Reports of Cases

JUDGMENT OF THE GENERAL COURT (Third Chamber, Extended Composition)

25 May 2016*

(Arbitration clause — Fifth Framework Programme of the European Community for research, technological development and demonstration activities (1998-2002) — Contract relating to 'Energy, environment and sustainable development' — Termination of the contract — Reimbursement of part of the amount advanced — Default interest — Procedure by default)

In Case T-226/14,

European Commission, represented initially by L. Cappelletti and F. Moro, subsequently by F. Moro, acting as Agents, and by R. van der Hout, lawyer,

applicant,

v

McCarron Poultry Ltd, established in Killacorn Emyvale (Ireland),

defendant,

ACTION under Article 272 TFEU seeking an order that the defendant reimburse part of the amount advanced by the Commission under contract NNE5/1999/20229, together with default interest,

THE GENERAL COURT (Third Chamber, Extended Composition)

composed of S. Papasavvas, President, I. Labucka, C. Wetter, E. Bieliūnas (Rapporteur) and V. Kreuschitz, Judges,

Registrar: E. Coulon,

having regard to the written part of the procedure,

gives the following

Judgment

Background to the dispute

1 On 27 April 2001 the European Community, represented by the Commission of the European Communities, concluded with the company S., in its capacity as coordinator, and with the contractors A., E., I. and McCarron Poultry Ltd ('the defendant') contract NNE5/1999/20229 ('the contract')

* Language of the case: English.

entitled ‘Community Activities in the Field of the specific programme for RTD and demonstration on “Energy, Environment and Sustainable Development — Part B: Energy program”, forming part of the Fifth Framework Programme of the European Community for research, technological development and demonstration activities (1998-2002), with a view to implementing the project ‘Optimised Biomass CHP Plant for Monaghan Integrating Condensing Economiser Technology’.

2 The contract, drafted in English, is governed by Belgian law pursuant to Article 5.1 thereof. According to Article 8.1 of the contract, the contract has three annexes, which form an integral part thereof. Annex I contains a description of the work to be carried out, Annex II states the general conditions governing the contract and Annex III mentions the mandates.

3 Article 5.2 of the contract contains an arbitration clause, within the meaning of Article 272 TFEU, worded as follows:

‘The Court of First Instance of the European Communities [now the General Court] and, in the case of an appeal, the Court of Justice of the European Communities [now the Court of Justice of the European Union] shall have sole jurisdiction to hear any disputes between the Community, on the one hand, and the contractors, on the other hand, as regards the validity, the application or any interpretation of this contract.’

4 According to Article 2.1 of the contract, the duration of the project was to be 58 months from the first day of the month after the last signature of the contracting parties. The period in question was thus from 1 May 2001 (project commencement date) to 28 February 2006.

5 So far as concerns the Community’s financial contribution, Article 3 of Annex II states the following:

‘1. The Community’s financial contribution shall be paid in accordance with the following principles:

(a) An initial advance shall be paid to the coordinator within a maximum period of 60 days running from the date of the last signature of the contracting parties. The coordinator shall allocate the advance in accordance with the table of the indicative breakdown of estimated eligible costs following the signatures to this contract.

...

3. Subject to Article 26 of this Annex, all payments shall be treated as advances until the last project deliverable is approved.

4. ...

In the event of non-reimbursement by the contractor within the time-limit set by the Commission, the latter shall add interest to the sums due at the rate applied by the European Central Bank for its main refinancing operations on the first day of the month during which the time-limit set by the Commission has expired, plus one and a half percentage points, unless interest is due pursuant to another provision of this contract. The interests shall cover the period running from the day after the expiry of the time-limit until the date of receipt of the funds to be reimbursed.’

6 Article 6.2 of the contract is worded as follows:

‘If the execution of the project is subject to authorisation from any public body and this is not available within one year from the commencement date referred to in Article 2.1, the Commission may immediately terminate the contract following the provisions of Article 7 of Annex II to the contract.’

7 The third subparagraph of Article 7.6 of Annex II to the contract, entitled 'Termination of the contract or of the participation of a contractor', provides the following:

'In the event of termination of the contract or of the participation of a contractor:

(a) ... the Commission may require reimbursement of all or part of the Community's financial contribution, taking into account the nature and results of the work carried out and its usefulness to the Community in the context of the specific programme concerned,

...'

