JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)

13 September 2006 *

In Case T-226/01,

CAS Succhi di Frutta SpA, established in Castagnaro (Italy), represented by G. Roberti, F. Sciaudone and A. Franchi, lawyers,

applicant,

v

Commission of the European Communities, represented by C. Cattabriga and L. Visaggio, acting as Agents, and A. Dal Ferro, lawyer,

defendant,

APPLICATION for compensation for the damage allegedly caused by Commission Decisions C (96) 1916 of 22 July 1996 and C (96) 2208 of 6 September 1996, adopted in the context of Commission Regulation (EC) No 228/96 of 7 February 1996 on the supply of fruit juice and fruit jams intended for the people of Armenia and Azerbaijan (OJ 1996 L 30, p. 18),

* Language of the case: Italian.

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

composed of J. Pirrung, President, N.J. Forwood and S. Papasavvas, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 10 January 2006,

gives the following

Judgment

Background to the dispute and procedure

1 On 7 February 1996 the Commission adopted Regulation (EC) No 228/96 on the supply of fruit juice and fruit jams intended for the people of Armenia and Azerbaijan (OJ 1996 L 30, p. 18, 'the notice of invitation to tender'), in application of Council Regulation (EC) No 1975/95 of 4 August 1995 on actions for the free supply of agricultural products to the peoples of Georgia, Armenia, Azerbaijan, Kyrgyzstan and Tajikistan (OJ 1995 L 191, p. 2) and Commission Regulation (EC) No 2009/95 of 18 August 1995 laying down detailed rules for the free supply of agricultural products held in intervention stocks to Georgia, Armenia, Azerbaijan, Kyrgyzstan and Tajikistan pursuant to Regulation No 1975/95 (JO 1995 L 196, p. 4).

2 According to Article 1 of Regulation No 228/96:

'A tendering procedure is hereby initiated for the supply of a maximum of 1 000 tonnes of fruit juice, 1 000 tonnes of concentrated fruit juice and 1 000 tonnes of fruit jams as indicated in Annex I ...'.

3 According to Article 3(2)(a) of Regulation No 228/96 the offer of the tenderers has to indicate, for each lot, the total quantity of fruit withdrawn from the market which each tenderer undertakes to take over in payment of all of the costs of supplying the services and products concerned by the tender.

4 According to Annex I to Regulation No 228/96, lots 1, 2 and 5 concerned respectively the supply of 500 tonnes (net) of apple juice, 500 tonnes (net) of apple juice concentrated to 50% and 500 tonnes (net) of diverse fruit jams, the fruit to be withdrawn for those lots being apples. Lots 3, 4 and 6 concerned respectively the supply of 500 tonnes (net) of orange juice, 500 tonnes (net) of orange juice concentrated to 50% and 500 tonnes (net) of diverse fruit jams, the fruit to be withdrawn for those lots being oranges.

5 By letter of 15 February 1996, the applicant submitted a tender for lots 1 and 2, offering to withdraw 12 500 tonnes and 25 000 tonnes of apples respectively as payment for the supply of those lots.

6 Trento Frutta SpA and Loma GmbH offered, respectively, to withdraw 8 000 tonnes of apples for Lot 1 and 13 500 tonnes of apples for Lot 2. In addition, Trento Frutta stated that, in the event of there not being enough apples, it was prepared to withdraw peaches.

7 On 6 March 1996, the Commission sent to the Azienda di Stato per gli Interventi nel Mercato Agricolo (the Italian intervention agency, 'AIMA'), with a copy to Trento Frutta, Memorandum No 10663 stating that it had awarded lots 1, 3, 4, 5 and 6 to Trento Frutta. According to that memorandum, Trento Frutta would receive as payment, in priority, the following quantities of fruit withdrawn from the market:

— Lot 1: 8 000 tonnes of apples or, alternatively, 8 000 tonnes of peaches;

— Lot 3: 20 000 tonnes of oranges or, alternatively, 8 500 tonnes of apples or 8 500 tonnes of peaches;

— Lot 4: 32 000 tonnes of oranges or, alternatively, 13 000 tonnes of apples or 13 000 tonnes of peaches;

— Lot 5: 18 000 tonnes of apples or, alternatively, 18 000 tonnes of peaches;

— Lot 6: 45 000 tonnes of oranges or, alternatively, 18 000 tonnes of apples or 18 000 tonnes of peaches.

