OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 30 June 1988 *

Mr President,
Members of the Court,

A — Facts

1. The case on which I deliver my Opinion today concerns questions regarding the technical cooperation provided for in Chapter 10 of Title VII of the Second ACP-EEC Convention of 31 October 1979 [1] (hereinafter referred to as 'Lomé II') and in Chapter 3 of Title III of the Third ACP-EEC Convention of 8 December 1984 [2] (hereinafter referred to as 'Lomé III').

2. What is meant by technical cooperation may be ascertained from Article 138 of Lomé II and Article 208 of Lomé III (for example, the carrying out of studies, the provision of supervisory, advisory or administrative services during the implementation of a project, technical assistance and so forth).

3. According to Lomé II (Article 140), technical cooperation was to be provided under service contracts and the companies or natural persons qualifying for consideration were to be recruited 'with reference in particular to their professional qualifications and practical experience'. Article 142 of Lomé II provided that the rules governing the placing and award of service contracts were to be determined by a decision of the Council of Ministers. Since no such rules were adopted, Articles 24 to 27 of Protocol No 2 to the First ACP-EEC Convention ('Lomé I') applied to those matters (see Annex XIV to Lomé II). [3] According to Article 24 of Annex XIV, technical cooperation contracts were to be awarded by mutual agreement and certain contracts could be awarded following competitive tendering. According to Article 25 of the Annex, for each operation of technical cooperation which was to involve a mutual agreement procedure, the Commission was to 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. From that list the ACP State concerned freely chose a candidate. When competitive tendering was resorted to, the list of selected candidates was to be drawn up in close collaboration with the Commission and the ACP State concerned on the basis of the abovementioned criteria and the contract was awarded to the listed candidate that submitted the economically most advantageous tender.

4. Lomé II remained in force until 28 February 1985. However, Title VII thereof remained applicable until the entry into force of Lomé III on 1 May 1986. [4]

* Translated from the German.

1 — OJ L 347, 22.12.1980, p. 1 *et seq.*

2 — OJ L 86, 31.3.1986, p. 1 *et seq.*

3 — OJ L 347, 22.12.1980, pp. 169 and 170.

4 — Decision No 2/85 of the ACP-EEC Council of Ministers of 22 February 1985 (OJ L 61, 1.3.1985, p. 2), and Council Regulation No 690/86 of 3 March 1986 (OJ L 63, 5.3.1986, p. 1).

5. In Lomé III the criteria for the selection of service contractors are set out in Article 209 (2). According to Article 210 of this Convention, service contracts are to be awarded on the basis of restricted invitations to tender and certain contracts may be awarded by direct agreement. According to Article 211 (1) (a), for each technical cooperation scheme for which an invitation to tender is to take place, a short list of candidates from the Member States or the ACP States is to be drawn up by agreement between the Commission and the ACP State concerned, where appropriate following pre-qualification; candidates are to be chosen by reference to their legal and financial situation, qualifications, experience, independence, availability and the criteria and principles set out in Article 209. According to Article 211 (1) (d), after the invitation to tender is over, the most advantageous tender must be selected, 'account being taken notably of its technical qualities, the organization of and methods proposed for the services rendered, the competence, experience and aptitude of the staff employed for the operation and . . . the cost of the services'.

6. Where the procedure by direct agreement is applied, the successful candidate is to be chosen by the ACP State on the basis of a Commission proposal and a candidate may also be proposed by the ACP State.

7. As far as the abovementioned short lists are concerned, it was the Commission's practice, since 1960, to take account of national quotas which were related to the Member States' contributions to the Development Fund as fixed, as far as the relevant period is concerned, in the Internal Agreement of 1979[5] and the Internal Agreement of February 1985.[6] Since that practice (the details of which I shall discuss later) was criticized by some Member States, an agreement was reached with the Commission in April 1983 in the competent Council Working Party to the effect that, during a trial period (from 1 June 1983 to 28 February 1985), 81.75% of projects would be allocated on the basis of the quota system and in the case of 18.25% of all operations no consideration would be given to national quotas (in this case, where larger sums were involved, open invitations to tender were addressed to undertakings in all Member States, which numbered 10 at that time).

8. After an assessment of the results of applying that method (it is contained in a report of November 1985 appended to Annex 2 to the application), the Commission representative stated at a meeting of the Working Party on 29 November 1985 (Annex 2 to the application, p. 3) that it was 'desirable to revert to the quota system as previously applied . . . '. This intention was also declared by the Commission representative at a meeting of the Working Party on 18 December 1985 (Annex 4 to the application). It was then actually put into effect: at a meeting of the Working Party on 6 March 1986 the Commission representative stated that 'the system introduced on a trial basis in 1983 was no longer applied by the Commission as it had reverted — with effect from 1 March 1986 . . . — to the former quota system' (Annex 6 to the application, p. 4). In the minutes of the meeting of the Working Party held on 12 May 1986 (Annex 7 to the application, p. 4) the point in discussion is accordingly the Commission's decision to

5 — OJ L 347, 22.12.1980, p. 210 *et seq.*

6 — OJ L 86, 31.3.1986, p. 210 *et seq.*

revert, with effect from 1 March 1986, to the quota system applied before 1 June 1983.

9. The United Kingdom does not consider this decision to be lawful. It had already pointed this out in a letter sent to the Head of Directorate-General VIII on 21 March 1986 and it did so again in a letter of 28 April 1986 in which the Commission was requested to produce the documents embodying the terms of its decision.

