JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)

18 September 1997 *

In Joined Cases T-121/96 and T-151/96,

Mutual Aid Administration Services NV (MAAS), a company incorporated under Belgian law, established in Antwerp (Belgium), represented by Jan Tritsmans and Koenraad Maenhout, of the Antwerp Bar, with an address for service in Luxembourg at the Chambers of René Faltz, 6 Rue Heinrich Heine,

applicant,

v

Commission of the European Communities, represented by Blanca Vilá Costa, a national civil servant on secondment to the Commission, and Hubert van Vliet, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: Dutch.

APPLICATION for annulment of the Commission's decisions requiring the applicant to pay dispatch money,

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

composed of: K. Lenaerts, President, P. Lindh and J. D. Cooke, Judges,

Registrar: A. Mair, Administrator,

having regard to the written procedure and further to the hearing on 5 June 1997,

gives the following

Judgment

Background to the dispute

1 The applicant, Mutual Aid Administration Services NV, is a shipping company.

2 On 4 August 1995 the Council adopted Regulation (EC) No 1975/95 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, hereinafter 'Regulation No 1975/95'). By Regulation (EC) No 2009/95 of 18 August 1995 (OJ 1995 L 196, p. 4, hereinafter 'Regulation No 2009/95'), the Commission laid down detailed rules for the application of Regulation No 1975/95.

3 On the basis of Regulation No 1975/95, the Commission adopted Regulation (EC) No 2781/95 of 1 December 1995 on the transport for the free supply to Georgia, Armenia, Azerbaijan and Tajikistan of rye flour (OJ 1995 L 289, p. 5, hereinafter 'Regulation No 2781/95').

4 That regulation provided for a tendering procedure for the supply costs of 23 000 tonnes of rye flour.

5 Pursuant to Article 1(1) of Regulation No 2781/95 and Article 2(1)(b) of Regulation No 2009/95, the successful tenderer was required to supply the flour from a Community port or railway station, on the means of transport, to a point of take-over and delivery stage to be determined in the invitation to tender.

6 On 18 December 1995 lot No 3 of the tendering procedure was awarded to the applicant which was notified to that effect by fax and by post the same day. The lot consisted of the delivery of 2 500 tonnes (net) destined for Armenia, made available in the port of Antwerp with effect from 18 January 1996, and 2 000 tonnes (net) destined for Georgia, made available in the port of Rotterdam with effect from 15 January 1996. The remuneration paid to the applicant in respect of that transaction was BFR 12 541 273.

7 The Commission's letter informing the applicant of the award of the contract was accompanied by extracts from a memorandum established on 10 October 1995 between the Commission and the Georgian authorities on the basis of Article 10(5) of Regulation No 2009/95 (hereinafter 'the Memorandum'). It requested the

applicant to read the extracts carefully and to ensure that the instructions concerning payment of discharge and transport costs were followed.

8 In accordance with Regulation No 2009/95 and the Memorandum, the applicant was free to organize the shipping as it chose, but the Georgian authorities were to be responsible for discharging the ships in the Georgian ports and the subsequent transport of the goods to their destination.

9 The applicant entered into a charterparty with a shipowner on the COP (customs of the port) basis for shipment of the goods. It was expressly agreed that no dispatch money would be paid; dispatch money is an incentive payment received by the undertaking responsible for discharge if the discharge is completed faster than anticipated.

10 Article 10(5) of Regulation No 2009/95 provides that payments in respect of unloading and transport as well as demurrage and dispatch to be effected in favour of Georgian administrations must be executed in accordance with the terms and conditions fixed in the Memorandum. Demurrage is an allowance receivable by the shipowner as compensation for any loss he may suffer as a result of any delay beyond the time originally anticipated for the discharge because, during that delay, he is unable to transport any other goods. The undertaking responsible for discharge is generally liable to pay that compensation.

11 Point 5 of the Memorandum provides that 70% of the costs in respect of discharge and transport must be paid before arrival of the ship, on the basis of the quantities transported.

12 Point 6 provides that the balance of 30%, together with demurrage and dispatch, will be calculated by the Commission on the basis of 'time sheets' established before departure of the ship and signed by the captain and the port authorities of Poti or Batami. No demurrage or dispatch are to be paid directly to the ports.

