ORDER OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

8 February 2010 *

In Case T-481/08,

Alisei, established in Rome (Italy), represented by F. Sciaudone, R. Sciaudone, S. Gobbato, R. Rio and A. Neri, lawyers,

applicant,

v

European Commission, represented by P. van Nuffel and L. Prete, acting as Agents,

defendant,

APPLICATION, first, for annulment of the decision allegedly contained in the Commission's letter of 19 August 2008 on the repayment of a part of the advances paid to the applicant in the context of certain development cooperation and humanitarian aid projects financed by the Community budget or by the European Development

* Language of the case: Italian.

Fund (EDF) and, second, compensation for the loss allegedly suffered by the applicant due to the conduct of the Commission,

THE GENERAL COURT (Fifth Chamber),

composed of M. Vilaras (Rapporteur), President, M. Prek and V.M. Ciucă, Judges,

Registrar: E. Coulon,

makes the following

Order

Legal and contractual context

Contracts between Alisei and the Commission

1 The applicant, Alisei, is a non-profit-making association established under Italian law by an act of 20 January 1998 from the merger of Cidis and Nouva Frontera, both also non-profit-making associations established under Italian law. Between 27 May 1998 and 21 July 2004, it concluded with the Commission of the European Communities 22 grant contracts within the meaning of Title VI ('Grants') of Part One and Title IV of Part Two of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the

Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1, 'the financial regulation').

2 The general conditions governing 17 of those 22 contracts (ALI 08, ALI 41, ALI 44, ALI 46, ALI 03, ALI 04, ALI 06, ALI 07, ALI 17, ALI 18, ALI 19, ALI 25, ALI 39, ALI 42, ALI 45, ALI 47 and ALI 48) contain a clause stating that 'any dispute between the Commission and the [applicant] which arises out of the performance of the ... contract and which it had not been possible to settle amicably between the parties will be brought before the Brussels courts'.

3 The general conditions governing 5 of those 22 contracts designate the Brussels courts as the courts which have jurisdiction over disputes which arise out of the performance of the contract and which have not been resolved by friendly settlement and/or a conciliation procedure.

4 In addition, the general conditions governing the 22 contracts mentioned above permitted the relevant Commission staff, inter alia, to carry out checks and inspections on the use being made of the grant allocated.

Contracts between Alisei and third countries financed by the EDF

5 The European Development Fund (EDF) was set up to finance European Community cooperation with the African, Caribbean and Pacific States (ACP), initially by means of an annex to the EEC Treaty and later by means of internal agreements between the Member States meeting in the Council. To date, there have been 10 successive EDFs and the internal agreements relating to those EDFs were concluded for a period corresponding to the period of validity of the various agreements and conventions through which the European Community and its Member States established that

special partnership with the ACP States. The amounts allocated to the EDFs do not come under the general budget of the European Communities, which explains why their management is subject to a specific financial regulation for each EDF.

6 The sixth, seventh, eighth and ninth EDFs were set up, respectively, by the Third ACP-EEC Convention signed at Lomé on 8 December 1984 (OJ 1986 L 86, p. 3, 'the Lomé III Convention'), the Fourth ACP-EEC Convention signed at Lomé on 15 December 1989 (OJ 1991 L 229, p. 3, 'the Lomé IV Convention'), the Agreement amending the Lomé IV Convention signed in Mauritius on 4 November 1995 (OJ 1998 L 156, p. 3, 'the Mauritius Agreement') and the Partnership agreement between the members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000 (OJ 2000 L 317, p. 3, 'the Cotonou Agreement').

7 Those accords and conventions provide that, save as otherwise provided, for any project or programme financed by a grant from the EDF, a financing agreement is to be drawn up between the Commission and the ACP State or States concerned. That agreement is to specify, in particular, the details of the EDF's financial commitment and the financing arrangements and terms (see Article 222(1) of the Lomé III Convention, Article 291(1) and (2) of the Lomé IV Convention, not amended by the Mauritius Agreement, and Article 17(1) and (2) of Annex IV to the Cotonou Agreement, entitled 'Implementation and management procedures').

8 In addition, the same agreements and conventions introduce the office of chief authorising officer of the EDF. That person is appointed by the Commission. He is responsible for managing the resources of the EDF (see Article 226(1) of the Lomé III Convention, Article 311(1) of the Lomé IV Convention, not amended by the Mauritius Agreement, and Article 34(1) of Annex IV to the Cotonou Agreement).

9 The financing of the abovementioned four EDFs has been the subject of four internal agreements between the Member States meeting in the Council, namely, Internal Agreement 86/126/EEC on the financing and administration of Community aid

(OJ 1986 L 86, p. 210), Council Decision 91/482/EEC of 25 July 1991 on the association of the overseas countries and territories with the European Economic Community (OJ 1991 L 263, p. 1), the Internal Agreement between the representatives of the Governments of the Member States, meeting within the Council, on the financing and administration of the Community aid under the Second Financial Protocol to the Lomé IV Convention (OJ 1998 L 156, p. 108) and Internal Agreement 2000/770/EC between Representatives of the Governments of the Member States, meeting within the Council, on the Financing and Administration of Community Aid under the Financial Protocol to the Cotonou Agreement and the allocation of financial assistance for the Overseas Countries and Territories to which Part Four of the EC Treaty applies (OJ 2000 L 317, p. 355).

10 The provisions implementing those four internal agreements are the subject, respectively, of Financial Regulation 86/548/EEC of 11 November 1986 applicable to the Sixth EDF (OJ 1986 L 325, p. 42), Financial Regulation 91/491/EEC of 29 July 1991 applicable to development finance cooperation under the Lomé IV Convention (OJ 1991 L 266, p. 1), Financial Regulation 98/430/EC of 16 June 1998 applicable to development finance cooperation under the Lomé IV Convention (OJ 1998 L 191, p. 53), and the Financial Regulation of 27 March 2003 applicable to the ninth EDF (OJ 2003 L 83, p. 1).

