JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)

18 January 2005 *

In Case T-141/01,

Entorn, Societat Limitada Enginyeria i Serveis, established in Barcelona (Spain), represented by M. Belard-Kopke Marques-Pinto and C. Viñas Llebot, lawyers, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by S. Pardo and L. Visaggio, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for annulment of Commission Decision C (1999) 534 of 4 March 1999 cancelling financial assistance by the Guidance Section of the European Agricultural Guidance and Guarantee Fund (EAGGF), initially granted to the applicant by Decision C (93) 3394 of 26 November 1993, under Council Regulation (EEC) No 4256/88 of 19 December 1988 laying down provisions for implementing

* Language of the case: Spanish.

Regulation (EEC) No 2052/88 as regards the EAGGF Guidance Section (OJ 1988 L 374, p. 25), for the financing of a demonstration project concerning the introduction of new cultivation techniques for the production of sumac (Project No 93.ES.06.030),

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

composed of N.J. Forwood, President, J. Pirrung and A.W.H. Meij, Judges,
Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 14 January 2004,

gives the following

Judgment

Legal background

1 In order to strengthen economic and social cohesion within the meaning of Article 158 EC, Council Regulation (EEC) No 2052/88 of 24 June 1988 on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the European Investment Bank and

the other existing financial instruments (OJ 1988 L 185, p. 9) entrusted to the structural funds inter alia the tasks of promoting the development and structural adjustment of the regions whose development was lagging behind, and speeding up the adjustment of agricultural structures and promoting the development of rural areas, with a view to reform of the common agricultural policy (Article 1(1) and (5) (a) and (b)). That regulation was amended by Council Regulation (EEC) No 2081/93 of 20 July 1993 (OJ 1993 L 193, p. 5).

2 Article 5(2)(e) of Regulation No 2052/88, as amended by Regulation No 2081/93, provides that financial assistance from the structural funds may be provided inter alia in the form of support for technical assistance, including the measures to prepare, appraise, monitor and evaluate operations, and pilot and demonstration projects.

3 On 19 December 1988 the Council adopted Regulation (EEC) No 4256/88 laying down provisions for implementing Regulation No 2052/88 as regards the EAGGF Guidance Section (OJ 1988 L 374, p. 25). That regulation was amended by Council Regulation (EEC) No 2085/93 of 20 July 1993 (OJ 1993 L 193, p. 44).

4 Article 8 of Regulation No 4256/88, as amended by Regulation No 2085/93, provides that in achieving its tasks the Fund may devote up to 1% of its annual budget to financing inter alia 'pilot projects for adjusting agricultural and forestry structures and promoting rural development' (second indent) and 'demonstration projects, including projects for developing and exploiting forests and projects for processing and marketing agricultural products, to show the real possibilities of systems, methods and techniques of production and management which are in accordance with the objectives of the common agricultural policy' (third indent).

5 On 19 December 1988 the Council also adopted Regulation (EEC) No 4253/88 laying down provisions for implementing Regulation No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1988 L 374, p. 1). That regulation was amended by Council Regulation (EEC) No 2082/93 of 20 July 1993 (OJ 1993 L 193, p. 20).

6 Article 24 of Regulation No 4253/88, as amended by Regulation No 2082/93, provides with regard to the reduction, suspension and cancellation of assistance:

'1. If an operation or measure appears to justify neither part nor the whole of the assistance allocated, the Commission shall conduct a suitable examination of the case in the framework of the partnership, in particular requesting that the Member State or authorities designated by it to implement the operation submit their comments within a specified period of time.

2. Following this examination, the Commission may reduce or suspend assistance in respect of the operation or a measure concerned if the examination reveals an irregularity or a significant change affecting the nature or conditions for the implementation of the operation or measure for which the Commission's approval has not been sought.

3. Any sum received unduly and to be recovered shall be repaid to the Commission. Interest on account of late payment shall be charged on sums not repaid in compliance with the provisions of the Financial Regulation and in accordance with the arrangements to be drawn up by the Commission pursuant to the procedures referred to in Title VIII.'

Facts

Applicant company

7 The applicant company, Entorn, Societat Limitada Enginyeria i Serveis, was set up on 4 June 1993 in Barcelona.

8 Its members included Compañia de Estudios y Servicios para el Medio Ambiente Codema, SA, Mr A and two other natural persons. The shares of the two other natural persons were subsequently taken over by Codema. When the company was set up Mr A was appointed chairman and representative of the board of directors, all the powers of the board that could lawfully be delegated being delegated to him for a period of five years. On 29 May 1998 Mr A was re-elected chairman of the board for a further period of five years. He gave up this position on 31 July 2001.

9 The applicant's registered office was initially at Calle Juan Güell No 152, entresol, Barcelona. In 1996 the registered office was transferred to Calle Galileu No 303, 1st floor-A, and in 1999 to Calle Guitard No 45, 5th floor, again in Barcelona. The applicant's current registered office is at that last address.

Other Entorn entities

10 On 22 December 1993 the offshore company Entorn Trading Ltd was set up by Mr B in Guernsey. That company has its registered office in Dublin.

11 Entorn Trading gave Mr C a power of attorney. On the basis of that power of attorney, on 5 July 1994 Mr C set up a Spanish branch, named Entorn SL-Sucursal en España ('Entorn Sucursal'). Entorn Sucursal was represented, on a permanent basis, by Mr C. Entorn Sucursal had its registered office at the premises of MB Consultores y Auditores, Plaza Ruiz de Alda, 4, 7th floor A, Seville. In 1996 the registered office of Entorn Sucursal was transferred, on Mr B's instructions, to Tenerife, where it appears the company was then wound up.

Application for and grant of Community assistance

12 The Community assistance referred to in the contested decision was granted for a project entitled 'Project demonstrating sumac cultivation using new cultivation techniques' ('the Sumac Project'). Sumac is a typical Mediterranean plant, from whose dried and pulverised leaves tannin can be extracted, tannin being a substance used in tanning skins. That demonstration project was designed by Mr B, who at the end of 1992 had made contact with Mr A in order to inform him of his intention to carry out the project in Spain. At Mr B's request, Mr B was able to establish contact, through Mr A, with Mr C, residing in Seville, the head of the planning section of the Research Department of the Junta of Andalusia, who subsequently took over the technical implementation of the project and who was involved in setting up Entorn Sucursal.

13 On 12 July 1993, a letter on paper headed 'Entorn SL' and giving the applicant's address was sent to the Agriculture Directorate-General of the Commission for the attention of an official in that Directorate-General, Mr D. That letter expressed the applicant's interest in submitting the Sumac Project under Article 8 of Regulation No 4256/88 and requested a pro forma so that an application could be made. It was signed by 'A. López Gargallo', someone who, according to Mr A's statements, Mr A does not know and whose existence it has not been possible to establish.

