JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)
24 September 1996 *

In Case T-494/93,

Compagnie Continentale (France), a company incorporated under French law, established at Levallois-Perret (France), represented by Patrick Chabrier, of the Paris Bar, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 8-10 Rue Mathias Hardt,

applicant,

v

Commission of the European Communities, represented by Marie-José Jonczy, Legal Adviser, and Nicholas Khan, 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,

APPLICATION for (i) annulment of the decision of the Commission of 1 April 1993 addressed to the Vnesheconombank and (ii) restoration of its rights against Crédit Lyonnais,

* Language of the case: French.

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

composed of: C. P. Briët, President, B. Vesterdorf and A. Potocki, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 25 April 1996,

gives the following

Judgment

Legal background

1 On 16 December 1991, having established the need to provide food and medical aid to the Soviet Union and its constituent Republics, the Council adopted Decision 91/658/EEC granting a medium-term loan to the Soviet Union and its constituent Republics (OJ 1991 L 362, p. 89, hereinafter 'Decision 91/658'), which provides as follows:

'*Article 1*

1. The Community shall grant to the USSR and its constituent Republics a medium-term loan of not more than ECU 1 250 million in principal, in three successive instalments and for a maximum duration of three years, in order to enable agricultural and food products and medical supplies (...) to be imported.

Article 2

For the purposes of Article 1, the Commission is hereby empowered to borrow, on behalf of the European Economic Community, the necessary resources that will be placed at the disposal of the USSR and its constituent Republics in the form of a loan.

Article 3

The loan referred to in Article 2 shall be managed by the Commission.

Article 4

1. The Community is hereby empowered to finalize, in concert with the authorities of the USSR and its constituent Republics (...), the economic and financial conditions to be attached to the loan, the rules governing the provision of funds and the necessary guarantees to ensure loan repayment.

(...)

3. Imports of products financed by the loan shall be effected at world market prices. Free competition shall be guaranteed for the purchase and supply of products, which shall meet internationally recognized standards of quality.'

2 On 9 July 1992 the Commission adopted Regulation (EEC) No 1897/92 laying down detailed rules for the implementation of a medium-term loan to the Soviet Union and its constituent Republics (OJ 1992 L 191, p. 22, hereinafter 'Regulation No 1897/92'), which provides:

'*Article 2*

The loans shall be concluded on the basis of agreements entered into between the Republics and the Commission which shall include, as conditions for disbursement of the loan, the requirements set out in Articles 3 to 7.

(...)

Article 4

1. The loans shall only finance the purchase and supply under contracts that have been recognized by the Commission as complying with the provisions of Decision 91/658/EEC and with the provisions of the agreements referred to in Article 2.

2. Contracts shall be submitted to the Commission for recognition by the Republics or their designated financial agents.

Article 5

Recognition referred to in Article 4 shall only be granted subject to fulfilment of, in particular, the conditions referred to in this Article.

1. The contract was awarded following a procedure guaranteeing free competition.
(...)

2. The contract offers the most favourable terms of purchase in relation to the price normally obtained on the international markets.'

3 On 9 December 1992 the EEC, the Russian Federation and its financial agent, the Vnesheconombank ('VEB') signed, pursuant to Regulation No 1897/92, a Memorandum of Understanding, on the basis of which the European Community was to grant to the Russian Federation the loan provided for by Decision 91/658. It was provided that the EEC as lender would grant to the VEB, as borrower, under the guarantee of the Russian Federation, a medium-term loan of the principal sum of ECU 349 million for a maximum term of three years. The Memorandum of Understanding states:

'6. The proceeds of the loan, less commissions and costs incurred by the EEC, shall be disbursed to the Borrower and applied, according to the terms and conditions of the Loan Agreement, exclusively to cover irrevocable documentary credits issued by the Borrower in international standard form pursuant to delivery contracts provided that such contracts and documentary credits have been approved by the Commission of the European Communities as complying with the Council decision of 16 December 1991 and the present Memorandum of Understanding.'

