JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)

14 October 1999 *

In Joined Cases T-191/96 and T-106/97,

CAS Succhi di Frutta SpA, a company incorporated under Italian law, established in Castagnaro, Italy, represented by Alberto Miele, of the Padua Bar, Antonio Tizzano and Gian Michele Roberti, of the Naples Bar, and Carlo Scarpa, of the Venice Bar,

applicant,

v

Commission of the European Communities, represented by Paolo Ziotti, of its Legal Service, acting as Agent, assisted by Alberto Dal Ferro, of the Vicenza Bar, 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: Italian.

APPLICATION for annulment of Commission Decisions C (96) 2208 of 6 September 1996 (Case T-191/96) amending its decision of 14 June 1996, and C (96) 1916 of 22 July 1996 (Case T-106/97) on the supply of fruit juice and fruit jams intended for the people of Armenia and Azerbaijan provided for in Regulation (EC) No 228/96,

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

composed of: A. Potocki, President, C.W. Bellamy and A.W.H. Meij, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 10 February 1999,

gives the following

Judgment

Legal framework, facts and procedure

1 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). The first two

recitals in the preamble to that regulation state that 'it is advisable to supply Georgia, Armenia, Azerbaijan, Kyrgyzstan and Tajikistan with agricultural products in order to improve the food supply situation, taking into account the diversity of local situations without compromising development towards supplies according to market rules', and that 'the Community has agricultural products in stock following intervention measures and it is advisable, exceptionally, to dispose, in priority, of these products in carrying out the action envisaged'.

2 Article 1 of Regulation No 1975/95 states:

'Under the conditions laid down by this Regulation, measures shall be taken for the free supply to Georgia, Armenia, Azerbaijan, Kyrgyzstan and Tajikistan of agricultural products, to be determined, which are available as a result of intervention measures; in the case where the products are temporarily not available in intervention they may be mobilised on the Community market in order to meet the commitments of the Community.'

3 Article 2 of Regulation No 1975/95 provides:

'1. The products shall be supplied unprocessed or in processed form.

2. The measures may also relate to foodstuffs available or which may be obtained on the market by payment with products coming from intervention stocks and belonging to the same group of products.

3. The supply costs, including transport and, where applicable, processing costs, shall be determined by invitation to tender or, for reasons connected with urgency or with difficulties of transportation, by direct agreement procedure.

...'

4 Subsequently, the Commission adopted 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 (OJ 1995 L 196, p. 4).

5 The second recital in the preamble to Regulation No 2009/95 states:

'... free supplies are foreseen in the form of agricultural products from intervention stocks without further processing and of products not available from intervention stocks but belonging to the same group of products;... therefore, specific detailed rules should be laid down for supplies of processed products;... provisions should be made in particular for such supplies to be paid for in raw materials from intervention stocks'.

6 Article 2(2) of Regulation No 2009/95 provides:

'The invitation to tender may relate to the quantity of products to be removed physically from intervention stocks as payment for the supply of processed products from the same group of products to a delivery stage to be determined in the notice of invitation to tender'.

7 According to Article 6(1)(e)(1) of Regulation No 2009/95, where Article 2(2) applies, tenders are only valid where they indicate 'the proposed quantity of product, expressed in tonnes (net weight), to be exchanged for one tonne (net) of finished product under the conditions and to the delivery stage specified in the invitation to tender'.

8 Under Article 6(2) of Regulation No 2009/95:

'Tenders submitted which are not in accordance with the conditions of the present Article, or which only conform partially to the conditions of the tender Regulation or which contain conditions other than those laid down in this Regulation may be rejected.'

9 According to Article 15(1) of Regulation No 2009/95, notices of invitation to tender are to specify in particular:

'— the additional terms and conditions,

— the lots...,

...

— the main physical and technical characteristics of the various lots,

...'.

10 According to Article 15(2) of Regulation No 2009/95, in the case of invitations to tender as provided for in Article 2(2), the notice is to specify in particular:

'— the lot or group of lots to be taken over in payment for the supply,

— the characteristics of the processed product to be supplied, namely type, quantity, quality, packaging, etc.'.

