ORDER OF THE GENERAL COURT (Fourth Chamber)

24 March 2011 *

In Case T-36/10,

Internationaler Hilfsfonds eV, established in Rosbach (Germany), represented initially by H. Kaltenecker, and subsequently by R. Böhm, and lastly by H. Kaltenecker, lawyers,

applicant,

supported by

Kingdom of Denmark, represented initially by B. Weis Fogh and V. Pasternak Jørgensen, and subsequently by V. Pasternak Jørgensen, C. Vang and S. Juul Jørgensen, acting as Agents,

intervener,

* Language of the case: German.

European Commission, represented by P. Costa de Oliveira and T. Scharf, acting as Agents,

defendant,

APPLICATION for the annulment of the Commission's decisions of 9 October 2009 and 1 December 2009 refusing Internationaler Hilfsfonds full access to the file relating to the LIEN 97-2011 contract,

THE GENERAL COURT (Fourth Chamber),

composed of I. Pelikánová, President, K. Jürimäe (Rapporteur) and M. van der Woude, Judges,

Registrar: E. Coulon,

makes the following

Order

Legal context

1 Article 7(1) and (2) of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43) provide:

'(1) An application for access to a document shall be handled promptly…

(2) In the event of a total or partial refusal, the applicant may, within 15 working days of receiving the institution's reply, make a confirmatory application asking the institution to reconsider its position.'

2 In the words of Article 8 of Regulation No 1049/2001, which is entitled 'Processing of confirmatory applications':

'(1) A confirmatory application shall be handled promptly. Within 15 working days from registration of such an application, the institution shall either grant access to

the document requested and provide access in accordance with Article 10 within that period or, in a written reply, state the reasons for the total or partial refusal. In the event of a total or partial refusal, the institution shall inform the applicant of the remedies open to him or her, namely instituting court proceedings against the institution and/or making a complaint to the Ombudsman, under the conditions laid down in Articles [263 TFEU] and [228 TFEU].

(2) In exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents, the time limit provided for in paragraph 1 may be extended by 15 working days, provided that the applicant is notified in advance and that detailed reasons are given.

(3) Failure by the institution to reply within the prescribed time limit shall be considered as a negative reply and entitle the applicant to institute court proceedings against the institution and/or make a complaint to the Ombudsman, under the relevant provisions of the [TFEU].'

Background to the dispute

3 The applicant, Internationaler Hilfsfonds eV, is a non-governmental organisation established under German law which is active in the field of humanitarian aid. On 28 April 1998, it signed with the Commission of the European Communities a contract named 'LIEN 97-2011' ('the contract'), with a view to the joint funding of a medical assistance programme organised by it in Kazakhstan.

4 On 1 October 1999, the Commission terminated the contract unilaterally and on 6 August 2001, it informed the applicant of its decision, taken further to that termination, to recover a certain sum paid to the applicant under that contract.

5 On 9 March 2002, the applicant made an application to the Commission seeking access to the documents relating to the contract. As that application was only partially satisfied, the applicant, by letter of 11 July 2002, addressed to the President of the Commission, applied for full access to the documents relating to the contract. Since the application did not give full satisfaction to the applicant, it lodged a complaint with the European Ombudsman criticising the Commission's refusal to grant it full access to the documents relating to the contract. The complaint was registered under the reference 1874/2003/GG.

6 Further to a draft recommendation of 15 July 2004 made by the Ombudsman to the Commission and a detailed opinion sent to the Ombudsman by the Commission, on 14 December 2004, the Ombudsman adopted a definitive decision in which it found, by means of a critical remark, that the fact that the Commission did not provide valid reasons capable of justifying its refusal to grant the applicant access to several documents relating to the contract constituted an instance of maladministration.

7 On 22 December 2004, acting on the basis of the conclusions of the Ombudsman's definitive decision of 14 December 2004, the applicant made a new application to the President of the Commission for full access to the documents relating to the contract. By letter of 14 February 2005, the Commission responded to that application and, in that respect, decided not to grant the applicant access to documents other than those to which it had already granted access.

