JUDGMENT OF THE COURT (Third Chamber)

9 September 1999 *

In Case C-64/98 P,

Odette Nicos Petrides Co. Inc., established in Kavala (Greece), represented by Nikolaos Vassilakakis, Evangelos Vassilakakis, of the Thessaloniki Bar, and Evangelia Pallioudi, of the Kavala Bar, with an address for service in Luxembourg at the Chambers of Carlos Zeyen, 67 Rue Ermesinde,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (Fourth Chamber) of 17 December 1997 in Case T-152/95 *Petrides* v *Commission* [1997] ECR II-2427, seeking to have that judgment set aside,

the other party to the proceedings being:

Commission of the European Communities, represented by Gérard Berscheid, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

* Language of the case: French.

THE COURT (Third Chamber),

composed of: J.-P. Puissochet, President of the Chamber, J.C. Moitinho de Almeida (Rapporteur) and C. Gulmann, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 23 February 1999,

gives the following

Judgment

1 By application lodged at the Court Registry on 3 March 1998 Odette Nicos Petrides Co. Inc. brought an appeal under Article 49 of the EC Statute of the Court of Justice against the judgment of the Court of First Instance of 17 December 1997 in Case T-152/95 *Petrides* v *Commission* [1997] ECR II-2427 (hereinafter 'the contested judgment') which dismissed its application for an order requiring the Commission to pay damages under Article 178 and the second paragraph of Article 215 of the EC Treaty (now Articles 235 EC and 288 EC) as compensation for the damage resulting from certain action taken by it in managing the common organisation of the market in raw tobacco in the period 1990 to 1991.

2 As stated in the contested judgment, the second subparagraph of Article 7(2) of Regulation (EEC) No 727/70 of the Council of 21 April 1970 on the common organisation of the market in raw tobacco (OJ, English Special Edition 1970 (I), p. 206) provides that tobacco purchased by other intervention agencies of the Member States is to be disposed of in such a way as to avoid any disturbance of the market and to ensure equal access to goods and equal treatment of purchasers (paragraph 1 of the contested judgment). According to Article 3 of Regulation (EEC) No 327/71 of the Council of 15 February 1971 laying down certain general rules relating to contracts for first processing and market preparation, to storage contracts and to disposal of tobacco held by intervention agencies (OJ, English Special Edition 1971 (I), p. 78), the tobacco is to be disposed of on price terms determined case by case, on the basis of, *inter alia*, market trends and demand (paragraph 2 of the contested judgment).

3 Under Articles 1 and 6(1) of Regulation (EEC) No 3389/73 of the Commission of 13 December 1973 laying down the procedure and conditions for the sale of tobacco held by intervention agencies (OJ 1973 L 345, p. 47), such tobacco is to be offered for sale in particular by means of tendering procedures, the Commission being entitled to fix a minimum price for each lot or to award no contract (paragraphs 3 and 4 of the contested judgment). Each tenderer is to provide the intervention agency concerned with security in an amount of ECU 0.7 per kilogram of baled tobacco by virtue of a derogation from Article 5(1) of Regulation No 3389/73 introduced by Commission Regulation (EEC) No 3040/91 of 15 October 1991 amending Regulation (EEC) No 2436/91 opening an invitation to tender for the sale of baled tobacco held by the German, Greek and Italian intervention agencies (OJ 1991 L 288, p. 18) (paragraphs 5 and 6 of the contested judgment).

4 During the period from April 1990 to the end of 1991, the appellant, a Greek company whose business is processing and dealing in tobacco in Greece and elsewhere, took part in four tendering procedures organised by the Commission between those dates. During that period, the Commission also adopted Regulation (EEC) No 3040/91 increasing the amount of the security required to be lodged with the intervention agency by each tenderer (paragraphs 7 and 8 of the contested judgment).

