# JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)
10 February 2004 *

In Joined Cases T-215/01, T-220/01 and T-221/01,

**Calberson GE**, established in Paris (France), represented by T. Gallois, lawyer,

applicant,

v

**Commission of the European Communities**, represented by G. Berscheid, acting as Agent, with an address for service in Luxembourg,

defendant,

APPLICATIONS under Article 238 EC and Article 16 of Commission Regulation (EC) No 111/1999 of 18 January 1999 laying down general rules for the application of Council Regulation (EC) No 2802/98 on a programme to supply agricultural products to the Russian Federation and, in the alternative, under Article 235 EC and the second paragraph of Article 288 EC, for:

* Language of the case: French.

— in Case T-215/01, an order that the Commission pay to the applicant, by way of compensation for damage allegedly suffered, the sums of EUR 14 290.61 and USD 57 859.56, together with interest at the legal rate,

— in Case T-220/01, an order that the Commission pay to the applicant, by way of compensation for damage allegedly suffered, the sum of DEM 106 901.96 together with interest at the legal rate,

— in Case T-221/01, an order that the Commission pay to the applicant, by way of compensation for damage allegedly suffered, the sums of EUR 23 115.49 and USD 25 761.11, together with interest at the legal rate,

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

composed of: N.J. Forwood, President, J. Pirrung and A.W.H. Meij, Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 8 July 2003,

gives the following

## Judgment

### Legislative context

*Provisions relevant to Cases T-215/01, T-220/01 and T-221/01*

1 Council Regulation (EC) No 2802/98 of 17 December 1998 on a programme to supply agricultural products to the Russian Federation (OJ 1998 L 349, p. 12) provides for agricultural products to be made available to the Russian Federation.

2 Under Article 2(3) of Regulation No 2802/98, supply costs, including transport to ports or frontier points, unloading excluded, are to be determined by public tendering procedure or, for reasons of urgency or routing difficulty, by restricted tendering procedure.

3 Article 4(1) of Regulation No 2802/98 provides that the Commission is to be responsible for execution of the operation under the terms of that regulation.

4 Article 2(1) of Commission Regulation (EC) No 111/1999 of 18 January 1999 laying down general rules for the application of Regulation No 2802/98 (OJ 1999 L 14, p. 3) provides:

'An invitation to tender is opened to determine the costs of supply, to the sea ports and frontier points of take over by the recipient laid down in the notice of invitation to tender, of products ... withdrawn from intervention stores ....

(a) Such costs may relate to the supply of goods from the loading bay of the intervention agency store, or loaded onto the means of transport, to a point of take over at the delivery stage laid down ....'

5 Under Article 5(1)(e)(5) of Regulation No 111/1999, tenders are to be admissible only where they *inter alia* indicate a precise breakdown of the tender in accordance with the headings given in Annex II to the regulation. Among the headings mentioned in Annex II, as amended by Commission Regulation (EC) No 1125/1999 of 28 May 1999 amending Regulation No 111/1999 (OJ 1999 L 135, p. 41), is the heading 'Handling and loading costs'.

6 The second subparagraph of Article 7(1) of Regulation No 111/1999, as amended by Regulation No 1125/1999, reads as follows:

'Removal of the goods may commence once the intervention agency has obtained proof that the supply security has been lodged ....'

7 Article 8(3) of Regulation No 111/1999 reads as follows:

'In the event of difficulties arising in the course of execution of supply, after the products have been taken over by the successful tenderers, and except in cases of emergency, the Commission alone shall have the power to give instructions to facilitate completion of supply.'

8 Article 8(4) of Regulation No 111/1999 provides that the Commission may, at the request of the intervention agency concerned, allow a tolerance in so far as unidentifiable losses are concerned, to take account of particular difficulties.

9 The first subparagraph of Article 9(3) of Regulation No 111/1999 provides that, where the quality of the goods provided by the intervention agency does not meet the minimum standards laid down for intervention buying in, the intervention agency is immediately to provide goods meeting the requirements laid down for the supply. The second subparagraph of Article 9(3) states:

'The additional costs incurred by the successful tenderers (additional transport costs, demurrage, etc.) shall be borne by the intervention agency.'

10 Under Article 10(1) of Regulation No 111/1999, as amended by Regulation No 1125/1999, applications for payment for the supply are to be submitted to the intervention agency.

11 Article 16 of Regulation No 111/1999 states:

'The Court of Justice of the European Communities shall be competent to resolve any dispute resulting from the implementation or the non-implementation or from the interpretation of the rules governing supply operations carried out in accordance with this Regulation.'

*Other provisions relevant to Cases T-215/01 and T-221/01*

12 Article 1 of Commission Regulation (EC) No 1815/1999 of 18 August 1999 on the supply of skimmed-milk powder to Russia (OJ 1999 L 220, p. 13) provides:

'An invitation to tender is hereby opened to establish the costs of supplying transport, from intervention stocks, for ... skimmed-milk powder for delivery to [Russia] as a supply operation covered by Article 2(1)(a) of Regulation ... No 111/1999.'

13 Article 2 of Regulation No 1815/1999 provides:

'Supply shall comprise:

(a) the taking-over of the goods from the warehouses of the [relevant] intervention agencies ... , at the loading bay; and

(b) transport, by appropriate means, to the places of destination and no later than the dates laid down ....'

14 The annex to Commission Regulation (EEC) No 1643/89 of 12 June 1989 defining the standard amounts to be used for financing material operations arising from the public storage of agricultural products (OJ 1989 L 162, p. 12) provides:

'List of material operations covered by the standard amounts referred to in Article 6 of [Council] Regulation (EEC) No 1883/78 [of 2 August 1978 laying down general rules for the financing of interventions by the European Agricultural Guidance and Guarantee Fund, "Guarantee" Section (OJ 1978 L 216, p. 1)]

...

Milk products: SMP

...

III. Removal from store

...

(c) movement of SMP to loading bay of store and loading, excluding stowage, on means of transport if a lorry ....'

*Other provisions relevant to Case T-220/01*

15 Article 1 of Commission Regulation (EC) No 1799/1999 of 16 August 1999 on the supply of beef to Russia (OJ 1999 L 217, p. 20) provides:

'An invitation to tender is hereby opened to establish the costs of supplying transport, from intervention stocks, for ... beef for delivery to [Russia], as a supply operation covered by Article 2(1)(a) of Regulation ... No 111/1999.'

16 Article 2 of Regulation No 1799/1999 provides:

'Supply shall comprise:

(a) the taking-over of the goods from the warehouses of the [relevant] intervention agencies ... , at the loading bay; and

(b) transport, by appropriate means, to the places of destination and no later than the dates laid down ....'

## The facts

*Case T-215/01*

17 In the tender procedure opened by Regulation No 1815/1999, the applicant submitted to the United Kingdom intervention agency, the Intervention Board Executive Agency (hereinafter 'the IBEA'), a tender for establishing the costs of supplying transport for 3 000 tonnes of skimmed-milk powder, constituting lot No 4 as defined in Annexes I and II to Regulation No 1815/1999, from the warehouse of Alpine Cold Storage (hereinafter 'Alpine') to Russia. Under the tender, the transportation of that lot entailed carrying it by lorry from Alpine's warehouse to a depot situated in the port of Grimsby (United Kingdom), then loading it onto the vessel the *Freedom III* for carriage to Russia by sea. In its tender, the applicant took account of the fact that, in a quotation dated 25 August 1999, Alpine had said that it could load 10 lorries per day. The applicant's bid was EUR 79.60 per gross tonne of goods to be transported. The bid did not cover handling and loading costs, which the applicant considered did not apply in this case.

18 By decision of 7 September 1999, the Commission *inter alia* awarded to the applicant the supply of lot No 4.

19 On 8 October 1999, the applicant informed Alpine that loading of the lorries was to commence on 13 October 1999.

20 As a result of a disagreement between the applicant and Alpine, concerning additional sums claimed by Alpine for loading and stowing the goods and the lodging of a guarantee required by Alpine to ensure the return of the pallets on which the goods were placed, loading did not commence on 13 October 1999.

21 When informed of these difficulties, the Commission's staff stated, in a fax to the IBEA dated 14 October 1999 (hereinafter 'the fax of 14 October 1999'), that the imposition of additional charges and the demand for financial guarantees relating to the pallets were unjustified and inappropriate. In the fax, the Commission's staff also stated that the storage firms were acting in the name of and on behalf of the Community and asked the IBEA to intercede and require Alpine to observe the rules applicable to the stores of the intervention agencies during removal operations. The IBEA was also asked to take the necessary measures to ensure that loading could begin without further delay.

