JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)

14 December 2000 *

In Case T-105/99,

Council of European Municipalities and Regions (CEMR), having its registered office in Paris, represented by F. Herbert and F. Renard, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of K. Manhaeve, 56-58 Rue Charles Martel,

applicant,

v

Commission of the European Communities, represented by P. Oliver, Legal Adviser, K. Simonsson, of its Legal Service, and W. Neirinck, a national civil servant on secondment to the Commission, acting as Agents, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: French.

APPLICATION for annulment of the decision of the Commission, contained in the letter of 15 February 1999 to the applicant, effecting set-off between their mutual claims,

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

composed of: V. Tiili, President, R.M. Moura Ramos and P. Mengozzi, Judges,

Registrar: G. Herzig, Administrator,

having regard to the written procedure and further to the hearing on 11 May 2000

gives the following

Judgment

Facts

1 On 11 February 1994 and 25 April 1995, the Council of European Municipalities and Regions ('the CEMR'), an association constituted under French law which brings together national associations of local and regional authorities in

Europe, the association Agence pour les Réseaux Transméditerranéens (ARTM) and Cités Unies Développement (CUD), an association constituted under French law, concluded three technical assistance contracts with the Commission.

2 Those contracts concerned two regional cooperation programmes which were adopted on the basis of Council Regulation (EEC) No 1763/92 of 29 June 1992 concerning financial cooperation in respect of all Mediterranean non-member countries (OJ 1992 L 181, p. 5) and were called MED URBS and MED URBS MIGRATION ('the MED URBS contracts'). Under Article 8 of those contracts, they were governed by Belgian law, and a clause conferring jurisdiction on the civil courts of Brussels was also included in those contracts in case of failure to reach an out-of-court settlement in a dispute arising between the parties.

3 Following an audit of the CEMR's accounts, the Commission concluded that the sum of ECU 195 991 was to be recovered from that association in connection with the MED URBS contracts. Accordingly, on 30 January 1997, it drew up debit note No 97002489N in that sum and, by letter of 7 January 1997, requested repayment from the CEMR.

4 In that letter, which was not received by the applicant until 23 February 1997, the Commission relied, in general terms, on failure to comply with contractual clauses in order to justify the request for reimbursement.

5 At the request of the CEMR, in a letter of 25 July 1997, the Commission stated that the budgets relating to each contract had not been respected, since expenditure beyond the budget limits had been incurred without the Commission's prior written authorisation.

6 In various letters and at several meetings, the applicant challenged the Commission's position on its merits and refused to pay the sum claimed.

7 By registered letter of 19 November 1998, the Commission requested the CEMR to pay the sum in question within 15 days of receipt of that letter.

8 By letter of 3 December 1998, the Commission gave the CEMR notice to reimburse the sum of ECU 195 991 and raised the possibility of recovering that sum 'by set-off against the sums [payable to the CEMR] by way of any Community contribution, or even by legal action, in respect of both the principal sum and interest'.

9 In response to that letter, in its letter of 18 December 1998, the CEMR denied the real and undisputed nature of its alleged debt and raised an objection to set-off.

10 By letter of 15 February 1999, the Commission informed the CEMR that 'the claim in question [was] indeed real and undisputed, of an ascertainable amount and immediately payable, enabling set-off'. It also informed the applicant of its decision ('the contested decision') to 'recover the amount of EUR 195 991 by set-off against the sums... payable by way of Community contributions' relating to certain activities ('the disputed activities'). It added further: '[T]he ... payments ... are to be regarded as received by the CEMR with the obligations arising from

them, whether the payment constitutes an advance, an interim payment, or even a final payment.'

11 The CEMR brought proceedings before the Tribunal de Première Instance (Court of First Instance), Brussels, in accordance with the clause conferring jurisdiction contained in the MED URBS contracts, in order to challenge the validity of the alleged debt owed to the Commission in connection with those contracts and to establish, for the same reason, that the conditions required under Belgian law for the extinction of contractual obligations by way of set-off were not satisfied.

Procedure and forms of order sought by the parties

12 By application lodged at the Registry of the Court of First Instance on 28 April 1999, the applicant brought the present action.

