

JUDGMENT OF THE COURT

5 May 1998 *

In Case C-386/96 P,

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

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (Third Chamber) of 24 September 1996 in Case T-485/93 *Dreyfus v Commission* [1996] ECR II-1101, seeking to have that judgment set aside,

the other party to the proceedings being:

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

* Language of the case: French.

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, C. Gulmann, H. Ragnemalm, M. Wathelet (Rapporteur) and R. Schintgen (Presidents of Chambers), G. F. Mancini, J. C. Moitinho de Almeida, P. J. G. Kapteyn, J. L. Murray, D. A. O. Edward, J.-P. Puissochet, G. Hirsch, P. Jann, L. Sevón and K. M. Ioannou, Judges,

Advocate General: A. La Pergola,
Registrar: D. Louterman-Hubeau, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 8 October 1997

after hearing the Opinion of the Advocate General at the sitting on 16 December 1997,

gives the following

Judgment

1 By application lodged at the Registry of the Court of Justice on 28 November 1996, Louis Dreyfus & C^{ie} (hereinafter 'Dreyfus' or 'the appellant') brought an appeal under Article 49 of the EC Statute of the Court of Justice against the judgment of the Court of First Instance of 24 September 1996 in Case T-485/93 *Dreyfus v Commission* [1996] ECR II-1101 (hereinafter 'the contested judgment'), dismissing as inadmissible its action for the annulment of the Commission's decision of 1 April 1993 addressed to the Vnesheconombank.

Legal background

2 On 16 December 1991, the Council adopted Decision 91/658/EEC granting a medium-term loan to the Soviet Union and its constituent Republics (OJ 1991 L 362, p. 89).

3 Article 1(1) thereof provides:

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

4 Article 2 of Decision 91/658 provides that for those purposes:

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

5 Article 3 provides:

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

6 Article 4 further provides:

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

...

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

7 On 9 July 1992 the Commission adopted Regulation (EEC) No 1897/92 laying down detailed rules for the implementation of a medium-term loan to the Soviet Union and its constituent Republics [in accordance with] Council Decision 91/658/EEC (OJ 1992 L 191, p. 22).

8 Under Article 2 of that regulation:

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

9 Article 4 of Regulation No 1897/92 states that:

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

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

10 Article 5 sets out the conditions of recognition pursuant to Article 4. These include the two following conditions:

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

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

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

12 Paragraph 6 of the Memorandum provides:

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

13 Paragraph 7 sets out the conditions to which recognition of the conformity of the contract is subject. It states in particular that the suppliers are to be selected by Russian organisations designated to that end by the Government of the Russian Federation.

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

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

Facts and procedure before the Court of First Instance

16 In the contested judgment the Court of First Instance made the following findings:

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

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

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

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

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

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

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

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

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

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

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

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

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

21. According to the applicant, the documentation containing the new bids and the amendments to the contract were officially sent by the VEB to the Commission on 22 and 26 March 1993. The applicant maintains that on 5 April 1993 it was informed by Exportkhleb of the Commission's refusal to approve the amendments to the contract as initially concluded; that refusal was given concrete form by a

letter sent to the VEB on 1 April 1993 by the Agriculture Commissioner. On that same day, 5 April 1993, the applicant decided to stop its deliveries of wheat.

22. The contents of the letter of 1 April 1993 may be summarised as follows. The Commissioner, Mr R. Steichen, stated that, having examined the amendments to the contracts concluded between Exportkhleb and various suppliers, the Commission was prepared to accept those relating to the postponement of the final dates for delivery and payment. On the other hand, "the magnitude of the price increases is of such a nature that we cannot consider them as a necessary adaptation but as a substantial modification of the contracts initially negotiated". He went on to state: "In fact, the present level of prices on the world market (end of March 1993) is not significantly different from the level which prevailed at the time when the initial prices were agreed (end of November 1992)." The Commissioner pointed out that the need, first, to ensure free competition between potential suppliers and, second, to secure the most favourable purchase terms constituted one of the main factors governing the approval of contracts by the Commission. He found that, in the present case, the amendments had been negotiated directly with the companies concerned, without any competition with other suppliers, and concluded: "The Commission cannot approve such major changes as simple amendments to existing contracts." The Commissioner stated that he would be willing to approve the amendments relating to the postponement of delivery and payment, subject to compliance with the usual procedure. On the other hand, he stated that "should it be considered necessary to modify the prices or quantities, it would then be appropriate to negotiate new contracts to be submitted to the Commission for approval under the full usual procedure (including submission of at least 3 offers)".