8 By application lodged at the Registry of the General Court on 11 April 2005, the applicant brought an action for annulment of the Commission's decision of 14 February 2005, which was registered as Case T-141/05. Following a plea of inadmissibility raised by the Commission pursuant to Article 114(1) of the Rules of Procedure of the General Court, the General Court, in its judgment of 5 June 2008 in Case T-141/05 *Internationaler Hilfsfonds* v *Commission*, not published in the ECR, dismissed the application as inadmissible.

9 Following an appeal brought by the applicant pursuant to Article 56 of the Statute of the Court of Justice, the Court of Justice, by decision in Case C-362/08 P *Internationaler Hilfsfonds* v *Commission* [2010] ECR I-669, set aside the judgment of 5 June 2008 in Case T-141/05 *Internationaler Hilfsfonds* v *Commission*, rejected the plea of inadmissibility raised by the Commission before the General Court and referred the case back to the General Court for judgment on the heads of claim of Internationaler Hilfsfonds eV for annulment of the Commission's decision of 14 February 2005 refusing it access to certain documents in the Commission's possession. The case referred back to the General Court, the reference number of which is now T-141/05 RENV, is currently pending.

10 By letters of 28 and 31 August 2009, the applicant made a new application for full access to the documents relating to the contract.

11 By letter of 9 October 2009, the Commission responded to the new application for full access to the documents relating to the contract by stating that, in the light of the time elapsed since its decision on the application of 22 December 2004 for full access to the documents relating to the contract, which is the subject-matter of Case T-141/05, it had carried out a new examination of the documents in the file at issue to which access had not been granted and, following that examination, it had decided to grant the applicant more extensive access, although not full access, to the said documents.

12 By letter of 15 October 2009, received by the Commission on 19 October 2009, the applicant made an application by which it invited the Commission to re-examine its response of 9 October 2009 to the new application for full access to the documents relating to the contract contained in the letters of 28 and 31 August 2009.

13 On 10 November 2009, the Commission extended the prescribed time-limit for response to the applicant's application of 15 October 2009 to 1 December 2009.

14 By letter of 1 December 2009, received by the applicant on 2 December 2009, the Commission stated, first of all, that, since the applicant's application of 15 October 2009 required a comprehensive examination of the many relevant documents and discussions with the other departments on this subject were ongoing, it was not, unfortunately, in a position to adopt a definitive decision. The Commission also added the following:

'Under Article 8(3) of Regulation … No 1049/2001, you are entitled to bring proceedings before the [General Court] or to make a complaint to the Ombudsman. The letter of response is however nearly ready, with the result that you can expect a detailed response from the Commission in the near future. … You will be notified of the decision as soon as possible. …'

Procedure and forms of order sought

15 By application lodged at the Registry of the General Court on 1 February 2010, the applicant brought the present action against the Commission's decisions which include the letters of 9 October 2009 and 1 December 2009.

16 On 5 May 2010, the Commission lodged at the Registry of the General Court a defence containing a request for a declaration of no need to adjudicate and an application for a measure of organisation of procedure.

17 By letter lodged at the Registry of the General Court on 20 July 2010, the applicant produced, in accordance with Article 48 of the Rules of Procedure, new pleas in law, in order to include in its arguments in support of the present action arguments that are alleged to be similar to those which the General Court upheld in Case T-111/07 *Agrofert Holding* v *Commission* [2010], not published in the ECR.

18 By order of the President of the Second Chamber of the General Court of 24 August 2010, the Kingdom of Denmark was granted leave to intervene in support of the forms of order sought by the applicant.

19 Following a request for further information from the General Court inviting the parties to the proceedings to inform it of any comments and any conclusions drawn from the grounds and the operative part of the judgment in Joined Cases T-355/04 and T-446/04 *Co-Frutta* v *Commission* [2010] ECR II-1, so far as concerns the applicant's legal interest in bringing proceedings following the adoption of the decision of 29 April 2010 and proceedings being brought in Case T-300/10, those parties submitted their replies within the prescribed time-limit.