11 The Commission then adopted 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).

12 The first and second recitals in the preamble to Regulation No 228/96 state:

'... Regulation (EC) No 1975/95 provides that actions for the free supply of agricultural products may relate to foodstuffs available or capable of being obtained on the market by means of payment with products available following intervention measures;

... to respond to requests from the beneficiary States for fruit juices and fruit jams, it is appropriate to open a tender to determine the most advantageous conditions for the supply of such products and to provide the payment of the successful tenderer with fruit withdrawn from the market following the withdrawal operations in application of Articles 15 and 15A of Council Regulation (EEC) No 1035/72 of 18 May 1972 on the common organisation of the market in fruit and vegetables (OJ 1972 L 118, p. 1), as last amended by Commission Regulation (EC) No 1363/95 (OJ 1995 L 132, p. 8).'

13 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, in accordance with the provisions of Regulation (EC) No 2009/95, and in particular Article 2(2) thereof and the specific provisions of the present Regulation.'

14 Annex I to Regulation No 228/96 contains the following details:

Lot No 1 Product to be supplied: 500 tonnes (net) of apple juice
Product to be withdrawn: Apples

Lot No 2 Product to be supplied: 500 tonnes (net) of apple juice concentrated to 50%
Product to be withdrawn: Apples

Lot No 3 Product to be supplied: 500 tonnes (net) of orange juice
Product to be withdrawn: Oranges

Lot No 4 Product to be supplied: 500 tonnes (net) of orange juice concentrated to 50%
Product to be withdrawn: Oranges

Lot No 5 Product to be supplied: 500 tonnes net of diverse fruit jams
Product to be withdrawn: Apples

Lot No 6 Product to be supplied: 500 tonnes net of diverse fruit jams
Product to be withdrawn: Oranges

For each of the lots, the delivery date is fixed at 20 March 1996.

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

16 Trento Frutta SpA ('Trento Frutta') and Loma GmbH ('Loma') offered, respectively, to withdraw 8 000 tonnes of apples for Lot No 1 and 13 500 tonnes of apples for Lot No 2. In addition, Trento Frutta stated that, in the event of there not being enough apples, it was prepared to accept peaches.

17 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 Nos 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 No 1 8 000 tonnes of apples or, alternatively, 8 000 tonnes of peaches;

Lot No 3 20 000 tonnes of oranges or, alternatively, 8 500 tonnes of apples or 8 500 tonnes of peaches;

Lot No 4 — 32 000 tonnes of oranges or, alternatively, 13 000 tonnes of apples or 13 000 tonnes of peaches;

Lot No 5 — 18 000 tonnes of apples or, alternatively, 18 000 tonnes of peaches;

Lot No 6 — 45 000 tonnes of oranges or, alternatively, 18 000 tonnes of apples or 18 000 tonnes of peaches.

18 On 13 March 1996, the Commission sent Memorandum No 11832 to AIMA informing it that it had awarded Lot No 2 to Loma in return for the withdrawal of 13 500 tonnes of apples.

19 Pursuant to Regulation No 228/96, AIMA took the measures necessary for giving effect to Commission Memoranda Nos 10663 and 11832, cited above, by means of Circular No 93/96 of 21 March 1996 which reproduced their content.

20 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 award, the quantities of products 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 products withdrawn from the markets in predetermined quantities reflecting the processing equivalence of the products in question.

21 Article 1 of the Decision of 14 June 1996 provides that the products withdrawn from the market be made available to the successful tenderers (namely Trento Frutta and Loma) at their request, according to the following coefficients of equivalence:

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

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

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

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

22 That decision was addressed to the Italian Republic, the French Republic, the Hellenic Republic and the Kingdom of Spain.

23 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 and apricots available would not be sufficient to complete the operation and it was appropriate to allow, in addition, the substitution of nectarines for the apples to be withdrawn by the successful tenderers.

24 Article 1 of the Decision of 22 July 1996 provides that the products withdrawn from the market are made available to Trento Frutta and Loma, at their request,

according to the coefficient of equivalence of 1.4 tonnes of nectarines for 1 tonne of apples.

25 That decision was addressed to the Italian Republic.

26 By action brought before the Tribunale Amministrativo Regionale (Regional Administrative Court), Lazio, and notified to AIMA on 24 July 1996, the applicant sought the annulment of AIMA's Circular No 93/96, cited above.

27 On 26 July 1996, at the meeting organised at its request with the staff of Commission Directorate-General VI-Agriculture (DG VI), 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.

28 On 2 August 1996, the applicant sent to the Commission Technical Report No 94 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 equivalence of certain fruit to be used for processing into juice.

29 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'). According to the second recital in the preamble to that decision, in order to bring about a more balanced substitution of products, 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 products which had not yet been withdrawn by the successful tenderers as payment for supplies.

