OPINION OF ADVOCATE GENERAL LÉGER

delivered on 17 September 2002 [1]

1. This appeal has been lodged by the Commission of the European Communities against the judgment of the Court of First Instance of the European Communities of 14 December 2000, [2] which annulled the Commission's decision effecting set-off against a private body.

2. The Court of First Instance took the view that the Commission's right to effect set-off was subject to the condition that it should ascertain whether the operation was such as to jeopardise activities financed by the Community. The Commission disputes the legality of that condition.

3. The case has been brought in the context of a dispute between the Commission and the Council of European Municipalities and Regions. [3]

I — Facts giving rise to the dispute

4. The CEMR is an association constituted under French law which brings together national associations of local and regional authorities in Europe.

5. On 11 February 1994 and 25 April 1995 the CEMR concluded three technical assistance contracts with the Commission. [4] Article 8 of the contracts states that they are governed by Belgian law and Article 9 confers jurisdiction on the civil courts of Brussels (Belgium) for any dispute arising between the parties.

6. In January 1997 the Commission carried out an audit of the CEMR's accounts pursuant to the MED URBS contracts and concluded that the CEMR owed it the sum of ECU 195 991 by virtue of those contracts. The Commission made out a debit note for that amount on 30 January 1997 and, by letter of 7 February 1997, requested repayment from the CEMR.

1 — Original language: French.

2 — Case T-105/99 *CEMR* v *Commission* [2000] ECR II-4099, 'the contested judgment'.

3 — 'CEMR'.

4 — 'The MED URBS contracts'.

7. In various letters the CEMR disputed the Commission's position and refused to pay the sum claimed.

8. On 3 December 1998 the Commission gave the CEMR notice to repay the said sum and also mentioned the possibility of recovering it 'by set-off against the sums [payable to the CEMR] by way of any Community contribution, or even by legal action, in respect of both the principal sum and interest'. [5]

9. In reply, the CEMR expressly denied the real and undisputed nature of its alleged debt and objected to set-off.

10. By letter of 15 February 1999, [6] the Commission stated that, in its opinion, its claim was indeed real and undisputed, of an ascertainable amount and immediately payable, enabling set-off. It therefore informed the CEMR of its decision 'to recover the amount of EUR 195 991 by set-off against the sums... payable by way of Community contributions' relating to certain Community activities. [7] The Commission added that 'the payments are to be regarded as received by the CEMR with the obligations arising from them, whether the payment constitutes an advance, an interim payment or even a final payment'.

11. On 20 April 1999 the CEMR brought proceedings before the Tribunal de Première Instance (Court of First Instance), Brussels, in accordance with the jurisdiction clause in the MED URBS contracts, in order to challenge the validity of the alleged debt owed to the Commission and to show, for the same reason, that the conditions required under Belgian law for extinguishing contractual obligations by way of set-off were not satisfied.

II — Procedure before the Court of First Instance

12. By application lodged on 28 April 1999, the CEMR also brought an action before the Court of First Instance of the European Communities, seeking the annulment of the contested decision in so far as it sets off the sum of EUR 195 991, which is said to be owed to the Commission under the MED URBS contracts, against the sums

5 — The Commission's letter CBI-XIX/C1/D(98)36805 of 3 December 1998 (Annex 7 to the application lodged by the CEMR before the Court of First Instance in Case T-105/99).

6 — 'The contested decision'.

7 — 'The disputed activities'.

owed by it in respect of the following programmes and documents: [8]

— EUR 39 447.39 in respect of 'regional seminars in the target 2 zones';

— EUR 50 000.00 in respect of the 'Subvention Programme 1998';

— EUR 82 800.00 in respect of 'Declaration B4-3040/98/208/jnb/d3', and

— EUR 23 743.61 in respect of 'Agreement SOC 98 101185 05D05'.

13. In support of its application, the CEMR put forward four grounds of annulment, pleading respectively: (1) lack of a legal basis for the contested decision; (2) breach of the principle of legal certainty; (3) breach of the principle of the protection of legitimate expectations, and (4) breach of the obligation to state reasons laid down in Article 190 of the EC Treaty (now Article 253 EC).

8 — 'The contested sums'.

