

1. Where the preliminary objections raised by a party regarding the jurisdiction of the Court and the admissibility of the main application constitute a prerequisite for the decision on the admissibility of the application for the adoption of interim measures, the judge hearing that application cannot escape the necessity of resolving provisionally the various problems raised. From his point of view, it is sufficient if he can establish, with a sufficient degree of probability, that there is a basis, albeit partial, on which the Court may found its jurisdiction in order to enable him to acknowledge the existence of a legitimate interest in the adoption of interim measures designed to preserve the existing position pending a decision on the substance of the case.
2. It is impossible to accept the view that, by participating in a tender organized, under the provisions of the second ACP-EEC Convention which relate to financial and technical cooperation, by an ACP State, in close cooperation with the Community institutions, with a view to the execution of a project financed entirely by the European Development Fund, an undertaking established in the Community is automatically placed outside the judicial protection afforded to it by the provisions of the EEC Treaty.
3. Whilst it seems certain that a contract for public works concluded between the authorities of an ACP State and the successful tenderer under the provisions on financial and technical cooperation contained in the second ACP-EEC Convention 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 Convention.
4. Although the functions which, under the provisions on financial and technical cooperation contained in the second ACP-EEC Convention, are performed by the Commission in connection with the various stages of the preparation of projects and with putting those projects out to tender are closely linked to the acts of the ACP State benefiting from them, the fact remains that, on the one hand, all the decisive operations relating to the award of the contract are subject to the approval of the Commission and, on the other hand, the Commission, in its capacity as manager of the European Development Fund, retains control over the allocation and transfer of funds earmarked for the execution of the various projects until such time as they are used.

In Case 118/83 R

1. CMC COOPERATIVA MURATORI E CEMENTISTI, Ravenna (Italy),
2. CRC COOPERATIVA REGGIANA COSTRUZIONI, Reggio Emilia (Italy),
3. CMB COOPERATIVA MURATORI E BRACCianti, Carpi, Modena (Italy),

represented by Professor Giorgio Bernini, Avvocato and Procuratore, member of the Bologna Bar, and Stanley A. Crossick, Solicitor of the Supreme Court of England and Wales, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 34 B Rue Philippe-II,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Anthony McClellan, acting as Agent, assisted by Daniel Jacob, of the Brussels Bar, with an address for service in Luxembourg at the office of Oreste Montalto, a member of the Commission's Legal Department, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for suspension of the performance of a works contract relating to the execution of the Amarti Diversion Project, presented by the Provisional Military Government of Socialist Ethiopia and financed by the European Development Fund,

THE PRESIDENT OF THE SECOND CHAMBER, exercising the functions of President of the Court pursuant to the second paragraph of Article 85 and Article 11 of the Rules of Procedure,

makes the following

ORDER

Facts and background to the dispute

1. By application lodged at the Court Registry on 28 June 1983, the Cooperativa Muratori e Cementisti, established at Ravenna in Italy, the Cooperativa Reggiana Costruzioni, established at Reggio Emilia in Italy, and the Cooperativa Muratori e Braccianti, established at Carpi, Modena, in Italy,

combined as a consortium (hereinafter referred to as "the Italian Consortium"), brought an action under Articles 173, 175 and 177 and the second paragraph of Article 215 of the EEC Treaty seeking primarily the annulment of a decision of the Commission by which the applicants were deprived of the award of a contract for the construction of a hydroelectric dam in Ethiopia (the Amarti Diversion Project), to be carried out under the provisions on financial and technical cooperation contained in the Second ACP-EEC Convention, signed at Lomé on 31 October 1979 and approved by Council Regulation (EEC) No 3225/80 of 25 November 1980 (Official Journal 1980, L 347, p. 1) (hereinafter referred to as "the Convention") and to be financed by the European Development Fund (hereinafter referred to as "the Fund"). In the alternative, the applicants ask the Court to find that the Commission failed to act should it appear that it did not exercise the powers which it possesses in connection with the tender procedure governed by the aforesaid provisions of the Convention. Should the exclusion of the applicants appear irreversible, the applicants ask to be awarded compensation for the damage caused by their exclusion.

