OPINION OF ADVOCATE GENERAL TESAURO

delivered on 30 January 1997 *

1. In this appeal, Geotronics SA ('Geotronics' or 'the appellant') asks the Court to set aside the judgment of the Court of First Instance of 26 October 1995. [1] In that judgment, the Court of First Instance dismissed an application by Geotronics for, first, annulment of the Commission's decision of 10 March 1994 rejecting the appellant's tender under an invitation to tender for a contract financed by the PHARE programme and, second, for compensation for the damage which the appellant claimed to have suffered as a result of that decision.

More specifically, the Court of First Instance held Geotronics' claim for annulment of the contested decision to be inadmissible and the claim for compensation to be unfounded. In its appeal, the appellant challenges the finding that its action for annulment was inadmissible and, in the alternative, it reiterates its damages claim against the Commission.

The facts

2. On 9 July 1993 the Commission, 'acting on behalf of the Government of Romania', and the Romanian Ministry for Agriculture and Food Industry jointly issued a restricted invitation to tender under the PHARE programme [2] for the supply of electronic tacheometers to that Ministry for use in the Romanian land reform programme. At national level the operation of the tendering procedure was entrusted to the 'EC/PHARE Programme Management UNIT-Bucharest' ('PMU-Bucharest').

Under the terms of the invitation to tender, the equipment to be supplied had to originate in a Member State of the European Community or in one of the beneficiary countries under the PHARE programme. [3]

* Original language: Italian.

1 — Case T-185/94 *Geotronics* v *Commission* [1995] ECR II-2795.

2 — The PHARE programme, based on Council Regulation (EEC) No 3906/89 of 18 December 1989 (OJ 1989 No L 375, p. 11; 'the basic regulation'), channels economic aid to the countries of Central and Eastern Europe in order to finance the process of economic and social reform. The programme, which was originally restricted to the Republic of Hungary and the People's Republic of Poland, was subsequently extended to other countries of Central and Eastern Europe by Council Regulations (EEC) Nos 2698/90 of 17 September 1990 (OJ 1990 L 257, p. 1), 3800/91 of 23 December 1991 (OJ 1991 L 357, p. 10) and 2334/92 of 7 August 1992 (OJ 1992 L 227, p. 1).

3 — See point 1(A) of the invitation to tender (under 'Instructions to tenderers').

3. On 16 July 1993 the appellant, a French company wholly owned by the Swedish company Geotronics AB, submitted a tender for the supply of equipment of the type required. On 18 October 1993, PMU-Bucharest informed Geotronics that its tender had been successful and that the supply contract would be submitted to the contracting authority for approval.

On 19 November 1993, the Commission informed the appellant that it had doubts as to the origin of the equipment tendered and asked for further clarification in that respect; by letter of 14 December 1993 Geotronics replied that the tacheometers in question were manufactured in the United Kingdom.

4. On 2 March 1994 the appellant informed the Commission that it had heard that its tender would be rejected because the equipment was of Swedish origin. It none the less asked the Commission to reopen the tendering procedure: it considered that the entry into force on 1 January 1994 of the Agreement on the European Economic Area [4] ('the EEA Agreement') had changed the criteria in the invitation to tender concerning the origin of the goods by treating in essentially the same way, including for the purposes of the tendering procedure, goods from States party to the EEA Agreement and those from Member States of the Community.

By fax letter of 10 March 1994, the Commission informed the appellant that it had rejected its tender on the ground that the goods were of Swedish origin. On the following day the Commission informed PMU-Bucharest that, of the two tenders received, only that submitted by a German firm (a competitor of Geotronics) satisfied the tender conditions, and requested PMU-Bucharest to make contact with that firm to finalize the supply contract.

5. PMU-Bucharest concluded the contract with that firm and so informed the Commission and Geotronics on 17 May 1994. It told the appellant that it could not be awarded the contract because its tender did not satisfy the criteria of origin laid down in the invitation to tender.

In the meanwhile, on 29 April 1994, Geotronics had brought an action before the Court of First Instance for annulment of the Commission's decision of 10 March 1994 and for compensation for loss incurred as a result of the Commission's actions.