According to clause 7 of the Memorandum of Understanding, approval of the conformity of the contract was subject to fulfilment of certain conditions. These included a requirement that suppliers were to be selected by Russian organizations designated to that end by the Government of the Russian Federation.

4 On 9 December 1992 the Commission and the VEB signed the loan agreement provided for by Regulation No 1897/92 and the Memorandum of Understanding (hereinafter 'the loan agreement'). That agreement sets out in precise terms the machinery for the disbursement of the loan. It establishes a facility to which recourse may be had during the drawing period (15 January 1993 to 15 July 1993), with a view to the advance of sums authorized for payment of the price of goods supplied.

5 The disbursement machinery, based on normal practice in international trade, is described in Part III of the loan agreement as follows:

'5. **DRAWING**

5.1 *Procedure*

(a) The Borrower shall notify the Lender of a proposed Disbursement by issuing an Approval Request (...)

(b) If the Drawing Period has commenced and if the Lender is satisfied, on the basis of the information contained in the Approval Request and in its absolute discretion, that the purpose of the proposed Disbursement is in accordance with Clause 3 and the Memorandum of Understanding and the Advising/Confirming Bank named in the Approval Request is acceptable to the Lender, it shall within a reasonable time issue a Notice of Confirmation substantially in the form of Schedule 3.

(c) Following receipt of a Notice of Confirmation in respect of a proposed Disbursement the Borrower shall issue a Disbursement Request within the Disbursement Period in accordance with the provisions of Clause 5.3.

5.3 *Disbursement*

(a) A Disbursement shall, subject to Clause 5.5, only be made available for drawing pursuant to a Disbursement Request received by the Lender from the Borrower to meet a payment falling due from the Borrower to an Approved Confirming Bank. All Disbursement Requests once given shall be irrevocable

and shall (subject to Clauses 10 and 12) oblige the Borrower to become indebted in the stated amount on the stated day and to accept the Disbursement Conditions.

(b) Each Disbursement Request shall:

(i) be in the form set out in Schedule 4;

(ii) be signed by the Borrower;

(iii) request the relevant payment to be made not later than the last Business Day of the Drawing Period to the Approved Confirming Bank by having the account of such bank credited with the amount of such payment;

(iv) be accompanied by documents as specified in Schedule 4.'

6 The irrevocable documentary credit machinery provided for is in accordance with the 'uniform customs and practices for documentary credits' elaborated by the Paris International Chamber of Commerce and adopted by the Community as the standard form of documentary credit to be used by issuing banks.

7 On 15 January 1993, in accordance with Article 2 of Decision 91/658, the Commission as borrower concluded on behalf of the Community a loan agreement with a consortium of banks led by Crédit Lyonnais.

Facts

8 The applicant, an international trading company specializing in agricultural raw materials, was contacted, together with other companies, in connection with an invitation to tender organized by Exportkhleb, a State-owned company charged by the Russian Federation with the negotiation of wheat purchases.

9 On 27 November 1992 the applicant signed two contracts with Exportkhleb for the sale of wheat. Under the first contract, it undertook to supply 500 000 tonnes of milling wheat, 50 000 tonnes of which were subsequently cancelled, at a price of US $140.40 per tonne, CIF free out one safe Baltic Sea discharge port. Under the second contract, it undertook to supply 20 000 tonnes of durum wheat at a price of US $145 per tonne, CIF free out one safe Black Sea port. That second contract was modified on 2 December 1992 to provide for the delivery of an additional 15 000 tonnes of durum wheat at a price of US $148 per tonne, CIF free out one safe Black Sea port. All those consignments were to be shipped by 28 February 1993.

10 Following signature of the loan agreement (see paragraph 4 above), the VEB requested the Commission to approve the contracts concluded between Exportkhleb and the grain exporting companies, including the contracts signed by the applicant.

