JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
17 September 2003 *

In Case T-137/01,

Stadtsportverband Neuss eV, established in Neuss (Germany), represented by H.G. Hüsch and S. Schnelle, lawyers,

applicant,

v

Commission of the European Communities, represented by J. Sack, acting as Agent, with an address for service in Luxembourg,

defendant,

APPLICATION for annulment of the Commission's decision of 9 April 2001 ordering partial repayment of financial assistance granted to the applicant under the Eurathlon programme,

* Language of the case: German.

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

composed of: V. Tiili, President, P. Mengozzi and M. Vilaras, Judges,

Registrar: D. Christensen, Administrator,

having regard to the written procedure and further to the hearing on 9 January 2003

gives the following

Judgment

Facts

1 Stadtsportverband Neuss eV ('the applicant') is a group of sporting associations from the municipality of Neuss. Its purpose is the promotion of sport in the public interest.

2 By letter of 28 February 1994 ('the application for a subsidy') the applicant requested a subsidy from the Commission to finance an international sporting event ('ISO 94'). That event took place in Neuss from 11 to 15 May 1994.

3 By decision of 10 June 1994 ('the decision to grant the subsidy') the Commission granted the applicant, under the Eurathlon programme, financial assistance of ECU 20 000 which comes under the general budget of the European Communities (financial aid charged against Chapter B3, Article 3050,11).

4 The decision to grant the subsidy is worded as follows:

'... I am pleased to inform you that the Commission of the European Communities has decided to grant your organisation a subsidy of ECU 20 000.

A form setting out the general obligations which a recipient of a Commission subsidy must fulfil is attached to this letter. Please read it carefully and return it duly completed and signed... so that I can commence the payment procedure....'

5 On 28 June 1994, Mr Franssen, chairman of the management committee of the applicant at the time, signed the form setting out the general obligations which the recipient of a Commission subsidy had to fulfil ('the declaration by the recipient of the subsidy').

6 Paragraph 1 of the declaration by the recipient of the subsidy states that the applicant undertakes 'to use Community funds only to carry out the project described in the application of 28 February 1994'.

7 According to the fifth indent of paragraph 2 of the declaration by the recipient of the subsidy, as amended by the recipient, 'the Commission subsidy amounts to 18.4% of the proposed expenditure. In the event that actual expenditure is less, the Commission subsidy will be reduced to that percentage'.

8 The sixth indent of paragraph 2 of the declaration states that 'the financial aid may not in any event result in a profit'.

9 According to paragraph 3 of that declaration, the applicant 'agrees — in accordance with the Financial Regulation of 21 December 1977 applicable to the general budget of the European Communities [OJ 1977 L 356, p. 1], as last amended [by Council Regulation (Euratom, ECSC, EEC) No 610/90 of 13 March 1990 (OJ 1990 L 70, p. 1)] — that the use of Community funds should be subject to an audit by the Commission and the Court of Auditors'.

10 According to paragraph 4 of the declaration by the recipient of the subsidy, the applicant 'undertakes to forward to the Commission, within three months of the termination of the subsidised measure and by 15 August 1994 at the latest (under the budget rules, funds granted for such a measure are granted for a limited period), three copies of:

— a report on the use of the above financial aid

— a certified list of the costs drawn up by the recipient of the aid or financial statement accompanied by certified documentation, showing the amount and nature of the expenditure and the corresponding income (including the Commission subsidy)

— where appropriate, the annual report of a trust company'.

11 According to paragraph 5 of the declaration by the recipient of the subsidy, the recipient of the subsidy also undertakes 'to retain all original documents for five years with a view to a possible audit'.

12 Finally, according to paragraph 7 of that declaration, the recipient of the subsidy 'declares that, in the event that the use of the whole subsidy is not documented in the list of costs it will repay to the Commission on request sums already paid out use of which is not documented'.

13 In January 1995, the Commission paid the financial assistance of ECU 20 000 to the applicant on the basis of the account drawn up by the applicant on 27 October 1994.

14 On 12 December 1996, Mr Grahl, sports coordinator with the applicant, sent a letter to the Commission pointing out certain anomalies relating to the payments in connection with ISO 94 and reporting an estimated surplus of DEM 40 000.

15 As the applicant had also received a subsidy of DEM 20 000 from Kreis Neuss (the district of Neuss), that authority reviewed the expenditure incurred by the applicant in connection with ISO 94 and drew up an auditor's report on 26 November 1997 ('the Kreis Neuss audit') on the basis of a provisional audit by the local audit office of 25 July 1997. The Kreis Neuss audit concluded that there

was an accounting surplus of at least DEM 19 905.03. Following that audit, under a decision by Kreis Neuss of 19 March 1998, the applicant was requested to repay in full the Kreis Neuss subsidy ('the Kreis Neuss repayment decision').

16 By debit note No 3240010317 of 6 April 1999, the Commission also ordered the repayment in full of the financial aid it had paid, on the ground that it had had no response to its request of 9 February 1999 for all the documents relating to expenditure and income in connection with ISO 94, and that, in any event, it was in possession of information that the applicant had derived a profit from the event which was incompatible with the rules on financial assistance ('the decision of 6 April 1999').

17 By application lodged at the registry of the Court of First Instance on 25 June 1999, registered as Case T-154/99, the applicant brought an action for annulment of the decision of 6 April 1999.

18 By decision of 6 August 1999 ('the decision of 6 August 1999'), the Commission withdrew its decision of 6 April 1999.

19 On 11 August 1999, Mr Hüsch, the applicant's lawyer, sent the Commission the 'final account of ISO 94', drawn up in August 1999. According to that account, the total expenditure amounted to DEM 242 070.94 and the total income amounted to DEM 225 567.25 including the Community subsidy and to DEM 187 973.73 without the Community subsidy.

20 Following the decision of 6 August 1999, the Court of First Instance ruled that there was no need to adjudicate by order of 20 October 1999.

21 On 13 April 2000, the Commission's representatives carried out an audit of the accounts for ISO 94 at the office of the applicant's lawyer.

22 On 23 May 2000 Mr Hüsch sent the Commission information to clarify certain transactions.

23 On 15 June 2000 the Commission drew up a report on the audit of 13 April 2000 ('the audit report'). That report was served on Mr Hüsch in German on 27 October 2000.

