JUDGMENT OF THE COURT OF FIRST INSTANCE
(First Chamber, Extended Composition)

15 March 2005 *

In Case T-29/02,

Global Electronic Finance Management (GEF) SA, established in Brussels (Belgium), represented by E. Storme and A. Gobien, lawyers, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by R. Lyal and C. Giolito, acting as Agents, assisted by J. Stuyck, lawyer, with an address for service in Luxembourg,

defendant,

APPLICATION, based on an arbitration clause within the meaning of Article 238 EC, for an order that the Commission pay the sum of EUR 40 693 and issue a credit note in the sum of EUR 273 516, together with a counterclaim by the

* Language of the case: English.

Commission that the applicant should be ordered to reimburse to it the sum of EUR 273 516, plus default interest at the rate of 7% a year as from 1 September 2001,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES
(First Chamber, Extended Composition),

composed of B. Vesterdorf, President, M. Jaeger, P. Mengozzi, E. Martins Ribeiro and F. Dehousse, Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 30 March 2004,

gives the following

Judgment

The contract

1 On 21 August 1997, the European Community, represented by the Commission, entered into an agreement, entitled 'Esprit Network of Excellence Working Group — 26069 — Financial Issues Working Group Support (FIWG)' ('the contract'), with

Global Electronic Finance Management S.A. ('GEF'), represented by its managing director and director of operations, Mr Goldfinger.

2 The contract falls within the scope of Council Decision 94/802/EC of 23 November 1994 adopting a specific programme for research and technological development, including demonstration, in the field of information technologies (1994 to 1998) (OJ 1994 L 334, p. 24).

3 Annex III to Decision 94/802 provides that the programme is to be executed through indirect action, whereby the Community makes a financial contribution to research and technological development activities, including demonstration projects, (RTD) carried out by third parties or by institutes of the Joint Research Centre (JRC) in association with third parties.

4 In Article 6 of Council Decision No 94/763/EC of 21 November 1994 concerning the rules for the participation of undertakings, research centres and universities in research, technological development and demonstration activities of the European Community (OJ 1994 L 306, p. 8), the Council laid down that proposals for RTD activities are to be the subject of contracts concluded between the Community and the participants in the activity concerned which specify, in particular, the administrative, financial and technical monitoring arrangements for the action.

5 Under the contract, GEF, a consultancy company specialising in electronic finance, was to provide assistance for and manage the various tasks and activities of the 'Financial Issues Working Group' ('the FIWG'). In accordance with Article 1.1 of the contract, the project assigned to GEF was defined in Annex I, entitled 'Technical

Annex', ('the Technical Annex'). According to the Technical Annex, the FIWG was composed of representatives of various sectors and its purpose was to stimulate the development and deployment of innovative payment systems and transaction mechanisms necessary for the successful growth of electronic commerce and electronic finance within the European Union.

6 Under Article 2.1 of the contract, the duration of the project was fixed at 24 months from 4 July 1997, the commencement date of the contract. The financial provisions of the contract are in Articles 3 to 5 of the contract and 12 to 17 of Annex II entitled 'General Conditions' ('the General Conditions').

7 In the version attached to the application, the Technical Annex contains, in point 7 (pages 14 and 15), five tables, four of which are entitled 'Table 1: Human resources requirements per task (in man-days)', 'Table 2: Cost estimates per task (in ECU)', 'Table 3: Unit costs assumptions (in ECU)', 'Table 4: Total cost estimates per task (in ECU)' and a fifth table relating to the breakdown of costs according to resource category. Those tables contain the various cost estimates and resource requirements necessary for carrying out the project.

8 In the version attached as Annex 3 to GEF's replies to the questions put by the Court, the Technical Annex contains, in point 3.7, four tables entitled 'Table 1: Human resources requirements per task (in man-day)', 'Table 2: Cost estimates per task (in ECU)', 'Table 4: Total cost estimates per task (in ECU)' and 'Table 5: Cost estimates per resource category (in ECU)'. Those two technical annexes differ in so far as the second contains new pages (pages 1, 3 to 16 and 25), a different heading numbering, includes, in point 3.7, a Table 5, has no Table 3 and gives different figures in Tables 2 and 4.

9 Article 3.2 of the contract provides that the Commission is to contribute 100% of the allowable costs of the project up to ECU 440 000. That is the amount which, under Article 3.1 of the contract, was estimated to be the total cost of that project.

10 Article 4 of the contract provides:

'The Commission shall pay its contribution for the task in ECU as follows:

— an advance of ECU 165 000 (one hundred and sixty five thousand European currency units) within two months after the last signature of the contracting parties;

— by instalments, each paid within two months after the approval of the respective periodic progress reports and corresponding cost statements. The advance and instalments shall not cumulatively exceed ECU 396 000 of the maximum Commission contribution for the task;

— the balance of its total contribution due (a retention of ECU 44 000 (forty four thousand European currency units)) within two months after the approval of the last report, document or other task deliverables specified in [the Technical Annex] and the cost statement for the final period, as specified in Article 5.2'.

11 Article 5 of the contract provides that three signed cost statements are to be submitted by the contractor every six months from the commencement date of the project and that the cost statement for the final period is to be submitted no later than three months after the approval of the last report, document or other task deliverable under the contract, following which no further costs are to be allowable for payments.

12 The second paragraph of Article 6 of the contract provides that periodic progress reports are to be submitted every six months from the commencement date of the term of the project.

13 Article 9 of the General Conditions lays down the rules governing the submission by the contractor of, inter alia, the periodic progress reports and a final report.

14 Under Article 12.1 of the General Conditions of the contract, 'allowable costs are those actual costs defined in Article 13 of [those conditions] which are necessary for the task, can be substantiated, and are incurred during the period specified in Article 2.1 of the contract ...'.

15 According to Article 12.2 of the General Conditions, 'the estimated costs for the work by categories shall be indicative only. The members may transfer the estimated budget between categories provided the scope of the task is not fundamentally affected'.

16 Article 13 of the General Conditions contains specific provisions on the costs relating to the items 'personnel' (Article 13.1), 'networking costs' (Article 13.2), 'other

costs' (Article 13.3), 'significant specific task costs' (Article 13.4) and 'overheads' (Article 13.5).

17 According to Article 13.1.2 of the General Conditions:

'All personnel time charged must be recorded and certified. This requirement will be satisfied by, at the minimum, the maintenance of time records, certified at least monthly by the designated task manager, or an authorised senior employee of the contractor.'

18 Article 13.3 of the General Conditions provides, inter alia, that:

'The following other costs — incurred by the contractor — may be charged to the extent they relate to the performance of the task:

— costs of external technical services and facilities (if previously agreed with the Commission);

...

— publications, including newsletters, aimed at disseminating information on the work under the *Task*.'

19 Under Article 13.4 of the General Conditions, 'significant specific task costs incurred by the contractor may be charged with the prior written approval of the Commission (approval is deemed granted if the costs item has been specified in Annex 1 to the contract, or if no objections are raised by the Commission within two months of the receipt of the written request)'.

20 Article 13.5 of the General Conditions provides that:

'A maximum contribution of 20% of the allowable personnel costs specified in Article 13.1 ... may be charged for general costs related to the work carried out under the task. These include such costs as non-professional administrative and secretarial staff, telephone, heating, lighting, electricity, postal services, electronic mail, stationery etc. Overheads shall exclude items readily capable of being charged directly in accordance with Article 13.1 to 13.4 ... and costs recovered from third parties.'

21 Article 15.1 of the General Conditions of the contract provides:

'The contractor shall maintain, on a regular basis and in accordance with the normal accounting conventions of the State in which it is established, proper books of account and appropriate documentation to support and justify the costs and the hours reported. These shall be made available for audits.'

22 Articles 16.2 and 16.3 of the General Conditions provide:

'16.2 Subject to Article 17 of this annex [Audit], all payments shall be treated as advances until acceptance of the appropriate task deliverables, or, if none are specified, until acceptance of the final report.

16.3 Where the total financial contribution for the task, including the result of any audit, is less than the payments made for the task, the contractors shall immediately reimburse the difference, in ECU, to the Commission.'

23 Article 17.1 of the General Conditions provides that 'the Commission, or persons authorised by it, shall be entitled to carry out audits up to two years after the completion date or the termination of the contract. ...'

24 Finally, Article 10 of the contract states that the contract is governed by Belgian law and, under Article 7 of the General Conditions, any dispute relating to the contract falls within the exclusive jurisdiction of the Court of First Instance of the European Communities and, in the case of appeal, the Court of Justice of the European Communities.

Background to the dispute

25 On 12 September 1997, the Commission paid GEF an advance of ECU 165 000 in accordance with Article 4 of the contract.

26 GEF subsequently submitted to the Commission four periodic progress reports and four cost statements covering the four periods from 4 July 1997, the commencement date of the project, to 3 July 1999, the end of the project.

27 On 18 and 21 June 1999, before the fourth cost statement, which covered the contractual period from 4 January 1999 to 3 July 1999 ('the fourth period'), was submitted, the Commission carried out a financial audit in respect of the previous three periods from 4 July 1997 to 3 January 1999.

A — *First cost statement, covering the period from 4 July 1997 to 3 January 1998*

28 On 3 March 1998, GEF sent the Commission the first cost statement, which covered the period from 4 July 1997 to 3 January 1998 ('the first period'), claiming a total amount of ECU 111 193, of which ECU 25 249 represented overheads.

29 By letter of 19 March 1998, headed 'Payment Request Submission for period 4-Jul-97 to 3-Jan-98' ('the letter accepting costs for the first period'), the Commission agreed to pay an instalment of the costs declared by GEF amounting to ECU 101 432 and, in accordance with Article 13.5 of the General Conditions, rejected the claim for overheads in so far as it exceeded 20% of the allowable personnel costs. Consequently, in respect of that item, the Commission paid GEF ECU 15 488 instead of the ECU 25 249 claimed.

30 In that letter, the Commission stated that 'the costs reported (or as amended by us) have been checked and found in line with the periodic progress report and in accordance with the contract (see Annex II Part D), subject to verification, adjustments on post calculation or audit and acceptance of the labour rates'.

B — *Second cost statement, covering the period from 4 January 1998 to 3 July 1998*

31 On 6 October 1998, GEF submitted to the Commission the second cost statement, which covered the period from 4 January 1998 to 3 July 1998 ('the second period'). The costs claimed by GEF for this period amounted to ECU 107 017, of which ECU 3 818 related to 'other costs'.

32 By letter of 14 December 1998, headed 'Payment request submission for period 4-Jan-98 to 3-Jul-98' ('the letter accepting costs for the second period'), the Commission agreed to pay an instalment of the costs declared by GEF amounting to ECU 103 228 and refused to pay the sum of ECU 3 818 claimed for 'other costs' on the ground that those costs were already included in 'overheads'. That letter included a passage in the same terms as set out in paragraph 30 above.

