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

In Case T-485/93,

Société Louis Dreyfus et Cie, a company incorporated under French law, established in Paris, represented by Robert Saint-Esteben, of the Paris Bar, with an address for service in Luxembourg at the Chambers of Aloyse May, 31 Grand-Rue,

applicant,

v

Commission of the European Communities, represented by Marie-José Jonczy, Legal Adviser, Nicholas Khan, of its Legal Service, and, at the hearing, Berend Jan Drijber, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION (i) for annulment of the decision of the Commission of 1 April 1993 addressed to the Vnesheconombank and (ii) for damages for the loss allegedly suffered by the applicant,

* Language of the case: French.

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

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

Registrar: J. Palacio González, Administrator,

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

gives the following

Judgment

Legal background

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

'*Article 1*

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

Article 2

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

Article 3

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

Article 4

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

(...)

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

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

'*Article 2*

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

(...)

Article 4

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

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

Article 5

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

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

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

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

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

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

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

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

'5. **DRAWING**

5.1 *Procedure*

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

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

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

(...)

5.3 *Disbursement*

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

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

(b) Each Disbursement Request shall:

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

(ii) be signed by the Borrower;

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

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

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

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

Facts

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

9 On 28 November 1992 the applicant signed a contract with Exportkhleb for the sale of wheat, whereby it undertook to supply 325 000 tonnes of milling wheat at a price of US $140.50 per tonne, CIF free out one safe Baltic Sea discharge port. That contract stipulated that the goods were to be shipped by 28 February 1993.

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

11 After the Commission had obtained from the applicant various additional items of essential information, concerning in particular the ecu/US$ exchange rate, which had not been fixed in the contract, it finally gave its approval on 27 January 1993, in the form of a notice of confirmation addressed to the VEB. According to the applicant, that notice of confirmation modified the contract in two respects, namely the shipment period, which the Commission automatically extended until 31 March 1993, and the ecu/US$ exchange rate, which was neither that proposed by the applicant to Exportkhleb on 25 January 1993 (ECU 1 = US $1.1711) nor that agreed between them on 28 January 1993 (ECU 1 = US $1.1714, bringing the agreed price up to ECU 119.94 per tonne).

12 According to the applicant, the documentary credit was set up by the VEB on 4 February 1993 but the letter of credit did not become effective until 16 February 1993, that is to say, approximately two weeks before the end of the shipment period provided for by the contracts (28 February 1993).

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

14 On 19 February 1993 Exportkhleb invited all the exporters to attend a meeting in Brussels, which was held on 22 and 23 February 1993. At that meeting Exportkhleb requested the exporters to submit fresh quotations for delivery of what it termed the 'foreseeable balance', that is to say, the quantities which could not reasonably be expected to be delivered by 28 February 1993. According to the applicant, the price of wheat on the world market rose considerably between November 1992, when the sale contract was concluded, and February 1993, when the fresh negotiations took place, going up from US $132 in November 1992 to US $149.50 in February 1993.

15 Following negotiations in which the exporting companies had to align themselves to the lowest bid, namely US $155 per tonne, agreement was reached between Exportkhleb and its contracting partners regarding the allocation of the fresh quantities to be supplied by each company. The applicant was awarded a contract for 185 000 tonnes of milling wheat. Under that informal agreement, the shipment period was to end on 30 April 1993.

16 By reason of the urgency arising from the seriousness of the food situation in Russia, it was decided that those modifications would be formalized by a simple rider to the initial contract, which was dated — for the sake of convenience, according to the applicant — 23 February 1993, the date of the meeting in Brussels, even though, as the applicant acknowledges, it was not actually signed until the third week of March.

17 On the strength of the new terms agreed with Exportkhleb and — according to the applicant — the Russian organization's verbal assurances that the Commission would accept the new amendments, the applicant recommenced deliveries of wheat bound for Russia from 4 March 1993 onwards.

