JUDGMENT OF THE COURT (Sixth Chamber)

29 April 2004 *

In Case C-496/99 P,

Commission of the European Communities, represented initially by F. Ruggeri Laderchi, acting as Agent, and subsequently by T. van Rijn and L. Visaggio, acting as Agents, and by A. Dal Ferro, avvocato, with an address for service in Luxembourg,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (Second Chamber) in Joined Cases T-191/96 and T-106/97 *CAS Succhi di Frutta* v *Commission* [1999] ECR II-3181, seeking to have that judgment partially set aside,

* Language of the case: Italian.

the other party to the proceedings being:

CAS Succhi di Frutta SpA, established in Castagnaro (Italy), represented initially by A. Tizzano, G.M. Roberti and F. Sciaudone, and subsequently by G.M. Roberti and F. Sciaudone, avvocati,

applicant at first instance,

THE COURT (Sixth Chamber),

composed of: V. Skouris, acting for the President of the Sixth Chamber, J.N. Cunha Rodrigues, J.-P. Puissochet, R. Schintgen (Rapporteur) and F. Macken, Judges,

Advocate General: S. Alber,
Registrar: R. Grass,

having regard to the Report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 24 October 2002,

gives the following

Judgment

By application lodged at the Court Registry on 21 December 1999, the Commission of the European Communities brought an appeal under Article 49 of the EC Statute of the Court of Justice against the judgment of the Court of First Instance of 14 October 1999 in Joined Cases T-191/96 and T-106/97 *CAS Succhi di Frutta* v *Commission* [1999] ECR II-3181 ('the contested judgment'), seeking to have that judgment partially set aside.

Legal framework, facts and procedure

In the contested judgment, the Court of First Instance set out the legal framework, facts and procedure as follows:

'1 On 4 August 1995, the Council adopted Regulation (EC) No 1975/95 on actions for the free supply of agricultural products to the peoples of Georgia, Armenia, Azerbaijan, Kyrgyzstan and Tajikistan (OJ 1995 L 191, p. 2 ["Regulation No 1975/95"]). The first two recitals in the preamble to that regulation state that "it is advisable to supply Georgia, Armenia, Azerbaijan, Kyrgyzstan and Tajikistan with agricultural products in order to improve the food supply situation, taking into account the diversity of local situations without compromising development towards supplies according to market rules", and that "the Community has agricultural products in stock following intervention measures and it is advisable, exceptionally, to dispose, in priority, of these products in carrying out the action envisaged".

2 Article 1 of Regulation No 1975/95 states:

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

3 Article 2 of Regulation No 1975/95 provides:

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

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

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

...".

4 Subsequently, the Commission adopted Regulation (EC) No 2009/95 of 18 August 1995 laying down detailed rules for the free supply of agricultural products held in intervention stocks to Georgia, Armenia, Azerbaijan, Kyrgyzstan and Tajikistan pursuant to Regulation No 1975/95 (OJ 1995 L 196, p. 4 [; "Regulation No 2009/95"]).

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

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

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

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

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

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

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

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

"— the additional terms and conditions,

— the lots ...,

...

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

...".

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

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

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

11 The Commission then adopted Regulation (EC) No 228/96 of 7 February 1996 on the supply of fruit juice and fruit jams intended for the people of Armenia and Azerbaijan (OJ 1996 L 30, p. 18 [; hereinafter: "Regulation No 228/96"]).

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

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

... to respond to requests from the beneficiary States for fruit juices and fruit jams, it is appropriate to open a tender to determine the most advantageous conditions for the supply of such products and to provide the payment of the successful tenderer with fruit withdrawn from the market following the

withdrawal operations in application of Articles 15 and 15A of Council Regulation (EEC) No 1035/72 of 18 May 1972 on the common organisation of the market in fruit and vegetables (OJ 1972 L 118, p. 1), as last amended by Commission Regulation (EC) No 1363/95 (OJ 1995 L 132, p. 8)."

13 According to Article 1 of Regulation No 228/96:

"A tendering procedure is hereby initiated for the supply of a maximum of 1 000 tonnes of fruit juice, 1 000 tonnes of concentrated fruit juice and 1 000 tonnes of fruit jams as indicated in Annex I, in accordance with the provisions of Regulation (EC) No 2009/95, and in particular Article 2(2) thereof and the specific provisions of the present Regulation."

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

Lot No 1	Product to be supplied: 500 tonnes (net) of apple juice Product to be withdrawn: Apples
Lot No 2	Product to be supplied: 500 tonnes (net) of apple juice concentrated to 50% Product to be withdrawn: Apples
Lot No 3	Product to be supplied: 500 tonnes (net) of orange juice Product to be withdrawn: Oranges

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

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

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

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

15 By letter of 15 February 1996, [CAS Succhi di Frutta SpA; "Succhi di Frutta" or "the applicant"] submitted a tender for Lots Nos 1 and 2, offering to withdraw 12 500 tonnes and 25 000 tonnes of apples respectively as payment for the supply of its products for those two lots.

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

17 On 6 March 1996, the Commission sent to the Azienda di Stato per gli Interventi nel Mercato Agricolo (the Italian intervention agency, "AIMA"), with a copy to Trento Frutta, Memorandum No 10663 stating that it had

awarded Lots Nos 1, 3, 4, 5 and 6 to Trento Frutta. According to that memorandum, Trento Frutta would receive as payment, in priority, the following quantities of fruit withdrawn from the market:

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

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

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

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

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

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

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

20 On 14 June 1996, the Commission adopted Decision C (96) 1453 on the supply of fruit juice and fruit jams intended for the people of Armenia and Azerbaijan, pursuant to Regulation No 228/96 ("the Decision of 14 June 1996"). According to the second recital in the preamble to that decision, since the award, the quantities of products in question withdrawn from the market had been negligible in comparison with the quantities required, although the withdrawal season was virtually over. It was therefore necessary, in order to complete that operation, to allow the successful tenderers wishing to do so to take as payment, in place of apples and oranges, other products withdrawn from the markets in predetermined quantities reflecting the processing equivalence of the products in question.

