ORDER OF THE GENERAL COURT (First Chamber)

22 June 2011 *

In Case T-409/09,

Evropaïki Dynamiki — Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE, established in Athens (Greece), represented by N. Korogiannakis and M. Dermitzakis, lawyers,

applicant,

v

European Commission, represented by M. Wilderspin and E. Manhaeve, acting as Agents,

defendant,

ACTION for damages for the loss allegedly suffered by the applicant as a result of the decision of the Commission of 15 September 2004 rejecting its bid and awarding the contract to another tenderer in the course of the tendering procedure for the provision of computer and related services linked to the information systems of the Directorate-General for Fisheries,

* Language of the case: English.

THE GENERAL COURT (First Chamber),

composed of J. Azizi, President, E. Cremona (Rapporteur) and S. Frimodt Nielsen, Judges,

Registrar: E. Coulon,

makes the following

Order

Background to the dispute and procedure

1 The applicant, Evropaïki Dynamiki — Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE, submitted, on 19 May 2004, a bid in response to the call for tenders FISH/2004/02 for the provision of computer and related services linked to the information systems of the Directorate-General (DG) for Fisheries ('DG Fisheries') of the Commission of the European Communities ('the first contract') published in the Supplement to the *Official Journal of the European Union* on 14 April 2004 (OJ 2004 S 73, p. 61407).

2 By letter of 15 September 2004, which the applicant received on the same day, DG Fisheries informed it that its bid had not been selected, stating that the grounds for that rejection related to the composition and stability of the team, the procedures

proposed for transferring knowledge on completion of the project, and the fact that its bid did not offer the best value for money. DG Fisheries also stated that the applicant could request in writing additional information on the grounds for the rejection of its bid.

3 On 16 September 2004, the applicant, whilst expressing its objections to the grounds for the rejection of its bid, asked DG Fisheries for the name of the successful tenderer; the scores awarded to its technical offer and to that of the successful tenderer on each evaluation criterion; a copy of the evaluation committee report; and how its financial offer compared with that of the successful tenderer.

4 By letter of 22 October 2004, DG Fisheries responded to the applicant that all tenderers who had requested additional information about the rejection of their bids had received that information simultaneously by letter, attached as an annex, dated 18 October 2004. In that letter, DG Fisheries provided some additional information concerning the evaluation of the applicant's bid and also stated the name of the tenderer to whom the contract was awarded and the fact that that tenderer's bid had been successful because it was the most advantageous economically. Lastly, DG Fisheries communicated the marks obtained by the applicant's bid and that of the successful tenderer for each of the technical evaluation criteria, as well as the result of the financial evaluation, in the form of tables.

5 By application lodged on 25 November 2004 and entered in the register as Case T-465/04, the applicant brought an action before the General Court for annulment of the aforementioned letter of DG Fisheries of 15 September 2004.

6 By judgment of 10 September 2008 in Case T-465/04 *Evropaïki Dynamiki* v *Commission*, not published in the ECR, the General Court annulled the Commission's decision to reject the tender submitted by the applicant and to award the first contract to the successful tenderer.

7 In letters of 7 October 2008 and 5 March 2009, addressed directly to the President of the Commission, the applicant, complaining of the Commission's action towards it, requested, in essence, that the Commission re-examine all the existing cases, declaring at the same time that it was prepared to withdraw all pending actions relating to the award of public contracts by the Commission.

8 On 25 September 2009, the applicant brought the present action by fax. The packages containing the signed original of the application, copies of that document and the annexes were sent on 3 October 2009 through a courier service.

9 On 5 October 2009, the Registry of the General Court, having received a package which contained only copies of the application, informed the applicant's counsel that the package containing the original had not yet arrived. A copy of the missing documents and a new signed original of the application were, therefore, lodged at the Registry on the same day.

10 On 16 November 2009, the Registry of the General Court informed the applicant that the new original of the application, which was lodged on 5 October 2009, differed from the copy of that document received by fax on 25 September 2009. Therefore, in accordance with Article 43(6) of the Rules of Procedure of the General Court, the date of 5 October 2009 and not that of 25 September 2009 was used as the date when the action was brought.

11 By letter dated 19 November 2009 and sent the next day by fax to the Registry of the General Court, the applicant, whilst acknowledging receipt of the Registry's letter of 16 November 2009, set out the reasons why the original of the application had not arrived within the time-limits and requested that the General Court acknowledge that there was a situation of *force majeure* in the present case and, consequently, reconsider its decision to use the date of 5 October 2009 as the date when the action was brought.

12 On 26 November 2009, the applicant sent a letter by fax to the Registry of the General Court in which it explained the circumstances of the loss of the package by the company to which it had entrusted the courier service and again requested that the date of lodgement of the original of the application be regarded as 25 September 2009.