24 In the audit report, the Commission concludes that:

'Taking account of all the anomalies recorded, the final account is as follows:

corrected total of eligible expenditure	DEM 149 291
corrected total income	DEM 181 202 (including Community subsidy)
	DEM 143 609 (excluding Community subsidy)

On the basis of the eligible expenditure the maximum Community subsidy is limited to 18.4% which corresponds to a maximum of DEM 27 470. However, the clause of the contract providing that the subsidy may not in any event result in a profit must be applied and the subsidy must be limited to DEM 5 682 to balance expenditure and income in the final account.'

25 On 3 April 2001 the Commission sent Mr Hüsch a letter in reply to the applicant's comments on the audit report (the 'letter of 3 April 2001').

26 The letter of 3 April 2001 reads as follows:

'... By letter of 23 January 2001, Mr Pettinelli informed you that he had forwarded the file in question to my department for review of the information and observations included in your letter of 28 November 2000. Please find attached a summary of the main conclusions of that review.

Unfortunately, I must observe that the new matters raised do not in any way induce us to dismiss the conclusions of the audit report sent to you on 27 October 2000.

I am thus obliged to ask your client, Stadtsportverband Neuss, to repay the sum of DEM 31 911.11; a notice to that effect will be sent to you shortly...'

27 On 9 April 2001 the Commission drew up a new debit note No 3240302372 for a sum of DEM 31 911.11, equivalent to EUR 16 315.89, (the 'contested decision').

28 The contested decision reads as follows:

'...

215050/94 — "International schools meeting 1994"

Repayment of DEM 31 [91]1.11 following an audit of 13 April 2000 at the office of H.G. Hüsch and confirmed in a letter to your lawyer on 3 April 2001 annexed hereto.

... '

Procedure and forms of order sought

29 By application lodged at the registry of the Court of First Instance on 19 June 2001, the applicant brought this action.

30 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fourth Chamber) opened the oral procedure. By way of measures of organisation of the procedure, the parties were asked to produce certain documents and reply to certain written questions by the Court. They complied partially with those requests.

31 The oral arguments of the parties and their answers to the questions asked by the Court were heard at the hearing of 9 January 2003.

32 The applicant claims that the Court should:

— annul the contested decision;

— order the defendant to pay the costs.

33 The Commission contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

Pleas in law and arguments of the parties

34 The applicant essentially relies on five pleas in law in support of its application. The first is that there was no legal basis, the second, that the obligation to state reasons was disregarded, the third, that there was a manifest error of assessment, the fourth, that the action was time-barred and the fifth, that there was a breach of the principle of sound administration and the duty of care. At the hearing the applicant withdrew its plea concerning the alleged error in the serving of the contested decision.

The first plea — no legal basis

Arguments of the parties

35 The applicant disputes that there is in fact any obligation to repay. It submits that the decision to grant the subsidy contains no specific provision concerning possible repayment. Moreover, the declaration by the recipient of the subsidy, signed by Mr Franssen, then chairman of the applicant, cannot be binding on it as, under the rules laid down by the Bürgerliches Gesetzbuch (German Civil Code) and the applicant's own statutes, it should have been represented jointly by its chairman or deputy chairman and by another member of its management committee. Thus, the signature of the former chairman on its own is not sufficient to impose an obligation on the applicant. However, according to the applicant, the validity of the decision to grant the subsidy is not thereby called into question as it was quite properly addressed to the applicant as a beneficial administrative measure.

36 The applicant also disputes that the alleged surplus from ISO 94 constitutes a profit in the legal sense. As a public interest association, it does not make a profit. If it has surplus funds after organising various events, that surplus is invested in the work of the public interest association. As no profit can arise, there is no legal basis for a decision to repay. The applicant submits that the Commission is confusing the concepts of profit and surplus.

37 The Commission contends, as regards the allegation that Mr Franssen has no authority to represent the applicant, that if he could not bind the applicant legally on his own then the whole of the Commission's grant was made without a legal basis, given that the applicant did not, from the outset, fulfil the conditions for the receipt of aid. Thus, the repayment of the aid in full could be required pursuant to the doctrine of unjust enrichment and the applicant cannot plead its good faith as its chairman must have known that he had no representative authority on his own.

38 As regards the concepts of profit and surplus, the Commission explained at the hearing that, in the present case, it understood profit to mean the surplus created where the income from an event is higher than the expenditure incurred in that connection.

Findings of the Court

39 First, it should be noted that the decision to grant the subsidy expressly refers to the declaration by the recipient of the subsidy attached to that decision. Receipt of the subsidy was subject to the condition that the recipient fill in, sign and

return that form to the Commission. Accordingly, that declaration by the recipient of the subsidy, containing the rules governing the grant of the subsidy, is an integral part of the decision to grant the subsidy.

40 In that connection, it must be pointed out that, according to the declaration by the recipient of the subsidy, the applicant undertook to use Community funds only to carry out the project described in the application of 28 February 1994, that is to say the ISO 94 event.

41 Moreover, the declaration by the recipient of the subsidy contains a clause stipulating that the financial assistance may not in any event result in a profit.

42 The applicant also agreed, in accordance with the Financial Regulation of 21 December 1977 applicable to the general budget of the European Communities, that the use of Community funds should be subject to an audit by the Commission and the Court of Auditors

43 Moreover, the applicant undertook to provide the Commission with a report on the use of the financial assistance and a certified list of the costs drawn up by it or financial statement accompanied by certified documentation, showing the amount and nature of the expenditure and the corresponding income.

44 Finally, the applicant undertook to repay to the Commission on request, in the event that the use of the whole subsidy is not documented in the list of costs, sums already paid out use of which is not documented.

45 Accordingly, the declaration by the recipient of the subsidy clearly conferred on the Commission the right to monitor the use of the subsidy and to order its repayment if necessary. In that connection, it must be borne in mind that the Commission is bound, under Article 274 EC, by an obligation of sound financial management of Community funds. Therefore, in the system of granting Community financial assistance, the use of that assistance is subject to rules which may require the partial or full repayment of assistance already granted.

46 Accordingly, the applicant cannot claim that there was no obligation to repay incumbent upon it. In the event of breach of the rules contained in the declaration by the recipient of the subsidy, the Commission was entitled to require the partial or full repayment of the financial assistance granted. According to settled case-law, the beneficiary of financial assistance for which the application was approved by the Commission does not thereby acquire any definitive right to full payment of the assistance if he does not satisfy the conditions to which the aid was subject (Case T-81/95 *Interhotel* v *Commission* [1997] ECR II-1265, paragraph 62, and Case T-126/97 *Sonasa* v *Commission* [1999] ECR II-2793, paragraph 59).

