REPORT FOR THE HEARING
delivered in Case 114/86 *

I — Facts

In the framework of the Second ACP-EEC Convention of Lomé (hereinafter referred to as 'Lomé II') signed at Lomé on 31 October 1979 and approved by Council Regulation No 3225/80 of 25 November 1980 (Official Journal 1980, L 347 p. 1), the European Community and its Member States provide financial and technical assistance to certain developing states (collectively referred to as the 'African, Caribbean and Pacific (or ACP) States'). This assistance is financed from the resources of the Fifth European Development Fund (hereinafter referred to as 'the EDF'), established by the Internal Agreement of 1979 on the financing and administration of Community aid (Official Journal 1980, L 347 p. 210).

This case relates to the award of service contracts under Chapter 10 of Title VII of Lomé II. Although Lomé II expired on 28 February 1985 several provisions, including Title VII on financial and technical cooperation, have been maintained in force after 28 February 1985 pursuant to a number of Council regulations of which the most recent is Regulation No 690/86 of 3 March 1986 (Official Journal 1986, L 63, p. 1). To the extent that these provisions of Lomé II remain in force, the Fifth EDF set up for its implementation also remains in force. The Internal Agreement of 1979 provides that the EDF shall remain in force for as long as is necessary for all the operations financed under the Convention to be fully executed (Article 31) and also that the remaining balance of previous development funds shall continue to be administered as provided for in the appropriate internal agreement and in accordance with the rules and regulations in force on 1 March 1980 (Article 30). Similarly, Lomé II, at Article 110 (1) (c), provides that any balance remaining from the Fund that has not been committed by the end of the last year of the application of the Convention will be utilized until it has been exhausted, in accordance with the same conditions as those laid down in Lomé II.

The placing and award of service contracts is dealt with in Chapter 10 of Title VII. According to Article 140 (1), service contracts are to be concluded 'with consultancy firms or consulting engineers or experts recruited with reference in particular to their professional qualifications and practical experience of problems of the type to be dealt with.'

Paragraphs (1) and (2) of Article 142 of Lomé II provide that the rules governing the placing and award of service contracts will be laid down by decision of the Council of Ministers; pending such decision, Articles 24 to 27 of Protocol No 2 and the Joint Declaration on Article 26 of the said protocol, as reproduced in Annex XIV to the Final Act of Lomé II, will apply. Since the Council of Ministers did not make any decision on the rules governing the

* Language of the Case: English.

placement and award of service contracts, Articles 24 and 25 of Protocol No 2 describe how the Commission shall act.

Article 24:

'Technical cooperation contracts shall be awarded by mutual agreement. Certain contracts may be awarded following competitive tendering, notably for important, complicated and technically difficult studies where technical, economic or financial reasons justify recourse to this procedure.'

Article 25:

'1. For each operation of technical cooperation which will involve a mutual agreement procedure, the Commission shall compile a list of selected candidates from Member States or ACP States, selected according to criteria guaranteeing their qualifications, experience and independence and taking into account their availability for the proposed undertaking.

The ACP State concerned shall choose freely the listed candidate it wishes to deal with.

2. When competitive tendering is resorted to, the list of selected candidates shall be drawn up in close collaboration with the Commission and the ACP State concerned on the basis of the criteria set out in paragraph 1. The contract shall be awarded to the listed candidate that submits the tender judged by the Commission and the ACP State concerned to be economically the most advantageous.

3. . . .'.

In addition to the criteria laid out in Article 25, the Commission applied, until 1983, a full quota system which linked the extent of a Member State's contribution to the EDF to the number of contracts awarded to their nationals. As from 1 June 1983, the Commission introduced, on a trial basis, a limited quota system under which approximately 18.25% of the available resources were kept out of the quota system and awarded to the most competitive bidder.

The Commission announced at the ACP/FIN Working Party meeting of 6 March 1986, that it had reverted to the full quota system with effect from 1 March 1986.

II — Written procedure and conclusions

1. By application lodged on 16 May 1986 the United Kingdom brought the present action.

2. On 24 July 1986 the Commission requested a decision under Article 91 of the Rules of Procedure on a preliminary objection. It requested the Court to give a ruling on the application as a preliminary issue.

The applicant's observations on the objection of inadmissibility were lodged at the Court Registry on 6 October 1986.

By two orders of 15 October 1986 the Court granted leave respectively to the Kingdom of the Netherlands to intervene in support of the conclusions of the applicant, and to the Italian Republic to intervene in support of the conclusions of the defendant.

The observations of the Netherlands Government were submitted on 9 December 1986 and those of the Italian Government on 15 December 1986.

