OPINION OF ADVOCATE GENERAL ALBER
delivered on 24 October 2002 [1]

I — Introduction

1. In 1996, the Commission initiated a tendering procedure for the supply of fruit juice earmarked for consignment as aid to the Caucasus. As payment for such supply, the successful tenderer would, instead of money, receive apples held in intervention stocks following their withdrawal from the market; in that procedure, tenderers were required to state the quantity they would accept as payment. When the applicant's tender was rejected however, it did not challenge that outcome. Once the lots had been awarded to other firms, the Commission notified the intervention agency that peaches could be withdrawn instead of apples, a modification that was subsequently extended to other types of fruit, and for that purpose coefficients of equivalence by weight were established for the individual types of fruit. It was not until those coefficients of equivalence were amended by a further Commission decision that the applicant brought an action against the Commission. The Court of First Instance granted the annulment requested by the applicant. The Commission as defendant in that case has lodged the present appeal against that judgment.

2. The Commission bases its appeal on a total of five pleas in law. In terms of admissibility of the application, it claims that C.A.S. Succhi di Frutta SpA (hereinafter: the applicant) had neither a right of action nor a legitimate interest in invoking the protection of the courts, and in terms of substance, it criticises the conclusion of the Court of First Instance that a new invitation to tender should have been issued, and complains that errors were committed by the Court of First Instance as regards determining the quantity of apples available in the Community at the material time (for further detail in that context, see point 18).

II — Relevant legislation and facts

3. By Regulation (EC) No 228/96 of 7 February 1996 on the supply of fruit juice and fruit jams intended for the people of

1 — Original language: German.

Armenia and Azerbaijan, [2] the Commission initiated a tendering procedure. In that connection, Article 1 of that regulation provides:

'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, [3] and in particular Article 2(2) thereof and the specific provisions of the present Regulation.' 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.'

4. In Annex I, Regulation No 228/96 indicated, for each of the six lots in respect of which tenders were invited, first, the characteristics of the product to be supplied and, secondly, the product which the successful tenderers were to take from the intervention agencies in payment for the relevant supply. The product to be withdrawn as regards Lots 1 and 2 was apples.

5. Article 3(2) of Regulation No 228/96 provides:

'The offer of the tenderer shall indicate, for each lot, the total quantity of fruit, withdrawn from the market in accordance with Articles 15 and 15A of Regulation (EEC) No 1035/72, which he undertakes:

(a) to take over from the producer organisations concerned, in payment of all supply costs to the delivery stage defined in Article 2; ...

...'.

6. Following the submission of a number of tenders within the period prescribed in Regulation No 228/96, Trento Frutta SpA and Loma GmbH were awarded the lots in question.

7. The applicant had participated in the tendering procedure for Lots 1 and 2. It is apparent from the documents in the case-file that its tenders were not accepted since it had proposed to withdraw, in payment for the supply of its products, a quantity of apples much greater than the quantities

2 — OJ 1996 L 30, p. 18.

3 — Commission 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 Council Regulation (EC) No 1975/95, OJ 1995 L 196, p. 4.

proposed by the two successful tenderers in their respective offers. It is also apparent from the documents in the case-file that Trento Frutta SpA had stated in its tenders that it was prepared to take peaches should there be a shortage of apples, a possibility that had not been mentioned in the invitation to tender.

8. By letter of 6 March 1996, the Commission informed the Azienda di Stato per gli Interventi nel Mercato Agricolo (AIMA), the Italian intervention agency, that the tender submitted by Trento Frutta SpA had been accepted. The Commission pointed out that, depending on the lot in question, that successful tenderer would receive as payment a given quantity of apples or, alternatively, peaches, or of oranges or, alternatively, apples or peaches.

9. By decision of 14 June 1996, adopted after the award, the Commission allowed the successful tenderers to take delivery of — instead of apples or oranges — 'other products withdrawn from the markets, in predetermined quantities reflecting the processing equivalence of the products in question'. According to the second recital, that decision was adopted because, since the award, the quantities of apples and oranges withdrawn from the market had been negligible in comparison with the quantities required, although the withdrawal season was virtually over. The substitute products referred to in the decision were peaches and apricots and the coefficient of equivalence between peaches and apples was fixed at 1 to 1. Moreover, by a further decision of 22 July 1996, the Commission allowed the substitution of nectarines for the apples to be withdrawn by the successful tenderers in payment for the supply of their products.

10. On 26 July 1996, at a meeting organised at its request with the staff of the Commission Directorate-General for Agriculture (DG VI), the applicant presented its objections to the substitution, authorised by the Commission, of other fruit for apples and oranges. 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. (The fact of the matter was that, irrespective of the particular circumstances of this case, the decision to fix the coefficient of equivalence between apples and peaches at 1 to 1 had on the whole led to distortions on the peach market caused by the associated reduction in the value of peaches.) In the course of those negotiations, the Commission reviewed the arrangements for substituting other fruits for apples and oranges. It its decision of 6 September 1996 amending the decision of 14 June 1996, the Commission fixed new coefficients of equivalence between peaches on the one hand and apples and oranges on the other, which were less favourable to the successful tenderers. Under that decision, which — like the previous decision of 14

June 1996 — was addressed to Italy, France, Greece and Spain, 0.914 tonne of peaches could be substituted for 1 tonne of apples and 0.372 tonne of peaches for 1 tonne of oranges. Those new coefficients could be applied only to products which, on 6 September 1996, had not yet been withdrawn by the successful tenderers as payment for supplies.

III — Proceedings before the Court of First Instance and judgment delivered by that Court

11. By application registered at the Court of First Instance on 25 November 1996, the applicant brought an action in which it claimed that the Court should:

— annul the Commission Decision of 6 September 1996 amending the Commission Decision of 14 June 1996 on the supply of fruit juice and fruit jams intended for the people of Armenia and Azerbaijan;

— order the Commission to pay the costs.

12. The Commission contended that the Court should:

— dismiss the application as inadmissible or, in the alternative, unfounded; order the applicant to pay the costs.

13. By judgment of 14 October 1999 (*C.A. S. Succhi di Frutta* v *Commission* [1999] ECR II-3181), the Court of First Instance held the application in Case T-191/96 to be admissible and well founded. The Commission is challenging that judgment in its appeal.

