JUDGMENT OF THE GENERAL COURT (Third Chamber)

15 April 2011 *

In Case T-297/05,

IPK International — World Tourism Marketing Consultants GmbH, established in Munich (Germany), represented by H.-J. Prieß, M. Niestedt and C. Pitschas, lawyers,

applicant,

v

European Commission, represented by B. Schima, acting as Agent, assisted by C. Arhold, lawyer,

defendant,

ACTION for the annulment of the Commission's decision of 13 May 2005 (ENTR/01/Audit/RVDZ/ss D(2005) 11382) to cancel the Commission's Decision of 4 August 1992 (003977 / XXIII/A3 — S92/DG/ENV8/LD/kz) to grant financial assistance in the sum of ECU 530 000 within the framework of the Ecodata project,

* Language of the case: German.

THE GENERAL COURT (Third Chamber),

composed of J. Azizi (Rapporteur), President, E. Cremona and S. Frimodt Nielsen, Judges,

Registrar: K. Andová, Administrator,

having regard to the written procedure and further to the hearing on 9 June 2010,

gives the following

Judgment

Legal context

1 Recital 20 in the preamble to Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1) ('the Financial Regulation'), in the version applicable to the facts in the present case, is worded, inter alia, as follows:

'... For cases of fraud,..., this Regulation should refer to the provisions in force on the protection of the European Communities' financial interests and on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union.'

2 Article 72(2) of the Financial Regulation provides:

'The institution may formally establish an amount as being receivable from persons other than States by means of a decision which shall be enforceable within the meaning of Article 256 [EC].'

3 Under Article 109 of the Financial Regulation, entitled 'Award principles':

'1. The award of grants shall be subject to the principles of transparency and equal treatment. Grants may not be cumulative; they may not be awarded retrospectively; and they must involve co-financing.'

2. The grant may not have the purpose or effect of producing a profit for the beneficiary.'

4 Article 119(2) of the Financial Regulation provides:

'Should the beneficiary fail to comply with his/her legal or contractual obligations, the grant shall be suspended and reduced or terminated in the cases provided for by the implementing rules after the beneficiary has been given the opportunity to make his/her observations.'

5 Article 183(1)(a) of Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of the Financial Regulation (OJ 2002 L 357, p. 1, 'the Implementing Rules'), relating to Article 119 of the Financial Regulation and entitled 'Suspension and reduction of grants', provides, in the version applicable to the facts in the present case:

'1. The authorising officer responsible shall suspend payments and, depending on the stage reached in the procedure, either reduce the grant or demand reimbursement pro rata by the beneficiary or beneficiaries:

(a) where the agreed action or work programme is not carried out at all, or is not carried out properly, in full or on time;

...'

6 Council Regulation (EC, EURATOM) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests (OJ 1995 L 312, p. 1), provides, under Title I, headed 'General principles':

'Article 1

1. For the purposes of protecting the European Communities' financial interests, general rules are hereby adopted relating to homogenous checks and to administrative measures and penalties concerning irregularities with regard to Community law.

2. "Irregularity" shall mean any infringement of a provision of Community law resulting from an act or omission by an economic operator, which has, or would have, the effect of prejudicing the general budget of the Communities or budgets managed by them, either by reducing or losing revenue accruing from own resources collected directly on behalf of the Communities, or by an unjustified item of expenditure.

Article 2

1. Administrative checks, measures and penalties shall be introduced in so far as they are necessary to ensure the proper application of Community law. They shall be effective, proportionate and dissuasive so that they provide adequate protection for the Communities' financial interests.

2. No administrative penalty may be imposed unless a Community act prior to the irregularity has made provision for it. In the event of a subsequent amendment of the provisions which impose administrative penalties and are contained in Community rules, the less severe provisions shall apply retroactively.

3. Community law shall determine the nature and scope of the administrative measures and penalties necessary for the correct application of the rules in question, having regard to the nature and seriousness of the irregularity, the advantage granted or received and the degree of responsibility.

4. Subject to the Community law applicable, the procedures for the application of Community checks, measures and penalties shall be governed by the laws of the Member States.

Article 3

1. The limitation period for proceedings shall be four years as from the time when the irregularity referred to in Article 1(1) was committed. However, the sectoral rules may make provision for a shorter period which may not be less than three years.

In the case of continuous or repeated irregularities, the limitation period shall run from the day on which the irregularity ceases. In the case of multi-annual programmes, the limitation period shall in any case run until the programme is definitively terminated.

The limitation period shall be interrupted by any act of the competent authority, notified to the person in question, relating to investigation or legal proceedings concerning the irregularity. The limitation period shall start again following each interrupting act.

However, limitation shall become effective at the latest on the day on which a period equal to twice the limitation period expires without the competent authority having imposed a penalty, except where the administrative procedure has been suspended in accordance with Article 6(1).

2. The period for implementing the decision establishing the administrative penalty shall be three years. That period shall run from the day on which the decision becomes final.

Instances of interruption and suspension shall be governed by the relevant provisions of national law.

3. Member States shall retain the possibility of applying a period which is longer than that provided for in paragraphs 1 and 2 respectively.'

7 Under Title II, headed 'Administrative measures and penalties', Regulation No 2988/95 provides:

'Article 4

1. As a general rule, any irregularity shall involve withdrawal of the wrongly obtained advantage:

— by an obligation to pay or repay the amounts due or wrongly received,

— …

2. Application of the measures referred to in paragraph 1 shall be limited to the withdrawal of the advantage obtained plus, where so provided for, interest which may be determined on a flat rate basis.

3. Acts which are established to have as their purpose the obtaining of an advantage contrary to the objectives of the Community law applicable in the case by artificially creating the conditions required for obtaining that advantage shall result, as the case shall be, either in failure to obtain the advantage or in its withdrawal.

4. The measures provided for in Article 4 shall not be regarded as penalties.

Article 5

1. Intentional irregularities or those caused by negligence may lead to the following administrative penalties:

…

(c) total or partial removal of an advantage granted by Community rules, even if the operator wrongly benefited from only a part of that advantage;

(d) exclusion from, or withdrawal of, the advantage for a period subsequent to that of the irregularity;

…

Article 6

1. Without prejudice to the Community administrative measures and penalties adopted on the basis of the sectoral rules existing at the time of entry into force of this Regulation, the imposition of financial penalties such as administrative fines may be suspended by decision of the competent authority if criminal proceedings have been initiated against the person concerned in connection with the same facts. Suspension of the administrative proceedings shall suspend the period of limitation provided for in Article 3.

…

Article 7

Community administrative measures and penalties may be applied to the economic operators referred to in Article 1, namely the natural or legal persons and the other entities on which national law confers legal capacity who have committed the irregularity. They may also apply to persons who have taken part in the irregularity and to those who are under a duty to take responsibility for the irregularity or to ensure that it is not committed.'

8 Article 2(1) of the Protocol, drawn up on the basis of Article K.3 of the Treaty on European Union, to the Convention on the protection of the European Communities' financial interests (OJ 1996 C 313, p. 2, 'the Protocol to the Convention on the protection of the European Communities' financial interests'), provides, under the heading 'Passive corruption':

'For the purposes of this Protocol, the deliberate action of an official, who, directly or through an intermediary, requests or receives advantages of any kind whatsoever, for himself or for a third party, or accepts a promise of such an advantage, to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties in a way which damages or is likely to damage the European Communities' financial interests shall constitute passive corruption.'

9 According to Article 3(1) of the Protocol, under the heading 'Active corruption':

'For the purposes of this Protocol, the deliberate action of whosoever promises or gives, directly or through an intermediary, an advantage of any kind whatsoever to an official for himself or for a third party for him to act or refrain from acting in accordance with his duty or in the exercise of his functions in breach of his official duties in a way which damages or is likely to damage the European Communities' financial interests shall constitute active corruption.'

Facts

Call for proposals procedure and execution of the Ecodata project

10 By its final adoption of the general budget of the European Communities for the financial year 1992, the European Parliament had decided that 'a sum of at least ECU

530 000 [would] be used to support an information network on ecological tourism projects in Europe' [Chapter B2, Article 7100 (tourism)] (OJ 1992 L 26, p. 1, 659, 'the final general budget for the financial year 1992').

11 On 26 February 1992 the Commission of the European Communities published in the *Official Journal of the European Communities* a call for proposals with a view to supporting projects in the field of tourism and the environment (OJ 1992 C 51, p. 15). It stated that it intended to allocate a total of ECU 2 million, and to select about 25 projects eligible for financial support of up to 60 % of their total costs.

12 On 22 April 1992, the applicant, IPK International — World Tourism Marketing Consultants GmbH ('IPK'), a company established in Germany and active in the field of tourism, submitted a request for financial support for a proposal concerning the creation of a databank on ecological tourism in Europe, called 'Ecodata' ('the Ecodata project'). IPK was to be responsible for coordinating the project. However, in order to carry out the work, it was to collaborate with three partners, the French undertaking Innovence, the Italian undertaking Tourconsult and the Greek undertaking 01-Pliroforiki. The proposal did not specify how tasks would be distributed between those undertakings, but merely stated that they were all 'consultants specialised in tourism, as well as in information- and tourism-related projects'.

13 By letter of 4 August 1992 ('the award decision'), the Commission, on a proposal from Mr Tzoanos, Head of Unit 3 'Tourism' of Direction A 'Promotion of enterprise and improvement of operational environment' of the Directorate General for 'Enterprise policy, trade, tourism and social economics' (DG XXIII), granted IPK financial assistance of ECU 530 000 for the Ecodata project ('the financial assistance at issue'). It asked IPK to sign and return the 'declaration by the beneficiary of a financial contribution', which was annexed to the grant decision and contained the conditions for

obtaining that assistance. The declaration stipulated that 60% of the amount of the assistance would be paid on receipt by the Commission of the beneficiary's declaration duly signed by IPK and that the balance would be paid following the receipt and acceptance by the Commission of the performance reports for the project. Point 7 of the declaration stated that the beneficiary agreed to waive payment of any balance in the event of non-compliance with the time-limits stipulated in points 4 and 5 for submitting the reports relating to the progress of the project and to the use of the financial aid. Under point 8 of that declaration, the beneficiary agreed, if the bill of costs did not prove the use of the amount of the financial aid, to repay to the Commission, at its request, the unproved sums already paid. The declaration was signed by IPK on 23 September 1992 and lodged at the Commission's DGXXIII on 29 September 1992.

14 On 24 November 1992 Mr Tzoanos invited IPK and 01-Pliroforiki to a meeting, which took place in the absence of the two other partners in the project. On that occasion, Mr Tzoanos suggested entrusting most of the work and allocating most of the funds to 01-Pliroforiki. IPK objected to that requirement.

15 The first instalment of the financial support, namely ECU 318 000 (60% of the total grant of ECU 530 000), was paid in January 1993.

16 At the end of February 1993, the file on the Ecodata project was withdrawn from Mr Tzoanos. A disciplinary procedure was subsequently initiated against him, together with internal investigations concerning the matters for which he had been responsible. The disciplinary procedure resulted in the dismissal of Mr Tzoanos, with effect from 1 August 1995. In contrast, no irregularities were revealed by the internal investigation concerning the administrative procedure resulting in the award decision.

17 Following an unsatisfactory evaluation report concerning the execution of the Ecodata project, the Commission, by decision of 3 August 1994 ('the refusal decision of 3 August 1994' or 'the contested decision'), refused to pay the second instalment of the financial assistance, ECU 212 000, and stated that it wanted to continue considering whether or not to seek repayment of the first instalment of that aid.

Legal proceedings concerning the refusal decision of 3 August 1994

18 IPK brought an action for the annulment of the refusal decision of 3 August 1994, which led to the first legal proceedings before the Community courts ('the first legal proceedings').

19 By judgment of 15 October 1997 in Case T-331/94 *IPK* v *Commission* [1997] ECR II-1665, the General Court dismissed that action.

20 As grounds for dismissing the action, the General Court held, inter alia, in paragraph 47 of that judgment, as follows:

'... [IPK] cannot claim that the Commission caused the delay in the completion of the [Ecodata] project. [IPK] waited until March 1993 before starting discussions with its partners concerning the distribution of tasks with a view to completing the project, even though it was responsible for coordination of the project. Thus, [IPK] allowed one-half of the time envisaged for completing the project to elapse before it was reasonably able to commence proper work. Even though [IPK] has provided some evidence that one or more officials of the Commission did interfere in the project between November 1992 and February 1993, it has not established at all that this

interference prevented it from engaging in proper cooperation with its partners before March 1993.'

21 Following an appeal lodged by IPK, the Court of Justice set aside the judgment of the General Court and referred the case back to it (Case C-433/97 P *IPK* v *Commission* [1999] ECR I- 6795).

22 In support of its judgment, the Court held, inter alia:

'15. ... [I]t should be observed that, as appears from paragraph 47 of the judgment under appeal, [IPK] did provide some evidence of the Commission officials' interference in the management of the project, particulars of which are given in paragraphs 9 and 10 of the judgment under appeal. That interference was likely to have had an impact on the smooth running of the project.

16. In circumstances such as those, it was for the Commission to show that, notwithstanding the interference in question, [IPK] continued to be able to manage the project in a satisfactory manner.

17. It follows that the Court of First Instance erred in law by requiring [IPK] to furnish proof that the Commission officials' actions made it impossible for it to engage in proper cooperation with its partners in the project.'

23 After the case had been referred back to it, the General Court upheld the action by judgment of 6 March 2001 in Case T-331/94 *IPK-München* v *Commission* [2001] ECR II-779).