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

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

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

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

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

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

23 On 22 July 1996 the Commission adopted Decision C (96) 1916 on the supply of fruit juice and fruit jams intended for the people of Armenia and Azerbaijan, pursuant to Regulation No 228/96 ("the Decision of 22 July 1996"). According to the third recital in the preamble to that decision, the quantity of peaches and apricots available would not be sufficient to complete the operation and it was appropriate to allow, in addition, the substitution of nectarines for the apples to be withdrawn by the successful tenderers.

24 Article 1 of the Decision of 22 July 1996 provides that the products withdrawn from the market are made available to Trento Frutta and Loma, at their request, according to the coefficient of equivalence of 1.4 tonnes of nectarines for 1 tonne of apples.

25 That decision was addressed to the Italian Republic.

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

27 On 26 July 1996, at the meeting organised at its request with the staff of Commission Directorate-General VI-Agriculture (DG VI), the applicant presented its objections to the substitution, authorised by the Commission, of other fruit for apples and oranges and obtained a copy of the Decision of 14 June 1996.

28 On 2 August 1996, the applicant sent to the Commission Technical Report No 94 prepared by the Dipartimento Territorio e Sistemi Agro-Forestali (Department of Land and Forestry Management) of the University of Padua on the coefficients of economic equivalence of certain fruit to be used for processing into juice.

29 On 6 September 1996, the Commission adopted Decision C (96) 2208 amending the Decision of 14 June 1996 on the supply of fruit juice and fruit jams intended for the people of Armenia and Azerbaijan, pursuant to Regulation No 228/96 ("the Decision of 6 September 1996"). According to the second recital in the preamble to that decision, in order to bring about a more balanced substitution of products, over the whole withdrawal period for peaches, between the apples and oranges used for the supply of fruit juice to the people of the Caucasus, on the one hand, and the peaches withdrawn from the market to pay for those supplies, on the other, it was appropriate to amend the coefficients established in the Decision of 14 June 1996. The new coefficients were to be applied only to products which had not yet been withdrawn by the successful tenderers as payment for supplies.

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

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

...

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

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

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

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

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

35 By order of 20 March 1998, the President of the Second Chamber of the Court of First Instance dismissed an application by Allione Industria Alimentare SpA ["Allione"] for leave to intervene in support of the form of order sought by the applicant in Case T-191/96 *CAS Succhi di Frutta* v *Commission* [1998] ECR II-573.

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

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

3 In Case T-191/96, Succhi di Frutta claimed that the Court should annul the Decision of 6 September 1996 amending the Decision of 14 June 1996 and order the Commission to pay the costs.

The contested judgment

Admissibility

4 The Commission contended before the Court of First Instance that the application lodged by Succhi di Frutta in Case T-191/96 was inadmissible on two grounds: first, the applicant was not directly and individually concerned by the Decision of 6 September 1996 and, secondly, it had no interest in obtaining its annulment.

5 As regards admissibility, the Court held as follows:

'50 The fourth paragraph of Article 173 of the EC Treaty (now, after amendment, Article 230 EC) confers on natural or legal persons the right to bring an action for annulment against decisions addressed to them and against

decisions which, although in the form of a regulation or a decision addressed to another person, are of direct and individual concern to them.

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

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

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

54 The amendment of the arrangements for payment prescribed for the different lots was confirmed by the Decision of 14 June 1996 with regard to all the successful tenderers. Subsequently, the applicant asked the Commission to

reconsider that decision. For that purpose, a meeting between the staff of DG VI and the applicant took place on 26 July 1996, following which the applicant sent to the Commission Technical Report No 94 (paragraphs 27 to 28 above).

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

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

57 In those circumstances, it must be held that the applicant is individually concerned by the contested decision. It is concerned, first, in its capacity as unsuccessful tenderer in so far as one of the important conditions of the invitation to tender — that concerning the means of payment for the supplies at issue — was later amended by the Commission. Such a tenderer is not individually concerned merely by the Commission decision which determines the fate, be it favourable or unfavourable, of each of the tenders submitted in answer to the notice of invitation to tender ([Case 92/78] *Simmenthal* v *Commission* [[1979] ECR 777,] paragraph 25). It also retains an individual interest in ensuring that the conditions of the notice of invitation to tender are complied with at the stage when the award itself is implemented. The fact that the Commission did not point out in the notice of invitation to tender the

possibility for successful tenderers to obtain fruit other than those prescribed as payment for their supplies denied the applicant the chance of submitting a tender different from that which it had submitted, and of thus having the same opportunity as Trento Frutta.

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

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

60 Furthermore, the argument based on the fact that the applicant did not challenge the Decision of 14 June 1996 within the prescribed time-limit must be rejected, since the contested decision cannot be regarded as a measure which is merely confirmatory of that decision. As stated above, the Commission agreed, at the applicant's request, to reconsider the Decision of 14 June 1996, and the contested decision was adopted following that reconsideration. Furthermore, the contested decision lays down different coefficients of equivalence and is based on new evidence. In those circumstances, the applicant's action cannot be declared inadmissible on that basis (see judgments in Case T-82/92 *Cortes Jimenez and Others* v *Commission* [1994] ECR-SC II-237, paragraph 14; Case T-331/94 *IPK* v *Commission* [1997] ECR II-1665, paragraph 24; Case T-130/96 *Aquilino* v *Council* [1998] ECR-SC II-1017, paragraph 34; and Case T-100/96 *Vicente-Nuñez* v *Commission* [1998] ECR-SC II-1779, paragraphs 37 to 42).

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

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

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

64 It follows that the application is admissible.'

Substance

6 As regards the substance of Case T-191/96, Succhi di Frutta based its case on seven pleas in law alleging: (1) infringement of Regulation No 228/96 and breach

of the principles of transparency and equal treatment; (2) infringement of Regulations Nos 1975/95 and 2009/95; (3) misuse of powers; (4) manifest errors of assessment; (5) infringement of Articles 39 of the EC Treaty (now Article 33 EC) and 40(3) of the EC Treaty (now, after amendment, Article 34 EC) and of Regulation No 1035/72; (6) an inadequate statement of reasons; and (7) manifest inappropriateness of the replacement mechanism.