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

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

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

21 According to the applicant, the documentation containing the new bids and the amendments to the contract were officially sent by the VEB to the Commission on 22 and 26 March 1993. The applicant maintains that on 5 April 1993 it was informed by Exportkhleb of the Commission's refusal to approve the amendments to the contract as initially concluded; that refusal was given concrete form by a letter sent to the VEB on 1 April 1993 by the Agriculture Commissioner. On that same day, 5 April 1993, the applicant decided to stop its deliveries of wheat.

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

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

Procedure and forms of order sought

23 It was in those circumstances that, by application lodged at the Registry of the Court of Justice on 9 June 1993 and registered under number C-311/93, the applicant brought the present action.

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

25 The case was registered in the Registry of the Court of First Instance under number T-485/93. By document lodged at the Registry on 15 September 1993 the Commission raised an objection of inadmissibility.

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

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

28 The applicant claims that the Court should:

— annul the Commission's decision of 1 April 1993 refusing to approve the amendments to the supply contract concluded with Exportkhleb;

— rule that the Commission has committed wrongful acts such as to render it liable;

— order the Commission to pay it compensation for the pecuniary damage suffered by it, amounting to ECU 253 991.98 in respect of lost interest, ECU 1 347 831.56 in respect of the difference between the initial contract price and the amended contract price and US $229 969.58 in respect of loss on the ecu/US$ exchange rate, and ECU 1 as compensation for the non-material damage suffered;

— order the Commission to pay the costs.

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

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

— declare either that the contested decision does not give rise to liability on the part of the Commission or that the action is inadmissible since it concerns a complaint which does not put the Commission's non-contractual liability in issue;

— order the applicant to pay the costs.

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

— dismiss the objection of inadmissibility as regards both the application for annulment and the application to establish non-contractual liability;

— alternatively, reserve its decision on the objection until final judgment;

— acknowledge that the applicant is entitled to rely in full on its previous written submissions.

Admissibility of the application for annulment

Arguments of the parties

31 The Commission has raised an objection of inadmissibility on the ground that the contested measure is not of direct concern to the applicant within the meaning of the fourth paragraph of Article 173 of the Treaty.

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

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

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

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

in accordance with the documentary credit. The Commission points out that the right *per se* of a supplier to receive payment on the basis of an unconfirmed letter of credit exists only against the bank issuing the credit — in the present case, the VEB.

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

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

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

39 In the Commission's view, the contested letter of 1 April 1993 cannot be regarded as being of direct concern to the applicant within the meaning of the fourth paragraph of Article 173 of the Treaty. That letter was not, and could not have been,

intended to modify the terms of the commercial contract between the applicant and Exportkhleb. The Commission's role was solely to verify whether the financing conditions laid down by the documentation were fulfilled and, if so, to authorize disbursement of the Russian loan. It was not for the Commission to 'validate' the commercial agreement. The consequence of the Commission's letter is merely that the loan can no longer be used to pay for deliveries of wheat under the revised terms of the contract.

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

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

42 The applicant maintains that the Commission played a crucial role in the conclusion of its contract with Exportkhleb. Moreover, that role is expressly acknowledged in all the applicable documents, that is to say, the Memorandum of Understanding, Regulation No 1897/92 and the loan agreement, which shows that the financing of the contracts for the supply of wheat is conditional on those contracts being approved by the Commission. The Commission cannot therefore contend that it does not have to 'validate' the contracts. The applicant observes, moreover, that the contested decision of 1 April 1993 expressly mentioned the approval procedure prescribed by the Community provisions and referred in an annex to the supply contract concluded by the applicant. Consequently, there can be no doubt that it is for the Commission, pursuant to those provisions, to approve the supply contract between the applicant and Exportkhleb; it follows that the refusal to approve the amendments is of direct concern to the applicant.

