In Case 76/79

KARL KÖNECKE FLEISCHWARENFABRIK GMBH & CO. KG, a meat-processing undertaking having its registered office in Bremen, Federal Republic of Germany, represented by Klaus Landry, Rechtsanwalt, Hamburg, with an address for service in Luxembourg at the office of Jeanne Jansen-Housse, Huissier de Justice, 23 Rue Aldringen,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Gianluigi Campogrande, acting as Agent, assisted by Jörn Sack, a member of the Legal Department, with an address for service in Luxembourg at the office of its Legal Adviser, Mario Cervino, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for the annulment of Commission Decision No 79/187 of 30 January 1979 fixing the minimum selling prices for frozen beef put up for sale by the intervention agencies in accordance with Regulation No 2900/77 and specifying the quantities of frozen beef for processing which may be imported under special terms in the first quarter of 1979 (Official Journal 1979, No L 41, p. 49)

THE COURT (Second Chamber)

composed of: A. Touffait, President of Chamber, P. Pescatore and O. Due, Judges,

Advocate General: G. Reischl
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

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

I — Summary of the facts

Regulation No 805/68 of the Council of 27 June 1968 on the common organization of the market in beef and veal (Official Journal, English Special Edition 1968 (I), p. 187) provides in Article 13 (1) that a levy shall be charged on imports into the Community of frozen meat of domestic bovine animals listed under tariff subheading No 02.01 A II (a) 2 of the Common Customs Tariff.

Nevertheless Article 14 (1) of the regulation provided that frozen meat intended for processing (forequarters and other cuts, unboned (bone-in) or boned or boneless) should qualify for special import terms consisting of the total or partial suspension of the levy. In Article 14 (3) (a) provision was made for the total suspension of the levy in respect of meat intended for the manufacture of the preserved food falling within heading 16.02 B III (b) I of the Common Customs Tariff and not containing characteristic components other than beef and jelly.

On 14 February 1977 the Council adopted Regulation No 425/77 amending Regulation No 805/68 (Official Journal 1977, No L 61, p. 1).

Since the situation on the beef and veal market had been characterized for several years by a shortage accompanied by a rise in prices and thereafter degenerated into a market-price slump, made worse by massive imports and since import arrangements had to be adjusted to avoid a recurrence of similar situations the Council considered it necessary to adapt certain special systems so that account might be taken in annual estimates of both the supplies available to the Community and of the Community's needs. It accordingly modified *inter alia* Article 14 of Regulation No 805/68 by providing that henceforth frozen meat intended for processing imported under total suspension of the levy would only qualify for the exemption from the levy on new conditions:

(a) Before 1 December each year, the Council, on a proposal from the Commission, shall draw up an estimate of meat which may be imported under suspension of the levy. This estimate shall take account, on the one hand, of the expected Community supplies of meat of a quality and type of cut suitable for industrial use and, on the other, of industrial needs (Article 14 (2) as amended).

(b) The Commission shall determine each quarter the quantities of meat which may be imported under total suspension of the levy and determine the detailed rules for the application of that article, and particularly those

concerning control of the end use of imported meat (Article 14 (4) as amended).

(c) Importation under total suspension of the levy shall be conditional on production of an import licence issued for a quantity falling within the limits laid down each quarter; it may be made conditional, as far as necessary, on production of a purchase contract for frozen meat held by an intervention agency ("linking" or "twinning" arrangements; Article 14 (3) as amended).

The implementing provisions provided for in Council Regulation No 425/77 were adopted by the Commission in Regulation No 585/77 of 18 March 1977 on the system of the import and export licences for beef and veal (Official Journal 1977, No L 75, p. 5) and in Regulation No 597/77 of 18 March 1977 laying down detailed rules for the application of special import arrangements for certain types of frozen beef intended for processing (Official Journal 1977, No L 76, p. 1); those regulations were amended and supplemented by Commission Regulations Nos 1384/77 of 27 June 1977 (Official Journal 1977, No L 157, p. 16) and No 2901/77 of 22 December 1977 (Official Journal 1977, No L 338, p. 9). (Those were subsequently replaced by Commission Regulations Nos 571/78 and 572/78 of 21 March 1978 (Official Journal 1978, No L 78, pp. 10 and 17)).

