

ORDER OF THE COURT OF FIRST INSTANCE (Third Chamber)
2 December 2003 *

In Case T-334/02,

Viomichania Syskevasias Typopoiisis kai Syntirisis Agrotikon Proionton AE,
established in Athens (Greece), represented by I. Stamoulis, lawyer, with an
address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by M. Condou-Durande,
acting as Agent, with an address for service in Luxembourg,

defendant,

APPLICATION for a declaration under Article 232 EC that the Commission failed to act in that, first, it did not bring proceedings against the Hellenic Republic for infringement of Community law damaging the applicant's economic interests and, second, it did not immediately withdraw the financial assistance

* Language of the case: Greek.

granted by the European Agricultural Guidance and Guarantee Fund (EAGGF) for the joint financing of the applicant's investment project as approved by Decision No 324986/505 of the Greek authorities of 17 February 1994,

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

composed of: J. Azizi, President, M. Jaeger and F. Dehousse, Judges,

Registrar: H. Jung,

makes the following

Order

Facts and procedure

- 1 Viomichania Syskevasias Typopoiisis kai Syntirisis Agrotikon Proïonton AE is a Greek undertaking whose object is the production, packaging, standardisation, preservation and marketing of fruit and vegetables. It was established on the basis of an improvement plan drawn up under Council Regulation (EEC) No 355/77 of

15 February 1977 on common measures to improve the conditions under which agricultural products are processed and marketed (OJ 1977 L 51, p. 1) in order to receive joint financing from the European Community and the Greek State.

- 2 The applicant subsequently submitted to the Greek authorities an investment project under Council Regulation (EEC) No 866/90 of 29 March 1990 on improving the processing and marketing conditions for agricultural products (OJ 1990 L 91, p. 1), in order to improve the facilities and equipment for the processing of fruit and vegetables. That project was attached to the investment projects submitted by the Hellenic Republic as part of its application for assistance from the European Agricultural Guidance and Guarantee Fund (EAGGF) for the operational programme for the processing and marketing of agricultural products in Greece (92.CT.EL.03). The Commission approved the application from the Greek authorities by decision of 24 November 1992.

- 3 The company's project was finalised in September 1993 and approved by the Greek authorities by decision No 324986/505/17-2-94 of the Secretary General of the Ministry of Agriculture. That project, costing 243 738 000 Greek drachmae (GRD) was financed jointly by the European Community and the Greek State as follows: GRD 85 308 000 from the EAGGF, GRD 24 373 000 from the Greek State and GRD 134 057 000 from the recipient.

- 4 In November 1994, when the applicant was starting to expand its activities, the Greek authorities adopted Ministerial Order No 10/94 on the policing of markets and Order No A2-2330/26-6-95 inter alia on the conditions for renting a shop in the central market in Athens. Those orders considerably disrupted, if not destroyed, the applicant's business activities.

- 5 That situation persisted until, following a number of complaints to the Greek Ministry of Agriculture, a committee appointed by that ministry found that the ministerial orders in question were damaging to a number of companies. The Greek authorities therefore adopted decisions in order to facilitate access to the Athens central market and repealing the orders in question. From August 1998 onwards the applicant finally gained access to the Athens central market.

- 6 On the basis of those facts the applicant referred the matter to the Diikitiko Protodikio Athinon (Administrative Court of First Instance, Athens) seeking compensation for the damage it had suffered as a result of the unlawful actions of the Greek State. That court granted the application and found the Greek State liable.

- 7 At the same time the applicant submitted a large number of petitions, complaints and applications for assistance to the Community institutions, which gave rise to various actions and responses on the part of those institutions.

- 8 During 2001 and 2002 it submitted inter alia various petitions to the European Parliament.

- 9 On 23 November 2001, 18 February and 30 March 2002 it also made official complaints to the Member of the Commission responsible for agricultural matters.

- 10 Failing to obtain what it regarded as a satisfactory answer, by a letter dated 20 May 2002 the applicant gave the Commission formal notice. That letter was also sent to the Court of Auditors and the European Anti-Fraud Office (OLAF).

In that letter it complained in essence that the Commission had failed to bring infringement proceedings against the Hellenic Republic and that the Commission had stated in its letters in reply that the case fell within the jurisdiction of the Greek courts.