14 On 14 September 1993 an application for Community assistance was submitted to the Commission. It was accompanied by a letter on the same headed paper as the letter of 12 July 1993 with an unidentifiable signature. On 22 September 1993 another version of the application for assistance was sent to the Commission, on the grounds that on 14 September a draft that was not the final version had been sent by mistake. The covering letter again had the same heading and the signature 'A. López Gargallo'. The applicant's bank details were sent to the Commission by fax dated 25 October 1993, signed by Mr A.

15 By decision C (93) 3394 of 26 November 1993 ('the decision to grant assistance'), taken under Article 8 of Council Regulation No 4256/88, the Commission awarded the applicant financial assistance towards project No 93.ES.06.030. The total cost of the project was ECU 1 381 132 and the Community financial contribution was fixed at a maximum of ECU 1 035 849.

Progress of the project

16 By letter of 30 November 1993, a new address for 'Entorn SL' (in Albacete, Spain) and new bank details (an account at the Banca Nazionale del Lavoro in Madrid) were sent to the Commission. The heading of that letter gave the name 'Entorn SL' and the new address. The letter was again signed by 'A. López Gargallo'.

17 By letter of 29 March 1994, signed on behalf of Mr A by a person whose signature is illegible, the Commission was informed that in connection with the Sumac Project 'Entorn SL' had opened 'an office specially for that purpose, which would become its operational head office', at the premises of MB Consultores y Auditores, in Seville. In that letter Mr C and Mr A were referred to as the technical officer and the project officer respectively.

18 The applicant denies that Mr A took part in the Sumac Project as the project officer and in his capacity as a director of the applicant. It concedes, however, that he did take part in the project as a technical adviser on behalf of Codema and that that company had invoiced Entorn Sucursal for around ESP 2.25 million for the services of Mr A and the related travel expenses.

19 Mr A did not take any legal steps regarding the similarity between the business name of Entorn Sucursal and that of the applicant.

20 In accordance with the provisions of Annex 2 to the decision to grant assistance, two advances were paid amounting to a total of ECU 725 094. The first of those advances, of ECU 414 340, was paid on 20 January 1994 into the bank account mentioned in the letter of 30 November 1993. Payment of the second advance was notified by fax of 25 August 1995, addressed to 'Entorn SL' at the address in Albacete. That advance, of ECU 310 755, was paid into a bank account with Caixa Bank in Madrid, held in the name of 'Entorn Trading Ltd Entorn SL'. The relevant account number had been notified to the Commission in a fax sent on 14 July 1995 in the name of MB Consultores y Auditores, but bearing a signature that did not correspond to the signature of any of that company's employees.

The administrative procedure and the contested decision

21 On 10 July 1997 the Commission sent a letter to 'Entorn SL' in Seville informing it that its staff had started a technical and accounting review of the financial assistance already granted by the Commission under Article 8 of Regulation No 4256/88. The inspections were conducted at the place where the project was being carried out in Seville, on 24 and 25 July 1997 in the presence of Mr A and Mr C.

22 Following those inspections conducted in July 1997, the Commission sent 'Entorn (Sumac)' a letter dated 3 April 1998, which was delivered to the address of MB Consultores y Auditores in Seville. In that letter the Commission pointed to the existence of certain facts which might constitute irregularities and indicated that it had decided to initiate the procedure provided for in Annex 2, point 10, of the decision to grant assistance and in Article 24 of Regulation No 4253/88. 'Entorn (Sumac)' was also informed that recovery of all amounts granted to date could be requested. Finally, Entorn (Sumac) was invited to furnish proof, within six weeks, that it had fulfilled all its obligations under the decision to grant assistance. The Commission received a reply by letter of 24 May 1998 sent from Seville and signed by Mr C.

23 On 4 March 1999 the Commission adopted a decision ('the contested decision'), in which it ordered the cancellation of the financial assistance in question and repayment by the applicant, and where appropriate by those persons liable in law for its debts, of all advances already paid, within 60 days of the date of notification of the contested decision. The grounds for the contested decision read:

'(1) The request for assistance was made by the company Entorn S.L., having its head office in Barcelona; it was to this company that the Community assistance was granted; meanwhile a company by the name of Entorn Trading Limited had been established in Dublin and, at the request of [Mr B], a branch of that company was opened in Seville under the name of Entorn S.L; all payments relating to the project and made by the Commission were sent to the last-mentioned company; that operation was presented to the Commission as a simple change of address of the beneficiary whereas in reality it was a matter of changing the beneficiary of the project without the Commission's agreement;

(2) during the abovementioned inspection at the head office notified by the beneficiary, it was found that that head office belonged to the company MB Consultores y Auditores; the inspectors were not able to inspect any supporting documents, whether of an administrative or accounting nature, relating to the project although, in paragraphs 5 and 6 of Annex 2 to [the decision to grant

assistance], the Commission requires that all documentation relating to the project must be kept at the disposal of the Commission services at the head office of the company; at the same time the inspectors found that the signatures of various documents presented to the Commission in the context of the project had been falsified and that none of the equipment in the pictures in the photographs in the technical annex to the final report had been used in this context;

(3) finally, it is apparent from a reading of a copy of the balance sheet presented to the Spanish Ministry of Finance in the tax declaration of the company Entorn S.L., that the cost of the project amounted to more or less [ESP 23 000 000], whereas the total cost declared amounts to ESP 233 623 004;

whereas, in those conditions it is necessary to cancel the assistance and to proceed, in accordance with Article 24(3) of Council Regulation (EEC) No 4253/88, to recover the amounts granted to date in respect of the project;

whereas, under the applicable national company law the members of certain companies are liable for all their debts;

...

Has adopted this decision:

Article 1

The assistance from the Guidance Section of the EAGGF, of a maximum of [ECU] 1 035 849, granted by Commission Decision C (93) 3394 to the company Entorn SL in connection with project No 93.ES.06.030, entitled "Project demonstrating sumac cultivation using new cultivation techniques", is hereby cancelled.

Article 2

The company Entorn SL and, where appropriate, the persons legally liable for its debts are required to refund the sum of [EUR] 725 094 ...'

24 That decision, which was also addressed to the Kingdom of Spain, was notified to the applicant at its address in Barcelona on 10 April 2001, after an attempt to notify it at the address in Seville had failed.

25 The Commission also sent to the Spanish public prosecutor's office the file on the Sumac Project and the files concerning two other projects in which Mr A and Mr C in particular had been involved. The public prosecutor's office brought proceedings before the competent Juzgados de Instrucción for forgery of documents and fraud. Messrs A, B, C and D are among the persons prosecuted with regard to the Sumac Project.

Procedure and forms of order sought

26 By application lodged at the Court Registry on 20 June 2001, the applicant brought the present action. By a separate document lodged at the Court Registry on 25 June 2001 the applicant also submitted an application for suspension of operation of the contested decision. By order of 22 October 2001 in Case T-141/01 R *Entorn* v *Commission* [2001] ECR II-3123 the President of the Court of First Instance dismissed the application for interim measures and reserved the costs.

