JUDGMENT OF THE GENERAL COURT (Sixth Chamber)

17 June 2010 *

In Joined Cases T-428/07 and T-455/07,

Centre d'étude and de valorisation des algues SA (CEVA), established in Pleubian (France), represented by J.-M. Peyrical, lawyer,

applicant,

v

European Commission, represented initially by L. Escobar Guerrero and W. Roels, and subsequently by Roels, acting as Agents, and by E. Bouttier, lawyer,

defendant,

* Language of the case: French.

APPLICATION for annulment, in Case T-428/07, of debit note No 3240908670 of 20 September 2007, relating to the Seahealth project and, in Case T-455/07, of debit note No 3240909271 of 4 October 2007, relating to the Biopal contract, and for the Commission to be ordered to repay those debit notes to CEVA,

THE GENERAL COURT (Sixth Chamber),

composed of A.W.H. Meij (Rapporteur), President, V. Vadapalas and L. Truchot, Judges,

Registrar: T. Weiler, Administrator,

having regard to the written procedure and further to the hearing on 17 December 2009,

gives the following

Judgment

Contractual framework and background to the dispute

1 On 24 December 2002, the European Commission entered into with, among others, the applicant, the Centre d'étude et de valorisation des algues SA (CEVA), a French local semi-public company, in its capacity as coordinator of a consortium, two contracts designed to enable the reimbursement of costs for research and technical development projects. Those contracts were entered into under Council Decision 1999/167/EC of 25 January 1999 adopting a specific programme for research, technological development and demonstration on quality of life and management of living resources (1998 to 2002) (OJ 1999 L 64, p. 1). One of those contracts, referred to as Seahealth (contract No GLK1-CT-2002-02433, 'the Seahealth contract'), relates to a project entitled 'Seaweed antioxidants as novel ingredients for better health and food quality'. The other, referred to as BIOPAL (contract No QLK5-CT-2002-02431, 'the Biopal contract'), relates to a project entitled 'Algae as raw material for production of bioplastics and biocomposites contributing to sustainable development of European coastal regions'.

2 The first paragraph of Article 5 of those contracts provides that they are to be governed by Belgian law. They also contain an arbitration clause within the meaning of Article 238 EC. Those contracts are drawn up in English.

3 According to the particulars supplied by the applicant, and which are not disputed by the Commission, those two contracts were duly performed from 2003 to 2005.

4 The costs eligible for reimbursement are defined in Articles 22 to 24 of the General Conditions set out in Annex II to each of those contracts ('Annex II').

5 As regards the personnel costs, Article 23(1)(a) provides inter alia:

'All the working time charged to the contract must be recorded throughout the duration of the project, or, in the case of the coordinator, no later than two months after the end of the duration of the project, and be certified at least once a month by the person in charge of the work designated by the contractor in accordance with Article 2(2)(a) of this Annex or by the duly authorised responsible financial officer of the contractor.'

6 As regards the Community's financial contribution, Article 3(2) of Annex II provides that '[t]he Commission may, in case of suspected fraud or financial irregularity on the part of a contractor, suspend payments and/or instruct the coordinator not to make any payment to such contractor. The latter shall remain bound by his contractual obligations'.

7 Under Article 3(4) of Annex II:

'Where the total financial contribution due from the Community, taking into account any adjustments, including as a result of a financial audit as referred to in Article 26 of this Annex, is less than the total amount of the payments referred to in paragraph 1, first subparagraph, of this Article, the contractors concerned shall reimburse the difference, in euro, within the time-limit set by the Commission in its request sent by registered letter with acknowledgement of receipt …'

8 In addition, Article 3(5) states the following:

'After the contract completion date, or the termination of the contract or of the participation of a contractor the Commission may or shall, as relevant, where financial irregularities have been discovered during a financial audit, reclaim from the contractor the repayment of all the Community's financial contribution paid to him. Interest at the rate applied by the European Central Bank for its main refinancing operations on the first day of the month during which the contractor concerned has received the funds plus two percentage points shall be added to the amount to be repaid. The interest shall cover the period between the receipt of the funds and their repayment.'

9 Article 7(4(b) of Annex II provides, inter alia, that the Commission must immediately terminate the contract or the participation of a contractor where the latter 'has made false declarations for which he may be held responsible or has deliberately withheld information in order to obtain the Community's contribution or any other advantage provided for in the contract.'

10 In the event of termination of the contract pursuant to Article 7(4)(b), Article 7(6)(c) of Annex II provides that 'the Commission may require repayment of all or part of the Community's financial contribution. Interest at the rate applied by the European Central Bank to its main refinancing operations on the first day of the month during which the contractor concerned has received the funds plus two percentage points shall be added to the amount to be repaid. The interest shall cover the period between the receipt of the funds and their repayment'.

11 As regards the financial audit of the project, Article 26(3) of Annex II lays down the following procedure:

'On the basis of the findings made during the financial audit, a provisional report shall be drawn up. It shall be sent by the Commission to the contractor concerned, who may make observations thereon within one month of receiving it.

The final report shall be sent to the contractor concerned. The latter may communicate his observations to the Commission within a month of receiving it. The Commission may decide not to take into account the observations conveyed after that deadline.

On the basis of the conclusions of the audit, the Commission shall take all appropriate measures which it considers necessary, including the issuing of a recovery order regarding all or part of the payments made by it.'

12 In May 2006, a financial audit of CEVA was carried out by members of the Commission's staff in accordance with Article 26 of Annex II (see paragraph 11 above).

13 By letter of 1 August 2006, CEVA submitted its observations on the draft audit report which had been sent to it in June 2006, the conclusions of which mentioned irregularities concerning the expenses submitted by CEVA.

14 In October 2006, the European Anti-Fraud Office (OLAF) conducted an investigation at the premises of CEVA and seized the originals of all the contracts and supporting documents, in particular the 'time sheets' relating to the contracts in question, as well as the correspondence and memoranda exchanged at the time of the tasks. In addition, at the request of OLAF, a preliminary police investigation into 'the management by CEVA of the national and European funds … obtained in recent years' was initiated by the prosecuting authorities in Guingamp (France), from whom the case was subsequently removed in favour of the specialised interregional court in Rennes (France).

15 In its final audit report sent to CEVA by letter of 14 December 2006, the Commission maintained its findings relating to numerous and serious irregularities in the cost statements.

16 It is apparent from that report that the auditors examined, in accordance with the provisions of Annex II, the evidence relating to the amounts of the costs declared, on the basis of tests. They pointed out that their inspection was not designed to identify incidents or fraud.