III — The contested judgment

14. With its first plea in law, the CEMR argued that there was no legal basis for the contested decision. In particular, it contended that the set-off mechanism was not a general principle of Community law [9] and that, in any case, the conditions for applying set-off (namely, that the claims are real and undisputed, of an ascertainable amount and immediately payable) were not satisfied in the present case. [10]

15. The Court of First Instance allowed the first plea in law for the following reasons:

'54 It should be borne in mind, first, that the object of the present action is the annulment of the decision of the Commission, contained in its letter of 15 February 1999 to [the CEMR], to effect set-off between their mutual claims and, second, that the parties conferred jurisdiction on the civil courts of Brussels in respect of any dispute over the MED URBS contracts. Accordingly, the Court must examine only the legality of the abovementioned decision in the light of its effects relating to the failure actually to pay the contested sums to [the CEMR].

55 Next, there are at present under Community law no express rules on the

9 — See paragraphs 29 to 31 of the contested judgment.

10 — See paragraphs 32 to 37 of the contested judgment.

right of the Commission, as the institution responsible for the implementation of the Community budget under Article 205 of the EC Treaty (now Article 274 EC), to effect set-off against entities to which Community funds are owed but which also owe sums of Community origin.

56 However, set-off in relation to Community funds is a legal mechanism whose application was regarded by the Court of Justice as consistent with Community law in [the judgments in Case 250/78 *DEKA* v *EEC* [1983] ECR 421, Case 125/84 *Continental Irish Meat* [1985] ECR 3441, and Case C-132/95 *Jensen and Korn- og Foderstofkompagniet* [1998] ECR I-2975].

57 That case-law of the Court of Justice does not contain, however, all the elements needed to resolve the present case.

58 Moreover, it would be preferable for the issues raised by set-off to be dealt with under general provisions laid down by the legislature and not by individual decisions adopted by the Community judicature in the context of disputes which come before it.

59 In the absence of express rules on the subject and in order to determine whether the contested decision has a legal basis, it is necessary to look to the rules of Community law applicable to the activity of the Commission and to refer to the abovementioned case-law. In that context, it is necessary, in particular, to take account of the principle of the effectiveness of Community law to which that case-law refers (*Jensen*, paragraphs 54 and 67) and the principle of sound financial management.

60 The principle of the effectiveness of Community law implies that the funds of the Community must be made available and used in accordance with their purpose.

61 Consequently, in the present case, before effecting set-off, the Commission was required to assess whether, in spite of that operation, the use of the funds in question for the purposes prescribed and the completion of the activities which had justified the granting of the contested sums remained assured.

62 In that regard, it should be borne in mind that set-off is a method of extinguishing reciprocal obligations. In this case, set-off would have extinguished, according to the Commission, the claim on which it relies as against the CEMR in respect of the MED URBS contracts and, at least partially, that of the CEMR *vis-à-vis* the institution in respect of Community subsidies which were to be paid to it in connection with the activities at issue. It must also be observed that, in the letter of 15 February 1999, the Commission stated that the payments made by means of set-off were to be regarded "as received by the CEMR with the obligations arising from them". Having done that, the Commission expressed its requirement for [the CEMR] to fulfil its obligation to carry out the activities at issue.

63 However, in the absence of the actual payment of the sums intended for the fulfilment of that obligation, it is clear that those sums would not be used for their purpose and that accordingly the activities at issue were in danger of not being carried out, which is contrary to the effectiveness of Community law and, more specifically, to the effectiveness of the decisions granting the contested sums.

64 The Commission's position implied that the CEMR still had access to the funds which were awarded under the MED URBS contracts and are claimed by the Commission, and that, once set-off had been effected, the CEMR was going to be able to use those funds in order to carry out the activities at issue.

65 However, it is clear that, if the CEMR no longer had access to the abovementioned funds, it could no longer finance the carrying out of those activities.

66 Accordingly, the contested decision had the effect of moving the problem of the recovery of an alleged debt owed to the Commission in connection with the performance of the MED URBS contracts to the carrying out of the activities at issue, which correspond to a Community interest, now threatened by set-off.

67 The contested sums were not intended to pay the CEMR's debts, but for carrying out activities for which those sums had been allocated. It is necessary, in this respect, to stress that in the present case, unlike that which resulted in the *Jensen* judgment (paragraphs 38 and 59), in which the aim of the regulation in question was to guarantee a certain income for farmers, the contested sums could be used only to carry out the activities for the purpose of which those sums were intended.

68 In this respect, in spite of the statements made by its representative at the hearing, the Commission has not been able to show that before effecting set-off it had, at the very least, assessed the risk which actual non-payment of the contested sums to [the CEMR] posed for the carrying out of the corresponding activities.

69 As regards the principle of sound financial management, in accordance with which the Commission must implement the Community budget under Article 205 of the Treaty, its application in this case confirms the analysis above.

