JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)

17 April 2008 *

In Case T-260/04,

Centro di educazione sanitaria e tecnologie appropriate sanitarie (Cestas), established in Bologna (Italy), represented initially by N. Amadei and C. Turk, and subsequently by N. Amadei and P. Manzini, lawyers,

applicant,

v

Commission of the European Communities, represented by E. Montaguti and F. Dintilhac, acting as Agents,

defendant,

APPLICATION for annulment of the decision of 21 April 2004 of the Commission (Delegation in the Republic of Guinea), sent to the applicant by registered letter, ordering it to pay the amount of GNF 959 543 835 (equivalent to EUR 397 126.02),

* Language of the case: Italian.

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Fourth Chamber),

composed of V. Vadapalas, acting for the President, E. Moavero Milanesi and N. Wahl, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 6 June 2007,

gives the following

Judgment

Legal context

1 The European Development Fund (EDF) was set up to finance co-operation with the African, Caribbean and Pacific States (ACP), initially by means of an annex to the EEC Treaty and later by means of internal agreements between the Member States meeting in the Council. To date, there have been nine successive EDFs, each for a period of five years, corresponding, as regards the last eight, to the period of validity of the various agreements and conventions through which the European Community and its Member States established that special partnership with the ACP States. The EDF does not come under the general budget of the European Communities, which explains the need to adopt specific financial regulations to implement it and to set up, in particular, a specific accounting function.

2 The principle set out in Article 133(2) of the Financial regulation of 27 March 2003 applicable to the Ninth European Development Fund (OJ 2003 L 83, p. 1, the 'Ninth EDF Regulation') is that commitments relating to previous EDFs entered into before the entry into force of the Partnership agreement between the members of the ACP Group of States, of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000 (OJ 2000 L 317, p. 3), known as the 'Cotonou Agreement', are to continue to be implemented in accordance with the rules applicable to those EDFs, save as regards the duties of the Financial Controller, the presentation of accounts and the procedure for calling contributions, for which the provisions of the Ninth EDF Regulation are to apply.

3 The contracts financed under the Sixth and Seventh EDFs are governed by the corresponding provisions, namely the Third ACP-EEC Convention signed at Lomé on 8 December 1984 (OJ 1986 L 86, p. 3) and the Fourth ACP-EEC Convention signed at Lomé on 15 December 1989 (OJ 1991 L 229, p. 3), known as the 'Lomé III Convention' and the 'Lomé IV Convention' respectively, which are internal agreements setting up the Sixth and Seventh EDFs, and, in principle, since the corresponding expenditure was committed prior to the entry into force of the Cotonou Agreement, by Financial Regulation No 86/548/EEC of 11 November 1986 applicable to the Sixth European Development Fund (OJ 1986 L 325, p. 42) and Financial Regulation No 91/491/EEC of 29 July 1991 applicable to development finance cooperation under the Fourth ACP-EEC Convention (OJ 1991 L 266, p. 1). However, Articles 15 and 16 of Regulation No 86/548 and Regulation No 91/491, which concern recovery of debts, requires the intervention of the financial controller, an office which is no longer provided for under the Ninth EDF Regulation; nor does it exist, as such, within the organisational structure of the Commission. Consequently, even for the recovery of debts linked to EDF credits prior to the entry into force of the Cotonou Agreement, the Commission applies the provisions of the Ninth EDF Regulation, in accordance with Article 133(2) thereof.

4 Article 311 of the Lomè IV Convention provides that the Commission is to appoint the chief authorising officer, who is responsible for managing the resources of the EDF and who, in that capacity, commits, clears and authorises expenditure and keeps accounts of commitments and authorisations, ensures that financing

decisions are carried out, and, in close cooperation with the national authorising officer, makes commitment decisions and financial arrangements that prove necessary to ensure proper execution of approved operations from the economic and technical viewpoints.