13 Point 9 provides that dispatch and demurrage are to be calculated on the basis of the following factors:

— working hours from Monday 8 a. m. to Friday 6 p. m. on the basis of 24 hours per day without interruption;

— periods of rain are to be deducted from the time elapsed;

— once the agreed period for discharge has expired, periods of rain and bank holidays are no longer taken into account;

— the daily discharge rates taken into account for each port are as follows:

'bulk wheat — vacuvator'	1 300 tonnes
'grab'	2 500 tonnes
'big bags/pallets'	350 tonnes
'unpalletised sacks and cartons'	250 tonnes.

14 Point 7 provides that the operator — in this case the applicant — is to pay the amount referred to in Point 6 within 15 days of notification by the Commission. Proof of payment must be sent to the Commission.

15 The goods were discharged in the port of Batumi between 8 and 15 February 1996 inclusive.

16 On 6 May 1996 the Commission faxed to the applicant a detailed statement of the costs to be paid to the Georgian authorities, specifying that USD 21 967.19 was payable in respect of dispatch money. A Commission document entitled 'Port of Batumi time sheet — dispatch (demurrage calculation)' was attached to that fax and contained all the information necessary for calculating the dispatch money payable. In particular it indicated the name of the ship to be discharged, its tonnage, the agreed discharge rate, the date of arrival of the ship, the time necessary for discharge, the daily dispatch rate and the total amount payable in respect of dispatch money.

17 Between 10 May and 25 July 1996, the date of the Commission's last fax, the applicant and the Commission exchanged a number of letters and faxes in which the applicant disputed that it was required to pay the dispatch money, whilst the Commission considered that it was payable by virtue of Article 10(5) of Regulation No 2009/95.

18 In its fax of 25 July 1996 the Commission rejected the applicant's offer to resolve the matter amicably by stating that the amount payable was not open to negotiation.

19 On 26 July 1996, in order to avoid forfeiting its security, the applicant paid the dispatch money.

20 On 12 March 1996 the Commission adopted Regulation (EC) No 449/96 on the transport for the free supply to Armenia and Azerbaijan of fruit juice, fruit jams and common wheat flour (OJ 1996 L 62, p. 4, hereinafter 'Regulation No 449/96').

21 That regulation provided for a tendering procedure for the supply costs of 3 800 tonnes of fruit juice, fruit jams and common wheat flour.

22 By decision of 27 March 1996 the Commission allocated the transport of that lot to the applicant, which was notified to that effect by registered letter dated 28 March 1996. That letter was accompanied by the same extracts of the Memorandum as were annexed to the letter to the applicant in Case T-121/96 (see paragraphs 7 and 8 above).

23 The applicant then entered into a charterparty with the shipowner on the COP basis for shipment of the goods. It was expressly agreed that no dispatch would be paid.

24 The goods were transported on three ships and discharged in the port of Batumi between 15 and 31 May 1996 inclusive.

25 On 27 August 1996, the Commission sent to the applicant, by fax and by ordinary post, a detailed statement of the costs to be paid to the Georgian authorities, including dispatch of USD 3 934.02, USD 1 705 and USD 375 respectively, giving a total of USD 6 014.02.

26 The applicant challenged that statement in a fax dated 29 August 1996. It none the less paid the dispatch money in order to avoid forfeiting its security.

Procedure and forms of order sought by the parties

27 By applications lodged at the Registry of the Court of First Instance on 5 August and 24 September 1996, the applicant brought two actions for annulment, which were registered under numbers T-121/96 and T-151/96 respectively.

28 By order of 9 December 1996 the President of the Fourth Chamber decided, pursuant to Article 50 of the Rules of Procedure, to join the two cases for the purposes of the written and oral procedure.

29 The parties presented oral argument and replied to the Court's questions at the hearing on 5 June 1997.

30 Having heard the parties at the hearing, the Court of First Instance (Fourth Chamber) considers that the two cases should also be joined for the purposes of the judgment.