Under those provisions in order to qualify for total suspension of the levy the application for a licence or licences lodged by any one applicant must relate to a quantity corresponding to not less than five tonnes of bone-in meat and not more than 10% of the quantity fixed by the Commission pursuant to Article 14, as amended, of Regulation No 805/68 for the quarter during which the application for a licence or licences is lodged (Article 3 of Regulation No 1384/77).

Furthermore applications for licences may be considered only if they are submitted by a natural or legal person who for at least 12 months has been carrying on business in the meat and livestock sector and is officially registered in a Member State (Article 1 of Regulation No 2901/77).

On 22 December 1977 the Commission also adopted Regulation No 2900/77 laying down detailed rules for the sale of beef held by the intervention agencies to enable the import with total suspension of the levy of frozen beef and veal intended for processing (Official Journal 1977, No L 338, p. 6).

Under Article 1 (1) of that regulation, importation with total suspension of the levy is conditional upon the submission of a purchase contract for frozen meat held by an intervention agency, concluded in accordance with the regulation. Article 1 (2) provides that sale shall take place by way of tender pursuant to Articles 6 to 14 of Regulation No 216/69 of the Commission of 4 February 1969 on detailed rules of application for the disposal of frozen beef and veal bought in by intervention agencies (Official Journal, English Special Edition, 1969 (I) p. 31); that regulation provides *inter alia* that in a tendering procedure the Commission shall fix minimum selling prices, that if the tender is less than the minimum price it shall be refused and that the contract shall be awarded to the highest tender whilst when several tenders at the same price are received for the same quantity, the intervention agency shall divide the quantity available in agreement with the tenderers concerned or award it by balloting. Article 1 (2) of Regulation No

2900/77 refers to Regulation No 216/69 "subject to the special and derogating provisions laid down in this regulation [No 2900/77]".

According to Article 2 of Regulation No 2900/77 "under the tendering system" the intervention agencies shall issue partial invitations to tender every quarter; a general notice of invitation to tender must be published at the latest on the date of publication of the first partial invitation to tender.

According to Article 3 of the regulation tenders may be submitted only during the first ten days of each quarter. Only tenders for a total quantity of not less than five tonnes and not more than 100 tonnes, expressed as unboned meat, can be accepted.

On the basis of its Regulations Nos 216/69, 2900/77 and 2901/77 the Commission published on 13 January 1978 (Official Journal 1978, No C 11, p. 16) a "General notice of periodic invitations to tender for the sale of frozen beef held by the intervention agencies to enable the import with total suspension of the levy of frozen beef and veal intended for processing".

On 23 December 1978 the Commission published Notice of invitation to tender No D P 5 — Regulation (EEC) No 2900/77 — for the sale of certain frozen bone-in beef held in stock by the German intervention agency (Official Journal 1978, No C 308, p. 29).

According to that notice of partial invitation to tender the German intervention agency was to sell approximately 5 700 tonnes of frozen bone-in beef in accordance with the rules laid down in the General notice of invitations to tender of 13 January 1978. Notice No D P 5 provided that only tenders which reached BALM (Bundesanstalt für landwirtschaftliche Marktordnung; the German agricultural intervention agency) at the latest on 10 January 1979 would be considered.

On 9 January 1979 Kommanditgesellschaft in Firma Karl Könecke, a meat-processing undertaking having its registered office in Bremen, addressed to BALM five tenders each relating to a quantity of 20 tonnes at prices of DM 5 741, 5 311, 5 291, 5 271 and 5 251 per tonne respectively, depending on the various categories of frozen meat and the country in which it was stored (the Federal Republic in the case of the first tender and Denmark in the case of the remaining tenders).

By a communication of 29 January 1979 which was received on 5 February BALM notified Könecke that, according to the decision of the Management Committee for Beef and Veal, its tender could not be accepted under the tendering system.

On 30 January 1979 the Commission adopted Decision No 79/187 fixing the minimum selling prices for frozen beef put up for sale by the intervention agencies in accordance with Regulation No 2900/77 and specifying the quantities of frozen beef for processing which may be imported under special terms in the first quarter of 1979 (Official Journal 1979, No L 41, p. 49).

