JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)
18 May 1995 *

In Case T-478/93,

Wafer Zoo Srl, a company incorporated under Italian law, established in Pesaro (Italy), represented by Wilma Viscardini Donà, of the Padua 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 Eugenio de March, Legal Adviser, acting as Agent, assisted by Alexandre Carnelutti, of the Paris Bar, with an address for service in Luxembourg at the office of Georgios Kremlis, of the Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION, first, for the annulment, pursuant to Article 173 of the EC Treaty, of Decision C (92) 2264, by which the Commission refused the financing of a project submitted by the applicant under Council Regulation (EEC) No 866/90

* Language of the case: Italian.

on improving the processing and marketing conditions for agricultural products (OJ 1990 L 91, p. 1), and, second, for compensation pursuant to Articles 178 and 215 of the EC Treaty for the damage allegedly caused to the applicant by that decision,

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

composed of: J. L. Cruz Vilaça, President, H. Kirschner and A. Kalogeropoulos, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 25 October 1994,

gives the following

Judgment

The relevant legislation

1 The rules relating to the implementation of the economic and social cohesion provided for by Article 130a of the EC Treaty were laid down by Council Regulation (EEC) No 2052/88 of 24 June 1988 on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the European Investment Bank and the other existing financial

instruments (OJ 1988 L 185, p. 9) and Council Regulation (EEC) No 4253/88 of 19 December 1988 laying down provisions for implementing Regulation (EEC) No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1988 L 374, p. 1).

2 Regulation No 2052/88 provided that the three structural funds, namely the European Regional Development Fund, the European Social Fund and the European Agricultural Guidance and Guarantee Fund (hereinafter 'EAGGF'), should contribute to the attainment of the five priority objectives set out in Article 1, more particularly by promoting the development and structural adjustment of the regions whose development is lagging behind (objective 1), speeding up the adjustment of agricultural structures (objective 5(a)) and promoting the development of rural areas (objective 5(b)).

3 The detailed provisions regarding the involvement of the EAGGF in the attainment of the abovementioned objectives were laid down by Regulation No 4253/88 and Council Regulation (EEC) No 4256/88 of 19 December 1988 laying down provisions for implementing Regulation (EEC) No 2052/88 as regards the EAGGF Guidance Section (OJ 1988 L 374, p. 25).

4 Council Regulation (EEC) No 866/90 of 29 March 1990 on improving the processing and marketing conditions for agricultural products (OJ 1990 L 91, p. 1), which was adopted pursuant to Article 10(1) of Regulation No 4256/88, provides in that connection that Community involvement should take the form of the 'Community co-financing' by the EAGGF Guidance Section of investments which satisfy at least one of the criteria specified in Article 1(2) thereof.

5 Article 2 of Regulation No 866/90 provides that, in order for Community co-financing to be provided,

— the investment must take place within the framework of a 'sectoral plan' drawn up by the Member State concerned;

— that plan must accord with 'Community support frameworks', drawn up by the Commission in agreement with the Member States concerned, within the framework of the partnership (fourth recital in the preamble), in accordance with the 'selection criteria' laid down by the Commission.

6 Article 8(1) of Regulation No 866/90 provides that the abovementioned selection criteria are to lay down priorities and indicate investments which must be excluded from Community financing. According to Article 8(3), those criteria are to be adopted by the Commission in accordance with the procedure laid down in Article 29 of Regulation No 4253/88 and the decision adopting them is to be published in the *Official Journal of the European Communities*.

7 Article 29 of Regulation No 4253/88 provides for the setting up, under the auspices of the Commission, of a Committee on Agricultural Structures and Rural Development (hereinafter 'the Committee'), made up of Member States' representatives and chaired by a representative of the Commission. The Committee is to deliver opinions on drafts, submitted by the Commission's representative, of the measures to be taken; where the measures ultimately adopted are not in accordance with the opinion delivered by the Committee, they are to be communicated forthwith by the Commission to the Council, which, acting by a qualified majority, may take a different decision within one month from the date of such communication.

8 Article 10 of Regulation No 866/90 provides that 'the (national) authorities and intermediaries referred to in Article 14(1) and 16(1) of Regulation (EEC)

No 4253/88 may submit through the Member State concerned applications for aid in the form of operational programmes or global grants'.

9 According to Article 15(1) and (2) of Regulation No 866/90 in conjunction with Article 14(1) of Regulation No 4253/88, the Commission is to decide on the granting of aid from the Fund in accordance with the procedure laid down in Article 29 of Regulation No 4253/88 and that decision is to be communicated by the Commission to the competent national, regional or local authorities designated for that purpose by the Member States.

