JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)
16 July 1998 *

In Case T-81/97,

Region of Tuscany, represented by Vito Vacchi and Lucia Bora, of the Florence Bar, with an address for service in Luxembourg at the office of Paolo Benocci, 50 Rue de Vianden,

applicant,

v

Commission of the European Communities, represented by Paolo Ziotti, of its Legal Service, acting as Agent, assisted by Alberto Dal Ferro, of the Vicenza Bar, 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 annulment of several acts of the Commission concerning the Community assistance allocated to project No 88.20. IT.006.0 (works for the supply of drinking water in Tuscany),

* Language of the case: Italian.

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

composed of: V. Tiili, President, C. P. Briët and A. Potocki, Judges,

Registrar: J. Palacio Gónzalez, Administrator,

having regard to the written procedure and further to the hearing on 28 April 1998,

gives the following

Judgment

Background to the action and procedure

1 Within the framework of Council Regulation (EEC) No 2088/85 of 23 July 1985 concerning the integrated Mediterranean programmes (OJ 1985 L 197, p. 1), by decision of 27 October 1988 the Commission approved project No 88.20. IT.006.0, relating to works for the supply of drinking water in Tuscany. The Commission thus undertook to fund the project up to a maximum of LIT 676 742 000.

2 The works were initially to have been carried out between October 1988 and October 1990. They were postponed on several occasions and were only commenced on 20 September 1990.

3 At the request of the Region of Tuscany, the Commission authorised the deferment of the date for completion of the works on two occasions.

4 By a letter dated 21 November 1994, signed by the director of the European Agricultural Guidance and Guarantee Fund (EAGGF) and addressed to the President of the Italian Council of Ministers and the Region of Tuscany, the Commission stated that the request for final payment in respect of the project in question should reach it by 31 March 1995 at the latest, on the basis of Article 10 of Council Regulation (EEC) No 4256/88 of 19 December 1988 laying down provisions for implementing Regulation (EEC) No 2052/88 as regards the EAGGF guidance section (OJ 1988 L 374, p. 25), as amended by Council Regulation (EEC) No 2085/93 of 20 July 1993 (OJ 1993 L 193, p. 44) (hereinafter 'Article 10').

5 That article reads as follows: 'Those portions of the sums committed for the granting of assistance in respect of projects decided on by the Commission before 1 January 1989 under Regulation ... (EEC) No 2088/85 ... which have not been the subject of a request for final payment by 31 March 1995 shall be automatically released by the Commission by 30 September 1995 at the latest ...'.

6 On 31 March 1995, the Region of Tuscany sent a letter to the Commission seeking payment of the final balance. That letter was received by the Commission on 4 April 1995.

7 In the absence of any response from the Commission and since it had not received the requested payment, the applicant sent a follow-up letter to the Commission on 19 November 1996.

8 The Commission replied by letter of 31 January 1997, which was received by the applicant on 7 February 1997. It recalled that, in accordance with its letter of

21 November 1994, it should have received the request for final payment on 31 March 1995 at the latest. In this instance the applicant's letter dated 31 March 1995 only reached it on 4 April 1995; the accounting documents sent by the Ministry only arrived on 29 May 1995. It concluded that, in accordance with Article 10, the corresponding sums had been automatically released on 30 September 1995.

9 It is in those circumstances that, by application registered at the Registry of the Court of First Instance on 1 April 1997, the applicant brought the present proceedings.

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

11 The parties presented oral argument and answered questions put to them by the Court at the public hearing on 28 April 1998.

Forms of order sought

12 The applicant claims that the Court should:

— annul the Commission's letter of 21 November 1994;

— annul the act of the Commission, which was never communicated to it, releasing the Community assistance allocated to project No 88.20. IT.006.0;

— annul the Commission's letter of 31 January 1997;

— order the defendant to pay the costs.

13 The Commission contends that the Court should:

— dismiss the application as inadmissible;

— in the alternative, dismiss the application as unfounded;

— order the applicant to pay the costs.

Admissibility

Argument of the parties

14 The Commission claims that the application is inadmissible.

15 In its submission, even if the letter of 21 November 1994 had to be regarded as a decision, the action brought against it is inadmissible since the applicant failed to challenge its legality within the requisite period.

16 The Commission claims, furthermore, that the letter of 31 January 1997 merely recalled, as had already been stated in the letter of 21 November 1994, that the deadline of 31 March 1995 laid down in Article 10 was absolute; the applicant does

not dispute that the deadline is absolute nor does it invoke any event of *force majeure* in that respect. Since the deadline is absolute, it applies automatically, without the adoption of any reasoned decision by the Commission.

17 Since the letter of 31 January 1997 is no more than a confirmatory measure, the action brought against it is also inadmissible (see, in particular, the judgment in Joined Cases 166/86 and 220/86 *Irish Cement* v *Commission* [1988] ECR 6473, paragraph 16).

18 In its reply, the applicant essentially contends that the letter of 31 January 1997 cannot be regarded as merely confirming the letter of 21 November 1994.

