JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
16 March 2005 *

In Case T-283/02,

EnBW Kernkraft GmbH, fomerly Gemeinschaftskernkraftwerk Neckar GmbH, established in Neckarwestheim (Germany), represented by S. Zickgraf, lawyer,

applicant,

v

Commission of the European Communities, represented by S. Fries and F. Hoffmeister, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for compensation under Article 288 EC in respect of damage allegedly suffered by the applicant following failure by the Commission to pay for services provided by it under the TACIS programme in relation to the Zaporozhe nuclear power station (Ukraine),

* Language of the case: German.

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

composed of H. Legal, President of the Chamber, V. Tiili and V. Vadapalas, Judges,

Registrar: D. Christensen, Administrator,

having regard to the written procedure and further to the hearing on 22 September 2004,

gives the following

Judgment

Legal and factual background

1 The programme for technical assistance to the Commonwealth of Independent States (TACIS), based, for the period 1 January 1996 to 31 December 1999, on Council Regulation (Euratom, EC) No 1279/96 of 25 June 1996 concerning the provision of assistance to economic reform and recovery in the New Independent States and Mongolia (OJ 1996 L 165, p. 1) provides, in particular, for assistance in relation to nuclear safety.

2 The General Conditions for Service Contracts financed from PHARE/TACIS Funds, in the version applicable at the material time, lay down rules applicable to TACIS contracts (hereinafter 'the TACIS General Conditions').

3 EnBW Kernkraft GmbH, formerly Gemeinschaftskernkraftwerk Neckar GmbH (hereinafter 'the applicant' or 'GKN'), maintained, as from 1994, contractual relations with the Commission, under the TACIS programme in relation to on-site assistance for the Zaporozhe nuclear power station in Ukraine.

4 The first service contract was concluded in September 1994 for a period of 12 months, with a budget of EUR 552 656. The contract provided for the execution of various projects designed to ensure the safety of the installations. The project manager was Mr Hoensch, an engineer employed by the applicant, who was in essence responsible for management of the various projects and coordination of the contractual staff engaged in their execution.

5 The second service contract was concluded in September 1995 for a period of 15 months, with a budget of EUR 1 299 090. That contract was extended by seven months by a first addendum, with a supplementary budget of EUR 990 910, then by eight months by a second addendum. The second contract thus expired in March 1998.

6 On 10 April 1997, the Court of Auditors adopted Special Report No 6/97 concerning TACIS subsidies allocated to the Ukraine together with the Commission's replies (OJ 1997 C 171, p. 1). That report criticised, in particular, the concluding of contracts having retroactive effect.

7 The third service contract (hereinafter 'the third contract'), concerning on-site assistance for 1996, was concluded on 17 July 1997 for an initial period of 19 months, thus expiring on 17 February 1999, with a budget of EUR 800 000. Under Article 10 thereof, any dispute connected with or arising from that contract was to be brought before the courts of Brussels.

8 By letter of 30 December 1997 to Mr Lütkemeyer of the Commission Directorate-General (DG) External Relations: Europe and the New Independent States, Common and Foreign Security Policy and External Service, the representatives of the Commission delegation in Kiev (Ukraine) wrote:

'The project manager ... Mr Hoensch, gave a commitment without prior consent from the Commission and misled the Ukrainian party. We should be most obliged if you could give strict instructions to Mr Hoensch on this question.'

9 On 15 April 1998, Mr Jousten, head of the Nuclear Safety and Coordination of TACIS Energy Measures unit in the Directorate for Relations with the New Independent States and Mongolia in the same directorate-general, sent the applicant a letter inviting it to prepare a proposal for an on-site assistance contract for 1997 (hereinafter 'the fourth contract').

10 On 20 May 1998, the applicant sent Mr Jousten its proposal for a fourth contract. On 16 July 1998, the applicant sent Mr Jousten an expanded proposal for the contract in question. On 29 July 1998, the applicant gave its bank details to the Commission. On 26 August 1998, the applicant sent an amended version of its proposal to Mr Jousten, indicating that the amendments concerned Annex 6. On 23 September 1998, the applicant sent it a new proposal, referring to a meeting held on 10 September 1998.

11 In August 1998, the parties adopted the first addendum to the third contract (hereinafter 'the first addendum'), which amended Article 2 and Article 4 of the third contract and Annexes A, B, C and D thereto, extending the initial contract by 17 months so that it would thus expire on 17 July 2000.

12 By letter of 2 October 1998, addressed to Mr Jousten, Mr Giuglaris, the interim head of the Kiev delegation, stated that he 'wished to refer to his earlier proposal envisaging the possibility of replacing Mr Hoensch as project manager'.

13 On 9 October 1998, the applicant sent Mr Jousten a letter concerning the state of negotiations, concluding that it 'remain[ed] in hopeful expectation that [the] service contract [would] come into force very soon'.

14 Mr Jousten replied to the applicant by letter of 20 October 1998, summarising the main problems linked with the applicant's proposal. He also proposed to the applicant that a contract should be concluded that excluded the works concerning which no agreement had yet been arrived at. His letter stated:

'If, following reception of these [technical terms of reference] GKN does not wish to submit an offer for this work, in order to avoid further delays we propose to conclude a contract for the remainder of the work (implementation of the 1997 programme, etc.).'