8 On 13 March 1996, the Commission sent Memorandum No 11832 to AIMA informing it that it had awarded Lot 2 to Loma.

9 On 14 June 1996, the Commission adopted Decision C (96) 1453 on the supply of fruit juice and fruit jams intended for the people of Armenia and Azerbaijan, pursuant to Regulation No 228/96 ('the Decision of 14 June 1996'). According to the second recital in the preamble to that decision, since the tendering procedure, the quantities of fruit in question withdrawn from the market had been negligible in comparison with the quantities required, although the withdrawal season was virtually over. It was therefore necessary, in order to complete that operation, to allow the successful tenderers wishing to do so to take as payment, in place of apples and oranges, other fruit withdrawn from the markets in predetermined quantities reflecting the processing equivalence of the fruit in question.

10 Article 1 of the Decision of 14 June 1996 provided that fruit withdrawn from the market was to be made available to the successful tenderers (namely Trento Frutta and Loma) at their request, according to the following coefficients of substitution:

'(a) 1 tonne of peaches for 1 tonne of apples,

(b) 0.667 tonnes of apricots for 1 tonne of apples,

(c) 0.407 tonnes of peaches for 1 tonne of oranges,

(d) 0.270 tonnes of apricots for 1 tonne of oranges.'

11 On 22 July 1996 the Commission adopted Decision C (96) 1916 on the supply of fruit juice and fruit jams intended for the people of Armenia and Azerbaijan,

pursuant to Regulation No 228/96 ('the Decision of 22 July 1996'). According to the third recital in the preamble to that decision, the quantity of peaches available would not be sufficient to complete the operation. Consequently, it was appropriate to allow, in addition, the substitution of nectarines for the apples to be withdrawn by the successful tenderers.

12 Article 1 of the Decision of 22 July 1996 provided that the fruit withdrawn from the market was to be made available to Trento Frutta and Loma, at their request, according to the coefficient of substitution of 1.4 tonnes of nectarines for 1 tonne of apples.

13 On 26 July 1996, at the meeting organised at its request with the staff of Commission Directorate-General 'Agriculture', the applicant presented its objections to the substitution, authorised by the Commission, of other fruit for apples and oranges and obtained a copy of the Decision of 14 June 1996.

14 On 2 August 1996, the applicant sent the Commission the technical report prepared by the Dipartimento Territorio e Sistemi Agro-Forestali (Department of Land and Forestry Management) of the University of Padua on the coefficients of economic substitution of certain fruit to be used for processing into juice.

15 On 6 September 1996, the Commission adopted Decision C (96) 2208, amending the Decision of 14 June 1996, on the supply of fruit juice and fruit jams intended for the people of Armenia and Azerbaijan, pursuant to Regulation No 228/96 ('the Decision of 6 September 1996'). It sent that decision to the French Republic, the Hellenic Republic, the Italian Republic and the Kingdom of Spain. According to the second recital in the preamble to that decision, in order to bring about a more balanced substitution of fruit, over the whole withdrawal period for peaches, between the

apples and oranges used for the supply of fruit juice to the people of the Caucasus, on the one hand, and the peaches withdrawn from the market to pay for those supplies, on the other, it was appropriate to amend the coefficients established in the Decision of 14 June 1996. The new coefficients were to be applied only to fruit which had not yet been withdrawn by the successful tenderers as payment for products to be supplied.

16 Under Article 1 of the Decision of 6 September 1996, Article 1(a) and (c) of the Decision of 14 June 1996 was amended as follows:

'(a) 0.914 tonnes of peaches for 1 tonne of apples;

(b) 0.372 tonnes of peaches for 1 tonne of oranges.'

17 The applicant brought two actions for annulment, one against the Decision of 6 September 1996 (registered under number T-191/96) and the other against the Decision of 22 July 1996 (registered under number T-106/97).

18 By judgment of 14 October 1999 in Joined Cases T-191/96 and T-106/97 *CAS Succhi di Frutta* v *Commission* [1999] ECR II-3181 ('*CAS* v *Commission*'), the Court of First Instance annulled the Decision of 6 September 1996 in Case T-191/96 and dismissed as inadmissible the action in Case T-106/97. Essentially, the Court of First Instance upheld the first plea for annulment in Case T-191/96, taking the view that the substitution of peaches for apples and oranges constituted a significant amendment to an essential condition of the notice of invitation to tender, not provided for in the rules, and therefore constituted an infringement of the notice of invitation to tender and of the principles of transparency and equal treatment (paragraphs 74 to 82).