10. The competent Director-General replied that, since there was no *decision*, it was not possible to communicate the terms of such a decision. An application was therefore made to the Court on 16 May 1986 for a declaration that the Commission's decision to revert to the full quota system as from 1 March 1986 is void.

11. As the Court is aware, the Commission's immediate reaction was to submit an application under Article 91 of the Rules of Procedure for a decision on a preliminary objection to the admissibility of the United Kingdom's application, which, in the Commission's view, must be disputed. Since the Court was not prepared to examine the question of admissibility separately, the Commission has claimed in the alternative that the application must be regarded as unfounded.

12. In my view, this case, in which the applicant is supported by the Kingdom of the Netherlands and the Commission by the Italian Republic, calls for the following observations.

B — Opinion

I — *Admissibility of the application*

13. Much of the argument has been taken up by the question whether the statement made by the Commission representative at the meeting of the Working Party on 6 March 1986 concerning the reversion to the quota system previously applied as regards the entry into service contracts indicates an act which is open to challenge for the purposes of Article 173 of the EEC Treaty.

14. The Commission denies this on the basis primarily of the relevant case-law (including the case-law on the ECSC Treaty) and Decision No 22/60 of the High Authority of 7 September 1960,[7] adopted pursuant to the ECSC Treaty, which was intended to regulate *inter alia* the form of decisions so that all the parties concerned could ascertain without difficulty whether a decision, within the meaning of Article 14 of the ECSC Treaty, was involved. In its view, there is no decision of the Commission involved in this case, but only certain guidelines laid down by a superior for his subordinates for the application of an unspecified provision. The most important point in this regard is that, because the nationality of the contractors is only one of many factors to be taken into account, no precise, mandatory, unalterable directions are involved, only guidelines which leave considerable room for manoeuvre. According to the Commission, another important point is that they are only significant in connection with a preparatory measure, which means that they have no definitive effect, particularly with regard to third parties, which follows *inter alia* from the fact that the ACP States may add to the short lists the names of interested parties

7 — *Journal Officiel* 61, 29.9.1960, p. 1248.

known to them. In such circumstances, it is not possible, in the Commission's view, to see any necessity for any judicial review within the meaning of Article 173 of the EEC Treaty and a political review is the most which may be considered appropriate.

15. *1.* As far as this issue is concerned, it must be borne in mind first of all that responsibility for carrying out the Commission actions referred to in Article 25 of Annex XIV to Lomé II and in Article 211 of Lomé III, namely the drawing up of a short list of candidates, is clearly entrusted to the Head of Directorate-General VIII (Development) as the *chief authorizing officer* (within the meaning of Article 121 of Lomé II) so that neither the competent Member of the Commission nor even the Commission as a body acts in this regard.

16. The instructions in question, issued by the Head of the Directorate-General for Development with regard to the application of the aforesaid provisions, are also based on the assumption (the soundness of which is not to be examined at this stage) that the aforementioned provisions leave a considerable margin of discretion. In fact, the Commission takes the view (mainly based on an analysis of the French and German versions of Article 25 of Annex XIV to Lomé II) that the criteria which are referred to in Article 25 (1) of Annex XIV to Lomé II and in Article 211 of Lomé III and which I mentioned at the beginning of my Opinion are relevant only for the purposes of the initial selection of candidates qualifying for consideration who must meet all those criteria and that for the drawing-up of a *short list* from that initial group there are, however, no precise provisions. According to the Commission, the instructions — in which national quotas are mentioned as criteria — were therefore intended to fill that gap.

17. Furthermore, it must also be stated forthwith that the short list undoubtedly had definitive effect under Article 25 (1) of Annex XIV to Lomé II because, as is stated therein, the ACP State could choose only from the selected candidates on that list. Although, in the case of competitive tendering under Article 25 (2) there appeared to be a difference in so far as under that provision the list of selected candidates was to be drawn up in close cooperation between the Commission and the ACP State concerned (the procedure under Article 211 of Lomé III is similar, too,), in practice apparently — so we have been informed — the lists drawn up by the Commission are normally accepted by the ACP States and only very occasionally will an ACP State extend the list submitted to it.

18. *2.* Accordingly, it may be stated without hesitation that Decision No 22/60, which required *inter alia* the designation of an act as a decision, a statement of its legal basis, a statement of reasons and the signature of a Member of the Commission, is certainly of no assistance in this case and that upon closer inspection the case-law on the ECSC Treaty cited by the Commission proves to be of no avail either.

19. (a) Whilst Decision No 22/60 may in general afford useful guiding principles for the coal and steel sector (the question whether a decision may be said to exist *only* when all the factors set out in that decision are taken into account has still not been clarified by the Court), it is at all events

quite clear from the case-law on Article 173 of the EEC Treaty that a measure must be characterized primarily in the light of its subject-matter and content; in other words, the nature of a measure must be considered and not its form. This was made clear in the judgments in Joined Cases 16 and 17/62 [8] and in Case 60/81. [9] The judgment in Joined Cases 316/82 and 40/83, [10] according to which, in the law relating to Community officials, oral decisions are also possible, is also of some relevance in this context. Consequently, it is certainly not possible to conclude from the circumstance that the formal requirements listed in Decision No 22/60 were not observed when the instructions in question were drawn up that the measure concerned is not open to challenge.