7 The Court of First Instance held as follows with regard to the first plea:

'72 In connection with Council Directive 71/305/EEC of 26 July 1971 concerning the co-ordination of procedures for the award of public works contracts (OJ, English Special Edition 1971 (II), p. 682), the Court of Justice held that, when a contracting entity had laid down prescriptive requirements in the contract documents, observance of the principle of equal treatment of tenderers required that all the tenders must comply with them so as to ensure objective comparison of the tenders (judgments in Case C-243/89 *Commission* v *Denmark* [1993] ECR I-3353, paragraph 37; and Case C-87/94 *Commission* v *Belgium* [1996] ECR I-2043, paragraph 70). In addition, it has been held that the procedure for comparing tenders has to comply at every stage with both the principle of the equal treatment of tenderers and the principle of transparency so as to afford equality of opportunity to all tenderers when formulating their tenders (*Commission* v *Belgium*, cited above, paragraph 54).

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

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

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

76 Furthermore, it is clear from Article 6(1)(e)(1) of Regulation No 2009/95 (see paragraph 7 above) that tenders were to be valid only where they indicated the quantity of product requested by the tenderer as payment for the supply of processed products under the conditions laid down in the notice of invitation to tender.

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

78 However, contrary to what the Commission contends, none of the provisions it cites, in particular, the first and second recitals in the preamble to Regulation No 228/96 and Article 2(2) of Regulation No 1975/95 (paragraphs 3 and 12 above), authorises such a substitution, even by implication. Neither is substitution provided for in the situation, put forward

by the Commission, where the quantities of fruit in the intervention stocks are insufficient and the substitute fruit supplied as payment to the successful tenderers belongs to the "same group of products" as their supplies.

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

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

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

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

8 Consequently, the Court of First Instance thereby:

'1. Annul[led] Commission Decision C (96) 2208 of 6 September 1996;

...

3. Order[ed] the Commission to pay the costs in Case T-191/96 ...'.

The appeal

9 The Commission claims that the Court of Justice should:

— set aside the contested judgment and declare the action brought by Succhi di Frutta in Case T-191/96 inadmissible;

— in the alternative, set aside the contested judgment on substantive grounds and declare the action brought by Succhi di Frutta in Case T-191/96 unfounded;

— in the further alternative, set aside the contested judgment and refer the case back to the Court of First Instance so that it may give a ruling on the merits in the light of the information that the Court of Justice will have provided;

— order Succhi di Frutta to pay the costs of the present proceedings and of the proceedings at first instance relating to Case T-191/96.

10 Succhi di Frutta contends that the Court of Justice should:

— declare inadmissible, whether in whole or in part, the pleas in law raised by the Commission in the appeal against the judgment of the Court of First Instance of 14 October 1999 in Joined Cases T-191/96 and T-106/97, specifically as regards Case T-191/96;

— in the alternative, dismiss the appeal as unfounded;

— order the Commission to pay the costs in their entirety.

11 The Commission bases its appeal on five pleas in law alleging that:

— the principle of equal treatment as between unsuccessful and successful tenderers has been misapplied, thus prompting the Court of First Instance to hold incorrectly that the action brought by Succhi di Frutta was admissible;

— the grounds of the contested judgment are incorrect and contradictory as regards the conclusions which the Court of First Instance drew from that principle regarding the merits of the case;

— the Court of First Instance made an error of interpretation when it held that Succhi di Frutta was individually concerned by the Decision of 6 September 1996 because it had taken part in the procedure for the adoption of that decision;

— the Court of First Instance has misinterpreted the concept of an interest in bringing proceedings as regards Succhi di Frutta and the scope of Article 233 EC, and that

— the Court of First Instance has misinterpreted the rules relating to the withdrawal of fruit provided for by the common organisation of the market in fruit and vegetables, thus prompting that Court to deny any lack of availability of apples to be used as payment for the products to be supplied by the successful tenderers.

The appeal brought by the Commission

12 The first, third and fourth pleas in law raised by the Commission concern various aspects of the admissibility of the action brought at first instance by Succhi di Frutta in Case T-191/96, whilst its second and fifth pleas concern the assessment of the substance of that case.

13 Thus, the Commission's pleas concerning the admissibility and the merits of the action brought by Succhi di Frutta in Case T-191/96 against the Decision of 6 September 1996 must be examined in turn.

The pleas relating to the admissibility of the action brought by Succhi di Frutta in Case T-191/96

Arguments of the parties

14 The Commission alleges that the Court of First Instance made three errors in law when it held that the action brought by Succhi di Frutta in Case T-191/96 was admissible.

15 In its first plea, the Commission maintains that the contested judgment attributed excessive scope to the principle of equal treatment as between the tenderers.

16 Although the Commission does not dispute the fact that the abovementioned principle and the principle of transparency must be scrupulously observed by the contracting authority throughout the actual tendering procedure, it argues that different rules apply once the contract has been awarded.

17 At that point, a very clear distinction has to be made between the successful tenderer, on the one hand, and the unsuccessful tenderers, on the other.

18 Once the contract had been awarded, there is a contractual relationship between the Commission and the individual successful tenderer, each party being obliged to comply with the terms of the agreement entered into. By contrast, at that stage of the procedure the Commission no longer has a relationship with the unsuccessful tenderers.

19 For that reason, the conditions laid down in the notice of invitation to tender remain inviolable only until the successful tenderer is selected, at which point, however, the contracting authority can derogate from those conditions if circumstances so require and provided that any amendment made does not infringe the rights of the undertaking awarded the contract.

20 The Commission infers from the foregoing that the Decision of 6 September 1996 contested by Succhi di Frutta, which was adopted after the tenders had been assessed and the contract awarded, concerns solely the Commission's relationship with the successful tenderers, but that it does not affect the unsuccessful tenderers, whose situation does not in any way differ from that of any third party which has not taken part in the tendering procedure.

21 Consequently, like any other undertaking in the sector concerned, Succhi di Frutta is not entitled to challenge an amendment to the conditions of the invitation to tender which had been made, as in this case, after the contract had been awarded.

22 The Court of First Instance, therefore, erred in law when it held, at paragraph 57 of the contested judgment, that Succhi di Frutta was individually concerned by the Decision of 6 September 1996 in its capacity as unsuccessful tenderer.

