financing decisions on behalf of the Community, the responsibility for preparing, negotiating and concluding the contracts falls to the authorities of the ACP State.

It follows that no act or omission on the part of the Commission can, as far as tenderers are concerned, be the subject of an action under the second paragraph of Article 173 or the third paragraph of Article 175 of the EEC Treaty.

Whilst such undertakings are entitled to bring an action to establish liability under Article 178 and the second paragraph of Article 215 of the Treaty, the Commission can be held liable only if, in the exercise of the strictly limited powers conferred on it by the Convention, it adopted an unlawful measure or engaged in improper conduct.

# REPORT FOR THE HEARING
## in Case C-257/90 *

### I — Legal background to the dispute

The third convention signed at Lomé on 8 December 1984 [1] provides, in Article 192, in Title III, which concerns financial and technical cooperation:

'1. Operations financed by the Community shall be implemented by the ACP States and the Community in close cooperation, the concept of equality between the partners being recognized.

2. The ACP States shall be responsible for:

...

(d) preparing, negotiating and concluding contracts;

...

4. The Community shall be responsible for taking financing decisions on projects and programmes.'

Article 222 of the convention provides:

'1. For any project or programme financed by a grant from the Fund, a financing agreement shall be drawn up between the Commission, acting on behalf of the

* Language of the case: Italian.
1 — OJ 1986 L 86, p. 1.

Community, and the ACP States concerned.

...'

Pursuant to Article 225(3) of the Convention:

'3. The ACP States, and the other beneficiaries authorized by them, shall execute the projects and programmes financed by the Community; they shall in particular be responsible for preparing, negotiating and concluding the necessary contracts for the execution of these operations'.

Pursuant to Article 226(2):

'2. In close cooperation with the National Authorizing Officer, the Chief Authorizing Officer shall ensure equality of conditions for participation in invitations to tender and see to it that there is no discrimination in the invitation to tender dossier and that the tender selected is economically the most advantageous. The Chief Authorizing Officer shall receive the result of the examination of the tenders and approve the proposal for the placing of the contract, subject to the powers exercised by the Commission delegate under Article 228.'

Finally, pursuant to Article 45(1) of the provisions regulating public works and supply contracts financed by the European Development Fund: [2]

'1. The committee shall propose to the administration [3] the most economically advantageous offer, having regard in particular to the price of the services, the cost of using them, their technical value and the financial guarantees.

2. The proceedings of the committee shall be recorded in minutes which shall not be made public or disclosed to any tenderer. The minutes shall be initialled by the members of the committee.

For information purposes, the administration shall notify its choice to the tenderer chosen by it by means of a registered letter with a form for acknowledgment of receipt

...

The administration shall also send registered letters to the other tenderers informing them that their tenders have been rejected.

The administration shall not be required to disclose the reasons for its choice.

...'

2 — JO 1972 L 39, p. 3.

3 — Article 4(4) of the regulatory provisions states that 'administration' is to be understood as meaning 'the State, a territorial collectivity or any person governed by public law in whose name the contract is concluded'.

## II — Facts and procedure

1. *Facts*

Under the Third Lomé Convention, the Community decided to finance, out of the sixth European Development Fund, [4] a regional programme for the use of solar photovoltaic energy in the Sahel countries, presented by the Interstate Permanent Committee for Drought Control in the Sahel (ICDCS).

The programme involves the large-scale introduction of photovoltaic equipment in order to make the use of solar energy more generally available in the rural areas of the nine countries of the Sahel. [5]

Pursuant to Article 222 of the convention, an agreement for the financing of the project was established between the Community, represented by the Commission, and the nine Member States in question, represented by the ICDCS.

Following Notice No 2731 concerning a preselection procedure, [6] Italsolar submitted an application to take part in the restricted call for tenders identified as Project No 6100.20.94.216 (REG/6116).

Article IV of the special conditions of the call for tenders indicated that the contract was divided into three lots. [7] Tenders could be submitted for one, two or three lots.

It was indicated that the applicable general conditions were the 'General conditions for public works and supply contracts financed by the European Development Fund' referred to above.

Tenders were to include separate details of (a) the characteristics of the equipment and the prices for the supply and installation thereof and (b) the procedures for commissioning it and the prices of certain after-sale services (establishment of a network for the sale of spare parts, maintenance of equipment and training of personnel).

By letter of 6 July 1989, signed by the executive secretary of the ICDCS, Italsolar was invited to take part in the restricted call for tenders and was informed that it should send its tender before 6 November 1989, drawn up in accordance with the tender dossier, to the Directorate General for Development (DG VIII) of the Commission of the European Communities.

Italsolar submitted its tender within the prescribed period for the second and third lots.

4 — Established by the internal agreement on the financing and administration of Community aid (86/126/EEC), OJ 1986 L 86, p. 210.