...

23. It was in those circumstances that, by application lodged at the Registry of the Court of Justice on 9 June 1993 ..., the applicant brought the present action.

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

25. ... By document lodged at the Registry on 15 September 1993 the Commission raised an objection of admissibility.'

17 The contested judgment indicates that the applicant requested the Court to annul the Commission's decision of 1 April 1993 refusing to approve the amendments to the supply contract concluded with Exportkhleb (hereinafter 'the contested decision'), and to order the Commission to pay it compensation for the pecuniary damage suffered by it, amounting to ECU 253 991.98 in respect of loss of interest, ECU 1 347 831.56 in respect of the difference between the initial contract price and the amended contract price and USD 229 969.58 in respect of loss on the ecu/USD exchange rate, and ECU 1 as compensation for the non-material damage suffered (paragraph 28).

18 The Commission raised an objection of inadmissibility, contending that the Court should:

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

— declare either that the contested decision does not give rise to liability on the part of the Commission or that the action is inadmissible since it concerns a complaint which does not put the Commission's non-contractual liability in issue' (paragraph 29).

The contested judgment

Admissibility of the action for annulment

- 19 The Court of First Instance dismissed the action for the annulment of the contested decision as inadmissible on the following grounds:

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

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

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

49. The Community rules and the agreements concluded between the Community and the Russian Federation provide for a division of powers between the Commission and the agent appointed by the Russian Federation to arrange the purchase of wheat. It is for that agent — in the present case, Exportkhleb — to select the other contracting party by means of an invitation to tender and to negotiate and

conclude the contract. The Commission's role is merely to verify that the conditions for Community financing are fulfilled and, where necessary, to acknowledge, for the purposes of the disbursement of the loan, that such contracts are in conformity with the provisions of Decision 91/658 and with the agreements concluded with the Russian Federation. It is not for the Commission, therefore, to assess the commercial contract with reference to any other criteria.

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

51. The action of the Commission does not therefore affect the legal validity of the commercial contract concluded between the applicant and Exportkhleb; nor does it modify the terms of the contract, particularly as regards the prices agreed by the parties. Thus, irrespective of the Commission's decision not to recognise the agreements as being in conformity with the applicable provisions, the amendment which the parties made on 23 February 1993 to their contract of 28 November 1992 remains validly concluded on the terms agreed between them.

52. The fact that the Commission was in contact with the applicant or with Exportkhleb cannot affect that assessment of the legal rights and obligations which each of the parties involved has under the applicable legislation and contractual agreements. Moreover, as regards the admissibility of the application for annulment, the exchanges relied on by the applicant do not show that the Commission went beyond its proper role. Thus, the letter sent by the Commission to Exportkhleb on 12 March 1993 expressly states that the amendments required an official

request from the VEB. Similarly, the sole purpose of the alleged contacts between the Commission and the applicant in January 1993 was to have the parties include in their contract a condition which was indispensable for acceptance of conformity but it was left to the parties alone to modify their contract if they wanted to secure the financing provided for. Lastly, the fact that, several weeks before the adoption of its decision, the Commission held a meeting in Brussels with the applicant in order to explain its position does not as such establish that that decision was of direct concern to the applicant.

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

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

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

20 The Court of First Instance declared admissible, however, the claims for compensation for the material and non-material damage allegedly suffered by the applicant on grounds which are not contested in this appeal.

21 In the light of those considerations, the Court of First Instance:

(1)dismissed the application for annulment as inadmissible;

(2)dismissed the objection of inadmissibility inasmuch as it concerned the claims for compensation for the material and non-material damage allegedly suffered by the applicant;

(3)ordered the procedure relating to those claims for compensation to be continued in relation to the substance;

(4)reserved the costs.

The appeal

22 In support of its appeal Dreyfus relies on two pleas: infringement of the fourth paragraph of Article 173 of the Treaty and contradictory reasoning vitiating the judgment.