31 In Case T-121/96 the applicant claims that the Court should:

— annul the Commission's decisions requiring the applicant to pay dispatch of USD 21 967.19 and rule that the applicant is not obliged to pay dispatch money to the Georgian authorities;

— order the Commission of the European Communities to pay to the applicant the sum of USD 21 967.19, together with interest calculated on the basis of the current statutory interest rate in Belgium of 8% per annum, as from 30 July 1996;

— order the Commission to pay the costs.

32 In Case T-151/96 the applicant claims that the Court should:

— annul the Commission's decision of 27 August 1996 requiring the applicant to pay dispatch of USD 6 014.02 and, accordingly, rule that the applicant is not obliged to pay dispatch money to the Georgian authorities;

— order the Commission to pay to the applicant the sum of USD 6 014.02, together with interest calculated on the basis of the current statutory interest rate in Belgium of 7% per annum, as from 1 September 1996;

— order the Commission to pay the costs.

33 The Commission contends that the Court should:

— declare the application in Case T-121/96 inadmissible; alternatively, dismiss it as unfounded;

— dismiss the application in Case T-151/96 as unfounded;

— order the applicant to pay the costs of the proceedings.

The claim for a declaration that the application in Case T-121/96 is inadmissible

Arguments of the parties

34 In its rejoinder the Commission claims that the application in Case T-121/96 is inadmissible on the ground that it was lodged out of time. According to the Commission, the contested decision had already been notified to the applicant on 6 May 1996, so that the subsequent decisions of the Commission which are referred to in the application do no more than confirm the contested decision. The application, lodged on 5 August 1996, was therefore made out of time.

35 The Commission adds that the plea of inadmissibility, raised in the rejoinder, is not contrary to Article 48(2) of the Rules of Procedure which prohibits the introduction of new pleas in law in the course of proceedings unless those pleas are based on matters of law or of fact which come to light in the course of the procedure. According to the Commission, it is apparent from the case-law that absolute bars to proceeding with a case, for example, expiry of the period within which proceedings may be brought, which are of such a nature that they can be raised at any time by the Court of its own motion, may be relied upon by the parties at any stage of the proceedings (see, in this respect, the Opinion of Advocate General Darmon in Case 126/87 *Del Plato* v *Commission* [1989] ECR 643, points 9 and 10).

36 At the hearing, although the applicant confirmed that this action was brought under the fourth subparagraph of Article 173 of the EC Treaty, it claimed that the two-month time-limit was observed. According to the applicant, time began to run in this case only as from 4 June 1996, when the Commission notified it by a new fax of the precise content of the fax of 6 May 1996 and the reasons on which it was based, so that it was able to exercise its right of action with effect from that moment only (Joined Cases T-432/93, T-433/93 and T-434/93 *Socurte and Others* v *Commission* [1995] ECR II-503, paragraph 49).

37 In the alternative, the applicant further claimed at the hearing that its letter of 10 May 1996, informing the Commission that it had entered into a COP charterparty in order to carry out the transport entrusted to it, constituted a new fact. The Commission subsequently adopted a new decision, notified to the applicant by fax on 4 June 1996, which took that new fact into account (see, *a contrario*, Case T-514/93 *Cobrecaf and Others* v *Commission* [1995] ECR II-621, paragraph 47).

Findings of the Court

38 It is settled case-law that the time-limit prescribed for bringing actions under Article 173 of the Treaty is a matter of public policy and is not subject to the discretion of the parties or the Court, since it was 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 (see in particular, Case 152/85 *Misset* v *Council* [1987] ECR 223, paragraph 11 and Case C-246/95 *Coen* [1997] ECR I-403, paragraph 21).

39 Under Article 113 of the Rules of Procedure, the Court of First Instance may at any time of its own motion consider whether there exists any absolute bar to proceeding with the case. Failure to observe the time-limit of two months for bringing actions laid down by the fifth subparagraph of Article 173 of the Treaty constitutes an absolute bar to the admissibility of the application. In this case, therefore, the Court of First Instance must ascertain of its own motion whether that time-limit was observed.