19 On 21 December 1999, the Commission brought an appeal against the judgment in *CAS* v *Commission*, paragraph 18 above, registered under number C-496/99 P.

20 On 25 September 2001, the applicant brought the present action for damages.

21 By order of 17 July 2003, the President of the Second Chamber (Extended Composition) of the Court of First Instance, after hearing the parties, stayed proceedings in the present case in accordance with Article 77(a) of the Rules of Procedure of the Court of First Instance, pending the decision of the Court of Justice in Case C-496/99 P.

22 By judgment in Case C-496/99 P *Commission* v *CAS Succhi di Frutta* [2004] ECR I-3801 ('*Commission* v *CAS*'), the Court of Justice dismissed on the merits the appeal brought by the Commission against the judgment in *CAS* v *Commission*, paragraph 18 above. The proceedings were consequently resumed in the present case.

23 At the Court's request, the parties submitted their observations on the further steps to be taken in the proceedings in the present case, in the light of *Commission* v *CAS*, paragraph 22 above.

Forms of order sought

24 The applicant contends that the Court should:

— award it compensation for the damage caused by the decisions of 22 July and 6 September 1996, estimated at EUR 1 385 163 [ITL 2 682 049 410];

— order the Commission to pay the costs.

25 The Commission contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

Law

26 According to settled case-law, for the Community to incur non-contractual liability within the meaning of the second paragraph of Article 288 EC, a series of conditions must be met, namely, the conduct of which the institutions are accused must have been unlawful, the damage must be real and a causal connection must exist between that conduct and the damage in question (Case 153/73 *Holtz & Willemsen* v *Council and Commission* [1974] ECR 675, paragraph 7, and Case T-19/01 *Chiquita Brands and Others* v *Commission* [2005] ECR II-315, paragraph 76).

27 Since those three conditions for the incurring of liability are cumulative, failure to meet one of them is sufficient for an action for damages to be dismissed (Case C-257/98 P *Lucaccioni* v *Commission* [1999] ECR I-5251, paragraph 14, and Case T-43/98 *Emesa Sugar* v *Council* [2001] ECR II-3519, paragraph 59).

28 At the outset, the applicant claims, relying on *Commission* v *CAS*, paragraph 22 above, that the Court of Justice has already recognised its right to compensation in that it explicitly recognised that the applicant had an interest in the annulment of the Decision of 6 September 1996, since a declaration of illegality, if appropriate, on the part of the contracting authority can be taken as the basis for any action for damages aimed at properly restoring the applicant to its original position (paragraph 83).

29 In the first place, the Court notes that the assessment of the Court of Justice was made in the context of considering the admissibility of the applicant's action for annulment and cannot in any circumstances prejudge the Community's liability as a result of the declared illegality of the decision contested in that action.

30 In the second place, the action for damages referred to by the Court of Justice concerns the applicant's situation in the context of the invitation to tender, in the case of infringement of the principle of equal treatment, as stated in *CAS* v *Commission*, paragraph 18 above. It must be found that, by the present action, the applicant does not at all allege that it suffered damage because its offer was not accepted at the end of the tendering procedure, but rather that it suffered damage as an economic operator on the market on which the successful tenderers are active.

31 Consequently, the argument relating to the authority of *Commission* v *CAS*, paragraph 22 above, must be rejected.

32 As regards the unlawful conduct complained of, the applicant claims that the decisions of 22 July and 6 September 1996, in that they arranged for the substitution of peaches and nectarines for the apples envisaged as payment for the products to be supplied and laid down coefficients for so doing, constitute infringements of a number of provisions. First, they infringe the notice of invitation to tender and the

principles of transparency and equal treatment, as stated in *CAS* v *Commission*, paragraph 18 above, which annulled on those grounds the Decision of 6 September 1996. Second, they infringe Regulations Nos 1975/95 and 2009/95, in particular in that the Commission carried out a substitution between fruit not belonging to the same group of fruit contrary to those regulations. Third, they infringe Articles 33 EC and 34 EC and Regulation (EEC) No 1035/72 of the Council of 18 May 1972 on the common organisation of the market in fruit and vegetables (OJ 1972 L 118, p. 1) and Council Regulation (EC) No 2200/96 of 28 October 1996 on the common organisation of the market in fruit and vegetables (OJ 1996 L 297, p. 1), in that they prohibit, essentially, any disturbances in the agricultural markets and any distortion of competition.