19 First, the letter of 21 November 1994 is not in the nature of a decision, since it comprises only a restrictive interpretation of Article 10. It is a purely internal procedural measure which is not capable of producing legal consequences for the applicant. Furthermore, on the date of the letter, the request for final payment had not been submitted.

20 Second, in order for an act to confirm a previous measure, the initial and subsequent acts must have a common purpose (see, in particular, the judgment in Case 58/69 *ELZ* v *Commission* [1970] ECR 507). In the present case, the letter of 21 November 1994 does not mention the forfeiture of the right to the assistance and the release of the sum; those consequences are apparent only from the letter of 31 January 1997.

Findings of the Court

21 According to settled case-law, any measure the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position is an act or a decision which may be the subject of an action under Article 173 of the EC Treaty for a declaration that it is void (see, in particular, the judgment in Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 9).

22 That cannot be said of a document in which the Commission simply interprets a legislative provision. A written expression of opinion by a Community institution cannot constitute a decision in respect of which an action for annulment may be brought, since it is not capable of producing any legal effects nor is it intended to produce such effects (judgments in Case 133/79 *Sucrimex and Westzucker* v *Commission* [1980] ECR 1299 and Case 114/86 *United Kingdom* v *Commission* [1988] ECR 5289 and order in Case 151/88 *Italy* v *Commission* [1989] ECR 1255).

23 In such circumstances, it is not the interpretation of the regulation proposed by the Commission which is capable of producing legal effects but, rather, its application to a given situation.

24 In the present case, the letter of 21 November 1994, concerning project No 88.20. IT.006.0, stated: 'in accordance with Article 10, requests for final payment must be received by the European Commission before, and at the latest on, 31 March 1995'.

25 It thus follows from the wording of that letter that it was merely drawing attention to the relevant provisions of the applicable legislation, as interpreted by the

Commission. Furthermore, since it predated the Region of Tuscany's request for final payment, by several months, it cannot be regarded as being a decision comprising the Commission's response to that request.

26 In those circumstances, the Commission's letter of 21 November 1994, comprising an interpretation of Article 10, was purely informative and did not in itself affect the applicant's legal position. As the applicant accepts in its reply, it cannot therefore be treated as an act which may be the subject of an action under Article 173 of the Treaty and the application for its annulment is inadmissible.

27 As regards the letter of 31 January 1997, it should be pointed out that, far from merely recalling the absolute nature of the deadline of 31 March 1995 laid down in Article 10, it reflects the Commission's application of that deadline in the specific situation of the applicant. By declaring that, in the present case, the applicant had failed to respect the time-limit for submission of the request, the Commission denied it the financial assistance initially granted to it.

28 It follows that the letter of 31 January 1997 declaring the applicant to be out of time is an act which may be the subject of an action under Article 173 of the Treaty. The application must therefore be declared admissible, in so far as it concerns the decision contained in that letter.

29 Finally, as regards the measure releasing the sums in question, it should be pointed out that the sums are automatically released, pursuant to Article 10, if no request for their final payment has been made before 31 March 1995. It follows that the release of the sums is not the unavoidable consequence of the declaration that the right to the financial assistance previously granted by the Commission had been forfeited. Accordingly, the release of the sums does not, as such, produce any independent legal effect *vis-à-vis* the applicant.

30 The application for annulment of the measure whereby the Commission automatically released the sums, after concluding that the deadline of 31 March 1995 had not been respected, is therefore inadmissible.

31 It follows from all the foregoing that the application is admissible only in so far as it concerns the decision, contained in the letter of 31 January 1997, that the applicant had forfeited its right to receive the financial assistance.

Substance

32 The applicant submits, first, that the Commission infringed Article 10. In the alternative, it claims that the principles of proportionality and the protection of legitimate expectations have been breached.

The main plea, based on infringement of Article 10

Arguments of the parties

33 The applicant recalls that Article 10 concerns allocated sums in respect of which no request for final payment has been made before 31 March 1995. That rule relates only to the final date for sending requests and not the final date for receipt of those requests by the Commission.

34 By relying on the fact that it only received the Region of Tuscany's request on 4 April 1995, the Commission therefore infringed Article 10.

35 According to the case-law, the penalty of forfeiture of entitlement is justified only by the need to ensure the proper administration of social funds. The provision imposing a time-limit for submission of the request for aid is in conformity with the principle of proportionality only inasmuch as compliance with the prescribed time-limits has been found to be indispensable to ensure the proper functioning of the aid scheme (judgment in Case C-319/90 *Pressler* v *Germany* [1992] ECR I-203 and the Opinion of Advocate General Tesauro in that case, I-209). In the present case, the Commission's interpretation of Article 10 cannot be regarded as indispensable to ensure the proper functioning of the aid scheme.

36 The Commission points out, first, that the purpose of Article 10 is to ensure the proper administration of funding intended, in particular, for the integrated Mediterranean programmes in order to avoid procedures concerning projects which should have been completed many years earlier continuing indefinitely.

