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COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES
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T-2/04 -22

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In Case **T-2/04**

Cemender Korkmaz
The Corner House
The Kurdish Human Rights Project

against

Commission of the European Communities

the Registrar of the Court of First Instance encloses herewith a certified copy of the objection as to admissibility (reg. no. 240247) and notifies you that he has fixed **22 July 2004** (including extension on account of distance) as the date by which the applicant may lodge its observations on the said objection (to be lodged in accordance with Article 43(1) of the Rules of Procedure in the form of an original and **6** certified copies).

COMMUNITATVM EVROPÆARVM CVRIA

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EUROPEAN COMMISSION

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The Registrar:
(Signature)

Brussels, 18 May 2004

JURM(2004) 10018

TO THE PRESIDENT AND THE MEMBERS OF THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES

PRELIMINARY OBJECTION OF ADMISSIBILITY

SUBMITTED PURSUANT TO Article 114(1) of the Rules of Procedure of the Court of First Instance by

THE COMMISSION OF THE EUROPEAN COMMUNITIES

represented by Michael Wilderspin and Géraldine Boudot, Members of its Legal Service, with an address for service in Luxembourg at the office of Luis Escobar Guerrero, a Member of its Legal Service, at the Centre Wagner, Kirchberg, Luxembourg,

In Case T-2/04

CEMENDER KORKMAZ

THE CORNER HOUSE

THE KURDISH HUMAN RIGHTS PROJECT

Applicants

Against

COMMISSION OF THE EUROPEAN COMMUNITIES

Defendant

in the matter of an application under Articles 230 and 231 or in the alternative Articles 232 and 233 of the EC Treaty concerning the omission by the Commission to propose to freeze pre-accession aid to Turkey.

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A. LEGAL BACKGROUND AND FACTS OF THE CASE

I. LEGAL FRAMEWORK

a. Council Regulation (EC) No 390/2001

1. Council Regulation (EC) No 390/2001 of 26 February 2001[1] on assistance to Turkey in the framework of the pre-accession strategy, and in particular on the establishment of an Accession Partnership provides *inter alia* that an Accession Partnership shall be established for Turkey (Article 1).

Article 2 provides as follows:

"Acting on a proposal from the Commission, the Council shall decide by qualified majority on the principles, priorities, intermediate objectives and conditions contained in the Accession Partnership, as it will be submitted to Turkey, as well as on the subsequent significant adjustments to it."

Article 4 provides as follows:

"Where an element that is essential for continuing to grant pre-accession assistance is lacking, in particular when the commitments contained in the EC-Turkey Agreements are not respected and/or progress towards fulfilment of the Copenhagen criteria is insufficient, the Council, acting by a qualified majority on a proposal from the Commission, may take appropriate steps with regard to pre-accession assistance granted to Turkey".

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[1] OJ L 58 of 28 February 2001, p. 1.

b. Council Decision 2001/235/EC

2. The principles, priorities, intermediate objectives and conditions contained in the Accession Partnership for Turkey are set out in the Annex to Council Decision 2001/235/EC of 8 March 2001 on the principles, priorities, intermediate objectives and conditions contained in the Accession Partnership with the Republic of Turkey[2] under the title "Turkey: 2000 Accession Partnership".

3. Point 6 of the Annex, entitled "Conditionality" provides that "Community assistance for financing projects through the pre-accession instruments for Turkey is conditional on respect by Turkey of its commitments under the Association Agreement, customs union and related decisions of the EC-Turkey Association Council...". Point 6 also refers to the possibility of a decision by the Council on the basis of Article 4 of Regulation 390/2001 suspending financial assistance in the event of failure to respect those general conditions.

c. Council Regulation (EC) No 2500/2001

4. Council Regulation (EC) No 2500/2001 of 17 December 2001 concerning pre-accession financial assistance for Turkey and amending Regulations (EEC) No 3906/89, (EC) No 1267/1999 and (EC) No 555/2000[3] establishes detailed rules for the provision of pre-accession financial assistance to Turkey to support the priorities defined in the Accession Partnership for Turkey.