33 As regards damage, the applicant claims that it had to charge sale prices for its processed peach or nectarine products which were lower than its production costs in order to match Trento Frutta's prices. It claims as damage that loss of profit, including the loss of normal profit margins. It claims, moreover, reimbursement of the procedural and adviser's expenses which it had to incur in order to protect its rights.

34 As regards the causal connection, the applicant submits, essentially, that, due to the substitution of peaches and nectarines for the apples initially foreseen as payment for the products to be supplied and the coefficients laid down for so doing, Trento Frutta received a very large quantity of peaches and nectarines for a very low price. That successful tenderer then turned the market upside down by selling its processed peach and nectarine products at prices which were very low and, in any case, lower than the applicant's production costs. The applicant submits that it was obliged, to survive, to sell at a loss.

35 The Court considers that the question of compensation for the damage allegedly represented by selling at a loss should be treated separately from that of the costs incurred in order to protect the applicant's rights.

The right to compensation for the damage represented by selling at a loss

36 The Court considers it appropriate, in the present case, to examine first whether there is a causal link between the unlawful conduct complained of and the alleged damage.

37 It is settled case-law that there is a causal link for the purposes of the second paragraph of Article 288 EC where there is a direct link of cause and effect between the error committed by the institution concerned and the injury pleaded, the burden of proof being on the applicant (Case T-149/96 *Coldiretti and Others* v *Council and Commission* [1998] ECR II-3841, paragraph 101, and the case-law cited). The Community can be held liable only for damage which is a sufficiently direct consequence of the wrongful conduct of the institution concerned (see, in particular, Joined Cases 64/76 and 113/76, 167/78 and 239/78, 27/79, 28/79 and 45/79 *Dumortier Frères and Others* v *Council* [1979] ECR 3091, paragraph 21, and Case T-168/94 *Blackspur and Others* v *Council and Commission* [1995] ECR II-2627, paragraph 52). In particular, in order to be able to exclude any liability on the part of the Community, the Court ought to ascertain whether the cause of the difficulties encountered by an applicant on the market does not indeed lie in the unlawful conduct complained of (see, by analogy, Case C-295/03 P *Alessandrini and Others* v *Commission* [2005] ECR I-5673, paragraph 57).

38 It is appropriate, in the present case, to examine whether the decisions of 22 July and 6 September 1996, the sole objectives of which were to lay down the substitution of the fruit foreseen as payment for the products to be supplied and to set the coefficients of substitution for so doing, actually caused the alleged damage.

39 In that respect, the parties disagree as to whether, in order to assess the harmful consequences of the substitution of the fruit and the fixing of the coefficients of

substitution, all of the fruit to be received by Trento Frutta, that is 65 000 to 85 000 tonnes of peaches and nectarines, should be taken into account, as the applicant argues, or whether only quantities of fruit possibly granted in excess, due to the application of a coefficient of substitution which was too favourable, should be taken into account to that end, as the Commission argues.

40 It must be recalled that only damage which is a sufficiently direct consequence of the unlawful conduct of a Community body is a compensable injury (see paragraph 37 above). As regards the substitution of the fruit, in so far as it affects the vast majority of the fruit to be received by Trento Frutta, the analysis of the harmful consequences of its illegality must take into account all of this fruit. On the other hand, as regards the coefficients of substitution, the analysis of the harmful consequences of their possible illegality need relate only to the quantities of fruits affected by that illegality, that is it need relate only to the fruit affected by an allegedly incorrect coefficient.

The substitution of the fruit

41 As regards the substitution of peaches and nectarines for the apples and oranges originally foreseen, the applicant has only explained, in its written submissions, that, because of that substitution, Trento Frutta received very large quantities of peaches and nectarines at low prices.