17 In that final report, the auditors concluded that the personnel expenses were ineligible for reimbursement by the European Union on the ground that the time records made by CEVA were not reliable and that the number of hours of work declared in respect of the projects in question was inaccurate.

18 Moreover, in that general conclusion of that report, the auditors stated that, with the exception of the abovementioned corrections relating mainly to the personnel costs, the costs declared to the Commission by the applicant corresponded to the amounts entered in the Commission's account books and were justified by documents and corresponding payments.

19 Undertaking, on the basis of those findings, an adjustment of the eligible costs, the auditors indicated that, out of a total amount of costs declared for 2003 and 2004 of EUR 465 409 in respect of the Seahealth contract and of EUR 351 430 in respect of the Biopal contract, the amount of the eligible costs, after adjustment, was EUR 110 971 for the Seahealth contract and EUR 32 110 for the Biopal contract.

20 By letter of 22 January 2007, the Commission terminated both contracts, pursuant to Article 7(4)(b) of Annex II, which provides, inter alia, that the Commission is to terminate a contract immediately where a contractor has made false declarations for which he may be held responsible, or has deliberately withheld information in order to obtain the Community's financial contribution or any other advantage provided for in the contract. In support of that decision, the Commission alleged infringement by the applicant of the abovementioned Article 22 and Article 23(1) of Annex II. It based its allegation on the findings concerning the personnel costs made in its final audit report and pointed out that those findings had been confirmed during the OLAF inspection.

21 By a letter dated the same day, the Commission, taking the view that the applicant had committed serious financial irregularities, informed it, with reference to Article 3(2) and (4) of Annex II, of its intention to require repayment of all the sums which had been paid to the applicant in connection with the implementation of the two contracts in question. In addition, it stated that it would not be making any further payments under those contracts.

22 By that same letter, the Commission specified that it intended to recover an amount of EUR 208 613 in respect of the Biopal contract and an amount of EUR 140 320 in respect of the Seahealth contract. It invited the applicant to submit its observations and to supply particulars, supported by bank statements, of the share of the advances which it had received in its capacity as coordinator and which it had not yet transferred to the other co-contractors.

23 By letter of 1 March 2007, the applicant submitted its observations and supplied the particulars required in the abovementioned letter from the Commission. It stated, inter alia, that it no longer had in its possession the contracts, the 'time records' or the correspondence and memoranda exchanged at the time of the tasks, which had been seized by OLAF.

24 Following that letter, the Commission re-assessed the amount of the sums to be repaid. By letter of 20 March 2007, it informed CEVA of its intention to request the repayment of a sum the amount of which was now fixed at EUR 205 745 in respect of the Biopal contract and at EUR 189 703 in respect of the Seahealth contract, and again invited it to submit its observations. Annexed to that letter, it forwarded to it a copy of the contracts and of the audit report.

25 By letter of 3 April 2007, the applicant dismissed its managing director on the ground, inter alia, of 'very serious management and accounting irregularities'.

26 By letter of 25 May 2007, the applicant submitted its observations. It first maintained that it was unable to conduct its defence. In the course of the preliminary police investigation into the management by CEVA of national and Community public financing which it had obtained in recent years, initiated at the request of OLAF, the public prosecuting authority in Rennes had confirmed that it intended that the documents seized by OLAF should remain inaccessible throughout the duration of the investigation and had refused to send it copies of those documents. In consequence, the applicant asked the Commission to send it copies 'of the documents on the basis of which [the Commission had] established [its] diagnosis and [of those] of the OLAF report'. The applicant then stated in that same letter that, following the Commission audit and the OLAF investigation, it had set up a new 'time record' system, which had been applied to the various projects since February 2007, incorporating the times as from 1 January 2007. It had, moreover, introduced a new costing model which enabled old projects to be re-costed. The applicant therefore offered, on the basis of the documents in the Commission's possession, to have the cost statements relating to the contracts in question reprocessed at its own expense by an independent service provider chosen by mutual agreement.

27 By letter of 21 August 2007, OLAF refused to send the applicant the documents and conclusions of its investigation, on the ground, inter alia, that they concerned an ongoing investigation and were therefore covered by the exceptions to the right of access to documents, provided for in Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43).

28 By letter of 28 August 2007, the Commission replied to the applicant's abovementioned letter of 25 May 2007 that the contracts and the audit report which had been sent to it were sufficient to enable the applicant to conduct its defence. It stressed that OLAF's findings merely confirmed the results of the Commission's audit. It pointed out that the new time management system established by the applicant would allow the actual number of hours spent on the project to be recalculated only on the basis of 'time sheets' signed by the members of the personnel and their hierarchical superiors

during the implementation of the project. Consequently, the Commission informed the applicant of its decision to require, on the basis of Article 3(5) of Annex II, the repayment of all the amounts which it had been granted in respect of the Seahealth and Biopal contracts.

29 By letter of 9 October 2007, the Commission, while noting that the applicant '[was seeking] in good faith to find a reasonable and equitable solution', confirmed that, as a result of the serious irregularities committed by the applicant in the management of the projects in question, it was obliged to recover the sums paid from it.

30 Consequently, CEVA settled debit note No 3240908670 of 20 September 2007, relating to the total amount of EUR 189 703 which it had been paid under the Seahealth contract, and debit note No 3240909271 of 4 October 2007, relating to the total amount of EUR 205 745 which it had been paid under the Biopal contract.

Procedure and forms of order sought

31 By applications lodged at the Court Registry on 22 November and 14 December 2007, the applicant brought the present actions.

32 On 16 June 2008, by way measures of organisation of procedure provided for in Article 64 of the Court's Rules of Procedure, a meeting was held before the Judge-Rapporteur, with the participation of the parties' representatives, in order to clarify certain points between the parties and to facilitate the opening of discussions between the parties for the purposes of a possible amicable settlement of the present disputes. The parties submitted their observations and it was agreed that, within one month, the Commission would inform the Court whether it was prepared to resume contact with CEVA in order to seek an amicable agreement. By letter of 10 July 2008, the Commission informed the Court that it was unable to enter into such discussions.

33 The written procedure was closed on 29 October 2008.

34 By order of 27 November 2009, after the parties had been heard, the President of the Sixth Chamber ordered the joining of Cases T-428/07 and T-455/07 for the purposes of the oral procedure and the judgment.

35 On hearing the report of the Judge-Rapporteur, the Court (Sixth Chamber) opened the oral procedure. By way of measures of organisation of procedure, it asked the parties to give written replies to a number of questions. The parties complied with that request and the Commission produced certain documents.