37 It claims, first, that the meaning of Article 10 had been clarified in the letter it sent to the applicant on 21 November 1994. It was for the applicant to challenge its legality if it did not agree with the interpretation expressed therein.

38 Furthermore, the case-law concerning legal certainty and limitation periods is unambiguous, specifically in the field of structural funds (Case 44/81 *Germany* v *Commission* [1982] ECR 1855, paragraphs 15 to 17). In accordance with the criteria adopted in that judgment, Article 10 states, clearly and precisely, both the time-limit to be observed and the penalty of forfeiture of entitlement, resulting from infringement. Furthermore, the Commission's letter of 21 November 1994 gave

the applicant, without any possible ambiguity, the Commission's interpretation of Article 10. The legal context was therefore clear and the applicant was aware of it.

39 The Commission points out, finally, that other regulations concerning the structural funds contain similar provisions to those in Article 10. The Member States were involved in drawing up those texts, which presumably underwent a detailed examination in which the authorities of the public bodies concerned were involved.

Findings of the Court

40 In the present case, it is not disputed that the applicant's letter of 31 March 1995 was sent to the Commission on that date and was received by the Commission on 4 April 1995.

41 At the hearing, the Commission expressed doubt as to whether that letter could constitute a request within the meaning of Article 10. It is clear, however, from the defendant's pleadings that no plea to that effect was raised during the written procedure. On the contrary, the Commission described the letter as a request on several occasions. It follows that the plea is a new plea within the meaning of Article 48(2) of the Rules of Procedure and is therefore inadmissible since it is not based on matters of law or of fact which came to light in the course of the procedure.

42 It follows, furthermore, from the letter of 31 January 1997 that the Commission rejected the applicant's request on the ground that it had not received it before the deadline of 31 March 1995 laid down in Article 10.

43 This plea is therefore limited to the question whether the date specified in Article 10 is to be interpreted as the date on which requests for final payment are to be sent or the date on which they are to be received by the Commission.

44 It should be pointed out, first, that neither the wording of the provision in question, nor the recitals in the preamble to Regulation No 2085/93 of 20 July 1993, nor the preparatory work preceding its adoption justify favouring either one of those interpretations.

45 Furthermore, it appears that in all essential respects the arguments raised by the Commission do not make it possible to give a response to the applicant's claim.

46 They are designed to demonstrate that the time-limit laid down in Article 10 is mandatory, that considerations of public policy and sound administration require the time-limit to be absolute, that, furthermore, a similar time-limit was imposed in other similar regulations or that the limitation period thus laid down is in conformity with the requirements of the case-law, since it clearly indicates the penalties for infringement.

47 However, the applicant is specifically not challenging the existence of an absolute time-limit but, rather, the Commission's interpretation of it (see paragraphs 33 and 34 above) in concluding that it applied to the deadline for receipt of the request for final payment.

48 The Commission submits, however, that it had informed the applicant of its interpretation of Article 10, in its letter of 21 November 1994. If the applicant did not agree with that interpretation, it should have challenged that letter.

49 That argument cannot be accepted. First, as has already been held (see paragraph 26 above), the letter of 21 November 1994 did not constitute an act challengeable by way of an action for annulment. Second, the interpretation of a Community provision is a matter exclusively for the Community judicature and hence the approach adopted by the Commission cannot be regarded as having any specific legal value.

50 The Court considers that the deadline laid down in Article 10 must be understood as being the date on which a request is sent.

51 First, such an interpretation ensures equal treatment for potential applicants, since it ensures that the time-limit is the same, irrespective of the geographical distance of the recipients and the time necessary for transmission.

52 Second, in view of the radical consequences, under Article 10, of exceeding the time-limit laid down by law, legal certainty requires that reference be made to the date on which the request is sent, to the advantage of the potential recipients; potential recipients can determine only the date on which the request is sent, of which they can provide proof, and not the time taken to transmit that request. The fact that the Commission may consequently only receive requests from recipients some days later cannot be regarded as detrimental to the effectiveness of an absolute time-limit and the requirements of proper administration of the Community budget.

53 In view of all the foregoing and without there being any need to rule on the alternative pleas raised by the applicant, the Commission's decision, contained in the letter of 31 January 1997, must be annulled.

Costs

54 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 three applications for annulment submitted by the applicant had, in reality, the same purpose, namely the annulment of the decision not to consider its request for final payment, it is not necessary to apply the provisions of Article 87(3). Having regard to the form of order sought by the applicant, the defendant must, consequently, be ordered to pay all the costs, notwithstanding the fact that the application is dismissed in part as inadmissible.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. Annuls the decision contained in the letter of 31 January 1997;

2. Dismisses the remainder of the application as inadmissible;

3. Orders the Commission to pay the costs.

Tiili Briët Potocki

Delivered in open court in Luxembourg on 16 July 1998.

H. Jung V. Tiili

Registrar President