42 In the first place, questioned during the hearing as to how that substitution, apart from the fact that it necessitated the fixing of the disputed coefficients of substitution, could, by itself, have caused any damage, the applicant replied that, without that substitution, the peach and nectarine processing market would have been unaffected by the invitation to tender, since that market had not been

contemplated by it, and that Trento Frutta had received quantities of peaches and nectarines seven times greater than its capacity for processing and had had to subcontract the processing to third parties. Because the quantities received far exceeded its capacity, Trento Frutta was obliged to pursue a very aggressive commercial policy. That substitution was a 'gift' to Trento Frutta which allowed it considerably to strengthen its position on the peach and nectarine processing market and to make substantial profits there, when it had previously been only a minor operator on that market.

43 In answer to the same question, the Commission stated that it had never understood how the substitution, leaving aside the question of whether the coefficients were correct or not, had caused damage.

44 It is apparent from the applicant's explanations that it is in fact complaining because it had to face strong competition in the peach and nectarine processing market, competition from which it would have been protected, in that market, in the absence of substitution.

45 The Court finds, as a preliminary point, that, by the substitution of the fruits to be given to Trento Frutta as payment for the fulfilment of its obligations pursuant to the award, the Commission necessarily brought any effects of that type of payment onto a market not initially foreseen by the invitation to tender. It is also incontestable, because of the rules of the invitation to tender, that the fruit received as payment will be processed, by the successful tenderer or by third parties, into derived products (juice, purée or jam) and put on the market in those products.

46 However, if payment had been made with the fruit originally foreseen, in the absence of substitution, the successful tenderers would have adopted the same type of conduct, and therefore conduct producing the same effects on the markets in

question, by reason of a Community act, without any economic damage to other operators on those markets being compensable. In that respect, in the context of the present action, no illegality is complained of as regards the invitation to tender itself, in particular with regard to the fact that payment was to be made with fruit withdrawn from the market. Similarly, Trento Frutta's success in the tendering procedure is not in any way contested.

47 As regards the actual price at which Trento Frutta is supposed to have acquired the fruit in question, it must be recalled that the notice of invitation to tender provided that each of the lots would be awarded to the tenderer which submitted the most favourable tender, that is which asked for the lowest quantity of fruit in return for the fulfilment of its obligations to process and transport to the countries in question the quantities of fruit juice and jam specified for each lot. It should also be noted that the fruit thus received as payment constituted the normal remuneration of the successful tenderer, corresponding essentially to the cost of fulfilment of those obligations, with, possibly, an appropriate profit margin.

48 It follows that, in so far as Trento Frutta submitted the most favourable tender in terms of the quantity of fruit applied for, there is no reason, a priori, to consider that it received fruit at an advantageous price. On the contrary, its success in the tendering procedure indicates, theoretically, that it received the lowest possible quantity of fruit, in any event less than that asked for by the other tenderers, as payment for the fulfilment of its obligations. In particular, Trento Frutta made an offer which was approximately half that proposed by the applicant (see paragraphs 5 and 6 above).

49 As regards the quantities of fruit thus put at Trento Frutta's disposal, it should be noted that the substitution in no way modified, in itself, the basic mechanism of the tendering procedure, that is the granting to successful tenderers of fruit withdrawn from the market because of its overabundance. First, such a mechanism necessarily

implies the availability of the fruit in question on the market, in large quantities, for all economic operators, since that fruit was withdrawn from the market because a purchaser could not be found at the withdrawal price. Second, that mechanism means that that fruit was, a priori, available on the market before being withdrawn at a price close to that of the actual withdrawal price. In fact, on a market where withdrawal takes place, because of a fall in prices caused by excess production, the market price will naturally tend to align itself to the withdrawal price triggering the withdrawal. It follows that the applicant, or any other economic operator, was able to obtain fruit at a price equivalent to the value of the fruit received by the successful tenderers and, what is more, to obtain equally large quantities because of the overabundance of the fruit in question. In so far as the successful tenderers still had a competitive advantage in relation to the other operators on the markets in processed products, this was entirely due to their economically superior tenders in the context of the tendering procedure, in comparison with those of the other tenderers.