11 After the Commission had obtained from the applicant various additional items of essential information, concerning in particular the ecu/US$ exchange rate, which had not been fixed in the contract, it finally gave its approval on 27 January 1993, in the form of a notice of confirmation addressed to the VEB.

12 According to the applicant, the letters of credit did not become operational until 16 February 1993 in the case of the durum wheat and 25 February 1993 in the case of the milling wheat, that is to say, a few days before the end of the shipment period provided for by the contracts (28 February 1993).

13 The contracts were only partially performed. Although a substantial part of the goods had been delivered or was in the course of shipment, it was becoming clear, according to the applicant, that it would not be possible to deliver all of them by 28 February 1993.

14 On 19 February 1993 Exportkhleb invited all the exporters to attend a meeting in Brussels, which was held on 22 and 23 February 1993. At that meeting Exportkhleb requested the exporters to submit fresh quotations for delivery of what it termed the 'foreseeable balance', that is to say, the quantities which could not reasonably be expected to be delivered by 28 February 1993. According to the applicant, the price of wheat rose considerably between November 1992, when the sale contracts were concluded, and February 1993, when those fresh negotiations took place.

15 Following negotiations in which the exporting companies had to align themselves on the lowest bid, namely US $155 per tonne, agreement was reached between the importer and its contracting partners regarding the allocation of the fresh quantities to be supplied by each company. Compagnie Continentale was awarded a contract for the supply of 300 000 tonnes of milling wheat, of which 120 000 tonnes were to be supplied at the price initially agreed and 180 000 tonnes at a price of US $155, together with 20 000 tonnes of durum wheat or milling wheat at a price of US $155. Under that informal agreement, the shipment period was to end on 30 April 1993.

16 According to the applicant, it was decided at the request of Exportkhleb, by reason of the urgency arising from the seriousness of the food situation in Russia and with a view to obviating the ponderous procedure for approval and for setting up the credits, that those modifications would be formalized by simple riders to the initial contracts, which were dated, for the sake of convenience, 23 February 1993, the date of the meeting in Brussels. When the riders were drawn up, it was agreed that the quantity of wheat to be delivered should be reduced, in order, according to the applicant, to prevent the new total price from exceeding the total price initially provided for.

17 On 9 March 1993 Exportkhleb informed the Commission, first, that the contracts concluded with five of its suppliers had been amended and, second, that the deliveries still to be made would henceforth be effected at a price of US $155 per tonne, to be converted into ecus at a rate of 1.17418 (ECU 132 per tonne).

18 On 12 March 1993 Mr Legras, Director General in the Directorate-General for Agriculture (DG VI), replied to Exportkhleb, stating that he wished to draw its attention to the fact that, since the maximum value of those contracts had already been set by the Commission's notice of confirmation and the entire available amount of credits for wheat was already contracted, such a request could only be accepted by the Commission if the total value of the contracts was maintained, which could be done by a corresponding reduction in outstanding quantities to be delivered. He further stated that the request for approval of the amendments could only be considered by the Commission pursuant to an official request from the VEB.

19 According to the applicant, that letter was interpreted as confirming the Commission's agreement in principle, subject to scrutiny for the purposes of formal approval once the documentation was sent by the VEB. It was for that reason that the applicant continued to ship the cargoes of wheat bound for Russia.

20 According to the applicant, the documentation containing the new bids and the amendments to the contracts was officially sent by the VEB to the Commission on 22 March 1993. On 1 April 1993, by letter addressed to the VEB by the Agriculture Commissioner, the Commission refused to approve the amendments to the contracts.