5 Article 317 of the Lomé IV Convention defines the functions of the delegate, who is the head of the Commission's delegation in the ACP State and who, in close cooperation with the national authorising officer, is, inter alia, required to endorse contracts and estimates in the case of direct labour, riders thereto, as well as payment authorisations issued by the national authorising officer, ensure that the projects and programmes financed from the EDF resources managed by the Commission are properly executed from the financial and technical viewpoints, cooperate with the national authorities of the ACP State where he represents the Commission in evaluating operations regularly, maintain close and continuous contacts with the national authorising officer for the purpose of analysing and remedying specific problems encountered in the implementation of development finance cooperation and, in particular, make regular checks to see that operations are proceeding in accordance with the schedule laid down in the advance timetable in the financing decision.

6 When payments have been wrongly made, the corresponding amounts must be recovered by the national authorising officer, in his capacity as a party to the contract.

7 Article 23 of the Ninth EDF Regulation provides as follows:

'Where the Chief Authorising Officer becomes aware of problems in carrying out procedures relating to management of EDF resources, he shall, in conjunction with the national or regional authorising officer, make all contacts necessary to remedy the situation and take any steps that are necessary. For instance, in cases where the

national or regional authorising officer does not or is unable to perform the duties incumbent on him under the [Cotonou] Agreement, the Chief Authorising Officer may temporarily take his place, in which case, the Commission may receive, from the resources allocated to the ACP State in question, financial compensation for the extra administrative workload incurred.

Any measure taken by the Chief Authorising Officer pursuant to the first subparagraph shall be taken in the name of and on behalf of the national or regional authorising officer concerned.'

8 The rules on recovery of the Commission's debts are contained in Articles 43 to 47 of the Ninth EDF Regulation.

9 Article 43 of the Ninth EDF Regulation provides as follows:

'1. Amounts wrongly paid shall be recovered.

2. The Commission shall lay down the conditions in which interest on late payment is due to the Communities.'

10 Article 44 of the Ninth EDF Regulation provides as follows:

'1. The authorisation of recovery is the act whereby the authorising officer responsible instructs the accounting officer, by issuing a recovery order, to recover an amount receivable which he has established.

2. Without prejudice to the responsibilities of the ACP States or the [Overseas Countries and Territories], the Commission may formally establish an amount as being receivable from persons other than States by means of a decision which shall be enforceable under the same conditions as laid down in Article 256 of the [EC] Treaty.'

11 Article 45 of the Ninth EDF Regulation provides that:

'Every debt that is identified as being certain, of a fixed amount and due in the context of the implementation of EDF resources shall be established by means of a recovery order given to the accounting officer, followed by a debit note sent to the debtor, both drawn up by the authorising officer responsible. The recovery order shall be accompanied by supporting documents certifying the established entitlements. When drawing up the recovery order, the authorising officer responsible shall ensure that:

(a) the revenue is booked to the correct item;

(b) the recovery order is in order and conforms to the relevant provisions;

(c) the supporting documents are in order;

(d) the particulars of the debtor are correct;

(e) the due date is indicated;

(f) the order conforms to the principle of sound financial management referred to in Article 4;

(g) the amount and currency of the sum to be recovered are correct.

Such recovery orders shall be recorded in the accounts by the accounting officer.'

12 Article 46 of the Ninth EDF Regulation is drafted in the following terms:

'1. The accounting officer shall act on recovery orders for amounts receivable that have been duly established by the authorising officer responsible. He shall exercise due diligence to ensure that the EDF receives its revenue by the due dates indicated in the recovery orders and ensure that the relevant rights of the Communities are safeguarded.

2. If recovery has not actually taken place by the due date specified in the recovery order, the accounting officer shall inform the authorising officer responsible and immediately initiate the procedure for effecting recovery by any means offered by the law, including, where appropriate, by offsetting. If this is not possible, the accounting officer shall enforce a recovery decision secured either in accordance with Article 44(2) or by a legal action.

3. The accounting officer shall recover amounts by offsetting them against equivalent claims that the EDF or the Communities [have] on any debtor who himself has a claim on the EDF or the Communities that is certain, of a fixed amount and due.