C — *Third cost statement, covering the period from 4 July 1998 to 3 January 1999*

33 On 3 June 1999, GEF submitted to the Commission the third cost statement, covering the contractual period from 4 July 1998 to 3 January 1999 ('the third

period') and amounting to EUR 104 098 (the amount of costs was converted into euros in accordance with Council Regulation (EC) No 1103/97 of 17 June 1997 on certain provisions relating to the introduction of the euro (OJ 1997 L 162, p. 1), which provides that the ecu is to be replaced by the euro from 1 January 1999 at the rate of one euro to one ecu).

34 By letter of 27 July 1999, headed 'Payment Request Submission for period 4-Jul-98 to 3-Jan-99' ('the letter accepting costs for the third period'), the Commission accepted the costs declared by GEF up to the amount of EUR 96 214 and rejected the claim for EUR 7 884, which was the total declared under the item 'other costs', on the ground that those costs were already included in 'overheads'.

35 By that letter, the Commission, in order to comply with the ceiling of EUR 396 000 provided for in Article 4 of the contract (GEF had received an advance payment of EUR 165 000 + EUR 101 432 for the first period + EUR 103 228 for the second period = EUR 369 660), agreed to pay an instalment of a lesser amount than that of the costs which it had accepted, namely EUR 26 340 instead of EUR 96 214 (EUR 396 000 - EUR 369 660 = EUR 26 340). That letter too included a passage in the same terms as set out in paragraph 30 above.

D — *The financial audit*

36 On 18 and 21 June 1999, the Commission carried out a financial audit relating to the first three periods of the contract.

37 By letter of 9 July 1999, the Commission requested from GEF additional information on the remuneration of the project manager Mr Goldfinger. By letter of 30 July 1999, GEF sent the Commission documents and explanations concerning Mr Goldfinger's remuneration and certain aspects of tax and social security.

38 By letter of 12 October 1999, the Commission sent GEF the final technical review report on the project, dated 21 September 1999.

39 By letter of 21 December 1999, the Commission sent GEF a draft report on the financial audit. In that draft report, the Commission came to the conclusion that GEF had overclaimed a total amount of EUR 228 713, which was equivalent to 245% of the total amount of costs accepted of EUR 93 334.

40 By fax of 31 January 2000, GEF informed the Commission that it disagreed with the content of the draft audit report, stated its objections and attached the analysis carried out by Mr Joseph Pirenne, its tax adviser and certified accountant ('the letter from Mr Pirenne of 31 January 2000').

41 By letter of 20 March 2000, the Commission rejected the objections raised by GEF and proposed a specific technical review ('the Second Technical Review') in order to establish the precise number of hours which could be reasonably claimed for each of the tasks performed in accordance with the Technical Annex. The Second Technical

Review took place on 24 May 2000. A copy of the report on that review was sent to GEF on 27 October 2000 in response to its request of 18 October 2000.

42 By letter of 18 July 2000, the Commission sent GEF the final audit report of 28 June 2000. In that report, the Commission concluded that, for the audited period from 4 July 1997 to 4 January 1999, GEF had overclaimed a total amount of EUR 253 823, which was equivalent to 372% of the total costs accepted of EUR 68 224.

43 The conclusions reached by the auditors in the final audit report of 28 June 2000 were based in particular on the following observations:

'[GEF] does not keep time records for individual employees. This is not in compliance with Article 13.1.2 of [the General Conditions annexed] to the contract.

Mr Goldfinger admitted that in fact no time sheets whatsoever are kept by GEF. During our audit, Mr Goldfinger made an overview of the hours spent based on an office agenda and the employment contracts. We noted that this office agenda did not contain any registration of hours. Consequently, we could not accept the hours charged to the EC project. Furthermore, the time sheets made by Mr Goldfinger were incorrect for the following reasons: the project started on 4/7/97 and not 1/7/97 and the 202 hours claimed for the information specialist in July 1997 and October 1997 were incorrect as this person started working for GEF only on 3 November 1997.

The analysis of the ratio turnover/personnel costs in the Financial Statements compared to what was claimed in the cost statements shows the following (amounts in BEF):

	1996/1997	1997/1998
Salary Mr Goldfinger	2 791 211	4 119 153
Salaries employees	2 711 775	4 599 788
Total Personnel Costs in Financial Statements	5 502 986	8 718 941
Personnel Costs claimed on EC project (2 first periods)	0	6 428 877
Personnel Costs non-EC projects	*5 502 986*	*2 290 064*
Turnover Financial Statements	13 208 003	15 556 779
Deduct: EC project (according to client accounts)	6 656 100	9 397 877
Turnover non-EC projects	*6 551 903*	*6 158 902*

Apparently, in fiscal year 1996/1997, a turnover of BEF 6.5 million was generated by a personnel cost of BEF 5.5 million (ratio 1.19). In fiscal year 1997/1998 almost the same turnover was generated (BEF 6.2 million) but with a personnel cost of only BEF 2.3 million (ratio 2.69). This is an indication that the personnel costs charged to the Commission are seriously overstated.

Paragraph 3.7 of the Technical Annex to the contract gives a budgeted number of man-days for the project of 447 or 3 576 hours. This would mean an average of 894

hours per semester. We have noted that the total ... hours claimed for the 2 first semesters were 2 827 and 2 878, which is more than 300% of what had been budgeted.

As time sheets did not exist, we were unable to assess the number of hours that could be charged to the EC project. In the draft audit report the accepted number of hours [was] based on the budgeted number of hours, as the final technical review report of 21 September 1999 did not give any indication with regard to the number of hours either ... .

It was therefore decided and agreed with GEF that another technical review should take place, with the objective of establishing the precise number of hours which could reasonably be claimed for each of the tasks performed in accordance with Annex I to the contract.

The Second Technical Review took place on 24 May 2000. The results were that for the whole contract period i.e. for the period from 4/7/1997 to 4/7/1999, 303 man-days can be accepted, or 2 420 hours.

Considering the results of this Second Technical Review, we calculated the personnel costs that could be accepted for the audited period, i.e. from 4/7/1997 to 4/1/1999. These calculations are based on the total number of hours for the whole contract period accepted by the Second Technical Review (2 420 hours) and divided by four in order to obtain the number of man-hours per semester (605 hours).

Although we acknowledge that the split of the total number of accepted man-days per semester may not conform to the work effectively carried out in each semester, we consider this method reasonable. Moreover, the audit revealed that the hourly personnel rates do not differ a lot from one semester to another.

...'.

44 By letter of 14 November 2000, GEF sent the Commission a copy of the time sheets drawn up by Mr Goldfinger and documents intended to prove that, contrary to the findings made by the auditors in the final audit report, GEF kept time sheets for its staff.

45 By letter of 22 November 2000, the Commission confirmed that it had received those documents and informed GEF that the audit file had been passed to Ms De Graef, to whom all future correspondence was to be sent.

46 By letter No 502667 of 14 December 2000 relating to the third period, the Commission sent GEF the version of the accepted costs for the first three contractual periods as recalculated in the light of the final audit report and a consolidated cost statement taking account of that revision, according to which the Commission had paid GEF an excess of EUR 208 602 in respect of those periods.

47 By letter of 21 December 2000, addressed to Ms De Graef, GEF requested a meeting in order to initiate a discussion with the Commission on, in particular, the content of the report on the Second Technical Review and the final audit report.

E — *Fourth cost statement, covering the period from 4 January 1999 to 3 July 1999*

48 On 2 December 1999, GEF submitted to the Commission its fourth cost statement, for the fourth period, for an amount of EUR 148 148.01.

49 By letter of 3 July 2000, the Commission requested from GEF additional information on the items 'networking costs' and 'other costs' and made observations on costs which were not allowable under the contract.

50 By letter of 31 July 2000, GEF submitted to the Commission, on the basis of the comments already made by the latter, an adjusted version of the fourth cost statement amounting to EUR 135 819.48 and documents relating to the items 'networking costs' and 'other costs'.

51 By letter No 502668 of 14 December 2000, headed 'Payment request submission for period 4-Jan-99 to 3-Jul-99' ('the letter accepting costs for the fourth period'), the Commission accepted the costs declared by GEF up to the amount of EUR 30 212. The costs claimed by GEF which were rejected by the Commission concerned part of the item 'personnel' amounting to EUR 83 805, part of the item 'networking costs' amounting to EUR 3 404, part of the item 'other costs' amounting to EUR 1 608 and a share of the item 'overheads' amounting to EUR 16 790. The Commission stated that a share of the items 'personnel' and 'overheads' was rejected because, on the basis of the audit results, it had limited working hours to 605 hours and had used the audited labour rates. With respect to the items 'networking costs' and 'other costs',

the Commission stated that some costs had been partially rejected because they were not supported by invoices. The Commission added that no payment could be ordered at that stage since the contractual retention ceiling had been reached. That letter included a passage in the same terms as set out in paragraph 30 above.

52 By that same letter No 502668 of 14 December 2000, the Commission also sent GEF a consolidated cost statement for the entire period covered by the contract (from 4 July 1997 to 3 July 1999).

F — *The Commission's request for reimbursement: the debit note of 11 July 2001*

53 By letter of 24 January 2001, the Commission sent GEF a final consolidated cost statement for the entire term of contract, which was identical to that appended to abovementioned letter No 502668 of 14 December 2000. It appears from that document that, according to the Commission, GEF had been paid an excess of EUR 273 516, which was equivalent to the total amount of costs paid to GEF by the Commission of EUR 396 000, less the costs accepted by the Commission of EUR 122 484.

54 By letter of 2 February 2001, the Commission informed GEF's lawyer that the European Anti-Fraud Office (OLAF) had begun an investigation into the FIWG and that a meeting was to be held with GEF to review and discuss the matters arising from the final audit reports drawn up by the Directorate-General of the Information Society (DG InfoSoc) and the points raised in GEF's letter of 21 December 2000, mentioned in paragraph 47 above, in so far as they were relevant to the Commission's investigation.

55 In reply to the two abovementioned letters of the Commission of 24 January and 2 February 2001, GEF informed the Commission, by two letters dated 21 February 2001, addressed to Mr Lefebvre of DG InfoSoc and Mr Brüner of OLAF respectively, that it disagreed with the final consolidated cost statement to the extent to which it was based on the results of the audit reports, which had already been contested previously. GEF also repeated its request, made in its letter of 21 December 2000, for a meeting with the Commission's representatives.

56 By letter of 12 March 2001, the Commission informed GEF that it had followed the results of the audit report so that any further recourse was to be addressed directly to the Audit Service.

57 By letter of 19 March 2001, addressed to Ms De Graef, GEF confirmed that she should explain to the Audit Service that a discussion on the contract was in progress.

58 On 11 July 2001, the Commission addressed a debit note to GEF, by which it claimed reimbursement of the sum of EUR 273 516.

59 By letter of 25 July 2001, addressed to Mr Lefebvre, GEF formally contested the Commission's debit note since no final agreement had been reached with the Commission on the final audit report on the project. In addition, it requested that the Commission suspend the repayment procedure until discussions with its authorised representatives had been held.

60 By letter of 26 July 2001, addressed to Ms De Graef, GEF's lawyer confirmed his client's position and reiterated the disagreement which GEF had expressed as regards the audit reports in its previous correspondence (in particular in the letters

addressed to the Commission on 14 November and 21 December 2000) and pointed out that, contrary to what the Commission had claimed in its letter of 2 February 2001, GEF had received no invitation to discuss matters which it had raised.