23 The Commission adds that that view is supported by the fact that Allione, another Italian producer of fruit juice, was denied leave to intervene in the proceedings by order of the President of the Second Chamber of the Court of First Instance of 20 March 1998, cited above, on the ground that it did not have sufficient interest in the annulment of the decision challenged by Succhi di Frutta. There is nothing to distinguish the latter's situation from that of Allione.

24 By its third plea the Commission asserts that, contrary to the Court's finding at paragraph 58 of the contested judgment, Succhi di Frutta was also not individually concerned by the Decision of 6 September 1996 by virtue of its having taken part in the process resulting in that decision, which was adopted at the express request of Succhi di Frutta and after a reconsideration of the situation as a whole by the Commission in the light of additional information presented by Succhi di Frutta.

25 Those factors are not, according to the Commission, in themselves sufficient to distinguish Succhi di Frutta from any other person, particularly since, in this case, the decision at issue was addressed to various Member States and affected only the successful tenderers.

26 In support of its fourth plea, the Commission submits, first of all, that the Court of First Instance erred in finding, at paragraphs 62 and 63 of the contested judgment, that Succhi di Frutta had an interest in bringing proceedings against the Decision of 6 September 1996, because the undertaking had not challenged the similar decisions adopted previously, which were less favourable to it, and, secondly, that annulment of the Decision of 6 September 1996 effectively reinstates those earlier decisions. The obligation properly to comply with the judgment of the Court of First Instance annulling the measure in question has no effect at all on those other decisions adopted previously.

27 The Commission states that all the same, the Court's judgment to that effect calls the Commission's relationship with the successful tenderers into question at a time when the tendering procedure has been concluded, with the result that legal certainty is not guaranteed.

28 Succhi di Frutta is seeking, principally, to have those three pleas raised by the Commission dismissed as inadmissible.

29 It contends that the first plea in law must be rejected on the ground that the Commission merely repeats the objection of inadmissibility of the action which it has already raised at first instance. Therefore, that plea amounts simply to a request for a re-examination of the action brought before the Court of First Instance.

30 Similarly, the fourth plea is a mere repetition of grounds and arguments already raised before the Court of First Instance. As clearly follows from paragraph 46 of the contested judgment, that plea reproduces an objection already raised at first instance, when the Commission maintained that Succhi di Frutta had no interest in bringing an action for the annulment of the Decision of 6 September 1996 because the sole effect of that annulment would be to reinstate the previous coefficients of equivalence which were more favourable to Trento Frutta.

31 The third plea is inadmissible inasmuch as the Commission did not raise it at first instance and it has therefore been raised for the first time only at the appeal stage, although the Commission had the requisite knowledge during the proceedings before the Court of First Instance.

32 In the alternative, Succhi di Frutta challenges the merits of those pleas.

33 It contends that the first and third pleas, whose respective subject-matter is essentially the same, can only be dismissed as unfounded.

34 The Court of First Instance was indeed right in finding that Succhi di Frutta was individually concerned by the Decision of 6 September 1996 in the particular circumstances of the case.

35 Thus the situation of Succhi di Frutta was set apart not only because the company had, in good time, made representations to the Commission on account of the serious economic loss which it had suffered following the award to its direct competitors of an entirely disproportionate quantity of substitute fruit as payment for supplies of fruit juice or fruit jams, but in particular because it had taken part both in the tendering procedure at issue and in the procedure for the adoption of the Decision of 6 September 1996.

36 The Commission's argument that the situation of Succhi di Frutta ceased to be different from that of any other third party once the successful tenderer was chosen is without substance.

37 It is for the contracting authority to define, in the notice of invitation to tender, the subject-matter of and the conditions governing the award procedure. The contracting authority then has to adhere strictly to the conditions which it has laid down in that notice and which have prompted the tenderers to take part in the procedure and submit a particular tender, on the basis of the conditions governing the invitation to tender.

38 That obligation prevails throughout the procedure, including at the stage when the contract between the contracting authority and the successful tenderer is performed. The contracting authority may derogate from the conditions and

arrangements laid down only in the circumstances expressly specified in the notice of invitation to tender. It is not, therefore, at liberty to manage the contract with the selected tenderer or tenderers as it sees fit.

39 In exceptional circumstances arising after the contract has been awarded and requiring that the conditions of the tender be adjusted, and where the notice does not contain a clause providing for such adjustment, it is for the contracting authority to set aside the procedure and initiate a new tendering procedure in which all the previous tenderers are entitled to take part on an equal footing.

40 In this case, it clearly follows from Annex I to Regulation No 228/96 that the fruit to be withdrawn by the successful tenderers were apples and oranges and that the relevant legislation did not contain a clause providing for the subsequent amendment of one of the conditions laid down in the notice of invitation to tender and, in particular, the substitution of peaches for apples.

41 Furthermore, if the Commission's view was accepted, the contracting authority could, during performance of the contract with the successful tenderer, make fundamental amendments to the notice of invitation to tender, safe in the knowledge that it would not be challenged by a rejected tenderer in an action seeking to have an unauthorised change in the conditions of invitation to tender penalised.

42 Succhi di Frutta considers that the fourth plea in law must also be dismissed as unfounded.

43 The Court of First Instance was also right in considering that Succhi di Frutta could invoke an interest in bringing proceedings in the particular circumstances of the case.

44 The legal interest in challenging an unlawful decision does not, it argues, disappear simply because there are other unlawful measures which have not themselves been challenged in an action for annulment.

45 In this instance, the Court of First Instance clearly held that the substitution of specific fruit for the fruit mentioned in the notice of invitation to tender was unlawful.

46 In accordance with Article 176 of the Treaty and the principle of sound administration, the Commission should have drawn all the necessary inferences from that declaration of unlawfulness as regards the decisions that it had adopted prior to the Decision of 6 September 1996 and which were subject to the same defect. Any other interpretation is clearly contrary to the system of judicial protection underlying the Community legal order.

47 The interest of Succhi di Frutta in bringing proceedings is in any event substantiated, on the one hand, by the need to prevent any repetition of unlawful measures and, on the other hand, with a view — potentially — to its bringing an action for damages against the contracting authority to compensate for the loss suffered as a result of the unlawful act.

