JUDGMENT OF THE COURT (Fifth Chamber)
7 November 2002 *

In Joined Cases C-24/01 P and C-25/01 P,

Glencore Grain Ltd, formerly Richco Commodities Ltd, established in Hamilton (Bermuda), represented by P. Bos and J. van Zuuren, advocaten, with an address for service in Luxembourg,

Compagnie Continentale (France) SA, established in Labège (France), represented by P. Bos and P. Chabrier, avocats, with an address for service in Luxembourg,

appellants,

TWO APPEALS against the judgment of the Court of First Instance of the European Communities (Second Chamber) of 8 November 2000 in Joined Cases T-485/93, T-491/93, T-494/93 and T-61/98 *Dreyfus and Others* v *Commission* [2000] ECR II-3659, seeking to have that judgment set aside,

* Languages of the cases: Dutch and French.

the other parties to the proceedings being:

Commission of the European Communities, represented by M.-J. Jonczy and T. van Rijn, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

Louis Dreyfus & Cie SA, established in Paris (France),

applicant at first instance,

THE COURT (Fifth Chamber),

composed of: M. Wathelet (Rapporteur), President of the Chamber, C.W.A. Timmermans, A. La Pergola, P. Jann and S. von Bahr, Judges,

Advocate General: P. Léger,

Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 11 July 2002,

gives the following

Judgment

1 By two applications lodged at the Court Registry on 19 January 2001 Glencore Grain Ltd, formerly Richco Commodities Ltd, (hereinafter 'Glencore') and Compagnie Continentale (France) SA (hereinafter 'Compagnie Continentale') lodged an appeal under Article 49 of the EC Statute of the Court of Justice against the judgment of the Court of First Instance of 8 November 2000 in Joined Cases T-485/93, T-491/93, T-494/93 and T-61/98 *Dreyfus and Others* v *Commission* [2000] ECR II-3659 (hereinafter 'the judgment under appeal') by which the Court dismissed their applications, first, for annulment of the Commission's decision of 1 April 1993 refusing to approve certain riders relating to contracts which they had concluded with Exportkhleb (hereinafter 'the contested decision') and, secondly, for compensation for the harm allegedly suffered as a result of that decision.

2 By order of the President of the Court of Justice (Fifth Chamber) of 31 May 2002, Cases C-24/01 P and C-25/01 P were joined for the purposes of the oral procedure, if any, and the judgment.

Law

3 On 16 December 1991 the Council adopted Decision 91/658/EEC granting a medium-term loan to the Soviet Union and its constituent Republics (OJ 1991 L 362, p. 89).

4 Article 1(1) of that decision provides as follows:

'The Community shall grant to the USSR and its constituent Republics a medium-term loan of not more than ECU 1 250 million in principal, in three successive instalments and for a maximum duration of three years, in order to enable agricultural and food products and medical supplies... to be imported.'

5 Article 2 of Decision 91/658 provides:

'For the purposes of Article 1, the Commission is hereby empowered to borrow, on behalf of the European Economic Community, the necessary resources that will be placed at the disposal of the USSR and its constituent Republics in the form of a loan.'

6 Article 3 provides:

'The loan referred to in Article 2 shall be managed by the Commission.'

7 Furthermore, Article 4(1) and (3) provides that:

'1. The Community is hereby empowered to finalise, in concert with the authorities of the USSR and its constituent Republics... the economic and

financial conditions to be attached to the loan, the rules governing the provision of funds and the necessary guarantees to ensure loan repayment.

...

3. Imports of products financed by the loan shall be effected at world market prices. Free competition shall be guaranteed for the purchase and supply of products, which shall meet internationally recognised standards of quality.'

8 On 9 July 1992 the Commission adopted Regulation (EEC) No 1897/92 laying down detailed rules for the implementation of a medium-term loan to the Soviet Union and its constituent Republics, established by Council Decision 91/658 (OJ 1992 L 191, p. 22).

9 Under Article 2 of that regulation:

'The loans shall be concluded on the basis of agreements entered into between the Republics and the Commission which shall include, as conditions for disbursement of the loan, the requirements set out in Articles 3 to 7.'

10 Article 4 of Regulation No 1897/92 provides:

'1. The loans shall only finance the purchase and supply under contracts that have been recognised by the Commission as complying with the provisions of Decision 91/658/EEC and with the provisions of the agreements referred to in Article 2.

2. Contracts shall be submitted to the Commission for recognition by the Republics or their designated financial agents.'