61 By letter of 9 August 2001, GEF's lawyer informed the Commission that, since the Commission had failed to honour its formal promise to organise a meeting in order to try to find a mutually satisfactory solution with regard to the project accounts, his client intended to bring an action before the Court of First Instance under the arbitration clause contained in the contract.

Procedure

62 By application lodged at the Registry of the Court of First Instance on 13 February 2002, GEF brought the present action.

63 In its defence, lodged at the Registry of the Court of First Instance on 13 May 2002, the Commission made a counterclaim.

64 As measures of organisation of procedure provided for in Article 64(3)(a) and (d) of the Court's Rules of Procedure and having regard to the report of the Judge-Rapporteur, the Court of First Instance (First Chamber) decided, during its deliberations on 11 November 2003, to put a number of written questions to the parties and to ask them to produce certain documents. The parties replied to the questions and produced the requested documents within the time-limits laid down.

65 Pursuant to Articles 14(1) and (3) and 51(1) of the Court's Rules of Procedure, the First Chamber decided to propose to the Court sitting in plenary session that the present case be referred to a Chamber composed of five judges.

66 By letter of 4 December 2003, the parties were asked, pursuant to Article 51(1) of the Rules of Procedure, to submit their observations on that referral by 9 December 2003.

67 By letters of 8 and 9 December 2003, the Commission and GEF informed the Court that they had no observations to submit on the referral of the present case to the First Chamber, Extended Composition.

68 By decision of the plenary session of 10 December 2003 on the proposal made by the First Chamber, the present case was referred to the First Chamber, Extended Composition.

69 The parties presented oral argument and answered the questions put to them by the Court at the hearing on 30 March 2004.

Forms of order sought

70 The applicant claims that the Court of First Instance should:

— declare the application admissible and well founded;

— order the Commission to pay the applicant EUR 40 693;

— declare the Commission's claim for reimbursement of EUR 273 516 unfounded and therefore order the Commission to issue a credit note for EUR 273 516;

— dismiss the Commission's counterclaim as unfounded;

— order the Commission to pay the costs.

71 The Commission contends that the Court of First Instance should:

— dismiss the action as unfounded;

— order the applicant to pay it EUR 273 516, plus default interest at the rate of 7% a year as from 1 September 2001;

— order the applicant to pay the costs.

The jurisdiction of the Court of First Instance

72 Under Article 113 of its Rules of Procedure, the Court of First Instance may of its own motion consider whether there exists any absolute bar to proceeding with an action. Since the jurisdiction of the Court of First Instance is an issue involving an absolute bar to proceeding, the matter may be examined by the Court of its own motion (Case T-174/95 *Svenska Journalistförbundet* v *Council* [1998] ECR II-2289, paragraphs 79 and 80).

73 In that connection, it must be pointed out that, on the date when the present action was brought, the jurisdiction of the Court of First Instance under Article 238 EC and Article 3(1)(c) of Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities (OJ 1988 L 319, p. 1), as amended by Council Decision 93/350/ECSC, EEC, Euratom of 8 June 1993 (OJ 1993 L 144, p. 21) to deal with an action based on an arbitration clause necessarily implies jurisdiction to deal with a counterclaim made by an institution in the context of the same action which derives from the contractual relationship or the situation on which the main application is based or has a direct link with the obligations deriving therefrom (see to that effect Case 426/85 *Commission* v *Zoubek* [1986] ECR 4057, paragraph 11, and Case C-167/99 *Parliament* v *SERS and Ville de Strasbourg* [2003] ECR I-3269, paragraphs 95 to 104; order of the Court of 21 November 2003 in Case C-280/03 *Commission* v *Lior and Others,* not reported in the ECR, paragraphs 8 and 9, and Case T-68/99 *Toditec* v *Commission* [2001] ECR II-1443.

74 It follows that the Court of First Instance has jurisdiction to deal with the Commission's counterclaim.

Substance

A — *The applicant's claim for EUR 40 693 and for the issue of a credit note for EUR 273 516*

75 GEF claims that, under the contract, it is entitled to reimbursement of EUR 436 693, being the sum of the amounts accepted by the Commission in respect of its first three cost statements, namely EUR 101 432 for the first, EUR 103 228 for the second and EUR 96 214 for the third, and the sum of EUR 135 819 declared in the fourth cost statement. It states that, since the Commission has already paid EUR 396 000, its claim for reimbursement is limited to EUR 40 693 (EUR 436 693 – EUR 396 000).

76 In support of its claim GEF puts forward, in essence, four pleas in law, alleging, first, breach of contract by the Commission, second, breach of the principle of the protection of legitimate expectations, third, breach of the principle of respect for the rights of the defence and, fourth, breach of the principle that contractual obligations should be performed in good faith and of the principle of sound administration. In that connection, the latter plea, alleging as it does a failure by the Commission to perform the contract in good faith and breach of the principle of sound administration, should be examined second.

1. *The first plea: breach of contract*

(a) Arguments of the parties

77 GEF maintains, first, that its claim for EUR 40 693, still payable to it for expenditure incurred in connection with the contract, is based on breach by the Commission of its obligations under the contract and infringement of the first paragraph of Article 1134 of the Belgian Civil Code, according to which 'agreements legally entered into operate as law for those who entered into them'. By having arbitrarily and unilaterally changed its position regarding acceptance of the expenses submitted and proved by GEF, the Commission failed in its contractual obligations. GEF correctly performed the contract, as is confirmed by the final technical review report, which states clearly that the project resources were properly used and gives a 'green flag' (final approval of results) for the work carried out by GEF.

78 Second, GEF maintains in its application that the Commission has not duly proved, in accordance with the first paragraph of Article 1235 of the Belgian Civil Code, that the sum of EUR 273 516 which it sought to recover following a change in its position was paid 'in error'. According to GEF, no payment was made in error. In its reply, GEF reformulates that position which was based on a mistranslation of the first paragraph of the abovementioned Article 1235. According to that article, 'every payment presupposes a debt: any payment made but not due is recoverable'. The Commission has not proved that the sum claimed was paid but was 'not due'. GEF considers that the payment was due and that, in case of doubt, it is incumbent upon the Commission to prove that it made the payment in error, which is not the case here.

79 Next, contrary to the Commission's contention, and as already pointed out by GEF in its letter from Mr Pirenne of 31 January 2000, the contract is not a subsidised contract and makes no reference to any form of subsidy under a European assistance programme. The Commission also accepts in its letter of 20 March 2000, in which it gave its approval for replacement of the words 'Subsidies for EC 26 069' and 'Turnover minus subventions' used on page three of the draft audit report by the words 'of which EC contract 26 069' and 'Turnover minus EC contribution' respectively.

80 Finally, with regard in particular for the proof of the costs submitted to the Commission, GEF makes observations concerning the 'personnel' costs, including Mr Goldfinger's remuneration and certain expenses under the headings 'Travel and subsistence costs' and 'Other costs'.

81 As regards personnel costs, GEF observes, as a preliminary point, that they constitute the main point on which the parties to the contract disagree, as highlighted by the final audit report, according to which 9 859 hours' work were overclaimed.

82 In that regard, GEF claims, first, that the Commission and GEF itself underestimated the increase in the volume of work resulting from the speed of the changes occurring in the field of electronic financial transactions and internet financial transactions, those changes having made necessary constant adjustments to the scope of the tasks that were not foreseeable when the contract was signed.

83 Thus, GEF, as a result, legitimately declared a larger number of hours and substantially adjusted the hourly rates as compared with the initial estimates, in

accordance with the detailed guidelines provided by the Commission after signature of the contract. Those new rates, which served as a basis for the cost statements for the first three contractual periods, were notified to the Commission in March 1998 through a financial questionnaire accepted by the Commission.

84 According to GEF, the Commission, which had closely followed the work done and planned as part of the tasks covered by the project and had received in each cost statement a detailed outline of the time devoted by GEF personnel to the project, was thus aware of the fact that, as from the first cost statement, submitted in March 1998, the number of hours initially estimated would be exceeded and that, as from the second cost statement, submitted in October 1998, that number of hours had in fact been exceeded. Moreover, at no time during the course of the project had the Commission ever made any adverse comments concerning the time devoted to it and the rates used by GEF to calculate personnel costs. On the contrary, all the relevant Commission staff had expressed positive views concerning the progress of the project and supported the manner in which GEF was carrying it out. That shows that the Commission accepted the larger number of working hours worked on the project and the rates applied by GEF and explains why the Commission made payments to it on the basis of its cost statements. The statement contained in the second technical review report to the effect that the Commission had not approved the additional time devoted by GEF to the project is therefore incorrect.

85 Moreover, the fact that the estimated number of working hours was exceeded does not involve any change to the contract since, unlike the contractual ceiling of EUR 440 000, it is not an essential element of the contract. In that connection, GEF submits, first, that the Commission's statement in the final audit report that the number of man-days provided for by the contract for the project is 447, or 3 576 hours, is merely an estimate and not a maximum limit of days and hours to be worked.

86 Also, with regard to the statement contained in the second technical review report that the number of hours worked on the project was initially regarded as a maximum which could not be exceeded without prior written approval from the Commission, GEF claims that, when the contract was concluded, it was impossible to define objectively and precisely the number of hours' work that would be necessary for performance of the contract. That is why the parties agreed to set an amount of EUR 440 000 to be apportioned among a number of tasks and categories of costs by way of maximum authorised costs, without any reference to a predetermined number of hours as a basis for that maximum amount. No provision of the contract indicates that the estimated number of hours could not be exceeded or that such an eventuality would require an amendment to the contract, as would be the case if GEF had called for a contribution exceeding EUR 440 000. It infers that the only criterion for payment of personnel costs was not the final estimate but the fact that the total expenditure should be acceptable and not exceed EUR 440 000.

87 Second, as regards the statements of hours worked on the project and the costs incurred, GEF considers that the Commission was wrong to take the view, in the draft audit report and in the final audit report, that the number of hours worked was overestimated because there was no recording of working time and no time sheets.

88 GEF states, first, that it completed all the requisite forms and complied with all the applicable legal provisions, in particular all the requirements of the Social Secretariat Securex ('Securex'), the Belgian statutory social security provisions and accounting principles, in accordance with Article 15.1 of the General Conditions, a provision which, according to the draft audit report, was fully complied with.

89 GEF claims that it filled in and sent to the Commission the financial questionnaire concerning budgeted costs, and each cost statement sent to the Commission contained in an annex a detailed breakdown of personnel costs, including the number of hours worked and the unit rate. At the end of the period covered by the

contract, GEF prepared a summary cost statement for the whole period and sent the Commission an updated financial questionnaire. Moreover, GEF kept the documents relating to the time worked on the project by each of its members of staff. To that end, it used and still uses the Securex documents. In addition to those documents, GEF also prepared supplementary time sheets showing the hours worked each day by each professional category assigned to the project, for which the Commission confirmed to it, in its letter of 20 March 2000, that no requirement had been imposed regarding any specific format.

