REPORT FOR THE HEARING
delivered in Case 353/88 *

I — Facts and procedure

1. *Background to the dispute*

At the beginning of March 1988, an EEC-China Business Week was held in Brussels. For the purpose of organizing it, the Commission concluded a contract with the firm Price Waterhouse Belgium. Under that contract, the tasks entrusted to Price Waterhouse were in particular participation in the preparation and implementation of the programme, preparation, printing and distribution of documents, the collection of contributions on behalf of the Commission, reservation, hiring and layout of the premises, accommodation arrangements for participants, and contacts with the press and the Chinese authorities. In addition, the contract provided that Price Waterhouse was to perform its tasks in accordance with general guidelines laid down by the Commission officials authorized to oversee the performance of the contract.

As part of the preparations for the business week, the Italian Institute for Foreign Trade distributed a letter announcing the event. According to that letter,

'10 Chinese import-export undertakings with representatives of Chinese regions and provinces with authority to take decisions will be present'

during the week.

The letter indicated that Italian undertakings interested in bilateral meetings could forward a questionnaire, attached to the letter, direct to the agency to which the EEC had entrusted organization of the week. In particular, interested undertakings were asked in the questionnaire to specify their main areas of activity and to indicate the Chinese undertakings with which they would like to have a meeting.

Relying on that information, Mr Di Domenico, the managing director of Briantex, an Italian undertaking specializing in the wholesale marketing and manufacture of household linen, lace, handkerchiefs and similar products, registered for the business week. In the abovementioned questionnaire he indicated that he wished to establish contact with CNART, the China National Arts and Craft Import-Export Corporation. In February, Mr Di Domenico was informed that an appointment had been made for him by the organizers of the week with the leaders of the CNART Chinese delegation. In the belief that he would be able to place an order with the Chinese representatives, Mr Di Domenico left for Brussels. However, at the meeting which took place on 29 February 1988, Mr Di Domenico was informed that he could not place any order with the Chinese representatives since Italy's quota for textile imports from China had been entirely used up.

* Language of the case: French.

Considering that they had suffered loss as a result of those developments, on 4 March 1988 Briantex and Mr Di Domenico served notice on the European Economic Community, the Commission of the European Communities and the firm Price Waterhouse that they intended commencing proceedings and, on 15 June 1988, they summoned them to appear before the tribunal de première instance (Court of First Instance), Brussels. According to the applicants, the loss suffered comprised the travel and accommodation expenses needlessly incurred, a sum corresponding to four days' lost work as a result of Mr Di Domenico's fruitless trip, and the damage resulting from the loss of the business which the applicants had believed they would be able to conclude. The loss was attributable to negligence on the part of the defendants, which had provided the plaintiffs with inaccurate and incomplete information.

Some months later, Briantex and Mr Di Domenico brought the present action.

2. *Procedure*

The application made by the applicant company and Mr Di Domenico was received at the Court Registry on 9 December 1988.

The written procedure followed the normal course.

By decision of 21 June 1989, adopted pursuant to Article 95(1) and (2) of the Rules of Procedure, the Court assigned the case to the Fourth Chamber.

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, it called on the applicants to produce certain information to the Court.

II — Conclusions

Briantex and Mr Di Domenico, the applicants, claim that the Court should:

(1) declare the application admissible and well founded;

(2) order the European Economic Community and the Commission of the European Communities, jointly and severally, *in solidum*, or at the very least each in default of the other, to pay the applicants by way of compensation for the defendants' negligence the sum of BFR 796 380, plus default interest from the date of the notice of the intention to commence proceedings, that is to say 4 March 1988, subject to any upward or downward adjustment made in the course of the proceedings;

(3) order the Community and the Commission to pay the costs.

The European Economic Community and the Commission, the defendants, claim that the Court should:

(1) dismiss the application as inadmissible or at least as unfounded;

(2) order the applicants to pay the costs.

III — Submissions and arguments of the parties

1. *Admissibility*

The Community and the Commission, the defendants, contend that Mr Di Domenico, as such, has no standing as an applicant nor any interest in bringing an action. When he took part in the European-Chinese Week, he acted as an executive or agent of Briantex. Only that company could have suffered any damage. Accordingly, the application lodged in the name of Mr Di Domenico should be declared inadmissible.

The defendants claim that the application is also inadmissible in so far as it is directed against the Commission. According to the defendants, only the Community has legal personality, by virtue of Article 210 of the EEC Treaty; an application for compensation should be directed only against it, the Commission being no more than an organ of the Community.

