

ORDER OF THE COURT OF FIRST INSTANCE (Fifth Chamber)
15 October 2003 *

In Case T-372/02,

Internationaler Hilfsfonds eV, established in Rosbach (Germany), represented by
H. Kaltenecker, lawyer,

applicant,

v

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

defendant,

APPLICATION for (i) annulment of the Commission's decision of 22 October 2002 rejecting the application by the applicant to sign a framework partnership agreement with the European Community Humanitarian Office (ECHO), (ii) an order requiring the Commission either to reinstate the applicant

* Language of the case: English.

in the position it had in 1996 when it applied to sign a framework partnership agreement or, alternatively, to invite it to sign the framework partnership agreement now in force and (iii) an order requiring the Commission to reimburse to the applicant the costs relating to its complaint to the European Ombudsman,

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

composed of: P. Lindh, President, R. García-Valdecasas and J.D. Cooke, Judges,
Registrar: H. Jung,

makes the following

Order

Legal context

1 The European Community Humanitarian Office (ECHO) was set up by a Commission decision of 6 November 1991 in order to enable the Community to provide effective aid in cases of humanitarian crisis. ECHO performs its task by funding humanitarian projects implemented by non-governmental organisations (NGOs), international organisations or specialised agencies of the Member States.

- 2 The framework partnership agreement (hereinafter 'FPA') is an instrument for administering humanitarian aid, the purpose of which is to establish close ties between ECHO and its partners and to define their respective roles and responsibilities in the implementation of humanitarian operations financed by the Community. It contains general conditions applicable to all grant agreements concluded by ECHO with its implementing partners. The FPA also enables ECHO to check that potential partners which are NGOs meet a number of objective criteria. Those checks are carried out when applications to sign the FPA are being considered. Organisations which are accepted under this pre-selection procedure are invited to sign a standard-form agreement whose terms they agree to observe.

- 3 An FPA is concluded for a specified period and may be extended. The first FPA was adopted in 1993 and remained in force until December 1998.

- 4 On 20 June 1996 the Council adopted Regulation (EC) No 1257/96 concerning humanitarian aid (OJ 1996 L 163, p. 1). That regulation establishes the Community legislative framework for the grant and payment of humanitarian aid. Article 16(2) of the regulation indicates that the FPA is one of 'the instruments for administering humanitarian aid'.

- 5 Article 6 of Regulation No 1257/96 reads as follows:

'Humanitarian aid operations financed by the Community may be implemented either at the request of international or non-governmental agencies and organisations from a Member State or a recipient third country or on the initiative of the Commission.'

6 Article 7 of Regulation No 1257/96 states:

'1. Non-governmental organisations eligible for Community financing for the implementation of operations under this Regulation must meet the following criteria:

- (a) be non-profit-making autonomous organisations in a Member State of the Community under the laws in force in that Member State;

- (b) have their main headquarters in a Member State of the Community or in the third countries in receipt of Community aid. This headquarters must be the effective decision-making centre for all operations financed under this Regulation. Exceptionally, the headquarters may be in a third donor country.

2. When determining a non-governmental organisation's suitability for Community funding, account shall be taken of the following factors:

- (a) its administrative and financial management capacities;

- (b) its technical and logistical capacity in relation to the planned operation;

- (c) its experience in the field of humanitarian aid;
- (d) the results of previous operations carried out by the organisation concerned, and in particular those financed by the Community;
- (e) its readiness to take part, if need be, in the coordination system set up for a humanitarian operation;
- (f) its ability and readiness to work with humanitarian agencies and the basic communities in the third countries concerned;
- (g) its impartiality in the implementation of humanitarian aid;
- (h) where appropriate, its previous experience in the third country involved in the humanitarian operation concerned.'

7 Article 12 of Regulation No 1257/96 states:

'All financing contracts concluded under this Regulation shall provide in particular that the Commission and the Court of Auditors may conduct checks on the spot and at the headquarters of humanitarian partners according to the

usual procedures established by the Commission under the rules in force, and in particular those of the Financial Regulation applicable to the general budget of the European Communities.'

8 Article 14 of Regulation No 1257/96 provides:

'The Commission shall appraise, decide upon and administer, monitor and assess operations under this Regulation according to the budgetary and other procedures in force, and in particular those laid down in the Financial Regulation applicable to the general budget of the European Communities.'