5 According to the contested judgment, the outcome of the four tendering procedures was as follows:

'9. The first tendering procedure at issue (hereinafter "the first tendering procedure") was organised by Commission Regulation (EEC) No 899/90 of 5 April 1990 which opened an invitation to tender for the sale for export of baled tobacco held by the Greek intervention agency (OJ 1990 L 93, p. 7) and involved four lots of baled raw tobacco from the 1986 and the 1987 harvests, divided by varieties and totalling 5 271 428 kg. The deadline fixed for the Commission decision on the award of contract was 14 June 1990. The first lot comprised 1 805 903 kg of tobacco and was made up of the varieties Mavra, Kaba Koulak Classic and Elassona, Kaba Koulak Non-Classic, Katerini, Burley EL and Basmas. The second lot comprised 1 519 836 kg of tobacco and was composed of the same varieties, with the exception of Basmas. The third lot comprised 1 519 991 kg of tobacco, and was made up of the same varieties as the second lot. The fourth lot comprised 425 698 kg of tobacco and was made up of the Mavra and Basmas varieties only. The applicant submitted a tender for the first and second lots (in the amounts of DR 76.11 and DR 63.11 per kilogram respectively). However, on 14 June 1990 the Commission decided not to accept any of the tenderers' bids on the ground that, in view of the prices offered, there was a risk that the market might be disturbed.

10 The second tendering procedure at issue (hereinafter "the second tendering procedure") was organised by Commission Regulation (EEC) No 1560/90 of 8 June 1990 opening an invitation to tender for the sale for export of baled tobacco held by the Greek intervention agency (OJ 1990 L 148, p. 7). It related to the same four lots of baled raw tobacco. The deadline fixed for the Commission decision on the award of contract was 9 August 1990. The applicant submitted a bid for the first and fourth lots (in the amounts of DR 91.11 and DR 101.11 per kilogram respectively). On 7 August 1990 the Commission accepted the bid from another tenderer for the second lot (of DR 102 per kilogram), but rejected all bids for the first, third and fourth lots, on grounds of risk of disturbance of the market.

11 The third tendering procedure at issue (hereinafter "the third tendering procedure") was organised for the three remaining lots by Commission Regulation (EEC) No 2610/90 of 10 September 1990 opening an invitation to tender for the sale for export of baled tobacco held by the Greek intervention agency (OJ 1990 L 248, p. 5). The deadline fixed for the Commission decision on the award of contract was 12 November 1990. The applicant submitted a bid for all three lots (of DR 152.26, DR 132.26 and DR 121.26 per kilogram respectively). Its bid for the first lot was the highest of those received. On 16 November 1990, the Commission decided, once again, not to accept the tenderers' bids on the ground that the prices offered were liable to give rise to abnormal developments on the market.

12 The fourth tendering procedure at issue (hereinafter "the fourth tendering procedure") was organised by Commission Regulation (EEC) No 2436/91 of 7 August 1991 opening an invitation to tender for the sale of baled tobacco held by the German, Greek and Italian intervention agencies (OJ 1991 L 222, p. 23). The total quantity of 105 486 276 kg was made up of 11 lots, divided into four groups. Each group of lots could be put up for sale only when a contract for the previous group of lots had been awarded. The aim was to obtain bids for all the varieties of tobacco, and dealings were to commence with the least popular varieties on the market. Each lot comprised tobaccos of a given variety held by the various intervention agencies of the various Member States concerned. The applicant took part in a number of sales in that series. Its bids, which were for a quantity lower than that fixed for the lots in question, were rejected as not fulfilling the tendering conditions.'

6 It was against that background that, by application lodged at the Registry of the Court of First Instance on 24 July 1995, the appellant brought an action for compensation under the second paragraph of Article 215 of the Treaty.

7 By the contested judgment, the Court of First Instance declared the action inadmissible as regards the first tendering procedure and dismissed it as regards the other three tendering procedures.

8 In its appeal, the appellant contests the reasoning of the Court of First Instance regarding the illegality of the Commission's conduct and puts forward the following seven grounds of appeal: (1) inadequate statement of reasons regarding the existence of a disturbance of the market in relation to the second and third tendering procedures; (2) incorrect assessment of the facts for the purpose of applying the principle of proportionality in relation to the second tendering procedure; (3) distortion of the clear sense of the evidence produced by the appellant in considering whether the principle of equal treatment had been observed in relation to the second tendering procedure; (4) infringement of Articles 1 and 6 of Regulation No 3389/73 and 7(2) of Regulation No 727/70; (5) breach of the principle *audi alteram partem* and the principle of equality of arms; (6) incorrect assessment of the appellant's allegations concerning the principle of equal treatment and the increase of the amount of the guarantee in relation to the fourth tendering procedure; and (7) infringement of Regulation No 3389/73.