47 Second, as regards the applicant's argument that the fact that the declaration by the recipient of the subsidy was not signed by a person authorised to do so precluded any obligation on its part, suffice it to observe that it is irrelevant. The receipt and use of the financial assistance by the applicant constitute the ratification of all the undertakings given by its chairman in relation to the rules governing the grant of that assistance. Moreover, if that were not the case, it would have to be concluded that the applicant ought to repay the financial assistance at issue in full.

48 Third, as regards the applicant's argument that the alleged surplus from ISO 94 did not constitute a profit in the legal sense of the term, consideration must be given to what should be understood by profit in the present case. In the context of

Community financial assistance, assistance must be limited to the amount necessary to balance the account for the project. Accordingly, the term 'profit' which appears in the declaration by the recipient of the subsidy, must here be understood to mean surplus, that is to say, the fact that income is higher than expenditure. The applicant, as a public interest association, cannot, in fact, make a profit as such. However, that fact did not prevent it from acquiring a surplus for ISO 94, *inter alia* as a result of the various subsidies it received, in particular from the Commission. As the Court of First Instance has held above, the applicant had accepted its obligation to repay in the event that it obtain more income than the expenditure it incurred on ISO 94. It cannot escape that obligation simply by relying on the inconsistency between its status as a public interest association and the making of profits.

49 Accordingly, the first plea must be rejected.

The second plea — breach of the obligation to state reasons

Arguments of the parties

50 The applicant submits that the contested decision does not make the grounds for the demand for repayment clear at all. It argues that the grounds for the decision should be stated in the contested decision itself as the audit report sent to it cannot serve as a statement of reasons for such purposes, given that such a report cannot constitute an act adversely affecting a person, nor can it replace such an act or serve as a basis for one. At the hearing, the applicant confirmed that, in its view, the letter of 3 April 2001 attached to the contested decision stated no grounds, whereas the audit report explained exactly how the amount, repayment

of which was required, was arrived at. None the less the applicant stated at the hearing that, if the audit report were regarded as the documentation supporting the contested decision, it would accept it should the Court of First Instance take the view that grounds for that decision were given in the audit report itself.

51 The Commission contends that the audit report explains better than any supplementary statement of reasons in the debit note the reasons why it demands repayment of part of the subsidy. Moreover, it points out that it is expressly stated in the contested decision that the demand for repayment is based on the existence of a surplus of income over expenditure.

Findings of the Court

52 It must be observed that it is settled case-law that the purpose of the obligation to state the reasons for an individual decision is to provide the person concerned with sufficient information to make it possible to determine whether the decision is well founded or whether it is vitiated by an error which may permit its validity to be contested, and to enable the Community judicature to review the lawfulness of the decision. The extent of that obligation depends on the nature of the measure at issue and the context in which it was adopted (Joined Cases T-551/93 and T-231/94 to T-234/94 *Industrias Pesqueras Campos and Others* v *Commission* [1996] ECR II-247, paragraph 140; Joined Cases T-46/98 and T-151/98 *CEMR* v *Commission* [2000] ECR II-167, paragraph 46, and Case T-80/00 *Associação Comercial de Aveiro* v *Commission* [2002] ECR II-2465, paragraph 35).

53 According to the case-law, since a decision reducing the amount of Community financial assistance has serious consequences for the recipient of the assistance,

that decision must show clearly the grounds which justify the reduction in the assistance initially authorised (*CEMR* v *Commission*, cited above, paragraph 48, and *Associação Comercial de Aveiro* v *Commission*, cited above, paragraph 36).

54 The question as to whether the statement of reasons for a decision satisfies those requirements must be assessed with reference not only to its wording but also to its context and the whole body of legal rules governing the matter in question (*Associação Comercial de Aveiro* v *Commission*, paragraph 37).

55 The content of the contested decision should first be examined. The contested decision refers to the audit, carried out on 13 April 2000, at the offices of the applicant's lawyer. It also refers to a letter sent to the applicant's lawyer on 3 April 2001 and attached to the contested decision.

56 As to the reference to the audit of 13 April 2000 in the wording of the contested decision, the case-law allows it to be considered that sufficient grounds have been given for a decision where it refers to an audit report sent to the applicant (see, to that effect, *Pesqueras Campos and Others* v *Commission*, cited above, paragraphs 142 to 144). The applicant acknowledges that it received the audit report in French and, on 27 October 2000, in German. Moreover, in its covering letter of 27 October 2000, the Commission had expressly asked the applicant to give its opinion on that report within one month. As the applicant itself accepted at the hearing, the audit report contains sufficient information to allow it to know the reasons why the repayment of part of the financial assistance was required. The fact that the contested decision referred to the audit of 13 April 2000 and not to the audit report as such cannot but be irrelevant to the settlement of the dispute, as the applicant was in a position to understand the connection between the audit of 13 April 2000 and the report which followed.

57 Moreover, according to the case-law, where reference is made to a document attached to a decision and thus contained in that decision, the obligation to state reasons can be fulfilled by such a document (see, to that effect, Case T-65/96 *Kish Glass* v *Commission* [2000] ECR II-1885, paragraph 51). In the present case, the letter of 3 April 2001, attached to the contested decision, answers the applicant's concerns regarding the audit report and also states the reasons put forward by the Commission in support of its demand for repayment. It is worth quoting the concluding part of that letter, according to which 'the statements by the contractor's lawyer are not supported by any fresh evidence. There is no reason to set again the amount which must be repaid according to the audit report'. The applicant was informed in that letter of the reasons why the Commission did not consider it appropriate to dismiss the conclusions of the audit report. Accordingly, that letter gives further reasons, in addition to those in the audit report.

58 Accordingly, given that the Commission refers, in the contested decision, to the audit carried out at the offices of the applicant's lawyer, and to the letter of 3 April 2001 attached to that decision, it must be held that, in the light of the case-law cited, sufficient reasons were given for the contested decision.

59 In those circumstances, the second plea must be rejected.

The third plea — a manifest error of assessment

60 The third plea is divided into two parts. The first part concerns the erroneous assessment of the facts made by the Commission and the second the erroneous method of calculation it used.

First part: erroneous assessment of the facts

— Arguments of the parties

61 The applicant disputes that certain payments were ineligible, arguing that the Commission's assessment of that expenditure is erroneous.