(1) Admissibility

14. According to what is stated in the judgment under appeal, the Commission put forward the following arguments in that regard:

'41 The Commission contends that the application is inadmissible on two

grounds: the applicant is not directly and individually concerned by the Decision of 6 September 1996, and it has no interest in obtaining its annulment.

42 The Commission points out first of all that the applicant does not dispute the award of the lots for which it submitted a tender. It contends that the act contested in this case did not provide for the replacement of apples and oranges by peaches, but merely amended the coefficients of equivalence between those fruits, that substitution having been authorised by the Decision of 14 June 1996.

43 The fact that those coefficients of equivalence may be more or less favourable to the successful tenderers can be of individual concern only to them. The applicant's situation, in relation to the Decision of 6 September 1996, is not in any way different from that of any operator in the sector concerned, other than the successful tenderers for the contract ... .

44 The case-law on challenging a tendering procedure ... is not relevant. The Decision of 6 September 1996 is a measure independent of the notice of invitation to tender, adopted after the award of the contract, which it does not amend in any way. The successful tenderers are indeed those tenderers who offered to accept the smallest quantity of apples as payment. In those circumstances, the fact that the applicant took part in the tendering procedure in question does not confer on it any special attribute, as compared with any other third person, in relation to the Decision of 6 September 1996.

45 Furthermore, the mere fact that a measure may exert an influence on the competitive relationships existing on the market in question is not sufficient to enable any trader in any form of competitive relationship with the addressee of the measure to be regarded as directly and individually concerned by that measure ... .

46 Moreover, since the contested decision amended the coefficients of equivalence fixed in the decision of 14 June 1996 along the lines the applicant wished, it had no interest in requesting the annulment of that decision since the effect of that annulment would be to reinstate the previous coefficients ... .

47 The Commission states, finally, that the arguments put forward by the

applicant could have been directed against the Decision of 14 June 1996, which was more unfavourable to it, but which it did not challenge within the prescribed time.'

15. Citing a number of judgments, the Court of First Instance made the following findings in that regard:

'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 ... .

52 ...

53 Moreover, the Commission does not dispute the fact that its Memorandum No 10663 of 6 March 1996, cited above [at paragraph 8], 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 the Commission Technical Report No 94 ... , [to that effect, see also point 10 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 ... , 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 (*Simmenthal* v *Commission*, 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 Secondly, 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 ...

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.

...

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) ... .

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. ...

64 It follows that the application is admissible.'

(2) Substance

16. According to what is stated in the judgment under appeal, the Commission put forward *inter alia* the following arguments as regards the plea that Regulation No 228/96 as well as the principles of transparency and equal treatment had been infringed:

'71 The replacement, after the award, of the fruits to be received as payment does not in any way constitute a breach of the principles of equal treatment and transparency in that it had no influence on the course of the tendering procedure. The tenderers all competed under the same conditions, namely those laid down by Regulation No 228/96 and Annex I thereto. Since the replacement of fruit took place after the award, it did not have the slightest influence on the course of the operation.'

17. The Court of First Instance made the following findings in that regard:

'72 In connection with Council Directive 71/305/EEC of 26 July 1971 concerning the coordination 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, [at] 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 ... 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 ... 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 ... , 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 ... .

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 ... 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 ... and also the principles of transparency and equal treatment, and that it must therefore be annulled ... .'

IV — Grounds of appeal

18. The Commission bases its appeal, lodged by application of 21 December 1999, on five pleas in law, alleging that:

(1) the applicant's situation is no different from that of any other third parties which, as such, are not entitled to challenge the decision on equivalence;

(2) the Court of First Instance asserted that the Commission may not alter the terms of payment, and yet at the same time stated that the Commission ought to have issued a new invitation to tender, which would have meant changing the terms of payment of the successful tenderers which had already fulfilled their contractual obligations;

(3) the Court of First Instance misinterpreted Community law relating to the concept of individual concern when it held that the applicant was individually concerned by the contested decision;

(4) the Court of First Instance misinterpreted the concept of an interest in bringing proceedings and in particular the scope of Article 176 of the Treaty (now Article 233 EC) and consequently found that the applicant had such an interest;

(5) the Court of First Instance misinterpreted the rules relating to the withdrawal of fruit provided for by the common organisation of the market in fruit and vegetables and as a result treated as available fruit withdrawn on dates prior to that on which payment was possible.

V — Assessment

19. It is clear from examining the first and third pleas that they concern the same issue. The third plea relates to the applicant's individual concern. [4] According to case-law, persons are individually concerned for the purposes of the fourth paragraph of Article 230 EC 'if [the] decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them

4 — The French term 'concernée individuellement' [individually concerned], rendered as 'unmittelbar betroffen' [directly concerned] in the translated notice contained in the Official Journal, should have been translated, for the sake of accuracy, as 'individuell betroffen' [individually concerned]. In its pleadings, the Commission made no reference to any alleged absence of direct concern.

individually just as in the case of the person addressed.' [5] That definition therefore focuses on ascertaining whether the situation of the applicant distinguishes it, by virtue of certain circumstances, from any other third parties and thus corresponds to the wording of the first plea. Since, moreover, similar consideration has been given to these two pleas in the respective submissions of the parties, they will be examined together below.

(1) The first and third pleas, alleging that the applicant has no right of action in the absence of individual concern

(a) Arguments of the parties

(i) The Commission

20. The Commission takes the view that the applicant had no right of action since it was not individually concerned by the contested decision.

21. The view of the law expressed by the Court of First Instance in the judgment under appeal extends to excess the scope of the principle of equal treatment of tenderers. Although all tenderers taking part in a public tendering procedure indeed must be afforded equal treatment before the award, the legal position of the successful tenderer differs from that of the unsuccessful tenderer once the contract has been awarded. The Commission's relationship with the successful tenderer is contractual and, therefore, defined by the rules governing impossibility of performance, *force majeure*, etc. By contrast, there is no longer any legal relationship with unsuccessful tenderers after the award. The public procurement directives are no longer applicable after the award.