13 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fourth Chamber) decided to open the oral procedure.

14 The parties presented oral argument and answered the questions put to them by the Court at the hearing on 11 May 2000.

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

— annul the decision of the Commission, contained in debit note No 97002489N of 15 February 1999, not to pay it the following sums ('the contested sums'):

— EUR 39 447.39 in respect of 'regional seminars in the target 2 zones (DG XVI)';

— EUR 50 000.00 in respect of the 'Subvention Programme 1998 (General Secretariat)';

— EUR 82 800.00 in respect of 'Declaration B4-3040/98/208/jnb/d3 (DG XI)'; and

— EUR 23 743.61 in respect of 'Agreement SOC 98 101185 05D05 (DG V)' (out of a total of EUR 31 405.08);

— order the Commission to pay the costs.

16 The Commission contends that the Court should:

— dismiss the application as inadmissible and, in the alternative, unfounded;

— order the applicant to pay the costs.

Admissibility

Arguments of the parties

17 The Commission disputes the admissibility of the action, contending that, on the wording of the application, it is directed against 'the decision of the Commission... contained in debit note No 97002489N of 15 February 1999', whereas that note is in actual fact dated 30 January 1997. The applicant has thus committed a manifest error and commenced its action after the expiry of the time-limit laid down in the fifth paragraph of Article 173 of the EC Treaty (now the fifth paragraph of Article 230 EC).

18 The Commission points out that the applicant amended its claim in the reply by referring to 'the decision of the Commission of the European Communities, contained in the letter of 15 February 1999 referring to debit note No 97002489N'.

19 The Commission states that, if the action had been presented in that way in the application initiating proceedings, it would never have raised a plea of inadmissibility. It disputes the possibility for the applicant to amend the initial wording of its claim in the reply.

20 The applicant points out that the object of the present proceedings is the annulment of the decision of the Commission to use debit note No 97002489N as a method of paying, by means of set-off, the Community contributions which are owed to it.

21 That decision is contained in the letter of 15 February 1999, which was received by the applicant on 23 February 1999. It has legal effects which undeniably affect the interests of the applicant in its capacity as a body to which Community contributions are owed and therefore constitutes an act having an adverse effect.

22 Since the application was lodged at the Registry of the Court of First Instance on 28 April 1999, the time-limit laid down in the fifth paragraph of Article 173 was complied with. Consequently, the application is admissible.

Findings of the Court

23 The Court finds that it is clear from the application that the action concerns the decision of the Commission, contained in the letter of 15 February 1999, to effect set-off. Accordingly, that application must be declared admissible as having been made within the period prescribed in the fifth paragraph of Article 173 of the Treaty.

Substance

24 In support of its application, the applicant puts forward four pleas in law based on lack of legal basis for the contested decision, breach of the principle of legal certainty, breach of the principle of the protection of legitimate expectations, and breach of the obligation to state reasons laid down in Article 190 of the EC Treaty (now Article 253 EC). In the circumstances of the case, it is appropriate to give priority to consideration of the first plea.

Arguments of the parties

25 The applicant claims that the legal framework governing the respective rights and obligations of the Commission and the recipients of Community contributions is defined by the terms of the agreement or of the grant documents concerned and, where relevant, by the general conditions which are annexed to them.

26 In this case, none of the clauses contained in those texts provides for the possibility for the Commission to set off the debts for which it is responsible by way of Community contributions against an alleged claim *vis-à-vis* the CEMR in connection with another legal relationship.

27 The applicant points out, first, that the claim is merely alleged and the debts concerned are owed on different bases, since the first is of a contractual nature whilst the second corresponds to legislative obligations, and, second, the debts are governed by two different legal orders, namely Belgian and Community law. Furthermore, the contracts and contributions concerned depend on different Commission services.

28 The applicant observes that, under the administrative law of certain Member States, in particular French and Belgian administrative law, an administrative authority is not permitted to set off debts against claims concerning different services and/or governed by a different legal regime.