11 Article 5 of Regulation No 1897/92 sets out the conditions on which the contracts referred to in Article 4 are to be recognised. These include the conditions set out in paragraphs 1 and 2, which are worded as follows:

'1. The contract [must be] awarded following a procedure guaranteeing free competition. To this end, the purchasing organisations of the Republics shall, when selecting supplier firms within the Community, seek at least three offers from firms independent of each other...

2. The contract [must offer] the most favourable terms of purchase in relation to the price normally obtained on the international markets.'

12 On 9 December 1992 the European Economic Community, the Russian Federation, acting as successor to the Soviet Union and its Republics, and its financial agent, the Vnesheconombank ('VEB') signed, pursuant to Regulation No 1897/92, a Memorandum of Understanding, on the basis of which the European Community was to grant to the Russian Federation the loan provided for by Decision 91/658. It was provided that the Community, as lender, would grant to the VEB, as borrower, under the guarantee of the Russian Federation, a medium-term loan of the principal sum of ECU 349 million for a maximum term of three years.

13 Paragraph 6 of the Memorandum of Understanding stipulates:

'The proceeds of the loan, less commissions and costs incurred by the EEC, shall be disbursed to the borrower and applied, according to the terms and conditions of the loan agreement, exclusively to cover irrevocable documentary credits issued by the borrower's agent in international standard form pursuant to delivery contracts provided that such contracts and documentary credits have been approved by the Commission of the European Communities as complying with the Council decision of 16 December 1991 and the present Memorandum of Understanding.'

14 Paragraph 7 sets out the conditions to which recognition of the conformity of the contract is subject. It states in particular that the suppliers are to be selected by Russian organisations designated to that end by the Government of the Russian Federation.

15 On 9 December 1992 the Commission and the VEB signed the loan agreement provided for in Regulation No 1897/92 and the Memorandum of Understanding (hereinafter 'the loan agreement'). That agreement sets out in precise terms the machinery for the disbursement of the loan. It stipulates, in Clause 5.1(a), that the approval request to be sent by the VEB to the Commission is to be in the standard form appended to that agreement as Schedule 2-A. It is apparent from that schedule that the VEB was required to attach to the request a copy of the supply contract, the three invitations to tender sent to independent undertakings and issued prior to the conclusion of the contract, and the responses to those invitations.

16 On 15 January 1993, in accordance with Article 2 of Decision 91/658, the Commission, as borrower, concluded on behalf of the Community a loan agreement with a consortium of banks led by Crédit Lyonnais.

Facts

17 The international trading companies Glencore and Compagnie Continentale were contacted, along with other companies, in connection with an informal invitation to tender organised by Exportkhleb, a State-owned company charged by the Russian Federation with the negotiation of wheat purchases.

18 By contracts concluded on 27 and 28 November 1992 ('the contracts') the applicants and Exportkhleb agreed the quantities of wheat to be delivered and the price. Under the terms of those contracts, the goods were to be shipped during the months of January and February 1993.

19 The judgment under appeal also indicates that:

'8 Following signature of the loan agreement, the VEB requested the Commission to approve each of the contracts concluded between Exportkhleb and the applicants.

9 After the Commission had obtained from the applicants various additional items of essential information, concerning in particular the ECU/USD exchange rate, which had not been fixed in the contracts, it gave its approval on 27 January 1993, in the form of notices of confirmation addressed to the VEB.

10 According to the applicants, the letters of credit on the basis of which the financing was to be provided did not become effective until the second half of February 1993, that is to say, only a few days before the end of the shipment period provided for by the contracts.

11 Although a substantial part of the goods had been delivered or was in the course of shipment, it was becoming clear, according to the applicants, that it would not be possible to deliver all the goods by the end of February 1993.

12 By telex of 19 February 1993 Exportkhleb invited the exporters to attend a meeting in Brussels, which was held on 22 and 23 February 1993. At that meeting Exportkhleb requested the exporters to submit fresh quotations for delivery of what it termed the "foreseeable balance", that is to say, the

quantities which could not reasonably be expected to be delivered by 28 February 1993. According to the applicants, the price of wheat on the world market rose considerably between November 1992, when the sale contracts were concluded, and February 1993, when the fresh negotiations took place.

13 Following that meeting in Brussels, the applicants reached agreement with Exportkhleb for the supply of further shipments of wheat, which were to be delivered by the end of April 1993.... Glencore Grain undertook to supply 450 000 tonnes of milling wheat at the... price [of USD 155]. Lastly, Compagnie Continentale (France) was awarded a contract for the supply of 300 000 tonnes of milling wheat, of which 120 000 tonnes were to be supplied at the price initially agreed and 180 000 tonnes at a price of USD 155, together with 20 000 tonnes of durum wheat or milling wheat at the same price.