Inadequacy of the statement of reasons regarding the existence of a disturbance of the market in relation to the second and third tendering procedures

9 The appellant submits that the Court of First Instance failed to explain to what extent the aim of avoiding disturbance of the market in relation to the second and third tendering procedures had been attained. It submits that the Court of First Instance should have indicated the reasons for which the award of a lot to another tenderer had not disturbed the tobacco market whereas the rejection of that bid would also have led to a higher price being bid for that lot, the reason given for rejecting the appellant's bid. Such a statement of reasons is needed to enable compliance with the principle of proportionality to be verified.

10 As regards the second tendering procedure, it is clear from paragraph 50 of the contested judgment that the appellant maintained at first instance that the rejection of its bid was motivated not by a concern not to disturb the market but by unawareness of market prices on the part of the Commission. The Court of First Instance observed in that regard that any such unawareness was irrelevant in considering application of the principle of proportionality (paragraph 51) and that in any event that Commission decision had prompted the operators

concerned to tender, in the third procedure, prices which were higher than those tendered for the same lots in the second tendering procedure (paragraph 52).

11 Moreover, in rejecting the plea that the Commission's refusal to accept the appellant's bid in the second tendering procedure was not motivated by the need to avoid disturbance of the market, the Court of First Instance did not have to take a view on the question whether the lot awarded in the same tendering procedure could have secured a higher price in a new tendering procedure. That question relates either to the appellant's plea alleging breach of the principle of equal treatment or to the validity of such a tendering procedure, which is not at issue in these proceedings.

12 As regards the third tendering procedure, the Court of First Instance held, in paragraph 65, that 'the applicant has produced no evidence to show that, by deciding on 16 November 1990 to reject all the tenders in order not to disturb the market, the Commission failed to take account of market requirements'.

13 That statement of reasons is clearly adequate.

14 The first ground of appeal cannot therefore be upheld.

Incorrect assessment of the facts for the purpose of applying the principle of proportionality in relation to the second tendering procedure

15 The appellant maintains, first, that the Court of First Instance infringed the principle of proportionality in taking the view, in paragraphs 48 to 52 of the contested judgment, that the Commission decision of 7 August 1990 was

appropriate to the aim of not disturbing the market since that decision embodied two contradictory measures, namely acceptance of the bid for the second lot and rejection of the bid for the fourth lot: those measures could not therefore be pursuing the stated aim. Second, it submits that the Court of First Instance was wrong in saying that the Commission's refusal of the bids received in the second tendering procedure prompted operators to tender higher prices in the next procedure in order to show that the decision rejecting the bids was appropriate to the aim of not disturbing the market. The appropriateness of a measure must be assessed by reference not to its results but to the aims pursued when it was adopted.

16 In that connection, it need merely be observed that, under Article 51 of the EC Statute of the Court of Justice, an appeal is to be limited to points of law and the Court of Justice will review facts found by the Court of First Instance only if they have been distorted. The appellant does not allege any such distortion.

17 The appellant also submits that the rejection decision relating to the fourth lot is contrary to the terms of the notice of invitation to tender and to Article 1(2) of Regulation No 3389/73, which provides that, in an invitation to tender, the contract is to be awarded to the person making the best offer in accordance with the regulation.

18 It must be pointed out that this ground of appeal raises a separate issue and has been put forward by the appellant for the first time in its appeal. According to settled case-law, under Articles 113(2) and 116(1) of the Rules of Procedure of the Court of Justice new pleas, not contained in the original application, cannot be raised in an appeal (see, in particular, Case C-153/96 P *De Rijk* v *Commission* [1997] ECR I-2901, paragraph 18).

19 It follows that the second ground of appeal is inadmissible.

Distortion of the clear sense of the evidence produced by the appellant in considering whether the principle of equal treatment had been observed in relation to the second tendering procedure

20 According to the appellant, the Court of First Instance distorted the clear sense of the information contained in the minutes of the Tobacco Management Committee and in the Court of Auditors Special Report regarding the fact that its bid was significantly higher for the fourth lot than the successful bid in the procedure for the second lot. It appears from those minutes that the first bid represented 75% of the value of the tobacco whereas the one accepted for the second lot represented only 23%. In the Court of Auditors Special Report it was indicated, in points 4.53 to 4.55, that the bid for the fourth lot was significantly better in that the latter lot contained a larger quantity of tobaccos of inferior quality, as compared with the bid for the second lot, which contained a larger quality of tobacco of higher value. The distortion of the clear sense of the information in those two documents meant that the Court of First Instance incorrectly held in paragraphs 54, 57 and 59 of the contested judgment that there had been no breach of the principle of equal treatment.