(b) As regards the ECSC case-law it must be borne in mind that in the judgment in Joined Cases 16 to 18/59 [11] (which concerned a High Authority decision on a cartel matter) it was merely stated that recitals in the grounds of the decision explaining the requirements for the future authorization of agreements simply constituted a notice, *not binding* on the High Authority, of the view to be taken in future and that secondly, with regard to the part of the decision in which it is a question of officials being charged with carrying out an examination, it was held that this was purely an internal measure. It is in fact clear that neither of those findings are of any assistance in the present case; they shed no light on the question whether an internal *instruction* of a department responsible for a certain measure, which is doubtless intended as guidance for the department itself as the body giving the instruction, may be regarded as a measure that is susceptible of challenge.

20. Although in the judgment in Case 54/65 [12] the Court ruled out judicial review of a statement regarding the concept of scrap made by the Scrap Equalization Fund in existence at that time, it must not be overlooked that the Court held that no decision was involved in that case on account of the fact that the Scrap Equalization Fund's powers had been revoked and hence it no longer had the power to adopt such measures at the material time.

21. Finally, in so far as the problem of internal departmental instructions was addressed in the judgment in Case 20/58 [13] (it involved a letter from the High Authority addressed to an auxiliary agency), the Court did not deny that such instructions may in principle be open to challenge; what that case turned upon was the finding that the High Authority was merely seeking to confirm the direct inferences to be drawn from a general decision; it therefore had no intention to adopt a decision at all.

22. *3.* I also have the impression that no compelling precedents for the point at issue here can in fact be derived from the

8 — Judgment of 4 December 1962 in Joined Cases 16 and 17/62 *Confédération nationale des producteurs de fruits et légumes and Others* v *Council* [1962] ECR 471.

9 — Judgment of 11 November 1981 in Case 60/81 *IBM* v *Commission* [1981] ECR 2639.

10 — Judgment of 9 February 1984 in Joined Cases 316/82 and 40/83 *Nelly Kohler* v *Court of Auditors* [1984] ECR 641.

11 — Judgment of 12 February 1960 in Joined Cases 16 to 18/59 *Geitling Ruhrkohlen-Verkaufsgesellschaft mbH, Mausegatt Ruhrkohlen-Verkaufsgesellschaft mbH, Präsident Ruhrkohlen-Verkaufsgesellschaft mbH and Others* v *High Authority of the European Coal and Steel Community* [1960] ECR 17.

12 — Judgment of 16 June 1966 in Case 54/65 *Compagnie des forges de Châtillon* v *High Authority of the ECSC* [1966] ECR 185.

13 — Judgment of 17 July 1959 in Case 20/58 *Phoenix-Rheinrohr AG* v *High Authority of the ECSC* [1959] ECR 75.

case-law concerning the Development Fund, which has also been cited by the Commission.

23. In cases concerning the awarding of contracts by the authorities of ACP States with the Commission's consent it was indeed held with regard to other excluded candidates that the Commission's action was not of direct concern to them (see the judgments in Cases 126/83 [14] and 118/83 [15]) and in other cases of this kind it was stressed that undertakings had legal relations only with the associated States, which awarded the contracts, that no Community decisions were taken with regard to them (see the judgment in Case 33/82 [16]) and that the undertakings remained outside the exclusive dealing conducted between the Commission and ACP States (see the judgment in Case 267/82 [17]). Nevertheless, I do not consider it justifiable to infer generally from those cases that the Court takes the view that measures taken by the Commission in procedures for the awarding of Development Fund contracts never have effects on undertakings involved in such procedures which would justify actions challenging such measures. There is no basis in those cases for reaching such far-reaching conclusions. In particular, it must not be forgotten that those cases involved actions brought by *undertakings* under the second pararaph of Article 173 of the EEC Treaty and that therefore the question whether *Member States* may bring an action before the Court challenging Commission measures taken in such a context was not discussed.

24. *4.* In my view, an important consideration in dealing with the problem now before the Court is that the first paragraph of Article 173 of the EEC Treaty, which governs *inter alia* actions brought by Member States, refers not only to decisions, as in the second paragraph, but also contains the wider term '*acts*'. According to the case-law of the Court (Case 22/70 [18]), that term covers a Council decision on the negotiation and conclusion of an agreement (the decision laid down rules of conduct and contained procedural provisions) and (according to the judgments in Cases 230/81 [19] and 108/83 [20]) resolutions of the European Parliament (on the holding of plenary sessions and meetings of committees and political groups at a certain place and on the work of the Secretariat and the technical services).

25. In addition, according to the case-law on the definition of measures open to challenge, the test is first whether they produce certain legal effects (see the judgments in Cases 22/70 and 60/81) and secondly (in cartel law procedures, for example) whether they are merely preparatory acts (see the judgment in Case 60/81; the judgment in Case 54/65 concerning the ECSC Treaty refers in this regard to final decisions constituting the culmination of the internal procedure).

14 — Judgment of 10 July 1984 in Case 126/83 *STS Consorzio per sistemi di telecommunicazione via satellite SpA* v *Commission* [1984] ECR 2769.

15 — Judgment of 10 July 1985 in Case 118/83 *CMC* v *Commission* [1985] ECR 2337.

16 — Judgment of 19 September 1985 in Case 33/82 *Murri Frères* v *Commission* [1985] ECR 2759, at p. 2780.

