JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)
19 March 2003 *

In Case T-273/01,

Innova Privat-Akademie GmbH, established in Berlin (Germany), represented by R. Wöstmann, lawyer,

applicant,

v

Commission of the European Communities, represented by M. de Pauw and B. Martenczuk, acting as Agents, with an address for service in Luxembourg

defendant,

APPLICATION for compensation for the loss allegedly suffered by the applicant following the refusal to finance a project under the ECIP (European Community Investment Partners) financial instrument to set up a joint venture for professional training in India,

* Language of the case: German.

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

composed of: K. Lenaerts, President, J. Azizi and M. Jaeger, Judges,

Registrar: D. Christensen, Administrator,

having regard to the written procedure and further to the hearing on 11 December 2002

gives the following

Judgment

1 The 'EC Investment Partners' (ECIP) financial instrument was administered by the Commission from 1988. During the period relevant to the present proceedings the legal basis for the programme was Council Regulation (EC) No 213/96 of 29 January 1996 on the implementation of the European Communities investment partners financial instrument for the countries of Latin America, Asia, the Mediterranean region and South Africa (OJ 1996 L 28 p. 2, the 'ECIP Regulation').

2 In accordance with Article 1(1) of the Regulation, the Community, as part of its economic cooperation with the countries of Latin America, Asia, the Mediterranean region, and South Africa for the period 1995-99, operated special cooperation schemes aimed at promoting mutually beneficial investment by Community operators, particularly in the form of joint ventures with local operators in the countries eligible.

3 To that end, Article 2 of the ECIP Regulation provided four types of financing facility. The relevant type of financing facility in this case is Facility No 2, which enabled the Community to finance the following operations:

'Feasibility studies and other action by operators intending to set up joint ventures or to invest, not exceeding 50% of the cost up to a ceiling of ECU 250 000, within which pre-feasibility travel costs of ECU 10 000 maximum may be financed by grant.'

4 Generally, the funds provided for under Facility No 2 were paid as interest-free advances. Under Article 5(2) of the ECIP Regulation, the interest-free advances were reimbursed according to arrangements determined by the Commission, on the understanding that the final repayment periods were to be as short as possible and should in no instance exceed five years. Such advances were not refundable where the actions produced negative results.

5 The ECIP financial instrument was implemented by specialised financial institutions which, according to Article 3(1) of the ECIP Regulation, were chosen by the Commission. Under Article 4(2) applications for Facilities Nos 2, 3

and 4 could be submitted by the undertakings concerned solely through those financial institutions. The Community funds were applied for and provided exclusively through the financial institution.

6 In accordance with Article 6 of the ECIP Regulation, the final financing decision was to be taken by the Commission, which verified compliance with the criteria set out in paragraph 1 and compatibility with Community policies, in particular development cooperation policy and the mutual benefit to the Community and the developing country concerned.

7 The procedure followed by the Commission during the processing of each application was described in detail in the ECIP Procedure Manual, which was available to each financial institution.

8 The Commission's decisions were prepared by a Management Board composed of officials of the various competent divisions. Paragraph 8.1.D of the ECIP Procedure Manual provides:

'The ECIP sector notifies the financial institution of the result of the Management Board's consultations. When the Management Board has proposed the approval of the project, the financial institution is notified before the Commission's final decision. Therefore, the notification is for information purposes only and does not constitute an offer of financing.'

9 Paragraph 8.1.E of the Manual adds:

'When the Management Board has recommended the approval of an application, the ECIP sector takes the steps necessary to obtain a final decision from the Commission. Any decision by the Commission is sent by the ECIP sector to the financial institution by letter containing the special conditions for the project.'

10 In accordance with Article 11, the ECIP Regulation expired on 31 December 1999. During 1999 the Commission took the view that because of the various difficulties encountered during the operation of the programme, the ECIP financial instrument should not be extended beyond that date. It submitted to the Parliament and the Council a draft regulation concerning the closure and liquidation of the projects adopted by the Commission under the ECIP Regulation.

11 On 4 April 2001 the Parliament and the Council adopted Regulation EC No 772/2001 regarding the closure and liquidation of projects adopted by the Commission under the ECIP Regulation (OJ 2001 L 112, p. 1). Under Article 1(1) of the Regulation, the Commission is to take the measures necessary for the closure and liquidation of the projects adopted under the ECIP Regulation.

Facts forming the basis of the proceedings

12 On 10 December 1998, Innova Privat-Akademie GmbH, through the financial institution Berliner Bank c/o Landesbank Berlin (the 'Bank'), applied to the

Commission for a grant to finance a project under the ECIP instrument. The project at issue was a feasibility study for the setting up of a joint venture for professional training in India.

13 By fax of 5 January 1999, sent by the ECIP's Technical Assistance Unit to the Bank, the Commission confirmed the receipt of the application. The fax expressly mentioned that it did not constitute an authorisation and that consideration of the project would take place at a later date. The confirmation of receipt was sent to the applicant by the Bank.