20 In its reply by letter of 14 October 2010, the applicant claims that it retains a legal interest in bringing proceedings in the present case and that, supposing that the General Court decides otherwise, it should, in the light of the circumstances of the present case, order the Commission to bear its own costs and to pay those incurred by the applicant.

21 In its reply by letter of 14 October 2010, the Commission claims, inter alia, that, since the applicant brought an application for annulment of the decision of 29 April 2010, it no longer retains a legal interest in bringing proceedings in the present case.

22 In its reply by letter of 15 October 2010, the Kingdom of Denmark did not wish to make comments on the applicant's legal interest in bringing proceedings.

23 The applicant, supported by the Kingdom of Denmark, claims that the Court should:

— annul the Commission's decisions of 9 October 2009 and 1 December 2009 refusing Internationaler Hilfsfonds access to the undisclosed documents relating to the contract;

— order the Commission to pay the costs.

24 The Commission contends that the Court should:

— dismiss the action as inadmissible;

— should the Court decide that the action is directed against an implied negative decision, dismiss the action on the ground that it has no purpose;

— order the applicant to pay the costs.

Law

25 It should be noted at the outset that, so far as concerns the purely factual context in which the two decisions contested by the applicant in the present case were adopted, it is not disputed by the parties that the letter of 9 October 2009 was addressed to the applicant in reply to its new application for full access to the documents relating to the contract contained in the letters of 28 and 31 August 2009. Moreover, it is not disputed that the letter of 1 December 2009 was addressed to the applicant following the submission of its application of 15 October 2009.

26 In addition, as the applicant itself expressly acknowledged in the application and which is not disputed by the Commission, it must be found that, first, the applicant's letters of 28 and 31 August 2009 were addressed to the Commission in accordance with Article 7 of Regulation No 1049/2001 and, therefore, must together be considered as the 'initial application' within the meaning of that article ('the initial application') and, second, the letter of 15 October 2009 was addressed to the Commission in accordance with Article 8 of that regulation and must therefore be considered as the 'confirmatory application' within the meaning of that article ('the confirmatory application').

27 With regard to the foregoing considerations, an examination should be carried out, first, on the admissibility of the heads of claim of the applicant for annulment of the Commission's decision contained in the letter of 9 October 2009 and, second, as to whether the applicant retains a legal interest in bringing proceedings with regard to the heads of claim for annulment of the Commission's decision contained in the letter of 1 December 2009.

Admissibility of the heads of claim against the Commission's decision of 9 October 2009

28 Under Article 111 of the Rules of Procedure, where the action is manifestly inadmissible, the Court may, by reasoned order and without taking further steps in the proceedings, give a decision on the action.

29 In the present case, the Court considers that it has sufficient information, in the form of the documents in the case, and decides, pursuant to that article, to give its decision on the admissibility of the heads of claim for annulment of the Commission's decision of 9 October 2009 without taking further steps in the proceedings.

30 The sixth paragraph of Article 263 TFEU provides that proceedings for annulment are to be instituted within two months of the publication of the measure, or of its notification to the applicant or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be. In accordance with Article 102(2) of the Rules of Procedure, that period must be extended on account of distance by a single period of 10 days.

31 In accordance with settled case-law, the prescribed time-limit for bringing an action is a matter of public policy, having been established in order to ensure that legal

positions are clear and certain and to avoid any discrimination or arbitrary treatment in the administration of justice, and the EU Courts must ascertain, of their own motion, whether that time-limit has been observed (Case C-246/95 *Coen* [1997] ECR I-403, paragraph 21, and Joined Cases T-121/96 and T-151/96 *Mutual Aid Administration Services* v *Commission* [1997] ECR II-1355, paragraphs 38 and 39).

32 In the present case, it is common ground that, in its confirmatory application of 15 October 2010, the applicant invited the Commission to reconsider its position, set out in its letter of 9 October 2009, with regard to the applicant's new application. Without there being any need to determine the exact date on which the letter of 9 October 2009 was notified to the applicant or indeed on which date it came to the applicant's knowledge, it should therefore be stated that the date on which the applicant was notified or became aware was clearly 15 October 2010 at the latest, the date on which the applicant made its confirmatory application.

