the authorities of an ACP State, in the framework of the financial and technical cooperation provided for by the Second ACP-EEC Convention, is not of direct concern to undertakings which submit tenders within the meaning of the second paragraph of Article 173 of the EEC Treaty.

In Case 126/83

STS CONSORZIO PER SISTEMI DI TELECOMUNICAZIONE VIA SATELLITE SPA, Milan, represented by Pier Carlo Bruna, of the Rome Bar, with an address for service in Luxembourg at the Chambers of Jacques Loesch, 2 Rue Goethe,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by Eugenio de March, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of Oreste Montalto, a member of its Legal Department, Jean Monnet Building, Kirchberg,

defendant,

concerning, at the present stage of the proceedings, the admissibility of the application by STS for a declaration that the measure by which the representative of the Commission approved the award of public works contracts

THE COURT

composed of: Lord Mackenzie Stuart, President, T. Koopmans, K. Bahlmann and Y. Galmot (Presidents of Chambers), P. Pescatore, G. Bosco, O. Due, U. Everling and C. Kakouris, Judges,

Advocate General: P. VerLoren van Themaat
Registrar: H. A. Rühl, Principal Administrator

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure, and the conclusions, submissions and arguments of the parties may be summarized as follows:

I — Facts and procedure

In the framework of the regional cooperation provided for in Chapter 8 of Title VII to the Second ACP-EEC Convention [hereinafter referred to as "the Convention"] 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 Community decided to finance from the resources of the Fifth European Development Fund, established by the Internal Agreement of 1979 (Official Journal 1980, L 347, p. 210), a project submitted by four ACP States, Fiji, Kiribati, Papua New Guinea and Tuvalu) for the provision in those countries of international and inter-regional telephone, telegraph and telex services.

In accordance with Article 115 of the Convention, a financing agreement for that project was drawn up on 10 December 1982 between the Community, represented by the Commission, and the ACP States referred to above, represented by the South Pacific Bureau for Economic Cooperation, hereinafter referred to as "the SPEC".

Pursuant to Articles 125 and 126 of the Convention, the SPEC issued invitation to tender No 1861 (Official Journal 1982, S 189, p. 4) in respect of four lots of public works.

Following a technical evaluation of the tenders carried out by the International Telecommunications Union in conjunction with the technical authorities of each of the ACP States, the SPEC decided to award the contract for the first two lots of work, relating to the provision of a satellite earth station and related facilities in Kiribati and in Papua New Guinea, to the French undertaking Telspace.

The relevant contracts, signed by the SPEC and Telspace on 13 April and 6 June 1983, were approved by the Commission's delegate on 21 April and 9 June 1983 respectively.

STS Consorzio per Sistemi di Telecomunicazione via Satellite [hereinafter referred to as "STS"] was informed by a telex message from the SPEC on 6 May 1983 that its tender had not been accepted. It brought an action, lodged at the Court Registry on 6 July 1983, in which it claims that the Court should:

1. Declare that the measure approving the award of the contracts adopted by the chief authorizing officer or by the Commission's delegate is unlawful and void in so far as it adversely affects the applicant, on the ground that it is contrary to the rules of the Lomé Convention of 30 December 1979 and is vitiated by abuse of power;

2. Declare that the annulment of that measure entails the annulment of all measures adopted pursuant to it;

3. Order the Commission to produce the contested measure, which STS has not had an opportunity of seeing;

4. Authorize the applicant under Article 38 (7) of the Rules of Procedure to put the application in order within a reasonable period by means of the documents applied for which it has been unable to obtain from the SPEC.

In a document lodged on 19 August 1983 the Commission requested the Court pursuant to Article 91 of the Rules of Procedure to decide on the admissibility of the application without going into the substance of the case and to order the applicant to pay the costs.

In observations lodged on 29 September 1983 STS, replying to the objection, requested the Court to dismiss the objection of inadmissibility raised by the Commission and to order the case to proceed by ordering the Commission to produce the contested measures and all the measures concerning the award of the contracts in question.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure on the objection of inadmissibility without any preparatory inquiry.