17 — Judgment of 24 June 1986 in Case 267/82 *Développement SA and Clemessy* v *Commission* [1986] ECR 1907, at p. 1913.

18 — Judgment of 31 March 1971 in Case 22/70 *Commission* v *Council* [1971] ECR 263.

19 — Judgment of 10 February 1983 in Case 230/81 *Grand Duchy of Luxembourg* v *European Parliament* [1983] ECR 255.

20 — Judgment of 10 April 1984 in Case 108/83 *Grand Duchy of Luxembourg* v *European Parliament* [1984] ECR 1945.

26. In the present case, it may certainly be said that the actions entrusted to the Commission under Article 25 of Annex XIV to Lomé II and Article 211 of Lomé III have legal effects. They undoubtedly have a determining influence on the selection of consultants by the ACP States, for, according to Article 25 (1) of Annex XIV, the selection had to be made on the basis of the list drawn up by the Commission. Whilst Article 25 (2) and Article 211 refer to cooperation (and agreement) with the ACP State concerned (which means that the ACP State may add names to the short list), the point is that the Commission's proposal is in any event final and, as we have been told, normally adhered to (which is not very surprising since most of the consultants qualifying for consideration do not have sufficient knowledge about the service contracts to be awarded nor the necessary relations with all the ACP States so that no pressure to supplement the lists can come from them). If, however, those powers of the Commission, which undoubtedly include a certain margin of discretion (how wide may for the moment remain an open question), are accompanied by clarifying instructions issued by the competent department, then those instructions may also be said to have legal effects within the meaning of the relevant case-law because they indicate the track to be taken. The fact that they are alterable (which is true of any rule) or that they allow a flexible approach, which is to say that they do not prescribe strict adherence to national quotas but permit some deviation, does not render them devoid of such effects. The crucial point is that there is an intention to have national quotas as a guideline (as from March 1986 there was in fact no more 'masse libre') and that a corresponding influence is exerted on the distribution of the service contracts (as the statistics submitted to the Court demonstrate, even if they also show that some deviations from the quotas do exist).

27. Whilst it must be admitted, on the other hand, that the part played by the Commission, considered in the context of the whole procedure for the award of contracts and in relation to the final decision which is reserved for the ACP State, is preparatory in nature, this does not exclude judicial review, having regard to the case-law on measures which are only preparatory. The point is simply that, as I have shown, the Commission has a determining influence on the group of candidates qualifying for consideration. Whoever is excluded from that group is normally excluded from the award procedure for good. For undertakings which the Commission does not put on the short list, the Community pre-selection measure is therefore quite final. Consequently, considering the matter in that light, it cannot be said that the instructions regarding the drawing-up of the short lists have no legal effects.

28. Bearing in mind, too, that it is not really possible to see how a satisfactory review of the practice concerned could be achieved by actions for damages, to which the Commission has referred and which presumably would have to be brought by undertakings left out of consideration, there is really no alternative but to consider the action admissible, despite the reservations expressed by the Commission, and thus designate the decision to revert to a quota system as from 1 March 1986, referred to in the application and attributable to the Commission, as a measure open to challenge. This is because there is clearly a legitimate interest in clarifying the question whether and to what extent national quotas are admissible in the context of technical

cooperation with the ACP States and because it is hard to see why a Member State which does not agree with the Commission's practice should have to wait for a definite measure, that is to say the establishing of a specific short list.

II — *Substance*

29. *1.* The Court's consideration of the case should be preceded by a description of the quota system employed by the system, as it emerges from the documents submitted.

30. The main criteria are percentages which are closely aligned on the Member States' contributions to the European Development Fund (memo of 21 February 1986, submitted as Appendix I to the Commission's reply to the request of the Court for the production of documents). If it appears from the regular (approximately two-monthly) surveys of the allocation of service contracts that the quota target is not being attained, preference is given when choosing from interested parties, all of whom must satisfy the criteria of competence, independence and availability (see Annex 9 to the Application), to undertakings from countries which have not attained their quotas, whereas undertakings from countries which have exceeded their quotas are held back (minutes of November 1985, Annex 2 to the Application). At the working party meeting held on 18 December 1985 the Commission representative even said that firms from Member States which had exceeded their annual quota were *excluded* (Annex 4 to the Application, page 3) and the aforementioned memo of 21 February 1986 speaks of giving *top priority* to consultancy firms from countries showing a substantial shortfall. It appears from a memo of 17 September 1984, also appended to the Commission's reply to the Court's request, that where relatively small amounts are involved, only *one* consultant is to be short-listed 'without reference to guidance on Member States' percentages', whereas in all other cases consultants are to be chosen 'preferably . . . according to current guidance on percentages for EEC Member States'.

31. On the other hand, the Commission has stated (and this corresponds to what is stated in Annex 9 to the Application) that the quota system is operated flexibly with exceptions being made, for instance, in the case of related contracts, on grounds of historical ties or cost, or when an undertaking proves to be particularly competent (an actual example was given in the course of the proceedings), and this is borne out by the statistics produced and in particular by the statistics of November 1985 specifically covering contracts dealt with under the quota system (Annex 2 to the Application). In fact it can be seen from this that the quotas are not kept to very closely (as the applicant maintains), rather in some respects there are substantial deviations (namely instances in which quotas have been exceeded by the order of 20% to over 30% and shortfalls of between 15 and 50%). However, all in all the impression remains (especially from the documents produced) that when service contracts are entered into the nationality quotas are given, not only marginal, but substantial importance.

