JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)

17 January 2007 *

In Case T-231/04,

Hellenic Republic, represented by P. Mylonopoulos and V. Kyriazopoulos, acting as Agents,

applicant,

v

Commission of the European Communities, represented by D. Triantafyllou and F. Dintilhac, acting as Agents,

defendant,

ACTION for annulment of the act of 10 March 2004 by which the Commission proceeded to recovery by offsetting of sums due from the Hellenic Republic following its participation in building projects for the diplomatic mission of the Commission and several Member States in Abuja (Nigeria),

* Language of the case: Greek.

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

composed of R. García-Valdecasas, President, J.D. Cooke and I. Labucka, Judges, Registrar: K. Pocheć, Administrator,

having regard to the written procedure and further to the hearing on 10 May 2006,

gives the following

Judgment

Legal context

1 Article 71(1) and (2) 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 (OJ 2002 L 248, p. 1, hereinafter 'the Financial Regulation'), states:

'1. Establishment of an amount receivable is the act by which the authorising officer by delegation or subdelegation:

(a) verifies that the debt exists;

(b) determines or verifies the reality and the amount of the debt;

(c) verifies the conditions in which the debt is due.

2. The own resources made available to the Commission and any amount receivable that is identified as being certain, of a fixed amount and due must be established by a recovery order to the accounting officer followed by a debit note sent to the debtor, both drawn up by the authorising officer responsible.'

2 Under Article 72(1) of the Financial Regulation:

'The authorisation of recovery is the act whereby the authorising officer by delegation or subdelegation responsible instructs the accounting officer, by issuing a recovery order, to recover an amount receivable which he/she has established.'

3 Pursuant to Article 73(1) of the Financial Regulation:

'The accounting officer shall act on recovery orders for amounts receivable duly established by the authorising officer responsible. He/She shall exercise due diligence to ensure that the Communities receive their revenue and shall see that their rights are safeguarded.

The accounting officer shall recover amounts by offsetting them against equivalent claims that the Communities have on any debtor who himself/herself has a claim on the Communities that is certain, of a fixed amount and due.'

4 Under Article 78 of Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of the Financial Regulation (OJ 2002 L 357, p. 1):

'1. The establishment by the authorising officer responsible of an amount receivable shall constitute recognition of the right of the Communities in respect of a debtor and establishment of entitlement to demand that the debtor pay the debt.

2. The recovery order shall be the operation by which the authorising officer responsible instructs the accounting officer to recover the amount established.

...'

5 Article 79 of Regulation No 2342/2002 states:

'To establish an amount receivable the authorising officer responsible shall ensure that:

(a) the receivable is certain and not subject to any condition;

(b) the receivable is of fixed amount, expressed precisely in cash terms;

(c) the receivable is due and is not subject to any payment time;

(d) the particulars of the debtor are correct;

(e) the amount to be recovered is booked to the correct budget item;

(f) the supporting documents are in order; and

(g) the principle of sound financial management is complied with ...'

6 Under Article 83 of Regulation No 2342/2002:

'At any point in the procedure the accounting officer shall, after informing the authorising officer responsible and the debtor, recover established amounts receivable by offsetting in cases where the debtor also has a claim on the Communities that is certain, of a fixed amount and due relating to a sum established by a payment order.'

Facts giving rise to the dispute

7 Following the transfer of the capital of Nigeria from Lagos to Abuja, the Commission has, since 1993, rented a building in Abuja to house its delegation as well as, temporarily, the representations of a number of Member States, including the Hellenic Republic. Under an arrangement with those Member States (hereinafter the 'Abuja I project'), the Commission was subletting a number of offices and provided a number of services to the representations in question. The Member States reached an agreement on the sharing of the costs relating to their representations. The contribution of the Hellenic Republic amounted to 5.5% of the total costs. Having decided that the Hellenic Republic had not paid its debts in that regard, the Commission, in 2004, proceeded to recovery by offsetting of the corresponding sums (see paragraph 44 below).

8 On 18 April 1994, the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Kingdom of the Netherlands, the Portuguese Republic and the Commission (hereinafter 'the partners'), on the basis of Article J.6 of the Treaty on European Union (now, after amendment, Article 20 EU), concluded a Memorandum of Understanding (hereinafter 'the initial memorandum') concerning the construction, for their diplomatic missions in Abuja, of a joint complex of embassies using joint support services (hereinafter 'the Abuja II project'). The initial memorandum was supplemented, following the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden, by an accession protocol.

9 Article 1 of the initial memorandum stipulates that the embassies of the participating Member States and the delegation of the Commission are to be distinct diplomatic missions which are subject to the Vienna Convention on Diplomatic Relations of 18 April 1961, and, with regard to the Member States, also subject to the Vienna Convention on Consular Relations of 24 April 1963.

10 Article 10 of the initial memorandum stated that the Commission would act, as coordinator of the Abuja II project, 'on behalf of' the other partners.

11 Under Article 11 of the initial memorandum, the Commission is authorised to undertake architectural feasibility studies for the Abuja II project, as well as initial costings and design developments. That article also provides for the conclusion of an additional Memorandum of Understanding covering 'detailed building design, sharing of costs and individual participating partners' legal interests in the premises on completion of the [Abuja II] project' (hereinafter the 'additional memorandum'). Finally, Article 11 provides for the setting-up of a permanent Steering Committee, comprising representatives of all the partners and chaired by the Commission, to coordinate and control the Abuja II project. The permanent Steering Committee is to give regular reports to the Working Party on Administrative Affairs, established in the Council in the framework of the Common Foreign and Security Policy (CFSP) (hereinafter the 'CFSP Working Party on Administrative Affairs').

12 Article 12 of the initial memorandum reads as follows:

'The [Abuja II] project will be directly financed, upon approval of the [additional memorandum] referred to in Article 11, by contributions from participating partners, reflecting the share of the project allocated to each partner. The contribution by the Commission will be paid from the appropriate budget line.

The costs of preparation of the project (phase 1) will be paid by the Commission from its administrative appropriations. These costs are estimated at ECU 140 000. If the [Abuja II] project is carried out, these costs will be reimbursed by contributions from all participating partners reflecting their individual share of the project.'

13 Article 13 of the initial memorandum states:

'All participating partners guarantee, upon approval of the [additional memorandum], the payment of their total costs. The total costs for each partner will consist of:

(a) the full costs for each partner's individual part of the project

(b) each partner's share of the costs for the common and public areas, calculated in the same proportion as its share of the sum of individual areas.'

