

ORDER OF THE COURT OF FIRST INSTANCE (First Chamber)

13 July 2004^{*}

In Case T-29/03

Comunidad Autónoma de Andalucía, represented by C. Carretero Espinosa de los Monteros, lawyer, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by C. Ladenburger and S. Pardo Quintillán, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for annulment of the decision allegedly contained in the letter of the Director-General of the European Anti-Fraud Office (OLAF) of 8 November 2002, by which the latter informed the applicant of the impossibility of investigating its complaint against OLAF Report IO/2000/7057 relating to administrative investigation into the marketing of olive oil in Andalusia, Spain,

* Language of the case: Spanish.

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

composed of: B. Vesterdorf, President, P. Mengozzi and M.E. Martins Ribeiro,
Judges,
Registrar: H. Jung,

makes the following

Order

Legal framework

- 1 Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) (OJ 1999 L 136, p. 1) governs the inspections, checks and other measures undertaken by employees of the Office in the performance of their duties.
- 2 Article 3 of Regulation No 1073/1999, which is entitled ‘External investigations’, provides:

‘The Office shall exercise the power conferred on the Commission by Regulation (Euratom, EC) No 2185/96 to carry out on-the-spot inspections and checks in the Member States ...’.

- 3 Article 9 of Regulation No 1073/1999 is headed 'Investigation report and action taken following investigations'. It provides:

'1. On completion of an investigation carried out by the Office, the latter shall draw up a report, under the authority of the Director, specifying the facts established, the financial loss, if any, and the findings of the investigation, including the recommendations of the Director of the Office on the action that should be taken.

2. In drawing up such reports, account shall be taken of the procedural requirements laid down in the national law of the Member State concerned. Reports drawn up on that basis shall constitute admissible evidence in administrative or judicial proceedings of the Member State in which their use proves necessary, in the same way and under the same conditions as administrative reports drawn up by national administrative inspectors. ...

3. Reports drawn up following an external investigation and any useful related documents shall be sent to the competent authorities of the Member States in question in accordance with the rules relating to external investigations.

4. ...'

- 4 Under Article 14 of Regulation No 1073/1999:

'Pending amendment of the Staff Regulations, any official or other servant of the European Communities may submit to the Director of the Office a complaint by virtue of this Article against an act adversely affecting him committed by the Office

as part of an internal investigation, in accordance with the procedures laid down in Article 90(2) of the Staff Regulations. Article 91 of the Staff Regulations shall apply to decisions taken with regard to such complaints.

The above provisions shall apply by analogy to the staff of the institutions, bodies, offices and agencies which are not subject to the Staff Regulations.'

Facts

- 5 In February 2000, various complaints were submitted to OLAF, through the Commission's Directorate-General for Agriculture, relating to 23 economic operators and certain practices involving the re-pressing of olive oil residues in Spain. The complaints alleged that olive oil made from re-pressed olive residues was being sold, both in Spain and abroad, as 'virgin olive oil' and that, in some oil-mills, re-pressed olive oil was being blended with virgin olive oil so as improperly to increase the volume of virgin olive oil qualifying for Community aid. That Community aid is granted from the funds of the European Agricultural Guidance and Guarantee Fund (EAGGF).
- 6 On the basis of that information, OLAF opened an external investigation. In that connection, OLAF asked the Guardia Civil (the armed police force responsible for maintaining law and order in Spain) to provide it with information about any past records of fraud perpetrated in the olive oil sector by the 23 traders mentioned in the complaints. Following these communications, in December 2001 the Special Public Prosecutor for Financial Fraud Offences in Spain (hereinafter 'the Anti-fraud Prosecutor') opened an investigation, registered under Number 10/2001.

- 7 At the end of inspections at the premises of three of the undertakings which had been reported, OLAF concluded that those operators were engaged in fraudulent practices.
- 8 At the beginning of 2002, OLAF carried out further administrative inspections at the premises of three other economic operators, one of which was the undertaking Oleícola El Tejar. In the course of its inspection of that undertaking, OLAF had access to the minutes of its Board of Directors. Certain passages in those minutes concerned the Consejería de Agricultura (Department of Agriculture) of the applicant's executive body and were reproduced in OLAF's final report, in 2002, relating to possible irregularities committed by economic traders in the olive oil sector in Spain, reference IO/2000/7057 (hereinafter 'the final report').
- 9 That part of the final report which relates to Oleícola El Tejar reads as follows:

'We also consider that all of the company's activities were encouraged by the Consejería de Agricultura (of the applicant's executive body), in particular the sale of re-pressed oil as virgin olive oil, which constitutes an infringement of Community law.'
- 10 OLAF sent a copy of the final report to the FEGA (the State body responsible for making direct payment of aid in Spain). In the covering letter, the FEGA was requested to take the necessary steps to recover the amounts set out in the report and the interest payable on those sums, and to adopt certain additional measures.