90 In addition, it states that, in June 1999, the documents concerning hours worked, filled in in accordance with the rules laid down by Securex, and the supplementary time sheets drawn up by Mr Goldfinger had already been submitted to the auditors, but the latter refused to take them, for which reason GEF notified them to the Commission on 14 November 2000. It also states that those documents were the subject of a letter from Mr Pirenne of 31 January 2000. GEF states that it would be able to produce to the Court evidence of all the costs incurred, including copies of all time sheets and purchase invoices.

91 Next, it states that Article 13.1.2 of the General Conditions does not stipulate that each employee must draw up his own time sheets. In this case, GEF maintains that the time records and time sheets were drawn up by the project manager and that, accordingly, they were also certified by him as required by the contract. Moreover, the Commission explicitly confirmed that GEF acted in accordance with the contract, in its letters accepting costs relating to the cost statements submitted by GEF, in which it stated that the 'the costs reported (or as amended by us) have been checked and found in line with the periodic progress report and in accordance with the contract (see Annex II Part D), subject to verification, adjustments on post calculation or audit and acceptance of the labour rates'. According to GEF, the

express reference to part D of the General Conditions, which deals with the form to be filled in for personnel costs, indicates that GEF complied with the Commission's instructions regarding the manner of declaring costs.

92 Finally, in the event of the Court considering that the contractual provisions, in particular Articles 13.1 and 15.1 of the General Conditions, are not sufficiently clear, it should be concluded that GEF acted correctly and in accordance with the contract, pursuant to Article 1162 of the Belgian Civil Code, which provides that 'in case of doubt, agreements are to be interpreted against the person who imposed the obligation and in favour of the person who assumed it'.

93 As regards, in particular, Mr Goldfinger's remuneration, GEF states that the Commission took no account of the fact that his pay was queried at the time of the audit and GEF had showed, on the basis of the company accounts, that the cost relating thereto was acceptable having regard to the situation on the Belgian market.

94 Third, GEF contests the procedure followed in the second technical review and the result arrived at.

95 As regards the procedure followed for the second technical review of 24 May 2000, GEF considers that the auditors did not comply with the terms of reference for the examination laid down in the Commission's letter of 20 March 2000 since they did not ask how much time GEF had devoted to each task or make a reasonable estimate of that time. They simply divided the total number of hours, as estimated when the contract was signed, among various tasks and moreover made no effort to validate

those calculations with the project team. That approach is not in conformity with the contract, according to which the basis for payment by the Commission is not the initially estimated costs but the reasonable costs actually incurred and proved. Accordingly, GEF considers that, in so far as the final audit report was based on the second technical review report, it is not correct.

96 As regards the results of the second technical review, GEF states that it is not reasonable for the number of hours worked on the project and accepted by the Commission to be lower than the initial estimate. GEF claims that it demonstrated that it had expended the resources declared in its cost statements and the Commission accepted this not only in the final technical review but also in the draft audit report, both of which confirmed the accuracy of GEF's accounts. GEF observes that, in the final technical review, cited in the draft audit report, the Commission stated that 'the work was done and resources were consumed' and it spoke of 'good use of resources in general'.

97 Fourth, GEF maintains that the Commission was wrong not to take account, when drawing up the final audit report, of the remarks made by Mr Pirenne in his letter of 31 January 2000 concerning the draft audit report.

98 Thus, first, GEF refers in particular to the statement contained in the final audit report, repeating that in the draft, to the effect that the 202 hours declared for an information specialist in July and October 1997 were not justified, because that person had not started working for GEF until 3 November 1997. However, Mr Pirenne mentioned in his letter of 31 January 2000 that, in July, October and November 1997, the work of information specialist had been carried out successively by three people. In that connection, GEF also observes that the contract contains no provision preventing it from using more than one person to carry out a particular task and adds that, in this case, everyone who worked as an information specialist was qualified to do so.

99 GEF also refers to the analysis of the ratio between its turnover and its personnel costs and to the finding that the personnel costs which had been invoiced were greatly overestimated, as indicated in the draft audit report and also in the final audit report. In that connection, Mr Pirenne had clearly stated, in his letter of 31 January 2000, that the auditors had not correctly presented the remarks and the figures provided by it, in particular by failing to take account of the fact that a project covering successive accounting periods involves a staggering of costs and income over the entire duration of the project. Thus, GEF's financial year runs from 1 October to 30 September, whereas the costs were recorded in accordance with the Commission's method, under which the financial year starts in July. Even though that information may not have been clear when GEF submitted its accounts, it then gave explanations in its letter of 31 January 2000 and they should have been taken into account when the final audit report was drawn up.

100 Lastly, GEF examines the other expenses disallowed by the auditors, under the headings 'Travel and subsistence' and 'Other costs'. GEF claims that the rejection of costs under those two headings in the draft audit report, in the final audit report and in the letter accepting costs for the fourth period is not correct, since it documented and proved all those costs. It also criticises the Commission for not taking account of Mr Pirenne's observations in his letter of 31 January 2000. GEF proposes resubmitting the proof of all those costs in the present proceedings.

101 As regards in particular the EUR 3 145.05 paid for the Datamonitor study, GEF considers it to be a cost incurred in connection with project documentation which the auditors incorrectly classified as relating to technical assistance. The incurring of that cost should not therefore have been subject to prior approval by the Commission under Article 13.3 of the General Conditions. GEF also states that it made the study and the invoice relating to it available to the auditors, who nevertheless refused to rectify their error.

102 As to the heading 'Other costs' and, in particular, the cost statement for EUR 1 790.31, backed by invoices and relating to the purchase of small items in bookshops, GEF claims that it forms part of a series of allowable costs, specifically relating to documentation, up to the sum of EUR 11 056 and that the documentation in question was necessary for performance of the tasks involved in the project.

103 The Commission contends that this plea is unfounded, and maintains that it did not breach its obligations under the contract.

(b) Findings of the Court

Preliminary observations

104 It should be borne in mind that, under the contract, GEF committed itself to executing the project defined in the Technical Annex. The project consisted in providing assistance to the FIWG, in the form of the performance of six different tasks, for each of which there was a list of various services to be provided.

105 It should also be borne in mind that, in accordance with Article 6 of Decision 94/763, the contract specifies, among other things, the administrative, financial and technical monitoring arrangements for the project.

106 Thus, GEF was, in particular, required to submit to the Commission, under Article 6 of the contract and Article 9 of the General Conditions, four periodical progress reports, at six-monthly intervals as from the commencement date of the contract. The aim was to enable the Commission to evaluate the progress made and cooperation received in connection with the project and any tasks relating thereto. GEF was also required to provide a final report concerning the work, objectives, results and conclusions of the project. Under Articles 4 and 5 of the contract GEF was required, finally, to submit to the Commission, every six months as from the commencement date of the contract, four cost statements corresponding to the same periods as those covered by the four reports mentioned above, to enable the Commission to make partial payments relating to them.

107 In addition, the contract laid down the conditions under which the various categories of costs borne by GEF should be reimbursed.

108 In view of the foregoing, and having regard to the answers given to GEF to the questions put to it on this point by the Court at the hearing, it must be held that the applicant has not demonstrated in what way the question whether the contract should be regarded as a subsidy contract might affect the outcome of the dispute. Consequently, the question of the extent to which the parties fulfilled their contractual obligations must be examined in the light of the contractual provisions alone (see, to that effect, *Toditec* v *Commission*, cited in paragraph 73 above, paragraph 77).

109 Next, it is necessary to analyse the contractual provisions concerning the various categories of costs which it was permissible to incur in relation to execution of the project and the conditions for reimbursement of those costs.

110 As regards the categories of allowable costs for execution of the project, as provided for in Article 13 of the General Conditions, namely personnel costs, networking costs, other costs, significant specific task costs and overheads, Article 12.1 of the

General Conditions provides that allowable costs are the actual costs necessary for the project which can be substantiated and are incurred during the period specified for the duration of the project. Article 12.2 provides in addition that the estimated costs for work by categories are to be indicative only and it is permissible for the estimated budget to be transferred between categories provided that the scope of the task is not fundamentally affected.

111 Article 13.1.2 of the General Conditions provides that the requirement that all personnel time charged must be recorded and certified will be satisfied by, at the minimum, the maintenance of time records, certified at least monthly by the designated task manager or an authorised senior employee of the contractor. Article 15.1 of the General Conditions also makes it clear that the contractor must maintain, on a regular basis and in accordance with the accounting conventions of the State in which it is established, proper books of account and appropriate documentation to support and justify the costs and the hours reported, and these are to be made available to the auditors.

112 It follows that GEF is required to produce proof that the costs reported in the various cost statements which it submitted to the Commission are actual costs which were in fact necessary and were incurred for execution of the project within the duration of the project. It also follows that, in producing such proof, GEF must comply with the requirements mentioned in Articles 13.1 and 15.1 of the General Conditions and keep a certified record of hours worked and accounts conforming with the provisions in force in Belgium.

113 In view of those considerations, the argument, based on the first paragraph of Article 1235 of the Belgian Civil Code, put forward by GEF in support of its claim that the Commission should be ordered to issue a credit note for EUR 273 516, cannot be upheld. That argument places on the Commission the burden of proving that the payment of EUR 273 516 to GEF, of which repayment was called for in the debit note issued by the Commission on 11 July 2001, was made but was not due.

114 However, that claim by the Commission for reimbursement is based on Article 16.3 of the General Conditions, which provides that, where the total financial contribution for the task, including the result of any audit, is less than the payments made for the task, the contractors must immediately reimburse the difference to the Commission. The finding that the sum of the payments made exceeds the total financial contribution due in respect of the project is based on the proof of the costs incurred in the execution thereof, which, under the terms of the contract, is incumbent on GEF, not on the Commission.

115 It follows that the claim that the Commission should be ordered to issue a credit note for EUR 273 516, with a view to cancelling the amount of its debit note of 11 July 2001 is linked with the claim for reimbursement of EUR 40 693, in that both are based on GEF's purported compliance with its contractual obligations. If GEF has proved that it complied with its contractual obligations, it would necessarily follow that GEF is entitled to payment of EUR 40 693 and that the Commission's debit note for EUR 273 516 would no longer have any basis.

116 In those circumstances, it is necessary to examine the merits of GEF's claim in respect of each of the categories of costs of which it seeks reimbursement and which it claims to have substantiated, namely the 'Personnel' costs, including Mr Goldfinger's remuneration, and certain costs under the headings 'Travel and subsistence' and 'Other costs'.

The 'Personnel' costs

117 The various arguments put forward by GEF concerning personnel costs raise, in essence, three questions: first, whether the Commission accepted the overstepping of the estimated number of hours worked and the adjustments to the wage rate used

for calculation of the personnel costs initially provided for in the contract; second, whether GEF proved, in accordance with the contract, the hours which it claims to have worked for execution of the project, and, third, whether the auditors erred in their findings concerning hours worked and personnel costs contained in the second technical review report and the final audit report.