43 In addition, on the facts, the Commission played a crucial role in the award of the sale contract by intervening with regard both to the applicant and Exportkhleb. Thus, as regards the applicant, in January 1993 the Commission requested certain

information which it needed prior to approving the initial contract and in May 1993 organized a meeting in Brussels with the representatives of the Grain and Feed Trade Committee of the EEC (COCERAL), of which the applicant is a member. As regards Exportkhleb, the applicant points out an exchange of correspondence of 9 and 12 March 1993 between the Commission and Exportkhleb. Yet if the Commission's argument that the Russian financial agent is the only party with which it is required to have dealings were right, such interventions should not have taken place.

44 The applicant denies that the case-law of the Court of Justice relating to the Lomé Convention is applicable by analogy to this case. In the present case, it was the Commission alone which refused to approve a contract already concluded between the undertaking and the Russian commercial agent, whereas, in the cases at issue in the case-law, the contract had not yet been concluded. Furthermore, the Commission was directly involved with the contracting parties.

45 According to the applicant, a more useful parallel may instead be drawn with Joined Cases 41/70, 42/70, 43/70 and 44/70 *International Fruit Company and Others* v *Commission* [1971] ECR 411; first, by reason of its suspensory provisions, the supply contract was expressly subject to approval by the Commission, and, second, the VEB's position was analogous to that of the national authorities in that case, that is to say, it had no discretion whatever as regards the Commission's decision. In those circumstances, that decision, which has the direct effect, in relation to the applicant, of not validating the agreement and, consequently, of stopping payment for the deliveries of wheat made on the conditions laid down in the contract, particularly as regards the Community loan financing, was of direct concern to the applicant.

Findings of the Court

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

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

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

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

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

51 The action of the Commission does not therefore affect the legal validity of the commercial contract concluded between the applicant and Exportkhleb; nor does it modify the terms of the contract, particularly as regards the prices agreed by the

parties. Thus, irrespective of the Commission's decision not to recognize the agreements as being in conformity with the applicable provisions, the amendment which the parties made on 23 February 1993 to their contract of 28 November 1992 remains validly concluded on the terms agreed between them.

52 The fact that the Commission was in contact with the applicant or with Exportkhleb cannot affect that assessment of the legal rights and obligations which each of the parties involved has under the applicable legislation and contractual agreements. Moreover, as regards the admissibility of the application for annulment, the exchanges relied on by the applicant do not show that the Commission went beyond its proper role. Thus, the letter sent by the Commission to Exportkhleb on 12 March 1993 expressly states that the amendments required an official request from the VEB. Similarly, the sole purpose of the alleged contacts between the Commission and the applicant in January 1993 was to have the parties include in their contract a condition which was indispensable for acceptance of conformity but it was left to the parties alone to modify their contract if they wanted to secure the financing provided for. Lastly, the fact that, several weeks before the adoption of its decision, the Commission held a meeting in Brussels with the applicant in order to explain its position does not as such establish that that decision was of direct concern to the applicant.

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

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

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

Admissibility of the claim for compensation for pecuniary damage

Arguments of the parties

56 The Commission maintains, first, that the letter of 1 April 1993 is not a negation of the provisions of the loan agreement, and thus it cannot be accused of any unlawful conduct giving rise to liability, *a fortiori* in relation to a person to whom that decision is not of direct concern.

57 The Commission contends, next, that, whilst the Court of Justice has established the principle that a claim for damages is independent of a claim for annulment (judgment of the Court of Justice in Case 4/69 *Lütticke* [1971] ECR 325, paragraph 6, reversing the decision in Case 25/62 *Plaumann* v *Commission* [1963] ECR 95; judgment of the Court of Justice in Case 118/83 *CMC* v *Commission*

[1985] ECR 2325, paragraph 31), a claim for damages will remain inadmissible where what is really in issue is not an award of damages but the validity of the act. In the present case, the applicant is simply seeking to obtain, through an award of damages, the same price as it would have obtained if the Commission had approved the changes made to the contract, and thus the claim for damages is an attempt to circumvent the requirements of Article 173 of the Treaty.