13 On 3 December 2009, the applicant was informed by the courier company which it had used that the missing package had not been found.

14 By a separate document lodged at the Registry of the General Court on 29 January 2010, the Commission raised, under Article 114(1) of the Rules of Procedure, an objection of inadmissibility inasmuch as the action for damages is time-barred.

15 The applicant lodged its observations on the objection of inadmissibility on 14 April 2010.

16 By way of a measure of organisation of procedure, the General Court, by letter of 2 July 2010, put a written question to the parties concerning the applicability to the present case of Article 102(2) of the Rules of Procedure relating to an extension of the procedural time-limits on account of distance by a single period of 10 days. The parties replied within the time-limits prescribed.

Forms of order sought

17 In the application, the applicant claims that the Court should:

— order the Commission to pay it the amount of EUR 2 000 000, corresponding to the gross profit which it could have made from the first contract if it had been awarded to it (50 % of the contract value);

— order the Commission to pay it the amount of EUR 100 000 corresponding to the damage suffered because of the loss of the opportunity to carry out the contract;

— order the Commission to pay the costs.

18 In the objection of inadmissibility, the Commission contends that the Court should:

— dismiss the action as inadmissible;

— order the applicant to pay the costs.

19 In its observations on the objection of inadmissibility, the applicant claims that the Court should dismiss that objection.

Law

20 Under Article 114(1) of the Rules of Procedure, if a party so requests, the General Court may make a decision on admissibility without considering the substance. Under Article 114(3) of those rules, unless the General Court otherwise decides, the remainder of the proceedings is to be oral.

21 Moreover, under Article 111 of the Rules of Procedure, where it is clear that the General Court has no jurisdiction to take cognisance of an action or where the action is manifestly inadmissible or manifestly lacking any foundation in law, the General Court may, by reasoned order, without taking further steps in the proceedings, give a decision on the action.

22 In this case, the General Court considers that its examination of the documents in the case-file has provided it with sufficient information and there is no need to open the oral procedure.

Arguments of the parties

23 The Commission raises an objection of inadmissibility against the application on the ground that the action on which it is based is time-barred inasmuch as it was brought after the expiry of the five-year limitation period prescribed in matters arising from non-contractual liability of the European Community by Article 46 of the Statute of the Court of Justice.

24 That period began to run from the time when the alleged damage actually materialised.

25 The Commission recalls that, in the present case, the applicant claims compensation for damage purportedly flowing from the fact that the first contract was not awarded to it and, in the alternative, also for 'loss of opportunity'.

26 According to the Commission, the alleged damage which gave rise to both the main and the alternative claim was caused at the time when the decision to reject the applicant's tender was taken since it was at that point that the applicant was no longer in a position to be awarded the first contract. The damage thus materialised on the date on which the Commission informed the applicant that its bid had not been selected, namely on 15 September 2004. It is as of that date, as the applicant implicitly concedes in its letter of 19 November 2009 addressed to the Registry of the General Court, that the limitation period began to run. The action brought on 5 October 2009 is therefore time-barred.

27 That conclusion is confirmed, according to the Commission, by the order in Case T-140/04 *Ehcon* v *Commission* [2005] ECR II-3287. According to paragraph 43 of that order, the loss suffered as a result of not being awarded the contract that was the subject of a tendering procedure and the damage flowing from the loss of the chance of securing that contract materialised on the date on which the Commission rejected the unsuccessful tenderer's bid. That rejection thus constitutes the event giving rise to the proceedings to establish non-contractual liability within the meaning of the first sentence of Article 46 of the Statute of the Court of Justice.

28 The Commission also states that the General Court, having held that the limitation period started to run on the day on which the Commission rejected the tender, held, in paragraph 46 of the order in *Ehcon* v *Commission*, paragraph 27 above, that, in that case, that period had started to run at the latest on the date on which the applicant had received a second communication from the Commission informing it of the reasons for the rejection of its tender.

29 In the Commission's submission, it cannot be inferred from paragraph 46 of the order in *Ehcon* v *Commission*, paragraph 27 above, that the General Court accepted that the date on which the limitation period had started to run was the day on which the tenderer received the letter in which the Commission explained the reasons for its rejection of the tenderer's bid. As the action in the case which gave rise to that order was in any event time-barred, knowledge of the exact date on which the limitation period began to run was immaterial. Furthermore, such a conclusion would be contrary to the wording of paragraph 43 of the order, which is set out above.

