OPINION OF ADVOCATE GENERAL JACOBS

delivered on 17 February 2000 *

1. This is an appeal against a judgment [1] of the Court of First Instance dismissing an action for damages by TEAM Srl, an Italian engineering consultancy company. The damage was allegedly suffered as a result of, first, a decision by the Commission annulling a tendering procedure for a feasibility study for the modernisation of a railway junction in Warsaw and, secondly, the subsequent restricted invitation to tender for another such feasibility study.

Background and procedure before the Court of First Instance

2. The PHARE programme, based on Council Regulation (EEC) No 3906/89 of 18 December 1989 on economic aid to the Republic of Hungary and the Polish People's Republic [2] and subsequently extended to other countries of Central and Eastern Europe, is the framework within which the European Community channels economic aid in order to implement measures intended to support the process of economic and social reform under way in those countries.

3. Article 3(2) of Regulation No 3906/89 provides as follows:

'Account shall be taken, *inter alia*, of the preferences and wishes expressed by the recipient countries concerned in the choice of measures to be financed pursuant to this regulation.'

4. Article 23 of the General Regulations for Tenders and the Award of Service Contracts financed from PHARE/TACIS Funds, in the version thereof applicable at the material

* Original language: English.

1 — Case T-13/96 [1998] ECR II-4073.

2 — OJ 1989 L 375, p. 11; as amended by Council Regulations (EEC) No 2698/90 of 17 September 1990 (OJ 1990 L 257, p. 1), No 3800/91 of 23 December 1991 (OJ 1991 L 357, p. 10), No 2334/92 of 7 August 1992 (OJ 1992 L 227, p. 1), No 1764/93 of 30 June 1993 (OJ 1993 L 162, p. 1) and No 1366/95 of 12 June 1995 (OJ 1995 L 133, p. 1).

time in the present case,[3] provides as follows:

'Annulment of the tendering procedure

1. The Contracting Authority may, prior to awarding the contract, without thereby incurring any liability to the Tenderers, and notwithstanding the stage in the procedures leading to the conclusion of the contract, either decide to close or annul the tender procedure in accordance with paragraph 2, or order that the procedure be recommenced, if necessary, on amended terms.

2. A tender procedure may be closed or annulled in particular in the following cases:

...

(d) if exceptional circumstances render normal performance of the tender procedure or contract impossible;

...

3. In the event of annulment of any tender procedure, Tenderers who are still bound by their tenders shall be notified thereof by the Contracting Authority. Such Tenderers shall not be entitled to compensation.'

5. On 13 June 1995 the Commission issued a restricted invitation to tender for a feasibility study for the modernisation of a railway junction in Warsaw on the E-20 line ('the June invitation to tender') to be financed in the context of PHARE Project PL 9406 (1994 Transport Infrastructure Programme). That invitation to tender was sent to, amongst others, TEAM and Centralne Biuro Projektowo-Badawcze Budownictwa Kolejowego (Kolprojekt) (hereinafter 'Kolprojekt'), a Polish public-owned company providing railway engineering consultancy services. Having formed a consortium to take part jointly in the procedure, with Kolprojekt acting as the lead tenderer, the two undertakings submitted their tender.

6. By fax of 16 November 1995, the Commission informed the tenderers that the invitation to tender had been cancelled due to the introduction of new objectives and modified terms of reference ('the contested decision').

3 — Set out in paragraph 4 of the judgment of the Court of First Instance.

7. On 4 December 1995 the Commission issued, 'on behalf of the Government of Poland', a new restricted invitation to tender for a feasibility study for the modernisation of the Warsaw railway node on the E-20 TEN line ('the contested invitation to tender'). The shortlist of undertakings invited to submit tenders included the applicant but not Kolprojekt. The terms of reference issued with the contested invitation to tender, however, stated, under the heading 'Staff and local participation', that the successful tenderer would be required to work with Kolprojekt and that the budget allocated for the participation of the latter company was to be 25% of the financial offer. The terms of reference appear to be otherwise identical to those issued with the June invitation to tender.

