JUDGMENT OF THE COURT
10 July 2003 *

In Case C-87/01 P,

Commission of the European Communities, represented by P. Oliver and H.M.H. Speyart, acting as Agents, with an address for service in Luxembourg,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (Fourth Chamber) of 14 December 2000 in Case T-105/99 *CEMR* v *Commission* [2000] ECR II-4099, seeking to have that judgment set aside,

* Language of the case: French.

the other party to the proceedings being:

Council of European Municipalities and Regions (CEMR), having its registered office in Paris (France), represented by F. Herbert and F. Renard, lawyers, with an address for service in Luxembourg,

applicant at first instance,

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, M. Wathelet and R. Schintgen (Presidents of Chambers), C. Gulmann, A. La Pergola (Rapporteur), P. Jann, V. Skouris, N. Colneric, S. von Bahr, J.N. Cunha Rodrigues and A. Rosas, Judges,

Advocate General: P. Léger,
Registrar: H. von Holstein, Deputy Registrar,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 25 June 2002,

after hearing the Opinion of the Advocate General at the sitting on 17 September 2002,

gives the following

Judgment

1 By application lodged at the Court Registry on 21 February 2001, the Commission of the European Communities brought an appeal under Article 49 of the EC Statute of the Court of Justice against the judgment of the Court of First Instance of 14 December 2000 in Case T-105/99 *CEMR* v *Commission* [2000] ECR II-4099 ('the judgment under appeal'), whereby the Court of First Instance upheld the application of the Council of European Municipalities and Regions ('the CEMR'), an association constituted under French law, for annulment of the Commission decision contained in its letter to the CEMR of 15 February 1999 ('the contested letter') to effect set-off between their mutual claims.

The facts of the case and the judgment under appeal

2 The facts of the case are described as follows at paragraphs 1 to 10 of the judgment under appeal:

'1 On 11 February 1994 and 25 April 1995, the Council of European Municipalities and Regions ("the CEMR"), an association constituted under

French law which brings together national associations of local and regional authorities in Europe, the association Agence pour les Réseaux Transméditerranéens (ARTM) and Cités Unies Développement (CUD), an association constituted under French law, concluded three technical assistance contracts with the Commission.

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

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

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

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

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

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

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

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

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

3 On 20 April 1999, the CEMR brought proceedings before the Tribunal de Première Instance (Court of First Instance), Brussels (Belgium), in accordance with the clause conferring jurisdiction contained in the MED URBS contracts, in order to challenge the validity of the alleged debt owed to the Commission in connection with those contracts and to establish, for the same reason, that the conditions required under Belgian law for the extinction of contractual obligations by way of set-off were not satisfied.

4 On 28 April 1999, the CEMR brought an action before the Court of First Instance for annulment of the contested decision.

5 In support of its application, the applicant relied on four pleas in law alleging, respectively, lack of legal basis for the contested decision, breach of the principle of legal certainty, breach of the principle of the protection of legitimate expectations, and breach of the obligation to state reasons laid down in Article 190 of the EC Treaty (now Article 253 EC).

6 At paragraph 23 of the judgment under appeal, the Court of First Instance first dismissed the objection of inadmissibility raised by the Commission, finding that it was clear from the application that the CEMR's action concerned the decision of the Commission, contained in the letter of 15 February 1999, to effect set-off, and not, as the Commission maintained, debit note No 97002489N of 30 January 1997, and that the action had therefore been brought within the period prescribed in the fifth paragraph of Article 173 of the EC Treaty (now, after amendment, the fifth paragraph of Article 230 EC).

7 As regards the substance, the Court of First Instance, adjudicating on the plea alleging lack of legal basis, annulled the contested decision on the following grounds:

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

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

56 However, set-off in relation to Community funds is a legal mechanism whose application was regarded by the Court of Justice as consistent with Community law in [Case 250/78] *DEKA* [v *Council and Commission* [1983] ECR 421], [Case 125/84] *Continental Irish Meat* [[1985] ECR 3441] and [Case C-132/95] *Jensen [and Korn- og Foderstofkompagniet* [1998] ECR I-2925]...