…'

13 Article 47 of the Ninth EDF Regulation provides as follows:

'1. Where the authorising officer responsible is planning to waive recovery of an established amount receivable, he shall ensure that the waiver is in order and complies with the principles of sound financial management and proportionality in accordance with procedures and criteria previously laid down by the Commission for that purpose. The waiver decision must be substantiated. The authorising officer may delegate the decision only as laid down by the Commission in the rules referred to in paragraph 2.

2. The detailed rules for implementing the General Financial Regulation shall apply *mutatis mutandis* to the implementation of this Article.'

Background to the dispute

14 A non-governmental organisation, Centro di educazione sanitaria e tecnologie appropriate sanitarie (Cestas) (the 'applicant'), has its headquarters in Italy and has been working in Guinea since 1987 on various international cooperation projects in the field of health, initially financed by the Italian Ministry of Foreign Affairs and later financed by the Community.

15 Until 1997, its activities were related to hospital infrastructures and equipment. After 1997, those activities were extended to technical assistance in the area of planning and management.

16 In order to carry out those operations, with regard to the projects financed by the Community, the applicant concluded with the Republic of Guinea protocols of agreement and contracts for the provision of services, which were approved by the head of the Commission's delegation in Guinea and based on financing conventions Nos 5169/GUI and 4205/GUI and on a financing contract providing for the setting up of a Sysmin re-employment account.

17 On 14 June 1993, financing convention No 5169/GUI was concluded between the European Economic Community, represented by the Commission, and the Republic of Guinea within the framework of the Lomé IV Convention, with the purpose of improving living conditions in that country on the basis of financing drawn from the resources of the Seventh EDF. Two thirds of the total cost of the financing, amounting in total to ECU 30 million, was to come out of the resources of the National Indicative Programme under Lomé IV and the remaining third was to come out of counterpart funds generated by the general import programme.

18 That convention provided for the restructuring and support of health structures in Guinea with the aid of six NGOs, including the applicant, all operating alongside the public health services, following the award of public service contracts.

19 The general import programme was the subject of financing convention No 4205/GUI, concluded on 30 December 1988 between the European Economic Community, represented by the Commission, and the Republic of Guinea and was

intended to cover the 'cost, insurance, freight' (cif) value in convertible currency of the imported goods. That convention, which expressly provided for the use of counterpart funds for the benefit of the health sector, involved the constitution of counterpart funds in Guinean francs following acquisitions carried out in the private and public sectors.

20 On 1 February 1990, the European Economic Community, represented by the Commission, and the Republic of Guinea concluded a financing contract providing for the establishment of a Sysmin (system for the stabilisation of export receipts for mineral products) re-employment account with the Central Bank of the Republic of Guinea. Following upon that contract, a protocol of agreement entitled 'Fonds de réemploi/CEE nº 02/96' (Re-employment Fund/EEC No 02/96) was concluded between the applicant and the Republic of Guinea with the purpose of fixing the technical, administrative and financial details of the applicant's assistance in support of the health sector in the Prefecture of Fria (Guinea), to be financed out of the re-employment fund.

21 The contracts concluded by the applicant within the framework of projects financed by EDF funds are covered, in case of dispute, by the procedure laid down in the 'Procedural Rules on Conciliation and Arbitration of Contracts Financed by the European Development Fund (EDF)', which is contained in Annex V to Decision No 3/90 of the ACP-EEC Council of Ministers of 29 March 1990 adopting the general regulations, general conditions and procedural rules on conciliation and arbitration for works, supply and service contracts financed by the European Development Fund (EDF) and concerning their application (OJ 1990 L 382, p. 1).

22 A check carried out at the end of 1998 by the Guinean Minister for Cooperation, the national authorising officer for the EDF (hereinafter the 'national authorising officer'), revealed failings in the applicant's work in regard to contracts financed out of resources from the Sixth and Seventh EDFs (the 'contracts at issue') in the form of a limited rate of completion, insufficient technical capacity, weak organisational and financial capacity and a lack of transparency.

23 That finding led the national authorising officer to bring in a firm of auditors to carry out a full audit of the accounts and finances of the projects in Guinea in which the applicant was involved.