27 As a measure of organisation of procedure, the Court put questions and requested the parties to produce documents. The parties replied to those questions and to that request within the time-limit laid down. In July 2003 the applicant had the opportunity to consult at the Court Registry an administrative file lodged by the Commission, with the exception of some documents which the Court had decided should be afforded confidential treatment. It did not seek leave to lodge written observations on that file.

28 On 13 October 2003 the applicant submitted a detailed pleading entitled 'Observations on the report for the hearing'. Annexed to that pleading it produced a document prepared by the Unit on Coordination of Fraud Prevention (UCLAF) on 29 September 1997, containing a record of some statements that Mr B had made to officials from that unit, which he had approached of his own free will in September 1997. Those statements concern in particular the part played by Mr B in the Sumac Project. The applicant stated that it had seen that document in the context of the criminal proceedings instituted in Spain in respect of the facts in the present case. It also asked for the record of the criminal investigation to be placed on the file. On 4 November 2003 the applicant lodged a pleading in which it requested a number of measures of organisation of procedure and measures of inquiry.

29 The Court put further questions to the parties and requested the Commission to produce the annexes to the abovementioned record prepared by UCLAF. The parties replied to the questions within the time-limit laid down. The Commission produced the documents that had been requested, although it objected to them being shown to the applicant. After their confidential nature had been verified and certain data unrelated to the Sumac Project had been removed, some of those documents were placed in the case-file and communicated to the applicant.

30 An informal meeting between the parties took place on 14 January 2004 before the Second Chamber of the Court of First Instance. A time-limit was set for the parties to decide whether it was possible to reach an amicable settlement of the case.

31 Following that informal meeting a hearing was held on the same day, at which the parties presented oral argument and their replies to the Court's questions.

32 By statements lodged at the Court Registry on 26 February and 4 March 2004 the parties declared that they could not reach an amicable settlement of the dispute.

33 The applicant claims that the Court should:

— annul the contested decision;

— request the Commission, by way of measures of organisation of procedure, to produce all the documents relating to the administrative procedure that preceded the adoption of the contested decision and all the documents produced by the Commission which might contribute to establishing the correct facts;

— order the Commission to pay the costs.

34 The Commission contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

A — *Taking into account the record of Mr B's statements and the annexes to that document*

Arguments of the parties

35 The Commission objected to the record of Mr B's statements being placed in the file on the grounds that the document in question could not have been lawfully obtained by the applicant. It challenges the applicant's statement that it was granted leave to take part in the criminal proceedings before the Spanish courts as a civil party, and contends that the applicant could only have obtained the document in breach of investigative confidentiality. It also points to the confidential nature of the document, which in its view precludes it from being placed in the file.

36 The applicant states that the way in which it obtained the document in question was not unlawful. After initially maintaining that it had obtained the document as it was a civil party in the criminal proceedings, the applicant stated in reply to a question from the Court that the document had been given to it by Mr A, a defendant in the criminal proceedings in Spain.

Findings of the Court

37 However regrettable it may be that when it produced the document in question the applicant made incorrect statements regarding the circumstances in which it had obtained it, that is insufficient of itself to preclude the Court from taking that

document into account. In reply to the Court's question, the applicant provided a plausible explanation of the fact that it had been able to obtain the document without committing any unlawful acts that might preclude it from being able to rely on the document in the proceedings before the Court.

38 In that regard, it should be pointed out that the document in question is part of the file which the Commission sent to the Spanish authorities with a view to possible criminal proceedings being brought against those responsible for fraudulent misconduct in connection with the Sumac Project. It is in accordance with the general principles of law govering criminal proceedings, and in particular with respect for the right to a fair hearing, that, in the context of the criminal proceedings, that document was sent to the persons who were likely to be charged, including Mr A, who was the applicant's director at the time the dispute arose. Further, it does not appear that Mr A, by in turn sending the document in question to the applicant, could have committed an infringement of rules of law that should preclude the Court from taking into account a document that might provide details relating to the facts in the present case.

39 Therefore, the record of Mr B's statements to UCLAF officials, and the statements in the annexes to that record which the Court decided to place in the file, may be taken into consideration in the examination of the applicant's pleas.

B — *Substance*

40 The applicant puts forward three pleas in support of its action. The first two pleas, which should be considered together, allege infringement of Article 24 of Regulation No 4253/88 and infringement of the obligation to state reasons. The third plea alleges infringement of the right to a fair hearing.

First and second pleas: infringement of Article 24 of Regulation No 4253/88 and infringement of the obligation to state reasons

Arguments of the parties

41 By its first two pleas, the applicant maintains in essence, first, that it cannot be regarded as the recipient of the Community financing, so that it is not the proper addressee of the decision to cancel the assistance, and, second, that it did not receive the payments corresponding to the first two tranches of assistance, so that it cannot be asked to repay those sums.

42 The applicant concedes that according to the decision to grant assistance it is the recipient of the assistance and is in charge of carrying out the project. It states, however, that its involvement in the development of the project was limited to providing Mr B with legal information on the company and indicating the appropriate area, and a person who might undertake the technical implementation, in Spain. Responsibility for developing the project and subsequently negotiating it with the competent Commission staff fell entirely to Mr B. The applicant states in that regard that all the documents prepared in its name relating to the Sumac Project, with the exception of the fax dated 25 October 1993, signed by Mr A, in which the Commission was sent its bank details, are forgeries and that the headed letter paper used was not that officially used by the applicant.

43 The applicant criticises the lack of care on the part of the Commission, and more particularly of the official in charge of managing projects under Article 8 of

Regulation No 4256/88, during the granting of assistance for the Sumac Project and points to a number of aspects in respect of which the Commission should have asked it for further clarification before paying the assistance.

44 As regards the fate of the project following the decision to grant assistance, the applicant points out that its director, Mr A, considered when he received notification of that decision that it was impossible for the applicant to successfully complete the project. Mr A informed Mr B accordingly and asked him to pass this information on to Mr D, with whom, according to the applicant, Mr B was in close contact.

45 The applicant contends that it is clear from the contested decision that that information, and the information relating to a new bank account into which the Commission was to pay amounts in connection with implementation of the project, was indeed sent to the Commission. It points out in that connection that the documents relating to the change in the bank account to be credited were signed by a person named A. López Gallardo, who was not authorised to represent it.

46 The applicant maintains that the Commission agreed to the change in the recipient of the Community assistance. In the application the applicant contends that the Commission tacitly acknowledged that it had ceased to be the recipient of the financing provided for in the decision to grant assistance. In the reply it argues that the Commission official responsible for the project, Mr D, agreed orally to its disengagement.