10 By its Decision 90/342/EEC of 7 June 1990 on the selection criteria to be adopted for investments for improving the processing and marketing conditions for agricultural and forestry products (OJ 1990 L 163, p. 71), adopted pursuant to Article 8(3) of Regulation No 866/90, the Commission laid down selection criteria for investments eligible for Community financing for improving the processing and marketing conditions for products in those sectors. Those criteria are set out in the annex to that decision, point 2.5 of which, relating to oil seeds, protein crops and fodder plants, provides as follows:

'(a) All investments are excluded except for those carried out in units of small size provided:

— they do not lead to an increase in the production capacity — unless equivalent capacity is abandoned by the same or another undertaking;

— (...).

(b) In the case of those allowed under (a) above, priority is given to the following investments:

— (...)

— investments concerning animal feed leading to reduced energy consumption for industries involved in drying and dehydration.

— (...)'.

11 By Regulation (EEC) No 1935/90 of 3 July 1990 on applications in the form of operational programmes for aid from the Guidance Section of the EAGGF for investments for improving the processing and marketing conditions for agricultural and forestry products (OJ 1990 L 174, p. 16), the Commission prescribed the information and documents which must accompany any applications for aid from the EAGGF pursuant to Regulation No 866/90. In the standard form declaration to be submitted for that purpose by the competent national authorities of the Member States, they undertake to check that the investments concerned comply with the selection criteria laid down by Article 8 of Council Regulation No 866/90.

Facts and procedure

12 With a view to implementing, within the framework of the partnership, the principle of joint action in the cattle feed sector, the Italian Minister of Agriculture and Forestry drew up a 'sectoral plan' in May 1991. The Commission, for its part, prepared a document entitled 'Community support framework — Italy' for 1991 to 1993 (document VI/6095/91).

13 Wafer Zoo Srl, a company incorporated under Italian law, having as its object the production and processing of, and trade in, agricultural products and operating in the animal fodder and feed sector, submitted to the Marche Region (Italy), the national authority responsible for drawing up and implementing operational programmes under Regulation No 866/90, an application for the financing of an investment project.

14 The reasons given for the applicant's project were: (a) the need to move its installations from the city of Pesaro, where they were located, to a new industrial area in the vicinity of that city, so as to save energy without increasing its production volume, and (b) the assimilation of existing farmland in the vicinity of the new plant and the possible discovery there of raw materials, together with the provision of an outlet to local farmers.

15 That project was given the code number 015 and was included in 'operational programme 92. CT. IT.05' for the regions of Tuscany, Lazio and the Marche submitted by the Italian Republic on 26 March 1992 for the period from 1 October 1991 to 31 December 1993.

16 By letter of 3 September 1992, the Commission's Directorate-General for Agriculture, Rural Development II (DG VI/F. II/1), informed the Italian Ministry of Agriculture and Forestry of its intention to exclude from EAGGF financing investment projects Nos 003 (operational programme 92. CT. IT.02), 013 and 015 (operational programme 92. CT.05), the latter being the applicant's project, on the ground that the production units concerned did not fulfil the selection criteria laid down by Decision 90/342 and the Community support framework established by the Commission pursuant to Council Regulation No 866/90.

17 In response to that letter from the Commission, the Italian Ministry of Agriculture and Forestry requested the Commission, by letter of 11 September 1992, to

reconsider its decision. The Italian Ministry pointed out in that regard that the investments concerned were being sought by undertakings with annual production volumes of 41 000, 22 000 and 24 250 tonnes respectively, the latter figure representing the applicant's production, and that, in the absence of any precise indication as to the definition of units of small size, referred to in point 2.5.(a) of the Annex to Decision 90/342, a reasonable limit for the eligibility of projects to be financed was an annual production figure of 50 000 tonnes.

18 On 30 September 1992, the Commission nevertheless adopted Decision C (92) 2264 relating to the grant of EAGGF Guidance Section financing for operational programme 92. CT. IT.05, in which it expressly excluded the applicant's project and the two other projects cited above from the financing applied for. That decision was communicated to the Italian Republic by letter of 1 October 1992.