— The Commission's acceptance of the increase in hours worked and adjustment of the rates of pay initially provided for in the contract

118 First, it is necessary to determine whether the Commission's acceptance of the cost statements submitted by GEF and the partial payments made in response to them imply acceptance of the higher figure for hours worked and the adjustment of the rates of pay initially estimated in the contract.

119 In that connection, it must be pointed out that, as regards the Commission's contribution, Article 3.1 and 3.2 of the contract provide that the Commission is to contribute 100% of the allowable costs of the project up to EUR 440 000, that being the estimated total cost of the project.

120 According to Article 4 of the contract, which lays down the timetable for the Commission's payments, the Commission's contribution is to be paid, first, in the form of an advance of EUR 165 000, followed by partial payments within two months following approval of the periodic progress reports and corresponding cost statements. Finally, the balance of the total contribution due is to be paid within two

months following approval of the last report, document or other task deliverables specified in the Technical Annex and the cost statement for the last period, as specified in Article 5.2 of the contract.

121 Article 16.2 of the General Conditions provides that, subject to Article 17 concerning the audit, all payments are to be regarded as advances until acceptance of the other task deliverables in respect of the project, or, if none are specified, until acceptance of the final report. Article 16.3 also provides that, where the total financial contribution due for the project, including the one resulting from an audit, is less than the payments made, the contractor is required immediately to reimburse the difference to the Commission.

122 It follows from all those provisions that all the payments made by the Commission by way of advances or partial payments must be regarded as provisional payments until certain conditions, as described above, are fulfilled.

123 Under Articles 16 and 17 of the General Conditions, all those payments are made by the Commission subject to verification and cannot therefore, before such verification takes place or the period prescribed for that purpose has expired, constitute definitive settlement in respect of a cost statement. The letters accepting the cost statements, sent by the Commission to GEF on 19 March 1998, 14 December 1998, 27 July 1999 and 14 December 2000, also expressly state that 'the costs reported (or as amended by us) have been checked and found in line with the periodic progress report and in accordance with the contract (see Annex II Part D), subject to verification, adjustments on post calculation or audit and acceptance of the labour rates.'

124 Consequently, even if, as GEF asserts, the Commission followed the progress of the project closely and in detail, expressed positive views on the progress and made no negative observations concerning the costs reported or the labour rates applied, the fact that the Commission took note of the cost statements submitted to it by GEF, after some adjustments due to rejection of certain expenses, and paid it certain sums on that basis does not imply acceptance of the larger number of hours worked or the changes made to the labour rates applied. The audit undertaken by the Commission was intended specifically to establish the allowability of the costs claimed in accordance with the provisions of the contract. Accordingly, the cost statements could not be regarded as having been accepted by the Commission until after the financial audit.

125 Second, it is necessary to consider under what conditions it was permissible to depart from the hours of work initially estimated in the contract, a change which, according to GEF, was made necessary by developments in the circumstances surrounding the project.

126 In that connection, it must be observed at the outset that, as regards the labour rates applied, GEF explained at the hearing, in response to a question put to it by the Court, that the reference to those rates in the present proceedings derives from the simultaneous adjustment of the number of hours and of the hourly rates and from the combination of those two factors in the total amount of the costs incurred in executing the project. However, it is clear from the file that GEF neither made any complaint concerning the adjustments to the labour rates applied nor challenged the figures adopted for them by the Commission for the purposes of the audit.

127 The Court's analysis therefore will relate only to the number of hours worked on the project.

128 In that connection, it must be pointed out that, in the version contained in Annex 3 to GEF's replies to the questions put to it by the Court, the Technical Annex contains, in point 3.7, a table entitled 'Human Resources Requirements per Task (in man-days)' (hereinafter 'Table 1'), from which it is apparent that the number of man-days provided for by the contract for implementation of the six tasks described in the Technical Annex is 447, which is equivalent to 3 576 hours worked (447 man-days x 8 hours = 3 576 hours) and to 894 hours work per semester (3 576 hours' work ÷ 4 semesters = 894 hours each semester).

129 The table entitled 'Cost estimates per Task (in ECU)' (hereinafter 'Table 2'), in the same point 3.7, contains an estimate of costs for each of the six tasks, broken down into categories of costs.

130 A table entitled 'Unit Costs Assumptions (in ECU)' (hereinafter 'Table 3'), which lays down the daily rate applicable to the hours worked, in particular by the Project Manager (1 050), by the Senior Consultant (1 050), by the Consultant (650) and by the Information Specialist (300), and which was repeated in the version of the Technical Annex appended to the application, no longer appears in the Technical Annex contained in Annex 3 to GEF's replies to the questions put to it by the Court. GEF nevertheless attached to those replies a table containing daily rates which differed slightly from those set out above, applicable to the hours worked.

131 In addition, the same 3.7 of the version of the Technical Annex appended to GEF'S answers to the questions put to it by the Court contains a table entitled 'Total cost estimates per Task (in ECU)' (hereinafter 'Table 4'), which indicates the costs for each task and the total estimated cost of the project, amounting to EUR 440 000.

132 It is apparent from those tables that the maximum sum of EUR 440 000, laid down in Article 3(1) and (2) of the contract, represents a round figure comprising the estimated numbers of hours, calculated in man-days, required to execute each task (envisaged in Table 1), multiplied by the rate (shown in Table 3). All those data are the basis for calculation of the maximum sum of EUR 440 000 and thereby constitute, like that maximum figure, essential components of the contract.

133 A technical review of a project, like that of the project at issue, contained in the Technical Annex, is intended to enable the parties to agree on an estimate for the total budget for the project, which determines the framework within which the Commission will agree to make a financial contribution. In this case, the budget estimate was based on the abovementioned data, the estimate for each of them, in which the volume of work is the main element, having been agreed to by both parties. Accordingly, those data constitute objective criteria for appraising the necessity of the costs declared for due implementation of the project, and whether they and any adjustment made to them are in conformity with the contract.

134 It must also be emphasised that the only case of amendment of estimated costs, provided for in Article 12.2 of the General Conditions — in which costs are not increased but certain costs are merely allocated to a category different from that to which they were initially assigned — is permitted only if the scope of the project is not fundamentally affected.

135 In this case, it is clear from the file, and in particular from the final audit report, that GEF claimed for the four periods 2 827, 2 878, 3 005 and 3 569 hours' work respectively, instead of the 894 hours estimated by the contract for each semester.

136 It must be considered that such a large increase in the number of hours needed for execution of the project, estimated for each task and for each category of costs, like the reallocation of costs provided for in Article 12.2 of the General Conditions, is liable to affect the dimension and impact thereof, in so far as the volume of work performed on the project determines its characteristics. Any change to the contract made necessary by a substantial increase in the volume of work performed by personnel assigned to the project would have called for an amendment to the contract, pursuant to Article 8 thereof, in the form of a written agreement concluded between the authorised representatives of the two parties.

137 That conclusion is not undermined by the fact, referred to by GEF, that its claim does not involve a contribution in excess of the maximum sum of EUR 440 000. Whilst that sum of EUR 440 000 constitutes a maximum which must not be exceeded, it is not, conversely, a minimum limit for reimbursement of costs incurred in relation to the project or the only criterion for appraising the declared personnel costs. Moreover, the contract makes allowable expenses subject to certain specific conditions, including those relating to how costs are to be substantiated, so that the Commission could not make any payment under the contract on the sole ground that its contribution did not exceed the maximum sum of EUR 440 000.

138 Finally, it does not appear from the documents before the Court that GEF submitted any proposal to the Commission for an amendment to the contract with a view to departing from the working time initially estimated for the project because of changes in the circumstances surrounding the project.

139 GEF has thus failed to prove that the statement in the second technical review report that no proof had been produced to the auditors to show that the substantial departure from the initially estimated working time for the project had been approved by the Commission was not correct.

— Proof of the hours worked on the project

140 As regards the question whether GEF produced proof of the personnel costs which it purportedly incurred in executing the project, it must be borne in mind that, as indicated in paragraphs 110 to 112 above, proof of the need for and effective application of the actual costs declared for execution of the project, within the period of the project, is subject to precise conditions. Thus, GEF was required to keep a record of hours worked, certified at least monthly by the project manager or an authorised senior employee. Moreover, it was required to keep accounts and appropriate documentation, which were to be made available for audits, in order to support and prove the costs and hours declared.

141 It is therefore necessary to determine whether the documents produced by GEF for the purposes of the audit fulfil the conditions prescribed by the contract to serve as proof of the personnel costs incurred in respect of the project.

142 It is clear from the file that three categories of documents must be examined. The first category concerns the accounts and documents which GEF must keep in accordance with the provisions applicable in Belgium, as referred to in Article 15.1 of the General Conditions. The second category comprises the documents indicating the total number of hours worked each month by each of the members of the personnel, filled in in accordance with the rules laid down by Securex, which serve as a basis for the payment of wages and social security contributions (hereinafter 'the Securex time sheets'). The third category comprises the supplementary time sheets drawn up by Mr Goldfinger at the time of the audit on the basis of the employment contracts and an office diary which did not contain a record of hours; those sheets mentioned the hours worked each day by each professional category assigned to the project (hereinafter 'the supplementary time sheets').

143 As regards the first category of documents, the Commission does not deny that GEF filled in and sent to the Commission two financial questionnaires and four cost statements containing a detailed breakdown of the personnel costs, including hours worked and the unit rate. It likewise does not deny that GEF kept accounting records in accordance with the provisions applicable in Belgium, which were made available to the auditors. It is also clear from paragraph 3 of both the draft audit report and the final audit report, under the heading 'Book keeping analysis', that the auditors found that GEF prepared a financial statement each year and that the costs relied on for presentation of the cost statements were mentioned in GEF's accounts. The fact that the auditors verified that the cost statements were, in that respect, in conformity with the GEF accounts does not however mean that GEF was keeping the documentation necessary to confirm and substantiate, in accordance with the contract, the costs and hours declared as relating to the project. It is necessary to analyse the other two categories of documents mentioned above.

144 Thus, in the case of the second category of documents, the Commission accepts that GEF kept Securex time sheets and states that they were submitted to the auditors at the time of the audit of 18 and 21 June 1999, and were supplied to the Commission on 20 November 2000. However, as the Commission correctly points out, those time sheets cannot be regarded as a record of hours worked, within the meaning of Article 13.1.2 of the General Conditions, unless they specify that the hours indicated therein were actually spent on the project. GEF admitted at the hearing that those sheets do not contain such information.

145 Admittedly, as GEF claims and the Commission itself concedes in its letter of 20 March 2000, the contract does not require any specific format for the recording of hours worked. However, it is clear from Articles 13.1.2 and 15.1 of the General Conditions that the documentation must be appropriate to support and substantiate the costs and hours actually worked on the project. Since the Commission's financial contribution is subject to the condition that the actual and necessary costs incurred by the contractor must relate solely to the project, the appropriateness of the documents required by the abovementioned provisions implies that GEF should clearly indicate in its record of expenditure that the costs and hours declared

actually relate to execution of the project. Consequently, as the Commission has rightly pointed out, those documents must indicate specifically the number of hours worked, the identity of the worker, his actual remuneration and the link between the costs and the tasks covered by the Commission's financial contribution.