14 According to the applicants, it was decided at the request of Exportkhleb, by reason of the urgency arising from the seriousness of the food situation in Russia, that those modifications would be formalised by simple riders to the initial contracts.

15 On 9 March 1993 Exportkhleb informed the Commission that the contracts concluded with five of its suppliers had been amended and that the deliveries still to be made would henceforth be effected at a price of USD 155 per tonne (CIF free out one safe Baltic port), to be converted into ecus at a rate of 1.17418 (ECU 132 per tonne).

16 By fax of 12 March 1993 the Director-General of the Directorate-General for Agriculture (DG VI) pointed out to Exportkhleb that, since the maximum value of those contracts had already been set by the Commission's notice of

confirmation and the whole available amount of credits for wheat was already contracted, such a request could only be accepted by the Commission if the total value of the contracts was maintained, which could be done by a corresponding reduction in outstanding quantities to be delivered. He further stated that the request for approval of the amendments could only be considered by the Commission pursuant to an official request from the VEB.

17 According to the applicants, that information was interpreted as confirming the Commission's agreement in principle, subject to scrutiny for the purposes of formal approval once the documentation was sent by the VEB.

18 The riders to the contracts were then officially agreed, albeit that they were notionally dated 22 February 1993, the date of the meeting in Brussels. Whilst the price per tonne was not changed from that which had been announced on 9 March 1993, the volumes were altered in order to prevent the total [cost] from exceeding the [cost] initially provided for. The applicants then resumed or continued with their shipments.

19 The documentation containing the new bids and the amendments to the contracts were officially sent by the VEB to the Commission on 22 and 26 March 1993.

20 By letter of 1 April 1993, signed by the Agriculture Commissioner, the Commission informed the VEB of its refusal to approve the amendments to the contracts as initially concluded.

21 In that letter, the Commissioner stated that, having examined the amendments to the contracts concluded between Exportkhleb and various suppliers, the Commission was prepared to accept those relating to the postponement of the final dates for delivery and payment. On the other hand, "the magnitude of the price increases is of such a nature that we cannot consider them as a necessary adaptation but as a substantial modification of the contracts initially negotiated". He went on to state: "In fact, the present level of prices on the world market (end of March 1993) is not significantly different from the level which prevailed at the time when the initial prices were agreed (end of November 1992)." The Commissioner pointed out that the need, first, to ensure free competition between potential suppliers and, second, to secure the most favourable purchase terms constituted one of the main factors governing the approval of contracts by the Commission. He found that, in the present case, the amendments had been negotiated directly with the companies concerned, without any competition with other suppliers, and concluded: "The Commission cannot approve such major changes as simple amendments to existing contracts." He further stated that "should it be considered necessary to modify the prices or quantities, it would then be appropriate to negotiate new contracts to be submitted to the Commission for approval under the full usual procedure (including submission of at least 3 offers)".'

The procedure before the Court of First Instance and the judgment under appeal

The procedure before the Court of First Instance

20 By documents lodged at the Registry of the Court of Justice on 5 July 1993 and 22 June 1993 respectively, Glencore and Compagnie Continentale brought actions for annulment of the contested decision.

21 By orders of 27 September 1993 the Court of Justice referred those cases to the Court of First Instance pursuant to Council Decision 93/350/Euratom, ECSC, EEC of 8 June 1993 amending Decision 88/591/ECSC, EEC, Euratom establishing a Court of First Instance of the European Communities (OJ 1993 L 144, p. 21). The cases were registered in the Registry of the Court of First Instance under numbers T-491/93 and T-494/93.

Case T-491/93

22 By judgment of 24 September 1996 in Case T-491/93 *Richco* v *Commission* [1996] ECR II-1131, the Court of First Instance dismissed as inadmissible the application for annulment made by Glencore and rejected the objection of inadmissibility raised by the Commission with regard to the claim for compensation.

23 By document lodged at the Registry of the Court of Justice on 23 December 1996 Glencore brought an appeal against that judgment in so far as it declared its claim for annulment inadmissible.

24 By order of 27 January 1997 the Court of First Instance decided to suspend the written procedure regarding the claim for compensation pending delivery of the judgment of the Court of Justice.

25 By judgment of 5 May 1998 in Case C-403/96 P *Glencore Grain* v *Commission* [1998] ECR I-2405, the Court of Justice set aside the judgment of the Court of First Instance inasmuch as it declared Glencore's application for annulment inadmissible, referred the case back to the Court of First Instance for judgment on the substance and reserved the costs.

26 By judgment of 24 September 1996 in Case T-494/93 *Compagnie Continentale* v *Commission* [1996] ECR II-1157, the Court of First Instance dismissed as inadmissible the application for annulment made by Compagnie Continentale.