36 The parties presented oral argument and their replies to the Court's oral questions at the hearing on 17 December 2009.

37 The applicant claims that the Court should:

— annul debit notes Nos 3240908670 and 3240909271;

— order the Commission to repay the sums paid in accordance with those debit notes;

— in the alternative, annul the debit notes in so far as they claim full repayment of the sums paid under the Biopal and Seahealth contracts, and order the Commission to repay the sums paid in accordance with those debit notes;

— in the further alternative, appoint an expert.

38 The Commission contends that the Court should:

— declare the actions for annulment inadmissible;

— in the alternative, dismiss the claims seeking reduction of the amounts of the debit notes or appointment of an expert;

— in the further alternative, stay proceedings until the ongoing criminal proceedings in France allow CEVA to acquaint itself with the documents which it considers necessary for the defence of its interests;

— order the applicant to pay the costs.

Admissibility

Arguments of the parties

39 Without raising any formal objection of inadmissibility, the Commission submits, as its principal contention, that the present actions, seeking annulment of the above-mentioned debit notes, are inadmissible.

40 The Commission submits that the present actions cannot be reclassified by the Court.

41 It argues that the Court may only exceptionally reclassify an action brought as an action for annulment as an action to enforce contractual liability where infringement of the law applicable to the contract is alleged in the application. Reliance solely on specific clauses of the contract does not permit such reclassification.

42 It recalls, in that regard, that, in the order of 26 February 2007 in Case T-205/05 *Evropaïki Dynamiki* v *Commission*, not published in the ECR, paragraph 57, the Court held that it 'cannot make such a reclassification since, contrary to Article 44(1)(c) of the Rules of Procedure, the applicant does not put forward, even briefly, any plea, argument or complaint alleging infringement of Luxembourg law [applicable in that case] or of specific provisions of the contract'.

43 In that regard, the Commission contends that a plea is necessarily a claim based on an infringement of the law. It infers from this that it was only for the sake of completeness, and in the light solely of the facts in that case, that the Court held, in the order in *Evropaïki Dynamiki* v *Commission*, that the applicant had not alleged any infringement of the provisions of the contract. That interpretation is confirmed by the order of 2 April 2008 in Case T-100/03 *Maison de l'Europe Avignon Méditerranée* v *Commission*, not published in the ECR.

44 Indeed, any other approach would infringe the rights of the defence and the rule that the parties should be heard. Consequently, the present actions cannot be reclassified as actions to enforce contractual liability, in so far as, contrary to Article 44(1)(c) of the Rules of Procedure, CEVA's applications do not contain any plea alleging infringement of Belgian law, which alone is applicable to the contract.

45 The applicant disputes that argument. In its reply, it maintains that, when an action for annulment or an action for damages is brought before the Court, even though the dispute is of a contractual nature, the Court reclassifies that action.

Findings of the Court

46 As a preliminary point, it must be recalled that it is for the applicant to choose the legal basis of its action and not for the Courts of the Union themselves to choose the most appropriate legal basis (see, to that effect, orders in *Evropaïki Dynamiki* v *Commission*, cited above, paragraph 38, and in Case T-235/06 *Austrian Relief Program* v *Commission* [2008] ECR II-207, paragraph 32).

47 In this case, although the applications are not expressly based on the provisions governing actions for annulment, their examination shows that the actions seek annulment of the debit notes of 20 September and 4 October 2007, relating to the Seahealth and Biopal contracts respectively ('the debit notes'), and are thus implicitly based on the provisions relating to such actions.

48 Furthermore, in the context of those actions for annulment, the applicant has also made applications for orders. In its claims, the applicant seeks, in the first place, annulment of the abovementioned debit notes. In the second place, it claims that the Court should order the Commission to repay to it the amount of those debit notes which it has, in the meantime, settled.

49 As regards those second heads of claim, it must be pointed out that, in this case, they cannot be interpreted independently of the claims for annulment of the debit notes, as separate claims for payment deriving from the contracts and implicitly based on Article 238 EC, which have been brought at the same time as the claims for annulment. Indeed, although the arguments put forward by the applicant in the applications are founded inter alia on the clauses of the contracts in question, the applications are headed 'applications for annulment'. Furthermore, the applicant does not maintain that those applications contain claims for payment. In particular, in the replies, it does not dispute that the actions are inadequately worded. It does, on the other hand, maintain that they should be reclassified.

50 It follows that the applicant has based the present actions solely on Article 230 EC.

51 Under Article 230 EC, the Community Courts review the legality of acts of the institutions intended to produce legal effects vis-à-vis third parties by bringing about a distinct change in their legal position (orders of 10 April 2008 in Case T-97/07 *Imelios*

v *Commission*, not published in the ECR, paragraph 21, and in *Austrian Relief Program* v *Commission*, cited above, paragraph 34).

52 According to settled case-law, measures adopted by the institutions in a purely contractual context from which they are inseparable are, by their very nature, not among the measures covered by Article 249 EC, annulment of which may be sought pursuant to Article 230 EC (orders in Joined Cases T-314/03 and T-378/03 *Musée Grévin* v *Commission* [2004] ECR II-1421, paragraph 64, and in *Austrian Relief Program* v *Commission*, cited above, paragraph 35).

53 In this case, it is sufficient to note that the debit notes fall within the context of the Seahealth and Biopal contracts, from which they are inseparable. By those debit notes, the Commission pursues repayment of the contribution paid to the applicant under those contracts, taking as its basis the contractual clauses contained, inter alia, in Article 3 of Annex II.

54 It follows that, by their very nature, those debit notes do not constitute administrative decisions as referred to in Article 249 EC, annulment of which may be sought before the Community judicature under Article 230 EC.

55 Consequently, the present actions cannot be declared admissible in so far as they seek annulment of the debit notes under Article 230 EC.

56 As regards the abovementioned applications for orders, they are also inadmissible inasmuch as they were brought under Article 230 EC (see paragraphs 49 and 50 above), in so far as, in accordance with settled case-law, the Community judicature is not

entitled, when exercising judicial review of legality, to issue directions to the institutions or to assume the role assigned to them; rather, it is for the administration concerned to adopt the necessary measures to implement a judgment given in proceedings for annulment (Case T-67/94 *Ladbroke Racing* v *Commission* [1998] ECR II-1, paragraph 200 and case-law cited).