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

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

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

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

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

62 In that regard, it should be borne in mind that set-off is a method of extinguishing reciprocal obligations. In this case, set-off would have extinguished, according to the Commission, the claim on which it relies as against

the CEMR in respect of the MED URBS contracts and, at least partially, that of the CEMR *vis-à-vis* the institution in respect of Community subsidies which were to be paid to it in connection with the activities at issue. It must also be observed that, in the letter of 15 February 1999, the Commission stated that the payments made by means of set-off were to be regarded "as received by the CEMR with the obligations arising from them". Having done that, the Commission expressed its requirement for the applicant to fulfil its obligation to carry out the activities at issue.

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

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

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

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

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

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

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

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

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

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

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

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

The appeal

8 The Commission claims that the Court should:

— set aside the contested judgment and draw all the appropriate inferences from that annulment;

— order the CEMR to pay the costs of the appeal.

9 In support of its appeal, the Commission puts forward three grounds of appeal, alleging, respectively, breach of the Community principle of set-off of claims, breach of the principle of effectiveness of Community law and breach of the principles of sound financial management and the proper administration of justice.

10 The CEMR claims that the Court should dismiss the appeal as inadmissible in part and unfounded in part, or in the alternative as wholly unfounded, and order the Commission to pay the costs. Further in the alternative, and in case the appeal should be allowed, the CEMR requests the Court to give final judgment itself on the dispute and to grant the form of order which it sought at first instance.

Admissibility

11 The CEMR submits that the appeal should be declared inadmissible in part. It maintains, more specifically, that the Commission's first ground of appeal does not correspond with the requirements laid down in Article 51 of the EC Statute of the Court of Justice, namely, in the present case, that it must be based on an infringement of Community law. In the CEMR's submission, the principle of set-off of claims, which the Commission claims to have been breached, does not exist in Community law.

12 According to the CEMR, the inadmissibility of the first ground of appeal is also capable of having consequences as regards the first and third heads of the second ground of appeal and also the third ground of appeal, since the Commission has itself stated that these are connected with the first ground of appeal.

13 In that regard, it is sufficient to observe that, as the Commission has rightly stated, the existence or otherwise of a Community principle authorising set-off of claims is precisely one of the questions of law on which the parties were disagreed at first instance and on which they are still divided at the appeal stage, so that this questions can only be dealt with, if appropriate, in the examination of the merits of the appeal.

14 It follows that the appeal must be declared admissible.

The ground of appeal alleging breach of the principle of effectiveness of Community law

Arguments of the parties

15 The Commission maintains, first of all, that it follows from the Court's case-law (*DEKA* v *Council and Commission*, *Continental Irish Meat* and *Jensen and Korn- og Foderstofkompagniet*) that set-off, as a procedure for payment and a mechanism effecting the simultaneous extinction of two mutual claims, may be effected by virtue of a principle of Community law inspired by the principles common to all the Member States, even in the absence of an express provision.

16 Having made that point, the Commission claims, essentially, by its second ground of appeal, the three heads of which may be joined, that the Court of First Instance erred in law in finding, at paragraph 61 of the judgment under appeal, that under the principle of effectiveness of Community law the Commission, before effecting

set-off, was required to assess whether, in spite of that operation, the use of the Community funds in question for the purposes prescribed and the completion of the activities which had justified the granting of those funds remained assured.

17 In doing so, the Court of First Instance in reality considered, as is apparent in particular from paragraph 54 of the judgment under appeal, that the set-off must be distinguished, as regards its effects, from actual payment. In the Commission's submission, such a distinction is not well founded from a legal viewpoint, since both set-off and actual payment bring about the extinction of a legal obligation. Nor is that distinction well founded from an accounting viewpoint, since actual payment and payment by set-off have the same effect on the balance sheet and on the solvency of the beneficiary, in the first case by increasing its assets and in the second case by reducing its debts.

18 The obligation to make a preliminary assessment thus formulated by the Court of First Instance also fails to have regard to the conditions apt to ensure effective recovery of debts owing to the Community, by requiring the creditor to act only in accordance with the debtor's available funds, irrespective of whether the creditor effects a set-off or employs other forms of recovery.

19 The formulation of such an obligation is also irrelevant in the light of the fact that, once actual payment has been made, a sum of money may be subject to other forms of actions for recovery which are equally prejudicial to the Community activities concerned, such as seizure.