19 By letter of 22 January 1993, the Commission (DG VI) provided the Italian Ministry of Agriculture and Forestry with a brief summary of the reasons for the rejection of certain projects submitted by the Italian Republic in the animal feed sector, including the applicant's project No 015. The Commission explained in that letter that the rejection of the three projects, including that of the applicant, was justified by the fact that the undertakings concerned did not fulfil the criteria in respect of small-sized enterprises, a concept applying, according to the interpretation adopted by the Commission and brought to the attention of the Member States, to undertakings with an annual production of not more than 20 000 tonnes.

20 By letter of 10 February 1993, the Marche Region informed the applicant of the rejection of its application for EAGGF financial aid. On 26 February 1993, the regional authorities sent to the applicant, in response to a request made by the latter, a copy of the Commission's letter of 22 January 1993.

21 Those were the circumstances in which, by application lodged at the Registry of the Court of Justice on 19 April 1993, the applicant brought the present proceedings under Case C-167/93 against Decision C (92) 2264 of the Commission of 30 September 1992.

22 By order of 27 September 1993, made pursuant to Article 4 of Council Decision 93/350/Euratom/ECSC/EEC of 8 June 1993, amending Decision 88/591/ECSC/EEC/Euratom establishing the Court of First Instance of the European Communities (OJ 1993 L 144, p. 21), the Court of Justice transferred the case to the Court of First Instance, where it was registered as Case T-478/93.

23 The written procedure followed the normal course. Upon hearing the Report of the Judge-Rapporteur the Court of First Instance (First Chamber) decided to open the oral procedure without any preparatory inquiry. However, it requested the Commission to reply to a written question.

24 The parties presented oral argument and answered questions put to them by the Court at the hearing on 25 October 1994.

Forms of order sought by the parties

25 The applicant claims that the Court should:

— annul Decision C (92) 2264 of the Commission of 30 September 1992 in so far as it rejects the application for the financing of project No 015 included in programme 92. CT. IT.05, thereby impliedly rendering the project once again eligible for financing;

— order the Commission to pay compensation pursuant to Article 215 of the Treaty for the damage suffered and to be suffered by the applicant, part of which may be determined forthwith in a sum equivalent to the Community aid payable in place of the regional aid which the applicant is no longer able to obtain, and part of which, relating to the financial and commercial consequences of the delay in granting the aid, is to be fixed in a sum to be agreed with the Commission;

— order the Commission to pay the costs.

26 The Commission contends that the Court should:

— dismiss the application in its entirety;

— order the applicant to pay the costs.

Substance

The claim for annulment

27 The applicant maintains that the contested decision is illegal, having been adopted in breach of, and in pursuance of a misapplication of, Regulation No 866/90 and in consequence of a misuse of powers, in that the Commission did not lawfully adopt or failed to publish and communicate, in accordance with the applicable provisions, the selection criterion applied in rejecting the applicant's project, and thereby reserved for itself a margin of discretion in assessing the various projects which was contrary to the objectivity and transparency required of it in matters involving financial commitments by the Community. The applicant further contends that the

contested decision was adopted in breach of Decision 90/342 and Article 190 of the Treaty and contrary to the principle of the protection of legitimate expectations.

28 The Court considers it appropriate, in the circumstances of the present case, to examine the applicant's plea regarding misuse of powers first, inasmuch as it calls in question the lawfulness of the adoption of, and the failure to publish and communicate, the criterion applied by the Commission in rejecting the application for the financing of the applicant's project.

Brief summary of the parties' arguments

29 The applicant points out that, as is apparent from the letter sent by the Commission on 22 January 1993 to the Italian Ministry of Agriculture and Forestry, its project was rejected because it did not fulfil the selection criteria laid down by Decision 90/342, and more particularly the criterion relating to the size of the undertakings concerned, which, according to the Commission's interpretation, meant those with an annual production not exceeding 20 000 tonnes.

30 The applicant notes that no reference to any such criterion for the selection of projects eligible for EAGGF financing appears in Decision 90/342 or in any act similar in scope. It further states that even if, as the Commission maintains, the adoption of that criterion was discussed by the Committee provided for by Article 29 of Regulation No 4253/88, the task of the Committee is in any event limited to the delivery of opinions which do not have the force of law. Consequently, even if the Committee was able to agree to the adoption of a criterion laying down an annual production limit not exceeding 20 000 tonnes, that criterion was inapplicable, since it was not duly incorporated in a decision adopted in the prescribed

manner in such a way as to be capable of being notified to the Member States and published in the *Official Journal of the European Communities* in accordance with Article 8(3) of Regulation No 866/90.

