JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)

22 May 2007 *

In Case T-500/04,

Commission of the European Communities, represented by G. Braun, W. Wils and N. Knittlmayer, acting as Agents,

applicant,

v

IIC Informations-Industrie Consulting GmbH, established in Königswinter (Germany), represented by E. Rott and J. Wolff, lawyers,

defendant,

APPLICATION under Article 238 EC for an order requiring the defendant to repay part of the advance paid by the Community in implementation of two financing contracts in relation to cultural programmes,

* Language of the case: German.

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

composed of J. Pirrung, President, N.J. Forwood and S. Papasavvas, Judges,

Registrar: K. Andová, Administrator,

having regard to the written procedure and further to the hearing on 7 November 2006,

gives the following

Judgment

Legal and factual background

Applicable Community law

1 Community financial aid in the field of trans-European networks is granted on the basis of Council Regulation (EC) No 2236/95 of 18 September 1995 laying down general rules for the grant of such financial aid (OJ 1995 L 228, p. 1).

2 Under Articles 1, 2 and 5 of that regulation, a project of common interest in the field, inter alia, of trans-European networks for telecommunications may qualify for Community aid not exceeding the minimum considered necessary for the launch of the project.

3 Article 11 of Regulation No 2236/95 provides that Community aid may cover only project-related expenditure incurred by the beneficiaries or by third parties responsible for the implementation of a project. As a general rule, payments are to be made in the form of advances, followed by intermediate payments and then a final payment.

4 Article 13 of Regulation No 2236/95 sets out the conditions for the reduction, suspension and cancellation of Community assistance. Thus, the Commission may reduce, suspend or cancel aid in respect of the operation in question if examination of the case reveals an irregularity or a failure to comply with one of the conditions for the grant of assistance. Any unjustified cumulation of Community assistance is to give rise to the recovery of sums unduly paid. Any sum to be recovered for want of due entitlement is to be repaid to the Commission.

Facts

5 By decision of 4 April 1996, the Council called for art and culture to be further integrated into the European Union's promotion of the Information Society. Consequently, the Commission launched an initiative in relation to multimedia access to Europe's cultural heritage, known as the 'Memorandum of understanding on Europe's cultural heritage'. As part of that initiative, the Commission subsidised,

in particular, two cross-border projects intended to establish networks connecting people in different Community countries through a common digital platform in a European cultural space: the 'DCC — Digital Content for Culture' ('DCC') project and the 'Donna — Art, Design and Fashion Online' ('Donna') project.

6 Specifically, the DCC project concerned the digitisation of selected cultural content together with its presentation, communication and sale via the internet. In this way, it aimed to generate new products and services in the economic sector of culture, with a view to making the most of Europe's cultural heritage. That was to have enabled the creation of new jobs, particularly for artists and designers, as well as new opportunities for innovative small and medium-sized undertakings.

7 The Donna project, on the other hand, was aimed at enabling creative women (artists and designers) to present their work in the fields of art, design and fashion digitally, using a software-based information and communication system, in order to establish interactive communication with the public. That pilot project was conceived generally as a virtual forum which would allow women artists and designers in various fields (industrial products, fashion, television, architecture, and so on) to meet, exchange ideas and establish contacts with suppliers, customers, partners and the media.

8 For each of those projects, the European Community, represented by the Commission, entered into a financing contract with both IIC Informations-Industrie Consulting — a limited liability company governed by German law, which operates in the sector of strategic planning, marketing and consultancy in the information industry — and CSC Ploenzke ('Ploenzke'), a public limited company governed by

German law. The contract relating to the DCC project (contract No 45 528) was dated 18 December 1996, and the contract relating to the Donna project (contract No 20 730) was dated 30 December 1996.

9 By those contracts, which are largely identical so far as the relevant provisions are concerned, the Commission undertakes to grant Community financial aid covering 50% of the eligible ('allowable') costs of the projects in question.

10 Article 4 of each contract indicates the estimated costs of the project concerned: ECU 3 360 000 in the case of the DCC project and ECU 980 000 in the case of the Donna project. Under Article 2 of the respective contracts, the DCC project was to last for 12 months, and the Donna project for 9 months, with effect in each case from the first day of the month after the last of the contracting parties' signatures, that is to say, from 1 January 1997.

11 The contracts, which were drawn up in English and which contain an arbitration clause within the meaning of Article 238 EC in favour of the Court of First Instance (Article 12.2), are governed by German law (Article 12.1). They include the following provisions:

'Article 1 ...

1.1 The Contractors shall carry out this contract jointly and severally towards the Commission for the work set out in Annex I ("the Project").

...

[1.3/1.4] The Coordinator shall be the channel for submitting all documents and for general liaison between the Contractors and the Commission. All general communications with the Commission will be through the Coordinator.

...

Article 4 ...

4.5 All payments by the Commission shall be made to the ... bank account of the Coordinator ...

The Coordinator shall be responsible for immediately transferring the appropriate amount of the financial contribution of the Commission to each Contractor. The Coordinator shall not be the beneficial owner of any payment, except by agreement between the Contractors who shall agree appropriate arrangements concerning any transfer to the Coordinator's own account.

Article 5 ...

5.1 The Contractors may enter into Subcontracts subject to the prior written approval of the Commission being required. ... The Contractors shall impose on any Subcontractor the same obligations as apply to themselves under the contract.'

12 The work programme of the project in question is explained in Annex I to each contract. Under Annex I.3 to the DCC contract and Annex I to the Donna contract, the defendant's professional team includes Mr B (the defendant's former chairman), Mr F, Mr M, Ms DD, Ms BD and Ms L.

13 The conditions for the reimbursement of the allowable costs in respect of each project are based on Annex II to the relevant contract. Annex II provides as follows:

'1.2. Allowable costs are those actual costs defined hereafter, which are necessary for the Project, can be substantiated and are incurred during the period specified in Article 2.1 of the contract ...

Allowable costs may include all or any of the following categories of costs:

— personnel

— equipment

— third party assistance

— travel and subsistence

— consumables and computing

— other costs

— overheads

...

1.3.1. Personnel

The costs of actual hours worked on the Project by personnel directly employed by the Contractor may be charged.

...

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 technical manager, or an authorised senior employee of the Contractor.

1.3.2. ...

Equipment purchased or leased may be charged as a direct cost. The allowable costs for leased equipment shall not exceed any allowable costs for its purchase. ...

1.3.3. Third Party Assistance

Costs of Subcontracts and external services shall be allowable costs in accordance with Article 5 of the contract.

...

1.3.5. ...

Consumables ... may be charged as direct costs.

...

1.4. ...

For Contractors using full costs, overheads (indirect general costs) relating to the Project, calculated in accordance with their normal accounting conventions, policies and principles considered by the Commission to be reasonable, may be charged for items such as internal own funded research (subject to a maximum of 10% of the personnel costs), administration, support personnel, office supplies, infrastructure, utilities and services.

...

For Contractors using additional costs, a contribution up to 20% of the actual allowable costs in respect of all the direct costs under point 1.3 of this Annex may be charged in respect of such overheads.

...

4.3. Where the total financial contribution due for the Project, including the result of any audit, is less than the payments made for the Project, the Contractors shall immediately reimburse the difference, in ECU, to the Commission.

...

5. Justification of Costs

The Contractors shall maintain, on a regular basis and in accordance with the normal accounting conventions of the State in which it (they) is (are) established, proper books of account and appropriate documentation to support and justify the costs and the hours reported.'

14 On the basis of those contracts, the Commission paid the following advances to Ploenzke in its capacity as coordinator of the two projects: DEM 980 472 for the DCC project and DEM 317 745 for the Donna project. Under Article 4.5 of the contracts, Ploenzke was obliged to transfer to the defendant the amounts paid by the Commission to which it was entitled. Thus, DEM 293 328 was transferred to the defendant for the DCC project and DEM 107 493 for the Donna project. The

defendant thus received, in 1997, a total of DEM 400 821 (EUR 204 936.52) by way of advance payments of the financial aid.

15 Implementation of the two projects began on 1 January 1997. After the projects were completed, Ploenzke and the defendant applied for reimbursement of costs in the total amount of DEM 6 144 287 in respect of the DCC project and DEM 1 906 934 in respect of the Donna project, of which the defendant's part amounted to DEM 1 960 943 in respect of the DCC project and DEM 646 809 in respect of the Donna project.

16 The costs claimed by the defendant in respect of the DCC project are divided into the costs of personnel (DEM 834 568), subcontracting (DEM 618 631), equipment (DEM 384 018), travel (DEM 32 682), consumables (DEM 35 017) and overheads (DEM 56 027).

17 In respect of the Donna project, the defendant claimed costs of personnel (DEM 227 998.39), subcontracting (DEM 257 659), equipment (DEM 106 871), travel (DEM 22 659), consumables (DEM 9 312.53) and overheads (DEM 22 385).