30 Lastly, such a conclusion would not be in conformity with the *ratio legis* of the limitation period which, as the Court of Justice recalled in its order in Case C-136/01 P *Autosalone Ispra dei Fratelli Rossi* v *Commission* [2002] ECR I-6565, paragraph 28, is to reconcile the protection of the rights of the aggrieved person with the principle of legal certainty. The Commission refers to case-law according to which specific knowledge of the facts is not one of the conditions which must be met to cause the limitation period to run. It concludes, in the present case, that it was unnecessary, in order for the limitation period to start running, for the applicant to be in possession of the detailed reasons for the rejection of its tender. A relatively extensive limitation period is granted precisely in order for the applicant to have the time to come by that information in the course of that period.

31 The Commission therefore submits that the action to establish non-contractual liability should have been brought on 25 September 2009 at the latest, that is to say 5 years after the rejection of the applicant's tender and taking into account the extension on account of distance by a single period of 10 days.

32 Lastly, the Commission rejects the applicant's argument that there is a case of *force majeure* in the present case. In that regard, it submits that, according to the case-law, the notion of *force majeure* contains an objective element and a subjective element. The first element relates to abnormal circumstances unconnected with the person in question and the second involves an obligation on that person to guard against the consequences of the abnormal event by taking appropriate steps without, however, making unreasonable sacrifices. In particular, in Case T-125/06 *Centro Studi Manieri*

v *Council* [2009] ECR II-69, paragraph 28, the General Court held that the person concerned must pay close attention to the course of the procedure and, in particular, demonstrate diligence in order to comply with the prescribed time-limits.

33 As regards the first element, the Commission submits that late delivery of a package is an unusual but not unpredictable event. Even if the failure to deliver one of the two packages sent by the applicant does constitute an abnormal event, the Commission nevertheless submits that the applicant has not demonstrated the required diligence since it chose to wait not only until the five-year limitation period had expired but also until the eve of the expiry of the extra time allowed on account of distance before faxing the application to the General Court. Secondly, the applicant waited for an entire working week before handing over the documents to the courier at the last moment on 3 October 2009, knowing that any delay in delivery must result in the deadline being missed. The applicant thus knew of and willingly accepted such a risk.

34 In its observations on the objection of inadmissibility, the applicant disputes the Commission's determination of the moment at which the limitation period began. In particular, it rejects the Commission's argument that the limitation period began to run on 15 September 2004, the date on which it was informed that its tender had not been accepted. In that regard, it refers to paragraphs 44, 45 and 48 of the order in *Ehcon* v *Commission*, paragraph 27 above, which contradict paragraph 43 on which the Commission relies. It follows from those paragraphs that the conditions for the applicant to assert its right to compensation were satisfied only at the time when the applicant knew the reasons for the Commission's decision and not at the date when it had merely been informed of the outcome of the tender procedure. In the present case, the applicant was not aware of those reasons before 20 or 23 October 2004.

35 The applicant also maintains that the contract in the present case is a 'framework contract' and that, consequently, no damage occurs and no damage is certain before a 'specific contract' is signed. It follows that the limitation period begins to run only as of the time when a 'specific contract' between the Commission and the successful tenderer is actually signed.

36 According to the applicant, the action to establish non-contractual liability was therefore time-barred on 3 November 2009 at the earliest, that is to say 5 years and 10 days, taking into account the extension of the time-limit on account of distance, after it knew of the reasons for the Commission's rejection of its tender.

37 Furthermore, the applicant disputes the argument that the Commission derives from the order in *Autosalone Ispra dei Fratelli Rossi* v *Commission*, paragraph 30 above, since the facts of that case are too far removed from the present case for it to be relevant. In the applicant's submission, in cases concerning tendering procedures, as long as the unsuccessful tenderer does not know the exact reasons for the rejection of its tender it is not in a position to evaluate whether the act is unlawful or not and therefore whether or not damage exists, which is the first condition for the commencement of an action to establish non-contractual liability against the Community. Therefore, the applicant submits, relying on paragraph 45 of the order in *Ehcon* v *Commission*, paragraph 27 above, that the communication of the reasons for the decision is the condition *sine qua non* for the person concerned to be in a position to assess the legality of the procedure.

38 Furthermore, the applicant states that, following its request, the Commission delayed for more than one month before providing it with the reasons for the decision to reject its tender and that the Commission is now trying to include that period of inaction in the limitation period for bringing an action to establish non-contractual liability.

39 Lastly, in the present case, the decision of the General Court, in *Evropaïki Dynamiki* v *Commission*, paragraph 6 above, to annul the Commission's decision not to award the first contract to the applicant is based specifically upon the inadequacy of the reasons for that decision. Consequently, it was only on the date of delivery of that judgment, 10 September 2008, that the applicant received the explanation for the rejection of its tender.