31 According to the applicant, that failure to publish in the Official Journal and to communicate to the Member States a decision laying down the selection criterion at issue cannot be offset by the letter of 22 January 1993 sent by the Commission to the Italian Ministry of Agriculture and Forestry. First, that letter does not constitute evidence of adequate communication for the purposes of notifying the Member States of the criterion of units of small size referred to in point 2.5 of the Annex to Decision 90/342, since it mentions neither the terms nor the date of any such communication. Second, even if that letter were capable of being treated as equivalent to a communication to the Member States, such a communication would be irrelevant in the present case, since it was addressed to the Member States and not, as the applicant contends should have been the case, to the recipients of Community financing, who are, according to the wording of Article 14 of Regulation No 866/90, 'the natural or legal persons, or groups thereof, who are ultimately responsible for financing the investments'.

32 The applicant also considers that, following the submission of its investment project, the Commission applied the criterion at issue, relating to the annual production volume, in an unforeseeable manner and that that criterion was, moreover, different from that which it was entitled to expect to see applied, given that in point 6 of Part II of the Annex to Regulation No 1935/90, relating to the information and documents which must accompany applications to the EAGGF for aid, the undertakings concerned are requested to specify whether they may be regarded as 'small or medium-sized' on the basis of at least two of the three criteria indicated, namely, turnover, balance-sheet total and number of employees. The applicant contends that if those criteria had been applied to it, it would have qualified as a small-sized enterprise. It further states that, having an annual turnover of ECU 3.8 million and a workforce of 30, it also qualifies as a small-sized undertaking as defined

by the Italian Ministerial Decree of 1 June 1993, according to which small-sized enterprises are those having no more than 50 employees and an annual turnover not exceeding ECU 5 million.

33 The applicant thus maintains that, by failing to state in Decision 90/342 itself, or in a measure having similar scope, the meaning of the term 'units of small size', the Commission misused its powers (see paragraph 27 above).

34 The Commission maintains that the criterion of an annual production limit not exceeding 20 000 tonnes as a condition of eligibility for project financing was discussed by the Committee in May 1990, in accordance with the procedure laid down in Article 29 of Regulation No 4253/88, and that, although it was not formally adopted by the Committee and was not therefore published as such in the Official Journal, it was nevertheless approved prior to the adoption of Decision 90/342. The absence of any reference to it in that decision, point 2.5 of the Annex to which states that the recipients of Community finance are to be units of small size, is justified by the need to avoid the inclusion in that decision of all the practical details whilst at the same time indicating with sufficient precision the group of persons eligible for financing under Regulation No 866/90. During the oral procedure, and in the written procedure, the Commission stressed that the representatives of the Italian Republic, in which the applicant undertaking is established, were fully aware of the existence of the criterion in question, and that such knowledge on the part of the national authorities concerned is such as to mitigate any failure to publish and communicate a decision expressly adopting the criterion at issue, in accordance with Article 8(3) of Regulation No 866/90.

35 As regards the divergence alleged by the applicant to exist between the eligibility criterion laying down an annual production limit not exceeding 20 000 tonnes and

the criterion based on turnover, balance-sheet total and number of employees which, according to Regulation No 1935/90, distinguishes a small or medium-sized enterprise, the Commission maintains that those criteria relate to two different and autonomous concepts. The concept underlying Regulation No 1935/90 corresponds to the fourth and seventh company law directives; its essential aim is to alleviate the accounting obligations of small and medium-sized enterprises and to speed up the procedure for examining State aid for such enterprises; it is also intended to be used for statistical purposes. By contrast, the concept established in pursuance of the criterion applied in the present case, namely an annual production figure of not more than 20 000 tonnes, concerns the selection of projects eligible for financing in the light of the objectives of Regulation No 866/90.

36 Moreover, as regards the application of the criterion at issue, the Commission observes that that criterion, which accords with the basic policy defined in Decision 90/342 and corresponds to the Community average, has been applied consistently and without discrimination, and that it has constituted the reason for the refusal to grant Community finance for investment projects in other Member States. Lastly, the applicant has not adduced any evidence in support of its allegation regarding a misuse of powers, despite the strict requirements laid down in that respect by the case-law.

Findings of the Court

37 The Court notes, as a preliminary point, that, according to the wording of Article 8(3) of Regulation No 866/90, the selection criteria applying to investments eligible for Community financing and, where applicable, amendments thereto are to be adopted by the Commission in accordance with the procedure laid down in Article 29 of Regulation No 4253/88, and that the decision thus adopted is to be notified to the Member States and published in the *Official Journal of the European Communities*.