33 Moreover, the applicant has not demonstrated, or even alleged, the existence of unforeseeable circumstances or *force majeure* so as to permit a derogation from the time-limit in question on the basis of the second paragraph of Article 45 of the Statute of the Court of Justice, which applies to proceedings before the General Court by virtue of Article 53 thereof.

34 In the light of the foregoing, the period of two months prescribed for bringing an action began to run, in accordance with Article 101(1)(a) of the Rules of Procedure, on 16 October 2009 at the latest, that is to say the day after the date on which the applicant was notified or became aware of the Commission's letter of 9 October 2009. The period therefore expired, at the latest, on 29 December 2009, in view of the extension on account of distance by 10 days and, in accordance with Article 101(2) of the Rules of Procedure, the extension of the period where it would otherwise end on a Sunday or official holiday, or, at least, one month and three days before the present action was brought, in so far as it challenges the Commission's decision of 9 October 2009, on 1 February 2010.

35 It follows that the present action, in so far as it seeks the annulment of the decision which includes the letter of 9 October 2009, must be regarded as out of time and therefore dismissed as inadmissible, without there being any need to examine the other pleas of inadmissibility raised by the Commission.

The applicant's legal interest in bringing proceedings with regard to the heads of claim against the Commission's decision of 1 December 2009

The subject-matter of the heads of claim against the Commission's decision of 1 December 2009

36 The parties disagree as to whether the heads of claim for annulment of the Commission's decision of 1 December 2009 are directed at an implied negative decision rejecting the confirmatory application ('the implied decision of rejection').

37 In that regard, first of all, the Court finds that, in the present case, in its letter of 1 December 2009, the Commission informed the applicant that it was not in a position to adopt a definitive decision, within the prescribed time-limit, on the confirmatory application. Similarly, the Commission, in that letter, informed the applicant that, in accordance with Article 8(3) of Regulation No 1049/2001, it is entitled to bring proceedings before the General Court or to make a complaint to the Ombudsman. In the light of the very wording of the letter of 1 December 2009, it must thus be held that the Commission not only established its own inability to reply, within the prescribed period and following the extension thereof, to the confirmatory application, but, furthermore, took steps to draw attention to the legal remedies available to the applicant, under Article 8(3) of Regulation No 1049/2001, in the case of failure by that

institution to reply to the confirmatory application. Consequently, it must be held, as the applicant argues in its reply, that, in its letter of 1 December 2009, the Commission was mainly content, whilst informing the applicant, incidentally, that it could 'expect a detailed response from the Commission in the near future', to acknowledge that it was not in a position to adopt a definitive decision on the confirmatory application and that an action might be brought against that failure to reply.

38 Second, the Court points out that, in accordance with settled case-law, in principle, both the Court of Justice and the General Court refuse to acknowledge, without calling into question the system of legal remedies established by the TFEU, that the mere silence of an institution is to be considered to be an implied decision, except where there are express provisions laying down a time-limit after which an implied decision will be deemed to have been taken by an institution which has been asked to state its position and prescribing the content of that decision (Case C-123/03 P *Commission* v *Greencore* [2004] ECR I-11647, paragraph 45; Joined Cases T-189/95, T-39/96 and T-123/96 *SGA* v *Commission* [1999] ECR II-3587, paragraph 27; Joined Cases T-190/95 and T-45/96 *Sodima* v *Commission* [1999] ECR II-3617, paragraph 32; and Case T-437/05 *Brink's Security Luxembourg* v *Commission* [2009] ECR II-3233, paragraph 55).

39 With regard to Regulation No 1049/2001, it is clear from Article 8(3) thereof that the legislature provided that failure by the institution to reply within the prescribed time-limit, in respect of the processing of confirmatory applications provided for in Article 8(1) and (2) of that regulation, is to be considered as a negative reply.

40 It must therefore be held that Article 8(3) of Regulation No 1049/2001 expressly establishes a time-limit after which, in the case of failure to reply to the confirmatory application, the institution concerned is considered to have adopted an implied

decision and, moreover, defines the content of the implied decision, that is to say that it is to be considered to be a negative decision.