2. It appears from the file that in December 1981 the Ethiopian Government, acting through the intermediary of the Ethiopian Electric Light and Power Authority (EELPA) in its capacity as "employer", issued an invitation to tender in respect of the construction works relating to the diversion of the River Amarti, involving the diversion of the river, on the central plateau approximately 190 kilometres north-west of Addis Ababa, into the existing Finchaa reservoir. The invitation to tender was published, under No 1824, in the Supplement to the Official Journal of the European Communities of 14 July 1982 S 132, p. 3). The works are to be

financed by the European Development Fund of the European Economic Community.

3. According to the conditions of tender, tenderers were required to demonstrate their technical experience and competence to undertake the works, the major factor being successful execution in the capacity of prime contractor and in recent years of a project or projects containing elements similar in nature and at least equal in scale to those specified in the conditions (Clause IT-1, 4c). Tenderers were also required to demonstrate their current financial capability (Clause IT-1, 4d).

4. Tenderers' qualifications were to be examined by a tender committee appointed by the employer. The committee was to include the delegate of the EEC in Addis Ababa and a consultant engineer (Clause IT-1, 4, third paragraph).

5. As regards the acceptance of tenders, it was stated in the conditions of tender that the employer did not bind itself to award the contract to the lowest tenderer, but would take into careful consideration the whole of the information given in the tender and appendices. It was also stated that the successful tenderer would be informed of the acceptance of his tender and would be invited to send to Addis Ababa a representative with a proper power of attorney for the purpose of executing a contract (Clause IT-11).

6. The time-limit specified for the submission of tenders was 5 November 1982 (see corrigendum to the invitation to tender published in Official Journal, S 193, p. 3, of 6. 10. 1982). By that date EELPA had received three tenders submitted by the Italian Consortium, by Rush and Tompkins BV, a company incorporated under Netherlands law, and

by Boskalis Westminster-Baresel, a company incorporated under English law.

7. It should be noted that Rush and Tompkins BV submitted its tender only in the form of a telex communication, since the dispatch of the tender documents to Addis Ababa had been delayed owing to forwarding difficulties beyond the control of the tenderer. It seems that the Ethiopian authorities accepted that these circumstances amounted to a case of *force majeure* and considered the tender to have been duly received within the prescribed period.

8. On 8 November 1982, the opening date of the tender, the following prices (in millions of ECU) were established:

1. Rush and Tompkins BV	24.3
2. Italian Consortium	26.7
3. Boskalis Westminster-Baresel	28.2

9. It appears from the information supplied by the applicants that initially the employer considered that the lowest tenderer, Rush and Tompkins BV, did not possess the technical and financial qualifications required by the conditions of tender. Consequently, it considered the tender submitted by the Italian Consortium, which was at all times considered to be qualified, to be the most advantageous. The applicants claim that that was the unanimous conclusion of the Tender Committee, established under the conditions of tender, at a meeting held in Addis Ababa on 24 February 1983, which was attended by the Commission delegate.

10. In any event, on 3 March 1983 EELPA sent to the Italian Consortium the following telex message, the authenticity of which is not contested:

"You are hereby invited to come to our head office in Addis Ababa Ethiopia for contract negotiations of the above project. Negotiation is scheduled to start on March 14/1983 at our head office in Addis Ababa.

If the negotiation proves successful the Authority shall conclude a contract with your Consortium. Therefore, your representatives should bring along with them the relevant power of attorney which will enable them to sign a contract on behalf of the Consortium."

11. When the representatives of the Italian Consortium arrived at the head office of EELPA in Addis Ababa on the specified date, they were not received. On the following day, 15 March 1983, they were informed that negotiations could not take place as the Commission had "ordered" that negotiations be opened with Rush and Tompkins BV.