14 Article 14 of the initial memorandum provides that the Commission, with the agreement and participation of the partner Member States, will make all payments to third parties (contractors).

15 Article 15(1) of the initial memorandum stipulates:

'If a partner decides to withdraw from the [Abuja II] project by not signing the [additional memorandum] referred to in Article 11, the terms of this Memorandum of Understanding, including the financial obligations referred to in Articles 12 and 13, will cease to apply to the withdrawing partner.'

16 On 29 March 1995, the Community, represented by the Commission, concluded a first contract for a joint venture between Dissing & Weitling arkitektfirma A/S, the winner of an architectural competition organised by the Commission for the Abuja II project, on the one hand, and COWIconsult Consulting Engineers and Planners A/S (hereinafter 'the consultants'). Under Article 1 of that contract, the Commission confirms the intention of the participating partners to conclude a 'contract' with the consultants. Under Article 2, the consultants undertake to begin design work for the project in question. The cost of that design work amounted to EUR 212 547.59.

17 At meetings between representatives of the responsible services of the foreign ministries of the Member States concerned and the architects, Dissing & Weitling arkitektfirma, the real needs of the representation of each Member State and their respective share of the expenditure were determined.

18 On 26 October 1995, the 'Buildings' sub-working party, established in the framework of the CFSP, met. According to the minute of the meeting, the sub-working party requested that the Commission:

'...

— finish work on the [outline design] phase;

— make the necessary arrangements with the firm of architects for elaboration of the [scheme design phase] within the time-limits laid down by the [permanent Steering Committee];

— conclude the contracts [relating to the soil survey and investigation of the construction site], that latter [contract] being essential to the drafting of the additional memorandum;

— and advance the funding linked to these steps.'

19 The sub-working party confirmed that 'the sums paid by the Commission [would be] considered to be an advance on its share of the ad hoc autonomous fund, which has been agreed beforehand as the appropriate method of financing the [Abuja II] project' and that '[i]n the case of a failure to execute the project, the other partners shall reimburse the Commission under the procedures agreed for previous phases'.

20 On 24 November 1995, the permanent Steering Committee (see paragraph 11 above) met. The minute of that meeting states that a 'technical assistance' contract with the consultants, for a value of EUR 2 676 369 (hereinafter the 'principal contract') had been submitted for approval to the Commission's Advisory Committee on Procurements and Contracts (ACPC). It also stated that 'in the case of a failure to execute the project, the other partners shall reimburse the Commission'.

21 On 27 December 1995, the Commission concluded the principal contract. That contract concerned the outline and scheme design phases of the Abuja II project (Articles 4.4 and 4.5), as well as possible detailed design (Article 4.6).

22 On 19 September 1996, the CFSP Working Party on Administrative Affairs approved the scheme design.

23 On 21 November 1996, the CFSP Working Party on Administrative Affairs asked the Commission to make ad hoc arrangements in order to allow the architects to start work on the detailed design. The Working Party indicated that the formal contract for that phase would be concluded after the additional memorandum had been finalised. At that meeting, the Commission informed the Working Party of the amount that it had advanced until 15 November 1996 for the preparation of the Abuja II project, namely approximately EUR 2.8 million.

24 On 24 February 1997, the CFSP Working Party on Administrative Affairs met again and decided not to wait for the additional memorandum to be finalised before proceeding to the drawing-up of the detailed design and contractual documents. The minute of that meeting contains the following resolutions:

'The Commission [is invited] to make the necessary arrangements with the architects for the elaboration of these documents and to advance the funds needed for these tasks according [to] modalities agreed for the project. Like on previous occasions, such advance payments by the Commission will later be reimbursed by other participants according to the procedures foreseen to this end in [the initial memorandum].'

25 In the months that followed, several Member States withdrew from the Abuja II project. On 28 April 1997, the CFSP Working Party on Administrative Affairs asked the Commission to 'arrange bilaterally for the reimbursement of the Danish share of project-related costs incurred by the Commission on behalf of participating partners'. A similar decision was taken following the withdrawal of Ireland in September 1997, and the withdrawals of the Portuguese Republic, the Republic of Finland and the Kingdom of Sweden.

26 On 12 November 1997, the Commission concluded with the architects an addendum to the principal contract, the object of which was the drawing-up of detailed plans and the reimbursement of travel expenses, for a value of EUR 1 895 696.

27 On 18 June 1998, the CFSP Working Party on Administrative Affairs mentioned the possibility of a withdrawal of the Kingdom of Belgium from the Abuja II project. It is clear from the minute of that meeting that the permanent Steering Committee pointed out that the Kingdom of Belgium would pay its share of the costs as agreed after the approval of the scheme design.

28 On 10 June 1998, a payment order for EUR 153 367.70, corresponding to the share of the Hellenic Republic in the initial phase of the project, namely 5.06% of the total costs, was sent by the Commission to the Hellenic Republic. The deadline for payment was 31 December 1998.

29 On 9 December 1998, the additional memorandum was signed by the Federal Republic of Germany, the Hellenic Republic, the French Republic, the Italian Republic, the Kingdom of the Netherlands, the Republic of Austria and the Commission. Article 11 of the additional memorandum provides for the creation of a special fund to finance the project.

30 Under Article 14 thereof, the additional memorandum was to be provisionally applied from the first day of the second month after its signature and enter into force on the first day of the second month following the date on which the Member States and the Commission declared that it had been ratified.

31 On 28 April 1999, the Commission issued a call for tender for the construction of the embassies of the Member States concerned and of the Commission delegation (OJ 1999 S 82). It was stated therein that the embassy of the Hellenic Republic was to have an area of 677 m^2.

32 On 3 September 1999, the Commission 'reiterated' its request of 1998 in the CFSP Working Party on Administrative Affairs that the Member States reimburse it for the sums paid to consultants for the scheme design phase. The Commission stated that some Member States had already paid the amounts due, but that others, including the Hellenic Republic, had not reimbursed it before the due date of 31 December 1998. The Commission added that a further invoice would be sent to all partners concerning, first, the costs of the detailed design (phase) and, second, the costs caused by the redesign of the complex after the withdrawal of the Kingdom of Belgium, the Kingdom of Spain and the Portuguese Republic.

33 On 20 September 1999, the permanent Steering Committee met to finalise the pre-qualification of construction companies. The representative of the Hellenic Republic signed the minute of the meeting. A call for tender was published in the Official Journal S 54 of 17 March 2000.