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

'(a) 0.914 tonne of peaches for 1 tonne of apples,

...

(c) 0.372 tonne of peaches for 1 tonne of oranges.'

31 That decision was addressed to the Italian Republic, the French Republic, the Hellenic Republic and the Kingdom of Spain.

32 By application lodged at the Registry of the Court of First Instance on 25 November 1996, the applicant brought an action for annulment of the Decision of 6 September 1996. That case was registered under number T-191/96.

33 By order of 26 February 1997 in Case T-191/96 R *CAS Succhi di Frutta* v *Commission* [1997] ECR II-211, the President of the Court of First Instance dismissed an application for suspension of the operation of the Decision of 6 September 1996, made by the applicant on 16 January 1997.

34 By application lodged at the Registry of the Court of First Instance on 9 April 1997, the applicant brought an action for annulment of the Decision of 22 July 1996, claiming that it had received a copy of that decision only on 30 January 1997, in the context of the proceedings for interim relief. That case was registered under number T-106/97.

35 By order of 20 March 1998, the President of the Second Chamber of the Court of First Instance dismissed an application by Allione Industria Alimentare SpA for leave to intervene in support of the form of order sought by the applicant in Case T-191/96 *CAS Succhi di Frutta* v *Commission* [1998] ECR II-575.

36 By order of 14 October 1998, the President of the Second Chamber of the Court of First Instance ordered that Cases T-191/96 and T-106/97 be joined for the purposes of the oral procedure and the judgment.

37 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Second Chamber) decided to open the oral procedure without taking any measures of preparatory inquiry. However, it requested the Commission to indicate in writing before the hearing what had been the state of apple stocks available to the intervention agencies at the material time. The Commission complied with that request within the time-limit prescribed. The hearing took place on 10 February 1999.

Forms of order

38 In Case T-191/96, the applicant claims that the Court should:

— annul the Decision of 6 September 1996 amending the Decision of 14 June 1996;

— order the Commission to pay the costs.

39 In Case T-106/97, the applicant claims that the Court should:

— annul the Decision of 22 July 1996;

— order the Commission to pay the costs.

40 In these two cases, the Commission contends that the Court should:

— dismiss the application as inadmissible or, in the alternative, unfounded;

— order the applicant to pay the costs.

Case T-191/96

Admissibility

Arguments of the parties

41 The Commission contends that the application is inadmissible on two grounds: the applicant is not directly and individually concerned by the Decision of 6 September 1996, and it has no interest in obtaining its annulment.

42 The Commission points out first of all that the applicant does not dispute the award of the lots for which it submitted a tender. It contends that the act contested in this case did not provide for the replacement of apples and oranges by peaches, but merely amended the coefficients of equivalence between those fruits, that substitution having been authorised by the Decision of 14 June 1996.

43 The fact that those coefficients of equivalence may be more or less favourable to the successful tenderers can be of individual concern only to them. The applicant's situation, in relation to the Decision of 6 September 1996, is not in any way different from that of any operator in the sector concerned, other than the successful tenderers for the contract (see, in particular, order in Case T-183/94 *Cantina Cooperativa fra Produttori Vitivinicoli di Torre di Mosto and Others* v *Commission* [1995] ECR II-1941, paragraph 49).

44 The case-law on challenging a tendering procedure, in particular, Case 92/78 *Simmenthal* v *Commission* [1979] ECR 777, is not relevant. The Decision of 6 September 1996 is a measure independent of the notice of invitation to tender, adopted after the award of the contract, which it does not amend in any way. The

successful tenderers are indeed those tenderers who offered to accept the smallest quantity of apples as payment. In those circumstances, the fact that the applicant took part in the tendering procedure in question does not confer on it any special attribute, as compared with any other third person, in relation to the Decision of 6 September 1996.

45 Furthermore, the mere fact that a measure may exert an influence on the competitive relationships existing on the market in question is not sufficient to enable any trader in any form of competitive relationship with the addressee of the measure to be regarded as directly and individually concerned by that measure (Joined Cases 10/68 and 18/68 *Eridania Zuccherifici and Others* v *Commission* [1969] ECR 459, paragraph 7).

46 Moreover, since the contested decision amended the coefficients of equivalence fixed in the Decision of 14 June 1996 along the lines the applicant wished, it had no interest in requesting the annulment of that decision since the effect of that annulment would be to reinstate the previous coefficients (see orders in Case T-6/95 R *Cantine dei Colli Berici* v *Commission* [1995] ECR II-647, paragraph 29; and in Case T-6/95 *Cantine dei Colli Berici* v *Commission*, not published in the ECR, paragraph 46).