70 As regards the recovery of the debt which [the CEMR] has *vis-à-vis* the Commission, it should be pointed out that, since the CEMR was not insolvent, that institution could have sought payment from it before the Belgian court with jurisdiction.

71 Furthermore, in order to guarantee the proper use of the contested sums, if the Commission had had doubts about the CEMR's management of the Community funds, it could have contemplated the suspension, as a preventive measure, of the payment of those sums to that association as it did in respect of other funds which were also owing to the CEMR.

72 In that way, the Commission could have, first, brought about the recovery of the debt in relation to the MED URBS contracts and, second, ensured that the contested sums, in the event of payment to the CEMR, would in fact be used in order to carry out the activities at issue.

73 Finally, the principle of sound financial management must not be reduced to a purely accounting definition which considers as essential the mere possibility of regarding a debt as formally paid. On the contrary, a correct interpretation of that principle must include a concern for the practical consequences of the acts of financial management, using as a reference point, in particular, the principle of the effectiveness of Community law.

74 It follows from all the foregoing that the Commission was not entitled to adopt the contested decision without first ensuring that it did not pose a risk for the use of the funds in question for the purposes for which they were intended and for the carrying out of the activities at issue, when it could have acted otherwise without jeopardising the recovery of [the CEMR's] alleged debt to it and the proper use of the contested sums.'

16. Consequently the Court of First Instance annulled the contested decision without examining the other pleas and arguments put forward by the CEMR.

IV — The appeal

17. The Commission brought the present appeal by application lodged at the Registry of the Court of Justice on 21 February 2001. The Court is asked to set aside the contested judgment and to order the CEMR to pay the costs of both stages of the action.

18. In support of its claims, the Commission relies on three pleas in law:

— breach of the general principle of Community law authorising set-off;

— breach of the principle of the effectiveness of Community law, and

— breach of the principles of sound financial management and the sound administration of justice.

19. Before examining the different pleas in law (part C), it will be necessary to consider the parties' submissions regarding the law applicable to the dispute (part A). It will also be necessary to identify the rule of Community law which must guide the Court in determining the appeal (part B).

A — *The law applicable to the dispute*

20. In this case the contested set-off relates to debts which are governed by two different legal systems. The Commission's claim [11] originates in the MED URBS contracts, which are governed by Belgian law. On the other hand, the CEMR's claim arises from four decisions of the Commission granting the CEMR Community finance for certain activities in the field of social policy and economic and social cohesion. [12] Although the documents in the file give little information on this point, it is common ground that the finance conditions are governed by Community law. [13]

11 — It must be borne in mind that, before both the Court of Justice and the Court of First Instance, the CEMR disputed the validity of the Commission's claim under the MED URBS contracts. I shall revert to this point later on (see point 119 et seq.). For the moment, however, for the sake of convenience I shall refer to 'the Commission's claim' and 'the debt owed to the CEMR' without pointing out every time that the claim or the debt is disputed.

12 — Annexes 10 to 13 of the application lodged by the CEMR before the Court of First Instance in Case T-105/99.

13 — See the appeal (paragraph 42) and statement in defence (paragraph 6).

21. That being so, the parties to the action have examined the question of the law applicable to the dispute. [14] They have put forward various arguments to determine whether the validity of the contested decision must be assessed by reference to Community law or Belgian law.

22. The CEMR contends that the Court must apply Belgian law and Community law simultaneously. According to the CEMR, set-off is a means of extinguishing *mutual* obligations. This means that, if one of the obligations is governed by national law and the other by Community law, the set-off must fulfil the conditions prescribed by the two legal systems concerned. In the present case, the contested set-off will therefore be permitted only if the conditions laid down by Belgian law and Community law are fulfilled.

23. The Commission's position is more ambiguous. It observes that both Community law and Belgian law recognise the mechanism of set-off and that its application depends on identical conditions in both systems. Consequently, according to the Commission, there is nothing to prevent the operation in question. However, the Commission adds that in this case it applied the conditions laid down by Belgian law. Therefore the Commission appears to take the view that the legality of the contested decision must be examined by reference to Community law and Belgian law simultaneously.