By decision of 28 January 1987 the Court reserved its decision on the objection of inadmissibility for the final judgment.

3. The remainder of the written procedure followed the normal course.

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. However, in a letter of 21 December 1987, the Court asked the Commission to provide it with two sets of documents, namely the documents (minutes of meetings, etc.) and other information which it has relating to the re-introduction with effect from 1 March 1986 of the system of nationality quotas at issue in the present proceedings, as well as the statistics used by the Commission, since 1980, to monitor compliance with the said system of nationality quotas. Copies of two internal notes from the Director-General of Directorate-General VIII to the directors and departments concerned were lodged at the Court's Registry on 18 February 1988. Copies of the statistics requested were also lodged.

4. The *United Kingdom* claims that the Court should:

(i) annul the decision of the Commission, announced at the ACP/FIN Working Party meeting of 6 March 1986, to re-introduce, with effect from 1 March 1986, the system as applied prior to 1 June 1983, whereby the Commission takes into account the nationality of firms in drawing up lists of candidates for service contracts concluded within the framework of the Second ACP-EEC Convention of Lomé of 31 October 1979;

(ii) order the Commission to pay the costs.

The *Commission* contends that the Court should:

(i) dismiss the action as inadmissible and in the alternative as unfounded;

(ii) order the applicant to pay the costs.

III — Submissions and arguments of the parties

A — *Admissibility*

The Commission puts forward three arguments on admissibility. The first submission relates to the form of the measure subject to review by the Court, the second to the source of the measure, and the third to its content and effects.

1. *The form of the measure*

(a) The Commission argues that a minimum of formal existence is necessary for the purposes of review under Article 173 of the Treaty. It refers to the guidelines laid down by the High Authority in its Decision 22/60 (*Journal Officiel* 60, 29.9.1960, p. 1248) to the effet that the act must be designated as a 'decision', contain a fixed date, a precise legal basis under the Treaty, clear reasons, articles with numbers and the signature of a

member of the High Authority. The Commission maintains that none of these requirements was fulfilled in the present case.

(b) The applicant submits that the Court has always emphasized substance rather than form as the decisive criterion for identifying acts challengeable under Article 173 (see, *inter alia*, Case 22/70 *Commission* v *Council* [1971] ECR 263, at p. 277; Case 60/81 *IBM* v *Commission* [1981] ECR 2639); it points out that this is even the case with regard to the more restrictive Article 33 of the ECSC Treaty which only allows decisions and recommendations of the Commission to be challenged. Finally, it claims that acceptance of the Commission's argument that the absence of a formal decision renders the action inadmissible would be tantamount to allowing it to take advantage of its own illegality to deprive the applicant of its right of action (see the judgment in Joined Cases 361/82 and 40/83 *Kohler* v *Court of Auditors* [1984] ECR 641, at p. 656).

2. *The source of the measure*

(a) As regards the source of the decision, the Commission submits that an act for the purposes of Article 173 of the Treaty must be issued by the competent body. However, in the present case, the position was one taken by the departments of the Commission only; since there is no document signed by the Commission as a college, or one of its members by delegation of authority, it cannot be seen as 'a definitive expression of the Commission's will' (see Case 54/65 *Chatillon* v *High Authority* [1966] ECR 185).

(b) The applicant points out that since the Commission does not deny that it has reverted to the quota system, it should not be permitted to take advantage of the absence of a formal decision to argue that the measure in question cannot be reviewed by the Court. It argues that, even in the absence of a formal decision, an act of the Commission may still be challenged under the first paragraph of Article 173 provided that it produces legal effects.

3. *The content and effects of the measure*

(a) With regard to the content of the measure at issue, the Commission observes, and is supported in this opinion by the Italian Government, that in drawing up a list of selected candidates as referred to in Article 25 of Annex XIV to Lomé II, it applies internal guidelines which include the criterion of the system of nationality quotas; such guidelines consist simply in the establishment of general criteria, part of the internal rules, given by superiors to their subordinates within the Commission departments to assist them in their preparation of service contract short-list proposals. They do not firmly bind the internal addressees concerned; they simply constitute one of the criteria to which the Commission's officials may, in their discretion, refer in compiling a list of selected candidates. Such internal or preparatory measures which pave the way for the final decision cannot be challenged in an action for annulment under Article 173 of EEC Treaty (see the judgment in Case 20/58 *Phoenix-Rheinrohr* v *High Authority* [1959] ECR 75; the judgment in Joined Cases 16 to 18/59 *Geitling, Mausegatt, Präsident* v *High Authority* [1960]

ECR 17; the judgment in Case 60/81 *IBM* v *Commission* [1981] ECR 2639).