8 According to the first subparagraph of Article 3.4 of Annex II to the contract, 'where the total financial contribution due from the Community, taking into account any adjustments, including as a result of a financial audit as referred to in Article 26 of this Annex, is less than the total amount of the payments referred to in paragraph 1, first subparagraph, of this Article, the contractors concerned shall reimburse the difference, in euro, within the time-limit set by the Commission in its request sent by registered letter with acknowledgement of receipt'.

9 Pursuant to Article 3 of the contract, as amended by Amendment No 1, signed on 6 September 2004, the total eligible costs of the project were fixed at EUR 46 388 002 and the maximum financial contribution of the Community at EUR 2 975 000.

10 On 21 June 2001 the Commission transferred an initial advance of EUR 892 500 to the bank account of company S., then, on 12 December 2003, an intermediate payment of EUR 71862.28. In its capacity as coordinator, company S. had the task of distributing those funds between the various contractors according to the information contained in the detailed statement of eligible costs annexed to the contract.

11 By Amendment No 1 to the contract, company S. withdrew from the project and was replaced by the defendant as the new coordinator, with effect from 1 May 2003.

12 Subsequent to that amendment, the funds paid by the Commission to the original coordinator were transferred by the latter to the defendant. That transfer took place on 17 September 2004.

13 By registered letter (with acknowledgment of receipt) of 7 December 2005 addressed to the defendant, the Commission stated that the project had experienced 'substantial delays since its start' and that 'only a small fraction of contractual work ha[d] been carried out until [then]'. It is also apparent from that letter that both the defendant's email of 13 June 2005 and its progress reports of 31 May and 15 November 2005 revealed the failure of the contractors to obtain the planning permissions required for the project.

14 The Commission therefore informed the defendant, given that the project would have ended in about three months, of the requirements, in terms of documents, for the contractor to request an extension of the project through an amendment to the contract, in accordance with Article 7 of the contract.

15 By letter of 17 January 2006, the defendant asked for an extension of the contract for an additional three year period, but did not provide any of the documents requested by the Commission in the letter of 7 December 2005.

16 By registered letter (with acknowledgment of receipt) of 20 March 2006, the Commission informed the defendant that its request for extension could not be accepted, since, first, the essential permits for the realisation of the project had not been granted and, therefore, there was not 'any possibility to bring the project to a successful completion within a reasonable timeframe' and, second, the request had

been received by the Commission only on 3 February 2006, thus after the expiry of the deadline provided for in Article 7 of the contract for requesting an amendment to that contract, namely 1 January 2006.

17 In that same letter, therefore, the Commission informed the defendant of its decision to terminate the contract, in accordance with Article 7.1(a) of Annex II to the contract and Article 6.2 of the contract. The Commission informed the defendant that the termination would take effect upon receipt of that letter.

18 Last, in order to complete the administrative procedure, the Commission requested the defendant to submit a final consolidated report and a final cost statement covering the period from the project commencement date until the date of its termination, within one month from receipt of that letter.

19 After having received the final consolidated report and the final cost statement on 5 May 2006 and in the light of the fact that, during the lifetime of the project, it had received four different versions of the form summarising the amounts transferred by the coordinator to the other contractors (namely the 'E-3 Form'), the Commission requested all contractors, by registered letter (with acknowledgment of receipt) of 15 May 2007, to provide a declaration indicating the amounts received (and, in some cases, transferred) in relation to the project, in order to determine for each contractor the final amount to be paid or recovered by the European Union.

20 The Commission received statements from companies E., I. and A. on 8 June, 12 June and 17 September 2007, respectively. It is apparent from those that, as parties to the contract, companies I. and A. did not receive any funds, whereas company E. received some funds under the project.

21 After several subsequent exchanges with the defendant and company S. to ascertain the amounts transferred in relation to the project and after analysing the financial and technical reports submitted under the contract, the Commission determined, for each contractor, the accepted eligible costs, the financial contribution due from the Union, the contribution received from the Union and, finally, the amounts to be paid or recovered by the Union.