21 The contents of the letter of 1 April 1993 may be summarized as follows. The Commissioner, Mr R. Steichen, stated that, having examined the amendments to the contracts concluded between Exportkhleb and various suppliers, the Commis-

sion was prepared to accept those relating to the postponement of the final dates for delivery and payment. On the other hand, 'the magnitude of the price increases is of such a nature that we cannot consider them as a necessary adaptation but as a substantial modification of the contracts initially negotiated'. He went on to state: 'In fact, the present level of prices on the world market (end of March 1993) is not significantly different from the level which prevailed at the time when the initial prices were agreed (end of November 1992).' The Commissioner pointed out that the need, first, to ensure free competition between potential suppliers and, second, to secure the most favourable purchase terms constituted one of the main factors governing the grant of approval by the Commission. He found that, in the present case, the amendments had been negotiated directly with the companies concerned, without any competition with other suppliers, and concluded: 'The Commission cannot approve such major changes as simple amendments to existing contracts.' The Commissioner stated that he would be willing to approve the amendments relating to the postponement of delivery and payment, subject to compliance with the usual procedure. On the other hand, he stated that, 'should it be considered necessary to modify the prices or quantities, it would then be appropriate to negotiate new contracts to be submitted to the Commission for approval under the full usual procedure (including submission of at least 3 offers)'.

22 On 5 April 1993 the applicant received a telex from Exportkhleb informing it of the Commission's refusal and quoting extracts from the letter of 1 April 1993, attributed to Mr Legras. On 20 April it received from Exportkhleb the complete text of the letter in question.

Procedure and forms of order sought

23 It was in those circumstances that, by application lodged at the Registry of the Court of Justice on 22 June 1993 and registered under number C-357/93, the applicant brought the present action.

24 By order of 27 September 1993 the Court of Justice referred the case to the Court of First Instance pursuant to Council Decision 93/350/Euratom, ECSC, EEC of 8 June 1993 amending Decision 88/591/ECSC, EEC, Euratom establishing a Court of First Instance of the European Communities (OJ 1993 L 144, p. 21).

25 The case was registered in the Registry of the Court of First Instance under number T-494/93. By document lodged at the Registry on 7 December 1993 the Commission raised an objection of inadmissibility.

26 Upon hearing the Report of the Judge-Rapporteur, the Court of First Instance (Third Chamber) decided to open the oral procedure without any preparatory inquiry.

27 At the hearing on 25 April 1996 the parties presented oral argument and answered questions put to them by the Court.

28 The applicant claims that the Court should:

— annul the Commission's decision of 1 April 1993 refusing to approve the agreements concluded on 23 February 1993 and the amendments to the letters of credit relating thereto;

— restore the company's right to receive from Crédit Lyonnais the balance arising from the difference between the price initially agreed and the prices subsequently agreed in relation to the quantities of wheat delivered from

28 February 1993 onwards, failing which the company expressly reserves all its rights if necessary to bring proceedings for non-contractual liability with a view to obtaining compensation for the loss it has suffered;

— order the Commission to pay the costs.

29 In its objection of inadmissibility, the Commission contends that the Court should:

— declare the action inadmissible on the ground that it was brought out of time;

— declare the application for annulment inadmissible on the ground that the decision is not of direct concern to the applicant;

— declare the ancillary claim inadmissible;

— order the applicant to pay the costs.

30 In its observations on the objection of inadmissibility, the applicant claims that the Court should:

— dismiss the objection of inadmissibility.

Admissibility

31 In its objection of inadmissibility, the Commission advances three pleas. First, the action as a whole is inadmissible, since it is out of time. Second, the application for annulment is inadmissible, since the contested act is not of direct concern to the applicant. Third, the applicant's ancillary application is not for any known legal remedy. Having regard to the circumstances of the case, the Court considers it appropriate to examine first of all the second and third pleas.

Admissibility of the claim for annulment

Arguments of the parties

32 The Commission raises an objection of inadmissibility on the ground that the contested act is not of direct concern to the applicant within the meaning of the fourth paragraph of Article 173 of the Treaty.

33 The Commission first presents lengthy explanations describing the machinery of the rules and agreements in issue. It points out that the very nature of the arrangements made is such as to render the claim for annulment inadmissible.