22 In a letter to Alpine dated 19 October 1999, a copy of which was sent to the IBEA and to the Commission, the applicant disputed Alpine's quotation for the operations to load the lorries on the ground that, under Regulation No 1643/89, the cost of those operations was borne by the storage firm of the intervention agency. The applicant also mentioned that the arrival of the *Freedom III*, on which the goods were to be loaded, was imminent and that demurrage would arise if its departure were unjustifiably delayed.

23 Operations to load the lorries began on 22 October 1999. The loading-rate was lower than the 10 loads per day which Alpine had initially indicated in its quotation of 25 August 1999.

24 On 2 November 1999, the master of the *Freedom III* sent the applicant a letter of protest in which he stated that, of the 3 000 tonnes of skimmed-milk powder expected, only 798 tonnes had been loaded and pointed out that, according to the charter party concluded between the applicant and the shipowner, the period

envisaged for loading expired on 3 November 1999 and that after that date demurrage would accrue. The applicant sent a copy of that letter to the IBEA and to the Commission on 2 November 1999.

25 It was 18 November 1999 before all the goods to be transported had been loaded onto the vessel. Consequently, the applicant had to pay demurrage of USD 23 072.89 because, at the port of departure, the vessel's total number of lay days for loading and unloading the goods had been exceeded.

26 The vessel reached its destination and was ready for the goods to be unloaded on 25 November 1999. Unloading of the goods did not commence until 11 December 1999 and terminated on 17 December 1999. Because the vessel's lay days were exceeded, the applicant had to pay demurrage of USD 54 347.25.

27 On 4 January 2000, the applicant sent the IBEA invoice BRU 135 039 in respect of the transportation of lot No 4. The invoice was for a total sum of EUR 318 987.24, of which EUR 243 115.51 related to transport charges and EUR 75 871.73 to demurrage.

28 The sum of EUR 75 871.73 for demurrage was reached by converting the amount paid for demurrage accrued at the ports of departure and arrival — USD 77 420.14 — at the USD/EUR conversion rate of 0.98.

29 Following intervention by the Commission, the IBEA paid the sum of USD 19 904.51 as a single, final settlement of the demurrage incurred by the applicant for the *Freedom III*. The applicant contested that part payment.

30 On 28 July 2000, the applicant gave the IBEA notice to pay the balance of the entry relating to demurrage on invoice BRU 135 039, an amount which it assessed at USD 57 516, and also invoices BRU 138 552 for EUR 7 096.37 and BRU 138 553 for USD 343.93, which both related to financial charges accrued through delay in payment of invoices sent to the IBEA. That formal notice was not acted upon.

31 By letter of 16 May 2001, the applicant gave the Commission formal notice to intervene and require the IBEA to pay the sums owed. According to that letter of formal notice, the IBEA still owed EUR 7 194.24 in respect of transport charges, USD 57 515.63 in respect of demurrage and EUR 7 096.37 and USD 343.93 in respect of the financial charges arising out of delays in payment, that is to say a total of EUR 14 290.61 and USD 57 859.56. That letter of formal notice was not acted upon.

*Case T-220/01*

32 In the tender procedure opened by Regulation No 1799/1999, the applicant submitted to the German intervention agency, the Bundesanstalt für Landwirtschaft und Ernährung (hereinafter 'the BLE'), two tenders for establishing the costs of supplying transport for beef. Those tenders related to the taking-over and transportation of lots Nos 5 and 7, as defined in Annexes I and II to Regulation No 1799/1999, from various warehouses storing those goods to the frontier point of Krasnoye in Russia.

33 The tenders included handling and loading charges which, according to the breakdown of each of the tenders, amounted to EUR 21.80 per gross tonne.

34 By decision of 23 September 1999, the Commission *inter alia* awarded to the applicant the supply of lots Nos 5 and 7. Part of each of those lots was stored in the warehouses of Nordfrost Kühl u. Lagerhaus (hereinafter 'Nordfrost').

35 Nordfrost carried out the handling and loading operations for the part of lots Nos 5 and 7 stored in its warehouses. For those services it sent invoices to the BLE, which reinvoiced the applicant. Lastly, the applicant included that cost in the overall transport invoices sent to the BLE at EUR 21.80 per tonne, in accordance with its bids for the handling and loading costs relating to lots Nos 5 and 7 (see paragraph 33 above).

36 During the loading of the goods, Nordfrost demanded from the applicant sums corresponding to additional costs relating to those loading operations.

37 After being informed of that demand by the applicant's fax of 10 November 1999, the Commission's staff told the applicant, by fax of 15 November 1999, that they considered that all the loading costs were already included in the sums which the BLE was invoicing to the applicant for the loading of the goods. In that fax, the Commission's staff also recommended that the applicant send Nordfrost's invoices for the loading operations directly to the BLE.

38 Since Nordfrost refused to load the goods in its possession until it received payment of the sums corresponding to the additional costs, the applicant paid the amounts demanded. It then charged those costs to the BLE in invoices BRU 135 963 for DEM 82 991.96 and BRU 135 964 for DEM 16 050.

39 Furthermore, the applicant was fined DEM 6 960 by the Polish police on the ground that lorries carrying the beef in lots Nos 5 and 7 had axle overload. The applicant passed that charge on to the BLE in invoice BRU 135 099.

40 By registered letter of 13 July 2000, the applicant gave formal notice to the BLE to pay invoice BRU 135 963 for DEM 82 991.96 in respect of additional loading costs, and invoice BRU 135 098 for DEM 900 and invoice BRU 135 099 for DEM 6 960, both relating to the fines paid to the Polish authorities. That formal notice was not acted upon.

41 By registered letter of 1 August 2001, the applicant gave the Commission formal notice to intervene and to pay the outstanding invoices relating to the supply of lots Nos 5 and 7 for a total amount of DEM 106 901.96. That formal notice was not acted upon.

*Case T-221/01*

42 In a fresh tender procedure opened by Regulation No 1815/1999, the applicant submitted to the Irish intervention agency, the Department of Agriculture, Food and Rural Development (hereinafter 'the DAF'), a tender for establishing the costs of supplying transport for skimmed-milk powder. That tender related to the taking-over and transportation of lot No 5, as defined in Annexes I and II to Regulation No 1815/1999, from the DAF's warehouses to the port of St Petersburg in Russia. In order to transport the skimmed-milk powder to Russia, the applicant entered into a charter party with a shipowner for the affreightment of the vessel the *MV Okapi*.

43 By decision of 23 September 1999, the Commission *inter alia* awarded to the applicant the supply of lot No 5.

44 On 5 October 1999, the applicant informed the DAF that an initial shipment of 3 500 tonnes of goods was planned as from 15 October 1999, the date on which the *MV Okapi* was due to dock at the port of Greenore, Ireland.

45 On 14 October 1999, the applicant, having established that the DAF had not yet drawn up the warrants permitting it to remove the goods from the intervention stores, informed the Commission and warned that demurrage might accrue in respect of the operational delay of the *MV Okapi*.

46 On 21 October 1999, the DAF sent the applicant warrants permitting it to remove about 2 500 tonnes of goods from storage and informed it that the remaining 1 000 tonnes of goods were to be removed from the warehouse at Mallow, which is not referred to in Regulation No 1815/1999 and is situated approximately 300 kilometres from the port of Greenore. On the same day, the applicant expressed its reservations to the Commission and to the DAF.

47 On 28 October 1999, the 3 500 tonnes of goods were made available to the applicant. On the same day, the *MV Okapi* was assigned a wharf for loading the goods.

48 Because of the delays in loading the vessel, the applicant had to pay demurrage. The total sum in respect of demurrage was USD 102 219.44. Of that total, the sum of USD 55 788.89 was regarded as chargeable to the Russian authorities and was therefore borne by the European Agricultural Guidance and Guarantee Fund

(EAGGF). A further sum of USD 20 669.44 was borne by the DAF. The sums thus paid, that is to say USD 76 458.33, corresponded to demurrage accrued at the port of arrival in Russia.

49 The DAF considered that it did not have to bear the cost of the demurrage accrued at the port of departure, namely USD 25 761.11, on the ground that, under the charter party governing the relations between the applicant and the shipowner, they were not payable.

50 The applicant and the DAF exchanged letters concerning that demurrage but did not reach an agreement.

51 On 3 August 2001, the applicant gave formal notice to the Commission to intervene and to pay the balance of USD 25 761.11 on invoice BRU 114 4316 and the balance of EUR 23 115.49 on invoice BRU 413 1828. That formal notice was not acted upon.