22 The amount to be recovered from the defendant corresponded to EUR 848926.33 and was calculated by considering the financial contribution that that company received from the Union following Amendment No 1 to the contract, which amounted to a total of EUR 964362.28, corresponding to EUR 892500.00 of advance payment plus EUR 71862.28 of intermediate payment, and by deducting from that amount the financial contribution due to the defendant (EUR 4073.54), the financial contribution transferred by the defendant to company S. (EUR 40782.04 for its coordination and project costs) and company E. (EUR 18844.45), and the financial contribution to be transferred by the defendant to company I. (EUR 41458.53) and company A. (EUR 10277.39).

23 By registered pre-information letter (with acknowledgment of receipt) of 27 April 2010, the Commission notified the defendant of its intention to send it a debit note, with a view to recovering from it an amount of EUR 848926.33, provided that the defendant send the Commission proofs of payment made to companies I. and A. within four weeks from receipt of the letter. In that pre-information letter, the Commission specified that, if no proofs of payment were provided, the amount to be recovered from the defendant would increase from EUR 848926.33 to EUR 900662.25, corresponding to the amount to be recovered from the defendant plus the financial contributions still to be transferred by the Commission to companies I. and A., which are EUR 41458.53 and EUR 10277.39, respectively.

24 As the defendant did not provide proof of payment to companies I. and A., reimburse the sum due or disagree with the calculations contained in the pre-information letter, the Commission issued a debit note, bearing number 3241009140, for an amount of EUR 900662.25 against the defendant. The debit

note, sent by registered letter (with acknowledgment of receipt) of 24 September 2010, specified that, if the sum was not reimbursed by 30 November 2010, the principal debt would be increased by default interest.

25 On 2 December 2010 the Commission sent the defendant a reminder and, payment still not having been made, gave it formal notice, by registered letter (with acknowledgment of receipt) of 4 January 2011, to pay the principal amount increased by default interest calculated in accordance with Article 3.4 of Annex II to the contract.

Procedure and form of order sought by the Commission

26 By application lodged at the Court Registry on 15 April 2014, the Commission brought the present action.

27 Following the failure, on two occasions, to serve the application on the defendant in accordance with Article 100(1) of the Rules of Procedure of the General Court of 2 May 1991, on 25 April and 3 July 2014, the Court decided, on the request of the Commission, to notify the application to the defendant using the services of a judicial officer.

28 The application was duly served on the defendant by the judicial officer on 17 November 2014.

29 As the defendant had not lodged a defence within the period prescribed, the Commission, on 10 March 2015, applied to the Court for judgment by default, in accordance with Article 122(1) of the Rules of Procedure of 2 May 1991. The Court Registry served that application on the defendant.

30 As a member of the Third Chamber was unable to sit, the President of the Court designated another Judge to complete the Chamber.

31 By way of measures of organisation of procedure, provided for in Article 64 of the Rules of Procedure of 2 May 1991, the Court, by letter of 11 June 2015, put written questions to the Commission, which replied to them on 9 July 2015.

32 On a proposal from the Third Chamber, the Court decided, pursuant to Article 28 of the Rules of Procedure of the General Court, to refer the case to a Chamber sitting in extended composition.

33 The Commission claims that the Court should:

— order the defendant to pay it the sum due of EUR 976663.34, corresponding to the principal amount of EUR 900662.25 plus the amount of EUR 76001.09 as late payment interest calculated at a rate of 2.50% for the period between 1 December 2010 and 15 April 2014;

— order the defendant to pay it the sum of EUR 61.69 per day by way of interest from 16 April 2014 until the date on which the debt is repaid in full;

— order the defendant to pay the costs.

Law

Applicability of Article 123(3) of the Rules of Procedure

34 It must be held that, although the Commission's application had been duly served on the defendant, the latter did not lodge a defence within the period prescribed, pursuant to Article 46 of the Rules of Procedure of 2 May 1991. The Commission consequently submitted, on 10 March 2015, an application to the Court, on the basis of Article 122(1) of the Rules of Procedure of 2 May 1991, for judgment by default. However, on 1 July 2015, the new Rules of Procedure of the Court, which contain, in Article 123 thereof, new provisions relating to procedure by default, entered into force. It is therefore necessary to ascertain which provision is applicable to the present dispute.