62 First, the audit report is incorrect in stating that the applicant granted an amount of DEM 20 000 to Kreis Neuss. That transaction was nothing to do with the subsidy granted by the Commission. Moreover, the repayment to Kreis Neuss was made 'on the basis of a misassessment of the overall transaction by the management committee of the applicant' from which the Commission cannot draw any inference in law.

63 The applicant also submits that the assessment by the Commission in the audit report is erroneous as regards the payment of a sum of DEM 15 000 to the town of Neuss from the applicant's accounts for ISO 94. That receipt of DEM 15 000 appearing in the applicant's accounts was a subsidy from a third party intended for sporting activities for young people in Neuss and the applicant credited the ISO 94 account with that sum in error. In fact it was general assistance granted to the applicant without any particular reason being given and without any connection with ISO 94. The applicant did not use that money for ISO 94, but first of all as an accounting aid and subsequently for the benefit of the town of Neuss for another football tournament for young people. However, if that transaction were to be considered as a subsidy in the final accounts for ISO 94, it would be an own resource of the applicant and not a receipt requiring entry in the accounts under ISO 94. In that connection the applicant cites a letter from the town of Neuss, dated 4 May 2000, in support of its argument.

64 Next, the applicant submits that ISO 94 is not an event with a legal personality distinct from that of the applicant. Consequently, the entry in the accounts of the applicant's own resources for the arrangement of ISO 94 should not be considered as a receipt in the legal sense of the term. Thus, the transfer of DEM 10 000 made by the applicant to the ISO 94 account was a mere cash advance, which was to be repaid to it, and not a subsidy by a third party. If it were none the less to be considered a payment intended for ISO 94, it would thereby constitute the use of an own resource by the applicant. It points out in that connection that the decision to grant the subsidy does not oblige the applicant to use its own resources.

65 Moreover, the applicant disputes the assessment made by the Commission in the audit report of transactions relating to ISO 93, that is to say, receipts of DEM 24 364.96 and expenditure of DEM 25 593.56, in the light of which the Commission refused to take those transactions into account in setting the amount of the subsidy for ISO 94. According to the applicant, they are, rather, a constituent part of the preparations for ISO 94 and reflect the intention, in connection with ISO 94, to gain knowledge of the event, its organisation and its requirements.

66 The applicant also submits that the audit report is incorrect in contesting the entry in the accounts of an amount paid to Mr Donalek of DEM 1 584.57. It claims that Kreis Neuss has already checked that item.

67 Moreover, the applicant disputes the Commission's finding that an expense of DEM 10 000 is ineligible. The applicant points out that it received a subsidy in kind worth DEM 10 000 from the Hülser and Brüster advertising agency. German tax law allows such gifts, as long as it can be proved that the benefit in kind was actually provided and that a certificate of gift was issued in respect of it, as it allegedly was by the Sports office of the town of Neuss in the present case. Hülser and Brüster provided benefits in kind *inter alia* in the form of printed matter. That benefit in kind also featured in the Kreis Neuss audit report. The

applicant regrets that no invoice was subsequently drawn up because of the bankruptcy of Hülser and Brüster. At the hearing, the applicant made clear that that invoice for DEM 10 000, the full amount of which was paid, should be distinguished from another invoice for DEM 6 799, which covered a payment of DEM 1 799 and a gift to the value of the remaining DEM 5 000.

68 Moreover, the applicant submits that the Commission failed to take account of the fact that the town of Neuss also provided significant benefits in kind for the purposes of the organisation of ISO 94, which was held mainly in municipal facilities. According to the letter from the town of Neuss of 11 May 2000, those benefits in kind were worth DEM 92 450. The applicant submits that those benefits in kind could be considered as expenditure and entered in the accounts in respect of gifts in kind.

69 Next the applicant disputes the ineligibility of several expenses which, the Commission alleged, were incurred without documentary evidence or other explanation, and often without their basis being known. It submits that the Commission is incorrect in alleging that it did not put forward any documentary evidence of those expenses in the letter of 23 May 2000 and therefore considering those expenses ineligible.

70 First, according to the applicant, the Commission should have allowed the expense consisting of the lump sum of DEM 4 000 paid to Mr Franssen. That sum covered Mr Franssen's out-of-pocket expenses in connection with the preparation, organisation and running of ISO 94, *inter alia*, travel expenses, telephone, correspondence and services provided after ISO 94. Although detailed documentary evidence relating to those expenses was not available, their reimbursement appeared appropriate, according to the applicant, in the light of the long period of preparation, and the scale and duration of ISO 94. According to the applicant, it was entitled to reimburse a lump sum which was less than the total expenses incurred.

71 Next, the applicant takes issue with the fact that the Commission did not accept the payment of an amount of DEM 1 300 to a group of dancers directed by Mrs Beyen. That payment was made on 2 August 1994 from the applicant's account, as the ISO 94 account was mistakenly not used for that transaction. The fact that the payment was made is, however, not disputed, since the group of dancers appeared in accordance with the terms of their contract at the closing ceremony of ISO 94. As the applicant is the organiser of ISO 94 a payment made from its own account for ISO 94 must thus be considered a deductible expense.

72 The applicant also submits that the Commission was wrong to exclude an expense of DEM 1 093.81 for a payment made to the Gesellschaft zur Wahrung von Urheberrechten (copyright protection company, 'GEMA'). It explains that that payment, relating to music played at the closing ceremony of ISO 94, falling within the remit of GEMA, was made from its current account and then reimbursed by payment from the ISO 94 account to its account. Moreover, the applicant claims that the two Commission investigators instructed to audit its accounts, did not have sufficient knowledge of either the German legal system or the German language to understand German copyright law and the role of the GEMA.

73 Further, the applicant takes issue with the fact that the Commission did not agree to take account of the payments for reimbursement of costs amounting to DEM 5 117.82 and DEM 4 430 made to Mr Grahl. Those payments were made from the ISO 94 account and the transfer documents were shown to the defendant. According to the applicant, those transfers are based on expenses invoiced by Mr Grahl for ISO 94 which he paid upfront.

74 The Commission contends, as regards the assistance of DEM 15 000 given to the town of Neuss, that, even if it was general assistance granted to the applicant by a third party, that sum was correctly imputed to ISO 94 and could not be

transferred after the event to a third party (in this case, the town of Neuss) to prevent a surplus. According to the Commission, this is therefore a transaction intended to conceal a surplus. The crucial point, in that respect, is that the contested sum had first been used for ISO 94. Moreover, the letter from the town of Neuss of 4 May 2000, confirming the existence of a cash payment made to its account nearly three years after ISO 94 took place and clearly anonymous, tends to indicate that there was subterfuge, particularly as no receipt was drawn up on that occasion.