21 On this point, the Court of First Instance observed, in paragraph 55, that the second and fourth lots in the second tendering procedure were of a different composition and that the tobacco qualities were different and, in paragraph 56, that, on the basis of the information in its possession at the time, the Commission had considered that the appellant's tender for the fourth lot was low, whereas that submitted for the second lot was acceptable, particularly when compared with the price tendered for the third lot, the composition of which was almost identical to that of the second lot.

22 Finally, the Court of First Instance stated, in paragraph 57, that the Commission had taken the view that if the Mavra in the second and fourth lots, the quantity of which was almost the same (306 491 kg in the second lot and 333 872 kg in the fourth), had been disregarded, it would have become apparent that the appellant was tendering a lower price per kilogram for the Basmas variety in the fourth lot than the price per kilogram tendered for the other tobacco varieties in the second lot by the tenderer to which the contract for the latter was awarded, when the Basmas variety was more sought after than the other varieties in the second lot, a fact not disputed by the appellant. The Court of First Instance went on to say

that, in the proceedings before it, the appellant had not established in what respect that assessment was manifestly incorrect but had merely cited an extract from the Special Report to the effect that the tender not accepted for the fourth lot was better than that accepted for the second lot, without convincingly answering the Commission's arguments, which contradicted the conclusion reached in the extract cited from the Special Report.

23 In view of the foregoing and having regard to the latitude necessarily available to the Commission in managing the common organisation of the market (paragraph 58 of the contested judgment), the Court of First Instance found, in paragraph 59, that the appellant had failed to show that the Commission had treated two comparable situations differently.

24 In support of this ground of appeal, the appellant merely contends that the abovementioned minutes of the Tobacco Management Committee and the Court of Auditors Special Report are conclusive and that the Commission disregarded 'the price adjustment mechanism after excluding the Mavra variety from a lot'. However, those factors, of which the Court of First Instance took account, provide no basis for calling in question the assessment of the facts which it undertook without distorting the clear sense of the evidence produced.

25 The ground of appeal alleging that the facts were distorted when it was considered whether the principle of equal treatment had been infringed must therefore be rejected.

Infringement of Articles 1 and 6 of Regulation No 3389/73 and 7(2) of Regulation No 727/70

26 The appellant claims, in reliance on Articles 1 and 6 of Regulation no 3389/73 and 7(2) of Regulation No 727/70, first, that, with regard to ordinary decisions

for management of the agricultural sector concerned, such as those at issue here, the Community institutions should not be allowed the degree of latitude that they enjoy when making choices of economic policy. Second, it claims that, when the Commission refuses to award a lot and, in such a case, chooses to fix a minimum price for the lot not awarded, it is thereby making clear its view as to the needs of the market and the fact that the market is not subject to any disturbance, with the result that it no longer enjoys any discretion. It undertakes to make an award in respect of all bids in the next tendering procedure if they are of a level at least equal to the minimum price set.

27 In that regard, it must be pointed out, as the Commission has done, that the Court of Justice has held, in relation to the common organisation of the market in vinous alcohols (Case C-358/90 *Compagnia Italiana Alcool* v *Commission* [1992] ECR I-2457, paragraph 42), that, where the Commission decides not to make an award because of the risk of disturbance of the market, it enjoys a wide power for the assessment of complex economic situations. The decision whether or not to accept a bid is not therefore a simple and mechanical administrative operation but calls for the appraisal of a complex economic situation. The same applies to the procedures for the making of awards in this case.

28 The Court of First Instance was therefore right, in reliance on the case-law of the Court of Justice (Case 27/85 *Vandelmoortele* v *Commission* [1987] ECR 1129, paragraphs 31 to 34), to take the view in paragraph 58 of the contested judgment that, in those circumstances, even decisions which may subsequently prove to be open to criticism do not necessarily cause the Community to incur liability in the absence of a manifest error of assessment on the part of the institution.

29 The allegation that the Commission infringed Articles 1 and 6 of Regulation No 3389/73 and Article 7(2) of Regulation No 727/70, in that it no longer enjoys any latitude when fixing a minimum price for a lot not awarded, constitutes a new plea which, for the same reasons as those set out in paragraph 18 of this judgment, is inadmissible.