32. 2. First and foremost, the applicant criticizes the quota system on the ground that it is not consistent with the Second and Third Lomé Conventions. There is no provision in the Lomé Conventions to the effect that such a criterion should be used in connection with entry into service contracts and it is impossible to infer such a criterion from the Conventions. In fact, the correct view is that the important selection criteria for use in drawing up lists of selected candidates are set out exhaustively in Article 25 of Annex XIV to Lomé II and in Article 211 of Lomé III, and hence there is no scope for additional criteria of the kind at issue. In particular it is significant that the Conventions are based on the principle of equal treatment — as can be seen from a number of provisions and from their general scheme — and that where the Conventions derogate from that principle they do so expressly. Another, and not the least, consideration is that the application of nationality quotas is not compatible with the overall objective of the Conventions, that of providing the most effective assistance; they could easily result in the very undertakings likely on closer examination to provide the most effective assistance being excluded on the ground of nationality from the circle of undertakings fulfilling the criteria set out in Article 25 of Annex XIV to Lomé II and in Article 211 of Lomé III.

33. For its part, the Commission (and also the Italian Government, which intervened in its support) essentially takes the view that it is not appropriate in the case of service contracts to cite those general provisions of the Conventions on which the United Kingdom is principally relying. It argues that Article 25 of Annex XIV to Lomé II and Article 211 of Lomé III are in fact *leges speciales* for service contracts, which, in view of their special nature, cannot be dealt with under the general rules. The only requirement to be inferred from those provisions is that it must be made sure when making the initial selection of eligible candidates that they meet the criteria set out in those articles, and it is to be assumed that the subsequent reduction in the number of possible candidates for the purposes of establishing a short list lies within the discretion of the Commission. In any event, it is certainly not possible to achieve a short list solely on the basis of the express criteria and if, pursuant to the discretion undoubtedly remaining to it, the Commission has regard, *inter alia* to candidates' nationality it must be acknowledged that that serves the objective of achieving a satisfactory pattern of relations between all the Member States and the ACP States.

34. In assessing this — by no means straightforward dispute — I have been left with the impression, which I shall pass on to the Court immediately, that the more impressive arguments have been adduced by the United Kingdom and the Kingdom of the Netherlands.

35. (a) It can be said straight away that the principle characterizing Title VII of Lomé II and Title III of Lomé III on financial and technical cooperation is that of *equal treatment* of participating undertakings or — to put it another way — the exclusion of discrimination.

36. In that connection reference can be made to:

(i) Article 108 (4) of Lomé II (to which Article 192 (3) (d) of Lomé III corresponds), according to which the ACP States and the *Community* bear joint responsibility for taking the necessary

implementing measures to ensure equality of conditions for participation in invitations to tender and contracts;

(ii) Article 121 (2) of Lomé II (corresponding to Article 226 (2) of Lomé III), under which the chief authorizing office (the Head of the Directorate-General, who issued the contested instructions) is to ensure equality of conditions for participation in invitations to tender and see to it that there is no discrimination;

(iii) Article 125 of Lomé II (corresponding to Article 232 of Lomé III), under which, as regards operations financed by the Community, participation in invitations to tender and contracts is to be open on equal terms to all natural persons and companies falling within the scope of the Treaty and to all natural persons and companies of the ACP States; and

(iv) Article 126 of Lomé II (corresponding to Article 233 of Lomé III), which stipulates that the ACP States and the Commission shall take the necessary measures to ensure the widest possible participation on equal terms in invitations to tender and works and supply contracts, and that discriminatory practices are to be eliminated.

37. In my view, the principle expressed thereby is diminished only to an insignificant degree by the fact that the last-mentioned provisions refer solely to works and supply contracts (which play no role in these proceedings but which, nevertheless, as we have been informed, account for about 80% of the disbursements from the Development Fund) and that Article 121 of Lomé II (Article 226 of Lomé III) mentions only invitations to tender, whereas Article 25 of Annex XIV to Lomé II and Article 211 of Lomé III — the provisions primarily of interest in this case — are concerned solely with restricted invitations to tender, since the latter provisions do not preclude the application of the criterion of non-discrimination. However, it cannot be denied that Articles 108 and 125 of Lomé II (Articles 192 and 232 of Lomé III) have general application and, in particular, it cannot be considered that the sole purpose of Article 125 (Article 232 of Lomé III) is to identify the geographical area from which persons eligible to participate may come and point to the need for equal treatment between undertakings from the Community and undertakings in the ACP countries.

38. (b) No lengthy explanations are needed on top of this to show that the prominent importance attached as a result of the quota system to the nationality of undertakings taken into consideration gives rise to unequal treatment within the meaning of the provisions cited. It is plain from the point of view of Community law that the location of the head office of an undertaking is an irrelevant criterion with regard to development assistance and that the relevant criterion should primarily be criteria characterizing the activities of the participating undertakings. In addition, it has also been pointed out in this connection that, under the practice adopted by the Commission, time after time undertakings which basically should be excluded because the relevant national quota has been exhausted are taken into consideration all the same on the ground that they have quite special competence. In fact, that simply means that those undertakings have to satisfy higher requirements (they must be 'better') and that, owing to the nationality criterion,

which entails the application of a stricter standard to them, they are not given equal treatment.