40 The applicant also disputes the Commission's argument relating to its letter of 19 November 2009, namely that it amounts to an implicit acceptance of 15 September 2004 as the date on which the limitation period began to run. That letter was written, as a precautionary measure, in accordance with Article 43(6) of the Rules of Procedure, to anticipate the Commission's arguments and cannot in any event be interpreted as an acceptance of 15 September 2004 as the date on which the limitation period began to run.

41 As regards the issue of the date of lodgement of the original of the application which the General Court used, the applicant submits, first, that apart from the signature, which had to be added again by its counsel to the version of the application which was reprinted following the loss of the original sent by courier, there is no difference between the version sent by fax on 25 September 2009 and the original lodged at the Registry on 5 October 2009. A possible difference in signature does not constitute infringement of Article 43(6) of the Rules of Procedure.

42 Secondly, the applicant disputes the Commission's arguments concerning the inapplicability in the present case of *force majeure*. It states that all the steps necessary to bring an action were taken within the time-limits. In any event, it submits that although the late delivery of a package represents a considerable risk, the same cannot be said for the loss of that package, particularly because the package was sent via a company belonging to Deutsche Post.

43 The applicant therefore disputes the principles laid down in the case-law referred to by the Commission and states that in the present case, after sending a fax of the application within the time-limit, it took care to check on the courier company's internet site that the package containing the original and the annexes had indeed been delivered within the time-limit, namely 5 October 2009. It was only in the afternoon of the same day that the applicant was informed by the Registry that the original had not arrived. The courier company was then contacted immediately and, once it was realised that the package would not be found in time, a new copy of the application was printed and delivered to the Registry in the evening of 5 October 2009.

44 Therefore, by taking appropriate steps to ensure that the action was brought within the time-limits, the applicant demonstrated diligence and could not have foreseen or, in any event, have avoided the loss of the original document.

45 Lastly, the applicant claims that the present case should be considered on an ad hoc basis on account of the both new and irreversible nature of the loss of an original document by a courier company.

Findings of the Court

46 Under Article 46 of the Statute of the Court of Justice, applicable to proceedings before the General Court pursuant to the first paragraph of Article 53 of that statute, proceedings against the Community in matters arising from non-contractual liability are to be barred after a period of five years from the occurrence of the event giving rise thereto. The period of limitation is to be interrupted if proceedings are instituted before the Court of Justice or if prior to such proceedings an application is made by the aggrieved party to the relevant institution.

47 According to established case-law, in order for the Community to incur non-contractual liability, within the meaning of the second paragraph of Article 288 EC, on account of the unlawful conduct of its institutions, a number of requirements must be satisfied, namely that the alleged conduct of the institutions is unlawful, that the damage is real and that there is a causal link between the conduct alleged and the damage relied upon (see Case C-243/05 P *Agraz and Others* v *Commission* [2006] ECR I-10833, paragraph 26 and the case-law cited; Case T-175/94 *International Procurement Services* v *Commission* [1996] ECR II-729, paragraph 44; and *Centro Studi Manieri* v *Council*, paragraph 32 above, paragraph 97).

48 It is also apparent from settled case-law that the limitation period begins once all those requirements governing the obligation to provide compensation are satisfied and, in particular, once the damage to be made good has materialised. In particular, in disputes arising, as in the present case, from individual measures, the limitation period begins as soon as those measures have produced their effects vis-à-vis the persons concerned by them (see, to that effect, Case C-282/05 P *Holcim (Deutschland)* v *Commission* [2007] ECR I-2941, paragraphs 29 and 30; judgment of 11 June 2009 in Case C-335/08 P *Transports Schiocchet — Excursions* v *Commission*, not published in the ECR, paragraph 33; and order of 27 August 2009 in Case T-367/08 *Abouchar* v *Commission*, not published in the ECR, paragraph 23).

49 It must also be borne in mind that the function of the limitation period is to reconcile protection of the rights of the aggrieved person and the principle of legal certainty. The length of the limitation period was therefore determined by taking into account, in particular, the time that the party who has allegedly suffered harm needs to gather the appropriate information for the purpose of a possible action and to verify the facts likely to provide the basis of that action (see, to that effect, order in *Autosalone Ispra dei Fratelli Rossi* v *Commission*, paragraph 30 above, paragraph 28; order of 16 December 2009 in Case T-194/08 *Cattin* v *Commission*, not published in the ECR, paragraph 69; and judgment of 28 September 2010 in Case T-247/08 *C-Content* v *Commission*, not published in the ECR, paragraph 54).