24 In that judgment, under the heading 'The dispute', the Court stated:

'34. In the present action the Court of First Instance is called upon to rule on the legality of the Commission's decision refusing to pay the second instalment of the aid granted to the applicant for the purposes of carrying out the Ecodata project. The grounds on which that refusal was based are set out in the contested decision and in the letter of 30 November 1993 to which the decision refers.

35. It must, however, be pointed out that the letter of 30 November 1993 is in two parts. The first part, namely points 1 to 5 of the letter, concerns the Commission's refusal to pay the second instalment of the aid and therefore contains the grounds on which the contested decision is based. The second part, namely points 6 to 12 of the letter, concern the possible recovery of 60 % of the aid that had already been paid. However, as at that date the Commission had not yet taken a decision about recovery.

36. It follows, as the Commission acknowledged at the hearing, that points 6 to 12 of the letter of 30 November 1993 are not among the grounds on which the contested decision is based. Those points were raised merely in the context of a possible future Commission decision requiring repayment of the instalment of the aid that had already been paid. The arguments advanced by the applicant in its application which relate to points 6 to 12 of the letter of 30 November 1993 must therefore be held to be inadmissible.'

25 As regards the substance, the Court held, inter alia, as follows:

> '85. In those circumstances and since the Commission has failed to put forward any other arguments, it must be held that the Commission has not shown that, in spite of its interference, in particular that intended to involve Studienkreis in the Ecodata project, "[IPK] continued to be able to manage the project in a satisfactory manner".
>
> 86. Therefore, given that, first, from the summer of 1992 until at least 15 March 1993 the Commission insisted that [IPK] involve Studienkreis in the... project (even though [IPK's] proposal and the decision granting the aid did not provide for that undertaking's participation in the project), — something which necessarily delayed realisation of the project — and that, second, the Commission has not shown that, in spite of its interference, [IPK] continued to be able to manage the project in a satisfactory manner, it must be held that the Commission acted in breach of the principle of good faith by refusing to pay the second instalment of the aid on the ground that the project was not completed on 31 October 1993.'

26 The Court then examined the Commission's argument alleging that there was collusion between Mr Tzoanos, 01-Pliroforiki and IPK, raised by the Commission at the defence stage, and then expressed in more detail and with greater clarity in its subsequent pleadings, and found, inter alia, as follows:

> '88. However, in so far as, concerning the last intervention, the Commission needs to emphasise that there was collusion between Mr Tzoanos, 01-Pliroforiki and [IPK]..., the Court must also rule on the application of the principle *fraus omnia corrumpit*, which, according to the Commission, calls for the present action to be dismissed.

89. ... [T]he Commission explains in that regard that the [award] decision resulted from collusion between Mr Tzoanos, 01-Pliroforiki and [IPK]. In support of its argument, the Commission refers to the minutes of the interviews held during the Belgian authorities' inquiry into Mr Tzoanos... It points out that Mr Freitag, [IPK's] manager and owner, stated that Mr Tzoanos had asked him to appoint Mr Tzoanos as a partner in ETIC [European Travel Intelligence Center], one of Mr Freitag's companies, and led him to believe that [IPK] would find it easier to obtain contracts from the Commission in the future... In addition, Mr Tzoanos indicated to Mr Freitag that a future project referred to by Mr Freitag at a conference of DG XXIII in Lisbon in May 1992 "could work" if a commission of ECU 30 000 was paid to him... In support of its argument, the Commission also points out that, from June 1992, the Lex Group represented ETIC in Greece (brochure No 1/92 of ETIC). Mr Tzoanos was the founder of the Lex Group, while the person who was responsible for making client contact for that company was Ms Sapountzaki, his fiancée at that time and subsequently his wife. 01-Pliroforiki succeeded the Lex Group as ETIC's representative in Greece. The Commission also refers to the statement made by Mr Franck, ETIC's collaborator, which, it claims, clearly establishes that there was collusion between Mr Tzoanos, 01-Pliroforiki and [IPK]... It is significant that Innovence, the only one of [IPK's] partners in the project which had no connection with either Mr Tzoanos or Mr Freitag, was not invited to the meeting on 24 November 1992..., which was held in ETIC's offices. The Commission also points out that Mr Tzoanos had Mr Freitag's private telephone number. During the telephone conversation that Mr von Moltke had with Mr Freitag on 10 March 1993, Mr Freitag covered for Mr Tzoanos and thus became his accomplice. At the hearing the Commission again referred to the judgment of the Tribunal de Grande Instance (Twelfth Chamber) (Regional Court), Paris, of 22 September 2000, by which Mr Tzoanos was sentenced to four years' imprisonment for corruption.

90. The Court notes that there is no mention in either the contested decision or the letter of 30 November 1993, to which the contested decision refers, of collusion between Mr Tzoanos, 01-Pliroforiki and [IPK], which prevented payment of the second instalment of the aid to the applicant. The contested decision and the letter of 30 November 1993 do not, furthermore, give any indication that the

Commission considered that the way in which the aid had been granted to [IPK] was irregular. In those circumstances, the Commission's explanation concerning the alleged existence of collusion between the parties concerned cannot be regarded as clarifying in the course of the proceedings the reasons stated in the contested decision …

91. If account is taken of the fact that, under Article [230 EC], the Court of First Instance must confine itself to a review of the legality of the contested decision on the basis of the reasons set out in that measure, the Commission's argument concerning the principle *fraus omnia corrumpit* cannot be upheld.

92. It must be added that if the Commission, having adopted the contested decision, had taken the view that the evidence mentioned in paragraph 89 above was sufficient to conclude that there was collusion between Mr Tzoanos, 01-Pliroforik and [IPK] which had vitiated the procedure by which aid was allocated to the Ecodata project, rather than pleading in the present proceedings a ground which was not mentioned in the contested decision, it could have withdrawn that decision and adopted another decision not only refusing to pay the second instalment of the aid but also ordering repayment of the instalment that had already been paid.'

27 The Commission and IPK both appealed against the judgment of the General Court. In support of its appeal, the Commission raised, inter alia, a fifth ground of appeal, alleging a failure to examine the principle *fraus omnia corrumpit*. IPK, for its part, claimed that the Court should set aside the judgment under appeal in so far as it works on the assumption, in paragraphs 34 to 36, that paragraphs 6 to 12 of the grounds set out in the Commission's letter of 30 November 1993 did not form part of the refusal decision of 3 August 1994.

28 By judgment of 29 April 2004 in Joined Cases C-199/01 P and C-200/01 P *IPK-München* v *Commission* [2004] ECR I-4627, the Court of Justice dismissed IPK's appeal as inadmissible and the Commission's appeal as unfounded.

29 With regard to the fifth ground of appeal raised by the Commission, the Court held as follows:

'62 By its second and fifth grounds of appeal, which it is appropriate to examine together and first of all, the Commission complains that the Court of First Instance, first, disregarded the findings set out in paragraphs 15 and 16 of the judgment of the Court of Justice of 5 October 1999 in [Case C-433/97] *IPK* v *Commission* [ECR I-6795], in particular concerning the relevance of the alleged unlawful collusion between [Mr Tzoanos], 01-Pliroforiki and IPK.

63 The Commission submits that that collusion delayed the implementation of the project at least until February 1993, in so far as the partners in the project could not agree on the award of the funds to the Greek partner demanded by [Mr Tzoanos], which led to the suspension of the project and, second, that IPK expressly covered the actions of [Mr Tzoanos]. In accordance with paragraphs 15 and 16 of the judgment of the Court of Justice of 5 October 1999 in *IPK* v *Commission*, the Court of First Instance should have checked whether the Commission had shown that, in spite of the actions in question, IPK remained in a position to manage the project in a satisfactory manner. Therefore, the Commission argues that by dismissing its argument relating to such collusion as irrelevant, the Court of First Instance committed an error of law.

64 The Commission claims that, by holding that it was not a criminal court and that it could not consider whether there had been such collusion, the Court of First Instance disregarded the principle *dolo agit, qui petit, quod statim redditurus est* and the principle *fraus omnia corrumpit*.

65 By contrast, IPK submits that there was no unlawful collusion between [Mr Tzoanos], 01-Pliroforiki and itself. In any event, the lawfulness of the decision should be determined solely with regard to the reasons for which it was adopted and, as the Court of First Instance found, the contested decision does not contain any finding as to the so-called unlawful collusion of IPK with [Mr Tzoanos] and 01-Pliroforiki.

66 According to established case-law, the purpose of the obligation to state the grounds on which a decision adversely affecting an official is based is to enable the Community judicature to review the legality of the decision and to provide the official concerned with sufficient information to assess whether the decision is well founded or subject to a defect enabling its legality to be challenged. The statement of reasons must therefore in principle be notified to the person concerned at the same time as the act adversely affecting him, for failure to state the reasons cannot be remedied by the fact that the person concerned learns the reasons for the act during the proceedings before the Community judicature.

67 Furthermore, pursuant to Article 173 of the EC Treaty (now, after amendment, Article 230 EC), the Court of First Instance must confine itself to review the legality of the contested decision on the basis of the reasons contained in that act.

68 In this case, the Commission, by the contested decision, refused to pay IPK, for the reasons contained in the letter of 30 November 1993, the outstanding 40% of the financial aid of ECU 530 000 that it had earmarked for the project. In that letter, the Commission informed IPK that, in its view, the work carried out until 31 October 1993 did not satisfactorily correspond to that envisaged in the proposal, and set out the grounds which led to the adoption of that decision in paragraphs 1 to 6 of that letter.

69 It is clear from paragraph 15 of the present judgment that neither in the letter of 30 November 1993 nor in the contested decision is there any mention of the existence of collusion between [Mr Tzoanos], 01-Pliroforiki and IPK. Thus, in paragraph 90 of the judgment under appeal, the Court of First Instance was right to hold that such collusion was not a ground for the contested decision.

70 Furthermore, in holding that the letter of 30 November 1993 and the contested decision did not contain any indication of the fact that the Commission considered that the financial aid had been improperly awarded to IPK, the Court of First Instance rightly held that the explanation put forward by the Commission concerning the alleged existence of unlawful collusion between the parties concerned could not be regarded as a clarification made in the course of the proceedings of the grounds put forward in the contested decision, and that the case-law set out in paragraph 66 of the present judgment applied in this case.

71 In those circumstances, the Court of First Instance was therefore able to conclude in paragraph 91 of the judgment under appeal without any error of law, from the grounds as a whole, that the Commission's arguments relating to the principle *fraus omnia corrumpit* could not be accepted. Furthermore, since the principle *dolo agit, qui petit, quod statim redditurus est* was not raised before the Court of First Instance, the Commission's argument that it disregarded that principle is inadmissible.'

Administrative procedure leading to the adoption of the contested decision

30 By letter of 30 September 2004, the Commission informed IPK, referring to the judgment in *IPK-München* v *Commission*, cited in paragraph 28 above, that it had carried out an in-depth investigation concerning Mr Tzoanos, which revealed that it was customary for him to award projects in which Greek undertakings which he proposed were partners and from which he made a personal profit. The Commission reviewed the legality and regularity of the procedure for granting the financial support at issue

and came to the conclusion that the decision to grant it was unlawful in that it resulted from a collusion between Mr Tzoanos and Mr Freitag, the director and owner of IPK. The Commission therefore intended to 'annul' the award decision.

31 By letters of 26 November and 23 December 2004 and of 21 February 2005, IPK presented its observations on the letter of 30 September 2004. In its letters of 23 December 2004 and 21 February 2005, IPK also claimed payment of the second instalment of the financial assistance at issue. IPK formally repeated that request by letter of 20 July 2005.

32 By letter of 13 May 2005 [ENTR/01/Audit/RVDZ/ss D(2005) 11382], addressed to IPK and in particular to Mr Freitag ('the contested decision'), the Commission stated inter alia as follows:

'In those circumstances, [the Commission] reviewed the procedure for granting the financial assistance [at issue] in order to verify that it was lawful and in order.

For the reasons which will be set out in points (a) to (k) below [see paragraph 33 below], [the Commission] reached the conclusion that the decision to grant the financial assistance [at issue] was unlawful in that it was the result of a collusion between Mr Tzoanos and [Mr Freitag].

The Commission has therefore decided to annul the previous decision to grant financial assistance of ECU 530 000 within the framework of the Ecodata project …

In accordance with this decision, the Commission refuses first of all to pay the second instalment of the [financial assistance at issue], which amounts to ECU 212 000 and rejects your request for payment of interest for delay.

Secondly, the Commission will recover the advance of ECU 318 000, plus interest.

That order for recovery is currently being drawn up and will be sent to you in due course.'

33 According to the contested decision, the collusive agreement between Mr Tzoanos and Mr Freitag is established by the following evidence:

'(a) The proposal for the Ecodata project was submitted following the publication, on 26 February 1992, of a call for proposals in the *Official Journal of the European Communities* with a view to supporting projects in the field of tourism and the environment (OJ 1992 C 51, p. 16). Point D of that call for proposals, entitled "Selection criteria", listed five main themes for the projects. The creation of a databank, to which the Ecodate project relates, was not among those five themes. Therefore, on the basis of the official text of the call for proposals, it is impossible to understand why you submitted a proposal concerning the creation of that databank. In the light of your previous relations with Mr Tzoanos and of the evidence, referred to below, that you were in contact at the time of the proposal, the only explanation is that Mr Tzoanos informed you that such a project might be subsidised in spite of the wording of the call for proposals.