39. (c) I also agree with the applicant's statement that derogations from that principle may only be accepted where they can be derived clearly from the wording or the scheme of the Convention, precisely because an instrument is involved which the Community accepted as such and which confers on the Commission, that is to say, a Community institution, important management powers. If the Member States, which are also parties to the Convention, had genuinely considered that it was important to take account of the nationality of eligible undertakings, they would certainly have made express reference to that factor, which was important from their point of view but which, as far as the Community itself is concerned, cannot have any relevance. In this respect it is doubtless not without interest that in the law relating to Community officials it was considered that express reference had to be made to the possibility of taking account of nationality (which under Article 7 of the Staff Regulations is in itself to be regarded as being, so to speak, extraneous), and that was in fact done in Article 27 of the Staff Regulations, which states that recruitment is to be on the broadest possible basis from among nationals of Member States of the Community. It is also of interest in that connection that strict requirements are laid down in the case-law in that regard, it having repeatedly been emphasized that where the qualifications of the various candidates are equal, nationality may play a decisive role in order to secure geographical balance. [21]

21 — Judgment of 4 March 1964 in Case 15/63 *Lassalle* v *European Parliament* [1964] ECR 31; judgment of 6 May 1969 in Case 17/68 *Reinarz* v *Commission* [1969] ECR 61; judgment of 21 April 1983 in Case 282/81 *Ragusa* v *Commission* [1983] ECR 1245; and judgment of 30 June 1983 in Case 85/82 *Schloh* v *Council* [1983] ECR 2105.

40. However, as far as the wording of the Lomé Conventions is concerned, they manifestly contain no provision providing for the nationality-based procedure adopted by the Commission. Rather, special provisions allowing for derogations from the requirement for equal treatment are provided only in favour of the ACP States, such as, for instance, Articles 130 and 140 of Lomé II and Articles 209 and 236 of Lomé III. Moreover, it is certainly not possible to try to justify nationality quotas by reference to the spirit of the Conventions by arguing that they are concerned to give rise to relations whose intensity is as uniform as possible between all the Member States and all the ACP countries. If that consideration manifestly has no significance in the case of works and supply contracts, which account for by far the largest share of the development assistance, it cannot really be seen why that idea should have dominant importance in the case of service contracts.

41. As against that it cannot be argued that the importance of consultancy contracts goes far beyond their share in value terms, on the ground that they often pave the way for subsequent supply or works contracts.

42. If that is right, an overt reference to a nationality ratio would perhaps have been justified on that very ground if it had been the stated intention of the Member States.

But it cannot justify reading the nationality criterion, which conflicts with the basic tendency of the other provisions of the Convention, into a provision which lays down objective quality criteria.

43. (d) If, on the other hand, it must be conceded *vis-à-vis* the Commission that the provisions of Article 25 of Annex XIV to Lomé II and Article 211 of Lomé III constitute in a certain sense *leges speciales* for service contracts (because they relate to services of a special nature, because it is very difficult to make an objective quality comparison with general invitations to tender and because attention must be paid, *inter alia* on cost grounds — frequently relatively small sums are involved — to reducing the number of candidates), this does not necessarily mean that in this case the candidates' nationality can be made into a determining factor. It is not, in my view, convincing to interpret the aforesaid two provisions as meaning that initially candidates are to be selected on the basis of the criteria laid down, and that subsequently a reduced list selected from those candidates can be compiled at the Commission's free discretion (with, *inter alia*, national quotas being allowed to play a role). Whilst the very fact that such a broad discretion should be provided for in respect of the decisive choice in an area for which such detailed rules are laid down (I am thinking above all of Articles 211 and 209 of Lomé III) must seem unusual, the wording of the provisions referred to seem equally well to support the interpretation that the express, listed criteria are primiarily to be used also in drawing up the short list (and — in Article 25 of Annex XIV to Lomé II — also probably the price, since in the case of an actual project, it will possibly depend, not on who is the best qualified and hence the most expensive candidate, but on which is the cheapest possible service). In any event, the argument that it is practically impossible for the Commission to identify a small group initially on the basis of the criteria set out in the provisions in question is not plausible. Indeed the Commission itself stated in the course of the proceedings — with regard to criticism in that regard in the Court of Auditors' report — that the method for assessing eligible undertakings has since been improved and, in particular, that regular reports stored on computer on services provided in the past were useful in that regard.

44. If one accepts the existence of a certain margin of discretion with regard to the establishment of the short lists (which it would be difficult to deny), the fact certainly still remains that in the context of that discretion nationality quotas may not play a *predominant* role, if only because that would be liable to endanger a characteristic principle of development assistance, which can be inferred from a number of provisions cited by the applicant from the two Conventions at issue, namely ensuring the most effective assistance. In fact, it is certainly conceivable for the very candidates excluded in a given case on account of their nationality to include on closer examination those candidates which might perform the most useful technical services, which the Commission has generally not been at pains to determine. At most, the characteristic of nationality may play a quite subordinate role in the context of any discretion (comparable to that which exists in the law relating to Community officials, that is to say when the objective equality of the candidates has been established) and it can even be held to have a certain utility in so

far as it helps to avoid blatant one-sidedness arising in the development of relations between a Member State and some ACP countries, which would certainly not accord with the spirit of the Conventions.