24. For my part, I consider that these differing arguments are unfounded.

25. It must be observed that, under Article 173 of the EC Treaty (now, after amendment, Article 230 EC), actions may be brought for the annulment of acts of the institutions other than recommendations and opinions. It has consistently been held [15] that an action for annulment is available in the case of all measures adopted by the institutions which are intended to have binding legal effects capable of affecting the interests of the applicant. In this connection, the form in which such acts are cast is immaterial as regards the question whether they are open to challenge. [16]

26. In the present case the contested decision is an act open to challenge within

14 — The only parties to the present action are the CEMR and the Commission. The Member States and the other Community institutions have not exercised their right to intervene before the Court of First Instance or the Court of Justice under the first paragraph of Article 37 of the EC Statute of the Court of Justice.

15 — See, for example, the judgments in Case 22/70 *Commission* v *Council*, known as 'the *AETR* case' [1971] ECR 263, paragraph 42; Joined Cases C-133/87 and C-150/87 *Nashua Corporation and Others* v *Commission and Council* [1990] ECR I-719, paragraph 9; Case C-47/91 *Italy* v *Commission* [1992] ECR I-4145, paragraph 19; and Case C-325/91 *France* v *Commission* [1993] ECR I-3283, paragraph 9.

16 — See, for example, the judgment in Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 9.

the meaning of the case-law cited above. The decision cannot be dissociated from previous decisions of the Commission whereby it agreed to grant Community finance to the CEMR.

With the contested decision, the Commission chose a particular method of extinguishing its obligations. The Commission states that its debt arising from the financing decisions has been extinguished by the effect of set-off, so that it will not make actual physical payment of the sums due to the CEMR. On the other hand, the obligations arising from the receipt of those sums will have to be properly fulfilled. Accordingly the contested decision limits the CEMR's right to dispose freely of the amounts payable by way of Community contributions while maintaining the obligations arising from the receipt of those amounts. In those circumstances, the contested decision produces binding legal effects likely to affect the CEMR's interests. [17] It is therefore an act which may become the subject of an application for annulment before the Court of Justice or the Court of First Instance. [18]

27. However, it seems clear to me that the Community courts cannot apply the domestic law of a Member State in the context of an action for annulment. The grounds of annulment are listed exhaustively in Article 173 of the Treaty and all form part of Community law. In this connection it may also be noted that the refusal to assess the validity of Community acts by reference to national law is one of the foundations of the Court's case-law relating to fundamental rights.

28. As we know, following the judgments in the cases of *Stork* v *High Authority* [19] and *Sgarlata and Others* v *Commission*, [20] the Court had to reply to arguments to the effect that acts of the institutions are illegal if they disregard fundamental rights guaranteed by the national legal systems. In the judgment in the case of *Internationale Handelsgesellschaft*, [21] the Court rejected those arguments for the following reasons:

'Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law.

The validity of such measures can only be judged in the light of Community law.

17 — See also, by analogy, the judgment in Case 44/81 *Germany* v *Commission* [1982] ECR 1855, paragraphs 4 to 8.

18 — The situation would obviously be different if the Commission's debt also arose from a contract. In that case, set-off would take place in the context of a purely contractual relationship and the Community courts would have jurisdiction to take cognisance of it only if the contract included an arbitration clause within the meaning of Article 181 of the EC Treaty (now Article 238 EC).

19 — Case 1/58 [1959] ECR 17, 26.

20 — Case 40/64 [1965] ECR 215, 227.

21 — Case 11/70 [1970] ECR 1125, paragraphs 3 and 4.

In fact, the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called in question.

Therefore the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure.

However, an examination should be made as to whether or not any analogous guarantee inherent in Community law has been disregarded.

In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice.'

29. I think the same reasoning can be applied to the present case. If the validity of the contested decision were to be judged by reference to Belgian law, the uniformity and efficacy of Community law would be seriously jeopardised. Such an approach would also have the effect of destroying the equality of individuals before the law because the answer to the question whether the Commission could, and on what conditions, set off debts would depend on the national law to which one of the debts in question was attached.

30. Therefore I think the legality of the contested decision must be judged solely by reference to Community law. The Court of First Instance (in relation to the action for annulment) and the Court of Justice (in relation to the present appeal) cannot apply Belgian law to judge the legality of the contested decision. [22]

31. However, this conclusion entails ascertaining the rule of Community law which must guide the Court in determining the appeal.

B — *The rule of Community law for guiding the determination of the appeal*

32. First of all, set-off is a means of extinguishing obligations. It has the effect

22 — On the other hand, the question whether the Commission has a claim under the MED URBS contracts is a matter of Belgian law for which the civil courts of Brussels have exclusive jurisdiction, in accordance with Articles 8 and 9 of the contracts (see point 119 et seq. below).

of extinguishing simultaneously separate obligations existing between two persons who are debtors of each other, to the extent of the smaller debt. Depending on the legal system in question, set-off may be legal (where it takes place by the sole effect of law), contractual (where it takes place by the will of the parties) or judicial (where it is ordered by a court).