II — Submissions and arguments of the parties on the admissibility of the application

First submission

The first submission is that the measure by which the chief authorizing officer or the Commission's delegate approves the proposal for placing the contract which is submitted to him by the national or regional authorizing officer does not constitute a measure subject to review under Article 173 of the Treaty.

The *Commission* states that the approval given by the Commission's delegate to the contract is an internal measure of cooperation between the EEC and the ACP States, whose sole effect is to permit the contract to be financed by the Fund and which does not alter the validity and consequences of the contract concluded between the ACP State and the successful tenderer.

In the Commission's opinion, it is therefore a measure which has no binding effects for third parties and which cannot be declared void under Article 173 of the Treaty.

In support of that argument, the Commission stresses first that under Articles 108 (2) (d) and 120 of the Convention, responsibility for the placing of contracts is borne by the ACP State. It is clear from the roles of the chief authorizing officer of the Fund appointed by the Commission, the national authorizing officer appointed by the government of each ACP State, and the Commission's delegate in each ACP State or group of States, as defined in Articles 121, 122 and 123 of the Convention respectively, that it is the ACP State which deals directly with parties tendering for a contract, rather than the Commission's representative whose intervention is confined to dealings with the national authorizing officer of the Fund.

The Commission takes the view that its observations are confirmed by the wording of Article 132 of the Convention, which provides that any dispute arising between the authorities of an ACP State and a contractor, supplier or provider of services on the occasion of the placing or performance of a contract is to be settled by arbitration in accordance with rules of procedure adopted by the Council of Ministers.

Secondly, the Commission points out that the contracts between the SPEC and Telspace provide that they are to come into effect when signed by the ad-

ministration of the APC State and the successful tenderer, and not at the time of their approval by the Commission's delegate. In that connection, the Commission draws attention to the fact that the two contracts in question were signed by Telspace on 13 April 1983 and by the SPEC, representing the Governments of Kiribati and Papua New Guinea, on 13 April and 6 June respectively. The contracts therefore came into effect on those dates, irrespective of the approval subsequently given by the representative of the Commission on 21 April and 9 June 1983 respectively. The Commission therefore considers that if a measure awarding a contract by the ACP State is declared void in an action brought by a third party, and such declaration renders the contract void and results in the re-opening of the invitation to tender, the fact that the contract which is declared void has been approved by the Commission has no significance.

In the Commission's opinion it follows from the foregoing, on the one hand, that the approval by the chief authorizing officer or the Commission's delegate of the choice made by the ACP State constitutes only a "secondary aspect" of the contract, and on the other hand that a third party whose tender is unsuccessful cannot benefit from any order declaring void the approval of a contract which would in any event continue to have effect as between the parties.

In the opinion of *STS*, even if the secondary effect of the approval given by the Commission's representative is to permit the payment of funds, it remains nonetheless an administrative act.

It follows from the provisions of the Convention referred to above that in addition to the relationship governed by private law which is peculiar to the contract, there is a procedure of an administrative nature enabling the Commission to oversee the public interest through, on the one hand, the chief authorizing officer who ensures that contracts are awarded fairly, and, on the other hand, its delegate who ensures that the funds are properly administered. STS stresses in that regard that Article 123 (2) (c) of the Convention provides that the Commission's delegate is to approve the proposal for the placing of the contract wherever three conditions are fulfilled: namely, the tender selected is the lowest, is economically the most advantageous and does not exceed the sum earmarked for the contract.

According to STS, it follows that the Commission's representative exercises a power of control over the placing of contracts and that consequently his approval is a measure within the meaning of Article 173 of the Treaty.

Second submission

In the second submission it is argued that, assuming that the contested approval is a measure within the meaning of Article 173 of the Treaty, it is not addressed to the applicant or of direct concern to it.

The *Commission* contends first that under the combined provisions of Articles 121, 122 and 123 of the Convention, the chief authorizing officer or, in certain cases, the Commission's delegate, approves the placing of the contract which is forwarded to it by the national authorizing officer. Consequently, the decision of approval is addressed to the national authorizing officer.