## Procedure

52 By application lodged at the Court Registry on 20 September 2001, the applicant brought the action in Case T-215/01. By applications lodged at the Court Registry on 24 September 2001, it brought the actions in Cases T-220/01 and T-221/01.

53 By order of the President of the Second Chamber of the Court of First Instance of 26 June 2003, Cases T-215/01, T-220/01 and T-221/01 were joined for the purposes of the oral procedure and of the judgment, pursuant to Article 50 of the Rules of Procedure of the Court of First Instance.

54 On hearing the report of the Judge-Rapporteur, the Court of First Instance (Second Chamber) decided to open the oral procedure and, by way of a measure of organisation of procedure as provided for in Article 64 of the Rules of Procedure, put written questions to the applicant and the Commission, asking them to answer them at the hearing.

55 The parties presented oral argument and gave their answers to the Court's questions at the hearing on 8 July 2003.

56 At the hearing, the applicant sought permission to put in evidence a note recording the content of its replies to the Court's written questions and two annexes. The Commission was invited to submit any observations it might have on that request and raised no objection. Those documents were therefore added to the case-file.

57 At the end of the hearing, the Court asked the applicant to specify in writing the USD/EUR conversion rate which it used in Case T-215/01 to reach an outstanding balance of USD 57 516 for the entry relating to demurrage on invoice BRU 135 039.

58 In response to that request, on 23 July 2003 the applicant lodged with the Court Registry a note showing that the USD/EUR conversion rate used was 0.98.

59 By letter lodged at the Court Registry on 1 August 2003, the Commission sought permission to lodge its observations on the applicant's note in reply to the Court's question.

60 The Court acceded to that request and the Commission lodged its observations on that note at the Court Registry on 19 September 2003.

## Forms of order sought

61 In the present cases, the applicant claims that the Court should:

— declare the actions, brought under Article 238 EC and, in the alternative, under Article 235 EC and the second paragraph of Article 288 EC, admissible and well founded and, accordingly, order the Commission to pay to the applicant:

— in Case T-215/01 the sums of EUR 14 290.61 and USD 57 859.56, together with interest at the legal rate from the eighth day after the date of each unpaid invoice, in the alternative, from when formal notice was given to IBEA on 28 July 2000 or, in the further alternative, from when formal notice was given to the Commission on 16 May 2001,

— in Case T-220/01, the sum of DEM 106 901.96 (approximately EUR 54 658.10), together with interest at the legal rate from the eighth day after the date of each unpaid invoice, in the alternative, from when formal

notice was allegedly given to the BLE on 16 May 2000 or, in the further alternative, from when purported formal notice was given to the Commission on 16 May 2001,

— in Case T-221/01, the sums of USD 25 761.11 and EUR 23 115.49, together with interest at the legal rate from the eighth day after the date of each unpaid invoice, in the alternative, from when formal notice was allegedly given to the DAF on 9 March 2001 or, in the further alternative, from when formal notice was given to the Commission on 3 August 2001;

— order the Commission to pay the costs.

62 In each of the three cases, the Commission contends that the Court should:

— dismiss the action as inadmissible, be it brought under Article 238 EC or under Article 235 EC and the second paragraph of Article 288 EC;

— in the alternative, dismiss the action as unfounded, be it brought under Article 238 EC or under Article 235 EC and the second paragraph of Article 288 EC;

— order the applicant to pay the costs.

63 In Case T-220/01, the applicant stated in its reply that, contrary to what it had stated in the application, only DEM 12 300 of the additional costs of DEM 16 050 shown on invoice BRU 135 964 were relevant and that invoice BRU 135 098 for DEM 900 was irrelevant. Consequently, the applicant's claims in this case were reduced to a total sum of DEM 102 251.96 (approximately EUR 52 280.60), together with interest.

64 In Case T-221/01, the applicant stated at the hearing that it was withdrawing its claim relating to payment of invoice BRU 413 1828 in the sum of EUR 23 115.49.

**The main claims brought under Article 238 EC**

*Admissibility*

Arguments of the parties

65 In each case, the Commission maintains that the application made under Article 238 EC is inadmissible on the ground that there is no contractual relationship between itself and the applicant. It submits, in the alternative, that in each of the cases several claims must be declared inadmissible on the ground that they do not satisfy the requirements of Article 44(1)(c) of the Rules of Procedure.

66 In each of the three cases, the applicant contests the validity of the pleas of inadmissibility raised by the Commission.

— The plea of inadmissibility alleging that there was no contractual relationship between the parties

67 The Commission argues, first, that the rules which apply to the various tender procedures at issue in these cases contain no reference to a contractual relationship. It cannot be inferred from Article 16 of Regulation No 111/1999 that that regulation contains an arbitration clause testifying to the existence of a contractual relationship between the Commission and the applicant. That article could be regarded as containing an arbitration clause only if it were already established that the relationship between the Commission and the applicant was of a contractual nature.

68 The Commission also argues that the regulations which apply here differ qualitatively from Council Regulation (EEC) No 3972/86 of 22 December 1986 on food-aid policy and food-aid management (OJ 1986 L 370, p. 1) and from Commission Regulation (EEC) No 2200/87 of 8 July 1987 laying down general rules for the mobilisation in the Community of products to be supplied as Community food aid (OJ 1987 L 204, p. 1), which were relevant in Case C-142/91 *Cebag* v *Commission* [1993] ECR I-553, to the judgment in which the applicant refers. Therefore, that judgment, in which the Court held that the Commission and the successful tenderer were bound by a contractual relationship, cannot usefully be invoked in the present cases. For the same reasons, the order in Case T-186/96 *Mutual Aid Administration Services* v *Commission* [1997] ECR II-1633, on which the applicant relies, is also irrelevant.

69 The Commission also maintains that the goods mobilisation measures put out to tender are carried out in large part by the intervention agencies of the Member States and not directly by the Commission itself. Furthermore, as a rule the national authorities act in their own name and on their own responsibility, not merely as the Commission's agents or representatives. Regulations Nos 111/1999 and 2802/98 come under the common agricultural policy which is characterised by a method of administration making extensive call upon the Member States. Thus, it is apparent from Article 6 of Regulation No 2802/98 that the 'Guarantee' Section of the EAGGF bears the costs connected with the implementation of the mobilisation measures. In those circumstances, it is for the Member States to ensure the implementation in their territory of the Community legislation (Joined Cases 205/82 to 215/82 *Deutsche Milchkontor* [1983] ECR 2633). If the Commission had wished to move away from that approach and confine the national authorities to the role of mere agents, it would have had to make that clear in Regulation No 111/1999, which, it claims, it did not do.

70 According to the Commission, the fact that, under Article 6(2) of Regulation No 111/1999, it takes the decision to appoint the supplier does not prevent the intervention agencies from managing almost all the supply on their own responsibility. It also points out that Regulation No 111/1999 entrusts the intervention agencies with management of the tenders (receipt, opening and examination of admissibility), the guarantees (lodged with them and in their favour) and the advances and final payments.

71 Furthermore, the Commission gives no directions to the intervention agencies. Even though Article 8(3) and (4) of Regulation No 111/1999 provides for the Commission to act in order to 'facilitate completion of supply' and to 'allow a tolerance to take account of particular difficulties', those forms of intervention concern specific situations — different from those in these cases — outside which the Commission does not intervene in the relations between the intervention agency and the successful tenderer.

72 Finally, unlike some other Community legislation, Regulation No 111/1999 contains no indication that the contract between the successful tenderer and the intervention agency is concluded in the name of and on behalf of the Commission.

73 The applicant maintains that it has a contractual relationship with the Commission. In that regard it points out, first of all, that the provisions of Regulation No 111/1999 concerning the conclusion of the supply transaction are characteristic of a relationship of a contractual nature between the Commission and the successful tenderer. Thus, under Article 6 of Regulation No 111/1999, the price depends on the tenderer's bid and its acceptance by the Commission. The case-law enshrines the principle that, when the price of a service is the result of the tenderer's bid and its acceptance by the Commission, there is a contractual relationship between those two parties (*Cebag* v *Commission*, cited above, and *Mutual Aid Administration Services* v *Commission*, cited above, paragraph 38 et seq.).

74 It also maintains that the provisions of Regulation No 111/1999 concerning performance of the supply contract confirm, so far as is necessary, the Commission's status as party to the contract. According to the applicant, the Commission's rights as laid down in Article 8(3) and (4) of Regulation No 111/1999 are those which a principle or instructing party has in relation to a forwarding agent and can arise only out of a relationship of a contractual nature. Furthermore, Article 9 of that regulation requires the successful tenderer, prior to exit of the goods from Community territory, to submit to any controls conducted by or on behalf of the Commission.