Article 1 (1) of that decision together with the annex thereto fixes as follows the minimum selling prices for the frozen beef stored by the German intervention agency which are to be adopted for the invitation to tender No D P 5:

Products	Minimum selling prices (in units of account per tonne)	
	A	B
Stored in Germany:		
Forequarters straight cut at eighth rib, from		
Steers A		1 903
Bulls A	1 831	1 951
Stored in Denmark:		
Forequarters straight cut at eighth rib, from		
Steers A	1 584	1 689

Article 2 of the decision fixes, for the period 1 January to 31 March 1979, the maximum quantities of meat intended for the manufacture of 'preserved food' under total suspension of the levy at 7 732 tonnes.

II — Written procedure

On 7 May 1979 Könecke instituted proceedings pursuant to the second paragraph of Article 173 of the EEC Treaty for the annulment of Commission Decision No 79/187 of 30 January 1979.

The written procedure followed the normal course.

The Court, having heard the report of the Judge-Rapporteur and the views of the Advocate General, decided to open the oral procedure without any preparatory inquiry. It nevertheless requested the Commission and Könecke each to reply in writing to a question; its request was complied with within the prescribed time-limit.

By an order of 7 November 1979 the Court, pursuant to Article 95 (1) and (2) of the Rules of Procedure, decided to assign the case to the Second Chamber.

III — Conclusions of the parties

The *applicant* claims that the Court should:

(a) annul Commission Decision No 79/187 of 30 January 1979 in so far as it affects the applicant;

(b) order the Commission to pay costs.

The *Commission* contends that the Court should:

(a) rule that the application is inadmissible;

(b) in the alternative declare that it is not well founded at least in so far as the applicant company's tenders for the meat of the German intervention agency stored in Denmark are concerned;

(c) order the applicant to pay the costs.

IV — Submissions and arguments of the parties in the course of the written procedure

A — Admissibility

The *Commission* considers that the application is inadmissible on the one hand because it is out of time and on the other because the applicant has no legal interest in taking proceedings.

(a) Decision No 79/187 was notified (by the communication from BALM of 29 January 1979 to Könecke) and was published (in the Official Journal of

16 February 1979). The application was lodged on 7 May 1979; the time-limit for lodging the application having regard to the time allowed on account of the distance from Germany was thus not observed unless the point from which it is calculated is taken as the publication of the contested decision in the Official Journal.

The contested decision constitutes an act whose publication is not obligatory. Since the Official Journal is very much overloaded with acts whose publication is obligatory it is impossible for the Commission to guarantee that acts whose publication is not obligatory will appear in the Official Journal shortly after their adoption or notification to the person concerned; furthermore the need to effect publication in the Official Journal very often only becomes apparent some considerable time after the adoption of the act. If the Commission were to fear that such delayed publication would considerably extend the time-limit for instituting proceedings or reopen time-limits for instituting proceedings which had already expired it would be prompted, in that same interest of legal certainty which it is the very purpose of the time-limits to preserve, to refrain from all publication of acts whose publication is not obligatory.

There are no compelling reasons for fixing the beginning of the period laid down in the third paragraph of Article 173 of the Treaty at the later date where individual notification is followed by subsequent publication in the Official Journal. The requirement of protection of the person concerned by the decision is sufficiently met if he is allowed a period of two months after individual notification of the measure. If this view were not accepted there would in fact result two distinct time-limits entirely independent of each other for instituting proceedings; such an interpretation is not in accordance with either the spirit or the letter of the third paragraph of Article 173 of the Treaty. The notification provides for the person concerned greater certainty than publication in the Official Journal since the latter can easily escape his notice. Where the applicant is individually notified and an act whose publication is not obligatory is subsequently published in the Official Journal the fixed period must thus begin to run from the first of those two dates. This interpretation does not result in either lack of clarity or uncertainty as to the law; it reconciles the requirements of effective legal protection with the need to prevent litigation arising and to provide as full information as possible.

"Notification" within the meaning of Article 173 of the Treaty or "receipt by the person concerned of notification" within the meaning of Article 81 (1) of the Rules of Procedure need not be understood as meaning full and formal communication of the measure or the sending of a copy thereof; according to the second paragraph of Article 191 of the Treaty those stringent conditions are justified only in the case of notification to the person concerned of the measure where that form of communication is a necessary condition of the validity of the measure. The only persons to whom Decision No 79/187 is addressed are the Member States.

The fact that the communication from BALM is dated 29 January 1979 and gives the wrong authority as the source of the decision is irrelevant: since the applicant undertaking was fully conversant with the tendering procedure in question it could not have entertained the slightest doubt as to the nature and meaning of the decision at issue.