41 Third, the Court observes that the legislature has, in Article 8(3) of Regulation No 1049/2001, expressly provided that an action may be brought by the applicant against the implied decision of rejection pursuant to the provisions of the TFEU.

42 In accordance with the case-law cited in paragraph 38 above, it must therefore be found that the silence of an institution following a confirmatory application is to be considered to be an implied decision of rejection against which an action may be brought pursuant to Article 263 TFEU.

43 In the light of the foregoing, the Court finds that the heads of claim for annulment of the Commission's decision of 1 December 2009 must be interpreted as seeking annulment of the implied decision of rejection further to the Commission's failure to respond to the confirmatory application, as acknowledged by the Commission itself in the aforementioned letter.

The applicant's legal interest in bringing proceedings with regard to the heads of claim for annulment of the implied decision of rejection

44 Under Article 113 of the Rules of Procedure, the General Court may at any time, of its own motion, after hearing the parties, decide whether there exists any absolute bar to proceeding with an action. In this case the Court considers that it has sufficient information from the documents submitted and the arguments presented by the parties during the written procedure, so that there is no need to open the oral procedure.

45 According to settled case-law, the lack of legal interest in bringing proceedings constitutes an absolute bar to proceedings, which the EU courts may raise of their own motion (see Case T-310/00 *MCI* v *Commission* [2004] ECR II-3253, paragraph 45 and the case-law cited).

46 In that regard, it must be borne in mind that the conditions governing the admissibility of an action must be judged, subject to the separate question of the loss of an interest in bringing proceedings, at the time when the application is lodged (see Case T-131/99 *Shaw and Falla* v *Commission* [2002] ECR II-2023, paragraph 29 and the case-law cited). However, in the interest of the proper administration of justice, that consideration relating to the time when the admissibility of the action is assessed cannot prevent the Court from finding that there is no longer any need to adjudicate on the action in the event that an applicant who initially had a legal interest in bringing proceedings has lost all personal interest in having the contested decision annulled on account of an event occurring after that application was lodged. For an applicant to be entitled to pursue an action seeking the annulment of a decision, he must retain a personal interest in the annulment of the contested decision (see the order in Case T-28/02 *First Data and Others* v *Commission* [2005] ECR II-4119, paragraphs 36 and 37, and Case T-301/01 *Alitalia* v *Commission* [2008] ECR II-1753, paragraph 37), because, otherwise, if the applicant's interest in bringing proceedings disappears in the course of proceedings, a decision of the General Court on the merits cannot bring him any benefit (Case C-362/05 P *Wunenburger* v *Commission* [2007] ECR I-4333, paragraph 43, and *Co-Frutta* v *Commission*, paragraph 44).

47 In the present case, it is not disputed by the parties that, on the date on which this action was brought, the applicant had only received, in response to its confirmatory application, the letter of 1 December 2009 by which the Commission informed it, in essence, of the implied decision of rejection. Thereafter, the applicant had a legal interest in bringing proceedings and the action was admissible.

48 However, it is also common ground that, further to the Commission's letter of 1 December 2009 (paragraph 14 above), the Commission, by letter of 29 April 2010, adopted an explicit and definitive decision on the applicant's confirmatory application and, in this respect, granted the applicant access to new documents on file relating to the contract, yet without granting full access. By application lodged at the Registry of the General Court on 9 July 2010, the applicant brought an action for the annulment of the Commission's decision of 29 April 2010.

49 Furthermore, it is clear from the arguments set out by the applicant in the reply dated 5 July 2010 that it did not wish, further to the Commission's decision of 29 April 2010, to amend the heads of claim in the present action for annulment. On the contrary, the applicant, also in the reply, expressly informed the Court that it had decided to make a fresh application for the annulment of the Commission's decision of 29 April 2010 which, as set out in paragraph 48 above, was lodged on 9 July 2010 in accordance with Article 263 TFEU.