146 As regards the third category of documents, GEF does not deny, in its pleadings, the Commission's allegation that Mr Goldfinger drew up the supplementary time sheets during the audit on the basis of the employment contract and an office diary which contained neither the names of the members of staff nor a record of the hours spent on the project. Nor does it claim that those sheets give the names of the persons who worked on the project or bear signatures. GEF also concedes that there are discrepancies between those sheets and the Securex time sheets, totalled about 120 hours (letter from Mr Pirenne dated 31 January 2000).

147 It is common ground that, like the Securex time sheets, the supplementary time sheets could not be admitted as evidence of the time devoted to the project by each of the staff members of GEF unless it could be established that they satisfied the conditions referred to in paragraph 145 above.

148 Moreover, according to Article 13.1.2 of the General Conditions, the documents recording hours worked are to be certified at least monthly by the project manager or an authorised senior employee. That requirement, which is an essential aspect of fulfilment of the obligation to keep a certified record of declared hours worked, implies that that record is to be kept for the entire duration of the project, in other words, the hours worked must be recorded progressively in step with the performance of the tasks, and cannot therefore be reconciled with the drawing up of supplementary time sheets after the event.

149 In view of the foregoing considerations, neither the Securex time sheets — because of the lack of details of the costs and hours mentioned above — nor the supplementary time sheets produced at the time of the audit on 18 and 21 June 1999 — for the same reasons and because they were not certified at least monthly by the project manager or an authorised senior employee — cannot be regarded as meeting the requirements as to proof laid down by the contract.

150 Moreover, GEF's argument, raised for the first time at the hearing, that the supplementary time sheets were drawn up, updated and stored on an electronic medium by Mr Goldfinger cannot be accepted. It cannot be inferred from that circumstance, even if proved, that those time sheets comply with the conditions mentioned in paragraph 145 above, since GEF admitted at the hearing that it did not at any time think of adducing evidence regarding the date on which those documents were drawn up.

151 Furthermore, during the second technical review, GEF did not produce other documents to justify the costs declared, so that the conclusions of the draft audit report were properly reproduced in the final audit report.

152 In those circumstances, it is unnecessary to examine the parties' arguments concerning the statements made in the final audit report about the sheets drawn up by Mr Goldfinger, to the effect that they are incorrect regarding both the commencement date of the contract and the 202 hours declared for an information specialist in July and October 1997. Those sheets cannot be regarded as meeting the requirements as to proof laid down by the contract, and therefore any examination of the above errors would be pointless.

153 Consequently, it must be held that GEF was not keeping time sheets for the members of its staff in accordance with Article 13.1.2 of the General Conditions.

154 As regards, in particular, Mr Goldfinger's remuneration, it must be pointed out, first, that GEF confines itself to stating that the Commission took no account of the position which it set out in Mr Pirenne's letter dated 31 January 2000 concerning the draft audit report. In that letter, Mr Pirenne reaffirmed the correctness of the calculation of Mr Goldfinger's remuneration, contending that it constituted an acceptable cost having regard to the situation on the Belgian market, as GEF had already stated in its earlier letter of 30 July 1999.

155 Next, it is clear from the draft audit report of 21 December 1999 that the auditors recalculated that remuneration, on the ground that it included bonuses covering three years, so as to take account only of a bonus for two years.

156 Therefore, in so far as GEF makes no criticism concerning rectification of the relevant period, it has still failed to show that the auditors were wrong to reduce the amount received by Mr Goldfinger for those bonuses, so as to take account only of the bonuses for the two years within the period of the project.

157 It follows from all the foregoing that GEF has not produced proof either of the personnel costs declared for execution of the project or of any incorrectness in the calculation of Mr Goldfinger's remuneration carried out during the audit.

— The alleged miscalculations made by the auditors in respect of hours worked and personnel costs indicated in the second technical review report and the final audit report

158 It is appropriate to consider GEF's arguments concerning the question whether the auditors made mistakes, first, regarding the procedure followed during the second technical review and the result for hours worked arrived at in it, and, second, in their findings concerning personnel costs contained in the final audit report.

159 So far as concerns the second technical review, of 24 May 2000, GEF's allegation concerning the irregularity of the procedure followed by the auditors must be rejected. According to GEF, the auditors did not respect the terms of reference for the examination mentioned in the Commission's letter of 20 March 2000, in so far as the auditors did not question it concerning the time it had spent on each task or made a reasonable estimate of the time spent on the project. The approach followed, whereby the total number of hours' work estimated initially for the various tasks was apportioned, is not, in GEF's view, in conformity with the contract, in which the basis for payment is not the estimated costs but the costs actually incurred and substantiated.

160 In that connection, it must be borne in mind, first, that, in its letter of 20 March 2000, the Commission stated that the adjustments contained in the draft audit report were based on the total estimated number of hours which the assessors of the initial proposal had considered reasonable for the execution of the tasks. It was because of strong opposition from GEF concerning those adjustments that, in its letter of 20 March 2000, the Commission proposed that a further technical review should be carried out to establish the exact number of hours that could reasonably be claimed for each of the tasks carried out in accordance with the Technical Annex to the contract.

161 Secondly, Annex I to the second technical review report, according to which the purpose of the review was to re-examine the time reasonably needed for execution of the project, makes it clear that, given that the project had already been the subject of a technical review, emphasis should be placed, first, on confirmation or otherwise of the previous review, second, on an assessment as to whether the tasks carried out conformed with the work programme contained in the Technical Annex, third, on evaluation of the proper execution of the work and, fourth, on an evaluation of the number of hours which could be reasonably claimed for each member of staff or category of staff.

162 Furthermore, it is clear from the report on the second technical review, during which Mr Goldfinger gave a presentation of the work done on the project and answered the questions put to him during the two sessions dealing with that matter, that the auditors, in the first place, established that the project, for which the technical description required an initial budget of 22 man-months' work, had required three times that level of resources. According to them, that change in the hours needed for execution of the project had not been substantiated by any documentation or approved by the Commission. Second, the auditors considered that it was difficult to match the work done for the project with the available documents. According to that report, that difficulty was admitted by Mr Goldfinger, who stated that the work had been covered by a number of documents and that the work had been adjusted over time to take account of surrounding circumstances that were changing very rapidly. Mr Goldfinger added that certain work had not been done because it was not of interest to the parties.

163 Third, the auditors found that no document had been produced to support those explanations. Moreover, they found no relevant information concerning the level of resources devoted to each group of tasks, in so far as the only information provided related to total costs in Belgian francs. When invited to provide information on that point, Mr Goldfinger gave no clarification.

164 GEF does not contest those findings, but merely states that no effort was made to validate the calculations with the project team.

165 Lastly, it is clear from the findings in paragraphs 140 to 153 above that GEF was not keeping a record of hours worked in accordance with Article 13.1.2 of the General Conditions.

166 In view of all the foregoing, it must be observed, first, that no provision of the contract required the Commission to propose that an additional technical review be carried out. In that connection, it is clear from the file that at no time, even before the Court, did GEF deny that it consented to the conduct of that audit.

167 Next, it must be concluded that, as it is clear from the very terms of reference for the evaluators carrying out that audit, mentioned in paragraph 161 above, whereby there was to be a review of the first audit with regard to the time reasonably necessary for execution of the project, that audit fell within the scope of the contractual obligations entered into by the two parties.

168 Whilst it is true that the evaluators were unable, in performing their tasks, to reach a result conforming with the wishes expressed by GEF that the time which it claimed to have devoted to each task within the project should be recognised, the fact nevertheless remains that, following that result, GEF did not ask the Commission to arrange for an expert's report. Nor did GEF at any time, as noted in paragraph 150 above, consider providing evidence concerning the date of recordal on an electronic medium of the supplementary time sheets intended to substantiate the hours of work claimed, in accordance with the requirements of the General Conditions.

169 Finally, in response to a question put to it by the Court at the hearing, GEF was unable to explain how the evaluators should have made a reasonable estimate of the hours devoted to the project in the absence of any evidence in that regard.

170 The auditors were therefore right, for the purpose of verifying the costs claimed by GEF, to take the view that they could not determine the number of hours that could reasonably be attributed to the project and to adopt the procedure of basing the number of working hours allowed on the number of hours estimated initially. In those circumstances, the approach adopted, whereby the total number of hours of work initially estimated for the various tasks was apportioned — and was indeed apportioned in the same way as in the Technical Annex — is clearly compatible with the contract.

171 Second, the Court must reject GEF's argument that since, in the final technical review report of 21 September 1999, the Commission stated that the work had been carried out and that the resources had been well used, it is not reasonable for the number of hours worked on the project, accepted by the Commission following the second technical review of 24 May 2000, to be lower than the initial estimate.

172 It must be observed, first of all, that that statement must be read in conjunction with the others contained in the same report. Thus, the evaluators stated that it was not clear that the effort deployed in implementing the project was in conformity with the original plans. According to the original evaluators, the project manager had not clearly matched the resources used with specific tasks, thereby rendering difficult any attempt to match the activities involved in each task with the corresponding resources. It was on the basis of those statements that they considered that, in general, the resources had been properly used. Moreover, in the conclusions and recommendations of the report, they added that, even though the work had been carried out and the resources had been used, the project manager did not keep himself sufficiently informed about the formal procedures for monitoring the work done and the resources used, which made their work more difficult in that they were obliged, on several occasions, to make assumptions about the impact and the cost of the tasks which were not well documented.

173 Seen in that context, GEF's assertion clearly appears to be a general one, not supported by specific information and limited in scope by the finding that there were insufficient details and records concerning the work done and the resources used, a situation attributed to the project manager.

174 Next, the Commission's assessment in the final technical review report, dated 21 September 1999, does not in this case constitute the Commission's final assessment as to the propriety of the expenses incurred in executing the project. That assessment took place in the context of the audit.

175 Finally, the definitive assessment of the hours needed and worked on execution of the project depends on the evidence produced by GEF concerning the costs relating thereto. Since the documents presented by GEF were not considered to be adequate to constitute the proof required for that purpose by the contract, the auditors relied on the values estimated initially in the contract for the purpose of assessing the declared hours of work and accepting the costs attributed to the project. Those values are not minimum estimates, and therefore the values accepted following the check carried out by the Commission may prove to be lower.

176 In this case, it is common ground that the auditors drew up the list of work involved in each project task in accordance with the Technical Annex and considered that the results concerning the second and third tasks had disappeared or were fragmented.

177 Following that examination, the number of hours initially estimated in the technical description in the contract was reduced for those two tasks.

178 In those circumstances, so far as concerns the second technical review, it must be concluded that, since GEF has produced no evidence such as to support the hours claimed to have been worked, the auditors properly carried out their examination on the basis of the technical description in the contract and reduced the number of hours by reference to the tasks not carried out.

179 As regards the final audit report of 28 June 2000, GEF is wrong to contest the auditors' finding based on the analysis of the ratio between turnover and personnel costs, contained in the draft audit report and repeated in the final audit report, according to which the personnel costs invoiced were greatly overstated.