18 The Commission instructed outside experts to produce technical reports. As a result, an In-depth Review Panel Report was drawn up on 10 December 1997 in respect of the DCC project, and a Report of Assessors in respect of the Donna project on 26 June 1998. Both reports concluded that the prescribed quality criteria had not been met and that the conditions for reimbursement of costs provided for in the DCC and Donna contracts had not, in general, been satisfied.

19 The In-depth Review Panel Report was sent to the DCC project participants on 17 December 1997. Then, by letter to Ploenzke of 23 December 1997 (copied to the defendant), the Commission terminated the DCC contract and requested that Ploenzke inform its partners accordingly; the termination took effect one month later, pursuant to Article 9.1 of the contract.

20 As regards the Donna project, which was completed on 30 September 1997, the assessors' report was drawn up inter alia following a meeting ('technical review'), which was held in Brussels on 26 June 1998. At that meeting, representatives of the defendant answered questions put by the experts appointed by the Commission.

21 Furthermore, on 10 and 11 March 1998, the Commission's agents reviewed the financing of the projects concerned. Following that examination, the Commission sent the defendant draft audit reports dated 28 April 1998 (concerning the DCC project) and 27 May 1998 (concerning the Donna project). After listing and assessing the project costs in detail, those draft reports revealed that the majority of the costs claimed were not repayable because of the failure to adhere to the contract's objectives.

22 After receiving the defendant's comments dated 30 June 1998, the Commission sent it the final version of the audit reports with a covering letter dated 29 July 1998. In those reports, the Commission concluded that Ploenzke could claim reimbursement of only DEM 51 506 in respect of the DCC project and DEM 37 679 in respect of the Donna project, whereas the defendant was not entitled to any reimbursement in respect of the DCC project and to reimbursement of only DEM 46 300.18 in respect of the Donna project.

23 The Commission then presented both Ploenzke and the defendant with a claim for repayment of the non-allowable part of the advance paid for the two projects. Ploenzke repaid the Commission the amounts requested, but the defendant refused to make any repayment.

24 On 12 August 1998, the Commission sent the defendant a notice of recovery followed by a debit note, received by the defendant on 8 September 1998, in relation to the difference of ECU 179 337 (DEM 354 520.82), repayable before 31 October 1998. To date, the defendant has not paid that amount.

25 By letter of 30 November 1998, the defendant applied to the Commission for the further payment of ECU 352 800 for the DCC project and ECU 110 781.45 for the Donna project. To date, the Commission in turn has not paid those amounts.

26 Finally, in 1999, the defendant submitted a complaint against the Commission to the European Ombudsman. That procedure was closed on 27 April 2000. In his decision, the Ombudsman concluded that it could not be established that there had been any maladministration on the part of the Commission.

Procedure and forms of order sought by the parties

27 By application lodged at the Registry of the Court of First Instance on 24 December 2004, the Commission brought the present action.

28 On hearing the report of the Judge-Rapporteur, the Court of First Instance (Second Chamber) decided to arrange an informal meeting with the parties. That meeting took place in the presence of the Judge-Rapporteur on 2 February 2006. On that occasion, the parties entered into negotiations with a view to reaching an amicable settlement within two months. After that time-limit had twice been extended, the defendant informed the Court of First Instance on 29 June 2006 that those attempts to reach an amicable settlement had failed.

29 The Court of First Instance (Second Chamber) then decided to open the oral procedure.

30 The parties presented oral argument and answered the questions put to them by the Court at the hearing on 7 November 2006.

31 The Commission claims that the Court should:

— order IIC Informations-Industrie Consulting to pay the Commission the sum of EUR 181 263.61, together with interest at 4% as from 1 November 1998;

— order IIC Informations-Industrie Consulting to pay the costs of the proceedings.

32 The defendant contends that the Court should:

— dismiss the action;

— alternatively, grant the defendant suspension of enforcement and enable it to avoid enforcement action through the provision of security, which could take the form of a bank guarantee;

— order the Commission to pay the costs of the proceedings.

Law

33 The Commission claims that almost all of the costs for which the defendant was granted financing were ineligible for reimbursement. According to the Commission, it is apparent from the technical reports referred to in paragraphs 18 to 20 above that the defendant is required, under point 4.3 of Annex II to the DCC and Donna contracts, to repay the sums which it received in the form of advance payments, in so far as it was not entitled to financing in respect of its costs.

34 Against those claims, the defendant puts forward two sets of pleas in law. By the first, it denies that the debt claimed by the Commission is due. In that context, it relies on its lack of standing to defend itself in court (capacity to be sued), the limitation period in respect of the alleged debt and the forfeiture by the Commission of any right to repayment. By the second set of pleas, it argues that the objectives of the two projects were met and that the declared costs were actually incurred. It complains that the Commission's conduct is contradictory, in that it is trying to avoid its contractual obligations after the event by relying on mere formalities.

Standing to mount a defence in court (capacity to be sued)

Arguments of the parties

35 The Commission considers that it is entitled to pursue the defendant for the recovery of its debt, as the DCC and Donna contracts designate the defendant as the person liable for reimbursement. In fact, every contractor is individually required to repay sums that are unduly paid.

36 According to the defendant, it is clear from the two contracts that the Commission was aiming to ensure that it would have a single interlocutor together with which any difficulties involved in performing the contracts could be dealt with directly. Consequently, Ploenzke's role as coordinator went beyond that of a mere agent entrusted with receiving the aid. Point 4.3 of Annex II to the contracts, which places the contractors under an obligation to repay overpayments to the Commission, does not suggest otherwise, as it does not describe how repayment should be made. Point 4.3 is to be interpreted as meaning that Ploenzke was the contracting partner through which the contracts were to be performed.

Findings of the Court

37 It must be noted that the DCC and Donna contracts were concluded between the Commission on the one hand, and Ploenzke and the defendant, defined as 'the Contractors', on the other; it should also be made clear that Ploenzke had the further role of 'coordinator' as provided for in Article 1.3 of the DCC and Donna contracts. In accordance with Article 1 of the contracts, the contractors were under an obligation towards the Commission to carry out the contracts jointly and severally in respect of the work set out in Annex I thereto.

38 Admittedly, in its capacity as coordinator, Ploenzke was responsible for submitting all documentation to the Commission as well as for general liaison between the contractors and the Commission. Furthermore, from the contractors' point of view, Ploenzke was the sole party with which the Commission exchanged communication. However, the contractual provision providing for the role of coordinator must — in accordance with the relevant German law, namely Paragraph 242 of the Bürgerliches Gesetzbuch (German Civil Code; 'BGB') — be interpreted in accordance with the requirements of good faith and reciprocal expectations which are generally accepted as between contracting parties.

39 It is quite clear from Point 4.3 of Annex II to the contracts that the onus was on the 'Contractors' as such, rather than on any coordinator, to repay to the Commission the difference between the financial contribution actually due and undue payments made. Furthermore, the Commission rightly emphasised that the coordination for which Ploenzke was responsible was limited to some additional organisational tasks, in particular the task of transferring to the other contractor the sums paid by the Commission.

40 Consequently, the contracts at issue cannot reasonably be interpreted as meaning that Ploenzke, in its capacity as coordinator, should reimburse the payments of which the defendant alone, in its capacity as contractor and the party liable, was the beneficiary in accordance with the second subparagraph of Article 4.5. The contracts do not, therefore, include any provision which would require Ploenzke to repay more than it had itself received in its capacity as contractor.

41 It follows that the obligation to repay the advance payments in so far as the defendant has been overpaid, assuming that obligation proves to be valid, falls on the defendant.

42 The plea in law concerning the lack of capacity to be sued must, therefore, be dismissed.

Limitation

Preliminary remarks

43 As regards the German law on limitation, the provisions of the BGB relating to limitation are applicable in the present case even though the contracts at issue are

treated as 'contracts governed by public law' within the meaning of Article 238 EC. In fact, the Bundesverwaltungsverfahrensgesetz (Federal Law on Administrative Procedure; 'BVwVfG') of 25 May 1976 (BGBl. 1976 I, p. 1253, and 2003 I, p. 102), which governs, inter alia, contracts governed by public law but is silent on limitation issues, provides in Paragraph 62 that the provisions of the BGB are additionally applicable by analogy.

44 In that respect, it is common ground that, before the reform of the German law of obligations, which took effect in 2002, the provisions concerning limitation in Paragraphs 195 and 196 of the BGB laid down a general limitation period of 30 years and a limitation period of two or four years in respect of a series of particular claims by specific economic operators.

45 Since the reform of the German law of obligations, Paragraph 195 of the BGB, as amended, prescribes a general limitation period of three years.

46 In the context of the reform of the law of obligations, Article 229(6)(4) of the Einführungsgesetz zum Bürgerlichen Gesetzbuch (Introductory Law of the Civil Code; 'EGBGB') introduced a transitional scheme under which, if the limitation period prescribed in the new version of the BGB applicable since 1 January 2002 is shorter than that prescribed in the former version of the BGB applicable until that date, the shorter limitation period applies and begins to run on 1 January 2002.