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[2] OJ L 85 of 24 March 2001, p.13.

[3] OJ L 342 of 27 December 2001, p. 1.

II. FACTS OF THE CASE

a. The Pipeline project

5. The Baku-Tbilisi-Ceyhan crude oil pipeline project (hereafter referred to as the "pipeline project") is a pipeline which will carry crude oil from the Caspian Sea to the maritime terminal in Ceyhan in Turkey. The total length of the pipeline is 1, 768 kilometres, of which 1, 076 kilometres are situated in Turkey. The project is undertaken by BTC Co, a consortium of eleven companies.

6. According to the information at the Commission's disposal, the International Finance Corporation, which is the private sector arm of the World Bank, has approved a loan of $ 310 million for the pipeline project and an associated project. At the same time, the European Bank for Reconstruction and Development has approved a $250 million loan to Georgia and Azerbaijan in the context of the pipeline project.

7. However, the Community is not involved in the financing of the pipeline project. The Commission is consequently somewhat perplexed that the applicants feel able to assert peremptorily that reduction or suspension of aid to Turkey would have had the effect of causing work on the pipeline to be abandoned (see paragraph 1.7 of the application). In the Commission's view, this assertion is simply not accurate and is certainly not substantiated in the application. This point is examined further, infra, insofar as it is relevant to the question of the applicants' *locus standi.*

b. The alleged impact of the pipeline project on the applicants

8. The applicants give some sketchy indications, at pages 19 and 20 of the application as to how they claim to be affected by the pipeline project. The arguments, insofar as

they are relevant to the question of the applicants' *locus standi*, are examined below at paragraphs 32-39.

c. Correspondence with the Commission

9. The Commission refers to the application, at paragraphs 1.5 and 1.6, where the applicants have set out the chronology of the relevant correspondence with the Commission which is annexed to the application.

B. PRELIMINARY OBJECTION OF INADMISSIBILITY

i) The Form of Order sought

The applicants ask the Court:

1. to have the relevant finding in the 2003 Regular Report on Turkey's progress towards accession to be declared void; and/or:

2. to declare contrary to the EC Treaty the Commission's failure to act; and in either event:

3. to require the Commission to:

3.1. propose to the Council the freezing of pre-accession assistance pending a resolution of Turkey's failures to comply with the EU accession criteria identified by the Council; and/or

3.2. act through the mechanisms of the EU-Turkey Association Agreement, the institutions of which are supposed to monitor the Accession Partnership; and/or

3.3. declare a moratorium on further accession negotiations pending the resolution of the said failures by Turkey.

ii) The action for annulment

10. In the form of Order sought, the applicants ask for "the relevant finding" in the 2003 Regular Report on Turkey's progress towards accession (hereafter the "2003 Report" to be declared void. The applicants do not specify precisely to what finding they are referring. However, in the heading entitled "Basis of application" the applicants assert that they are seeking annulment of "the Commission's negative decision refusing to make a recommendation to the Council in relation to the Community's pre-accession funding for Turkey" by its 2003 Report.

11. The Commission has some difficulty in deciding precisely what the applicant is asking for, since the application is ambiguous on this point.

12. If the Form of Order sought is to be taken literally, the applicants appear to be asking the Court to declare void factual findings to the effect that Turkey has made progress towards meeting the Copenhagen criteria. If this is the correct interpretation, the Commission submits that the application is inadmissible on this point. It is settled case law that acts against which an action for annulment may be brought under Article 230 are measures which produce binding legal effects capable of affecting the applicants' interests and clearly altering his legal position (judgment in Joined Cases T-377/00, T-379/00, T-380/00, T-260/01 and T-272/01, Philip Morris and others v Commission, 2003 ECR p. II-1, paragraphs 77 et seq; judgment in Case T-186/94, Guérin v Commission, 1995 ECR p. II-1753, at paragraph 39; judgment in Case 60/81, IBM v Commission, 1981 ECR 2639, paragraph 9). Factual findings in a report are not acts producing binding legal effects and are hence not capable of being the subject of an action for annulment.