47 The Commission states, finally, that the arguments put forward by the applicant could have been directed against the Decision of 14 June 1996, which was more unfavourable to it, but which it did not challenge within the prescribed time.

48 The applicant claims that it is directly concerned by the contested decision. It is also individually concerned by the contested decision, first, in its capacity as tenderer (*Simmenthal* v *Commission*, paragraphs 25 and 26) and, second, by reason of the extremely serious economic loss that it has suffered because of the allocation to competitors, as payment for their supplies, of substitute fruits in

excessive quantities. It points out that the contested decision was adopted after the Commission had, at its request, fully reconsidered the situation.

49 The applicant also claims that it retains an interest in seeking the annulment of the contested decision, even if the award of the contract for the benefit of its competitors has been fully implemented (*Simmenthal* v *Commission*, paragraph 32).

Findings of the Court

50 The fourth paragraph of Article 173 of the EC Treaty (now, after amendment, Article 230 EC), confers on natural or legal persons the right to bring an action for annulment against decisions addressed to them and against decisions which, although in the form of a regulation or a decision addressed to another person, are of direct and individual concern to them.

51 It is settled case-law that persons other than those to whom a decision is addressed may claim to be individually concerned, for the purpose of that provision, only if the decision at issue affects them by reason of certain attributes peculiar to them or by reason of factual circumstances in which they are distinguished from all other persons, and by virtue of those factors distinguishes them individually in the same way as the person addressed (judgment in Case 25/62 *Plaumann* v *Commission* [1963] ECR 95; see, for example, judgment in Case T-86/96 *Arbeitsgemeinschaft Deutscher Luftfahrt-Unternehmen and Hapag-Lloyd Fluggesellschaft* v *Commission* [1999] ECR II-179, paragraph 42; and the case-law cited therein).

52 It is common ground in this case that the applicant took part in the bidding for Lots Nos 1 and 2, and that Lot No 1 was awarded to Trento Frutta.

53 Moreover, the Commission does not dispute the fact that its Memorandum No 10663 of 6 March 1996, cited above, contains elements which do not correspond to the conditions laid down in the notice of invitation to tender provided for by Regulation No 228/96, in so far as it provides, *inter alia*, for the substitution of peaches for apples and oranges as the means of payment for the supplies from Trento Frutta. That memorandum therefore amends the arrangements for payment prescribed for the different lots.

54 The amendment of the arrangements for payment prescribed for the different lots was confirmed by the Decision of 14 June 1996 with regard to all the successful tenderers. Subsequently, the applicant asked the Commission to reconsider that decision. For that purpose, a meeting between the staff of DG VI and the applicant took place on 26 July 1996, following which the applicant sent to the Commission Technical Report No 94 (paragraphs 27 to 28 above).

55 In the light of the new information brought to its attention in this way and of a reconsideration of the situation as a whole, in particular of the level of the price of peaches on the Community market recorded by its staff in mid-August 1996 (see the DG VI working document, Annex 11 to the defence), the Commission adopted the contested Decision of 6 September 1996, laying down new coefficients of equivalence between peaches, on the one hand, and apples and oranges, on the other.

56 Consequently, the contested decision must be regarded as an independent decision, taken following a request from the applicant, on the basis of new information, and it amends the conditions of the invitation to tender in that it provides, with different coefficients of equivalence, for the substitution of peaches for apples and oranges as a means of payment to the successful tenderers in spite of the contacts which took place in the interim between the parties.

57 In those circumstances, it must be held that the applicant is individually concerned by the contested decision. It is concerned, first, in its capacity as unsuccessful tenderer in so far as one of the important conditions of the invitation

to tender — that concerning the means of payment for the supplies at issue — was later amended by the Commission. Such a tenderer is not individually concerned merely by the Commission decision which determines the fate, be it favourable or unfavourable, of each of the tenders submitted in answer to the notice of invitation to tender (*Simmenthal* v *Commission*, paragraph 25). It also retains an individual interest in ensuring that the conditions of the notice of invitation to tender are complied with at the stage when the award itself is implemented. The fact that the Commission did not point out in the notice of invitation to tender the possibility for successful tenderers to obtain fruit other than those prescribed as payment for their supplies denied the applicant the chance of submitting a tender different from that which it had submitted, and of thus having the same opportunity as Trento Frutta.