- 11 By letter of 14 June 2002 Mr Silva Rodriguez, Director-General of the Commission's Directorate-General for Agriculture, replied as follows:

'Commissioner Fischler has asked me to thank you for your letter of 24 May 2002, in which you indicate your intention to bring an action for failure to act against the Commission in order that the latter should bring infringement proceedings against the Greek authorities in connection with your dispute with them. I must remind you that the Court of Justice has consistently held (as, for example, in Case 247/87 *Star Fruit Company v Commission*) that the Commission is under no obligation to initiate infringement proceedings against a Member State but has "discretion in that respect which means that individuals have no right to require the Commission to take a decision to a particular effect". In such circumstances, I can only repeat the view already taken by Commission officials that it is for the Greek judicial authorities dealing with the case to decide for themselves the amount of any damages to be paid to your client by the Greek authorities.'

- 12 Furthermore, by letter of 12 September 2002 OLAF replied to the applicant's various letters. It stated, first, that it did not have the competence to deal with that case and, second, that in the light of the time that had elapsed the applicant could approach the European Mediator.
- 13 Finally, by application lodged at the Court Registry on 28 October 2002, the applicant brought the present action.

- 14 By a separate document lodged at the Court Registry on 31 January 2003 the defendant raised an objection of inadmissibility under Article 114 of the Rules of Procedure of the Court of First Instance. The applicant submitted its observations on that objection on 13 March 2003.

Forms of order sought

- 15 The applicant claims that the Court should:

- declare that the defendant failed to act in that it did not withdraw the assistance granted by the EAGGF for the purposes of jointly financing its investment project;

- declare that the defendant failed to act in that it did not institute infringement proceedings against the Hellenic Republic;

- order the defendant to pay the costs.

- 16 The defendant contends that the Court should:

- dismiss the application as inadmissible;

— order the applicant to pay the costs.

Law

- 17 Under Article 114(1) of the Rules of Procedure of the Court of First Instance, if one of the parties so requests the Court may decide on a plea of inadmissibility without considering the substance of the case. Under Article 114(3), the remainder of the proceedings is to be oral unless the Court decides otherwise.
- 18 In the present case, the Court considers that in this case it has sufficient information from the documents on the file, so that there is no need to open the oral procedure.

Arguments of the parties

- 19 The defendant contends first of all that the action for failure to act is inadmissible since it replied by its letter of 14 June 2002 to the applicant's request for it to act made in the letter dated 20 May 2002.
- 20 Second, it considers that the action is out of time. It observes that the action was brought on 28 October 2002, whilst the applicant's letter of 20 May 2002, which constituted a request to act, was sent on 22 May 2002.

21 Lastly, it points out that, according to settled case-law, natural and legal persons may bring proceedings before the Court of Justice under the third paragraph of Article 232 EC only for a declaration that an institution has declined, in breach of the Treaty, to adopt a measure other than a recommendation or an opinion of which those persons are the potential addressees or which they could challenge in annulment proceedings (see in particular the order in Case T-13/94 *Century Oil Hellas v Commission* [1994] ECR II-431). It considers that that condition is not met in the present case because the applicant's complaint is that the Commission failed to introduce infringement proceedings against the Hellenic Republic. It also considers that that condition is not met with regard to the request to bring proceedings under Article 23 of Council Regulation (EEC) No 4253/88 of 19 December 1988 laying down provisions for implementing Regulation (EEC) No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1988 L 374, p. 1). It points out first of all that that provision relates exclusively to relations between the Commission and the Member State and the latter's obligations towards the Commission. It goes on to contend that that provision does not give rise to any right for an undertaking that might be relied on by the latter in order to require the Commission to adopt a measure which is of direct and individual concern to it. Lastly, it comments that the letter of formal notice sent on 22 May 2002 did not contain a request to act in this way.

22 The applicant denies that its application is inadmissible.

23 First, it contends that the settled case-law relating to the inadmissibility of applications for a declaration that the defendant has failed to act by not bringing the infringement proceedings provided for in Article 226 EC does not apply in this case. It points out that in the present case the defendant's discretion is limited by three requirements which oblige it to intervene and act immediately. First, it states that as the defendant is a Community institution it should respect the applicant's fundamental rights as guaranteed under the Charter of Fundamental Rights of the European Union, proclaimed at Nice on 7 December 2000 (OJ 2000 C 364, p. 1) — in particular freedom to choose an occupation (Article 15), freedom to conduct a business (Article 16), the right to property (Article 17),

equal treatment before the law and the principles of good administration and non-discrimination —, and hence come to its assistance, since it has acknowledged that the Greek administration was subjecting it to inhumane treatment. Second, it observes that under Article 280 EC the defendant is required to protect the financial interests of the European Community and cannot therefore use its discretion in order not to require the Greek State to repay amounts paid as part of the joint financing of a project which it has approved. Third, it considers that according to the principle of equal treatment, where as in the present case the defendant is informed that irregularities have occurred in connection with a project being jointly financed by Community funds it must adopt a decision withdrawing the financial assistance (see in particular Case C-500/99 P *Conserve Italia v Commission* [2002] ECR I-867).