27 By document lodged at the Registry of the Court of Justice on 23 December 1996 Compagnie Continentale brought an appeal against that judgment in so far as it declared its claim for annulment inadmissible.

28 By application lodged at the Registry of the Court of First Instance on 8 April 1998 Compagnie Continentale brought a fresh action seeking an order requiring the Commission to make good the damage suffered by the applicant as a result of the contested decision. That case was registered in the Registry of the Court of First Instance under number T-61/98.

29 By judgment of 5 May 1998 in Case C-391/96 P *Compagnie Continentale (France)* v *Commission* [1998] ECR I-2377, the Court of Justice set aside the judgment of the Court of First Instance inasmuch as it declared Compagnie Continentale's application for annulment inadmissible, referred the case back to the Court of First Instance for judgment on the substance and reserved the costs.

30 The written procedures before the Court of First Instance were resumed from the stage which they had reached, in accordance with Article 119(2) of the Rules of Procedure of the Court of First Instance.

31 In accordance with Article 50 of those Rules of Procedure, the Court of First Instance decided to join Cases T-485/93, T-491/93, T-494/93 and T-61/98 for the purposes of the oral procedure and judgment.

The judgment under appeal

The application for annulment

32 In support of the applications for annulment the appellants had put forward three pleas in law alleging, first, breach of Decision 91/658 and infringement of Regulation No 1897/92, secondly, breach of the principle of the protection of legitimate expectations, and, thirdly, breach of the duty to state reasons.

33 Those three pleas were dismissed by the Court of First Instance. In view of the complaints raised in the present appeals, only those points in the judgment under appeal that concern the plea of breach of Decision 91/658 and infringement of Regulation No 1897/92 are set out below.

34 The Court of First Instance made the following preliminary observation:

'56 The parties are... agreed that one of the conditions imposed by the relevant provisions for the purposes of obtaining the Commission's approval relates to the price agreed, whilst another concerns adherence, in the conclusion of the contract, to the precepts of free competition. It is apparent from the contested decision that, in the Commission's view, neither of those conditions has been fulfilled.

57 Moreover, it is not disputed by the parties that those two conditions are cumulative, with the result that the non-fulfilment of either of them is enough to justify the decision not to approve the contracts.

58 In the circumstances of the present case, it is appropriate, first of all, to consider the second condition.'

35 On this point the Court of First Instance found that it had not been shown that the Commission had made any error in concluding that the principle of free competition had not been observed when the riders to the contracts were concluded. The Court gave the following explanation:

'65 The Court observes, as a preliminary point, that the criterion requiring adherence to the principle of free competition in the conclusion of contracts is crucial to the proper functioning of the lending mechanism established by the Community. In addition to being aimed at the prevention of fraud and collusion, it is designed, more generally, to guarantee the optimum use of the funds made available by the Community for aid to the Republics of the former Soviet Union. In actual fact, it is intended to protect both the Community as lender and the Republics in question as recipients of food and medical aid.

66 Consequently, fulfilment of that criterion is clearly not merely a formal obligation but in fact an essential element of the implementation of the lending mechanism.

67 In those circumstances, it is necessary to verify whether the Commission, when adopting the contested decision, was correct in finding that the condition of free competition had not been fulfilled upon the conclusion of the riders to the contracts. The legality of the decision must be assessed in the light of all the rules needing to be complied with by the Commission in the matter, including those relating to the agreements concluded with the Russian authorities.

68 The riders concluded with the various Community undertakings constitute, in relation to one another, specific contracts, each of them requiring the Commission's authorisation. It is necessary, therefore, to examine whether each applicant, upon agreeing new contractual terms with Exportkhleb, was required to compete with at least two independent undertakings.

69 It should be noted in that regard, first, that the telex sent by Exportkhleb to the applicants, inviting them to attend a meeting in Brussels on 22 and 23 February 1993, cannot be regarded as proof that each undertaking, prior to concluding the riders, was required to compete with at least two undertakings independent of each other.

70 It is true that the applicable Community legislation does not require the call for bids to be in any particular form. However, the question which arises in the present case is not whether a telex may constitute a valid call for bids but whether the telex in question shows that each undertaking was required to compete with others before the new terms were concluded. Clearly, the telex from Exportkhleb, which was worded in a general way and which did not state, in particular, the quantities to be supplied or the delivery terms, does not constitute the necessary evidence in that regard.

71 Similarly, the extracts from the trade press produced by the applicants, which report the arrival in Europe of representatives of Exportkhleb for discussions on, *inter alia*, supplies of wheat in the context of the Community loan, do not in any way show that the riders were concluded with undertakings which had previously been required to compete with at least two other independent undertakings.