22. The Commission submits that the decision contested by the applicant, which concerns only the internal relationship with the successful tenderer, was adopted in the light of exceptional circumstances quite some time after the award. It could not, therefore, affect the applicant in a manner different to any other third party. The logical consequence of the approach taken by the Court of First Instance would have been to grant Allione Industria Alimentare SpA leave to intervene, but the Court expressly dismissed an application to that effect.

5 — Case 25/62 *Plaumann* v *Commission* [1963] ECR 95.

23. The economic impact of a decision on equivalence between apples and peaches that was too liberal and was amended following a complaint by the applicant was, of course, felt by all producers of fruit juice and not just by the unsuccessful tenderers. The Commission adds that, by its line of reasoning the Court of First Instance turns the unsuccessful tenderers into the perfect embodiment of the principle of non-discrimination without, however, taking into account the distinction between general and individual concern provided for in the fourth paragraph of Article 230 EC as regards the right to institute proceedings.

24. The Court of First Instance attached undue importance to the memorandum sent on 6 March 1996 to AIMA, which the Commission regards as non-binding. The memorandum was drafted as a result of exceptional circumstances and contains nothing more than a suggestion, not an imperative requirement, that the successful tenderers who agree to the arrangement be paid in fruit other than those originally specified in the invitation to tender.

25. The Commission further submits that it is also apparent from the case-law [6] that the fact that a decision is adopted which originates from a person's request is not such as to differentiate that person from any other. That is all the more true where the relevant decision is addressed to various Member States and it has implications only for the successful tenderers.

(ii) C.A.S. Succhi di Frutta

26. The applicant takes the view that the first plea raised in appeal is inadmissible because the Commission is merely relying on an argument that it has already put forward at first instance. [7] The third plea raised in appeal is inadmissible because the Commission is raising it for the first time before the Court of Justice although it was aware of it even at first instance. [8]

27. As far as the applicant is concerned, the Court of First Instance delivered the correct judgment. The applicant is individually concerned by the contested decision and accordingly entitled to institute proceedings. This is true not simply because it suffered an economic loss and approached the Commission about the problem but precisely because it had taken part in the tendering procedure. The applicant submits

6 — Joined Cases T-481/93 and T-484/93 *Exporteurs in Levende Varkens and Others* v *Commission* [1995] ECR II-2945, paragraph 59, and order in Case C-10/95 P *Asocarne* v *Council* [1995] ECR I-4149, paragraph 39.

7 — Order in Case C-244/92 P *Kupka-Floridi* v *ESC* [1993] ECR I-2041, paragraph 10, Case C-354/92 P *Eppe* v *Commission* [1993] ECR I-7027, paragraph 8, and order in Case C-338/93 P *De Hoe* v *Commission* [1994] ECR I-819, paragraph 19.

8 — In that regard, C.A.S Succhi di Frutta relies *inter alia* on the judgment in Case C-7/95 P *Deere* v *Commission* [1998] ECR I-3111, paragraph 62.

that it retains its tenderer status after the award.

28. Denying a right of action in this case to C.A.S. Succhi di Frutta, a measure which would be in keeping with the Commission's view, would have intolerable consequences. During performance of the contract, the contracting authority would be able to make fundamental changes to the invitation to tender without having to incur the risk of legal proceedings. In the extreme case of negotiated procedures, only those tenderers negotiating with the Commission would have a right of action.

29. The Court of Justice [9] and the Commission, in its statements as well as in relation to the authorities of the Member States, have always upheld the principle of the equal treatment of tenderers in the context of tendering procedures. It follows that the authorities inviting tenders have to adhere strictly to the terms of the invitation to tender which they themselves laid down and which prompted the tenderers to take part in the tendering procedure and to submit a particular tender. The principles of equal treatment and transparency cannot, on account of their importance, be applied only at the stage prior to the award.

9 — Case C-243/89 *Commission* v *Denmark* [1993] ECR I-3353, paragraph 37, Case C-87/94 *Commission* v *Belgium* [1996] ECR I-2043, paragraph 54, Case T-203/96 *Embassy Limousines & Services* v *Parliament* [1998] ECR II-4239, paragraph 85, and Case T-145/98 *ADT* v *Commission* [2000] ECR II-387, paragraph 164.

30. Freedom to enter into a contract under civil-law rules after the award procedure presupposes compliance with all rules governing transparency prior to the award. Freedom of contract is restricted by those public procurement rules, which apply to contracting authorities. By claiming that, on account of exceptional circumstances, contracts other than those originally offered for tender may be executed, the Commission is venturing so far as to infringe itself the obligations imposed by the public procurement directives on the Member States.

(b) Assessment

(i) Admissibility

31. In paragraphs 50 to 58 of its judgment, the Court of First Instance addresses the issue of individual concern. Thus, the third ground of appeal is admissible because the subject-matter of the proceedings before the Court of First Instance is not changed in the appeal, for the purposes of Article 113(2) of the Rules of Procedure of the Court of Justice, as a result of reliance on that ground.

32. With regard to the abovementioned argument raised at first instance and put

forward by C.A.S. Succhi di Frutta in these proceedings against the admissibility of the second and fourth pleas, I intend at this juncture to make the following general points which will not be repeated later when it comes to examining the other grounds of appeal.

33. The purpose of appeals is to obtain a review of judgments of the Court of First Instance, in view of that Court's assessment of points of law, in accordance with Article 225(1) EC. This, of course, means that points of law which have already been discussed at first instance are again raised before the Court of Justice. The case-law cited by the applicant, [10] however, dismisses those arguments submitted in appeal which challenge the assessment of the facts by the Court of First Instance and confine themselves to repeating or reproducing word for word the arguments previously submitted to the Court of First Instance, including those based on facts rejected by that Court, and which contain no legal argument in support of the forms of order sought in the appeal. In reality, those pleas seek to obtain merely a re-examination of the application submitted to the Court of First Instance, which is in fact outside the jurisdiction of the Court of Justice.

34. In this case, the Commission takes issue with the views of the law expressed by the Court of First Instance and takes its own divergent views as the basis for its appeal. In that respect, there is no question of a mere repetition of submissions based on facts; what is involved is, rather, a dispute concerning points of law, which typifies the appeal procedure.