34 By payment order of 17 February 2000, the Commission requested payment from the Hellenic Republic of EUR 168 716.94 for the drawing-up of the call for tender for the detailed design.

35 On 22 June 2000, the permanent Steering Committee decided to adopt a new project approach (hereinafter 'Abuja Light'), which was made necessary by the withdrawal of the French Republic. The Abuja Light project provided in particular for the omission of common buildings and common technical installations, and a

reduction of the construction area. The representative of the Hellenic Republic at that meeting indicated his agreement with the project, subject nonetheless to the approval of his superiors. On 29 June 2000, the Commission sent the minute of the meeting of 22 June to the Hellenic Republic and asked it for an official reply regarding the Abuja Light project.

36 On 5 September 2000, the Commission reiterated its request to the representatives of the Hellenic Republic. After another reminder dated 14 September 2000, the Commission sent a letter on 25 September 2000 to the Hellenic Republic by fax, giving a deadline for response of 30 September 2000 and stating that a failure to respond would be understood as a withdrawal from the project. On 2 October 2000, the Greek authorities informed the Commission that they were unable to give a formal answer regarding the Abuja Light project. Consequently the Commission responded, on the same day, that it had asked the architects to proceed with the redesign of the Abuja II project without including the Hellenic Republic.

37 By letter of 28 January 2002, the Commission sent a debit note for EUR 1 276 484.50 to the Hellenic Republic for the construction costs of the Abuja II project. The Commission subsequently cancelled this debit note.

38 After setting up its own embassy in Abuja, the Hellenic Republic vacated the temporary buildings it was occupying as a partner of the Abuja I project on 13 July 2002.

39 By letter of 11 October 2002, the Commission formally notified the Hellenic Republic of the outstanding debit notes regarding the Abuja I and Abuja II projects and requested that it pay a total amount of EUR 861 813.87 and USD 11 000.

40 Following negotiations between the parties, the Commission reminded the Hellenic Republic, by letter of 31 January 2003, that the latter had not paid its debts relating to the Abuja I and Abuja II projects and requested that it pay a total amount of EUR 516 374.96 and USD 12 684.89 by the end of February 2003. The Commission added that, in the case of failure to pay by that deadline, it would enforce recovery of the amounts in question by all means available under the law.

41 During the months that followed, the Hellenic Republic and the Commission discussed the amounts of the sums due.

42 On 29 December 2003, the Hellenic Republic sent its Permanent Representative to the European Union a letter worded as follows:

'Given that the European Commission maintains its position regarding our country's debt for the Abuja II project by applying the offsetting procedure, we ask you to monitor that procedure and to inform us whether, and to what extent, it has been used, so that the Hellenic Republic can examine the possibility of taking action against the European Commission.

As regards the Abuja I project, we would note that we have admitted our debt up to May 2002, while the amount claimed by the Commission covers the period up to July 2002 and after. Given that we have the intention to pay the aforementioned debt, we ask you to make contact with the competent financial services of the Commission in order to verify the elements of the exact total amount of our debt in euro up to May 2002.'

43 On 16 February 2004, the Commission sent a letter to the Hellenic Republic identifying the latter's outstanding debts for the Abuja I and Abuja II projects. It is apparent from the table attached to that letter, which mentions in particular 11 unpaid debit notes for the Abuja I and Abuja II projects, that the Commission was requesting payment of EUR 565 656.80 from the Hellenic Republic. In that letter, the Commission stated:

'The Hellenic Republic forwarded the following claim for payment to the Commission:

2000GR161PO005OBJ 1 MAINLAND GREECE — Interim payment — EUR 4 774 562.67.

Under the payment conditions laid down in [the second subparagraph of Article 73(1) of the Financial Regulation], the Commission shall proceed to the offsetting of the debts and amounts receivable, taking interest for late payment into account, where necessary.

Where the claims that you have communicated are greater than the amounts offset, the net amount to which you are entitled will be transferred to you as soon as possible ... .'

44 On 10 March 2004, the Commission transferred funds to the Hellenic Republic under the Regional Operational Programme for mainland Greece. However, instead of paying an amount of EUR 4 774 562.67 (see paragraph 43 above), the Commission only transferred EUR 3 121 243.03. It thus proceeded to recovery by offsetting the amount not yet paid by the Hellenic Republic, of which EUR 565 656.80 concerned the Abuja I and Abuja II projects (hereinafter 'the contested act').

Procedure and forms of order sought by the parties

45 By application lodged at the Registry of the Court of Justice on 22 April 2004, the Hellenic Republic brought the present action. The case was registered as Case C-189/04.

46 By order of 8 June 2004, pursuant to Article 2 of Council Decision 2004/407/EC, Euratom of 26 April 2004 amending Articles 51 and 54 of the Protocol on the Statute of the Court of Justice (OJ 2004 L 132, p. 5), the Court of Justice referred the case to the Court of First Instance.

47 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance decided to open the oral procedure and, as a measure of organisation of procedure, requested the parties to reply in writing to a series of questions. That request was complied with.

48 In its answers to the Court's questions, the Commission claimed that the opinion of the Council's Legal Service of 26 June 1998, submitted as annex 12 of the Hellenic Republic's application, should be removed from the case-file.

49 The parties presented oral argument and answered the questions put by the Court at the hearing on 10 May 2006.

50 The Hellenic Republic claims that the Court should:

— declare void the act of offsetting by the Commission of the European Communities of the amount of EUR 565 656.80;

— order the Commission to pay the costs.

51 The Commission contends that the Court should:

— dismiss the application as manifestly unfounded;

— order the applicant to pay the costs.

Substance

52 The Hellenic Republic relies on a single plea, alleging infringement of the initial and additional memoranda and of the provisions of the Financial Regulation and Regulation No 2342/2002.

53 This plea consists of two parts. First, the Hellenic Republic submits that the Commission made errors regarding the financial obligations of the Hellenic Republic relating to the Abuja I and Abuja II projects and, in particular, that the Hellenic Republic had no financial obligations relating to the Abuja II project. Second, and in any event, the Hellenic Republic argues that the Commission was not entitled to recover the amounts in issue by offsetting them, because the amounts receivable were not certain and of fixed amount in accordance with the Financial Regulation and Regulation No 2342/2002.