Arguments of the parties

47 According to the Commission, its right to repayment is not time-barred in the present case. Under Paragraph 195 of the former version of the BGB, that right

would originally have been subject to a limitation period of 30 years. By virtue of the combined provisions of Paragraph 195 of the BGB, as amended, and Article 229(6)(4) of the EGBGB, the limitation period in respect of that right is now three years. That limitation period began to run on 1 January 2002 and was interrupted before its expiry on 31 December 2004 by the lodging of the present action.

48 In so far as the defendant relies on Paragraph 196 of the former version of the BGB, the Commission submits that the list set out in that provision is exhaustive and, consequently, the short limitation period does not apply to any rights which are not expressly referred to there. The fundamental thinking behind that provision — to make day-to-day transactions which rarely result in proof of payment subject to a short limitation period — does not apply by analogy to the Commission's financing of the projects at issue.

49 The defendant contends that the Commission's claim has lapsed, as the limitation period in the present case expired before the action was brought. It states that cultural initiatives, such as those launched through the two projects in dispute, are largely dependent on the grant of subsidies. Yet there is a particular need for legal certainty in that area, because demands for repayment mean significant financial pressure for beneficiaries. It is therefore appropriate to apply by analogy the provisions relating to the shortened limitation period in Paragraph 196 of the former version of the BGB.

50 The defendant explains that its interest is comparable with that of persons liable in respect of the claims mentioned in that provision — that is to say, claims which result from general trade — who need the legal certainty afforded by shortened limitation periods. The defendant's involvement with the cultural projects at issue was associated with significant economic interests and tangible financial repercussions. German law recognises the principle that Paragraph 196 of the BGB may be

applied by analogy; the statutory provisions on limitation do not include an exhaustive list because the legislature could not have provided detailed rules to cover all the minutiae associated with the grant of European subsidies.

Findings of the Court

51 In order to consider the possibility of applying, either directly or by analogy, Paragraph 196 of the former version of the BGB to the present case, it must be noted that that provision prescribes a shortened limitation period for a series of claims which are listed in detail.

52 Clearly that provision does not specify the right to repayment of sums paid as a Community subsidy, or the right to repayment of advances paid in that regard. It cannot, therefore, be applied directly in the present case.

53 An analogous application is accepted under German law if there is a lacuna in the legislation concerned, although the factual and legal situation to be assessed must be comparable with that which is actually governed by the law. An analogous application presupposes, in particular, that it is highly probable that if the legislature had had to supply that lacuna, taking the various interests into account, it would have done so by including the situation at issue in the legislation concerned (Decisions of the Federal Court of Justice in Civil Matters, BGHZ Vol. 105, p. 140, 143; Vol. 110, p. 183, 193; Vol. 120, p. 239, 252).

54 As is apparent from the reasons given for the BGB, Paragraph 196 of the former version of the BGB is based on the premiss that day-to-day transactions are generally

characterised by prompt payment and by the absence of evidence or by its rapid destruction, as the parties cannot reasonably be required to keep for 30 years the evidence relating to the conclusion and performance of that type of contract.

55 Having regard to the foregoing, it cannot be held in the present case that there is a lacuna in the relevant text.

56 Paragraph 196 of the former version of the BGB prescribes a shortened limitation period only in respect of the repayment of advances paid in the context of a contract with a dependent employee, with a workman or with a lawyer. As a commercial company, the defendant cannot be deemed to be on the same footing as those well-defined categories of persons. Nor, as a commercial company, can it be regarded as needing the particular protection afforded by shortened limitation periods.

57 Furthermore, the Community financing of the cultural projects at issue cannot be regarded as a day-to-day transaction. Those projects, which have considerable financial significance, are underpinned by complex agreements with extensive annexes, which provide for technical and financial audits and which require the defendant to supply detailed proof of its costs in order to secure their reimbursement.

58 Consequently, the plea in law relating to the expiry of the limitation period in respect of the Commission's claim must also be dismissed.

Forfeiture

Arguments of the parties

59 The Commission claims that, contrary to the defendant's assertions, it has not forfeited the right to its claim. The Commission's general attitude was not such that the defendant was entitled to expect the Commission not to assert its claim. Nor was the defendant entitled to the protection of legitimate expectations, as the Commission explained in the technical reports referred to above that the projects at issue did not meet the quality requirements. Consequently, the defendant should have expected to have to reimburse the sums in question.

60 The defendant considers that it was legitimately entitled to believe that the Commission would no longer assert its claim to repayment. Accordingly, the Commission has forfeited that right. Given the general conduct of the Commission, the defendant could take the view that the Commission had waived its entitlement because, for a period of almost seven years between the preparation of the audit reports and the end of December 2004, it did not take any action to claim repayment of the sums in question through legal proceedings. The defendant adds that it was legitimately entitled to believe in that waiver because, for seven years, the Commission referred to the projects in question on the European Union's website, thereby using their results for its own ends. It should also be borne in mind that the projects could not have been carried out without the financial support of the Commission and that the defendant's financial wellbeing depends on it being able to keep the financial aid. In that regard, the defendant emphasises the particular nature of the disputed subsidies as 'lost subsidies'. It concludes that any action seeking their repayment should be brought without delay, which did not occur in the present case.

61 According to the defendant, the reference to the audit reports is irrelevant, as the experts chosen and appointed by the Commission did not carry out independent and professionally competent expert reviews. In particular, there was no detailed consideration of the arguments which the defendant put forward while the projects were being carried out.

62 As far as the Donna project is concerned, the date of delivery of the assessors' report (26 June 1998) suggests that the Commission wanted to avoid consideration of the arguments put forward by the defendant. In fact, the defendant's representatives responded to the questions of the Commission's experts at the meeting held on that date. However, the Commission did not transmit the record of that meeting until shortly before its demand for repayment. The same applies so far as the DCC project is concerned: the Commission sent the technical review to the interested parties on 17 December 1997, on 23 December 1997 it terminated the contract.

63 In that context, the defendant states that it has not yet claimed the sums to which it is itself entitled by way of reimbursement of expenses (ECU 352 800 in respect of the DCC project and ECU 110 781.45 in respect of the Donna project) because it took the view that the Commission would not be asserting its right to reimbursement either. The two parties had, at the material time, tacitly agreed to let matters lie in order to achieve a mutually acceptable solution (*pactum de non petendo*). The defendant's conduct was thus proof of its expectation that the Commission would take no action in that regard.

Findings of the Court

64 The defendant's assertion that the two parties had, at the material time, tacitly agreed to let matters lie in order to achieve a mutually acceptable solution must be

dismissed from the outset. That is an assertion which is not substantiated by any documents before the Court. Although the assertion has been vigorously contested by the Commission, the defendant has not put forward any concrete evidence of a tacit mutual waiver.

65 It must be added, in any event, that, given the difference in the size of the sums in dispute — namely the Commission's claim for repayment of EUR 180 000 on the one hand, and the defendant's claim for reimbursement of expenses of EUR 650 000 on the other — the conclusion that there was such a *pactum de non petendo* does not seem credible. Moreover, even before the Court of First Instance, the defendant did not mention setting off its alleged claim against that of the Commission, but merely alleged that it 'reserve[d] the right to demand payment of the residual sums from the Commission'. In accordance with Paragraph 215 of the BGB, as amended, the possibility that the defendant's claim may have been time-barred would not have prevented it from asserting that claim, by way of set-off, in the context of the present dispute.

66 Next, it must be noted that, under German law, the principle of forfeiture of claims has been developed by case-law in the context of Paragraph 242 of the BGB, with contracting parties being required to perform their contract in accordance with the requirements of good faith and reciprocal expectations generally accepted in legal relations between private parties. According to the case-law, the person to whom a pecuniary obligation is owed forfeits his contractual right if he fails to assert it for a lengthy period and if, having regard to his general conduct, the person liable is entitled to believe that that right will not be invoked in future (BGHZ Vol. 91, p. 62, 71, Vol. 105, p. 290, 298, and, in particular, Vol. 146, p. 217, 220 and 221).

67 It is appropriate to consider first, therefore, the length of time for which the person to whom the obligation is owed has failed to exercise his right, the relevance of any period of inactivity being dependent on the circumstances of each individual case.

Second, account must be taken of the nature and size of the claim, which may arise under private or public law, and, lastly, of the strength of the expectations engendered by the conduct of the person to whom the obligation is owed, as well as the extent of the debtor's need for protection.

68 As regards the length of time for which the Commission took no action, it must be noted first of all in the present case that the beginning of that period of inactivity must be fixed as 1 November 1998. It was by the notice of recovery and the debit note, referred to in paragraph 24 above, that the Commission clearly and definitively put the defendant on formal notice of its demand for reimbursement of the sum of ECU 179 337 before 31 October 1998.

69 It follows that any evidence prior to that date — in particular the manner, criticised by the defendant, in which the technical and audit reports referred to in paragraphs 18 to 22 above were drawn up — has no bearing on the question whether the Commission has forfeited its right to repayment (claimed for 31 October 1998) simply because of its failure to assert that right in judicial proceedings before 24 December 2004.