57 However, according to settled case-law, when an action for annulment or an action for damages is brought before the Court when the dispute is, in point of fact, contractual in nature, the Court reclassifies the action, provided that the conditions for such a reclassification are satisfied (Case T-26/00 *Lecureur* v *Commission* [2001] ECR II-2623, paragraph 38; orders in *Musée Grévin* v *Commission*, cited above, paragraph 88; and in Case T-265/03 *Helm Düngemittel* v *Commission* [2005] ECR II-2009, paragraph 54).

58 In that regard, contrary to the Commission's contentions, it does not follow from the case-law that such a reclassification is made subject to the condition that the law applicable to the contract is relied on in the application. On the contrary, it is apparent in particular from paragraphs 38 to 40 of the judgment in *Lecureur* v *Commission*, that the Court has agreed to reclassify an action based on Article 230 EC, in support of which the applicant alleged only infringement by the Commission of its contractual obligations.

59 In addition, examination of the case-law shows that, when faced with a dispute which is contractual in nature, the Court considers itself unable to reclassify an action for annulment either where the applicant's express intention not to base his application on Article 238 EC precludes such a reclassification (see, to that effect, orders in *Musée Grévin* v *Commission*, cited above, paragraph 88, and *Maison de l'Europe Avignon Méditerranée* v *Commission*, cited above, paragraph 54) or where the action is not based on any plea alleging infringement of the rules governing the contractual relationship in question, whether they be contractual clauses or provisions of

the national law designated in the contract (see, to that effect, orders in *Evropaïki Dynamiki* v *Commission*, cited above, paragraph 57, and *Imelios* v *Commission*, cited above, paragraph 33).

60 The Commission's restrictive interpretation of the order in *Evropaïki Dynamiki* v *Commission*, is based on an erroneous view of the concept of plea in law within the meaning of, inter alia, Article 44(1)(c) of the Rules of Procedure. In that regard, the Commission's definition, according to which, in the context of an action to enforce contractual liability, a plea may be based only on infringement of the national law governing contracts, cannot be accepted. Contractual clauses, together with the applicable national law and under its aegis, form part of the rules governing the contractual relationship. Indeed, the interpretation of a contract in the light of the provisions of the applicable national law is justified only in case of doubt concerning the content of the contract or the meaning of certain of its clauses (judgment of 19 November 2008 in Case T-316/06 *Commission* v *Premium*, not published in the ECR, paragraph 53). Consequently, since the concept of plea in law covers any legal or factual argument capable of leading the Court, if it considers it well founded, to grant the form of order sought by the party putting it forward, it is undeniable that, like reliance on the applicable national law, reliance on contractual clauses constitutes a plea in law characteristic of an action based on Article 238 EC.

61 It is sufficient that one of the pleas in law characteristic of an action based on Article 238 EC is put forward in the application in accordance with Article 44(1)(c) of the Rules of Procedure in order for that action to be capable of being reclassified without any infringement of the rights of defence of the defendant institution. In that respect, although, as the Commission concedes, it is accepted that an action for annulment may be reclassified as an action based on Article 238 EC where the applicant puts forward pleas alleging infringement of the national law governing the contract, there are no grounds for not conferring the same legal effect, for the purposes of any reclassification, on pleas alleging infringement of contractual obligations.

62 The order in *Maison de l'Europe Avignon Méditerranée* v *Commission*, relied on by the Commission, does not invalidate that analysis. It is true that, in paragraph 23 of that order, the Court pointed out that the applicant had not raised 'any plea, argument or complaint alleging infringement of Belgian law, which, under the arbitration clause inserted in that agreement, [was] the only law applicable to the agreement in question'. It thus omitted to mention also the absence of any pleas alleging infringement of a clause of the contract. However, it is not apparent from that order that any such pleas had been put forward. Moreover, the abovementioned ground is not the only ground which justified the refusal to reclassify the action. The Court also took as its basis, in that order, the fundamental fact that the applicant had expressly stated that its action was based on Article 230 EC.

63 In this case, it must be observed that, as the applicant claims in the replies, in support of reclassification of the actions, the applications are expressly based on clauses of the contracts in question, namely Article 26 and Article 3(4) and (5) of Annex II. The applicant disputes in particular the Commission's interpretation and application of Article 3(5) of Annex II, allowing a full repayment of the sums paid, on which the debit notes are based, even though the irregularities discovered reveal a relatively small difference between the cost statements submitted to the Commission and the eligible costs. It complains that the Commission did not act on the basis of Article 3(4) of Annex II, authorising that institution to require reimbursement of the difference found as a result of a financial audit. In accordance with the provisions of Article 44(1)(c) of the Rules of Procedure, the applications thus contain a clear and comprehensible statement of the plea alleging irregularity, under the contractual clauses, of the recovery of the whole of the financial contribution paid under the contracts in question.

64 It follows that the present actions can be reclassified as applications based on Article 238 EC, in so far as they are based in particular on infringement of contractual clauses. Those actions are therefore admissible.

Substance

65 The applicant alleges, as its principal claim, infringement of the rule that the parties should be heard and of the rights of the defence and, in the alternative, irregularity of the recovery of the whole of the sums granted.

66 The Commission, for its part, contends as a preliminary point that, if the present actions are reclassified as claims for payment, they are in any event unfounded, on account of the preparatory nature of the debit notes.

67 The Commission argues that the debit notes are purely preparatory and informative in character with a view to a possible Commission decision to pursue the recovery procedure on the basis of Article 256 EC. Regardless of the nature of the present actions, such debit notes therefore do not constitute measures against which actions may be brought. The Commission infers from this that, if the present actions are reclassified as actions to enforce contractual liability, they must be dismissed as unfounded, on the ground that the issuing of the debit notes in question cannot constitute a fault and be the cause of the loss allegedly suffered by CEVA as a result of the repayment of the sums claimed back by the Commission.

68 In that regard, in the first place, it is sufficient to recall that, in contractual matters, the Commission must observe the principles governing contracts (see Opinion of Advocate General Kokott in Case C-294/02 *Commission* v *AMI Semiconductor Belgium and Others* [2005] ECR I-2175, I-2178, point 170). In principle, it does not have the right, in that context, to adopt unilateral measures (see, to that effect, order in *Musée Grévin* v *Commission*, cited above, paragraph 85). Consequently, the Commission is not entitled to address any measure having the nature of a decision to the

contractor concerned with a view to the latter's performance of his contractual obligations of a financial nature, but is required, where appropriate, to bring a claim for payment before the court having jurisdiction.