On the basis of these considerations it must be found that in the present case the period fixed for instituting proceedings began to run on the day after notification of the decision to the

applicant company, that is 6 February 1979, and that since the application was only lodged on 7 May it is out of time and accordingly inadmissible.

(b) The application is also inadmissible because the applicant has no legal interest in the annulment of Decision No 79/187.

In its judgment of 6 March 1979 in Case 92/78 the Court upheld the *Simmenthal* company's legal interest on two grounds even though the contested decision had already been fully implemented for the benefit of the other tenderers participating in the invitation to tender and as such had become devoid of purpose: the Court considered that Simmenthal retained an interest in the annulment of the decision, such interest consisting either in its being suitably restored to its original position following the rejection of its tender or in inducing the Commission to make suitable amendments in the future as required by law to the system of invitations to tender.

In this case the second ground must be excluded from the outset: the Commission, by Regulation No 1138/79 of 8 June 1979 fixing the quantities of frozen beef intended for processing which may be imported on special conditions for the second and third quarters of 1979 and repealing Regulations No 2900/77 and No 535/79 (Official Journal 1979, No 141, p. 15) has made the appropriate amendments to the provisions in implementation of Article 14 of Regulation No 805/68.

With regard to the second ground it must be found that even if Decision No 79/187 were annulled it would still be impossible to accept the applicant's tender or subsequently to issue it with a corresponding licence for the importation of beef and veal for processing under exemption from the levy; likewise the case-law of the Court indicates that there would be no possibility of success for an action for damages based on the improper nature of the contested decision arising from the invalidity of the legal provisions by the Commission on which the decision was based.

The action for making good the consequences of a mesure (Folgenbeseitigungsanspruch) known to German law and relied upon by the applicant is not available with regard to administrative measures whereby the administration grants the citizen certain advantages of an economic or social nature; it is linked to the requirement that the administrative measure, the implementation of which is sought, is lawful and possible in practice; the removal of the consequences of a measure may not adversely affect the rights and interests of third parties.

An action of that nature is thus in any event not appropriate in this case.

(c) Since the annulment of the contested decision cannot either promote the interests of the applicant concerning the amendment of the future rules for the importation of meat for processing or obtain for him subsequently the award of a tender corresponding to his offer or compensation, the applicant has no legal interest in taking proceedings and his application must be dismissed as inadmissible.

The *applicant* considers that the objections of inadmissibility raised by the Commission are not well founded.

(a) The contested decision was not notified either in accordance with the second paragraph of Article 191 or in accordance with the third paragraph of Article 173 of the EEC Treaty.

The decision is dated 30 January 1979; the letter from BALM notifying the applicant that his tender could not be accepted is dated 29 January; that letter accordingly cannot constitute notification to the applicant of a decision which the Commission had not yet taken.

Furthermore the letter from BALM of 29 January 1979 does not mention a decision of the Commission but of the "Management Committee for Beef and Veal"; accordingly it cannot constitute an individual notification of the contested decision.

Finally the contested decision does not contain any statement of the reasons on which it is based.

The period fixed for instituting proceedings against a decision cannot begin to run until the text of that decision or at any rate the essential details of its contents have been notified to the applicant. An individual notification for the purpose of the third paragraph of Article 173 of the Treaty means communication of the entire text of a contested decision. Only then can the applicant establish whether the reasons on which it is based have been properly stated and whether it refers to the necessary proposals and opinions. The letter from BALM of 29 January 1979, obviously does not even come near to meeting those conditions; furthermore it did not come from the Commission either.

In the absence of individual notification of the contested decision to the applicant only the date of publication is relevant. The time-limit was thus observed.

In any event although the contested decision was individually notified to the applicant the period fixed for instituting proceedings begins to run in accordance with Article 81 (1) of the Rules of Procedure from the date on which it is actually published (whether or not such publication is obligatory).

In such a case the principle of most favoured treatment must be applied to the applicant; in so far as the Community institutions are at fault in creating doubt as to the date at which time begins to run the applicant must be given the benefit of that doubt.

(b) The judgment of 6 March 1979 in Case 92/78 has established beyond doubt that the contested decision is unlawful. That finding is sufficient to establish that the applicant has a legal interest in taking proceedings. The applicant cannot be expected to accept a situation in which an unlawful decision, which is of direct and individual concern to it, continues in force.

