JUDGMENT OF THE COURT OF FIRST INSTANCE
(Second Chamber, Extended Composition)

8 May 2007 *

In Case T-271/04,

Citymo SA, established in Brussels (Belgium), represented by P. Van Ommeslaghe, I. Heenen and P.-M. Louis, lawyers,

applicant,

v

Commission of the European Communities, represented by L. Parpala and E. Manhaeve, acting as Agents, assisted by D. Philippe and M. Gouden, lawyers,

defendant,

APPLICATION, principally, for contractual damages seeking to have the Commission ordered to pay the applicant damages further to cancellation of a lease allegedly entered into by the applicant and the European Community, represented by the Commission and, in the alternative, for non-contractual damages to compensate for

* Language of the case: French.

the damage allegedly sustained by the applicant as a result of the Commission's decision to terminate the pre-contract negotiations undertaken with a view to concluding the abovementioned lease,

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

composed of J. Pirrung, President, A.W.H. Meij, N.J. Forwood, I. Pelikánová and S. Papasavvas, Judges,

Registrar: K. Pocheć, Administrator,

having regard to the written procedure and further to the hearing on 17 May 2006,

gives the following

Judgment

Facts

1 The applicant is a limited company governed by Belgian law, specialising in real estate transactions. It forms part of the Fortis group which operates in the insurance and financial services sectors in the Benelux countries.

2 At the end of 2002, the applicant renovated a real estate complex owned by it in Brussels, known as 'City Center' and consisting of two buildings, B1 and B2.

3 At the beginning of 2003, the European Parliament entered into negotiations with the applicant with a view to leasing the entire floor area of building B1 of City Center, namely, 16 954 m^2 of office space and 205 parking spaces ('the Building'). Subsequently, however, the Parliament did not proceed with leasing the Building, indicating that the Commission wished to continue the negotiations on its own behalf. In the framework of interinstitutional cooperation between the two Community institutions, it was agreed that the removal of certain Commission departments to the Building would enable the Parliament to occupy the premises left vacant by them.

4 On 13 May 2003, the Commission, through Mr C ('the negotiator'), an official of the Office for infrastructure and logistics in Brussels ('OIB'), an entity constituted by Commission Decision 2003/523/EC of 6 November 2002 (OJ 2003 L 183, p. 35), contacted the applicant and Fortis Real Estate, the real estate department of the Belgian-law company Fortis AG ('Fortis AG'), a sister company of the applicant in the Fortis group, for the purpose of finalising the negotiation of the terms of the lease contract for the Building ('the lease').

5 In the course of three meetings on 16 May, 3 and 6 June 2003, the negotiator and Fortis AG ('the parties to the negotiations') discussed the terms of the lease and the internal fitting-out work to be carried out in the Building. The Commission asked for the lease to stipulate that the work would be carried out for and on behalf of the applicant and that the cost would be subsequently reimbursed by an additional rent. In addition, the Commission required the lease to provide that the work was to be completed by 31 October 2003, that is to say, just before the date proposed for the lease to take effect, and for a penalty to be payable in the event of delay.

6 In an email of 11 June 2003, Fortis AG informed the negotiator that the orders for carrying out the work could not reasonably be placed before confirmation of the Commission's agreement to the terms of the lease.

7 In an attachment to a letter of 16 June 2003 Fortis AG sent the Commission a draft lease which had previously been sent to the Commission by email. Article 4.4 of that draft stated that the internal fitting-out work in the Building required by the Commission, apart from the work relating to the cafeteria and safety ('the fitting-out work'), was to be finished by 31 October 2003 and that, in default, a penalty for delay would be payable from 1 November 2003, the date when the lease was to take effect. However, the letter from Fortis AG added that the deadline for the completion of the fitting-out work and the starting point for the penalty for delay provided for in the draft lease were subject to the following condition: 'a copy of this letter simply signed by you and thus confirming your agreement to the terms and conditions of the lease must reach us by 30 June 2003 at the latest'. Fortis AG also added: 'on receipt [of the document requested] we shall, as you have requested, place the orders for the [fitting-out] work without awaiting formal signature of the lease.' The letter also stated that, failing receipt of the document requested by the specified date, 'the deadline for completion of the work and the date from which penalties for delay begin to run will be deferred taking account of the date of receipt [of the document requested] and builders' holidays, without changing the date for the lease to begin'.

8 On 19 June 2003, after certain aspects had been clarified by the parties to the negotiations, Fortis AG sent a second version of the draft lease, which made some amendments to Article 4.5, as shown in the version of 16 June 2003.

9 On 23 June 2003, following further discussions between technical departments, Fortis AG sent the negotiator a third version of the draft lease, which made

amendments to Articles 4.3, 11 and 12, as shown in the previous versions of 16 and 19 June 2003, together with an annex summarising the parties' agreement on the budget and specifications of the fitting-out work. In the covering email, Fortis AG added that the third draft cancelled and replaced the drafts previously sent, but that the terms of its letter of 16 June 2003 remained entirely applicable.

10 By memorandum of 25 June 2003, OIB submitted the draft letter of intent and the draft lease to the Commission departments and directorates-general ('DG') which were to be consulted in connection with any real estate transaction, namely the legal department, the DG Budget and the DG Personnel and Administration (together referred to as 'the supervisory authorities'), for their opinion.

11 By fax of 26 June 2003, the negotiator returned to Fortis AG a copy of its letter of 16 June 2003, bearing his signature beneath the following handwritten words:

'The terms of the lease are satisfactory for OIB. It has been submitted to the supervisory authorities.'

12 By email of 30 June 2003, following a meeting with the supervisory authorities, the negotiator submitted a question to Fortis AG concerning the recovery of value added tax (VAT) on the fitting-out work. He added that the legal department wished to amend Article 7 of the draft lease. Finally, he wrote as follows:

'There are some other comments, but not too important. NB: this does not mean that the matter has already been approved.'

13 By email of 1 July 2003, Fortis AG replied in the negative to the negotiator's question concerning the possible recovery of VAT and the amendment to Article 7 of the draft lease.

14 On the same day, the legal department gave a favourable opinion on the draft lease, subject to the proposed amendments to the letter of intent aiming to strengthen its conditional nature, and the proposed amendments to the lease itself, which included an amendment to the jurisdiction clause in favour of the courts of Brussels.

15 On 4 July 2003 the applicant placed the first orders necessary for carrying out the fitting-out work with companies A and B.

16 On the same day, the DG Budget gave a favourable opinion on the draft lease of the Building, subject to its comments being taken into account. These concerned the obligation to follow the budget commitment procedure, the need to strengthen the conditional nature of the letter of intent and certain proposed amendments to the lease.

17 At the same time, the Commission prepared a draft communication to the Council and the Parliament in their capacity as supervisory authorities, concerning a budget extension. This was made necessary by the considerable additional cost incurred in 2003 as a result of leasing the Building.

18 Also on 4 July 2003, an OIB official, Mr F., sent a fax to Fortis AG confirming acceptance of the costs of a security service for the Building site.

19 On 5 July 2003, the DG Budget gave a favourable opinion on the draft communication to the Council and the Parliament requesting a budget extension.

20 On 7 July 2003, the DG Personnel and Administration gave a favourable opinion on the draft lease for the Building, provided that the consequences of the project for the current and future budgets were examined and taken into account, and also the consequences for the general strategy of the location of Commission departments, and subject to a reply to the questions raised on 25 June 2003 by the Comité de sécurité, d'hygiène et d'embellissement des lieux de travail de Bruxelles (CSHT) regarding certain technical and safety problems relating to the Building and its geographical location.

21 In a telephone conversation of 10 July 2003, the negotiator informed the applicant that there was some delay in approving the lease in principle by reason of the discovery of fraud within the Commission and that approval would in all probability not be given before mid-September 2003.

22 By email of 14 July 2003, the negotiator confirmed to Fortis AG that approval of the lease had been deferred and that it was difficult to foresee when a decision in that respect could be taken. However, he added that, at that stage, the actual principle of the lease was not in doubt. He concluded as follows: 'I leave you to judge what measures to take that may be useful and necessary to take account of this deferment.' At the same time, OIB was undertaking negotiations with other lessors in order to find another solution permitting removal as soon as possible.

23 On the same day, Fortis AG took formal note of the suspension of the procedure for approving the lease. It informed the negotiator that, as a consequence, it had

immediately notified its suppliers of the suspension of all orders placed for the fitting-out work and that any cost commitment relating to the fulfilment of those orders had been stopped. Fortis AG also made it clear that the fitting-out work and the starting point for penalties for delay would have to be brought forward to a date to be determined subsequently, taking account of builders' holidays, the ending date of the suspension of the procedure for formal signature of the lease and the period for the reactivation of orders, without altering the date for the lease to take effect. Finally, Fortis AG asked the negotiator to inform it as soon as possible if the actual principle of the letting were called into question.

24 On 16 July 2003, the Building Policy Group (BPG, the real estate policy group of OIB) held a meeting at which it was decided, taking account of the two-month delay in occupying the Building, to examine seriously and very rapidly the possibility of leasing a different building, referred to as 'M.', situated in Brussels and, consequently, the possibility of suspending the orders already given by the Commission's own departments with a view to the internal fitting-out of the Building.

25 In a letter received on 23 July 2003, the negotiator informed Fortis AG that the Commission accepted no liability for the damage that it might sustain by reason of the delay in approving the lease. In that connection the negotiator added:

'The consent given by myself to the terms of the lease in no way signified final approval of the lease, but only an undertaking on the part of OIB to ensure that this matter progresses through the Commission's decision-making channels which, as you know, comprise several stages without which a contract cannot be signed by OIB.'

26 By letter of 27 August 2003, Fortis AG informed the negotiator that it would hold the Commission liable for the damage that it might sustain because of the Commission's failure to take up the lease. It also informed the negotiator that some of its suppliers had already incurred costs as a result of starting the fitting-out work.

27 By registered letter of 9 September 2003, with request for acknowledgement of receipt, addressed to the director of OIB, Mr V., and to the negotiator, Fortis AG informed them of reports that after 14 July 2003 OIB had entered into negotiations concerning leasing another building, which were in the final stages of completion. On that occasion, it stated that failure by the Commission to proceed with the negotiated letting would be regarded as a unilateral breach of the lease which had been concluded.