(b) The actual selection of the Ecodata project by Mr Tzoanos … was unlawful. In order to ensure transparency, fair competition, equality of treatment and of access to Community funding, the evaluation and selection of the proposals with a view to financing them must be based on the criteria published in the call for proposals. That was clearly not the case for the Ecodata project, since it did not correspond to any of the five themes stated in the call for proposals. Points (a) and (b) are both clear indications of unlawful practices.

(c) The call for proposals published in the *Official Journal* [*of the European Communities*] stated that the amount available for financing, which was ECU 2 (two) million, would be divided between about 25 projects. Therefore, the average amount of financial aid which could be expected was approximately ECU 80 000. However, you submitted a proposal with a view to receiving a Community contribution of ECU 600 000 (30 % of the total financing available). That proposal would have been totally unrealistic if Mr Tzoanos had not informed you in advance that you could expect a favourable result.

(d) The [final general budget for the financial year 1992] contained a note relating to the tourism budget stating that a minimum amount of ECU 530 000 was to be allocated to the creation of an information system for ecological tourism. However, that subject did not appear in the call for proposals published on 26 February 1992. You had no reason to believe that, in spite of the lack of any reference to the subject "databank or information system" in the call for proposals or the budgetary note relating to the need for an information system, the Commission intended to use that part of the budget at that time. The only possible explanation is that [Mr Tzoanos] informed you of his intention, thus converting the selection procedure into an unfair and improper procedure excluding all competition.

(e) During the inquiry conducted by the Commission, Mr Franck, president of ETIC, informed two of the Commission's officials that the whole of the text of the request for [financial support] (the Ecodata [project] proposal) had been sent to you by Mr Tzoanos. Your sole task, at that stage, consisted in... copying the text on IPK's headed paper and sending it on to the Commission. According to [Mr Franck], it was not envisaged at the time that you would actually take part in the execution of the project; the distribution of the funds between the partners was to be made at the rate of 10 % for you and 90 % for the other partners, one of which was 01-Pliroforiki, a Greek company proposed by Mr Tzoanos. It is clear that such practices in the drawing up of a proposal distort the selection procedure and are collusive manoeuvres between a corrupt official and an apparently consenting third party.

(f) Mr Franck's statements have been partly confirmed by one of your competitors. According to the latter, you said that you had had discussions with Mr Tzoanos before submitting the proposal and that [he] had informed you that you would obtain the financial assistance if you accepted three project partners nominated by him. This was a wholly unacceptable proposal made by a Community official and it should have been reported immediately to the competent authorities. By continuing to deal with that official, you demonstrated your willingness to take part in unlawful practices to the detriment of the Commission in spite of your long-standing contractual relationship with this institution.

(g) During the execution of the E[codata] project, you had ample opportunity to point out that Mr Tzoanos had distorted the selection procedure and that he had tried unlawfully to influence the allocation of funds. However, at no time during your contacts with the officials of DG XXIII … did you express your concerns; on the contrary, you protected and defended Mr Tzoanos. However, when you were questioned by the Belgian police in February 1995, you explained that, both

during the period between 1989 and 1990 and in 1992, Mr Tzoanos had already made offers, particularly with regard to [the] Ecodata [project], which clearly revealed his corrupt intentions. Even though, during police questioning, you denied having accepted those offers, the fact that you did not point out at the time those attempts at corruption either to the authorities or to the officials of DG XXIII, but on the contrary continued to collaborate with Mr Tzoanos, is a serious indication of unlawful conduct on your part.

(h) When the Director General of DG XXIII asked you, in March 1993, if you had had contact with Mr Tzoanos during the drawing up of your proposal, you denied that Mr Tzoanos had handled the project before the proposal was submitted, and you stated that... 01-Pliroforiki had been introduced on the recommendation of Mr Tzoanos during discussions with him when your proposal was being prepared. Since you acknowledged that Mr Tzoanos had previously made attempts to corrupt, the acceptance of that recommendation before the submission of your proposal, which was subsequently to be evaluated and approved by Mr Tzoanos himself for the purposes of granting [the financial assistance at issue] is another indication that the grant procedure was unlawful and had been distorted.

(i) The record of Mr Tzoanos' interrogation by the Belgian police shows that, according to Mr Tzoanos' diary, a meeting was held between you and Mr Tzoanos and also between Mr Tzoanos and one of your collaborators during the period in which the proposal for the Ecodata project was being drawn up. That indication compares with the statements referred to in points (e) and (f). Consequently, the fax which you sent on 31 March 1993 to the Director General [of DG XXIII], at his request, stating that you had had no contact with Mr Tzoanos during the preparation period of the proposal constitutes an untrue statement.

(j) The meeting which took place in November 1992 between Mr Tzoanos and [the partners in the Ecodata project] in the offices of ETIC, one of your companies, in Brussels concerning the distribution of funds between the partners in the project seems to be an example of those collusive practices. Innovence, the only company in the group which is not linked either to you or to Mr Tzoanos, was not invited to that important meeting. The Italian partner, Tourconsult, was represented by you as a shareholder of that company.

(k) The fact that Mr Tzoanos' fiancée (and subsequently wife) worked as the Greek representative of ETIC (founded by IPK) within the Lex Group (founded by Mr Tzoanos) confirms that the links between yourselves and Mr Tzoanos were long-standing and relatively close.'

Decision to recover the first instalment of the financial assistance

34 After IPK had disputed a debit note and a payment reminder that the Commission had sent it on 13 June and 31 August 2000 respectively, the Commission adopted Decision C(2006) 6452 of 4 December 2006 ('the recovery decision').

35 In that decision, the Commission states, in Article 1, that IPK is accountable to it, as at 31 October 2006, for a principal sum of EUR 318 000, plus interest for delay running from 25 July 2005. In Article 3 of the recovery decision, the Commission informed IPK that the enforcement procedure would be initiated pursuant to Article 256 EC if payment were not made within 15 days of notification of the recovery decision. In

Article 4 of that decision, it is stated that the decision constitutes a pecuniary obligation within the meaning of the first paragraph of Article 256 EC.

36 On 15 May 2007, IPK, without acknowledging that it was liable for the payment, repaid the Commission the sum requested in the recovery decision.

Criminal proceedings against Mr Tzoanos at national level

37 The criminal proceedings against Mr Tzoanos in Belgium, relating inter alia to his actions with regard to the Ecodata project, were held inadmissible in a judgment of 6 May 2008 of the Brussels Cour d'appel (Court of Appeal) in Belgium, on the ground that the limitation period had expired.

38 In the criminal proceedings against Mr Tzoanos in France, which did not concern his actions with regard to the Ecodata project, he was sentenced in his absence by the Paris Tribunal de grande instance (Regional Court), by judgment of 22 September 2000 (Case No 9508001053), to four years' imprisonment for a series of fraudulent acts. That conviction was confirmed by the Paris Cour d'appel by judgment of 3 November 2005 (Case No 04/06084). Mr Tzoanos' appeal against the latter judgment was dismissed by the Cour de Cassation by judgment of 20 December 2006.

Procedure and forms of order sought by the parties

39 By application lodged at the Registry of the General Court on 29 July 2005, IPK brought the present action.

40 By document lodged at the Court Registry on 21 December 2006, IPK brought an action for interim measures seeking suspension of operation of the recovery decision until the General Court had given an enforceable decision in the present case. That application was lodged as Case T-297/05 R.

41 By application lodged at the Registry of the General Court on 16 February 2007, IPK brought an action for the annulment of the recovery decision, registered as Case T-41/07.

42 By order of 2 May 2007 in Case T-275/05 R *IPK International — World Tourism Marketing Consultants* v *Commission* (not published in the ECR), the President of the General Court interpreted the application for interim measures referred to in paragraph 40 above as seeking suspension of the operation of the contested decision (paragraph 18 of that order), and rejected that application for lack of urgency.

43 By order of 20 November 2009 in Case T-41/07 *IPK International — World Tourism Marketing Consultants* v *Commission* (not published in the ECR, paragraph 15), the General Court decided, in accordance with Article 113 of its Rules of Procedure, that there was no longer a need to give a ruling in Case T-41/07, since IPK had repaid to the Commission the sum requested in the recovery decision and the action had therefore become devoid of purpose.

44 IPK claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

45 The Commission contends that the Court should:

— dismiss the application;

— order IPK to pay the costs.

46 The applicant asks the Court to take evidence from several people. Moreover, pursuant to Article 64 (3)(d) and (4) of the Rules of Procedure, it requests disclosure of certain of the Commission's documents. Accordingly, it asks the Court, in essence, to order the Commission to produce, inter alia, 'the documents of DG XXIII and of the directorate general for financial control concerning the project and all the documents relating to the investigations conducted into the measures at issue in this case' and to examine the documents relating to the first legal proceedings before the Court (T-331/94), since those documents are 'relevant for the purposes of this action'. The Commission also gives the names of several people who may be called as witnesses and proposes that the Court rely on the file in Case T-331/94.

47 By letter of 30 April 2010, by way of the measures of organisation of procedure provided for in Article 64 of the Rules of Procedure, the Court called on the parties to lodge certain documents and put to them questions with a request for a response in writing. The parties complied with those measures of organisation of procedure within the prescribed periods.

48 Acting upon a report of the Judge-Rapporteur, the General Court (Third Chamber) decided to open the oral procedure.

49 The parties presented oral argument and their answers to the oral questions put by the Court at the hearing on 9 June 2010. Moreover, at the hearing, by way of measures of organisation of procedure provided for in Article 64 of the Rules of Procedure, the Court called on the parties to lodge certain documents and evidence and to provide certain information in writing. The parties complied with those measures of organisation of procedure within the prescribed periods. After the parties had presented their observations on the documents and evidence lodged as well as on the information provided, the oral procedure was terminated on 2 September 2010.

Law

Preliminary observation

50 In support of its action, the applicant puts forward four pleas in law. The first plea alleges that the conditions for cancelling a decision granting financial assistance are

not met. The second and third pleas allege infringement, respectively, of the principle of good administration and of the duty to state reasons pursuant to Article 253 EC. The fourth plea, raised in the alternative, concerns the 'prohibition on the issuing of decisions which have been declared void'.

51 The Court considers it expedient to set out, first, all the arguments relating to the evidence of the collusion underlying, in particular, the first plea and then to appraise them together with that plea.

Evidence of collusion and the first plea

Arguments of the parties

— Evidence of collusive conduct on the part of IPK

52 IPK denies the existence of the collusion alleged in the contested decision. The sole purpose of that line of argument, developed by the Commission after having been unsuccessful in the first legal proceedings (see paragraphs 18 to 28 above), is to impute the unlawful acts committed within the Commission to IPK, which is the real victim of those acts.

53 IPK maintains, in essence, that it learned of the Ecodata project through 01-Pliroforiki during a telephone conversation on 16 March 1992, following which 01-Pliroforiki submitted a draft project to it on 3 April 1992. IPK extensively developed the concept presented in that draft and, on 22 April 1992, sent the Commission its first proposal for the Ecodata project which envisaged the collaboration of Innovence, Tourconsult and 01-Pliroforiki. However, at the hearing, IPK acknowledged, in answer to a question from the Court, that it had not received the draft project from 01-Pliroforiki until 20 April 1992, which was noted in the record of the hearing.

54 It was only after the decision to grant the financial assistance had been taken that Mr Tzoanos first sought to insist, unsuccessfully because IPK objected, that a substantial part of the tasks and funds should be allocated to 01-Pliroforiki, owing to its importance in the databank sector. Contrary to what the Commission claims, no agreement relating to that project was concluded between IPK and Mr Tzoanos before the decision to grant the financial assistance was taken, and it was not agreed to allocate 10 % of the financial assistance to IPK and the remaining 90 % to the other partners in the Ecodata project. Contact between IPK and Mr Tzoanos prior to the award decision had nothing to do with the project and is irrelevant to the present proceedings. IPK has always behaved fairly to the Commission and asked in vain for a confidential meeting with Mr Tzoanos' superiors in order to complain about his actions.

55 As regards Paragraph 9(a) of the contested decision, namely, the lack of a specific call for proposals for the creation of a databank such as the one proposed in the Ecodata project, IPK points out that the call for proposals did not contain exhaustive selection criteria, so that, apart from the express restrictions mentioned therein and on the basis of Section B of that call for proposals, any projects which were innovative and promoted an ecological development in tourism could be submitted. In that context, there was an obvious link between the funds allocated in the final general budget for the financial year 1992 and the call for proposals. It is therefore unsurprising that IPK submitted the Ecodata project.

56 So far as concerns Paragraph 9(b) of the contested decision, relating to the allegedly unlawful nature of the selection of the Ecodata project by Mr Tzoanos, IPK points out that it had no influence on that act, which was purely an internal act of the Commission, which, in any event, does not support the conclusion that there was any collusion. Moreover, IPK does not understand why the award decision is unlawful, since, on the one hand, the proposal for the Ecodata project was perfectly suited to the need for an information network for projects concerning ecological tourism in Europe, as stated in the final general budget for the financial year 1992, and, on the other hand, as the Commission itself recognised when it altered the wording of the contested decision in relation to that of its letter of 30 September 2004, the selection did not have to be made solely on the basis of the criteria stated, by way of example, in the call for proposals.

57 As regards Paragraph 9(c) of the contested decision, according to which an unrealistic amount of ECU 600 000 of financial assistance was requested by IPK, representing 30 % of the overall allocation for about 25 projects, IPK rejects the Commission's argument as being 'contrary to the economic approach required'. Such an approach would make it impossible from the outset to 'sprinkle' Community aid among so many projects. Since IPK considered that the cost of the Ecodata project was ECU 1 million, it accordingly applied for the percentage of Community co-financing (60 %).