35 In that regard, the provisions of the new Rules of Procedure are, as procedural provisions, of immediate application from the date of their entry into force (orders of 10 December 1997 in *Smets* v *Commission*, T-134/96, EU:T:1997:193, paragraph 16, and of 30 May 2002 in *Coe Clerici Logistics* v *Commission*, T-52/00, EU:T:2002:134, paragraph 23) and apply, consequently, to all proceedings pending at the time when they enter into force (judgment of 12 November 1981 in *Meridionale Industria Salumi and Others*, 212/80 to 217/80, EU:C:1981:270, paragraph 9), subject in particular to transitional provisions.

36 In the present case, there is no transitional provision that refers expressly to Article 123 of the Rules of Procedure.

37 It follows that the latter provision must be regarded as being of immediate application from the entry into force of the Rules of Procedure on 1 July 2015 and, therefore, as being applicable to the present dispute.

38 Even supposing the rules applicable to judgment by default in favour of the applicant in the context of a procedure by default could be regarded as being partly a matter of substantive law to the extent that they directly affect the interests of the parties to the dispute, that would be irrelevant. As the situation which arose out of the failure to lodge a defence and from the submission of an application for judgment by default in favour of the applicant definitively arises only at the time when the Court rules on that application, the rules in question apply immediately (see, to that effect, judgment of 11 December 2008 in *Commission* v *Freistaat Sachsen*, C-334/07 P, EU:C:2008:709, paragraphs 43 and 44 and the case-law cited).

Substance

39 Pursuant to Article 123(3) of the Rules of Procedure, the Court is to give judgment in favour of the applicant in the judgment by default, unless it is clear that the Court has no jurisdiction to hear and determine the action or that the action is manifestly inadmissible or manifestly lacking any foundation in law.

40 Accordingly, it is sufficient for the Court to hold that, in the present case, first, it has jurisdiction to hear the present action pursuant to the arbitration clause, within the meaning of Article 272 TFEU, contained in Article 5.2 of the contract, second, there is no doubt that the action is admissible and, last, in view of the contract provisions recalled in paragraphs 2 to 9 above and the description of the facts set out by the Commission in the application and substantiated by the documents in the file, the action is not manifestly lacking any foundation in law.

41 Consequently, the form of order sought by the Commission as recalled in paragraph 33 above must be granted.

42 Moreover, so far as concerns the payment of default interest, under the second subparagraph of Article 3.4 of Annex II to the contract, default interest is to be added to the sums due at the rate applied by the European Central Bank (ECB) for its main refinancing operations on the first day of the month during which the time-limit set by the Commission has expired, plus one and a half percentage points. As the Commission set that time-limit at 30 November 2010, the rate in force on 1 November 2010 must be taken into account. It is apparent from the *Official Journal of the European Union* (OJ 2010 C 298, p. 5) that the rate applied by the ECB for its main refinancing operations was set, on 1 November 2010, at 1%. In those circumstances, the rate to be applied in the present case must be set at 2.50% per annum.

43 The second subparagraph of Article 3.4 of Annex II to the contract also states that the interest is to cover the period running from the day after the expiry of the time-limit until the date of receipt of the funds to be reimbursed. As the period set by the Commission expired on 30 November 2010, the default interest must cover the period running from 1 December 2010 to the date of full payment of the amount due.

44 It follows from all of the foregoing that the defendant must be ordered to repay to the Commission the sum of EUR 900662.25, plus accrued default interest at the rate of 2.50% per annum from 1 December 2010 until the date of full payment of the debt, which corresponds to default interest amounting to EUR 61.69 per day.

Costs

45 Under Article 134(1) 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 defendant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (Third Chamber, Extended Composition),

hereby:

1. Orders McCarron Poultry Ltd to repay to the Commission the sum of EUR 900662.25, plus accrued default interest calculated at the rate of 2.50% per annum from 1 December 2010 until the date of full payment of the debt;

2. Orders McCarron Poultry to pay the costs.

Papasavvas Labucka Wetter

Bieliūnas Kreuschitz

Delivered in open court in Luxembourg on 25 May 2016.

[Signatures]