5 — Burkina Faso, Cape Verde, Gambia, Guinea Bissau, Mauritania, Niger, Senegal and Chad.

6 — OJ 1988 S 62.

7 — Lot No 1: Cape Verde, Gambia, Guinea Bissau, Mali, Mauritania, Niger, Senegal and Chad;
Lot No 2: Burkina Faso and Mali;
Lot No 3: Niger and Chad.

On 7 November 1989, the envelopes containing the tenders received were opened at the Commission's offices in Brussels. The tenders were then examined and evaluated. At that time, information and explanations of various kinds were sought from the tenderers and from the competent ministries of the Member States of the ICDCS.

By letter of 14 November 1989 from DG VIII, Italsolar was asked to provide additional information on the technical specifications of the equipment, references concerning its previous use in overseas countries and the prescribed procedures for its installation, and organization of the after-sal service. The applicant provided all that information within the time limits laid down.

On 27 November 1989, officials were sent to Italsolar's premises in Italy for a technical examination of its products.

By letter of 5 March 1990, the executive secretary of the ICDCS asked Italsolar to extend the validity of its tender by two months to allow completion of the analysis of the tenders and consultation between the beneficiaries and the Commission of the European Communities financing the programme.

The ICDCS then proposed that the contract be awarded provisionally to undertakings other than Italsolar and that the trial phase should be proceeded with in respect of those undertakings, in accordance with Article 5 of the technical annex to part A of the tender documents. That proposal was approved by the Commission on 30 April 1990.

The ICDCS therefore informed Italsolar by telex message of 3 May 1990 that its tender had been rejected and confirmed that fact by letter of 7 May 1990.

By letter of 7 May 1990, Italsolar, referring to the text of the telex message, asked the Commission to take steps to rectify the situation and reserved the right to bring the matter before the appropriate courts.

The Commission replied by letter dated 12 June 1990, informing Italsolar that the power to award the contract for the lot in question was vested in the executive secretary of the ICDCS since the Regional Solar Programme under which the contract would be awarded was to be implemented under the responsibility of that body. The Commission added that in any event the ICDCS had obtained the assistance of international experts in assessing the technical details of the various tenders and that the overall assessment of the economically most advantageous tender, in accordance with the tender dossier, had taken account not only of the intrinsic quality of the equipment but also of the viability of the separate items and, in particular, of the after-sale service and the guarantees offered regarding maintenance. Finally, the Commission reminded Italsolar that, pursuant to Article 45(2), subparagraph 5, of the regulatory provisions, the Administration was under no obligation to state the reasons for its decision.

By letter of 9 July 1990 addressed to the executive secretary of the ICDCS, Italsolar claimed that the decision to exclude it from the subsequent stages of the tendering procedure was vitiated by misuse of powers and infringed procedural and substantive rules applicable to public contracts financed by

the EDF. In that letter, Italsolar also formally requested withdrawal of the decision excluding it and authorization to participate in the subsequent stages of the procedure, in particular the workshop tests, until the contract was ultimately awarded. In the alternative, Italsolar asked that its complaint be forwarded to such authority as might be competent in that regard. In the absence of measures favourable to Italsolar, the latter would initiate the arbitration procedure provided for in Article 238 of the Lomé Convention III, in order to secure recognition of its right to participate in the procedure and to have the contract awarded to it by reason of its most economically advantageous offer, failing which to have damages paid to it.

In the event, on 4 December 1990 Italsolar lodged an application with the International Chamber of Commerce for arbitration proceedings against the ICDCS.

2. *Written procedure*

On 22 August 1990, the applicant brought an action before the Court of Justice against the Commission on the basis of the second paragraph of Article 173, the third paragraph of Article 175, Article 178 and the second paragraph of Article 215 of the EEC Treaty and at the same time applied for interim measures. The latter application was dismissed by order of the President of the Court of 25 October 1990.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry and to assign the case to the Sixth Chamber.

3. *Forms of order sought by the parties*

The *applicant* claims that the Court should:

— declare the application admissible in its entirety;

— declare null and void the Commission decision notified to the applicant by letter of 12 June 1990 and in the alternative declare that the Commission has failed to take the measures that it was required to take vis-à-vis the applicant;

— order the Commission to pay damages to the applicant;

— order the Commission to pay the costs, including those of the proceedings for interim measures.

The *defendant* contends that the Court should:

— declare the application inadmissible in so far as it is based on Articles 173 and 175 of the Treaty and, in the alternative, dismiss it as unfounded;

— dismiss the application as unfounded in so far as it is based on Articles 178 and 215, second paragraph, of the EEC Treaty;

— order the applicant to pay the costs, including those of the proceedings for interim measures.

III — Pleas in law and arguments of the parties

1. *Admissibility*

The Commission considers that the application is inadmissible in so far as it is based on Articles 173 and 175 of the Treaty.