28 By registered letter of 16 September 2003, with request for acknowledgment of receipt, the director of OIB replied to the two previous letters from Fortis AG, contending that the lease between the parties had never been entered into, so that the relationship between them had always remained at the negotiation stage. He also stated that OIB, by virtue of its function, was in constant contact with property developers and discussing with them several projects simultaneously. In passing, the director of OIB wrote:

'I confirm that the City Center project is not one of the Commission's current priorities for the installation of its own departments [but] City Center remains, in the Commission's eyes, a very interesting option which we shall not fail to ... propose [to other European organisations, whether existing or in the course of constitution]. In that connection we should be in contact with you again very shortly.'

29 By registered letter of 24 September 2003, with request for acknowledgment of receipt, by way of response addressed to the director of OIB, Fortis AG took formal note of the Commission's abandonment of the letting and stated that it intended to refer the matter to its legal adviser.

30 By letter of 26 September 2003, company B informed Fortis AG that it wished to invoice it for EUR 297 000 in respect of the cost of labour and materials used. By letter of 12 November 2003, company B sent Fortis AG a detailed estimate of the costs incurred, totalling EUR 302 870. In a letter of 18 June 2004, confirmed by a letter of 14 January 2005, company B then revised the estimate downwards, reducing it to EUR 16 842 as a result of the re-use of a large part of the materials.

31 By registered letter of 14 October 2003, with request for acknowledgment of receipt, addressed to the director of OIB, Fortis AG requested the Commission to accept responsibility for compensating company B.

32 By letter of 20 November 2003, company A in turn demanded compensation from Fortis AG for the damage sustained by reason of cancelled orders, which it estimated to total EUR 24 795.77.

33 By letter of 24 November 2003, the director of OIB refused to give a favourable reply to Fortis AG's request concerning compensation for company B, taking the view that the Commission had no contractual liability. He stated, inter alia, that 'any initiative taken by Fortis AG in relation to the presumed letting of the building or the order, if any, for work, is purely unilateral and is not binding on OIB' and that 'the harmful consequences of an erroneous interpretation concerning the extent of OIB's commitments in the framework of the negotiations are exclusively attributable to Fortis AG'.

34 In a letter of 10 December 2003, Fortis AG maintained its position that the Commission had incurred contractual liability by refusing to honour the lease.

35 In a letter of 22 December 2003, the director of OIB also maintained his position that OIB had not breached any obligation to Fortis AG.

36 By letter of 18 February 2004, addressed to the negotiator, the applicant's legal adviser claimed that the Commission had incurred contractual liability and put the Commission on notice for payment of EUR 1 137 039 to his client by way of compensation for the damage allegedly sustained by it.

37 By letter of 19 March 2004, the director of OIB refused to accede to the claim for compensation formulated by the applicant's legal adviser.

Procedure and forms of order sought

38 By application received at the Court Registry on 5 July 2004, the applicant brought the present action.

39 On 16 February 2005, the applicant lodged a request for leave to produce the lease of part of the Building which it had just concluded with the French Community of

Belgium, together with a memorandum explaining the impact of the conclusion of the lease on its estimate of its damage. On 10 March 2005, after hearing the Commission, the President of the Second Chamber of the Court granted the applicant's request. The applicant produced the documents referred to in its request within the prescribed period.

40 On 17 January 2006, upon the report of the Judge-Rapporteur, the Court (Second Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure, requested the parties to reply in writing to a number of questions and requested the applicant to produce certain documents. The parties did so within the prescribed periods.

41 On 7 February 2006, after hearing the parties, the Court remitted the case to the Second Chamber (Extended Composition).

42 On 27 March 2006, the applicant lodged a further request for leave to produce a lease concluded with Fortis AG for the part of the Building not yet let, with a brief memorandum explaining the impact of the conclusion of that lease on the estimate of its damage. By decision of the Court of 4 April 2006, after hearing the Commission, the applicant's request was granted. On 26 April 2006, the applicant lodged the documents referred to in its request with the Registry of the Court.

43 At the hearing of 17 May 2006, the parties presented their oral argument and replied to the questions put by the Court. In the transcript of the hearing, the Court took formal note of the applicant's amendments to its claim for compensation, to which the Commission raised no objections, and of the applicant's withdrawal of its alternative claim for compensation, taking account of the indexation of rents, which had been presented for the first time on 26 April 2006.

44 The applicant claims principally that the Court should:

— find contractual liability on the part of the Commission by reason of its misconduct and order it to pay the applicant finally the sum of EUR 8 853 399.44, being the total estimated damage, together with interest at the statutory rate applicable in Belgium from the date of the application to the date of actual payment;

— if necessary, summon the negotiator to appear in order to be heard on the subject of the comments he is said to have made at the meeting of 6 June and during the telephone conversation of 10 July 2003.

45 In the alternative, the applicant claims that the Court should:

— find non-contractual liability on the part of the Community, represented by the Commission, and order the Commission to pay it the sum of EUR 6 731 448.46 by way of compensation for the damage sustained, together with default interest on that sum from the date of the forthcoming judgment to the date of actual payment, at the rate of 6%;

— if necessary, order the measure of inquiry suggested in the principal application.

46 In any case, the applicant claims that the Court should order the Commission to pay the costs.

47 The Commission contends that the Court should:

— declare the applicant's action inadmissible in so far as it is based on the Commission's contractual liability;

— declare the applicant's action unfounded in so far as it is based on the Commission's non-contractual liability;

— order the applicant to pay the costs, including the costs necessary for its defence, totalling EUR 15 000.

The principal action for contractual liability

48 In its application, the applicant states that its action for liability has been brought before the Court of First Instance principally by virtue of the arbitration clause in Article 17 of the lease entered into by the applicant at the latest on 26 June 2003 with the Community, represented by the Commission, and thus on the basis of Articles 225(1) EC and 238 EC.

49 The Commission contends that the action for contractual liability brought by the applicant is inadmissible.

A — *Arguments of the parties*

50 The Commission claims that the Court has no jurisdiction to give a ruling on the basis of an arbitration clause in a contract which was not validly concluded by the parties.

51 The applicant submits that the Court has jurisdiction to give a ruling on its action for contractual liability by virtue of the arbitration clause in the draft lease which it sent to the Commission on 16 June 2003. The draft corresponded to an offer to contract made by the applicant, represented by Fortis AG, which was then accepted by the European Community, represented by the Commission, on 26 June 2003 at the latest. The Commission's agreement is shown by the handwritten statement and the negotiator's signature on the covering letter sent with the draft lease to the Commission on 16 June 2003. The applicant therefore relies on Article 17 of the draft, entitled 'Jurisdiction clause and applicable law', which stipulates that, 'in the event of a dispute, and failing amicable agreement, the Court of Justice of the European Communities shall have jurisdiction'.

52 At the hearing, the Commission disputed the existence of the arbitration clause relied upon by the applicant, on the ground that there was no agreement on the clause between the parties to the action before the Court of First Instance on the basis of Article 238 EC, namely the European Community, represented by the Commission, and the applicant. In its written pleadings, the Commission claimed that the parties to the negotiations were not empowered, without the necessary authorisations or approvals, to bind the parties to the present action contractually, so that no contract could have been validly formed between them.

B — *Findings of the Court*

53 Under the combined provisions of Articles 225(1) EC and 238 EC, the Court of First Instance has jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by or on behalf of the Community, whether that contract be governed by public or private law. The case-law states that only the parties to the arbitration clause can be parties to the action brought on the basis of Article 238 EC (see, to that effect, Case 23/76 *Pellegrini* v *Commission* [1976] ECR 1807, paragraph 31). In the absence of any expression of the parties' intention to confer jurisdiction on it to adjudicate on a contractual dispute, the Court cannot accept the referral of the case (see, to that effect, order in Case T-186/96 *Mutual Aid Administration Services* v *Commission* [1997] ECR II-1633, paragraph 46), otherwise it would extend its jurisdiction beyond the limits placed by Article 240 EC, since that article specifically gives national courts or tribunals ordinary jurisdiction over disputes to which the Community is a party (Joined Cases 133/85 to 136/85 *Rau and Others* [1987] ECR 2289, paragraph 10, and order in *Mutual Aid Administration Services* v *Commission*, paragraph 47). As this Community jurisdiction derogates from ordinary law, it must also be given a restrictive interpretation (Case 426/85 *Commission* v *Zoubek* [1986] ECR 4057, paragraph 11).

54 It is therefore necessary to consider whether the arbitration clause alleged by the applicant was validly concluded by the Commission or its representatives, acting for and on behalf of the Community, and the applicant or its representatives.

55 On that point, it is clear from the case-law that, if, under an arbitration clause entered into pursuant to Article 238 EC, the Court may be called on to decide a dispute on the basis of the national law governing the contract, its jurisdiction to determine a dispute concerning that contract falls to be determined solely in the light of Article 238 EC and the terms of the arbitration clause, and this cannot be affected by provisions of national law which allegedly exclude its jurisdiction (Case C-209/90 *Commission* v *Feilhauer* [1992] ECR I-2613, paragraph 13).

56 While Article 238 EC does not state what form the arbitration clause is to take, it is clear from Article 44(5a) of the Rules of Procedure, which requires an application submitted under Article 225(1) EC and Article 238 EC to be accompanied by a copy of the clause conferring jurisdiction on the Community courts, that the clause must in principle be stipulated in writing. Article 44(5a) of the Rules of Procedure has an evidential purpose and the formal requirement which it prescribes must be deemed to have been fulfilled where the documents produced by the applicant provide the Community court with sufficient information on the agreement between the parties to the action to remove the dispute between them from the purview of the national courts and to submit it to the Community courts (see, to that effect, *Pellegrini* v *Commission*, cited in paragraph 53 above, paragraph 10).