11 Those four regulations provide that the Commission is to manage the EDF on its own responsibility and is to appoint, in particular, the chief authorising officer and the financial controller of the EDF (see Articles 10(1), 11 and 13 of Financial Regulation 86/548, Articles 9(1), 11 and 13 of Financial Regulation 91/491, Articles 13(1) and 15(1) in Title II, 'Financial administration of EDF-appropriations by the Commission', of Financial Regulation 98/430 and Articles 1(2), 18 and 27 of the Financial Regulation of 27 March 2003 applicable to the ninth EDF). In addition, the first three financial regulations referred to in paragraph 10 above institute the office of financial controller. On the other hand, Article 133(2) of the Financial Regulation of 27 March 2003 applicable to the ninth EDF provides that commitments relating to previous EDFs entered into before the entry into force of the Cotonou Agreement on 1 April 2003 continue to be implemented in accordance with the rules applicable to those EDFs, save, inter alia, as regards the duties of the financial controller, for which the provisions of the said Regulation are to apply. The latter regulation does not provide for the office of financial controller.

12 Financial Regulations 86/548, 91/491 and 98/430, applicable to the sixth, seventh and eighth EDFs respectively, provide that, in principle, the chief authorising officer is to draw up a recovery order in respect of every established, liquid and payable debt due to the EDF in the context of the implementation of EDF appropriations. However, the chief authorising officer may waive the right to recover a debt. A recovery order is to be recorded in the accounts by the accounting officer, who assumes responsibility for it and is to do all in his power to ensure that the debts referred to in the recovery order are recovered at the due dates indicated therein. The accounting officer is to inform the chief authorising officer of any debts not recovered within the time-limits laid down and, if necessary, initiate the recovery procedure (see Articles 15 and 16 of Financial Regulation 86/548, Articles 15(2) and 16 of Financial Regulation 91/491 and Articles 18(2) and 19 of Financial Regulation 98/430).

13 Articles 45 to 47 of the Financial Regulation of 27 March 2003 applicable to the ninth EDF contain similar provisions. However, some additional details were added concerning recovery. First of all, the first paragraph of Article 45 of the regulation provides that the recovery order is to be 'followed by a debit note sent to the debtor', also drawn up by the chief authorising officer of the EDF. Secondly, Article 46(2) of the same regulation states that if recovery has not actually taken place, the accounting officer of the EDF is to 'immediately initiate the procedure for effecting recovery by any means offered by the law, including, where appropriate, by offsetting. If this is not possible, the accounting officer shall enforce a recovery decision secured either in accordance with Article 44(2) or by a legal action'. Thirdly, Article 44(2) of the Regulation provides that 'the Commission may formally establish an amount as being receivable from persons other than States by means of a decision which shall be enforceable under the same conditions as laid down in Article 256 of the [EC] Treaty'.

14 Between 24 April 2002 and 13 April 2005, the applicant concluded 10 contracts for the provision of services which were financed by the EDF. It concluded six contracts with the Commission, acting for and on behalf of the Democratic Republic of the Congo, which were financed by the sixth EDF, a contract with the Republic of Angola, which was financed by the seventh EDF, a contract with the Republic of Equatorial Guinea, which was financed by the eighth EDF, and two contracts with, respectively, the Gabonese Republic and the Democratic Republic of São Tomé and Príncipe, which were financed by the ninth EDF.

15 All those contracts were governed by the general conditions for service contracts financed by the EDF, laid down in Annex IV to Decision No 3/90 of the ACP-EEC Council of Ministers of 29 March 1990 adopting the general regulations, general conditions and procedural rules on conciliation and arbitration for works, supply and service contracts financed by the EDF and concerning their application (OJ 1990 L 382, p. 1), as supplemented or amended by the contract.

16 Article 45.2 of the abovementioned general conditions, entitled 'Settlement of disputes', provides for a procedure for the amicable settlement of disputes. If that procedure fails, Article 45.3 of the general conditions states that the parties may agree to the settlement of the dispute by conciliation within a specific time-limit by a third party. Article 45.5 of the general conditions adds that '[i]n the absence of an amicable settlement or settlement by conciliation within the maximum time limits specified, the dispute shall … in the case of a transnational contract, be settled, either, … if the parties to the contract so agree, in accordance with the national legislation of the State of the contracting authority or its established international practices … or … by arbitration in accordance with the procedural rules adopted in accordance with the Convention'.

17 The provision in Article 45.5 was neither supplemented nor amended in the 10 contracts at issue. In addition, none of those contracts contained a term providing for settlement of disputes in accordance with the legislation or practices of the State concerned, with the effect that disputes between the parties to the contracts in question are to be settled by arbitration. The rules governing the arbitration procedure referred to in Article 45.5 are contained in Annex V to Decision No 3/90.

18 In addition, the applicant concluded two contracts, one each with the Republic of the Congo and the Republic of the Ivory Coast, which were financed by the eighth and ninth EDFs respectively. Article 13 of the general conditions applicable to each of those contracts lays down a procedure for the amicable settlement of disputes between the parties to the contracts and for submission of the dispute, by common accord, to the Commission. According to the same article, if the abovementioned measures fail, each party may submit the dispute to the courts of the State of the contracting authority.

Background to the dispute

19 On 27 August 2004, the European Anti-fraud Office (OLAF) commenced an investigation of the applicant, which was informed of that fact on 3 June 2005. In that context, OLAF carried out, from 6 to 10 June 2005, a series of inspections in the applicant's premises in Milan. During that period, employees of an external auditing firm also carried out an inspection in the applicant's premises.

20 By letter of 6 March 2006, OLAF transmitted to the applicant, for comment, its report on its inspections and verifications, drawn up after the inspections of 6 to 10 June 2005, and the draft report of the abovementioned external auditing firm. OLAF also transmitted a copy of that letter to EuropeAid Cooperation Office (EuropeAid). The applicant submitted its observations on that report on 7 April 2006.