50 It follows that it has not been established that the substitution gave an additional competitive advantage to the successful tenderers as compared with payment on the markets originally foreseen. First, assuming that the coefficients of substitution guaranteed economic equivalence between oranges and apples on the one hand and peaches and nectarines on the other, the substitution transferred to the peaches and nectarines the correct definition of the price of the fruit defined in the tendering procedure. Second, there is nothing to indicate that the economic excellence of the operation carried out by Trento Frutta depended on the type of fruit received, even if Trento Frutta appeared to want to be paid in peaches. Third, still assuming correct economic equivalence, the significant quantities of fruit received by Trento Frutta result from the fact that that successful tenderer was awarded, incontestably, five of the six lots in issue in the tendering procedure.

51 In the second place, at the hearing, the applicant stated that the quantity of apples to be received as payment for the products supplied pursuant to the award compared with the total quantity of apples destined for the processing industry was minimal while the quantity of peaches to be received compared with the total quantity of peaches was large.

52 By that argument, the applicant seems to imply that the payment pursuant to the award would have had different effects depending on the markets concerned by that payment. However, the Court is not in a position to assess the implications of that argument in the light of the information provided by the parties. The applicant stated, without being proved wrong, that the 65 000 to 85 000 tonnes of peaches and nectarines to be paid to Trento Frutta represented 70% of the Italian market in the processing of that fruit. The Commission has claimed, without being proved wrong either, that those quantities represented 0.8% of the Italian market in fresh fruit. No figure has been provided concerning the markets in fresh apples or in apples for processing. The only items in the documents before the Court relating to the market in apples show that there was much less withdrawal of that fruit from the Italian market than there was withdrawal of peaches and nectarines for the year in question. Consequently, the burden of proof being on the applicant, the argument must be rejected.

53 In the third place, the applicant has claimed that the fact that Trento Frutta was able to know, from the date of the award, that it would be paid in peaches, and to know its supply costs, allowed it to adopt speculative conduct. However, the certainty of receiving peaches dates only from the Decision of 14 June 1996. There is nothing in the documents before the Court to indicate in what way knowledge of the type of fruit to be received would have enabled the adoption of speculative conduct going beyond what is normal, that is beyond the preparation necessary for the handling of that type of fruit and the sale of the resulting processed products. With regard to knowledge of the supply costs, that knowledge was late and uncertain, since the Commission continually changed the payment due by changing the coefficients of substitution. Moreover, there is also nothing to indicate that the alleged competitive advantage results from the substitution of the fruit. In fact, whatever the market on which the payment was to take place, the successful tenderers knew in advance that they would receive the fruit at a price equivalent, at most, to the withdrawal price of that fruit (see paragraph 49 above). Moreover, the applicant itself described the market in peaches and nectarines as particularly transparent, making the information on prices of little interest. Finally, the applicant also knew of that information very early, since it was able to challenge the procedure by its internal appeal before the Commission before 26 July 1996 (see paragraph 13 above).

54 It follows that it has not been shown that, subject to their having been a correct economic substitution of fruit by the fixing of adequate coefficients of substitution, the alleged beneficial consequences of the award to Trento Frutta result from the substitution of the fruit and not, directly, from the award.

The coefficients of substitution

55 As regards the coefficients of substitution set by the contested decisions, the applicant claims, in its written submissions, that the setting of coefficients of substitution which were too generous, between apples and peaches or between apples and nectarines, was the principal cause of the alleged damage.

56 The Court recalls at the outset that the damage alleged by the applicant must stem directly from the illegality of the coefficients of substitution (see paragraph 37 above). Consequently, only the quantities of fruit resulting from the illegality complained of, assuming it to be established, must be taken into account for the purposes of the analysis of the harmful consequences of that illegality, that is to say the quantities of fruit which were overpaid as against the amount which would have been paid had the coefficient been correct.

57 In the first place, when asked at the hearing whether it confirmed that it did not contest the coefficient of substitution between oranges and peaches or between oranges and nectarines, the applicant replied that such a question was redundant in view of the illegality of the substitution. It must therefore be found that, in the absence of any challenge to that coefficient, it must be regarded as correct. Therefore, a substitution took place in respect of lots 3, 4 and 6, initially to be paid in oranges, which did not give rise to overpayment.

58 In the second place, concerning lots 1 and 5, it is apparent from the documents before the Court that, because the successful tenderers were paid in stages, Trento Frutta had received for those lots, as at 29 January 1997, 5 611 tonnes of peaches and 4 317 tonnes of nectarines, and that those quantities were the maximum which it could have received during 1996, the only year cited in the context of the alleged damage.