45. (e) Lastly, it is plain that I am not convinced by the Commission's reference to the practice followed by other institutions active in the sphere of development assistance (World Bank, Inter-American Development Bank, African Development Bank, UN Development Programme).

46. From what has been stated it would appear that in those institutions it is not nationality quotas in the sense of the practice adopted by the Commission which play a role, but simply the desire to secure the widest possible geographical distribution of service contracts. Furthermore, the point should be made that, of course, practices of purely international organizations cannot simply be transposed to the qualitatively quite different type of cooperation which takes place under the Lomé Conventions, to which the Community itself is a party (as a result of which quite specific allowance has to be made for the interests of Community citizens) and from which in addition clear principles of substantive law can be derived with regard to the treatment of candidates for service contracts.

47. (f) Consequently, it must be held with regard to the applicant's first conclusion that the quota system, as described in these proceedings, to which the competent Commission department decided in March 1986 to revert in full is to be regarded as being incompatible with the Second and Third Lomé Conventions, and hence the application for it to be declared void ought to be granted.

48. However, as the applicant itself has urged and in accordance with the possibility afforded under Article 174 of the Treaty, this should be subject, on grounds of legal certainty, to the limitation that contracts already concluded should not be affected.

49. *3.* Consequently it is in fact unnecessary to consider the applicant's other two grounds, namely the alleged infringement of Article 7 of the EEC Treaty (according to which any discrimination on grounds of nationality within the scope of application of the Treaty is prohibited) and the alleged infringement of the objective defined in Article 3 (f) of the EEC Treaty (the institution of a system ensuring that competition in the common market is not distorted). However, for the sake of completeness I shall append at least a few brief remarks on those claims.

(a) *Article 7 of the EEC Treaty*

50. The applicant argues that it can be inferred from Article 228 of the EEC Treaty that agreements concluded by the Community (as Lomé II and III were) should be compatible with the Treaty. It also considers that acts of the Commission issued in connection with such agreements fall within the field of application of the Treaty; consequently, they are covered by the prohibition set out in Article 7 and that precludes attaching critical importance in forming such acts to the location of the head office of an undertaking.

51. Without question this sounds at first quite convincing. In any event, it is hard to argue against this view that the quota system at issue in this case takes account of the differing situations of the Member States as reflected in their differing financial contributions to the Development Fund (which is used to finance the service contracts), and that it should be regarded from that point of view as objectively justified. Certainly no support for that view can be obtained from Opinion 1/78 [22] cited by the Commission: whilst in that case it was stated in regard to the possibility of financing being by the Member States (it had not yet been established whether that was to be the case) that that would imply their participation in the decision-making machinery with regard to the buffer mechanism, that was manifestly only relevant with regard to the question as to whether the Community was to be regarded as having sole competence for the conclusion of the relevant agreement; by contrast, it is not possible to infer from that decision the principle that a particular mode of financing enables derogations to be made from basic principles of Community law.

52. Moreover, it could be pointed out in that connection that, strictly speaking, the Member States' financial contributions to the Community differ considerably and yet the Community is governed by the principle laid down in Article 7.

53. However, the question has rightly been raised as to whether it can in fact be said that acts of the Commission in connection with the conclusion of service contracts in the context of technical cooperation with the ACP countries fall completely within the field of application of the Treaty and therefore are fully subject to the prohibition set out in Article 7. In practice, there is no getting round the fact that we are dealing with mixed agreements, that is to say agreements which have also been signed by the Member States, and while in those agreements powers have been transferred to the Commission, that does not necessarily mean that they are exercised solely in the name of the Community, but it appears (for instance from Article 11 of the Internal Agreement of 1979 on the financing and administration of Community aid) that the Commission acts also in an administrative capacity for all the parties to the agreement.

54. Impressive insights can also be derived from the case-law cited by the Commission on the incomplete application of the principle of equality and permissible derogations from that principle. I have in mind in the first place two judgments relating to commercial policy. In the judgment in Case 41/76 [23] a restriction in intra-Community trade in products from non-member countries which were in free circulation in a Member State was held to be permissible under and with regard to Article 115 on the ground that the Community commercial policy had not yet been fully achieved. The judgment in Case 242/84 [24] was on the same lines (the case was concerned with common import arrangements involving quantitative limits, which were divided among the Member States in accordance with their needs). Once again, the Court found that in view of the fact that the common commercial policy was not yet fully achieved there was justification for restrictive measures with respect to goods which were in free circulation in a Member State. I also have in mind the judgment in Case 153/73, [25] which justified in the sphere

22 — Opinion 1/78 of the Court of 4 October 1979 given pursuant to the second paragraph of Article 228 (1) of the EEC Treaty on the International Agreement on Natural Rubber [1979] ECR 2871.

23 — Judgment of 15 December 1976 in Case 41/76 *Donckerwolcke* v *Procureur de la République and Others* [1976] ECR 1921.

24 — Judgment of 5 March 1986 in Case 242/84 *Tezi BV* v *Minister for Economic Affairs* [1986] ECR 933.