35. The first four pleas raised by the Commission in the appeal are, in those circumstances, admissible.

(ii) Substance

36. The Commission considers that the applicant is not individually concerned by the contested decision on equivalence of 6 September 1996 and consequently has no right of action pursuant to the fourth paragraph of Article 230 EC.

37. Since the contested decision was not addressed to the applicant, what matters here, according to the definition set out above, [11] is whether the decision affects the applicant by reason of certain attributes which are peculiar to it or by reason of circumstances in which it is differentiated from all other persons, and by virtue of these factors distinguishes it individually just as in the case of the person addressed.

10 — Orders in *Kupka-Floridi* v *ESC* and *De Hoe* v *Commission* (cited in footnote 7) and judgment in *Eppe* v *Commission* (cited in footnote 7).

11 — See point 19.

38. The connecting factor in the definition is, therefore, comparability with the person addressed. The manner in which the contested decision came to be created comprises several factors that present the applicant as though it were the person addressed. The applicant contacted the Commission staff responsible for such matters and subsequently held intensive negotiations with them. Following its complaint, the previously valid decision of 14 June 1996 was reviewed. It forwarded data and other documentation to the Commission, as a result of which further market analyses were carried out. Finally, a new decision — that contested in these proceedings — was adopted which met the applicant's request at least in part. It is by reason of those circumstances that the applicant is differentiated from all other persons.

39. Invoking the rule in *Asocarne*, [12] the Commission, on the other hand, takes the view that persons are not individually concerned by a decision merely by reason of their having been involved in the creation of that decision.

40. The Court of Justice held in *Asocarne* that, where an individual has participated in the preparation of a legislative measure, he may not, for that very reason, subsequently bring an action against that measure if, in the procedure for the adoption of that measure, no provision is made for any intervention by individuals. In that case it was taken as read that the possibility of instituting proceedings was restricted essentially because the subject-matter of the action was a directive, that is to say an abstract, general and normative measure. [13]

41. In the present case, however, no directives or regulations — comparable in this context with directives — have been contested. On the contrary, the subject-matter of the action is a Commission decision. Such a measure does not, in principle, have the general or normative quality expressly attributed to regulations under the first subparagraph of Article 249 EC and intrinsic to directives on account of the obligation they impose on Member States to legislate, as provided for in the second subparagraph of Article 249 EC. Under the third subparagraph of Article 249 EC, decisions, on the other hand, are to be binding only upon those to whom they are addressed. Therefore, the statement of the Court of Justice in *Asocarne* cannot readily be applied to the circumstances of this case.

42. The judgment in *CIRFS*, [14] one of the cases described by the Court of Justice in

12 — Order in Case C-10/95 P (cited in footnote 6).

13 — Cited in footnote 6, at paragraphs 37, 39 and 40.

14 — Case C-313/90 *Comité International de la Rayonne et des Fibres Synthétiques (CIRFS) and Others* v *Commission* [1993] ECR I-1125.

the order in *Asocarne* as different from the circumstances of that case,[15] is, on the contrary, the appropriate case-law for establishing individual concern in the circumstances of this case. The *CIRFS* case concerned an association's application for the annulment of a decision addressed to the French Republic in a competition procedure. The Court of Justice held that the applicant, which was the Commission's interlocutor with regard to the introduction and adaptation of the discipline and, during the procedure prior to those proceedings, actively pursued negotiations with it, in particular by submitting written observations to it and by keeping in close contact with the responsible departments, was individually concerned by the contested decision in its capacity as negotiator of the discipline.[16]

43. The Court also held in *Van der Kooy*[17] that a person is differentiated from all others as a result of his previous active participation in the procedure for granting aid involving his submission of written comments and his close contact with the Commission departments responsible for such matters.

44. Lastly, in a more recent judgment,[18] the Court again pointed to the significance of the part played by natural or legal persons in the administrative procedure as regards ascertaining whether those persons are individually concerned.

45. The applicant is, therefore, individually concerned by the contested decision on account of its position as negotiator in the administrative procedure.

46. In the Commission's view, that conclusion is incompatible with the judgment in *Exporteurs in Levende Varkens*. In that judgment, the Court of First Instance held that the fact that a person intervenes arbitrarily in the procedure leading to the adoption of a Community measure, particularly by sending to the competent Community institution letters criticising a measure which that institution has already adopted and seeking to influence its future action, is not such as to differentiate that person from any other.[19]

47. It is uncertain whether the applicant's intervention by means of a complaint can as such be described as arbitrary, because of

15 — Cited in footnote 6, at paragraph 36.

16 — *CIRFS and Others* v *Commission* (cited in footnote 14, at paragraphs 29 to 31).

17 — Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy and Others* v *Commission* [1988] ECR 219, paragraph 22.

18 — Joined Cases C-68/94 and C-30/95 *France and Others* v *Commission* [1998] ECR I-1375, paragraphs 53 to 55.

19 — Joined Cases T-481/93 and T-484/93 (cited in footnote 6, at paragraph 59).

the applicant's status as a tenderer in the previous tendering procedure. In that regard, the applicant is differentiated from Allione which did not submit any tender in the tendering procedure and which the Court of First Instance denied leave to intervene. [20]

48. As a tenderer in the tendering procedure, certain rights accrue to the applicant in respect of the contracting authority, in particular the right to equal treatment for all tenderers. That right is laid down, for example, in Article 3(2) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts [21] and in Article 4(2) of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors. [22] It can be applied, in the form of a general principle, to the present proceedings.

49. The Court of Justice underlined the significance of that principle in a number of judgments. [23] In the cases of *Commission* v *Belgium* [24] and *Embassy Limousines*, [25] it also referred to the principle of transparency, which likewise determines the procedure.

50. In its capacity as the authority inviting tenders, the Commission has itself offended against those principles by virtue of the fact that the consideration, a fundamental component of a contract, in the form of apples or peaches, specified in the memorandum addressed to AIMA concerning the implementation of the award to the successful tenderer, did not correspond with the consideration mentioned in the notice of invitation to tender (apples alone). [26] Such considerations must hold true on account of the particular importance attached to the principles of the equal treatment of tenderers and of transparency, irrespective of whether the tenderer would have submitted a better tender had it been aware of the amended payment condition.