- 24 Second, it objects to the defendant's argument that the present application has become purposeless since the letter of 14 June 2002 contains a definition of the defendant's position. It points out first of all that the judgment of the Court in Case 247/87 *Star Fruit v Commission* [1989] ECR 291 is irrelevant because the circumstances of the case which gave rise to that judgment were radically different, since it was an application for the termination of a regulatory measure adopted by the French Republic which did not concern the applicant. It also states that the defendant's recommendation to approach the Greek judicial authorities contained in that letter is incomprehensible since those authorities are not responsible for ensuring compliance with Community law or its interpretation or application. Lastly, it considers that the letter of 14 June 2002 is at most a letter providing information, but by no means is it a refusal.
- 25 Third, it contends that insofar as, in its letter of 14 June 2002, the defendant advised it to approach the national courts rather than the Community courts, it committed a triple infringement of Community law. First, it infringed Article 220 EC, which awards Community courts exclusive jurisdiction to ensure compliance with Community law, which is applicable in the present case since the

infringement committed concerns Article 23 of Regulation No 4253/88, Article 24 of Council Regulation (EEC) No 2082/93 of 20 July 1993 amending Regulation No 4253/88 (OJ 1993 L 193, p. 20), Articles 5 EC and 34 EC and the principle of the uniform application of Community law. Second, it defined its position inadequately. Third, it deprived the applicant of protection of its fundamental rights.

26 Lastly, the applicant rejects the defendant's assertion that its application was out of time.

27 It considers, first, that the circumstances of the case show that it made an excusable error which justifies having exceeded the relevant time limits. It points out that, by letters of 18 February and 30 March 2002, it approached the Member of the Commission responsible for agricultural matters in order to make a complaint about the fraudulent practices of the Greek authorities. It also observes that, by letter of 23 April 2002, the Secretary General of the Commission informed it that its letter of 23 November 2001 had been registered as a complaint under No 02/4436 SG(2002) A 3934/1. It goes on to note that, by letter of 20 May 2002, it requested the Commission to take action under Article 232 EC and that the latter replied to this by letter of 14 June 2002. It also states that by letter of 18 June 2002 the Chairman of the Committee on Petitions of the European Parliament informed it that its petition was admissible and that, by letter of 15 July 2002 the Court of Auditors, in response to its letters of 20 May, 24 June and 28 July 2002, informed it that its case would be considered by the relevant section of its administration. It also mentioned that on 8 July 2002 Mr Alavanos, Member of the European Parliament, submitted a written question to the defendant and that in its reply of 20 September 2002 the defendant stated that it had not received an official reply from the Greek authorities, that the complaint of 18 February 2002 and petition No 1075/2001 were still being dealt with and that, at any event, it was for the Greek courts to settle the dispute pending before them. Lastly, the applicant states that on 12 September 2002 OLAF replied to its various letters by advising it to approach the European Mediator.

- 28 According to the applicant, it is clear from those factual circumstances that it made an excusable error with regard to the actual content of the Commission's letter of 14 June 2002 and that that error has three aspects. First, it considers that the ambiguous wording of the letter of 14 June 2002 did not make clear that it was a refusal. Second, it points out that the defendant was fully aware of the factual circumstances in which it adopted the alleged definition of its position contained in the letter of 14 June 2002, so that, if it intended to provide a clear refusal of the request to act it had submitted it was not necessary to continue dealing with the complaint of 18 February 2002. Third, it contends that no connection could be established between the letter of 14 June 2002 and the other letters received.
- 29 It states that it was due to this excusable error that it was late in bringing its case. It states that it was due to the fact that it considered that the letter of 14 June 2002 dealt with its problem too lightly that it brought its action on 28 October 2002. It contends that that time-limit, which exceeds the relevant time-limit by only 33 days, is reasonable: the letter of formal notice was sent on 24 May and 25 July 2002 was therefore the final date for the Commission to define its position. Hence, in its view, the time-limit for the application expired on 25 September 2002.
- 30 Lastly, it points out that in reply to the written question of 8 July 2002, submitted by Mr Alavanos, Member of the European Parliament, who asked the Commission what it intended to do in that case, the Commission replied on 20 September 2002 that it had not received a formal reply from the Greek authorities so it was not in a position to confirm whether proceedings had begun in order to ensure that the applicant's activities could continue, but that regular contact was being maintained with the Greek Ministry of Agriculture. It added that at any event it considered that it was for the Greek courts to resolve the dispute pending before them. According to the applicant, that reply, which was given 96 days after the letter of 14 June 2002, in fact constitutes a retraction of that reply, since the Commission states in it that the complaint was still being dealt with, without any reference to the position it defined in the letter of 14 June 2002.