The judgment of the Court of First Instance

6. In the judgment appealed against, the Court of First Instance, as I have said, dismissed Geotronics' action in its entirety, holding it to be in part inadmissible and in part unfounded.

4 — OJ 1994 L 1, p. 3.

First, that Court considered that the Commission's letter of 10 March 1994 could not be regarded as a measure which produced binding legal effects such as to affect the appellant's legal position, and therefore held the claim for annulment of that letter to be inadmissible.

7. In reaching that conclusion, the Court of First Instance first of all noted that the PHARE programme is funded by the general budget of the European Union and that contracts under it are awarded pursuant to the Financial Regulation of 21 December 1977. [5] Next, the Court described the powers and responsibilities conferred on the Commission and the beneficiary countries respectively by the enabling provisions of that regulation, as amended by Regulation (EEC) No 610/90: [6] in accordance with those provisions, whilst the Commission, being responsible for administering the aid, grants credits and ensures that participants in tendering procedures can compete on an equal footing and that the tender selected is economically the most advantageous, the power to award a contract lies with the beneficiary country under the PHARE scheme. It is for that country to issue invitations to tender, receive tenders, preside over the examination of tenders, establish the results and, in particular, sign contracts, additions to contracts and estimates. In that respect, the Court of First Instance notes that, as the appellant's representative conceded at the hearing, the Romanian Government was free to award the contract to Geotronics in any event, notwithstanding the Commission's refusal to grant it Community aid. [7]

According to the Court of First Instance, it follows from those facts that contracts financed by PHARE must be regarded as national contracts which are binding only on the beneficiary country and the economic operator, whereas no binding legal relationship arises between the tenderers and the Commission; the latter restricts itself to taking funding decisions on behalf of the Community, which in principle could also not influence the selection of the tenderer. [8] In support of that conclusion, the Court cites by way of analogy the judgments of the Court of Justice on public contracts financed by the European Development Fund ('EDF'). [9]

8. The Court of First Instance went on to give a decision as to the claim for compensa-

5 — Financial Regulation of 21 December 1977 applicable to the general budget (OJ 1977 L 365, p. 1).

6 — Notably, the provisions of Title IX, relating to external aid, of Regulation No 610/90 (OJ 1990 L 70, p. 1), in particular Articles 107, 108(2) and 109(2).

7 — Judgment in *Geotronics*, paragraphs 27 to 30.

8 — *Geotronics*, paragraphs 31 and 32.

9 — Case 126/83 *STS* v *Commission* [1984] ECR 2769, paragraphs 18 and 19; Case 118/83 *CMC* v *Commission* [1985] ECR 2325, paragraphs 28 and 29; Case C-257/90 *Italsolar* v *Commission* [1993] ECR I-9, paragraphs 22 and 26, and Case C-182/91 *Forafrique Burkinabe* v *Commission* [1993] ECR I-2161, paragraphs 23 and 24. In those judgments the Court held that contracts financed by the EDF pursuant to the Convention between African, Caribbean and Pacific States and the European Communities (ACP-EEC), in the versions (Second, Third and First) respectively applicable, remain national contracts which only the representatives of the beneficiary countries have the power to conclude, whereas the actions of the Commission are intended solely to establish whether or not the conditions for Community financing have been met; in practice it has ruled that actions for annulment of acts adopted by the Commission during the contract-awarding procedure are inadmissible.

tion for the loss allegedly incurred by the appellant as a result of the failure to apply the EEA Agreement to the case, holding that claim to be unfounded in the absence of any unlawful conduct on the part of the Commission during the tender procedure.