Secondly, the Commission notes that the measure of approval does not have any immediate effect on the applicant's legal position, since it falls within the terms of the financial relationship between the Community and the ACP State. The fact that the discretionary measure by which the national authorizing officer proposes which tenderer is to be selected is interposed between the applicant's legal position and the approval by the Commission's representative means that there is no direct causal link between the

measure and the applicant, which therefore has no direct interest in bringing an action.

In the circumstances, the Commission considers that it would be contrary to the case-law of the Court as expressed in particular in the judgment of 13 May 1971 in Joined Cases 41 to 44/70, *International Fruit Company* v *Commission* [1971] ECR 411 to declare the application admissible.

Thirdly, the Commission notes that under the provisions of the Convention the ACP State, far from merely acting upon the assessments of the Commission, has a power of initiative which is embodied in the proposal for the placing of contracts and its own responsibility in the implementation of financial aid from the Community.

Thus the measure which directly affects the applicant's position is not the approval by the Commission's representative of the contract between the ACP State and the third party but the award of that contract to a competitor. In that connection, the Commission stresses that the applicant seems to have shared that point of view inasmuch as it brought an action challenging the placing of the contracts in the ACP States in question.

STS considers that where an administrative measure concerns a number of persons each of them must be able to require its reviewal by the courts, not only in the applicant's individual and immediate interest but also in the interest of all the individuals concerned in the legality of measures adopted by a public body. The Commission's argument that the measure of approval adopted by the Commission is not addressed to the applicant and that the action challenging that measure is therefore inadmissible conflicts with the traditional principles of administrative law inasmuch as the contracts could not have been placed if the contested measure had not been adopted.

Third submission

The third submission alleges that the application instituting proceedings infringed Article 19 of the Statute of the Court of Justice and Article 38 (1) of the Rules of Procedure in so far as it did not state the subject-matter of the dispute and the grounds on which it was based.

The *Commission* asserts that in support of its application to have the measure declared void "on the ground of infringement of the rules of the Lomé Convention of 30 October 1977 and abuse of power" STS merely states that its tender "was certainly the most advantageous" without any further details and without the slightest proof. Under those circumstances, the Commission has no means of proving that the application is unfounded, other than to set out before the Court the entire course of the contested invitation to tender. Such a reversal of the onus of proof is inconsistent with the rights of the defence and with what the Court has held in that connection in particular in the judgment of 14 December 1962 in Joined Cases 46 and 47/59, *Meroni* v *High Authority* [1962] ECR 411.

Since the applicant has itself admitted that its application is incomplete and has requested sufficient time to put it in order in accordance with Article 38 (7), the Commission notes that under that provision the time in question is granted only if the application does not comply with the requirements set out in paragraphs (2) to (6) of Article 38 "and not in circumstances such as those in this case, where the application does not comply with the requirements set out in paragraph (1) of that article", when inadmissibility is unavoidable.

In the opinion of *STS* the view put forward by the Commission is little short of a denial of justice. It was unable to submit a complete application within the prescribed period precisely because the contested measure was not addressed to

it. The applicant considers that in view of both that *de facto* impossibility and the fact that its tender was the most advantageous, as has not been disputed by the Commission, it should be authorized to provide evidence of the illegality and abuse of power alleged at a later date.

In concluding its observations, STS states that it has not brought any action against the SPEC in the ACP States. The Commission's statement is based on an erroneous interpretation of the telex message which the applicant sent to it on 9 June 1983 and in which it intended to refer solely to the application lodged before the Court of Justice.

III — Oral procedure

At the sitting on 20 March 1984 oral argument was presented by C. F. Carnacini, for STS, and G. L. Campogrande, for the Commission of the European Communities.

The Advocate General delivered his opinion at the sitting on 22 May 1984.

Decision

1 By application lodged at the Court Registry on 6 July 1983 STS Consorzio per Sistemi di Telecomunicazione via Satellite SpA, (hereinafter referred to as "STS"), which has its registered office in Milan, Italy, brought an action under the second paragraph of Article 173 of the EEC Treaty for a declaration that the measure by which the representative of the Commission approved the award to the French undertaking Telspace of two public works contracts for the provision through the Fifth European Development Fund of a satellite earth station and related facilities in Kiribati and in Papua New Guinea was void.