21 By letter of 3 May 2006, EuropeAid informed the applicant that the findings in the abovementioned reports raised a doubt as to whether it was entitled to apply for reimbursement of the expenses which it had claimed in regard to the various projects. Consequently, EuropeAid intended to order an audit and, in the meantime, to suspend all payments to the applicant in respect of current contracts and work programmes coming under its authority.

22 Following a meeting between the representatives of the Commission and those of the applicant on 16 May 2006, EuropeAid, by letter of 2 June 2006, confirmed to the applicant its intention to order an audit to ascertain whether the costs declared by the applicant were eligible for reimbursement. By letter of 7 July 2006, EuropeAid informed the applicant of the name of the external auditor to whom the audit had been entrusted and of the projects which the audit was to cover.

23 The audit began with an exploratory phase, which took place on the applicant's premises from 12 to 16 July 2006. The purpose of the exploratory phase was to identify and localise the documents needed for the investigation. From 20 September 2006, verifications were carried out on the spot. On 7 December 2006, a preliminary closure meeting took place between the external auditor and the applicant, in the presence of the Commission's representatives. On 2 March 2007, a further meeting took place between the external auditor and the applicant, also in the presence of the Commission's representatives. That meeting terminated the on-the-spot checks.

24 By letters of 18 January, 28 February, 23 April and 13 June 2007, the applicant made some criticisms of the external auditor who had carried out the audit and of the way in which the audit had been carried out. EuropeAid replied to the applicant's first three letters by letters of 2 February, 22 March and 15 May 2007.

25 By letter of 20 July 2007, the Commission transmitted to the applicant, for comment, a consolidated version of the draft audit report, accompanied by its own observations. It also called upon the applicant to express its opinion on the recovery of an amount of EUR 6 433 424,80 and informed it of the Commission's intention to initiate an *inter partes* procedure for gross professional misconduct and serious breach of its contractual obligations, pursuant to Articles 93, 96 and 114 of the financial regulation, and to exclude it for two years from participating in any public invitations to tender and from obtaining any grant financed by the Community. It granted the applicant one month in which to submit its observations on that subject.

26 That letter from the Commission was followed by an exchange of correspondence between the parties, consisting of five letters from the applicant to EuropeAid, dated 20 September, 28 September and 22 October 2007 and 4 and 13 April 2008, and three letters from EuropeAid to the applicant, dated 22 September and 9 October 2007 and 5 March 2008.

27 By letter of 19 August 2008, the Commission transmitted to the applicant the final report of the audit, which the external auditor had transmitted to it on 28 July 2008. It also replied to the applicant's letters of 4 April and 13 August 2008, and informed the applicant that a recovery procedure would be initiated, at a date of which it would be informed subsequently by the responsible authorising officer, in respect of an amount of EUR 4 750 121, representing sums wrongly received in the context of the 34 contracts at issue.

Procedure and forms of order sought

28 By application lodged at the Court Registry on 5 November 2008, the applicant brought the present action in which it claims that the Court should:

— annul the decision allegedly contained in the letter of 19 August 2008;

— order the Commission to pay compensation for the loss suffered by the applicant;

— order the Commission to pay the costs.

29 By separate document lodged at the Court Registry on 19 January 2009, the Commission raised an objection of inadmissibility pursuant to Article 114 of the Rules of Procedure of the General Court. It contends that the Court should:

— dismiss the action as inadmissible;

— order the applicant to pay the costs.

30 On 4 March 2009, the applicant submitted its observations on the plea of inadmissibility. In its observations, it claims that the Court should:

— dismiss the objection of inadmissibility;

— order the Commission to pay the costs.

31 By way of measures of organisation of procedure provided for by Article 64 of the Rules of Procedure, the Court requested the Commission to produce certain documents. The Commission complied with that request within the time-limit prescribed.

32 By a separate document lodged at the Court Registry on 2 July 2009, the applicant requested 'measures of organisation of procedure', on the one hand, ordering the Commission to produce the full text of the contract which it had concluded with the

external auditor tasked with carrying out the audit mentioned above (paragraphs 21 and 22 above) and, on the other hand, requesting that the Court should hear as witnesses the Director-General of EuropeAid and an associate of the external auditor tasked with the audit.

33 The Commission lodged its observations on that application on 17 July 2009. It argues that the applicant's application is seeking, in reality, the adoption of measures of inquiry and must be rejected as inadmissible or, in the alternative, as unfounded.

34 By a separate document lodged at the Court Registry on 30 September 2009, the applicant requested the adoption of a measure of organisation of procedure ordering the Commission to state whether the external auditor carried out an audit in accordance with 'international accounting standards' or whether he carried out an 'agreed-upon procedure', governed by the 'International standard on related services 4400 — Engagements to perform agreed-upon procedures regarding financial information', which is different from what was provided for under the contract between the Commission and the auditor in question.

35 By a separate document lodged at the Court Registry on 1 December 2009, the applicant produced the contract concluded between the Commission and the external auditor, and raised two new pleas in law in support of its action.

Law

36 Under Article 114(1) of the Rules of Procedure, the Court may, on the application of a party, rule on admissibility without considering the substance of the case. Under Article 114(3), unless the Court otherwise decides, the remainder of the proceedings is to be oral. Moreover, under Article 111 of the Rules of Procedure, where the action

is manifestly lacking any foundation in law, the Court may, by reasoned order, and without taking further steps in the proceedings, give a decision on the action.

37 In the present case, the Court considers that it is sufficiently informed by the documents in the Court file and that there is no need to open the oral proceedings.