58 As regards Paragraph 9(d) of the contested decision, according to which only Mr Tzoanos' intention, communicated to IPK, to accept the Ecodata project could explain IPK's application, IPK states, in essence, that both the text of the final general budget for the financial year 1992 and that of the call for proposals were communicated and accessible to the public. In order to support the Commission's incorrect argument alleging that information had been leaked, those texts would have had to be confidential.

59 IPK challenges Paragraph 9(e) of the contested decision, based on the evidence of Mr Franck, according to which, first, the text of the application for financial support had been wholly prepared by Mr Tzoanos and copied by IPK on headed paper before being sent to the Commission and, second, IPK was not actually expected to participate, and that it was to receive 10 % of the amount of the financial assistance at issue, and the remaining 90 % was to be paid inter alia to 01-Pliroforiki, whose participation had been proposed by Mr Tzoanos. There is no evidence to support that supposition. On the contrary, the draft Ecodata project was originally conceived by 01-Pliroforiki, in the person of its president, before being communicated to IPK.

60 Moreover, before the award decision, there had never been any question of IPK receiving 10 % of the amount of the assistance without providing a service in return. It was only following that decision that Mr Tzoanos tried in vain to interfere in the relations between the partners in the Ecodata project. The Commission bases its incorrect assumptions solely on the unreliable evidence of Mr Franck. Mr Franck has never been an employee or a representative of IPK, his role being limited to that of managing a consultancy company which operated an office rental business in Brussels (Belgium) and to which IPK was linked, for approximately one year, by an office rental agreement. IPK terminated that contract following serious irregularities committed by Mr Franck to the detriment of the company. Subsequently, he tried to register a company in the name of IPK International in Luxembourg, to which IPK objected. These facts lie behind the false accusations made by Mr Franck against IPK.

61 IPK also challenges Paragraph 9(f) of the contested decision, according to which Mr Tzoanos compelled IPK to accept three partners designated by him before the award decision was taken. The Commission does not give the name of IPK's competitor which made that incorrect allegation. However, IPK believes that it is Studienkreis, which had every interest in participating in the execution of the Ecodata project owing to its imminent insolvency and whose participation had been persistently sought by the Commission (*IPK-München* v *Commission*, paragraph 23 above, paragraph 75). These facts are enough to call into question the reliability of that allegation. Finally, far from characterising collusive behaviour on the part of IPK, that allegation,

on the contrary, underlines the unlawful nature of the acts of the Commission, which improperly maintained shared interests with Studienkreis.

62 As regards Paragraph 9(g), according to which IPK failed to report Mr Tzoanos' fraudulent acts to the Commission, IPK maintains that that line of argument cannot corroborate the allegation of collusion, since all the evidence invoked is subsequent to the award decision. That allegation is also unfounded, since IPK tried to complain to the Commission about Mr Tzoanos' actions, of which it was the victim. To that end, in August 1992 it requested an interview with Mr von Moltke, Director General of DG XXIII, without Mr Tzoanos' participation. However, Mr von Moltke invited Mr Tzoanos to the interview on 30 September 1992 and informed IPK that the grant procedure had been lawful. In so far as the Commission refers to events dating from the years 1989, 1990 and 1992, IPK claims that, at that time, it had neither evidence nor reliable information which would have enabled it to approach the Commission. Moreover, those events had neither any connection with the Ecodata project nor any impact on the award decision.

63 For the reasons set out in paragraph 53 above, IPK also rejects the allegation in Paragraph 9(h) of the contested decision, according to which the fact that, in March 1993, it denied the alleged manipulation by Mr Tzoanos of the Ecodata project before it was submitted to the Commission, constitutes an indication of IPK's collusive behaviour.

64 Similarly, IPK challenges Paragraph 9(i) of the contested decision, according to which it made a dishonest statement, contradicted by the record, drawn up by the Belgian police, of Mr Tzoanos' interrogation, by stating in a fax of 31 March 1993 addressed to Mr von Moltke that neither Mr Freitag nor his employee had had any contact with Mr Tzoanos during the preparation of the Ecodata project. Indeed, such contact

did not take place. IPK adds that, if there had been contact, it would have involved Mr Tzoanos and Mr Franck, and the latter would then have acted with out IPK's authorisation and without its knowledge.

65 As regards Paragraph 9(j) of the contested decision, according to which, in November 1992, a meeting was held between Mr Tzoanos, 01-Pliroforiki and IPK, which also represented Tourconsult, IPK claims that it did not know that Innovence and Tourconsult had not been invited. It was also unable to foresee that that meeting concerned the distribution of tasks between the participating undertakings. Besides, Mr Tzoanos' attempts to interfere on that occasion are not evidence of the alleged collusion since that meeting took place after the award decision. IPK adds that, although it is true that it had a symbolic holding of EUR 1 000 in Tourconsult — from which it has not managed to withdraw —, it did not represent that company at the aforementioned reunion through Mr Freitag, who was not authorised for that purpose. On the contrary, Tourconsult was directed and represented by Mr F., who acted on behalf of Tourconsult in connection with other projects carried out for the Commission. In reply to a question from the Court, IPK states that it tried unsuccessfully to obtain repayment of its capital contribution of EUR 1 000 from Mr F. and that it finally abandoned the idea of bringing legal proceedings for that purpose.

66 As regards, finally, Paragraph 9(k) of the contested decision, according to which Ms Sapountzaki, Mr Tzoanos' fiancée and subsequently his wife, worked as the Greek representative of ETIC, founded by IPK, within the Lex Group, which was itself founded by Mr Tzoanos, a fact which affirms the long-standing and relatively close nature of relations between Mr Freitag and Mr Tzoanos, IPK maintains that it was unaware of the personal connection between Mr Tzoanos and his fiancée, that she, as the alleged owner of the Lex Group, only represented for IPK a contact in Greece and that, in any event, that fact did not support the conclusion that there were long-standing relations between IPK and the Tzoanos couple.

67 Moreover, apart from the fact that the Commission justifies its claims on the basis of the dubious statements made by Mr Tzoanos, who is subject to legal proceedings in France and Belgium, and of Mr Franck, who committed irregularities in connection with his activity on behalf of IPK, it failed to take sufficient account of certain exculpating evidence contradicting the existence of collusion. Accordingly, no criminal investigation was ever opened against IPK and the French and Belgian authorities reached the conclusion that there was not the least suspicion that Mr Freitag was guilty of an infringement. Furthermore, the internal investigations carried out by the Commission did not establish that the grant of financial assistance at issue was unlawful.

68 On the contrary, it is apparent from the first legal proceedings that the Commission had exerted unlawful pressure on IPK (*IPK-München* v *Commission*, paragraph 23 above, paragraphs 75 and 85). Moreover, IPK drew attention to Mr Tzoanos' actions in good time and tried, from August 1992, to have a confidential meeting with Mr von Moltke regarding that matter.

69 IPK states that the Belgian police investigation had been the result of a complaint lodged by IPK on 27 April 1994 against Mr von Moltke and of an interview granted by IPK on 4 May 1994 to the journal *The European*. IPK would not have lodged a complaint if it had had to fear the risk of proceedings, the only plausible explanation for that step being that there had been no collusion between IPK and Mr Tzoanos. On the contrary, IPK refused to accede to Mr Tzoanos' demands and carried out and coordinated most of the Ecodata project itself, contrary to the expectations of Mr Tzoanos, who wished to promote 01-Pliroforiki. Since IPK had invested own funds in the Ecodata project, the total cost of which was more than EUR 1 million, it had a personal and immediate interest in its success. However, if the alleged collusion had existed, events would necessarily have developed differently. In particular, in that case, IPK would have complied with the alleged agreements, in order to receive part of the financial assistance without providing any services in return.

70 The Commission considers that the present dispute must be placed in the context of the system of corruption put in place in the late 1980s and early 1990s by the former head of the 'Tourism' Unit of DG XXIII, Mr Tzoanos. That system was essentially based on the payment of 'fees', proportionate to the grants awarded by the Commission, to consulting companies controlled by Mr Tzoanos' fiancée, Ms Sapountzaki, who subsequently became his wife. The Commission states that Mr Tzoanos was finally convicted in France for that kind of offence and that legal proceedings brought against him and his wife in Belgium are ongoing.

71 Mr Tzoanos is wanted under an international arrest warrant and is assumed to be in Greece, a country which refuses to extradite him. The corrupt conduct of Mr Tzoanos, nicknamed 'Mr Thirty Per Cent', was known about in the relevant circles, particularly by the director and owner of IPK, Mr Freitag. According to several transcripts drawn up by the Belgian police, Mr Freitag and Mr Tzoanos had been in contact since 1989. Accordingly, Mr Tzoanos suggested to Mr Freitag that he become a limited partner in his company European Travel Monitor in order to facilitate the company's acquisition of Commission contracts. Moreover, the companies controlled by Mr Freitag received, during the period 1991 to 1992 alone, Commission grants amounting to ECU 949 365.

72 As regards the Ecodata project, the Commission reiterates the argument that Mr Tzoanos informed Mr Freitag of the possibility of obtaining a significant amount by way of financial assistance for an information system for ecological tourism projects. Mr Tzoanos intimated that IPK could obtain that financial assistance if it submitted an application for it in a previously drafted form. It would then receive 10% of the funds for that sole purpose. The rest of the funds would be divided between the other companies participating in the project, and would be allocated in particular to 01-Pliroforiki, a Greek company controlled, as was the Lex Group, by Mr Tzoanos and unlawfully promoted by him (Case T-74/96 *Tzoanos* v *Commission* [1998] EC-SC I-A-00129 and II-00343, paragraphs 252 to 255).

73 Since it was impossible for other economic operators to be aware of that opportunity for financial assistance without an express call for proposals, IPK was the only one to apply for financial assistance to create a database for ecological tourism projects. During the summer holiday period, it was easy for Mr Tzoanos to arrange for the assistance to be granted to IPK, in spite of the surprise expressed by Studienkreis — which had already collaborated with the Commission on a similar project — at the imminence of that grant, made without a call for proposals.

74 Even before the award decision was taken, ETIC, which was founded by IPK, was represented in Greece by the Lex Group, which was 10 % owned by Mr Tzoanos (*Tzoanos* v *Commission,* paragraph 72 above, paragraphs 58 to 79). The person responsible for making client contact was Ms Sapountzaki, who at the time was Mr Tzoanos' fiancée and subsequently became his wife.

75 After the award decision had been taken, Mr Freitag no longer felt bound by the agreement concluded with Mr Tzoanos, so that Mr Tzoanos was obliged to put pressure on IPK in order to ensure that the project was carried out as initially agreed.

76 Once the Ecodata project had been withdrawn from Mr Tzoanos, on 26 March 1993, IPK, 01-Pliroforiki and the other two participating companies reached an agreement concerning the financial and technical division of the project which, in the circumstances, could not be finished within the periods envisaged. It was in those circumstances that the Commission decided, by its refusal decision of 3 August 1994 (see paragraph 17 above), not to pay the second instalment of the financial assistance.

77 Since IPK obtained the annulment of the refusal decision of 3 August 1994 at the end of the first legal proceedings, the Commission adopted the contested decision on the basis of the information relating to the collusion between Mr Tzoanos and Mr Freitag, obtained since the adoption of the refusal decision, and on the possibility, 'expressly envisaged by the Community Courts' (*IPK-München* v *Commission*, paragraph 23 above, paragraph 92; Opinion of Advocate General Mischo in *IPK-München* v *Commission*, paragraph 28 above, point 101), that it could order repayment of all the financial assistance under the principle *fraus omnia corrumpit*.

78 As regards more particularly Paragraph 9(a) of the contested decision, relating to the lack of a specific call for proposals for the creation of a databank such as the Ecodata project, the Commission maintains that, in accordance with the principles applicable to financial assistance, it is the call for proposals that determines the eligibility of a project. IPK's proposal did not correspond to any of the selection criteria listed in the call for proposals. As for IPK's argument that the final general budget for the financial year 1992 provided for a sum of ECU 530 000 to finance the creation of an information network on projects for ecological tourism in Europe the link of which with the call for proposals was 'obvious', the Commission contends that it was impossible for a 'normal' applicant to realise that the call for proposals also related to financial assistance mentioned in a single sentence on page 659 of that general budget. The Commission adds that point B of the call for proposals refers specifically to the criteria in point D. However, IPK did not even attempt to show, in its application for financial support, that the proposed project corresponded to the selection criteria, as required in point C.2 of the call for proposals. According to the Commission, that omission reflects IPK's certainty that it would obtain the financial assistance applied for. Only Mr Tzoanos, the person who *de facto* decided who would receive the financial assistance, could have provoked that certainty. In those circumstances, it is not surprising that IPK was the only operator to submit a proposal corresponding to the description on page 659 of the final general budget for the financial year 1992 and that Studienkreis, which, however, was particularly interested in that kind of project, did not do so.