12. Having tried unsuccessfully to obtain information from the Commission, the applicants finally received a telex message from EELPA, dated 25 April 1983, the authenticity of which is likewise uncontested. The telex message was worded as follows:

"We are extremely disappointed to inform you that for reasons beyond our knowledge and capacity we are unable to proceed with the scheduled negotiation with you Consortium. We are now forced to start negotiations with Rush and Tompkins BV of Holland in strict compliance to the decision made by the Commission alone. This decision was made against our strong objection and disagreement on grounds of the tenderer's financial and technical disqualifications a fact which is still maintained not only by the Tender Com-

mittee for this Project but also by the Consultant as evidenced by their recent telex to the Authority.

Quote

May we ... mention that the receipt of supplementary information on the experience of the Rush and Tompkins Group PLC created — after the completion of our Draft Report — a new situation requiring decision making which we found to be beyond our authority.

May we take this opportunity to restate our opinion that:

The lowest tenderer Rush and Tompkins BV is considered unqualified.

The Rush and Tompkins Group PLC, however, is considered qualified, but they are not the tenderer.

We consider it contrary to normal rules for open tendering to negotiate with the Rush and Tompkins Group PLC, and only the client can decide whether such negotiations should be held. If this is decided against them, negotiations should be held with the Italian Consortium with the objective of resolving the Contractor for the works.

Unquote.

In any event, we deeply regret the inconveniences you have been faced with as well as the embarrassing situation we were exposed to in this connection. We sincerely hope that you will understand our position in these rather unfortunate circumstances beyond our control.

Finally, we like to bring it to your attention that in the event that negotiations

with Rush and Tompkins BV fails, the Consortium is still considered a qualified and potential contractor whom we look forward to conclude a contract with."

13. Having approached the Commission on several occasions without success with a view to bringing about a change in the attitude adopted by the competent authority, or at least to obtaining information concerning the reasons for the change in attitude of which they had learned, the applicants brought an action for the annulment of the act, acts or measures of the Commission by which the applicants were deprived of their status as "lowest qualified tenderer". In the alternative, the applicants ask the Court to find that the Commission failed to take action designed to enable the applicants to continue the negotiations the opening of which had been notified to them. Finally, they ask that, in any event they be awarded compensation for the damage caused to them by the acts, measures or omissions of the Commission.

14. By a document lodged at the Court Registry on 14 July 1983, the applicants brought an application under Articles 185 and 186 of the EEC Treaty and Article 83 of the Rules of Procedure for the adoption, as a matter of urgency, of interim measures, which may be defined as follows:

- (a) Suspension of the decision of the Commission whereby the applicants were deprived of their status as "lowest qualified tenderer";
- (b) An order that the Commission act in accordance with the Convention and in particular take all necessary action under Articles 121 to 123 thereof to ensure that effect is given to the resolution adopted by the Tender

Committee at the meeting held on 24 February 1983 in Addis Ababa;

- (c) An order that the Commission undertake that no contract shall be signed with Rush and Tompkins BV and that the works shall not be started by that company until the Court has given its decision on the main application;
- (d) An order, if a contract has already been signed with Rush and Tompkins BV, suspending all legal effect deriving from that contract until the Court has given its decision on the main application.

15. On 27 July 1983 the Commission submitted its written observations and on 29 July 1983 the parties presented oral argument in the presence of the Advocate General.

16. It is clear from the Commission's written and oral observations that on 22 February 1983 the Committee of the European Development Fund delivered a favourable opinion on the financing proposal and that the final financing decision was taken by the Commission on 7 March 1983. The national authority's choice, the date of which has not been indicated, was approved by the Chief Authorizing Officer appointed by the Commission on 10 June 1983. The

contract between the national authority and Rush and Tompkins BV was signed on 6 July 1983 in Addis Ababa and endorsed by the local Commission delegate on the same date.

17. As a preliminary matter, the Commission challenges the jurisdiction of the Court. Under the system established by the Convention for financial and technical cooperation, the ACP State, in this case Ethiopia, is responsible, according to the Commission, for preparing, negotiating and concluding contracts. The Commission's cooperation in the execution of the projects of the Fund is of a purely internal nature in relations with the ACP State concerned. According to the Convention, any disputes between a tenderer and the ACP State must be settled by arbitration and therefore fall outside the jurisdiction of the Court. The Commission refers in that regard to Article 132 (1) of the Convention and to the "joint declaration" which is the subject of Annex XIII to the Convention.