180 It is clear from the Commission's letter of 20 March 2000 that the auditors, while considering in certain cases that staggering of costs was necessary, confined themselves to examining the data provided by GEF on the basis of its own accounts. The fact that, during the financial year 1996-1997, a turnover of BEF 6.5 million was achieved, with personnel costs of BEF 5.5 million, and, in the financial year 1997-1998, almost the same turnover was achieved, namely BEF 6.2 million, with personnel costs of BEF 2.3 million, gives an indication that the personnel costs invoiced to the Commission were overstated. Even if it is accepted that, as claimed by GEF, the presentation of the figures might have had an impact on the precise way the periods concerned were accounted for, GEF was well aware of that fact when the financial accounts were drawn up and could have presented them differently. Moreover, in response to a question put to it by the Court on that point, GEF admitted at the hearing that it was under an obligation to present the abovementioned figures in a manner that took account of the time variable referred to.

181 It follows that all the complaints concerning personnel costs must be rejected.

The costs under the headings 'Travel and subsistence' and 'Other costs'

182 GEF claims that it documented and substantiated all those costs. That applies, it says, to the costs of the Datamonitor study and the purchase of small items in bookshops, which GEF gives as examples of its non-acceptance of the Commission's refusal. It is therefore necessary to consider, in respect of each of those cost headings, whether GEF produced the relevant proof.

— 'Travel and subsistence costs' declared in the second cost statement

183 According to the draft audit report and the final audit report which follows the latter on this point, in its second cost statement GEF declared a sum of BEF 261 869 (EUR 6 450) for 'travel and subsistence' forming part of the item 'networking costs'.

184 That amount included a cost of BEF 126 871 (EUR 3 145.05) relating to payment for a study provided for by Datamonitor.

185 The Commission reclassified the sum of BEF 62 750, declared as travel costs, and transferred it from the heading 'Other costs' to the heading 'Travel and subsistence costs'.

186 The figure of BEF 64 121, rejected in connection with the second cost statement, thus reflects the result of subtracting from the figure of 261 869 the result of the following operation, namely 261 869 -126 871 + 62 750, which gives a final result of 64 121.

187 As regards, first, the payment relating to the Datamonitor study (BEF 126 871), the reason given by the Commission for its refusal was that that cost was not allowable under that heading. That cost should, in its view, be classified as an external technical assistance service and placed under the heading 'Other costs', and should therefore have been approved in advance by the Commission in accordance with Article 13.3.1 of the General Conditions. However, it is common ground that there was no such prior approval in this case.

188 In that connection, it must be pointed out that the invoice for that cost, annexed to the application, does not disclose to which heading that cost relates.

189 It must also be noted that, in challenging the need for prior authorisation by the Commission, GEF first contended, in response to a written question from the Court, that the Datamonitor study is within the scope of Task 3 of the project and that the cost relating thereto should be placed under the heading 'Documentation', for which Tables 2 and 5 in the Technical Annex provide for a total figure of EUR 11 056. It then stated at the hearing that the costs relating to that study fell within Article 13.4 of the General Conditions, according to which the Commission's agreement is deemed to have been given if the Commission raises no objection within the two months following receipt of the written request.

190 In view of those findings, the Court considers that GEF has not produced evidence to show that the Commission's position is incorrect.

191 First, the Datamonitor study, which was ordered in February 1998 in preparation for the financial technology workshop of 27 March 1998, is not a publication designed to disclose information on the work done in the context of the project within the meaning of Article 13.3.3 of the General Conditions.

192 Second, even if, as GEF contended for the first time at the hearing, the Datamonitor study came under the heading 'Significant specific task costs' referred to in Article 13.4 of the General Conditions and the Commission did not raise objections within two months following receipt of the written request, GEF has failed to show that such a request was submitted to the Commission.

193 Thus, GEF has not shown that the cost relating to the Datamonitor study was not an external technical assistance service under the heading 'Other costs'. Consequently, the Commission correctly refused to pay the relevant amount.

194 As regards, second, travel costs, GEF confines itself, in Mr Pirenne's letter of 31 January 2000, to querying the merits of the rejection of the travel costs declared in the second cost statement, which, according to GEF, were documented and substantiated and for which the contract did not lay down authorisation procedures provided that the travel was within the EEC. In its reply of 20 March 2000, the Commission explains that the travel costs of BEF 62 750 were not rejected but were transferred from the heading 'Other costs' to the heading 'Travel and subsistence costs'. The letter does not refer to any lack of proof of such costs.

195 At the hearing, GEF conceded that the costs concerned had been transferred to another heading and had been paid. It follows that that complaint has become devoid of purpose.

— 'Other costs' declared in the second cost statement

196 It is clear from the draft audit report and the final audit report that GEF had claimed BEF 155 006 (EUR 3 818) under the heading 'Other costs'.

197 That sum included BEF 62 750 for travel costs, transferred by the Commission to the heading 'Travel and subsistence' (see paragraphs 194 and 195 above) and BEF 92 256 for telephone and internet costs.

198 As regards the rejection of the latter amount, GEF confines itself, in Mr Pirenne's letter of 31 January 2000, to stating that 'as regards telephone and internet costs, this matter could be discussed in detail, since the FIWG contract provides for reimbursement of internet costs and in particular operations on the FIWG internet site, but [it preferred] not to deal with the matter ..., through lack of time'. In its answers to the questions put to it by the Court, GEF stated that the contract and the guidelines authorised it to claim those costs since, in particular, the Technical Annex provides, in Table 2, Task 5, for a sum of EUR 5 500 for internet expenses, that task being exclusively concerned with design and maintenance of the internet site. At the hearing, GEF claimed that that cost did not fall under the heading 'Overheads' since it involves variable costs, which are of a specific nature and accordingly appear in the Technical Annex.

199 The Commission, in its reply of 20 March 2000, explained that those costs had been rejected because, under Article 13.5 of the General Conditions, they came under the heading 'Overhead costs'.

200 Given that, first, GEF considers to be incorrect the rejection, in general, of the costs under the heading 'Other costs', as indicated in the draft audit report and repeated in the final audit report, but that, on the other hand, it has put forward no specific argument to show how the Commission's position, regarding in particular the classification of those costs under the heading 'Overhead costs', is incorrect or that, even had it been possible to identify internet costs specifically within the amount claimed, those costs related only to project Task 5, GEF's arguments in that connection must be rejected.

— 'Other costs' declared in the third cost statement

201 According to the draft audit report and the final audit report, GEF declared, in its third cost statement, a sum of BEF 318 034 BEF (EUR 7 833) under the heading 'Other costs'.

202 That amount included the sum of BEF 72 221 (EUR 1 790.31) for the purchase of small items in bookshops, and the sum of BEF 245 813 (EUR 6 093.54) for telephone and internet costs.

203 As regards the amount relating to the purchase of small items in bookshops (BEF 72 221), the reason given by the Commission for its refusal was that those items bore no specific relation to the project.

204 In its pleadings, GEF merely expressed the view that there is a specific category of allowable costs for 'documentation' up to the sum of EUR 11 056 and that those purchases were necessary for performance of the tasks involved in the project. Moreover, GEF produced as an annex to its replies to the questions from the Court, in order to show the link between those costs and the project, payment vouchers for two credit cards, a cash receipt, credit card statements, invoices from two bookshops, a subscription and two pages of bibliographical references.

205 It need merely be stated in that connection that those documents do not contain information such as to establish the requisite link between the book or publication purchased and the project. It follows that GEF has failed to demonstrate the necessity of those costs and their link with the project.

206 As regards the sum for telephone and internet expenses (BEF 245 813), the Commission's position and that of GEF are identical to those already described in paragraphs 197 to 200 above, concerning the same expenses. Accordingly, GEF's arguments must be rejected for the reasons set out in paragraph 200 above.

— 'Travel and subsistence' costs rejected in the letter accepting costs for the fourth period

207 As regards the costs refused in the letter accepting costs for the fourth period, namely EUR 3 404 for 'travel and subsistence' under the heading 'Networking costs' and EUR 1 608 under the heading 'Other costs', the Commission's reason for its refusal was that those costs were not supported by invoices.

208 It need merely be stated that GEF has produced no evidence concerning those costs, and thus has not shown that the Commission was wrong to reject them.

209 This plea must therefore be rejected.

2. *The fourth plea: breach of the principle that contractual obligations must be performed in good faith and of the principle of sound administration*

(a) Arguments of the parties

210 GEF maintains, first, that the Commission's conduct shows that it failed in its obligation to perform the contract in good faith, in breach of the third paragraph of Article 1134 of the Belgian Civil Code.

211 GEF states that the Commission knew, first, that the estimated number of hours needed for execution of a project would be exceeded and that, at a given moment, was in fact exceeded and, second, that the basis for calculating personnel costs was changed following the initial estimate and before completion of the financial questionnaire, but it had never made any adverse comment in that connection. The Commission thus accepted that GEF devoted more hours to the project than had been originally estimated, at significantly lower hourly rates. GEF also observes that the Commission refused to take account of its observations on the draft audit report when the final audit report was drawn up. The notification of the report prepared

following the second technical review to its board on 27 October 2000 prevented it from submitting comments on the report, which was used as a basis for the final audit report of 28 June 2000. Finally, the Commission refused to hold the promised meeting following its change of attitude regarding the project costs.

212 Next, GEF considers that the Commission breached the principle that contractual obligations should be performed in good faith and the principle of sound administration by failing to tell it of its change of position regarding acceptance of the costs of the project within a reasonable period. The Commission, GEF maintains, informed it of its change of position in December 1999, that is to say six months after completion of the project and three months after the final technical review report. However, when it presented its first cost statement to the Commission in March 1998, it stated that the estimated number of hours would be exceeded and, when the second cost statement was submitted in October 1998, it was clear that the number of hours had in fact been exceeded. It concludes from this that the Commission did not notify its objections to it within a reasonable period, even though it had well-equipped staff who followed the project very closely from the outset.

213 In support of its view, GEF refers to two judgments, one of the Hof van Beroep te Brussel (Belgium) (Brussels Court of Appeal) of 18 September 1991 (R.W., 1991-1992, p. 677) and the other of the Hof van Beroep te Antwerpen (Belgium) (Court of Appeal Antwerp) of 5 February 1992 (T.R., 1992, p. 174), according to which the principles of sound administration and good faith in the performance of contractual obligations require the observance of reasonable time-limits for the purpose of the obligation to transmit information.

214 The Commission rejects that plea, contending that the fact that it carried out an audit, in accordance with Article 17 of the General Conditions, cannot be regarded as a departure from its initial position.

(b) Findings of the Court

215 First, as is clear from paragraphs 118 to 124 above, the fact that the Commission took formal notice of the cost statements submitted by GEF, made certain payments relating to them and expressed positive views concerning the execution of the project certainly does not mean that the Commission had definitively accepted the costs declared.

216 In that connection, it should be noted that the Commission's conduct throughout the execution of the project was in conformity with its obligations under the contract.