75 The applicant also argues that Article 16 of Regulation No 111/1999 contains a clause conferring jurisdiction which must be regarded as an arbitration clause within the meaning of Article 238 EC (*Cebag* v *Commission*, cited above, and *Mutual Aid Administration Services* v *Commission* cited above).

— The plea of inadmissibility alleging that the applications do not satisfy the requirements of Article 44(1)(c) of the Rules of Procedure

76 The Commission submits that, in each of the cases, several claims must be declared inadmissible on the ground that they do not satisfy the requirements of Article 44(1)(c) of the Rules of Procedure.

77 Thus, in Case T-215/01, the claim for payment of the balance of EUR 7 194.24 on invoice BRU 135 039 is inadmissible on the ground that the justification for that claim is not sufficiently clear from the wording of the application. Consequently, the claim relating to purported financial charges of EUR 7 096.37 in respect of the delay in payment of the sum of EUR 7 194.24 is also inadmissible as ancillary to an inadmissible main claim. In any event, the claims relating to the financial charges (EUR 7 096.37 and USD 343.93) are inadmissible on the ground that they are not substantiated in the application.

78 In Case T-220/01, it maintains that the claim for payment of invoice BRU 135 964, even reduced to DEM 12 300, is neither explained nor substantiated at the application stage and is therefore inadmissible.

79 Furthermore, in each of the three cases, the claim for payment of interest, which is to accrue from the eighth day after the date of each unpaid invoice, in the alternative from the date on which formal notice was allegedly given to the relevant intervention agency and, in the further alternative, from the date on which formal notice was allegedly given to the Commission, is also inadmissible, because the claim is not substantiated in each of the applications.

80 The applicant maintains, in essence, that the various claims which the Commission considers inadmissible satisfy the requirements of Article 44(1)(c) of the Rules of Procedure.

Findings of the Court

— The plea of inadmissibility alleging that there was no contractual relationship between the parties

81 It is necessary to examine whether, in each of the present cases, there is a legal relationship between the Commission and the applicant and, if so, to determine whether that relationship is of a contractual nature.

82 First of all, under Article 4(1) of Regulation No 2802/98, the Commission is responsible for execution of the operation of making agricultural products available to Russia. Next, under Article 6 of Regulation No 111/1999, the Commission decides on the appointment of the supplier, whereas the role of the intervention bodies is confined, at that stage, to receiving and transmitting to the Commission tenderers' valid offers. In each of the present cases, the supplier was appointed on the basis of a decision taken by the Commission (see paragraphs 18, 34 and 43 above). In addition, as provided in Article 8(3) of Regulation No 111/1999, the Commission alone has the power to give instructions to facilitate completion of the supply. Furthermore, according to Article 9 of that regulation, controls in respect of the supply are a matter for the Commission.

83 It follows from those provisions and circumstances that a legal relationship was created between the Commission, acting as the awarding authority, and the applicant, in its capacity as a successful tenderer. The existence of a legal relationship between the Commission and the applicant is not undermined by the fact that the mobilisation measures in respect of the products in question were carried out in part by the intervention agencies of the Member States (see, to this effect, Case T-134/01 *Fuchs* v *Commission* [2002] ECR II-3909, paragraph 50).

84 As to the categorisation of the legal relationship between the Commission and the applicant, it must be observed, first, that the regulations applicable to these cases, namely Regulations Nos 2802/98, 111/1999, and 1799/1999 (Case T-220/01) or 1815/1999 (Cases T-215/01 and T-221/01), contain no express indication. Those regulations differ therefore, on this point, from Regulation No 3972/86, which was applicable in *Cebag* v *Commission*, and from Regulation (EC) No 1292/96 (which replaced Regulation No 3972/86), in which it is expressly provided that food aid is supplied on the basis of contractual obligations.

85 However, the absence of any such express categorisation in the regulations which apply to each of the present cases does not in itself preclude the possibility that the relationship between the Commission and the applicant, in their capacity as parties to a tender award, may be regarded as contractual in nature.

86 In each of the present cases, the applicant's offer and its acceptance by the Commission created a legal relationship between the two parties which gave rise to reciprocal rights and obligations between them. The applicant undertook *inter alia* to take over specified goods at a specified place and to transport them to Russia within a certain time. The Commission, for its part, undertook *inter alia* that the agreed price would be paid. Such a relationship satisfies the criteria of a bilateral contract (see, to this effect, *Fuchs* v *Commission*, cited above, paragraph 53, the order in Case T-44/96 *Oleifici italiani* v *Commission* [1997] ECR II-1331, paragraphs 33 to 35, and *Mutual Aid Administration Services* v *Commission*, paragraphs 41 to 44).

87 Moreover, the clause contained in Article 16 of Regulation No 111/1999, according to which the Court of Justice of the European Communities is competent to resolve any dispute resulting from the implementation or the non-implementation or from the interpretation of the rules governing supply operations carried out in accordance with that regulation, has reasonable meaning only if a contractual relationship exists between the Commission and a successful tenderer such as the applicant.

88 It is apparent from the foregoing that the plea of inadmissibility alleging that there was no contractual relationship between the Commission and the applicant must be dismissed in each of the present cases.

— The plea of inadmissibility alleging that the applications do not satisfy the requirements of Article 44(1)(c) of the Rules of Procedure

89 In Case T-215/01, the application clearly states that the claim for payment of the sum of EUR 7 194.24 refers to the balance of the 'transport' entry on invoice BRU 135 039 sent by the applicant to the IBEA. Furthermore, the application likewise states that the sums of EUR 7 096.37 and USD 343.93 of which the applicant claims payment refer to the balances on invoices BRU 138 552 and BRU 138 553 relating to so-called financial charges arising out of the IBEA's alleged delays in payment. In Case T-220/01, the application states that the claim for payment of the sum of DEM 16 050 (reduced, at the stage of the reply, to DEM 12 300) refers to the cost of plastic sheets required by Nordfrost, for which the applicant sought reimbursement from the BLE by invoice BRU 135 964. In those circumstances, it must be considered that each of those claims is substantiated rather briefly, but sufficiently to satisfy the requirements laid down by Article 44(1)(c) of the Rules of Procedure of the Court of First Instance.

90 As regards, in the three cases, the claim for payment of default interest, it is generally accepted in the laws of the Member States that a delay in payment involves a loss for which the creditor must be compensated. Community law recognises an obligation to pay such compensation as a general principle of law (see, by way of example, Case C-152/88 *Sofrimport* v *Commission* [1990] ECR I-2477, paragraph 32, Joined Cases T-202/96 and T-204/96 *von Löwis and Alvarez-Cotera* v *Commission* [1998] ECR II-2829, and *Fuchs* v *Commission*, cited above, paragraph 56).

91 Since the claim, in each of the present cases, is for payment of default interest as flat-rate and abstract compensation, it is not necessary for it to be supported by specific reasons and it is, as such, admissible (*Fuchs* v *Commission*, cited above, paragraph 57).

92 In the light of the foregoing, the plea of inadmissibility alleging failure to satisfy the requirements of Article 44(1)(c) of the Rules of Procedure should be dismissed in each of the present cases. Consequently, the applications made under Article 238 EC must be declared admissible.

*Substance*

Arguments of the parties

93 In each of the present cases, the applicant argues, first, that the Community has incurred contractual liability on the ground that the Commission, as principal or instructing party, must answer for the faults committed by the intervention agencies acting as agents.

94 According to the applicant, in each of the present cases the Commission has the status of principal or instructing party *vis-à-vis* the intervention agencies and their storage firms. It points out, in each of the three cases, that in the fax of 14 October 1999 the Commission expressly acknowledged that the storage firms act in the name of and on behalf of the European Community. Furthermore, in Cases T-215/01 and T-220/01 it maintains that the Commission gave instructions to the intervention agencies in question, namely the IBEA and the BLE, which confirms that the Commission has the status of principal or instructing party *vis-à-vis* those bodies.

95 At the very least, the Commission gave indications which led the applicant to agree to incur additional costs in each of the three cases. Thus, in Cases T-215/01 and T-221/01, it was on the basis of the fax of 14 October 1999, in which the Commission expressly acknowledged that the IBEA and Alpine were acting in its name and on its behalf, that the applicant agreed to pay demurrage to the owner of the *Freedom III*, in Case T-215/01, and to the owner of the *MV Okapi*, in Case T-221/01. In Case T-220/01, it was on the basis of the fax of 15 November 1999, in which the Commission recommended that it send Nordfrost's invoices relating to additional costs directly to the BLE, that the applicant agreed to advance the additional costs to Nordfrost.