58 Second, in the particular circumstances of the case, the applicant is individually concerned by the contested decision because it was adopted after a reconsideration of the situation as a whole, undertaken at the applicant's request and in the light, in particular, of the additional information which it presented to the Commission.

59 The applicant is also directly concerned by the contested decision since the Commission did not leave any margin of discretion to the national authorities in the matter of the methods for implementing that decision (see, for example, the judgment in Joined Cases 41/70, 42/70, 43/70, 44/70 *International Fruit Company and Others* v *Commission* [1971] ECR 411, paragraphs 25 to 28).

60 Furthermore, the argument based on the fact that the applicant did not challenge the Decision of 14 June 1996 within the prescribed time-limit must be rejected, since the contested decision cannot be regarded as a measure which is merely confirmatory of that decision. As stated above, the Commission agreed, at the applicant's request, to reconsider the Decision of 14 June 1996, and the contested decision was adopted following that reconsideration. Furthermore, the contested decision lays down different coefficients of equivalence and is based on new evidence. In those circumstances, the applicant's action cannot be declared inadmissible on that basis (see judgments in Case T-82/92 *Cortes Jimenez and Others* v *Commission* [1994] ECR-SC II-237, paragraph 14; Case T-331/94 *IPK* v *Commission* [1997] ECR II-1665, paragraph 24; Case T-130/96 *Aquilino* v

Council [1998] ECR-SC II-1017, paragraph 34; and Case T-100/96 *Vicente-Nuñez* v *Commission* [1998] ECR-SC II-1779, paragraphs 37 to 42).

61 The argument according to which the applicant has no interest in bringing proceedings since the sole effect of annulling the contested decision would be to reinstate the coefficients laid down in the Decision of 14 June 1996, which are less favourable to the applicant, must also be rejected.

62 It should not be presumed, for the purpose of determining whether the present action is admissible, that a judgment annulling the Decision of 6 September 1996 would have the effect merely of reviving the coefficients of equivalence laid down by the Decision of 14 June 1996, having regard, in particular, to the Commission's obligation to take the necessary measures to comply with the present judgment in accordance with Article 176 of the EC Treaty (now Article 233 EC) (see the judgment in Joined Cases 97/86, 99/86, 193/86 and 215/86 *Asteris* v *Commission* [1988] ECR 2181, paragraphs 27 to 32).

63 In any event, it is clear from paragraph 32 of *Simmenthal* v *Commission* that, even where a decision to award a contract has been fully implemented for the benefit of other competitors, a tenderer retains an interest in the annulment of such a decision; such interest consists either in the tenderer's being properly restored by the Commission to his original position or in prompting the Commission to make suitable amendments in the future to the system of invitations to tender if that system is found to be incompatible with certain legal requirements. That case-law is applicable to the present case, particularly since it is common ground that the operations prescribed by the notice of invitation to tender at issue had not yet been fully implemented at the time when the contested decision was adopted.

64 It follows that the application is admissible.

Substance

65 In support of its claim for the annulment of the Decision of 6 September 1996, the applicant bases its case on seven pleas in law alleging: (1) infringement of Regulation No 228/96 and breach of the principles of transparency and equal treatment; (2) infringement of Regulations Nos 1975/95 and 2009/95; (3) misuse of powers; (4) manifest errors of assessment; (5) infringement of Articles 39 of the EC Treaty (now Article 33 EC) and 40(3) of the EC Treaty (now, after amendment, Article 34(3) EC) and of Regulation No 1035/72 of 18 May 1972, cited above; (6) an inadequate statement of reasons; and (7) manifest inappropriateness of the replacement mechanism.

66 The first plea, alleging infringement of Regulation No 228/96 and breach of the principles of transparency and equal treatment, should first be examined.

Arguments of the parties

67 The applicant claims that, by authorising the successful tenderer to withdraw, in payment for the supply, a product different from that prescribed by Regulation No 228/96, the Commission infringed that regulation and was in breach of the principles of transparency and equal treatment.

68 The Commission contends, first, that the aim of the legislation at issue is to supply humanitarian aid to the people of Armenia and Azerbaijan by using products withdrawn from the market by the intervention agencies in order to maintain the prices of agricultural products. In that context, the possibility of replacing the fruit specified in Annex I to Regulation No 228/96 by other fruit withdrawn from the market is apparent from the first and second recitals in the preamble to that regulation, and from Regulations Nos 1975/95 and 2009/95.