The first plea

23 The first plea is divided into three limbs.

24 First, the appellant criticises the Court of First Instance's conclusion that, in the absence of direct legal relations with the Commission, the appellant could not be directly concerned by the decision since the 'validity of the contract' or 'its terms' were not affected (paragraphs 49, 50 and 51 of the contested judgment). However, the Court of Justice, and indeed the Court of First Instance itself, have held that an individual may be directly concerned, even if he has not entered into legal relations with the Commission, where his 'legal or factual situation' is directly affected by the decision (Joined Cases 41/70 to 44/70 *International Fruit Company and Others v Commission* [1971] ECR 411, Case C-135/92 *Fiskano v Commission* [1994] ECR I-2885 and Case T-83/92 *Zunis Holding and Others v Commission* [1993] ECR II-1169).

25 That is the case, the appellant submits, in triangular transactions where the national authority entrusted with implementing the Community decision has no margin of discretion, as in the present case.

26 The parties had provided in their contract that it would be subject to the Commission's approval and that payment of the price would be by way of the Community loan. Therefore, that loan and the loan agreement entered into in that connection between the Commission and the Russian Federation were both the precondition for the performance of the contract and the sole means of payment, not only *de facto* but also *de jure*.

- 27 As a result, contrary to what was stated in the judgment appealed against, the appellant's legal and factual situation was directly affected by the contested decision because the Russian authorities were obliged to pay the new price provided for in the addendum to the contract only and in so far as the Community loan was forthcoming.
- 28 The appellant goes on to criticise the Court of First Instance for taking the view that 'the Commission's decision does not take the place of a decision taken by the Russian national authorities, since the Commission may only examine the conformity of contracts for the purposes of Community financing' (paragraph 53). Relying on the judgment in *International Fruit Company*, cited above, the appellant maintains on the contrary that, in the absence of any discretion exercisable on the part of the Russian authorities in implementing the contested decision, that decision directly and automatically affected the appellant's legal situation under the contract. Consequently, the Russian authorities had no alternative but to note that the Commission had not given its approval and, thus, to pay for the supplies of wheat at the old price under the initial contract and not at the new price agreed on in the addendum to the contract.
- 29 Finally, the appellant challenges the statement by the Court of First Instance that the 'suspensory clause making performance of the contract and payment of the contract price subject to acknowledgement by the Commission that the criteria for disbursement of the Community loan are fulfilled ... is a link which the contracting parties decide to make between the contract concluded by them and a contingent future event; their agreement will be binding only if the latter occurs', and the conclusion it drew from that finding, namely that 'the admissibility of an application under the fourth paragraph of Article 173 of the Treaty cannot ... be made to depend on the intention of the parties' (paragraph 54 of the judgment appealed against).
- 30 The appellant submits that under the Court's case-law only the effect of the contested decision on the 'legal or factual situation' of the applicant is relevant in determining whether it is directly concerned by the decision, even if that effect is linked to an intentional act on the part of the parties prior to the contested decision.

31 The Commission challenges the admissibility of the appeal on the ground that nearly all the arguments put forward merely reproduce arguments developed by the appellant before the Court of First Instance. It has consistently been held that an appeal which merely repeats or reproduces verbatim pleas and arguments already raised at first instance does not satisfy the requirements of Article 51 of the EC Statute of the Court of Justice and Article 112(1)(c) of its Rules of Procedure.

32 As to the substance, the Commission observes as a preliminary matter that the contractual clauses on which the appellant relies are far from clear and refutes the argument that, in the absence of approval by the Commission, the contractual obligation to pay came to an end. The contract at issue could only be interpreted by the competent jurisdiction, that is to say that chosen by the contracting parties in the contract itself, namely the Moscow Chamber of Commerce and Industry. Dreyfus has never brought the matter before that body.

33 The Commission also cites Annex 25 to the application originating the proceedings before the Court of First Instance, in which Dreyfus produced a fax which it sent on 6 April 1993 to Exportkhleb and in which it pressed it for payment, notwithstanding the contested decision, in these terms:

‘We trust you will understand that we consider we have with you a firm contract ... and must insist on fulfilment of your obligations under the contract.’

34 As regards the first limb of the first plea, the Commission considers that, for an action for the annulment of a Commission decision to be admissible, the decision must produce effects in Community law with regard to the applicant, failing which it is not directly concerned by the decision. The effect relied on by the appellant stems solely from the contractual clauses which it invokes.