The procedure for the conclusion of public contracts established within the framework of financial and technical cooperation by the ACP-EEC Conventions involves a division of authority as between the Commission and the authorities of the ACP States.

Whilst it is the responsibility of the Commission, acting on behalf of the Community, to take the decisions on financing, the responsibility for preparing, negotiating and concluding the contracts rests with the authorities of the ACP States. It follows, as the Court has consistently held, [8] that as far as tenderers are concerned there can be no act or omission on the part of the Commission such as to found an action for annulment or for failure to act.

That applies in particular to the present case where the contested measure, namely the letter sent by the Commission to the applicant on 12 June 1990, manifestly does not rank as a decision, merely referring to a position previously taken by the ICDCS.

Whilst it is true that the Commission gave assistance to the ICDCS, in particular regarding the physical and logistical organization of the tendering procedure, that does not mean that the Commission stands in the place of the ICDCS in the conduct of the tendering procedure. Indeed, the ICDCS supervised the examination of the tenders, led the technical committee and made the proposal concerning the provisional award of contract, in accordance with the powers reserved to it by the Third Lomé Convention.

On the other hand, it is apparent from the case-law of the Court that the application for compensation is admissible, even though the Commission contends, in its rejoinder, that the calculation of the quantum of damages, put forward by the applicant for the first time in its reply, is inadmissible.

The *applicant* maintains that the letter of 12 June 1990 constitutes the Commission's definitive decision on the facts described to it by Italsolar and that that letter is capable of adversely affecting its legal situation, even though formally — and only formally — the measure adversely affecting it is the document bearing the signature of the executive secretary of the ICDCS.

The contested measure is addressed to the applicant and is an external manifestation of the Commission's refusal to rectify the error complained of by the applicant. The present application thus differs from those in previous actions which were dismissed as inad-

8 — Judgments in: Case 126/83 *STS* v *Commission* [1984] ECR 2769, Case 118/83 *CMC* v *Commission* [1985] ECR 2325, Case 33/82 *Murri* v *Commission* [1985] ECR 2759 and Case 267/82 *Clemessy* v *Commission* [1986] ECR 1907.

missible by the Court on the ground that they were directed against Commission measures addressed to an ACP State, approving the award or the signature of a contract.

The *failure to act* of which the Commission is accused relates not to the award of the contract and signature of the document relating thereto but to the duties entrusted to the Commission by the Third Lomé Convention, namely a duty of assistance regarding organization of the tendering procedure and a duty of care during the course of that procedure. The Commission should see to it that the adminstration which makes the award complies with the principles of equality and non-discrimination and chooses the most economically advantageous tender.

The *damage* suffered by the applicant has been made irreversible by the Commission's refusal to carry out in full the institutional role entrusted to it under the Third Lomé Convention and its failure to react, using the means available to it, to the unlawful exclusion of the applicant. If the Commission had acted properly, that damage could have been avoided.

As the Court has held in the past, the availability to tenderers under the Lomé Convention of arbitration proceedings against the authorities in the ACP countries does not deprive them of the legal protection that they enjoy under the EEC Treaty vis-à-vis the Commission. By commencing arbitration, the applicant certainly had no intention of releasing the Commission from its responsibilities under Community law.

That is why the applicant considers that its action for damages and its applications based on Articles 173 and 175 of the Treaty should be considered admissible.

2. *Substance*

A — The applicant considers that the decision notified by the Commission to the applicant by letter of 12 June 1990 is *unlawful* and that in any event the Commission *did not take the measures necessary* to safeguard the applicant's interests. As a result, the applicant suffered serious *damage*.

1. *The action for annulment*

The applicant maintains that the *reasons* for its exclusion were not notified to it either by the ICDCS or by the Commission. The rule in the Regulatory Provisions which relieves the administration of the obligation to give the reasons for its choice is contrary to Article 190 of the EEC Treaty. The applicant refers in that regard to Article 5a of the new Council directive concerning public works contracts, [9] pursuant to which the contacting authority is required to inform any unsuccessful tenderer of the reasons for the rejection of his tender.

9 — Council Directive 89/440/EEC of 18 July 1989 amending Directive 71/305/EEC concerning coordination of procedures for the award of public works contracts (OJ 1989 L 210, p. 1).

Similarly illegal is the rule whereby the minutes recording the proceedings of the committee responsible for awarding contracts are secret.

Consequently, the applicant formally pleads that those provisions are unlawful. It states that the Council and the Commission have drawn up directives designed to eliminate discrimination and abuse in the award of public contracts by the authorities of the Member States and to provide adequate legal remedies for undertakings which are excluded, whereas Community undertakings taking part in tendering procedures for projects financed entirely out of Community funds and administered by Commission officials, with the purely formal involvement of the ACP countries, are reduced to suffering unjustifiable damage without any real possibility of securing full satisfaction.