15 Following that letter, Mr O'Rourke, deputy head of the unit in question, requested the applicant, by letter of 23 October 1998, to send him a revised version of the fourth contract.

16 On 12 November 1998, the Court of Auditors adopted Special Report No 25/98 concerning operations undertaken by the European Union in the field of nuclear safety in Central and Eastern Europe (CEEC) and in the New Independent States (NIS) (1990 to 1997 period) together with the Commission's replies (OJ 1999 C 35, p. 1). That report criticised in particular the inadequacy of human resources to ensure that implementation of the programmes was monitored correctly.

17 On 20 November 1998, the Kiev review team drew up a report concerning on-site assistance in relation to the third contract.

18 By letter of 23 November 1998 to Mr Zaiss, assistant project manager for the applicant, Mr Jousten, referring to the letters from Mr Zaiss dated 2 and 4 November 1998, commented on the accusations made in those letters against Mr O'Rourke, concluding as follows:

'Our cooperation can only continue if we can return to normal standards of business.'

19 By letter of 26 November 1998, also addressed to Mr Zaiss, Mr Doucet, head of the Nuclear Safety unit of the Directorate for Europe Projects (Central, Eastern, NIS and West Balkans) — Common and Foreign Security Policy and External Service, in the Joint Service for the Management of Community Aid to Non-Member Countries, referring to a report of 8 July 1998 concerning the state of advancement of the contract, stated that the comments contained in that report constituted personal judgments incompatible with the authority granted to Mr Hoensch as project manager. He went on to say that 'the Commission [was] expecting decisive measures to be taken from [the applicant's] side regarding the project management'.

20 On 3 December 1998, the applicant sent Mr Jousten the revised version of the fourth contract, stating that the outstanding points, with one exception, had been taken into consideration.

21 By fax of 22 December 1998, Mr Jousten stated in reply to the applicant that the terms of reference had been notified to Mr Doucet and that he would contact the applicant concerning the other matters and the annexes to its proposal.

22 On 24 February 1999, the applicant sent the Commission a progress report on the contract for the period 1 December 1998 to 31 January 1999.

23 The applicant took part in a meeting with the Commission on 16 March 1999.

24 On 14 April 1999, the applicant sent Mr Doucet a letter summarising the outstanding matters which had been discussed at the meeting of 16 March 1999.

25 On the same day, the applicant also sent Mr Doucet a new version of the fourth contract, describing it as a completely revised version of the 'terms of reference'.

26 On 7 May 1999, Mr Summa, director of the Directorate for Relations with the New Independent States and Mongolia, in the Commission DG for External Relations: Europe and the New Independent States, Common Foreign and Security Policy and External Service, sent a letter to Mr Möller, of the Bundesministerium der Finanzen

(Federal Ministry of Finance), replying to a letter from the latter dated 25 February 1999, concerning the TACIS and PHARE nuclear safety programmes.

27 On 20 May 1999, the Kiev monitoring team drew up a report concerning on-site assistance under the third contract. In particular, it stated that the budget had been exhausted and that, from the contractual point of view, the applicant was required to continue providing certain services, which was impossible from the financial point of view.

28 A meeting attended by the applicant and Commission representatives was held on 12 and 13 July 1999.

29 On 21 July 1999, following that meeting, the applicant sent to Mr Vadé, of the Commission Joint Service for the Management of Community Aid to Non-Member Countries, a 'completely revised version' of the 'terms of reference'.

30 On 22 July 1999, Mr Vadé sent the applicant a letter setting out the main points discussed at the meeting.

31 By letter of 28 July 1999 to Mr Zaiss, Mr Doucet informed the applicant that he could not accept the technical evaluation of the tenders for projects U1.03/96B, U1.03/96D2 and U2.03/96.

32 Mr Zaiss replied to the Commission on 29 July 1999 giving explanations concerning the three projects in question. He also referred to a promise allegedly made by the Commission at the meeting of 16 March 1999 that all expenses incurred by the applicant before signature of the fourth contract would be paid by the Commission.

33 By fax of 2 August 1999, Mr Doucet informed Mr Zaiss, in relation to evaluation of the three projects, that the applicant's position could not be interpreted as a refusal to proceed with the necessary re-evaluation.

34 On 6 August 1999, Mr Hoensch sent Mr Doucet a letter concerning technical evaluation of project U2.03/96.

35 On 25 August 1999, the applicant, referring to the meeting of 16 March 1999 and its letter of 14 April 1999, sent Mr Doucet a proposal for a second addendum, amending the third contract and the first addendum. That proposal envisaged an increase of EUR 457 163 over the initial budget.

36 By letter of 16 September 1999 to Mr Zaiss, Mr Doucet wrote:

'[The fax of 2 August 1999] has not yet received any satisfactory answer and in addition the Procurement Agent (GOPA [Group of Political Advisers]) reported that GKN claims being unable to perform a series of on-site acceptances, which are due under the terms of the [third] contract.

In this context, the [Commission] is not any more convinced that GKN is willing to carry out the on-site assistance with the care and diligence that the Commission is expecting for subjects related to nuclear safety.

In case you would still envisage to continue your cooperation with the Commission, please send a proposal for the execution of pending evaluations and acceptance of equipment taking due account of the content of [the] previous letters and faxes [from the Nuclear Safety unit of the Directorate for Europe Projects (Central, Eastern, NIS and Western Balkans) — Common and Foreign Security Policy and External Service in the Joint Service for the Management of Community Aid to Non-Member Countries]. Results are expected to be obtained at the latest by 15 October 1999.