According to Briantex and Mr Di Domenico, the applicants, Mr Di Domenico has a sufficient substantive, or at least moral, interest in bringing an action: he incurred not inconsiderable expenses in making his fruitless trip to Brussels and lost four days' work.

As regards the alleged inadmissibility of the application directed against the Commission, the applicants point out that the business week was organized by the Commission. According to a previous decision of the Court, in a case concerning non-contractual liability, the Community must be represented before the Court by the institution alleged to be responsible for the event giving rise to liability. Moreover, the Court has made it clear that an action under Article 215 should be brought not against the Community as such but against the institution to which the damage is imputable (judgment of 13 November 1973 in Joined Cases 63 to 69/72 *Werhahn* v *Council* [1973] ECR 1229).

2. *The claim that the case should not proceed to judgment*

The Community and the Commission, the defendants, contend that the Court should declare that the case should not proceed to judgment, on the following two grounds.

In the first place, proceedings having the same subject-matter and based on the same claims have been commenced by the applicants against the defendants before the tribunal de première instance, Brussels *(lis alibi pendens)*. Although the Rules of Procedure of the Court contain no special provisions regarding such cases, the obligation to declare that the case should not proceed to judgment in such circumstances arises by virtue of the general principles observed in the Member States and Article 21 of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

In the second place, the action brought before the Court is linked to that brought against Price Waterhouse before the tribunal de première instance, Brussels. The defendants refer to the judgment of the

Court of 14 July 1967 in Joined Cases 5, 7 and 13 to 24/66 *Kampffmeyer and Others* v *Commission* [1967] ECR 245, according to which, before any damage for which the Community might be held liable is assessed, it is necessary for the national court to give its decision on the liability, if any, of the Member State concerned.

In addition, the defendants refer to Article 9(2) of the agreement entered into between the Commission and Price Waterhouse which provides as follows:

'The contractor shall hold the Commission and its staff harmless from any action for compensation for damage suffered by third parties, including the staff of the contractor, in connection with the performance of the present contract, to the extent to which such damage is not attributable to gross negligence on the part of the Commission or its staff.'

As regards the argument concerning the existence of proceedings elsewhere *(lis alibi pendens)*, Briantex and Mr Di Domenico, the applicants, claim that that is irrelevant. Moreover, the applicants state that the action before the court in Brussels was not properly brought against the Community and the Commission. Furthermore, there is no connection between the action against the Community and the Commission, on the one hand, and the action brought against Price Waterhouse, on the other. According to the applicants, there is no risk that the judgment of the Court and the judgment of the tribunal de première instance might be contradictory, since the two actions are divisible. As regards the agreement entered into between the Commission and Price Waterhouse, it affects the applicants only as third parties.

3. *The substance*

Briantex and Mr Di Domenico, the applicants, criticize the Commission for publishing incorrect information or causing it to be published. More specifically, the Commission should have informed them that they could not place orders with the Chinese representatives because Italy's quota in the sector which is of interest to the applicants had already been taken up in its entirety by other Italian undertakings. It is the Commission which allocates the quotas for textile imports into the Member States and oversees the application thereof. Thus, the applicants were victims of a state of affairs whereby they were led to believe that they could conclude contracts with the Chinese representatives.

The damage suffered by them amounts to BFR 96 380, in respect of travel and accommodation expenses needlessly incurred, BFR 500 000 in respect of the turnover which they might otherwise have achieved, and BFR 200 000 in respect of the loss of four days resulting from the fruitless trip.

The Community and the Commission, the defendants, observe in the first place that the applicants complain of the inaccuracy of the information given to them by the Italian Institute for Foreign Trade and, indirectly or otherwise, by Price Waterhouse. Neither Price Waterhouse nor the Italian Institute for Foreign Trade are Community institutions or agents.

The defendants then contend that the information provided was not in any way inaccurate. Nobody stated that the Chinese

undertakings would agree to enter into contracts. A business week provides an opportunity for contacts between businessmen, who are free to agree or decline to enter into any given contract.

Furthermore, the defendants observe that the Commission is not in a position to determine whether or not a given quota has been used up, since it verifies such matters only *ex post facto.*

Finally, the defendants contend that the alleged damage has not been, and cannot be, proved, the applicants having given no details or evidence regarding the compensation sought for loss of turnover and the loss of four days.

T. Koopmans
Judge-Rapporteur