13. However, taken in context with the explanation in paragraph 1.1 of the application it appears more probable that what the applicants are in reality seeking is the annulment of a purported decision of the Commission not to make a proposal to the Council in relation to pre-accession funding to Turkey pursuant to Article 4 of Regulation 390/2001. If this is the correct interpretation, the application is devoid of purpose on this point because no such decision was adopted. It is not clear why the applicants appear to consider that comments in a regular report are to be equated with a formal decision of the Commission not to make a legislative proposal.[4]

14. In the Commission's view, the application on this point adds nothing to the second head of claim which is that the Court declares unlawful the Commission's alleged failure to act in not putting forward a "recommendation" to the Council. The Commission therefore invites the Court of First Instance to treat this claim as being either devoid of purpose or as being identical to the claim at 1.2.2 of the application, which is examined in detail *infra*.

15. Should the applicants dispute these interpretations of its claim under 1.2.1, the Commission reserves the right to return to this question at a later stage.

iii) The action for failure to act

16. The applicant claims in the alternative that the Commission's failure to act, which allegedly consists in not making a "recommendation" to the Council, should be declared contrary to the EC Treaty. If the applicants really required the Commission to adopt a recommendation, the failure to do so could not be challenged under Article 232. However, the Commission does not insist upon such a legalistic interpretation of the application. As already explained, the Commission considers

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[4] It should be noted that the applicants consistently use the expression « recommendation ». If this expression is to be taken literally, the application is in any event inadmissible because it flows directly from the first paragraph of Article 230 that a recommendation may not be the subject of an action for annulment.

that properly interpreted, the applicants' claim on this point is referring to the Commission's alleged failure to adopt a proposal pursuant to Article 4 of Regulation 390/2001 proposing to the Council to take appropriate steps with regard to pre-accession assistance granted to Turkey.

17. The first applicant has not called upon the Commission to act.

18. It is a procedural requirement under the second paragraph of Article 232 that the Community institution, *in casu* the Commission, should first have been called upon to act. The applicants specifically rely on a letter of 2 September 2003 addressed to Commission official to satisfy this condition. An examination of that letter, (Annex A.2 to the application) however reveals that the letter is written on headed letter paper naming the second and third applicants respectively, but not the first applicant.

19. Since the first applicant refers to no other document in which he called upon the Commission to act, the Commission submits that the application should be declared inadmissible *in limine* in respect of him.

The act in question could not be addressed to a natural or legal person

20. Seen in this light the action is inadmissible since it is settled law that natural and legal persons may bring proceedings under the third paragraph of Article 232 only for a declaration that an institution has declined, in breach of the Treaty, to adopt decisions of which they are the potential recipients (see for example Order of the Court of First Instance in Case T-13/94, Century Oils Hellas v. Commission, ECR 1994, p. II-431, at paragraph 13; Order of the Court in Case C-371/89, Emrich v Commission, 1990 ECR p. I-1555, at paragraph 5). It is settled case law that an omission by the Commission to institute infringement proceedings against a Member State or by the Council to make a request to the Commission, pursuant to Article 208 of the Treaty, to submit to it a proposal is not an act which by its nature

could be addressed to a natural person or legal person (see respectively Order of the Court of First Instance in case T-126/95, Dumez v. Commission, ECR 1995, p. II-2863, at paragraph 33; Order of the Court of First Instance in Case T-167/95, Kuchlenz-Winter v. Commission, ECR 1996 p. II-1609; Emrich, cited above, at paragraph 6). In Kuchlenz-Winter the Court stated as a general proposition that "an action for a declaration of failure to act cannot lie in respect of the failure by a Community institution to exercise a discretionary power" (paragraph 24 of the Order). That case concerned the failure by the Council to address a request to the Commission pursuant to Article 208 of the Treaty but, by parity of reasoning, the same principle must apply to the failure by the Commission to present a proposal to the Council to adopt an act of general application[5].