24 On 30 March 2000, following the audit report, the national authorising officer sent a letter of formal notice to the applicant in which he called upon it not merely to put right the defects which had been established in the various projects concerning the management of the accounts and the staff but also to repay an amount of GNF 261 181 309 by way of cash balances in all the projects financed out of counterpart funds, in addition to other amounts which were insufficiently justified and which are mentioned in the audit report, although not expressed in precise figures amount in the letter of formal notice, with repayment to be made by way of instalments to be agreed on.

25 On 14 April 2000, the applicant answered the letter of formal notice by providing explanations, which led the national authorising officer to ask the same firm of auditors to carry out a supplementary audit in order to take account of the answers provided by the applicant in its reply to the letter of formal notice.

26 On 13 August 2000, the abovementioned firm of auditors, at the request of the national authorising officer, prepared a draft report on the supplementary audit in which it concluded that the applicant's debt should be reduced from GNF 1 510 307 148 to GNF 1 085 836 676 in respect of the total amount of the expenditure not supported by documentary evidence and the non-eligible expenditure.

27 In the Commission's view, that is why the national authorising officer did not use the bank guarantee at his disposal, which expired on 15 September 2000.

28 On 21 March 2001, after successive verifications, a supplementary audit report was submitted by the same firm of auditors in which the amount of the debt was further reduced to GNF 1 006 740 345, due to the acceptance of justified expenditure of GNF 79 096 331.

29 By letter of 31 July 2001, following upon a further letter of formal notice from the national authorising officer, the applicant, which considered that the amount of its debt was limited to GNF 44 278 586, continued to challenge the conclusions of that report, even though it already took account of the applicant's observations, thereby making an amicable settlement of the dispute impossible.

30 From the summer of 2001, there was reduced contact between the applicant, the Guinean authorities and the Commission. The applicant complained that it did not have access to a new audit report drawn up in 2002 by the same firm.

31 By letter of 24 July 2003 addressed to the applicant, the Commission expressed its regret that it had not succeeded in persuading the national authorising officer to adopt an official position as to the further steps to be taken in regard to the dispute, as the latter took the view that the option of legal action should be envisaged only as a last resort.

32 On 24 September 2003, a meeting took place in Brussels between the applicant and the Commission for the purpose of resolving the dispute, but no solution was found.

33 By letter of 24 March 2004, received by the applicant only on 26 April 2004, the head of the Commission's delegation in Guinea informed the applicant that a recovery order would shortly be issued.

34 On 21 April 2004, by registered letter with acknowledgement of receipt, in an envelope also containing the letter of 24 March 2004, which was thus also received by the applicant on 26 April 2004, the head of the Commission's delegation in Guinea sent the applicant a debit note in the amount of GNF 959 543 835 (EUR 397 126.02) (the 'contested measure'), fixing 25 May 2004 as the final date for payment.

35 Since the applicant asked for clarifications concerning the contents of the contested measure, the head of the Commission's delegation in Guinea replied by letter of 18 May 2004, enclosing with his reply the latest supplementary audit report, dated 27 March 2002, and stating that that report did not change the substantive findings brought out in the first audit report, with the exception of the reduction in the amount of the expenditure which has been declared ineligible, which was reduced to GNF 988 314 134.

36 In the absence of a reply from the applicant, the EDF accounting officer sent a reminder by letter of 2 July 2004, which called upon the applicant to pay the sum of GNF 959 543 835 by 23 July 2004 at the latest.

37 On 4 August 2004, at a time when the applicant had already lodged the present action, the Commission sent it a second reminder once again calling on it to pay the amount mentioned in the contested measure by 6 September 2004 at the latest.

38 On 9 June 2005, since the applicant had not paid the amount mentioned in the contested measure, the Commission sent it a letter of formal notice.

39 On 20 June 2005, the applicant replied to the letter of formal notice to the effect that, in its view, it was best to await the outcome of the present action.