34 The Commission observes that the Memorandum of Understanding constitutes the basis of the agreement between the Community and the Russian Federation for the grant of the loan. The Memorandum of Understanding fixes the amount of the loan (ECU 349 million) and lists the conditions for approval of contracts.

35 As regards the loan agreement, the Commission states that the implementation of the loan constitutes a private commercial act. It points out, first, that there is nothing to suggest that the facility for which it provides was to become available with effect from 15 January 1993, since clause 4 requires various conditions to be fulfilled prior to its becoming operational, and, second, that the loan agreement does not confer on it any role in the conclusion of the supply contracts, its involvement being limited to verifying that those contracts qualify for financing from the Community loan.

36 As regards the actual documentary credit operation, the Commission observes that, even though an irrevocable credit creates a legally binding contract between the issuing bank and the debtor, such a contract nevertheless contains no covenant by the Community requiring the supplier's demand for payment to be met by the Community authorities. Moreover, like any unconfirmed credit, the documentary credit issued by the issuing bank merely creates a contingent liability on the part of that bank towards the supplier, since the latter's right to receive payment arises only when the company has submitted the documents showing that the acts required for payment have been performed, for example, by producing the documents proving shipment of the wheat. The Commission infers from this that the Community consequently assumes no liability towards the supplier or its bank, and observes that, although in practice the Community sends the supplier's bank a reimbursement undertaking when it receives a satisfactory disbursement request, that undertaking remains in any event subject to the essential data set out in the notice of confirmation and is, in particular, valid only in relation to the supplier's bank, to whom the Community merely guarantees that the issuing bank's obligation will be honoured in accordance with the documentary credit. The Commission points out that the right *per se* of a supplier to receive payment on the basis of an unconfirmed documentary credit exists only against the bank issuing the credit — in the present case, the VEB.

37 As regards the supply contracts concluded with Exportkhleb, the Commission asserts that those contracts were signed before the Memorandum of Understanding and the loan agreement were concluded, and that the applicant had no control either over the loan agreement or over the date on which the issuing bank was to fulfil the conditions to be met in order for the loan to be made available.

38 As regards the notice of confirmation, the Commission observes that that document is drawn up in accordance with the provisions of the loan agreement and cannot modify the contractual terms agreed between the applicant and Exportkhleb.

39 Continuing with its opening remarks, the Commission notes the analogies between that system and the system governing the financing of development projects in the context of the Lomé Convention. As the Court of Justice stated in its judgment in Case 126/83 *STS* v *Commission* [1984] ECR 2769, Article 120 of the Lomé Convention lays down the principle that States have sole responsibility for implementing projects and action programmes. Accordingly, they are responsible for preparing, negotiating and concluding the necessary contracts for the implementation of those operations. The Commission asserts that the position is the same as regards the system set up for the financing of imports of wheat, since the Memorandum of Understanding provides that the loan is to cover irrevocable documentary credits issued by the borrower pursuant to supply contracts. It maintains that it plays an even greater role within the Lomé system than in the context of the Russian loan, inasmuch as, in the latter case, it takes no part in the award of the contract.

40 In the Commission's view, the contested letter of 1 April 1993 cannot be regarded as being of direct concern to the applicant within the meaning of the fourth paragraph of Article 173 of the Treaty. That letter was not, and could not have been, intended to modify the terms of the commercial contracts between the applicant and Exportkhleb. The Commission's role was solely to verify whether the financing conditions laid down by the documentation were fulfilled and, if so, to authorize disbursement of the Russian loan. It was not for the Commission to validate the commercial agreements. The consequence of the Commission's letter is merely that the loan can no longer be used to pay for deliveries of wheat under the revised terms of the contract.

41 The Commission refers in that regard to the judgment of the Court of Justice in Case 126/83 *STS* v *Commission*, cited above, contending that that judgment raised comparable issues in the context of the Lomé Convention and that the decision on those issues is applicable by analogy to the present case.