The past experiences of constant negative attitude and the repetition of disagreements between GKN and the Commission makes us consider that the problems faced are mainly caused by the lack of proficiency and cooperative spirit of GKN's TACIS Task Manager. In any event, the Commission requires that a more efficient person be assigned as TACIS Task Manager.

If the Commission does not receive such a proposal within 10 days of the receipt of the present letter, we can not but consider that this contract is terminated. It would also mean that the Commission would not conclude any other such contract with GKN.

We are certain that you understand that it is of the utmost importance to clarify the current contractual situation with regards to its implications for safety and operations at [the] Zaporozhe [nuclear power station].'

37 By fax of 23 September 1999 to Mr Zaiss, Mr Vadé replied to the applicant's letter dated 25 August 1999 and refused to take the proposal for a second addendum into consideration.

38 By letter of 4 October 1999, Mr Zaiss replied to Mr Doucet's letter of 16 September 1999. According to that letter:

'... GKN has so far met its obligations under the [third] contract and would like to continue doing so in the future. GKN has not been responsible for the delays that have arisen in the projects involved.

In order to clarify how matters should now proceed, GKN has consulted with the responsible German federal ministries ...

According to the above, the Commission is now expected to:

— reimburse GKN for the costs incurred so far (see GKN's letter of 25 August 1999);

— accept the technical evaluation of the projects (see GKN's letter of 29 July 1999), and

— put ... [the] TACIS 97 [contract] into force (see GKN's letter of 17 April 1998 and the Commission's fax of 22 December 1998).

Until such time as all points have been resolved to GKN's satisfaction, we shall refrain from performing any further work under the present contract.

Furthermore, I must protest most strongly against the reproaches and accusations that you have continually brought against GKN's TACIS Management.'

39 By letter of 15 October 1999, the applicant reacted to the Commission's fax of 23 September 1999, explaining the differences of contractual periods relating, on the one hand, to on-site assistance and, on the other, to action relating to execution of specific projects. It concluded:

'We believe it is necessary to point out that our contractual proposal submitted with our letter dated 25 August 1999 covers the time from July 1998 until September 1999. That means, if the Commission needs more time for their decision concerning our contract-proposal the contractual duration and the costs for the requested service contract have to be prolongated/increased about the time which will be caused by the decision making process within the European Commission.'

40 By fax of 20 October 1999 to Mr Doucet, Mr Hoensch confirmed, referring to their telephone conservation, an appointment planned for 28 October 1999. He stated that he would give a detailed explanation of the contractual situation and of the technical evaluation of projects U2.03/96 and U1.03/96D2.

41 By fax of 22 October 1999 to Mr Hoensch, Mr Doucet informed the applicant that, given that it intended also discussing difficulties concerning technical evaluation of the tenders, he would prefer to postpone the meeting so that Mr Vadé, who was more familiar with technical matters, could attend.

42 By letter of 25 October 1999 addressed to Mr Zaiss, referring to the latter's letter of 4 October 1999, Mr Weber, Director of the Directorate for Invitations to Tender, Contracts and Legal Matters of the Commission Joint Service for the Management of Community Aid to Non-Member Countries, stated:

'Further to your negative answer to the letter of Mr Doucet of 16 September 1999 ..., the Commission herewith terminates GKN's [third] contract according to the terms of Article 41 of the [TACIS] General Conditions (Annex E of the abovementioned contract). This means that the termination will be effective six calendar weeks after receipt by GKN of this letter.

You are required to provide the Commission as soon as possible with your final invoice and to transmit the whole technical file to [the Nuclear Safety unit of the Directorate for Europe Projects (Central, Eastern, NIS and Western Balkans) — Common and Foreign Security Policy and External Service in the Joint Service for the Management of Community Aid to Non-Member Countries].

I see no point in explaining in further details that the Commission can not envisage to reimburse GKN the expenses of evaluations of projects U1.03/96B, U1.03/96D2 and U2.03/96, which were mishandled from the start and did not produce any usable results.

Following the reception of your letter dated 4 October 1999, the Commission, to preserve its interests as well as interests of the Beneficiary, has organised on its own an On-Site acceptance for equipment provided under projects U1.03/95E ..., U1.03/96A ... and U2.02/94C. Thus GKN is therefore not entitled to any reimbursement for eventual further acceptances related to these [equipment] supply contracts.

I am finally compelled to inform you, that due to GKN's unsatisfactory performance and, in particular, its refusal to correct irregularities and cooperate with the Commission as required, the Commission can not envisage to place further contract with GKN.'

43 By letter of 19 November 1999 to Mr Weber, signed by Mr Wiedemann, the applicant replied to the letter of 25 October 1999 indicating, in particular, that the third contract was to expire on 15 December 1999.

44 On 24 November 1999, a meeting was held between the applicant and the Commission.

45 By fax of 17 April 2002 to Mr Knudsen of the Directorate for Europe, Caucasus, Central Asia, in the EuropeAid Cooperation Office, the applicant replied to a letter of 4 March 2002 and asked that an amicable settlement be found.

46 By letter of 17 May 2002, Mr Knudsen replied that the applicant's letter contained no new convincing argument and that he wished to avoid further pointless correspondence.

