complained of, and the alleged damage, that is to say, the fact that the amount of financial aid granted was calculated on the basis of a tonnage established pursuant to the Oslo method and not according to the London method, is thus connected to the illegality of the decision of 5 July 1993 and the Commission's refusals to amend that decision.

36 The decision of 5 July 1993 was notified to the applicant in accordance with Article 191(3) of the Treaty. The applicant confirms that he received it on 17 July 1993. It is an individual decision, addressed to the Hellenic Republic and to the applicant, capable of forming the subject of an action for annulment brought by the latter. Since the applicant did not bring such an action, the decision has become definitive so far as he is concerned.

37 Regarding the Commission's subsequent refusals to grant additional financial aid, the applicant appears to define four such refusals, contained in the letters of 23 August 1993, 1 February 1994, 4 July 1994 and 19 September 1994 (see paragraphs 10, 13, 15 and 17 above). In this connection, it follows from the case-law that an action for damages seeking compensation for damage caused by the unlawfulness of a measure adopted by an institution is inadmissible where that measure has no legal effect (orders in Case C-50/90 *Sunzest* v *Commission* [1991] ECR I-2917, paragraphs 18 and 19, and in Case C-117/91 *Bosman* v *Commission* [1991] ECR I-4837, paragraph 20). It is therefore necessary to examine whether the refusals to review the decision of 5 July 1993 simply confirmed that previous decision or whether they amounted to decisions clearly altering the applicant's legal position compared with that resulting from the earlier decision because they were based on a new factor capable of having mandatory legal effects such as to affect the applicant's interests (*Cobrecaf and Others*, cited above, paragraph 45).

38 The Commission's first refusal to review the decision of 5 July 1993, which was the subject of the letter of 23 August 1993 in which the Commission solely informed the applicant that the decision of 5 July 1993 had been taken on the basis of the data notified by the Greek authorities, merely confirms that decision.

39 In contrast, the refusal contained in the letter of 1 February 1994 must be regarded as a new decision. It is clear from the case-file that the Commission adopted its decision of 5 July 1993 on the strength of the information sent by the Greek authorities, without checking whether the tonnage indicated for the *Maistrali II* had been calculated according to the London method, the Oslo method, or some other method. The Commission addressed that matter only after the applicant had pointed out to it that, contrary to the provisions in force, the amount of the financial aid granted had not been calculated according to a tonnage established pursuant to the London method. The applicant drew the Commission's attention to that point both via the Greek authorities and directly, in particular by his letter of 22 November 1993. In its letter of 1 February 1994, the Commission stated that the capacity of the *Maistrali II* measured according to the provisions of the London Convention could not be accepted for the purpose of calculating the financial aid. Had the Commission accepted the applicant's argument, it would have granted the financial aid requested. It follows that the letter of 1 February 1994 was based on a new factor capable of having mandatory legal effects such as to affect the applicant's interests. This conclusion is corroborated by the letter of 14 January 1994 indicating that, at that time, the Commission was in the process of examining the matter.

40 The refusals contained in the letters of 4 July 1994 and 19 September 1994 merely confirm the decisions taken earlier on 5 July 1993 and 1 February 1994.

41 Since the letters of 23 August 1993, 4 July 1994 and 19 September 1994 have therefore no legal effects, the present action is inadmissible in so far as it seeks reparation of damage resulting from their illegality.

42 So far as the letter of 1 February 1994 is concerned, although it is an individual decision addressed to the applicant and capable of being the subject of an action for annulment, the unavoidable conclusion is that the applicant also failed timeously to bring such an action against that decision. That decision has consequently also become definitive.

43 In this context, it follows from the case-law that time-limits for initiating proceedings, which are a matter of public policy, are not subject to the discretion either of the Court or of the parties; the concept of excusable error must be strictly construed and can concern only exceptional circumstances in which, in particular, the conduct of the institution concerned has been, either alone or to a decisive extent, such as to give rise to a pardonable confusion in the mind of a party acting in good faith and exercising all the diligence required of a normally experienced trader (Joined Cases T-33/89 and T-74/89 Blackman v *Parliament* [1993] ECR II-249, paragraph 34, and Case C-195/91 P *Bayer* v *Commission* [1994] ECR I-5619, paragraph 26). The applicant has adduced no evidence capable of establishing that the Commission engaged in such conduct.

44 Finally, the present action seeks to obtain an amount equal to the difference between the amount of Community financial aid which would have been paid had the Commission upheld the request as submitted by the applicant and the amount granted by the decision of 5 July 1993, increased by default interest (order in *Pevasa and Inpesca* v *Commission*, cited above, paragraph 28).

45 It follows from all of the foregoing that the present action for compensation, brought more than two years and three months after the last decision capable of being the subject of an action for annulment was adopted, seeks to circumvent the time-limit laid down in Article 173 of the Treaty for bringing such an action and therefore constitutes a misuse of the procedure under Article 178 of the Treaty (order in *Pevasa and Inpesca* v *Commission*, cited above, paragraph 28).

46 In those circumstances, the action must be dismissed as being manifestly inadmissible.

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, he must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby orders:

1. The action is dismissed as being manifestly inadmissible.

2. The applicant shall pay the costs.

Luxembourg, 3 February 1998.

H. Jung — P. Lindh

Registrar — President