51. By its complaint, which gave rise to the contested decision, the applicant requested that the effects of that infringement of the

20 — Order in Case T-191/96 *C.A.S. Succhi di Frutta* v *Commission* [1998] ECR II-573.

21 — OJ 1992 L 209, p. 1.

22 — OJ 1993 L 199, p. 84.

23 — *Commission* v *Denmark* (cited in footnote 9, at paragraph 37), *Commission* v *Belgium* (cited in footnote 9, at paragraph 54), *ADT* v *Commission* (cited in footnote 9, at paragraph 164) and *Embassy Limousines & Services* v *Parliament* (cited in footnote 9, at paragraph 85).

24 — Cited in footnote 9, at paragraph 54.

25 — Cited in footnote 9, at paragraph 85.

26 — In that regard, see further the findings cited in this Opinion under heading III, section 2, from the judgment of the Court of First Instance, at paragraphs 72 to 79. The Commission does not appeal against the basic assumption that it committed such an infringement in the tendering procedure.

principles of equal treatment and transparency at least be mitigated by the introduction of a more favourable decision on equivalence between apples and peaches which corresponds to the market conditions.

52. Therefore, rather than intervening in the proceedings arbitrarily, the applicant on the contrary asserted its original rights as a tenderer. This is a valid statement irrespective of the fact that it was additionally affected, as an ordinary economic operator, by the implications of the incorrect decision on equivalence for the market in peaches. As an unsuccessful tenderer, it cannot be compared with all other producers of fruit juice or fruit traders, which were affected by the decision merely by reason of their objective capacity as economic operators pursuing the same activity. All subsequent decisions continued to infringe the principle of the equal treatment of tenderers by granting to the successful tenderer the possibility — even though that possibility is not mentioned in the notice of invitation to tender — of substituting peaches for the apples to be supplied from intervention stocks as payment. That infringement was the basis both of the first and of the second — contested — decision on equivalence, both of which laid down the coefficient to be applied for the substitution of peaches for apples. In that context, it is irrelevant whether those decisions contained an express reference to that coefficient. After all, the substance of a decision on equivalence is the fundamental decision allowing different types of fruit to be treated as equivalent. Without a fundamental decision to allow the substitution of peaches for apples, there would have been no need to fix coefficients of equivalence between those two types of fruit because they would, in that case, have been pointless.

53. The Commission, on the other hand, considers that the applicant can no longer rely on its legal status as a tenderer and is not, therefore, individually concerned. The contested decision was adopted quite some time after the award, in the context of a contractual relationship under civil law between the Commission and the successful tenderer, in the light of an unforeseeable shortage of apples.

54. It should be examined first of all whether that argument is consistent with the findings of the Court of First Instance.

55. The decision allowing peaches to be substituted for apples, which, as explained, was the general basis for the subsequent decisions on equivalence, was adopted as early as 6 March 1996 in the memorandum to AIMA, immediately after the contract had been awarded to Trento Frutta SpA. The specific details of the arrangements for implementing the Commission's decision on the award were conveyed to the Italian intervention agency by that memorandum. Therefore, contrary to the view expressed by the Commission, the

memorandum is not simply a non-binding proposal. However, when the memorandum was drafted, there was — according to other information supplied by the Commission — no discernible shortage of apples. It is apparent from the arguments raised in relation to the fifth plea that the period during which apples were withdrawn from the market and, by extension, could be made available to the intervention agencies did not end until 31 May 1996, that is to say three months later. The Commission submits that the original drafting of the conditions of the invitation to tender was itself contingent on there having been sufficient availability of apples in preceding years. The actual decision to allow substitution, which forms the basis and substance of the decision at issue in this case, was thus adopted not primarily in the light of unforeseeable circumstances arising after the award of the contract.

56. Furthermore, the contested decision was addressed to the Italian Republic, the French Republic, the Hellenic Republic and the Kingdom of Spain. It thus extended beyond the scope of a purely internal contractual relationship with the successful tenderer.

57. Those circumstances relating to the addressees of and the persons concerned by the decision illustrate a further point. By the contested decision addressed to certain Member States, the Commission laid down amended conditions governing the contract awarded to the successful tenderer, but instead of discussing those conditions with that successful tenderer, namely the other party to the contract, the Commission had held negotiations on the matter with the applicant. It was therefore acting largely independently, in some kind of position of superiority rather than as an equal partner in a relationship established purely under civil law. It thus maintained its contracting-authority status, even in the performance of the contract, along with the rights and obligations arising in that connection.

58. The legal status of unsuccessful tenderers is maintained in the same way, provided that a decision is adopted which concerns them in terms of their rights as tenderers.

59. However, the Commission's approach of dividing the procurement procedure rigidly into two sections subject to independent assessment does not meet the requirements of legal certainty. Such an approach would mean that although the Commission first and foremost, or any other contracting authority, would be bound by the rules governing procurement, in particular the principles of equal treatment and transparency, if they did not abide by those rules, action by unsuccessful tenderers against

such non-compliance would be impossible in the majority of cases. In the absence of clarity, an infringement would not be detected and challenged immediately on the decision to award the contract. Were the Commission's approach adopted, it would escape subsequent scrutiny by the courts.

60. Just as this approach offends against the principles of equal treatment and transparency in the tendering procedure, it would likewise offend against the principle that where there are procedural rights and guarantees, there must be a procedure in place for their implementation. [27]

61. As the Commission's negotiating partner in the procedure prior to the [contested] decision and on account of its status as unsuccessful tenderer, the applicant was therefore individually concerned by the contested decision and consequently entitled to bring an action.

62. The first and third pleas raised must therefore be rejected.

27 — Case 169/84 *Cofaz and Others* v *Commission* [1986] ECR 391, paragraph 23.

(2) The plea alleging a contradictory assertion made by the Court of First Instance to the effect that a new invitation to tender should have been issued

(a) Arguments of the parties

(i) The Commission

63. In asserting that a new invitation to tender should have been issued in the event of a shortage of apples, the Court of First Instance has erred in law and has contradicted itself because it at the same time takes the view that the Commission may not alter the terms of payment. Since, in those circumstances, the Commission would have to pay pecuniary damages to the successful tenderers who did, for their part, comply with the contract, this would also lead to an amendment of the terms of payment in that money would be substituted for the apples. Following the approach taken by the Court of First Instance, the unsuccessful tenderers could have submitted different tenders had they in fact known of that substitution possibility.