The application for annulment

Arguments of the parties

38 The Commission claims that the letter of 19 August 2008 was drafted in a purely contractual context, governed by the stipulations of the various contracts referred to in that letter. However, the conditions applicable to contracts concluded between the Commission and the applicant contain no clause conferring jurisdiction on the General Court to rule on the present dispute but, on the contrary, stipulate that the Brussels courts have jurisdiction in regard to all disputes arising under those contracts. The other contracts mentioned in the letter in question, concluded between the applicant and a number of non-member countries, and financed by the EDF, are governed by contractual conditions providing that disputes arising under those contracts are to be resolved 'in accordance with the national legislation of the State of the contracting authority'. The Court thus has no jurisdiction in regard to disputes arising under any of those contracts. Moreover, given the contractual context in which the letter of 19 August 2008 must be placed, that letter is not a measure which may be the subject of an action for annulment before the Court.

39 The Commission adds that, in any event, having regard to its wording, the letter of 19 August 2008 cannot be regarded as a measure which produces binding legal effects but is, at most, a preparatory measure against which an action for annulment cannot be brought.

40 The applicant admits that the Court does not have jurisdiction in regard to disputes arising under the 34 contracts covered by the letter of 19 August 2008. It contends, however, that the Commission's claim that the said letter must be placed in a purely contractual context and that, consequently, it is not a measure against which an action for annulment may be brought before the Court is based on an incorrect and partial reading of the letter and on a misunderstanding of the purpose and content of the application for annulment.

41 According to the applicant, the Commission, in the letter of 19 August 2008, did not merely reply to its claims regarding the suspension of payments and alleged irregularities in the audit, and announced the initiation of a recovery procedure. It also transmitted the final report of the audit to it and informed it that the Commission regarded that report as a reliable and legitimate technical basis on which to draw conclusions in the present case. In other words, by letter of 19 August 2008, the Commission validated the conclusions drawn by the external auditor by adopting the final report.

42 It is precisely that specific aspect of the letter of 19 August 2008 which is concerned by the application for annulment, in which the applicant challenges the Commission's decision, adopted under its administrative prerogatives, to regard as closed and settled that audit procedure carried out by an external auditor and to validate all the conclusions reached in the final report.

43 Moreover, the infringements of some of its rights and of certain general principles of law, raised in the application, concern the adoption and approval of the report as a measure attributable to the will and powers of an administration in the exercise of its public law prerogatives, and not any contractual relations between it and the Commission. The complaints thus concern, not a breach of specific contractual terms, but an infringement of general principles of law.

44 The case-law concerning the inadmissibility of an action for annulment brought against a measure adopted in a contractual context is not applicable to the present case. On the one hand, the letter of 19 August 2008 constitutes neither an order for recovery nor a debit note, as the Commission, indeed, admits. On the other hand, in the letter in question, the Commission considered the audit procedure carried out by an external auditor to be closed and correct and validated its conclusions. It may therefore be separated from the contractual framework in which it was adopted, all the more so as it also concerned contracts concluded with a number of non-member countries which were exclusively financed by the EDF.

45 The applicant also claims that, in so far as the Commission, in the letter of 19 August 2008, definitively terminated the audit procedure carried out by an external auditor, it considered that procedure correct and validated the conclusions drawn by the external auditor in the final report, which changed the applicant's legal situation. It claims that it went from being a 'creditor of a series of payments yet to be received' to a 'debtor, at least potentially, of amounts already paid and currently the subject of accounting disputes'. In addition, in application of the principles of prudence, applicable in accounting matters, that letter required it to remove from its balance sheet over EUR 2 million in credits and to replace them with an unforeseen debt of EUR 4.7 million.

46 The applicant claims that, even if the letter of 19 August 2008 could be regarded in part as a preparatory measure, inasmuch as the Commission replied to its complaints and announced the initiation of a recovery procedure, that part of the letter concerning the closure of the audit procedure and the adoption of the final report is definitive and can be severed from the contractual context within the meaning of the judgment in Case C-395/95 P *Geotronics* v *Commission* [1997] ECR I-2271, paragraphs 12 to 15), and the approach in that case is applicable to the present case, with the result that an action for annulment can be brought against the letter in question. That interpretation is also confirmed by the observations submitted by the Commission to the European Ombudsman in reply to a complaint lodged by the applicant.

Findings of the Court

47 In an action for annulment, the Court reviews the legality of acts of the institutions intended to produce binding legal effects vis-à-vis third parties by significantly altering their legal position (order of 10 April 2008 in Case T-97/07 *Imelios* v *Commission*, not published in the ECR, paragraph 21; see also, to that effect, Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 9, and Case C-131/03 P *Reynolds Tobacco and Others* v *Commission* [2006] ECR I-7795, paragraph 54).

48 In the case of acts or decisions adopted by a procedure involving several stages, in particular where they are the culmination of an internal procedure, an act is, in principle, open to review only if it is a measure definitively laying down the position of the institution at the conclusion of that procedure, and not a provisional measure intended to pave the way for that final decision (*IBM* v *Commission*, paragraph 47 above, paragraph 10, and Case T-95/99 *Satellimages TV5* v *Commission* [2002] ECR II-1425, paragraph 32).

49 It would be otherwise only if the decisions or acts adopted in the course of the preparatory proceedings were themselves the culmination of a special procedure distinct from that intended to permit the institution to take a decision on the substance of the case (*IBM* v *Commission*, paragraph 47 above, paragraph 11, and the order in Case T-96/03 *Camós Grau* v *Commission* [2004] ECR-SC I-A-157 and II-707, paragraph 30).

50 Measures adopted by the institutions in a purely contractual context from which they are inseparable are, by their nature, not among the measures annulment of which may be sought before the Court (orders in Joined Cases T-314/03 and T-378/03 *Musée Grévin* v *Commission* [2004] ECR II-1421, paragraph 64, and *Imelios* v *Commission*, paragraph 47 above, paragraph 22).

51 In the present case, it must be considered whether the letter of 19 August 2008 constitutes an act against which an action for annulment may be brought before the Court. The applicant argues that that is so since, on the one hand, the letter contains a decision terminating an administrative audit procedure, with which the Commission had tasked an external auditor and, on the other, it adopted the report drafted by the external auditor.