59 Assuming that those quantities were determined in accordance with the coefficients disputed by the applicant (that is a coefficient of 0.914 tonnes of peaches for one tonne of apples as a result of the Decision of 6 September 1996 and a coefficient of 1.4 tonnes of nectarines for one tonne of apples as a result of the Decision of 22 July 1996), the application of the coefficients which it would have wished (that is a coefficient of 0.704 tonnes of peaches for one tonne of apples and a coefficient of 1.25 tonnes of nectarines for one tonne of apples), reveals that Trento Frutta was overpaid by approximately 1 800 tonnes of peaches or nectarines.

60 However, it has not been shown in any way that those 1 800 tonnes possibly overpaid would have had the disruptive effects put forward by the applicant.

61 First, in terms of quantity, the applicant based its argument on the fact that Trento Frutta turned the markets upside down with the 65 000 to 85 000 tonnes of peaches and nectarines which it was to receive, a quantity which represents 70% of the annual quantity processed by the Italian industry. First of all, during the year in question, Trento Frutta received only 21 000 tonnes of peaches and nectarines, considering all of the lots together. Next, as stated above, only quantities illegally granted can be the cause of damage. It follows that the compensable damage could have been caused only by the 1 800 tonnes possibly overpaid and not by the 65 000 to 85 000 tonnes to be paid in total. Although it is true that quantities representing 70% of the peach and nectarine processing market have a definite effect thereon,

such reasoning does not in any way establish that the 1 800 tonnes in question, representing approximately, by projection, 1.8% of the approximately 100 000 tonnes constituting the market, may have such an effect. What is more, the size of the national market is not entirely relevant, since the applicant recognised that Trento Frutta was also active on markets other than that national market.

62 Second, in terms of price, the applicant has calculated that the economic value of the fruit to be received by Trento Frutta in return for its services was, for peaches, ITL 62.48 per kilo (ITL/kg) and, for nectarines, 51.44 ITL/kg while the applicant paid 260 ITL/kg for peaches and 180 ITL/kg for nectarines. However, while accepting that the tonnes possibly overpaid are equivalent to a rebate on the price of the quantities to be received, the 1 800 tonnes in question would constitute a rebate on the 21 000 tonnes received in 1996, the effect of which would be diluted in that of all of the quantities of fruit received, including those received at a correct price in substitution for the oranges originally foreseen. Therefore, those 1 800 tonnes would represent a rebate of less than 9%. That possible rebate of 9% would hardly explain the difference in prices between those allegedly encountered by the applicant (260 ITL/kg for peaches and 180 ITL/kg for nectarines) and those calculated for Trento Frutta (62.48 ITL/kg for peaches and 51.44 ITL/kg for nectarines). Moreover, the Commission has also produced invoices showing that the price of that fruit was, at one point in 1996, between 70 and 90 ITL/kg. The applicant has in addition recognised that the price of peaches and nectarines is very variable. It follows that the possible rebate of 9% is out of all proportion to the very large variations in the price of that fruit on the market and to the alleged damage which is alleged to have stemmed essentially from the price of the fruit.

63 Third, having regard to the smallness of the advantage possibly obtained, it is difficult to regard this as the cause of the alleged damage. In fact, there is nothing to show that that possible advantage was not absorbed by the cost of processing the fruit representing, according to the applicant's figures, a little less than 50% of the price of the processed products. First, the applicant has firmly maintained that Trento Frutta could not under any circumstances have production costs lower than its own. Therefore, the competitive advantage for that successful tenderer could only be small. Second, a normal profit must have been deducted from the cost of processing by the companies which, according to the applicant, carried out a large

part of the processing of the fruit received on behalf of Trento Frutta. Consequently, the advantage thus claimed becomes minimal and cannot be the cause of the alleged damage.

64 Fourth and last, assuming that there was a competitive advantage in relation to the applicant, it would be much less than the normal profit of 15% indicated by the applicant in the calculation of its damage and would, in any event, be minor in relation to the commercial risks inherent in the sector in question. Therefore, it would not exceed the room for commercial manoeuvre which Trento Frutta in any case had.