8. By fax of 21 December 1995, the head of the relevant Commission unit announced that, in response to questions and remarks from several tenderers pointing to a lack of clarity in the terms of reference as regards available data, data collection and the involvement of the Polish institutions, the Commission would clarify the matter with the Polish authorities with a view to issuing more precise terms of reference during January and setting a new deadline for the submission of bids. The fax stated that the submission of bids was, in the meantime, deferred and the deadline postponed.

9. On 26 January 1996, the applicant and Kolprojekt brought proceedings before the Court of First Instance, claiming that that Court should annul both the Commission decision contained in the letter of 16 November 1995 and the contested invitation to tender, award them compensation for the damage suffered and order the Commission to pay the costs.

10. By fax of 28 May 1996, the Ministry of Transport and Maritime Economy of the Republic of Poland asked the Commission to withdraw the Warsaw railway junction study from the PHARE PL 9406 programme and to replace it with other urgent railway projects. It pointed out that the tendering procedure had been suspended for several months and that the study could not be undertaken. The ministry also mentioned external factors relating to the planned modernisation of the junction, in particular the improvement of the Warsaw-Terespol section of the E-20 railway line and new priority pre-investment activities for another line.

11. By letter of 3 June 1996, the Deputy Director-General of DG IA informed the Polish ministry that the Commission had acceded to its request. He further explained that, since there was no longer any reason to proceed with the invitation to tender for the study, the Commission had decided to annul the whole procedure on the basis of Article 23(2)(d) of the General Regulations.

12. By letter of the same date, the Director of the relevant Directorate informed the applicant and Kolprojekt of the Polish

ministry's request and of the Commission's consequent decision to annul the whole tendering procedure on the basis of Article 23(2)(d) of the General Regulations.

13. By order of 13 June 1997, the Court of First Instance (Fourth Chamber), in response to an application by the Commission, ruled that there was no longer any need to give a decision on the application for annulment and reserved for the final judgment its decision on the admissibility of the claim for damages. [4]

14. By order of 8 May 1998, [5] the President of the Fourth Chamber of the Court of First Instance, having been informed by the applicants in the reply that Kolprojekt wished to withdraw from the present proceedings, ordered the latter's name to be removed from the Court register.

The judgment of the Court of First Instance

15. The substance of the ruling of the Court of First Instance is contained in paragraphs 68 to 79 of the judgment. In brief that Court made the following points.

16. First, [6] the Court held that the charges and expenses incurred by a tenderer in connection with his participation in a tendering procedure could not in principle constitute loss capable of being remedied by an award of damages since, first, Article 23 of the General Regulations applicable to the tender procedure provided for contracting authorities to close or annul the tendering procedure without incurring liability for compensation, and, secondly, the Instructions to Tenderers forming part of the June invitation to tender provided that the contracting authority was not bound to accept the lowest offer or to award any contract.

17. Next, [7] the Court examined the questions of illegality and causation, since Article 23 could not apply if a tenderer's chances of being awarded the contract had been affected by an infringement of Community law in the conduct of the tendering procedure. It noted that TEAM had not shown any such infringement of Community law and that in any event the cause of the loss of chance of award was the withdrawal from the PHARE PL 9406 programme of the feasibility study (and the acceptance of that withdrawal by the Commission pursuant to Article 3(2) of Regulation No 3906/89), which TEAM

4 — Case T-13/96 *TEAM and Kolprojekt* v *Commission* [1997] ECR II-983.

5 — Not published in the European Court Reports.

6 — Paragraphs 69 to 71.

7 — Paragraphs 72 to 75.

had not shown to be either contrary to Community law or caused by the conduct alleged against the Commission.

18. The Court then turned to the damage allegedly resulting from the non-award of the contract, [8] holding that, since the applicant had no certainty of securing the contract, the damage was not real and existing but future and hypothetical. As for the alleged harm to its image, there was no causal link between unlawful conduct on the part of the Commission and the damage allegedly resulting therefrom.

19. The Court accordingly dismissed the claim for damages as unfounded. [9]

20. The Court also ruled on two documents on which TEAM sought to rely at the hearing: a letter dated 21 August 1995 from the Ministry of Transport and Maritime Economy of the Republic of Poland to the Commission and a confidential version of the minutes of a meeting held in Brussels on 13 September 1995 between representatives of the Commission and of the Ministry concerning the evaluation of the tenders submitted in the context of the invitation to tender of 13 June 1995. The Court ruled that the documents were irrelevant for the purposes of determining the dispute; they were therefore not taken into consideration by the Court for the purposes of its judgment. [10] The Court did not however rule on the objection of inadmissibility raised by the Commission with regard to those documents.