20 As may be seen from paragraphs 63 to 65 of the judgment under appeal, the principle thus laid down by the Court of First Instance is, moreover, based on the incorrect assumption that the Community activities concerned can only be financed by the Community funds assigned for that purpose, which ignores the fungible nature of money.

21 The Commission concludes by claiming that, at the same paragraphs of the judgment under appeal, the Court of First Instance distorted the facts or failed to provide reasons for its observations. It is not apparent for what reasons the CEMR should no longer have access to the funds paid under the MED URBS contracts, or why it would not have sufficient assets to carry out the activities in question: on the contrary, the Court of First Instance stated at paragraph 70 of the judgment that the CEMR was not insolvent.

22 The CEMR contends that at paragraph 54 of the judgment under appeal the Court of First Instance correctly drew a clear distinction between the assessment of the set-off effected by the Commission, which in this case was solely a matter for Belgian law and for the exclusive jurisdiction of the Belgian courts, and the failure actually to pay the contested sums, which constituted the act adversely affecting the CEMR and capable of being annulled by the Community Courts, as regards its impact in the light of the objectives pursued by the Community regulations concerned.

23 That distinction, in the CEMR's submission, is entirely consistent with the case-law of the Court of Justice, which shows, first, that the question of set-off is not regulated by Community law but is subject to a national legal order and, second, that the national regulations applicable to set-off cannot have the effect of undermining the effectiveness of Community law (*Jensen and Korn- og Foderstofkompagniet*, paragraphs 37, 38, 41 and 54).

24 That case-law therefore wholly justifies the requirement that the Commission carry out a preliminary examination designed to ensure that the proposed set-off does not have the effect of undermining the effectiveness of Community law.

25 Unlike the sums at issue in *Jensen and Korn- og Foderstofkompagniet*, which pursued a general objective of increasing farmers' incomes, the amounts which the Commission claimed to discharge by means of set-off in the present case were

to be used by the CEMR to carry out particular Community activities, so that a set-off was actually capable of undermining the effectiveness of those activities.

26 Even though it has no effect on the balance sheet of the party against whom it is effected, set-off is capable of causing cash flow problems for that party and, accordingly, of jeopardising the Community activities concerned.

27 The requirement for effectiveness of the recovery of the Community's debts, to which the Commission refers, cannot serve to justify the jeopardising of the Community activities entrusted to the CEMR, particularly where, as in this case, the alleged debt to be recovered is disputed.

28 Last, the CEMR submits that the argument that the Court of First Instance was wrong to consider that the Community activities in issue were jeopardised as a result of the set-off, since the CEMR's undisputed solvency enabled it to meet its obligations, is tantamount to accepting that a creditor could decline to honour its contractual undertakings on the pretext that its debtor has sufficient funds to do what it should have been paid to do.

Findings of the Court

29 For the purpose of adjudicating on the second ground of appeal, it is sufficient to state that, on the assumption that it is actually authorised by Community law on

certain conditions, out-of-court set-off cannot in any event, and contrary to what the Court of First Instance held at paragraphs 60 and 61 of the judgment under appeal be subject to a prior obligation to ascertain that the use of the funds concerned for the purposes prescribed and the completion of the activities which justified the granting of the funds concerned will remain assured in spite of the proposed set-off.

30 In deriving such an obligation from a principle of effectiveness of Community law which means that the Community funds must be made available and used for the intended purpose, the Court of First Instance made an error of law.

31 The assertion of such a principle appears to be based on a twofold premiss: first, the amounts which the Community appropriates to Community activities are capable, once paid to a third party responsible for those activities, of retaining their separate identity within the assets of that third party and of being assigned exclusively to the Community activities concerned, which would ensure the proper completion of those activities; and, second, the making available of those amounts by actual payment is to be distinguished from a making available by other forms of payment, including, on the assumption that it is permissible, set-off.

32 As the Commission rightly submitted, such premisses are incorrect in a number of aspects. First, they ignore the fungibility of the money in the context of the assets. Second, they ignore the fact, alluded to by the Advocate General at point 91 of his Opinion, that the assets constitute the creditors' security, so that once the Community amounts have been paid to the Community partner, they are no longer a priori immune from enforcement measures taken by its creditors. Third, they ignore the fact that the form taken by a payment is neutral as regards its effects on the recipient's assets.