38 The Court finds that, as is apparent from the letter sent by the Commission on 22 January 1993 to the Italian Ministry of Agriculture and Forestry, the applicant's investment project in the present case, submitted pursuant to Regulation No 866/90, was rejected on the ground that the applicant's annual production exceeded 20 000 tonnes. According to the Commission, therefore, the decisive factor for the purposes of determining units of small size as referred to in point 2.5 of the Annex to Decision 90/342 on the selection criteria for the investments concerned, and, consequently, for assessing the eligibility of their financing projects under Regulation No 866/90, was the annual production volume of the undertakings concerned. It follows that, far from constituting a practical detail for defining the concept of units of small size referred to in point 2.5 of the Annex to Decision 90/342, as the Commission maintains, the criterion laying down an annual production limit not exceeding 20 000 tonnes constitutes for the defendant institution a decisive selection criterion, inasmuch as its application may result either in the acceptance of a project for Community financing or in a refusal to finance such a project. That criterion, as relied on by the Commission in its letter of 22 January 1993, should have been formally adopted in accordance with the procedure laid down in Article 29 of Regulation No 4253/88 and should have been published in the Official Journal and notified to the Member States in accordance with Article 8(3) of Regulation No 866/90 as a precondition for its application by the Commission in the context of the latter's examination of projects to be financed under that regulation.

39 The Court notes in that regard the Commission's acknowledgement that, although the criterion at issue was discussed by the Committee, it was not adopted in accordance with the procedure laid down in Article 29 of Regulation No 4253/88 and was not in any event included in either Decision 90/342, published in the Official Journal of 29 June 1990 (OJ 1990 L 163, p. 71), or any decision of similar scope adopted pursuant to Article 8(3) of Regulation No 866/90. In the Court's view, the fact that the Commission applied the criterion at issue without having previously published it in the Official Journal, thereby breaching its obligation under Article 8(3) of Regulation No 866/90 (see paragraph 6 above), contravenes the principle of legal certainty and the right of the undertakings concerned to be informed, prior to submitting their applications for financing, of the precise criteria for the selection of projects.

40 Furthermore, the Commission failed *a fortiori*, in breach of the principle of legal certainty, to fulfil its obligation to give the undertakings concerned precise information regarding the selection criteria applying to their projects, in that, shortly after publishing Decision 90/342, it published Regulation No 1935/90 (see paragraph 11 above) requesting the undertakings concerned, in point 6 of Part II of the annex thereto, the ambiguity of which is aggravated by disparity between the wording of the different language versions, to state whether they constitute small or medium-sized enterprises fulfilling at least two of the following three criteria: a balance-sheet total of less than ECU 6.2 million, a turnover of less than ECU 12.8 million and a workforce of less than 250 employees. In so doing, the Commission created further confusion for the undertakings concerned, inasmuch as it failed to indicate sufficiently clearly whether it was according to those criteria that a unit of small size was to be determined or whether those criteria had to be fulfilled by small-sized enterprises already classified as such pursuant to other criteria.

41 It follows from all the foregoing that, by applying to the applicant the criterion of an annual production limit not exceeding 20 000 tonnes, without having complied with the provisions of Article 8(3) of Regulation No 866/90, the Commission has acted in breach of those provisions and of the principle of legal certainty. Consequently, the contested decision is unlawful and must be annulled, without there being any need to examine whether the Commission's actions may also have constituted, as the applicant maintains, a misuse of powers.

The claim for damages

Brief summary of the parties' arguments

42 The applicant considers that although a judgment upholding its application would enable it once again to qualify for EAGGF aid, renewed eligibity for that aid would

not suffice to make good in full the damage which it has suffered by reason of the contested decision, since the refusal to grant it Community financial aid has also deprived it of the benefit of regional financial aid.

43 The applicant further argues that it has provisionally abandoned its investment project, despite having already incurred certain expenses in preparing that project and with a view to the removal of its installations as planned under that project. In addition, it is being forced to contemplate having sooner or later to close its undertaking in the near future, since the city of Pesaro, in which it is established, has several times requested it, on grounds of environmental protection, to leave the area in which it is located, although it is unable to move its installations because of a lack of adequate funds. The causal link between the damage alleged and the liability of the Community is thus established.