52 First of all, with regard to the 22 contracts mentioned in paragraph 1 above, it must be pointed out that, in order to protect its rights under those contracts and to ensure proper performance by the applicant of its obligations under the said contracts, the Commission may carry out such checks and inspections as it regards as necessary and appropriate. Moreover, such checks and inspections are expressly authorised by the very terms of the contracts concerned (see paragraph 4 above).

53 In that context, the Commission is permitted to give an external auditor the task of carrying out an audit on its behalf and informing it of the results of that audit in the form of a report. It may also, if it regards the conclusions drawn in the report as correct and justified, rely on that report to defend, before an appropriate jurisdiction, the rights to which it considers itself entitled under the contracts in question.

54 It follows that, as far as the 22 contracts in question are concerned, the audit carried out by the external auditor chosen by the Commission is part of the latter's exercise of its rights under those contracts and thereby comes within the contractual framework defined by them.

55 Consequently, even if the letter of 19 August 2008 must be understood as terminating the audit procedure in regard to the abovementioned 22 contracts and validating the external auditor's conclusions by adopting the final report, it is not, contrary to the applicant's claim, severable from the contractual context of those contracts and cannot be regarded as an act against which an action for annulment can be brought

before the Court. The application for annulment of the decision allegedly contained in that letter, in regard to those 22 contracts, is therefore inadmissible.

56 Moreover, that application cannot be reclassified as alleging an infringement, on the Commission's part, of its obligations under the abovementioned 22 contracts and as therefore being brought under a clause giving the Court jurisdiction to decide the case. It is for the applicant to choose the legal basis of its action and not for the Court itself to choose the most appropriate legal basis (Case C-160/03 *Spain* v *Eurojust* [2005] ECR I-2077, paragraph 35; orders, of 26 February 2007 in Case T-205/05 *Evropaïki Dynamiki* v *Commission*, not published in the ECR, paragraph 38; and *Imelios* v *Commission*, paragraph 47 above, paragraph 19).

57 In any event, even if the application for annulment could be reclassified in so far as it related to that part of the letter of 19 August 2008 concerning the 22 contracts in question, it would be inadmissible since the Court manifestly has no jurisdiction to hear it.

58 The Court does not have jurisdiction to give judgment at first instance in disputes relating to contractual matters brought before it by natural or legal persons unless there is a jurisdiction clause to that effect. In the absence of such a clause, the Court would be extending its jurisdiction beyond the limits placed on it (order in Case T-186/96 *Mutual Aid Administration Services* v *Commission* [1997] ECR II-1633, paragraph 47).

59 In the present case, the 22 contracts mentioned in paragraph 1 above contain no clause conferring jurisdiction on the Court in regard to the case at hand but provide, on the contrary, that disputes arising under those contracts are within the jurisdiction of the Brussels courts.

60 Secondly, in so far as the letter of 12 August 2008 refers to the 12 contracts mentioned in paragraphs 14 and 18 above, which were concluded between the applicant and certain ACP States and receiving financial support from the EDF, it must be pointed out that, according to settled case-law concerning public contracts financed by the European Development Fund, measures adopted by the Commission's representatives, whether approvals or refusals to approve, endorsements or refusals to endorse, are intended solely to establish whether or not the conditions for financing have been met, and are not intended to interfere with the principle that the contracts in question remain national contracts which the beneficiary States alone are responsible for preparing, negotiating and concluding (Case 126/83 *STS* v *Commission* [1984] ECR 2769, paragraph 16, and Case 118/83 *CMC and Others* v *Commission* [1985] ECR 2325, paragraph 28).

61 The undertakings which submit tenders for or are awarded the contract in question have legal relations only with the beneficiary State which is responsible for the contract and the measures adopted by representatives of the Commission cannot substitute, in relation to them, a decision of that institution for the decision of the ACP State which has the sole power to conclude and sign that contract (*STS* v *Commission*, paragraph 60 above, paragraph 18; Case C-257/90 *Italsolar* v *Commission* [1993] ECR I-9, paragraph 22, and Case C-182/91 *Forafrique Burkinabe* v *Commission* [1993] ECR I-2161, paragraph 23).

62 Those considerations, which apply to the contracts to provide services mentioned in paragraph 14 above, concluded after a national tendering procedure organised by the ACP State concerned, also apply by analogy to the grant contracts concluded by an ACP State and mentioned in paragraph 18 above.

63 However, those considerations are not, in themselves, sufficient to conclude that an action for annulment brought against a measure adopted by the Commission in the exercise of its own powers, by an individual concerned by that measure and to whom it is formally addressed, is inadmissible even if that measure formed part of a contractual procedure (see, to that effect, *Geotronics* v *Commission*, paragraph 46 above, paragraphs 13 and 14).

64 In order to rule on the admissibility of the application for annulment, in so far as it refers to the 12 contracts concluded between the applicant and various ACP States, it must therefore be determined whether that letter, formally addressed to the applicant, actually contains a decision of the Commission, adopted in the exercise of its own powers, against which an action for annulment may be brought before the Court.

65 The applicant itself admits that inasmuch as the Commission, in the letter of 19 August 2008, states that a debit note would shortly be sent to it, that letter does not constitute an act producing binding legal effects in regard to it. It claims, however, that, in that letter, the Commission did not merely reply to its complaints concerning the audit carried out by an external auditor at the Commission's request but adopts the formal decision terminating the administrative audit procedure and validating the external auditor's conclusions by adopting the final report. It claims that an action for annulment of that decision may be brought before the Court.

66 It must be pointed out in that regard that the purpose of an audit carried out in the context of contracts financed by the EDF is necessarily to check that the financial transactions carried out in the performance of those contracts are lawful. In that context, irregularities giving rise to an obligation to reimburse certain sums to the EDF were found to exist.

67 However, debts owed to the EDF as a result of an audit carried out by the Commission or at its request do not arise from the audit itself but from a breach of contractual obligations on the part of a party to a contract financed by the EDF. The audit report merely takes note of the existence of possible pre-existing irregularities and the debts which arise from them. It thus does not modify the legal position of the debtor. Moreover, the latter can contest the findings and conclusions of the audit report before the competent court in any proceeding dealing with the debts in question.