Assessment by the Court of Justice

— The first plea in law

48 As regards the admissibility of this plea, it must be recalled that, according to settled case-law, it follows from Article 225 EC, the first paragraph of Article 51 of the Statute of the Court of Justice and Article 112(1)(c) of the Rules of

Procedure of the Court of Justice that an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside and also the legal arguments specifically advanced in support of the appeal (see, in particular, Case C-41/00 P *Interporc Im- und Export* v *Commission* [2003] ECR I-2125, paragraph 15).

49 Where an appeal merely repeats or reproduces verbatim the pleas in law and arguments previously submitted to the Court of First Instance, including those based on facts expressly rejected by that Court, it fails to satisfy the requirements to state reasons under those provisions (see inter alia the judgment in *Interporc*, cited above, at paragraph 16).

50 However, provided that the appellant challenges the interpretation or application of Community law by the Court of First Instance, the points of law examined at first instance may be discussed again in the course of an appeal. Indeed, if an appellant could not thus base his appeal on pleas in law and arguments already relied on before the Court of First Instance, an appeal would be deprived of part of its purpose (see inter alia the judgment in *Interporc*, cited above, at paragraph 17).

51 It is apparent from paragraphs 15 to 23 of this judgment that the first plea raised satisfies those requirements.

52 In this case, in challenging paragraph 57 of the contested judgment the Commission is seeking to demonstrate that the Court of First Instance infringed Community law in holding that Succhi di Frutta was individually concerned by the Decision of 6 September 1996 in its capacity as unsuccessful tenderer in the tendering procedure in question. The Commission alleges more specifically that, in making such a finding, the Court of First Instance attributed excessive scope to the principle of equal treatment as between tenderers, a principle which, in its view, no longer applies at the stage when the award is being implemented.

53 Thus, far from merely repeating arguments which have already been raised before the Court of First Instance, the Commission is actually challenging that Court's answer to a point of law which was expressly raised in the judgment under appeal and which may be reviewed by the Court of Justice in an appeal.

54 Accordingly, the Commission's first plea in law is admissible.

55 In order to assess the merits of that plea, it must be stated at the outset that the fundamental argument advanced by the Commission in support of its plea, to the effect that the principles of transparency and equal treatment as between tenderers do not apply once the contract has been awarded, relates in fact to the substance of the case.

56 That argument will have to be considered, therefore, in connection with the Commission's second plea relating to the merits of the action brought at first instance by Succhi di Frutta.

57 At this juncture, assessment of the merits of the first plea, which is exclusively concerned with the admissibility of the action in Case T-191/96, will be confined to establishing whether the Court of First Instance erred in law when it held, at paragraph 57 of the contested judgment, that, in the circumstances of this case, Succhi di Frutta was individually concerned by the Decision of 6 September 1996 in its capacity as unsuccessful tenderer.

58 The parties do not dispute that Succhi di Frutta took part in the tendering procedure in the course of which the abovementioned decision was adopted.

59 Although there is no doubt that economic operators in the sector concerned which did not take part in the invitation to tender in question are not individually concerned by that decision since they are affected only in their objective capacity as producers of fruit juice or fruit jams, the same reasoning cannot be applied to the tenderers: they must enjoy a right of recourse to the Community judicature to obtain a review of the legality of the tendering procedure as a whole, whether or not their respective tenders have ultimately been accepted.

60 The situation of Succhi di Frutta differs fundamentally from that of Allione specifically on that basis. Allione did not submit a tender during the tendering procedure forming the basis of this case and, therefore, was denied leave to intervene in support of the form of order sought by Succhi di Frutta in Case T-191/96 by the President of the Second Chamber of the Court of First Instance (see the order of 20 March 1998, cited above).

61 Consequently, the Commission cannot legitimately maintain — as regards a decision such as the Decision of 6 September 1996 — that the situation of Succhi di Frutta does not in any way differ from that of any operator in the sector concerned and that, therefore, the successful tenderers alone are entitled to challenge, if necessary, a decision of that kind.

62 Such an interpretation would inevitably mean that infringements committed by the contracting authority after the contract had been awarded, but none the less casting doubt on the legality of the tendering procedure as a whole, could not be penalised as long as they did not affect the situation of the successful tenderer or tenderers.

63 An outcome of that kind would be contrary both to the fourth paragraph of Article 173 of the Treaty, which provides for a means of redress for persons directly and individually concerned by the contested measure, and to the fundamental principle that, in a community governed by the rule of law, adherence to legality must be properly ensured.

64 That applies in particular in circumstances such as those underlying Case T-191/96 in which, as the Court of First Instance pointed out particularly at paragraph 57 and, to the same effect, at paragraph 73 of the contested judgment, the decision challenged by the tenderer's action, albeit adopted subsequently by the contracting authority, was capable of directly affecting the manner in which that tenderer actually formulated its tender and the equality of opportunity of all the undertakings taking part in the procedure concerned.

65 It is indeed clear from the documents in the case that, even before decisions to that effect — including the decision at issue here — were formally adopted by the contracting authority, the undertaking to which the major part of the contract in question was ultimately awarded was already referring in its tender to the possibility — for which no provision was made in the notice of invitation to tender — of other fruit being substituted as payment, whereas all the other tenderers complied strictly in their tenders with the conditions laid down in that notice.

66 In the light of the foregoing considerations, the Court of First Instance was therefore correct in finding, at paragraph 57 of the contested judgment, that Succhi di Frutta was individually concerned by the Decision of 6 September 1996 in its capacity as unsuccessful tenderer and was, on that basis, entitled to seek a review by the Community judicature as to whether that decision had been adopted lawfully and, if it had not, to have the unlawful conduct of the procedure by the contracting authority penalised.

67 Thus, the first plea in law put forward by the Commission must be dismissed as unfounded.

— The third plea in law

8 It must be pointed out that, in accordance with the case-law of the Court of Justice, where one of the grounds adopted by the Court of First Instance is sufficient to sustain the operative part of its judgment, any defects that might vitiate other grounds given in the judgment concerned in any event have no bearing on that operative part and, accordingly, a plea relying on such defects is ineffective and must be dismissed (see, inter alia, Case C-326/91 P *De Compte* v *Parliament* [1994] ECR I-2091, paragraph 94, and order in Case C-49/96 P *Progoulis* v *Commission* [1996] ECR I-6803, paragraph 27).