40 According to the fifth subparagraph of Article 173, the time-limit within which an action for annulment may be brought begins to run when the decision is notified to the person to whom it is addressed. It is settled case-law that the purpose of the notification is to enable the person concerned to become aware of the existence of the decision and the reasons given by the institution to justify it. In order to be duly notified, a decision must have been notified to the person to whom it is addressed and that person must be in a position to examine it (see, on the latter

point, the judgment of the Court of First Instance of 3 June 1997 in Case T-196/95 *H* v *Commission* [1997] ECR II-403, paragraph 31).

41 It is therefore necessary to consider whether the fax of 6 May 1996 constitutes a decision against which an action for annulment under Article 173 of the Treaty may be brought and, if so, whether it was duly notified to the applicant.

42 To determine whether the fax of 6 May 1996 constitutes a decision, it is necessary to examine whether it is capable of having any legal effect (Case 133/79 *Sucrimex and Westzucker* v *Commission* [1980] ECR 1299, paragraph 15).

43 In that respect, it is clear from the fax that the Commission, in accordance with the Memorandum, required the applicant to pay discharge and transport costs amounting to USD 89 940.87, including USD 21 967.19 in respect of dispatch money, to the Georgian authorities, within 20 days. The fax refers to the second indent of Article 12(4)(b) of Regulation No 2009/95 according to which the security lodged by the applicant is to be forfeited up to the amount payable together with transport costs, if payment is not made within the prescribed period. That fax therefore amounts to an act adversely affecting the applicant, of which the applicant clearly became aware on 6 May 1996.

44 As to whether the applicant was able to examine the reasons on which the decision at issue was based, two observations must be made.

45 First, the contested decision refers expressly to the Memorandum, the relevant extracts of which were received by the applicant. In that respect, the applicant's fax of 10 May 1996 demonstrates that the applicant had identified the reasons given by

the Commission to justify its decision, since it challenges the legality of referring to the Memorandum in order to require it to pay dispatch money to the Georgian authorities. Point 6 of the Memorandum, which concerns the calculation of the discharge and transport costs by the Commission once the transport has been effected, provides expressly that those costs are calculated by the Commission taking into account demurrage and dispatch.

46 Second, it should be noted that at no time, either before the application was lodged or in the course of the proceedings before the Court, did the applicant challenge the material accuracy of the information set out in the 'time sheet — dispatch/demurrage calculation' annexed to the Commission's fax of 6 May 1996, as the applicant admitted at the hearing. That document contains all the detailed information necessary for calculation of the dispatch money payable in this case, such as the discharge rate (already referred to in point 9 of the Memorandum), the daily dispatch rate, the tonnage of the ship to be discharged, the date of arrival of the ship, the dates and times of the commencement and completion of discharge together with a complete overview of the discharge operations, day-by-day. The applicant cannot therefore claim, as it did at the hearing, that in so far as it was not able to verify the authenticity of the information on that 'time sheet — dispatch/demurrage calculation' before it received a copy of the original as an annex to the Commission's letter of 17 July 1996, the contested decision was incomplete and was therefore not capable of having legal effects for it.

47 It follows from the above that the fax of 6 May 1996 amounted to a decision capable of having legal effects for the applicant and that it was duly notified to it. From the moment it received the fax, the applicant was therefore able to exercise its right to bring an action under Article 173 of the Treaty. It follows that the period of two months prescribed for bringing an action began to run on 6 May 1996.

48 That conclusion is not altered by the fact that the Commission sent a fax on 4 June 1996 replying to the applicant's fax of 10 May 1996. The fax of 4 June 1996, in which the Commission refused to reconsider its earlier decision contained in the

fax of 6 May 1996, did not clearly alter the applicant's legal position compared with that resulting from the previous decision since the Commission simply confirmed its previous decision without accepting any new factor capable of having mandatory legal effects such as to affect the applicant's interests (see, in that respect, the judgments in *Cobrecaf*, cited above, paragraph 45 and in Case C-480/93 P *Zunis Holding and Others* v *Commission* [1996] ECR I-1, paragraphs 11 to 14).