The grounds of appeal relating to alleged procedural infringements by the Court of First Instance

21. TEAM's first two grounds of appeal may be subsumed under this one head. The grounds comprise allegations that, in its treatment of the two documents referred to above, the Court of First Instance committed infringements of its Rules of Procedure which adversely affected TEAM's interests.

The history of the two documents in question

22. By written question sent on 11 May 1998 the Court of First Instance requested the Commission, pursuant to Article 64 of its Rules of Procedure, to produce before 20 May 1998 the minutes, notes and memoranda relating to the contested decision and the contested invitation to tender, together with the correspondence exchanged between the Commission and the Polish authorities between 13 June and 4 December 1995 concerning the conduct of the two invitations to tender in question.

8 — Paragraphs 76 and 77.

9 — Paragraph 78.

10 — Paragraph 79.

On 20 May 1998 the Commission sent the documents to the Court under cover of a letter submitting that they were not relevant to the proceedings and were in any event confidential, and accordingly requested the Court not to put them on the file or communicate them to the applicant without hearing its further observations. On 4 June 1998 the Court of First Instance returned the documents to the Commission and asked it to produce a non-confidential version. The Commission replied to that request by letter of 5 June 1998, stating that it was not for the Commission to provide the documents belonging to the Polish Government or authorities, sending the other documents duly expurgated of all confidential material and repeating its view that the documents were in any event irrelevant to the proceedings.

23. The Court forwarded the documents to TEAM on 12 June 1998. They included a letter dated 21 August 1995 from the Ministry of Transport and Maritime Economy of the Republic of Poland to the Commission and a non-confidential version of the minutes of a meeting held in Brussels on 13 September 1995 between representatives of the Commission and of the Ministry concerning the evaluation of the tenders submitted in the context of the invitation to tender of 13 June 1995.

24. The letter of 21 August 1995 was in response to a letter from the Commission dated 11 August 1995 in which the Commission stated that it could not endorse the tender evaluation report (which had recommended TEAM and Kolprojekt) and the outcome of the tender procedure and indicated that, if the Polish authorities wished to proceed with PHARE financing of the study, a new evaluation would have to take place. The letter of 21 August 1995 expressed surprise at that view and sought clarification from the Commission, while acknowledging that the final decision concerning selection of the successful tenderer was for the Commission.

25. The minutes of the meeting of 13 September 1995, convened with a view to clarifying the Commission's position, record the Commission's view that the two equally economically most advantageous offers were those presented by undertakings other than TEAM, with TEAM in third place. An Annex gives detailed reasons for that view, supported by a table awarding percentage points to all five tenderers for various criteria.

26. At the hearing on 25 June 1998, TEAM requested that the two documents should be put on the Court file. The Court of First Instance refused that request, finding that the documents were irrelevant.

Summary of the arguments

27. TEAM notes that it first asked the Court of First Instance to request the Commission to produce all relevant minutes of meetings and correspondence in its application lodged on 26 January 1996, two and a half years before the Court's formal request was made. TEAM submits that the conduct of the Court of First Instance is a manifest infringement of its right to a fair hearing, since the decision to request production was taken after excessive delay when it was no longer in a position to submit written observations and had little time to use the documents for the purposes of the hearing.

28. TEAM further submits that an even more serious infringement of its right to a fair hearing was committed when the Court of First Instance refused to take the two documents into consideration: the Court decided essential questions for the exercise by TEAM of its right to a fair hearing, such as the relevance and confidentiality of the documents, without giving TEAM the opportunity to express its point of view. Moreover in finding, without giving reasons, that the documents were irrelevant and in thus refusing to take them into consideration, the Court committed serious procedural errors.

29. TEAM adds that the Court distorted the evidence by concluding that that evidence had no relevance for the purpose of the proceedings: on the contrary, the documents were relevant for a correct assessment of at least two elements of the application, namely the illegality of the Commission's conduct and the decisive role played by the Commission in changing the tender procedure and preventing its continuance.