72 As Glencore Grain has pointed out, it is true that the applicable legislation requires Exportkhleb merely to "seek" at least three competing offers. Consequently, the possibility cannot be ruled out that certain undertakings, despite having been invited to submit a bid, may have declined to do so.

73 In the present case, however, the documentation does not even show that, for every rider finally concluded, at least two competing undertakings declined to respond to Exportkhleb's invitation.

74 Thus, in the telefax which it sent to the Commission on 9 March 1993 in order to point out the changes made to the contracts, Exportkhleb merely referred to the contracts concluded with each undertaking. In respect of each contract, mention was made only of the bid submitted by the undertaking to which the contract was awarded and the terms agreed following the negotiations between Exportkhleb and the undertaking in question. In relation to each of those contracts, no indication is given of at least two other responses, even negative ones, having been given to the invitations to submit offers. That telefax merely states that each undertaking had concluded with Exportkhleb a contract corresponding to the tonnage still to be delivered by it as at the date of the meeting in Brussels. In actual fact, although offers were indeed annexed to the telefax of 9 March 1993, these were separate offers for separate contracts, and not for one and the same contract. Consequently, that telefax likewise provides no proof that each rider was concluded after competing offers had been solicited from at least three undertakings independent of each other.

75 Furthermore, the Commission has stated, without being challenged in that regard, that, upon being officially notified by the VEB of the new contractual terms on 22 and 26 March 1993, it did not receive the responses, favourable or unfavourable, given by at least three independent undertakings.

76 The applicants claim, however, that the principle of free competition was adhered to, since each of them was obliged to match the lowest price offered.

77 It is true that the telefax sent by Exportkhleb to the Commission on 9 March 1993 shows that, whilst the prices offered ranged from USD 155 to USD 158.50, the price ultimately agreed with Exportkhleb was USD 155 in respect of all the undertakings.

78 Nevertheless, that shows, at most, that negotiations took place between Exportkhleb and each applicant before each of the contracts was concluded. On the other hand, also taking into account the foregoing, it does not show that the price in question was the result of at least three undertakings independent of each other having competed for each of the contracts to be awarded.'

The claim for damages

36 Having rejected the pleas in law put forward in support of the applications for annulment, the Court of First Instance concluded, at paragraph 126 of the judgment under appeal, that Glencore and Compagnie Continentale had failed to prove 'any wrongful conduct on the part of the Commission'. Consequently, it rejected the application for compensation for the material damage alleged.

37 The actions in Cases T-491/93, T-494/93 and T-61/98 were therefore dismissed in their entirety.

The appeals

38 By their appeals the appellants claim that the Court should set aside the judgment under appeal, annul the contested decision, refer the cases back to the Court of First Instance to rule on the claims for damages brought before it and order the Commission to pay the costs, including those at first instance.

39 The Commission contends that the appeals should be dismissed and the appellants ordered to pay the costs.

40 In support of their appeals the appellants argue, first of all, that the Court of First Instance erred in law by restricting its review to the single condition relating to observance of the principle of free competition in concluding the contracts and by finding that the riders to the contracts were concluded in breach of that condition. Next, they complain that the Court failed to apply Article 68(1) of its Rules of Procedure by failing to summon witnesses. Lastly, they maintain that the Court was wrong to deny them the damages they sought by way of compensation.

Restriction of the review to the condition relating to free competition

Arguments of the parties

41 The appellants maintain that the Court of First Instance erred in law by finding, at paragraph 57 of the judgment under appeal, that the condition relating to the price agreed and the condition concerning adherence to the precepts of free competition in the conclusion of the contracts were cumulative. They take the contrary view that the two conditions are inextricably linked, the condition relating to prices on the international markets making it possible to check whether the condition relating to free competition has been complied with, those prices reflecting, according to the applicants, the results of world-wide free and fair competition.

42 The Commission submits that it is clear from Article 5 of Regulation No 1897/92 that the two conditions are different in nature, the condition relating to free competition concerning the procedure for the conclusion of the contracts, and the condition relating to international market prices concerning the content of the contracts. The Court thus rightly considered them to be cumulative.

Findings of the Court

43 Under Article 5(1) and (2) of Regulation No 1897/92 two conditions must be satisfied in order for the Commission to be able to approve the funding of the purchases to be made by the Republics of the former Soviet Union and the supply of the goods to them. Article 5 requires that 'the contract [is] awarded following

a procedure guaranteeing free competition' and that 'the contract offers the most favourable terms of purchase in relation to the price normally obtained on the international markets'.