49 In that respect, the reference in the fax of 4 June 1996 to Article 10(5) of Regulation No 2009/95 must be regarded as merely explaining, by reference back to the Memorandum, the legal basis on which the initial decision contained in the fax of 6 May 1996 had been founded. It does not, therefore, prove that the Commission reexamined the file following the applicant's fax of 10 May 1996. Furthermore, in its response, the Commission clearly states that the obligation to pay dispatch arises exclusively from the regulations which apply in this case 'independently of the contracts which the operators entered into with their shipper and which may provide otherwise'. The existence of a COP charterparty entered into by the applicant for the transport at issue, which was only notified to the Commission in its fax of 10 May 1996, does not therefore constitute a new fact. Since that charterparty was extraneous to the legal relationship between the Commission and the applicant, it was not capable of affecting the Commission's findings concerning the existence and the basis of the payment requirement imposed by the decision contained in the fax of 6 May 1996.

50 It follows that the fax of 4 June 1996 did not amount to a new decision with respect to the decision contained in the fax of 6 May 1996.

51 The two-month time-limit, extended by two days on account of distance for parties established in Belgium by Article 102(2) of the Rules of Procedure, consequently expired at midnight on 8 July 1996.

52 The application in Case T-121/96 on 5 August 1996 was therefore lodged out of time and is consequently inadmissible.

53 Furthermore, since the pleas and arguments relating to the merits were identical to those raised in Case T-151/96 this application would, in any event, have had to be dismissed on its merits on the same grounds as those set out below in relation to that case.

The claim, in Case T-151/96, first, for annulment of the decision at issue and, second, for reimbursement by the Commission of the dispatch money paid, together with interest

54 In its reply the applicant pointed out that the application and the reply submitted in Case T-121/96 should be deemed to be reproduced in full in Case T-151/96. For that purpose, it annexed those two pleadings to its reply.

55 Accordingly, since the two cases have been joined, the arguments advanced by the applicant in Case T-121/96 should be taken into account in deciding Case T-151/96.

56 It should be noted that the application is poorly structured and that the pleas relied upon by the applicant in support of its application for annulment are not identified as such. However, the Commission was able to adopt a position on the merits and the parties accepted the structure given to the arguments by the Judge-Rapporteur in the Report for the Hearing. The Court of First Instance is therefore in a position to carry out its review.

First plea: infringement of Regulation No 2009/95 and the Memorandum

Arguments of the parties

57 The applicant considers that the decision requiring it to pay dispatch money of USD 6 014.02 amounts to an infringement of Regulation No 2009/95 and of the Memorandum, since neither of those measures specifies any rate on the basis of which those costs could be calculated. The applicant cannot, therefore, be considered liable for the dispatch money payable to the Georgian authorities.

58 The Commission was in a position to determine the dispatch rate at the time when the tendering procedure was announced or, at least, when the contract was awarded. The applicant claims that the Memorandum was concluded on 6 October 1995, so that the dispatch rates could have been notified when the contract was awarded on 27 March 1996. From the moment the applicant submitted its tender, the Commission was in possession of all the technical data concerning the vessels which would effect the transport awarded to the applicant, since the applicant was required to provide that information by Article 6(1)(d)(3) of Regulation No 2009/95. It is also clear from the Commission's practice that it was perfectly able to determine the dispatch rate at the time when it adopted the regulation concerning the tender procedure. In that respect, the applicant refers to Commission Regulation (EC) No 1416/96 of 22 July 1996 on the supply of common wheat as food aid (OJ 1996 L 182, p. 1, hereinafter 'Regulation No 1416/96') which sets out dispatch rates in respect of a supply to Bangladesh.

59 The applicant also questions the reasons which led the Commission to disclose the information necessary for calculating the dispatch rate only in its defence, although it could have done so earlier in the tender procedure.

60 The Commission's argument according to which the applicant is required to pay dispatch money, is tantamount to saying that the applicant should have predicted a rate when it chartered the vessel, although it did not know the amount which would finally be payable. On that point, the Commission cannot claim that the applicant could have referred to the rates applied in previous food aid operations under Council Regulation (EC) No 1999/94 of 27 July 1994 on actions for the free supply of agricultural products to the peoples of Georgia, Armenia, Azerbaijan, Kyrgyzstan and Tajikistan (OJ 1994 L 201, p. 1), since that transport took place in 1994 and 1995, whilst the transport in this case occurred in 1996.