57 In the present case, Article 17 of the draft lease stipulates that, failing amicable agreement between the parties, disputes which may arise concerning the lease will submitted to the jurisdiction of the 'Court of Justice'. According to the case-law, those words must be interpreted as designating the institution referred to in Article 238 EC, which comprises the Court of First Instance (see, to that effect, Case C-294/02 *Commission* v *AMI Semiconductor Belgium and Others* [2005] ECR I-2175, paragraphs 43 to 53), which is, in the present case, the competent court under Article 225(1) EC.

58 However, the parties to the present dispute disagree as to whether the stipulation in Article 17 of the draft lease constituted consent to the alleged arbitration clause.

59 On that point, it must be observed that the applicant did not did not duly contest the Commission's statements that the authorising officer competent to enter into the lease was, in the present case, the director of OIB, which is corroborated by the provisions of Article 16 of Council Decision 2003/523 and of Title V of Part Two of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities ('the Financial Regulation') (OJ 2002 L 248, p. 1), to which the latter article refers. It must

also be observed that, when questioned on this point during the hearing, the applicant merely claimed that the arbitration clause was 'apparently' entered into as the negotiator always appeared to the applicant to have power to bind the Commission contractually and, ultimately, the Community for the purpose of the present real estate transaction. In its written pleadings, the Commission denied that the applicant could rely, in the present case, on the theory of ostensible authority, as it had not shown in what way the negotiator's attitude could have suggested that he was empowered to bind the Commission contractually.

60 Assuming that the theory of ostensible authority is recognised in Community law, particularly with regard to the representation of parties to a contract, applying that theory necessarily presupposes that the third party pleading that authority establishes that the circumstances of the case justified his belief that such ostensible authority accorded with reality. It follows that, in the present case, the applicant, which brought its action on the basis of an arbitration clause 'apparently' entered into by it and the Commission, must at least show that, having regard to the circumstances of the case, it could legitimately have believed that the negotiator was empowered to bind the Commission contractually, acting for and on behalf of the Community.

61 That is not the case here. The applicant has adduced no evidence at all in support of its allegations that the negotiator appeared to it to be the competent authorising officer with the powers necessary to bind the Commission and the Community contractually. Thus it has not been shown that the error pleaded by the applicant as to the exact limits of the negotiator's powers was induced by the latter's conduct.

62 Nor has, the applicant shown that the facts of the case justified its error, without imprudence or negligence on its part, as to the exact limits of the negotiator's powers and the significance of the negotiator's handwritten statement and signature

of 26 June 2003 on the letter accompanying the draft lease (see paragraph 11 above). As the documents in the file show, Fortis AG, which represented the applicant in the pre-contract negotiations, is an informed operator and a significant player in the Brussels real estate market. Before the present negotiations, it had conducted several similar negotiations between 1999 and 2002 with the Commission departments. The documents produced in that connection by the Commission attest to the fact that it is customary in transactions of that kind to negotiate the terms of the future contract and any jurisdiction agreement relating to it before starting the internal supervision and decision-making procedure which ends with the contractual commitment of the Commission. In view of its experience in the matter, Fortis AG knew that the agreement on the terms of the contract and the jurisdiction agreement precede the Commission's legal commitment, which is entered into only after the institution's internal supervision and decision-making stage. In the present case, the handwritten statement of 26 June 2003, in which the negotiator pointed out, in particular, that the terms of the jurisdiction agreement had been submitted to the supervisory authorities, were sufficiently clear and definite to enable Fortis AG to understand that the Commission's internal supervision and decision-making stage had been initiated and that, in accordance with its usual practice, the contractual commitment would be entered into by the competent authorising officer only upon completion of that procedure.

63 This conclusion cannot be called into question on the ground that the Commission did not in the present negotiations expressly inform the other party of the exact rules of its internal supervision and decision-making procedure or that the present negotiations were being conducted with a new entity, specifically constituted by the Commission to manage real estate transactions. As the ostensible situation claimed by the applicant differed from the customary practice in that sphere (see paragraph 62 above), which was known to the applicant, the applicant's suspicions ought to have been aroused and it ought to have been induced to verify, in the present case, the exact extent of the negotiator's powers. By failing to do so in the circumstances of the present case, the applicant acted negligently and it cannot legitimately take advantage of that in the context of the present action.

64 In the light of the foregoing, there is no foundation for the applicant's argument that it legitimately believed that the power to negotiate the terms of the lease was the same as the power to bind the Commission contractually and that the agreement of 26 June 2003 between the parties to the negotiations could be equated with a contractual commitment on the part of the Commission. There is therefore no foundation for the applicant's claim that, in the present case, the alleged arbitration clause 'apparently' existed in that connection as from 26 June 2003.

65 Consequently, without its being necessary to rule on whether Fortis AG had the power to represent the applicant for the purpose of stipulating the alleged arbitration clause, the conclusion must be that, as the applicant has failed to demonstrate the existence of an arbitration clause validly concluded by the parties to the present action, and as the applicant has failed in that respect to comply with the provisions of Article 44(5a) of the Rules of Procedure, its action is inadmissible in so far as it has been brought on the basis of the combined provisions of Articles 225(1) EC and 238 EC.

The alternative action for non-contractual liability

66 In its application, the applicant indicated that its action for liability had been brought before the Court on an alternative basis should the Court find that the lease had not been entered into by the parties, on the basis of Articles 225 EC and 235 EC, as well as the second paragraph of Article 288 EC.

67 Consequently, it is necessary to give a ruling on the action for non-contractual liability which has been duly instituted by the applicant on the basis of the abovementioned articles.

A — *Merits*

1. *Arguments of the parties*

68 The applicant complains that the Commission failed in its duty to act in good faith in connection with the pre-contract negotiations and abused its right not to contract by breaking off the pre-contract negotiations at a very advanced stage. First of all, the Commission did not inform the applicant, on receiving the offer of 16 June 2003, that it could not accept the offer by reason of the imperatives of its internal decision-making procedure but, on the contrary, countersigned the offer in the knowledge that, on that basis, the applicant would start the fitting-out work. Second, it allowed negotiations to continue until 14 September 2003, when it knew from the beginning of July 2003 that they were bound to fail. Finally, the Commission never gave the true reason for the termination of the negotiations and recklessly pursued them without taking into account the opposition of officials to the location of the Building. The applicant denies that the Financial Regulation confers on the Commission an absolute right not to complete the process for the conclusion of a contract without owing compensation. On this point, the applicant submits that the provisions of Title V of Part One of the Financial Regulation are unlawful, either because they were adopted on an incorrect legal basis, in breach of the principle that the Community can only act within the powers conferred on it or because they infringe Article 288 EC by unlawfully exempting the Commission from part of its liability. The applicant submits in the alternative that, as against the applicant, the Commission cannot rely on the rule in the first paragraph of Article 101 of the Financial Regulation because it did not itself comply with the requirements of the second paragraph of that article, which requires the interested tenderers to be informed of the reasons for the decision to abandon the procurement.

69 At the reply stage, the applicant also claimed that, by withdrawing its acceptance of the offer, the Commission breached the general principles of Community law which prohibit the withdrawal of an administrative act conferring subjective rights on individuals.

70 The applicant submits that the Commission also breached the principle of protection of legitimate expectations by breaking off the negotiations after leading the applicant, on 26 June 2003, to entertain a reasonable expectation that the agreement in principle on the terms of the lease would be followed by signature of the lease. First, the Commission misled the applicant as to the extent of its, the Commission's, obligations by failing to inform it that, because of the imperatives of its internal procedure, it would not be legally bound until formal signature of the lease by the authorised officer and that any initiative undertaken by the applicant in the meantime would be at its own risk. Second, the Commission encouraged the applicant to place the necessary orders for the fitting-out work. For instance, the Commission insisted on several occasions that the work be completed quickly so that the installation of officials could be carried out on the date when the lease took effect on 1 November 2003. In addition, the negotiator countersigned without the slightest reservation the letter of 16 June 2003 which stated as follows: 'on receipt [of the countersigned letter] we shall, as you have requested, place the orders for the work without awaiting formal signature of the lease.' Furthermore, at the meeting of 6 June 2003, referred to in paragraph 5 above, the negotiator, first, informed Fortis AG that, although the lease could not be signed before 15 June 2003, it was certain to be taken up and, second, he suggested to his interlocutors that they rely on his word to place the orders necessary for the fitting-out work. On the basis of that legitimate expectation, which was not subsequently called into question, the applicant placed, from 4 July 2003, the orders necessary for the fitting-out work so that it could meet its obligations under the lease within the prescribed time-limits. Only later, by implication from 10 July 2003 and expressly on 14 September 2003, did the Commission express doubt with regard to the formal signature of the lease.

71 In respect of the damage arising from those illegal acts, the applicant claims, first, compensation for its loss of the opportunity to enter into the lease by an award of 75% of the expected contractual earnings, namely a total of EUR 6 608 821.25.

72 The applicant also seeks reimbursement of the costs incurred to no purpose in the negotiations. With regard, first, to the costs claimed by its suppliers, companies A and B, in connection with the orders placed, totalling EUR 41 637.77, these were

incurred on the basis of the legitimate expectation entertained by the applicant that the lease would be signed. Second, in respect of the services performed by the limited company Fortis Real Estate Property Management ('FREPM'), a Fortis group company which acted as project manager in the negotiations, for the sum of EUR 19 298.76 excluding VAT, and by staff of Fortis AG for a sum estimated at EUR 21 690.68, those costs were incurred for the sole benefit of the Commission, on the basis of the legitimate expectation that the lease would be taken up.

73 Finally, the applicant seeks compensation for the loss of the opportunity to let the Building to a third party on equivalent terms for the duration of the negotiations, that is to say, from 13 May to 14 September 2003. During that period, it refrained from conducting negotiations concerning the Building with third parties and thus conferred on the Commission an exclusive right which was justified by the Commission's manifest readiness to take up the lease. The applicant estimates the damage at a total of EUR 40 000 on an equitable basis.

74 The Commission contends, first, that, in breaking off the negotiations with the applicant, there was no misconduct on its part for the purposes of the second paragraph of Article 288 EC.