In that connection, the Court of First Instance pointed out that the EEA Agreement takes effect only as from its entry into force, namely 1 January 1994, whereas the legal framework for the contract-awarding procedure, especially as regards the condition concerning the origin of the products in question, had already been established in the restricted invitation to tender issued by the Commission on behalf of the Romanian Government on 9 July 1993. [10] The Commission was therefore correct in relying upon the general conditions which it had laid down in the invitation to tender of 9 July 1993 when it adopted the contested decision. In short, the entry into force of the EEA Agreement could not be such as to confer upon the appellant rights which it was not entitled to assert at the time when the general conditions of the invitation to tender were published. [11]

9. Finally, according to the Court of First Instance, the EEA Agreement could not in any event apply in this case: indeed it found that the contract (for the conclusion of which the invitation to tender was issued) bound, as we have seen, only the tenderer and the Romanian State, which is not a signatory to that Agreement. [12]

The appeal

10. As I have already said, in these proceedings Geotronics contests the judgment of the Court of First Instance, asking the Court of Justice to set it aside and also to annul the decision contained in the letter of 10 March 1994.

The appeal is based on the Court of First Instance's purported error in law in ruling that the claim for annulment of the letter of 10 March 1994 was inadmissible. In particular, the appellant argues that the letter constitutes a genuine decision within the meaning of Article 173 of the Treaty which produces binding legal effects for the addressee and may therefore be the subject of an action at law. The appellant maintains that the Commission in actual fact plays a significant and decisive part in the conduct and outcome of the contract-awarding procedure under the PHARE programme, regardless of the fact that the contracts are subsequently formally signed by the representative of the country receiving the aid; it points out that it is merely hypothetically possible that the beneficiary country might still enter, as the Court of First Instance suggests, into a

10 — *Geotronics*, paragraphs 48 and 49.

11 — *Geotronics*, paragraphs 53 and 54.

12 — *Geotronics*, paragraph 55.

supply contract with a tenderer who has been refused Community finance.

ECU 500 400 (plus interest at the rate prescribed by law), by way of compensation for the loss suffered.

11. As to the substance, the appellant repeats in essence the arguments put before the Court of First Instance. First of all, it claims that the EEA Agreement applied without exceptions as from 1 January 1994 and therefore before the letter of 10 March 1994. According to the appellant, therefore, the invitation to tender published on 9 July 1993 entailed, as from 1 January 1994, discrimination of a kind no longer permitted against signatory States of the EEA Agreement and therefore to be abolished in accordance with Article 4 of the Agreement.

In any case, in the appellant's view, the EEA Agreement should apply with retrospective effect in this case, in so far as the legal framework of the invitation to tender, even though it was established before the Agreement entered into force, was intended to take effect at a date subsequent to 1 January 1994.

12. In the alternative, if the inadmissibility of its action for annulment should be upheld, the appellant repeats its claim for damages, alleging that the Commission has incurred non-contractual liability within the meaning of the second paragraph of Article 215 of the Treaty through its fault in failing to apply the EEA Agreement to the procedure under consideration. It therefore requests that the Court should award it damages of

The plea concerning admissibility

13. As I pointed out above, the Court of First Instance based the inadmissibility of the action for annulment on the fact that, in this case, there was no act of the Commission which produced binding legal effects for the appellant. It stated that '(...) contracts financed by the PHARE programme must be regarded as national contracts which are binding only on the beneficiary country and the economic operator', and that '[t]he preparation, negotiation and conclusion of the contracts takes place between those two partners only', and also that 'no legal relationship arises between the tenderers and the Commission, since the latter restricts itself to taking funding decisions on behalf of the Community, and its measures cannot have the effect, in relation to tenderers, of substituting a Community decision for the decision of the beneficiary country under the PHARE programme'. It follows that 'In this area, therefore, there can be no Commission decision, as far as tenderers are concerned, which is capable of forming the subject-matter of an action under the fourth paragraph of Article 173 of the EC Treaty'. [13]

13 — *Geotronics*, paragraphs 31 and 32.

In the final analysis, the Court of First Instance based its decision on the allocation of responsibility between the Commission and the beneficiary countries under the PHARE programme provided for by the applicable provisions and, having regard to the similarities existing with the procedure for awarding contracts financed by the EDF, it applied the EDF judgments of this Court to the case in point (specifying that it was 'by way of analogy'). As I have said, those judgments confirm that actions for annulment brought by unsuccessful tenderers against measures adopted by the Commission during the contract-awarding procedure pursuant to the Lomé Convention are almost automatically held to be inadmissible. [14]

14. I shall say straight away that I do not agree with the reasoning of the Court of First Instance on this point. I consider that because of the special features of the present case it is possible to leave the case-law of the Court of Justice on contracts financed by the EDF out of consideration, irrespective of any evaluation of that case-law.