9 Prompted by the adoption of this regulation, the Commission reassessed the first FPA and decided to adopt the second FPA, laying down a fresh selection procedure. The second FPA was adopted in March 1998 and entered into force in January 1999.

Facts

10 Internationaler Hilfsfonds eV (hereinafter 'the applicant' or 'IH') is an NGO established under German law operating in the field of humanitarian aid. In particular, it provides assistance to refugees and victims of wars and disasters.

- 11 By letter of 9 February 1995, IH asked ECHO for a copy of the FPA and provided certain information relating to itself. Following that letter, ECHO sent a fax to the Auswärtiges Amt (the German Federal Ministry for Foreign Affairs) on 16 February 1995, requesting information and references in respect of IH. On 15 March 1995 the Auswärtiges Amt told ECHO in response to that request that IH's activities had 'given reasons for official prosecution'. On 26 October 1995 ECHO repeated its request to the German authorities for information. According to an internal note dated 17 November 1995 written by R. Cox, an adviser at ECHO, the competent German department informed him that it did not work with and therefore did not know IH.

- 12 On 20 March 1996 IH formally submitted an application to sign the FPA.

- 13 On 12 July 1996 Mr Cox sent IH a letter in the following terms:

' ...

We are currently reviewing plans for expanding our network of partners. Moreover, we are working on a new system for assessing likely NGO partners, which will take on board a new Council Regulation on humanitarian aid which has been adopted in June 1986.

I should point out that the FPA is also being reviewed to pinpoint any improvements and amendments needed in the light of the new Regulation.

We have, however, noted your request and will keep you informed of further developments.

...'

- 14 In December 1998 the first FPA expired, and according to the Commission, IH's application to sign that FPA 'lapsed' as did all other pending applications.
- 15 Following the entry into force of the second FPA on 1 January 1999, ECHO decided to treat applications to sign the first FPA received by it which were still pending as new applications in respect of the second FPA. By letter of 1 June 1999, ECHO informed IH of the entry into force of the second FPA and of the applicable new procedure. It also indicated to IH that its application would be evaluated in the third phase of that procedure.
- 16 By letter of 14 December 2000, ECHO informed IH that it was now able to consider its application to sign the second FPA and requested it to provide a number of documents. IH did not act upon that request.

- 17 By letter of 23 January 2001, ECHO informed IH that it intended to carry out an audit at its headquarters in order to verify that it met the eligibility criteria set out in Article 7 of Regulation No 1257/96. IH refused several times, by telephone and in correspondence, to be audited.
- 18 On 19 July 2001 ECHO accordingly sent IH a letter in the following terms:

‘In reply to your letter of 6 July 2001, I would like to provide definitive clarification concerning ECHO’s position with respect to the application of Internationaler Hilfsfonds eV to sign the Framework Partnership Agreement.

The signature of an FPA with ECHO entails a number of obligations on the candidate’s part as well as a number of obligatory checks to be carried out by ECHO in cooperation with the Member States’ national authorities. Checks can include eligibility audits when these are deemed necessary to evaluate a potential partner’s conformity with Art. 7 of... Regulation [No 1257/96]. To decide and to put into practice such control measures is an integral part of our work.

As you are well aware, the German authority responsible for providing information concerning humanitarian organisations in Germany is the Auswärtiges Amt. ECHO duly consulted it for this purpose in 1995, after receiving your application to sign the FPA. In the absence of a positive response from the German authorities, the application could not be treated.

In 1999, with the entry into force of a new FPA, ECHO reopened your application file and decided to proceed to an eligibility audit, which is the normal procedure adopted with all applicants when the national authorities do not confirm their compliance with Art. 7.

ECHO decided to have such audit carried out on your organisation and informed you accordingly on 23 January 2001. Two dates were proposed for the visit: 22 and 23 February. No reply was given to our proposal. In further phone contacts, where my service (Mr Glatz, Mr Buda) invited you to propose alternative dates, you appeared to overreact to the idea of being audited and verbally abused my staff. On February 21, ECHO's Head of Financial Unit, Mr Brandt, sent you a fax cancelling the planned audit and inviting you to propose a more convenient date for it, as a condition for signature. The deadline for such proposal was set at 31 March. On 27 March you sent us a letter explaining that your organisation had already been audited by national authorities and scrutinised by VENRO.

We do not doubt the truth of your assertions. ECHO, however, is entitled and requests to carry out audits by itself.