44 As has been pointed out by the Commission and by the Advocate General, in point 50 of his Opinion, it is clear from the wording of Article 5(1) and (2) of Regulation No 1897/92 that, by contrast with the condition relating to international market prices, the condition relating to free competition must be understood as a procedural, rather than a substantive rule.

45 Thus, having rightly taken the view that the two conditions mentioned in paragraph 43 of the present judgment were cumulative, the Court of First Instance was entitled to restrict its review to the single condition relating to free competition.

46 The first plea in law must therefore be rejected as unfounded.

The findings of the Court of First Instance on observance of the principle of free competition

Arguments of the parties

47 The appellants complain that the Court of First Instance found that it had not been shown that the Commission had made any error in concluding that the principle of free competition had not been observed when the riders to the contracts were concluded.

48 This plea has four parts.

49 First of all, according to the appellants, the Court was wrong to find, at paragraph 68 of the judgment under appeal, that the condition relating to observance of the principle of free competition required, for each contract, that offers be submitted from at least three independent undertakings. Neither Decision 91/658 nor Regulation No 1897/92 imposes such a requirement.

50 The Commission, on the other hand, submits that that requirement is indeed set out in Article 5(1) of Regulation No 1897/92, the seventh indent of Article 7 of the Memorandum of Understanding and Clause 5.1(a), read together with Schedule 2-A, of the loan agreement.

51 Secondly, the appellants argue that the Court of First Instance erred in holding, at paragraph 67 of the judgment under appeal, that '[t]he legality of the decision must be assessed in the light of all the rules needing to be complied with by the Commission in the matter, including those relating to the agreements concluded with the Russian authorities'. To make such an assertion is tantamount to making contractual conditions contained in unpublished documents capable of operating against third parties.

52 According to the Commission, it was for the Court of First Instance to make an objective assessment of the legality of the contested decision in the light of all the rules needing to be complied with by the Commission, including those contained in the Memorandum of Understanding.

53 Thirdly, the appellants complain that the Court failed to take account of the Commission's administrative practice and the obligations arising therefrom and of the rights of the defence. They maintain that the Commission ought, in accordance with its administrative practice, to have requested from them other documents in addition to the amended contracts and ought to have conducted a more thoroughgoing enquiry, rather than simply wait passively for information to be supplied to it.

54 The Commission maintains that this plea, unconnected with any issue of public policy, was not put forward at first instance and must therefore be regarded as a new plea and rejected as inadmissible. In any event, the appellants have failed to show in what way the Commission departed from its usual administrative practice or failed to have regard for the rights of the defence.

55 Fourthly, the appellants argue that the Court of First Instance's evaluation of the evidence of observance of the principle of free competition was inaccurate. The Court ought to have taken account of the particular characteristics of the tenders at issue, which were needed to answer an emergency. The requirements to be filled were so enormous that no single trader could ever have satisfied them. The riders ought therefore to have been regarded as parallel to and connected with the contracts, rather than separate from them as the Court found in paragraphs 68 and 74 of the judgment under appeal. Exportkhleb did indeed solicit offers from more than three suppliers: it called eleven cereal traders, all of them competing in the wheat market, to a meeting on 22 and 23 February 1993 in Brussels. Seven of the eleven put forward an offer, five of those entered into simultaneous contracts with Exportkhleb and four traders refrained from making any offer, for reasons unknown. Lastly, Exportkhleb managed to ensure that the riders to the contracts were concluded at the lowest of the prices offered by those traders. All of the foregoing is evidence that there was free competition. That being so, the appellants take the view that the Court of First Instance ought to have inferred from the telefax sent by Exportkhleb to the Commission on 9 March 1993, which mentioned that seven offers had been received from cereal traders as a result of invitations addressed to eleven traders, that the condition relating to free competition had been satisfied.

56 According to the Commission, it is clear from paragraph 74 of the judgment under appeal that the Court of First Instance reviewed the telefax of 9 March 1993 thoroughly and concluded that it provided 'no proof that each rider was concluded after competing offers had been solicited from at least three undertakings independent of each other'.

Findings of the Court

57 As regards the obligation to have competing offers from at least three undertakings in order to ensure compliance with the condition relating to free competition, suffice it to observe that that condition is explicitly set out in Article 5(1) of Regulation No 1897/92: 'The contract [must be] awarded following a procedure guaranteeing free competition. To this end, the purchasing organisations of the Republics shall, when selecting supplier firms within the Community, seek at least three offers from firms independent of each other and shall, when selecting supplier firms in the non-Community supplier countries, seek at least three offers from firms independent of each other...'.