68 The applicant's argument that the adoption of the final report required it to modify its balance sheet by removing a credit and replacing it with an unforeseen debt cannot lead to a contrary conclusion since, as has already been pointed out, the audit report did not imply any obligation on the part of the applicant to modify its own accounts, which are entirely a matter for itself.

69 It must also be recalled that the Commission is responsible, under the agreements and conventions setting up the various EDFs and by the corresponding financial regulations, for the management of those EDFs. In that connection, it has not only the right but also the duty to ensure, before any payments are made out of Community funds, that the conditions for such payments are in fact fulfilled and to that end it must, in particular, seek the necessary information in order to ensure the economical administration of the resources of the EDF (Case T-175/94 *International Procurement Services* v *Commission* [1996] ECR II-729, paragraph 45; see also, to that effect, *CMC and Others* v *Commission*, paragraph 60 above, paragraphs 44 and 47).

70 As was pointed out in paragraphs 12 and 13 above, the chief authorising officer of the EDF, who is appointed by the Commission, is to draw up a recovery order in respect of every established, liquid and payable debt due to the EDF. That order is sent to the accounting officer, who is also appointed by the Commission. The latter takes the necessary steps to ensure that amounts owed to the EDF are paid and if, at the date of expiry of the recovery order, the amounts have not actually been recovered, he informs the chief authorising officer of the EDF and initiates the recovery procedure. The Financial Regulation of 27 March 2003 applicable to the ninth EDF adds that the recovery order is to be followed by a debit note sent to the debtor.

71 The finding in an audit report that there is a debt due to the EDF can thus lead to a recovery order being drawn up in respect of it and, where appropriate, to a debit note being sent to the debtor.

72 However, as has already been decided, a debit note merely constitutes information given to the debtor concerning an obligation flowing from a contract financed by the ninth EDF to which the Commission was not a party. Where the debtor does not pay the amount demanded, the Commission can either waive recovery of the debt or enforce a recovery decision which may take place either by way of an enforceable decision or through an enforceable title secured by a legal action. The debit note is thus clearly not enforceable but is a preparatory measure preceding the possible adoption of a decision by the Commission to continue the recovery procedure either by initiating legal proceedings or by adopting an enforceable decision. Consequently, the debit note is not a measure definitively laying down the position of the Commission, does not produce binding legal effects that are capable of affecting the interests of the applicant and, therefore, cannot constitute a measure challengeable by way of an action for annulment (see, to that effect, Case T-260/04 *Cestas* v *Commission* [2008] ECR II-701, paragraphs 75 and 76).

73 That conclusion also applies to a recovery order, provided for in all the financial regulations governing the four EDFs at issue in the present case. In addition to the fact that such an order is not even sent to the debtor but is a purely internal document sent only to the accounting officer, a recovery order merely requires the accounting officer, if the debt concerned is not recovered, to initiate the recovery procedure through the various means of recovery set out above.

74 It is therefore not at all certain that an audit report which found debts to the EDF to exist will give rise to an act which produces binding legal effects that are capable of affecting the interests of the debtor. Evidently, that will not be the case if the Commission decides to waive recovery of the debt. That will also not be the case if the Commission decides to initiate the recovery procedure by way of legal proceedings, in which case an action will be brought before the courts having jurisdiction. As has already been pointed out, in the latter hypothesis, the debtor will have an opportunity to challenge the conclusions of the audit in the context of those proceedings.

75 Even supposing that an audit report dealing with contracts financed by the EDF gave rise to a subsequent act producing binding legal effects in regard to one of the contracting parties, that audit report would merely constitute a preparatory measure in

regard to the subsequent act in question and only the latter would adversely affect the person concerned. In accordance with the case-law referred to in paragraphs 47 and 48 above, therefore, an action for annulment cannot be brought before the Court against a Commission decision terminating the audit and validating the external auditor's conclusions by adopting the final report.

76 The applicant is incorrect to refer in that regard to an alleged administrative audit procedure. None of the financial regulations mentioned in paragraph 11 above contain provisions relating to audits of contracts financed by the EDF. Although that does not mean that the Commission is not permitted to carry out such audits itself, or ask an external auditor to carry out such an audit on its behalf, the fact remains that there is no question, in that hypothesis, of a special and distinct audit procedure, allegedly closed by a decision approving the audit report. The case-law referred to in paragraph 49 above is thus not relevant to the present case.

77 It follows from all the foregoing considerations that the application for annulment of the decision allegedly contained in the letter of 19 August 2008 is also inadmissible in so far as that letter concerns the 12 contracts concluded between the applicant and various ACP States and which were financed by the EDF, and that the application must therefore be dismissed in its entirety.

78 Thirdly, the conclusion that the application for annulment of the decision allegedly contained in the letter of 19 August 2008 is inadmissible both in so far as it concerns the 22 contracts mentioned in paragraph 1 above and in so far as it concerns the 12 contracts mentioned in paragraphs 14 and 18 above is not called into question by the argument put forward by the applicant in the document lodged on 1 December 2009 (see paragraph 35 above).

79 Essentially, the applicant claims that, whereas the contract between the Commission and the external auditor, annexed to that document, provides that the auditor is to carry out an 'audit' in accordance with 'international accounting standards', the Commission, subsequently and without formally amending the contract, permitted the

auditor to carry out only checks in accordance with an 'agreed-upon procedure'. The applicant claims that that fact confirms that the pleas put forward in the application are well founded and puts forward two new pleas alleging an infringement of 'the obligation of the impartiality of administrative action' and an abuse or misuse of powers.

80 Even if those claims are admissible and well founded, they do not prove that the letter of 19 August 2008 contained a decision against which an action for annulment could be brought before the Court. At very most, they suggest that the audit carried out by the external auditor at the Commission's request was unlawful. However, as has already been pointed out, that audit took place in a contractual context, from which it cannot be severed.