69 Against that legal background, and in so far as the present actions are reclassified as seeking payment of the amount of the sums repaid by the applicant in response to the debit notes which were issued to it, those actions for payment must be examined in the light of the contractual clauses relied on by the parties. In the context of such actions to enforce contractual liability, the Commission's argument based on the legal nature of the debit notes is therefore completely irrelevant. Having had the present claims for payment brought before it under Article 238 EC, the Court is merely required to determine whether, under the clauses of the contracts, the Commission is entitled to recover the whole of the financial contributions paid to the applicant.

70 In the context of that examination, the fact that the applicant repaid the amounts claimed by the Commission by means of the debit notes, even though the latter do not constitute decisions adversely affecting it (see paragraphs 52 to 54 above), is irrelevant. The settlement of the debit notes by the applicant, despite the fact that they were not in the nature of decisions, cannot be considered a waiver of any claim it may have to payment of the sums in question. However, only a waiver by the applicant of that claim or the fact that that claim is time-barred, neither of which has been alleged by the Commission, could cause the applicant's claims for payment to fail, if they are justified by the clauses of the contracts (see, by analogy, Case C-142/91 *Cebag* v *Commission* [1993] ECR I-553, paragraph 18).

71 In the second place, the present actions for payment can in no way be construed, as the Commission's initial argument suggests, as claims for compensation for the loss suffered by the applicant as a result of the Commission's sending of the debit notes, in breach of its contractual obligations. Those actions ask the Court only to order the Commission to pay to the applicant the sums mentioned in the debit notes, which

the Commission considers itself to be owed in performance of the contracts. In the context of those actions, the Court is therefore not required to review the legality of the debit notes. Consequently, the Commission's argument based on the idea that the issuing of the debit notes cannot constitute a fault in the performance of the contract must be held to be ineffective.

72 It follows that the Commission's initial argument must be rejected.

The plea alleging infringement of the rule that the parties should be heard and of the rights of the defence

Arguments of the parties

73 The applicant alleges infringement of the rule that the parties should be heard and of the rights of the defence. It relies on Article 41 of the Charter of Fundamental Rights of the European Union, proclaimed at Nice on 7 December 2000 (OJ 2000 C 364, p. 1), relating to the right to good administration, which includes the right of every person to be heard, before any individual measure which would affect him or her adversely is taken, and the right to have access to his or her file, on Article 42 of that charter, relating to the right of access to documents, and on Article 48 of that charter, enshrining the presumption of innocence and the right of defence.

74 The applicant complains in essence that the Commission acted on the basis, on the one hand, of the conclusions of the OLAF investigation and, on the other, of the 'time sheets' relating to the two contracts in question. However, the applicant never had any knowledge of OLAF's conclusions and the 'time sheets' were seized before the final audit report was drawn up. The applicant was therefore not properly heard before the Commission took the decision to claim repayment of the whole of the financial contributions paid under those contracts.

75 The Commission failed to observe the principle of good administration in the conduct of the financial audit, in so far as the audit report refers not only to the 'time sheets', but also to the conclusions of the OLAF investigation. Furthermore, it infringed the rule that the parties should be heard, by failing to send the 'time sheets' and OLAF's conclusions to CEVA.

76 In its replies, the applicant refers to the Commission's behaviour in connection with other contracts which it concluded with that institution, behaviour which, according to it, was partial and unfair.

77 The Commission disputes that argument. It contends that the rule that the parties should be heard was observed, in so far as the applicant was acquainted with all the documents, of which it was the author, on the basis of which the Commission drew up the debit notes, in the light of the audit report. Moreover, the applicant dismissed its managing director for serious misconduct, by adopting the Commission's conclusions on the irregularities which he had committed in the management of the 'time sheets'. It is therefore inconsistent to dispute those conclusions.

78 Moreover, the Commission did not use the conclusions of the OLAF report as its basis for requiring repayment of the sums paid.

Findings of the Court

79 Article 26(3) of Annex II confers on the contractor concerned the right to submit his observations on the provisional audit report and the final audit report.

80 In this case, it is necessary in the first place to examine the complaint that the Commission infringed the applicant's right to be heard during the audit procedure, in so far as the applicant did not have access to OLAF's report.

81 In that regard, it is sufficient to observe that neither the audit report nor the Commission's decision to request repayment of the financial contributions paid under the contracts in question is based on OLAF's conclusions.

82 The final audit report, on the basis of which the Commission acted, clearly shows that the auditors distinguished the financial inspection which they carried out pursuant to the contractual provisions from the inspection carried out by OLAF. It is thus clear that that report does not take OLAF's conclusions into account. It expressly states that its purpose is to examine the evidence relating to the declared costs, that it does not seek to detect 'impacts' or fraud and that it is drawn up subject to any additional finding made by OLAF.

83 In addition, it is apparent in particular from the letter of 28 August 2007 sent by the Commission to the applicant that that institution acted solely on the basis of the findings made in the final audit report. As regards OLAF's conclusions, the Commission

merely indicated, in that correspondence, that OLAF's conclusions confirmed the declarations made by the auditors.

84 It follows that, in this case, the reliance on the OLAF report is not relevant, since the recovery of the whole of the financial contribution paid, contested by the applicant, was not based on that report, nor on the subsequent opening of a criminal investigation with regard to the applicant.

85 In those circumstances, the fact that the applicant did not have access to the OLAF report is not capable of infringing the rule that the parties should be heard and its right to be heard during the audit procedure. As regards the argument relating to the presumption of innocence, it is not substantiated and must also be rejected as unfounded.

86 In the second place, as regards the complaint that the applicant no longer had the 'time sheets' at its disposal when it submitted its observations on the final audit report, it should be pointed out that, contrary to the Commission's contentions, the fact that the applicant was author of the 'time sheets' does not give grounds for presuming that it was properly heard even though it no longer had access to those documents following their seizure by OLAF. Moreover, the fact that the applicant admitted the existence of irregularities, whereas it no longer had access to the 'time sheets', cannot in any way imply that it was able to defend its position and that it acknowledged all the irregularities with which it was charged and their gravity.

87 In this instance, although the Commission does not raise the point, it must be noted that the applicant still had the 'time sheets' at its disposal when it submitted its observations on the provisional audit report. However, it no longer had those 'time sheets' when it submitted its observations on the final audit report.

88 In those circumstances, even though the applicant does not dispute that the Commission confirmed the conclusions of the provisional audit report in the final audit report, the fact remains that it was unable properly to exercise its right to be heard on the final audit report in accordance with Article 26(3) of Annex II. Nor was it able to comment subsequently, with full knowledge of the facts, on the existence and gravity of the financial irregularities established following the Commission's abovementioned letters of 22 January 2007 and 20 March 2007 informing it of that institution's intention to request repayment of all the financial contributions which had been paid to it under the two contracts in question.