29 Moreover, the Commission cannot effect set-off by contending that a general principle of Community law is involved. The purpose of general principles of Community law, which may apply in all circumstances, is to avoid denying justice (Joined Cases 7/56, 3/57, 4/57, 5/57, 6/57 and 7/57 *Algera and Others* v *Common Assembly* [1957] ECR 39), to clarify an undefined concept of Community law which is relied on in legal proceedings, to justify the interpretation of a norm of Community law which is the most consistent with the spirit of the Treaty or to limit the discretionary power of the Community institutions and Member States.

30 Set-off does not serve any of those purposes and would, on the contrary, serve to extend wholly unlawfully the power of the Commission to refuse the payment of sums which are undeniably payable. The defendant has thus removed the claim which it invokes from the control of the courts of a Member State which have jurisdiction by reason of the clauses conferring jurisdiction defined by agreement between the parties.

31 It is clear from the case-law that set-off is merely a particular 'mechanism' for extinguishing reciprocal obligations, which applies only when well-defined conditions are satisfied.

32 The applicant submits that it is only in Case C-132/95 *Jensen and Korn- og Foderstofkompagniet* v *Landbrugsministeriet* [1998] ECR I-2975) that the Court of Justice referred to the application of the mechanism of setting off obligations under two different legal orders. In that case, the Court of Justice held that, in the case of two legal orders of which one has no relevant provision on set-off, it was

appropriate, in any event, to apply the rules laid down under the other legal order.

33 In application of that principle, it is necessary, in this case, to determine whether the conditions required under Belgian law for the application of set-off are satisfied, in the light of the fact that that law governs the contracts from which the debt allegedly owed to the Commission arises.

34 Under Belgian law, two reciprocal obligations can be offset by the parties to a contract only if the claims in question are real and undisputed, of an ascertainable amount and immediately payable. None of the three types of set-off — statutory, by court order, contractual — is applicable automatically on the initiative of only one of the parties without strict conditions being satisfied.

35 In the present case, the alleged claim relied on by the Commission in connection with the performance of the MED URBS contracts is not real and undisputed, since it is denied by the applicant which, to that end, has brought the matter before the Tribunal de Première Instance, Brussels.

36 The only other legal order which is linked to the case is French law, by virtue of the location of the CEMR's office. However, French law lays down the same conditions as Belgian law for the application of the set-off mechanism.

37 Consequently, even if set-off may be used in connection with Community law to extinguish two obligations under two different legal orders, the conditions required for its application are not, in any event, satisfied.

38 At the hearing, the CEMR added that, in response to its letter of 22 January 1999 in which it had informed the Commission of the problems caused by the delay in payment of Community funds for the proper completion of the activities at issue, the Commission had merely acknowledged receipt of that letter in a letter of 3 February 1999.

39 The Commission contends that the right to effect set-off is a general principle of Community law which applies even in the absence of an express provision.

40 The distinction between 'mechanism' and 'principle' is purely semantic. Even if set-off is regarded as a mechanism or a method of payment, the right to effect set-off constitutes a general principle of Community law.

41 In support of that argument, the Commission relies on three judgments of the Court of Justice on the subject of set-off. In Case 250/78 *DEKA* v *EEC* [1983] ECR 421, paragraph 13, the Court of Justice held that Community legislation may 'give rise, as between authorities and traders, to reciprocal and even related claims which are an appropriate subject for set-off'. The right to effect set-off thus exists in Community law, even in the absence of an express provision.

42 The Commission disputes the applicant's interpretation of *DEKA*, according to which that judgment in fact applies the principle that the fraudulent acts of debtors may not be pleaded against their creditors. It submits that it was not the transfer of the credit but the attempt to avoid set-off which was fraudulent.

43 It also relies on Case 125/84 *Continental Irish Meat* v *Minister for Agriculture* [1985] ECR 3441, in which set-off by the national administrative authority concerned was also accepted.

44 It refers, finally, to the passage in *Jensen* (paragraph 54) according to which 'Community law does not preclude a Member State from effecting set-off between an amount due to a beneficiary of aid payable under Community legislation and an outstanding debt to that Member State', and points out that, in his Opinion (ECR I-2977, paragraph 39), Advocate General Fennelly made the following observation:

'Execution before the actual transfer of money differs little, from the point of view of the degree of liberty enjoyed by the beneficiary in respect of his assets, from any form of post-payment execution.'