58 In this case, however, at paragraph 68 of the judgment under appeal, the Court of First Instance found, in the exercise of its exclusive jurisdiction, that '[t]he riders concluded with the various Community undertakings constitute, in relation to one another, specific contracts, each of them requiring the Commission's authorisation'. It follows that the Court was right to hold that, for each of the contracts, three independent offers had to be sought and, as it found at paragraph 74 of the judgment under appeal, that had not been the case.

59 The first part of the second plea must therefore be dismissed as unfounded.

60 As regards the consideration given by the Court of First Instance, in the context of its review of the legality of the contested decision, to the contracts concluded with the Russian authorities, it is evident that the obligations arising from the Memorandum of Understanding, or even from the loan agreement, themselves constitute the implementation of Decision 91/658 and Regulation No 1897/92, both of which have been published. The conditions relating to international market prices and free competition, which are at the centre of the present dispute, are set out in Article 5 of Regulation No 1897/92.

61 Consequently, the second part of the second plea must also be rejected as being of no effect.

62 As regards the complaint that the Court of First Instance failed to check whether the Commission had followed its usual administrative practice and had had regard for the rights of the defence, suffice it to observe that that complaint was not raised at first instance. To allow a party to put forward for the first time before the Court of Justice a plea in law which it has not raised before the Court of First Instance would be to allow it to bring before the Court, whose jurisdiction in appeals is limited, a dispute of wider ambit than that which came before the Court of First Instance. In an appeal the Court's jurisdiction is confined to review of the findings of law on the pleas argued before the Court of First Instance (see, *inter alia*, Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others* [1994] ECR I-1981, paragraph 59, and Case C-7/95 P *Deere* v *Commission* [1998] ECR I-3111, paragraph 62).

63 Consequently, the third part of the second plea must be rejected as inadmissible.

64 Coming to the fourth part of the second plea, it is appropriate to point out that the appellants seek by their arguments to challenge the determination and assessment of the facts which led the Court of First Instance to find that the Commission was entitled to take the view that the condition relating to observance of the precepts of free competition had not been satisfied.

65 Under Article 225 EC and the first paragraph of Article 51 of the EC Statute of the Court of Justice the latter thus has no jurisdiction to establish the facts or, in principle, to examine the evidence which the Court of First Instance accepted in support of those facts. Provided that the evidence has been properly obtained and the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence have been observed, it is for the Court of First Instance alone to assess the value which should be attached to the evidence produced to it (Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 24). That appraisal does not therefore constitute, save where the clear sense of the evidence has been distorted, a point of law which is subject as such to review by the Court of Justice.

66 In the present case the Court of First Instance began by finding, at paragraphs 69 and 70 of the judgment under appeal, that the telex sent by Exportkhleb to the appellants inviting them to attend a meeting in Brussels on 22 and 23 February 1993, 'which was worded in a general way and which did not state, in particular,

the quantities to be supplied or the delivery terms', could not be regarded as proof that each undertaking, prior to concluding the riders, had been required to compete with at least two undertakings independent of each other.

67 Next, the Court noted, at paragraph 71 of the judgment under appeal, that extracts from the trade press produced by the appellants also failed to provide that proof.

68 Lastly, as regards the telefax which Exportkhleb sent to the Commission on 9 March 1993 in order to inform the Commission of the changes made to the contracts, the Court of First Instance held, at paragraph 74 of the judgment under appeal, that that too failed to show that each rider had been concluded after competing offers had been solicited from at least three undertakings independent of each other. In this connection, the Court held that '[i]n respect of each contract, mention was made only of the bid submitted by the undertaking to which the contract was awarded and the terms agreed following the negotiations between Exportkhleb and the undertaking in question. In relation to each of those contracts, no indication is given of at least two other responses, even negative ones, having been given to the invitations to submit offers. The telefax merely states that each undertaking had concluded with Exportkhleb a contract corresponding to the tonnage still to be delivered by it as at the date of the meeting in Brussels. In actual fact, although offers were indeed annexed to the telefax of 9 March 1993, these were separate offers for separate contracts, and not for one and the same contract.'

69 The Court of First Instance also stated, at paragraph 78 of the judgment under appeal, that although the price agreed with Exportkhleb was the lowest offered, that shows, at most, that 'negotiations took place between Exportkhleb and each applicant before each of the contracts was concluded'. It does not show that the price was 'the result of at least three undertakings independent of each other having competed for each of the contracts to be awarded'.

70 The appellants have thus failed to show in what way those findings indicate that the clear sense of the evidence submitted to the Court was distorted.