We deeply regret that your organisation has not responded positively to a legitimate request, despite the efforts made by ECHO. Furthermore I must point out that the threatening tone of your last letter and your attitude towards my service and my staff was absolutely not in keeping with a genuine spirit of partnership.

For these reasons we are obliged to close your application file with a negative answer. We are copying this letter to Mr S. Stevenson.

...'

- 19 In response to that letter, IH sent a letter to ECHO on 25 July 2001 in which it criticised the way in which ECHO had dealt with its application and requested certain information. By letter of 27 August 2001, ECHO explained in detail the reasons for which it had rejected IH's application. It pointed out in the letter that IH's file '[had] been closed on 19 July 2001'.
- 20 On 15 November 2001 the Auswärtiges Amt sent a letter to ECHO in order to inform it that the charges against IH had been dropped on 30 April 1996.
- 21 On 22 November 2001 IH submitted a complaint to the European Ombudsman. The complaint, registered under number 1702/2001/GG, called into question several aspects of the procedure followed by the Commission in dealing with IH's file. With regard to its application to sign the second FPA, IH noted *inter alia* that ECHO had closed its file on 19 July 2001.

- 22 On 21 May 2002 the European Ombudsman issued a decision on that complaint. As regards IH's application in respect of the first FPA, he made the following critical remarks:
- ECHO's decision not to deal with IH's application on the grounds that a reference from national authorities was missing constituted an instance of maladministration;

 - ECHO's failure to inform IH of its decision to suspend the handling of IH's application in the absence of a reference from the national authorities constituted an instance of maladministration;

 - ECHO's failure to deal with IH's application within a reasonable period constituted an instance of maladministration;

 - ECHO's suspension of IH's application on the basis of information received from the German authorities without having given IH the chance to comment on that information constituted an instance of maladministration.
- 23 However, given that those aspects of the case concerned specific events in the past, the European Ombudsman concluded that it was not appropriate to pursue a friendly settlement and therefore closed the case.

24 As regards IH's application in respect of the second FPA, the European Ombudsman concluded that ECHO's decision to insist on an audit was reasonable. Noting, in particular, that ECHO had carried out 11 such audits in 2001, he considered that IH had not established discrimination against it.

25 On 27 August 2002 IH wrote to Mr P. Nielson, a member of the Commission, to inform him of the European Ombudsman's decision. It concluded its letter as follows:

' ...

IH therefore invites you, Mr Nielson, to consider the following courses of action:

...

b. It is the considered view of the Board of Directors, that IH is entitled to become reinstated in its rights and position prevailing at the moment of its application (March 1996) and to receive your invitation to sign the Framework Partnership Agreement whether under the first or the second FPA.

...'

26 In reply to that letter, Mrs Adinolfi, the Director of ECHO, sent a letter to IH on 22 October 2002 in the following terms (hereinafter 'the contested decision'):

'Commissioner Nielson received your letter and asked me to reply on his behalf.

The Commission received and examined the Ombudsman's opinion of 21 May 2002 concerning [IH's] complaint (ref 1702/2001/GG).

The critical remarks formulated by the Ombudsman in his opinion refer to events that took place in the past, for which the Ombudsman stated that no settlement is to be envisaged. In addition, the remarks pertain mainly to transparency issues that the Commission has by now tackled through a large reform process, as you know.

As regards the core of your complaint, i.e. your unsuccessful application to the Framework Partnership Agreement (FPA) with ECHO, the Commission wants to stress the following:

(1) Your request that IH be invited to sign the 1994 FPA, under the conditions in force at the time of its application in March 1996, is *irreceivable*, as that instrument is no longer in force and cannot, therefore, be subscribed. This matter also falls therefore within the issues that cannot be settled any more.

(2) As for recent events, the Ombudsman stated, in his opinion, that the rejection of IH's application to the current FPA was justified.

I quote: "The Ombudsman considers that the Commission is justified in arguing that ECHO needs to check carefully whether organisations applying to sign the FPA meet the criteria for eligibility. An audit appears to be an appropriate way of ascertaining that this is the case. The Ombudsman considers that the Commission's view according to which ECHO is entitled to insist on such audits thus appears reasonable...."

In the absence of further evidence and in the light of the Commission's statement that ECHO carried out 11 such audits in 2001, the Ombudsman arrives at the conclusion that the complainant has not established its claim that it was being discriminated by the fact that ECHO insisted on an audit in the present case. In these circumstances, there appears to be no maladministration on the part of the Commission in so far as this allegation is concerned."