30. Finally, TEAM states that the Court gave no reasons for its decision that the documents were irrelevant, which is in itself sufficient to invalidate its judgment.

31. The Commission notes that two years and ten months elapsed between lodging of the application before the Court of First Instance and delivery of its judgment. It draws attention, however, to the unusual features of the case — namely that the Court was being asked to rule on facts occurring after the start of proceedings, that TEAM quantified its damages claim only in its reply lodged on 8 October 1997 (one year and ten months after the start of proceedings), and that it was not until that same date that the Court was notified of Kolprojekt's wish to discontinue its claim. The Court accordingly could not have had a precise idea of the situation before the close of the written procedure, namely at the end of November 1997. In those circumstances, it cannot be maintained that the measures of inquiry of May 1998 indicate excessive or unjust delay.

32. As for the Court's alleged failure to give reasons for not taking the documents into consideration, the Commission submits that paragraph 79 of the judgment, introduced by the words 'In view of the foregoing' and therefore to be read in conjunction with paragraphs 12, [11] 73, 74 and 75, clearly shows the logic behind the Court's decision.

Analysis

33. TEAM complains essentially that the Court of First Instance (i) ordered the production of documents with excessive tardiness; (ii) decided questions — namely the relevance and confidentiality of the documents — which were relevant to TEAM's right to a fair hearing without hearing TEAM; (iii) wrongly refused to take the documents into consideration, distorting the evidence by concluding that they were not relevant; and (iv) gave no reasons for that conclusion.

34. Although measures of internal organisation of the Court of First Instance cannot in general be reviewed by the Court of Justice, [12] excessive duration of proceedings before the Court of First Instance may be a ground of appeal. [13] In this case, however, there is nothing to support the allegation of unreasonable delay in ordering production of the documents. It was not until the order of the Court of First Instance of 13 June 1997 that the Court decided to postpone ruling on the Commission's objection of inadmissibility until it ruled on the substance of the claim for damages. In the following month the Commission, in its defence lodged on 16 July 1997, referred to the existence of a notarial deed by which Kolprojekt's representatives revoked the powers of attorney granted to their lawyers (who also acted for TEAM), noting that they had asked those lawyers to cease any actions in the name of Kolprojekt. That deed was subsequently annexed to TEAM's reply lodged on 8 October 1997. In its order of 8 May 1998 the Court of First Instance stated that that must be regarded as a discontinuance of proceedings within the meaning of Article 99 of its Rules of Procedure, and accordingly removed the name of the applicant Kolprojekt from the register. Three days later the Court of First Instance made its first request for relevant documents to the Commission. In the circumstances outlined above, the lapse of time between TEAM's application and that first request cannot be regarded as unreasonable or excessive.

35. As for the complaints about the approach of the Court of First Instance to deciding on the relevance and confidentiality of the documents, the Court of Justice has repeatedly stressed that it is for the

11 — Which summarises the fax from the Polish Ministry of Transport asking the Commission to withdraw the study from the PHARE programme: see paragraph 10 above.

12 — Case C-173/95 P *Hogan* v *Court of Justice* [1995] ECR I-4905, paragraph 15 of the order.

13 — Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417.

Court of First Instance alone to assess the value to be attached to items of evidence adduced before it and that that appraisal does not, save where the sense of the evidence has been distorted, constitute a point of law which is subject to review by the Court of Justice. [14] There is nothing in the judgment of the Court of First Instance to suggest that that Court distorted the sense of the evidence.

36. With regard more specifically to the argument concerning confidentiality, it is for the Court of First Instance, and more particularly the Chamber to which the case has been assigned, to rule on procedural issues raised by the parties and in particular on questions connected with the communication between parties of secret or confidential documents. [15] Moreover and in any event, the Court of First Instance saw the confidential versions and excluded them as irrelevant: since, as indicated above, that decision is unreviewable on appeal, it seems to me that no separate point of appeal relating to the confidentiality aspect subsists.