Procedure and forms of order sought

40 By application lodged at the Registry of the Court of First Instance on 23 June 2004, the applicant brought the present action.

41 By a separate document lodged at the Court Registry on 30 September 2004, the Commission raised an objection of inadmissibility under Article 114 of the Court's Rules of Procedure. The applicant filed its observations on that objection on 25 October 2004.

42 By order of the Court of 22 September 2005, the objection was joined to the substance and costs were reserved.

43 On hearing the report of the Judge-Rapporteur, the Court (Fourth Chamber) decided to open the oral procedure.

44 The parties presented oral argument and answered the questions put by the Court at the hearing on 6 June 2007.

45 The applicant claims that the Court should:

— dismiss the objection of inadmissibility;

— annul the contested measure;

— order the Commission to pay the costs, even if the action is dismissed as being inadmissible.

46 The Commission contends that the Court should:

— dismiss the action as inadmissible or, in the alternative, as being without foundation;

— order the applicant to pay the costs.

Law

Arguments of the parties

47 The Commission contends that the present application is inadmissible inasmuch as the contested measure cannot be regarded as an act amenable to challenge under Article 230 EC. The contested measure is a preparatory measure with a view to possible contentious proceedings or the adoption of a decision under Article 256 EC.

48 In the Commission's view, the contested measure is an act preceding the possible adoption of a decision to initiate contentious proceedings and is therefore not a measure which produces legal effects capable of affecting the interests of the applicant by bringing about a distinct change in its legal position.

49 The Commission states that a debit note is 'a final warning before proceeding to the next step'. It constitutes information given to the debtor as provided for in Article 78(3) of Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 357, p. 1).

50 The Commission points out in that regard that, in the present case, it could still send a final request to the national authorising officer to decide what is to be done next in the dispute with the applicant. However, as things stand at the moment, the Commission has not decided what step to take next in the dispute in its capacity as guarantor of the financial interests of the EDF.

51 Thus, the Commission explains that its definitive decision could possibly be a decision adopted under Article 256 EC, a compensatory decision or a decision under Article 46(2) of the Ninth EDF Regulation to bring an action before the courts having jurisdiction in the matter. In the latter case, the Italian courts would have jurisdiction because, as the Commission is not a party to the contracts at issue, it cannot have recourse to the arbitration procedure provided for in those contracts, of which the Guinean authorities alone may avail themselves.

52 The Commission argues that if the Court should take the view that the contested measure is an act which may be the subject of an action under Article 230 EC, it would anticipate the Commission's definitive decision, which may never be adopted if the national authorising officer were to act before the Commission does so.

53 The Commission disagrees with the applicant's observations that the contested measure is a genuine decision on the grounds, first, that it constitutes an application of Article 44(2) of the Ninth EDF Regulation, second, that the enforceability of that 'decision' is confirmed by the terms thereof and, third, that the second reminder confirms that analysis and that, consequently, those letters produce legal effects in regard to the applicant capable of adversely affecting its interests and of bringing about a change in its legal position within the meaning of the case-law of the Court of Justice.

54 The Commission contends that, in accordance with Article 44(2) of the Ninth EDF Regulation, '[it] may formally establish an amount as being receivable from persons other than States by means of a decision which shall be enforceable under the same conditions as laid down in Article 256 [EC]'. It follows that neither the contested measure nor any other letter sent to the applicant at a later date constitutes an enforceable measure for the purposes of Article 256 EC.

55 In addition, according to the Commission, those letters do not in any way constitute an exercise of its public-law powers, with the result that they cannot be enforceable.

56 The Commission considers that the only purpose of the form of words which it used in its second reminder, dated 4 August 2004, namely, the words '[i]f the Commission does not hear from you, it will continue the enforcement procedure against you by any means offered by the law in regard both to principal and interest', is to refer to the enforcement phase.

57 Thus, in the Commission's view, the use of the future 'will continue' in such a form of words means that a decision within the terms of Article 249 EC has not yet been adopted. It is clear from the abovementioned letters that the Commission could adopt a decision under Article 256 EC only at a later stage.

