Case C-250/90

Control Union Gesellschaft für Warenkontrolle mbH
v
Commission of the European Communities

(Inadmissibility)

Order of the Court, 9 July 1991 ..... I - 3585

Summary of the Order

1. *Action for annulment — Time-limits — Expiry of time-limits (EEC Treaty, Art. 173, third paragraph)*

2. *Action for failure to act — Adoption of a decision — Inadmissibility (EEC Treaty, Art. 175)*

ORDER OF THE COURT
9 July 1991 *

In Case C-250/90,

Control Union Gesellschaft für Warenkontrolle mbH, a company incorporated under German law, registered in Bremen (Federal Republic of Germany), represented by F.-M. Hohrmann, of the Bremen Bar, with an address for service in Luxembourg at the Chambers of Arendt and Harles, 4 Avenue Marie-Thérèse,

applicant,

* Language of the case: German.

Commission of the European Communities, represented by U. Wölker, a member of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of G. Berardis, a member of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION primarily for an order requiring the Commission to entrust to Control Union certain tasks relating to the coordination of consignments and quality and quantity control of foodstuffs in the ports of shipment of the European Community or, in the alternative, for an order requiring the Commission, after the annulment of the decision of 1 March 1990 by which the Commission decided not to accept Control Union's tender following an invitation to tender, to address a new decision to the applicant,

THE COURT,

composed of: O. Due, President, G. F. Mancini, T. F. O'Higgins, J. C. Moitinho de Almeida, G. C. Rodríguez Iglesias and M. Díez de Velasco (Presidents of Chambers), Sir Gordon Slynn, C. N. Kakouris, R. Joliet, F. A. Schockweiler, F. Grévisse, M. Zuleeg and P. J. G. Kapteyn, Judges,

Advocate General: G. Tesauro,
Registrar: J.-G. Giraud,

after hearing the Opinion of the Advocate General,

makes the following

Order

1 By application lodged at the Court Registry on 6 August 1990, Control Union Gesellschaft für Warenkontrolle mbH ('Control Union') brought an action primarily for an order requiring the Commission to entrust to Control Union certain tasks relating to the coordination of consignments and quality and quantity control of foodstuffs in the ports of shipment of the European Community or, in the alternative, for an order requiring the Commission, after the annulment of the decision of 1 March 1990 by which the Commission decided not to accept Control Union's tender following an invitation to tender, to address a new decision to the applicant.

2 In May 1987 the Commission published a notice on 'pre-qualification of firms for participation in the forthcoming restricted invitation to tender for the provision of services relating to the coordination of consignments and quality and quantity control of foodstuffs' (Official Journal 1987 C 127, p. 2). According to that notice, the services of the undertakings selected were to be performed in the ports of shipment in Community Member States, in the various ports of landing and in certain unloading points in the recipient countries. The invitation to tender related to tasks to be carried out under 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 (Official Journal 1987 L 204, p. 1).

3 Control Union was one of the undertakings which applied at the pre-qualification stage.

4 On 22 December 1987 the Commission informed Control Union that it had been pre-selected for the checking of supplies in the ports of shipment. However, as the undertaking did not have any subsidiaries in the recipient countries, the Commission could not consider it for control tasks to be carried out in the ports of landing and in the unloading points.

5 On 20 June 1989 Control Union sent the Commission a list of its establishments and subsidiaries in certain recipient countries as well as an undertaking to open offices in various other recipient countries if it were selected.

6 On 1 March 1990 the Commission informed Control Union that the selection had been made on the basis of the network of subsidiaries which undertakings had overseas and that, therefore, its application had been unsuccessful as regards both the control tasks in ports of shipment and those to be carried out in ports of landing and in unloading points. The Commission pointed out that the decision brought the selection procedure to an end.

7 On 4 May 1990 Control Union informed the Commission of its objections to the reasons given for the rejection of its tender. By letter of 2 July 1990, the Commission maintained its position.

8 In support of its action, Control Union relies on various arguments pointing to the irregularity of the selection procedure. First of all, the Commission did not abide by the notice of invitation to tender in that it selected a Swiss undertaking whereas the notice specified that only natural or legal persons from a Member State could be chosen. Secondly, in selecting only undertakings with a substantial overseas network to carry out control tasks, the Commission adopted a criterion that was irrelevant both in law and in fact. In law, because the preamble to Commission Regulation No 2200/87 specifies that the procedures for checking the products in the ports of shipment must be such as to provide sufficient guarantees of the eventual correct performance of the supply operation. In fact, because the condition that a tenderer has a wide network of overseas branches does not in any circumstances constitute a valid criterion by which to assess his ability to check goods.

9 By an application made pursuant to Article 91(1) of the Rules of Procedure, the Commission raised an objection of inadmissibility and requested the Court to give a decision on that objection without considering the substance of the case. In the Commission's view, Control Union had brought an action for annulment which was inadmissible as it was out of time.

10 In its observations on that objection, Control Union maintains that its action is to be regarded as an action for failure to act in which it seeks a declaration that the Commission failed to take a decision on the terms of the invitation to tender in a legally appropriate form. According to Control Union, its action is not an action for annulment. The Commission's refusal is not a decision within the meaning of the second paragraph of Article 173 of the Treaty because it is based on a legally incorrect criterion and is unsupported by any specific statement of reasons.

11 It is apparent from the foregoing that by letter of 1 March 1990 the Commission informed Control Union definitively and unequivocally of its decision not to select it.

12 It should be emphasized that Control Union was entitled, under the procedure for bringing an action for annulment under Article 173 of the Treaty and within the period prescribed by that provision, to put forward its arguments, in particular those alleging the illegality of the criterion used by the Commission, in order to contest the legality of the decision in question.

13 It has been established, furthermore, that Control Union knew of the decision by 4 May 1990 at the latest, since on that date it raised various objections concerning the conduct of the selection procedure.

14 It should also be pointed out that the Commission's letter of 2 July 1990 did not have the effect of causing time to start running again for the purpose of bringing an action, given that the letter merely confirms the decision of 1 March 1990.

15 In those circumstances, if, as is maintained by the Commission, Control Union's action is to be regarded as an action for annulment, it must be dismissed as inadmissible on the ground that it was not brought within the two-month period prescribed by the third paragraph of Article 173 of the Treaty, as extended on account of distance in accordance with Annex II of the Court's Rules of Procedure.

16 If, however, as the applicant argues, the action is based on Article 175 of the Treaty, it is sufficient to hold that the Commission did take a decision with regard to the applicant, with the result that the conditions for the application of that article have not been fulfilled.

17 Accordingly, Article 92(1) of the Rules of Procedure is to be applied and the action declared inadmissible.

Costs

18 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the applicant has failed in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. Dismisses the application as inadmissible;

2. Orders the applicant to pay the costs.

Luxembourg, 9 July 1991.

J.-G. Giraud
Registrar

O. Due
President