79 According to the Commission, if the link between the final general budget for the financial year 1992 and call for proposals was as obvious as IPK claims, it is surprising that, as the company itself says, it was 01-Pliroforiki and not itself that had the idea for the Ecodata project or, according to a different version given by the company, the Greek entrepreneur Mr C., in April 1992. It is also strange that, in March 1993, Mr Freitag also told Mr von Moltke by telephone and in writing that the initiative for the Eco-data project came from him alone. Those contradictory descriptions undermine the credibility and plausibility of IPK's assertions. The statements made by the representatives of 01-Pliroforiki to the Commission's officials carrying out an audit of its books, on 18 October 1993, according to which it was IPK which first mentioned the Ecodata project to them, likewise do not correspond to IPK's version. According to the Commission, it is therefore likely that Mr Tzoanos, who was the official responsible for the call for proposals and had a decisive role in the award decision, himself drew up the call for proposals in such a way that it corresponded exactly to the financial assistance referred to on page 659 of the final general budget for the financial year 1992. That situation would have been very propitious for promoting the fraudulent system put in place by Mr Tzoanos, which consisted in providing financial assistance in exchange for commission.

80 As regards Paragraph 9(b) of the contested decision, relating to the unlawful nature of the selection of the Ecodata project by Mr Tzoanos, the Commission points out that, although IPK certainly could not itself make the award decision, it was nevertheless able to manipulate it by agreeing, under a prior agreement dictated by that competent official, to collaborate with 01-Pliroforiki. Only that prior agreement can explain how Mr Tzoanos chose IPK's proposal from among 301 proposals submitted in response to the call for proposals, of which only 25 were to be accepted, particularly because Mr Tzoanos was aware that Studienkreis' project, which had already been financed by the Community, was very similar to the Ecodata project. In any event, IPK does not offer any other convincing explanation in that regard.

81 Concerning Paragraph 9(c) of the contested decision, which refers to the unrealistic amount of ECU 600 000 of financial assistance requested by IPK, representing 30 %

of the total allocation of ECU 2 million provided for a total of 25 projects, the Commission states that that is a clear indication of the fact that the matter was agreed in advance. Such an application, for one third of the total amount of the allocation, is extremely rare for a single project.

82 As regards Paragraph 9(d) of the contested decision, the Commission points out that only a prior invitation from Mr Tzoanos to IPK can explain that the company submitted an application for financial support, the content of which did not meet the published objective award criteria and for which the amount requested was manifestly disproportionate to the overall budget of the grant scheme in question. Since the preparation of any application for financial support is time-consuming and costly, no sensible operator would have proceeded in that way without the prospect of success. IPK produces no credible argument against this evidence, and its attempts to explain are abstract, unrealistic and contradictory.

83 As regards Paragraph 9(e) of the contested decision, which refers inter alia to Mr Franck's evidence, the Commission rejects IPK's argument that Mr Franck did not work for the company in Brussels. Mr Franck set up, at Mr Freitag's request, the company ETIC Headquarters Bruxelles, which was supposed to establish and develop contacts with the Community institutions. It was against that background that Mr Franck met Mr Tzoanos and became aware of the Ecodata project. Mr Franck was therefore included among IPK's experts in the application for financial support for that project. His evidence is therefore conclusive for establishing the facts, which is why IPK is trying to undermine his credibility.

84 As regards Paragraph 9(f) of the contested decision, according to which Mr Tzoanos compelled IPK to accept three project partners nominated by himself before the award decision, the Commission challenges IPK's claim that 01-Pliroforiki took the initiative and submitted a draft project to IPK. The description of the facts by IPK is contradicted by the statements of Mr Franck and Mr Bausch, which are compatible

with each other and both credible, and also compatible with the fax sent on 31 March 1993 to Mr von Moltke by Mr Freitag, according to which IPK produced the Ecodata project and had chosen its partners.

85 As for Paragraph 9(g) of the contested decision, according to which, inter alia, throughout the procedure, IPK omitted to report Mr Tzoanos' fraudulent acts to the Commission, the Commission maintains that that omission is a clear indication, not to say the only plausible explanation, of the collusion of Mr Tzoanos and Mr Freitag at the time of the adoption of the award decision. If it had complained to Mr Tzoanos' superiors, it would have run the risk of revealing the actual sequence of events and, accordingly, of losing the financial assistance at issue. So far as concerns IPK's alleged request for a confidential meeting with Mr von Moltke without the presence of Mr Tzoanos, the Commission adds that IPK need only have telephoned him.

86 As regards Paragraph 9(h) of the contested decision, according to which Mr Tzoanos handled the Ecodata project before it was submitted to the Commission and recommended 01-Pliroforiki as a partner, the Commission states that, during a telephone conversation with Mr von Moltke in March 1993, Mr Freitag said that he had discussed with Mr Tzoanos, during the preparation stage between April and June 1992, countries and undertakings to be incorporated into that project, which led Mr Tzoanos to recommend 01-Pliroforiki. However, that statement contradicts IPK's repeated claims that the idea for the Ecodata project came from 01-Pliroforiki. Furthermore, that statement by Mr Freitag proves in itself that there was a conclusive collaboration between Mr Tzoanos and IPK.

87 As regards Paragraph 9(i) of the contested decision, according to which IPK made a false statement, contradicted by the records of the interrogation of Mr Tzoanos by the Belgian police, indicating in a fax of 31 March 1993 to Mr von Moltke that neither Mr Freitag nor his collaborators had had contact with Mr Tzoanos during

the preparation stage of the Ecodata project, the Commission states that that false statement, the incorrect nature of which is apparent from several documents in the file, is an additional indication of the collusion between Mr Tzoanos and IPK. The Commission adds that IPK's line of defence in that regard is not quite clear, particularly because it does not deny that there were meetings between Mr Freitag and/or Mr Franck and Mr Tzoanos during the period preceding the submission to the Commission of the Ecodata project.

88 As regards Paragraph 9(j) of the contested decision, according to which the meeting between Mr Tzoanos, 01-Pliroforiki and IPK took place in November 1992, the Commission states that the fact, referred to by IPK, that that meeting took place after the award decision does not call into question its quality as evidence of the alleged collusion, since Mr Tzoanos' attempt to interfere in the division of tasks and funds at that meeting corresponds to what had been agreed previously.

89 As regards Paragraph 9(k) of the contested decision, according to which the appointment of Ms Sapountzaki, Mr Tzoanos' fiancée and subsequently his wife, as representative of ETIC confirms the long-standing and relatively close relations between Mr Freitag and Mr Tzoanos, the Commission points out that IPK had known for a long time about Mr Tzoanos' corrupt conduct, which makes its statement that it only contacted him as Head of Unit of the Commission in order to obtain a recommendation unbelievable.

90 The Commission denies that the arguments put forward by IPK (see paragraph 67 above) are capable of calling into question the evidence establishing collusion. That would be so if there were no criminal proceedings against Mr Freitag. That fact does not prevent the Commission from intervening where there is sufficient evidence of collusion (opinion of Advocate General Mischo in *IPK-München* v *Commission*, paragraph 28 above, point 101).

91 The same is true of the Commission's internal investigations concerning Mr Tzoanos. Apart from the fact that IPK does not state to which investigations it is referring or in what respect those investigations are capable of exculpating it, the Commission maintains that the Belgian criminal proceedings against Mr Tzoanos are still ongoing and may therefore provide further information. Also the Commission's internal investigations have only been halted temporarily. In addition, IPK makes a truncated reference to the judgment in *IPK-München* v *Commission*, paragraph 23 above (paragraphs 75 and 85), which in fact contains nothing to support its argument.

92 As for the complaint lodged by IPK, the Commission points out that that complaint, the text of which was not produced by IPK, was directed against Mr von Moltke, not Mr Tzoanos. In this way, IPK sought to divert suspicion away from Mr Tzoanos and towards Mr von Moltke, and from 01-Pliroforiki to Studienkreis. IPK's complaint is therefore, on the contrary, a further indication of collusion.

93 As regards IPK's resistance to the pressure exerted by Mr Tzoanos, the Commission points out that such resistance, which occurred only after the decision to grant the financial assistance at issue, does not support the conclusion that there was no collusion before that decision.

94 As regards, finally, the contribution of own capital made by IPK for the purposes of implementing the Ecodata project, the Commission maintains that that contribution was a necessary condition for obtaining co-financing from the Commission.

— The first plea, alleging that the necessary conditions for annulling a decision granting financial assistance were not satisfied

95 As its principal argument, IPK maintains that the relevant conditions, governed by Regulation No 2988/95, for the retroactive annulment of a decision to grant Community funds are not satisfied in the present case. The contested decision infringes inter alia Regulation No 2988/95 in that the award decision is not based on an irregularity within the meaning of that regulation. In the alternative, IPK claims that, in any event, since limitation within the meaning of Article 3 of that regulation had become effective, the Commission could not adopt the contested decision.

96 According to IPK, as is apparent from recitals 3 and 4 in the preamble to Regulation No 2988/95, that regulation applies to all areas of Community policy and therefore also to the recovery of Community funds by Community bodies. It is clear from the scheme and objective of that regulation that its scope may be extended to measures adopted by the Commission as soon as the financial interests of the Communities are at stake, whether it is a matter of the centralised or decentralised administration of Community law. Moreover, in the present case, as the case-law has confirmed, that regulation is applicable retroactively irrespective of the fact that the financial assistance was granted before it came into force.

97 IPK maintains that the finding of an irregularity within the meaning of Article 1(2) of Regulation No 2988/95, namely, in the present case, the unlawfulness of the award decision, constitutes the precondition for withdrawing the advantage pursuant to Article 4(1) of the same regulation. The award decision enjoys a presumption of legality, and the Commission has not adduced evidence, as it is required to do, that the decision was unlawful owing, inter alia, to the alleged collusion invoked in the contested decision.

98 In that regard, IPK contests the truth of the collusion alleged by the Commission in the contested decision (see paragraphs 33 and 52 to 67 above). Moreover, the Commission failed to take account of numerous factors showing that there was no collusion (see paragraph 67 above).

99 In any event, even if there were an irregularity within the meaning of Article 1(2) and Article 4(1) of Regulation No 2988/95, IPK considers that the limitation laid down in Article 3(1) of that regulation precluded the withdrawal of the award decision by the contested decision. In that regard, contrary to what the Commission claims, the limitation applies not only to penalties, but also to administrative measures, as is confirmed by the case-law.

100 IPK maintains that the four-year limitation period, which starts to run when the irregularity is committed, had expired when the contested decision was adopted, on 13 May 2005, since the alleged collusion had taken place before the award decision was adopted on 4 August 1992. In that regard, IPK denies that there was a continuous or repeated infringement, constituted, according to the Commission, by the breach of the alleged duty of any recipient of Community assistance to provide information and to act in good faith. The consequence of accepting that argument would be that the limitation period laid down in Article 3 of Regulation No 2988/95 would never start to run since the aforementioned duty to provide information and to act in good faith applies to any irregularity. Moreover, IPK claims that the Commission based its claim alleging collusion on facts of which it had been aware since 1996, so that it could have invoked it much earlier in the context of a new decision relating to the annulment of the award decision. Since the Commission had not done so, IPK is entitled, more than eleven years after the successful execution of the Ecodata project, to restitution of legal certainty.

101 Furthermore, the limitation period was not interrupted in the present case. IPK points out, first, that the refusal decision of 3 August 1994, apart from the fact that

it was not based on the allegation of collusion, did not have the same subject matter as the contested decision, since it merely refused payment of the second instalment of the financial assistance and, secondly, that it was not an act notified to IPK relating to the investigation of or action against an irregularity within the meaning of the third subparagraph of Article 3(1) of Regulation No 2988/95. Moreover, according to IPK, the allegation of collusion made by the Commission in Case T-331/94, for the first time when it presented its observations after the case had been referred back to the General Court by the Court of Justice, was out of time, unconnected with the subject-matter of the case and therefore inadmissible (*IPK-München* v *Commission*, paragraph 23 above, paragraph 90). Therefore, the limitation period was likewise not interrupted in the proceedings in Case T-331/94.

102 According to IPK, even if it were considered that the limitation period was interrupted, since the Commission had not imposed a penalty or stayed the administrative proceedings, the maximum period of eight years provided for in the fourth subparagraph of Article 3(1) of Regulation No 2988/95 had expired by the time the contested decision was adopted.

103 In the alternative, IPK considers that, if the application of Regulation No 2988/95 has to be ruled out — in spite of its nature as *lex specialis* — in favour of the application of general principles, the strict conditions to which the retroactive withdrawal of an unlawful administrative act is subject are not satisfied in this case.

104 As regards the reference made by the Commission to Article 119(2) and Article 72(2) of the Financial Regulation, IPK contends that the question of whether the financial assistance at issue constitutes a grant within the meaning of Title VI of the Financial Regulation may remain open. Article 119(2) of that regulation does not in itself constitute a sufficient legal basis for the withdrawal of the award decision, since its wording provides for the adoption of implementing rules for that purpose. Neither the grounds of the contested decision nor the Commission's defence state the implementing rules on which the withdrawal of the award decision could have been based. In any event, Article 72 of the Financial Regulation is not such an implementing rule. Moreover, the contested decision does not refer to a suspension, reduction or

termination of a grant within the meaning of Article 119(2) of the Financial Regulation, since such a measure requires the adoption of a separate recovery order. Finally, in the absence of a secondary legal provision specifying it, the legal adage *fraus omnia corrumpit* likewise does not constitute a legal basis for the annulment of a decision granting financial assistance.

105 The Commission considers that, since IPK received the financial assistance at issue directly from the general budget of the European Communities, recovery of that assistance is governed by Title VI (Grants) of the Financial Regulation. Although that title does not contain any express rule applicable to the case of a grant awarded following a collusion, Article 119(2) of the Financial Regulation, having regard to the principle *fraus omnia corrumpit* and to the fact that extortion of a grant by means of fraud falls under a basic prohibition, is to be interpreted widely and to be considered as constituting the legal basis of the contested decision. The technical implementation of the recovery is governed by Article 72(2) of the Financial Regulation.