47 According to the applicant, the fact that the Commission did not give it an opportunity to submit its observations before adopting the contested decision shows that the Commission did not consider it to be the recipient of the Community

assistance. It considers that this is corroborated by the fact that, between the date of the contested decision (4 March 1999) and its notification (10 April 2001), two years elapsed without any communication relating to the project or to the progress of the administrative procedure being sent to its registered office. The applicant considers that it could easily have been contacted after the attempted notification of the decision to Entorn Sucursal had failed.

48 The applicant is of the view that the Commission is deliberately failing to acknowledge that Entorn Sucursal and itself are two separate entities and that there is no link between them since the shareholders, the authorised representatives and the directors of the two companies are different. According to the applicant, the apparent similarity between its business name and that of Entorn Sucursal is not sufficient to establish a link between the two companies.

49 The applicant states that neither itself nor its then director Mr A was involved in an organised network to obtain Community subsidies by fraudulent means, as the Commission claims. According to the applicant, the persons engaged in the deception at issue in the present case were Italian citizens Mr E and Mr B and the official Mr D. It criticises the Commission for failing to mention the role played by the latter, and for failing to consider the latter's involvement in that network. The applicant maintains that it was after he learned that the applicant no longer intended to carry out the project that Mr B set up a company with a name very similar to its own. In the applicant's view, he could not have acted in that way without the consent of Mr D, who, with Mr B and Mr E, may have had the idea of using that name.

50 The applicant acknowledges that Mr A's conduct is not blameless, since he could and should have responded to the setting up of a company with a name similar to that of his own company. It maintains, however, that that conduct was due to the

fact that the idea had the support of the Commission official responsible for managing the project. The applicant questions whether Mr A was entitled to doubt the competency and integrity of that official. It considers that it is not fair to demand more upright conduct of Mr A than of the official responsible for managing the project.

51 With regard to the statements Mr B made to UCLAF officials, the applicant adds that those statements establish that Mr B was the real recipient of the assistance and the person actually responsible for misappropriating it. In its view, Mr B acknowledged not only his liability for misappropriating the assistance, but also its own refusal to be involved in such misappropriation.

52 As regards refunding the assistance, the applicant is of the view that it must be proved that it actually received the amounts for which refund is being sought. The applicant states that the Commission acknowledges that it paid the assistance to a new recipient entity although according to the decision to grant assistance those amounts should have been paid to the applicant. It criticises the Commission for not providing any justification for making the payment to that other entity and for not asking it to provide any explanations with regard to that change.

53 The applicant contends that the Commission did not consider that the applicant was the only person liable for making a refund until it found that the debt in question could not be recovered from the company which had actually received the assistance, that is to say, Entorn Sucursal.

54 Lastly, the applicant contends that the Commission infringed the obligation laid down in Article 253 EC to provide a statement of reasons, arguing that the contested decision does not demonstrate, with clarity and coherence, the reasons justifying the treatment of the applicant as if it were the real addressee of the decision to grant assistance and does not show in clear and coherent terms that the applicant actually received the amounts which it is being asked to repay.

55 The Commission points out first of all that the contested decision in this case is one of a number of decisions cancelling assistance granted under the EAGGF Guidance Section, which it adopted due to the serious irregularities found in the implementation of the projects concerned. According to the Commission, there was a link between those projects because the same companies and the same individuals appeared in each case to be connected in some way or other with the projects in question. The Commission points out in particular that Mr A and Mr C were involved in several other projects for which Community assistance was cancelled.

56 The Commission is of the view that the contested decision was rightly addressed to the applicant, which was the addressee of the decision to grant assistance.

57 The Commission states that it was informed only of the recipient's change of address and bank account number and was never informed that there had been a change in the recipient of the assistance, nor was its agreement to that change ever sought. It points out that Mr A not only omitted to inform the Commission staff of the fact that the applicant was foregoing the assistance granted, he also remained closely connected with the Sumac Project all the time it was being carried out. The Commission's view is that the permanent contacts between Mr A, the applicant's director, and Mr B, who is connected with Entorn Sucursal, and Mr A's participation in the Sumac Project are sufficient to establish the existence of manifest links between the applicant and Entorn Sucursal.

58 As regards the applicant's criticisms that when granting the assistance the Commission staff did not act with the necessary care, the Commission points out that those factors do not in any way alter the applicant's liability with regard to the

use of the Community funds that were granted it in order to carry out the Sumac Project.

59 The Commission considers that the statement of reasons for the contested decision adequately enables the applicant to know the justification for the measure adopted. In its view, the applicant cannot require the Commission to justify and prove in its decision that the applicant is actually the company that received the payments made by the Commission.

Findings of the Court

60 It should be considered first whether the Commission was correct in addressing the decision to cancel the assistance under Article 24(2) of Regulation No 4253/88, as amended, to the applicant. Second, it must be ascertained whether the Commission was entitled to require the applicant, under Article 24(3) of Regulation No 4253/88, as amended, to refund the Community assistance that had been paid.

— Cancellation of the assistance

61 Article 24 of Regulation No 4253/88 does not expressly state who should be the addressee of a decision to cancel Community assistance. That is due to the scheme of the system of intervention by the structural funds resulting from Regulation No 2052/88, as amended, for which Regulation No 4253/88, as amended, contains the implementing provisions. It is clear from the provisions of Article 4(1) and Article 5 (2) of Regulation No 2052/88, as amended, that Community action is intended to be complementary to corresponding national action, or a contribution to the latter, and only exceptionally does it take the form of direct financing by the Commission of

pilot and demonstration projects. Under that system, decisions taken under Regulation No 4253/88, as amended, are addressed, as appropriate, to Member States or to the competent authorities or other bodies appointed by them, or else, in the case of direct intervention by the Commission, to the individual recipients of Community assistance. It follows that, in the case of a project financed directly by the Commission under Article 8 of Regulation No 4256/88, a decision to cancel community assistance must be addressed to the recipient of that assistance.

62 It must therefore be ascertained whether the applicant could be considered to be the recipient of the assistance granted for the Sumac Project.

63 In that regard, it must first of all be pointed out that the application for assistance was submitted in the applicant's name. Although it is correct that the name 'Entorn SL' used in the application and the relevant correspondence is not the applicant's full name (Entorn, Societat Limitada Enginyeria i Serveis), it is an abbreviation of that name which comes naturally to mind, whose use, in conjunction with the applicant's address, can only be understood to mean that the application was submitted on behalf of the applicant. However, neither the letter of 12 July 1993 expressing an interest in submitting an application for assistance, nor the letters of 14 and 22 September 1993 accompanying the two versions of the application for assistance, bear the signature of the applicant's director. Moreover, the applicant states that the letter paper used is not the paper it normally uses.

64 In his statements made in September 1997 to UCLAF officials, Mr B admitted that he signed the letter of 14 September 1993. He also admitted using the signature 'A. López Gargallo', which appears on the letters of 12 July and 22 September 1993.