75 As to the expenses relating to ISO 93, the Commission takes issue with the argument that they constituted preparation for ISO 94 on the ground that Mr Franssen had received a special allowance for his travel and other activities in preparation for ISO 94. It took the view, in that regard, that the arguments put forward by the applicant did not demonstrate any link whatsoever between those expenses and ISO 94.

76 As regards the payment to Mr Donalek, the Commission contends that it is not documented and its use remains obscure.

77 As regards the subsidy from Hülser and Brüster, the Commission contends that, if it was a gift from that company, whether in cash or in kind, the applicant was not entitled to declare a payment of the same amount to that company by way of expenses. As the certificates at issue demonstrate, it was in fact a gift of DEM 10 000, of which no subsequent reimbursement was envisaged.

78 As regards the benefit in kind from the town of Neuss, the Commission contends that, as such benefits were not invoiced, they cannot be entered in the accounts as expenses.

79 As regards the payment of a lump sum of DEM 4 000 to Mr Franssen, the Commission explains that it could not be allowed as eligible expenditure given that it has not been possible to prove how the funds were used.

80 As regards the payments made to the group of dancers and the GEMA, the Commission contends that they cannot be linked to ISO 94 and that it was thus not possible to take them into account. It was for the applicant to ensure that they could be clearly linked to ISO 94. As for the alleged lack of knowledge of the German language and the German legal system of the officials responsible for the audit, the Commission points out that the applicant has not been able to prove the extent to which the alleged difficulties of expression and understanding of those officials led to errors, misunderstandings or inaccuracies.

81 As regards the payments to Mr Grahl, the Commission submits that the applicant did not produce the bank documents to which it refers or provide any sort of explanation demonstrating the nature of those expenses. The Commission contends that it was for the applicant to adduce evidence that the expenses in question were linked to ISO 94 and explain their nature.

— Findings of the Court

82 It is clear from the case-law laid down by the judgments in *Interhotel* v *Commission*, cited above, paragraph 46, and *CEMR* v *Commission*, cited above, paragraph 68, that grant of financial assistance is subject not only to compliance with the conditions laid down by the Commission in the decision granting assistance but also to compliance with the terms of the application for assistance in respect of which that decision was given. The same is true, in the present case, of the declaration by the recipient of the subsidy, as that declaration is an integral part of the body of rules governing the grant of Community financial assistance.

83 It must be pointed out that the applicant was bound, under paragraph 1 of the declaration by the recipient of the subsidy, to use the Community aid only to organise ISO 94 and that it accepted, in paragraph 3 of that declaration, that the use of the Community financial assistance could be subject to an audit by the Commission and the Court of Auditors. According to paragraph 4 of the declaration, the applicant also had to forward to the Commission a report on the use of the financial aid and a certified list of the costs or financial statement with certified documentation, showing the amount and nature of the expenditure and the corresponding income. Finally, according to paragraph 7 of that declaration, in the event that the use of the whole subsidy is not documented in the list of costs it undertook to repay to the Commission on request sums already paid out use of which is not documented. Accordingly, it was for the applicant to prove the eligibility of all the expenses it incurred.

84 It is also clear from *Interhotel* v *Commission*, paragraph 47, that it is incumbent on the beneficiary of financial assistance to prove that the expenses were actually incurred and were linked with the measures approved. It is in the best position to do so and must establish that the receipt of resources from public funds is justified.

85 It should be pointed out that, where Community financial assistance has not been used in conformity with the conditions laid down in the approving decision, the Commission may suspend, reduce or withdraw that assistance, which may render it necessary for the Commission to undertake an evaluation of complex facts and accounts. When undertaking such an evaluation, the Commission must therefore enjoy a considerable measure of latitude. Consequently, the Court of First Instance must confine itself to examining whether the Commission committed a manifest error in assessing the information in question (*Associacão Comercial de Aveiro* v *Commission*, paragraph 50).

86 Accordingly, if the applicant is not able to provide either supporting documents or any other evidence to establish that the information and findings relied on by

the Commission were incorrect, the Commission cannot be accused of making a manifest error of appreciation (see, to that effect, *Interhotel* v *Commission*, paragraph 47).

87 Accordingly, the contested payments must be examined one by one.

88 In that connection, it must be observed that, according to settled case-law, the legality of a Community measure must be assessed on the basis of the facts and the law as they stood at the time when the measure was adopted (see Joined Cases 15/76 and 16/76 *France* v *Commission* [1979] ECR 321, paragraph 7, Case C-449/98 P *IECC* v *Commission* [2001] ECR I-3875, paragraph 87, and Joined cases T-177/94 and T-377/94 *Altmann and Others* v *Commission* [1996] ECR II-2041, paragraph 119). If the Court were to examine contested measures in the light of evidence which was not available at the time the measure was taken, it would be assuming the role of the institution which enacted the measure at issue. It is not for the Court of First Instance to assume the role assigned to the institutions (see Case T-19/90 *Von Hoessle* v *Court of Auditors* [1991] ECR II-615, paragraph 30). Accordingly, only matters of which the Commission could be aware during the administrative procedure are to be taken into consideration.

89 First, as regards the subsidy of DEM 20 000 allocated by Kreis Neuss, it must be observed that, in the audit report, the Commission noted that it had been paid back in full by the applicant. The Commission therefore corrected the applicant's accounts symmetrically, reducing expenses and receipts by DEM 20 000 each. The 'final account for ISO 94' shows clearly that the reimbursement was actually made, three payments of DEM 13 260.58, DEM 3 500 and DEM 3 239.42 respectively having been made by the applicant to Kreis Neuss. It is also clear from the Kreis Neuss repayment decision that that repayment was demanded from the applicant in connection with ISO 94.

90 It must, accordingly, be considered that, as the Community subsidy is based on actual expenditure, the Commission was entitled to reduce expenses and receipts by DEM 20 000, given that the Kreis Neuss subsidy was entirely reimbursed. Therefore, the applicant could not increase either its expenses or its receipts.