89 In that regard, the fact that the supporting documents held by the contractor concerned, in this instance the 'time sheets', were seized by OLAF and that they are therefore covered, according to the Commission, by the exceptions to the right of access to documents provided for by Regulation No 1049/2001 cannot justify negating the right of that contractor to be heard in accordance with Article 26(3) of Annex II during the audit procedure.

90 However, with regard to the legal consequences of the infringement, in this case, of the applicant's right to be heard under Article 26(3) of Annex II, it is important to point out that, in the context of the present actions to enforce contractual liability, such an irregularity is not, on its own, such as to justify a possible order against the Commission to pay to the applicant the sums which it claims. In the context of the present actions based on Article 238 EC, the Commission's contractual liability must be assessed in the light of all the relevant clauses of the contracts in question, relied on by the parties, and on the basis of all the available evidence before the Court, having due regard to the rule that the parties must be heard and to the rights of the defence.

91 Moreover, the abovementioned infringement of the applicant's right to be heard under Article 26(3) of Annex II could, where relevant, be taken into consideration in the

examination of a claim for damages — in the form inter alia of a claim for compensatory interest — for the possible loss occasioned by that irregularity, if the applicable national law provides for the possibility of such damages being awarded in the event of an infringement of contractual obligations.

92 However, in this case, the applicant does not seek to be awarded damages for any loss resulting from the infringement of its right to be heard under Article 26(3) of Annex II. The present actions seek only to have the Commission ordered to repay to the applicant the sums which the latter unduly repaid to that institution after receiving the abovementioned debit notes.

93 As regards the applicant's arguments relating to the Commission's alleged conduct in the context of other contracts, they must in any event be rejected in so far as they have no connection with the subject-matter of the present disputes.

94 It follows that, in the circumstances of the present dispute, the plea alleging infringement of the rule that the parties should be heard and of the rights of the defence is ineffective.

95 In this instance, the Court must examine the applicant's claims for payment in the light of all the evidence submitted to it and on which the parties have been able to put forward their observations, whether in their pleadings or in their written replies to the Court's questions or at the hearing.

96 In that regard, it is apparent from the parties' written replies to the written questions put by the Court before the hearing that the applicant, after being placed under judicial investigation, and the Commission, as the party claiming damages in criminal

proceedings, now had access to all the documents on the criminal case file in France, which included the applicant's documents, among which were the 'time sheets' relating to the Seahealth and Biopal projects, which had been seized by OLAF.

97 Against that background, since the applicant was able to have access to all the documents which it considered necessary for its defence, the Commission's contention in the further alternative that proceedings should be stayed has been rendered redundant. There is therefore no need to rule on that contention.

98 It is therefore necessary to examine below the plea alleging irregularity of the recovery of all the sums at issue, in the light of all the evidence now available, to which the applicant had access and on which it was able to state its view in its replies to the Court's written questions and at the hearing.

The plea alleging irregularity of the recovery of all the sums granted to the applicant under the Seahealth and Biopal contracts

Arguments of the parties

99 The applicant points out that Article 3(5) of Annex II provides that it is only in the case of fraud or serious financial irregularities discovered during an audit that the Commission may claim full repayment of the Community contribution paid to its co-contractor.

100 In this case, the applicant acknowledges the existence of 'flagrant gaps in the recording of hours' during the period corresponding to the performance of the contracts in question. It does not dispute the inconsistencies and lack of transparency in the 'time sheet' system, observed during the Commission's audit. However, those errors or faults do not give grounds for calling in question the genuineness and quality of the work carried out by the applicant, which are not disputed by the Commission. Moreover, they are not sufficiently serious to justify the application of Article 3(5) of Annex II.

101 The applicant suggests applying retroactively to the contracts in question its new management control system allowing rigorous monitoring of hours and costs, set up in 2007 and based, on the one hand, on the costs and hours directly chargeable to the project in question and, on the other hand, on those shared between the projects. According to the new costings made using that method, the difference between the number of hours actually chargeable to each of the projects and the number of hours declared in the cost statements relating to the two contracts in question, which had been sent to the Commission, does not exceed 1.9% as regards the Seahealth contract and 5.35% as regards the Biopal contract. The applicant explains that, since the contracts were performed in 2003, 2004 and 2005, the costing parameters for each year were reconstructed from the actual end-of-year profit and loss accounts and from the pay slips during those periods.

102 In its replies to the Court's written questions, the applicant claims that it is apparent from the summary 'time sheets' drawn up, project by project, by the fraud squad of the Rennes criminal investigation department that the difference between the 'time sheets' and the cost statements was only 6% as regards the Seahealth and Biopal projects.

103 The smaller differences thereby highlighted confirm that the errors contained in the 'time sheets' were not sufficiently serious to justify the application of Article 3(5) of Annex II. The claim for repayment of all the sums paid is therefore disproportionate.

104 In the further alternative, the applicant asks the Court to appoint an expert to review the calculation of the times which it made by applying its new management control system to the contracts in question (see paragraph 101 above). At the hearing, the applicant stated that a scientific expert would be able to make a costing of the working times necessary, taking account of the scientific tasks required and of the resources to be applied under the two contracts in question.

105 The Commission contends, in the first place, that the applicant does not allege that it infringed, in any way, its contractual obligations or a provision of Belgian law. The claims seeking reduction of the amount of the sums to be returned and the appointment of an expert should therefore be rejected as contrary to the terms of Article 44(1)(c) of the Rules of Procedure.

106 In the second place, and in any event, due to the seriousness of the financial irregularities committed, the claim for full repayment of the sums paid, pursuant to Article 3(5) of Annex II, is justified. At the hearing, the Commission pointed out that the existence of an intentional element, characteristic of fraud, was not necessary in order to require such repayment where serious financial irregularities such as those discovered in this case are involved.

Findings of the Court

107 As a preliminary point, with regard to the admissibility of the present plea, it is sufficient to note that, contrary to the Commission's contentions, the plea has been put forward in a manner consistent with the provisions of Article 44(1)(c) of the Rules of Procedure (see paragraph 63 above).

108 As regards the claims in the alternative, seeking the appointment of an expert, it must be pointed out that, in accordance with the principle that each court applies its own procedural rules (Opinion of Advocate General Kokott in *Commission* v *AMI Semiconductor Belgium and Others*, cited above, point 56), those claims must be examined by the Court in the light of the provisions of Articles 65 to 67 of the Rules of Procedure, concerning measures of inquiry. The applicant therefore cannot be accused of not having based such claims on the proper law of the contracts.