75 Article 101 of the Financial Regulation confers upon it an absolute right not to take up the lease, without owing compensation. That right to abandon the procurement, which is exercised without prejudice to the application of the second paragraph of Article 288 EC, is effective as against the applicant. In the present case, the Commission considers that it fulfilled the requirements of Article 101 of the Financial Regulation even though it refrained from informing the applicant of the reasons for its decision to abandon the procurement, because the applicant did not send a prior request in writing to that effect.

76 The Commission denies the applicant's plea of illegality. The rules applying to the award of Community public contracts and to legal commitments of the European Union authorities laid down in the Financial Regulation were legally adopted on the basis of Articles 274 EC and 279 EC, so that there are no grounds for refusing to apply them in the present case.

77 The Commission claims that, as it merely exercised its rights, in conformity with the Community procedures for the award of public contracts, in abandoning the lease because of very specific considerations relating to technical problems connected with the Building and its geographical location, and as, on 26 June 2003, it informed the applicant of the beginning of the consultation and decision-making process and, without delay, kept the applicant informed of the suspension of that procedure and then of the decision not to take up the lease, it, the Commission, cannot be criticised for seriously and manifestly disregarding the limits to its discretion in this particular case. Nor can it, be alleged against the Commission that it failed to inform the applicant expressly that final approval of the lease was subject to a consultation and decision-making process because the relevant rules are binding on all the persons concerned, are published in the Official Journal and therefore known to everyone, including, the applicant who, furthermore, had notice of them in previous negotiations. In those circumstances, the Commission cannot be considered to have acted in breach of good faith in the pre-contract negotiations in question.

78 The Commission also considers that it cannot be criticised for having withdrawn its consent to taking up the lease as it never gave its consent, contrary to what the applicant alleges.

79 The Commission contends that it did not breach the principle of the protection of legitimate expectations in the circumstances of the present case. It never encouraged the applicant to incur expenditure with a view to carrying out the fitting-out work, nor did it lead the applicant to entertain a legitimate expectation that the lease

would be taken up. In particular, it gave no definite assurance concerning the outcome of the consultation and decision-making process. On the contrary, the negotiator expressed reservations concerning taking up the lease in his handwritten note of 26 June 2003 and his email of 30 June 2003. Furthermore, during the negotiations he informed the applicant that its wish to have the lease approved within a certain period could not be met in view of the obligation to adhere to the consultation and decision-making procedure.

80 Second, the Commission denies that the applicant has discharged its burden of proving a direct causal link between the unlawful conduct and the alleged damage. With regard to the loss of an opportunity to contract, the damage arising from the non-occupation of a building, suffered a number of years after the pre-contract negotiations were broken off, cannot be regarded as a normal consequence of the latter. In respect of the costs incurred by suppliers, the applicant by its own conduct, directly caused that damage by deciding to place orders at a time when it was aware that the lease had not yet been approved and despite the reservations expressed by the negotiator. Finally, with regard to the costs of FREPM and of Fortis AG staff, the applicant has not shown in what respect the alleged services were performed on the occasion of the negotiations for the lease.

81 Third, the Commission denies that the applicant has discharged its burden of proving actual and certain damage.

82 In Community law, compensation cannot be allowed for the loss of the anticipated profit from the performance of a contract where there is no contract. Moreover, compensation for the loss of an opportunity is open to dispute in the present case because the applicant never lost the opportunity to let the Building to a third party. In any case, the applicant has not shown the extent of the alleged damage.

83 With regard to the costs claimed by suppliers, the applicant has not shown that the alleged damage was actually sustained, namely that the materials were paid for and that they were ordered to no purpose.

84 The costs incurred by FREPM or Fortis AG in connection with the negotiations do not constitute damage for which compensation can be awarded because of the Commission's right to refrain from concluding public contracts without compensation. In addition, the applicant has not shown to the requisite legal standard that it suffered actual personal damage or that the factors used to evaluate the alleged damage are relevant.

85 Finally, the applicant can claim nothing for the alleged loss of an opportunity to let the Building to a third party for the duration of the negotiations because no compensation is due for the loss of the profit from a contract which was not formed. In any case, the applicant has not proved that it actually had an opportunity to let the Building to a third party for the duration of the negotiations.

2. *Findings of the Court*

86 It is settled case-law that in order for the Community to incur non-contractual liability under the second paragraph of Article 288 EC a number of conditions must be satisfied: the institutions' conduct must be unlawful, actual damage must have been suffered and there must be a causal link between the conduct and the damage pleaded (Case 26/81 *Oleifici Mediterranei* v *EEC* [1982] ECR 3057, paragraph 16; Case T-175/94 *International Procurement Services* v *Commission* [1996] ECR II-729, paragraph 44; Case T-336/94 *Efisol* v *Commission* [1996] ECR II-1343, paragraph 30; and Case T-267/94 *Oleifici Italiani* v *Commission* [1997] ECR II-1239, paragraph 20).

87 If any one of those conditions is not satisfied, the action must be dismissed in its entirety and it is unnecessary to consider the other conditions for non-contractual liability (Case T-170/00 *Förde-Reederei* v *Council and Commission* [2002] ECR II-515, paragraph 37); nor is the Court required to examine the conditions giving rise to the liability of the Community in a particular order (Case C-257/98 P *Lucaccioni* v *Commission* [1999] ECR I-5251, paragraph 13).

(a) The alleged unlawful conduct

Preliminary observations

88 First of all, the context of the present pre-contract negotiations must be described.

89 Under Article 104 of the Financial Regulation and Article 116(7) of Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002, laying down detailed rules for the implementation of the Financial Regulation ('the detailed rules') (OJ 2002 L 357, p. 1), the Community institutions and their departments are deemed to be contracting authorities in the case of contracts awarded on their own account.

90 Article 88(1) of the Financial Regulation states that public contracts are contracts for pecuniary interest concluded in writing by a contracting authority in order to obtain, against payment of a price paid in whole or in part from the budget, the supply of movable or immovable assets, the execution of works or the provision of services. The same article provides that those contracts include contracts for the purchase or rental of a building.

91 In the present case it is common ground that the lease was to have been concluded by the applicant, a real estate company governed by Belgian law, and the European Community and that its subject-matter was the leasing of an existing building, namely building B1 of City Center, on behalf of the Commission, which wished to accommodate some of its departments therein.

92 It follows from the foregoing that the Commission acted in the present case as a 'contracting authority' within the meaning of Article 104 of the Financial Regulation and Article 116(7) of the detailed rules and that the lease must be classified as a 'public contract' within the meaning of Article 88(1) of the Financial Regulation and, more exactly, as a 'building contract' within the meaning of Article 116(1) of the detailed rules.

93 Without its being unnecessary at this stage to rule on the nature or lawfulness of Title V of Part One of the Financial Regulation and the detailed rules (see paragraphs 114 to 117 and 118 to 125 respectively below), it must be observed that the lease was subject to those provisions, which govern the procedure for the award of contracts concluded on behalf of a Community institution, including public building contracts (see, to that effect, Case T-148/04 *TQ3 Travel Solutions Belgium* v *Commission* [2005] ECR II-2627, paragraph 1).

94 Article 126(1) of the detailed rules provides that, when they award building contracts, the contracting authorities may use the negotiated procedure, without a threshold limit and without prior publication of a contract notice, after prospecting the local market. In the context of such a procedure, the contracting authority may choose freely the undertaking or undertakings with which they wish to enter into negotiations.

95 In the present case, the documents in the file show that the Commission chose to use the negotiated procedure, without prior publication of a contract notice and after prospecting the local market, in order to meet its needs for the accommodation of some of its staff.

96 The applicant's complaints of illegality must be examined in the particular context of that procedure for awarding a contract.

Withdrawal of a duly-given acceptance, failure to state the reasons for breaking off pre-contract negotiations, and entering recklessly into pre-contract negotiations

97 In relation to the complaint that the Commission disregarded the rule forbidding the withdrawal of a duly-given acceptance, it must be observed first of all that the complaint was raised for the first time at the reply stage. However, under Article 48(2) of the Rules of Procedure, no new plea in law may be introduced in the course of the proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure.

98 In the present case, the complaint in question could have been raised at the stage of the application, which was lodged on 5 July 2004. The documents in the file show that on 24 September 2003 the applicant, by letter addressed to the Commission, took formal notice of the fact that the director of OIB had officially informed the applicant that 'the City Centre project is no longer one of the Commission's ... priorities for the installation of its own departments'. Consequently, that was the date on which the applicant became aware of the unlawful act which it alleges, namely the disregard of the rule forbidding the withdrawal of an acceptance said to have been duly given.

99 Consequently, the applicant's complaint, which was raised belatedly in the course of the present proceedings, must be dismissed as inadmissible.

100 With regard to the complaint that the Commission breached the principle of good faith and abused its right not to contract by not informing the applicant of the true reasons for its decision to abandon the procurement for which the pre-contract negotiations had been started and, consequently, for breaking off the negotiations, it must be observed that, in the circumstances of the present case, this is, in essence, akin to a complaint that no reasons were given for the decision not to award the contract. Under the second paragraph of Article 101 of the Financial Regulation and, more generally, the general obligation to state reasons pursuant to Article 253 EC, the Commission was under an obligation, at the same time as informing the applicant of the decision not to award the contract for which it was bidding, to inform it also of the reasons for that decision.

101 The Court finds, however, that the applicant has not alleged any damage (see paragraph 157 below) liable to have arisen, through a cause-and-effect connection, from the Commission's failure to state the reasons for its decision to abandon the procurement and, therefore, to break off the pre-contract negotiations. Therefore, the conditions requiring that there be damage and a causal connection between that damage and the unlawful conduct of the Community institution, which are necessary for non-contractual liability on the part of the Community to be incurred (see paragraphs 86 and 87 above) have not been fulfilled in the present case. Consequently, the Community cannot have incurred non-contractual liability by reason of that alleged illegality.

102 Consequently, the complaint alleging failure to state the reasons for breaking off the pre-contract negotiations were not given has no merit and must be dismissed.