18. As regards the interim measures sought by the applicants, the Commission contests both their urgency and the existence of grounds establishing a case for granting them within the meaning of Article 83 of the Rules of Procedure.

Decision

- 19 Since the problems raised by the application are in all respects novel, it is appropriate first of all to define the legal context in which they arise. It is in that light that the question of jurisdiction will have to be considered before

the conditions laid down by the second paragraph of Article 83 of the Rules of Procedure can be examined.

The legal context of the dispute

- 20 The execution of the project which has given rise to this dispute must be seen in the context of the provisions on financial and technical cooperation which form the subject-matter of Title VII (Articles 91 to 154) of the Second ACP-EEC Convention. That Convention was duly entered into by the Community and must therefore be regarded as an integral part of the Community legal order, as the Court had occasion to emphasize, in connection with an agreement concluded under similar circumstances, in its judgment of 30 April 1974 (Case 181/73 *Haegeman v. Belgian State* [1974] ECR 449).
- 21 According to Article 95 of the Convention, projects and programmes envisaged by Title VII are to be financed by the European Development Fund, the administration of which is entrusted to the Commission.
- 22 Under the terms of Article 108, "operations financed by the Community are to be implemented by the ACP States and the Community in close cooperation, the concept of equality between the parties being recognized." The same article defines the responsibilities regarding the administration of the programme of financial and technical cooperation which are to be borne by the ACP States, the ACP States and the Community jointly and the Community. For the purposes of the present case it should be pointed out in that regard that:

The *ACP States* are responsible for choosing the projects, for presenting them for Community financing, for preparing, negotiating and concluding contracts and for implementing projects (Article 108 (2) (b) (d) and (e));

The *ACP States and the Community* are *jointly* responsible for appraising projects, for taking the necessary implementing measures to ensure equality of conditions for participation in invitations to tender and contracts and for ensuring that the projects financed by the Community are executed in

accordance with the arrangements decided upon and with the provisions of the Convention (Article 108 (4) (c) (d) and (f));

The *Community* is responsible for preparing and taking financial decisions on projects (Article 108 (5)).

- 23 Articles 111, 112 and 113 lay down detailed provisions concerning the appraisal of projects. Article 111 provides that preparation of the dossiers is to be the responsibility of the ACP States concerned and Article 112 provides that appraisal of projects is to be undertaken in close collaboration between the Community and the ACP States. Article 113 adds that the conclusions of the appraisal are to be summarized in a financing proposal, which is to serve as the basis for the Commission's decision. According to Article 113 (2), the financing proposals are to be drawn up by the relevant departments of the Community and transmitted to the ACP States concerned. Article 115 provides that the financing proposal is to be the subject of a financing agreement between the Commission, acting on behalf of the Community, and the ACP State concerned.
- 24 Under the terms of Article 120, it is for the ACP States to implement the projects financed by the Community. Accordingly they are to be responsible in particular for preparing, negotiating and concluding the necessary contracts for the implementation of those operations.
- 25 The administrative measures necessary for that purpose are the subject of a set of practical arrangements prescribed in Articles 120 to 124 of the Convention. Of those provisions the following details are of particular relevance to the present case. According to Article 121, the Commission is to appoint the "chief authorizing officer" of the Fund, who is to ensure that financing decisions are carried out and is to be responsible for managing the Fund's resources. It is the chief authorizing officer who is to commit, clear and authorize expenditure and keep the accounts of commitments and authorizations. Under the terms of Article 121 (2), the chief authorizing officer, in close cooperation with the national authorizing officer, "shall ensure equality of conditions for participation in invitations to tender, and see to it that there is no discrimination and that the tender selected is economically

the most advantageous. In this connection the chief authorizing officer shall approve the dossiers before invitations to tender are issued, receive the result of the examination of the tenders and approve the proposal for the placing of the contract.”