35 As regards the second limb of the first plea and, in particular, the reference to the judgment in *International Fruit Company*, cited above, the Commission observes that in that case its refusal to issue import licences for dessert apples originating in non-member countries had been notified to the applicant through the *Produktschap voor Groenten en Fruit* in The Hague. Thus, the legal effect of the Commission's decision on the applicants stemmed directly from that decision, even if it was formally addressed to the Netherlands body.

36 In the present case, by contrast, the request for advance payments under the loan granted to the Russian Federation was apparently addressed to the Commission by the VEB on behalf of Russia (and not Dreyfus) and the alleged effect was merely a result of a combination of the contested decision and the terms of the contract, to which the Commission is not a party.

37 As regards the third limb of the first plea the Commission considers that the argument that the contractual clause predated the contested decision is wholly irrelevant. Moreover, judicial review of its decisions cannot be subject to arrangements under private law to which the Commission is not a party.

38 As regards the objection of inadmissibility raised by the Commission, the appeal clearly states which aspects of the contested judgment are criticised and the legal arguments which specifically support the appeal (see, in particular, the order of 26 April 1993 in Case C-244/92 P *Kupka-Floridi v Economic and Social Committee* [1993] ECR I-2041, paragraph 9). Accordingly, the fact that those arguments were also raised at first instance cannot entail their inadmissibility.

39 The objection of inadmissibility must therefore be dismissed.

40 Under the fourth paragraph of 173 of the Treaty, any natural or legal person may institute proceedings for the annulment of a decision addressed to that person or of a decision which, although in the form of a decision addressed to another person, is of direct and individual concern to the former.

41 In the present case the contested decision was formally addressed to the VEB.

42 The Court of First Instance dealt only with the question whether the applicant was directly concerned by the contested decision, since the Commission had not denied that the applicant was individually concerned.

43 The Court's case-law shows that, for a person to be directly concerned by a Community measure, the latter must directly affect the legal situation of the individual and leave no discretion to the addressees of that measure who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from Community rules without the application of other intermediate rules (see to that effect, in particular, *International Fruit Company*, cited above, paragraphs 23 to 29, Case 92/78 *Simmenthal v Commission* [1979] ECR 777, paragraphs 25 and 26, Case 113/77 *NTN Toyo Bearing Company and Others v Council* [1979] ECR 1185, paragraphs 11 and 12, Case 118/77 *ISO v Council* [1979] ECR 1277, paragraph 26, Case 119/77 *Nippon Seiko and Others v Council*

and Commission [1979] ECR 1303, paragraph 14, Case 120/77 *Koyo Seiko and Others v Council and Commission* [1979] ECR 1337, paragraph 25, Case 121/77 *Nachi Fujikoshi and Others v Council* [1979] ECR 1363, paragraph 11, Joined Cases 87/77, 130/77, 22/83, 9/84 and 10/84 *Salerno and Others v Commission and Council* [1985] ECR 2523, paragraph 31, Case 333/85 *Mannesmann-Röhrenwerke and Benteler v Council* [1987] ECR 1381, paragraph 14, Case 55/86 *Arposol v Council* [1988] ECR 13, paragraphs 11 to 13, Case 207/86 *Apesco v Commission* [1988] ECR 2151, paragraph 12, and Case C-152/88 *Sofrimport v Commission* [1990] ECR I-2477, paragraph 9).

44 The same applies where the possibility for addressees not to give effect to the Community measure is purely theoretical and their intention to act in conformity with it is not in doubt (see to that effect Case 62/70 *Bock v Commission* [1971] ECR 897, paragraphs 6 to 8, Case 11/82 *Piraiiki-Patraiki and Others v Commission* [1985] ECR 207, paragraphs 8 to 10, and Joined Cases C-68/94 and C-30/95 *France and Others v Commission* [1998] ECR I-1375, paragraph 51).

45 The Court of First Instance should therefore have determined whether the contested decision alone affected the appellant's legal situation, since the competent Russian authorities had no discretion to forgo Community financing and have the contract performed in accordance with the conditions agreed between the parties in the addendum but repudiated by the Commission.