On proper examination, there does not seem to me to be any reason why the act contested in these proceedings should escape the review of legality provided for by the Treaty, taking into account its actual wording, its content, its legal effects on the appellant and also the legal and factual context in which it was adopted. As we shall shortly see, it is in fact clear that such an act satisfies all the conditions laid down in Article 173 for an act to constitute an actionable measure within the meaning of the case-law of the Court of Justice.

15. Let me remind myself first of all that the fourth paragraph of Article 173 of the Treaty confers on any natural or legal person the right to institute proceedings against a decision adopted by a Community institution concerning that person.

As regards the specific aspect of the nature of the actionable measure, this Court has repeatedly explained that for the purpose of deciding whether an application for legal review is admissible it is necessary to look not to the external form of the measure but to its substance. In particular, any measure which produces binding legal effects such as to affect the interests of an applicant by bringing about a distinct change in his legal position is an act or decision which may be the subject of an action under Article 173. [15]

16. As may clearly be seen from the case-file, the act which Geotronics asked the Court of First Instance to annul was the letter in which the Commission informed it that its offer had been rejected on the ground

14 — For the decisions cited by the Court of First Instance, see point 7 of this Opinion and footnote 9, above.

15 — Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraphs 8 and 9. However, for a more recent judgment, see Case C-476/93 P *Nutral* v *Commission* [1995] ECR I-4125, paragraph 28.

that the equipment offered, being of Swedish origin, did not comply with the conditions of the invitation to tender. The action was based on the fact that, according to the appellant, the Commission rejected its tender in breach of Community law, in particular of the principle of equal treatment for products from EEC countries and those from EFTA countries which was applicable as from the entry into force of the EEA Agreement.

17. The letter at issue referred to contacts between the Commission and Geotronics concerning the specific question of the origin of the products, and pointed out that examination of the documentation submitted by the appellant, and of the facts emerging from a meeting held in Brussels between representatives of both parties, had shown that the products proposed by Geotronics were in fact of Swedish origin. The Commission therefore stated that it had to reject the appellant's offer and could not endorse the award of the contract (as previously proposed by PMU-Bucharest) to Geotronics.

In that letter, moreover, the Commission indicated that it had no intention of re-issuing the invitation to tender since another undertaking had submitted a tender which it found technically and financially acceptable and which satisfied the conditions laid down in the invitation to tender.

18. In those circumstances, I do not see how it can be denied that the letter in dispute is an actionable measure. Such a measure, adopted expressly *vis-à-vis* the appellant alone, undoubtedly produced *in itself* binding and definitive legal effects for the latter, namely its exclusion from the invitation to tender in question, or rather, in the circumstances of the case (there being only two offers), the automatic award of the contract to the other tenderer. There was therefore quite obviously a 'distinct' change in the appellant's legal position as required by the settled case-law of the Court.

In this respect there is no point in claiming that the national authority was in such circumstances entitled to have concluded the contract with the tenderer in any case, even though the latter had been refused Community funding; that suggestion is so hypothetical as not to deserve further comment.

19. On the other hand, it could be argued (and this appears to be the most important part of the grounds for the judgment appealed against) that the Commission has no responsibility for the award of the contract between the beneficiary country and the chosen contractor, not being a party to it, and that its independent decision-making power is confined to taking decisions on the permissibility of Community funding.

This reasoning, set out by the Court of Justice for the first time in *STS*, [16] cannot however be transposed just like that to the case before the Court today. In that case, the act challenged by STS (a company which had taken part unsuccessfully in an invitation to tender financed by the EDF), in an application held by the Court to be inadmissible, was the mere approval given by the Commission's local representative to contracts between the competent national authority and an undertaking other than the applicant, *which had already been awarded, negotiated and signed.* No one can fail to see that the circumstances under consideration today are very different.