Moreover, it points out that the establishment of the criterion in question has no factual consequences on firms, since names may be re-introduced at a later stage of the procedure either by the Commission official's superior or by the ACP countries. It is only at a much later stage that some legal consequences may occur, caused by the ACP State, in its choice of contractor, which would not constitute legal effects for the purposes of Article 173. It relies in this regard on the Court's judgment of 10 July 1984 in Case 126/83 (*STS Consorzio per sistemi di telecomunicazione via satellite SpA* v *Commission* [1984] ECR 2769) and its judgment of 10 July 1985 in Case 118/83 (*Muratori* [1985] ECR 2325), in which it was held that undertakings availing themselves of the tendering procedure for contracts under Lomé II have legal relations only with the ACP State and not with the Commission.

Finally, the Commission argues that if the only justification is that the measure has legal effects on individuals then the second paragraph of Article 173 must be complied with.

(b) The applicant points out that the adoption of a rule governing the allocation of contracts is a decision, in the sense that it constitutes a definitive expression of the Commission's will regarding the exercise of its managerial power. This fact does not however detract from the flexible approach which may be adopted to the application of the rule. Moreover, it is irrelevant whether the measure at issue is only part of the process by which the Commission allocates contracts, since the criterion of quotas is applied from the outset and must condition the subsequent stages of the procedure.

The applicant submits that it is sufficient that the act challenged has legal effects other than effects on individuals. It maintains that the internal nature of a measure is relevant only to actions brought under the second paragraph of Article 173 where, *ex hypothesi*, the act challenged must have direct effects on third parties outside the institution if the action is to be admissible. This does not, however, apply to actions brought under the first paragraph of Article 173 and the cases cited by the Commission, *Phoenix-Rheinrohr* and *Geitling*, are irrelevant to the present case. In any event, it points out that the Court left open in *Phoenix-Rheinrohr* the question whether internal directives can in general produce legal effects. The applicant therefore concludes that internal administrative decisions of the Commission may have legal effects and thus form the subject-matter of an action for annulment (see the judgments in Case 148/73 *Louwage* v *Commission* [1974] ECR 81; Case 25/83 *Buick* v *Commission* [1984] ECR 1773; Case 230/81 *Luxembourg* v *Parliament* [1983] ECR 255; Case 108/83 *Luxembourg* v *Parliament* [1984] ECR 1945). Moreover, it points out that internal measures are not deprived of legal effect solely because they constitute instructions flowing from one part of an institution to another (see the judgment in Case 66/75 *Macevicius* v *Parliament* [1976] ECR 593).

The legal effects of the measure at issue in the present case arise from the fact that all acts performed by the Commission in the discharge of its management functions under the Lomé Conventions are performed on behalf of the Community and engage the

responsibility of the Community *vis-à-vis* the other Contracting Parties to the Convention; if the Commission were to act unlawfully in the discharge of functions entrusted to it by the Lomé Conventions it would occasion a breach by the Community of its Convention obligations. Infringement of the Conventions can therefore be cited in an action under Article 173.

Finally the applicant submits that, in any event, the act challenged has an effect on the legal position of third parties, namely those firms excluded by application of the measure. It points out that the legal effects on consultants are not remote since a significant number of lists of candidates are drawn up by the Commission for the contracts awarded under Lomé II contain only one name, thereby effectively determining the identity of the consultant selected by the ACP countries.

(c) The Netherlands Government is also of the opinion that the compilation of the short list is to be regarded as a pre-selection of undertakings which might possibly qualify for the award of a contract. The effect of not being included on the short list is that the firm concerned is excluded from further selection, so that it is deprived of the chance of obtaining the contract. In that sense, the pre-selection part of the preparatory procedure ends in a definitive legal effect. Moreover, it is caused solely by the Commission's action, since it alone has power to compile the short list. Once a candidate has been excluded from the short list, it does not matter for the purposes of establishing legal effects that he might not have been selected for the contract at a later stage in the procedure.

Furthermore, even if such a decision were an internal administrative decision, it is still not excluded that such a decision may have legal effects. In any event, the Commission cannot act contrary to the relevant provisions of the Conventions and of the EEC Treaty without exceeding its powers. The Court of Justice therefore has jurisdiction to rule upon the legality of the act of the Commission taken in pursuance of its functions under Lomé II.