2 The Community decided to finance certain works connected with the provision of international and inter-regional telephone, telegraph and telex stations, on the basis of a project presented by four ACP States which in addition to Kiribati and Papua New Guinea included Fiji and Tuvalu. The finance was available as part of the financial and technical cooperation provided for in Title VII of the Second ACP-EEC Convention signed at Lomé on 31 October 1979 (hereinafter referred to as "the Convention") and approved by Council Regulation No 3225/80 of 25 November 1980 (Official Journal 1980, L 347, p. 1), out of the resources of the Fifth European Development Fund (hereinafter referred to as "the Fund") set up by the Internal Agreement of 1979 (Official Journal 1980, L 347, p. 210), for which

the implementing provisions were laid down in Financial Regulation 81/215/EEC of 17 March 1981 (Official Journal 1981, L 101, p. 12).

3 In accordance with Article 155 of the Convention, a financing agreement for the works was drawn up on 10 December 1982 between the Community, represented by the Commission, and the ACP States concerned, represented by the South Pacific Bureau for Economic Cooperation, (hereinafter referred to as "the SPEC".

4 The contested contracts were concluded as a result of an invitation to tender, in accordance with Notice No 1861 published on 1 October 1982 (Official Journal 1982, S 189, p. 4); they were signed by Telspace and the SPEC on 13 April and 6 June 1983 and approved by the Commission on 21 April and 9 June 1983.

5 On being informed on 6 May 1983 by a telex message from the SPEC that its tender had not been accepted, STS lodged an application under Article 173 of the Treaty claiming that the Court should:

Declare void, on the one hand, the measure by which the representative of the Commission approved the placing of the contracts, inasmuch as it adversely affects the applicant's rights because it infringes the rules of the Convention and is vitiated by abuse of power, and, on the other hand, all the measures which arose out of the approval of those contracts;

Order the Commission to produce the contested measure which it has been unable to see.

6 By application lodged on 19 August 1983 the Commission requested the Court to decide on the admissibility of the action pursuant to Article 91 of the Rules of Procedure without going into the substance of the case.

7 In support of that application the Commission relies upon three arguments, alleging first that the measure by which the Commission's representative approves the proposal for placing the contract which is forwarded to him by the national or regional authorizing officer is not a measure which may be challenged under Article 173 of the Treaty and secondly that even if such approval is a measure whose legality is subject to review, it is neither addressed nor of direct concern to the applicant.

8 STS contends that in deciding whether or not to approve the placing of contracts the representatives of the Commission exercise a power of control over the decisions of the representatives of the ACP State. Although the effect of the contested measure is to permit the payment of funds, it remains nonetheless an administrative measure. Thus the defendant's argument that the application is inadmissible is incompatible with the traditional principles of administrative law inasmuch as the contracts could not have been placed if the contested measure had not been adopted.

9 By virtue of the second paragraph of Article 173 of the Treaty, any natural or legal person may institute proceedings against a decision addressed to that person or against a decision which, although in the form of a decision addressed to another person, is of direct and individual concern to the former.

10 In order to determine whether the measures by which an agent of the Commission approved public works contracts to be financed, on the conditions set out above, by the Fund are capable of forming the subject-matter of an action for a declaration of nullity on the basis of the second paragraph of Article 173 of the Treaty, it is necessary first to examine the respective powers of the Commission and the ACP States in the procedure for the placing of such contracts.

11 In that regard, it should be noted first that under Articles 108 (2) and 120 of the Convention the ACP States are responsible for implementing the projects and programmes decided upon in conjunction with the Community and financed by the latter. In particular they are responsible for preparing, negotiating and concluding contracts for carrying out such operations. By virtue of Article 122 of the Convention the necessary decisions are adopted by the national authorizing officer appointed for that purpose by the government of each ACP State concerned.

12 By virtue of Article 108 (5) of the Convention, however, it is the Community which is responsible for preparing and adopting financing decisions on projects and programmes. Under Article 121 of the Convention, it appoints the chief authorizing officer of the Fund, who is to ensure that all financing decisions are carried out and is responsible for managing the Fund's

resources. In order to facilitate and expedite the implementation of projects financed from the Fund's resources, the Commission appoints a delegate to represent it in each ACP State or group of ACP States.