109 On the basis of the conclusions of a financial audit, the Commission is authorised, under the last subparagraph of Article 26(3), to take all appropriate measures which it considers necessary, including the issuing of a recovery order regarding all or part of the payments made by it under the contracts in question.

110 In this case, as a result of the financial audit, the Commission terminated the two contracts in question, in accordance with Article 7(4)(b) of Annex II, and decided, in accordance with Article 3(2) of that annex, to make no further payments under those contracts. Those decisions are not contested by the applicant.

111 In this case, the applicant contests the recovery by the Commission, under Article 3(5) of Annex II, of all the financial contributions which had already been paid to it under the contracts in question. It complains that the Commission did not apply Article 3(4) of Annex II, which provides that the contractor concerned is to reimburse only the difference where, taking into account any adjustments, including those made as a result of a financial audit referred to in Article 26 of Annex II, the payments received exceed the total amount of the Community contribution due.

112 It must be observed that, whereas the Seahealth and Biopal contracts were duly performed from 2003 to 2005, as stated by the applicant without being contradicted by the Commission, it is apparent from the final audit report that the audit, carried out in May 2006, covered only 2003 and 2004.

113 As regards 2003 and 2004, a reading of that final audit report shows that the personnel costs were not justified by the applicant in accordance with the provisions of the contracts and were therefore declared ineligible. On the other hand, the costs other than those related to personnel expenses were considered eligible (see paragraph 19 above)

114 Moreover, it is apparent from the Commission's replies to the questions put by the Court during the hearing that that institution did not have at its disposal, at the time of the financial audit, the cost statements for 2005, which were completed after expiry of the time-limit. Those cost statements were rejected automatically following the audit report, since the Commission took the view, in the light of the serious doubts concerning 2003 and 2004, that the applicant was no longer fulfilling its financial obligations, including in 2005.

115 It is thus apparent that the present disputes involve, on the one hand, the costs declared for 2003 and 2004, which were checked during the audit (see paragraph 16

above) and, on the other, the cost statements relating to 2005, which were rejected automatically.

116 It must therefore be established whether, in the circumstances of this case, the provision laid down in Article 3(5) of Annex II, in conjunction with Article 26(3) and Article 7(6)(c) of that annex authorised the Commission to request the repayment of all the financial contributions paid under the two contracts in question.

117 Article 26(3) and Article 7(6)(c) of Annex II merely provide for the possibility for the Commission to recover all those financial contributions, as a result, respectively, of an audit or of termination of the contract. However, they do not set out the conditions to which such full recovery is subject.

118 Those conditions are set out in Article 3(5) of Annex II, which provides that the Commission may or must, as relevant, where fraud or serious financial irregularities have been discovered during a financial audit, claim from the contractor the repayment of all the financial contribution paid to him.

119 It is apparent from the wording of Article 3(5) of Annex II that, even in the event of fraud or serious financial irregularities discovered during an audit, the Commission is not required in all cases to recover all of the financial contribution granted to the contractor in question. It is, on the other hand, required to examine, 'as relevant', whether, in the light of the circumstances of the particular case, such a measure is obligatory or appropriate, having regard to the clauses of the contract.

120 In that regard, the interpretation of Article 3(5) of Annex II mentioned by the Commission at the hearing, according to which the obligation to require repayment of the whole of the financial contribution in question refers only to cases where the contract has been terminated for fault, whereas the Commission has a discretion allowing it to take into account the contractor's good faith if the contract has not expired, cannot be accepted.

121 The Commission's argument based on the concept of termination for fault lacks precision. Even conceding that the Commission was referring to a situation where a contract has been terminated, as with the Seahealth and Biopal contracts, under Article 7(4)(b) of Annex II, which refers to false declarations for which the contractor may be held responsible and to the deliberate withholding of information in order to obtain the Community's financial contribution, the relevant clauses of Annex II clearly do not establish any automatic link between such termination under the abovementioned article and any obligation to recover the whole of the financial contribution in question under Article 3(5) of Annex II.

122 In this case, it follows that the mere fact that the contracts in question were terminated under Article 7(4)(b) of Annex II and that that termination was not contested by the applicant was not such as to impose on the Commission an obligation to recover the total amount of the sums paid to the applicant, pursuant to Article 3(5) of Annex II. It should moreover be pointed out that, whereas the Commission acted, in the termination decision, on the basis of Article 7(4)(b), rather than on the basis of Article 7(3)(e), of Annex II, which confers on it the power to terminate a contract in the event of a serious financial irregularity, it alleges only, in the present proceedings, the existence of serious financial irregularities and does not, on the other hand, refer to fraud, as it confirmed at the hearing.

123 It must therefore be determined whether, in the light of the flagrant gaps in the recording of hours, which is acknowledged by the applicant, the Commission was, at the very least, authorised by Article 3(5) of Annex II to require repayment of all the sums which it had granted under the contracts in question. If the conditions for such full recovery were not satisfied, the Commission would be entitled only to request, under Article 3(4) of Annex II, on the basis of an assessment of all eligible costs, reimbursement of the difference between the sums paid by and the sums due from the Union.

124 That assessment must be made in the light of the contractual obligations binding upon contractors as regards the justification of their costs.

125 In this case, it was for the applicant to justify its personnel costs in accordance with the clauses of Article 23(1)(a) of Annex II, stipulating in essence that all the working time charged to the contract must be recorded throughout the duration of the contract, or, in the case of the coordinator, no later than two months after the end of the duration of the project, and be certified at least once a month by the project manager or by the duly authorised responsible financial officer of the contractor.

126 In that regard, it must be recalled that the Commission's obligation to ensure the sound financial management of Community resources, in accordance with Article 274 EC, and the need to combat fraud in connection with Community financing endow the obligations relating to financial conditions with fundamental importance (see, to that effect, Case T-500/04 *Commission* v *IIC* [2007] ECR II-1443, paragraphs 93 to 95, and judgment of 12 September 2007 in Case T-448/04 *Commission* v *Trends*, not published in the ECR, paragraph 141). In this case, the contractor's obligation to submit cost statements in accordance with the specific requirements laid down in Article 23(1) of Annex II, relating to personnel costs, is therefore one of his fundamental obligations, designed to enable the Commission to have at its disposal the necessary

data in order to satisfy itself that the contributions in question have been used in accordance with the provisions of the contracts.

127 That is the reason why the Commission is authorised by Article 3(4) of Annex II to require, where appropriate, the reimbursement of sums paid corresponding to costs which it considers ineligible on the ground that they have not been justified in accordance with the provisions of the contract.