Procedure and forms of order sought

47 By application lodged at the Registry of the Court of First Instance on 23 September 2002, the applicant brought the present action.

48 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fourth Chamber) decided to open the oral procedure.

49 By way of measures of organisation of procedure, the Court asked the parties to reply to written questions and to produce certain documents. The parties complied in part with those requests.

50 The parties presented oral argument and answered questions put to them by the Court at the public hearing on 22 September 2004.

51 The applicant claims that the Court of First Instance should:

— order the Commission to pay it the sum of EUR 332 083.60, together with interest at the rate of 5.25% as from 12 June 2000 on the sum of EUR 328 782.43, and interest at the rate of 5.25% on the sum of EUR 3 301.17 as from 21 August 2000;

— order the Commission to pay the costs.

52 The Commission contends that the Court of First Instance should:

— dismiss the application as inadmissible and manifestly unfounded;

— order the applicant to pay the costs.

Law

Arguments of the parties

The jurisdiction of the Court of First Instance

53 The Commission maintains, in essence, that the action has been brought before a court that has no jurisdiction to hear it. Under the jurisdiction clause in the third contract, disputes 'connected with or arising from this contract' are a matter for the Belgian courts of competent jurisdiction.

54 According to the Commission, the issue here is to interpret the third contract and, more specifically, to determine what is due. Accordingly, this dispute relates to the third contract.

55 The Commission states that, according to the stipulations of the third contract concerning equipment projects, the applicant was required to assume responsibility for those projects until acceptance and thus for the contractual period ending in July 2000. The Commission refers to the applicant's contractual acceptance of the fact that the budget relating thereto was limited to EUR 800 000.

56 The Commission states that, in the period for which the applicant seeks payment for work done by its project manager and some of its experts, a contract existed between the applicant and the Commission. That contract provided for a number of budgetary appropriations to cover the work of the project manager and the experts.

According to the Commission, the applicant exceeded the amount of those budgetary appropriations when its project manager and its experts completed the activities in question.

57 The Commission states that the third contract was extended because the execution of certain equipment projects had fallen behind schedule, necessitating the additional involvement of certain experts at Zaporozhe. Because of the extension of the contract, the applicant undertook to assume responsibility for those projects until July 2000. The Commission accepts that the extension also took place for reasons attributable to the budgetary rules. It would not have been possible to pay for the activities of those experts out of the planned budget if there had no longer been any contract at that time; nor would the experts have been covered from the insurance and visa points of view if they had not performed their duties under a valid contract.

58 The total budget for the third contract was not amended, only certain of its items having been re-adjusted. According to the Commission, no increase in the budget was necessary since the extension of the contract in no way changed the applicant's obligations concerning the equipment projects. The work plans needed only some minor adjustments since most of the projects did not require supplementary resources; only two specific projects were affected by the extension of time. Accordingly, given that the project manager and the experts in question were not entrusted with additional tasks, no fresh remuneration had been decided on for them. According to the Commission, they were simply to complete the activities provided for in the third contract, which included the obligation of completing the equipment projects whose duration had been extended. It had always been clearly indicated in the third contract that no separate remuneration for the applicant was envisaged for completion of the equipment projects, that being covered by the overall budget. According to the Commission, the role of the project manager in that connection was essentially limited to monitoring the acceptance of equipment projects and that almost incidental task did not justify an increase in the project manager's remuneration. The Commission states that that was why, despite the extension of the contract, the total budget for it was not increased and, moreover, the applicant had given its approval in that regard.

59 The applicant claims that the work at issue was not carried out in the context of the third contract or of the first addendum. The period at issue was not therefore covered by any contract. It was the contract budget and the work programmes which determined the scope of the work to be done, not the official duration of the third contract.

60 The applicant states that, as from August 1998 in the case of the project manager, and from April 1999 in the case of the experts, it no longer provided services under the third contract, which had been concluded, in its view, for a period ending on 16 January 1999. According to the applicant, because of the budgetary rules, the work programmes of the project manager and the experts provided for their involvement on only one occasion, until June 1998. The applicant claims that it is the programmes which determine whether activities are contractual or non-contractual, since they form an integral part of the contract and indicate the period for execution of the work required of it by the contract. As from July 1998, the work programmes of the third contract provided for no further involvement. Accordingly, the work at issue was not covered by the third contract.

61 Moreover, the activities in question were likewise not covered by the first addendum, which was signed in August 1998 on completion of the work programmes for the third contract. According to the applicant, by adopting that addendum, the parties sought to enable the various equipment projects to be pursued during the transitional period until conclusion of the fourth contract.

62 Although the third contract was extended by the first addendum until 17 July 2000, the work programme established by that addendum for the project manager clearly showed that it did not govern the activity of the project manager until that date. Thus, according to the applicant, as from August 1998 that programme no longer covered the activity of the project manager. Only two weeks' work envisaged for December 1997 was carried over to July 1998. The only action provided for as from July 1998 was that of experts, in connection with the various equipment projects.

63 According to the applicant, the nature of the experts' activity was likewise non-contractual. The applicant states that it provided in full the expert services provided for in the contract. The applicant is only claiming remuneration for activities not covered in the work programmes, which could not be paid for out of the budget for the third contract.