61 Finally, in its reply, the applicant alleges that, by prescribing a relatively low discharge rate in the Memorandum, and at the same time not stipulating the dispatch rate, the Commission indirectly adopted a provision allowing a form of subsidy to be paid to the recipient of food aid, in this case the Georgian authorities, by the tenderer, if the vessel was discharged swiftly. In such a situation it would be unreasonable for the tenderer to pay dispatch money, particularly if the amount charged is disproportionate to the value of the foodstuffs transported. The applicant claims that if this argument were to be regarded as a new plea, it would none the less be admissible under Article 48(2) of the Rules of Procedure, since it is based on a fact which was brought to the applicant's attention by the letter in Annex I to the defence in Case T-121/96.

62 In response, the Commission states, first, that the mere fact that no dispatch rate was prescribed in Regulation No 2009/95 or in the Memorandum is not sufficient to relieve the applicant of the obligation to pay the dispatch money, since it is clear from Article 10(5) of that regulation and points 5 and 9 of the Memorandum that it was liable to pay such costs. In that respect, the Commission refers to Article 55 of the Convention on Contracts for the International Sale of Goods according to which, where the contract does not fix the price, the purchaser is required to pay the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned.

63 In the light of those considerations, the Commission submits that the dispatch money claimed from the applicant should be examined in order to determine whether it is reasonable. The dispatch rate finally agreed between the Commission and the Georgian authorities cannot be considered to be unreasonable, since rates of a comparable level had been agreed in respect of an earlier food aid operation where the undertakings were authorized to negotiate the dispatch rates individually. Furthermore, it is clear from point 18 of the first part of the charterparty which was concluded between the applicant and the owner of a ship chartered for the transport at issue and which is annexed by the applicant to the application in Case T-151/96, as well as from additional clause 23, that demurrage was fixed at USD 2 200, so that the dispatch rate adopted by the Commission in that case, that is to say USD 750 for the ship which had transported less than 1 000 tonnes and USD 1 100 for the two other ships which had transported between 1 000 and 2 000 tonnes, is not unreasonable, since dispatch money normally amounts to one-half of demurrage.

64 The Commission points out that the applicant does not dispute the reasonableness of the dispatch rates which were applied, but merely asserts that no dispatch money was payable since those rates were not included in the extracts of the Memorandum provided when the contracts at issue were awarded. The defendant adds that no other undertaking has refused to pay dispatch money on the ground that the rate was not known at that time.

65 Secondly, the Commission considers that its legal relationship with the applicant must be distinguished from the relationship between the applicant and the owner of the ship.

66 The relationship between the Commission and the applicant is governed only by Regulation No 2009/95 and the Memorandum. For example, Article 5(1) of Regulation No 2009/95 provides that the Commission will pay a flat rate for each tonne transported, without taking into account the actual price agreed between the applicant and the shipowner. It is clear from those provisions that the applicant was

responsible for paying dispatch money. The Memorandum concluded with the Georgian authorities envisaged that demurrage would be paid to undertakings carrying out the transport. That was why they were only required to pay 70% of the discharge costs in advance, the balance of 30% being payable only after deduction of any demurrage on the basis of the actual delay in discharge. In exchange, the Georgian authorities required that dispatch money be added to the balance of 30% if discharge was completed rapidly. That twofold requirement explains the wording of point 6 of the Memorandum, according to which dispatch and demurrage may not be paid directly to the ports and the balance is to be calculated together with demurrage and dispatch. It is also clear from point 2 of the Memorandum that the Georgian authorities, and not the applicant in its capacity as charterer, were responsible for discharge. That being so, in contrast to the normal situation, those authorities, and not the applicant, were required to pay demurrage or permitted to claim dispatch money.

67 In contrast, the relationship between the applicant and the owner of the chartered ships is governed by the charterparties entered into by them. Clause No 23 of the charterparty annexed to the application in Case T-151/96 thus provided that no dispatch money was payable, meaning that, in contrast to the normal situation, the shipowner was not required to pay such costs to the applicant (the charterer). However, those charterparties do not affect the obligation — imposed on the applicant by Regulation No 2009/95 and the Memorandum, in its capacity as successful tenderer for the transport contract at issue, — to pay dispatch money to the Georgian authorities, which were responsible for discharge in its stead. They are intended only to govern the relationship between the applicant and the shipowner. The Commission also claims that the applicant could have drafted the charterparties with reference to the Memorandum, the content of which it was familiar with. By agreeing that the shipowner was not required to pay dispatch money, it deliberately exposed itself to the risk that it would have to pay dispatch money itself.