128 By contrast, where fraud or serious financial irregularities are discovered during a financial audit, Article 3(5) of Annex II provides for the possibility for the Commission to recover the whole of the financial contribution paid by the Union and thus has a deterrent purpose (see, by analogy, Case T-199/99 *Sgaravatti Mediterranea* v *Commission* [2002] ECR II-3731, paragraph 136).

129 However, the objective pursued by Article 3(5) of Annex II, which is to deter against fraud and serious financial irregularities, does not entitle the Commission to avoid the principle that contracts must be performed in good faith and that contractual clauses must not be applied unfairly, by assuming a discretionary power in the interpretation and application of those clauses.

130 In this case, it must therefore be established whether, having regard to the findings made in the final audit report and to the documents in the file which were produced and commented upon in the parties' replies to the Court's written questions and debated between the parties at the hearing, the financial irregularities committed by the applicant were sufficiently serious to justify, in the light of the principle that contracts must be performed in good faith, the recovery, under Article 3(5) of Annex II, of the whole of the financial contribution paid.

131 Admittedly, the final audit report finds only the personnel costs for 2003 to 2004 ineligible, in so far as the audit covered the period between 1 January 2003 and 31 December 2004, as has already been pointed out (see paragraph 112 above). However, it is evident from that report that the grounds on which the auditors based their finding of the absence of justification for the personnel costs declared in respect of 2003 and 2004 are capable of being applied to the personnel costs relating to 2005.

132 It is apparent from the final audit report that the 'time sheets' relating not only to 2003 and 2004, but also to 2005, contained in a box handed over to the auditors contained only an aggregate weekly and monthly statement of all the working hours completed by each member of staff for all the current projects. The working times chargeable to the Seahealth and Biopal projects had not been recorded. Those 'time sheets', signed by the former director of CEVA, were neither signed by the personnel working on the projects nor countersigned by the project managers. Moreover, they were neither dated nor numbered, so that it was not possible to identify the date on which they had been drawn up and signed by the applicant's former director. Furthermore, the auditors found that there were different versions of sets of 'time sheets' for different projects, revealing significant contradictions between them.

133 Finally, the final audit report indicates that the person in charge of the Biopal project confirmed that he was unable to determine exactly how much of the working time of each member of the personnel was chargeable to each project, since, according to him, no recording system existed.

134 In those circumstances, the auditors took the view that the 'time sheets' were not reliable and that they had no sound basis for calculating the number of hours chargeable

to the projects in question. Consequently, they considered that all the personnel costs declared in respect of 2003 and 2004, analysed during the audit, were ineligible.

135 Moreover, the Court observes that the applicant did not put forward, either in its written replies to the Court's questions or at the hearing, any serious argument invalidating the factual findings and conclusions contained in the audit report. The applicant failed, inter alia, to adduce any evidence capable of casting doubt on the fact, which is alleged against it by the Commission, that it did not undertake any recording of the working times chargeable to the contracts in question.

136 In particular, the applicant does not dispute that the 'time sheets' were reconstructed retrospectively, after the completion of the contracts, by its former director. As for the 'time sheets' described as 'summary', drawn up by the fraud squad of the Rennes criminal investigation department, which are relied on by the applicant, it is common ground that they merely summarise the time sheets thus reconstructed and compare them with the declared costs. They do not contain any evidence concerning the working times actually chargeable to the contracts in question.

137 Moreover, the fact that the abovementioned reconstruction of the 'time sheets' lacks any reliability is confirmed by the significant discrepancies between the content of those 'time sheets', as it appears from the summary table of the abovementioned summary sheets which was drawn up by the applicant, in its reply to the Court's written questions, and the statements of certain witnesses recorded in the fraud squad's report of 31 March 2008, produced by the Commission. Consequently, whereas, according to one of the witnesses, a project manager, the time sheets mentioned a total of 685 working hours spent on the Biopal project, that same witness stated, during his examination by the fraud squad, that he had never worked on that project.

138 Furthermore, as regards, more specifically, the advances paid in respect of 2005, it is not apparent, either from the documents in the file or from the parties' written replies to the Court's questions or their oral observations at the hearing, that the applicant sent to the Commission any supporting documents concerning the personnel costs incurred during 2005 in respect of the contracts in question. Nor, indeed, does the applicant claim to have produced any such supporting documents.

139 In those circumstances, the mere absence of properly kept time records with regard to 2003, 2004 and 2005 constitutes an infringement of Article 23(1) of Annex II, which is sufficient for all the personnel costs concerned to be considered ineligible (*Commission* v *Premium*, cited above, paragraph 44).

140 In addition, in view of the scale and gravity of the manifest financial irregularities discovered in the course of the audit and confirmed by the documents from the criminal investigation which have been discussed in this case between the parties, the recovery by the Commission of the whole of the financial contribution paid to the applicant under the contracts in question cannot be regarded as an unfair application of the clauses of Article 3(5) of Annex II. Contrary to the applicant's claims, that recovery is therefore not disproportionate to the objectives pursued by the relevant clauses of the contracts in question (see paragraphs 126 to 128 above).

141 As regards the applicant's claims in the alternative seeking the appointment of an expert, they cannot be accepted, in so far as it is for the applicant, by virtue of its contractual obligations, to adduce proof of its personnel costs in accordance with the specific evidential requirements of Article 23(1) of Annex II (see, to that effect, *Commission* v *IIC*, cited above, paragraph 105).

142 It follows that the present actions must be dismissed as unfounded.

Costs

143 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.

144 Moreover, the first subparagraph of Article 87(3) of the Rules of Procedure provides 'that where each party succeeds on some and fails on other heads, or where the circumstances are exceptional, the Court may order that the costs be shared or that each party bear its own costs.'

145 In this case, although the applicant has failed in all of its pleas, account must be taken of the fact that, following the seizure of the 'time sheets' by OLAF, it was not in a position to comment with full knowledge of the facts on the existence and gravity of the financial irregularities alleged against it. It was only at the end of the written procedure before the Court that it had access to those documents (see paragraphs 89 and 96 above). Each party must therefore be ordered to bear one half of its own costs and to pay one half of those incurred by the other party.

On those grounds,

THE GENERAL COURT (Sixth Chamber)

hereby:

1. Dismisses the actions;

2. Orders each party to bear one half of its own costs and to pay one half of those incurred by the other party.

Meij Vadapalas Truchot

Delivered in open court in Luxembourg on 17 June 2010.

[Signatures]