- 11 A copy of the final report was also sent to the Guardia Civil and to the Anti-fraud Prosecutor to be added to the file in investigation No 10/2001.
- 12 By letter of 30 August 2002, the applicant submitted a complaint (hereinafter 'the complaint') to the Director General of OLAF against the final report, pursuant to Article 14 of Regulation No 1073/1999, seeking an amendment to that part of the report which concluded that the applicant had encouraged all the activities of Oleícola El Tejar.
- 13 By letter of 8 November 2002, OLAF informed the applicant that it could not investigate its complaint. It explained, in that regard, that the complaints procedure laid down in Article 14 of Regulation No 1073/1999 was not applicable to the present case, since it is available only to an officer or other servant of the European Communities who wishes to lodge a complaint against a measure adversely affecting him adopted by OLAF as part of an internal investigation.
- 14 By fax of 10 June 2003, the office of the Anti-fraud Prosecutor informed OLAF that it had been decided to take no further action on the file in investigation No 10/2001.

Procedure and forms of order sought by the parties

- 15 By application lodged at the Court Registry on 27 January 2003, the applicant brought this action.

16 The applicant claims that the Court should:

- annul the decision contained in OLAF's letter of 8 November 2002;
- declare that OLAF must accept the complaint submitted by the applicant and consider the substantive questions raised in that complaint

17 By document lodged at the Court Registry on 24 March 2003, the Commission raised a plea of inadmissibility, claiming that the applicant's representative did not satisfy the conditions laid down in Article 19 of the Statute of the Court of Justice.

18 By document lodged at the Registry on 9 May 2003, the applicant submitted its written observations on the plea of inadmissibility

19 After the Commission had withdrawn the plea of inadmissibility, by written observations lodged at the Registry on 16 June 2003, a time-limit was fixed for lodging the defence.

20 On 24 October 2003, the Commission lodged its defence, in which it contended that the Court should:

- declare the action inadmissible;

- in the alternative, dismiss the action as unfounded;
 - order the applicant to pay the costs.
- 21 Since the applicant declined to submit a reply, the written procedure was closed on 5 January 2004.

Law

- 22 Under Article 113 of the Rules of Procedure, the Court, giving its decision in accordance with Article 114(3) and (4), may at any time, even of its own motion, consider whether there exists any absolute bar to proceeding with an action, including the conditions governing the admissibility of an action which are laid down in the fourth paragraph of Article 230 EC (order in Case T-12/96 *Area Cova and Others v Council and Commission* [1999] ECR II-2301, paragraph 21).
- 23 In the present case, the Court considers that it has sufficient information from the documents before it and will therefore give its decision without opening the oral procedure.
- 24 It is appropriate, first, to consider the applicant's second head of claim, which seeks a declaration from the Court that OLAF must accept the complaint submitted by the applicant and consider the substantive questions raised in that complaint, and then, secondly, to consider the first head of claim, which seeks annulment of the decision allegedly contained in OLAF's letter of 8 November 2002 (hereinafter 'the contested letter').

The second head of claim, which seeks a declaration from the Court that OLAF must accept the complaint submitted by the applicant and consider the substantive questions raised in that complaint

25 By its second head of claim, the applicant clearly intends that the Court should issue directions to one of the departments of the defendant institution.

26 However, it is settled case-law that, when exercising judicial review of legality under Article 230 EC, the Community judicature has no jurisdiction to issue directions to Community institutions (judgment in Case C-5/93 P *DSM v Commission* [1999] ECR I-4695, paragraph 36, and order in Joined Cases C-199/94 P and C-200/94 P *Pevasa and Inpesca v Commission* [1995] ECR I-3709, paragraph 24). Nor may the Court substitute itself for those institutions, since it is for the institution concerned, in accordance with Article 233 EC, to adopt the necessary measures to implement a judgment given in proceedings for annulment (Case T-67/94 *Ladbroke Racing v Commission* [1998] ECR II-1, paragraph 200, and Case T-110/95 *IECC v Commission* [1998] ECR II-3605, paragraph 33).

27 It follows that this head of claim is inadmissible.

The first head of claim, which seeks the annulment of the contested letter

28 By its first head of claim, the applicant seeks the annulment of the decision allegedly contained in the contested letter; by which OLAF informed the applicant of the impossibility of investigating its complaint against the final report.