9 As the Advocate General observed at point 19 of his Opinion, the first and third pleas raised by the Commission in actual fact concern the same issue in that they are both concerned with ascertaining whether or not the Court of First Instance erred in law when it held, at paragraph 57 of the contested judgment, that Succhi di Frutta was individually concerned by the Decision of 6 September 1996.

0 It clearly follows from paragraphs 57 and 58 of the contested judgment that the Court of First Instance relied on two separate grounds in support of its finding that Succhi di Frutta was in the event individually concerned by the above-mentioned decision.

1 The Court of First Instance considered at paragraph 57 of its judgment that Succhi di Frutta was individually concerned by the Decision of 6 September 1996, 'first', in its capacity as unsuccessful tenderer.

2 The Court of First Instance added at paragraph 58 of the contested judgment that 'second', in the particular circumstances of the case, Succhi di Frutta was individually concerned by the Decision of 6 September 1996 because it had been

adopted after a reconsideration of the situation as a whole, undertaken at the request of Succhi di Frutta and in the light, in particular, of the additional information which it had presented to the Commission.

73 Therefore, it need only be stated that, first, the Court of First Instance did not err in law, as is apparent from paragraph 66 of this judgment, when it held, at paragraph 57 of its judgment, that Succhi di Frutta could invoke an individual interest in seeking a review by the Community judicature as to whether the Decision of 6 September 1996 was lawful and that, secondly, the abovementioned paragraph of that judgment is sufficient to sustain the Court's finding that in Case T-191/96 Succhi di Frutta was individually concerned by that decision.

74 Since the Commission's third plea is levelled solely against the Court's finding set out at paragraph 58 of the contested judgment which constitutes, as is apparent from the four preceding paragraphs of this judgment, a non-essential ground of that judgment at first instance, the plea is in any event ineffective and must consequently be dismissed.

— The fourth plea in law

75 In accordance with the case-law cited at paragraphs 48 to 50 of this judgment, the objection of inadmissibility that Succhi di Frutta raised against the fourth plea must be dismissed.

76 The Commission refers to paragraphs 62 and 63 of the contested judgment for the purpose of challenging the legal assessment of the Court of First Instance that Succhi di Frutta could in this case invoke an interest in bringing an action against the Decision of 6 September 1996.

77 Since the Commission has indicated precisely the contested elements of the judgment which it is seeking to have set aside and the arguments supporting its view that the Court's legal assessment is incorrect, the plea in question does not constitute a mere verbatim reproduction of the arguments submitted at first instance.

78 As regards the merits of the fourth plea, it must be pointed out first of all that Succhi di Frutta took part in the tendering procedure at issue and that, as follows more specifically from paragraph 66 of this judgment, it must be held to be individually concerned by the Decision of 6 September 1996; it is therefore entitled to bring a court action for review of the legality of that decision and, if appropriate, ask that the unlawful conduct of the contracting authority in that connection be penalised. The Commission did not in any way cast doubt on the Court's assessment that Succhi di Frutta is directly concerned by the decision that it sought to have set aside.

79 Secondly, the Court of First Instance held at paragraph 60 of the judgment under appeal that the contested decision cannot be regarded as a measure which is merely confirmatory of the Decision of 14 June 1996 because the Commission had agreed, at the request of Succhi di Frutta, to reconsider the latter decision, and because the Decision of 6 September 1996 was adopted following that reconsideration, lays down different coefficients of equivalence and is based on new evidence, including information supplied by Succhi di Frutta.

80 The Commission has not challenged that paragraph of the judgment in this appeal.

81 Thirdly, it is common ground that the Decision of 6 September 1996 adversely affects Succhi di Frutta in that it may prejudice its legitimate interests by considerably impairing its position on the market concerned.

82 In addition, it is apparent from the documents in the case that the substitution of peaches for the apples and oranges prescribed in the notice of invitation to tender as payment for the supplies concerned, which was implemented inter alia by the Decision of 6 September 1996, directly affects the conditions of the tenders to be submitted by the individual tenderers, as the Court of First Instance pointed out at the end of paragraphs 57 and 73 of its judgment and as illustrated, moreover, by the tender submitted by Trento Frutta which had expressly stated that, in the event of there not being enough apples, it was prepared to accept peaches instead, even though the possibility of substitution was indisputably not envisaged in the notice of invitation to tender and the tenders submitted by the other tenderers complied strictly with the relevant conditions laid down in that notice. In taking into account a tender such as that submitted by Trento Frutta, there is a danger that the undertaking submitting that tender will be placed at an advantage in relation to its competitors, thus offending against the principle of equal treatment as between tenderers and undermining the transparency of the procedure.

83 On that basis, the view must be taken that, as the Court of First Instance held at paragraph 63 of its judgment, Succhi di Frutta did indeed have an interest in the annulment of the Decision of 6 September 1996 and, in particular, in obtaining from the Community judicature a declaration of illegality, if appropriate, on the part of the contracting authority. Such a declaration can then be taken as the basis for any action for damages aimed at properly restoring Succhi di Frutta to its original position.

84 The Commission's argument that annulment of the Decision of 6 September 1996 has the effect of reinstating the previous Decision of 14 June 1996, which is less favourable to Succhi di Frutta, relates to paragraph 62 of the contested judgment.

85 First of all, paragraph 63 of that judgment provides sufficient reasoning in law for the Court's finding that Succhi di Frutta had in that case an interest in the annulment of the Decision of 6 September 1996. Secondly, it follows from paragraph 83 of this judgment that the Court of First Instance did not infringe Community law in making that finding.

86 It follows that the Commission's objection concerning paragraph 62 of the contested judgment, which contains an additional argument in support of the applicant's interest in bringing an action, is ineffective.

87 In view of the above considerations, the fourth plea must be dismissed as unfounded.

The pleas relating to the merits of the action brought by Succhi di Frutta in Case T-191/96

Arguments of the parties

88 The Commission complains that the Court of First Instance made two errors in law in setting aside the Decision of 6 September 1996.

89 The Commission develops the same line of reasoning in support of its second plea as that underlying its first plea alleging that the Court of First Instance had misapplied the principle of equal treatment as between tenderers during the stage of the tendering procedure following the award of the contract.