64 The applicant maintains that the budget limitation, in conjunction with the programme of work, lays down binding limits for both parties concerning the extent of the obligation to provide services. The duration of the contract cannot of itself justify any extension of that obligation. Even if the term of the contract was extended, that was not due to any unremunerated extension of the obligation relating to project management but simply to the adjustment required in order to integrate new experts. According to the contractual stipulations, changes concerning the workforce could be made only in writing and, accordingly, conclusion of the first addendum was the only way of bringing the new experts within the contract.

65 Given that the first addendum provided neither for any budgetary increase nor for any additional period of involvement for the project manager and that, in the case of the experts, new periods of work had been provided for only in the proportions already indicated, the applicant concludes that it was clearly not required to carry out the services at issue on the ground that the official duration of the third contract had been extended.

The claim for compensation

66 The applicant claims that its action is well founded because the Commission breached the principles of the protection of legitimate expectations and sound administration, causing it damage in the sum of EUR 332 083.60.

67 As regards, first, the maladministration on the part of the Commission alleged by the applicant, deriving from its conduct during and after the contractual negotiations, the Commission gave it to understand that it would be compensated for its services outside the scope of the contract. Accordingly, the Commission infringed the principle of the protection of legitimate expectations, within the meaning of the judgment of the Court of First Instance in Case T-203/96 *Embassy Limousines & Services* v *Parliament* [1998] ECR II-4239. In the present case, the Commission also caused the applicant to entertain valid hopes which encouraged it to work for the Commission without a contract. By pursuing its activities in the context of pending contractual negotiations, the applicant did not, from a prudent operator's point of view, assume any risk that it would have to bear itself. On the contrary, it acted in a reasonable and realistic manner from the economic point of view, since the Commission gave it to understand that it would receive another contract. Nor did the Commission undermine the applicant's belief: it in fact reinforced and sustained it on several occasions during the negotiations.

68 In contrast to the circumstances surrounding the conclusion of a public contract, the circumstances of this case engendered a legitimate expectation on the part of the applicant that it would be chosen to sign the new on-site assistance contract. In the protocol of agreement signed between the G7 countries, the Commission and Ukraine in 1995, the applicant was designated as western safety partner for the Zaporozhe nuclear power station. The applicant states that the conclusion of on-site assistance contracts was normally carried out by means of a direct agreement. It submits that there was no doubt in the minds of the parties that the on-site assistance should continue and that it was necessary to obviate any interruption of the services, in particular for safety reasons. The direct awarding of contracts was also a further reason for limiting the period of services under the contract to about one calendar year only.

69 The applicant claims that the Commission also breached the principle of sound administration by causing contractual negotiations to fail through its mismanagement of the contract. The Commission was under an obligation to apply due diligence in the decision-making process and to weigh the interests involved (Case T-73/95 *Oliveira* v *Commission* [1997] ECR II-381, and Case T-231/97 *New Europe Consulting and Brown* v *Commission* [1999] ECR II-2403). Moreover, the involvement of various administrative and political authorities within an institution

of the European Community is no justification for that institution not showing a coherent and consistent attitude towards interested parties (*Embassy Limousines & Services* v *Parliament*, paragraph 87). Consequently, an interested party does not have to put up with the fact that the Commission does not succeed in making provision, during contractual negotiations, for those negotiations to be followed up or takes an abnormally long time to reach a decision, all those problems being attributable to rotation of Commission staff dealing with the matter. However, that is precisely what happened in the applicant's case. The Commission gave rise to and sustained a legitimate expectation on the part of the applicant in different ways during the various phases of the contractual negotiations and on numerous occasions acted in a manner clearly indicative of its inadequate management of the contract and its unsatisfactory internal organisation.

70 Moreover, the applicant claims that the refusal to sign the second addendum is evidence of the negligence with which successive officials were informed of the current state of negotiations and contracts in force. Mr Vadé's statement in the fax of 23 September 1999 ('It was my understanding that Addendum 1 ... , which was concluded without any change to the global budget, included a reallocation of budgetary lines in order to be consistent with the extension of the duration of the activities') shows that he clearly had not himself read the first addendum and that his predecessors had not explained the circumstances in which it was drawn up. The budget envisaged for the project manager having been totally exhausted at the time of signature of the first addendum, and the remaining balance of the budget being sufficient only to cover the activity of the experts, according to the applicant, it was never agreed to proceed with a budgetary adjustment, and in any event that would have not been authorised. The budgets envisaged for the project manager and the experts respectively were not therefore readjusted regarding the price-list attached to the first addendum, the only change made to the various budgets being removal of the distinction between the work done in Germany and that done in Ukraine. The purpose of that measure was to facilitate accounting for such work, although the change had no impact on the various budgets laid down for the experts or the project manager.

71 Next, with regard to the damage suffered by the applicant, it claims that, by relying on the Commission's promises, it suffered a loss amounting to EUR 332 083.60 by continuing with work not covered by the contract.

72 Finally, as regards the causal link between maladministration and damage, the applicant maintains that the requisite causal link exists between the Commission's maladministration and the damage suffered, which serves as a basis for compensation. The damage derives sufficiently directly from the conduct imputed to the Commission.

73 The applicant concludes that the damage suffered by it is also directly linked with inadequacies of the Commission's administrative organisation. The incomplete transmission of information between successive officials gave rise to additional delay and accounts both for the fact that services not covered by the contract were provided and for the duration thereof, and therefore for the amount of the loss suffered by the applicant.