33. As it stands at present, Community law does not expressly regulate set-off. [23] It contains no express rules on the right of the Commission, as the institution responsible for the implementation of the Community budget, to effect set-off against persons (natural or legal) to whom Community funds are owed but who also owe money to the Community. [24]

34. The question which arises is therefore whether there is a general principle of Community law authorising set-off. The parties to the action differ on this point.

35. The CEMR considers that in Community law there is no general principle authorising set-off. [25] In support of its conclusion that the Court has never recognised the existence of such a principle, the CEMR relies on a discussion of the case-law, namely the judgments in the cases of *DEKA* v *EEC* and *Continental Irish Meat*, cited above, and *Jensen*.

36. The Commission puts forward the opposite argument. [26] It observes that most national legal systems recognise the principle of set-off and require the same conditions for applying it. In addition, the Commission considers that the judgments in *DEKA* v *EEC*, *Continental Irish Meat* and *Jensen* expressly recognised the existence and usefulness of set-off in the Community legal system. Consequently that principle is one of the general principles of law which apply even in the absence of an express provision.

37. For my part, I consider that existing case-law does not justify the conclusion that the Court has already expressly recognised the existence of a general principle of law authorising set-off. The only judgment concerning the Commission's right of set-off against a private person is the judgment in the case of *DEKA* v *EEC*. The *Continental Irish Meat* and *Jensen* judgments do not deal with the question directly,

23 — See the *Jensen* judgment, paragraph 41.

24 — The contested judgment, paragraph 55.

25 — See the contested judgment, paragraphs 29 to 31, and the statement in defence, paragraphs 22 to 30.

26 — See the contested judgment, paragraphs 39 to 49, and the appeal, paragraphs 7 to 27.

although they contain useful pointers for the present dispute. [27]

38. The case of *DEKA* v *EEC* originated in a dispute arising from the abolition of certain production refunds for maize gritz. On 4 October 1979 [28] the Court had ordered the European Economic Community to pay compensation for the damage suffered by DEKA (formerly Contifex Getreideprodukte GmbH & Co. KG) as a result of the abolition of the production refunds for maize gritz used by the brewing industry. At the same time DEKA was to repay to the German authorities certain export refunds wrongly paid under Community legislation. The German authorities had assigned their claim to the Commission to enable it to set that claim off against the compensation payable by the Commission. DEKA objected to the set-off on the ground that it had assigned its own claim to another company and brought an action for compensation.

The Court observed that 'the Community rules on production or export refunds may give rise not only to debts which traders may raise against the authorities entrusted with administering the system, but also to claims, directed against traders, for the reimbursement of wrongly paid sums... . Those rules may thus give rise, as between authorities and traders, to reciprocal and even related claims which are an appropriate subject for set-off'. [29]

In view of the circumstances of that particular case, the Court found that the assignment by DEKA was fraudulent and could not be pleaded against the Commission. [30] Therefore it found that '[DEKA's] claim for compensation is extinguished by way of set-off' [31] against the Commission's claim for repayment. Consequently the Court dismissed DEKA's action for compensation.

39. This judgment shows that, although the Court recognised the Commission's right of set-off against a private person, the Court did not expressly accept that there was a general principle of Community law auth-

27 — In the *Continental Irish Meat* judgment, the Court found that the role of the Irish intervention agency when it paid monetary compensatory amounts upon importation, owed by another State, was no different from its role when it recovered compensatory amounts upon exportation. The purpose of the Court's judgment was to enable the national court to find that the conditions for set-off laid down by Irish law had been fulfilled. The *Jensen* judgment concerned the national authorities' right of set-off. The national court asked whether Community law precluded a Member State from setting off an amount payable to it by way of VAT against aid due to a private individual under Council Regulation (EEC) No 1765/92 of 30 June 1992 establishing a support system for producers of certain arable crops (OJ 1992 L 181, p. 12). This judgment is discussed in points 84 to 87 of the present Opinion.

28 — See the judgment in Joined Cases 241/78, 242/78 and 245/78 to 250/78 *DGV and Others* v *Council and Commission* [1979] ECR 3017.

29 — *DEKA* v *EEC*, paragraph 13.

30 — Ibid., paragraphs 15 to 19.

