

Case T-409/09

Evropaïki Dynamiki — Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE

v

European Commission

(Non-contractual liability — Public service contracts — Rejection of a tenderer's bid — Annulment of the decision by a judgment of the General Court — Limitation period — Time-limits on account of distance — Action in part inadmissible and in part manifestly unfounded in law)

Order of the General Court (First Chamber), 22 June 2011 II - 3769

Summary of the Order

1. *Actions for damages — Non-contractual liability — Limitation period*
(*Statute of the Court of Justice, Art. 46; Rules of Procedure of the General Court, Art. 102(2)*)
2. *Non-contractual liability — Conditions — Real and certain damage caused by an illegal measure — Definition — Loss of opportunity — Included — Conditions*
(*Art. 288 EC*)
3. *Actions for damages — Non-contractual liability — Limitation period — Point from which time starts to run*
(*Statute of the Court of Justice, Art. 46*)

4. *European Union public contracts — Non-contractual liability on the part of the European Union — Limitation period — Point from which time starts to run*
 (Statute of the Court of Justice, Art. 46)

1. The extension on account of distance relates only to the prescribed time-limits and not to the limitation period, the passing of which results in the action to establish non-contractual liability being barred and which is not therefore increased by any extension on account of distance. In that regard, the rules on limitation periods which govern actions to establish non-contractual liability on the part of the European Union are based on strictly objective criteria failing which the principle of legal certainty on which those rules specifically rely would be undermined.

Procedural time-limits, such as those prescribed for bringing proceedings, and the five-year limitation period in respect of actions to establish non-contractual liability against the European Union are time-limits which are, by nature, different. The periods prescribed for bringing proceedings are a matter of public policy and are not subject to the discretion of the parties or the court, since they were laid down with a view to ensuring clarity and legal certainty. The Courts of the European Union must therefore examine, even of their own motion, whether the action was brought within the prescribed period. By contrast, a court may not of its own motion raise the issue of

time limitation of actions to establish non-contractual liability.

Furthermore, the period of limitation is interrupted if proceedings are instituted before the Courts of the European Union or if prior to such proceedings an application is made by the aggrieved party to the relevant institution. In the latter case, interruption occurs only if the application is followed by proceedings within the time-limit determined by reference to Articles 230 EC or 232 EC, as appropriate.

In any event, there is no distinction, in calculating the limitation period, according to whether the cause of the interruption of that period is the institution of proceedings or the submission of an application prior to such proceedings. However, the application, in that regard, of the extension on account of distance has the consequence that limitation occurs at the end of a different period according to whether the aggrieved party has chosen to bring the matter directly to the Courts of the European Union or, beforehand, to the relevant institution.

Such a difference, which is not provided for by the Statute of the Court of Justice, makes the expiry of the limitation period dependent on a factor which is not objective and also has the consequence of encouraging the settling of disputes by means of court proceedings rather than by seeking amicable solutions.

would have been awarded the first contract. However, in a public tendering system, the contracting authority has a broad discretion in deciding to award a contract.

(see paras 47, 83-87)

(see paras 46, 56, 75-78)

2. In order for the European Union to incur non-contractual liability, a number of requirements must be satisfied, namely that the alleged conduct of the institutions is unlawful, that the damage is real and that there is a causal link between the conduct alleged and the damage relied upon.
3. The limitation period begins once all the requirements governing the obligation to provide compensation are satisfied and, in particular, once the damage to be made good has materialised. In particular, in disputes arising from individual measures, the limitation period begins as soon as those measures have produced their effects vis-à-vis the persons concerned by them.

One of those requirements is lacking if it is impossible to establish the existence of any causal link between the unlawful rejection of a tenderer's tender during the first tendering procedure and the loss which the tenderer allegedly suffered owing to the loss of the chance of securing other contracts linked to the first contract.

Specific and detailed knowledge of the facts of the case on the part of the victim is of no significance since knowledge of the facts is not one of the conditions which must be met in order for the limitation period to begin running.

In any event, the loss of the chance of securing the second contract can be regarded as real and certain damage only if, in the absence of the improper conduct by the Commission, there would be no doubt that the undertaking concerned

If that were not the case, a confusion would arise between the procedural criterion relating to the commencement of the limitation period and the finding that the conditions for liability were satisfied, which can ultimately be made only by the court before which the matter has been brought for final adjudication on its substance. Preventing the limitation period

for proceedings against the European Union to establish non-contractual liability from starting to run as long as the party who has allegedly been harmed is not personally convinced that he has suffered damage has the result that the point at which those proceedings become time-barred varies according to the individual perception that each party might have as to the reality of the damage, something which is at variance with the requirement of legal certainty necessary for the application of limitation periods.

(see paras 48, 50, 62, 64)

4. The requirement relating to the existence of certain damage is met where the damage is imminent and foreseeable with sufficient certainty, even if the damage cannot yet be precisely assessed, and the period of limitation cannot begin until the financial loss has in fact materialised. It is irrelevant, as regards the starting point of the period of limitation, that the European Union's unlawful conduct was established by a judicial decision.

In a tendering procedure, the loss suffered, on the part of the unsuccessful candidate, as a result of not being awarded the contract and as a result of the loss of the chance of securing that contract stems directly and immediately from the decision to reject its tender, irrespective of the future signature of a specific contract between the Community institution and the successful candidate and of the reasons for that rejection.

Consequently, the rejection of the tender constitutes the event giving rise to the proceedings to establish liability in the field of public procurement and causes the loss allegedly suffered by the unsuccessful tenderer to materialise. It is therefore as from the day on which the unsuccessful tenderer is personally informed of the rejection of its tender that the limitation period begins to run. The date of publication of the award notice in the *Official Journal* is in that regard irrelevant.

(see paras 52, 61, 66, 68, 70)