70 Next, it must be noted that, in bringing the present action more than six years after the formal notice of 31 October 1998, the Commission complied with the specific limitation period of, initially, 30 years, then of three years (see paragraphs 44 to 46 above), which is applicable in the present case. A party to which a pecuniary obligation is owed cannot normally be precluded from availing itself fully of the limitation period, particularly where that period is relatively short by comparison with the 30-year period.

71 It must be added that the defendant was required, under Paragraphs 257(1)(4) and 257(4) of the Handelsgesetzbuch (German Commercial Code; 'HGB') and Paragraphs 147(1)(4) and 147(3) of the Abgabenordnung (German Tax Code; 'AO') to keep any accounting records relating to the implementation of the DCC and

Donna projects for a period of 10 years. Although the duration of the obligation to keep those accounting records was extended to 10 years only by Articles 2 and 4 of the Law of 19 December 1998 amending tax legislation (BGBl. 1998 I, p. 3816), that new 10-year period applied, by virtue of Articles 3 and 5 of that Law, where the time-limit previously applicable to the keeping of those records had not yet expired by the end of 1998. As the DCC and Donna projects were carried out in 1997, the accounting records relating to those projects should have been kept for six years under the earlier provisions of the HGB and of the AO, with the result that, at the end of 1998, the time-limit had not yet expired.

72 The defendant did not claim before the Court of First Instance that it was subject to specific time-limits for keeping records that were shorter and that had already expired before the present action was brought. On the other hand, it invoked the provisions of Paragraph 45 of the Sozialgesetzbuch X (Part X of the German Social Code) of 18 August 1980 (BGBl. 1980 I, p. 1469, and 2001 I, p. 130) and Paragraph 48 of the BVwVfG (see paragraph 43 above), under which the administrative authorities have, in principle, only one year to withdraw — against the interests of the beneficiary — an unlawful yet favourable administrative measure.

73 It is sufficient in that regard to note that that time-limit of one year relates to administrative procedures under which a public administration is able to act by means of a unilateral administrative measure. By contrast, the provisions invoked by the defendant are irrelevant to the present case, given that the Commission and the defendant preferred to form a contractual relationship under the terms of which the Commission was not empowered to adopt such measures.

74 It follows that the period of more than six years between the defendant being put on notice and the present action being brought does not, in the circumstances of the present case, appear sufficient to entail forfeiture of the Commission's claim.

75 As regards the nature and size of that claim, the defendant has not put forward any evidence to show that the Commission should be deprived of the right to repayment at issue by reason of its characteristics or pecuniary value.

76 As regards any expectation on the part of the defendant engendered by the Commission's conduct, it must be noted that, aside from the mere fact of the Commission's inactivity over several years, there is no evidence in the documents before the Court of a positive act by which the Commission demonstrated an intention to waive its right to repayment. On the contrary, as is apparent from the European Ombudsman's Decision of 27 April 2000 closing the complaint procedure which the defendant had initiated, the Commission expressly declared to the European Ombudsman that it was going to take legal action to enforce its right to repayment.

77 Furthermore, as a prudent and reasonable economic operator, the defendant was deemed to be aware that the reform of the German law of obligations took effect in 2002. Accordingly, it could have expected the Commission to avail itself fully of the new limitation period expiring on 31 December 2004 (see paragraphs 44 to 46 above). The fact that the defendant chose not to pursue its own claim against the Commission in court could not in any event give rise to a legitimate expectation on the part of the defendant that the Commission would not exercise its right to repayment. In any event, the defendant has not contended that the Commission, by its conduct, prevented the defendant from bringing an action for payment in due time.

78 Finally, as regards the defendant's need for protection, the defendant contends that — as a limited liability company — it belongs to the category of small and medium-sized undertakings, with the result that it would be appropriate, in relation to that point, to make a clear distinction between the defendant and Ploenzke, a public limited company, which operates worldwide.

79 It must be noted in that regard that the fact that a liable company is small is not, in itself, sufficient for a person to whom it owes a pecuniary obligation to be held to have been deprived of its claim, unless, by his conduct, the latter has contributed to the debtor company's poor financial situation. There is nothing in the documents before the Court from which it could be inferred that the Commission conducted itself in such a way during the period between 1 November 1998 and the date on which the present action was brought.

80 Furthermore, as a small undertaking, the defendant cannot reasonably rely on lack of experience in relation to the performance of the two projects financed by the Commission. Indeed, Mr B, the defendant's former chairman and an active member of its professional team in relation to the projects (see paragraph 12 above), signed the DCC and Donna contracts on behalf of Ploenzke in his capacity as divisional director of that company. Furthermore, Mr B is referred to as one of Ploenzke's representatives in the annex to the DCC contract, and as its sole representative in the annex to the Donna contract. Given the existence of those links between the two companies at the personal level, it does not appear that the defendant objectively needs any particular protection against the Commission's claim for repayment.

81 Taking into account the actual circumstances of the present case, the plea in law relating to forfeiture cannot, therefore, be accepted.

82 It follows from all the foregoing that the first set of pleas in law upon which IIC relies must be dismissed. Accordingly, it must be held that the debt claimed by the Commission is due. Nevertheless, it remains to be determined which costs may be recovered in relation to the two projects concerned.

Recoverable costs in the context of the DCC and Donna projects

Preliminary remarks

83 It should be recalled that the right asserted by the Commission to repayment of the monies advanced arises under point 4.3 of Annex II to each contract. That contractual provision gives rise to such a right if the total financial contribution owed by the Commission in respect of the projects — as evidenced, where necessary, by a financial audit — is less than the payments already made for the projects. In accordance with point 4.3, it is, therefore, appropriate to ascertain whether the amount of the advances received by the defendant exceeds the amount of allowable costs.

84 In that regard, it appears that the Commission did not accept any of the items of expenditure which the defendant submitted to it in connection with the DCC project, the defendant having claimed reimbursement of a total of DEM 1 960 943, comprising the costs of personnel (DEM 834 568), subcontracting (DEM 618 631), equipment (DEM 384 018), travel (DEM 32 682), consumables (DEM 35 017) and overheads (DEM 56 027).

85 In connection with the Donna project, the Commission approved the reimbursement of only DEM 46 300.18, whereas the defendant had claimed a total of DEM 646 809, comprising the costs of personnel (DEM 227 998.39), subcontracting (DEM 257 659), equipment (DEM 106 871), travel (DEM 22 659), consumables (DEM 9 236) and overheads (DEM 22 385).

86 In that context, the defendant complains that the Commission's conduct is contradictory, as its claim for repayment is at odds with the fact that the contracted

services have all been duly performed. In addition, the defendant maintains that the costs which it declared to the Commission for reimbursement are all allowable.

The contradictory nature of the Commission's conduct

— Arguments of the parties

87 In the Commission's submission, its conduct — demanding the repayment of advances paid to the defendant — is not contradictory. The projects at issue ended in failure, as the quality criteria were not met.

88 In any event, reimbursement of the costs incurred was not contingent on the success or failure of the projects. Indeed, irrespective of the success of the projects, the defendant failed to recognise that the Commission was entitled to repayment on account of the fact that the costs claimed were not allowable for the purposes of points 1 and 5 of Annex II to each contract. Thus the only crucial point is whether the defendant can prove that the expenditure was allowable, and that it has been unable to do.

89 The defendant asserts that it performed — properly and in full — the services contracted for under the two contracts. In fact, the Commission currently uses the results of the two projects in its publicity on the European Union's website. That site refers back to the Memorandum of Understanding on Europe's Cultural Heritage in which the Commission thanks Mr B for the work done which is said to have contributed to the achievement of the objectives of the Memorandum of

Understanding. Reference is made to the DCC project in order to illustrate Mr B's qualities. Furthermore, in a letter of 16 March 1998, the Commission thanked the defendant for its contribution to the Memorandum of Understanding and thus to the two projects. It is significant that the Commission has not removed the references to the two projects from the internet site, and thus that it has not distanced itself from the objectives attained in relation to the projects.

90 The defendant adds that the reports, the programmes and the digital and analogue material produced for the projects were delivered, and that the personnel costs referred to were actually incurred. At the time when the projects were being carried out the defendant was not informed of any of the complaints now raised in the application. The sole purpose of the contractual provisions cited by the Commission was to facilitate the proof and control of the allowable expenditure incurred in connection with the two projects.

— Findings of the Court

91 In essence, the defendant considers that the success of the DCC and Donna projects is enough in itself to preclude the right of repayment claimed by the Commission, as that right is based on purely formalistic considerations as to eligibility.

92 That contention cannot be accepted.

93 Under Article 274 EC, the Commission is bound by the obligation of sound financial management of Community resources. Under the arrangements for the grant of Community financial aid, the use of that aid is subject to rules which may result in the partial or total repayment of aid that has already been granted. Thus, the

beneficiary of financial assistance for which the application was approved by the Commission does not thereby acquire any definitive right to full payment of the assistance if he does not satisfy the conditions to which the support was subject (Case T-81/95 *Interhotel* v *Commission* [1997] ECR II-1265, paragraph 62, and Case T-126/97 *Sonasa* v *Commission* [1999] ECR II-2793, paragraph 59).