Your letter fails to provide any new elements concerning your acceptance of an eligibility audit, which solely would allow the Commission to reconsider its decision to reject IH's application to the FPA with ECHO.

Of course, IH is most welcome to submit a new application to the FPA, under the conditions that are well known to you. I remind you that the acceptance of the aforementioned audit is an unquestionable precondition of eligibility.

With regard to the disciplinary measures you request the Commission to take against the officials who dealt with the IH file, and in line with the position expressed by the Commission in its letter of 19 September 2002 to your legal representative [ref. (2002) D32992], I confirm that neither the Commission nor the Ombudsman have identified grounds for opening an investigation on ECHO staff.

...'

Procedure and forms of order sought

- 27 By application lodged at the Registry of the Court of First Instance on 13 December 2002, IH brought the present action.
- 28 On 27 February 2003 the Commission lodged at the Registry its defence, in which it *inter alia* disputed the admissibility of the action.
- 29 On 21 March 2003 the Court adopted a measure of organisation of procedure inviting the applicant to submit observations limited to the pleas of inadmissibility raised in the defence. The applicant acceded to that request by letter lodged at the Registry on 29 April 2003.

30 By application lodged at the Registry of the Court of First Instance on 15 December 2001, IH had brought an action for annulment of a Commission decision, communicated to it by letter of 16 October 2001, refusing applications for the co-financing of two projects submitted in December 1996 and September 1997. The action was registered under number T-321/01. The Court gave judgment in that case on 18 September 2003 (*Internationaler Hilfsfonds v Commission* [2003] ECR II-3225).

31 The applicant claims that the Court should:

— declare the action admissible;

— annul the contested decision;

— order the Commission either to reinstate it in the position it had in 1996 when it lodged its application in respect of the first FPA or to invite it to sign the second FPA;

— order the Commission to reimburse to it the costs relating to its complaint to the European Ombudsman;

— order the Commission to pay the costs.

32 The Commission contends that the Court should:

- declare the action inadmissible;

- in the alternative, dismiss it as manifestly unfounded;

- order the applicant to pay the costs.

Admissibility

33 Under Article 113 of the Rules of Procedure, the Court, giving its decision in accordance with Article 114(3) and (4), may at any time, even of its own motion, consider whether there exists any absolute bar to proceeding with an action, including, in accordance with settled case-law, the conditions governing the admissibility of an action which are laid down in the fourth paragraph of Article 230 EC (order in Case T-12/96 *Area Cova and Others v Council and Commission* [1999] ECR II-2301, paragraph 21, and judgment in Case T-125/01 *Martí Peix v Commission* [2003] ECR II-865).

34 In the present case, the Court considers that it has sufficient information from the documents before it and will therefore give its decision without opening the oral procedure.

- 35 It is appropriate to begin by examining the first head of claim and then to examine the second and third heads of claim together.

The first head of claim, seeking annulment of the contested decision

- 36 It is settled case-law that an action for annulment brought against a decision which merely confirms an earlier decision not challenged in due time is inadmissible. A decision is a mere confirmation of an earlier decision where it contains no new factors as compared with the earlier measure and is not preceded by any reexamination of the situation of the person to whom the earlier measure was addressed (judgment in Case 23/80 *Grasselli v Commission* [1980] ECR 3709, paragraph 18; order in Case T-84/97 *BEUC v Commission* [1998] ECR II-795, paragraph 52; and judgment in Case T-365/00 *AICS v Parliament* [2002] ECR II-2719, paragraph 30).
- 37 In the present case, following IH's repeated refusal to be audited, the Commission decided by letter of 19 July 2001 to reject its application to sign the second FPA, and to close the file. That decision was confirmed by the Commission in its letter of 27 August 2001.
- 38 In the contested decision, adopted on 22 October 2002, the Commission again confirmed its decision to reject IH's application to sign the second FPA.
- 39 That decision contains no new factors as compared with the decision of 19 July 2001.