71 Consequently, the fourth part of the second plea must also be rejected as inadmissible.

72 In view of the foregoing, the second plea must be rejected in its entirety.

Infringement of Article 68(1) of the Rules of Procedure of the Court of First Instance

Arguments of the parties

73 The appellants maintain that the Court of First Instance infringed Article 68(1) of its Rules of Procedure by failing to summon witnesses such as Exportkhleb or one or more of the traders who attended the meeting in Brussels on 22 and 23 February 1993. Had it heard witness evidence, the Court would have been in a position to see that those traders had been competing with a considerable number of other traders.

74 The Commission argues that there is no indication in the documents before the Court that the appellants asked the Court of First Instance to call witnesses. In any event, the appellants failed to state precisely about what facts and for what reasons the witnesses should be examined, as is required by the third subparagraph of Article 68(1) of the Rules of Procedure of the Court of First Instance.

75 The Commission adds that Article 68(1) confers a discretion on the Court of First Instance in deciding whether or not it is appropriate to call witnesses. Its decision is amenable to challenge in the context of an appeal only if it can be shown that not calling witnesses was manifestly unreasonable.

Findings of the Court

76 Under Article 68(1) of the Rules of Procedure of the Court of First Instance:

'The Court of First Instance may, either of its own motion or on application by a party, and after hearing the Advocate General and the parties, order that certain facts be proved by witnesses. The order shall set out the facts to be established.

The Court of First Instance may summon a witness of its own motion or on application by a party or at the instance of the Advocate General.

An application by a party for the examination of a witness shall state precisely about what facts and for what reasons the witness should be examined.'

77 It must be pointed out, first, that the Court of First Instance cannot be required to call witnesses of its own motion, since Article 66(1) of its Rules of Procedure makes clear that it is to prescribe such measures of inquiry as it considers appropriate by means of an order setting out the facts to be proved (see *Baustahlgewebe* v *Commission*, cited above, paragraph 77). The Court of First Instance is thus the sole judge of whether it is necessary to supplement the information available to it concerning the cases before it (see, *inter alia*, Case C-315/99 P *Ismeri Europa* v *Court of Auditors* [2001] ECR I-5281, paragraph 19).

78 Moreover, whether or not the evidence before it is convincing is a matter to be appraised by it alone and is not subject to review by the Court of Justice on appeal, as has been pointed out in paragraph 65 of the present judgment, except where the clear sense of the evidence submitted has been distorted or the substantive inaccuracy of the Court of First Instance's findings is apparent from the documents in the case-file (*Ismeri Europa* v *Court of Auditors*, cited above, paragraph 19).

79 In support of their third plea, however, the appellants have offered no evidence to show that the clear sense of the evidence submitted to the Court was distorted or that there was any substantive inaccuracy of the Court's findings in light of the documents in the case-file.

80 Consequently, the third plea must be rejected.

The claim for damages

Arguments of the parties

81 The appellants maintain that, in view of the pleas which they put forward in support of their appeals, the Court of First Instance ought to have ordered the Commission to pay damages by way of compensation for the harm caused by the contested decision. They call upon the Court of Justice to refer the case back to the Court of First Instance to rule on the claims for damages made at first instance or itself rule on the point, should it regard that as appropriate.

82 According to the Commission, given that the pleas for setting aside the contested judgment are unfounded, the fourth plea must also be rejected as unfounded.

Findings of the Court

83 Suffice it to observe that the Community can incur non-contractual liability only if, *inter alia*, the acts alleged against the institution in question were unlawful (see, *inter alia*, Case C-146/91 *KYDEP* v *Council and Commission* [1994] ECR I-4199, paragraph 19).

84 This Court's review of the pleas put forward by the appellants in support of their appeals has not enabled it to establish the existence of any unlawful conduct on the Commission's part and the Court of First Instance was therefore right to reject their application for compensation of the harm they allegedly suffered.

85 The fourth plea must therefore also be rejected as unfounded.

86 It follows that the appeals must be dismissed in their entirety.

Costs

87 Under Article 69(2) of the Rules of Procedure, applicable to appeal proceedings pursuant to Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for by the successful party. Since the Commission applied for costs against the appellants and the latter have been unsuccessful, Glencore and Compagnie Continentale must be ordered to bear their own costs together with those incurred by the Commission in Case C-24/01 P and Case C-25/01 P respectively.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. **Dismisses the appeals;**

2. **Orders Glencore Grain Ltd to pay the costs in Case C-24/01 P and Compagnie Continentale (France) SA to pay the costs in Case C-25/01 P.**

Wathelet Timmermans La Pergola

Jann von Bahr

Delivered in open court in Luxembourg on 7 November 2002.

R. Grass

Registrar

M. Wathelet

President of the Fifth Chamber