- 26 According to Article 122, the government of each ACP State is to appoint a “national authorizing officer” to represent the authorities of his country in all operations financed from the Fund’s resources administered by the Commission. The national authorizing officer may delegate some of those functions. Under the terms of Article 122 (2), the national authorizing officer is in his turn to ensure, in close cooperation with the chief authorizing officer, “that there is equality of conditions for participation in invitations to tender, that there is no discrimination and that the tender which is economically the most advantageous is chosen” (Article 122 (2) (a)). He is to prepare invitation to tender dossiers and submit them to the delegate for agreement before invitations to tender are issued; he is to issue invitations to tender, receive tenders, preside over the examination of tenders, decide the outcome of that examination and transmit it to the delegate with a proposal for the placing of the contract; finally it is he who signs the contracts (Article 122 (2) (b), (c), (d) and (e)).
- 27 Under Article 123, the Commission is to appoint a “delegate” to each ACP State or group of States to represent it for the purpose of facilitating the application of the Convention. The delegate is to work in close cooperation with the national authorizing officer and deal with that officer on behalf of the Commission. In that capacity he is to approve the invitation to tender dossier and be present at the opening of tenders (Article 123 (2) (a) and (b)). He is to approve the national authorizing officer’s proposal for the placing of the contract wherever the following three condition are fulfilled: the tender selected is the lowest, it is economically the most advantageous and does not exceed the sum earmarked for the contract (Article 123 (2) (c)).
- 28 It is stressed in Articles 125 of 127 that, as regards operations financed by the Community, participation in invitations to tender and contracts is to be open on equal terms to all natural persons and companies or firms falling within the scope of the Treaty and to all natural persons and companies or

firms of the ACP States and that works contracts financed by the Fund's resources managed by the Commission are to be concluded following an open invitation to tender.

- 29 Under the terms of Article 130 (1), the criteria for selecting the tender which is economically the most advantageous are to take into account, in respect of each operation, *inter alia*, "the qualifications of and the guarantees offered by the tenderers, the nature and conditions of implementation of the works or supplies and the price, operating costs and technical value of those works or supplies."
- 30 According to Article 131, the general conditions applicable to the award and performance of works contracts financed from the Fund's resources administered by the Commission are contained in the general conditions which, on a proposal from the Commission, are to be adopted by decision of the Council of Ministers. Pending that decision — which has as yet not been adopted — the joint declaration forming Annex XII to the Convention refers, in the case of ACP States which, like Ethiopia, were not yet parties to the Yaoundé Convention, to the "national legislation" of the States concerned or to "established practices regarding international contracts."
- 31 Article 132 provides as follows with regard to the settlement of disputes:
- “1. Any dispute arising between the authorities of an ACP State and a contractor, supplier or provider of services on the occasion of the placing or performance of a contract financed by the Fund shall be settled by arbitration in accordance with rules of procedure adopted by the Council of Ministers.
 2. The rules of procedure referred to above shall be adopted, on a proposal, by a decision of the Council of Ministers not later than its first meeting following the entry into force of this Convention.”
- 32 Since the rules referred to in Article 132 have not yet been adopted, reference must be made to Annex XIII of the Convention, which is entitled "Joint declaration on Article 132 of the Convention" and is worded as follows:

“As a transitional measure pending the implementation of the decision provided for in Article 132 the final decision on all disputes shall be taken in accordance with the rules on conciliation and arbitration of the International Chamber of Commerce.”

Jurisdiction of the Court

- 33 The Commission claims that the Court has no jurisdiction to entertain either the main application or the application for the adoption of interim measures. It raises two fundamental objections regarding the jurisdiction of the Court and an objection of inadmissibility based on two grounds with particular reference to the action for annulment.
- 34 In the first place, the Commission argues that the ACP State is responsible for the preparation, negotiation and conclusion of the contract. It follows that it is the ACP State and not the Commission which deals directly with the tenderers. Whilst it is true that the Convention provides for cooperation between the Community and the ACP State, the fact remains that the State in question takes the various decisions required in the course of the procedure, including the final decision on the award of the contract. The cooperation to be given by the Commission in that connection is therefore said to be of a purely “internal” nature.
- 35 In the second place, the Commission contends that Article 132 of the Convention and the joint declaration which forms the subject-matter of Annex XIII have set up an arbitration procedure, with the result that any dispute between a tenderer and an ACP State falls outside the jurisdiction of the Court.
- 36 With particular reference to the action for annulment, the Commission argues that in this case there was, on its part, no decision within the meaning of the second paragraph of Article 173 of the EEC Treaty. The “order” to eliminate the applicants and to give preference to Rush and Tompkins BV which, the applicants allege, the Commission gave to the Ethiopian authorities and which came to the applicants’ knowledge when they visited Addis Ababa on 15 March 1983, did not, according to the Commission, constitute a measure which could be the subject of annulment. In any event, the action against that “order” is out of time since the applicants themselves state that it came to their knowledge on 15 March 1983.