65 The applicant stated in the application for interim measures it made to the Court in the present case that its director had consented to the applicant submitting the Sumac Project to the Commission, but that direct contact with the Commission would be established by Mr B. Also, by fax dated 25 October 1993, whose authenticity is not disputed by the applicant, the applicant's director sent the Commission its bank details, with the note 'further to our proposal 93.ES.06.030' (como complemento a nuestra propuesta 93.ES.06.030). That document, which referred to the number under which the application for assistance for the Sumac Project was processed by the Commission, shows not only that the applicant's director was aware of the fact that the application for assistance had been submitted on behalf of the company, but also that he accepted responsibility for that application for assistance on the company's behalf. That document shows therefore that the applicant's director endorsed the statements made on the company's behalf in the letters of 12 July 1993 and 14 and 22 September 1993.

66 The application for assistance must therefore be attributed to the applicant. It is irrelevant in that regard whether the three letters mentioned above were signed by Mr B, as appears from his statements to UCLAF, or by persons unknown.

67 The decision to grant assistance, adopted on 26 November 1993, is addressed, under a covering letter of notification dated 29 November 1993, to 'Entorn SL', at the address which was, at that time, the applicant's address in Barcelona. It states that 'carrying out the project is the responsibility of the company Entorn SL' and that 'this decision is addressed to the company Entorn SL (the recipient)'. During the written procedure and at the hearing the applicant did not deny that it had indeed seen that decision, which it moreover annexed to its application. It was only in a pleading of 4 March 2004, in which it adopted a position on the possibility of an amicable settlement, that the applicant stated that there was no evidence that that decision had been sent by registered mail, and that its records did not show that the decision had been received. Those statements are not only out of time, they also

conflict with the account of the facts given in the applicant's statements. In the part of its application entitled 'Facts relating to subsequent implementation of the project' the applicant states, in paragraph 25, that Mr A was 'informed of the content and scope of the Commission decision of 29 November 1993' and, in paragraph 12 of the reply, it states that Mr A received 'notification of the decision of November 1993, which granted [the applicant] Community assistance'.

68 The fact that the decision to grant assistance does not give the applicant's full name does not preclude the applicant from being considered to be the addressee of that decision. The name appearing in the decision to grant assistance is the same as that appearing in the letters sent to the Commission before the assistance was granted, which were endorsed by the applicant's director.

69 In those circumstances, it must be found that the applicant was the addressee of the decision to grant assistance of 26 November 1993 and the recipient of the Community assistance.

70 As regards the applicant's argument that it lost the status of recipient as a result of forgoing the assistance, it must be said that no evidence has been adduced to support its assertions on this matter. In that regard, the assertion contained in the application, that the applicant's director requested Mr B to inform the Commission official responsible that the applicant had decided not to carry out the project, even assuming it to be correct, is insufficient reason to consider that the applicant did validly forgo the assistance. There is nothing in the file to confirm that Mr B actually

informed the Commission of the applicant's intention to abandon the project. A recipient of Community assistance cannot relinquish its obligation towards the Commission to provide information and to act in good faith by using the services of a third party rather than its own resources. Therefore, any failing on the part of Mr B with regard to carrying out the instructions of the applicant's director is attributable to the applicant.

71 Nor are the applicant's assertions that the Commission accepted its disengagement supported by any evidence in the file. It cannot be inferred from the fact that the Commission took account of the new bank details supplied to it that it agreed to a change in the recipient of the assistance, since the letters sent to it in that connection on 30 November 1993 and 14 July 1995 make no reference to a change in the recipient company. It should be added that it is not plausible that the Commission would have agreed to so substantial a change to the project as the withdrawal by the recipient responsible for carrying it out, or the substitution of another undertaking for that recipient, without sending written confirmation to the applicant. The Court observes in that context that the applicant claims in the application that the Commission gave tacit agreement to the change in recipient, whereas it states in the reply that the official responsible agreed to it 'orally'. That contradiction raises doubts as to the reliability of the applicant's assertions regarding those facts.

72 In those circumstances, there is no evidence from which to conclude that the applicant lost the status of recipient of the Community assistance after that assistance had been granted.

73 The applicant also claims that the contested decision should not have been addressed to it because liability for the irregularities established falls first of all on other persons, in particular Mr B and Mr E and on the Commission official, Mr D.

74 In that regard, it must be stated that the applicant's director, Mr A, whose acts on behalf of the applicant are attributable to the latter, seriously infringed the obligation to provide information and to act in good faith, which is incumbent upon applicants for and recipients of financial assistance.

75 First, the applicant's director agreed to the application for assistance being made by Mr B on behalf of the applicant. He then endorsed inter alia the statements made on behalf of the applicant in connection with the application for assistance by a person using the signature 'A. López Gargallo'. He thus gave the Commission's officials the impression that a person using that signature was authorised to represent the applicant.

76 Second, Mr A failed to ensure that the Commission was properly informed that the applicant had abandoned the Sumac Project. He thus maintained the impression that the applicant was carrying out the project.

77 Third, Mr A was informed that Entorn Sucursal had been set up, but he made no attempt to prevent this, although he must have been aware that there was a significant risk that Commission staff might confuse the two companies.

78 Fourth, Mr A knew that the Sumac Project was being carried out by Entorn Sucursal since he worked as a consultant on the project. In that capacity, he must have been aware that the cost of the project as it was carried out was far less than the amount of the Community assistance granted. Mr A thus allowed the project, for which assistance had been allocated to the applicant, to be carried out by another company whose name was almost identical to the applicant's, in circumstances which gave serious reason to believe that there were irregularities, without ensuring that the Commission was duly informed of such facts.

79 The only plausible explanation of that conduct is that Mr A was knowingly involved in deception designed to misdirect payments by way of the Community assistance granted to the applicant away from the purposes for which they had been intended. Mr A therefore committed serious irregularities attributable to the applicant justifying withdrawal of the assistance.

80 The involvement of other persons in those irregularities cannot exonerate the applicant, as the recipient of the assistance, from its liability due to acts committed in its name by its director.

81 As regards more particularly the applicant's assertions concerning the part played by a Commission official in connection with the abovementioned deception, it should be pointed out that the involvement of an official or servant of the institution in the irregularities in question, even supposing that to be established, does not preclude cancellation of the assistance.

82 The fact that an official has failed to fulfil his obligations — either through negligence or through deliberate misconduct — does not protect the recipient of the assistance from the consequences of failure to comply with its own obligations.

83 In this context, the argument must be rejected that Mr B's statements to UCLAF officials demonstrate the applicant's refusal to be involved in deception designed to obtain payment of the subsidy for the Sumac Project unlawfully, a refusal which led Mr B to set up another company with a very similar name. Mr B stated that he had intended to acquire the applicant but that, as this had proved impossible, he had set

up Entorn Trading (Dublin) in order to acquire it through the latter. He does not mention, however, either the reason why it was not possible to acquire the applicant or any refusal by the applicant to be involved in his deception.