- 29 With regard to the admissibility of such an action for annulment, it should be pointed out that only measures which produce binding legal effects such as to affect the interests of an applicant by bringing about a distinct change in his legal position constitute acts or decisions which may be the subject of an action for annulment (Case 60/81 *IBM v Commission* [1981] ECR 2639, paragraph 9; Case C-476/93 P *Nutril v Commission* [1995] ECR I-4125, paragraphs 28 and 30; Case T-54/96 *Oleifici Italiani and Fratelli Rubino v Commission* [1998] ECR II-3377, paragraph 48; and Joined Cases T-125/97 and T-127/97 *Coca-Cola v Commission* [2000] ECR II-1733, paragraph 77). Furthermore, it is settled case-law that the mere fact that a letter is sent by a Community institution to its addressee in response to a request made by the latter is not enough for it to be treated as a decision within the meaning of Article 230 EC, thereby entitling its recipient to bring an action for its annulment (judgment in Case T-277/94 *AITEC v Commission* [1996] ECR II-351, paragraph 50; and order in Case T-280/02 *Pikaart and Others v Commission* [2003] ECR II-1621, paragraph 23).
- 30 It should also be pointed out that when, as in the present case, the Commission's decision is negative, it must be appraised in the light of the nature of the request to which it constitutes a reply (judgment of the Court of Justice in Case 42/71 *Nordgetreide v Commission* [1972] ECR 105, paragraph 5; order in Case T-126/95 *Dumez v Commission* [1995] ECR II-2863, paragraph 34). In particular, the refusal by a Community institution to withdraw or amend an act may constitute an act whose legality may be reviewed under Article 230 EC only if the act which the Community institution refuses to withdraw or amend could itself have been contested under that provision (judgment in Case T-330/94 *Salt Union v Commission* [1996] ECR II-1475, paragraph 32, and order in Case T-238/00 *IPSO and USE v BCE* [2002] ECR II-2237, paragraph 45).
- 31 In the present case, the act which is challenged pursuant to Article 230 EC is the contested letter by which OLAF informed the applicant of the impossibility of investigating its complaint against the final report.

- 32 In the light of the case-law cited in paragraph 30 above, that letter could be regarded as a decision which may be the subject of an action for annulment only if the final report had constituted a measure having binding legal effects such as to affect the interests of the applicant by bringing about a distinct change in its legal position.
- 33 It is clear that reports, such as the final report, drawn up by OLAF following an external investigation and sent to the competent authorities of the Member States, in accordance with Article 9 of Regulation No 1073/1999, are only recommendations or opinions which have no binding legal effects.
- 34 OLAF did send the final report to the competent Spanish authorities following an external investigation which it had carried out in accordance with Regulation No 1073/1999.
- 35 Article 9 of Regulation No 1073/1999 states, in essence, that reports sent to the competent authorities of the Member States, which have been drawn up under the authority of the Director and which contain *inter alia* the findings of the investigation and the recommendations of OLAF's director are to constitute admissible evidence in administrative or judicial proceedings of the Member State in which their use proves necessary, in the same way and under the same conditions as administrative reports drawn up by national administrative inspectors.
- 36 Furthermore, Regulation No 1073/1999 states, in recital 13 of its preamble, that 'it is for the competent national authorities or the institutions, bodies, offices or agencies, as the case may be, to decide what action should be taken on completed investigations on the basis of the report drawn up by the Office'.

- 37 It is apparent from these provisions that OLAF's conclusions contained in the final report cannot automatically lead to the opening of administrative or legal proceedings at national level, since the national authorities are free to decide what action should be taken on the final report and are, therefore, the only authorities which may take decisions capable of affecting the applicant's legal position.
- 38 That analysis is also confirmed by the fact — cited by the Commission in its defence — that, by decision of 10 June 2003, the Anti-fraud Prosecutor decided to take no further action on the file in investigation No 10/2001, to which the final report was attached.
- 39 In view of the fact that the final report has no binding legal affect with regard to the competent Spanish authorities, it likewise cannot be regarded as a decision capable of affecting the applicant's legal position.
- 40 It follows from the above that the applicant could not have brought an action for annulment against the final report, since it is not an act adversely affecting it within the meaning of Article 230 EC. Accordingly, it is likewise not able to challenge the contested letter.
- 41 It follows that this action must be declared inadmissible in its entirety.

Costs

- ⁴² Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleadings. Since the applicant has been unsuccessful, and the Commission has asked for costs, the applicant must be ordered to pay its own costs and those of the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby orders:

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

Luxembourg, 13 July 2004.

H. Jung

Registrar

B. Vesterdorf

President