96 The applicant maintains, in each of the present cases, that the relevant intervention agency committed a fault by refusing reimbursement of the additional costs which the applicant bore. That fault is an infringement of Article 9(3) of Regulation No 111/1999, according to which the intervention agency is liable for additional costs incurred by the successful tenderer if those costs are the result of the fact that the goods provided by the intervention agency do not meet the standards.

97 It argues that, even though the wording of that provision refers only to the supply of goods which do not meet the standards, there is no reason why the intervention agency should not be liable for the additional costs if these are the result of belated supply or of supply made in circumstances detrimental to the successful tenderer. That is the position in each of the present cases.

98 Thus, in Case T-215/01, the additional costs incurred by the applicant were caused by Alpine's wrongful delay in handing the goods over to the applicant's carrier. Indeed, Alpine tried to make the applicant pay for services and bear burdens which were not envisaged by the supply contract, and it was unable to provide the goods at the loading rate previously envisaged. The operation of loading the goods is the exclusive responsibility of the storage firm. The delay in that operation cannot therefore be attributed to the applicant.

99 In Case T-220/01, the additional costs were the result of the wrongful conduct of Nordfrost which, first, without due cause demanded payment of an additional charge for loading the goods and for using plastic sheets in the lorries and, second, carried out the loading operations badly, which led to the imposition of fines on the applicant.

100 The costs relating to removing the goods from storage, loading them and supplying plastic sheets are additional costs since they had not been provided for in Nordfrost's quotation for the handling and loading operations. The applicant cannot be charged those costs because the removal and loading operations are the responsibility of Nordfrost. Furthermore, the Commission itself acknowledged, in its fax of 15 November 1999, that those costs were to be met by the BLE.

101 With regard to the faulty execution of the loading operation, the applicant states that, contrary to the Commission's submissions, the fault of the storage firm during that operation is sufficiently proved by the reports drawn up by the Polish police which found that the lorries used to carry the goods loaded by Nordfrost had axle overload. Since the loading of the means of transport was the exclusive responsibility of the storage firm, it is clear that it was at fault.

102 In Case T-221/01, it was the DAF's wrongful delay in issuing the removal warrants which caused the additional costs, namely the costs relating to the operational delay of the *MV Okapi*. Therefore, the applicant cannot be held responsible either for the delays in loading or for the costs which they generated.

103 With regard more particularly to the demurrage paid by the applicant in respect of the operational delay of the *MV Okapi*, the Court must reject the argument, raised by the DAF and repeated by the Commission, that the applicant should not have paid demurrage because the charter party concluded between the applicant and the shipowner was a berth charter, not a port charter, a classification allowing the applicant to refuse to pay the demurrage claimed. The applicant asserts that the DAF has neither the status nor the power to reclassify an agreement to which it was not party. Also, according to the organisation 'BIMCO', which has the object under its statute of proposing to its members model contracts and standardised clauses, the BIMCO clauses used in the charter party are typical of a port charter. Finally, it adds that the parties to the charter party had agreed that they were concluding a port charter. It was due to that classification, which is not disputed by the signatories to the charter party, and in application of the principle that legally concluded agreements are binding, that the applicant paid the shipowner the additional costs resulting from the operational delay of the vessel, which it is not disputed did occur.

104 Simply in the light of the faults committed in each of the present cases by the intervention agencies for which the Commission, as principal or instructing party, is answerable, the Community has incurred contractual liability.

105 In all three cases, the applicant submits, secondly, that the Community also incurs contractual liability on the ground that the Commission infringed the obligation laid down in Article 8(3) of Regulation No 111/1999.

106 It argues that that provision, which confers on the Commission a power to give instructions in the course of performance of contracts, imposes on the Commission an obligation as to the result to be achieved with regard to the proper execution of the supply.

107 In each of the three cases, the fact that the Commission left the applicant to bear the additional costs constitutes an action on the part of the Commission obstructing the execution of the supply in the light of the successful tenderer's legitimate interests. That is an infringement of the rules governing the supply laid down by Regulation No 111/1999, on the basis of which the applicant tendered for and concluded the supply contract. Moreover, certain circumstances specific to each case confirm that the Commission failed to fulfil its obligations under Article 8(3) of Regulation No 111/1999.

108 Thus, in Cases T-215/01 and T-221/01, the Commission did not take sufficiently effective action to bring an end to the obstacles causing delays in the loading of the goods, which constitutes an infringement of Article 8(3) of Regulation No 111/1999.

109 In Case T-220/01, the fax of 15 November 1999, in which the Commission instructed the BLE to pay the additional costs imposed by Nordfrost, was not acted upon, which is enough to render the Commission contractually liable. If the fax of 15 November 1999 were not to be described as an instruction within the meaning of Article 8(3) of Regulation No 111/1999, the Commission would still be contractually liable on the ground that it failed to give effective instructions in order to facilitate the execution of the supply.

110 The applicant maintains, thirdly, in all the cases, that certain sums of which it claims payment must be regarded as proved since the Commission does not contest them.

111 Furthermore, contrary to what the Commission maintains, all the claims for payment are substantiated. Thus, in Case T-215/01, the claim for payment of the balance of the 'transport' entry on invoice BRU 135 039 — the sum of EUR 7 194.24 — is fully substantiated by the documents annexed to the application. Similarly, in Case T-220/01, the claim for payment of invoice BRU 135 964 in the sum of DEM 12 300 is based *inter alia* on the documents supporting that invoice which are annexed to the application and of which the Commission has a copy.

112 The applicant maintains, finally, that default interest is payable on all the sums of which it claims payment. That interest accrues from the eighth day following the date of each unpaid invoice. In the alternative, it maintains that interest accrues from the date on which the relevant intervention agency was given formal notice, namely 28 July 2000 in Case T-215/01, 16 March 2000 in Case T-220/01 and 9 March 2001 in Case T-221/01. In the further alternative, the date from which interest accrues is determined by the formal notice given to the Commission, that is to say, 16 May 2001 in Cases T-215/01 and T-220/01 and 3 August 2001 in Case T-221/01.

113 As a preliminary point, the Commission denies that it has any contractual relationship with the applicant in each of the cases. It also argues that, in any event, any liability it might have can be found only in the alternative and is conditional on the applicant bringing legal proceedings against the other operators involved, namely the intervention agencies and storage firms, before the competent national courts. If only for that reason it denies contractual liability.

114 Next, the Commission maintains in essence that, even if it is considered that, in each of the three cases, there is a contract between itself and the applicant, the Community cannot be rendered contractually liable on the grounds invoked by the applicant.

115 It applies itself, first of all, to rebutting the applicant's argument that the Commission must answer for the faults committed by the intervention agencies. In that regard it maintains, first, that it does not have the status of principal or master of the intervention agencies or the storage firms. Specifically, it argues that neither the fax of 14 October 1999 (in Cases T-215/01 and T-221/01) nor the fax of 15 November 1999 (in Case T-220/01) can accord it the status of principal *vis-à-vis* the intervention agencies in question if the applicable legislation does not so provide. In the present instance, the relevant Community legislation does not confer that status upon it. Article 8(3) of Regulation No 111/1999, which confers on the Commission the power to give instructions to facilitate the completion of the supply, concerns only difficulties with Russia and does not give the Commission the status of principal *vis-à-vis* the Member States. Also, Article 9(3) of Regulation No 111/1999 allows intervention agencies to bear additional costs without authorisation from the Commission. The Commission likewise disputes that the applicant may invoke an alleged ostensible authority because, in each of the present cases, the applicant dealt directly with the intervention agency concerned.

116 It argues secondly that, even if it were to be considered, in each of the three cases, that it is the principal or master of the other operators concerned (intervention agencies or storage firms), which it denies, it is impossible to infer from general principles, on which the applicant relies and the existence of which has not been substantiated, that it assumes any automatic liability in relation to the applicant. In that regard it maintains, in essence, that it follows from Article 8(1) of Regulation No 111/1999 that the applicant must bear the commercial risk connected with each supply, a fact which precludes automatic liability of the intervention agency and, *a fortiori,* of the Commission.

117 It submits thirdly that, by refusing to bear the additional costs alleged by the applicant, the intervention agencies have not committed any fault in any of the three cases. It points out that the alleged additional costs do not fall within the scope of Article 9(3) of Regulation No 111/1999, which makes the intervention agency responsible for additional costs arising because the goods supplied do not meet the standards. Since that provision is an exception to the principle that the successful tenderer bears the commercial risk, its scope cannot be extended by analogy to situations in which it is not established that the goods supplied do not meet the standards. Therefore, neither the delays recorded in supply of the goods, invoked by the applicant in Cases T-215/01 and T-221/01, nor the allegedly unsatisfactory loading conditions, invoked by the applicant in Case T-220/01, can be covered by that provision. Furthermore, these situations are not comparable with the supply of goods not meeting the standards, which, by definition, cannot be attributable to the successful tenderer for supply of the transport, whereas a delay in supply or allegedly unsatisfactory loading conditions may be attributable to him.