37. With regard to the arguments directed to TEAM's right to a fair hearing, it is clear that TEAM had the opportunity to address the two documents. It received both the letter and the non-confidential version of the minutes nearly two weeks in advance of the hearing; moreover by its own admission it had in the mean time obtained its own copies of the two documents, presumably including the confidential version of the minutes, which is annexed to its appeal.

38. Finally, TEAM argues that the Court of First Instance gave no reasons for concluding that the documents were not relevant. Although it is true that the Court of First Instance is subject to the general principle which places on every court the obligation to state the reasons on which its decisions are based, by indicating in particular the reasons which led it not to uphold a complaint expressly raised before it, [16] that principle does not mean that the Court of First Instance must give reasons for every decision on procedural and evidential matters: the principle requires the Court to respond to all the pleas in law raised before it but not necessarily to address all additional arguments. [17] In particular the Court is not obliged to give reasons for every assessment of evidence: such assessments are, as indicated above, findings of fact not decisions of law.

39. TEAM's grounds of appeal relating to the alleged procedural infringements by the

14 — See for example Case C-362/95 P *Blackspur DIY and Others* v *Council and Commission* [1997] ECR I-4775, paragraph 29 of the judgment.

15 — Joined Cases T-134/94, T-136/94, T-137/94, T-138/94, T-141/94, T-145/94, T-147/94, T-148/94, T-151/94, T-156/94 and T-157/94 *NMH Stahlwerke and Others* v *Commission* [1997] ECR II-2293, paragraph 41 of the order.

16 — Case C-283/90 P *Vidrányi* v *Commission* [1991] ECR I-4339, paragraph 29 of the judgment.

17 — *Vidrányi*, paragraph 31 of the judgment; see also the Opinion of Advocate General Van Gerven in Case C-68/91 P *Moritz* v *Commission* [1992] ECR I-6849, paragraph 7.

Court of First Instance are accordingly unfounded.

The grounds of appeal relating to the Court of First Instance's interpretation of TEAM's arguments

40. TEAM submits that on two points the Court of First Instance incorrectly interpreted the arguments set out in the application and thus erroneously assessed their legal implications: the first point concerns the loss allegedly suffered and the second concerns causation.

The concept of the damage to be compensated

41. TEAM first criticises the Court for stating that the loss pleaded by it, in particular the non-award of the contract, could be compensated only if it had a right to the contract. TEAM notes that it stressed in its written and oral pleadings that the damage of which it complains was not the failure to obtain the contract but was caused by a different legal situation. It is well established that, where there is irregularity in a tender offer, a participant who has complied with the prescribed procedure may seek compensation both for the loss of chance of award of the contract and for the charges and expenses incurred in participating in the tender, independently of the actual or potential outcome of the procedure for awarding the contract. That principle is based on the idea that the tenderer has at least a chance of obtaining the contract and that it is precisely in view of that chance that he incurs expenses linked to drawing up his tender offer. The Court of First Instance distorted TEAM's arguments on damage, completely ignoring the legal principles relied on, and thus committed a serious error of law.

42. The Commission responds that the Court did indeed examine the claim for loss of chance of award, concluding that that loss was due not to any infringement of Community law by the Commission but to an act of the Polish Government, namely withdrawal of the study. That was furthermore accepted by TEAM in its reply before the Court of First Instance, where it stated that the Polish authorities' decision to withdraw the study, far from extinguishing the damage pleaded, made it irremediable. The Court moreover found that TEAM had not shown that the Commission had infringed Community law.

43. TEAM's appeal on this ground is in my view inadmissible. In its application before the Court of First Instance, TEAM breaks down its damages claim into (i) charges and expenses, (ii) loss resulting from the non-award of the contract and (iii) damage to

its image. That formula is repeated in its response lodged on 8 August 1996 to the Commission's application to strike out and in its reply lodged on 8 October 1997 and is borne out by the quantifications of the damages claim set out in both those documents. Thus before the Court of First Instance it appears that TEAM was indeed seeking damages for not obtaining the contract. A party may not put forward for the first time before the Court of Justice a plea in law which it has not raised before the Court of First Instance. [18] That ground of appeal is accordingly inadmissible.