50 Consequently, there is no longer any need to adjudicate on the present action in so far as it seeks the annulment of an implied decision of rejection, since the applicant no longer has a personal interest in that decision on account of the Commission's decision of 29 April 2010, adopted in response to the confirmatory application, the annulment of which the applicant seeks in Case T-300/10 *Internationaler Hilfsfonds* v *Commission*, pending before the General Court. By adopting its decision of 29 April 2010, the Commission explicitly responded to the confirmatory application, which the applicant does not dispute, and withdrawal of the implied decision of rejection may therefore be inferred.

51 It is apparent from all of the foregoing considerations that the present action, without it being necessary to examine whether the applicant's new pleas of law raised in its letter of 20 July 2010 (paragraph 17 above) are admissible, must be declared

manifestly inadmissible in so far as it seeks the annulment of the Commission's decision of 9 October 2009 and as having lost its purpose in so far as it seeks the annulment of the implied decision of rejection.

Costs

52 First of all, it must be borne in mind that, 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 in so far as its action for the annulment of the Commission's decision of 9 October 2009 is manifestly inadmissible, the applicant must be ordered to pay its own costs as well as those incurred by the Commission relating to the heads of claim for annulment of that decision.

53 Next, it must be borne in mind that, under Article 87(6) of the Rules of Procedure, where a case does not proceed to judgment the costs are in the discretion of the Court.

54 In the present case, in respect of the fact that the action has ceased to have any purpose in so far as it seeks the annulment of the implied decision of rejection, it must be held that, as the Commission explicitly acknowledged in its letter of 1 December 2009, it was not in a position, after expiry of the time-limit established pursuant to Article 8 of Regulation No 1049/2001, that is to say, in this case, following extension, 1 December 2009, to adopt a definitive decision on the confirmatory application. Moreover, contrary to what was stated by the Commission in that letter, that the

applicant could expect a detailed response from the Commission 'in the near future', it should be noted that the confirmatory decision was not adopted until 29 April 2010, that is to say five months after the letter of 1 December 2009, received by the applicant on 2 December 2009, and, therefore, more than two and a half months after expiry of the prescribed time-limit for the applicant to bring an action for annulment under Article 263 TFEU to challenge, in accordance with Article 8(3) of Regulation No 1049/2001, the lawfulness of the implied decision of rejection of the confirmatory application. Lastly, in so far as it is not for the General Court to rule on the soundness of the applicant's decision to make a fresh application for the annulment of the Commission's decision of 29 April 2010, instead of updating its heads of claim in the present action in order to take account of that decision, account cannot be taken of this circumstance at the stage of the settlement of the costs by the General Court under Article 87(6) of the Rules of Procedure.

55 Therefore, in the light of the factual circumstances of the case and, in particular, the fact that the Commission manifestly exceeded the prescribed time-limit, pursuant to Article 8 of Regulation No 1049/2001, to reply to the confirmatory application, with the result that the applicant had no choice, in order to safeguard its rights, other than to bring the present action for annulment of the implied decision of rejection, the Commission must be ordered to pay its own costs and those incurred by the applicant relating to the heads of claim for annulment of the implied decision of rejection.

56 Lastly, under the first subparagraph of Article 87(4) of the Rules of Procedure, Member States which intervene in the proceedings are to bear their own costs. Therefore, the Kingdom of Denmark is to bear its own costs.

On those grounds,

THE GENERAL COURT (Fourth Chamber)

hereby orders:

1. **In so far as it is directed against the Commission's decision of 9 October 2009, the action for annulment is dismissed as inadmissible.**

2. **There is no longer any need to adjudicate on the heads of claim in the action brought by Internationaler Hilfsfonds eV for annulment of the implied decision of the European Commission rejecting its request of 15 October 2009 for access to documents relating to the LIEN 97-2011 contract.**

3. **Internationaler Hilfsfonds shall bear its own costs and pay those incurred by the Commission relating to the heads of claim for annulment, in so far as they are directed against the Commission's decision of 9 October 2009.**

4. **The Commission shall bear its own costs and pay those incurred by Internationaler Hilfsfonds relating to the heads of claim for annulment, in so far as they are directed against the Commission's decision of 1 December 2009.**

5. The Kingdom of Denmark shall bear its own costs.

Luxembourg, 24 March 2011.

E. Coulon — Registrar

I. Pelikánová — President