118 It adds that any application of Article 9(3) of Regulation No 111/1999 regarding the additional costs alleged by the applicant in each of the three cases requires the fault of the intervention agency or the storage firm concerned to have been proved.

119 That is not the position in Case T-220/01. The applicant, as a prudent trader, should have made provision for the additional loading costs and those relating to the use of plastic sheets, which stem from health, veterinary and loading problems. As regards the fines imposed by the Polish authorities on the applicant for the axle overloads on the lorries transporting the goods, the Commission maintains that the applicant does not adduce evidence to show that the storage firm committed a fault which led to the imposition of the fines.

120 Nor is that the position in Case T-221/01, because the additional costs consisting in demurrage paid to the owner of the *MV Okapi* are the consequence of the applicant's misunderstanding of its obligations to the owner under the charter party. According to the Commission, the charter party was a berth charter, and not a port charter, which, in the circumstances of the case, did not require the applicant to pay demurrage.

121 The Commission then submits that, contrary to what the applicant states, the Community can hardly be rendered contractually liable on the basis of Article 8(3) of Regulation No 111/1999 which, since its scope is limited to difficulties with Russia, does not grant the Commission a power to issue instructions to the Member States and, in particular, to their intervention agencies. Furthermore, even if that provision did confer on the Commission such a power to give instructions and if the fax of 14 October 1999 (in Cases T-215/01 and T-221/01) and the fax of 15 November 1999 (in Case T-220/01) were to be regarded as instructions within the meaning given to them by the applicant, the ineffectiveness of those instructions by no means proves that the Commission committed a fault.

122 Finally, the Commission denies that certain claims in each of the three cases are well founded. First, in all the cases, it maintains that, even if it has not specifically contested the amount of some of the sums of which the applicant claims payment, it nevertheless challenges the principle underlying them and considers that it

cannot be liable for them. Secondly, in all the cases, the claims concerning interest are unfounded. Even if the interest arose under commercial agreements concluded with third parties, those agreements would not be enforceable against the Commission, a third party in relation to such agreements.

123 Furthermore, in Case T-215/01 the claim for payment of EUR 7 194.24 must be rejected because it is not in any way substantiated. It is true that the applicant mentions in its pleadings difficulties concerning the loading operations and costs for the supply of pallets. However, no link has been established between those alleged difficulties and the claim for payment of EUR 7 194.24. Similarly, the claim relating to the financial charges has not been established. Even if those charges arise under a commercial agreement concluded with a third party, such an agreement is not, in any event, enforceable against the Commission.

124 Finally, in Case T-220/01 the Commission maintains that, even if it does have some liability for the additional costs for covering (plastic sheets) and for the fines in respect of the axle overloads, which it denies, in the alternative it is necessary to share the liabilities with the applicant, which is liable for those costs as successful tenderer.

Findings of the Court

125 First of all, it should be noted that, for the reasons set out in paragraphs 81 to 88 of this judgment, in each of the cases there is a contract between the Commission and the applicant. Also, in each of the three cases the dispute relates to sums

which the applicant claims by virtue of the Community's contractual liability. Therefore, it must be determined, in each case and for each amount claimed, whether the sums claimed by the applicant are referable to breach of a contractual obligation and, if so, who possesses that obligation.

— Case T-215/01

126 The dispute relates, first, to a sum of EUR 7 194.24 which, it is not disputed, is the balance unpaid by the IBEA of the entry relating to transport on invoice BRU 135 039. It is apparent from the documents in the case that that sum was withheld by the IBEA as compensation for the alleged losses and damage concerning the pallets on which the goods to be transported were loaded.

127 It must be determined with regard to that claim whether the applicant's obligations as successful tenderer include the obligation to return the pallets to Alpine in good condition.

128 The contract contains no provision permitting the inference that the applicant, as the successful tenderer, was required to return the pallets on which the goods were stored to the storage firm. Accordingly, any failure to return them in good condition cannot, in any event, constitute a failure by the applicant to fulfil its obligations as set out in the contract.

129 It follows that the sum of EUR 7 194.24 was charged to the applicant without any basis therefor in the contractual relationship between the Commission and the applicant. The applicant's claim for EUR 7 194.24 must therefore be upheld (see, to this effect, *Fuchs* v *Commission*, paragraphs 76 and 77).

130 The dispute relates, secondly, to the sum of USD 57 515.63 which, it is not disputed, is the balance unpaid by the IBEA of the amount invoiced by the applicant in respect of demurrage (invoice BRU 135 039).

131 According to the applicant, the demurrage of which it seeks payment is the consequence of the delay in loading the goods on departure from Alpine's warehouse. It is therefore necessary to examine whether the loading operation is an operation covered by the contract concluded between the Commission and the applicant and, if so, to determine whether it is the applicant or the Commission which assumes responsibility for that operation.

132 Article 1 of Commission Regulation No 1815/1999 provides that an invitation to tender is opened to establish the costs of supplying transport, from intervention stocks, for skimmed-milk powder to certain places of destination in Russia. It is apparent, therefore, that the contract concluded between the Commission and the applicant is a transport contract. Consequently, it must be considered that that contract, like every other transport contract, involves the performance of loading which is a preparatory operation necessary for the transport of the goods. No provision in Regulations Nos 111/1999 and 1815/1999 excludes the loading operation from the scope of the supply contract. In those circumstances, it must be held that the operation forms part of the contract.

133 Under Article 2 of Regulation No 1815/1999, the supply which the successful tenderer takes on comprises, as well as the transport, the taking-over of the goods from the warehouses of the intervention agencies, at the loading bay.

134 In the present case, the taking-over to which Article 2 of Regulation No 1815/1999 refers cannot cover the material operation of loading. Under Regulation No 1643/89, on removal from store, the movement of the skimmed-milk powder to the loading bay of the warehouse and its loading onto lorries, excluding stowage, are material operations covered by the standard amounts paid by the EAGGF for material operations arising from the storage of agricultural products. It follows that the EAGGF was already financing the operation to load onto lorries the 3 000 tonnes of skimmed-milk powder constituting lot No 4 in the tender procedure opened by Regulation No 1815/1999. In those circumstances, the principle of sound management of the Community's financial resources, as recognised by Community case-law (Case C-87/01 P *Commission* v *CCRE* [2003] ECR I-7617, paragraph 40), prevents payment being made for that operation for a second time by entrusting it to the successful tenderer for the supply in the procedure opened by Regulation No 1815/1999. The Commission itself acknowledged at the hearing that the loading operation could not be paid for twice. In those circumstances, it must be held that, in the present case, Article 2 of Regulation No 1815/1999 cannot have the effect of entrusting the loading of the goods concerned to the applicant.

135 Furthermore, it is apparent from the breakdown of the tender, which, it is not disputed, satisfies the requirements of Article 5(1)(e)(5) of Regulation No 111/1999, that the applicant excluded handling and loading services from the operations which it undertook to provide. Under the heading 'handling and loading costs' in the breakdown of the tender prescribed by Annex II to Regulation No 111/1999, as amended by Regulation No 1125/1999, the applicant put 'not applicable'. It was on the basis of that tender that the Commission awarded the supply contract to the applicant.

136 It is apparent from the foregoing that the operation of loading the goods cannot fall to the applicant. Therefore, it is the responsibility of the Commission, as party to a transport contract under which loading is a preparatory operation necessary for the subsequent transport of the goods.

137 At this stage, it must be determined whether the Commission failed to fulfil its contractual obligations relating to the loading operation.

138 In this case, the Commission did not load the goods concerned itself. The operation was carried out by Alpine, acting on behalf of the Commission, as is attested by the fax of 14 October 1999 in which the Commission's staff stated that the storage firms were acting in the name of and on behalf of the Community.

139 It is not disputed that the loading operation was delayed for some time owing to the conduct of Alpine. First, physical loading operations began eight days late, after Alpine had unjustifiably refused to load until its demands relating to stowage costs and to the lodging of a guarantee had been accepted. The fact that Alpine's refusal was unjustified is confirmed by the fax of 14 October 1999 in which the Commission's staff stated, in essence, that the additional costs were unjustified and that the demand for an additional guarantee for the pallets was neither appropriate nor provided for by the applicable legislation. Secondly, Alpine did not comply with the daily rate of 10 loads which it had indicated to the applicant in its quotation of 25 August 1999.