14 By fax of 18 January 1999, the Bank informed the applicant that from 5 January 1999 all the expenses incurred in relation to the feasibility study were eligible costs for the purposes of the grant application.

15 By fax on 31 March 1999, the Bank informed the applicant that the grant application for the feasibility study had been approved in the amount of EUR 115 328.

16 By fax of 26 August 1999 sent to the Bank, the Commission stated that the grant application had been considered by the ECIP's Management Board on 25 March 1999 and that its divisions had stated that they were favourable to the conditions mentioned in that fax. In the last paragraph of the fax it stated:

'This information is sent subject to the formal authorisation of the project by the Commission and, therefore, this letter does not constitute any commitment by the

Commission. The Commission's formal decision will be sent to you shortly accompanied, if appropriate, by a contractual document for you to sign.'

17 However, since the Commission had decided to submit the ECIP financial instrument to a detailed examination and not to propose the extension of the programme beyond the date of expiry provided in the ECIP Regulation, it stopped signing new financing agreements under the ECIP. Accordingly, it did not make a finance offer for the project at issue and no financing agreement was concluded between the Commission and the Bank.

18 By letter of 14 April 2000, the Commission sent to the Bank its decision to stop signing new financing agreements under the ECIP.

19 On 25 November 1998, the applicant concluded a contract with Berka Investment Consulting Ltd ('Berka') for the feasibility study. The study was to begin in February 1999. On the basis of that contract the applicant was sued by Berka in May 2000 before the national courts for the payment of DEM 111 881.46.

20 On 15 February 2002, the Landgericht Berlin held Berka's action to be unfounded. In the light of the feasibility study's serious failings, the applicant brought a counterclaim against Berka for DEM 78 172.39, corresponding to part payments by the applicant, travel and staffing costs. By judgment of 12 April 2002 the Landgericht Berlin upheld the counterclaim.

Forms of order sought

21 By application lodged at the Registry of the Court of First Instance on 22 October 2001, the applicant brought the present action. It claims that the Court of First Instance should:

— order the defendant to pay the sum of DM 78 172.39, together with interest;

— order the defendant to pay the costs.

22 The Commission contends that the Court of First Instance should:

— dismiss the application;

— order the applicant to pay the costs.

Substance of the case

23 According to settled case-law, in order for the Community to incur non-contractual liability, the applicant must prove the unlawfulness of the alleged conduct of the institution concerned, actual damage and the existence of a causal link between that conduct and the damage pleaded (Case 26/81 *Oleifici*

Mediterranei v *EEC* [1982] ECR 3057, paragraph 16; Case T-175/94 *International Procurement Services* v *Commission* [1996] ECR II-729, paragraph 44; Case T-336/94 *Efisol* v *Commission* [1996] ECR II-1343, paragraph 30; and Case T-267/94 *Oleifici Italiani* v *Commission* [1997] ECR II-1239, paragraph 20.) Where any one of those conditions is not satisfied, the action must be dismissed in its entirety and it is unnecessary to consider the other conditions for non-contractual liability (Case C-146/91 *KYDEP* v *Council and Commission* [1994] ECR I-4199, paragraph 19; Case T-170/00 *Förde-Reederei* v *Council and Commission* [2002] ECR II-515, paragraph 37).

The Commission's unlawful conduct

24 The applicant submits that the Commission's unlawful conduct arises from a breach of the principle of the protection of legitimate expectations. The Commission led the applicant to entertain reasonable expectations, in that by the fax of 26 August 1999 it confirmed the information to the Bank concerning the payment of a grant under the ECIP programme.

25 As a preliminary point, it is important to note that the Commission has no legal obligation to finance the applicant's project. Such an obligation does not arise from the ECIP Regulation, since the final decision on the financing of a project belongs exclusively to the Commission (Article 6(2) of the ECIP Regulation). Moreover, the ECIP Regulation does not create a right to financing for a particular project. The right to financing only accrues when the corresponding financial agreement has been concluded.

26 Next, it must be recalled that, according to settled case-law, the right to rely on the principle of the protection of legitimate expectations, which is one of the

fundamental principles of the Community, extends to any individual in a situation where the Community authorities, by giving him precise assurances, have caused him to entertain legitimate expectations. Such assurances, in whatever form they are given, are precise, unconditional and consistent information from authorised and reliable sources (see Joined Cases T-66/96 and T-221/97 *Mellett* v *Court of Justice* [1998] ECR-SC I-A-449 and II-1305, paragraphs 104 and 107, and the cited case-law). However, a person may not plead breach of the principle unless he has been given precise assurances by the administration (Case T-290/97 *Mehibas Dordtselaan* v *Commission* [2000] ECR II-15, paragraph 59).

27 Clearly, in the present case the contents of the Commission's letters of 5 January 1999 and 26 August 1999 do not reveal an assurance of financing for the project at issue.

28 First, the fax from the ECIP Technical Assistance Unit sent to the Bank on 5 January 1999 was only a confirmation of receipt of the application. Moreover, that fax expressly mentions in a clear and unambiguous manner that it was not an authorisation and that the examination of the project was to take place at a later date.