58 The Commission points out that a substantial proportion of the deliveries in respect of which the applicant is seeking compensation was in fact made before the VEB sought the Commission's approval of the amendments. The applicant could obtain from Exportkhleb the difference in price it claims only on the basis of the contractual obligations agreed by it with Exportkhleb. The Commission cannot be held liable for a breach of contract by Exportkhleb or the VEB at a time when the Community had not yet entered into any commitment in relation to the documentary credit.

59 The applicant maintains that the principle that claims for damages and claims for annulment are separate in nature was laid down by the Court of Justice in its judgment in *Lütticke*, cited above, and that it has been confirmed many times since then (in particular in *CMC* v *Commission*, cited above, and in Case 175/84 *Krohn* v *Commission* [1986] ECR 753). It follows, first, that the inadmissibility of a claim for annulment, or the absence of such a claim, does not preclude a claim for damages (judgments in *STS* v *Commission* and *Krohn* v *Commission*, cited above) and, second, that, where a claim for damages is made at the same time as a claim for annulment, the admissibility of the first claim does not depend on that of the second (see *CMC* v *Commission* and the judgment of the Court of Justice in Case C-87/89 *Sonito and Others* v *Commission* [1990] ECR I-1981).

60 However, in declaring inadmissible claims for damages brought by applicants with standing to bring an action for annulment of the harmful act but out of time for doing so, the Court of Justice intended to stop 'abuse of process' (judgment of the Court of Justice in Case 59/65 *Schreckenberg* [1966] ECR 543). Then, in *Krohn*, the Court of Justice stated that the decision in *Plaumann*, relied on by the

Commission, related solely to the exceptional case where an application for damages sought payment of an amount exactly the same as the amount of duty paid by the applicant pursuant to an individual decision, so that the true purpose of the application for damages was to have that individual decision withdrawn.

61 In the present case, the applicant considers that its application for damages cannot be regarded as an abuse of process, for two reasons.

62 First, the claim for annulment of the decision of 1 April 1993 was brought in a proper manner and its claim for damages cannot be regarded as an attempt to circumvent the requirements of Article 173 of the Treaty.

63 Second, in claiming damages it has a cause of action and its claim is autonomous. Thus, contrary to the Commission's contention, the fault on which the applicant relies lies not in the Russian party's non-performance of its contractual obligations but in the wrongful conduct of the Commission at the time of the decision, the legality of which is also contested. The claim for damages is founded, first, on the serious error of assessment committed by the Commission in applying the legal conditions laid down for approval of the supply contract between Exportkhleb and the applicant, and, second, on the breach by the Commission of the principle of the protection of legitimate expectations. Consequently, by comparison with the claim for annulment, the claim for damages has separate aims, since its purpose is not to have a specific measure withdrawn but to obtain reparation for the damage suffered by the applicant as a result of the two wrongful acts described above. Lastly, the claim is separate since the applicant is seeking not only payment of the price which it would have received if the Commission had approved amendment no 4 (namely, ECU 1 347 831.56) but also compensation for the loss suffered on the ecu/US dollar exchange rate (namely US $229 969.56). The applicant observes that the Commission has failed to reply on this point.

64 Finally, the applicant maintains that the Commission's argument that the decision of 1 April 1993 is perfectly valid in law pertains not to the admissibility of the claim for damages but to the substance of the case.

Findings of the Court

65 The Commission advances, in essence, three arguments in support of its objection to the admissibility of the claim for damages for the loss allegedly suffered by the applicant as a result of the decision of 1 April 1993. First of all, that decision was perfectly legal; next, it cannot be held liable for a breach of contract by Exportkhleb or the VEB at a time when it had not yet entered into any commitment; and lastly, the claim for damages is not separate from the claim for annulment.

66 The Court observes, first, that the arguments maintaining that the decision was legal and denying liability for breach of contract by one of the Russian parties go to the substance of the case and cannot constitute a ground of inadmissibility.