42 The Commission submits, finally, that, just as it is a third party to the sale contract between the Community undertaking and the competent Russian authority, the undertaking is a third party to the loan agreement. In those circumstances, the applicant cannot be directly concerned within the meaning of the fourth paragraph of Article 173 of the Treaty.

43 The applicant draws attention, first, to the specific features of the system that has been set up, inasmuch as the funds lent are directly allocated for payment by the Community or its financial agent, Crédit Lyonnais, for the goods supplied pursuant to contracts approved by the Commission. The Russian borrower at no time has access to those funds, since the Russian loan in fact consists of a credit facility made available by the Community, recourse to which may be had by its financial agent. Approval of the sale contracts, the criteria, rules and conditions of which are defined in published Community provisions, creates a direct link with the vendor, since it confirms the latter's entitlement to the loan cover, which guarantees that he will be paid if the criteria laid down by the provisions are fulfilled; without that guarantee, he would not have entered into the contract. If the applicant is directly concerned by the approval of contracts, it is *a fortiori* concerned by a refusal to approve them.

44 Next, the applicant contests the parallel drawn by the Commission with the judgments delivered by the Court of Justice in the context of the Lomé Convention. Thus, in *STS* v *Commission*, cited above, the applicant, in bringing proceedings against the Commission's decision approving the award of the contract to another tenderer, was in fact contesting the decision to accept that other tenderer's offer. In the present case, however, the decision of the Commission was not supplemental to the contract, which had already been concluded, but formed the very condition on which it was based. The action seeks only to contest a decision by the Commission refusing to approve the amended contract concluded between the applicant and Exportkhleb. Since the commercial contract is conditional on the issue of the credits by the Commission, the latter's refusal means that no legal nexus, and, by extension, no legal remedy, exists between the applicant and the Russian authorities. By contrast, a parallel should be drawn with Joined Cases 41/70, 42/70, 43/70 and 44/70 *International Fruit Company and Others* v *Commission* [1971] ECR 411.

45 Lastly, according to the applicant, it is apparent from the facts of the present case that it is directly concerned. As a direct result of the refusal to approve the amended contract, it has received only partial payment. There were numerous exchanges between the Commission and the applicant, which received, in particular, a copy of the notice of confirmation of 27 January 1993. Furthermore, in so far as performance of the initial contracts has proved problematic, that is solely because of the considerable delay in their being approved, which compromised the progress of the planned delivery programme and rendered the renegotiation of the contracts inevitable.

46 The applicant, invoking legitimate expectations arising, in its submission, from letters sent by the Commission prior to its refusal to give its approval, claims that the requisite price alterations were ratified.

Findings of the Court

47 According to the fourth paragraph of Article 173 of the Treaty, any natural or legal person may institute proceedings against a decision which, although in the form of a decision addressed to another person, is of direct and individual concern to the former.

48 It is necessary, therefore, to determine whether the letter sent by the Commission to the VEB on 1 April 1993 is of direct and individual concern to the applicant.

49 First of all, the Commission has not denied that the applicant is individually concerned. Having regard to the circumstances of the case, the Court considers that only the question whether the contested decision is of direct concern to the applicant need be examined.

50 The Community rules and the agreements concluded between the Community and the Russian Federation provide for a division of powers between the Commission and the agent appointed by the Russian Federation to arrange the purchase of the wheat. It is for that agent — in the present case, Exportkhleb — to select the other contracting party by means of an invitation to tender and to negotiate and conclude the contract. The Commission's role is merely to verify that the conditions for Community financing are fulfilled and, where necessary, to acknowledge, for the purposes of the disbursement of the loan, that such contracts are in conformity with the provisions of Decision 91/658 and with the agreements concluded with the Russian Federation. It is not for the Commission, therefore, to assess the commercial contract with reference to any other criteria.