31 — Ibid., paragraph 20.

orising set-off. Above all, the Court did not set out the circumstances and conditions under which debts could be set off.

40. Consequently I think that the premiss laid down by the judgment in *DEKA* v *EEC* must be confirmed by an examination of national laws.

1. The existence of a general principle of Community law authorising set-off

41. The role which has fallen to the general principles of law is well known. The existence of those principles is elicited by the courts from previous judgments in order to fill gaps in the legal system and to establish principles which are unwritten, but sometimes extremely important. [32] The order in which principles developed in this way rank in the hierarchy of rules may vary because some are regarded as constitutional in nature, while others are of the nature of legislation or even delegated legislation. [33]

42. In the Community legal system, the Court of Justice has recourse to general principles to supplement Community law where it is silent on certain problems which national legal systems have encountered and resolved long ago. [34] Accordingly, in the judgment in the case of *Algera and Others* v *Common Assembly*, [35] the Court observed that the problem of withdrawing individual administrative measures was 'a problem... which is familiar in the case-law and learned writing of all the countries of the Community, but for the solution of which the Treaty does not contain any rules'. The Court held that, unless it was 'to deny justice', it was 'obliged' to solve the problem. [36]

43. The method used to establish the existence of a general principle of Community law is also settled. The Court carries out an analysis of comparative law. It compares the law of the different Member States [37] and ascertains whether there is reasonable degree of convergence between national principles. [38] The Court may also refer to the history of the principle to emphasise that '[its] origins may be traced back to Roman law'. [39] As a general rule, it adopts a progressive approach [40] and seeks guid-

32 — J.-P. Puissochet, 'La Cour de justice et les principes généraux du droit communautaire', *La protection juridictionnelle des droits dans le système communautaire*, Bruylant, Brussels, 1997, p. 3.

33 — Ibid.

34 — H. Kutscher, 'Méthodes d'interprétation vues par un juge à la Cour', *Rencontre judiciaire et universitaire, 27-28 septembre 1976*, Luxembourg, 1976, p. I-26.

35 — Joined Cases 7/56 and 3/57 to 7/57 [1957] ECR 39, 55.

36 — Ibid.

37 — See, for example, the judgment in *Algera and Others* v *Common Assembly*, cited above, pp. 55 and 56, and the judgment in Case 32/62 *Alvis* v *Council* [1963] ECR 49, 55.

38 — P. Pescatore, 'Les droits de l'homme and l'intégration européenne', *Cahiers de droit européen*, 1968, p. 654.

39 — See the judgment in Case 23/68 *Klomp* [1969] ECR 43, paragraph 13.

40 — See the Opinions of Advocate General Lagrange in Case 14/61 *Hoogovens* v *High Authority* [1962] ECR 253, 284, and of Advocate General Roemer in Case 18/70 *Duraffour* v *Council* [1971] ECR 515, 533.

ance from changes taking place in the Member States.[41] When the Court establishes the existence of a general principle of law, the failure to take account of that principle is an 'infringement of the Treaty or of any rule of law relating to its application' within the meaning of Article 173 of the Treaty.[42]

44. In the context of the *Danværn Production*[43] case, I had occasion to carry out a comparative examination of national systems of law in relation to the concept of set-off. I concluded that, globally, three 'families' of national legal systems could be distinguished in that connection as follows:[44]

— legal systems adopting a concept based on statutory set-off.[45] Under these systems, set-off takes place automatically where certain conditions are fulfilled: the debts must be mutual, fungible, of an ascertainable amount and immediately payable. If one of these conditions is not satisfied, set-off may nevertheless take effect if the parties agree (contractual set-off) or if it is ordered by a court (judicial set-off);

— legal systems adopting a concept of set-off by declaration of one party.[46] On this basis, set-off is effected by a declaration of intention sent by one of the debtors to the other. For this to be possible, the debts must be mutual, fungible and immediately payable. They are not required to be ascertainable, as in the case of statutory set-off, and

— systems providing for set-off ordered by a court.[47] These systems allow set-off in the strict sense (extinguishment of mutual debts to the amount of the smaller of the two) and also recognise the principle that the defendant may defer settlement of all or part of his debt until judgment is given on his own claim.

45. It is clear from this that all the Member States recognise the principle of set-off. Moreover, 13 of them[48] accept that set-off

41 — H. Kutscher, cited above, p. I-27.

42 — See the judgment in Case 112/77 *Töpfer* v *Commission* [1978] ECR 1019, paragraph 19.