First part of the plea, alleging infringement of the initial and additional memoranda

Arguments of the parties

54 First, as regards the Abuja I project, the Hellenic Republic acknowledges that it is liable for the amounts payable for rent and operating costs, that is to say a total (without interest) of EUR 50 312.67 and USD 11 000. Those amounts were not paid immediately because, first, some of the debit notes did not state clearly the period to which they referred. The Hellenic Republic cites in that regard a debit note of 9 March 2000 and refers to its letter of 29 December 2003, in which it sought clarification regarding debit notes. Second, there was a disagreement as regards the date on which the rent in question was due. Third, the Commission decided unilaterally to proceed to the contested offsetting.

55 Next, as regards the Abuja II project, the Hellenic Republic submits that it is not subject to any financial obligations. The fact that it did not ratify the additional memorandum is the decisive factor in that regard.

56 It is apparent from the initial memorandum that a participating partner could withdraw from the project either by not signing the additional memorandum (Article 15(1)), or after the entry into force of the additional memorandum (Article 15(2)). The Hellenic Republic submits that it withdrew from the Abuja II project by availing itself of the former possibility. It signed the additional memorandum, but never ratified it. This non-ratification amounts to a withdrawal from the Abuja II project.

57 According to Article 14 of the additional memorandum (see paragraph 30 above), ratification is a necessary condition for the entry into force of that memorandum, which only occurred after the withdrawal of the Hellenic Republic.

58 Furthermore, according to Article 15(1) of the initial memorandum (see paragraph 15 above), that withdrawal has the effect of releasing the Hellenic Republic from any financial obligation.

59 The Hellenic Republic maintains that under Article 12 of the initial memorandum, and in particular the second paragraph thereof, the cost of preparation of the Abuja II project was to be borne by the Commission. It adds that, if the project were completed, that cost was to be reimbursed by contributions from all participating partners reflecting their individual share of the project (see paragraph 12 above). That cost was not to be borne by those who withdrew without ratifying the additional memorandum, at least if they withdrew prior to the entry into force of the memorandum.

60 According to the Hellenic Republic, the opinion of the Council's Legal Service confirms its interpretation in that regard.

61 Any other conclusion would distort the 'spirit of the project'. Even if the Member States transferred certain powers to the Commission in the context of the Abuja II project, they kept a degree of autonomy, so that their scope of action was not 'hindered or limited by strict, absolute and rigid rules'. A Member State could thus withdraw from the project if it decided that it was financially disadvantageous, or for any other good reason.

62 It follows, according to the Hellenic Republic, that the Commission was in breach of the initial memorandum, in particular Article 15 thereof, as well as the additional memorandum.

63 In its reply, the Hellenic Republic points out that several Member States withdrew from the Abuja II project because of the considerable increase in the cost of the project relative to the initial budget.

64 It also submits that the legal argument of the Commission in the case is surprising. On the one hand, the Commission admits the inapplicability of the additional memorandum and relies therefore on the supposed pre-contractual liability of the Hellenic Republic. On the other hand, the Commission maintains, in the alternative, that the additional memorandum is legally binding in its entirety. According to the Hellenic Republic, either an international agreement is in force in its entirety, or it is not, due to non-ratification. Consequently, those provisions cannot be considered inapplicable, principally, and applicable in the alternative. In that regard, the decisive question is whether the additional memorandum is or is not in force.

65 As regards the Commission's argument that the Hellenic Republic is subject to pre-contractual liability in that it led the other partners to expect that it would assume definitive contractual obligations, the Hellenic Republic claims that that expectation

might be justified if the circumstances had not altered fundamentally. However, due to the withdrawal of several Member States, the cost of the project increased considerably. That heavy burden, coupled with a radical change in the conditions of the Abuja II project, prompted the final and legitimate withdrawal of the Hellenic Republic.

66 According to the Hellenic Republic, only the initial and additional memoranda govern the rights and obligations of the participating partners, including their financial obligations. Even if decisions that might have been taken by the permanent Steering Committee in the course of its work were contrary to the abovementioned legal framework, they can never have primacy over it.

67 Finally, the Hellenic Republic does not claim that the Commission should bear the costs of the Abuja II project. A correct interpretation of the provisions of the initial memorandum (Articles 12 and 13) and additional memorandum (Article 14) shows that those costs are to be borne only by the final participants, the owners and exclusive beneficiaries of the building complex. Moreover, as coordinator of the project as a whole, the Commission can ask the final partners to bear the costs in question.

68 The Commission contests the Hellenic Republic's arguments in relation to the Abuja I project. It notes that the costs to be borne by the Hellenic Republic were calculated up to 13 July 2002, the date on which the latter vacated the temporary buildings.

69 As regards the Abuja II project, the Commission puts forward three arguments to show the liability of the Hellenic Republic.

70 First, the Hellenic Republic is liable in contract for the expenditure covered by the initial memorandum for the preliminary phase of the project, according to its individual percentage (see the second paragraph of Article 12 of the initial memorandum), because it signed and ratified that memorandum.

71 Second, the Commission maintains that the Hellenic Republic has pre-contractual liability under the additional memorandum for expenditure relating to later phases, which forms the largest part of the contested amount. It relies inter alia on the conduct of the Hellenic Republic and the principle of good faith in international law.

72 Third, and in the alternative, the Commission claims that the Hellenic Republic is contractually liable as a result of the provisional application of the additional memorandum by mandate. In that regard, the Commission submits, first, that Article 14 of the additional memorandum provided for the provisional entry into force of that memorandum, which, subject to ratification, gave rise to contractual obligations. The Hellenic Republic therefore manifestly participated de facto in that provisional application. In particular, the Commission contends, secondly, that the relations between the participating Member States and itself as the project co-ordinator, can be characterised as relations between principals and agent. As principals, the Member States ought to reimburse the Commission for expenditure it incurred as an agent.

Findings of the Court

73 At the outset, it should be recalled that, under the EU Treaty, in the version arising from the Treaty of Amsterdam, the powers of the Court of Justice are exhaustively listed in Article 46 EU. That article makes no provision for any jurisdiction of the

Court in respect of the provisions of Title V of the EU Treaty (order of the Court of First Instance of 18 November 2005 in Case T-299/05 *Selmani* v *Council and Commission*, not published in the ECR, paragraphs 54 and 55).

74 It is clear from the file in this case that the relations between the Commission and the Member States resulting from their cooperation in the design, planning and execution of the Abuja I and Abuja II projects come within the scope of Title V of the EU Treaty (see, in particular, paragraph 8 above). However, it is not disputed that the Commission proceeded to recover the disputed amounts by means of an act adopted pursuant to the Financial Regulation and Regulation No 2342/2002, so that the act of offsetting is covered by Community law. Since such an act is open to challenge by way of an action for annulment under Article 230 EC, the Court of First Instance has jurisdiction to hear this application.