50 In addition, it must be pointed out that, according to the case-law, specific and detailed knowledge of the facts of the case on the part of the victim is of no significance since knowledge of the facts is not one of the conditions which must be met in order for the limitation period referred to in Article 46 of the Statute of the Court of Justice to begin running. The subjective appraisal of the reality of the damage cannot therefore be taken into consideration in order to determine the moment at which the limitation period begins in proceedings being brought against the Community to establish non-contractual liability (see, to that effect, Case C-51/05 P *Commission* v *Cantina sociale di Dolianova and Others* [2008] ECR I-5341, paragraph 61 and the case-law cited).

51 In the present case, the applicant claims, primarily, compensation for the harm allegedly suffered as a result of the fact that the first contract was not awarded to it, that is to say a sum corresponding to the gross profit which it could have made from that contract (50 % of the value of the contract). In the alternative, it claims compensation for loss of opportunity in so far as it suffered both damage on account of the loss of the opportunity to carry out the first contract and damage on account of the loss of the chance to be awarded other contracts, inter alia the contract awarded in 2008 in the context of the call for tenders MARE/2008/01 ('the second contract'), the initial value of which exceeded EUR 5 million, by the Commission's DG for Maritime Affairs and Fisheries to the contractor who won the first contract ('the damage suffered as a result of the loss of the chance of securing further contracts').

The damage suffered as a result of not being awarded the first contract and the loss of the opportunity to secure that contract

52 As the General Court has already pointed out in *Ehcon* v *Commission*, paragraph 27 above, the loss suffered as a result of not being awarded the contract in question and as a result of the loss of the chance of securing that contract materialised on the day on which the Commission rejected the applicant's tender; that rejection also

constitutes the event giving rise to the proceedings to establish liability, for the purposes of Article 46 of the Statute of the Court of Justice (see, to that effect, order in *Ehcon* v *Commission*, paragraph 27 above, paragraph 43).

53 The rejection of its tender was communicated to the applicant by letter of 15 September 2004, which the applicant received on the same day (see paragraph 2 above).

54 It is true, as the applicant submits, that, in paragraphs 44, 45 and 48 of the order in *Ehcon* v *Commission*, paragraph 27 above, the General Court seems to call in question the approach identified in paragraph 43 of that order, according to which the loss in question materialised on the day on which the tender was rejected. The fact none the less remains that all those paragraphs must be read in context and in their logical order. In particular, in paragraph 45, the General Court, by stating that 'all the conditions for the applicant to assert its right to compensation were satisfied on 20 March 1997 [that is to say, the day on which the applicant in that case had become aware of the reasons for the decision to reject its tender] at the latest and that, therefore, the five-year limitation period [had] expired on 20 March 2002 at the latest', merely found, that, in that case, the action was in any event out of time since it had been brought only on 8 April 2004. In the light of the circumstances of the case, that finding by the General Court cannot call into question the main premiss of its reasoning according to which loss such as that at issue materialises on the day on which the tender is rejected since the rejection is the event giving rise to the proceedings to establish liability.

55 It must therefore be concluded that the alleged loss which gave rise, in the present case, to proceedings to establish non-contractual liability against the Community occurred on the date of the Commission's decision to reject the applicant's tender and that the limitation period in respect of that action began to run as of the time when that decision was communicated to the applicant, namely 15 September 2004.

56 Pursuant to Article 46 of the Statute of the Court of Justice, the period of limitation is interrupted only by the institution of proceedings before the Community Courts or by the submission of an application to the relevant institution of the Community prior to such proceedings; however, in the latter case, interruption occurs only if the application is followed by proceedings within the time-limit determined by reference to Articles 230 EC or 232 EC, as appropriate.

57 In that regard, the letters dated 7 October 2008 and 5 March 2009, which were addressed by the applicant to the President of the Commission, do not contain any express application for damages and were not followed by proceedings within the time-limit determined by reference to Article 230 EC or Article 232 EC. In any event, those letters thus have no effect on the five-year limitation period provided for by Article 46 of the Statute of the Court of Justice.

58 Consequently, as regards both of the alleged losses, the five-year limitation period expired on 15 September 2009 without having been interrupted.

59 None of the applicant's arguments can call that conclusion into question.

60 First, the applicant submits, relying in essence on paragraphs 45 and 48 of the order in *Ehcon* v *Commission*, paragraph 27 above, that, to establish the Commission's unlawful conduct, it needed to know the reasons for the decision given by the Commission and that it was not aware of those reasons before 20 or 23 October 2004. Consequently its action was time-barred on 3 November 2009 at the earliest, namely at the end of a period of 5 years and 10 days as from 22 October 2004, and not on 25 September 2009.

61 In that regard, it is sufficient to point out that, as has been stated in paragraphs 52 and 55 above, it is the rejection of the tender, and not the reasons for that rejection, which constitutes the event giving rise to the proceedings to establish liability in the field of public procurement and causes the loss allegedly suffered by the unsuccessful tenderer to materialise.