30 The fourth ground of appeal must therefore be rejected.

Infringement of the principle *audi alteram partem* and the principle of equality of arms

31 According to the appellant, the Court of First Instance should not have relied solely on the documents cited by the Commission in its reply to the written questions put to it by that Court in rejecting the appellant's pleas alleging breach of the principle *audi alteram partem* and the principle of equality of arms in relation to the fourth tendering procedure and the increase of the amount of the guarantee. The appellant observes that, in view of the timing of the production of those documents and the complexity of the case, it had no opportunity of verifying the information they contained, so that the requirements of the principle *audi alteram partem* and the principle of equality of arms were not observed. Moreover, the Commission's answer was lodged at the Registry of the Court of First Instance on 16 April 1997, whereas the date set was 15 April 1997.

32 It need merely be pointed out, as the Commission has done without being contradicted, that the appellant was entitled to put forward at the hearing any observations on those documents which it considered necessary or to request an adjournment of the hearing to enable it to analyse the Commission's reply, but did not do so. In those circumstances, the appellant cannot, in an appeal, rely on a procedural safeguard which it had already waived.

33 As regards the delay — which, it should be said, has not been established — in the lodging of the Commission's reply, nothing has been disclosed to show that it could have had any impact on the appellant's exercise of its rights in the course of the procedure.

34 This plea must therefore also be rejected.

Incorrect assessment of the appellant's allegations concerning the principle of equal treatment and the increase of the amount of the guarantee in relation to the fourth tendering procedure

35 As regards the fourth tendering procedure, the appellant submits that the Court of First Instance should have examined its plea alleging breach of the principles of proportionality and equal treatment by reviewing the legality of the acts for which the Commission was criticised separately rather than together.

36 It need merely be stated, on this point, that the Court of First Instance had to rule on the various complaints made by the appellant and that none of the arguments put forward by the latter justifies the view that the Court of First Instance failed to consider the Commission's conduct in its entirety when it held that the pleas alleging breach of the principles of proportionality and equal treatment were unfounded.

37 This ground of appeal must therefore be rejected.

Infringement of Regulation No 3389/73

38 According to the appellant, the Court of First Instance was wrong in accepting, in paragraph 91 of the contested judgment, that the Commission was entitled to derogate from Article 3 of Regulation No 3389/73 and that the reduction from 45 to 20 days of the period between the notice of invitation to tender and the date fixed by Regulation No 2436/91 for submitting tenders was lawful. It claims that Article 3(2) of Regulation No 3389/73, which ranks higher in the hierarchy of norms, does not allow any derogation from the period of 45 days except for lots of tobacco which are auctioned publicly. The Commission was therefore entitled to derogate from that period only for lots put up for public auction, namely those

for which the third tendering procedure of the Greek and Italian intervention agencies was annulled, involving a small quantity of tobacco — about eight tonnes.

39 It must be observed on this point that, in preparation for the fourth tendering procedure, Commission Regulation (EEC) No 395/90 of 15 February 1990 amending Regulation (EEC) No 3389/73 laying down the procedure and conditions for the sale of tobacco held by intervention agencies (OJ 1990 L 42, p. 46) reduced to 20 days the period of 45 days provided for in Article 3 of Regulation No 3389/73. As the Court of First Instance indicated in paragraph 91 of the contested judgment, that reduction was decided upon in the context of the considerable latitude available to the Commission and the appellant has not proved that the Commission committed any manifest error. Moreover, the appellant has not indicated the extent to which the reduction might have favoured other economic operators.

40 The appellant merely states that Regulation No 3389/73 is of a higher order that Regulation No 395/90 in view of the fact that it is an essential measure adopted under Regulation No 727/70 of the Council.

41 That argument cannot be upheld. Both regulations are of the same rank and both were adopted on the same legal basis, namely Article 7(4) of Regulation No 727/70.

42 Consequently, this ground of appeal has no legal basis and must therefore be rejected, and hence the appeal must be dismissed in its entirety.

Costs

43 Under Article 69(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 appellant has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT (Third Chamber)

hereby:

1. Dismisses the appeal;

2. Orders Odette Nicos Petrides Co. Inc. to pay the costs.

Puissochet Moitinho de Almeida Gulmann

Delivered in open court in Luxembourg on 9 September 1999.

R. Grass

Registrar

J.-P. Puissochet

President of the Third Chamber