75 It is then necessary to examine the financial liability of the Hellenic Republic for the Abuja I and Abuja II projects.

76 First, as regards the Abuja I project, the Hellenic Republic admitted its liability in principle for the expenditure in issue and, more specifically, acknowledged a debt of EUR 50 312.67 and USD 11 000, without interest. By contrast, it disputes its liability for the total amount of EUR 72 714.47 for which the Commission holds it liable in respect of the Abuja I project.

77 It is important to note in that regard that, under the first paragraph of Article 21 of the Statute of the Court of Justice, which is applicable to the procedure before the Court of First Instance in accordance with the first paragraph of Article 53 of that Statute and Article 44(1)(c) of the Rules of Procedure of the Court of First Instance, the application referred to in Article 21 of the Statute of the Court of Justice must contain the subject-matter of the dispute and a brief statement of the grounds on which the application is based. It is settled case-law that these indications must be

sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the application, if necessary, without any further information. In order to guarantee legal certainty and sound administration of justice it is necessary, in order for an action to be admissible, that the basic legal and factual particulars relied on be indicated, at least in summary form, coherently and intelligibly in the application itself (order of the Court of First Instance of 28 April 1993 in Case T-85/92 *De Hoe* v *Commission* [1993] ECR II-523, paragraph 20, and judgment in Case T-19/01 *Chiquita Brands and Others* v *Commission* [2005] ECR II-315, paragraph 64).

78 While admitting its liability in principle for the Abuja I project, the Hellenic Republic submits that it has not paid the debts in issue because of a disagreement as to the date on which the rent in question was due (see paragraph 54 above). The Hellenic Republic did not, however, put forward that argument in its application within the meaning of the case-law cited in paragraph 77 above.

79 It should be noted that the Commission requested payment from the Hellenic Republic of EUR 72 714.47 in respect of the Abuja I project, corresponding to provisional rental of the buildings it had occupied up to 13 July 2002. The Commission broke down those expenses in detailed documentation and established the amounts receivable in debit notes. It follows that the burden of proving the unfounded nature or erroneous calculation of the amount in issue falls on the Hellenic Republic. Yet the Hellenic Republic has not explained either its position regarding the date on which the rent in issue was payable or the difference between its position and that of the Commission. Similarly, the Hellenic Republic failed to state either the way in which it calculated the amounts of EUR 50 312.67 and USD 11 000 or the reasons for which it refused to accept liability for the total amount of EUR 72 714.47 charged to it by the Commission for the Abuja I project.

80 The Hellenic Republic has not shown that the Commission made an error regarding the amount payable. Thus, the Court is unable to assess whether the Commission erred in its assessment of the amount payable or to substitute the amount accepted by the Hellenic Republic for the amount recovered by the Commission.

81 The Hellenic Republic also claims that the debit notes did not state clearly the period to which they referred (see paragraph 54 above). It should be noted in that regard, first, that the Hellenic Republic admitted its liability in principle for the debt in issue and, second, that it did not raise any objections when it received a number of debit notes between 30 November 1997 and 31 January 2001. It follows that it was for the Hellenic Republic to prove that it was not liable for the debts in issue. However, it manifestly failed to do this. Furthermore, and as was stated at paragraph 79 above, the Hellenic Republic did not explain why it was not liable for the difference between the amount it concedes and that requested by the Commission. Nor does the Hellenic Republic clarify its allegation of lack of precision in the debit notes.

82 It follows that the argument of the Hellenic Republic concerning its liability for the debts relating to the Abuja I project cannot be accepted.

83 Second, it is necessary to examine the Hellenic Republic's argument that it has no financial liability as regards the Abuja II project. While emphasising that the rights and obligations of the participating partners are laid down solely in the initial and additional memoranda, the Hellenic Republic claims to have withdrawn from the project because it never ratified the additional memorandum. Accordingly, it follows from Article 15(1) of the initial memorandum that it is subject to no financial obligation as regards the Abuja II project (see paragraphs 55 to 62 above).

84 In that regard, the Court would point out, first, that the Hellenic Republic does not deny that it acted as a full participant in the Abuja II project for more than six years, namely from 18 April 1994 to 30 September 2000. The Hellenic Republic, which claims in this case to have withdrawn from the Abuja II project because it never ratified the additional memorandum, took part in that project for almost two years after the signature of that memorandum in December 1998 (see paragraph 29 above). Even after receiving the Commission's letters regarding the Abuja Light project (see paragraphs 35 and 36 above), the Hellenic Republic did not formally withdraw from the project, but merely indicated in its letter of 2 October 2000 that

it was unable to give a definitive response regarding its participation in the Abuja II project (see paragraph 36 above). From April 1994 to September 2000, by its conduct the Hellenic Republic consistently let the other partners understand that it was continuing to participate in the Abuja II project. It thus led the other participating partners to expect that it would continue to fulfil its financial obligations in relation to the Abuja II project. Therefore, an assessment of the Hellenic Republic's obligations cannot be based solely on the initial and additional memoranda, but must also take into account the expectations which that Member State's conduct led its partners to entertain.

85 In that regard, the Court would point out that the principle of good faith is a rule of customary international law, the existence of which has been recognised by the Permanent Court of International Justice established by the League of Nations (see the judgment of 25 May 1926, *German interests in Polish Upper Silesia*, CPJI, Series A, No 7, pp. 30 and 39), and subsequently by the International Court of Justice and which, consequently, is binding in this case on the Community and on the other participating partners.

86 That principle has been codified by Article 18 of the Vienna Convention of 23 May 1969 on the Law of Treaties, which provides:

'A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or

(b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.'

87 It should also be noted that the principle of good faith is the corollary in public international law of the principle of protection of legitimate expectations which, according to the case-law, forms part of the Community legal order (Case T-115/94 *Opel Austria* v *Council* [1997] ECR II-39, paragraph 93).

88 It is common ground that, on 18 April 1994, the Hellenic Republic signed the initial memorandum which it also ratified. From that moment on, according to the preamble to that memorandum, it was one of the partners participating in the Abuja II project that had decided to build a common embassy complex in the 'spirit of mutual benefit'. That status as partner entails certain enhanced obligations of cooperation and solidarity between participants.