- 37 The answers to all those questions, the complexity of which should not be underestimated, is a matter for the Court's decision on the substance of the main application. However, since the preliminary objections raised by the Commission regarding the jurisdiction of the Court and the admissibility of the main application constitute a prerequisite for the decision on the admissibility of the application for the adoption of interim measures, the judge hearing that application cannot escape the necessity of resolving provisionally the various problems raised. From his point of view, it is sufficient if he can establish, with a sufficient degree of probability, that there is a basis, albeit partial, on which the Court may found its jurisdiction in order to enable him to acknowledge the existence of a legitimate interest in the adoption of interim measures designed to preserve the existing position pending a decision on the substance of the case.
- 38 Subject to those reservations, the following observations may be made with regard to the preliminary objections raised by the Commission.
- 39 As the Commission rightly pointed out, the tenderers established a legal relationship solely with the Ethiopian national authority and more particularly with the national authorizing officer, who, according to the information supplied during the proceedings, is the Ethiopian Government acting, for the purposes of the present project, through the intermediary of EELPA, under the terms of Clause IT-I, paragraph (2), of the conditions of tender.
- 40 Nevertheless the provisions of the Convention at the same time impose specific obligations on the Commission and more particularly on the chief authorizing officer with regard to ensuring equality of conditions for participation in invitations to tender, the elimination of discrimination, selection of the tender which is economically the most advantageous, the open nature of tenders and the participation on equal terms of all natural persons and companies or firms falling within the scope of the EEC Treaty.
- 41 It is impossible therefore to accept the 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, with a view to the execution of

a project financed entirely by the European Development Fund, an undertaking established in the Community is automatically placed outside the judicial protection afforded to it by the provisions of the EEC Treaty.

- 42 It does not appear that Article 132, concerning the settlement of disputes, and the joint declaration on that subject, embodied in Annex XIII to the Convention, has the effect of eliminating any judicial protection which may be available under the Treaty. As the Commission has acknowledged, the Convention could not derogate, as far as Community subjects are concerned, from the provisions of the EEC Treaty governing access to the Court. Moreover, it was apparent from the arguments of the parties that it remains doubtful whether Article 132 applies only to disputes which may arise, on the occasion of the placing or performance of a contract, between the ACP State and the undertaking which is awarded the contract or whether that provision is also applicable to disputes which arise between the ACP State and any undertaking which is not awarded the contract but has participated in the tender procedure. That doubt is increased by the uncertainty regarding the interpretation which the ACP States, and Ethiopia in particular, may give to the terms of Article 132 and Annex XIII.
- 43 Moreover, the question arises whether, in arbitration proceedings initiated pursuant to Article 132 and Annex XIII, that is to say within the framework of the procedure for conciliation and arbitration of the International Chamber of Commerce, acts of the Commission may be challenged and whether an arbitral decision to be given in that context may contain a judgment on the validity of acts of the Commission or establish a basis for Community liability.
- 44 Consequently, 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 Convention.