84 Lastly, as regards the alleged infringement of the obligation to state reasons, it suffices to say that the Commission made clear in the contested decision that the decision granting assistance had been addressed to the applicant and that no change of recipient had been authorised. Hence, the contested decision contains an adequate statement of reasons as regards the applicant's status as the recipient of the assistance.

85 The decision to cancel the assistance was therefore correctly addressed to the applicant.

86 It follows from all the foregoing that the first two pleas are unfounded as regards the decision to cancel assistance contained in Article 1 of the contested decision.

— Reimbursement of the amounts paid in the first two tranches of Community assistance

87 Article 24(3) of Regulation No 4253/88, as amended, provides that '[a]ny sum received unduly and to be recovered shall be repaid to the Commission'.

88 That provision does not state whose obligation it is to refund to the Commission sums unduly paid. It is clear, however, from the scheme of Regulations Nos 2052/88 and 4253/88, as amended, described in paragraph 61 above, that in the case of direct financing by the Commission that obligation is incumbent on the recipient of the assistance. This is confirmed by paragraph 10 of the financial conditions laid down in Annex 2 to the decision to grant assistance, which states that the recipient is entitled to submit comments before any claims for reimbursement are implemented.

89 In order for a recipient to be required to reimburse sums paid, first, it is necessary for the reduction, suspension or cancellation of assistance to have been validly decided. Subject to consideration of the complaints relating to infringement of the applicant's procedural rights made in connection with the third plea, it is clear from the above considerations that the conditions for cancellation of the assistance were met in this case.

90 Second, the use of the verb 'repay' implies, in principle, that the obligation to reimburse only applies to sums that the recipient has actually received. That interpretation is supported by the use, in some of the various language versions of Article 24(3) of Regulation No 4253/88, as amended, of 'recovery of a sum received unduly' or similar wording (see in particular the Spanish, French, Italian and Dutch versions). In that regard, it is necessary to regard sums that the Commission has paid to third parties on the recipient's instructions in the same light as sums it has paid directly to the recipient. In such a case the Commission is merely following the arrangements adopted by the recipient, as the person to whom the sum to be paid is due, as regards the procedure for payment.

91 The recipient of the assistance cannot, however, be required to reimburse to the Commission sums which the latter has paid to third parties where the recipient has given no such instructions and no such instructions can be attributed to the recipient.

92 It is therefore necessary to ascertain whether the first two tranches of assistance were paid to the applicant or whether such payments were made on the latter's instructions.

93 The contested decision contains conflicting statements in that regard. On the one hand it states that 'the recipient has so far received by way of that Community assistance a total of [ECU] 725 094', and on the other hand it states that a branch of Entorn Trading had been opened in Seville, and that 'all payments relating to the project and made by the Commission were sent to the last-mentioned company [and] that operation was presented to the Commission as a simple change of address of the beneficiary, whereas in reality it was a matter of changing the beneficiary of the project without the Commission's agreement'.

94 It is clear from the documents in the file that the first tranche of assistance was paid into an account at the Banca Nazionale del Lavoro in Madrid. According to a bank statement for that account dated 19 July 1995 included in the annexes to Mr B's statements to UCLAF officials, the first tranche of assistance was credited to the account on 20 January 1994. The account holder named on that bank statement is 'Entorn Lda — en constitución'. A bank statement for the same account dated 15 June 1995 gives the account holder as 'Entorn Trading Ltd'. It appears therefore that one of the account holders is one of the entities set up by Mr B mentioned in paragraphs 10 and 11 above, namely 'Entorn Trading Ltd', while the name 'Entorn Lda — en constitución' does not correspond exactly either to the applicant's name or to that of the branch set up by Mr C in Spain. At any event, it is clear from those documents that the account holder was not the applicant, 'Entorn, Societat Limitada Enginyeria i Serveis'.

95 The applicant did not therefore receive payment of the first tranche of assistance.

96 As regards the second tranche of assistance, it is clear from the file that it was paid into an account opened at Caixa Bank in Madrid, the holder of which was 'Entorn Trading Ltd (Entorn SL)'. The applicant did not therefore receive the second tranche of assistance either.

97 As regards whether those payments were made on the applicant's instructions, so that they may be equated to payments which it received itself, it should be pointed out that the number of the bank account into which the first tranche of assistance was paid had been notified to the Commission in the letter of 30 November 1993 mentioned in paragraph 16 above. In his statements to UCLAF officials Mr B acknowledged that he had signed that letter.

98 The account into which the second payment was made was notified to the Commission in a fax sent on 14 July 1995 using a form of 'MB Consultores y Auditores, SL', in Seville, that is to say, the company at whose premises Entorn Sucursal had its registered office. The file does not indicate who sent that fax.

99 As was stated in paragraph 79 above, there is no other explanation for Mr A's conduct than that he was knowingly involved in deception designed to misdirect payments of assistance granted for the Sumac Project away from their intended destination.

100 Sending messages notifying the Commission of account numbers for payment of tranches of assistance that were not the applicant's account numbers, while giving the impression that they were the applicant's account numbers, was an essential part of that deception. It follows that Mr A agreed to those messages being sent and their content may therefore be attributed to him.

101 In his capacity as chairman and representative of the board, Mr A was authorised to bind the applicant by actions carried out by himself or with his consent on behalf of the company.

102 The letter of 30 November 1993 was written on behalf of the applicant and bears the signature 'A. López Gargallo', which, according to Mr B's statements to UCLAF officials, was used by him in his letters of 12 July and 22 September 1993 (see paragraph 64 above). As the impression given to the Commission that that signature committed the applicant resulted from Mr A's conduct (see paragraph 75 above), it must be considered that that letter was sent with the latter's consent. The letter is therefore attributable to the applicant, irrespective of who actually signed it. Hence, payment of the first tranche of assistance may be regarded as having been made on the applicant's instructions. It may therefore be equated with a payment which the applicant itself received.

103 The fax of 14 July 1995 in which new bank details for payment of the second tranche were notified to the Commission was written on a form bearing the name and address of the company 'MB Consultores y Auditores, SL', in Seville. The space on the header for 'sender' (*remite*) contains the typed name 'Entorn Trading, SL'. That name is not identical to the one used up until that time in correspondence relating to the Sumac Project sent to the Commission (which was 'Entorn SL'), but it is similar.

104 The letter of 29 March 1994, referred to in paragraph 17 above, had informed the Commission that 'Entorn SL' had opened an office in Seville for the purposes of the Sumac Project, the address of which was that of 'MB Consultores y Auditores, SL'. That letter bears the typed signature of Mr A and an illegible handwritten signature which, according to the statements made by Mr B to UCLAF officials, was that of Mr B. That letter created the impression, first, that the address in Seville was an address at which mail could be sent to the applicant in connection with the Sumac Project and, second, that messages sent from that address in connection with the

project emanated from the applicant. It is altogether part of the deception involved in the present case. That being so, the letter of 29 March 1994 was sent with Mr A's consent and, having been sent on behalf of the applicant, is attributable to the latter regardless of who actually signed it.