33 It follows that the Court of First Instance was not entitled to annul the contested decision on the ground that the Commission had ignored an alleged obligation to ascertain in advance that the use of the funds concerned for the prescribed purposes and the completion of the activities which justified the grant of those funds would remain assured in the case of set-off; and, accordingly, the Commission's second ground of appeal must be declared well founded.

Ground of appeal alleging breach of the principles of sound financial management and the proper administration of justice

34 By its third ground of appeal, the Commission maintains that the Court of First Instance also ignored the principles of sound financial management and the proper administration of justice.

35 In holding, at paragraph 70 of the judgment under appeal, that the Commission could have sought payment of the debt before the Belgian court with jurisdiction, the Court of First Instance failed to have regard to the *raison d'être* of set-off, which is specifically to make financial and procedural savings, both in the relations between the parties and from the aspect of sound financial management, and also in the interest of the proper administration of justice.

36 The Court of First Instance also failed to have regard to the requirements of the principle of sound financial management when it suggested, at paragraphs 70 and 73 of the judgment under appeal, that when the Commission seeks to recover sums from a contractor before a national court, it should none the less pay to that contractor the sums which it owes to it on a different basis.

37 In that regard, it follows from paragraph 73 of the judgment under appeal that the Court of First Instance was, in its own words, finally led to conclude that there had been a breach of the principle of sound financial management only in so far as, as it stated, a correct interpretation of that principle requires that the authority concerned has concern for the practical consequences of its acts of financial management, using as a reference point, in particular, the principle of the effectiveness of Community law. It was by reference to that finding, in particular, that the Court of First Instance concluded, at paragraph 74 of the judgment under appeal, that the Commission was not entitled to adopt the contested decision without first ensuring that it did not pose a risk for the use of the Community funds in question for the purposes for which they were intended and for the carrying out of the activities which had justified the grant of the funds, and then annulled the decision on that account.

38 As stated at paragraphs 29 to 33 of this judgment, in formulating such a requirement for a preliminary examination, the Court of First Instance made an error of law.

39 Since the Court of First Instance annulled the contested decision solely because the Commission unlawfully failed to carry out such a preliminary examination, and since such an assessment was not required under Community law, the judgment under appeal must be set aside on that account, without there being any need to consider further the Commission's arguments alleging breach of the principles of sound financial management and the proper administration of justice.

40 The Court observes, however, that, as the Commission rightly claimed, if the requirement for a preliminary examination laid down by the Court of First Instance were accepted, the logical consequence would be that it would apply not only in the case of payment by set-off but, more generally, before any payment of Community funds in any form whatsoever, and also before any exercise of an action to recover such funds from a party entrusted with carrying out Community activities. As the Advocate General has pointed out at point 94 of his Opinion, it would be difficult to reconcile such consequences with the principle of sound financial management.

Ground of appeal alleging failure to have regard to the concept of set-off

41 As the judgment under appeal must be set aside for the reasons stated at paragraph 39 of this judgment, there is no need to examine the first ground of appeal, alleging that the Court of First Instance failed to have regard to the concept of set-off of claims.

The action at first instance

42 Since, in accordance with Article 61 of the EC Statute of the Court of Justice, the state of the proceedings is such as to permit final judgment to be given in the matter, it is appropriate to rule on the substance of the application for annulment of the contested decision presented by the CEMR at first instance.

43 In the interest of providing a fuller picture of the context of the dispute, it should be observed, first of all, that, adjudicating on the action referred to at paragraph 3 of this judgment, the Tribunal de Première Instance, Brussels, held, by judgment of 16 November 2001, that the Commission had no claim against the CEMR under the MED URBS contracts. However, the Commission appealed against that judgment before the Cour d'appel (Court of Appeal), Brussels (Belgium).

44 It should likewise be pointed out that, as is apparent in particular from the explanations provided by the parties, Belgian law recognises three forms of set-off: set-off by agreement, judicial set-off and statutory set-off. Statutory set-off, which operates solely by operation of law, requires, in particular, that the two claims concerned are certain.

Admissibility of the action

45 As the Court of First Instance rightly held, at paragraph 23 of the judgment under appeal, the CEMR's action had to be declared admissible since it was clear from the application that the action concerned the decision of the Commission, contained in the letter of 15 February 1999, to effect set-off, and that the application had therefore been made within the period prescribed in the fifth paragraph of Article 173 of the Treaty.