The situation of the applicant, with regard to its participation in the invitation to tender for the first quarter of 1979, is the same as that in Case 92/78 of the Simmenthal company which the Court found had such a legal interest. In so far as it is necessary to induce the Commission appropriately to redress the consequences of its unlawful decision the applicant can undoubtedly establish such a legal interest.

The "redress of the situation" of the applicant for the purposes of the judgment of the Court of 6 March 1979 is termed in German administrative law "Folgenbeseitigungsanspruch" (action to redress the adverse consequences of an unlawful administrative measure). The action is to obtain restitution in kind or where that is impossible to provide reparation by other means. It is not intended to make good the loss in its entirety; only losses which have been

sustained must be made good. It accordingly does not amount to an action for damages. The manner in which such reparation must be provided and the objective in view in the present case are questions which must be reserved for a subsequent procedure. The admissibility of the application cannot be considered by settling that subsequent procedure in advance; the existence of the principle, indeed the mere possibility of bringing such an action, is sufficient to establish that the applicant has a legal interest.

The foregoing also applies to any actions for damages which the applicant may take against the Commission.

B — Substance

The *applicant* considers that Decision No 79/187 suffers from the same defects as Commission Decision No 78/258 of 15 February 1978 which the Court annulled in its judgment of 6 March 1979 in Case 92/78. It declares that it adopts the reasoning on which that judgment is based and the arguments submitted by Simmenthal in the course of Case 92/78.

(a) The Commission recognizes that the application is well founded with regard to the applicant's tender for the meat stored in Germany.

Its objection based on the fact that that tender was among the six lowest tenders in the category in question must be considered in the light of the Court's finding in its judgment of 6 March 1979 that the minimum price fixed in the tendering procedures was clearly higher than the usual price on release from storage and this constituted a breach of Article 14 of Regulation No 805/68. The applicant's tenders should accordingly have been accepted if only because they were above the price determined for procedures with a selling price fixed in advance.

(b) With regard to the tenders for meat stored in Denmark it must be found that the very fact that they were stored with the German intervention agency was sufficient to make them the concern of the Commission. Any errors in the transmission of the tenders are irrelevant to the fact that the contested decision also covers the applicant's tenders for the meat stored in Denmark; the errors in fact constitute an additional defect in the decision.

The *Commission* considers that in any case the application is not well founded with regard to the tenders for meat stored in Denmark, that is, to the most important part of the application.

(a) Although the applicant's five tenders were duly lodged with the German intervention agency an error occurred whereby they were not transmitted to the Commission as tenders concerning the meat stored by the agency in Denmark. In accordance with Article 3 of Commission Regulation No 1805/77 of 4 August 1977 laying down, in respect of the beef and veal sector, special rules for the application of Regulation No 1055/77 on the storage and movement of products bought in by an intervention agency (Official Journal 1977, No L 198, p. 19) and with 8 of the General notice of periodic invitations to tender of 13 January 1978 the minimum purchase price is fixed separately for each Member State; consequently the applicant's tenders for the meat stored in Denmark are not covered by the contested decision in so far as it concerns that meat. The decision accordingly

cannot adversely affect the applicant since it does not relate in any way to its tenders.

In view of the division of powers between the Community institutions and the authorities of the Member States the error on the part of the German intervention agency in the transmission of the applicant's tenders cannot lead to the annulment of the contested decision.

(b) With regard to the applicant's tender for the intervention meat stored in Germany the application, if it were considered admissible, would have to be considered well founded on the basis of the grounds for the judgment of the Court of 6 March 1979 in Case 92/78. Nevertheless that decision cannot have wider legal consequences for the applicant: its tender was amongst six of the lowest tenders in the category in question and 35 offers which, since they failed to reach the minimum price fixed, were likewise not taken into consideration although they were higher than those of the applicant. Accordingly the applicant's tender could not have been accepted in any case.

The judgment of 6 March 1979 provides no grounds for the view that the Commission was obliged to take into consideration any tender higher than the prices prevailing for sales at prices fixed in advance.

V — Written replies to the questions asked by the Court

The *applicant* claims with regard to the meat of the German intervention agency stored in Denmark that since the stocks of meat were not used up by the tender of the only other tenderer and that, since its own tenders were higher than the price on release from storage, they should have been taken into consideration.