91 As regards, next, the payment of a sum of DEM 15 000 to the town of Neuss, it must be observed that that sum was entered in the 'final account for ISO 94' as an expense. It is clear from the audit report that the payment of DEM 15 000 to the town of Neuss was made in March 1997, in other words nearly three years after ISO 94, that it was made in cash and coincided with the closure of the applicant's bank account opened for that event. In his letter of 23 May 2000, the applicant's lawyer had, moreover, stated that the payment in question had nothing to do with ISO 94.

92 However, the applicant has by no means proved that the gift of DEM 15 000, an amount which was actually credited to the ISO 94 account, had no connection with that event.

93 Against that background, the Commission was entitled to take the view that the payment of DEM 15 000 to the town of Neuss was not an expense supported by evidence falling within ISO 94, and, accordingly, to neutralise the applicant's accounts by reducing both income and expenditure symmetrically by the amount at issue and then entering the amount of DEM 15 000 again under income.

94 It must be observed that the applicant puts forward no argument against the contested decision as regards the transfer of DEM 10 000 made by the applicant to the ISO 94 account. What is more, it is clear from the audit report that the Commission did not correct the final account in that respect. Therefore, it must be held that that argument of the applicant is unfounded.

95 As regards the transactions relating to ISO 93, it must be observed that, as the parties confirmed at the hearing, the application for assistance related to ISO 94. Therefore, the assistance was granted solely for that event. Accordingly, it must be considered that the transactions relating to ISO 93 do not fall within the purpose of the decision to grant the subsidy nor that of the application for a subsidy. In fact that application was made long after ISO 93 and the applicant has by no means proved that the application made regarding ISO 94 could have included certain expenditure relating to the holding of the previous year's event. Therefore, the Commission was entitled to exclude those transactions from the final account for ISO 94.

96 As regards the payment to Mr Donalek of DEM 1 584.57, the Commission notes in the audit report, without being contradicted on that point, that that payment, made in January 1995, also related to the reimbursement of expenses relating to ISO 93. Accordingly, and for the reasons set out in paragraph 95 above, the Commission was entitled to exclude that transaction from the final account for ISO 94.

97 As regards the expense of DEM 10 000 paid to the Hülser and Brüster advertising agency, the Commission recorded in its audit report that that 'payment was made on the basis of a document headed "confirmation of order", without an invoice in the proper form. That expense appeared in the account drawn up in October 1994 but it was entirely offset by the two receipts of DEM 5 000 each received from that same company. The [Kreis Neuss] audit report confirms that those two amounts were received and the town of Neuss issued certificates confirming them.... The table of August 1999 only includes the expense of DEM 10 000, the corresponding receipts are not mentioned.... Mr Hüsch states that the certificates [regarding gifts] were drawn up on the basis of additional costs borne by that company and that there was thus no cash contribution. However, he does not put forward any documentary evidence in support of that statement. Given that the expense is not based on an invoice in the proper form and that there are clear indications that the amount was repaid (in the form of donations) [to the applicant] the expense of DEM 10 000 must be considered ineligible'.

98 In that connection, the applicant acknowledges that there were two certificates of gift, each for DEM 5 000, but none the less maintains that the contested expense of DEM 10 000 must be considered eligible for subsidy. As the Commission pointed out at the hearing, it entered the receipts of DEM 10 000, for which there were certificates of gift, in the accounts and offset them with expenditure of DEM 10 000.

99 It must be held that, if an undertaking makes a gift, whether in cash or in kind, there is not supposed to be any reimbursement. Accordingly, a party who receives such a gift cannot enter it in the accounts as expenditure.

100 In the present case, it cannot be disputed that, first, a payment of DEM 10 000 was made to Hülser and Brüster and, second, as the applicant itself admits, that it received a benefit in kind worth at least DEM 10 000 from that agency. Against that background, it must be held that the Commission was entitled to cite that DEM 10 000 gift to challenge the reality of that expenditure of DEM 10 000 and, therefore, to consider that expenditure ineligible. As regards the invoice of DEM 6 799, mentioned by the applicant for the first time at the hearing, suffice it to observe that, as that invoice was not considered beforehand by the Commission or cited previously by the applicant, it cannot rely on it to any purpose.

101 As regards the benefits in kind from the town of Neuss, it must be observed that the applicant itself describes them as 'gifts in kind'. In fact they consisted in the provision of municipal facilities free of charge. Suffice it to observe, therefore, that, in any event, such benefits in kind cannot be considered as an expense in accounting terms.

102 Next, as regards the ineligibility of several expenses which, the Commission alleged, were incurred without documentary evidence or explanation, and often

without their basis being known, it must be held that proof of payment is not sufficient to confirm the legality and eligibility of an expense. A payment must be made on the basis of an invoice or other documentary evidence showing the reason for the payment and the amount due, and that documentary evidence must be produced to the Commission. Consequently, all those expenses must be examined.

103 As regards the payment of a lump sum of DEM 4 000 to Mr Franssen, the applicant claims that an invoice for DEM 6 750 was submitted, covering all the expenses and all the payments which Mr Franssen incurred in various places, for small amounts. However, the management committee decided to pay him only a lump sum of DEM 4 000 to reimburse those expenses.

104 It must be accepted that, at the time of a given event its organisers may incur various expenses. However the recipient of assistance must be able to provide an explanation of the relation such expenses bear to the subsidised event. In the present case, the applicant has given no explanation other than that set out in paragraph 103 above regarding the various expenses making up the total of DEM 4 000. Accordingly, the Commission could not, in the light of its obligation of sound management of Community resources, agree to take account of a lump sum without any information relating to the expenses in question or documentary evidence. Therefore, the Commission was entitled to refuse to take account of the lump sum of DEM 4 000.

105 Next, as regards the payment of a sum of DEM 1 300 to a group of dancers, directed by Mrs Beyen, it must be observed that, at the hearing, the applicant relied on a letter from Mrs Beyen which the Commission stated it had never seen before, which the applicant did not dispute. It must, therefore, be held that that letter was produced out of time and that the applicant cannot rely on it. As observed above in paragraph 88 the Court of First Instance cannot take account

of documents which are not available to the Commission at the time of adoption of the contested decision. Accordingly, it must be considered that the Commission did not have sufficient information to establish any link between the amount in question and ISO 94 at the time the contested decision was adopted. Therefore, it was entitled to reject the expenditure of DEM 1 300 in the absence of sufficient documentary evidence.