First plea in law

Arguments of the parties

46 In its application, the CEMR puts forward a first plea, alleging that the contested decision was adopted notwithstanding the absence of any general or specific legal basis authorising the set-off. First, it submits, there is not, particularly in the light of the case-law of the Court of Justice, any general principle of Community law on which the Commission could rely in order to effect set-off between a claim which it has against an entity and debts which it has incurred on a different basis *vis-à-vis* that entity. Second, it cannot in any event be permissible for the Commission to effect set-off between debts arising under obligations governed by regulation and a claim of a contractual nature governed by the law of a Member State, in this case Belgian law.

47 On this last point, the CEMR also claims, in its reply before the Court of First Instance, that such set-off cannot, in particular, be effected solely at the whim of

the Commission and on the conditions which it deems appropriate, in disregard of the rules on jurisdiction and the applicable law.

48 The CEMR emphasises that the claims in issue are governed by two separate legal orders and maintains, in particular, that, even on the assumption that payment by set-off were to be contemplated in the present case, it would necessarily be the conditions laid down in the Belgian legal order that must govern any set-off, since the Community legal order contains no such conditions. In that regard, the CEMR stated, in answer to a question put by the Court of Justice, that where two claims are governed by different legal orders, set-off can be effected only in so far as the conditions laid down by each of those legal orders are satisfied.

49 One of the conditions laid down by Belgian law for set-off which is neither judicial set-off nor set-off by agreement is not fulfilled in the present case. The Commission's alleged claim in respect of the MED URBS contracts is not certain, as required by Belgian law before statutory set-off can be effected, since the claim was the subject of a serious dispute between the parties, as evidenced by the exchanges between the Commission and the CEMR and the fact that proceedings had been commenced before the Tribunal de Première Instance, Brussels.

50 In that regard, the CEMR claimed at the hearing before the Court of Justice that the fact that the Tribunal de Première Instance, Brussels, held in its judgment of 16 November 2001 that the Commission had no claim against the CEMR under the MED URBS contracts confirms that the condition relating to certainty of claims required by the rules of Belgian law on set-off was not satisfied.

51 The Commission contends, on the other hand, that it follows from the Court's case-law, and in particular from *DEKA* v *Council and Commission*, *Continental Irish Meat* and *Jensen and Korn- og Foderstofkompagniet*, that the right to effect set-off constitutes a general principle of Community law and that only the conditions governing its exercise remain to be defined by the Court of Justice, taking as its inspiration the solutions existing in the legal orders of the Member States.

52 In that regard, the Commission claims that it may be inferred from such a comparative examination that set-off must be authorised under the abovementioned general principle provided that the two claims are fungible, ascertainable and payable, which they are in this case, since the claims related to things of the same type, namely sums of money, the amounts of the claims were determined and they were payable, since payment was due at the time when set-off was effected.

53 At the hearing before the Court of Justice, the Commission further stated that it agreed with the CEMR that a set-off effected between two claims, one of which was subject to Community law and the other to the law of a Member State, must satisfy the requirements laid down by both legal orders.

54 As regards the rules of Belgian law on set-off, the Commission does not deny that statutory set-off is precluded where the claim is the subject of a serious dispute.

55 However, it is of the view that the claims under the MED URBS contracts were not the subject of such a serious dispute. Furthermore, the judgment of the

Tribunal de Première Instance, Brussels, of 16 November 2001, which, as the Commission points out, is the subject of an appeal, was delivered after the contested decision was adopted and, in the Commission's submission, does not call in question the fact that when the set-off was effected the Commission was able to conclude that its claim was not seriously disputed and was therefore certain, as required by Belgian law.

Findings of the Court

56 It should be observed at the outset that the Court has already held that the Community rules may give rise, as between an authority and a trader, to reciprocal claims which are an appropriate subject for set-off, and has stated that, in the case of an insolvent trader, such a set-off may in fact be the only way open to the authority to recover the wrongly paid sums (*DEKA* v *Council and Commission*, paragraphs 13 and 14).