29 Second, as regards the fax of 26 August 1999, it is clear that it was simply a provisional communication of the result of the examination undertaken by the Management Board. Therefore it follows from the final paragraph of that fax, reproduced in paragraph 16 above, that the communication was sent explicitly subject to the final decision of the Commission. The fax expressly states that it does not contain any commitment so that it did not lead the Bank or, *a fortiori*, the applicant to entertain reasonable expectations.

30 The Commission submits that the interpretation of the fax is clearly in accordance with its consistent practice concerning the application of the ECIP Regulation. That practice is in any case confirmed by the ECIP Procedure Manual, in particular paragraphs 8.1.D and 8.1.E reproduced in paragraphs 8 and 9 above.

31 In that regard, it must be pointed out that the first line of the form used for the grant application expressly refers to the manual, as it states:

'Please refer to the ECIP Procedure Manual before completing this form.'

32 The facts put forward do not, therefore, show precise assurances from the Community administration which led the applicant to entertain reasonable expectations enabling him to rely on the principle of the protection of legitimate expectations.

33 That conclusion is not called into question by the applicant's argument that the Bank's behaviour must nevertheless be imputed to the defendant. In that regard, the applicant submits that the Bank 'acts for the Commission in this case' and 'is the arm of the Commission'. It follows that when, as in the present case, an authorisation for a grant is made through a bank, there are grounds to consider it as emanating from the Commission itself. Furthermore, the applicant argues that the Commission's fax of 26 August 1999 is the recognition of the acceptance of the feasibility study for the grant and that therefore it reasonably believed the Bank's statements and deserves to be protected under the principle of the protection of legitimate expectations. Moreover, those legitimate expectations were breached by the defendant in so far as it did not inform the applicant that in the meantime it had terminated the ECIP programme. It was only on 14 April

2000 that the applicant became aware of that fact, nearly six months after the end of the programme.

34 Without any need to give judgment on whether the attitude of the Bank can possibly be imputed to the Commission, it is sufficient to recall that the fax of 26 August 1999 is a mere provisional communication of the result of the examination undertaken by the Management Board. The information contained in that fax was transmitted expressly subject to the Commission's final decision and the fax expressly states that it does not contain a commitment by the Commission.

35 It is clear from the above that the applicant's arguments as to the Commission's unlawful conduct are manifestly lacking in any foundation in law.

Loss

36 The applicant argues that, confident of the success of the project, it concluded a contract with Berka. It submits that it paid six partial instalments to Berka totalling DEM 69 600, and DEM 8 572.39 for travel and staffing costs (a total of DEM 78 172.39).

37 It must be recalled that the applicant was sued by Berka before the Landgericht Berlin for the payment of a sum of DEM 111 881.46 pursuant to the contract relating to the feasibility study. On 15 February 2002, the national court held that Berka's action was unfounded, and, on 12 April 2002, it upheld the applicant's counterclaim for reimbursement of DEM 78 172.39.

38 In addition to the fact that the applicant does not provide concrete evidence of those payments, it must be pointed out that it stated itself in its pleadings that its claim for an order that the Commission pay damages and interest became irrelevant if the counterclaim was upheld.

39 Therefore, it is sufficient to hold that the Landgericht Berlin upheld the counterclaim, without there being any need to examine the difficulties alleged by the applicant in executing the judgment of that court, in order to decide that there is no damage.

Causal link

40 The applicant argues that the Commission's failure to grant the financing requested has caused it to suffer loss. It must be recalled that the applicant submits that the Commission's unlawful conduct arises from a breach of the principle of the protection of legitimate expectations. By letter of 26 August 1999, the Commission led the applicant to entertain reasonable expectations that it had confirmed the Bank's information on the payment of a grant under the ECIP programme.

41 However, that fax cannot have been the origin of the expenses alleged by the applicant. The contract with Berka was concluded on 25 November 1998, before the date of the fax in question and even before the application for a grant on 10 December 1998 arrived at the Commission. Therefore, as the contract concluded with Berka is totally independent and is prior to all the Commission's actions with regard to the project which is the subject of the grant application, the alleged loss cannot be attributed to the Commission's conduct.

42 As regards the travel and staffing costs (DEM 8 572.39), it is not clear from the application at what moment the applicant incurred those costs. The applicant has therefore not provided evidence of the existence of a causal link with the assurances allegedly given by the Commission.

43 It follows that the applicant has not produced evidence of the existence of a causal link between the behaviour complained of and the loss claimed.

44 It is clear from the whole of the above that the applicant's arguments on each of the three conditions required for non-contractual liability to be attributed to the Commission are manifestly not founded. Therefore the application must be dismissed.

Costs

45 Under Article 87(2) of the Rules of Procedure, the unsuccessful party must be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs, as applied for by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. **Dismisses the application;**

2. **Orders the applicant to pay the costs.**

Lenaerts Azizi Jaeger

Delivered in open court in Luxembourg on 19 March 2003.

H. Jung
Registrar

K. Lenaerts
President