62 Furthermore, it is apparent from the case-law that the fact that an applicant may have considered, when it brought a claim for compensation against the Community, that it did not have all the evidence it needed to prove to the requisite legal standard in judicial proceedings that the Community was liable could not, as such, prevent the limitation period from running. If that were the case, a confusion would then arise between the procedural criterion relating to the commencement of the limitation period and the finding that the conditions for liability were satisfied, which can ultimately be made only by the court before which the matter has been brought for final adjudication on its substance (order in Case T-124/99 *Autosalone Ispra dei Fratelli Rossi* v *Commission* [2001] ECR II-53, paragraph 24).

63 It is also important to state that, contrary to what the applicant submits in relying on paragraphs 45 and 48 of the order in *Ehcon* v *Commission*, paragraph 27 above, in the present case the letter from DG Fisheries of 15 September 2004 — which constituted the contested measure in *Evropaïki Dynamiki* v *Commission*, paragraph 6 above — already contained an initial indication of the reasons for the rejection of its tender (see paragraph 2 above). The letters sent subsequently by DG Fisheries sought only to give, following the applicant's request, additional explanations as regards those reasons and the characteristics and advantages of the successful tender (see paragraphs 3 and 4 above). Furthermore, the fact that detailed knowledge of the reasons for the rejection of the tender allegedly materialised some days after the communication of that rejection had been sent does not conflict with the case-law, referred to in paragraph 49 above, according to which the length of the limitation period takes into account, in particular, the time that the party who has allegedly suffered harm needs to gather the appropriate information for the purpose of a possible action and to verify the facts likely to provide the basis of that action.

64 In short, preventing the limitation period for proceedings against the Community to establish non-contractual liability from starting to run as long as the party who has allegedly been harmed is not personally convinced that he has suffered damage has the result that the point at which those proceedings become time-barred varies according to the individual perception that each party might have as to the reality of the damage, something which is at variance with the requirement of legal certainty necessary for the application of limitation periods (see, to that effect, *C-Content* v *Commission*, paragraph 49 above, paragraph 55 and the case-law cited).

65 In that regard, it must be pointed out lastly that, as the Commission rightly states, it is apparent from the letter dated 19 November 2009, which was sent to the Registry of the General Court by the applicant, that the applicant considered that the unlawful conduct on the part of the Commission had occurred as soon as the letter of 15 September 2004 communicating the rejection of the tender was sent, given that the applicant implicitly concedes that the limitation period started to run from that date.

66 Secondly, the applicant submits that, on account of the fact that the first contract is a framework contract, the signature of a specific contract is necessary for loss to arise. However, it must be pointed out that, according to the case-law, the requirement relating to the existence of certain damage is met where the damage is imminent and foreseeable with sufficient certainty, even if the damage cannot yet be precisely assessed (Case 281/84 *Zuckerfabrik Bedburg and Others* v *Council and Commission* [1987] ECR 49, paragraph 14; see order in *Abouchar* v *Commission*, paragraph 48 above, paragraph 24 and the case-law cited). Furthermore, the period of limitation cannot begin until the financial loss has in fact materialised (*Holcim (Deutschland)* v *Commission*, paragraph 48 above, paragraph 33). In a tendering procedure, the loss suffered, on the part of the unsuccessful candidate, as a result of not being awarded the contract and as a result of the loss of the chance of securing that contract stems directly and immediately from the decision to reject its tender, irrespective of the future signature of a specific contract between the Community institution and the successful candidate. For the same reasons, it is necessary to reject the argument, which was raised for the first time by the applicant in its written reply to the General

Court's question, that, because of the framework contract, the damage continued for the whole period during which the applicant was deprived of the possibility to sign individual contracts.

67 Thirdly, in view of the analysis carried out in paragraphs 52 to 55 above, the applicant cannot validly rely on the delay with which the Commission replied to its request for clarification as regards the reasons for the rejection of its tender.

68 Fourthly, the applicant submits, in essence, that it had genuine explanations concerning the rejection of its tender only at the date of the judgment of the General Court annulling the decision which gave rise to the loss. It must be stated that the applicant's argument is not at all clear. In any event, it is sufficient to point out in that regard that, according to the case-law, it is irrelevant, as regards the starting point of the period of limitation, that the Community's unlawful conduct was established by a judicial decision (*Holcim (Deutschland)* v *Commission*, paragraph 48 above, paragraph 31). For the rest, reference must be had to the considerations set out in paragraphs 61 to 64 above.