The application for damages

Arguments of the parties

81 The Commission contends that the allegedly damaging conduct on its part of which the applicant complains in its claim for damages concerns the fact that, by suspending certain payments, it did not correctly fulfil, or totally failed to fulfil, its obligations under the various grant contracts which it concluded. A reading of those parts of the application dealing with the allegedly unlawful conduct of the Commission, with the existence of a causal link between that conduct and the damage which the applicant allegedly suffered and with the extent of that damage confirms that conclusion.

82 According to the Commission, verification of the allegedly unlawful nature of the conduct complained of thus requires consideration of its rights and duties under the contracts in question. However, in the absence of a clause in those contracts giving

the Court jurisdiction to rule on the present dispute, such a consideration would be beyond the limits of the Court's jurisdiction. The Commission therefore considers that, by its claim for damages, the applicant is seeking to obtain a result that it can only obtain by bringing an action for breach of contract before the competent courts. The claim for damages is therefore inadmissible.

83 In its application, the applicant invokes, in support of its claim for damages, the Commission's failure to transmit rapidly its decision, adopted in November 2005, to suspend all payments to the applicant as well as the Commission's refusal to provide it with an explanation in that regard and to meet its representatives. That conduct lasted several months, until the Commission informed it by letter, in May 2006, of the aforementioned decision. According to the applicant, that conduct on the Commission's part is unlawful for the same reasons put forward in support of the application for annulment and also constitutes a breach of the principles of good administration and transparency on the part of the Commission.

84 With regard to the causal link between that Commission's conduct of which the applicant complains and the damage which it allegedly suffered and the extent of that damage, the applicant argues that, since it was unaware of the Commission's decision to suspend payments to it, it carried on with the realisation of several projects without modifying its operating structure and its spending programmes and, consequently, took on new 'debts' by reason both of the realisation of the other projects in which it took part and of its being involved in several contentious procedures. It also suffered 'very serious' non-material damage. In addition, the applicant raises the non-contractual liability of the Commission for conduct without fault.

85 In its observations on the plea of inadmissibility, the applicant claims that the Commission's argument regarding the inadmissibility of the claim for damages is based on a distortion of the contents of its application. It follows from a reading of the whole of that part of the application dealing with the claim for damages that the applicant is seeking compensation for the loss that it suffered by reason of the Commission's failure to inform it in good time of the decision to suspend all payments to it. The claim for damages is thus based on a breach, on the Commission's part, of the principles

of transparency and good administration and on the other grounds of illegality put forward in support of the application for annulment.

86 The fact that the applicant is seeking, by way of compensation for the material damage suffered, amounts clearly distinct from the payments which it could expect to receive under the contracts in question and that it is also claiming compensation for non-material damage confirms that the claim for damages is non-contractual in nature and is, consequently, admissible.

Findings of the Court

87 It must be pointed out, first, that, according to settled case-law, for the Community to incur non-contractual liability, within the meaning of the second paragraph of Article 288 EC, as a result of the unlawful conduct of its bodies, a set of conditions must be satisfied, namely, the unlawfulness of the alleged conduct of the institutions, the reality of the damage and the existence of a causal link between the alleged conduct and the damage complained of (Case 26/81 *Oleifici Mediterranei* v *EEC* [1982] ECR 3057, paragraph 16; Case T-175/94 *International Procurement Services* v *Commission*, paragraph 69 above, paragraph 44, and Case T-267/94 *Oleifici Italiani* v *Commission* [1997] ECR II-1239, paragraph 20).

88 Secondly, as is apparent from settled case-law, the Community can incur non-contractual liability in respect of unlawful acts only if three cumulative conditions are satisfied, namely that the alleged damage was actually suffered, there is a causal link between the damage and the act by the Community institutions, and the damage alleged was unusual and special (Case C-237/98 P *Dorsch Consult* v *Council and Commission* [2000] ECR I-4549, paragraphs 19 and 53, and the order of 20 March 2007 in Case C-325/06 P *Galileo International Technology and Others* v *Commission*, not published in the ECR, paragraph 76).

89 Thirdly and lastly, under the first paragraph of Article 21 of the Statute of the Court of Justice of the European Union, applicable to the procedure before the General Court by virtue of the first paragraph of Article 53 thereof, and Article 44(1)(c) of the Rules of Procedure, the application must state the subject-matter of the proceedings and a summary of the pleas in law on which it is based. That statement must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the application, if necessary without any further information. In order to ensure legal certainty and the sound administration of justice it is necessary, for an action to be admissible, that the basic legal and factual particulars relied on be indicated, at least in summary form, but coherently and intelligibly, in the application itself (orders in Case T-85/92 *De Hoe* v *Commission* [1993] ECR II-523, paragraph 20; and Case T-154/98 *Asia Motor France and Others* v *Commission* [1999] ECR II-1703, paragraph 49; and the judgment in Case T-277/97 *Ismeri Europa* v *Court of Auditors* [1999] ECR II-1825, paragraphs 28 and 29).

90 As regards a claim for compensation in respect of the loss allegedly suffered by reason of the Commission's suspension of all payments to the applicant, the latter must, in order to fulfil its abovementioned obligations, set out in its application the legal and factual particulars which give rise to the Commission's alleged obligation to make payments to it or, at very least, to inform it in good time of the decision to suspend payments.

91 Those details are needed, more than anything else, in order to permit the Court to ascertain whether the action actually deals with the non-contractual liability of the Community by reason either of an unlawful act or of a lawful act, or if in fact it deals with the contractual liability of the Community, in which case, as follows from the case-law referred to in paragraph 58 above, the Court has jurisdiction to hear the action only if the contracts at issue contain a clause conferring jurisdiction on it in regard to disputes arising from the performance of those contracts.