21. The Commission therefore concludes that the act sought by the applicants is, because of its discretionary nature not a decision of which the applicants could be the potential addressees. This ground suffices without more to make the action inadmissible.

The act requested is not of direct and individual concern to the applicants

22. *Ex abundante cautela,* the Commission also recalls that it, is in any event, settled law that the *locus standi* of a legal or natural person under Article 232 is also subject to the condition that, where the applicant would not be the addressee of the decision sought, it must demonstrate that it would be directly and individually concerned by the act which it has called upon the relevant Community institution to take. This is clearly not the case of the applicants in the instant case.

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[5] Article 4 of Regulation 390/2001 provides simply that the Council may « take appropriate steps ». This formula would, in the Commission's view, allow the Council to adopt a Decision or a Regulation as appropriate. Precisely which act would be adopted is unimportant insofar as it would be an act of general application.

Direct concern

23. For an individual applicant to be directly concerned by a Community measure, that measure must directly affect the legal situation of that person and its implementation must be purely automatic and result from the Community rules alone without the need for the application of other intermediate measures (judgment of the Court of First Instance in Joined Cases T-198/95, T-171/96, T-230/97, T-174/98, and T-225/99, Comafrica and Dole Fresh Fruit v. Commission, ECR 2001, p. II-1975). The same applies where the possibility for the addressees not to give effect to the Community measure is purely theoretical and their intention to act in conformity with it is not in doubt (judgment of the Court of Justice in case C-386/96, Louis Dreyfus v. Commission, ECR 1998, p. I-2309).

24. The applicants assert baldly that the Commission's conduct led automatically to the consequences of which the applicants complain, namely loss of property and loss of habitat (paragraph 4.4 of the application). However, even a cursory examination of the nature of the act sought demonstrates that this argument cannot be correct. In the present case, the act sought is a legislative proposal by the Commission to reduce or suspend pre-accession assistance to Turkey. Such an act cannot possibly be of direct concern to the applicants since it would be impossible for it to have a direct legal effect on their situation. The arguments of all the applicants to have been directly affected are even weaker than those of the applicants in case T-585/93, Stichting Greenpeace and others v Commission (Order of the Court of First Instance, 1995 ECR p. II-2205, confirmed by the Court of Justice on appeal in case C-321/95 P, 1998 ECR p. I-1651), in which the applicants sought to have annulled a decision to disburse money to a Member State for the financing of a power station. In that case, the Court held that it was the decision to build the power stations, taken by the Member State, which was liable to affect the applicants' rights, and hence the decision under challenge concerning the Community financing of those power stations could "affect those rights only indirectly" (judgment of the Court of Justice, paragraphs 31 and 32).

25. In the instant case, it is in the first place quite obvious that the proposal could not have a direct impact on the applicants since any possible effect would be contingent on the proposal being adopted by the Council.

26. Secondly, even on the basis of the applicants' arguments, any impact on any of the applicants of a decision by the Council to suspend pre-accession assistance to Turkey would be purely speculative since the pipeline project in question is not being directly financed by Community pre-accession assistance. Moreover, so far as the Commission is aware, none of the costs of constructing the pipeline are borne directly by the Turkish government. It is therefore by no means clear, contrary to the peremptory assertions of the applicants at paragraph 1.7, that a reduction or suspension of financial aid would have the effect of causing work on the project to be suspended to be discontinued. Indeed, the Commission would go so far as to say that the availability of pre-accession aid from the Community is entirely irrelevant to the question whether the pipeline project is implemented or not.

27. Finally, in the case of the first applicant, any effect would be all the more indirect since his land has apparently already been compulsorily purchased by the Turkish authorities. It is therefore by no means clear that his land would be restored to him even if work on the project were to be suspended.