69 Fifthly and lastly, the applicant puts forward, in its written reply to the question put by the General Court, a new argument, alleging that the decision to reject its tender and to award the contract to another tenderer was published, like all other decisions of that kind and in accordance with Articles 118 and 120 of Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 357, p. 1) ('the Implementing Rules'), in Part S of the *Official Journal* on 16 December 2004 and that, consequently, as that date set an irrefutable deadline, it constituted the starting point of the limitation period.

70 In that regard, it must be pointed out, once again, that it is the rejection of the tender which constitutes the event giving rise to the proceedings to establish liability in the field of public procurement and causes the loss allegedly suffered by the unsuccessful tenderer to materialise. It is therefore as from the day on which the unsuccessful tenderer is personally informed of the rejection of its tender and not the date of publication of the award notice in the Official Journal that the limitation period begins to run. In any event, it must also be pointed out that, contrary to what the applicant maintains, the publication of such a notice, the purpose of which is to inform third parties, is compulsory, pursuant to Article 118(4) of the Implementing Rules, only in the case of contracts the value of which is equal to or greater than the thresholds laid down in Article 158 of those rules.

71 In view of all those considerations the five-year limitation period for bringing an action to establish non-contractual liability expired on 15 September 2009.

72 Although the applicant claims that, in the present case, a case of *force majeure* makes it necessary to use the date on which the fax was sent instead of that on which the original of the application was lodged, it must be stated that, in any event, the applicant sent the application by fax on 25 September 2009 when the limitation period had already expired.

73 The applicant's argument is that the extension of the time-limit on account of distance by a single period of 10 days is applicable in the present case. Thus, if the applicant's argument concerning the existence of a case of *force majeure* were upheld and if the date of 25 September 2009 were used as the date of lodging of the application the action would be admissible. The plea that the action is time-barred raised by the Commission is based on the fact that the action must be regarded as having been brought on 5 October 2009 and not, as the applicant claims, on 25 September 2009.

74 In reply to a written question from the General Court concerning the applicability in the present case of Article 102(2) of the Rules of Procedure, the applicant maintained that its action was not time-barred since the limitation period should be extended on account of distance by the single period of 10 days provided for in Article 102. In that regard, it also refers to paragraph 26 of Case T-571/93 *Lefebvre and Others* v *Commission* [1995] ECR II-2379 in which it was accepted that the extension of the time-limits on account of distance applies to cases to establish non-contractual liability.

75 It must be pointed out that, accordingly to the very terms of Article 102(2) of the Rules of Procedure, the extension on account of distance relates only to the prescribed time-limits and not to the limitation period provided for in Article 46 of the Statute of the Court of Justice, the passing of which results in the action to establish non-contractual liability being barred and which is not therefore increased by any extension on account of distance (see, to that effect, Case T-210/00 *Biret et Cie* v *Council* [2002] ECR II-47, paragraphs 19 and 45; Case T-28/03 *Holcim (Deutschland)* v *Commission* [2005] ECR II-1357, paragraph 74; order of 19 May 2008 in Case T-220/07 *Transport Schiocchet — Excursions* v *Commission*, not published in the ECR, paragraphs 15 and 35; and *Cattin* v *Commission*, paragraph 49 above, paragraphs 61 and 65).

76 In that regard, it must furthermore be borne in mind that the conditions to be met in order for the Community to incur non-contractual liability and, therefore, the rules on limitation periods which govern actions relating to that liability may be based only on strictly objective criteria. If it were otherwise, there would be a risk of undermining the principle of legal certainty on which the rules on limitation periods specifically rely (see *Commission* v *Cantina sociale di Dolianova and Others*, paragraph 50 above, paragraph 59 and the case-law cited).

77 Furthermore, the fact that procedural time-limits, such as those prescribed for bringing proceedings, and the five-year limitation period in respect of actions to establish non-contractual liability against the Community are time-limits which are, by nature, different may also be inferred from the case-law. The periods prescribed for bringing proceedings are a matter of public policy and are not subject to the discretion of the parties or the court, since they were laid down with a view to ensuring clarity and legal certainty. The General Court must therefore examine, even of

its own motion, whether the action was brought within the prescribed period (see Joined Cases T-142/01 and T-283/01 *OPTUC* v *Commission* [2004] ECR II-329, paragraph 30 and the case-law cited; see also, to that effect, order of 25 November 2008 in Case C-500/07 P *TEA* v *Commission*, not published in the ECR, paragraph 20). By contrast, a court may not of its own motion raise the issue of time limitation of actions to establish non-contractual liability (Case 20/88 *Roquette frères* v *Commission* [1989] ECR 1553, paragraphs 12 and 13).