13 The provisions of the Convention set out above therefore show that contracts financed by the Fund remain national contracts which the authorities of each ACP State have the power to prepare, negotiate and conclude. It is for the Commission, on the other hand, to adopt on behalf of the Community the financing decisions required for the implementation of the projects and programmes decided upon in agreement with the ACP States.

14 Such a division of powers requires close collaboration between the Commission and the ACP State concerned in the procedure for placing public contracts financed by the Fund, and according to the general scheme of the Convention such collaboration is restricted to the two partners present at the time.

15 The satisfactory implementation of financing decisions requires that the competent agents of the Commission ensure, before any payments are made out of Community funds, that the conditions for such payments are in fact fulfilled. In that connection, it should be noted in particular that Article 121 (2) of the Convention confers on both the chief authorizing officer and the Commission's delegate the task of ensuring "equality of conditions for participations in invitations to tender, . . . that there is no discrimination and that the tender selected is economically the most advantageous". For that reason Articles 122 and 123 of the Convention lay down a procedure for the placing of contracts which enables the Commission's representatives to ensure that those conditions are fulfilled. Thus the national authorizing officer representing the ACP State prepares invitation to tender dossiers which he submits to the Commission's delegate for agreement, issues invitations to tender, presides over examination of them, decides the outcome of such examination and transmits it to the Commission representative with a proposal for the placing of the contract, and finally signs the contract. For his part, the Commission's representative — either the delegate or the chief authorizing officer — approves the invitation to tender dossier, approves the proposal for the placing of the contract and finally endorses both the contract itself and the payment authorizations adopted for its implementation.

16 It is thus clear that the measures adopted by the Commission's representatives during that procedure, whether approvals or refusals to approve, endorsements or refusals to endorse, are solely intended to establish whether or not the conditions for Community financing are met. They are not intended to interfere with the principle that the contracts in question remain national contracts which the ACP States alone are responsible for preparing, negotiating and concluding, and they cannot have that effect.

17 It would therefore be incompatible with the sovereignty of the ACP States and the responsibilities reserved to them by the Convention for the Commission's agents to deal directly, in place of the ACP States, with undertakings submitting tenders for or awarding contracts financed by the Fund; indeed, such action would constitute interference in a sphere reserved solely to the authorities of those States.

18 For their part, undertakings which submit tenders for or are awarded the contracts in question remain outside the exclusive dealings conducted on this matter between the Commission and the ACP States; the measures adopted by the Commission's representatives in the course of the procedure for the placing or implementation of those contracts cannot be regarded as being addressed to them and they cannot claim that those measures are "of direct concern" to them within the meaning of the second paragraph of Article 173 of the EEC Treaty. Such undertakings have legal relations only with the ACP State which is responsible for the contract, and measures adopted by the representatives of the Commission cannot substitute in relation to them a Community decision for the decision of the ACP State, which has sole power to conclude and sign that contract.

19 From all the considerations set out above it follows that the measure by which the Commission's representative approved the award of the contested contracts to Telspace is not of "direct" concern to STS within the meaning of the second paragraph of Article 173 of the EEC Treaty. Accordingly, the application by STS must be dismissed as inadmissible, without its being necessary to examine the other grounds of inadmissibility relied upon by the Commission.

20 It should be stated that this judgment is without prejudice to other proceedings which any undertaking concerned may institute either against

the Commission, in the framework of the procedures laid down in Article 178, the second paragraph of Article 215 and Article 185 of the EEC Treaty, or against the ACP States, in proceedings available before the national courts or in arbitration proceedings provided for in Article 132 of the Convention.

Costs

21 According to Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs. Since STS has failed in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. Dismisses the application as inadmissible.

2. Orders the applicant to pay the costs.

Mackenzie Stuart Koopmans Bahlmann Galmot

Pescatore Bosco Due Everling Kakouris

Delivered in open court in Luxembourg on 10 July 1984.

D. Louterman
Administrator

A. J. Mackenzie Stuart
President