140 It is apparent from the foregoing that the operation of loading the goods onto the lorries, which, under the contract, was the Commission's responsibility, was not carried out correctly. The Commission must therefore answer for the consequences of that faulty execution.

141 In that regard, the delays in carrying out the loading operation led to the unduly prolonged operational delay of the *Freedom III* in the port of Grimsby. On the other hand, the file contains no evidence to corroborate the applicant's argument

that the undue operational delay of the *Freedom III* at the port of arrival was also caused by the faulty execution of the operation of loading the goods on departure from Alpine's warehouse. It is apparent from the documents before the Court that the *Freedom III* was ready for unloading at the port of arrival on 25 November 1999 and that unloading did not actually begin until 11 December 1999 and ended on 17 December 1999 (see paragraph 26 above). In those circumstances, it must be held that the operational delay of the *Freedom III* at the port of arrival was due to the delay in starting or slowness in completing the unloading operations. The demurrage accrued at the port of arrival was therefore not caused by Alpine's faulty execution of the loading operations. Only the demurrage relating to the operational delay of the vessel at the port of departure must therefore be charged to the Commission.

142 The file shows that demurrage relating to the operational delay of the vessel at the port of departure amounts to USD 23 072.89 (see paragraph 25 above). The applicant's claim for payment of the balance of the entry relating to demurrage on invoice BRU 135 039, amounting to USD 23 072.89, must therefore be upheld.

143 The dispute relates, thirdly, to financial charges of EUR 7 096.37 and USD 343.93 imposed because of delays in payment of invoices addressed to the IBEA, and to default interest on the sums claimed by the applicant in this action.

144 It is apparent from the documents in the case that the sums of EUR 7 096.37 and USD 343.93 relate to pre-established compensation, at the rate of 14 % per year, for the IBEA's delay in paying invoice BRU 135 039, the date for payment of which was fixed by the applicant as 12 January 2000 and which was paid on 10 March 2000, and invoice BRU 137 810, the date for payment of which was fixed by the applicant as 25 May 2000 and which was paid on 23 June 2000. It is true that a delay in payment involves a loss for which the creditor must be compensated. However, delay in payment can be pleaded only from the time

when the debtor is given formal notice (see, to this effect, *Fuchs* v *Commission*, cited above, paragraph 78). In this case, the supply contract does not provide that formal notice is automatically given merely by virtue of payment being due. Furthermore, it does not appear from the documents in the case that the Commission was given formal notice before 16 May 2001. In those circumstances, the claim for payment of the sums of EUR 7 096.37 and USD 343.93, which both relate to alleged delays in payment prior to 16 May 2001, must be rejected.

145 Default interest is payable only on the sums of EUR 7 194.24 and USD 23 072.89, from 16 May 2001, the date on which the applicant claimed the payment of those sums from the Commission, until they have been paid in full. As for the percentage of the annual rate of default interest to be applied, since no contractual rate has been fixed by mutual agreement of the parties to the contract, the rate is to be calculated on the basis of the rate set by the European Central Bank for its main refinancing operations that is applicable from time to time during the period concerned, plus two percentage points (*Fuchs* v *Commission*, paragraph 78).

— Case T-220/01

146 The dispute concerns various sums which, the parties agree, relate to additional costs all regarding the operation of loading the goods. Thus, the sum of DEM 82 991.96 is the outstanding amount on invoice BRU 135 963, relating to additional costs paid by the applicant to Nordfrost for loading operations. Similarly, it is agreed that the sum of DEM 12 300 is the relevant part of the outstanding amount on invoice BRU 135 964, relating to the additional costs concerning the use of plastic sheets required by Nordfrost when loading the

goods. Nor do the parties disagree that the sum of DEM 6 960 claimed by the applicant is the outstanding amount on invoice BRU 135 099 concerning the fines imposed on the applicant by the Polish authorities because of the axle overload on the lorries used for transporting the goods.

147 It is therefore necessary to determine whether the loading operation falls within the scope of the contract concluded between the Commission and the applicant in the tender procedure opened by Regulation No 1799/1999 and, if so, to identify the party responsible for that operation.

148 Article 1 of Regulation No 1799/1999 provides that an invitation to tender is opened to establish the costs of supplying transport, from intervention stocks, for certain lots of beef to certain places of destination in Russia. It is therefore apparent that the contract concluded between the Commission and the applicant, like the contract at issue in Case T-215/01 (see paragraph 132 above), is a transport contract, which as a rule involves a loading operation. In this case, no provision in Regulations Nos 111/1999 and 1799/1999 excludes that operation from the obligations covered by the contract. Consequently, the loading operation is part of the contract concluded between the Commission and the applicant.

149 Under that contract, the applicant is responsible for the loading operation. As provided in Article 2 of Regulation No 1799/1999, supply comprises, apart from the transport, the taking-over of the goods from the warehouses of the intervention agencies, at the loading bay. In this case, there is nothing to prevent the taking-over of the goods from covering the service of loading the goods because, contrary to what is laid down for the supply of skimmed-milk powder (see paragraph 134 above), the loading operation does not benefit from separate Community financing under Regulation No 1643/89. Furthermore, in the breakdown of the tender on the basis of which it was awarded the supply by the Commission, the applicant expressly stated that it would invoice the handling and loading operations at EUR 21.80 per gross tonne of goods.

150 However, although the applicant acknowledged at the hearing that, under the contract, it was responsible for the loading operation, it nevertheless submits that it was required by the BLE to include the handling and loading operations in its tender and to subcontract those operations to Nordfrost. In support of its contentions, it merely refers to the complex system of invoicing for the handling and loading operations (see paragraph 35 above). As to those submissions, it need only be pointed out that there is nothing in the file, not even that invoicing scheme, to corroborate the allegation that the applicant's offer to provide the loading service is the result of any constraint. Nor is it established that the applicant was required to call upon the services of Nordfrost to carry out the loading operation. It must therefore be held that the applicant fully agreed to provide the loading service and that it voluntarily entrusted Nordfrost with the task of carrying it out.

151 As regards the applicant's argument that Nordfrost acted as the Commission's agent when carrying out the loading operation, it need only be pointed out that the file contains no evidence allowing such a conclusion. In particular, contrary to the applicant's submissions, the fax of 14 October 1999 sent by the Commission's staff to the IBEA in the context of Case T-215/01 has no relevance where, as in Case T-220/01, the applicant is responsible for the loading operation. That fax was sent in connection with a case in which the Commission was responsible for the loading operation (see paragraph 136 above) and in which the operation had been entrusted to the storage firm. Only in such a situation may the storage firm, where appropriate, be regarded, in the contractual context, as acting in the name of and on behalf of the Commission.

152 In the light of the foregoing, it must be held that, within the framework of the contractual relationship between the Commission and the applicant, the applicant alone is liable for the alleged faulty performance of the loading operation by Nordfrost and any additional costs which it engendered.

153 In those circumstances, contrary to the applicant's submissions (see paragraphs 97 and 99 et seq. above), the BLE was right in refusing to bear the additional costs connected with the loading operation, and that refusal cannot constitute an infringement of Article 9(3) of Regulation No 111/1999. In any event, that provision concerns only the bearing of additional costs connected with the delivery of goods which do not meet the standards, which is not the position in this case.

154 Furthermore, the Commission's alleged failure, as claimed by the applicant, to take effective action to ensure that the BLE paid certain costs (see paragraphs 107 and 109 above) cannot constitute a breach of the alleged obligation laid down in Article 8(3) of Regulation No 111/1999. Since the BLE was right in not paying the additional costs incurred by the applicant, any intervention by the Commission in relation to that payment could not have facilitated completion of the supply.

155 It is apparent from the foregoing that the Community cannot be rendered contractually liable in Case T-220/01. Consequently, the main claim brought in that case by the applicant must be dismissed.

— Case T-221/01

156 Following the applicant's withdrawal of its claim for payment of invoice BRU 413 1828 in the sum of EUR 23 115.49, the dispute concerns the sum of USD 25 761.11, which is the outstanding balance on invoice BRU 114 4316 relating to demurrage.

157 The parties agree that, on 5 October 1999, the applicant informed the DAF that it wished to remove the goods from 15 October 1999. The parties also agree that, on 15 October 1999, the applicant was unable to remove the goods because the DAF had not prepared the removal warrants for the goods. Nor is it disputed that the goods were not available until 28 October 1999.

158 It must be held that, under the contract concluded between the applicant and the Commission in Case T-221/01, the Commission assumes the obligation to make the goods available to the applicant. Furthermore, it is apparent from Article 7 of Regulation No 111/1999, as amended by Regulation No 1125/1999, that removal of the goods may take place once the intervention agency has obtained proof that the supply security has been lodged.