44 The applicant therefore seeks an order requiring the Commission to pay it damages in a sum equivalent to the amount of the Community aid refused, together with the amount of the finance which it would have been granted by the national authorities but which it is no longer able to obtain, and the amount of the total financial and commercial losses suffered by it as a result of the delay in finally granting it the Community aid. It submits, however, that the precise amount of those damages should be determined jointly with the Commission after the Court has given judgment.

45 The Commission notes that the applicant's project was rejected on the basis of only one of the criteria laid down by Decision 90/342 and that there is no evidence to show that, if the circumstances had been different, that project would have been regarded as fulfilling the other criteria referred to in that decision. It further states that the applicant could not in any way have been certain of being granted the finance, for the additional reason that it could not have had knowledge of all the projects submitted on the basis of Regulation No 866/90; and it argues that the

applicant has not in any event submitted any assessment of the damage allegedly suffered. The Commission infers from this that the applicant has neither established the existence of a causal link between the alleged damage and the contested decision nor carried out a precise assessment of its loss.

46 Lastly, the Commission points out that, according to settled case-law, the liability of the Community for legislative acts involving choices of economic policy presupposes the existence of a flagrant violation by the Community of a superior rule of law for the protection of the individual (judgments of the Court of Justice in Joined Cases 63/72 to 69/72 *Werhahn Hansamühle and Others* v *Council* [1973] ECR 1229, Joined Cases 83/76 and 94/76, 4/77, 15/77 and 40/77 *HNL and Others* v *Council and Commission* [1978] ECR 1209, Case 238/78 *Ireks-Arkady* v *Council and Commission* [1979] ECR 2955 and Case 281/84 *Zuckerfabrik Bedburg* v *Council and Commission* [1987] ECR 49); it considers that that condition is not fulfilled in the present case.

Findings of the Court

47 The Court points out that, under the second paragraph of Article 215 of the EC Treaty, the non-contractual liability of the Community depends on the fulfilment of a set of conditions comprising the unlawfulness of the acts alleged against the institutions, the fact of the damage alleged and the existence of a causal link between those acts and the damage complained of (judgments of the Court of Justice in Case 4/69 *Lütticke* v *Commission* [1971] ECR 325, paragraph 10, Case 153/73 *Holtz & Willemsen* v *Council and Commission* [1974] ECR 675, paragraph 7, Joined Cases 256/80, 257/80, 265/80 and 267/80 and 5/81 *Birra Wührer* v *Council and Commission* [1982] ECR 85, paragraph 9, Case 51/81 *De Franceschi* v *Council and Commission* [1982] ECR 117, paragraph 9, Case 253/84 *GAEC de la Ségaude* v *Council and Commission* [1987] ECR 123, paragraph 9, and Case 353/88 *Briantex and Di Domenico* v *EEC and Commission* [1989] ECR 3623, paragraph 8).

48 In the present case, the applicant maintains that it has suffered various losses as a result of by the Commission's unlawful refusal to finance its project.

49 It should be noted in that regard that, according to the case-law of the Court of Justice (judgments in *De Franceschi* v *Council and Commission*, paragraph 9, and *Birra Wührer* v *Council and Commission*, paragraph 9, cited above), the damage for which compensation is sought must be actual and certain. In the present case, the existence of actual damage as pleaded by the applicant presupposes that its entitlement to Community financing has been recognized; however, finance can be granted only if it is clear upon examination that its project fulfils all the other conditions laid down by Decision 90/342. As the Commission has emphasized, no such examination has yet been carried out, and can only be carried out in the context of the measures which compliance with the Court's judgment involves and which the Commission is required to adopt pursuant to Article 176 of the Treaty. Consequently, although the unlawfulness of the contested decision, giving rise to its annulment, is in principle such as to render the Community liable, that liability can only be effectively incurred if it is established that, were it not for the unlawful application of the criterion relating to its annual production volume, the applicant would have been entitled to the Community financing sought by it, by reason of its fulfilment of the other conditions laid down by Decision 90/342.

50 In view of the foregoing, the Court considers itself unable, as matters stand at present, to rule on the applicant's claim for damages; that claim must therefore be rejected as premature.

Costs

51 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 Commission has been essentially unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1. Annuls Decision C (92) 2264 of the Commission of 30 September 1992;

2. Dismisses the claim for damages;

3. Orders the Commission to pay the costs.

Cruz Vilaça Kirschner Kalogeropoulos

Delivered in open court in Luxembourg on 18 May 1995.

H. Jung J. L. Cruz Vilaça

Registrar President