89 The initial memorandum concerns the preliminary phases of the Abuja II project. Although that memorandum, and in particular Articles 11 to 15 thereof, can be criticised for its lack of clarity, it is common ground that it is apparent that the Commission undertook to pay EUR 140 000 for the costs of preparation of the project and that those costs were to be reimbursed by all the partners in proportion to their individual share of the project if it was carried out (see inter alia Article 12 of the initial memorandum, quoted in paragraph 12 above). The parties also confirmed at the hearing that it follows from Articles 11 to 15 of the initial memorandum that, after the first phase, comprising the initial design of the project, the partners wishing to continue with the project would sign an additional memorandum relating to the detailed design of the building and the detailed financing of the project.

90 Following the signature of the initial memorandum, the Commission, with the approval of the partners, signed contracts with the consultants (see paragraph 16 above). Although it is clear from the case-file that the costs increased in relation to the initial estimates, the costs incurred were not questioned during the meetings of the committees responsible for the project (see paragraphs 18 to 23 above) by the participating partners, which included the Hellenic Republic.

91 It is clear that under the initial memorandum, signed and ratified by the Hellenic Republic, the extent of the Member States' participation in the project was determined according to the area requested for their delegation and included a share of the cost of the common and public areas (see paragraph 13 above). The Hellenic Republic does not dispute that it requested an area of 591 m^2 for its embassy, so that its share of the project, having regard to the shares of the 14 partners, was initially set at 5.06%.

92 After the initial design phase of the project, and, contrary to what was foreseen in the initial memorandum (see paragraph 11 above), the partners decided to go ahead with the project and to bear the costs relating to the detailed design of the building, before the additional memorandum was finalised. In particular, the CFSP Working Party on Administrative Affairs, at its meeting of 24 February 1997 which was attended by two representatives of the Hellenic Republic, authorised the Commission to make the necessary arrangements with the architects to draw up detailed plans without awaiting the additional memorandum (see paragraph 24 above). It was provided that '[l]ike on previous occasions, such advance payments by the Commission [would] later be reimbursed by other participants according to the procedures foreseen to this end in the initial memorandum'.

93 This is an important piece of evidence. In deciding to draw up detailed plans before the additional memorandum was finalised, the partners went further than the preliminary phases, thereby necessarily concluding an implied agreement to carry out the project. As regards the costs to which that decision gave rise, the partners

were evidently unable to rely on the procedures laid down in the additional memorandum, which had not been approved (see paragraph 13 above). Accordingly, by referring to the subsequent reimbursement of the advances provided for in the initial memorandum, the partners were in fact referring to Article 12 of that memorandum, according to which, if the project was carried out, the partners would reimburse the costs of preparation of the project advanced by the Commission (see paragraph 12 above). Since the partners decided at the meeting of 24 February 1997 to carry out the project, they were no longer free to withdraw from it without reimbursing their share of the preliminary and subsequent expenditure.

94 Although certain Member States subsequently withdrew from the project (see paragraphs 25 and 27 above), the Hellenic Republic did not conduct itself in any way as to give rise to doubts as to its participation. Furthermore, it raised no objection to the expenditure relating to the principal contract, amounting to EUR 1 895 696, which was concluded with the consultants on 12 November 1997 (see paragraph 26 above).

95 On 9 December 1998, the Hellenic Republic and the other partners which had not withdrawn from the project signed the additional memorandum (see paragraph 29 above). Moreover, in the subsequent months the Hellenic Republic acted as a full partner in the project. It was only during the summer of 2000 that the Hellenic Republic, for the first time, showed reticence with regard to its continued participation, which led the Commission to conclude that it had withdrawn from the project (see paragraph 36 above).

96 It is common ground that the Hellenic Republic was entitled to withdraw from the project. Nonetheless, given the evolution of the undertakings given after the initial phase, and notwithstanding the non-ratification of the additional memorandum, the Court considers that the Hellenic Republic could not withdraw without being held liable for the expenditure linked to its participation in the Abuja II project.

97 The Hellenic Republic, as a signatory of the additional memorandum, was bound to act in good faith as regards the other partners. That obligation was reinforced by the fact that the Hellenic Republic signed and ratified the initial memorandum and was, from 18 April 1994 to 30 September 2000, a 'participating partner' in the project. In that connection, first, it should be pointed out that the Hellenic Republic took part in the meetings of the committees responsible for the project and approved the Commission's expenditure. Second, the Hellenic Republic asked that the area occupied by its embassy in the complex be 591 m^2 and accepted, following the withdrawal of a number of Member States from the project, an increase to 677 m^2 (see call for tender of 28 April 1999). In effect, the Hellenic Republic was fully involved in the procedure concerning the call for tender for the project in 1999 and 2000, and its representative participated in the assessment of the construction companies (see paragraphs 31 and 33 above).

98 Furthermore, the Hellenic Republic expressed no doubts with regard to its participation in the project between 18 April 1994 and 30 September 2000. If it considered that it had no financial responsibility prior to ratification of the additional memorandum, it should have objected to the payment orders of 10 June 1998 and 17 February 2000 sent to it by the Commission in relation to the Abuja II project (see paragraphs 28, 32 and 34 above). In addition, it never showed any intention to withdraw or not to ratify the additional memorandum, despite the withdrawal of several Member States and the consequent change in its share of the project. It should be noted in that regard that, under the Vienna Convention on the Law of Treaties (see paragraph 86 above), a party which wishes to withdraw from an international agreement is obliged to notify the other parties of that intention (Articles 65 and 67).

99 The Court considers that it follows from the foregoing that the Hellenic Republic conducted itself as a full participant in the project. It let the other parties understand, by its conduct, that it accepted and approved of the undertakings made by the Commission on behalf of the partners. Thus, it led its partners confidently to expect that it would fulfil its financial obligations in relation to the project. Furthermore, it is clear that its participation in the project, and in particular its embassy of 677 m^2, had a direct effect on the total cost of the project. Consequently, by reason of the principle of good faith, the Hellenic Republic could not evade its

financial commitments by pleading that it had not ratified the additional memorandum.

100 Moreover, the Hellenic Republic's obligations also arise from the terms of the initial memorandum. As the Hellenic Republic acknowledged (see paragraph 56 above), it is quite clear from Article 15(1) of the initial memorandum that a participating partner which does not sign the additional memorandum can escape the financial obligations relating to the project (see paragraph 15 above). However, is not disputed that the Hellenic Republic did sign the additional memorandum. In the circumstances of the case, Article 15(1) of the initial memorandum must be read exactly contrary to the interpretation given to it by the Hellenic Republic.