58 The Commission contends that, in any event, within the legal framework of the EDF, it is normally the national authorising officer, who is a distinct person and has his own authority, who carries out recoveries. In this case, the Commission is still confident that, within the framework of the close cooperation instituted by the Lomé IV Convention, the national authorising officer will once again perform his duties in this matter.

59 The Commission points out that the fact that it sent to the applicant two reminders and a letter of formal notice after sending it the contested measure confirms that the latter could not be interpreted as being a final decision amenable to review.

60 Furthermore, the Commission points out that, at the time at which the facts occurred, decisions based on Article 256 EC were adopted by the Commission as a collegiate authority, in accordance with a special procedure, and differed in their presentation from the letters sent to the applicant in the framework of the preparatory phase of recovery.

61 The Commission takes the view that the contested measure, like the two reminders and the letter of formal notice, constitute, in this case, measures which form part of the preparatory phase of recovery, which do not constitute an exercise of the Commission's public-law powers and which are not, therefore, actionable decisions for the purposes of Article 230 EC. Thus, in the absence of the adoption of a definitive position, the enforcement phase of the recovery process has not been reached.

62 The applicant claims that the objection of inadmissibility raised by the Commission should be rejected since the contested measure amounts to a definitive act, a genuine formal decision which is enforceable in accordance with the provisions of Article 256 EC.

63 That conclusion, it argues, is reinforced by the very wording which constitutes the contested measure, in which it is stated that '[in] the absence of payment by the date fixed, the Commission … reserves the right to execute any financial guarantee previously provided and, if necessary, to proceed to enforcement in accordance with Article 256 [EC]'. That is clearly a threat to proceed directly to enforcement if payment was not made.

64 The applicant points out that that conclusion is further confirmed by the 'summons' sent to it by the registered letter, with acknowledgement of receipt, of 4 August 2004, after the present action had been lodged, in which the Commission once again called upon it to pay the amount of GNF 959 543 835, stating that if payment were not made, 'it [would] continue the enforcement procedure against [the applicant] by any means offered by the law in regard both to principal and interest'.

65 The applicant claims that the form of words used in the contested measure does not give rise to confusion because, in its view, it refers to the initiation of enforcement measures without there being any need to adopt other measures which might be regarded as final. Consequently, that measure produces binding legal effects.

66 The applicant takes the view that the Commission is confusing the 'enforceability' of a measure and an 'enforcement' measure. Thus, the words '[i]f the Commission does not hear from you, it will continue the enforcement procedure against you by any means offered by the law means in regard both to principal and interest', used in the letter of 4 August 2004, do not announce a future measure in the nature of a decision, that is to say, an enforceable measure, as the Commission contends, but constitute in fact formal notice to pay, which presupposes that a final decision has already been adopted both with regard to the existence of the debt and to its amount. [Reply, paragraph 18]

Findings of the Court

67 For the purpose of determining whether the present action is admissible, it should be noted at the outset that, according to settled case-law, only measures which produce binding legal effects and are capable of affecting the interests of the applicant by bringing about a distinct change in his legal position constitute measures challengeable by an action for annulment under Article 230 EC (judgment in Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 9; order in Case C-117/91 *Bosman* v *Commission* [1991] ECR I-4837, paragraph 13; and judgment in Joined Cases T-377/00, T-379/00, T-380/00, T-260/01 and T-272/01 *Philip Morris International and Others* v *Commission* [2003] ECR II-1, paragraph 81).

68 It is also settled case-law that, in order to ascertain whether a measure the annulment of which is sought is open to challenge, it is necessary to look to its substance as the form in which it is cast is, in principle, immaterial (*IBM* v *Commission*, paragraph 9; Joined Cases C-213/88 and C-39/89 *Luxembourg* v *Parliament* [1991] ECR I-5643, paragraph 15; and Case T-3/93 *Air France* v *Commission* [1994] ECR II-121, paragraphs 43 and 57).