- 45 As regards the objection of inadmissibility raised by the Commission in relation to the action for annulment, in view of the fact that it would be impossible to identify, in the cooperative decision-making process set up by the Convention, a decision of the Commission which could be the subject of an action, it should be observed that the functions performed by the Commission in connection with the various stages of the preparation of projects and with putting those projects out to tender are undoubtedly closely linked to the acts of the ACP State benefiting from them. Nevertheless, on the one hand, all the decisive operations relating to the award of the contract are subject to the approval of the Commission and, on the other hand, the Commission, in its capacity as manager of the European Development Fund, retains control over the allocation and transfer of funds earmarked for the execution of the various projects until such time as they are used.
- 46 Although it has not been possible at this stage to establish whether there was an "order" by the Commission to eliminate the applicants and to give Rush and Tompkins BV preference over them, it is clear from the information supplied by the Commission itself that the contract concluded with Rush and Tompkins BV on 6 July 1983 became effective only by virtue of the approval of the chief authorizing officer and the endorsement of the local Commission delegate.
- 47 Under those circumstances, 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.
- 48 The Commission's objection that the action is out of time must be rejected. The applicants have explained at great length the difficulties which they experienced in obtaining information regarding the attitude taken by the Commission in this case and the reasons for their elimination. The information which they were able to obtain in Addis Ababa on 15 May 1983 was no more than hearsay. Such information cannot therefore be regarded as fulfilling the condition laid down by the third paragraph of Article 173 of the EEC Treaty.

- 49 It follows from the foregoing that, although the placing of the public works contract in question occurred outside the sphere of jurisdiction of the Community, there are nevertheless sufficient connecting factors between the circumstances of the dispute and the provisions of the Treaty governing access to the Court — namely, the active participation of the Commission in the process for reaching a decision on the award of the contract, the financing of the project in question by the European Development Fund and the judicial protection to which the applicants are, as Community subjects, entitled to claim in the implementation of a convention concluded by the Community — to allow the finding that there exists a legitimate interest in the adoption of interim measures pending the Court's decision on the questions of jurisdiction and admissibility raised by the Commission.

Urgency

- 50 The applicants claim that an interim decision of the Court is required as a matter of urgency owing to the irreparable damage which would be caused to their corporate reputation in the international tender market if they were eliminated in spite of their status as "lowest qualified tenderer" in the tender procedure in question, particularly since it has received wide international publicity. Only the intervention of the Court at this stage could prevent damage which otherwise would be irreversible for them.
- 51 The applicants are mistaken in thinking that in the circumstances their elimination would damage their reputation: Participation in a public tender procedure, by nature highly competitive, involves risks for all the participants and the elimination of a tenderer under the tender rules is not in itself in any way prejudicial. That is all the more true since the applicants' tender was not the lowest and since the favourable prospects which seemed to be emerging at the beginning of the procedure for the award of the contract were due not to the characteristics of their tender but to the fact that there was some doubt at that time concerning the qualifications of a competing tenderer.

- 52 On the other hand, it must be acknowledged that the applicants have a legitimate interest in seeking the adoption of an interim measure as soon as possible, in order to prevent — should the procedure for the award of the contract be found to be irregular — a contract from being concluded and, should it be concluded, its performance from reaching a stage at which an irreversible *de facto* situation would be created. In that sense the requirement of urgency laid down by Article 83 of the Rules of Procedure must be recognized as being satisfied.

The nature of a possible interim measure and the grounds establishing a case for its adoption

- 53 For the reasons stated above, the Court has no power to intervene in the conclusion and performance of a contract concluded between the tenderer and an authority of a non-member country. On the other hand, there does not seem to be any reason precluding the Court from issuing, on a provisional basis, appropriate injunctions to the Commission either in order to prevent the conclusion of a contract as a result of a tender which appears to be contrary to the rules of the Convention, or to other relevant rules, or in order to prohibit the Commission from allocating funds for the performance of such a contract if it has already been concluded.
- 54 The question arises whether the applicants have been able to make out a *prima facie* case for the existence of circumstances which could justify such a measure.
- 55 The facts which the applicants have alleged and which the Commission has been unable to contest do indeed raise serious doubts concerning the regularity of the procedure followed for the award of the contract. As has already been mentioned, the applicants had been summoned by the competent national authority in circumstances which afforded grounds for believing that the contract would be signed upon the conclusion of a final round of negotiations. It appears from the communications of the employer, endorsing the findings of the Tender Committee and the consultant engineer, that the lowest tenderer was not regarded as technically and financially qualified and for that reason it had originally been intended to award the contract to the applicants. It also appears that that situation was changed not as a result of a decision of the employer but at the request of the Commission.