94 In that connection, the Court has held that, according to a fundamental principle of Community financial aid, the Community can subsidise only expenses which have actually been incurred. Accordingly, in order for the Commission to be able to carry out checks, the beneficiaries of such aid must show that the costs attributed to subsidised projects are genuine, as the provision by those beneficiaries of reliable information is indispensable for the successful operation of the system of control and evidence established in order to check whether the conditions for the grant of aid are satisfied. It is not sufficient, therefore, to show that a project has been carried out for the allocation of a specific subsidy to be justified. The beneficiary of the aid must, in addition, produce evidence that he has incurred the expenses declared in accordance with the conditions laid down for the grant of the aid concerned, with only those expenses which are properly justified being capable of being regarded as eligible. His obligation to satisfy the prescribed financial conditions is even one of his essential commitments and accordingly determines the allocation of Community financial aid (see, to that effect, Case C-240/03 P *Comunità montana della Valnerina* v *Commission* [2006] ECR I-731, paragraphs 69, 76, 78, 86 and 97).

95 The Court has held also that the obligation, laid down in Community subsidy contracts, to transmit to the Commission, in the form and within the time-limits prescribed, the statements of purportedly eligible costs is mandatory and that the sole purpose of the requirement to produce those cost statements in compliance with all required formalities is to enable the Commission to have to hand the information necessary for checking whether the Community funds were used in accordance with the terms of the contract (see, to that effect, judgment of 26 January 2006 in Case C-279/03 OP *Implants* v *Commission*, not published in the ECR, paragraphs 36 and 37).

96 Similarly, in the context of financing by the European Agricultural Guidance and Guarantee Fund and by the European Social Fund, the Court of Justice has emphasised the importance of the rule that only expenditure incurred in conformity with the Community rules is to be charged to the Community budget, so that the Commission may reduce, suspend or cancel Community financial assistance in the event of irregularities. According to the Court, even irregularities of a purely 'technical' nature, which do not have a specific financial impact, may be seriously prejudicial to the financial interests of the Union and to compliance with Community law and for that reason justify the application of financial corrections on the part of the Commission (Case C-199/03 *Ireland* v *Commission* [2005] ECR I-8027, paragraphs 26, 27, 29 and 31).

97 It follows from that line of authority that the Commission's insistence on the defendant's scrupulous compliance with its contractual obligations in relation to statements of expenditure and evidence of the expenses incurred cannot be described as formalistic. Rather, the onus is on the defendant to demonstrate that its obligations in respect of accounting evidence have in fact been fully met.

98 That conclusion is not affected by the rules on the burden of proof. According to those rules, it is indeed the Commission, as the applicant, which is required to establish that its right to repayment is well founded (Judgment of the Bundesgerichtshof (Federal Court of Justice, Germany) of 14 January 1991, II ZR 190/89, BGHZ Vol. 113, p. 222, 226), with the result that the onus is on the Commission to demonstrate conclusively and, if its claim is disputed, to prove that its payments exceeded the financial contribution owed.

99 However, the Commission owes contributions only in respect of the costs which have been incurred in accordance with the terms of the contract and which have, in particular, been properly documented. It is only if the defendant has submitted the relevant cost statements that the Commission must, if appropriate, prove that it owes no reimbursement of the costs incurred because the contractual service

provided was defective or the cost statements were inaccurate (see, to that effect, the Opinion of Advocate General Kokott in Case C-294/02 *Commission* v *AMI Semiconductor Belgium and Others* [2005] ECR I-2175, at I-2178, point 174 et seq.).

100 Furthermore, as regards the purported success of the projects in question, it must be added that the defendant admitted at the hearing that the documents before the Court do not include any computing document that demonstrates such success in relation to the digitisation of the cultural content chosen in the context of the DCC project or in relation to the setting up of a virtual forum in the context of the Donna project. The defendant even spoke at the hearing of a failure of the projects which was linked to the fact that, in 1997, there were not enough users with the benefit of rapid access to the internet and that it was necessary to use modems which were not at all suitable.

101 Although the defendant nevertheless asserts that the results of the two projects are used for publicity purposes on the European Union's website, the Commission demonstrated in its reply (paragraphs 21 to 29) that the information available on that site refers to the beginning of the projects' implementation (in 1997) and does not express a view on their possible outcome. Finally, the extracts from the Memorandum of Understanding on Europe's Cultural Heritage and, specifically, the thanks to which the defendant refers do not express a view on the success of the projects either.

102 Finally, it is true that, in relation to the Memorandum of Understanding on Europe's Cultural Heritage, the defendant's former chairman, Mr B, is mentioned by name in relation to a 'Working Group 4 — Priorities in Digital Content for Culture'. However, as the Commission has rightly observed, Mr B's personal contribution to the project entitled 'Multimedia for education and employment through an integrated cultural initiative' was mentioned only in the context of a general expression of thanks to all the DCC project participants. Nor can the final report of Working Group 4 be taken as attesting to an objective outcome of the DCC project, as that report was drawn up by Mr B himself. Similarly, the wording used by the

Commission in its letter of 16 March 1998, thanking the defendant for its efforts, is simply a courtesy and not indicative of any tangible or genuine success on the part of Working Group 4.

103 It follows from all the foregoing that the plea in law relating to the Commission's contradictory conduct must be dismissed.

Eligibility of the costs declared

104 As regards the categories of expenditure which could be incurred for the purposes of carrying out the DCC and Donna projects, namely direct costs (personnel, subcontracting, equipment, travel and consumables) and indirect costs (overheads), it must be recalled that point 1.2 of Annex II to each contract defines allowable costs as the actual costs which are necessary for each project, which can be substantiated and which are incurred during the lifetime of the projects.

105 It follows that it is for the defendant to adduce proof (see paragraph 99 above) that the costs declared to the Commission were actual expenses which were in fact necessary and which were incurred in order to carry out the projects while they were ongoing. In addition, when adducing that proof, the defendant had to adhere to the contractual requirements specific to each category of expense.

106 In that context, the defendant complains that the Commission's conduct was unfair in that it required detailed documents to be produced after a period of almost seven years, whereas those documents were either lost or could not be readily reconstituted, the defendant's former chairman, Mr B, having died in 1999. The

defendant claims to have supplied the Commission during the implementation of the two projects and immediately afterwards with all the requisite documents establishing the eligibility of all of the costs claimed. According to the defendant, the documents submitted — some of which are mentioned in the application and annexed to it — are sufficient evidence of actual, allowable expenditure.

107 However, that argument does not exempt the defendant from the obligations imposed in point 1.2 of Annex II to each contract. Furthermore, it is sufficient to note that the defendant was required, under the relevant provisions of German law, to keep for 10 years any accounting record relating to the implementation of the DCC and Donna projects (see paragraph 71 above).

108 It must be added that the crucial question as regards the eligibility of the costs declared by the defendant is whether the latter was able to provide proof of those costs in 1997 and 1998, that is to say, at the end of the two projects. As it is, the relevant supporting evidence was attached to the pleadings which the parties filed at the Court of First Instance. It appears, inter alia, in the annexes to the application. The defendant expressly referred to those annexes in its defence (paragraph 24) without accusing the Commission of having destroyed, or of deliberately failing to produce, the relevant documents which the defendant supplied to the Commission in good time, but which it maintains that it can no longer produce. The defendant's statement that those documents were only 'partially' annexed to the application is, in any event, too vague to relieve the defendant of its obligation to provide proof of the costs declared.

109 The eligibility of the various categories of expense must, therefore, be examined on the basis of the pleadings which the parties have exchanged, including the documents annexed to the application and to the defence.

— Personnel costs

110 In relation to the DCC project, the defendant declared DEM 834 568 in respect of the following: Mr C (Micro Computer DOS Systemhaus), Ms D, Messrs E, F, G (FORSA), Mr M (Leonardo) and Mr W (Innovative Software).

111 In relation to the Donna project, it declared DEM 227 998.39 in respect of Mr F, Mr E and Ms L.

112 As regards the costs declared in relation to the DCC project, the Commission claims that the individual items of expenditure could not be accepted because the individuals supposedly involved in carrying out the project were not employed by the defendant. The same is true of the Donna project. In any event, none of the documents submitted by the defendant satisfies the formal requirements laid down in point 1.3.1 of Annex II to each contract.

113 The defendant's response is that the refusal to recognise the personnel costs is contrary to the meaning and purpose of the agreed contracts. As regards the claim that it did not directly employ the personnel in question, point 1.3.1 of Annex II should be interpreted as being intended to preclude the reimbursement of expenditure only in relation to individuals who are wholly unconnected with the projects. Further, the defendant provided the Commission with time sheets which clearly show the date, the time worked, the area of activity and the project itself. While the Commission required time sheets to be drawn up at least once a month and to be signed by the technical manager, it is overlooking the purely formal nature of point 1.3.1 of Annex II.