57 At paragraph 20 of *DEKA* v *Council and Commission*, the Court also found that a claim against the Community for compensation on the part of a trader following a judgment of the Court of Justice had been extinguished by set-off against a claim for reimbursement of export refunds and monetary compensatory amounts wrongly paid to the trader which had been assigned to the Commission by the German authorities.

58 In the present case, however, it is sufficient to state that, irrespective of any provisions of Community law governing the matter, a set-off such as that effected by the contested decision was precluded in any event, since the rules of Belgian

law applicable to one of the claims concerned clearly did not permit the proposed set-off, which is sufficient to justify annulling the decision.

59 As the parties both recognise, a set-off extinguishes simultaneously two obligations existing mutually between two persons.

60 In this case, as the parties agree, one of the claims concerned is governed by Belgian law, under the MED URBS contracts, and the others are governed by Community law.

61 In so far as it extinguishes two obligations simultaneously, an out-of-court set-off between claims governed by two separate legal orders can take effect only in so far as it satisfies the requirements of both legal orders concerned. More specifically, any set-off of that nature makes it necessary to ensure, as regards each of the claims concerned, that the conditions relating to set-off provided for in the relevant legal order are not disregarded.

62 In that regard, it is immaterial that, in the present case, one of the legal orders concerned is the Community legal order and the other the legal order of one of the Member States. In particular, the fact that both legal orders are equally competent to govern any set-off cannot be called in question on the basis of considerations linked with the primacy of Community law. It must be emphasised that the fact that the MED URBS contracts are subject to Belgian law is the consequence of the free choice of the parties, a choice expressed in compliance

with the Treaties, which provide that a Community institution may subject its contractual relations to the law of a Member State.

63 As the CEMR has rightly observed, one of the conditions which, in Belgian law, must be satisfied in order for set-off which is neither out-of-court set-off nor set-off by agreement to take effect, namely that the claims in question must be certain, was clearly not satisfied. As the Court of First Instance had already stated at paragraph 6 of the judgment under appeal, it is apparent from the case-file that the CEMR, by various letters and at several meetings with the Commission's services, disputed the very existence of the claim which the Commission claimed to have under the MED URBS contracts. It should further be observed that, no matter what the outcome of the appeal brought by the Commission against the judgment of the Tribunal de Première Instance, Brussels, of 16 November 2001, the fact that that court, which had jurisdiction under the relevant clause in the MED URBS contracts, held in that judgment that the Commission had no claim under those contracts, fully confirms that the CEMR's defence against the Commission's claims was at least a serious one.

64 It follows that, since the contested decision was adopted even though the rules of the legal order governing one of the claims concerned clearly precluded the extinction of that claim by way of the set-off effected, it must be annulled as being legally unfounded, without there being any need to examine it from the aspect of the rules, in this case Community rules, governing the other claim.

Second, third and fourth pleas in law

65 As the CEMR's first plea in law has been upheld and the contested decision has been annulled on that account, there is no need to consider the other pleas put forward by the CEMR.

Costs

66 Under the first paragraph of Article 122 of the Rules of Procedure, where the appeal is well founded and the Court of Justice itself gives final judgment in the case, it is to make a decision as to costs. Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 118, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

67 In the present case, although the Commission's appeal has been declared well founded and the judgment under appeal set aside, the present judgment upholds the CEMR's appeal and annuls the Commission's decision. It follows that the Commission must be ordered to pay the costs incurred by the CEMR both at first instance and in connection with the appeal, in accordance with the form of order sought by the CEMR.

On those grounds,

THE COURT

hereby:

1. Sets aside the judgment of the Court of First Instance of the European Communities of 14 December 2000 in Case T-105/99 *CEMR* v *Commission*;

2. Annuls the decision of the Commission of the European Communities contained in its letter to the Council of European Municipalities and Regions (CEMR) of 15 February 1999, effecting set-off of their mutual claims;

3. Orders the Commission to bear its own costs and to pay those incurred by the Council of European Municipalities and Regions (CEMR) both at first instance and in connection with the appeal.

Rodríguez Iglesias Wathelet Schintgen

Gulmann La Pergola Jann

Skouris Colneric von Bahr

Cunha Rodrigues Rosas

Delivered in open court in Luxembourg on 10 July 2003.

R. Grass

Registrar

G.C. Rodríguez Iglesias

President