69 The first and second recitals in the preamble to Regulation No 228/96 and the second recital in the preamble to Regulation No 1975/95 provide only that the fruit handed over in payment to the successful tenderers is taken from the fruit stocks withdrawn from the market following intervention measures, without stating that that fruit given in payment to the successful tenderers must be expressly referred to in the notice of invitation to tender. In particular, Article 2(2) of Regulation No 1975/95 and Article 2(2) of Regulation No 2009/95 do not require that the fruit withdrawn from the intervention stocks be identical to that which is to be supplied by the successful tenderers, but merely that it must belong 'to the same group of products'.

70 Furthermore, such an obligation cannot be reconciled with the real needs of the States receiving the aid at issue. Thus, if one of them needs orange juice and there are not enough oranges withdrawn from the market, it is clear that the successful tenderers would be paid with other fruit. Equally, in payment for the supply of various fruit jams which are the subject-matter of Lots Nos 5 and 6 of Regulation No 228/96, the product to be withdrawn is oranges or apples.

71 The replacement, after the award, of the fruits to be received as payment does not in any way constitute a breach of the principles of equal treatment and transparency in that it had no influence on the course of the tendering procedure. The tenderers all competed under the same conditions, namely those laid down by Regulation No 228/96 and Annex I thereto. Since the replacement of fruit took place after the award, it did not have the slightest influence on the course of the operation.

Findings of the Court

72 In connection with Council Directive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682), the Court of Justice held that, when a contracting entity had laid down prescriptive requirements in the contract documents, observance of the principle of equal treatment of tenderers required

that all the tenders must comply with them so as to ensure objective comparison of the tenders (judgments in Case C-243/89 *Commission* v *Denmark* [1993] ECR I-3353, paragraph 37; and Case C-87/94 *Commission* v *Belgium* [1996] ECR I-2043, paragraph 70). In addition, it has been held that the procedure for comparing tenders has to comply at every stage with both the principle of the equal treatment of tenderers and the principle of transparency so as to afford equality of opportunity to all tenderers when formulating their tenders (*Commission* v *Belgium*, cited above, paragraph 54).

73 That case-law can be applied to this case. It thus follows that the Commission was obliged to specify clearly in the notice of invitation to tender the subject-matter and the conditions of the tendering procedure, and to comply strictly with the conditions laid down, so as to afford equality of opportunity to all tenderers when formulating their tenders. In particular, the Commission could not subsequently amend the conditions of the tendering procedure, and in particular those relating to the tender to be submitted, in a manner not laid down by the notice of invitation to tender itself, without offending against the principle of transparency.

74 As stated above, the contested decision allows the successful tenderers, namely Trento Frutta and Loma, to take as payment for their supplies products other than those specified in the notice of invitation to tender and, in particular, peaches instead of apples and oranges.

75 Such a substitution is not provided for in the notice of invitation to tender as set out in Regulation No 228/96. It is clear from Annex I to that regulation, interpreted in accordance with Article 15(1) and (2) of Regulation No 2009/95 (see paragraphs 9 to 13 above), that only the products listed, namely, as regards Lots Nos 1, 2 and 5, apples, and, in respect of Lots Nos 3, 4 and 6, oranges, could be withdrawn by the successful tenderers as payment for the supplies.

76 Furthermore, it is clear from Article 6(1)(e)(1) of Regulation No 2009/95 (see paragraph 7 above) that tenders were to be valid only where they indicated the

quantity of product requested by the tenderer as payment for the supply of processed products under the conditions laid down in the notice of invitation to tender.

77 The substitution of peaches for apples or oranges as payment for the supplies concerned, and the fixing of the coefficients of equivalence between those fruits therefore constitute a significant amendment of an essential condition of the notice of invitation to tender, namely the arrangements for payment for the products to be supplied.

78 However, contrary to what the Commission contends, none of the provisions it cites, in particular, the first and second recitals in the preamble to Regulation No 228/96 and Article 2(2) of Regulation No 1975/95 (paragraphs 3 and 12 above), authorises such a substitution, even by implication. Neither is substitution provided for in the situation, put forward by the Commission, where the quantities of fruit in the intervention stocks are insufficient and the substitute fruit supplied as payment to the successful tenderers belongs to the 'same group of products' as their supplies.

79 Furthermore, the contested decision not only provides for the substitution of peaches for apples and oranges, but also fixes coefficients of equivalence by reference to circumstances arising after the award, namely the level of the prices of the fruit concerned on the market in mid-August 1996 although the taking into consideration of such evidence, available after the award, in order to determine the arrangements for payment applicable to the supplies at issue, is not in any way provided for in the notice of invitation to tender.