43 — Case C-341/93 [1995] ECR I-2053, points 27 to 31 of my Opinion.

44 — For the purposes of the present case, I have added to my Opinion some observations on the law of certain countries which were not considered in the *Danværn Production* case cited above. The systems in question are those of Austria, Spain, Greece and Luxembourg.

45 — Belgium, Spain, France, Greece, Italy, Luxembourg and Portugal.

46 — Germany, Austria, Denmark, Finland, the Netherlands, Norway and Sweden.

47 — England, Scotland and Ireland.

48 — All save Ireland and the United Kingdom.

may be effected without court intervention. It takes place merely by operation of law or by the intention of the parties. The 13 Member States likewise require the same conditions for the application of set-off, namely reciprocity, fungibility and immediate payability. Seven of the thirteen [49] adopt a concept based on statutory set-off and require an additional condition, namely, that the amount of the debts must be ascertainable.

46. However, these particulars are not sufficient to resolve the problems raised by the present case. The foregoing summary relates only to the conditions for set-off between private persons. The present dispute concerns the conditions under which a *public authority* (the Commission) can set off debts as against a private person (the CEMR). Consequently it is necessary to continue the examination of national systems of law on that point.

47. According to my information, all the Member States except Ireland and the United Kingdom recognise the principle that a public authority may set off debts as against a private person. However, the approach taken by the national legal systems differs considerably from one Member State to another.

48. In certain Member States [50] the rules applicable are those of civil law, with the addition of special supplementary conditions. In one other State [51] the civil law rules are not mandatory and apply only if no specific provisions are made for a particular matter. Finally, in other Member States, [52] the civil law rules are not applicable, so that set-off is precluded unless it is expressly authorised by specific provisions. In that case, the special conditions borrow extensively from the conditions of general law or refer to them.

49. Set-off is often subject to more restrictive conditions where a public entity is involved. As a general rule, most national legal systems [53] require the debt to be real and undisputed, estimated in money and immediately payable (not subject to a suspensory period). However, some States lay down additional conditions. Accordingly, in spite of the principle that the State is an indivisible person, Belgium, France and Luxembourg require the two debts to be owed to and by the same authority or ministry. By contrast, this requirement does not exist in the legal systems of Germany, Austria, Finland and Greece, where the fact that two different authorities are involved does not preclude set-off. In addition, the

49 — Belgium, Spain, France, Greece, Italy, Luxembourg and Portugal.

50 — Germany, Austria, Denmark, France, Greece, Luxembourg and the Netherlands.

51 — Spain.

52 — Italy, Portugal and Sweden.

53 — Germany, Austria, Belgium, Denmark, Spain, Finland, France, Greece, Luxembourg and the Netherlands.

French and Luxembourg legal systems require the two debts to be of the same legal nature, whereas in Greek law it is immaterial whether the legal relationship on which the debts are based is the same or similar. Finally, of the States which authorise set-off, some exclude it in the area of tax [54] or where a debt owed to a private individual is exempt from seizure or attachment. [55]

50. It follows from what has been said that, although almost all the Member States recognise that a public authority may set off debts as against a private person, the detailed rules for applying set-off vary considerably from one State to another.

51. However, I do not think these differences are such as to prevent the Court from recognising the existence of a general principle of Community law. [56]

52. It has consistently been held that, to recognise the existence of a general principle of law, the Court does not require the rule to exist in all the national legal systems. Accordingly, in the joined cases of *Kampffmeyer and Others* v *Commission and Council*, [57] the Court accepted the possibility of an action for liability based on future damage, although such an action existed in only some of the Member States. [58] The Court merely observed that this possibility existed in 'the majority, if not all' the national legal systems. [59] Likewise the fact that the scope and the conditions for applying the rule vary from one Member State to another has no influence. In the judgment in the case of *AM & S Europe* v *Commission*, [60] the Court recognised the existence of a principle ensuring the confidentiality of communications between lawyers and their clients, although 'its scope and the criteria for applying it' differ considerably from one Member State to another. The Court found that the principle was 'generally recognised' and that the national legal systems revealed the existence of 'common criteria'. [61]

53. In the present case, I think the different conditions are fulfilled. We have found that 13 out of 15 Member States [62] recognised

54 — In Belgium and the Netherlands set-off is excluded where the mutual debts of the State and private individuals arise from taxes or duties.

55 — Germany, Belgium, Denmark, Finland, France, Luxembourg and the Netherlands.

56 — In relation to fundamental rights, see my Opinion in Case C-353/99 P *Council* v *Hautala* [2001] ECR I-9565, point 69.