114 It is sufficient, in that regard, to emphasise that it is common ground that the defendant has not satisfied the requirements of point 1.3.1 of Annex II to each contract. Under that provision, all personnel time charged must be recorded and certified, and time records have to be certified at least monthly by the technical manager or an authorised senior employee of the Contractor.

115 However, the time sheets submitted by the defendant (Annexes 9 and 10 to the defence) are unsigned and it is not known by whom they were produced. They amount to a bundle of electronically printed copies. In the absence of any additional explanation or evidence, their connection with the services actually provided has not been established. None of the defendant's representatives has assumed responsibility for the veracity of the content of those time records by signing them in due time.

116 Contrary to the defendant's assertions, the requirement laid down in point 1.3.1 of Annex II does not conflict with the meaning or purpose of the contracts. That provision serves to ensure that reliable evidence of the time actually spent by the defendant's employees on the projects in question, signed by its qualified representatives, is submitted properly and at regular intervals (at least once a month). Since the Commission was not present during the agreed works, it has no other means of checking the accuracy of the personnel costs claimed.

117 It follows that the defendant is not entitled to the reimbursement of the personnel costs claimed, and there is no need to rule on whether — or, as the case may be, by what procedure — independent contributors should be regarded, under German law, as belonging to the staff of their employer.

— Subcontracting costs

118 In relation to the DCC project, the defendant declared DEM 618 631, divided between the following: McDOS, Christian Liepe Photodesign and costs of Ploenzke which were attributed to IIC.

119 In relation to the Donna project, it declared DEM 257 659, divided between the following: Fink & Partner, Ms DD, Ms BD and Casper Casting and Styling Agency.

120 As regards the DCC project, the Commission states that it did not give the prior approval for subcontracting required under Article 5.1 of the contract. In any event, the defendant has not satisfied the requirement to make provision in the subcontracts for its obligations towards the Commission, in particular the obligation to produce time sheets.

121 As to the Donna project, the Commission points out that it accepted only the costs relating to Ms DD and Ms BD in the amount of DEM 46 300.18 as being allowable. By contrast, it refused to reimburse the other subcontracting costs in the absence of prior written approval.

122 According to the defendant, it is common ground that the undertakings on whose behalf those costs were submitted were involved in the DCC project. As a result, the Commission's prior agreement was not necessary, since Article 5 of the DCC contract is simply an administrative measure. Furthermore, the Commission had

already approved the subcontractors, having received a list of them to that end. The defendant was not obliged to supply detailed statements. Concerning Ploenzke's costs, they were attributed to IIC as the result of an internal agreement with Ploenzke.

123 As to the Donna project, the defendant considers all the subcontracting costs to be allowable. The signing of the Memorandum of Agreement by Fink & Partner satisfies Article 5.1 of the Donna contract in terms of its meaning and purpose. As regards the costs of Casper Casting and Styling Agency, the Commission's written approval was not necessary.

124 In that regard, it must be noted that, under the terms of Article 5.1 of the two contracts, the defendant was authorised to enter into subcontracts subject to the prior written approval of the Commission on the basis that the defendant was required to impose on any subcontractor the same obligations as applied to the defendant itself under the contracts concluded with the Commission.

125 The defendant's contention that that provision is merely an administrative measure, the infringement of which cannot affect the eligibility of the costs at issue, must therefore be dismissed.

126 Indeed, the contractual requirement relating to the Commission's prior approval of the involvement of subcontractors is justified and necessary, given that the performance of the agreed obligations is the responsibility, in principle, solely of the undertaking specifically and individually chosen by the Commission to be a contracting party. Consequently, the Commission must be able to check subcontractors and, if necessary, prevent the involvement of a particular subcontractor. The defendant's breach of the requirement of prior written approval is sufficient, therefore, for the Commission to refuse to reimburse the associated costs.

127 Furthermore, and in any event, it is common ground that the defendant did not produce time sheets for its subcontractors in the form prescribed in point 1.3.1 of Annex II to the contracts. Yet it was required under Article 5.1 of the contracts to impose on any subcontractor the same obligations as applied to the defendant itself. It follows that each subcontractor involved by the defendant in the implementation of the projects was required to comply with point 1.3.1 of Annex II by declaring the total hours worked by the personnel involved and by having the time sheets certified at least monthly by an authorised senior employee.

128 The contractual obligation to impose on each subcontractor the same obligations as applied to the defendant was justified and necessary in order to ensure complete control of the costs claimed to have been incurred and to rule out the possibility that, simply by involving subcontractors, the defendant could secure the reimbursement of costs which would not otherwise have been eligible.

129 None of the time sheets submitted by the defendant in the annex to its defence satisfies that requirement. For the reasons set out in paragraphs 115 and 116 above, it is therefore not entitled to the reimbursement of the subcontracting costs in question.

130 As regards the costs attributed to the defendant by Ploenzke by virtue of an alleged internal agreement between the two companies, it must be added that Ploenzke, unlike the defendant, spontaneously repaid in full the advances claimed back by the Commission (see paragraph 23 above). As a result, the Commission cannot be obliged to reimburse, through the defendant, costs in respect of which Ploenzke, by repaying the advances received, has waived its right to reimbursement.

131 It follows that the defendant cannot seek the reimbursement of the subcontracting costs claimed — with the exception of those which the Commission has already recognised, incurred in respect of Ms BD and Ms DD in relation to the Donna project — because proper proof of those costs has not been produced.

— Travel expenses

132 In relation to the DCC project, the defendant declared DEM 32 682 in respect of the following: Ms D, Mr E, Mr F, Ms L, Mr M (Leonardo) and Mr C (McDOS).

133 In relation to the Donna project, it declared DEM 22 659 in respect of the following: Ms DD, Mr E, Mr F, Ms L and Mr M.

134 According to the Commission, the defendant is not entitled to the reimbursement of travel expenses. Contrary to the combined provisions of points 1.3.4 and 1.2 of Annex II to the contracts, the defendant has failed to establish the actual link between those expenses and the two projects.

135 As regards the DCC project, the Commission claims that, with the exception of Ms L, all the companies and individuals referred to were subcontractors without prior approval. Ms L's expenses are not allowable because the defendant did not incur personnel costs in respect of that individual.

136 As for the Donna project, the Commission maintains that, regarding the costs incurred in respect of Mr M, the defendant did not claim personnel costs. Mr F and Mr E are not, in their capacity as subcontractors, covered by the Commission's prior approval. The defendant did not supply time sheets in respect of Ms L. Ms DD's costs could not be accepted because the documents submitted were inadequate for the purposes of establishing the need for her to have travelled.

137 Reiterating the arguments put forward in relation to the subcontracting issue, the defendant emphasises that the fact that it did not declare personnel costs does not preclude a claim for the travel expenses of the person concerned, since those costs were actually incurred. As regards Mr F and Mr E, no approval was necessary. As for Ms L's costs, the importance of her work was established through the time sheets supplied to the Commission. With regard to Ms DD's costs, the defendant refers back to the additional agreements concerning the reimbursement of its travel expenses.

138 In that regard, it must be held that, in terms of their eligibility, travel expenses are costs which typically are incidental in the sense that the only travel that can be regarded as necessary for the purposes of the projects concerned is travel on the part of individuals who actually provide services recognised as necessary in the context of those projects. In other words, the reimbursement of travel expenses is justified only if the person in respect of whom those costs are claimed has made a useful contribution — that is to say, one of a kind that is recognised by the Commission — to the implementation of the project concerned.

139 However, as explained above, the Commission was authorised to refuse to reimburse all the expenses declared by the defendant in respect of personnel and subcontracting costs except for those relating to Ms BD and Ms DD for the Donna project. Accordingly, as the services said to have been supplied by the individuals in question did not have any quantifiable value as far as the Commission was

concerned, any travel undertaken by them in the provision of those services cannot be regarded as necessary for the purposes of the DCC and Donna projects. The Commission therefore rightly refers, in that regard, to point 1.2 of Annex II to each contract, under which only those actual costs which are necessary for each project, which can be substantiated and which are incurred during the lifetime of the projects are allowable.

140 It must be added that the defendant was obliged under point 5 of Annex II to the two contracts to maintain proper books of account and appropriate documentation to support and justify the costs declared. Yet none of the copies at Annexes A7 to A23 to the application or at Annexes B9 to B14 to the defence can be described as valid and appropriate proof that, in terms of the purpose and necessity of each individual journey, the travel expenses declared were actually incurred for the purposes of the DCC and Donna projects. Contrary to the requirements under point 1.2 and point 5 of Annex II to the two contracts, the defendant has not, therefore, succeeded in establishing the necessary link between the travel expenses purportedly incurred in respect of the individuals in question and their involvement in the projects.

141 As regards Ms BD and Ms DD specifically, it must be recalled that the Commission accepted that the subcontracting costs incurred in respect of those individuals in relation to the Donna project were allowable. However, that does not automatically mean acceptance of the travel expenses declared.