80 In addition, the information supplied by the Commission in the course of the proceedings (see Annex 3 to the defence and the Commission's reply to the questions put to it by the Court) does not show that, at the time when the contested decision was adopted, apples were not available in the intervention stocks, so as to prevent the performance of the operations specified in the notice of invitation to tender.

81 Even if there had been such a lack of availability, at the Community level, of apples which could be withdrawn, the fact remains that it was for the Commission to lay down, in the notice of invitation to tender, the precise conditions for any substitution of other fruit for that prescribed as payment for the supplies at issue, in order to comply with the principles of transparency and equal treatment. Failing that, it was for the Commission to initiate a new tendering procedure.

82 It follows from the foregoing that the contested decision infringes the notice of invitation to tender prescribed in Regulation No 228/96 and also the principles of transparency and equal treatment, and that it must therefore be annulled, without its being necessary to rule on the other pleas in law put forward by the applicant.

Case T-106/97

83 The admissibility of the action must be examined.

Arguments of the parties

84 The Commission contends that the action brought on 9 April 1997 was brought after the expiry of the time-limit laid down in the fifth paragraph of Article 173 of the Treaty, and that time began to run on 31 October 1996.

85 The applicant was certainly aware of the content of the Decision of 22 July 1996 at the hearing of 31 October 1996 before the Tribunale Amministrativo Regionale, Lazio. At that date (and even 10 days before, that is 21 October 1996, according to AIMA's pleading), AIMA had produced in the case pending

before that court Commission Memorandum No 29903 of 23 July 1996 (Annex 11 to the defence in Case T-106/97). That memorandum reiterates the content of the Decision of 22 July 1996 and, in particular, the coefficient of equivalence between apples and nectarines. The text of that decision was even annexed to it.

86 In its application in Case T-191/96 (paragraph 12), lodged at the Registry of the Court of First Instance on 25 November 1996, the applicant furthermore claimed to know that on 22 July 1996 the Commission had adopted a decision which extended, in relation to the Decision of 14 June 1996, the 'possibility of substitution' of fruit. The applicant also showed that it knew the content of the Decision of 22 July 1996 by making express reference, in paragraph 23 of the application in Case T-191/96, to 'the fruits in question (apples and oranges, on the one hand, peaches and apricots and nectarines, on the other)'.

87 The fact that the applicant did not request a copy of Memorandum No 29903 of 23 July 1996, cited above, in the context of the proceedings before the Tribunale Amministrativo Regionale, Lazio, and that it did not take the trouble to have that document communicated to it, even though it had brought an action against AIMA in respect of the tendering procedure at issue, constitutes grave negligence and cannot be pleaded in justification of its failure to observe the time-limit for bringing proceedings in the present case.

88 Even if the applicant did not in fact have knowledge of the whole text of the Decision of 22 July 1996, it should, in any event, have formally requested it from the Commission (judgment in Case T-12/90 *Bayer* v *Commission* [1991] ECR II-219; orders in Case C-102/92 *Ferriere Acciaierie Sarde* v *Commission* [1993] ECR I-801, paragraph 17 et seq.; and in Case T-468/93 *Frinil* v *Commission* [1994] ECR II-33, paragraph 31 et seq.).

89 The applicant claims that it had knowledge of the text of the Decision of 22 July 1996 only when the Commission submitted its defence in Case T-191/96 on 30 January 1997.

90 At the meeting of 26 July 1996 with the staff of DG VI, the applicant expressly requested information on any decision which might have extended the possibility of substitution of fruit for that specified in the notice of invitation to tender. However, it did not receive any details from the officials present.

91 Although the pleading lodged by AIMA in the proceedings before the Italian administrative court mentioned, in an annex, Memorandum No 29903 of 23 July 1996, cited above, the applicant did not receive a copy of that document and did not request one, taking the view that it was a memorandum analogous to the others, relating to the replacement of apples and oranges by peaches and apricots. Moreover, AIMA's observations contained no reference to the Decision of 22 July 1996. Nor was that decision mentioned at the hearing on 31 October 1996.

92 By letter of 5 September 1997 replying to a request from the applicant, AIMA stated, furthermore, that it could find no trace in its files of 'the Commission decision which was adopted on 22 July 1996' (Annex 3 to the reply in Case T-106/97).