20. When Advocate General VerLoren van Themaat proposed that the Court should find STS's application inadmissible, he had stated that that solution was necessary in the circumstances not only because the contested act did not produce legal effects for the applicant, but because it was not of direct and individual concern to the applicant since it was addressed to the national authorizing officer; [17] he did not however rule out the possibility that other solutions might be desirable in other circumstances and he stressed the need to judge each case having regard to its own special features. [18]

The fact that in the grounds of the judgment under discussion the Court of Justice did not think it necessary to draw that distinction and that it subsequently held all actions for annulment brought by unsuccessful tenderers to be inadmissible, even in different circumstances, does not to my mind alter the terms of the problem, and that, I would repeat, is so regardless of any consideration of the case-law in this field. [19]

21. In this case the appellant has appealed against a decision *concerning it* adopted by the Commission *in the exercise of its specific powers*, that is to say, the decision by which the Commission informed the applicant that it had ascertained (*independently*, and on the basis of checks and assessments performed on its own initiative) that its tender did not satisfy the conditions set out in the invitation to tender in order to obtain Community funding (and also informed it of the consequences of that finding); as we have seen, the appellant challenges the decision on the ground that it was adopted in breach of the principle of equal treatment laid down in the EEA Agreement.

16 — Cited in footnote 9.

17 — Opinion in *STS* [1984] ECR 2781, section 4.2, in which it is stated that such an action brought against a measure excluding the undertaking from Community financing 'would certainly appear to be open to any Member State'.

18 — The Advocate General noted in this connection that, in relation to measures of the Commission approving *proposals* for the placing of a contract (thus *before* the final selection), 'one might also ask whether a right of action before the Court of Justice might not be desirable' (Opinion cited above, section 4.2). It should be observed that at the time *CMC* (cited at footnote 9) was pending and the Advocate General stated that he was unwilling to adopt a position on the case precisely because the facts were so different.

19 — It is well known that the Court's case-law concerning contracts financed by the EDF has not escaped all criticism. The prevailing school of thought considers that those decisions are seriously defective as regards the judicial protection actually given to the persons concerned. To that effect, see: Brown, 'Remedies of Unsuccessful Tenderers for EDF-financed Contracts', in *European Law Review*, 1985, p. 421 et seq.; Bertolini, 'Osservazioni a Corte di Giustizia, sentenza 10 luglio 1984, in Causa 126/83,' in *Foro Italiano*, 1988, col. 266 et seq.; and Kalugina, 'Les Voies de Recours des Entrepreneurs dans les Marchés Publics Financés par le F. E. D.', in *Droit et Pratique du Commerce International*, 1988, p. 511 et seq.

In the circumstances, I fail to see before what other court the appellant could have submitted the contested measure for a review of its legality, if not the Community judicature. [20]

22. In that connection the Commission maintained during the oral procedure that in a case such as this the only remedy open to the tenderer is to assert its rights before the competent courts of the beneficiary country.

It is clear, however, not only that such a remedy is precluded in principle, but also that it could in any event be of no use, since the issue is the review of the legality of an act which is to all intents and purposes a Community measure. A national remedy could relate only to acts falling within the competence of the national authorities, such as the definitive award of the contract to another undertaking, or to the relevant contract.

23. The decision by which the Commission establishes that the tenderer is not entitled to Community funding, a decision supposed to be taken (and in fact taken) *before* the contract is awarded, is on the contrary an autonomous decision of the Commission falling within the scope of its specific powers and in adopting which the national authorities of the beneficiary country play no part.

It must therefore be allowed that it is possible to bring an action for annulment for breach of Community law against such a decision which, as we have seen, is capable of having binding, definitive legal effects on the addressee. To maintain the contrary is, in my view, tantamount to sheltering behind the only too feeble protection of the national authorities and courts in order to strip an applicant of his right to judicial protection, which would plainly constitute an unacceptable breach of the most fundamental rules on which the 'Community governed by the rule of law' which the Treaty intended to establish is based and whose values are the Court's constant guide. [21]

20 — In connection with contracts financed by the PHARE programme, the unsuccessful tenderer is not even entitled to have recourse to a special arbitration procedure, which is however provided for by the Lomé Convention and frequently referred to by the Commission as a possible remedy for participants excluded from tendering for contracts financed by the EDF. It should be noted in this respect that since that arbitration procedure is expressly limited to governing the relations between the beneficiary country and the contractor, its application to the award of the contract is arguable in any event.