142 The documents before the Court do not include any travel invoice in respect of Ms BD. As for Ms DD, the invoices at Annex A23 to the application, which Ms DD sent to the defendant, contain such general and vague information that they cannot be regarded as sufficient evidence for the purposes of points 1.2 and 5 of Annex II to each contract. In particular, it is not possible to use them to check the relevance of Ms DD's travel for the Donna project, or of her own work in relation to that project.

143 It follows that the defendant is not entitled to the reimbursement of the travel expenses claimed.

— Equipment costs

144 In relation to the DCC project, the defendant declared DEM 384 018 in respect of the costs incurred by Digivision, and Ploenzke's costs which were attributed to IIC. In relation to the Donna project, it declared costs of DEM 106 871 based on a Fink & Partner invoice.

145 The Commission is opposed to the reimbursement of the costs declared in relation to the DCC project, arguing that the costs declared in respect of Digivision are ineligible. Contrary to the requirements under point 5 of Annex II to the contract, the correspondence between the defendant and Digivision does not enable the need for those costs to be assessed, nor is it possible to check whether the costs of renting equipment were higher than those of purchasing it. As for Ploenzke's costs which were attributed to the defendant, they cannot be reimbursed without an agreement between the two companies on that point.

146 As regards the Donna project, the Commission bases its refusal of reimbursement on the fact that the defendant did not produce the rental agreement concluded with Fink & Partner. Furthermore, the documents submitted did not specify what was rented and did not satisfy the contractual requirements as to proof.

147 According to the defendant, the documents supplied to the Commission in support of the costs claimed are capable, as a whole, of providing sufficient proof that those costs were incurred; the contracts do not require detailed proof of costs incurred. In

any event, the two projects could not have been carried out if no equipment had been rented and the Commission has no valid reason to regard the invoices as excessive, particularly as it has not explained the actual reasons for its view that the costs of renting equipment could be higher than those of purchasing it. Furthermore, the Commission itself is often involved in cultural initiatives and should know, therefore, that the costs incurred are reasonable. The precise nature of the technical material that is the subject-matter of the rental agreement is, therefore, of little significance. Finally, the invoice of the subcontracted company, Fink & Partner, is sufficient proof.

148 In that regard, reference must be made to the rules laid down in points 1.2, 1.3.2 and 5 of Annex II to each contract. According to those provisions, first, the allowable costs for leased equipment are limited to those which would be required for its purchase. Second, the defendant is obliged to keep proper books of account and appropriate documentation to support and justify the costs reported. Finally, only those actual costs which are necessary for each project, which can be substantiated and which are incurred during the lifetime of the projects are allowable.

149 That requirement to supply evidence that is as detailed as possible is intended to enable the Commission to control the amounts paid in the context of the two projects and to check the genuineness and necessity of the equipment costs purportedly incurred. Accordingly, the defendant was required to supply documents showing precisely the type of equipment leased and at what cost.

150 However, the defendant clearly failed to satisfy that obligation by its statements that the documents submitted to the Commission were capable 'as a whole' of proving that the equipment costs were incurred, and that the Commission '[had] no ... reason' to suggest that the amounts in the invoices submitted were excessive because it had not explained the actual reasons for its view that the costs of renting

equipment could be higher than those of purchasing it. Nor was it sufficient for the defendant simply to claim that the Commission had sufficient experience of cultural projects and should, therefore, know that the costs incurred were reasonable, the precise nature of the technical material leased accordingly being of little significance.

151 As regards the costs of Ploenzke which were attributed to IIC, the documents before the Court do not include any that would enable the genuineness and necessity of those costs to be checked. Furthermore, the fact that Ploenzke repaid in full the advances which the Commission had claimed back rules out any obligation on the part of the Commission to reimburse, through the defendant, costs allegedly incurred by Ploenzke and attributable to the defendant under an internal agreement (see paragraph 130 above).

152 As regards the equipment costs referred to in connection with Digivision, the information shown in the related invoices is so vague that it is not possible to establish with certainty that the equipment costs declared were necessary for the purposes of the project.

153 In particular, the invoice at Annex A16 to the application is not a genuine and conclusive invoice. It is a pro forma invoice, which merely serves to advise the customer of the details of the sale or to enable it to complete certain formalities prior to delivery. Furthermore, the pro forma invoice is unsigned. It merely describes the equipment leased in general terms without listing or detailing individually the apparatus covered, although there is a huge range, in terms of functionality, quality and price, available on the market. Consequently, it is objectively impossible to assess the necessity of the costs which the defendant claims to have incurred in respect of Digivision.

154 That lack of detail is not offset by Digivision's invoice at Annex B11 to the defence. Although that invoice does include a list of the apparatus and software purportedly

supplied, it is unsigned and, unlike the pro forma invoice, has not been submitted on Digivision's headed notepaper. In the absence of any additional explanation or evidence, that document has no evidential value as to whether the costs in question are genuine or necessary.

155 As for the equipment costs referred to in connection with Fink & Partner, they relate to the rental of an HIS studio system, including hardware platform, network and software systems (picture archive, picture flow management and ISDN access).

156 As is apparent from the documents before the Court, the first documentary evidence of those costs is in the draft audit report (Annex A6 to the application), which refers in paragraph 3.2 to the invoices regarded as insufficient to justify the necessity of the equipment rented — because the technical components of the equipment said to have been rented are not listed — and in which the defendant is alleged to have failed to produce the associated rental contract. In its comments on the draft report (Annex A9 to the application), the defendant confines itself, in paragraph 3.1, to challenging the refusal to accept the invoices concerned, without, however, producing copies of them or indeed of the rental contract. The refusal to treat the equipment costs relating to Fink & Partner as allowable is maintained in paragraph 3.2 of the final audit report (Annex A12 to the application).

157 The defendant produced the documents concerning the rental of the equipment in question only at Annex B14 to the defence. However, the documents in question are three 'invoices' which are unsigned and which have not been produced on Fink & Partner's headed notepaper, unlike the company's original invoices at Annexes A20 to A22 to the application. In the absence of any additional explanation or evidence, those documents have no evidential value as to whether the costs concerned are genuine or necessary.

158 In the light of the foregoing, the defendant is not entitled to the reimbursement of the equipment costs claimed.

— Consumables

159 In relation to the DCC and Donna projects, the defendant declared sums of DEM 35 017 and DEM 9 312.53 respectively in respect of consumables.

160 According to the Commission, the costs declared in relation to the DCC project have been neither explained nor documented by the defendant. Consequently, they could not be accepted. As regards the Donna project, the Commission claims that the documents submitted, namely three Fink & Partner invoices, are insufficient to permit an assessment of the necessity of the costs purportedly incurred. Further, the declared costs were incurred in connection with the Fink & Partner subcontract. However, that contract was not authorised by the Commission.

161 According to the defendant, the Commission's argument in relation to the DCC project is too generalised for the defendant to be able to comment on that issue. The Commission ought to know that the implementation of that project involved expenses in relation to consumables, which were indisputably necessary. As for the Donna project, the evidence produced is sufficient.

162 It must be noted in that regard that the declared costs of consumables in relation to the DCC project manifestly cannot be regarded as allowable. By confining itself to putting forward an entirely evasive line of argument, the defendant essentially acknowledges the total lack of documentary evidence in support of those costs. The Commission was not, therefore, in a position to check whether they were necessary in accordance with point 1.2 of Annex II to the DCC contract.

163 As regards the products claimed as consumables in relation to the Donna project, the defendant relies on three invoices dated 1 June 1997, 17 November 1997 and 1 December 1997 as proof of the costs incurred in respect of Fink & Partner (Annexes A20 to A22 to the application). It is apparent that that company invoiced the defendant for services described as 'graphic presentation of 3D objects ... including materials used'. As the Commission rightly noted, the defendant did not specify the presentation or materials used. As a result, it is not possible to establish the precise subject-matter of those invoices. Furthermore, the defendant made no distinction, in terms of figures, between the consumables and the graphic presentation.

164 It follows that the three invoices in question are not sufficiently detailed to be regarded as evidence duly establishing, in accordance with point 1.2 of Annex II to the Donna contract, the necessity of the costs declared in respect of consumables or their actual link with the Donna project.

165 It must be added that the defendant is not entitled to the reimbursement of the personnel, subcontracting or equipment costs declared in respect of Fink & Partner (see, in particular, paragraphs 155 to 157 above). For that further reason, it cannot be accepted that the defendant should be reimbursed the costs of consumables. Such costs are purely incidental in the sense that they can reasonably be incurred only in conjunction with a principal service, and their necessity, and thus their eligibility, is contingent on that of the service. In the present case, however, the Commission was entitled not to accept that any principal service had been provided in connection with Fink & Partner.

166 It follows that the refusal to reimburse the costs of consumables purportedly incurred by the defendant is justified.

— Overheads

167 In relation to the DCC and Donna projects, the defendant declared sums of DEM 56 027 and DEM 22 385 respectively in respect of overheads.