68 Thirdly, the Commission notes that it was not able to determine the exact amount of the dispatch money at the time when the Memorandum was signed, since that amount depended on a number of factors which were not certain at that time, such

as the port of discharge, the tonnage of the ship, the state of the ship and the evolution of prices in the shipping market. The applicable rates were only established to the extent that information was available. Furthermore, it was not possible to determine the tonnage of the ships used on the basis of the information set out in the applicant's tenders since those tenders indicated only the type of ship and did not specify either the number of ships to be used or their tonnage. In contrast, in Regulation No 1416/96, to which the applicant refers, the Commission was able to determine the tonnage of the ships to be used for the transport at issue and, consequently, to set the applicable dispatch rate in advance. The Commission also notes that the applicant never enquired as to the dispatch rate which would apply and therefore apparently did not object to the fact that that rate was not expressly mentioned in the documents sent to it.

69 Fourthly, the Commission considers that the argument according to which the payment of dispatch money is a form of subsidy to the Georgian authorities amounts to a new plea which is inadmissible under Article 48(2) of the Rules of Procedure, in so far as it is based on two facts, concerning calculation of the dispatch money payable, which were already known to the applicant before this action was brought. The Commission stresses that the discharge rate was specified in point 9 of the extracts of the Memorandum provided when the contracts at issue were awarded and that the dispatch rate was determined in the contested decisions. In any event, the discharge rate was not excessively low taking into account the nature of the goods transported and the facilities available in Georgia.

Findings of the Court

70 The relationship between the applicant and the Commission is governed exclusively by Council Regulation No 1975/95, Regulations Nos 2009/95 and 449/96 adopted by the Commission within the framework established by that regulation,

the decision of 27 March 1996 and the Memorandum concluded between the Commission and the Georgian authorities, the relevant extracts of which were attached to the Commission's letter of 28 March 1996.

71 It is clear from those measures that undertakings which submitted successful tenders for the transport were required to pay dispatch money to the Georgian authorities, where necessary.

72 Article 10(5) of Regulation 2009/95 thus provides that payments in respect of unloading and transport as well as demurrage and dispatch to be effected in favour of Georgian administrations must be executed in accordance with the terms and conditions fixed in the Memorandum. That provision not only specified that the Memorandum is to govern the terms and conditions of payments relating to payment of dispatch money, but also clearly sets out the principle that dispatch money is to be paid to the Georgian authorities if necessary, by use of the words 'payment in respect of [...] dispatch to be effected in favour of Georgian administrations'.

73 The procedures for payment are prescribed in the Memorandum as follows. Point 5 provides that the undertaking to which the transport contract is awarded must pay 70% of the transport and discharge costs, calculated on the basis of the quantities transported, before arrival of the ship in the Georgian port. Point 6 provides that the balance of 30% together with demurrage and dispatch is to be calculated by the Commission after discharge on the basis of the 'time sheets' prepared by the captain of the ship and the port authorities together. That point also provides that no demurrage or dispatch may be paid directly to the port authorities. Finally, point 7 provides that the operator must pay the amount referred to in point 6 within 15 days.

74 It is therefore clear from points 5, 6 and 7 of the Memorandum that the calculation made by the Commission after discharge of the ship by the Georgian authorities

comprises not only the balance of the discharge costs, but also, where appropriate, the dispatch money and that the undertaking responsible for the transport must pay that money.

75 The fact that it entered into a charterparty with a shipowner which precluded the payment of any dispatch by the shipowner does not in any way affect the applicant's legal position *vis-à-vis* the Commission, since that charterparty is intended only to govern the relationship between the applicant and the shipowner. The 'no dispatch' clause means only that the shipowner is not required to pay dispatch money to the applicant, even if the applicant becomes liable for such payment to the Georgian authorities under Article 10(5) of Regulation No 2009/95 and the Memorandum.