105 According to the impression created by that letter, the fax sent by 'Entorn Trading, SL' from the Seville address on 14 July 1995, which was also an integral part of the deception in which Mr A was knowingly involved, is also attributable to the applicant.

106 It follows that payment of the second tranche of assistance into the account notified to the Commission in that fax must be regarded as having been made on the applicant's instructions, and that it must be equated with a payment which the applicant itself received.

107 Consequently, the plea alleging infringement of Article 24 of Regulation No 4253/88, as amended, is unfounded.

108 As regards the alleged infringement of the obligation to state reasons, it is clear from the contested decision that the Commission considered that the applicant, being the recipient of the assistance, was required to repay both the tranches of assistance that had been paid, since no change of recipient had been approved. That statement of reasons was adequate to allow the applicant to ascertain the reasons for the contested decision and the Court of First Instance to exercise its power of review. Therefore, the plea alleging infringement of the obligation to state reasons with regard to repayment of both tranches of assistance must be rejected.

Third plea: infringement of the right to a fair hearing

Arguments of the parties

109 The applicant criticises the Commission for not giving it an opportunity to submit written observations following the inspection carried out at the office of Entorn Sucursal in Seville. It acknowledges that Mr A, its director, was present during the inspection. It claims, however, that it did not have an opportunity to submit a statement.

110 The applicant states that it does not understand why the Commission, having acquainted itself with Mr C's written assertions, contained in Annex 18 to the defence, did not make contact with representatives of the applicant. It considers that that constitutes a serious infringement of the right to a fair hearing.

111 The Commission contends that it did observe the applicant's right to a fair hearing in this case. It considers that it gave the applicant the opportunity to put forward its observations on the cancellation of the assistance by sending it the letter of 3 April 1998, which clearly set out the complaints made against the applicant and which gave it a reasonable time within which to submit its observations.

112 According to the Commission, the applicant cannot rely on the fact that that letter was sent to the address in Seville in order to claim that it was deprived of its right to submit observations. The Commission considers that it had good reasons to use the Seville address, not only because it was the last address that the applicant had notified it of, but also because it was from that address that the Sumac Project had been managed and it was there that the inspection of that project had taken place and the Commission inspectors had met Mr A.

Findings of the Court

113 Observance of the right to be heard is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the proceedings. That principle requires that the addressees of decisions which significantly affect their interests should be placed in a position in which they may effectively make known their views (Case C-32/95 P *Commission* v *Lisrestal* [1996] ECR I-5373, paragraph 21 and Case T-199/99 *Sgaravatti Mediterranea* v *Commission* [2002] ECR II-3731, paragraph 55).

114 Although Article 24 of Regulation No 4253/88, as amended, does not contain express provisions governing the right of a recipient of assistance to a fair hearing where it is proposed that such assistance should be cancelled, details of that right are however contained in paragraph 10 of Annex 2 to the decision to grant assistance, which relates to financial conditions. Under that paragraph, the recipient of assistance must be given the opportunity to submit comments within a period prescribed by the Commission, before the latter adopts any decision concerning suspension, reduction or cancellation of the assistance, or recovery of amounts unduly paid.

115 In the present case, the letter of 3 April 1998 intended to ensure the recipient of the assistance its right to be heard under paragraph 10 of the financial conditions was sent not to the applicant, whose registered office was, throughout the relevant period, in Barcelona, but to 'Entorn (Sumac)' at the address in Seville at the premises of MB Consultores y Auditores, which was the address used by Entorn Sucursal.

116 However, by the letter of 29 March 1994 mentioned in paragraphs 17 and 104 above, the Commission had been deliberately misled and encouraged to believe that the address in Seville was the address of an office opened by the applicant for the purposes of the Sumac Project. As was established in paragraph 104 above, that letter is attributable to the applicant.

117 The Commission was therefore justified in using that address in order to send the applicant any correspondence concerning the Sumac Project, including the letter of 3 April 1998 that was intended to give it an opportunity to make observations on the irregularities for which it was criticised.

118 It may indeed appear surprising that the Commission used that address when, at the time it sent the letter of 3 April 1998, it had in its possession the inspection report drawn up by UCLAF, which showed that the address in Seville had been that of the company Entorn Sucursal, that the latter's registered office had been transferred to Tenerife in February 1996, and that there were two separate companies in existence whose company names were very similar.

119 The applicant cannot, however, rely on this fact in order to claim that it was not properly enabled to submit its observations.

120 The applicant acknowledges itself that its director, Mr A, was aware of the existence of the letter of 3 April 1998. True, it claims that Mr A inferred from the fact that that letter had been sent to the address in Seville that the Commission did not consider him to be liable for the irregularities established. However, Mr A could not fail to be aware that that letter was sent to the address in Seville as a result of the confusion as to the applicant's correct address, which was created and deliberately maintained by the persons involved in the deception relating to the Sumac Project, of whom he was one. He also knew that the assistance had been granted to the applicant and that he had not himself ensured that the Commission was informed of the alleged abandonment of it. In those circumstances, it must have been clear to him that the applicant had an interest in ascertaining the content of the letter of 3 April 1998 and in submitting its observations on the irregularities noted in it. The applicant would thus have been able to submit its observations on that letter if it had so wished.

121 It should be added that a party cannot rely on its own wrongful conduct (see, by analogy, Case 39/72 *Commission* v *Italy* [1973] ECR 101, paragraph 10, and Opinion of Advocate General Mischo in Case C-453/99 *Courage and Crehan* [2001] ECR I-6297, I-6300, paragraph 39). Similarly, a party cannot rely on the unlawful conduct of a person authorised to act on its behalf in order to evade its own liability as a result of actions performed by that person. The applicant cannot therefore rely on the Commission's error, which its director was knowingly involved in bringing about.

122 The fact of sending the letter of 3 April 1998 to the address in Seville was therefore sufficient to safeguard the applicant's right to a fair hearing.

123 Consequently, the applicant's third plea, alleging infringement of the right to a fair hearing, is unfounded.

C — *The applicant's requests for measures of organisation of procedure and measures of inquiry*

Arguments of the parties

124 In the application and the reply, the applicant requested the Court to order the Commission to produce 'all the documents relating to the administrative procedure that preceded the adoption of the [contested] decision'.

125 In its observations of 13 October 2003 on the report for the hearing, the applicant asked the Court 'to agree to the record of the criminal investigation being included in the case-file, [considering] that its content [might] be significant in uncovering the truth'.

126 Later, in the pleading it lodged on 4 November 2003, the applicant requested the Court, first, to order the Commission to disclose all the evidence relating to the Sumac case, both before and after the subsidy was granted, and to place in the file in the present case all the documents, irrespective of whether they were confidential, that it had in its possession relating to the present case and, second, to hear as witnesses 'the Commission officials who were involved directly or indirectly in the administrative procedure before and after the subsidy was granted for the Sumac Project, and those who conducted the internal investigation undertaken by the competent Commission departments' and Mr B.