74 The applicant requests that Messrs Doucet, Kalbe, Jousten, Lütkemeyer and Vadé, Commission officials, and Messrs Zaiss, Hoensch, Collignon and Möller be heard as witnesses by the Court on the relevant issues, in particular the scope of the discussions between the Commission and the applicant, the management of the contractual negotiations and the exhaustion of the budget.

75 The Commission contends that the action is manifestly unfounded. The Commission cannot have incurred liability under the second paragraph of Article 288 EC since there was no maladministration.

76 First, the Commission contests the assertion that it raised justified hopes on the part of the applicant.

77 Second, the Commission contests the assertion that it infringed the principle of sound administration through poor management of the contract.

Findings of the Court

78 The dispute relates to the ending of the contractual relationship entered into by the parties in 1994 and the parties differ as to whether or not it falls within the scope of performance of the third contract and the first addendum to it. It is necessary to consider those two matters in turn.

79 By virtue of the combined provisions of Article 238 EC and of Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities (OJ 1988 L 319, p. 1), as amended, the Court of First Instance has jurisdiction to adjudicate in contractual matters brought before it by natural or legal persons only pursuant to an arbitration clause.

80 In the absence of such a clause, the Court of First Instance cannot adjudicate in proceedings arising from a contract. If it were otherwise, the Court would be extending its jurisdiction beyond the limits placed by Article 240 EC on the disputes of which it may take cognisance, since that article leaves to national courts or tribunals ordinary jurisdiction over the other disputes to which the Community is a party (Joined Cases 133/85 to 136/85 *Rau and Others* [1987] ECR 2289, paragraph 10; order of the Court of First Instance of 10 July 2002 in Case T-387/00 *Comitato organizzatore del convegno internazionale* v *Commission* [2002] ECR II-3031, paragraph 37).

81 In this case, the third contract, from which the Commission contends the dispute derived, contains no clause conferring jurisdiction on the Court of First Instance to adjudicate in matters resulting from its execution but, on the contrary, expressly submits such matters to the jurisdiction of the Brussels courts (see paragraph 7 above).

82 It must be observed that, in this case, the Court of First Instance is not in a position to determine whether or not the works at issue fall within the scope of the contract without interpreting the third contract and the first addendum to it. Consequently, if it is the case that those works fall within the contractual relationship between the applicant and the Commission, the Court of First Instance has no jurisdiction to adjudicate and the action must be dismissed for that reason.

83 In so far as the possibility cannot be excluded that the national court that has jurisdiction to interpret the third contract might reach the conclusion that the works in question were performed outside the scope thereof, it is necessary to consider whether the Commission infringed the principles of the protection of legitimate expectation and of sound administration, as claimed by the applicant.

84 It is settled case-law that Community liability within the meaning of the second paragraph of Article 288 EC depends on the fulfilment of a number of conditions, namely the unlawfulness of the alleged conduct of the Community institution concerned, the reality of the damage and the existence of a causal link between that conduct and the alleged damage (Case 26/81 *Oleifici Mediterranei* v *EEC* [1982] ECR 3057, paragraph 16; Case T-175/94 *International Procurement Services* v *Commission* [1996] ECR II-729, paragraph 44).

85 If any one of those conditions is not satisfied, the action must be dismissed in its entirety and it is unnecessary to consider the other conditions for non-contractual liability (Case C-146/91 *KYDEP* v *Council and Commission* [1994] ECR I-4199, paragraph 19; Case T-170/00 *Förde-Reederei* v *Council and Commission* [2002] ECR II-515, paragraph 37; and Case T-273/01 *Innova Privat-Akademie* v *Commission* [2003] ECR II-1093, paragraph 23).

86 The Commission's conduct must be examined in the light of those principles.

87 As regards the first of those conditions, the case-law requires proof of a sufficiently serious breach of a rule of law intended to confer rights on individuals (Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, paragraph 42). As regards the requirement that the infringement must be sufficiently serious, the decisive test for finding that a breach of Community law is sufficiently serious is whether the Community institution concerned has manifestly and gravely disregarded the limits on its discretion. Where the institution in question has only a considerably reduced or even no discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach (Case C-312/00 P *Commission* v *Camar and Tico* [2002] ECR I-11355, paragraph 54; Joined Cases T-198/95, T-171/96, T-230/97, T-174/98 and T-225/99 *Comafrica and Dole Fresh Fruit Europe* v *Commission* [2001] ECR II-1975, paragraph 134).

88 In this case, it is necessary to determine, first, whether the Commission's conduct constitutes a sufficiently serious breach of the principle of the protection of legitimate expectations.

89 It is settled case-law that the right to rely on the principle of the protection of legitimate expectations, which is one of the fundamental principles of the Community, extends to any individual in a situation where the Community authorities, by giving him precise assurances, have caused him to entertain legitimate expectations. Such assurances, in whatever form they are given, are precise, unconditional and consistent information from authorised and reliable sources. However, a person may not plead breach of the principle unless he has been given precise assurances by the administration (*Innova Privat-Akademie* v *Commission*, paragraph 26, and the case-law there cited).

90 It must be borne in mind, first of all, that contractual negotiations themselves are not binding on the parties. Next it is necessary to consider whether, during the contractual negotiations, the Commission gave the applicant specific assurances causing it to entertain legitimate expectations.

91 In that connection, the applicant relies in particular on its various discussions with the Commission and on a number of letters.