106 In that regard, no limitation period is laid down and the provisions of Regulation No 2988/95 concerning limitation do not apply by analogy. However, in reply to questions from the Court, the Commission acknowledged both in writing and at the hearing that, even if the limitation rule laid down in Article 3(1) of that regulation were applicable — which is not the case since that regulation does not constitute the legal basis of the contested decision — its retroactive application to the present case had to be allowed in the light of the relevant case-law, which was noted in the record of the hearing. The Commission also stated at the hearing that, in any event, as has been recognised by the case-law, IPK's obligation to repay is merely the consequence of the fact that it unlawfully obtained a financial advantage, and the claim for recovery is not

required to have a legal basis in primary or secondary law, such as that provided by Article 4 of Regulation No 2988/95.

107 In the alternative, the Commission maintains that the contested decision is also justified in the light of Regulation No 2988/95, particularly under Article 1(2), Article 4(1) and Article 7, and also Articles 2 and 3 of the Protocol to the Convention on the Protection of the European Communities' Financial Interests governing passive and active corruption, the criteria of which are satisfied in the present case. Mr Tzoanos accorded preferential treatment to IPK by granting it the financial assistance at issue without any express call for proposals, in exchange for the participation of 01-Pliroforiki in the Ecodata project managed by IPK. In that regard, the fact, claimed by IPK, that it did not itself directly commit fraud is irrelevant, since, according to Article 7 of Regulation No 2988/95, administrative measures may also apply to persons who have participated in committing the irregularity. In the present case there are many indications that IPK's actions constitute active corruption since it agreed, in order to obtain the financial assistance at issue, to constitute the team for the Ecodata project in accordance with Mr Tzoanos' wishes, in his own interests. Also, IPK conferred a mandate on the Lex Group very shortly after the award decision, which was also likely to benefit Mr Tzoanos.

108 According to its own statements during the first legal proceedings, when Mr Tzoanos openly requested that 01-Pliroforiki receive a large part of the financial assistance at issue, IPK should have realised that it had only obtained that assistance in exchange for its agreement to carry out the Ecodata project with 01-Pliroforiki. It was, at the latest, from the moment IPK sought to execute that project itself that it deliberately participated in an irregularity. The Commission states that IPK had known for years of Mr Tzoanos' mercenary nature and had been aware, from the beginning, that the grant of the financial assistance at issue was unlawful. IPK's subsequent refusal to

honour its collusive agreement with Mr Tzoanos cannot obscure the unlawfulness of the award decision.

109 Moreover, according to the Commission, the award decision, which is the result of that conclusion, was likely to adversely affect the financial interests of the Communities. Without that collusion, the financial assistance would have been granted with transparency and would have culminated in a better use of the funds at issue. The Commission points out that, according to IPK's statements, 01-Pliroforiki did not have special experience in the tourism sector or as regards environmental databanks and that, if it had not been incorporated by IPK into the Ecodata project team, it would not have obtained the financial assistance at issue. Conversely, IPK's proposal would not have been accepted by Mr Tzoanos without the participation of 01-Pliroforiki. Finally, the failure of the Ecodata project confirmed the inefficiency of the grant of the financial assistance at issue.

110 According to the Commission, the limitation period laid down in Article 3 of Regulation No 2988/95 did not preclude the adoption of the contested decision. Even if that regulation were applicable, that decision referred to the withdrawal of a wrongly obtained advantage within the meaning of Article 4 of Regulation No 2988/95, and not an administrative penalty. Under Article 3(1), fourth subparagraph, and (2) of that regulation, and notwithstanding the vague case-law which may indicate the contrary, the limitation applies only to administrative penalties.

111 Moreover, the limitation period has not yet started to run since, by persisting in denying the collusive agreement concluded with Mr Tzoanos, IPK continues to infringe its duty to provide information and act in good faith in respect of the Commission deriving from the grant of the financial assistance at issue, so that the irregularity committed by it has not yet ceased for the purposes of the second subparagraph of Article 3(1) of Regulation No 2988/95.

112 The Commission points out that, in any event, the limitation period was interrupted by the refusal decision of 3 August 1994, adopted before the expiry of that period, until 29 April 2004, the date of the judgment of the Court of Justice disposing of the first legal proceedings. As regards the maximum limitation period of eight years laid down in the fourth subparagraph of Article 3(1) of Regulation No 2988/95, the Commission rejects IPK's argument and states that the concept of 'penalty' also includes the 'acts' referred to in Article 4 of the same regulation, so that any penalty or measure within the meaning of that article is capable of interrupting that limitation period. Therefore, the refusal decision of 3 August 1994 also interrupted that period, or even rendered it inoperative. The Commission adds that the retroactive effect of Article 3(1) of Regulation No 2988/95 makes such a consistent approach necessary even though the refusal decision of 3 August 1994 was not based on Article 4 of that regulation. The contrary approach would be 'absurd' in that it would require the Commission, during legal proceedings against such a decision, to adopt 'as a precautionary measure', a further decision for the sole purpose of interrupting the limitation period. Finally, owing to the adoption of the refusal decision of 3 August 1994, the various suspensory actions referred to in the third subparagraph of Article 3(1) of Regulation No 2988/95 do not matter.

113 The Commission adds that the refusal decision of 3 August 1994 and the contested decision refer to irregularities concerning one and the same financial assistance. Moreover, those irregularities are closely linked with each other, since the incompetent execution of the Ecodata project is largely due to collusion. It points out that it raised this question in good time during the first legal proceedings. There is nothing to prevent the Commission basing the contested decision on the grounds invoked on that occasion.

114 In reply to a written question from the Court, the Commission pointed out, finally, that it adopted no measure to suspend the administrative proceedings within the meaning of Article 6(1) of Regulation No 2988/95, since such a suspension was provided for, in any event, only in the case of the imposition of financial penalties, which is not the position in the present case.

Findings of the Court

— The scope *ratione materiae* of Regulation No 2988/95

115 It should be pointed out that, according to IPK, Regulation No 2988/95 is applicable to this case. The contested decision infringes, on the one hand, Article 4 of that regulation because there was no irregularity attributable to IPK and, one the other, Article 3(1) of that regulation owing to the limitation on proceedings against that alleged irregularity. In contrast, the Commission disputes, as its main argument, that this case is to be appraised having regard to the provisions of Regulation No 2988/95, since the legal basis of the contested decision was, in particular, Article 119(2) of the Financial Regulation, read in the light of the principle *fraus omnia corrumpit*, not Article 4 of Regulation No 2988/95. Therefore, Article 3(1) of Regulation No 2988/95 relating to limitation is, likewise, not applicable.

116 As regards the question whether the present case falls within the scope of Regulation No 2988/95 and, in particular, whether Article 4 of that regulation constitutes the relevant legal basis for the contested decision, it should be pointed out, first of all, that that decision, which is designed to revoke the award decision, does not mention any provision of primary or secondary law which might constitute its legal basis.

117 It is apparent from settled case-law that the obligation to return an advantage improperly received by means of an irregular practice does not infringe the principle

of legality. The obligation to repay is not a penalty, but simply the consequence of a finding that the conditions required under Community legislation for obtaining the advantage were created artificially, thereby rendering the advantage received a payment that was not due and thus justifying the obligation to repay it (see, to that effect, Case C-110/99 *Emsland-Stärke* [2000] ECR I-11569, paragraph 56) and Case C-158/08 *Pometon* [2009] ECR I-4695, paragraph 28). Thus, unlike administrative penalties which require a specific legal basis apart from the general rules laid down by Regulation No 2988/95 (see, to that effect, Joined Cases C-383/06 to C-385/06 *Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening* [2008] ECR I-1561, paragraph 39; opinion of Advocate General Kokott in Case C-367/09 *SGS Belgium and Others* [2010] ECR I-10761, points 33 to 49), the provisions laid down in Article 4(1) to (3), read in conjunction with Article 1(1) and (2) of that regulation, are to be regarded as a relevant and adequate legal basis for any measure designed to withdraw an advantage wrongly obtained by means of an irregularity and, accordingly, to revoke the decision granting that advantage.

118 Under Article 4(1) of Regulation No 2988/95, as a general rule any irregularity shall involve withdrawal of the wrongly obtained advantage by an obligation to pay or repay the amounts due or wrongly received. Similarly, under Article 4(3) of that regulation, acts which are established to have as their purpose the obtaining of an advantage contrary to the objectives of the Community law applicable in the case by artificially creating the conditions required for obtaining that advantage shall result, as the case may be, either in failure to obtain the advantage or in its withdrawal. It is also apparent from Article 1(1), read in conjunction with Article 4(4), of the regulation that measures to withdraw an advantage wrongly obtained by means of an irregularity shall not be regarded as penalties. Finally, it has been recognised by established case-law that, in any event, in the absence of specific provisions to that effect, it is apparent from the general principles of Community law that the administration is, as a rule, empowered to revoke, with retrospective effect, favourable administrative acts obtained unlawfully (see, to that effect, Case T-251/00 *Lagardère and Canal+* v *Commission* [2002] ECR II-4825, paragraph 138 to 140, and the case-law cited), Article 4(1) of Regulation No 2988/95 in particular being namely the implementation at secondary law level of those principles.

119 In those circumstances, it is necessary to rule out the Commission's main argument that the contested decision, which seeks specifically to revoke the award decision on the ground that IPK irregularly obtained the financial assistance at issue on the basis of a collusive agreement with the competent official, Mr Tzoanos, does not fall within the scope of Regulation No 2988/95. Therefore, since the relevant provisions of that regulation constitute a specific legal basis for the contested decision, there is no need to assess whether that decision is based, implicitly, on Article 119(2) of the Financial Regulation, on the principle *fraus omnia corrumpit* or on any other rule of Community law.

120 It is therefore necessary to examine whether it was permissible for the Commission to plead an irregularity attributable to IPK.

— The concept of irregularity within the meaning of Article 4(1) to (3), read in conjunction with Article 1(1) and (2), of Regulation No 2988/95

121 Under Article 1(2) of Regulation No 2988/95, an irregularity is any infringement of a provision of Community law resulting from an act or omission by an economic operator, which has, or would have, the effect of prejudicing the general budget of the Communities.

122 As is apparent from Article 109(1) of the Financial Regulation, the award of grants shall be subject to the principles of transparency and equal treatment, which presupposes that, having regard to the limited budget available to finance such grants, potential applicants for financial assistance will be treated equally as regards, firstly, the communication, in the call for proposals, of relevant information concerning the selection criteria for the projects to be submitted and, secondly, the comparative assessment of those projects culminating in their selection and the award of the grant. That provision is therefore an enunciation of the general principle of equality (Joined Cases 117/76 and 16/77 *Ruckdeschel and Others* [1977] ECR 1753, paragraph 7, and

Case 106/83 *Sermide* [1984] ECR 4209, paragraph 28), the particular importance of which has been underlined in the neighbouring sector of public works contracts (Joined Cases C-285/99 and C-286/99 *Lombardini and Mantovani* [2001] ECR I-9233, paragraph 37, and Case C-315/01 *GAT* [2003] I-6351, paragraph 73), in particular with regard to the duty of the contracting authority to ensure equality of opportunity for all the tenderers (see Case T-160/03 *AFCon Management Consultants and Others* v *Commission* [2005] ECR II-981, paragraph 75, and the case-law cited).

123 In the light of the fundamental nature of the principles of transparency and equality of treatment, the Court considers that they apply *mutatis mutandis* to the procedure for awarding grants from the Community budget (see, to that effect, Case T-125/01 *José Martí Peix* v *Commission* [2003] ECR II-865, paragraph 113), even though the Financial Regulation of 21 December 1977, applicable to the general budget of the European Communities (OJ 1977 L 356, p. 1) applicable to the facts at the time of the adoption of the award decision, did not yet expressly mention those principles.

124 With regard to budgetary matters, the obligation of transparency, which is the corollary of the principle of equal treatment, is essentially intended to preclude any risk of favouritism or arbitrariness on the part of the budgetary authority. It implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner, inter alia, in the call for proposals. Accordingly, all the information relevant for the purpose of a sound understanding of the call for proposals must be made available as soon as possible to all the operators who may be interested in a procedure for awarding grants in order, first, to enable all reasonably well-informed and normally diligent applicants to understand their precise scope and to interpret them in the same manner and, secondly, to enable the budgetary authority actually to verify whether the proposed projects meet the selection and award

criteria previously announced (see, to that effect and by analogy, Case T-345/03 *Evropaïki Dynamiki* v *Commission* [2008] ECR II-341, paragraphs 142 to 145).

125 Therefore, any undermining of equality of opportunity and of the principle of transparency constitutes an irregularity invalidating the award procedure (see, to that effect and by analogy *Evropaïki Dynamiki* v *Commission*, paragraph 124 above, paragraph 147).

126 Therefore, the acquisition of financial assistance from the general budget of the Communities, such as the financial assistance at issue, by means of collusive behaviour, which is manifestly in breach of the binding limitation period governing the grant of such assistance, between the applicant for financial support and the official responsible for preparing the call for proposals and for evaluating and selecting the project to be financed, constitutes an irregularity within the meaning of Article 4(1) of Regulation No 2988/95 and it is not necessary to assess whether that conduct also fulfils the criteria for active or passive corruption or an infringement of any other criminal provision. In that regard, it should be pointed out that the Commission complains that IPK obtained irregularly, that is, through a collusive agreement with Mr Tzoanos, the official responsible for managing the budget heading allocated for financing projects in the area of tourism and the environment, confidential information regarding the way in which it was necessary to proceed in order to be sure of obtaining the financial assistance at issue.