Finally, the Netherlands Government distinguishes the decisions of the Court on competitive tendering under Lomé II from the present case (see the judgment in Case 126/83 *STS* v *Commission*, cited above, and in Case 118/83 *Muratori*, cited above) by pointing out that the Court reached the view in the earlier cases that in the relations which arise between the Commission and the ACP State concerned on the one hand and between that State and the tenderers on the other hand in the awarding of contracts, no act exists within the meaning of the second paragraph of Article 173. In the present case however, apart from the fact that the United Kingdom's action is based on the first paragraph of Article 173, the Commission has its own power which it manifests in compiling the short list. The ACP State concerned can then choose from that list the person with whom it wishes to conclude a contract.

B — *Substance*

1. *Breach of the Lomé II Convention*

(a) The applicant submits that the quota system is not based on any express or implied provision in the Lomé Convention

and runs counter to its general scheme which is based on the general principle of equality of treatment and non-discrimination on grounds of nationality. Where Lomé II derogates from the principle of equal treatment, it does so by express provision and in order to favour the ACP States and their nationals. In the absence of any express provision relevant to the present case, the general rules laid down by Lomé II and the principles derived from its general scheme apply in the context of Chapter 10 of the Convention on technical cooperation.

The applicant further argues that the use of a system of nationality quotas is incompatible with the principle on which the Lomé Conventions are based, namely that the ACP States are entitled to the most effective assistance that can be provided. By excluding on grounds of nationality consultants and consultancy firms who satisfy the objective criteria for inclusion in the short list, the Commission uses the nationality quotas to narrow the geographical spread and to limit choice and thereby reduces the possibility of selecting the most able consultant or consultancy firm.

In the alternative, the applicant submits that Article 25 (1) of Annex XIV to Lomé II gives ACP States a right to an unrestricted choice between the candidates selected according to the criteria mentioned in that article. Pre-selection on the basis of nationality not only renders this right meaningless but it also prevents the ACP State from finding out what is the most economically advantageous tender of all those which could have been submitted and is therefore contrary to the purposes of Article 25 (2) of Annex XIV to Lomé II.

(b) In the opinion of the Commission, it follows from the difference in nature between technical cooperation contracts and general works contracts, the former requiring the application of qualitative criteria to their evaluation and the latter objective criteria, that the general rules of Lomé II (such as, for example, Article 125 (1) defining the geographical origin of firms eligible to tender) can only apply to Chapter 10 to the extent that they do not derogate from the *lex specialis* of Chapter 10.

The Commission maintains that, according to the wording of Article 25 of Annex XIV to the Final Act of Lomé II, it lies within the discretion of the Commission to 'shorten' or 'restrict' the list of possible candidates. Moreover, none of the articles of Lomé II cited by the applicant forbids the procedure adopted by the Commission.

The Commission further argues that the quota system does not affect the quality of the service to be rendered or the efficiency of the service provided to the ACP country concerned. On the contrary, in its opinion, the establishment of a short list increases the likelihood of providing the most effective assistance to the ACP country involved. In any event, it claims that the target system never prevails over the requirement to provide the most effective assistance.

(c) The Netherlands Government considers that the Commission's qualification of what is involved as a flexible interrelation between several criteria, such as qualifications, experience and nationality, is not relevant; likewise the submission that it is merely a target for achieving a better distribution of shares in contracts among the

Member States. What is relevant, in its opinion, is that on the basis of a nationality criterion which is not provided for in the Convention and which is inconsistent with the spirit and intention of Lomé II, the most competitive offer may be excluded even though the undertaking in question fulfills the criteria which are mentioned in the Convention.

(d) The Italian Government concludes that Article 25 (1) of Annex XIV to Lomé II confers on the Commission a wide discretion with regard to the most appropriate criteria to be used in drawing up 'a list of selected candidates', which includes the criterion of the system of nationality quotas. The reason such discretion was conferred was to preclude the rigid and complete implementation of the principles of free competition, in the light of the special nature of technical cooperation contracts and in accordance with normal international practice.

2. *Breach of Article 7 of the EEC Treaty*

(a) The applicant stresses the fact that the prohibition of discrimination on grounds of nationality enshrined in Article 7 of the EEC Treaty is merely a specific expression of the fundamental principle of equality of treatment which must be observed in the whole field of Community law (see the judgment in Case 152/73 *Sotgiu* v *Deutsche Bundespost* [1974] ECR 153, and in Case 147/79 *Hochstrass* v *Court of Justice* [1980] ECR 3005). Since acts of the Commission performed within the framework of Lomé II and Lomé III fall within the scope of application of the Treaty, the subject matter of the present action falls within the scope of application of Article 7.