64. The Commission adds that since the public procurement directives do not apply beyond the period from the invitation to tender to the award, they cannot be relied on for asserting that a new tendering procedure should be initiated where there is a change in circumstances during the

performance of a contract. The two stages comprising the tendering procedure and the performance of the contract with the successful tenderer must be regarded as absolutely separate stages. The first comprises the obligation to observe the principles of transparency and equal treatment of tenderers, that is to say absolute contractual provisions and comparable tenders. The second stage — that of performance — often calls for adjustment of the contract in response to unforeseen events. Although the principles of transparency and equal treatment come into play at this stage where there are fundamental changes to be made,[28] the contested decision on equivalence, however, does not comprise any such fundamental change.

65. The Court of First Instance has, according to the Commission, made the mistake of considering the two stages as one. The Commission was under an obligation to pay the other party to the contract, despite the unforeseeable shortage of apples. It fulfilled that obligation by making peaches available. That obligation to effect payment at all costs in some form or another arises from its status as a party to the contract and explicit reference to it as such in the invitation to tender was not essential.

28 — Case C-337/98 *Commission* v *France* [2000] ECR I-8377, paragraph 44 et seq.

66. It was not feasible to take all contingencies into account in the invitation to tender. Adopting a coefficient of equivalence between the different types of fruits or other abstract payment mechanism would have involved a contingency and thus led to uncertainty, which is incompatible with the principles of transparency, equal treatment and comparability of tenders. Moreover, when the invitation to tender was issued, the Commission did not know if any peaches at all would be withdrawn from the market. There is, therefore, no need to determine the coefficient of equivalence until the possibility of a payment arises. Only then is it possible to take account of market development without partiality or discrimination.

(ii) C.A.S. Succhi di Frutta

67. In the applicant's view, the second plea is likewise inadmissible because it has already been raised in the proceedings at first instance.

68. The Commission's arguments are substantially flawed. The subsequent amendment of the conditions resulted primarily in discrimination against the unsuccessful tenderers. Such an amendment should have been made only by initiating a new tendering procedure. The Commission's approach, which the applicant regards as

arbitrary, constitutes an infringement of the principles of transparency, equal treatment of tenderers and, ultimately, lawfulness.

(b) Assessment

69. According to the Commission, the assertion made by the Court of First Instance, that a new invitation to tender should be issued where the terms of payment are changed, is contradictory because even settlement of a claim for damages where it is impossible to effect payment with apples would amount to a change in the terms of payment, namely by satisfying the claim for damages with money.

70. That theory is precluded by the fact that the original right to payment and the right to damages, which does not accrue until later and is derived from the first paragraph of Article 288 EC in conjunction with the relevant provisions of civil law, are clearly distinguishable rights. The form taken by the right to payment as the original right to performance is determined by the conditions of the invitation to tender. The right to damages, however, arises under civil-law provisions in the event of impossibility of performance or a breach of obligations in the subsequent performance of the contract. The creation of that right and the form it takes are unconnected with the issue of whether the original right to payment was to be satisfied in money or in kind.

71. It is at this point that the distinction between the two stages of a procurement procedure, on which the Commission invariably dwells, becomes relevant. However, the right to damages, an ever-present possibility, will have no impact on the form of tender submitted by the individual tenderers. In that respect, the assertion by the Court of First Instance that a new tendering procedure should be initiated is not contradictory.

72. As regards the issue — again, in the Commission's view, suggesting inconsistency — of whether the terms of payment applying to the successful tenderers who have complied with the contractual provisions would have been amended had a new invitation to tender incorporating the possibility of substituting peaches been issued, I should first of all refer to the fact that the decision to allow substitution was taken as far back as 6 March 1996 in the memorandum to AIMA. The successful tenderers were awarded their respective contracts concurrent with that decision. Therefore, the successful tenderers for their part could not have already performed the respective contracts by that time.

73. Furthermore, a new tendering procedure meets the legal certainty requirement only if, as is the case here during the award procedure, an essential component of the conditions of the invitation to tender is altered. Those considerations remain unaffected by any rights to damages that may arise.

74. The fact that the alteration in the present case related to the form of the consideration given in return for the products to be supplied gives the lie to the Commission's view that the situation did not involve a fundamental alteration. It involved a substitution of the main benefits of the contract, thus amending fundamentally the conditions of the invitation to tender. Unlike in cases where a value payable in one currency is replaced by a sum expressed in a foreign yet freely convertible currency, the substitution of peaches for apples involved two entirely different things. In some cases there is greater demand for peaches than apples, whilst in others there is no demand at all. Apples and peaches are not products that can be naturally substituted for each other.

75. The Commission is also wrong to consider, as it does, that introducing the possibility of substitution by other fruit in the notice of the invitation to tender would have loaded the notice with uncertainty and in that respect offended against the principles of equal treatment and transparency. On the contrary, it is the fear that the contracting authority and other tenderers could circumvent the procurement rules and subsequently amend the conditions of the invitation to tender that leads to an element of uncertainty which does not satisfy the requirements for transparency or legal certainty.

76. The practical problems put forward could be tackled by setting out the notice of invitation to tender in the same way as the memorandum to AIMA which, as well as awarding the contract, in fact specified detailed arrangements for substitution. The notice could be drawn up in conjunction with a clause setting out — even at that early stage — the possibility of adjusting at a later stage the coefficient of equivalence in line with market fluctuations.

77. Overall, I therefore have to concur with the Court of First Instance that the Commission should have either specified in the notice of invitation to tender the precise conditions governing substitution of the fruit prescribed as payment for the supplies at issue or instituted a new tendering procedure when the conditions of the invitation to tender changed.

78. The second plea must therefore be rejected.

(3) The plea alleging that the Court of First Instance erred in law in finding that the applicant had an interest in bringing proceedings on the basis of Article 233 EC

(a) Arguments of the parties

(i) The Commission

79. The Commission's view is that the applicant has no interest in bringing an action for the annulment of the contested measure. The sole consequence of a judgment to that effect would be to reinstate the original decision on equivalence, which is less favourable to the applicant and which it did not contest.