Individual concern

28. It is also settled law that, in principle, legal and natural persons are not individually affected by measures of general application. Furthermore, the general scope of a measure is not called into question by its being possible to determine the number - or even the identity - of the persons to whom it applies at a given moment as long as it is established that it is applied by virtue of an objective legal or factual situation defined by the measure. Whilst it is true that a measure of general application may in certain circumstances concern some persons individually and hence be in the nature of a decision vis-à-vis them, it is clear that a natural or legal person cannot claim to

be individually concerned unless he is affected by the act in question by reason of certain attributes which differentiate him from all other persons (judgment in case C-358/89, Extramet Industrie v. Council, 1991 ECR I-2501, paragraphs 13 and 14; judgment in Case C-3089/89, Codorniu v. Council, 1994 ECR p. I-1853, paragraph 19) or unless the applicable Community legislation specifically requires the situation of the applicant to be taken into account or otherwise grants the applicant certain procedural guarantees, including the right to be heard (judgment in Case 11/82, Piraiki-Patraiki and others v Commission, 1985 ECR p. 207; judgment in Joined Cases T-38/99 to T-50/99, Sociedade Agricola dos Arinhos v Commission, 2001 ECR p. II-585, paragraph 48; judgment in Case C-107/91, Empresa Nacional de Uranio v Commission, 1993, ECR p. I-599, paragraphs 15 to 19).

29. Applying these principles to the instant case, it is abundantly clear that even if it were the case, *quod non,* that the omission by the Commission to make a proposal to the Council had a direct impact on the implementation of the pipeline project, none of the applicants can claim to be individually concerned.

30. In the first place, it is common ground that Regulation 390/2001 did not grant any of the applicants any procedural rights, including the right to be heard. As regards the question whether the applicants were affected by reason of certain special attributes peculiar to them, the case of each applicant must be examined separately.

The first applicant

31. The Commission has already submitted that the application should be declared inadmissible in respect of the first applicant because he has not called upon the Commission to act. The following observations on the situation of the first applicant are made in the alternative, if the Court should not accept the Commission's main argument on this point.

32. The first applicant claims to own land in Turkey which has been the subject of a compulsory purchase order, at below market value, by the Turkish authorities[6]. He claims (paragraph 4.5.1 of the application) that he is individually concerned because he is affected by reason of particular attributes and circumstances differentiating him from all other persons, within the meaning of the test laid down in the judgment in Case 25/62, Plaumann v Commission, 1963 ECR p. 95, in that he is a landowner in the pipeline corridor who has been expropriated and that he is denied proper access to justice.

33. The Commission submits that the mere fact of owning property does not sufficiently differentiate him from other persons liable to be affected by the project. It is admittedly a matter of degree at what point particular attributes may serve to differentiate an applicant from other persons affected by a measure. The applicants naturally cite the judgments which appear to be in their favour (in particular judgment in Case C-358/89, Extramet v Commission, 1991 ECR p. I-2501 and the judgment in Case C-309/89, Codorniu v Council, 1994 ECR p. I-1853).

34. The Commission would point out in this respect that the onus is on the applicant to produce evidence to show that it is in a special situation of the type identified by the Court of Justice in Extramet and Codorniu (see judgment in Case T-177/01, Jego-Quéré v. Commission, 2002 ECR p. II-2365). The Commission submits that the applicant has produced no evidence establishing such a special situation. In Jego-Quéré, the fact that the applicant was the only operator fishing for whiting in the waters south of Ireland with vessels over 30 metres in length, and that its catches were greatly reduced by reason of the contested measure was held insufficient to differentiate the applicant. In the Greenpeace litigation (Case T-585/93, confirmed on appeal in Case C-321/95 P, cited above), the applicants who were private individuals were held not to be individually affected despite the fact that the power

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[6] In the application, the first applicant does not refer to any documents in support of the above assertions. Should the question of the accuracy of those statements become relevant at a later stage, the Commission reserves the right to return to them. For the purposes of this objection of inadmissibility only, the Commission is prepared at this stage to treat them as if they were true.

station in question was likely to affect their livelihoods. The Commission submits that being a landowner is a purely factual circumstance, and that the applicant's position is therefore more analogous to that of the applicants in Greenpeace and Jego-Quéré than that of those in Extramet or Codorniu.

The second applicant

35. The second applicant is an association representing flora and fauna which would allegedly be affected by the pipeline project.