51 It follows that the undertaking to which a contract is awarded has a legal relationship only with the party with whom it contracts, namely Exportkhleb, which is authorized by the Russian Federation to conclude contracts for the purchase of wheat. The Commission, for its part, has legal relations only with the borrower, namely the Russian Federation's financial agent, the VEB, which notifies it of the commercial contracts so that their conformity can be recognized, and which is the addressee of the Commission's decision in that regard.

52 The action of the Commission does not therefore affect the legal validity of the commercial contract concluded between the applicant and Exportkhleb; nor does it modify the terms of the contract, particularly as regards the prices agreed by the parties. Thus, irrespective of the Commission's decision not to recognize the agreements as being in conformity with the applicable provisions, the amendment which the parties made on 23 February 1993 to their contract of 28 November 1992 remains validly concluded on the terms agreed between them.

53 The fact that the Commission was in contact with the applicant or with Exportkhleb cannot affect that assessment of the legal rights and obligations which each of the parties involved has under the applicable legislation and contractual agreements. Moreover, as regards the admissibility of the application for annulment, the

exchanges relied on by the applicant do not show that the Commission went beyond its proper role. Thus, the sole purpose of the alleged contacts between the Commission and the applicant in January 1993 was to have the parties include in their contract a condition which was indispensable for acceptance of conformity, but it was left to the parties alone to modify their contract if they wanted to secure the financing provided for. Furthermore, the fact that the Commission sent the applicant a copy of the notice of confirmation addressed to the VEB does not affect the legal significance of that notice.

54 Whilst it is true that, on receiving from the Commission a decision finding that the contract is not in conformity with the applicable provisions, the VEB may not issue a documentary credit capable of being covered by the Community guarantee, nevertheless, as stated above, the decision affects neither the validity nor the terms of the contract concluded between the applicant and Exportkhleb. The Commission's decision does not take the place of a decision taken by the Russian national authorities, since the Commission may only examine the conformity of contracts for the purposes of Community financing.

55 Moreover, in order to establish that the contested decision is of direct concern to it, the applicant cannot rely on the presence in the commercial contracts of a suspensory clause making the performance of the contract and payment of the price subject to acknowledgement by the Commission that the criteria for disbursement of the Community loan are fulfilled. Such a clause is a link which the contracting parties decide to make between the contract concluded by them and a contingent future event: their agreement will be binding only if the latter occurs. The admissibility of an application under the fourth paragraph of Article 173 of the Treaty cannot, however, be made to depend on the intention of the parties. The applicant's argument must therefore be rejected.

56 Lastly, the Court considers that the applicant's claim for protection of a legitimate expectation that the amendment to the contracts would be validated by the Commission goes to the substance of the case and does not, therefore, affect its assessment of the admissibility of the action.

57 In view of the foregoing, the Court considers that the Commission's decision of 1 April 1993, addressed to the VEB, is not of direct concern to the applicant, within the meaning of the fourth paragraph of Article 173 of the Treaty. Consequently, the application for annulment of that decision must be declared inadmissible.

The claim for restoration of the applicant's rights against a third party

58 The applicant seeks 'restoration' of its right to receive from Crédit Lyonnais the balance (relating to the difference between the price payable under the contracts of 27 November 1992 and the new prices payable under the agreements of 23 February 1993) in respect of the quantities of wheat delivered since 28 February 1993.

59 The Court points out that, in an action for annulment based on Article 173 of the Treaty, the role of the Community judicature is restricted to reviewing the legality of the contested act. In those circumstances, the claim for restoration of rights goes beyond the limits of the jurisdiction conferred on the Community judicature by the Treaty in the context of an action for annulment and must therefore be declared inadmissible.

60 In view of the foregoing, and without there being any need to examine the plea that the proceedings have been brought out of time, the action must be dismissed as inadmissible in its entirety.

Costs

61 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, it must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. Dismisses the action as inadmissible;

2. Orders the applicant to pay the costs.

Briët Vesterdorf Potocki

Delivered in open court in Luxembourg on 24 September 1996.

H. Jung C. P. Briët

Registrar President