80. According to the Commission, a judgment annulling a measure cannot apply beyond the confines of the measure contested in proceedings before the Court of Justice. A supposed obligation, extending beyond those confines, on the part of the Commission to repeal the earlier decision on equivalence which has not been contested has no basis in law and conflicts with legal certainty. The obligation to repeal the provisions declared unlawful in the judgment relates only to arrangements which have been laid down under the annulled measure.

81. It is no longer possible for the Commission to initiate a new tendering procedure since the dispatch of goods to the Caucasus has stopped.

82. The Commission submits that problems arise in the enforcement of the judgment delivered by the Court of First Instance in that the judgment did not mention any specific measures that would have to be implemented, nor did it limit the annulment. Even now, on account of the resulting retroactive effect, rights accruing to the successful tenderers under the earlier decisions still have to be satisfied, and the procedure has indeed been very protracted.

(ii) C.A.S. Succhi di Frutta

83. In the applicant's view, the fourth plea is likewise inadmissible because it has already been raised in the proceedings at first instance.

84. The applicant argues that it has a legitimate interest in obtaining the annulment of the contested decision. The Court of Justice has held that such an interest is maintained even where the contested decision has already been implemented because its annulment is capable of having further consequences and of serving to prevent repetitions of the unlawful measures in the future. [29] An interest in bringing proceedings arises even in the context of challenging a decision that has already been repealed since the annulment of that decision by the Court of First Instance cannot be equated with its repeal by the Commission and since it also has retroactive effect. [30]

85. Furthermore, there is an interest in obtaining the annulment of unlawful measures as the institution responsible for the unlawful act is required under Article 233 EC to take the necessary measures to comply with the judgment and accordingly remove the effects of that act. [31] Article 233 EC is deprived of its substance in the event of the Court of First Instance being required to define the specific measures to be taken in each case. Making the correct inferences from the operative part and the grounds in the light of all the decisions adopted on the matter is more in line with the principle of sound administration. In the contested judgment the Court of First Instance clearly finds that the possibility of substituting at a later stage peaches for the other fruit concerned constituted an error in law.

(b) Assessment

86. The Commission takes the view that the applicant has no interest in bringing the action since annulment of the contested decision means that the decision of 14 June 1996, which is less favourable to the applicant, will be reinstated.

87. The decision of 6 September 1996 contains a coefficient of equivalence between apples and peaches which corresponds to the market conditions. In that respect it is in fact more favourable to the applicant than the decision of 14 June 1996 which favoured the successful tenderers by laying down coefficients of equivalence which were not in line with market conditions.

88. It can be concluded from the foregoing that no such interest arises only if the decisive factor is the formation of the coefficients of equivalence and if the assumption that the less favourable decision would merely be reinstated is in fact correct.

29 — Case 53/85 *AKZO Chemie* v *Commission* [1986] ECR 1965, paragraph 21, and Case T-509/93 *Glencore Grain* v *Commission* [2000] ECR II-3697, paragraph 31.

30 — *Exporteurs inLevende Varkens and Others* v *Commission* (cited in footnote 6, at paragraph 46).

31 — *Exporteurs in Levende Varkens and Others* v *Commission* (cited in footnote 6, at paragraph 47).

89. As explained above, the possibility of substituting peaches for the apples to be supplied as payment, which was introduced at a later stage in the memorandum to AIMA concerning the implementation of the award but was not contained in the conditions of the invitation to tender, was the basis and substance of all the decisions on equivalence. That infringement of the principle of the equal treatment of tenderers and, by extension, of the procurement rules was, admittedly, mitigated to some extent by the decision of 6 September 1996, but even that more favourable decision comprises an infringement of a rule of law relating to the application of the Treaty in that it offends against the principle of equal treatment. That infringement may be asserted under the second and fourth paragraphs of Article 230 EC in the context of an action for annulment. The Court of Justice has held that there is an interest in bringing an action for the annulment of a decision entailing such an error in law for the sole purpose of preventing comparable unlawful measures. [32] The applicant achieved only partial success in terms of removing the effects of the infringement by obtaining a more favourable decision on equivalence in response to its complaint. The purpose of this action is the removal of the remaining elements of the infringement. In that connection, there remains, as before, an interest in bringing legal proceedings.

90. Moreover, it is impossible in practice to reinstate and actually implement the decision of 14 June 1996 because the operation for supplying fruit juice to the Caucasus has in fact ceased. It was carried out on the basis of the contested decision of 6 September 1996 since, in accordance with the first sentence of Article 242 EC, the action brought against that decision did not have suspensory effect and the President of the Court of First Instance had rejected the application lodged by the applicant for the suspension of the operation of the measure concerned. [33] As a result, the issue of damages alone remains to be addressed.

91. To assess whether the applicant is in any way entitled to damages, it is essential to establish whether responsibility for an infringement which resulted in a loss suffered by the applicant can be attributed to the Commission. The judgment by the Court of First Instance annulling the measure concerned can be relied on to establish that infringement. As provided for in the first paragraph of Article 231 EC in conjunction with the second and fourth paragraphs of Article 230 EC, it is apparent from the operative part of that judgment annulling the contested decision that there was an infringement and, from the grounds of the judgment, what precisely that infringement consisted in. Thus there is also an interest in obtaining the annulment of the contested decision on account of the possible consideration of the infringement in a subsequent action for damages.

32 — *AKZO Chemie* v *Commission* (cited in footnote 29, at paragraph 21) and *Glencore Grain* v *Commission* (cited in footnote 29, at paragraph 31).

33 — Order in Case T-191/96 R *C.A.S. Succhi di Frutta* v *Commission* [1997] ECR II-211.

92. Furthermore, the Commission is required under the first paragraph of Article 233 EC to take all the necessary measures to comply with the judgment of the Court of Justice. Those measures include, *inter alia*, the removal of the effects of the illegal conduct found in the judgment annulling the act [34] with the result that the Commission may be required by the judgment to pay damages on its own initiative and without further legal action.

93. The problems additionally raised by the Commission as regards enforcement of the judgment delivered by the Court of First Instance do not arise. The annulment of the decision of 6 September 1996 requires no further enforcement. There is no reason for limiting the effects of the judgment to the past since there is no reasonable ground for restricting any right to damages that may arise.