92 It must be stated that, although the applicant refers, in its application, to an alleged suspension of all payments to it, decided on by the Commission as early as November 2005, it does not specify the payments to which it would have been entitled in the absence of that suspension and, even less, whether entitlement to them arose from

the contracts concluded between it and the Commission or whether it arose directly from applicable provisions which were not cited elsewhere in the application. It follows that, as regards the claim for damages, the application does not meet the minimum requirements laid down in Article 44(1)(c) of the Rules of Procedure.

93 The fact that, in the application, the applicant raises solely the non-contractual liability of the Community and the alleged breach, by the Commission, of the principles of good administration and transparency does not cast doubt on those conclusions.

94 In a contractual dispute, the mere mention of legal rules which do not arise from a contract but which are binding on the parties does not alter the contractual nature of the dispute and, as a consequence, permit the party which relies on them to evade the jurisdiction of the competent court. If it were otherwise, the nature of the dispute and, consequently, the court having jurisdiction, would change according to the rules relied on by the parties, something which would run counter to the rules of the various courts governing jurisdiction *ratione materiae* (judgment of 20 May 2009 in Case C-214/08 P *Guigard* v *Commission*, not published in the ECR, paragraph 43).

95 Furthermore, the institutions are subject to obligations flowing from the general principle of sound administration in regard to the public only in the exercise of their administrative responsibilities. On the other hand, when the relationship between the Commission and the applicant is clearly contractual, the latter can complain, in regard to the Commission, only of breaches of the terms of the contract or of the law applicable to it (see, to that effect, the judgment of 3 June 2009 in Case T-179/06 *Commission* v *Burie Onderzoek en advies*, not published in the ECR, paragraph 118).

96 It follows from those considerations that the applicant cannot merely invoke the non-contractual liability of the Community and the alleged breach by the Commission of

the principles of sound administration and transparency in the application, but must specify the source, contractual or non-contractual, of the obligations which the Commission allegedly infringed when it decided to suspend all payments to the applicant and failed, for a long period of time, to inform the applicant of that suspension.

97 It follows from the foregoing that the claim for damages is inadmissible and must be dismissed.

98 That conclusion is not called into question by the argument put forward by the applicant in the document lodged on 1 December 2009 (see paragraph 35 above). That argument is irrelevant to the claim for damages since it concerns the audit carried out by an external auditor at the Commission's request and therefore relates to a period after that concerned by the claim for damages. According to the applicant's own statements, the Commission's alleged wrongful conduct ended with the letter of 3 May 2006 from EuropeAid informing the applicant that all payments to it had been suspended. However, the audit commenced only on 12 July 2006 (see paragraphs 21 and 23 above).

99 In any event, even if the application is to be understood as meaning that the payments covered by the suspension allegedly decided in November 2005 arose under the 34 contracts concerned by the audit ordered by the Commission, it must be pointed out, on the one hand, that, in regard to the 22 contracts concluded between the Commission and the applicant, mentioned in paragraph 1 above, an alleged breach, by the Commission, of its obligations under those contracts would cause the Commission to incur contractual liability, giving rise to a dispute which is contractual in nature and which is outside the jurisdiction of the Court in the absence of a clause conferring jurisdiction over that dispute on it.

100 On the other hand, with regard to the 12 contracts referred to in paragraphs 14 to 18 above, concluded between the applicant and certain ACP States and financed by the

EDF, it is true that the considerations set out in paragraphs 60 and 62 above cannot affect the additional remedies available to any person against the Commission under the procedures laid down in Article 235 EC and the second paragraph of Article 288 EC (Case 33/82 *Murri* v *Commission* [1985] ECR 2759, paragraph 35).

101 However, it has been decided that, where a contractual dispute between an ACP State and the other party to a contract financed by the EDF has not been settled earlier on an amicable basis or by one of the procedures laid down in the contract, such as arbitration, the other party to the contract is unable to establish that the Commission's action in regard to that dispute caused it to sustain loss distinct from the loss in respect of which it ought to have sought compensation from the ACP State in question in accordance with appropriate procedures. In such a case, an action for damages brought against the Commission under Article 235 EC and the second paragraph of Article 288 EC must be dismissed inasmuch as the applicant has failed to establish the existence of a causal link between the conduct on the part of the Commission which is being complained of and the loss allegedly suffered (see, to that effect, *Murri* v *Commission*, paragraph 100 above, paragraphs 36 to 39, and *International Procurement Services* v *Commission*, paragraph 69 above, paragraphs 58 to 61).

102 That is precisely the case here in regard to the 12 contracts mentioned above which were concluded between the applicant and various ACP States. According to the applicant's own statements, the loss to which the claim for damages relates arises from the suspension of payments to it of amounts which, by the conclusion of the contracts, the ACP States had undertaken to pay if all the conditions laid down in regard to such payments were fulfilled.

103 However, it was for the applicant, and the applicant may still do so if it considers itself entitled, to claim from the ACP States concerned, in accordance with appropriate procedures, compensation for any loss resulting from an alleged breach, by those States, of their obligations under the contracts in question. Consequently, even supposing that the claim for damages could be understood as seeking compensation for loss allegedly suffered by the applicant as a result of suspension of the payments provided for in the 12 contracts in question, it must be dismissed as manifestly unfounded in law.

104 It follows from all of the foregoing considerations that the claim for damages must also be rejected and that, as a consequence, the action must be dismissed in its entirety. Under those circumstances, there is no need to order the measures sought by the applicant in its applications of 2 July and 30 September 2009 (paragraphs 32 and 34 above), regardless of their exact legal classification, that is to say, whether they are measures of organisation of procedure or measures of inquiry. According to the applicant, the purpose of those measures is to provide further details as to the nature of the instructions given by the Commission to the external auditor tasked with carrying out the audit, a question which is irrelevant to the resolution of the dispute.

Costs

105 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 form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (Fifth Chamber)

hereby orders:

1. The action is dismissed.

2. Alisei is ordered to pay the costs.

Luxembourg, 8 February 2010.

E. Coulon — Registrar

M. Vilaras — President