21 — On consideration, this is the same reasoning as underlies the Court's order of 5 August 1983 in Case 118/83 R *CMC v Commission* [1983] ECR 2583 made on the application for urgent interim measures brought by CMC seeking suspension of the decisions of the Commission which resulted in the applicant's exclusion from a tendering procedure for a contract in Ethiopia, until the Court should give final judgment on the main action. In that order, (the acting) President Pescatore, ruling for the first time on the Court's competence to hear and determine such disputes (competence denied by the Commission), declared: 'It is impossible (...) to accept that view that, by participating in a tender organized, under the terms of the Convention, by an ACP State, in close cooperation with the Community institutions (...), an undertaking established in the Community is automatically placed outside the judicial protection afforded to it by the provisions of the EEC Treaty'; and again: '(...) whilst it seems certain that the contract concluded between the ACP State and the successful tenderer falls outside the jurisdiction of the Court, that does not mean that there can be no judicial review under the EEC Treaty of acts of the Commission in the context of the tender procedure set up by the Commission'; and finally, as regards the admissibility of the action under consideration: '(...) it cannot be excluded that a thorough examination might reveal the existence of an act of the Commission which can be isolated from its context and which may be of such a nature as to enable an action to be brought for its annulment' (paragraphs 41, 44 and 47).

24. To recapitulate, I consider that in connection with an invitation to tender financed by the PHARE programme a tenderer who is refused Community funding must in any case be able to bring an action before the Court, if the other conditions laid down in Article 173 of the Treaty are satisfied, in order to challenge the validity of the decision taken to that effect by the Commission acting in the exercise of its power in that sphere; whereas in any event recourse may be had to the remedy of challenging the award of the contract (or any other act adopted by the national authority) before the competent court of the beneficiary country under the PHARE programme.

In the circumstances of the case, in short, I consider that the judgment of the Court of First Instance should be set aside in so far as it holds that Geotronics' claim for annulment of the Commission's letter of 10 March 1994 is inadmissible, but that the Court of Justice should be able to give a ruling itself on the substance of the claims, since there is no further inquiry to be made as to the facts.

Substance

25. Although the action for annulment brought by Geotronics is admissible it is undoubtedly without foundation. The EEA Agreement was inapplicable to this case *ratione temporis, ratione personae* and *ratione materiae*.

First and foremost, the conditions for the conduct of the tendering procedure were definitively fixed in the invitation to tender published on 9 July 1993 and there is no reason to suppose that they were implicitly altered by the entry into force of the EEA Agreement. Retrospective application of that Agreement to this case, as well as being unfounded in law, would obviously be contrary to the requirements of legal certainty.

Second, as the Court of First Instance has correctly pointed out, the EEA Agreement may be applied only in relation to those States which are parties to it, therefore not to Romania.

Finally, the EEA Agreement, in its current version, does not include the sphere of external aid, which covers funds used to implement the PHARE programme; it is moreover obvious that that aid is funded out of the Community's general budget, to which only the Member States of the Union contribute.

The damages claim

26. The inapplicability of the EEA Agreement to this case, which we have just established, dispels all lingering doubt that there might have been any liability on the part of the Commission under the second paragraph of Article 215 of the Treaty; this is confirmation, were it necessary, that the damages claim put forward by the appellant and already rejected by the Court of First Instance is unfounded.

27. In the light of the foregoing considerations I therefore propose that the Court should:

(1) set aside the judgment of the Court of First Instance of 26 October 1995 in Case T-185/94 *Geotronics* v *Commission* in so far as it held that Geotronics' application for annulment of the Commission's letter of 10 March 1994 was inadmissible, and declare the application admissible;

(2) dismiss the application as unfounded on the merits;

(3) dismiss the claim for compensation for the damage which the appellant claimed to have suffered as a result of the contested decision as unfounded.