76 As it acknowledged at the hearing, the applicant therefore took a risk by accepting the 'no dispatch' clause. The applicant claims that it accepted that risk because it believed that the fact that no precise dispatch rate was notified to it when the contract was awarded meant that it could not be required to pay dispatch money to the Georgian authorities under any circumstances. However, that belief is erroneous. The fact that no dispatch rate was notified to the applicant when the contract was awarded does not relieve the applicant of such an obligation. It should be recalled that the Memorandum clearly required the successful tenderer to pay dispatch money but did not dwell on determining the extent of that obligation by fixing the rate which would apply. Furthermore, no other provision of the regulations governing the relationship between the Commission and the applicant requires the Commission to determine the dispatch rate before or at the time of awarding the various contracts of carriage. In those circumstances, the fact that the applicable rates were not notified at the time when the contract was awarded does not alter the fact that the applicant is required to pay dispatch money.

77 Furthermore, the exact amount payable in respect of dispatch can only be determined after the ship has been discharged, meaning that it would be hazardous to determine that amount before discharge even if the applicable rates were known in

advance. When, as in this case, those rates are not known at the time when the contract is awarded, the successful tenderer must anticipate that a reasonable rate will be applied.

78 On that point, as it again confirmed at the hearing, the applicant does not dispute the reasonableness of the dispatch rate which was finally applied.

79 In any event, if problems arose, the applicant — which was aware from the time when it submitted its tender on the basis of Article 10(5) of Regulation No 2009/95 and, even more specifically, on receiving the extracts of the Memorandum when the contract at issue was awarded, that dispatch money might be payable — could have asked the Commission for the exact rates, in order better to assess the risk to which it exposed itself by entering into charterparties containing a 'no dispatch' clause.

80 The applicant's argument, in its rejoinder, that a hidden subsidy was granted to the Georgian authorities by virtue of the amount of the dispatch money payable, is a new plea which is inadmissible under Article 48(2) of the Rules of Procedure in so far as it is based on two facts which were already known to the applicant at the time the application was lodged. The calculation of the amount of dispatch payable depends on the stipulated discharge rate and the dispatch rate applied. The former is set out in point 9 of the extracts of the Memorandum which were annexed to the applications in the two cases now before the Court, and the latter is referred to in each of the decisions against which they have been brought and which are also annexed to those applications.

81 It follows from the above that the first plea must be dismissed.

Second plea: the calculation of the dispatch money payable is not clear

Arguments of the parties

82 The applicant also claims that the calculation of the amounts payable, contained in the contested decision, was not clear.

83 The Commission replies that the method of calculating the dispatch money payable is apparent from the documents entitled 'time sheet — dispatch/demurrage calculation' and that the various calculations are not in any way erroneous.

Findings of the Court

84 The calculation of the dispatch money payable is clearly shown in the documents entitled 'time sheet — dispatch/demurrage calculation' which the Commission sent to the applicant as an integral part of the contested decision.

85 At the hearing, in response to a question from the Court, the applicant stated that, in actual fact, the alleged lack of clarity related exclusively to the fact that the dispatch rates applied in the calculations were not previously known to it. The conclusion to be drawn from this is that the calculations were perfectly clear to the applicant but that what in fact it is doing, by means of the second plea, is to dispute once again the very principle that it is required to pay any dispatch money which may fall due, which is precisely the object of the arguments developed in the context of the first plea.

86 It follows that, like the first plea, the second plea must be dismissed, particularly since the applicant has in no way denied that all the calculations are correct or that they are based on the application of reasonable dispatch rates.

87 It follows from all the above that the claim for annulment of the decision at issue must be dismissed in its entirety. Consequently, the claim for reimbursement by the Commission of the dispatch money paid, together with interest, no longer has any purpose.

Costs

88 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 and the Commission has applied for costs, the applicant must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. Orders that Cases T-121/96 and T-151/96 be joined for the purposes of judgment;

2. Dismisses the application in Case T-121/96 as inadmissible;

3. Dismisses the application in Case T-151/96;

4. Orders the applicant to pay the costs.

Lenaerts Lindh Cooke

Delivered in open court in Luxembourg on 18 September 1997.

H. Jung K. Lenaerts

Registrar President