159 Here, it is not established or even alleged that, on 15 October 1999, the DAF was not in possession of proof that the supply security had been lodged. Therefore, the goods had to be capable of being withdrawn by the applicant on 15 October 1999. Furthermore, the Commission has given no reason why the goods were not available on that date. In those circumstances, it must be held that the fact that the goods were not available on 15 October 1999 constitutes breach by the Commission of its contractual obligations.

160 The Commission maintains, however, that the demurrage paid to the owner of the *MV Okapi* results from the applicant's misunderstanding of the nature of the charter party concluded between it and the owner. According to the Commission, the charter party is a berth charter, not a port charter, a classification which means that the applicant could have refused to pay the demurrage claimed.

161 In that regard it need only be pointed out that the Commission, not being a party to the charter party, is not authorised to reclassify it as a berth charter. Nor is it disputed between the applicant and the shipowner that the charter party was a port charter. Furthermore, it was performed as such. In those circumstances, there is no reason to consider that the applicant was wrong to pay demurrage to the owner of the *MV Okapi*.

162 It is not disputed that the demurrage of USD 25 761.11 paid by the applicant in respect of the operational delay of the *MV Okapi* at the port of departure was caused by the late availability of the goods. The applicant's claim relating to that sum must therefore be upheld.

163 That sum must bear default interest from 3 August 2001, the date on which the applicant claimed payment of the amount owed from the Commission, until it has been paid in full. Since no contractual rate has been fixed by mutual agreement of the parties, the rate applicable for the default interest is calculated on the basis of the rate set by the European Central Bank for its main refinancing operations that is applicable from time to time during the period concerned, plus two percentage points.

*Conclusion with regard to the main claims brought under Article 238 EC*

164 In Case T-215/01, some parts of the main claim have not been upheld. The applicant's claim for payment of the outstanding balance, USD 57 515.63, of the 'demurrage' entry on invoice BRU 135 039 has been upheld in the sum of only USD 23 072.89. Furthermore, the applicant's claim for payment of financial charges of EUR 7 096.37 and USD 343.93 has not been upheld. Finally, only the sums which the Commission is required to pay the applicant are increased by default interest.

165 In Case T-220/01, the main claim is dismissed in its entirety.

166 In Case T-221/01, the main claim, as amended following the applicant's withdrawal of its claim for payment of invoice BRU 413 1828, is upheld.

167 Since the main claims in Cases T-215/01 and T-220/01 are not allowed in their entirety, it is necessary to examine the claims brought in the alternative in those two cases.

**The alternative claims brought under Article 235 EC and the second paragraph of Article 288 EC in Cases T-215/01 and T-220/01**

*Admissibility*

Arguments of the parties

168 The Commission argues in essence that, in Cases T-215/01 and T-220/01, the claims brought under Article 235 EC and the second paragraph of Article 288 EC are inadmissible on the ground that the applications do not satisfy the requirements of Article 44(1)(c) of the Rules of Procedure.

169 More specifically, in each of those two cases, the applicant has not indicated to what extent the Commission's alleged faults constitute a sufficiently serious breach of a superior rule of law for the protection of individuals and presents no argument concerning the existence of a causal link between those alleged faults and the harm pleaded.

170 It also maintains that the claims relating to payment of EUR 7 096.37 and USD 343.93 by way of financial charges in Case T-215/01 and the claim relating to payment of invoice BRU 135 964 in Case T-220/01 are wholly unsubstantiated at the application stage.

171 The applicant argues, in essence, that in both cases the application contains a summary of the pleas relating to the alternative claim, in accordance with the requirements of Article 44 of the Rules of Procedure.

172 In that regard, it points out, in each of the two cases, that the application puts a precise figure on the damage suffered, being the outstanding balance on the invoices sent to the relevant intervention agency.

173 Each application identifies the conduct for which the Commission is criticised as resulting from the defective conception and drafting of the general conditions for the supply concerned and from the Commission's shortcomings in organising and

supervising the work of the other parties connected with the supply, namely the intervention agencies and storage firms.

174 Each application establishes the existence of a causal link between the damage and the conduct complained of, stating that the Commission's intervention and supervision would have enabled the refusals of the relevant storage firm and intervention agency to be overcome.

175 It also states, in each of the cases, that, contrary to what the Commission maintains, the various parts of the claims are sufficiently substantiated to satisfy the requirements of Article 44 of the Rules of Procedure.

Findings of the Court

176 It has repeatedly been held that, in order to satisfy the requirements of Article 44(1)(c) of the Rules of Procedure, an application seeking compensation for damage allegedly caused by a Community institution on the basis of the Community's non-contractual liability must set out the evidence from which the conduct which the applicant alleges against the institution can be identified, the reasons for which the applicant considers that there is a causal link between the conduct and the damage it claims to have suffered and the nature and extent of that damage (Case T-387/94 *Asia Motor France and Others* v *Commission* [1996] ECR II-961, paragraph 107, and Case T-195/00 *Travelex Global and Financial Services and Interpayment Services* v *Commission* [2003] ECR I-1677, paragraph 27).

177 In Cases T-215/01 and T-220/01, the application identifies the conduct alleged against the Commission as the defective planning and organisation of the supply, in that that institution did not provide for the possible failings, shortcomings, and/or lack of goodwill of the storage firms and intervention agencies.

178 Furthermore, each application identifies the damage suffered as being the additional costs incurred in connection with the supply of transport for the goods concerned.

179 As regards the causal link between the conduct complained of and the alleged harm, it must be stated, in each of the two cases, that the application remains silent. Contrary to what the applicant claims (see paragraph 174 above), neither of the applications states that the causal link results from the fact that the Commission's intervention and supervision would have enabled the refusals of the relevant storage firm and intervention agency to be overcome. In any event, even if the wording of each of the applications could be interpreted as containing such a statement, the statement cannot be regarded as establishing the existence of a causal link between the conduct complained of and the damage as actually alleged.

180 In those circumstances, it must be held that, as regards the alternative claims, based on Article 235 EC and the second paragraph of Article 288 EC, neither of the applications satisfies the requirements of Article 44(1)(c) of the Rules of Procedure. The claims brought in the alternative in Cases T-215/01 and T-220/01 must therefore be dismissed as inadmissible.

## Costs

181 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. Under Article 87(3), the Court 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.

182 In Case T-215/01, since the action has been partially successful, the Court considers it fair, having regard to the circumstances of the case, to order the applicant to bear one third of its own costs and one third of the costs incurred by the Commission, and the Commission to bear two thirds of its own costs and two thirds of the costs incurred by the applicant.

183 In Case T-220/01, since the applicant has been unsuccessful, it must be ordered to pay all the costs, as applied for by the Commission.

184 In Case T-221/01, the application has, admittedly, been upheld. However, it should be remembered that the applicant withdrew part of its action in so far as it referred to payment of invoice BRU 413 1828 in the sum of EUR 23 115.49. The Court accordingly considers it fair, having regard to the circumstances of the case, to order the applicant to bear one quarter of its own costs and one quarter of the costs incurred by the Commission, and the Commission to bear three quarters of its own costs and three quarters of the costs incurred by the applicant.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber),

hereby:

1. In Case T-215/01, orders the Commission to pay to the applicant the sum of EUR 7 194.24 and the sum of USD 23 072.89, both together with default interest from 16 May 2001 until payment has been made in full. The interest rate to be applied shall be calculated on the basis of the rate set by the European Central Bank for its main refinancing operations that is applicable during the period concerned, plus two percentage points;

2. Dismisses the remainder of the application in Case T-215/01;

3. Orders the applicant to bear in Case T-215/01 one third of its own costs and one third of the costs incurred by the Commission, and the Commission to bear two thirds of its own costs and two thirds of the costs incurred by the applicant;

4. Dismisses the application in Case T-220/01;

5. Orders the applicant to pay all the costs in Case T-220/01;

6. In Case T-221/01, orders the Commission to pay to the applicant the sum of USD 25 761.11, together with default interest from 3 August 2001 until payment has been made in full. The interest rate to be applied shall be calculated on the basis of the rate set by the European Central Bank for its main refinancing operations that is applicable during the period concerned, plus two percentage points;

7. Orders the applicant to bear in Case T-221/01 one quarter of its own costs and one quarter of the costs incurred by the Commission, and the Commission to bear three quarters of its own costs and three quarters of the costs incurred by the applicant.

Forwood Pirrung Meij

Delivered in open court in Luxembourg on 10 February 2004.

H. Jung

Registrar

N.J. Forwood

President

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