127 It is therefore necessary to examine whether the evidence adduced by the Commission is capable of proving the alleged irregularity.

— Evidence of irregularity

128 In the present case, the Commission, which bears the burden of proof, presented both in the contested decision and in its pleadings in the pending proceedings, a body of evidence, the veracity of which was not contested as such by IPK, to show that IPK actively participated in a collusive agreement with Mr Tzoanos with the aim of unlawfully obtaining the financial assistance at issue.

129 Thus, first, it is established that the final general budget for the financial year 1992, which contained a total of 1575 pages, stated in a single sentence in the last paragraph on page 659 that 'a sum of at least ECU 530 000 [would] be used to support an information network on ecological tourism projects in Europe'. The call for proposals with a view to supporting projects in the area of tourism and the environment did not, however, refer specifically to the creation of an information network on projects for ecological tourism in Europe, but merely stated, in a general way, that '[t]he Commission intend[ed] to allocate ECU 2 (two) million to this programme' and that '[a]bout 25 projects [would] be selected from amongst those submitted' and eligible for Community financial support of a maximum of 60 % of the costs. Furthermore, the selection criteria in point D of the call for proposals, which specified the project themes to which priority would be given, made no reference to the establishment of such an information network, or even to a databank such as that proposed by the Eco-data project. Mr Tzoanos, as the official responsible for preparing the call for proposals, was clearly capable of establishing that link with the final general budget for the financial year 1992.

130 The Court infers that the argument that the proposal for the Ecodata project was based on confidential information provided in advance and unlawfully by Mr Tzoanos, or even on such a proposal prepared by himself, and then sent either to 01-Pliroforiki, or directly to IPK, is sufficiently plausible and substantiated. As the Commission suggests, that argument alone explains why IPK was the only operator to

have submitted an application for financial support for the creation of a database for ecological tourism projects. In particular, Studienkreis, which was an operator with experience in the field, did not submit an application, even though it had already collaborated with the Commission in connection with a similar project and therefore had every interest in doing so. It is therefore very likely that Mr Tzoanos deliberately worded the call for proposals so as not openly to reveal a link with the last sentence on page 659 of the final general budget for the financial year 1992, in order to enable IPK and 01-Pliroforiki, thanks to the aforementioned confidential information, to be the only operators to propose such a project.

131 Secondly, IPK admitted that it had been contacted by 01-Pliroforiki concerning a database project for ecological tourism projects and, on 22 April 1992, had submitted to the Commission, on its headed paper, an application for financial support for the Ecodata project, the content of which corresponded in essence to the draft project which had been prepared and sent to it by 01-Pliroforiki on 20 April 1992, that is to say only two days before the application was made. IPK reproduced unaltered the description of that project in that draft and also the proposed total amount of the request for financial support, which was ECU 600 000, that is to say, 60 % of a total cost of ECU 1 million. It simply added an additional service entitled 'data collection' at a cost of ECU 250 000 and amended accordingly the breakdown of the costs of the various services proposed. These facts clearly contradict IPK's initial argument that it largely prepared the content of the Ecodata project proposal itself (see paragraph 53 above).

132 Thirdly, it is apparent from a list produced by the Commission — which includes the dates of meetings which appear, inter alia, in Mr Tzoanos' diary, which was seized by the Belgian police — that Mr Freitag and Mr Franck had met Mr Tzoanos on several occasions during the period between 18 March 1992 and 25 November 1992, and in particular at least three times before the application for financial support for the Ecodata project was submitted on 22 April 1992, namely on 18 March 1992 (meeting

between Mr Freitag and Mr Tzoanos), 3 April 1992 (meeting between Mr Franck and Mr Tzoanos) and 6 April 1992 (meeting between Mr Freitag and Mr Tzoanos). IPK has not disputed these facts as such and has merely claimed that those meetings were not connected with the Ecodata project and that, at that stage, it neither knew 01-Pliroforiki nor was it aware of a link between that company and Mr Tzoanos. Nevertheless, contrary to these established facts, in a fax sent on 31 March 1993 to Mr von Moltke, Mr Freitag stated, on behalf of IPK, that it had had no contact with Mr Tzoanos during the preparation of the application for financial support for the Ecodata project.

133 In that fax, Mr Freitag also explained that IPK had been active in the ecological tourism sector for over 20 years, which prompted it to present the Ecodata project. While preparing that project, IPK sought and found partners which were particularly suitable for cooperating with it in the execution of that project, one of which was 01-Pliroforiki. It was on that basis that IPK drew up the proposal to implement the Ecodata project. However, this last statement is contradicted by the facts set out in paragraph 131 above which establish that, after having been contacted by 01-Pliroforiki, IPK agreed with that company to share the tasks concerning the presentation of the Ecodata project and that it had basically reproduced, in the application for financial support on its headed paper, a draft project sent by 01-Pliroforiki on 20 April 1992.

134 It follows that the Commission has proved satisfactorily that, after the award decision had been taken, IPK actively sought, by making misleading statements, to conceal from Mr Tzoanos' superiors the true circumstances behind the submission of the application for financial support for the Ecodata project.

135 Fourthly, it is apparent from IPK's application for financial support that Mr Franck was one of the experts appointed by IPK to implement the Ecodata project. Moreover,

the Commission produced a document on ETIC's headed paper, which states that 'ETIC Headquarters has been in Brussels since May 1992' and places the names of Mr Franck and Mr Freitag in the place reserved for their joint signatures and at the bottom of the page, stating their respective positions as executive director and managing director of that company. Moreover, it is apparent from a letter of 8 September 1993, sent by Mr Freitag to Mr Franck, that Mr Freitag had asked Mr Franck, inter alia, to cease all commercial activity on behalf of 'ETIC, European Travel Intelligence Center, European Travel Monitor and IPK' and to express his agreement in writing to the immediate liquidation of 'ETIC Headquarter S A Luxembourg'. Finally in a brochure entitled 'European Travel Monitor No. 1/1992 — Update' edited by ETIC, reference is made on page 13, under the heading 'News from ETIC', to a new member of ETIC in Athens. ETIC appointed the Lex Group as its representative in Greece from June 1992, and Ms Sapountzaki was to be the person responsible for making client contact. It is not disputed that Ms Sapountzaki was the fiancée and subsequently the wife of Mr Tzoanos and that the Lex Group was a company founded by Mr Tzoanos in which he had, at the time a 10% holding (*Tzoanos* v *Commission*, paragraph 72 above, paragraph 65). In that regard, IPK merely states that it was unaware of those links between Ms Sapountzaki and Mr Tzoanos and between Mr Tzoanos and the Lex Group.

136 The Court concludes from the considerations set out in paragraphs 132 to 135 above that, contrary to what IPK claims, during the period from April 1992 to September 1993, Mr Franck enjoyed close contractual and professional relations with Mr Freitag both within the companies 'ETIC Headquarters Bruxelles' and 'ETIC — Headquarter S A Luxembourg' and in connection with Mr Freitag's role as director and owner of IPK, for and on behalf of which Mr Franck had established contacts with the Commission, including in the context of the application for financial support for the Ecodata project. That finding is corroborated, furthermore, by the evidence given, on 26 February 1996, by Mr Tzoanos to the Belgian police, in which he confirmed Mr Franck's attendance at a meeting concerning the Ecodata project which was held in November 1992, and by the list recording the meetings between Mr Franck and

Mr Tzoanos between 3 April and 9 November 1992, which had taken place either during lunch breaks or outside office hours.

137 In those circumstances, IPK's statement that Mr Franck had never collaborated with or represented IPK and had acted with Mr Tzoanos without IPK's authorisation must be rejected.

138 In the light of all the preceding facts, it is also necessary to reject IPK's unsubstantiated claim that the meetings between Mr Freitag and/or Mr Franck and Mr Tzoanos during the period between the publication of the call for proposals, on 26 February 1992, and IPK's submission of the application for financial support for the Ecodata project, on 22 April 1992, did not concern the ongoing call for proposals procedure, since, at the time, that was a matter of great interest and relevance for both sides. That claim is all the less plausible because, at the same time as, or following, those meetings, IPK established contact with 01-Pliroforiki — whose links with Mr Tzoanos at that time, in connection with another project, are not disputed (*Tzoanos* v *Commission*, paragraph 72 above, paragraphs 213 and 252 to 254), even though IPK claims to have been unaware of those links at that time — and because the contact culminated in the joint preparation and in IPK's submission of the application for financial support for the Ecodata project and, finally, at Mr Tzoanos' instigation, in the decision to make a grant to that project. IPK likewise has not challenged the Commission's argument that 01-Pliroforiki, on its own, would not have been eligible for the financial assistance at issue, which is why IPK was chosen as the applicant and main administrator of the Ecodata project.

139 IPK, contests, above all, the truthfulness of the evidence given by Mr Franck on 19 January 1996, before Mr von Moltke (Director-General of DG XXIII) and Mr Brumter (Assistant Director-General), as summarised in a 'File note' on DG XXIII headed paper, the authenticity of which was confirmed by the Commission by the production of a cover note dated 25 January, 1996, signed by Mr von Moltke. According to

IPK, Mr Franck found it necessary to make false statements against IPK in order to damage Mr Freitag. In the light of the facts set out in paragraphs 132 and 135 above, Mr Franck can nevertheless be believed when he stated, in that testimony, that he enjoyed close contractual and professional relations with Mr Freitag during the years 1992 and 1993, in particular through 'ETIC Headquarters Bruxelles' until that relationship came to an end in September 1993, on the initiative of Mr Freitag.

140 IPK rejects in particular the following statements made by Mr Franck, which form the basis of Paragraph 9(e) of the contested decision:

'A complete copy of applications [for financial assistance] including the description of the [Ecodata] project and the division of work between the subcontractors was sent by Mr Tzoanos to Mr Freitag, whom he had known for some time. Mr Freitag's role was limited to having that text transcribed on his headed paper and to sending it to the Commission. No participation by Mr Freitag in the execution of the project was envisaged at that point. [On the other hand], 10 % of the volume of the project (ECU 530 000) was provided for in exchange for merely submitting the file [to] Mr Tzoanos. The remaining 90 % (ECU 477 000) was divided between the various subcontractors, one of which was 01-Pliroforiki.'

141 The Court considers that simply the finding that, in essence, it was Mr Tzoanos and not 01-Pliroforiki (see paragraph 131 above) who sent Mr Freitag and/or IPK the draft Ecodata project does not cast doubt on the credibility of that evidence, which, furthermore, fits in fully with the account of the facts, as set out in paragraphs 129 to 139 above. In particular, it coincides with the fact that, first, Mr Tzoanos met Mr Freitag and Mr Franck on several occasions during the call for proposals procedure and before IPK submitted the application for financial support for the Ecodata project (see paragraph 132 above) and, secondly, at that time, in connection with another project, Mr Tzoanos had links with 01-Pliroforiki (*Tzoanos* v *Commission*, paragraph 72 above, paragraphs 213 and 252 to 254), whose active participation in the Ecodata project he clearly wished to promote. In view of those links, it is therefore possible

that Mr Franck no longer clearly differentiated, when he gave evidence on 19 January, 1996, between the roles which Mr Tzoanos and 01-Pliroforiki had each played during the call for proposals procedure. Irrespective of the above, the fact that, on 20 April 1992, 01-Pliroforiki sent IPK a draft project does not preclude that draft coming originally from the pen of Mr Tzoanos himself, which, in the light of the above, is furthermore highly likely.

142 Moreover, in his testimony before the Belgian police, Mr Freitag stated that, at a meeting in November 1992 with Mr Tzoanos, which 01-Pliroforiki, inter alia, had also attended — which was confirmed by Mr Tzoanos himself in his testimony before the same authorities — Mr Tzoanos had insisted on 01-Pliroforiki becoming the main beneficiary of the financial assistance at issue and on IPK receiving only 10 %. Although he contested this version of the facts in his own testimony, stating that it was Mr Freitag who had proposed receiving a commission of 10 % for managing the Ecodata project, Mr Tzoanos nevertheless confirmed the figure of ECU 477 000 which had to be divided, at various stages, between the other partners in the project, including 01-Pliroforiki. That figure and that division correspond exactly to those referred to in the testimony of Mr Franck, whose attendance at that meeting is also established (see paragraph 136 above). In that regard, IPK merely denied that that envisaged division of the funds of the financial assistance at issue was the result of a collusive agreement between Mr Tzoanos and Mr Freitag before the adoption of the award decision, an argument which corresponds to Mr Franck's presentation of the facts. According to IPK, it was at the meeting of 24 November 1992 that Mr Tzoanos tried for the first time to interfere in the implementation of the Ecodate data project by insisting on that division of the tasks and funds, to which IPK was opposed.