44. In any event, that ground of appeal is unfounded. As TEAM itself notes, damage for loss of chance of award of the contract could arise only where the conduct of the procedure was irregular. As is apparent from paragraph 69 of the judgment of the Court of First Instance, under Article 23(1) of the General Regulations the contracting authority may, before awarding the contract and without incurring any liability to the tenderers, either decide to close or annul the tendering procedure or order that the procedure be recommenced, if necessary, on amended terms. As the Court of First Instance indicates, such a provision would not validate conduct by the Commission in conflict with the principles of legal certainty and the protection of legitimate expectations. However, there is nothing to suggest any infringement of those principles in this case. There is no evidence, for example, that TEAM was 'encouraged by the contracting institution to make irreversible investments in advance and thereby to go beyond the risks inherent in... making a bid, [so that] non-contractual liability may be incurred on the part of the Community', in the words of the Court of First Instance in *Embassy Limousines & Services* v *Parliament.* [19] I accordingly see no reason to interfere with the conclusion of the Court of First Instance to the effect that TEAM has not shown any infringement of Community law by the Commission.

Erroneous test of causation

45. TEAM submits that the Court wrongly applied the test for determining causation: the judgment proceeds on the basis that the damage pleaded was due not to any illegal act or conduct on the part of the Commission but rather to the autonomous withdrawal of the project by the Polish authorities. That is wrong, TEAM suggests, for two reasons: first, the damage pleaded is due to the Commission's acts and conduct in administering the tender procedure, and is unrelated to the decisions subsequently taken by the Polish authorities, and

18 — Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others* [1994] ECR I-1981, paragraph 59 of the judgment.

19 — Case T-203/96 [1998] ECR II-4239.

secondly, in any event those decisions were caused wholly or partly by the illegal conduct of the Commission.

46. TEAM argues on the basis of *Embassy Limousines* [20] that the Commission acted unlawfully in refusing to endorse the recommendation of the Evaluation Committee. The Court should accordingly have concluded that the damage pleaded (both loss of chance and costs and expenses) was the direct consequence of the Commission's acts and had nothing to do with the Polish Government's subsequent decision. Moreover, since the delay in awarding the contract — due solely to the Commission's unlawful conduct — was a fundamental reason contributing to the Polish authorities' decision to withdraw the project, the Court's conclusion that the withdrawal was in no way attributable to the Commission's alleged conduct appears not to be justified.

47. The Commission states that the inclusion in the contested invitation to tender of the obligation on the successful tenderer to work with Kolprojekt and the provision that the budget allocated for the participation of that company was to be 25% of the financial offer meant that it was substantially different from the June invitation to tender. Those amendments, which significantly altered the economic content and the working methods of the project subject to tender, were added at the express request of the Polish Government. The Commission seeks to distinguish *Embassy Limousines*, where the conduct of the Parliament was found to have created legitimate expectations such as to give rise to non-contractual liability; in any event, in that case the Court of First Instance stated that the costs connected with the preparation of the bid must be borne by the undertaking which had chosen to participate in the procedure since it in no way followed from the mere fact that an undertaking had the right to take part in a tendering procedure that its tender would be accepted, [21] and that the applicant was not justified in claiming compensation for its loss of profit since that would result in giving effect to a contract which had never existed. [22] That principle applied *a fortiori* in this case, since the contract not only had never existed but could no longer exist since the Polish Government had withdrawn the project.

48. There are two separate but related aspects to this ground of appeal. First, there is the argument that the damage pleaded is due to the Commission's illegal acts and omissions and not to the Polish Government's decision to withdraw the study, as found by the Court of First Instance. Secondly, there is the argument that that decision was in any event substantially prompted by the Commission's illegal conduct.

20 — Cited in note 19.

21 — Paragraph 75 of the judgment.

22 — Paragraph 96 of the judgment.

49. In my view the findings of the Court of First Instance as to causation are findings of fact and as such unreviewable on appeal. Even if that were not the case, and even if the damage pleaded or the Polish authorities' decision was a consequence of the Commission's conduct of the tender procedure, I do not consider that the outcome would or should have been different since as stated above there is nothing to suggest that the Commission acted unlawfully.

50. It follows that none of the grounds of appeal can be upheld.

Conclusion

51. Accordingly in my opinion the Court should:

(i) dismiss the appeal;

(ii) order TEAM to pay the costs.