The applicant also maintains that the Commission has been guilty of *serious and inexcusable negligence* in the discharge of its duties regarding conclusion of the contract and verification of the propriety thereof.

There were no possible *bona fide* grounds for taking exception to Italsolar's tender so as to justify its exclusion at a relatively early stage in the selection procedure, that is to say before the technical workshop tests designed to test the equipment. In fact, Italsolar's tender was not only — by far — the best in terms of price, it was also technically irreproachable in the opinion of the Commission's own experts. The exclusion of the applicant coincided with its refusal to agree to fulfil the excessive requirements imposed by certain ICDCS executives.

The applicant rejects the grounds on which its tender was excluded, namely the alleged weakness of its after-sale service. It had provided ample evidence of its experience, its commitment and its organizational capacity, and of its local contacts with important companies in the countries concerned. Moreover, the applicant is part of the ENI group, which has considerable experience.

Therefore, the applicant considers that the decision whereby the Commission supported the ICDCS decision to exclude it from the contract procedure must be declared invalid, since the Commission made it clear, by so doing, that it wished to hide behind the ICDCS in order not to fulfil its obligation to ensure the proper conduct of the procedure for the award of contracts financed out of Community funds.

2. *The action for failure to act*

If, impossible though it might seem, the Court should decide that the measure adopted by the Commission regarding Italsolar did not constitute a decision within the meaning of Article 189 of the Treaty, the applicant states that the Commission in any event committed the sin of *omission* vis-à-vis the applicant by failing to intervene to ensure that it was readmitted to the tendering procedure.

In its view, the argument that it is solely for the authorities in the ACP States to award

and sign the contracts is unacceptable. The failure to act of which the Commission is accused does not relate to the award and signature of the contract but specifically to the duties assigned to the Commission by the Lomé Convention, namely a duty of assistance regarding the call-for-tenders procedure and a duty of care whilst the procedure was carried through. The Commission was under an obligation to ensure that the Administration observed the principle of non-discrimination as between tenderers and chose the tender which proved to be the most economically advantageous.

3. *The action for compensation*

The — at the very least — negligent conduct of the Commission gave rise to the *damage* suffered by Italsolar, in so far as it was one of the originating causes thereof.

It is generally accepted that in order to establish a *causal link* between a measure and the damage suffered, it is sufficient that the measure in question was one of the causes of the damage, without its having necessarily been the sole cause.

The *damage* suffered by Italsolar as a result of the Commission's conduct is unjust in so far as exclusion of the tenderer who lodged the most economically advantageous tender, probably as as result of its refusal to support an attempted misappropriation of funds, is not a normal risk to which any undertaking that decides to take part in a tendering procedure is exposed.

The component factors of that damage are, in the first place, all the costs incurred by the applicant in taking part in the tendering procedure. Furthermore, although relying on the Court's judgment in that regard, the applicant considers that it is reasonable to claim compensation for the profit which it expected to obtain from the contract, which it puts at 15% of the price offered for each lot.

B — The *Commission* states, with regard to the *action for compensation*, that the applicant has produced no evidence to show that the Commission was guilty of serious and inexcusable negligence in the performance of the duties entrusted to it for implementation of the tendering procedure and verification of the propriety thereof.

The tendering procedure was conducted normally, with the participation of a technical committee responsible for evaluation of the tenders, made up of independent experts.

The Commission states that the role assigned to it by the Lomé Convention is not to act in the stead of the technical committee. In the present case, the Commission found that the technical committee had proceeded in a correct and proper manner. The Commission had found no reason to disagree with the conclusions of the independent experts which were taken as the basis for the proposal for a provisional award of contract made by the ICDCS.

The technical committee's approach to Italsolar had been made by two of its members

and by the Commission official who was present at the proceedings of the technical committee. Far from proving-as the applicant claims-that the defendant was, at that stage of the tendering procedure, 'substituted for the ICDCS', those facts show, on the contrary, the commitment and seriousness with which both the Commission and the technical committee carried out their respective tasks.

The decision taken by the ICDCS not to choose the applicant's tender, even it was for the lowest amount, was justified in particular by the inadequacy of the after-sale service offered. In that regard, the Commission stresses that the success of the entire solar programme is largely dependent on the possibility of providing a service making assistance available to the users rapidly, effectively and economically.

Having regard to the requirements laid down in the general conditions, the after-sale service offered by Italsolar was vague and incomplete and was based on non-specialized private organizations or organizations without any solid reputation in the industry.

The Commission therefore considers that its conduct cannot be described as unlawful and that there is no basis whatsoever for any liability on the part of the Community.

The Commission formally contests the quantum of damages claimed by the applicant.

The Commission contends, in the alternative, that it is apparent from the foregoing that the actions for annulment and compensation are not only inadmissible but also unfounded.

J. L. Murray
Judge-Rapporteur