168 According to the Commission, the defendant has neither detailed those costs nor produced proof of them. It was therefore not possible to check in accordance with point 1.3.1 of Annex II to each contract that they had been incurred or that they were necessary. In any event, under point 1.4 of Annex II, the defendant could apply for the reimbursement of overheads (which are actually indirect costs) of only up to 20% of the other costs approved for reimbursement.

169 The defendant regards its evidence as sufficient, as overheads are ongoing by nature and only limited proof can therefore be produced. Thus, it is virtually impossible to produce evidence of the link between those costs and the projects.

170 It must be noted in that regard that the 'overheads' (according to the terminology of the DCC and Donna contracts), or indirect costs, must expressly satisfy the requirements under point 1.2 of Annex II to each contract. Consequently, only the costs incurred in covering actual overheads which are necessary in order for each project to be carried out can be regarded as allowable. An undertaking's overheads reflect its normal running costs, which the undertaking has to bear in any case as a

result of its normal activity, irrespective of the implementation of an individual project (see, to that effect, Case T-340/00 *Comunità montana della Valnerina* v *Commission* [2003] ECR II-811, paragraph 106), so that only overheads which are genuinely linked to the implementation of the project concerned are eligible for Community financing in respect of the project (see, to that effect, *Comunità montana della Valnerina* v *Commission*, cited in paragraph 94 above, paragraph 87).

171 In the present case, it has been explained above that the Commission was authorised to refuse to reimburse all the direct costs which the defendant had declared in relation to the DCC project. As a result, it cannot be accepted that the defendant can charge a standard part of its indirect costs (administration, infrastructure, etc.) to that project, as such costs are incidental to the direct costs. Further, the sum of DEM 56 027 claimed by the defendant is not based on any objective evidence that would enable that sum to be checked as to whether it is justified.

172 As regards the Donna project, the defendant has not submitted any evidence that would enable the sum of DEM 22 385 claimed as overheads to be checked as to whether it is justified. Further, it must be recalled that, although the Commission approved the reimbursement of subcontracting costs of DEM 46 300.18 in respect of Ms DD and Ms BD, it was not obliged to acknowledge any other expenditure as being allowable (see paragraphs 121 and 131 above). Moreover, the overheads claimed (DEM 22 385) are out of all proportion to the direct costs approved (DEM 46 300.18).

173 It must be pointed out that, in point 1.4 of Annex II to the two contracts, a distinction is drawn between contractors who calculate 'full costs' and those using 'additional costs'. As is apparent from the second paragraph of point 1.2 of Annex II to the two contracts, the defendant belongs to the first category of contractor (those using 'full costs'), as the second category covers only higher education establishments and research centres. In accordance with point 1.4, the defendant was required to establish that its overheads had been calculated in accordance with its

normal accounting conventions and principles, the latter considered by the Commission to be reasonable, on the basis that declared overheads would exclude items readily capable of being charged directly and costs recovered from other parties. However, in the absence of any detail as to the overheads declared by the defendant in relation to the Donna project, the Commission was not in a position to check whether those costs satisfied the requirements under point 1.4.

174 It follows that the defendant is not entitled to reimbursement of the overheads claimed.

— Conclusion

175 It follows from all the foregoing that the pleas in law upon which the defendant relies in order to establish that the costs declared in respect of the DCC and Donna projects are allowable must be dismissed in their entirety.

Principal amount and default interest claimed by the Commission

Principal debt

176 It must be recalled that the Commission's claim is for repayment of advances in the amount of EUR 181 263.61. According to the Commission, that amount is the result of converting ECU 179 337 to DEM 354 520.82 and of that sum into euro. The

defendant disputes the amount of EUR 181 263.61 and argues that in 1998 it was asked to pay only ECU 179 337.

177 Admittedly, the sum of the advances paid to the defendant is DEM 400 821, of which the Commission seeks repayment of DEM 354 520.82. It is also the case that the sum of EUR 181 263.61 claimed in the present action corresponds precisely to that figure of DEM 354 520.82, taking account of the applicable exchange rate, according to which one euro is equivalent to DEM 1.95583.

178 However, point 4 of Annex II to each contract provides that all payments made by the Commission are to be in ecus and that any reimbursement by the contractors to the Commission is also to be made in ecus. Furthermore, the notice of recovery and the debit note which the Commission sent to the defendant in 1998 (see paragraph 24 above) expressly refer to ECU 179 337, in accordance with the rate of exchange between the German mark and the ecu applicable at that time.

179 However, under Article 2(1) of 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), any reference to the ecu is to be replaced by a reference to the euro at a rate of one euro to one ecu (see, to that effect, judgment of 12 May 2005 in Case C-315/03 *Commission* v *Huhtamaki Dourdan*, not published in the ECR, paragraph 5).

180 It follows that the Commission's claim for repayment is well founded only to the extent of the sum of EUR 179 337. Consequently, the claim as to the remainder must be dismissed.

Default interest

181 According to the Commission, the defendant is obliged to pay default interest from the date on which it was put on formal notice of the debt and the Commission had asked the defendant to repay before 31 October 1998 the sums received by way of advance payments. Under the first sentence of Paragraph 284(1) of the former version of the BGB, the defendant was thus put on formal notice on 1 November 1998. Default interest at 4% per annum should, therefore, be added to the amount of the principal debt in accordance with Paragraph 288(1) of the former version of the BGB.

182 The defendant merely disputes the existence of a principal debt.

183 It must be noted in that regard that the DCC and Donna contracts are silent as to the date from and the period for which default interest should be payable. Accordingly, it is appropriate to apply those provisions of German law which relate to the debtor being put on formal notice.

184 Under Article 229(5) of the EGBGB, concerning obligations which arose before 1 January 2002, the BGB remains applicable in the version in force prior to that date, in the absence of explicit exceptions. As regards interest arising from the debtor being put on formal notice, Article 229(1) of the EGBGB provides that Paragraph 288 of the BGB will apply in the version in force prior to 1 May 2000 to all debts falling due before that date.

185 In the present case, the DCC and Donna contracts were concluded in 1996. Consequently, the former version of the BGB remains applicable. The provision

relating to the formal notice to the debtor, namely the first sentence of Paragraph 284(1) of the former version of the BGB, states that if a debtor does not perform its obligation following a demand for payment ('Mahnung') sent after the due date, that demand constitutes formal notice of default. However, under point 4.3 of Annex II to each contract, the reimbursement of advances to the Commission is due 'immediately' after the demand for payment. The demand which the Commission addressed to the defendant and which sought payment of the amounts in question before 31 October 1998 has, therefore, put the defendant on notice with effect from 1 November 1998.

186 Paragraph 288 of the former version of the BGB prescribes default interest at an annual rate of 4% as from the date of formal notice. Default interest at 4% will therefore be added to the amount of the principal debt of EUR 179 337 as from 1 November 1998 until that debt is finally paid.

Application for suspension of enforcement

187 In the alternative, the defendant has submitted an application for suspension of enforcement of the forthcoming judgment, enabling it to avoid enforcement action through the provision of security, which could take the form of a bank guarantee.

188 It must be noted in that regard that, under the arbitration clause in Article 12.2 of each contract, the Court of First Instance has jurisdiction to determine disputes between the parties only in relation to 'the validity, application and interpretation' of the contracts in question, as those contracts are governed by German law under Article 12.1.

189 It follows that, in the context of the present dispute, the Court of First Instance does not have jurisdiction to rule on the procedures available under German law for the enforcement of its judgment.

190 It must be added that, under Article 244 EC, the judgments of the Community Courts are to be enforceable under the conditions laid down in Article 256 EC and that, under the fourth paragraph of Article 256 EC, enforcement may be suspended only by a decision of the Community Courts. Under the first paragraph of Article 110 of the Rules of Procedure of the Court of First Instance, the provisions of Articles 104 to 110 of those Rules of Procedure are to apply to applications to suspend the enforcement of a decision of the Court of First Instance submitted pursuant to Articles 244 EC and 256 EC.

191 However, it is clear from Article 104(1) and (3) of the Rules of Procedure that such an application must be made by a separate document after the adoption of the decision concerned. As those conditions have not been fulfilled in the present case, the defendant's application for suspension of enforcement of this judgment must, therefore, be dismissed.

Costs

192 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the defendant has been unsuccessful and the Commission has applied for costs, the defendant must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. **Orders IIC Informations-Industrie Consulting GmbH to pay the Commission of the European Communities the principal sum due of EUR 179 337, together with default interest at 4% per annum as from 1 November 1998 until full payment of the sums due;**

2. **Dismisses the action as to the remainder;**

3. **Dismisses the application by IIC Informations-Industrie Consulting GmbH for suspension of enforcement of this judgment;**

4. Orders IIC Informations-Industrie Consulting GmbH to pay the costs.

Pirrung Forwood Papasavvas

Delivered in open court in Luxembourg on 22 May 2007.

E. Coulon J. Pirrung

Registrar President

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