Findings of the Court

- 31 In the context of the admissibility of this application, the Court has decided to consider, first of all, the defendant's arguments with regard to the action being brought out of time, and then the arguments concerning the absence of any obligation to act.
- 32 Under the second paragraph of Article 232 EC an action for failure to act must be brought within a period of two months, which starts to run from the expiry of the period of two months in which the defendant must have defined its position after being called upon to act.
- 33 In the present case it is common ground between the parties that since the request to act was sent on 22 May 2002 the present action, which was brought by an application lodged at the Court Registry on 28 October 2002, does not meet the time-limit laid down in the second paragraph of Article 232 EC.
- 34 However, in order to justify the lateness of its action the applicant relies upon the existence of an excusable error.
- 35 It is settled case-law that an error is excusable where it results from the actual conduct of the institution concerned and the applicant acted in good faith and exercised all the diligence required of a normally well-informed person (see in particular Case C-193/01 P *Pitsiorlas v Council and ECB* [2003] ECR I-4837, paragraph 25).

- 36 Contrary to what the applicant asserts, neither the letter of 14 June 2002 nor the letter from OLAF of 12 September 2002 advising it to approach the European Mediator, nor the defendant's reply to Mr Alavanos's written question, supports the finding that the action was lodged out of time as a result of an excusable error on its part.
- 37 It should be made clear first of all that the letter of 14 June 2002 contains the defendant's definition of its position. In that letter the defendant stated that, whatever its attitude might be in the present case, the applicant was not entitled to require it to define its position in a particular way since the bringing of infringement proceedings is a matter of discretion. The defendant also stated that in its view it was for the Greek judicial authorities to settle the dispute pending before them. By replying in this way the defendant clearly informed the applicant that it did not intend to give the reply the applicant was seeking.
- 38 Also, even if, as the applicant contends, the ambiguous wording of the letter of 14 June 2002 did not make clear that it was a definition of the defendant's position, this fact could not have resulted in the applicant's error regarding the starting point for the time-limit for the action. If the applicant had considered that that letter did not contain a definition of the defendant's position it should have brought its action within the period of two months laid down in the second paragraph of Article 232 EC.
- 39 The applicant is also wrong to rely on the letter from OLAF of 12 September 2002. According to the applicant itself, that letter does not constitute a reply to its letter of 20 May 2002 and to the request to act contained in it, but a reply to the letters of 30 May, 4 July, 16 July, 31 July, 6 August and 14 August 2002, which it had sent to OLAF (as can be seen from paragraph 4.13 of the observations and from the reference given in OLAF's letter). It is true that in that letter OLAF states that 'this complaint will be forwarded to the competent directorates for agriculture and competition, which are aware of this matter and are probably carrying out an investigation'. However, the words used show that

it is a mere supposition on OLAF's part (in particular the word 'probably') and not a statement of fact. Also, in view of OLAF's functions and its independence from the Commission OLAF was clearly not competent to determine what stage the work of the Commission had reached with regard to a third party and even less to commit the Commission in that respect.

- 40 Lastly, it should be considered that the defendant's reply of 20 September 2002 to written question E-2108/02 submitted by Mr Alavanos, Member of the European Parliament, (OJ 2003 C 52, p. 130) does not give reason to conclude that there was an excusable error on the applicant's part either. That reply makes no reference to the request to act contained in the letter of 20 May 2002. The mere fact that the second paragraph of that reply states that 'the complaint of 18 February 2002 lodged with the Commission by the representative of the company in question, Mr Barakakos, and his petition No 1075/2001 are still being dealt with under the relevant procedures' cannot justify any confusion in the mind of the applicant. It is stated in that reply that it is the complaint of 18 February 2002 and not the request to act of 20 May 2002 which is still being dealt with.
- 41 It follows from the above that this plea of inadmissibility is well founded.
- 42 For the sake of completeness, it should be pointed out that this application is also inadmissible since the defendant is under no obligation to act.
- 43 In that regard, it is necessary to point out that in the context of the present action the applicant is complaining that the defendant failed, on the one hand, to bring proceedings against the Hellenic Republic under Article 226 EC and, on the other hand, to withdraw the financial assistance from the EAGGF which had been granted at the request of the Greek authorities.