The applicant's tender for the meat stored in Germany indeed only came 71st but, according to the principles evolved by the Court in Case 92/78, the 69 higher tenders should not have been taken into consideration since they were not submitted by undertakings in the processing industry. The applicant's offer thus came second; since it was considerably in excess of the price on release from storage it should have been accepted.

The *Commission* states that in the course of the first quarter of 1979 sales at prices fixed in advance for beef and veal taken over by the German intervention agency were governed by the prices laid down in Annex I to Commission Regulation No 83/79 of 17 January 1979 deferring the date of acceptance of beef and veal offered for sale by intervention agencies under Regulations No 2073/74 and No 1027/78 and altering certain selling prices (Official Journal 1979, No L 13, p. 10) for bulls A, 132 503 units of account and for steers A, 130 556 units of account per 100 kg.

VI — Oral procedure

At the hearing on 13 December 1979 Könecke, represented by Klaus Landry, and the Commission, represented by Jürgen Sack, presented oral argument and replied to questions asked by the Court.

The Advocate General delivered his opinion at the sitting on 31 January 1980.

Decision

1 In an application lodged on 7 May 1979 under the second paragraph of Article 173 of the EEC Treaty the applicant claims the annulment of Commission Decision No 79/187 of 30 January 1979 fixing the minimum selling prices for frozen beef put up for sale by the intervention agencies in accordance with Regulation No 2900/77 and specifying the quantities of frozen beef for processing which may be imported under special terms in the first quarter of 1979 (Official Journal 1979, No L 41, p. 49).

2 It is not in dispute that the applicant, in response to Notice of invitation to tender No D P 5, published in the Official Journal of 23 December 1978 (No C 308, p. 29) submitted five tenders each for 20 tonnes the first of which concerned a quantity of meat stored in the Federal Republic of Germany and the other four a quantity of meat stored in Denmark. By a letter from the German intervention agency, the Bundesanstalt für landwirtschaftliche Marktordnung, of 29 January 1979 the applicant was notified that, following a decision of the Management Committee for Beef and Veal, its tender was not accepted.

3 The information provided in the course of the procedure shows that in fact only the first of the said tenders was duly transmitted to the Commission; on the other hand the four tenders concerning the meat stored in Denmark were placed by the German intervention agency amongst the tenders for the meat stored in Germany so that they could not be taken into consideration by the Commission in fixing the minimum price applicable to the sale of the meat stored in Denmark. With regard to the tender duly taken into consideration by the Commission, this was rejected because the price offered by the applicant was lower than the minimum price adopted for the corresponding quantity of meat. The list which forms the basis of the decision in dispute shows that the quantity of meat for which the applicant submitted its tender brought in 76 tenders in all of which the 35 highest were accepted, the minimum price being 1 831 units of account per tonne; the tender of the applicant came 71st with a tender price of 1 687 units of account per tonne.

4 The applicant considers that the decision at issue is vitiated by the same defects as to the law as the decision annulled by the Court in its judgment of 6 March 1979 in Case 92/78, on the claim by S.p.A., *Simmenthal* [1979] ECR 777 and accordingly claims that it should be annulled. In order to avoid repetition the applicant refers to the arguments submitted by Simmenthal in Case 92/78 and to the grounds on which that judgment is based.

5 The Commision puts forward against this claim a series of submissions relating both to the admissibility and the substance of the application:

Admissibility

6 Since the Commission is of the view that the contested decision took effect with regard to the applicant by way of the notification which the latter received through the medium of the German intervention agency on 29 January 1979, it considers that the application was lodged after the expiry of the period laid down in the third paragraph of Article 173. The applicant on the other hand considers that its application was lodged within the prescribed period which began to run with the publication of the decision at issue in the Official Journal of 16 February 1979.

7 The objection advanced by the Commission that the application is out of time must be dismissed. In fact the application is against Decision No 79/187 of the Commission which is dated 30 January 1979. The communication which the German intervention agency addressed to the applicant on the basis of information obtained from the Management Committee for Beef and Veal one day before the decision was adopted cannot be considered as a notification of the decision itself. That communication does not in fact contain any details, apart from the rejection of the tender, which would have permitted the applicant to identify the decision taken and to ascertain its precise content in such a way as to enable it to exercise its right to institute proceedings. Since the contested decision was published in the Official Journal of 16 February 1979 the provisions of Article 81 of the Rules of Procedure indicate that the application was lodged within the time-limit.