45 It also follows from the Opinions of Advocates General Mancini and Fennelly in *DEKA* (ECR 433), *Continental Irish Meat* (ECR 3442) and *Jensen* that set-off constitutes a perfectly ordinary method of payment, where the party against which set-off is effected always has the right to challenge it before the court with jurisdiction.

46 Outright rejection of the right of set-off for a creditor faced with a recalcitrant debtor would deprive him of the possibility of recovering his debt in a rapid and efficient manner, which would quite clearly be contrary to common sense and to the principle of procedural economy.

47 In order to determine, in the context of the Community legal order, the conditions required for the application of set-off, it is necessary to draw inspiration from the legal orders of the Member States. To that end, what is indicated is 'a process of

assessment in which above all the particular objectives of the Treaty and the peculiarities of the Community structure must be taken into account' (Opinion of Advocate General Römer in Case 5/71 *Zuckerfabrik Schoeppenstedt* v *Council* [1971] ECR 975, 989).

48 Relying on a comparative-law study concerning the law of six Member States and on the abovementioned case-law, the Commission submits that the conditions required in order to effect set-off are as follows: the two debts must have as their object a sum of money or a fixed quantity of fungibles of the same type and they must also be of an ascertainable amount and immediately payable. In the present case, those three conditions are satisfied, since the two debts have as their object money, the amount of each of them is fixed and the two sums are immediately payable since they were owed at the time of the set-off.

49 Even if certain national laws require, in addition, the absence of any serious dispute over the debt, the Commission submits that that requirement is not precisely consistent with the specificities of Community law, since it obliges one party to pay to the other what it owes him and then to bring the matter before the court with jurisdiction in order to recover his debt.

50 The Commission adds that the fact that the contracts and contributions in question concern different services of the same institution is irrelevant inasmuch as those services do not constitute autonomous entities, since all the acts were decided or concluded by the Commission, and not by the Directorates-General.

51 The Commission contends that to ascribe importance to the fact that the two claims in question come under different legal orders would have the effect of reducing the effectiveness of set-off.

52 The Commission underlines the fact that it may also have set-off effected against itself.

53 At the hearing, the Commission again contended that its approach in the present case is the only one which takes account of the effectiveness of the Treaty in relation to the implementation of the Community budget according to the principle of sound financial management.

Findings of the Court

54 It should be borne in mind, first, that the object of the present action is the annulment of the decision of the Commission, contained in its letter of 15 February 1999 to the applicant, to effect set-off between their mutual claims and, second, that the parties conferred jurisdiction on the civil courts of Brussels in respect of any dispute over the MED URBS contracts. Accordingly, the Court must examine only the legality of the abovementioned decision in the light of its effects relating to the failure actually to pay the contested sums to the applicant.

55 Next, there are at present under Community law no express rules on the right of the Commission, as the institution responsible for the implementation of the Community budget under Article 205 of the EC Treaty (now Article 274 EC), to effect set-off against entities to which Community funds are owed but which also owe sums of Community origin.

56 However, set-off in relation to Community funds is a legal mechanism whose application was regarded by the Court of Justice as consistent with Community law in *DEKA*, *Continental Irish Meat* and *Jensen*.

57 That case-law of the Court of Justice does not contain, however, all the elements needed to resolve the present case.

58 Moreover, it would be preferable for the issues raised by set-off to be dealt with under general provisions laid down by the legislature and not by individual decisions adopted by the Community judicature in the context of disputes which come before it.

59 In the absence of express rules on the subject and in order to determine whether the contested decision has a legal basis, it is necessary to look to the rules of Community law applicable to the activity of the Commission and to refer to the abovementioned case-law. In that context, it is necessary, in particular, to take account of the principle of the effectiveness of Community law to which that case-law refers (*Jensen*, paragraphs 54 and 67) and the principle of sound financial management.

60 The principle of the effectiveness of Community law implies that the funds of the Community must be made available and used in accordance with their purpose.

61 Consequently, in the present case, before effecting set-off, the Commission was required to assess whether, in spite of that operation, the use of the funds in question for the purposes prescribed and the completion of the activities which had justified the granting of the contested sums remained assured.