103 Likewise, the complaint that the Commission breached the principle of good faith and abused its right not to contract by entering recklessly into pre-contract negotiations which it then had to break off must be dismissed. This complaint is based on the argument that the only reason for the termination of the negotiations was the opposition of officials to the location of the Building, of which the Commission was aware at the time when it began the negotiations. However, this allegation has not been substantiated. On the other hand, it is clear from the rejoinder and the documents in the file that the negotiations were broken off by reason of a number of technical problems connected with the geographical location of the Building, which were noted by certain supervisory authorities (see paragraph 20 above) when the matter was referred to them in the course of the internal supervisory and decision-making procedure.

104 Therefore, the question whether the Commission acted unlawfully in the present case must be examined by taking account of the other complaints made by the applicant.

Late notice of the decision to break off the pre-contract negotiations, failure to set out the internal decision-making rules and the assurances given concerning taking up the lease and/or the acceptance of responsibility for the associated investments

105 With regard to the condition of illegal conduct, the case-law requires a sufficiently serious breach to be shown of a rule of law intended to confer rights on individuals (Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, paragraph 42). The decisive criterion for finding that a breach of Community law is sufficiently serious is whether the Community institution concerned manifestly and gravely disregarded the limits to its discretion. Where an institution has only a

considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach (Case C-312/00 P *Commission* v *Camar and Tico* [2002] ECR I-11355, paragraph 54, and Joined Cases T-198/95, T-171/96, T-230/97, T-174/98 and T-225/99 *Comafrica and Dole Fresh Fruit Europe* v *Commission* [2001] ECR II-1975, paragraph 134).

106 In view of the criteria identified by the case-law, it is necessary first to determine whether the breaches claimed by the applicant relate to rules of law conferring rights on individuals. On this point it must be observed that the plea of abuse of a right resulting from the circumstances of the abandonment of the lease and the termination of the pre-contract negotiations has, in the applicant's arguments, no significance independent of the complaint of a breach of the principle of good faith. Therefore the plea of a abuse of rights is indistinguishable from the latter complaint.

— The nature of the rules allegedly breached

107 In Joined Cases 43/59, 45/59 and 48/59 *Von Lachmüller and Others* v *Commission* [1960] ECR 463, p. 474, and Case 44/59 *Fiddelaar* v *Commission EEC* [1960] ECR 535, p. 547, the Court held that the conduct of the Community public authority, in administrative as in contractual matters, is at all times subject to observance of the principle of good faith. Community case-law has also developed a rule that individuals cannot seek to misuse Community measures (see, to that effect, Case 33/74 *Van Binsbergen* [1974] ECR 1299, paragraph 13; Case 229/83 *Leclerc and Others* [1985] ECR 1, paragraph 27; Case 39/86 *Lair* [1988] ECR 3161, paragraph 43; Case C-8/92 *General Milk Products* [1993] ECR I-779, paragraph 21; Case C-23/93 *TV10* [1994] ECR I-4795, paragraph 21; Case C-367/96 *Kefalas and Others* [1998] ECR I-2843, paragraph 20; Case C-373/97 *Diamantis* [2000] ECR I-1705, paragraph

33; and Case C-255/02 *Halifax and Others* [2006] ECR I-1609, paragraph 69). Where negotiations take place for the conclusion of a contract between the Community public authority and a tenderer in the context of a public procurement procedure, those rules of law confer rights on the tenderer concerned by imposing certain limits to the conduct of a Community contracting authority which decides to abandon the procurement and not to contract.

108 Furthermore, it is clear from the case-law that the principle of the protection of legitimate expectations is a general principle of Community law which confers rights on individuals (Joined Cases C-104/89 and C-37/90 *Mulder and Others* v *Council and Commission* [1992] ECR I-3061, paragraph 15, and Case T-43/98 *Emesa Sugar* v *Council* [2001] ECR II-3519, paragraphs 64 and 87). In a public procurement procedure, that principle confers rights on any tenderer who is in a situation in which it is apparent that, in giving him specific assurances, the Community administration has led him to entertain reasonable expectations (see, to that effect, Case T-203/96 *Embassy Limousines & Services* v *Parliament* [1998] ECR II-4239, paragraph 74 et seq.).

109 In the light of the foregoing, the Court finds that the applicant alleges in the present case a breach of rules which confer rights on individuals.

110 The criteria identified by the case law entail, secondly, an assessment of the Commission's room for manoeuvre in the present case, under inter alia the first paragraph of Article 101 of the Financial Regulation, in refusing to take up the lease and consequently breaking off the negotiations which it had begun.

— The scope, nature, lawfulness and *effectiveness* of the first paragraph of Article 101 of the Financial Regulation

111 It follows from the first paragraph of Article 101 of the Financial Regulation that, in the context of a negotiated procedure, without prior publication of a contract notice, after prospecting the local market, as was lawfully done in the present case, the contracting authority has a very broad discretion to refuse to conclude the contract and, therefore, to terminate the pre-contract negotiations which have been started (see, to that effect and by analogy, Case C-27/98 *Fracasso and Leitschutz* [1999] ECR I-5697, paragraphs 23 to 25, and *Embassy Limousines & Services* v *Parliament*, cited in paragraph 108 above, paragraph 54).

112 It follows that, in order for the condition concerning the existence of unlawful conduct to be fulfilled, the applicant must show not only that the Commission breached one of the rules of law relied on by the applicant, having regard to the circumstances of the decision not to take up the lease and consequently to terminate the pre-contract negotiations, but also that that breach constituted a manifest and serious disregard of the limits imposed on the Commission's discretion.

113 This finding is not affected by the arguments or pleas put forward by the applicant.

114 With respect to the applicant's argument that, like the other provisions of Title V of Part One of the Financial Regulation, the first paragraph of Article 101 is not applicable to the grant of the lease in so far as it only lays down internal organisation measures of the Community institutions which, by their very nature, cannot give rise to legal effects for third parties, suffice it to observe that, on the contrary, Article 101

contains requirements of a regulatory nature which, pursuant to Article 249 EC, are of general application, binding in their entirety and directly applicable to the objective situation which they govern.

115 It is clear from the final provisions of the Financial Regulation that, like all its provisions, the first paragraph of Article 101 is binding in its entirety and directly applicable in all Member States. It has been published in the Official Journal as an act whose publication is a condition of its applicability.

116 It is also clear from recital 24 in the preamble to the Financial Regulation that the first paragraph of Article 101 governs public contracts awarded by the Community institutions on their own account. Therefore, by virtue of its very purpose, Article 101 must produce legal effects in relation to all third parties who bid for those contracts. It must also be observed that the first paragraph of Article 101 sets out the contracting authority's rights in its relations with tenderers for public contracts. As the Commission correctly observes, those provisions would have no meaning or effect if they were of the nature of a mere internal operational rule of the institutions. It follows from the wording of the first paragraph of Article 101 that it is intended to produce legal effects as against third parties who tender for a public contract awarded by a Community institution for its own account and that, to that extent, it is of general application.

117 In the present case, the first paragraph of Article 101 was effective as against the applicant and was applicable to the procedure for awarding the contract in question here, as the pre-contract negotiations began subsequent to the date of publication and application of the Financial Regulation. It was published in the Official Journal on 16 September 2002 and came into force on 1 January 2003, in accordance with Article 187 thereof, while the pre-contract negotiations between the Commission and the applicant did not begin until May 2003.

118 Furthermore, the applicant's pleas of illegality in support of the inapplicability of the first paragraph of Article 101 and of the other provisions of Title V of Part One of the Financial Regulation to the present case must be dismissed.

119 It must be observed that, in the context of the scheme of powers of the Community, the choice of the legal basis for a measure must rest on objective factors which are amenable to judicial review. Those factors include in particular the aim and content of the measure (see Case C-84/94 *United Kingdom* v *Council* [1996] ECR I-5755, paragraph 25, and case-law cited).

120 Article 279 EC states that 'the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament and obtaining the opinion of the Court of Auditors, shall make Financial Regulations specifying in particular the procedure to be adopted for establishing and implementing the budget and for presenting and auditing accounts'. That Article confers a general power on the Council to lay down the rules governing the entire budgetary sphere covered by the EC Treaty, which includes not only the procedure for establishing and implementing the budget and for presenting and auditing accounts, but also, as expressed by the use of the phrase 'in particular', any other closely connected question.

121 As appears from Article 88(1) of the Financial Regulation, the public contracts governed by the Financial Regulation are contracts which are financed, entirely or in part, by the Community budget. In the context of Community public contracts, the conclusion of the contract therefore gives rise to an obligation (legal commitment) resulting in an expense which is charged to the budget (budget commitment). By virtue of the principle of the unity and accuracy of the budget, the expense relating to a legal commitment must therefore be entered in the budget. To that extent, the award of public contracts by the Community institutions for their own account and

the conclusion of the corresponding contracts are closely bound up with the implementation, in expenditure terms, of the budget.

122 Whilst, as a general rule, the legislation on public contracts is not regarded as an integral part of budget law, which is considered to be narrower, it must be observed that in Community law observance of the principles arising from the general scheme of the financial provisions of the EC Treaty and, in particular, the principles of transparency and sound financial management justifies public contracts awarded for the account of the Community institutions themselves, which may be connected with the implementation of the budget, being subject to transparent rules ensuring observance of procedures protecting Community funds. In addition, although in most cases it is not in the nature of financial law or budget law to create rights or obligations for persons outside the public sphere, there is nothing to prevent those rules from having their own legal effects in relation to third parties who agree to bid for a Community public contract financed entirely or in part by the Community budget.

123 It is clear from precisely Article 89 of the Financial Regulation that the purpose and object of the provisions of Title V of Part One of the same regulation, as supplemented by the corresponding provisions of the detailed rules, are that all public contracts financed in whole or in part by the budget are to comply with the principles of transparency, proportionality, equal treatment and non-discrimination and that all procurement contracts are to be put out to tender on the broadest possible base, except when use is made of the negotiated procedure. Those provisions thus aim to subject public contracts awarded for the Community institutions' own account to transparent rules ensuring observance of the procedures for the protection of Community funds.

124 It follows from the foregoing that Article 279 EC was an appropriate legal basis for the adoption of the provisions of Title V of Part One of the Financial Regulation. Moreover, it must be found that, in adopting the abovementioned rules, the Council acted on the basis and within the limits of its powers under Article 279 EC.