Findings of the Court

93 In paragraph 12 of its application in Case T-191/96, the applicant stated that, at the meeting of 26 July 1996 (see paragraph 27 above), it had learned that, by two separate decisions, of 14 June and 22 July 1996 respectively, the Commission had allowed the successful tenderers to withdraw, as payment for the supplies at issue, fruit other than that specified in the notice of invitation to tender. The second of those decisions, which had not been communicated to the applicant, had 'again extended the possibility of substitution'.

94 It is thus clear that, on 26 July 1996, the applicant had knowledge of the adoption by the Commission on 22 July 1996 of a decision which extended the possibility of substitution of fruit for apples and oranges laid down by the Decision of 14 June 1996.

95 Next, in its pleading of 21 October 1996 lodged at the Tribunale Amministrativo Regionale, Lazio (Annex 4 to the reply in Case T-191/96), AIMA stated:

'It is a fact that the contested conversion parameters between the fruit (apples, oranges, peaches, apricots and nectarines) used as payment for the supplies, to be used for the benefit of Trento Frutta and Loma, are derived from Community decisions (see Memoranda No 24700 of 20 June 1996 and No 29903 of 23 July 1996) which AIMA had necessarily to apply, while informing interested parties of them.'

96 That document stated that Commission Memorandum No 29903 of 23 July 1996 was annexed to it. It is not disputed that that memorandum reiterates the content of the Commission Decision of 22 July 1996.

97 The hearing before the Tribunale Amministrativo Regionale, Lazio, was held on 31 October 1996.

98 It thus follows that, by 31 October 1996 at the latest, the applicant had knowledge, at the very least, of the fact that the Commission had adopted a decision allowing the substitution of nectarines for the fruit prescribed in

payment for the supplies provided by Trento Frutta and Loma, and that the content of that decision was reiterated in Commission Memorandum No 29903 of 23 July 1996.

99 That finding finds support in the fact that, in paragraph 23 of its application in Case T-191/96, lodged at the Registry of the Court of First Instance on 25 November 1996, the applicant referred to the possibility of substitution of nectarines for the fruit specified in the notice of invitation to tender.

100 Even if, as it asserts, the applicant did not have knowledge of the whole text of the Decision of 22 July 1996 before 30 January 1997, the date on which the defence was lodged in Case T-191/96, with a copy of that decision annexed to it, it must be borne in mind that, according to the settled case-law of the Court of Justice, it is for a party who has knowledge of a decision concerning it to request the whole text thereof within a reasonable period (order in *Ferriere Acciaierie Sarde* v *Commission*, paragraph 18).

101 However, in this case, it has not been established that the applicant asked the Commission to provide it with the full text of the Decision of 22 July 1996, either after the meeting of 26 July 1996, or even after AIMA's pleading had been lodged at the Tribunale Amministrativo Regionale, Lazio, on 21 October 1996, or even after the hearing before that court on 31 October 1996.

102 In those circumstances, the applicant is not justified in claiming that the point from which time starts to run for bringing proceedings must be fixed at the date of 30 January 1997. It is clear from the foregoing that a reasonable period for requesting the full text of the Decision of 22 July 1996 had long since elapsed by that date.

103 It follows that the action brought on 9 April 1997 must be held to be out of time and, accordingly, inadmissible.

Costs

104 Under the first subparagraph of 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. According to Article 87(3) of the Rules of Procedure, the Court of First Instance may order that the costs be shared or that each party bear its own costs, where each party succeeds on some and fails on other heads, or where the circumstances are exceptional.

105 Since the Commission has been unsuccessful in Case T-191/96, it must be ordered to pay the costs in that case, as applied for by the applicant. As regards the proceedings for interim relief in Case T-191/96 R, the Court of First Instance considers it appropriate, in the light of the order of the President of the Court of First Instance of 26 February 1997, to order each party to bear its own costs.

106 By contrast, since the applicant has been unsuccessful in Case T-106/97, it must be ordered to pay the costs in that case, as applied for by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. **Annuls Commission Decision C (96) 2208 of 6 September 1996;**

2. **Dismisses the application in Case T-106/97 as inadmissible;**

3. **Orders the Commission to pay the costs in Case T-191/96, orders each party to bear its own costs in Case T-191/96 R, and orders the applicant to pay the costs relating to Case T-106/97.**

Potocki Bellamy Meij

Delivered in open court in Luxembourg on 14 October 1999.

H. Jung

Registrar

A. Potocki

President