127 The applicant states that it wishes thus to obtain confirmation of the facts set out in the UCLAF report on Mr B's statements and, where appropriate, details relating to those facts. It also considers that that evidence might show that the contested decision was adopted on the basis of manifestly incorrect facts.

128 The Commission considers that during the administrative procedure the applicant became aware of all the facts and circumstances necessary for it to mount its defence. It claims that it cannot take a decision on the request that officials should be examined as witnesses because the request is too vague and it would be irrelevant in the context of this case to examine those witnesses as requested.

Findings of the Court

129 Under Article 64(2)(a) and (b) of the Rules of Procedure of the Court of First Instance, the purpose of measures of organisation of procedure is in particular to ensure efficient conduct of the written and oral procedure and to facilitate the taking of evidence, and also to determine the points on which the parties must present further argument or which call for measures of inquiry. Under Article 64(3)(d) and (4) of the Rules of Procedure, those measures may be proposed by the parties at any stage of the procedure and may consist in requesting the production of documents or any papers relating to the case (Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 92).

130 However, measures of inquiry under Articles 65 to 67 of the Rules of Procedure are intended to prove the veracity of the facts alleged by one of the parties in support of its pleas in law (Case T-175/97 *Bareyt and Others* v *Commission* [2000] ECR-SC I-A-229 and II-1053, paragraph 90). In that regard, Article 44(1)(e) of the Rules of Procedure provides that the application must state the nature of any evidence offered in support by the applicant. Article 48(1) of the Rules of Procedure also enables the parties to offer further evidence in the reply or the rejoinder, but requires the parties to give reasons for the delay in offering it. However, under Article 66 of the Rules of Procedure, where the Court of First Instance prescribes measures of inquiry evidence may be submitted in rebuttal and previous evidence may be amplified.

131 It is in the light of those principles that it is necessary to consider whether it is appropriate to grant the applicant's requests for measures of organisation of procedure and measures of inquiry.

132 As regards, first of all, the request made in the observations on the report for the hearing for the record of the criminal investigation to be included in the case-file, it

should be pointed out that the applicant has not produced the record in question before the Court of First Instance. The applicant's request must therefore be interpreted as meaning that it is asking the Court to call upon the Spanish judicial authorities to produce that document. Although such a request for a measure of organisation of procedure may be made by the applicant at any stage in the procedure, it is none the less for the Court to determine whether the measure requested is conducive to proper conduct of the procedure. In order to enable the Court to make such an assessment, the party requesting production must identify the documents requested and provide the Court with at least minimum information indicating the utility of those documents for the purposes of the proceedings (*Baustahlgewebe* v *Commission*, paragraph 93). In that regard, if a request for measures of organisation of procedure is intended, as in the present case, to obtain new factual evidence and is made at a stage in the procedure when the production of new evidence is in principle no longer allowed, it is necessary in particular for the party requesting those measures to set out the reasons why the request could not have been made earlier.

133 In the present case, the applicant already referred in its application to the criminal proceedings initiated in Spain. The possible relevance of the record drawn up in that connection could in principle be assessed at that stage. Moreover, two reports containing statements made by Mr A and Mr C in the context of the criminal investigation were included in the file by the Commission as an annex to the defence. The applicant's request contains no specific information that makes it possible to assess whether the production of other records drawn up in that investigation will be of use for the purposes of the present case, apart from the general statement that it considers that their 'content might be significant in uncovering the truth', nor any explanation of why it did not request production of such documents earlier. In those circumstances, the Court considers that the adoption of that measure is not likely to ensure efficient conduct of the written or oral procedure or to facilitate the taking of evidence.

134 Secondly, as regards the request made in the pleading of 4 November 2003 for the Court to order the Commission to 'disclose once and for all and without reservation all the evidence relating to the Sumac case, both before and after the subsidy was

granted, even if it may point to the involvement of officials of its own institution in an international plot intended to defraud the Community budget and the resources of European citizens' and to 'place in the file in the present case all the documents, confidential or otherwise, that it has in its possession relating to the present case', it must be stated, first, that the applicant cannot be criticised for not making that request earlier. The applicant requested at the time of the application that all the documents relating to the administrative procedure that preceded the adoption of the contested decision should be produced, the Court ordered the documents relating to the administrative procedure to be produced, and the Commission produced a file which it said was the relevant administrative file. It was only when Mr A sent it the record of Mr B's statements to UCLAF that the applicant could realise that the administrative file produced by the Commission did not contain all the documents relating to the UCLAF investigation and that there could be other documents concerning that investigation.

135 However, the applicant does not indicate how those documents may be of use for the proceedings, except that it is of the view that they could demonstrate the involvement of certain Commission officials in fraudulent practices in connection with the Sumac Project. As was stated in paragraphs 81 and 82 above, were it to be established, such involvement by Commission officials, however wrongful it might be, would not be capable as such of affecting the lawfulness of the contested decision. In that regard, the measure requested by the applicant is therefore irrelevant as regards the outcome of the case.

136 Third, as regards the request relating to the examination of witnesses whose names appeared in the pleading of 4 November 2003, the applicant merely states, by way of setting out the facts on which it wishes the witnesses to be examined, that the purpose of examining them is 'for the witnesses to confirm and, where appropriate, make clear before the Court the facts and circumstances relied on in [the record of Mr B's statements to UCLAF officials] and for them to certify that the [contested decision] is unlawful since it was adopted on the bases of manifestly incorrect facts'.

137 So far as Mr B's statements are concerned, their content corresponds to a very great extent to the information already contained in the pleadings of the parties and the annexes to them. Although Mr B provided some clarification in respect of the facts contained in the file, in particular by recognising certain signatures that could not be identified before, he did not contradict those facts. As emerges from the considerations in paragraphs 66, 102 and 104 above, the outcome of this case does not depend on the veracity of the new evidence contained in Mr B's statements, which is not corroborated by other documents on the file. However, as regards the applicant's very general wish to demonstrate the inaccuracy of the facts on which the contested decision was based, it must be said that the applicant does not make clear what facts are concerned and that it does not give any reason why it did not offer to produce such evidence in the application.

138 There is therefore no need to grant the requests for measures of organisation of procedure and for measures of inquiry made by the applicant in the observations on the report for the hearing and in the pleading of 4 November 2003.

139 The application must therefore be dismissed.

Costs

140 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 applicant has been unsuccessful, it must be ordered to pay the costs, including the costs incurred in connection with the proceedings for interim relief, as applied for by the defendant.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. Dismisses the application;

2. Orders the applicant to bear its own costs and pay the costs incurred by the Commission, including those incurred in connection with the proceedings for interim relief.

Forwood Pirrung Meij

Delivered in open court in Luxembourg on 18 January 2005.

H. Jung J. Pirrung

Registrar President

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