125 With regard to the applicant's argument that the first paragraph of Article 101 of the Financial Regulation infringes Article 288 EC by unlawfully exempting the Commission from part of its liability, suffice it to observe that the right to abandon a procurement and not to conclude the contract in question is exercised without prejudice to the application of the second paragraph of Article 288 EC. It follows that, although the Commission has a broad discretion to break off negotiations, it may nevertheless incur the Community's non-contractual liability where it is clear from the actual circumstances of such termination that the Commission acted unlawfully for the purpose of the second paragraph of Article 288 EC.

126 Finally, with regard to the applicant's argument that, as against the applicant, the Commission cannot rely on the rule in the first paragraph of Article 101 of the Financial Regulation because it did not itself comply with the requirements of the second paragraph of that article, which requires the interested tenderers to be informed of the reasons for abandoning the procurement, it must be observed that the second paragraph requires the decision to abandon the procurement to contain reasons and brought to the attention of the candidates or tenderers. Failure to fulfil the obligation to state reasons is liable to invalidate the decision to abandon the procurement and not to conclude the contract. On the other hand, it cannot at this stage preclude the application of provisions which, in the present case, are intended to apply to the conclusion of the lease by reason of their regulatory nature.

— Breach of the principle of good faith and rule against abuse of rights

127 First, it is necessary to examine, by reference to the criteria previously set out (paragraph 112 above), the applicant's complaint that the Commission exceeded the limits imposed in the present case, by the principle of good faith and the rules against the abuse of rights, on its right not to contract, by continuing for more than two months negotiations which it knew were bound to fail.

128 It must first be observed that the Commission informed the applicant of its decision to abandon the procurement and therefore broke off the pre-contract negotiations on 24 September 2003 (see paragraph 98 above).

129 This finding is not called into question by the Commission's allegations that the information in question was given to the applicant in the course of a meeting held at the beginning of July. Apart from their lack of precision, those allegations are supported by no evidence and are contradicted by the correspondence in July 2003 between OIB and Fortis AG. Although the correspondence mentions a delay or postponement of approval of the lease, there is never any reference to the abandonment in any way of the actual principle of the procurement. Quite the contrary, the correspondence shows that on 14 July 2003 the negotiator informed the other party to the negotiations that the principle of taking up the lease had not, up to then, been called into question. In addition, in an undated letter received by Fortis AG on 23 July 2003, the negotiator also stated that he would keep it informed of the progress of the matter.

130 Next it is necessary to determine the date on which the Commission took the decision to abandon the procurement. The applicant submits that the decision was taken in July 2003, but has produced no evidence in support. However, it appears from the Commission's own pleadings that 'at the beginning of July 2003' and 'because of all the difficulties arising in the course of the procedure, [it] finally decided to abandon leasing the [Building]'. The same pleadings show that in the course of July 'OIB tried to seek a different solution [to leasing the Building] which would permit a move as soon as possible and [that] in that context negotiations were started with other prospective lessors'. It also appears from the documents produced by the Commission in the course of the proceedings that at the meeting of 16 July 2003, referred to in paragraph 24 above, BPG decided, taking account of the two-month delay in occupying the Building, to examine seriously and very rapidly the possibility of leasing building 'M.' and, consequently, the possibility of deferring the orders already given with a view to the internal fitting-out of the Building. In reply to questions put by the Court, the Commission also confirmed that, after the assessment by BPG, 'OIB finally began the consultation and decision-making

procedure for the building M'. It must therefore be found that on 16 July 2003 the Commission took the decision to abandon the procurement which it was negotiating with the applicant and to start a new negotiated procedure concerning a different building.

131 In view of the period of more than two months between the decision being taken and the applicant being informed of it, it is clear that the Commission delayed informing the other party to the negotiations of its decision to abandon the procurement. It thus continued the pre-contract negotiations which it knew were bound to fail and deprived the applicant of the opportunity to seek another tenant for the Building from 16 July 2003. In the context of a property procurement negotiated with the applicant alone, concerning a building which was not available because of pre-contract negotiations, the Commission's conduct breaches the principle of good faith and amounts to an abuse of its right not to contract.

132 Having regard to the rules of law which are found to have been breached, in the present case such breach constitutes a serious and manifest disregard of the limits to the Commission's discretion in exercising its right to abandon the procurement negotiated with the applicant and, thereby, to break off the negotiations entered into with the applicant.

133 Second, it is necessary to examine the complaint that the Commission exceeded the limits, imposed by the principle of good faith and the rule against abuse of rights, on its power not to contract by failing to inform the applicant, upon receipt of the draft lease of 16 June 2003, that it could not accept the draft by reason of the needs of its internal approval procedure, but, having on the contrary, countersigned the covering letter in the knowledge that, on that basis, the applicant would place the orders for the fitting-out work. In essence, the applicant's complaint is that the Commission broke off the pre-contract negotiations after having misled the applicant, through lack of information, as to the extent of the obligations which it had actually

undertaken, thereby causing it damage. This argument raises the question whether the principle of good faith required the Commission in the present case to provide the applicant with particular information on the obligations which it actually undertook in the context of the pre-contract negotiations.

134 First of all, it must be made clear that the Commission could be under an obligation, by virtue of the principle of good faith and the rule against abuse of rights, to give the applicant specific information only if the information in question was unavailable or, at the very least, quite difficult for the applicant to obtain.

135 Under the first paragraph of Article 101 of the Financial Regulation, the Commission could, up to the date of signature of the lease, abandon the procurement and refuse to take up the lease. It follows that the Commission could not be legally bound by the lease before that date. Furthermore, as already stated in paragraph 117 above, the provisions of that article were applicable and effective as against the applicant, Consequently, it must be found that the applicant knew or ought to have known, even without specific information from the Commission, that the Commission could abandon the procurement, without owing compensation, up to the date of signature of the lease, so that the legal commitment could formally arise only from signature of the lease by the Commission. However, it is common ground that formal signature of the lease never took place in the present case.

136 It must therefore be found that the applicant's claim of a breach of the principle of good faith or of the rule against abuse of rights, arising solely from the lack of information from the Commission as to the obligations it actually undertook in the context of the pre-contract negotiations, is unfounded in the present case.

137 In the light of the aforegoing considerations, the Court finds that, by informing the applicant belatedly of its' decision to break off the pre-contract negotiations, the Commission breached the principle of good faith to a sufficiently serious degree and abused its right not to contract.

— Breach of the principle of the protection of legitimate expectations

138 According to settled case-law, the right to rely on the principle of the protection of legitimate expectations extends to any individual in a situation where the Community authorities, by giving him precise assurances, have caused him to entertain legitimate expectations. Such assurances, in whatever form they are given, are precise, unconditional and consistent information from authorised and reliable sources. However, a person may not plead breach of the principle unless he has been given precise assurances by the administration (Case T-273/01 *Innova Privat-Akademie* v *Commission* [2003] ECR II-1093, paragraph 26, and the case-law cited). In addition, the case-law shows that assurances which do not take account of the relevant provisions cannot give rise to a legitimate expectation on the part of the person concerned, even if it is proved that they were given (see, in civil service disputes, Case 162/84 *Vlachou* v *Court of Auditors* [1986] ECR 481, paragraph 6; Case T-123/89 *Chomel* v *Commission* [1990] ECR II-131, paragraph 30; and Case T-18/90 *Jongen* v *Commission* [1991] ECR II-187, paragraph 34).

139 It is also clear from the case-law that traders must bear the economic risks inherent in their activities, taking account of the circumstances of each case. In connection with a tendering procedure, those economic risks include, inter alia, the costs connected with the preparation of the bid. The expenses thus incurred must therefore be borne by the undertaking which has chosen to participate in the procedure, since it in no way follows from the mere fact that an undertaking has the right to take part in a tendering procedure that its tender will be accepted (*Embassy Limousines & Services*, cited in paragraph 108 above, paragraph 75). On the other

hand, if, before the contract in question is awarded to the successful tenderer, a tenderer is encouraged by the contracting institution to make irreversible investments in advance and thereby to go beyond the risks inherent in the business under consideration, consisting in making a bid, non-contractual liability may be incurred on the part of the Community (*Embassy Limousines & Services* v *Parliament*, cited in paragraph 108 above, paragraph 76).

140 In the present case, the applicant pleads, first, that the Commission did not inform it of its, the Commission's, alleged right, before signature of the lease, to abandon the procurement without owing compensation.

141 However, as noted in paragraphs 117 and 135 above, the applicant ought to have known, even without being specifically informed, that the Commission had the right, before signature of the lease, to abandon the procurement, without owing compensation, so that the legal commitment could arise only from signature of the lease by the Commission. Therefore the applicant cannot plead precise assurances such as to give rise to a reasonable expectation that the lease would be taken up, which would have resulted from mere silence on the part of the Commission as to the rules applicable to the conclusion of the lease.

142 Second, the applicant pleads that the negotiator encouraged it to make an immediate start on the work at the meeting of 6 June 2003, referred to in paragraph 5 above. Suffice it to observe in that regard that, even assuming that the negotiator did make the remarks attributed to him, they were not such as to give rise to the legitimate expectation alleged by the applicant. The email of 11 June 2003, referred to in paragraph 6 above, shows that, after the meeting in question, Fortis AG still informed the negotiator that it could not reasonably place the orders for carrying out the work before the Commission confirmed its agreement to the terms of the lease. Furthermore, in its pleadings the applicant itself adds that, when it proposed certain conditions in its letter of 16 June 2003, referred to in paragraph 7 above, it merely wished to make a reservation for proof of the agreement reached by the

parties to the negotiations, as it could not agree to be satisfied with the negotiator's word alone at the meeting of 6 June 2003. In view of its own statements, therefore, the applicant cannot claim that the negotiator's remarks were of such a nature as to give rise to reasonable expectations on its part, based on the fact that the lease would be taken up, and encouraged it to place the orders for the fitting-out work.

143 Third, the applicant asserts that the Commission insisted on several occasions that the work be completed quickly so that the installation of officials could be carried out on the date when the lease took effect.