106 As regards the payment of DEM 1 093.81 allegedly to GEMA, suffice it to observe that the applicant provided no invoice to the Commission, as it itself acknowledged at the hearing. Producing a statement of account cannot be considered sufficient, given that that document makes no mention of the event to which the payment relates. Nor can the Commission's investigators be criticised for their alleged lack of knowledge of the German legal system or the German language, given that the applicant did not produce sufficient documentary evidence to establish the connection between the expenditure in question and ISO 94. Therefore, the Commission was entitled to refuse to take account of the payment made to GEMA.

107 As regards, finally, the reimbursement of expenses of DEM 5 117.82 and DEM 4 430 respectively, paid to Mr Grahl, it must be held that the applicant has not furnished documentary evidence of their connection with ISO 94. Accordingly, the Commission was entitled to reject those expenses.

108 In the circumstances, the Commission was entitled to refuse to allow the eligibility of the contested expenditure.

109 Consequently, and without it being necessary for the Court to hear witnesses, the first part of the third plea must be rejected.

Second part: erroneous method of calculation

— Arguments of the parties

110 The applicant takes issue with the method of calculation used by the Commission. It argues that the Commission was entitled to 18.4% of the surplus and not the whole of the surplus.

111 The Commission contends that, under the conditions for granting the aid, no financial surplus may be created and, therefore, the repayment of the whole of the surplus created was demanded.

— Findings of the Court

112 It must be recalled that the Commission granted the applicant a subsidy of ECU 20 000, equivalent to DEM 37 593.52, exclusive of bank charges. In that regard, under the rules governing the grant of the subsidy set out at paragraphs 6 to 12 above, that subsidy, first, can be used solely for the project described in the application for the subsidy, second, is limited to 18.4% of actual expenditure and, third, may not in any circumstances result in a profit.

113 Having learnt, through the Kreis Neuss audit report, that the account drawn up in October 1994, which was a provisional account as 37% of the expenditure was projected expenditure which had not yet been incurred, was not a true reflection of the position, the Commission made checks on the basis of the final account for ISO 94 drawn up in August 1999 and described in paragraph 19 above.

114 In its audit report, the Commission contended that several items of expenditure were ineligible for subsidy and that certain payments could not be taken into account in the final calculation of expenditure and income.

115 The Commission obtained a corrected total of eligible expenditure of DEM 149 291 and a corrected total income of DEM 181 202, including the Community subsidy. Thus, the corrected account shows a positive balance of DEM 31 911 (DEM 181 202 - DEM 149 291). The Community subsidy included in the income amounts to DEM 37 593.52, as pointed out in paragraph 112 above. However, as the declaration by the recipient of the subsidy provided that the subsidy could in no circumstances result in a profit, the Commission limited that subsidy to DEM 5 682 (DEM 37 593 - DEM 31 911). Therefore, it demanded the repayment of DEM 31 911, that is to say, the whole of the surplus.

116 It is clear from the declaration by the recipient of the subsidy that that subsidy may, in fact, be less than 18.4% of actual expenditure in the event that it results in a surplus, and particularly in the event that that surplus is used for purposes other than carrying out the ISO 94 project. As is clear from the facts considered in connection with the first part of this plea, and as the Court of First Instance held in paragraph 108 above, the Commission was entitled to refuse to accept that the expenditure at issue was eligible. Consequently, the existence of a surplus, as determined by the Commission, cannot be disputed in the present case. Accordingly, the third condition mentioned in paragraph 8 above is not fulfilled. Moreover, as is clear from the above facts, the surplus in question was used for other purposes. Therefore, the first condition mentioned in paragraph 6 above is not fulfilled either.

117 It must then be noted that the Community subsidy is of a subsidiary nature, as the Commission pointed out at the hearing. Accordingly, the Commission only participates in the financing of events where the other financial resources are not sufficient to finance something fully.

118 Moreover, as the Commission stated at the hearing, in the case of multiple subsidies, repayment must be pro rata, that is to say each body which granted a subsidy can only require repayment up to the amount that has been paid. In the present case, Kreis Neuss had already recovered its subsidy in full. Therefore, having first taken account of that fact in its calculations, the Commission was entitled to demand the surplus in full.

119 In the circumstances, the second part of the third plea must be rejected.

The fourth plea, based on limitation of action

Arguments of the parties

120 The applicant relies on limitation of the Commission's rights of action. It observes that, even if a right to repayment arose during 1994, when ISO 94 took place, the contested decision is dated 9 April 2001, in other words more than six years after the alleged claim arose. The applicant, which accepts that Community law does not expressly provide for a limitation period for repayment of subsidies, none the less submits that the Court of First Instance has upheld the application of provisions laying down shorter limitation periods than those which might apply in the present case. The applicant cites paragraph 48 et seq. of the Verwaltungsverfahrensgesetz (German law on administrative procedure), according to which the administration's power to annul a positive measure is time-barred one year after the administration's becoming aware of circumstances justifying repayment. According to the applicant, the Commission became aware of such circumstances for the first time on receipt of the letter from the applicant's sports coordinator, Mr Grahl, of 12 December 1996. Moreover, the

audit report of the Kreis Neuss audit office, on which the Commission bases its claim, is dated 25 July 1997 and was received by the Commission that year. At the hearing the applicant also relied on the clause of the declaration by the recipient of the subsidy according to which it was only obliged to keep documents relating to ISO 94 for five years.

121 The Commission disputes the alleged limitation period, as the Verwaltungsverfahrensgesetz is not applicable to the legal measures it enacts. In any event, it contends that it was necessary to make the calculations to determine the amount to be repaid if necessary and, by not producing the documents required despite the request made by the Commission, the applicant prevented it from making those calculations for a long time. Moreover, it was only at the start of 1999 that the Commission was reliably informed that there had been a surplus. The repayment decision by Kreis Neuss was not, furthermore, made until 19 March 1998 and was not forwarded to the Commission but brought to its attention by a third party. Finally, it contends that actions based on the doctrine of unjust enrichment have a limitation period of 30 years in German law.

Findings of the Court

122 First, as regards the application of German law, suffice it to note that the applicant is not entitled to rely, *vis-à-vis* a Community administrative procedure, on German legislation on limitation periods, as such legislation is not applicable in the context of financial assistance granted by the Commission from Community resources, management of which is subject to Community law. Moreover, as the applicant itself accepts, Community law contains no express provisions on limitation periods in respect of the repayment of subsidies.