101 The Hellenic Republic maintains that the ratification of the additional memorandum is a necessary condition for its entry into force (see paragraph 57 above). The Court notes in that regard that, under Article 14 of the additional memorandum, that memorandum was to be provisionally applied from the first day of the second month after its signature. As that memorandum was signed by the partners on 9 December 1998, it applied provisionally from 1 February 1999. The additional memorandum thus applied provisionally to the Hellenic Republic until October 2000. The Hellenic Republic cannot disregard that provisional application by pleading that it did not ratify the memorandum.

102 Moreover, it should be noted that the eight other Member States which withdrew from the project paid their share of the costs, even if they had not all ratified the additional memorandum.

103 It follows from all the foregoing that the Hellenic Republic must be held liable for all the costs relating to its participation in the Abuja II project.

104 The Hellenic Republic concedes that the other partners were justified in expecting it to assume its definitive contractual obligations only if the circumstances 'had not fundamentally changed' (see paragraph 65 above). Yet, contrary to the assertions of the Hellenic Republic, in the case of a building construction project, the increase in the cost of the project cannot be considered a 'fundamental change of circumstances'. Furthermore, the Hellenic Republic accepted the increase in the cost of the project, which was known since the beginnings of the Abuja II project (see paragraph 90 above), and did not raise any objections when its share of the project grew following the withdrawal of several Member States between 1997 and 1999.

105 It follows from all the foregoing that the first part of the single plea must be rejected.

Second part of the plea, alleging infringement of the Financial Regulation and of Regulation No 2342/2002

Arguments of the parties

106 The Hellenic Republic claims that, by proceeding to recovery by offsetting the amounts in issue, the Commission infringed the Financial Regulation and Regulation No 2342/2002.

107 The Hellenic Republic submits that, contrary to the Commission's assertion, there is manifest uncertainty surrounding the amount of, and justification for, the sums claimed, both for the Abuja I and Abuja II projects. In three successive letters of 29 May and 11 October 2002 and 31 January 2003, the Commission asked the Hellenic Republic to pay three entirely different amounts for the projects in question

(EUR 1 276 484.50, EUR 861 813.87 and EUR 516 374.96 respectively). The delay in payment of the amount payable can thus be explained by the lack of clarity regarding certain particulars of the debit notes, as well as large disparities between the corresponding sums (see paragraph 54 above). In that regard, the Hellenic Republic points out that the debt of EUR 1 276 484.50 was cancelled as not due.

108 The Hellenic Republic adds that the Commission breached the principles governing recovery by offsetting laid down in Articles 77 to 89 of Regulation No 2342/2002. In particular, the conditions for the application of Article 83 of Regulation No 2342/2002, according to which the amount receivable must be certain and of a fixed amount in order for the offsetting to be valid, are not fulfilled.

109 Furthermore, the Financial Regulation and Regulation No 2342/2002 contain provisions to protect the financial interests of the Community (Articles 78(1) and 80(1) of Regulation No 2342/2002). Yet in this case, the amount offset, in particular that relating to the Abuja II project, does not concern amounts receivable by the Community from the Hellenic Republic, but amounts that may be receivable by the partners in the Abuja II project, under the provisions of the initial memorandum alone. The Hellenic Republic infers from that that the Commission cannot legitimately avail itself of the procedures laid down in the Financial Regulation.

110 The Commission counters that it is wrong to question those amounts receivable, which are certain, verified and due.

Findings of the Court

111 It must be noted, first of all, that it is apparent from the scope of the Financial Regulation, and in particular Article 1 thereof, that the procedure of recovery by

offsetting laid down in Article 73(1) thereof (see paragraph 3 above) applies only to sums falling under the Community budget. It is not disputed that the Commission was authorised, under Article 268 EC, which provides for both Community expenditure and certain expenditure occasioned for the institutions by the provisions of the Treaty on European Union relating to the common foreign and security policy, to assign to the Community budget the costs incurred in respect of the Abuja I and Abuja II projects.

112 According to the Hellenic Republic, the Commission infringed the Financial Regulation and Regulation No 2342/2002 because the amounts receivable in issue were not 'certain and of a fixed amount' in accordance with those regulations. The Hellenic Republic states inter alia that uncertainty surrounded the amount of, and justification for, the sums claimed (see paragraphs 106 to 108 above).

113 It must be noted, in that regard, that the Financial Regulation and Regulation No 2342/2002 contain detailed rules regarding the Commission's right to proceed to recovery by offsetting.

114 Article 73(1) of the Financial Regulation provides that the accounting officer is to recover amounts by offsetting them against equivalent claims, duly established by the authorising officer responsible, that the Communities have on any debtor who himself/herself has a claim on the Communities that is certain, of a fixed amount and due (see paragraph 3 above).

115 With regard to the procedure applicable, Article 71 of the Financial Regulation provides that the authorising officer responsible must first establish an amount receivable, namely by verifying that the debt exists, determining or verifying the reality and the amount of the debt and verifying the conditions in which the debt is due (see paragraph 1 above). Article 79 of Regulation 2342/2002 requires the

authorising officer to ensure, inter alia, that the receivable is 'certain' and not subject to any condition. He must also ensure that the receivable is 'of fixed amount', expressed precisely in cash terms, and that the receivable is 'due' and is not subject to any payment time (see paragraph 5 above). Furthermore, Article 80 of Regulation No 2342/2002 states that the establishment of an amount receivable is to be based on supporting documents certifying the Communities' entitlement.

116 Any amount receivable that is identified as being 'certain, of a fixed amount and due' must be established by a recovery order to the accounting officer drawn up by the authorising officer responsible (Article 71(2) of the Financial Regulation). The recovery order is the operation by which the authorising officer responsible instructs the accounting officer to recover the amount established (Article 78(2) of Regulation No 2342/2002).

117 In this case, the Hellenic Republic has not shown that the authorising officer made an error in deciding that the amount receivable in issue was 'certain, of a fixed amount and due'.

118 It is important to emphasise in that regard that offsetting under Article 73(1) of the Financial Regulation is not precluded where one of the debts is disputed or where there are negotiations between the Commission and the debtor regarding those debts, since otherwise the debtor could indefinitely delay the recovery of a debt.

119 In its letter of 29 December 2003, the Hellenic Republic in fact asked its Permanent Representative to the EU to ascertain that the Commission would proceed to offsetting, at least with regard to the Abuja II project (see paragraph 42 above).