144 It is clear from the file of documents, particularly the agreement for inter-institutional cooperation concluded with the Parliament, that adherence to the date for taking possession of the premises, 1 November 2003, was an essential condition for the Commission's commitment. It follows that the award of the contract to the applicant and the conclusion and acceptance of the lease depended in principle on the applicant's ability to complete the fitting-out work by 31 October 2003 at the latest.

145 It is also clear from the documents in the file and from the Commission's own statements that, until mid-July 2003, the Commission was negotiating only with the applicant in order to meet the need for accommodation for some of its staff. It follows that, up to then, the Commission and, specifically, OIB behaved and acted as if the contract were to be awarded to the applicant and performed by it. It also appears from the documents produced by the Commission in the course of the proceedings that, until 7 July 2003, the date of the opinion of the DG Personnel and Administration, OIB had no reason to believe that the technical problems connected with the geographical location of the Building which were subsequently claimed by the Commission to be the cause of the termination of the pre-contract negotiations, were likely to jeopardise the award of the contract to the applicant and the conclusion of the lease.

146 It is also clear from the file that, before learning of the simultaneous negotiations conducted by the Commission with other real estate firms in the Brussels market, the applicant had no reason to believe that problems other than the completion of the work on schedule could jeopardise the conclusion of the lease. Only in the context of the present proceedings, that is to say, after the date alleged to be the date when its legitimate expectations originated, 26 June 2003, did the applicant learn of the problems which gave rise to the Commission's decision to abandon the procurement and not to take up the lease.

147 The relevance of the evidence adduced by the applicant in support of its allegations that the Commission encouraged it to carry out the fitting-out work without waiting for the formal signature of the lease falls to be assessed in the light of those findings.

148 The applicant claims that the negotiator countersigned, without expressing the slightest reservation, the letter of 16 June 2003 which stated that, upon receipt of the countersigned letter, the applicant would, as requested, place the orders for the fitting-out work without awaiting formal signature of the lease (see paragraph 7 above). The Commission disputes the applicant's allegations and contends that the applicant took the initiative in starting the fitting-out work without waiting for the lease to be taken up and that therefore the applicant accepted the risk that it would not be reimbursed for the fitting-out work in accordance with the conditions of the lease.

149 With regard to the lack of any reaction from OIB to the reference in the letter of 16 June 2003 to the Commission's request for fitting-out work to be started without awaiting formal signature of the lease, it must be observed that not only did the negotiator not dispute this, but he even tried to comply with the applicant's conditions for agreeing to submit to mandatory time-limits triggering penalties for delay and for placing orders for fitting-out work without awaiting formal signature of the lease. All these circumstances contradict the Commission's argument that the applicant took the initiative in placing the orders without being asked to do so and

without waiting for the lease to be signed. Those circumstances testify to the existence of OIB's encouragement of the applicant to place the orders necessary for the fitting-out work without even awaiting formal signature of the lease stipulating that such work would be charged to the Commission by the payment of additional rent.

150 As the applicant correctly pointed out, the encouragement to start the fitting-out work is confirmed by the acceptance, on 4 July 2003 (see paragraph 18 above), by another official of OIB, of an offer from Fortis AG relating to the hourly cost of a security service for the site of the Building, the amount of such costs being taken from the item 'Installation of site' of the budget for the fitting-out work. This express agreement testifies to the fact that the OIB officials tried to meet all the conditions for the applicant to be able to carry out the fitting-out work without awaiting formal signature of the lease.

151 The encouragement given on 26 June 2003 by OIB and, finally, the Commission, to the early execution of the fitting-out work was such as to induce the applicant, on that date, to entertain a legitimate expectation that the Commission would reimburse it for the investments made even before the formal signature of the lease.

152 These findings cannot be called into question, as the Commission argues, by the handwritten note by Mr S. on the letter of 16 June 2003, as countersigned on 26 June 2003 by the negotiator, and which raised the question of whether the orders could be given. In view of the ambiguous and laconic nature of the words in question, the Commission's interpretation of them as meaning that they express the applicant's doubts as to the possibility of placing orders without legal risk on the basis of the

agreement of 26 June 2003, appears too speculative and uncertain to be accepted. As the applicant correctly observed, the words could just as well be interpreted as a request for the orders to be given from then on.

153 In view of the circumstances of the case, the conclusion must be that the applicant was encouraged by the Commission, in its capacity as contracting authority, to make irreversible investments in advance and, consequently, to go beyond the risks inherent in the activities concerned, consisting in submitting a tender in the context of a public procurement procedure. Furthermore, it must be found that the applicant acted reasonably and realistically in agreeing to make the necessary investments in advance so as to be able to implement the lease in accordance with the Commission's requirements. The applicant had previously received specific assurances from the Commission that it would reimburse the applicant for the fitting-out work which the applicant had to carry out outside the contractual cover.

154 This finding is not called into question by the fact that the Commission could have abandoned the procurement and, therefore, refused to take up the lease without compensation being payable, up to the date of signature of the lease, in accordance with Article 100 and the first paragraph of Article 101 of the Financial Regulation. The existence of such a right does rule out the possibility that the Commission, as a result of its conduct, may have given the other party the impression that it would not exercise that right in a particular case (see, to that effect, and by analogy, *Embassy Limousines & Services* v *Parliament,* cited in paragraph 108 above, paragraphs 54 and 86).

155 Therefore, the Court finds that the Commission infringed in a sufficiently serious manner the principle of the protection of legitimate expectations by breaking off the pre-contract negotiations after encouraging the applicant to carry out the fitting-out work so as to be able to let the Building from 1 November 2003.

156 In the light of all the aforegoing considerations with regard to the condition of unlawful conduct, found that, in breaking off the pre-contract negotiations, the Commission's conduct was unlawful and capable of giving rise to non-contractual liability on the Commission's part by allowing pre-contract negotiations, which it knew were bound to fail, to continue, and by breaking off the pre-contract negotiations after encouraging the applicant to carry out the fitting-out work necessary for letting the Building from 1 November 2003. The remainder of the applicant's submission must be dismissed as unfounded.

(b) The alleged damage and the casual link between the unlawful conduct and the damage

157 The applicant seeks compensation for the loss of the opportunity to enter into the lease, for the costs incurred in connection with the pre-contract negotiations and for the loss of the opportunity to let the Building to a third party during those negotiations.

158 It must be remembered that the causal link required by the second paragraph of Article 288 EC entails the existence of a direct link of cause and effect between the unlawfulness of the conduct of the Community and the damage alleged, that is to say the damage must be a direct consequence of the conduct complained of (Case T-146/01 *DLD Trading* v *Council* [2003] ECR II-6005, paragraph 72; see also, to that effect, Joined Cases 64/76, 113/76, 167/78, 239/78, 27/79, 28/79 and 45/79 *Dumortier frères and Others* v *Council* [1979] ECR 3091, paragraph 21; Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, paragraph 51; and *International Procurement Services*, cited in paragraph 86 above, paragraph 55).

159 In addition, it must be noted that, according to settled case-law, it is first and foremost for the party seeking to establish the Community's liability to adduce

conclusive proof as to the existence or extent of the damage he alleges and to establish the causal link between that damage and the conduct complained of on the part of the Community institutions (Case C-401/96 P *Somaco* v *Commission* [1998] ECR I-2587, paragraph 71, and Case T-168/94 *Blackspur DIY and Others* v *Council and Commission* [1995] ECR II-2627, paragraph 40).

160 The applicant's claims for compensation must be examined in the light of those considerations.

Claim for compensation for loss of opportunity to contract

161 In the present case, the unilateral termination of the contractual negotiations falls within the scope of the contracting authority's right not to take up the lease pursuant to the first paragraph of Article 101 of the Financial Regulation. Consequently, the applicant never acquired a right to conclude the lease. Furthermore, without a binding agreement between the parties, the applicant could not have acquired a right of any kind under the lease nor, therefore, a right to obtain the anticipated contractual earnings.

162 It follows that the Commission's unlawful conduct, which arises entirely from the circumstances of its exercise of the right to abandon the procurement and to terminate the pre-contract negotiations unilaterally cannot be regarded as the cause of the damage consisting in the loss of an opportunity to contract and to obtain the earnings anticipated from the conclusion of the lease. Therefore, the damage sustained by the applicant as a result of that unlawful conduct cannot include the

earnings which it hoped to derive from letting the Building or even the loss of an opportunity to obtain such earnings (see, to that effect, *Embassy Limousines & Services v Parliament,* cited in paragraph 108 above, paragraph 96).

163 This finding is not called into question by the evidence adduced in the present case by the applicant. First, the documents produced by the applicant in support of its claim relate only to French and Belgian law and do not show that the law of those countries enshrines the principle of compensation for earnings lost owing to the non-conclusion of a contract. On the contrary, the documents show that most legal theorists are opposed to such an approach, which furthermore has not been adopted in case-law. Second, the fact that the applicant claims as compensation only part of the lost earnings is not such as to cast doubt on the above finding because it would in any case amount to giving effect, albeit partly, to a contract which was never concluded and to the conclusion of which the applicant was never entitled.

164 In view of the foregoing, and without its being necessary to give a ruling on the Commission's other arguments, the claim for compensation for loss of the opportunity to obtain the award of the lease and to realise the expected profit from the performance of the lease must be dismissed.

Claim for compensation for charges and expenses incurred

165 It is clear from the first paragraph of Article 101 of the Financial Regulation that, in principle, the charges and expenses incurred to no purpose by a tenderer in connection with his participation in a procurement procedure cannot in principle constitute damage which is capable of being remedied by an award of damages (see, by analogy, Case T-13/96 *TEAM* v *Commission* [1998] ECR II-4073, paragraph 71,

and *Embassy Limousines & Services* v *Parliament*, cited in paragraph 108 above, paragraph 97). However, that provision cannot, without potentially undermining the principles of legal certainty and of protection of legitimate expectations, apply in cases where an infringement of Community law in the conduct of the tendering procedure has affected a tenderer's chances of being awarded the contract (see, by analogy, *TEAM* v *Commission*, paragraph 72) or led him to incur unjustified charges or expenses.