62 In that regard, it should be borne in mind that set-off is a method of extinguishing reciprocal obligations. In this case, set-off would have extinguished, according to the Commission, the claim on which it relies as against the CEMR in respect of the MED URBS contracts and, at least partially, that of the CEMR *vis-à-vis* the institution in respect of Community subsidies which were to be paid to it in connection with the activities at issue. It must also be observed that, in the letter of 15 February 1999, the Commission stated that the payments made by means of set-off were to be regarded 'as received by the CEMR with the obligations arising from them'. Having done that, the Commission expressed its requirement for the applicant to fulfil its obligation to carry out the activities at issue.

63 However, in the absence of the actual payment of the sums intended for the fulfilment of that obligation, it is clear that those sums would not be used for their purpose and that accordingly the activities at issue were in danger of not being carried out, which is contrary to the effectiveness of Community law and, more specifically, to the effectiveness of the decisions granting the contested sums.

64 The Commission's position implied that the CEMR still had access to the funds which were awarded under the MED URBS contracts and are claimed by the Commission, and that, once set-off had been effected, the CEMR was going to be able to use those funds in order to carry out the activities at issue.

65 However, it is clear that, if the CEMR no longer had access to the above-mentioned funds, it could no longer finance the carrying out of those activities.

66 Accordingly, the contested decision had the effect of moving the problem of the recovery of an alleged debt owed to the Commission in connection with the performance of the MED URBS contracts to the carrying out of the activities at issue, which correspond to a Community interest, now threatened by set-off.

67 The contested sums were not intended to pay the CEMR's debts, but for carrying out activities for which those sums had been allocated. It is necessary, in this respect, to stress that in the present case, unlike that which resulted in the *Jensen* judgment (paragraphs 38 and 59), in which the aim of the regulation in question was to guarantee a certain income for farmers, the contested sums could be used only to carry out the activities for the purpose of which those sums were intended.

68 In this respect, in spite of the statements made by its representative at the hearing, the Commission has not been able to show that before effecting set-off it had, at the very least, assessed the risk which actual non-payment of the contested sums to the applicant posed for the carrying out of the corresponding activities.

69 As regards the principle of sound financial management, in accordance with which the Commission must implement the Community budget under Article 205 of the Treaty, its application in this case confirms the analysis above.

70 As regards the recovery of the debt which the applicant has *vis-à-vis* the Commission, it should be pointed out that, since the CEMR was not insolvent, that institution could have sought payment from it before the Belgian court with jurisdiction.

71 Furthermore, in order to guarantee the proper use of the contested sums, if the Commission had had doubts about the CEMR's management of the Community funds, it could have contemplated the suspension, as a preventive measure, of the payment of those sums to that association as it did in respect of other funds which were also owing to the CEMR.

72 In that way, the Commission could have, first, brought about the recovery of the debt in relation to the MED URBS contracts and, second, ensured that the contested sums, in the event of payment to the CEMR, would in fact be used in order to carry out the activities at issue.

73 Finally, the principle of sound financial management must not be reduced to a purely accounting definition which considers as essential the mere possibility of regarding a debt as formally paid. On the contrary, a correct interpretation of that principle must include a concern for the practical consequences of the acts of financial management, using as a reference point, in particular, the principle of the effectiveness of Community law.

74 It follows from all the foregoing that the Commission was not entitled to adopt the contested decision without first ensuring that it did not pose a risk for the use of the funds in question for the purposes for which they were intended and for the carrying out of the activities at issue, when it could have acted otherwise without jeopardising the recovery of the applicant's alleged debt to it and the proper use of the contested sums.

75 Accordingly, the first plea must be upheld and the contested decision must therefore be annulled without there being any need to examine the other pleas and arguments put forward by the applicant.

Costs

76 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the defendant has been unsuccessful, it must, having regard to the form of order sought by the applicant, be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. **Annuls the decision of the Commission, contained in the letter of 15 February 1999 to the applicant, effecting set-off between their mutual claims;**

2. **Orders the Commission to pay all the costs.**

Tiili Moura Ramos Mengozzi

Delivered in open court in Luxembourg on 14 December 2000.

H. Jung P. Mengozzi

Registrar President