217 As regards, second, GEF's argument that the Commission did not take account, in the final audit report, of the observations sought from GEF on the draft audit report and contained in Mr Pirenne's letter of 31 January 2000, it must be observed that all the points raised in that letter were answered by the Commission. By letter of 20 March 2000, it set out the reasons for which it considered that Mr Pirenne's observations were unfounded.

218 Thus, in its letter of 20 March 2000, the Commission set out the reasons for which GEF could not support the following statements made in Mr Pirenne's letter of 31 January 2000: first, the charges and allegations contained in the draft audit report had not been raised either during the audit or in the letter following the audit from Mr Schelling of 9 July 1999 and were in contradiction with the Commission's administrative and substantive feedback concerning the project; second, the commencement date of the contract indicated in it was merely a reference date; third, GEF kept time sheets as required by Article 13.1.2 of the General Conditions; fourth, the reasons put forward by the Commission in rejecting the supplementary time sheets, namely the date of commencement of the project and the time recorded for their information specialist, were not justified; fifth, the comparison made by the

auditors in the table on page 4 of the draft audit report between turnover and personnel costs was incorrect; sixth, the calculation of Mr Goldfinger's remuneration was incorrect. Lastly, the Commission also explained, first, the reasons for which it had rejected the costs relating to the Datamonitor study (BEF 126 871), travel costs of BEF 62 750, costs for purchases in bookshops and telephone and internet costs. Second, the Commission rejected the conclusions reached by GEF to the effect that the Commission had accepted all the costs declared and approved that expenditure for execution of the project.

219 As is clear from its letter of 20 March 2000, the Commission did take account of Mr Pirenne's observations. The fact that the Commission essentially maintained its position as set out in the draft audit report when preparing the final audit report certainly does not mean that it disregarded those observations, but merely that it did not consider it necessary to depart from its initial position after its re-examination.

220 As regards, third, the allegation that it was impossible for GEF to submit its observations on the second technical review report as a result of not having received it until 27 October 2000, it must be pointed out, first, that that report constitutes an account of the meeting held between the auditors and Mr Goldfinger on 24 May 2000, during which Mr Goldfinger gave a presentation of progress with the project and was invited to answer questions at two meetings organised for that purpose.

221 As has been pointed out in paragraphs 162 and 163 above, it appears that, at the meeting at which that technical review took place, GEF was able to give its views on the essential issues covered by the review. Moreover, GEF does not deny that fact.

222 Next, it must be observed that for the most part the final audit report repeated the findings already made by the auditors in the draft audit report, on which GEF had expressed its views. The only difference between the calculations made in those two reports consists in the fact that, after the second technical review, the number of hours taken into consideration was adjusted. That adjustment was made by virtue of the second technical review and derives from the fact that the Commission reduced the estimated hours for execution of the second and third tasks. Even if it were accepted that GEF had not been able to give its view on the latter point during the second technical review, it has not submitted to the Court any evidence to show that the adjustment was not correct.

223 Finally, it must also be pointed out that, as is clear from the assessment made concerning the procedure for and the result of that technical review in paragraphs 159 to 178 above, GEF's complaints concerning that review are unfounded.

224 Lastly, the Commission cannot be criticised for not setting up a meeting with GEF before finalising the final audit report.

225 By letter of 21 December 2000, GEF asked the Commission to organise a meeting to discuss, first, the method of determining the project price, second, the procedure for and the content of the report of the second technical review, third, the final audit report and the way in which it was drawn up and, lastly, the reasons for which GEF was convinced that it had acted in accordance with the contract, having regard also to the Commission's conduct throughout the execution of the project.

226 That request was reiterated by letters of 21 February and 26 July 2001 from GEF to the Commission.

227 It must be pointed out, first, that no provision of the contract requires the Commission to hold such meetings.

228 Second, it is true that, by letter of 2 February 2001, the Commission informed GEF, first, that OLAF had opened an inquiry concerning the FIWG and, second, that a meeting would be held with the latter in order to examine and discuss the issues arising from the final audit report and the points mentioned in the letter from GEF of 21 December 2000 in so far as they were relevant to the Commission's inquiry.

229 Nevertheless, it follows from all the reasons set out above that if, as the Commission observes, it had all the information and observations notified by GEF concerning the questions raised in the abovementioned letters and to which the Commission had already replied and GEF had been able to discuss the auditors' findings in particular during the second technical review, no meeting proved necessary.

230 GEF adds that the Commission did not inform GEF of its position concerning hours worked in December 1999 within a reasonable time, having done so six months after completion of the project and three months after the final technical review report.

231 In that regard, it need merely be pointed out that, as already stated above, the Commission is entitled, under Article 17 of the General Conditions, to undertake audits during the two years following the date of the last payment due from the Commission or the end of the contract. The draft audit report and the final audit

report, which were sent to GEF on 21 December 1999 and 18 July 2000 respectively, fell precisely within the period of two years provided for in Article 17 of the General Conditions.

232 Accordingly, the fourth plea cannot be upheld.

3. *The second plea: breach of the principle of the protection of legitimate expectations*

(a) Arguments of the parties

233 GEF considers that the Commission's conduct encouraged it to form a legitimate expectation that its method of declaring the costs and hours worked was in conformity with the contract, that the payments already made were justified and, therefore, that it was fulfilling all conditions required to receive the balance of the payment claimed.

234 It refers in that connection to earlier contracts with the Commission for which it had given an overall figure for the number of days worked on the project and the Commission had confirmed on several occasions that that procedure was adequate.

235 In this case, GEF claims to have filled in all the forms in the prescribed manner, in particular indicating on one of them, in detail, the number of hours worked and the hourly cost.

236 Moreover, all the cost statements submitted by GEF were examined by several Commission departments and the Commission never asked GEF to produce additional information concerning time spent on the project before making the relevant payment. Even when it was clear to the Commission that the number of hours worked would be or had been exceeded, upon submission of the first and second cost statements respectively, the Commission nevertheless made the relevant payment. Finally, the project had never been subject to an administrative 'red light' procedure of the kind applied by the Commission to problematical projects. On the contrary, during the implementation of the project, GEF had received only positive comments concerning it from the Commission. It is therefore beyond question that the Commission's explicit acceptance regarding execution of the project underwent a total U-turn.

237 The Commission contests GEF's arguments and contends that it acted entirely in accordance with the terms of the contract.

(b) Findings of the Court

238 It must be held that this plea is unfounded, since it has been determined in the examination of the first and fourth pleas that the Commission acted in accordance with the terms of the contract and with the principle that contractual obligations should be performed in good faith and the principle of sound administration.

239 That conclusion cannot be undermined by the fact that the Commission did not, for earlier contracts with GEF, carry out checks concerning the number of hours worked on the projects in question. Any indulgence shown by the Commission regarding those contracts cannot in any circumstances detract from its right to undertake, in this case, such checks as it considered necessary, in accordance with the contract.

240 It follows that this plea cannot be upheld

4. *The third plea; breach of the principle of respect for the rights of the defence*

(a) Arguments of the parties

241 GEF considers that the Commission did not observe the principle of respect for the rights of the defence.

242 First, it criticises the Commission for not disclosing the second technical review report until 27 October 2000, thereby preventing it from submitting its observations on that report in due time and discussing with the Commission its conclusions, which, moreover, conflicted with those of the final technical review report. The final audit report, which is largely based on the draft audit report and the second technical review report, does not therefore take account of GEF's observations concerning the latter report or those of GEF and Mr Pirenne contained in the letter of 31 January 2000 concerning the draft audit report. It concludes from this that, because personal interests were at stake, the persons concerned should have had an opportunity to make their views known before the audit report was produced in its final form.

243 Second, GEF criticises the Commission for not arranging a meeting with it before finalisation of the audit report, despite its request to that effect and the Commission's formal promise to organise such a meeting, which was repeated more than once. At the hearing, GEF stated that it had wished to deal at that meeting with the problem deriving from the Commission's rejection of the supplementary time sheets.

244 The Commission considers GEF's arguments to be unfounded.

(b) Findings of the Court

245 It need merely be stated that this plea is unfounded because it was established in the examination of the fourth plea that the Commission had not infringed either the principle that contractual obligations should be performed in good faith or the principle of sound administration (see paragraphs 215 to 229 above).

246 This plea cannot therefore be upheld.

247 It follows that the applicant's claim must be dismissed.

B — *The Commission's counterclaim*

1. *Arguments of the parties*

248 The Commission claims, under Article 16.3 of the General Conditions, repayment of the sum of EUR 273 516, representing the difference between the sums actually paid

to GEF, namely EUR 396 000, and the costs accepted by it, amounting to EUR 122 484.

249 GEF merely contends, in its reply, that the Commission's counterclaim is unfounded.

2. *Findings of the Court*

250 It need merely be stated that it is clear from the file that the Commission paid GEF a total of EUR 396 000 and that, as is clear from the foregoing, the Commission was right to accept the sum of EUR 122 484 for costs incurred in respect of the project, following the financial audit. It follows that the Commission is entitled, under Article 16.3 of the General Conditions, to reclaim from GEF the overpayment of EUR 273 516.

251 As regards the claim for interest, it must be observed that, in the debit note issued to GEF, the Commission made it clear that it should be settled by 31 August 2001 and that, after that date, default interest would be payable at the rate applied by the European Central Bank for its refinancing operations in euros in August 2001, plus 1.5 points.

252 It must however be noted that, although the contract stipulates, for certain eventualities, application of the rate fixed by the European Monetary Institute (Article 5.3.3 and Article 16.1 of the General Conditions), there is no agreed rate for the present circumstances.

253 In the absence of an agreement on interest and given that the contract is governed by Belgian law, it is therefore necessary to apply Article 1153 of the Belgian Civil Code, according to which:

'In the case of obligations confined to payment of a sum certain, damages in respect of late performance shall in all cases be subject to the interest rate prescribed by law, save where otherwise provided by law. Such damages shall be payable without the creditor having to prove any loss. They shall be payable as from the date of the order to pay, except in cases where they become automatically payable by operation of law ...'

254 Having given GEF formal notice, the Commission is entitled to claim default interest, at the statutory Belgian rate, as from 1 September 2001.

255 It is therefore appropriate to uphold the Commission's counterclaim. Consequently, GEF must, as claimed in the defendant's pleadings, be ordered to pay the Commission the sum of EUR 273 516, plus default interest at the annual statutory rate applicable in Belgium, from 1 September 2001 until full payment of the debt.

Costs

256 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. Since GEF has been unsuccessful, it must be ordered to pay the costs, as applied for by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber, Extended Composition)

hereby:

1. **Dismisses the applicant's claim for reimbursement of the sum of EUR 40 693 and for the issue of a credit note for EUR 273 516;**

2. **Upholds the Commission's counterclaim and, consequently, orders the applicant to pay the Commission the sum of EUR 273 516, plus default interest, at the annual statutory rate applicable in Belgium, from 1 September 2001 until full payment of the debt;**

3. **Orders the applicant to pay the costs.**

Vesterdorf Jaeger Mengozzi

Martins Ribeiro Dehousse

Delivered in Luxembourg on 15 March 2005.

H. Jung

Registrar

B. Vesterdorf

President

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