120 Despite its letter of 29 December 2003, the Hellenic Republic maintains in this case that the amounts receivable were not certain and of a fixed amount on the ground that the Commission asked the Hellenic Republic to pay three completely different amounts for the projects in question (see paragraph 107 above). Even if there may have been uncertainty regarding the amounts receivable in 2002, the Court considers that, following exchanges between the parties and a fresh examination of the case-file, the Commission came to a definite conclusion as regards the amounts due in 2004 when it proceeded to recovery.

121 It must be pointed out that the Hellenic Republic concedes that the Commission cancelled the debit note for EUR 1 276 484.50 more than a year before the recovery by offsetting in March 2004 (see paragraph 107 above). That debit note concerned construction costs relating to the Abuja II project and it is undisputed in this case that the Commission did not attempt to recover that sum by the contested act. Consequently, the debit note in question is irrelevant to the present case.

122 As regards the letter of 11 October 2002, by which the Commission requested payment of EUR 861 813.87 and USD 11 000 in respect of the Abuja I and Abuja II projects, the Commission reduced that amount long before the recovery decision. In its letter of 31 January 2003, the Commission requested payment of EUR 516 374.96 and USD 12 684.89.

123 Following the final debit note of 28 March 2003 and the charging of interest for non-payment, the Commission, in its letter of 16 February 2004, set the amount due at EUR 565 656.80 (see paragraph 43 above). It annexed to that letter the 11 debit notes for the period from 20 August 1997 to 28 March 2003 and stated its intention to proceed to recovery by offsetting.

124 Furthermore, it is apparent from the case-file that, in adopting the contested act, the Commission relied on supporting documents certifying the Communities' entitlement in accordance with Article 71 of the Financial Regulation and Article 80 of Regulation No 2342/2002. Those supporting documents included the initial memorandum signed and ratified by the Hellenic Republic, the additional memorandum signed by the Hellenic Republic, the minutes of the meetings during the course of which the Commission was authorised by the partners, including the Hellenic Republic, to go ahead with the Abuja II project without waiting for finalisation of the additional memorandum, the documents concerning the involvement of the Hellenic Republic in the tendering procedure for the project in 1999 and 2000, as well as several documents relating to costs linked to the Abuja I project incurred by the Hellenic Republic up to 13 July 2002.

125 Moreover, each of the 11 debit notes sent by the Commission to the Hellenic Republic and attached to the letter of 16 February 2004 gave a due date, as required by Article 78 of Regulation 2342/2002, and it is undisputed that the Hellenic Republic did not pay its debts by the allotted dates.

126 The Hellenic Republic has not produced any evidence to show that the Commission failed to follow the procedure laid down in the regulations in question and that the Commission was not justified in concluding that the amount receivable was 'certain, of a fixed amount and due'. In particular, the Hellenic Republic has not demonstrated that the debts were subject to a condition, or that the amount due was not expressed precisely.

127 As regards the Abuja II project, the Hellenic Republic did not in fact claim that the amount receivable was not certain and of a fixed amount. It confined itself to maintaining that it had no financial obligation in relation to that project, an argument which has been rejected by the Court in its analysis of the first part of the single plea.

128 As regards the Abuja I project, the Hellenic Republic submits that the Commission should not have proceeded to recovery while negotiations were ongoing. However, as the Court stated at paragraph 118 above, the existence of negotiations could not prevent the Commission from proceeding to recovery. It is clear in particular from the Commission's letter of 12 June 2003 that it was aware of the Hellenic Republic's objection concerning the Abuja I project from that date. The Court considers that the Commission was entitled to reject the objection in question and, by following the procedures laid down by the Financial Regulation and Regulation No 2342/2002, to proceed in March 2004 to recovery by offsetting.

129 According to the Hellenic Republic, the Commission was not authorised to proceed to recovery by offsetting because the objective of the abovementioned regulations is to protect the Communities' financial interests, while, it claims, the amounts in issue are receivable by the partners and not the Community (see paragraph 109 above).

130 The Court considers that the amounts in issue are receivable by the Community. As regards the Abuja I project, it is not disputed that the Commission, with the agreement of the Member States, rented the building in question and sublet offices to the latter. The Commission also supplied a number of services to the Member States. Those Member States, which included the Hellenic Republic, used the premises in full knowledge of the fact that the Commission had contracted with the owner of the building on behalf of all the occupants. The Commission was, to that end, their agent.

131 As regards the Abuja II project, the Commission was also the agent of the participating partners (see, for example, Articles 11 and 12 of the initial memorandum, paragraphs 11 and 12 above). It is clear from the case-file that the Commission advanced the disputed amounts on behalf of the Member States and as an advance payment on its own share of the project. Therefore, the amounts in issue were payable to the Community, and not to the partners.

132 It follows that, contrary to the Hellenic Republic's assertions, the conditions laid down for recovery by offsetting were fulfilled at the time of the contested act.

133 The second part of the single plea must therefore be rejected as unfounded.

The Commission's request that the opinion of the Counci's Legal Service of 26 June 1998 be removed from the case-file

134 As regards the objection raised by the Commission to the opinion of the Council's Legal Service of 26 June 1998 (see paragraph 48 above), it must be pointed out that it would be contrary to the public interest, which requires that the institutions should be able to benefit from the advice of their legal service given in full independence, to allow such internal documents to be produced in proceedings before the Court by persons other than the services at whose request they were drawn up, unless such production has been authorised by the institution concerned or ordered by that Court (order of the Court of Justice of 23 October 2002 in Case C-445/00 *Austria* v *Council* [2002] ECR I-9151, paragraph 12, and order of the Court of First Instance of 10 January 2005 in Case T-357/03 *Gollnisch and Others* v *Parliament* [2005] ECR II-1, paragraph 34).

135 In this case, the Hellenic Republic has not claimed that the Commission authorised the production of the opinion in question. In those circumstances, the Commission's request that that opinion be removed from the case-file must be allowed.

136 It follows from all the foregoing that the action must be dismissed in its entirety.

Costs

137 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the Hellenic Republic has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1. **Orders the removal of the opinion of the Council's Legal Service of 26 June 1998, submitted by the Hellenic Republic as Annex 12 to its application, from the case-file;**

2. **Dismisses the action;**

3. **Orders the Hellenic Republic to pay the costs.**

García-Valdecasas Cooke Labucka

Delivered in open court in Luxembourg on 17 January 2007.

E. Coulon J.D. Cooke

Registrar President