- 44 The Court has consistently held that an action brought by a natural or legal person for a declaration that, in breach of the Treaty, the Commission failed to act by not initiating proceedings for failure to fulfil Treaty obligations with regard to a Member State is inadmissible (see for example *Star Fruit v Commission*, cited in paragraph 24 above). Natural and legal persons may rely on the third paragraph of Article 232 EC only in order to challenge an institution's failure, in breach of the Treaty, to adopt measures other than recommendations or opinions of which they are potential addressees or which are of direct and individual concern to those persons (Case C 68/95 *T. Port* [1996] ECR I-6065, paragraphs 58 and 59). In the context of an action for failure to fulfil obligations under Article 226 EC, the only measures which the Commission may adopt are measures addressed to Member States (orders in Cases T-479/93 and T-559/93 *Bernardi v Commission* [1994] ECR II-1115, paragraph 31, and in Case T-117/96 *Intertronic v Commission* [1997] ECR II-141, paragraph 32). In addition, it is clear from the scheme of Article 226 EC that neither a reasoned opinion, which is merely a preliminary stage after which, if appropriate, an action may be brought before the Court of Justice for a declaration of failure to fulfil obligations, nor seising the Court of Justice by the actual lodging of such an action can constitute acts of direct concern to natural or legal persons.
- 45 The applicant's application for a declaration that, in breach of the Treaty, the defendant failed to act by not initiating infringement proceedings against the Hellenic Republic must be dismissed as manifestly inadmissible.
- 46 As for the applicant's application for a declaration that the defendant failed to act by not adopting a decision to withdraw the assistance granted, it must be stated that the letter of 20 May 2002 did not contain a request to act in that way. The application is therefore inadmissible.

47 Also, although it is hardly necessary to make the point, even if the letter of 20 May 2002 were to be interpreted as a request to act in that way, no obligation whatsoever upon the defendant to act can be inferred from Article 23 of Regulation No 4253/88. Article 23 provides that in order to guarantee completion of operations carried out by public or private promoters, Member States are to take the necessary measures to verify on a regular basis that operations financed by the European Community have been properly carried out, to prevent and to take action against irregularities and to recover any amounts lost as a result of an irregularity or negligence. It also provides that except where the Member State and/or the intermediary and/or the promoter provide proof that they were not responsible for the irregularity or negligence, the Member State is to be liable in the alternative for reimbursement of any sums unduly paid. A consequence of this is that, even if an obligation to act could be inferred from that provision it is not on the defendant but on the Member States. Article 24(2) of Regulation No 2082/93, to which the applicant refers in its pleadings, provides that 'the Commission may reduce or suspend assistance in respect of the operation or a measure concerned if the examination reveals an irregularity or a significant change affecting the nature or conditions for the implementation of the operation or measure for which the Commission's approval has not been sought'. That provision therefore provides that the defendant has a right and not an obligation to withdraw or suspend assistance (see with regard to a similar provision the judgment of the Court of First Instance in Case T-216/96 *Conserve Italia v Commission* [1999] ECR II-3139, paragraph 92, upheld by the judgment of the Court of Justice in Case C-500/99 P *Conserve Italia v Commission* [2002] ECR I-867. At any event, it should be pointed out that Regulation No 4253/88, to which the applicant refers, was repealed with effect from 1 January 2000 by Council Regulation (EC) No 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds (OJ 1999 L 161, p. 1).

48 In the light of all the foregoing the present application must be dismissed as manifestly inadmissible, without there being any need to consider the other pleas of inadmissibility put forward by the defendant.

Costs

- 49 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 applicant has been unsuccessful it must be ordered to pay the costs, as applied for by the defendant.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber),

hereby orders:

1. The application is dismissed as manifestly inadmissible.
2. The applicant shall bear its own costs and pay those of the Commission.

Luxembourg, 2 December 2003.

H. Jung

Registrar

J. Azizi

President