90 From that reasoning, which is summarised at paragraphs 15 to 19 of this judgment, the Commission concludes that the Court of First Instance incorrectly held, at paragraphs 73 and 81 of the contested judgment, that the Commission was obliged to comply strictly, throughout all the stages of the public procurement procedure, with the conditions laid down in the notice of invitation

to tender, with the result that it could not subsequently amend the arrangements for payment of the successful tenderer where there was no clause providing authorisation to that effect, and would have no choice but to initiate a new tendering procedure in which the successful tenderer and the other tenderers whose offers had not been accepted would be subject to the same treatment in terms of the conditions to be applied.

91 In this case it proved impossible to perform the contract as originally planned by virtue of the lack of availability of sufficient quantities of apples.

92 Although — according to the Commission — the principles of transparency and equal treatment as between all tenderers must be scrupulously observed until the successful tenderer is selected, on reaching the stage at which the contract is performed, however, it may become essential to alter the terms of the contract in response to unforeseen circumstances, bearing in mind that it is impossible to anticipate every eventuality in the notice of invitation to tender.

93 The contested judgment is contradictory inasmuch as it prohibits any subsequent amendment to the conditions laid down in the notice of invitation to tender or in the contract documents but at the same time it is stated that the Commission should have initiated a new tendering procedure, which would inevitably have involved a change in the conditions governing the invitation to tender and, furthermore, would have undermined the legitimate expectations of the successful tenderers which had already performed their contractual obligations.

94 By its fifth and final plea, the Commission maintains that the Court of First Instance was wrong to consider, at paragraph 80 of the contested judgment, that, at the time when the Decision of 6 September 1996 was adopted, there was no lack of availability of apples, which otherwise would have required the

Commission's staff to amend the conditions of payment for the products to be supplied by the successful tenderers by allowing the apples prescribed in the relevant legislation to be replaced with peaches in order to facilitate performance by the successful tenderers of their contractual obligations towards the contracting authority.

95 In response to the argument put forward by Succhi di Frutta that this plea is plainly inadmissible because it does not raise any point of law but concerns a mere finding of fact by the Court of First Instance, the Commission retorts that the Court's finding that there was no lack of availability of apples in intervention stocks was vitiated by an error of law since, in making that finding, the Court misunderstood the system for the withdrawal of fruit provided for by the common organisation of the market in fruit and vegetables.

96 Succhi di Frutta argues, primarily, that the two pleas in question are inadmissible.

97 The second plea merely repeats the arguments which the Commission has already raised before the Court of First Instance.

98 As for the fifth plea, rather than relating to points of law, it relates solely to the findings of fact by the Court of First Instance, which fall within that Court's exclusive jurisdiction.

99 In the alternative, Succhi di Frutta submits that those pleas should be dismissed as unfounded.

100 It contends that the second plea is without substance for the same reasons as those advanced by Succhi di Frutta in response to the first and third pleas raised by the Commission (see, more specifically, paragraphs 37 to 40 of this judgment).

101 It submits that the fifth plea is likewise unfounded, since the Court of First Instance correctly assessed the information supplied by the Commission itself and concluded that, when the Decision of 6 September 1996 was adopted, there was no lack of availability of apples to preclude performance of the operations specified in the notice of invitation to tender.

Assessment by the Court of Justice

— The second plea in law

102 In accordance with the case-law cited at paragraphs 48 to 50 of this judgment, Succhi di Frutta's argument that the second plea is inadmissible as a mere repetition of arguments already submitted at first instance must be rejected.

103 In referring to paragraphs 72 to 75 and 81 of the contested judgment, the Commission is challenging the interpretation by the Court of First Instance of the principle of equal treatment as between tenderers and the legal consequences of that interpretation as regards the substance of Case T-191/96.

104 Points of law of that kind may be examined by the Court of Justice in an appeal.

105 With a view to assessing the merits of that plea, it should be noted that it is based — as the parties have indeed acknowledged themselves — on the same premiss as the Commission's first plea, namely that the Court of First Instance misconstrued the principle of equal treatment as between tenderers by extending its scope to the stage of the tendering procedure following the award of the contract.

106 The Commission maintains more specifically that the Court of First Instance erroneously considered that observance of the principle of equal treatment as between all tenderers meant that the Commission was obliged to comply strictly with the conditions of the tendering procedure as laid down in the notice of invitation to tender; it could not subsequently, that is to say once the contract had been awarded, amend the conditions governing the tendering procedure and, in particular, those relating to the tender to be submitted, in a manner which had not been specified in the notice of invitation to tender itself. If it wished to make an amendment of that kind, it was required to initiate a new tendering procedure, which could then be subject to different conditions which would none the less be the same for all the undertakings taking part in the procedure.

107 It is appropriate at this stage of the examination of the appeal to establish whether that line of argument adopted by the Commission is valid.

108 The Court has consistently held, in cases concerning public procurement, that the contracting authority is required to comply with the principle that tenderers should be treated equally (see, inter alia, Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani* [2001] ECR I-9233, paragraph 37, and Case C-315/01 *GAT* [2003] ECR I-6351, paragraph 73).

109 It is also clear from the case-law that the abovementioned principle implies an obligation of transparency in order to permit verification that it has been complied with (see, inter alia, Case C-92/00 *HI* [2002] ECR I-5553, paragraph 45, and Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraph 91).

110 Under the principle of equal treatment as between tenderers, the aim of which is to promote the development of healthy and effective competition between undertakings taking part in a public procurement procedure, all tenderers must be afforded equality of opportunity when formulating their tenders, which therefore implies that the tenders of all competitors must be subject to the same conditions.

111 The principle of transparency which is its corollary is essentially intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority. It implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the notice or contract documents so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and, secondly, the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the relevant contract.

112 In view of their significance, objective and effectiveness those principles must also be observed in the case of a special tendering procedure such as that at issue, while any special features of that procedure can be taken into account if necessary.

113 In that connection, it must be pointed out that, in this case, the Commission — on the basis of Council Regulation No 1975/95 and by Regulations Nos 2009/95 and 228/96 — first of all laid down the general conditions of the tendering procedure

for the supply of fruit juice and fruit jams to the people of Armenia and Azerbaijan and then drew up the notice of invitation to tender in which it defined the precise subject-matter of and the detailed rules for that tendering procedure.