The discrimination at issue in this case does not solely relate to matters outside the Community but rather concerns the treatment by the Commission of undertakings within the Community, albeit with a view to their being considered for the award of service contracts by third countries. The case cited by the Commission (Case 52/81 *Faust* v *Commission* [1982] ECR 3745) as authority for the proposition that the non-discrimination rule does not apply in all external relations situations was concerned with a purely external relations situation which must be distinguished from the present case which concerns internal relations within the Community. Likewise, the judgments of the Court of 15 December 1976 in Case 41/76 (*Donckerwolcke* v *Procureur de la République* [1976] ECR 1921), and of 5 March 1986 in Case 242/84 (*Tezi BV* v *Minister for Economic Affairs* [1986] ECR 933) can be distinguished since there is no express provision in Lomé II allowing the discrimination complained of.

The applicant does not accept that the common Community policy on development aid is incomplete; in any event, Article 7 applies even in areas where a common policy has not yet been attained (see the judgment in Case 126/82 *Smit* v *Commissie Grensoverschrijdend Beroepsgoederenvervoer* [1983] ECR 73). Moreover, neither the fact that development aid is financed by the Member States nor the fact that the Lomé Conventions are mixed agreements in any way support the conclusion that the Commission is entitled to discriminate

between nationals of the Community on the ground of their nationality.

(b) The Commission argues that what is at issue is the award of service contracts by third countries, financed by the Member States of the Community under Lomé II. Since Article 7 of the Treaty does not apply to all external relations situations (see judgment of 28 October 1982 in Case 52/81 *Faust* [1982] ECR 3745, at p. 3762) it cannot be relied upon in the present case.

Moreover, the Commission believes that in the present state of Community development aid policy there is no violation of Article 7. In its view this conclusion follows by analogy with the Court's judgments of 15 December 1976 in *Donckerwolcke*, cited above, of 5 March 1986 in *Tezi BV*, cited above, and of 2 July 1974 in Case 153/73 (*Holtz and Willemsen* [1974] ECR 675), in which, notwithstanding exclusive Community competence with regard to, respectively, the common commercial policy and the common organization of the agricultural markets, derogations from basic rules of the Treaty were permitted. *A fortiori*, the Commission believes that this approach must apply to development aid financing under the Lomé Convention: it follows from the fact that such a policy has not yet been fully established, that a derogation from Article 7 for the purposes of the present case should be allowed.

In any event, the Commission is of the view that the quota system gives each Member State an equal chance to be included on a tender list and this notwithstanding the differences in the situations of each Member State. Moreover, it points out that the quota system avoids the unfair treatment which could result from a lack of objective criteria where contracts might be awarded simply for historical reasons or upon linguistic grounds.

(c) The Netherlands Government submits that the application of a nationality criterion is *per se* contrary to Article 7. In its view, the Convention may not derogate from the provisions of the EEC Treaty except in accordance with Article 236 of the Treaty.

(d) The Italian Government considers that the utilization of the nationality quota at issue involves no discrimination on grounds of nationality. Moreover, the application of such a criterion results in a better and fairer distribution of service contracts in relationship, *inter alia*, to the size of each Member State's contributions to the EDF.

3. *Breach of Article 3 (f) of the Treaty*

(a) The applicant claims, with the support of the Netherlands Government, that the system of nationality quotas is contrary to Article 3 (f) of the Treaty because it can be presumed that it distorts the structure of competition within the Community since competition for contracts is no longer centred on technical competence, experience and independence (see the judgment in Joined Cases 6 and 7/73 *Istituto chemioterapico italiano and Commercial Solvents Corporation* v *Commission* [1974] ECR 223, paragraph 33); it does so by preventing undertakings providing consultancy services from competing effectively within the common market for the award of a contract.

Moreover, there is no compelling reason why competition should be thus reduced by excluding able consultants and consultancy firms on grounds of nationality alone, even if the objective of the Lomé Convention is recognized as that expressed in 3 (k) of the Treaty.

(b) The Commission replies that the applicant adduces no tangible proof that competitive relationships are affected at all. Moreover, it is not shown how competition 'within the Community' is affected since the choice of competitors is made by a third country and since contracts are concluded outside the Community for services performed in an ACP State.

The Commission further suggests that the primary objectives of the Lomé Convention, as envisaged in Article 3 (k) of the Treaty should be given priority over Article 3 (f) of the Treaty. In order to ensure that the overseas development envisaged in Article 3 (k) is effectively provided, the fair distribution criterion envisaged by Article 3 (f) must not be allowed to override the criterion of ensuring that the most experienced, qualified and independent service or advice is offered.

(c) The Italian Government also argues that the use of the nationality criterion does not infringe the competition rules laid down in the Treaty. It points out that the candidates included on the list from which the ACP State is to make its choice, must all fulfill the requirements relating to qualifications, experience and independance set out in the applicable provisions of Lomé II.

T. F. O'Higgins
Judge-Rapporteur