8 Secondly the Commission claims that the applicant does not have a legal interest in taking proceedings since its application cannot be of any practical avail. In fact since the tendering procedure is definitively concluded it is impossible for the Commission to meet the applicant's claims even if it is successful in its action.

9 In raising that objection the Commision is in breach of its obligation under Article 176 of the Treaty when one of its acts has been declared void. According to that provision the institution whose act has been declared void "shall be required to take the necessary measures to comply with the judgment of the Court of Justice". Even if in the circumstances it proves impossible to fulfil that obligation the application for annulment still constitutes an interest as the basis for possible proceedings for damages.

10 Finally the Commission considers that the application is devoid of purpose with regard to the four tenders for meat stored in Denmark. Since the German intervention agency failed duly to communicate those tenders to the Commission they were not included in the contested decision; accordingly the only matter at issue is the first tender of the applicant for the meat stored in the Federal Republic of Germany.

11 That objection by the Commission cannot be upheld and moreover it matters little whether it concerns the admissibility of the application or its substance. The five tenders were duly submitted by the applicant to the competent intervention agency. The applicant cannot accordingly be held responsible for the consequences of an error in transmission which occurred in between the intervention agency and the Commission. All the tenders submitted by the applicant must thus be considered as falling within the ambit of the contested decision and of this application.

Substance

12 Commission Decision No 79/187 is from the legal point of view identical in all respects with Decision No 78/258 which forms the subject-matter of the judgment of 6 March 1979. For the reasons stated in that judgment Decision No 79/187 must thus be annulled although such annulment extends only the individual decision rejecting the tender which followed, as regards the

applicant and so far as the five tenders in question are concerned, from the contested decision.

13 It is consequently for the Commission, pursuant to the first paragraph of Article 176 of the Treaty, to review the individual situation of the applicant and, through the competent intervention agency, to take a fresh decision in its case.

14 As the Commission has stated it is particularly difficult to rectify the position of the applicant in this case since, unlike the situation in which the Court delivered its judgment of 6 March 1979 in Case 92/78, the applicant's tenders were higher than the price on release from storage normally prevailing at the time in question. In its judgment of 6 March 1979 the Court of Justice emphasized that the system introduced by the new Article 14 of Regulation No 805/68 may in no circumstances have the effect of ensuring that the processing industry buys intervention meat at a price lower than the price for reducing intervention agency stocks usually charged at the relevant time; this does not mean that a tender equal to or higher than the usual price for reducing intervention agency stocks automatically ensures that the tenderer is covered by the special arrangements set up by the said provision.

15 The Commission must accordingly appraise first whether, within the framework of tendering arrangements which should have been in accordance with the legal requirements set out in the judgment of 6 March 1979, the applicant's tenders could come within range. If the Commission considers that such was the case, then by virtue of Article 176 of the Treaty it will need, as respects the applicant, having due regard to the basic principles at present applicable to the management of the market in beef and veal, to take such decision as will provide due compensation for the damage which the applicant has suffered as a result of the decision which has been annulled.

Costs

16 Under Article 69 (2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs.

17 Since the defendant has failed in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT (Second Chamber)

hereby rules:

1. **Commission Decision No 79/187 of 30 January 1979 fixing the minimum selling prices for frozen beef put up for sale by the intervention agencies in accordance with Regulation No 2900/77 and specifying the quantities of frozen beef for processing which may be imported under special terms in the first quarter of 1979 is annulled in so far as it concerns the applicant.**

2. **The Commission is ordered to pay the costs.**

Touffait Pescatore Due

Delivered in open court in Luxembourg on 5 March 1980.

A. Van Houtte
Registrar

A. Touffait
President of the Second Chamber

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 31 JANUARY 1980 [1]

Mr President,
Members of the Court,

The proceedings on which I shall now give my opinion concern the special arrangements for the importation of frozen beef and veal already familiar to the Court from Case 92/78 *(Simmenthal S.p.A.* v. *Commission,* judgment of 6 March 1979 [1979] ECR 777). With regard to the legal background — at that time Regulation No 535/79 on the

1 — Translated from the German.