46 The Court of First Instance merely found that the decision of the Commission, 'which may only examine the conformity of contracts for the purposes of Community financing', had not affected 'the legal validity of the commercial contract concluded between the applicant and Exportkhleb' and did not modify 'the terms of the contract, particularly as regards the prices agreed by the parties', and that the 'amendment which the parties made on 23 February 1993 to their contract of 28 November 1992 [remained therefore] validly concluded on the terms agreed between them' (paragraphs 51 and 53). It added that the presence in the contract of a 'suspensory clause making performance of the contract and payment of the contract price subject to acknowledgment by the Commission that the criteria for

disbursement of the Community loan are fulfilled' resulted from the intention of the parties themselves, on which the admissibility of an action under the fourth paragraph of Article 173 could not be made to depend (paragraph 54).

47 However, the findings of the Court of First Instance contain objective, relevant and consistent grounds for concluding that the appellant was directly concerned by the contested decision.

48 The contested judgment indicates that the VEB, acting as financial agent for the Russian Federation, participated, in accordance with the Memorandum of Understanding and the loan agreement which binds it to the Commission, in the implementation of the Community financing of imports into the Russian Federation of agricultural and food products and medical supplies, as provided for in Decision 91/658.

49 Moreover, it appears that the validity of the supply contract at issue was subject to the suspensory condition of recognition by the Commission of conformity of the contract with the conditions for disbursement of the Community loan and no payment could be made if the bank designated in the contract did not receive a due undertaking for reimbursement issued by the Commission.

50 That detail is corroborated by the socio-economic context in which the supply contract was concluded: as stated in the third and fourth recitals in the preamble to Council Decision 91/658, the economic and financial situation of the recipient republic was critical, and the food and medical situation was deteriorating. In those circumstances it was legitimate to take the view that the supply contract was

entered into only subject to the obligations assumed by the Community, in its capacity as lender, in regard to the VEB, once the commercial contracts had been recognised as being in conformity with Community rules.

51 In those circumstances the insertion into the contract of that suspensory clause, which was certainly the intention of the parties, merely reflected, as was emphasised by the Advocate General in point 69 of his Opinion, the fact that the supply contract was subject for financial reasons to the conclusion of the loan agreement between the Community and the republic in question, since payment for supplies of cereals could be made only from financial resources made available to the purchasers by the Community by means of the opening of irrevocable documentary credits.

52 Exportkhleb's option to perform the supply contracts in accordance with the price conditions repudiated by the Commission and thus to forgo Community financing was purely theoretical and, in the light of the facts found by the Court of First Instance, was therefore not sufficient to prevent the appellant from being directly concerned by the contested decision.

53 It is thus clear that the contested decision whereby the Commission, in the exercise of its powers, refused to approve the addendum to the supply contract between Exportkhleb and Dreyfus deprived the latter of any real possibility of performing the contract awarded to it, or of obtaining payment for supplies made thereunder.

54 Consequently, although the contested decision was addressed to the VEB, as financial agent of the Russian Federation, it directly affected the appellant's legal situation.

55 The Court of First Instance therefore erred in law in taking the view, in the light of the facts as found by it, that the appellant was not directly concerned, within the meaning of the fourth paragraph of Article 173 of the Treaty, by the contested decision.

56 The appeal is therefore well founded in so far as it relates to the dismissal as inadmissible of the action for annulment by the contested judgment.

The second plea

57 In view of the foregoing there is no need to examine the second plea.

Referral back of the case to the Court of First Instance

58 Under the first paragraph of Article 54 of the EC Statute of the Court of Justice, 'if the appeal is well founded, the Court of Justice shall quash the decision of the Court of First Instance. It may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the Court of First Instance for judgment.'

59 In the present case, the Court is of the view that it is not in a position to give judgment in the present state of the proceedings and that the case must therefore be referred back to the Court of First Instance for judgment on the substance.

On those grounds,

THE COURT

hereby:

1. Annuls the judgment of the Court of First Instance of 24 September 1996 in Case T-485/93 *Dreyfus v Commission* in so far as it dismisses as inadmissible the action for annulment brought by Louis Dreyfus & C^{ie};
2. Refers the case back to the Court of First Instance for judgment on the substance;
3. Reserves costs.

Rodríguez Iglesias

Gulmann

Ragnemalm

Wathelet

Schintgen

Mancini

Moitinho de Almeida

Kapteyn

Murray

Edward

Puissochet

Hirsch

Jann

Sevón

Ioannou

Delivered in open court in Luxembourg on 5 May 1998.

R. Grass

G. C. Rodríguez Iglesias

Registrar

President