65 Consequently, in the circumstances of the present case, characterised by the very variable cost of the raw materials and by fair competition on the part of the principal successful tenderer, any advantage resulting from the coefficients of substitution cannot explain the alleged damage.

Conclusion on the right to compensation for the damage represented by selling at a loss

66 In conclusion, even assuming that the economic consequences, presented as damage, have been shown to stem from the disturbance of the markets caused by Trento Frutta's low prices, the applicant has not shown that it was subject to those consequences other than due to the legitimate success of the successful tenderers in the tendering procedure, without it being possible to regard the substitution of peaches and nectarines for the oranges and apples foreseen as payment or the coefficients chosen for so doing as direct causes of those economic consequences, or even as having helped to bring them about to a definite degree.

67 It follows from the foregoing findings of fact that it has not been shown that the alleged damage was caused by the unlawful conduct complained of. Consequently, pursuant to the case-law cited in paragraph 27 above, the action must be dismissed in so far as it seeks compensation for the alleged damage represented by selling at a loss due to the absence of a sufficiently direct causal link between the unlawful conduct and the damage.

The right to compensation for the damage represented by the defence of the applicant's rights

68 The applicant submits that the costs of technical and legal assistance incurred to defend its rights are directly related to the unlawful conduct complained of and constitute compensable damage. At the hearing, it quantified that damage at EUR 28 628 in order to take account of the reimbursement of its costs in *CAS* v *Commission*, paragraph 18 above. It has also submitted for the assessment of the Court the possibility of taking into account the expenses incurred in respect of its participation in the tendering procedure, in accordance with the new case-law established by Case T-160/03 *AFCon Management Consultants and Others* v *Commission* [2005] ECR II-981.

69 The Court recalls that the expenses incurred by the parties for the purpose of judicial proceedings cannot, as such, be regarded as constituting damage distinct from the burden of the costs of the proceedings (see the Order of the Court of First Instance of 14 September 2005 in Case T-140/04 *Ehcon* v *Commission* [2005] ECR II-3287, paragraph 79, and, to that effect, Case C-334/97 *Commission* v *Montorio* [1999] ECR I-3387, paragraph 54). Moreover, even though substantial legal work is carried out in the course of the proceedings preceding the judicial phase, it must be pointed out that by 'proceedings' Article 91 of the Rules of Procedure refers only to proceedings before the Court of First Instance, to the exclusion of any prior stage (see the Order in *Ehcon* v *Commission*, paragraph 79, and, to that effect, the Order of the Court of First Instance of 24 January 2002 in Case T-38/95 DEP *Groupe Origny* v *Commission* [2002] ECR II-217, paragraph 29, and the case-law cited). Therefore, to

regard such expenses as compensable damage in the context of an action for damages would be in contradiction with the irrecoverable nature of the costs incurred during the stage preceding the judicial proceedings, as follows from the case-law cited above.

70 The claim for compensation for the expenses incurred for the purpose of the defence of the applicant's rights in the present case must therefore be considered in the context of the decision on costs.

71 As regards the claim for reimbursement of the costs of participation in the tendering procedure, it should be pointed out that *AFCon Management Consultants and Others* v *Commission*, paragraph 68 above, acknowledged a right to compensation covering the costs of participation where that procedure was fundamentally undermined by the unlawful conduct found, thus affecting the applicant's chances of securing the contract at issue (paragraphs 99 and 102). In the present case, the tendering procedure has not been challenged in any way and it has not been claimed that the applicant missed an opportunity due to events which took place after that procedure. Therefore, in the absence of any alleged unlawful conduct concerning the award decision, contained in the memoranda of 6 March 1996 and 13 March 1996 and in the absence of any claim of damage represented by the loss of an opportunity, it is not appropriate to acknowledge a right to compensation on the basis of *AFCon Management Consultants and Others* v *Commission*, paragraph 68 above.

72 It follows from the foregoing that the claim for compensation for the damage represented by the defence of the applicant's rights must be dismissed.

General conclusion

73 Since it is not appropriate to uphold the claim for compensation for the alleged damage, represented by selling at a loss and by the defence of the applicant's rights, the action must be dismissed.

Costs

74 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. As the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. Dismisses the application;

2. Orders the applicant to pay the costs.

Pirrung Forwood Papasavvas

Delivered in open court in Luxembourg on 13 September 2006.

E. Coulon J. Pirrung

Registrar President