67 Second, it is settled case-law that the action for damages provided for by Article 178 and the second paragraph of Article 215 of the Treaty was meant to be an autonomous form of action with a particular purpose to fulfil within the system of remedies provided for (judgment of the Court of Justice in *Krohn*, paragraph 26). It follows that, in principle, the inadmissibility of a claim for annulment cannot entail the inadmissibility of a claim for damages for alleged loss.

68 It has, however, been held, by way of exception to the principle stated above, that the inadmissibility of a claim for annulment renders a claim for damages inadmissible where the claim for damages is actually aimed at securing withdrawal of an

individual decision which has become definitive (judgments of the Court of Justice in *Krohn*, paragraph 33, and of the Court of First Instance in Case T-514/93 *Cobrecaf and Others* v *Commission* [1995] ECR II-621, paragraph 59), and thus constitutes an abuse of process. The burden on proving such an abuse of process lies on the party pleading it.

69 In the present case, the Court considers that the Commission has not discharged that burden. First, the defendant has simply asserted that the applicant is merely seeking to obtain the same price as it would have obtained if the Commission had approved the amendment to the contract. Second, as the Court of Justice held in its judgment in *CMC* v *Commission*, which concerned an invitation to tender under the Lomé Convention, it would be wrong, in circumstances such as those of the present case, to dismiss the possibility that acts or conduct of the Commission or its officials or agents might cause damage to third parties. Any person who claims to have been injured by such acts or conduct must therefore have the possibility of bringing an action, if he is able to establish liability, that is, the existence of damage caused by an illegal act or illegal conduct on the part of the Community (judgment in *CMC* v *Commission*, paragraph 31).

70 In view of all the foregoing considerations, the claim for compensation for the pecuniary damage allegedly suffered by the applicant as a result of the Commission's decision must be declared admissible.

Admissibility of the claim for compensation for non-material damage

71 In its objection of inadmissibility, the Commission does not make any submissions concerning the claim for the award of one ecu for the non-material damage which the applicant claims to have suffered as a result of statements made by the Director General of DG VI to the effect that the applicant had engaged in unlawful practices at the time when the contract amendments were negotiated in February 1993.

72 At the hearing, however, it contended, first, that this claim should be declared inadmissible on the ground that, like the claim for compensation for pecuniary damage, it is not separate from the claim for annulment and, second, that it is a new kind of claim which, if the other heads of claim were to be held inadmissible, could lead to the Court ruling only on a claim for the award of one ecu.

73 The Court finds, first, that the claim for damages is based on alleged conduct of the Commission which is distinct from the act that the applicant is seeking to have annulled. In those circumstances, the claim for damages cannot be intended to achieve the withdrawal of that act. Consequently, the Commission's argument is manifestly unfounded.

74 Second, the allegedly fresh nature of a claim cannot in itself constitute a ground of inadmissibility where, in accordance with the second paragraph of Article 215 of the Treaty, the claim puts in issue the liability of the Community on account of alleged conduct on the part of the Commission or its officials. Similarly, the quantum of damages sought by the applicant cannot constitute a ground of inadmissibility but is connected to the assessment of the extent of the alleged damage.

75 It follows that the claim for compensation for the non-material damage alleged by the applicant must also be declared admissible.

Costs

76 Under Article 87(1) of the Rules of Procedure, a decision as to costs is to be given in the final judgment or in the order which closes the proceedings.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. Dismisses the application for annulment as inadmissible;

2. Dismisses the objection of inadmissibility inasmuch as it concerns the claims for compensation for the material and non-material damage allegedly suffered by the applicant;

3. Orders the procedure relating to those claims for compensation to be continued in relation to the substance;

4. Reserves the costs.

Briët Vesterdorf Potocki

Delivered in open court in Luxembourg on 24 September 1996.

H. Jung C. P. Briët

Registrar President