92 As regards the telephone conservation to which the applicant refers, with Mr Korsak, the Commission's equipment purchasing manager, which is alleged to have taken place after the first draft of the fourth contract was sent to the Commission in spring 1998 and which allowed the applicant to conclude that signature of the contract was imminent, it must be stated that there is nothing in the file to substantiate the reality of those alleged verbal assurances, which the Commission denies having made, and, *a fortiori*, that they are not such as to give rise to a legitimate expectation (see, to that effect, Joined Cases T-485/93, T-491/93, T-494/93 and T-61/98 *Dreyfus and Others* v *Commission* [2000] ECR II-3659, paragraph 87). That applies equally to all the other verbal assurances for which there is no evidence in the file.

93 According to the applicant, the contractual negotiations between the parties were conducted uninterruptedly in autumn 1998. It refers in particular to Mr Jousten's fax of 22 December 1998, from which it is apparent that there was no longer any obstacle to signature of the fourth contract. That fax read as follows:

'Further to your letter of 3 December 1998, please be informed that I have passed today the ToR for GNK's 1997 [on-site assistance] contract to the [Joint Service for the Management of Community Aid to Non-Member Countries] (Mr Doucet), who

will contact you concerning other elements of your proposal (Annex D, coherence of Annex B with Annex A, etc.).'

94 It is clear from the wording of that fax that it was merely informing the applicant of the state of the negotiations. It is clear from it that the questions relating to Annex D and Annex B were not yet settled and that those questions, which do not appear to be minor, called for further negotiations and that, accordingly, signature of the contract could not be imminent.

95 The contractual negotiations thus continued and the applicant sent several versions of the fourth contract to the Commission subsequently.

96 In the meantime, a difference arose between the parties concerning the evaluation of certain projects.

97 Moreover, it is clear from the file that, over the years, the project manager, Mr Hoensch, was criticised both by the Commission delegation in Kiev and by Commission staff in Brussels. The Commission asked the applicant on several occasions to replace the project manager, but the applicant refused to do so.

98 Following those disputes, the Commission terminated the third contract, by letter of 25 October 1999, under Article 41 of the TACIS General Conditions.

99 Moreover, it is clear from the file that, in addition to the problems relating to Mr Hoensch, the project manager, personally, and the assessment of certain projects, the actual conduct of the applicant during the negotiations did not facilitate conclusion of the fourth contract. It appears from the file that the applicant refused on several occasions to take account of amendments proposed by the Commission, that it thus itself contributed to prolongation of the negotiations and that the final failure of the negotiations is partly attributable to it, a fact which it admitted at the hearing.

100 Consequently, it must be observed that at no time was there any final agreement concerning conclusion of the fourth contract. Accordingly, the applicant cannot invoke the principle of the protection of legitimate expectations in connection with conclusion of the fourth contract. Although the Commission asked it to produce various contract drafts, that request forms an integral part of normal contractual negotiations and the Commission did not encourage the applicant to exceed the risks inherent in its business activity (see, to that effect, *Embassy Limousines & Services* v *Parliament*, paragraph 75).

101 It is also necessary to consider whether the Commission gave the applicant specific assurances causing it to entertain legitimate expectations that the services in question would be paid for otherwise than under a possible fourth contract.

102 In that connection it must be observed that the applicant relies in particular on verbal assurances from Commission staff and on various letters sent either by it or by the Commission. It also refers to a special report from the Court of Auditors.

103 As regards the alleged verbal assurances in general, it must be pointed out that there is nothing in the file capable of substantiating the reality of those assurances, which the Commission denies having given, or, *a fortiori*, to show that they were such as to give rise to any legitimate expectation.

104 As regards the letter of 20 October 1998, in which the Commission proposed to the applicant that a contract be concluded excluding the works for which no agreement had yet been reached, and on which the applicant relies to show that the Commission promised to pay for its services retroactively, it must be observed that that proposal concerned conclusion of the fourth contract and the TACIS 1997 programme and that the Commission was therefore proposing to conclude a contract in respect of the balance of works linked to the TACIS 1997 programme. Accordingly, that letter does not give any indication whatsoever that the activities in question would have been paid for retroactively.

105 As regards the letter of 14 April 1999, in which the applicant summarised the conclusions of the meeting of 16 March 1999 and indicated that it would, as expressly requested by the Commission, submit a draft retroactive contract relating to the period not covered by a contract, it need merely be pointed out that, given that that letter, of which the Commission contests the content, emanates from the applicant itself, it cannot be established on the basis of it alone that the Commission did in fact make such a request at that meeting.

106 Similarly, the letter of 25 August 1999 by which the applicant submitted a proposed second addendum to the third contract does not in any way demonstrate that the Commission requested the production of such an addendum, or that it promised to pay retroactively for the services provided by the applicant.

107 Indeed, by fax of 23 September 1999, the Commission declined to sign that addendum in the following terms:

'It was my understanding that Addendum 1 ..., which was concluded without any change to the global budget, included a reallocation of budgetary lines in order to be consistent with the extension of the duration of the activities.

You now submit a proposal, which does not include new tasks and is presented on end of August in view of covering activities related to the period July 1998 — June 1999, i.e. retrospectively. For all these reasons the Commission can only refuse to consider such a proposal.'