69 In the case of acts or decisions adopted by a procedure involving several stages, in particular where they are the culmination of an internal procedure, it follows from the same case-law that, in principle, an act is open to review only if it is a measure definitively laying down the position of the Commission at the conclusion of that procedure, and not a provisional measure intended to pave the way for that final decision (*IBM* v *Commission*, paragraph 10, and Case T-95/99 *Satellimages TV5* v *Commission* [2002] ECR II-1425, paragraph 32).

70 It is therefore necessary to ascertain whether it is clear from the contested measure that the Commission definitively laid down its position in regard to the applicant therein.

71 It is true that the contested measure is drafted in a way which could give the impression that it is a definitive measure by indicating, in particular, that '[in] the absence of payment by the date fixed, the Commission … reserves the right to execute any financial guarantee previously provided and, if necessary, to proceed to enforcement in accordance with Article 256 [EC]'. Similarly, the content of the two reminders of 2 July 2004 and 4 August 2004, sent after the present action had been lodged, is such as to reinforce that impression.

72 Furthermore, the Commission itself admitted at the hearing that the standard model for debit notes, on the basis of which the contested measure was drawn up, was drafted in such a way that the preparatory nature of the measure did not expressly appear, in order to encourage the debtor to pay the amount due.

73 The Court thus notes that the Commission did not use clear and unambiguous wording when it drafted the contested measure.

74 However, notwithstanding the fact that the contested measure sets out a deadline and conditions for payment, the Commission does not adopt a position as to the means which it intends to employ in order to recover the amount at issue.

75 In accordance with its obligation under Articles 42 to 47 of the Ninth EDF Regulation, the Commission drew up a debit note which, if it was not honoured by the debtor, permitted the Commission, pursuant to the Ninth EDF Regulation, to waive recovery of the debt (Article 47), to make a set-off (Article 46(2)) or to enforce a

recovery decision (Article 46(2); the latter may take place either by way of an enforceable decision under Article 256 EC (Article 44(2)) or through an enforceable decision secured by a legal action (Article 46(2)).

76 It is clear from those provisions that a debit note constitutes information given to the debtor. Since Article 44 and Article 46(2) of the Ninth EDF Regulation mention a distinct enforceable decision subsequent to the debit note in the framework of the recovery procedure, the debit note is clearly not enforceable. It is a preparatory measure preceding the possible adoption of a decision by the Commission to continue the recovery procedure either by initiating legal proceedings or by adopting a decision under Article 256 EC. The contested measure must be regarded as a debit note within the meaning of Article 45 of the Ninth EDF Regulation, because it states that '[t]he Commission … reserves the right, after obtaining information, to operate a set off in respect of mutual debts which are certain, of a fixed amount and due'. Consequently, the contested measure does not constitute a measure definitively laying down the position of the Commission, does not produce binding legal effects that are capable of affecting the interests of the applicant and, consequently, cannot constitute a measure challengeable by way of an action for annulment under Article 230 EC.

77 Consequently, the present action must be dismissed as being inadmissible.

Costs

78 Pursuant to Article 87(3) of the Rules of Procedure, the Court of First Instance may order that the costs be shared or that each party bear its own costs where each party succeeds on some and fails on other heads or where the circumstances are exceptional.

79 In this case, although the applicant has been unsuccessful, the Court takes the view that the Commission did not, in any event, use clear and unequivocal language in drafting the contested measure. In the light of that fact, it considers that it will make an equitable assessment of the case in ruling that the applicant is to bear three fifths of its own costs and pay three fifths of the costs incurred by the Commission. The Commission is to bear two fifths of its own costs and pay two fifths of the costs incurred by the applicant.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. Dismisses the action as being inadmissible;

2. Orders the Centro di educazione sanitaria e tecnologie appropriate sanitarie (Cestas) to bear three fifths of its own costs and also to pay three fifths of the costs incurred by the Commission;

3. Orders the Commission to bear two fifths of its own costs and also to pay two fifths of the costs incurred by Cestas.

Vadapalas Moavero Milanesi Wahl

Delivered in open court in Luxembourg on 17 April 2008.

E. Coulon V. Vadapalas

Registrar Registrar for the President