36. It is clear, as the applicants have admitted, that the flora and fauna concerned have no *locus standi* before the Court. It is settled case law that an association may claim to be individually concerned by an act, and therefore entitled to bring an action for annulment, only if its interests, as opposed to those of its members, are affected. Consequently, if the members of the association may not bring an action for annulment, neither may the association (see in particular the Greenpeace litigation, Case T-585/93, confirmed on appeal in Case C-321/95 P, cited above). There are admittedly limited exceptions to this principle, for example if relevant Treaty provisions or legislation have ensured particular procedural safeguards to such parties, if the association has replaced a member which itself is individually concerned or if an association has played a role in the adoption of an act whose annulment is sought (see for example case C-313/90, CIRFS v Commission, 1993 ECR p. I-1125).

37. In the present case, the second applicant does not claim that its own interests are affected by the pipeline, but specifically asserts that it is acting on behalf of the allegedly affected flora and fauna (paragraph 1.15 of the application). Its position is therefore analogous to that of Greenpeace in the above-mentioned Greenpeace litigation, in which the Court of First Instance held that Greenpeace, which claimed to represent the general interest in the matter of environmental protection, could not

claim to be individually affected (Order of the Court of First Instance in Case T-585/93, cited above, paragraphs 59 and 60).

38. With regard to the second applicant, the Commission would also remind the Court of First Instance that it and the Court of Justice declined to apply a more liberal approach to questions of *locus standi* of individuals where environmental interests where at stake than it did in the case of protection of economic interests, or to be influenced by the practices of national courts in matters of environmental protection (Order of the Court of First Instance in Case T-585/93, cited above, paragraphs 51 and 52).

The third applicant

39. The third applicant, unlike the second, is purporting to act on behalf of natural persons, namely persons living in the Kurdish regions. However, like the second applicant, it does not claim that its own interests are affected, but specifically asserts that it is the situations of those whom it represents which are affected.

iv) The argument that to declare the action inadmissible would be to deny the applicants a remedy

40. Lastly, the Commission notes that the applicants claim that they "have no rights of action in national courts or elsewhere to challenge the legality of the contested decision/non decision" (paragraph 1.13). The first and third applicants also claim that they have no effective access to the courts in Turkey in order to challenge the legality of the expropriations (paragraphs 4. 1 and 4.3).

41. The Commission does not necessarily accept the accuracy of the assertions in paragraphs 4.1 and 4.3, and reserves the right to return to them at a later stage if this question should become relevant. However, at this stage, the Commission would

merely observe that, even if true, this point has no bearing on the *locus standi* of the applicants before the Court of First Instance.

42. In its judgment in Philip Morris v Commission, cited above at paragraph 12, the Court of First Instance dismissed the applicants' argument that the fact that the Community had brought an action against them in the United States entailed legal consequences because it subjected them to a different legal system. Similarly, in Jego-Quéré cited above, the fact that national procedural rules did not allow an individual to contest the validity of a Community measure unless he had first contravened it was held insufficient to confer *locus standi* on the applicant to challenge the validity of the measure pursuant to Article 230.

43. In the Commission view, it flows from those cases that the exposure to legal proceedings or, conversely, difficulties in having recourse to national courts, in a Member State or non Member Country is not a factor which entitles the Community judiciary to ignore the criteria as to *locus standi* set down in Article 230 and Article 232.

v) The application that the Court of First Instance order the Commission to do certain acts

44. It is settled law that the Community judicature has no power to issue directions to Community institutions, which is what the applicants are seeking by their claims under Heading 3 (see, for example, Order of the Court of First Instance in case T-56/92, Caspar Koelman v. Commission, ECR 1993, p. II-1267, in particular at paragraph 18). It follows that all the claims under heading 3 must be dismissed as inadmissible.

C. CONCLUSIONS

45. The Commission respectfully submits to the Court of First Instance, for the reasons given above:

- that the application be declared inadmissible in respect of all the applicants;
- that the applicants be ordered to pay the costs.

COPY

Michael WILDERSPIN Géraldine BOUDOT

Agents for the Commission