108 The applicant also refers to the meeting of 24 November 1999, during which, it claims, it was again promised payment for work done as from August 1998, unless the envisaged audit of the third contract showed that the work was unsatisfactory. The Commission annexed to its defence handwritten notes taken by it at that meeting. It is apparent from those notes that the discussion related to the effects of termination of the third contract and the problems relating to Mr Hoensch personally, and to the possibility of restoring his reputation with help from the Commission. It cannot be determined on the basis of those notes that the Commission promised to make retroactive payments for the services in question. In any event, since that meeting was held on 24 November 1999, the applicant cannot claim that any legitimate expectation arose during the meeting regarding services which it carried out before that meeting.

109 Moreover, it must be remembered that the Commission could remunerate the applicant, under the TACIS programme, only on the basis of a contract. In view of the applicant's long experience of the TACIS programme, it must have been aware of the legal procedures associated with that programme and could not have been unaware of the need for a contract.

110 In those circumstances, it must be stated that the file contains no letter from the Commission promising the applicant retrospective payments for the services at issue.

111 The applicant also relies on the Court of Auditors' Special Report No 6/97 to show that the conclusion of retroactive contracts was possible. It is clear from that report that there were difficulties regarding the conclusion of contracts for on-site assistance and that the Commission also appears to have concluded retroactive contracts, a fact which the Court of Auditors criticised.

112 The Commission responded to the criticisms of the Court of Auditors in the following terms:

'Backdated contracts were signed in the past because their administrative preparation had taken too long. Measures have been taken to prevent a recurrence of this problem in the future. ... The Commission never requires experts to carry out work other than that under an approved contractual framework. There may be many reasons for the time lag between contracts and in such circumstances contractors are informed that the Commission is responsible only for work undertaken under their contracts with the Commission.'

113 It must be noted, first, that that report relates to a period prior to the one at issue here. Second, although it shows that the Commission has concluded retroactive contracts, that report, and likewise the Commission's answers, do not bind the Commission to continue to conclude retroactive contracts, such conduct having being specifically criticised by the Court of Auditors. There is nothing to indicate that it might have caused the applicant to form a legitimate expectation that the Commission would enter into a retroactive contract with it.

114 In those circumstances, it must be noted that nothing in the file serves to establish that the Commission gave the applicant specific assurances that the works in question would be paid for retroactively, either under the fourth contract or under any other agreement *ex post facto*, which might have given rise to any legitimate expectation on the part of the applicant. Moreover, a prudent economic operator

familiar with the TACIS programme must have known of the risks linked with the possibility of concluding a contract retrospectively contrary to the principles by which the Commission is bound as a matter of good and sound financial management of Community resources.

115 Accordingly, it does not appear that the Commission infringed, in a sufficiently serious manner, the principle of the protection of legitimate expectations.

116 It is necessary to determine, second, whether the Commission's conduct constitutes a sufficiently serious breach of the principle of sound administration.

117 In that connection, the applicant claims, relying on the Court of Auditors' Special Report No 25/98, that the Commission failed to ensure the continuity of contractual negotiations because of the continual rotation of staff, with the result that the fourth contract was not concluded.

118 The Court of Auditors' Special Report No 25/98 finds, in particular, that 'the administrative unit [of the DG for External Relations: Europe and the New Independent States, Common and Foreign Security Policy and External Service] [did] not have the staff needed to ensure that implementation of the programmes is monitored correctly' and that the 'clearance work undertaken by the Commission in 1997 in connection with the financial settlement of PHARE and TACIS contracts, which was complicated by the loss of background knowledge resulting from the turnover of contract staff and the lack of sound administrative practices, was not accompanied by a single measure to prevent such situations from recurring'.

119 It is thus clear from that report that it is concerned with and properly criticises the Commission's earlier practice and not the practice followed in the negotiations for conclusion of the fourth contract. As a result of the reorganisation of its departments and the creation in 1998 of the Joint Service for the Management of Community Aid to Non-Member Countries, the Commission took specific steps to attempt to improve the implementation of TACIS programmes.

120 Moreover, the applicant has not been able to provide any specific indications of a breach of the principle of sound administration. In that connection, the applicant claims to have submitted, on 14 April 1999, a new draft for the fourth contract, indicating that it was a completely revised version of the 'terms of reference', but which, according to the applicant, was substantively identical to the one which the DG for External Relations: Europe and the New Independent States, Common and Foreign Security Policy and External Service of the Commission had already examined in December 1998, which in its view shows that the continual turnover of the Commission staff dealing with the matter gave rise to a 'loss of background knowledge', as already found by the Court of Auditors. Far from demonstrating any breach of the principle of sound administration, that fact shows, on the contrary, that the conduct of the applicant itself does not appear beyond reproach.

121 In those circumstances, it does not appear that the Commission breached the principle of sound administration, so that the applicant's argument in that connection must be rejected, without there being any need to consider whether that principle has the effect of conferring rights on individuals.

122 Since the condition concerning illegal conduct on the part of the Commission has not been fulfilled in this case, the action must be dismissed without there being any need to consider the other preconditions for such liability, or to take oral testimony in court.

Costs

123 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 be ordered to pay the costs in their entirety, as applied for by the defendant.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. Dismisses the application;

2. Orders the applicant to pay the costs.

Legal Tiili Vadapalas

Delivered in open court in Luxembourg on 16 March 2005.

H. Jung H. Legal

Registrar President