- 40 The decision taken by the European Ombudsman on the complaint submitted to him by IH cannot amount to a new factor of that kind. The European Ombudsman confirms in the decision that the Commission was entitled to ask for an audit of the applicant.
- 41 Nor can the Commission's refusal in the contested decision to initiate disciplinary proceedings against members of ECHO's staff constitute a new factor, contrary to the applicant's submissions in its observations of 29 April 2003.
- 42 That refusal is clearly separate from the decision to reject IH's application to sign the FPA. To adopt a contrary approach would be tantamount to accepting that an undertaking could, by simply requesting that disciplinary proceedings be pursued against members of staff of the institution responsible for a decision, extend the time-limit for bringing an action for annulment of that decision.
- 43 In any event, a decision to initiate disciplinary proceedings is a purely internal Commission measure which cannot be called into question by the applicant in an action for annulment. It should be noted that the applicant apparently took account of this fact in its letter to the Commission of 27 August 2002.
- 44 Furthermore, neither the documents submitted to the Court nor the contested decision indicate that adoption of the latter was preceded by any reexamination of the applicant's situation. The fact that ECHO again replied to the applicant does not constitute a reexamination of its application in respect of the second FPA (see, to this effect, the judgment in Joined Cases T-83/99 to T-85/99 *Ripa di Meana and Others v Parliament* [2000] ECR II-3493, paragraph 34).

- 45 The contested decision thus merely confirms the decision of 19 July 2001. It is common ground between the parties that the latter, of which the applicant was aware by 25 July 2001 at the latest (see paragraph 19 above), was not challenged within the two-month time-limit laid down in the fifth paragraph of Article 230 EC.
- 46 It should be noted that both the letter of 19 July 2001 and the contested decision deal with the same application by IH to sign the second FPA. By contrast, the decision whose annulment was sought in Case T-321/01 *Internationaler Hilfsfonds v Commission*, cited above, refused the co-financing applications at issue for the first time. The circumstances of the present case are thus different from those examined by the Court in connection with the plea of inadmissibility raised by the Commission in Case T-321/01 (see paragraphs 28 to 34 of that judgment).
- 47 The first head of claim is therefore inadmissible.

The second head of claim, seeking an order that the Commission either reinstate the applicant in the position it had in 1996 when it lodged its application in respect of the first FPA or invite it to sign the second FPA, and the third head of claim, seeking an order that the Commission reimburse to the applicant the costs relating to its complaint to the European Ombudsman

- 48 It is settled case-law that the Court may not issue directions to the Community institutions or assume the role assigned to them (judgments in Case C-5/93 P *DSM v Commission* [1999] ECR I-4695, paragraph 36, and Case T-145/98 *ADT Projekt v Commission* [2000] ECR II-387, paragraph 83).

- 49 In an action for annulment founded on Article 230 EC, the jurisdiction of the Community judicature is limited to reviewing the legality of the contested measure. If it concludes that the measure is unlawful, it annuls it. It is then for the institution concerned to adopt, in accordance with Article 233 EC, the necessary measures to comply with the judgment annulling that measure (judgments in Case T-67/94 *Ladbroke Racing v Commission* [1998] ECR II-1, paragraph 200, and *ADT Projekt v Commission*, cited above, paragraph 84).
- 50 By its second and third heads of claim, the applicant clearly seeks the issue by the Court of directions to the Commission. In light of the principles recalled in paragraphs 48 and 49 above, those heads of claim must be declared inadmissible.
- 51 It should be added with regard to the third head of claim that, under Article 91(b) of the Rules of Procedure, ‘expenses necessarily incurred by the parties for the purpose of the proceedings, in particular the travel and subsistence expenses and the remuneration of agents, advisers or lawyers’ are to be regarded as recoverable costs. It follows from that provision that recoverable costs are limited to expenses which have been incurred for the purpose of the proceedings before the Court of First Instance and were necessary for that purpose (order in Case T-115/94 *DEP Opel Austria v Council* [1998] ECR II-2739, paragraph 26). By ‘proceedings’ the provision refers only to proceedings before the Court of First Instance (order in Case T-38/95 *DEP Groupe Origny v Commission* [2002] ECR II-217, paragraph 29). The applicant therefore cannot in any event obtain, in the present action for annulment, reimbursement by the Commission of the costs relating to the procedure before the European Ombudsman.
- 52 Nor can the third head of claim be interpreted as a claim for damages, contrary to the impression that the applicant seems to give in certain passages of its observations of 29 April 2003. The application contains no reference to a claim of that kind or to the essential matters of law upon which it would be based.

53 It follows from all of the foregoing that the action must be declared inadmissible in its entirety.

Costs

54 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful it must be ordered to pay the costs, in accordance with the Commission's application.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby orders:

1. **The application is dismissed as inadmissible in its entirety.**
2. **The applicant shall bear its own costs and those incurred by the Commission.**

Luxembourg, 15 October 2003.

H. Jung

Registrar

P. Lindh

President