166 With regard to the personnel costs of Fortis AG incurred in connection with the pre-contract negotiations, it is clear that the applicant has adduced no evidence to show that they result directly from unlawful conduct on the part of the Commission. Thus the applicant has not proved or even alleged that they were incurred during the period in which the Commission allowed the pre-contract negotiations to continue when it knew that they were bound to fail. Furthermore, in the absence of evidence to that effect adduced by the applicant, the personnel costs incurred by Fortis AG cannot be found to be unjustified in so far as they exceeded the risks inherent in the submission of a tender in the context of a procurement procedure.

167 In any case, it must be observed that, in the application, the applicant merely estimated the damage in respect of the personnel costs of Fortis AG in connection with the pre-contract negotiations, without producing a shred of evidence in support thereof . At the reply stage, the applicant asserted that the estimate was based on the time spent in the pre-contract negotiations by Messrs S. and D., two members of the staff of Fortis AG, namely 150 and 100 hours respectively, and an estimate of their hourly rate, namely EUR 62 and 124 respectively, without producing any specific detailed evidence in that respect. The relevance and the credibility of such an estimate cannot be assessed without sufficiently concrete and detailed evidence from the applicant and it cannot suffice to prove the existence and

extent of the damage in respect of the personnel costs of Fortis AG for which compensation is claimed.

168 In the light of the foregoing, the applicant's claim for compensation for the personnel costs of Fortis AG must be dismissed as unfounded.

169 Regarding the costs claimed by the suppliers, companies B. and A., it must be noted that the applicant claims only that the orders in question were placed by reason of the legitimate expectation that the lease would be taken up, which expectation was frustrated when the Commission subsequently broke off the pre-contract negotiations. On the other hand, it is common ground that this damage has no causal link with the breach of the principle of good faith and abuse of rights which have been found (see paragraph 137 above). As noted above in paragraph 153 above, the applicant is justified in asserting that it was on the basis of the legitimate expectation that it would be reimbursed by the Commission for the fitting-out work that it placed the orders for that work on 4 July 2003. Contrary to the Commission's argument, there is therefore a direct causal link between the damage for which the applicant seeks reparation, resulting from the orders in question, and the unlawfulness consisting in the Commission's breach of the principle of the protection of legitimate expectations. Consequently, that justifies compensation for the costs in question.

170 However, the information supplied by the applicant does not establish to the requisite legal standard the existence and extent of the damage actually suffered by the applicant as a consequence of the abovementioned illegality. First, the applicant has produced in support of its claim only ordinary statements of costs drawn up by its suppliers and addressed to Fortis AG, which are not such as to prove the existence of damage actually suffered by the applicant. Second, the applicant has admitted that it has not hitherto reimbursed its suppliers in respect of those statements of costs and that it will not do so before judgment is given in the present

action. The applicant submits that, under its agreements with the suppliers concerned, payment has been suspended until the applicant receives compensation from the Commission. However, the applicant has not adduced any evidence in support of its allegations and therefore the possibility cannot be ruled out, as the Commission contends, that there is some other reason for non-payment, such as a remission of debt or re-use of materials.

171 Consequently, the Court finds that the applicant has not substantiated its claim for compensation for the costs claimed by the suppliers, ultimately totalling EUR 41 637.77.

172 Finally, with regard to the claim for compensation for the cost of the services of FREPM, it must be noted that, according to the applicant, those costs were incurred by it for the sole benefit of the Commission, having regard to the negotiator's assurance that the lease would be taken up. Once again, therefore, the damage is a direct consequence of the Commission's breach of the principle of the protection of legitimate expectations. It is also necessary to consider whether the damage is a direct consequence of the breach of the principle of good faith and the abuse of rights referred to in paragraph 137 above.

173 As the documents in the file show, this claim for compensation does not relate to costs incurred by FREPM, but to two architects' fee notes addressed directly to the applicant. The first fee note, No 37-2003, dated 1 September 2003, is issued by the firm G. It refers to the file 'Work lessee City Center-Botanique 1' for services rendered in May and June 2003. The second fee note, No 242-2003, also dated 1 September 2003, is issued by the firm P. It refers to the project 'Fitting-out Commission offices' for services rendered in April, May, June, July and August 2003. The two invoices therefore relate to services which began, and which were therefore ordered, on a date prior to the date on which the applicant acquired a legitimate

expectation that the investments in question would fall within the scope of the Commission's liability, namely 26 June 2003. In addition, those costs were incurred prior to the Commission's decision to abandon the procurement.

174 In the light of the foregoing, the Court finds that the applicant sustained no damage by incurring expenses exceeding the economic risks inherent in the activity of bidding for a public contract, without being encouraged to do so by the Commission. The architects' fees shown in the abovementioned invoices are charges and costs incurred by the applicant when it participated in a procedure for the award of a public contract and the applicant must meet them as they cannot constitute damage which can be made good by the Community by an award of damages. Furthermore, it must be found that, in such a context, the applicant has not demonstrated the existence of a causal link between the Commission's unlawful conduct and the expenditure incurred to no purpose.

175 Consequently, the claim for compensation for the charges and costs incurred by the applicant in connection with the pre-contract negotiations must be dismissed as unfounded.

Claim for compensation for the loss of the opportunity to let to a third party

176 It must be observed, as a preliminary point that, according to case-law, the loss of an opportunity may constitute damage that can be made good (Case T-47/93 *C* v *Commission* [1994] ECR-SC I-A-233 and II-743, paragraph 54, and cases cited).

177 With regard to the applicant's argument that, during the period of the pre-contract negotiations from 13 May to 14 September 2003, it lost the opportunity to let the Building to a third party on terms equivalent to those negotiated with the Commission, the Court finds that, assuming that the Building remained on the Brussels office property market during the period in question, the applicant would have had a real chance of letting it to a third party. The applicant's chance of letting the Building to a third party arises from the fact that, as the Commission admitted, the Brussels office property market is constantly improving and shows steady expansion, inter alia to meet growing demand from the European institutions.

178 In the present case, however, the applicant stated in its pleadings that it 'abandoned [the real] opportunity [to let the Building to a third party] during the entire period when ... it conducted exclusive negotiations with the Commission', from which it follows that it itself took the decision, at the beginning of the pre-contract negotiations, to withdraw the Building from the Brussels office property market. On that point, the applicant has no justification for claiming that its decision was determined by the Commission's eagerness and the assurances given by the Commission that the contract would be signed.

179 Consequently, the loss of the opportunity to let the Building for the duration of the pre-contract negotiations, arising from the exclusive right to the Building granted by the applicant to the Commission, and the resulting non-availability of the Building, is the result of the applicant' own decision, which thus accepted the risk of losing the chance of letting the Building to another lessee.

180 Nevertheless the Commission, by not notifying the applicant immediately of its decision of 16 July 2003 to abandon the procurement and, therefore, not to lease the

Building, deprived the applicant of the opportunity to put the Building back on the market for rental property two months earlier than it actually did. It follows that the Commission in effect deprived the applicant of a chance to let the Building to a third party for a period which can reasonably be estimated as two months.

181 To assess the damage actually sustained by the applicant, account must taken of the difficulties inherent in the rental market at the time. In so far as those difficulties were recognised and taken into account by the applicant, an award of EUR 10 000 for each month concerned, which is the applicant's own estimate, appears to be reasonable compensation for the damage it actually suffered. Consequently, the damage for which compensation is due in relation to the loss of the opportunity to let the Building to a third party between mid-July and mid-September 2003 must be set at EUR 20 000.

182 In the light of all the aforegoing considerations, the total damage for which the Community is liable in the present case must be set at EUR 20 000.

183 The applicant claims interest of 6% on the sum awarded as compensation from the date of the judgment until the date of actual payment.

184 The amount of compensation due must be subject to default interest at a rate which does not exceed the rate claimed in the forms of order sought in the applications (*Mulder and Others* v *Council and Commission*, cited in paragraph 108 above, paragraph 35).

185 It follows that the amount of compensation in the present case must be increased by default interest from the date of delivery of this judgment until the date of actual payment, at the rate fixed by the European Central Bank for main refinancing operations, plus 2 points, provided that it does not exceed 6%, in accordance with the form of order sought by the applicant.

B — *Application for measure of inquiry*

186 The applicant has applied for the negotiator to be summoned to appear in order to be heard on the subject of the comments he is said to have made at the meeting of 6 June and during the telephone conversation of 10 July 2003. The defendant has not responded to this application for a measure of inquiry.

187 It has consistently been held that it is for the Court of First Instance to appraise the usefulness of measures of inquiry, within the meaning of Article 65 et seq. of the Rules of Procedure, for the purpose of resolving the dispute (Case T-140/97 *Hautem* v *EIB* [1999] ECR-SC I-A-171 and II-897, paragraph 92, and Case T-138/98 *ACAV and Others* v *Council* [2000] ECR II-341, paragraph 72).

188 In the present case, the Court finds that the measure of inquiry sought by the applicant is not necessary for the purpose of resolving the present dispute. Consequently, there are no grounds for ordering it.

Costs

189 Under the first paragraph of Article 87(3) of the Rules of Procedure, the Court may order that the costs be shared or that the parties bear their own costs where each party succeeds on some and fails on other heads of claim, or where the circumstances are exceptional.

190 In the present case, the applicant has failed in some of its claims, the main application having been dismissed as inadmissible and some of the claims for compensation in the alternative application having also been dismissed as unfounded. In those circumstances, it must be decided that each party bear is to its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE
(Second Chamber, Extended Composition)

hereby:

1. **Orders the Commission to pay the applicant the sum of EUR 20 000, together with interest running from the date of delivery of the present judgment to the date of actual payment, at an annual rate equal to the rate**

fixed by the European Central Bank for principal refinancing operations, plus 2 points, provided that it does not exceed 6%;

2. Dismisses the action as to the remainder;

3. Orders each party to bear its own costs.

Pirrung Meij Forwood

Pelikánová Papasavvas

Delivered in open court in Luxembourg on 8 May 2007.

E. Coulon J. Pirrung

Registrar President

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