114 In those circumstances, the provisions of those regulations must be regarded as the framework within which the entire procedure must be carried out.

115 Against that background, it consequently falls to the Commission, in its capacity as contracting authority, strictly to comply with the criteria which it has itself laid down on that basis not only in the tendering procedure *per se*, which is concerned with assessing the tenders submitted and selecting the successful tenderer, but also, more generally, up to the end of the stage during which the relevant contract is performed.

116 Although, therefore, any tender which does not comply with the specified conditions must, obviously, be rejected, the contracting authority nevertheless may not alter the general scheme of the invitation to tender by subsequently proceeding unilaterally to amend one of the essential conditions for the award, in particular if it is a condition which, had it been included in the notice of invitation to tender, would have made it possible for tenderers to submit a substantially different tender.

117 Consequently, in a situation such as that arising here, the contracting authority could not, once the contract had been awarded and, moreover, by a decision which derogates in its substance from the provisions of the earlier regulations, amend a significant condition of the invitation to tender such as the condition relating to the arrangements governing payment for the products to be supplied.

118 Should the contracting authority wish, for specific reasons, to be able to amend some conditions of the invitation to tender, after the successful tenderer has been selected, it is required expressly to provide for that possibility, as well as for the relevant detailed rules, in the notice of invitation to tender which has been drawn up by the authority itself and defines the framework within which the procedure must be carried out, so that all the undertakings interested in taking part in the procurement procedure are aware of that possibility from the outset and are therefore on an equal footing when formulating their respective tenders.

119 Furthermore, if such a possibility is not expressly provided for, but the contracting authority intends, after the contract has been awarded, to derogate from one of the essential conditions specified, it cannot legitimately continue with the procedure by applying conditions other than those originally specified.

120 If, when the contract was being performed, the contracting authority was authorised to amend at will the very conditions of the invitation to tender, where there was no express authorisation to that effect in the relevant provisions, the terms governing the award of the contract, as originally laid down, would be distorted.

121 Furthermore, a practice of that kind would inevitably lead to infringement of the principles of transparency and equal treatment as between tenderers since the uniform application of the conditions of the invitation to tender and the objectivity of the procedure would no longer be guaranteed.

122 In this case, it is established that, once the contract had been awarded, the Commission replaced the fruit specified in the notice of invitation to tender with other fruit as the means of payment for the fruit to be supplied by the successful tenderer, although no such substitution was provided for either in that notice or in the relevant legislation on which that notice was based.

123 The Court of First Instance was therefore right in holding, at paragraph 82 of the judgment under appeal, that the amendment in question, decided upon by the Commission when it had no authorisation to that effect, should lead to the annulment of the Decision of 6 September 1996 for infringement of the notice of invitation to tender annexed to Regulation No 228/96 and of the principles of transparency and equal treatment as between tenderers.

124 Inasmuch as the Commission complains in the same plea that the contested judgment is based on contradictory grounds in that, while prohibiting any amendment of the conditions of the invitation to tender, as they are laid down in the notice of invitation to tender, at the stage when the procedure involving the successful tenderer is being implemented, at the same time it states that a new procedure should have been initiated, which would inevitably have involved changing the conditions of the invitation to tender, it need only be stated that the Commission's complaint is based on a manifestly erroneous understanding of the contested judgment.

125 It follows clearly from the actual wording of that judgment that the contracting authority may not, at any stage of the procedure, amend the conditions of the invitation to tender, unless the notice of invitation to tender contains an express provision to that effect, as it would otherwise infringe the principles of equal treatment as between tenderers and transparency.

126 Moreover, as the Court of First Instance expressly held at paragraph 81 of the contested judgment, the Commission could, if necessary, have made provision, in the notice of invitation to tender, for the possibility of amending the conditions for payment of the successful tenderers in certain circumstances by laying down in particular the precise arrangements for any substitution of other fruit for that expressly prescribed as payment for the supplies at issue. In that way, the principles of equal treatment and transparency would have been fully observed.

127 The fact that the Court — again at paragraph 81 — refers to the initiation of a new tendering procedure in the event that the contracting authority is not authorised to substitute other fruit for that specified does not in any way contradict the reasoning set out above. It is true that nothing in that case would have prevented the contracting authority from laying down different conditions, but at least those conditions would have applied in the same way to all the tenderers. Just as in the situation described in the previous paragraph of this judgment, the principles of equal treatment and transparency would have been fully observed in that case too.

128 In so far as the Commission might have construed the final sentence of paragraph 81 of the contested judgment as leaving it no option, for the purposes of complying with the judgment, but to initiate a new tendering procedure, it need only be stated that it is not for the Community judicature to give the perpetrator of an infringement directions as to how it should remedy the illegality found.

129 Thus, the second plea must be dismissed in its entirety as unfounded.

— The fifth plea in law

130 By the fifth plea, the Commission is challenging paragraph 80 of the contested judgment stating that the information which it had supplied did not show that, at the time when the Decision of 6 September 1996 was adopted, apples were not available in the intervention stocks, so as to prevent the performance of the operations specified in the notice of invitation to tender.

131 It follows from the actual wording of paragraph 80, which begins with 'In addition', and also from the wording of paragraph 81 of that judgment, which begins with 'Even if there had been such a lack of availability, at the Community level, of apples which could be withdrawn ...', the Court's assessment in paragraph 80 is not essential to its decision.

132 In line with the case-law cited at paragraph 68 of this judgment, the fifth plea directed against the above ground in the judgment of the Court of First Instance, is in any event ineffective and must consequently be dismissed.

133 Since none of the pleas raised by the Commission in support of its appeal can be accepted, the appeal must be dismissed in its entirety.

Costs

134 Under Article 69(2) of the Rules of Procedure, which is applicable to appeal proceedings by virtue of Article 118 of those Rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since Succhi di Frutta has applied for costs and the Commission has been unsuccessful in its pleadings, it must be ordered to pay the costs of these proceedings.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. **Dismisses the appeal;**

2. **Orders the Commission of the European Communities to pay the costs of these proceedings.**

Skouris Cunha Rodrigues Puissochet

Schintgen Macken

Delivered in open court in Luxembourg on 29 April 2004.

R. Grass V. Skouris

Registrar President