- 56 When the Commission was questioned on this matter, it stated that following investigations which are normal in public tender procedures it became apparent that the lowest tenderer, Rush and Tompkins BV, which is a member of the British Rush and Tompkins group, whose technical and financial qualifications are undeniable, had the backing of that group and that the group undertook to guarantee, for the benefit of its Netherlands subsidiary, that the work would be successfully completed. The Commission produced in that connection a letter of guarantee issued by the Rush and Tompkins group, dated 21 June 1983.
- 57 The applicants contest the regularity of that procedure. In their view, the introduction of the letter of guarantee had the effect of altering, after the opening of the tenders, certain essential tender conditions, to such an extent that it is doubtful whether the tenderer and the undertaking to which the contract was awarded are still strictly identical.
- 58 In reply to that argument, the Commission contended that the tender submitted on 4 November 1982 already contained a guarantee by the Rush and Tompkins group, but it was not in a position to produce a copy of that letter or to indicate in what way the guarantee of 21 June 1983, which was apparently a decisive factor in the award of the contract, differed from the original guarantee.
- 59 Consequently, viewed as a whole, the circumstances in which the undertaking which was awarded the contract was chosen seem to be questionable. However, it is not possible at this stage to determine whether there was in this case any irregularity of such a nature as to vitiate the tender procedure or whether the inquiries and clarifications regarding the lowest tenderer are in accordance with normal practice in public tender procedures.
- 60 However, those doubts, even though they are genuine, do not constitute sufficient justification for a measure as serious as the suspension of the performance of the contract, concluded by the Ethiopian authorities and endorsed by the Commission, by means of the blocking of the funds earmarked for the performance of the contract.

- 61 It must be borne in mind that the applicants were only the second lowest tenderers. The Commission, which is responsible for the financial administration of the Fund, was therefore under a duty to give priority to its examination of the tender submitted by the lowest tenderer with a view to clarifying, in conformity with the criteria laid down by Article 130 of the Convention, the question of the qualifications and guarantees of that tenderer which were in dispute. As regards the designation "lowest qualified tenderer", which the applicants bestowed upon themselves, following a preliminary appraisal made by the employer, it should be observed that that status was at no time conferred upon them by the competent authority, namely the national authorizing officer.
- 62 It appears, moreover, from the explanations supplied by the Commission that, following checks carried out on the technical and financial qualifications of the lowest tenderer, both the national authorizing officer and the chief authorizing officer are now satisfied with the choice made for the award of the contract. This attitude emerges from a telex message sent on 22 June 1983 by EELPA to the applicants, in which the employer, after explaining the situation, requests the applicants "to drop the whole matter and let bygones be bygones."
- 63 In those circumstances it seems that the blocking of the funds earmarked for the execution of the project, with the grave consequences which such a measure would entail for all the parties concerned, would be a disproportionate response to the doubts which the facts alleged by the applicants have raised concerning the regularity of the tender procedures.
- 64 It is open to the applicants to pursue their action with a view to enabling the Court, after a more thorough examination of the matters involved in the dispute, to give judgment on its own jurisdiction and to state the consequences to be drawn from any irregularities in the tender procedure, in particular with regard to the issue of liability.
- 65 For all those reasons, it must be held that, at this stage, the applicants have failed to establish circumstances making out a *prima facie* case for an interim measure within the meaning of Articles 185 or 186 of the EEC Treaty.

On those grounds,

THE PRESIDENT OF THE SECOND CHAMBER, exercising the functions of President of the Court under the second paragraph of Article 85 and Article 11 of the Rules of Procedure,

by way of interim decision,

hereby orders as follows:

- 1. The application for the adoption of interim measures is dismissed;**
- 2. The costs are reserved.**

Luxembourg, 5 August 1983.

For the Registrar

H. A. Rühl

Principal Administrator

Pierre Pescatore

President of the Second Chamber,
Acting as President