123 It must be recalled that, in order to fulfil their function of ensuring legal certainty limitation periods must be fixed in advance by the Community legislature (see, for example, Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraphs 19 and 20; Case 48/69 *ICI* v *Commission* [1972] ECR 619, paragraphs 47 and 48, and Case T-26/89 *De Compte* v *Parliament* [1991] ECR II-781, paragraph 68, and Joined Cases T-126/96 and T-127/96 *BFM and EFIM* v *Commission* [1998] ECR II-3437, paragraph 67). The fixing of their duration and the detailed rules for their applications come within the powers of the Community legislature (*ACF Chemiefarma* v *Commission*, cited above, paragraph 20). Moreover, as regards limitation periods, legislative provisions unconnected with the case in point cannot be applied by analogy (*BFM and EFIM* v *Commission*, cited above, paragraph 68).

124 In that connection, it must be observed that there are no legislative provisions laying down a limitation period which would be applicable in this case. In particular, although paragraph 5 of the declaration by the recipient of the subsidy, cited by the applicant, provides for an undertaking by the recipient of the subsidy to retain all original documents for five years with a view to a possible audit, it does not lay down any limitation period for Commission actions to suspend, reduce or cancel the subsidy.

125 Second, if the applicant's plea is to be understood as relying on failure to comply with a reasonable time-limit, it must be observed that the question whether the duration of an administrative proceeding is reasonable must be determined in relation to the particular circumstances of each case and, in particular, its context, the various procedural stages followed, the complexity of the case and its importance for the various parties involved (Joined Cases T-213/95 and T-18/96 *SCK and FNK* v *Commission* [1997] ECR II-1739, paragraph 57).

126 The period to be taken into account in assessing whether this plea is well founded must therefore be determined. The period begins to run when the Commission became aware of the irregularities in connection with the ISO 94 account.

127 The applicant submits that that was the moment when the Commission received the letter dated 12 December 1996 from the applicant's sports coordinator, Mr Grahl. It is indeed clear from that letter that Mr Grahl alerted the Commission to certain anomalies, for example, the fact that the applicant had not settled certain payments, although those payments were presented to the Commission as expenditure. Moreover, Mr Grahl pointed out that there was a surplus of DEM 40 000.

128 However, given the imprecise nature of that letter, it must be considered that it did not allow the Commission, at that stage, to be aware in detail of the irregularities it criticised. Therefore, the applicant cannot criticise the Commission for not acting on the basis of that letter.

129 Therefore, what is important is to know when the Commission had sight of the Kreis Neuss audit report, drawn up on 26 November 1997, pointing out the existence of an accounting surplus and referring to the audit report of the audit office of 25 July 1997, or the repayment decision of Kreis Neuss of 19 March 1998. In its reply to a written question by the Court of First Instance, the Commission confirmed that it was informed of the Kreis Neuss repayment decision by letter from Kreis Neuss of 11 August 1998, received on 21 August 1998, and that it received the Kreis Neuss audit report with covering letter dated 17 February 1999 on 25 February 1999. At the hearing the applicant confirmed that it did not dispute those dates.

130 Accordingly, it must be held that the period to be taken into account began to run on 21 August 1998, the date on which the Commission was informed of the Kreis Neuss repayment decision, on the basis of which it was able to ascertain, for the first time in a serious manner, that there were irregularities relating to the ISO 94 account.

131 It is clear from the order of the Court of First Instance of 20 October 1999 mentioned in paragraph 20 above that the Commission first, on 9 February 1999, asked the applicant to produce all the documents concerning expenditure and income in connection with ISO 94 and, subsequently, by decision of 6 April 1999, ordered the repayment in full of the subsidy paid on the ground that its request had not been complied with and that, in any event, it had information according to which the applicant had derived a profit from the event which was incompatible with the rules on financial assistance. Accordingly, it is demonstrated that, until 6 April 1999, if not later, the Commission did not have evidence of the use of the funds in question.

132 The Commission withdrew the first repayment decision of 6 April 1999 on 6 August 1999. It was not until 11 August 1999 that Mr Hüsch, the applicant's lawyer, sent the Commission the 'final account for ISO 94' drawn up in August 1999. The Commission's representatives carried out an audit at the office of the applicant's lawyer on 13 April 2000. On 23 May 2000, Mr Hüsch sent the Commission certain information to clarify various transactions. On 15 June 2000, the Commission drew up the audit report and, on 9 April 2001, it issued a new debit notice, that is to say, the contested decision.

133 In the light of all those circumstances it is clear that the Commission did not remain inactive after becoming aware of the irregularities on 21 August 1998. The first repayment decision was adopted seven and a half months after that date. Subsequently, that decision was withdrawn and the contested decision was adopted on 9 April 2001, that is to say, 20 months after the first decision was withdrawn. It must therefore be held that those periods did not exceed a reasonable length.

134 Accordingly, in the circumstances, the fourth plea should be rejected.

The fifth plea — breach of the principle of sound administration and the duty of care

Arguments of the parties

135 In its reply, the applicant submits that the Commission breached the principle of due process. According to that principle, the Commission is obliged, in Community administrative law, to undertake a specific examination of the case in hand and may not confine itself to abstract considerations or assessments (Case 27/76 *United Brands* v *Commission* [1978] ECR 207, 306). The Commission did not assess the evidence put before it or take up the offers of evidence made to it. In particular, witnesses should have been heard regarding the various accounting transactions. As there was no use of evidence, the principle of due process was breached.

136 The Commission contends that the applicant is ignoring the obligation under paragraph 7 of the declaration by the recipient of the subsidy, according to which the applicant is bound to certify the proper use of the subsidy and, failing that, is required to reimburse it. According to the Commission, it explained fully in the audit report why it considered that such a certificate was not submitted or considered the documentary evidence presented by the applicant irrelevant. Moreover, the applicant had, even at that stage, still not taken a specific position on the objections raised by the Commission.

Findings of the Court

137 Given that the applicant did not raise this plea until the stage of the reply, it must be held that it is a new plea in law within the meaning of Article 48(2) of the Rules of Procedure of the Court of First Instance which may not be introduced in the course of proceedings. This plea must, therefore, be declared inadmissible.

138 In the light of all the foregoing observations, the application must be dismissed.

Costs

139 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must, in accordance with the form of order sought by the defendant, be ordered to pay all the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber),

hereby:

1. **Dismisses the application.**

2. **Orders the applicant to pay the costs.**

Tiili Mengozzi Vilaras

Delivered in open court in Luxembourg on 17 September 2003.

H. Jung
Registrar

V. Tiili
President