25 — Judgment of 2 July 1974 in Case 153/73 *Holtz & Willemsen GmbH* v *Council and Commission* [1974] ECR 675.

of the common agricultural policy (in respect of which there is a specific prohibition of discrimination laid down in Article 40 of the EEC Treaty) a special measure for one Member State (a subsidy for rape seed processed in Italy) on the ground that the common organization of the market in existence at that time did not completely measure up to the objectives listed in Article 39 of the Treaty and contained gaps. If, in view of this case-law and on the ground that policy on development assistance has not been completely taken over by the Community, it is argued that the prohibition of discrimination set out in Article 7 may not yet be applied in its full vigour, it must be conceded that there is certainly something in that argument.

55. In any event, that argument cannot be decisively countered by stating that Article 115 of the Treaty makes express provision for derogations in the context of the common commercial policy. Such express provision is also lacking in the agricultural field (which did not rule out a derogation from Article 40), and as far as the Conventions at issue are concerned, it must probably therefore be assumed that they warrant a certain margin of discretion on the part of the Commission as regards service contracts.

56. Neither can support be mustered against the Commission's proposition from the judgment in Case 126/82.[26] Although the judgment contains certain (in the final analysis, negative) observations on Article 7 of the EEC Treaty, it cannot simply be concluded therefrom that the Court assumed that although there were lacunae in the common transport policy, the prohibition of discrimination applied in full in that field.

26 — Judgment of 25 January 1983 in Case 126/82 *Smit Transport BV* v *Commissie Grensoverschrijdend Beroepsgoederenvervoer* [1983] ECR 73.

57. It must therefore be held — I shall go no deeper into this question now — that it is at least extremely dubious whether the quota system implemented by the Commission can be criticized in reliance on Article 7 of the EEC Treaty.

(b) *Article 3 (f) of the EEC Treaty*

58. In so far as the applicant also claims that the Commission is bound in exercising the powers conferred on it by the Conventions to have regard to the objective of Article 3 (f) of the EEC Treaty, and considers that it fails to do so when it takes account of nationality quotas which, in certain circumstances, may result in an undertaking's being placed on the short list solely on nationality grounds, I likewise have doubts as to whether that argument (distortion of the terms of competition) genuinely constitutes a ground for declaring the relevant decision void.

59. In my view it is quite certain that in this connection one must leave it out of account that in any event there will be a *restriction of the number* of persons being considered for service contracts and hence the competition will be restricted in each case to a few interested persons. That is provided for expressly in the Conventions and it can also be held to be in the interest of rational development assistance (because it means that only seriously interested undertakings are appointed for work, which in any event by its nature does not lend itself readily to general invitations to tender, and because it enables costs to be kept down as compared

with comprehensive invitations to tender in which a large number of participants would have to participate each time). Likewise it is doubtless of no further interest that sometimes only *one* candidate is placed on the short list, since it appears from a memo of 17 September 1984 (Appendix II to the Commission's reply to the request of the Court for the production of documents) that that occurs only in the case of minor service contracts and nationality quotas play no part in connection therewith.

60. Whilst, on the other hand, it cannot be accepted in this connection that the objective set out in Article 3 (k) has priority over that set out in Article 3 (f) (in so far as it is a matter of achieving with the help of the national quotas the most uniform possible development of the Members States' relations with the ACP countries — I have already said everything which needs to be said on this subject), it must, however, be considered doubtful whether the selection method in question — leading to objectively deserving candidates not being included on the list and others being included only because of their nationality — actually does have repercussions on the situation in the *Community* (given that services to be provided outside the Community are involved) such as to involve significant effects on competition within the meaning of the relevant provisions on competition. Nevertheless, it can be assumed that favouring undertakings which are basically unworthy of participating is not the general rule. On the other hand, it has not been shown that failure to consider intrinsically worthy undertakings on nationality grounds is capable of adversely affecting their competitive position within the common market, and it is also to be assumed that, as far as most of the undertakings in question are concerned, service contracts with ACP countries account for only a fraction of their business. Accordingly it can scarcely be seen how the contested quota system significantly affects competition between Member States in the Community in the services sector.

61. For the rest, the case-law cited by the applicant in this connection scarcely yields any decisive support. This is true of the judgment in Joined Cases 6 and 7/23,[27] which was concerned with an undertaking with a dominant position trying to eliminate a competitor and hence involved the question of the effects of behaviour on the competitive structure within the common market. That is also true of the judgment in Case 249/85. [28] Although that judgment refers to the Community institutions having to take account of the requirement of fairness in trade, I cannot see how that principle can seriously be affected by the quota system.

62. Consequently neither can it be taken that Article 3 (f) of the EEC Treaty might afford a further ground for declaring the decision void.

27 — Judgment of 6 March 1974 in Joined Cases 6 and 7/73 *Istituto chemioterapico italiano and Others* v *Commission* [1974] ECR 223.

28 — Judgment of 21 May 1987 in Case 249/85 *Albako* v *Bundesanstalt für landwirtschaftliche Marktordnung* [1987] ECR 2345.

C — Conclusion

I shall sum up as follows:

63. In my view, the application brought by the United Kingdom is to be regarded as admissible and appears to me to be well founded: accordingly, the decision of March 1986 on reversion to the full quota system for the entry into service contracts pursuant to the Second and Third Lomé Conventions must be declared void, subject, however, to the limitation that contracts already concluded thereunder are to remain unaffected.

64. In view of this outcome, the Commission should be ordered to pay the costs of the United Kingdom and of the Kingdom of the Netherlands, which intervened in support of the United Kingdom; the Italian Republic, which intervened in support of the Commission, should be ordered merely to bear its own costs.