143 The Court considers, however, that, in the light of all the circumstantial factors and evidence set out and assessed above, that presentation of the facts by IPK is neither credible nor capable of undermining Mr Franck's version of the facts. Accordingly,

it is implausible that Mr Franck should have made false statements solely in order to harm Mr Freitag, particularly because his version of the facts agrees with the account set out in paragraphs 129 to 139 above. Also, the fact that IPK subsequently opposed the division of tasks and funds in connection with the Ecodata project does not contradict that assessment, since, as Mr Franck stated credibly, contrary to what had been agreed with Mr Tzoanos originally, 'sometime in Autumn 1992, Mr Freitag no longer agreed to organise the [Ecodata] project as Mr Tzoanos had planned'. According to Mr Franck, 'as he was himself the beneficiary [of the financial assistance at issue], [Mr Freitag] intended to execute the project in his own way' and he 'considered that his percentage was too small in relation to the risk incurred'. The fact that IPK had altered the allocation of costs in the application for financial support for the Ecodata project in order to propose an additional service of 'data collection' is therefore an early indication that he wished to participate in the implementation of the project more actively than had been envisaged initially by 01-Pliroforiki, or even Mr Tzoanos. Finally, the fact that, in his testimony, Mr Franck confirmed IPK's comments that, at the time the application for financial support for the Ecodata project was being prepared, Mr Freitag did not yet know of 01-Pliroforiki or of its links with Mr Tzoanos does not contradict the plausible argument that IPK concluded a collusive agreement with Mr Tzoanos to submit such an application on the basis of the draft provided by that company, or even by Mr Tzoanos himself, and that that company would receive, under the terms of that agreement, the major part of the funds to be allocated.

144 In the light of all the foregoing considerations, it must therefore be concluded that the Commission has produced adequate proof to support its argument that IPK had obtained the financial assistance at issue by means of a collusive agreement with Mr Tzoanos. That assessment is unaffected by the 'exculpating evidence' presented by IPK (see paragraphs 67 to 69 above), since the lack of an outcome in the criminal investigation carried out against Mr Freitag at national level, and the pressure exerted on IPK by Mr von Moltke from the summer of 1992 (*IPK-München* v *Commission*, paragraph 23 above, paragraph 75) do not contradict the existence of such a secret

collusive agreement from March 1992. Finally, in those circumstances, there is no need to assess the probative value of the other evidence invoked by the Commission or to adopt measures of organisation of procedure or investigation or even to hear witnesses.

145 Consequently, it is established to the requisite legal standard that IPK actively participated in an irregularity within the meaning of Article 4(1) to (3), read in conjunction with Article 1(1) and (2) of Regulation No 2988/95, and that, therefore, the Commission was in principle entitled to revoke the award decision and to request IPK to repay the first instalment of the financial assistance at issue.

146 However, it is necessary to examine whether the limitation period for proceedings within the meaning of the first subparagraph of Article 3(1) of Regulation No 2988/95, precluded the adoption of the contested decision.

— The limitation period for proceedings within the meaning of Article 3(1) of Regulation No 2988/95

147 With regard to the question of the applicability to this case of the limitation rule laid down in Article 3(1) of Regulation No 2988/95, it is necessary to point to the case-law which holds that this rule is applicable both to irregularities resulting in the imposition of an administrative penalty within the meaning of Article 5 of that regulation and to those which entail an administrative measure within the meaning of Article 4 of that regulation, such measure involving the withdrawal of the wrongly obtained advantage without, however, constituting a penalty (Case C-281/07 *Bayerische Hypotheken- und Vereinsbank* [2009] ECR I-91, paragraph 18, and Joined Cases C-278/07 to C-280/07 *Josef Vosding Schlacht-, Kühl- und Zerlegebetrieb and Others*

[2009] ECR I-457, paragraph 22, and the case-law cited; and Case T-375/05 *Le Canne* v *Commission* [2008] ECR II-217, paragraph 64, and the case-law cited; see also paragraph 118 above).

148 The Court of Justice has also held that, by adopting Regulation No 2988/95 and, in particular, the first subparagraph of Article 3(1) thereof, the Community legislature intended to establish a general limitation rule to apply in that area, by which it intended, first, to define a minimum period applied in all the Member States and, secondly, to waive the possibility of recovering sums wrongly received from the Community budget after the expiry of a four-year period after the irregularity affecting the payments at issue was committed. It follows that, as from the date on which Regulation No 2988/95 entered into force, any advantage wrongly received from the Community budget can, as a rule and apart from in the sectors for which the Community legislature has prescribed a shorter period, be recovered by the competent authorities of the Member States within a period of four years. As regards the treatment to be given to advantages wrongly received from the Community budget as a result of irregularities committed before Regulation No 2988/95 entered into force, the Court stated that, by the adoption of Article 3(1) of that regulation and without prejudice to Article 3(3) thereof, the Community legislature thereby defined a general rule on limitation by which it voluntarily reduced to four years the period during which the authorities of the Member States, acting in the name and on behalf of the Community budget, should recover or should have recovered such wrongly received advantages (*Josef Vosding Schlacht-, Kühl- und Zerlegebetrieb and Others*, paragraph 147 above, paragraphs 27 to 29).

149 The Court of Justice finally inferred that, pursuant to the first subparagraph of Article 3(1) of Regulation No 2988/95, the repayment of any sum wrongly received by an operator as a result of an irregularity predating the entry into force of Regulation No 2988/95 must, as a rule, be regarded as time-barred in the absence of any suspensory act adopted in the four years following the commission of the irregularity, a suspensory act which, pursuant to the third subparagraph of Article 3(1) of the regulation, is to be understood as an act of the competent authority, notified to the person

in question, relating to investigation or legal proceedings concerning the irregularity. (*Josef Vosding Schlacht-, Kühl- und Zerlegebetrieb and Others*, paragraph 147 above, paragraph 32).

150 The General Court considers that those principles apply *mutatis mutandis* where the measure in question, pursuant to Article 4(1) to (3), read in conjunction with Article 1(1) and (2), of Regulation No 2988/95, has been adopted by the Commission, since that regulation is a piece of general legislation directed at any national or Community authority subject to the obligations of sound financial management and monitoring of the use of the Community budget resources for their intended purpose, as set out in recitals 3 and 13 in the preamble to Regulation No 2988/95.

151 It follows that the first subparagraph of Article 3(1) of Regulation No 2988/95 is applicable to this case, even though the facts in which the improper acquisition of the financial assistance at issue has its origins date from before the entry into force of that regulation.

152 However, the Commission maintains that, even if the first subparagraph of Article 3(1) of Regulation No 2988/95 were applicable, limitation was not effective at the time of the adoption of the contested decision. The irregularity at issue is continuous or repeated within the meaning of the second subparagraph of that provision, since, contrary to its obligation to provide information and to act in good faith, IPK still denies having participated in a collusive agreement in order wrongly to obtain the financial assistance at issue.

153 In that regard, it must be pointed out that an irregularity is continuous or repeated for the purposes of the second subparagraph of Article 3(1) of Regulation No 2988/95 where it is committed by an operator who derives economic advantages from a body

of similar transactions which infringe the same provision of Community law (Case C-279/05 *Vonk Dairy Products* [2007] ECR I-239, paragraphs 41 and 44).

154 In the present case, contrary to what the Commission maintains, the irregularity attributed to IPK, which consists in having participated in a collusive agreement with Mr Tzoanos in order to obtain the financial assistance at issue, cannot be regarded as continuous or repeated, within the meaning of that provision.

155 That irregularity arose when IPK submitted the application for financial assistance for the Ecodata project, and it was completed on the adoption of the award decision containing the undertaking of the budgetary authority to pay it the financial assistance at issue, that is, at the latest, at the moment IPK signed the beneficiary's declaration and sent it to the Commission (see paragraph 13 above), thus rendering that undertaking legally binding.

156 In those circumstances, it is unimportant that IPK has up to now maintained its claim by repeatedly denying its participation in the irregularity at issue, or even the existence of that irregularity, since that claim has its legal basis in the acts perpetrated and completed in 1992 (see, to that effect and by analogy, *La Canne* v *Commission*, paragraph 147 above, paragraphs 65 to 67).

157 Moreover, the fact of having repeatedly contested those facts, not only before the Commission, but also before the Union courts — however open to criticism it may be in the light of the findings in paragraphs 129 to 144 above and of the duty of the beneficiary of Community financial assistance to provide information and to act in good faith (see, to that effect, *José Martí Peix* v *Commission*, paragraph 123 above, paragraph 52) — does not, in any event, constitute irregular conduct identical or similar to the initial irregularity at issue, or conduct infringing the same provisions of Community law, within the meaning of the case-law cited in paragraph 153 above.

158 Consequently, the second subparagraph of Article 3(1) of Regulation No 2988/95, is not applicable in the present case.

159 It follows that the four-year limitation period within the meaning of the first subparagraph of Article 3(1) of Regulation No 2988/95, began to run either from 22 April 1992, the date on which IPK submitted the application for financial assistance for the Ecodata project, or from 4 August 1992, the date on which the award decision was adopted or, at the latest, from 23 September 1992, the date on which IPK signed the beneficiary's declaration and sent it to the Commission (see paragraph 13 above). It follows that that period expired, in the first case, on 22 April 1996, in the second, on 4 August 1996, and, in the third, on 23 September 1996. Irrespective of the question of which of those dates must be regarded as being relevant for the purposes of calculating the four-year limitation period in the present case, it must be pointed out that the contested decision was adopted on 13 May 2005, that is to say, a long time after the expiry of that period, unless it is considered that that period was suspended within the meaning of Article 6 of Regulation No 2988/95 or interrupted within the meaning of the first sentence of the third subparagraph of Article 3(1) of the same regulation.

160 In that regard, it must be stated, first, that, as the Commission acknowledged, in reply to a written question from the Court, Article 6(1) of Regulation No 2988/95 applies only to penalties and not to administrative measures and that, in any event, in the present case, it did not adopt any measure designed to suspend the limitation period.

161 Secondly, it must be determined whether that period was interrupted by investigation or legal proceedings concerning the irregularity at issue, adopted by the Commission, within the meaning of the first sentence of the third subparagraph of Article 3(1) of Regulation No 2988/95. That provision requires that there should be an 'act of the competent authority, notified to the person in question, relating to investigation or legal proceedings concerning the irregularity' in question.

162 According to the Commission, the refusal decision of 3 August 1994 constitutes such an act interrupting the four-year limitation period. It must be stated, however, that even if the Commission's argument is founded and that limitation period started to run again from 3 August 1994, it would have expired, unless there was another interrupting act, on 3 August 1998. Moreover, it is clear both from *IPK-München* v *Commission*, paragraph 23 above (paragraphs 90 and 91), and from *IPK-München* v *Commission*, paragraph 28 above (paragraphs 67 to 71), that the refusal decision of 3 August 1994 applied only to the irregularity at issue, namely, the collusive agreement with Mr Tzoanos, and that, therefore, that irregularity was not the subject-matter of the first legal proceedings, which were limited to the question of the inadequate execution of the Ecodata project which caused the Commission to refuse to pay the second instalment of the financial assistance at issue. In those circumstances, contrary to what the Commission claims, it is therefore impossible to classify the refusal decision of 3 August 1994 as an act relating to investigation or legal proceedings concerning the irregularity at issue, as attributed to IPK in the contested decision.

163 Moreover, the procedural steps taken by the Commission during the first legal proceedings in order that the Union Court should *a posteriori* find that there had been an unlawful irregularity are likewise not acts interrupting the four-year limitation period.

164 Although those procedural steps were indeed brought to the attention of IPK as applicant in those proceedings, they nevertheless did not concern the investigation or legal proceedings concerning the irregularity at issue, but merely informed the Union court of new facts and evidence to reinforce the defence of the lawfulness of the refusal decision of 3 August 1994, which did not refer to that irregularity. It is established that, at that stage, the Commission had not yet opened the administrative procedure to investigate or bring legal proceedings against the irregularity at issue. As the General Court found, in paragraph 92 of the judgement in *IPK-München* v *Commission*, paragraph 23 above, if the Commission had considered, after having adopted the refusal decision of 3 August 1994, that the new evidence on which it relied was enough to conclude that there was an unlawful collusion between Mr Tzoanos, 01-Pliroforiki and IPK, which had invalidated the grant procedure, it could, instead of putting forward during the first legal proceedings a ground not mentioned in that decision, have

revoked the decision and adopted a new decision, containing not only a refusal to pay the second instalment of the financial assistance, but also an order for repayment of the instalment already paid. However, the Commission deliberately did not proceed in that way and preferred to wait for the final outcome of the first legal proceedings, even though Mr von Moltke had already proposed, on 25 January 1996, following Mr Franck's testimony, the initiation of proceedings for the repayment in full of the financial assistance at issue on the ground of initial irregularity.

165 Consequently, since the four-year limitation period was not interrupted, at the latest, before 23 September 1996, the proceedings concerning the irregularity at issue were time-barred when the letter of 30 September 2004 was sent (see paragraph 30 above) and when the contested decision was adopted, within the meaning of the first sentence of the first subparagraph of Article 3(1) of Regulation No 2988/95.

166 Therefore, the first plea must be accepted and the contested decision must be annulled, and there is no need to examine the other pleas and heads of claim put forward by IPK.

Costs

167 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

168 Since the Commission has been unsuccessful, it must be ordered to pay the costs, including those incurred in the interim proceedings, in accordance with the form of order sought by IPK.

On those grounds,

THE GENERAL COURT (Third Chamber)

hereby:

1. Annuls the Commission's decision of 13 May 2005 [ENTR/01/Audit/RVDZ/ss D(2005) 11382] to cancel the Commission's decision of 4 August 1992 (003977/XXIII/A3 — S92/DG/ENV8/LD/kz) to grant financial assistance in the sum of ECU 530 000 within the framework of the Ecodata project.

2. Orders the European Commission to pay the costs, including those of the application for interim measures.

Azizi Cremona Frimodt Nielsen

Delivered in open court in Luxembourg on 15 April 2011.

[Signatures]

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