78 Moreover, it is apparent from Article 46 of the Statute of the Court of Justice that the period of limitation is interrupted if proceedings are instituted before the Community Courts or if prior to such proceedings an application is made by the aggrieved party to the relevant institution. That provision does not distinguish, in calculating the limitation period, according to whether the cause of the interruption of that period is the institution of proceedings or the submission of an application prior to such proceedings. However, the application of the procedural time-limit provided for in Article 102(2) of the Rules of Procedure, which can be contemplated only in the case of court proceedings, has the consequence that limitation occurs at the end of a different period according to whether the aggrieved party has chosen to bring the matter directly to the Community Courts or, beforehand, to the relevant institution. Such a difference, which is not provided for in Article 46 of the Statute of the Court of Justice, makes the expiry of the limitation period dependent on a factor which is not objective and also has the consequence of encouraging the settling of disputes by means of court proceedings rather than by seeking amicable solutions.

79 That fact that, in 1995, the General Court, in a judgment which remains an isolated case (*Lefebvre and Others* v *Commission*, paragraph 74 supra, paragraph 26), held that, in the context of the limitation of proceedings against the Community in matters arising from non-contractual liability, it was necessary to take into account the extension on account of distance under Articles 101 and 102(2) of the Rules of Procedure is not capable, contrary to what the applicant seems to submit, of calling into question such a conclusion.

80 It follows from all of the above that the present action to establish non-contractual liability is time-barred, as regards both of the alleged losses, since it was brought more than five years after the occurrence of the events which gave rise to it, within the meaning of Article 46 of the Statute of the Court of Justice, and it is not necessary to examine the other pleas and arguments put forward by the parties, including that alleging the existence of unforeseeable circumstances or of *force majeure*.

The damage suffered as a result of the loss of the chance of securing further contracts

81 As regards the damage suffered as a result of the loss of the chance of securing further contracts, it is first necessary to examine the substance of the applicant's claim (see, to that effect, order in *Ehcon* v *Commission*, paragraph 27 above, paragraph 72).

82 The applicant submits that, if it had been awarded the first contract it would have acquired valuable expertise and would have increased its chances of securing further contracts, including the second contract.

83 As has been pointed out in paragraph 47 above, it is settled case-law that in order for the Community to incur non-contractual liability a number of requirements must be satisfied, namely that the alleged conduct of the institutions is unlawful, that the damage is real and that there is a causal link between the conduct alleged and the damage relied upon.

84 As regards, first of all, the second contract, it must be pointed out that the applicant furnishes no information capable of establishing the connection between the first contract and the second contract. It is therefore impossible to establish the existence of any causal link between the unlawful rejection of the applicant's tender during the

first tendering procedure and the loss which the applicant allegedly suffered owing to the loss of the chance of securing the second contract (see, to that effect, order in *Ehcon* v *Commission*, paragraph 27 above, paragraph 76).

85 In any event, the loss of the chance of securing the second contract can be regarded as real and certain damage only if, in the absence of the improper conduct by the Commission, there would be no doubt that the applicant would have been awarded the first contract. However, it should be pointed out that, in a public tendering system such as the one in this case, the contracting authority has a broad discretion in deciding to award a contract (see, to that effect, order in *Ehcon* v *Commission*, paragraph 27 above, paragraph 77). It must also be pointed out that the decision to reject the applicant's tender and to award the first contract to the successful tenderer was annulled by the General Court on the sole ground that the Commission had failed to fulfil the obligation to state the reasons for that decision (*Evropaïki Dynamiki* v *Commission*, paragraph 6 above, paragraph 80). Therefore, not only could the applicant in no way be sure of securing the first contract, but there is no information in the file capable of substantiating such a conclusion.

86 It follows that, even if the applicant might have lost a chance of securing the first contract owing to the allegedly improper conduct of DG Fisheries, damage which is in any event time-barred, that single loss of a chance could not be regarded as sufficient to cause the applicant real and certain damage as a result of the loss of the chance of securing the second contract, if it were accepted that there was a sufficient link between that contract and the first one (see, to that effect, order in *Ehcon* v *Commission*, paragraph 27 above, paragraph 78).

87 The same considerations are, *a fortiori*, valid as regards the damage, referred to very generically by the applicant in the application, allegedly suffered as a result of the loss of the chance of securing other contracts from the Commission.

88 It follows from all the foregoing that the applicant's claim for compensation in respect of the damage suffered as a result of the loss of the chance of securing further contracts must be rejected as manifestly unfounded in law, and it is not necessary to rule on its admissibility.

89 The present action must therefore be dismissed in its entirety as in part inadmissible and in part manifestly unfounded.

Costs

90 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, the applicant must be ordered to pay the costs in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (First Chamber)

hereby orders:

1. The action is dismissed.

2. Evropaïki Dynamiki — Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE shall pay the costs.

Luxembourg, 22 June 2011.

Registrar
E. Coulon

President
J. Azizi