94. In those circumstances, the applicant has an interest in bringing the action and, consequently, the fourth plea should also be rejected.

(4) The plea alleging a misinterpretation of the rules of the common organisation of the market in fruit and vegetables

(a) Arguments of the parties

(i) The Commission

95. The Commission regards the fifth plea as admissible since the substantive inaccuracy of the judgment by the Court of First Instance is apparent from the documents in the case and since the Court of First Instance has defined the legal nature of the facts it has found. [35]

96. In finding that apples were available in intervention stocks and that there was therefore no *force majeure*, the Court of First Instance committed an error in law. During the period from the point at which the successful tenderers could begin to withdraw fruit to the date of the first decision on equivalence on 14 June 1996, only 19 958.648 tonnes of apples were withdrawn from the market as intervention stocks, although the successful tenderers were entitled to the supply of a total of 39 500 tonnes of apples.

34 — See *Exporteurs in Levende Varkens and Others* v *Commission* (cited in footnote 6, at paragraph 47).

35 — Case C-136/92 P *Commission* v *Brazzelli and Others* [1994] ECR I-1981, paragraph 49.

97. For their respective calculations to ascertain the quantity of apples available, both the Court of First Instance and the applicant relied — incorrectly — on dates inconsistent with the intervention mechanisms. Within the common organisation of the market in fruit and vegetables, intervention agencies do not have the option of buying in or storing stock, except in serious crisis situations. The fruit withdrawn from the market has to be destroyed or distributed free of charge among relief organisations.

98. The annex to the Commission's defence in the action before the Court of First Instance indicating that 200 000 tonnes had been available merely served to illustrate the fact that there had been sufficient availability of apples in the preceding years. It was therefore reasonable to assume, when the invitation to tender was issued, that there would be sufficient apples available for withdrawal from the market in order to pay for the fruit juice supplied.

99. The Court of First Instance failed to take account of those legal issues and misinterpreted the information provided. The substantive inaccuracy can clearly be seen from the documents handed over. The Court of First Instance erred in law when it regarded as available in intervention stocks apples withdrawn from the market prior to the date from which the successful tenderers could withdraw such stocks, and consequently its subsequent conclusions were also erroneous.

(ii) C.A.S. Succhi di Frutta

100. The applicant takes the view that the fifth plea is inadmissible as it involves a complaint concerning an incorrect appraisal of the facts, for which the Court of Justice has no jurisdiction in the appeal procedure. [36]

101. It adds that the Court of First Instance appraised the documents made available by the Commission correctly and was right to assume that there was sufficient availability of apples for the successful tenderers.

(b) Assessment

102. Under Article 225(1) EC and Article 51 of the EC Statute of the Court of Justice, appeals are limited to points of law. Accordingly, appeals may be based only

36 — *Deere* v *Commission* (cited in footnote 8, at paragraph 21) and order in Case C-436/97 P *Deutsche Bahn* v *Commission* [1999] ECR I-2387, paragraph 19.

on grounds relating to the infringement of rules of law, to the exclusion of any appraisal of the facts. The Court of First Instance has exclusive jurisdiction to establish and to assess the facts. [37] The availability of apples is an issue concerning a finding of fact, the re-examination of which therefore does not fall to the Court of Justice in the appeal procedure.

103. Although the Court of Justice has jurisdiction to review the legal characterisation of the facts established or assessed by the Court of First Instance and to review the legal conclusions it has drawn from those facts, [38] it has no jurisdiction to proceed with a new examination of the facts or to assess the evidence placed before it. [39] In taking the view that the Court of First Instance should have drawn different conclusions from the documents placed before it in terms of the availability of apples, the Commission is simply objecting to the assessment by the Court of First Instance of the facts and of the evidence. Since that assessment is precluded from a review by the Court of Justice, the corresponding plea is accordingly inadmissible.

104. In the *Brazzelli* case, the Court of Justice indeed did hold that 'the Court of First Instance ... has exclusive jurisdiction to find the facts except where the substantive inaccuracy of its findings is apparent from the documents submitted to it'. [40] However, if every inaccurate finding of fact, while apparent only from the documents submitted to the Court, were sufficient for the Court of Justice to have jurisdiction to review the facts at the appeal stage, there would be a risk of turning the Court of Justice into a second court hearing and determining points of fact, contrary to the legal parameters defined in the first sentence of Article 225(1) EC.

105. Should the Court of Justice indeed regard itself as having jurisdiction to review the assessment by the Court of First Instance of the facts in this case, then, following the underlying line of reasoning, the dispute concerning the availability of apples when the decisions on equivalence were adopted is irrelevant. As repeatedly stated above, the crucial infringement of the principle of the equal treatment of tenderers lay in the fact that the memorandum to AIMA of 6 March 1996 concerning the implementation of the award to the successful tenderer provided for the possibility to substitute peaches for apples in payment for the supplies given. However, at that point in time, the Commission itself, by its own account, assumed on the basis of experiences from previous years that sufficient apples would be available. Consequently, at the time relevant in this case, there was no unforeseeable shortage of apples.

37 — Case C-352/98 P *Laboratoires Pharmaceutiques Bergaderm* v *Commission* [2000] ECR I-5291, paragraph 49, and *Deere* v *Commission* (cited in footnote 8, at paragraph 21).

38 — *Deere* v *Commission* (cited in footnote 8, at paragraph 21) and order of the Court of Justice in Case C-19/95 P *San Marco* v *Commission* [1996] ECR I-4435, paragraph 39.

39 — *Eppe* v *Commission* (cited in footnote 7, at paragraph 29) and order in *Deutsche Bahn* v *Commission* (cited in footnote 36, at paragraph 19).

40 — Case C-136/92 P (cited in footnote 35, at paragraph 49).

106. The fifth plea must in those circumstances be rejected as inadmissible and, in any event, unfounded.

107. As a result, it should be held that the judgment of the Court of First Instance in Case T-191/96 is not vitiated by any illegality. The appeal must therefore be dismissed.

VI — Costs

108. Under Article 122 in conjunction with Articles 118 and 69(2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

VII — Conclusion

In the light of the foregoing considerations, I propose that the Court should:

— dismiss the appeal;

— order the appellant to pay the costs.