57 — Joined Cases 56/74 to 60/74 [1976] ECR 711.

58 — See the Opinion of Advocate General Reischl, ibid., ECR 752 and 753.

59 — See the *Kampffmeyer* judgment, cited above, paragraph 6. See also the judgment in Case 17/74 *Transocean Marine Paint Association* v *Commission* [1974] ECR 1063, paragraph 15, in which the Court recognised the existence of a general rule that 'a person whose interests are perceptibly affected by a decision taken by a public authority must be given the opportunity to make his point of view known,' although that rule did not exist in all the Member States (see the Opinion of Advocate General Warner, ibid., ECR 1089 and 1090).

60 — Case 155/79 [1982] ECR 1575, paragraphs 18 to 27.

61 — Ibid., paragraphs 19 and 21.

62 — Germany, Austria, Belgium, Denmark, Spain, Finland, France, Greece, Italy, Luxembourg, the Netherlands, Portugal and Sweden.

the principle that a public authority may set off debts as against a private individual. Furthermore, in 10 of those States,[63] the right of set-off is subject to minimum identical conditions, namely that the debts are real and undisputed, can be ascertained and are immediately payable. The comparative study therefore shows that, in accordance with the case-law, the principle is 'generally recognised'[64] and that 'apart from these differences... , there are to be found in the national laws of the Member States common criteria'.[65]

54. This conclusion is confirmed in the argument put forward by the different Member States which intervened in the *Jensen* case. In that case, which concerned specifically the right of a (national) public authority to effect set-off, the seven intervening governments[66] contended that 'the universal right, in the Member States' legal systems, to set-off... should be considered to give rise to a general principle of Community law in its favour'.[67]

55. Consequently I think that the conditions required for recognising the existence of a general principle of Community law are fulfilled in this case.

56. Moreover, the recognition of a general principle authorising set-off would enable the Commission to benefit from the advantages of that mechanism.[68] In essence, set-off would have three sets of advantages.

57. First, it would offer a genuine guarantee of payment to the institution responsible for the implementation of the Community budget. Where the Commission is simultaneously the debtor and the creditor of a private trader, set-off enables it to recover (all or part) of the amount owed to it without being exposed to the risk of the debtor's insolvency. In the judgment in the case of *DEKA* v *EEC*, the Court recognised, moreover, that 'in the case of an insolvent trader, such a set-off may in fact constitute the only practicable way open to the authorities to recover the wrongly paid sums'[69] under Community law.

63 — Germany, Austria, Belgium, Denmark, Spain, Finland, France, Greece, Luxembourg and the Netherlands.

64 — See the judgment in the case of *AM & S Europe* v *Commission*, cited above, paragraph 19.

65 — Ibid., paragraph 21.

66 — Denmark, Ireland, Finland, France, Greece, Sweden and the United Kingdom.

67 — See the Opinion of Advocate General Fennelly, point 23.

68 — For the advantages of set-off in civil law, see H. & L. Mazeaud and J. Mazeaud, *Leçons de droit civil*, Paris, ed. Montchrestien, 1978, sixth ed., Part II, Vol. I (paragraph 1145); G. Ripert and J. Boulanger *Traité de droit civil*, Paris, Librairie générale de droit et de jurisprudence R. Pichont and R. Durand-Auzias, 1957, Part II (paragraph 1971); G. Baudry-Lacantinerie, *Traité théorique et pratique de droit civil*, Paris, Librairie de la société du recueil J.-B. Sirey et du Journal du palais, 1908, third ed., Part III, Vol. XIV (paragraphs 1802 et seq.); and H. De Page, *Traité élémentaire de droit civil belge*, Bruylant, Brussels, 1976, third ed., Part III (paragraph 617).

69 — Paragraph 14.

58. Secondly, set-off would avoid the necessary costs of the forced recovery of debts owed to the Community. As we know, at present, when the Commission wishes to recover a debt owed by a private trader, it has to use the national authorities to enforce recovery. This procedure gives rise to numerous costs because it necessitates the assistance of the persons competent for that purpose (lawyers, national court, bailiffs, etc.). These costs could be substantially reduced if the Commission had a right of set-off as against its debtor.

59. Thirdly, by its very nature, set-off facilitates and shortens payment transactions. It avoids a double transfer of funds and therefore reduces the drawbacks of making a transfer (formalities, bank charges, risks, etc.). It may also be noted that, since the introduction of the euro, it has been much easier to use set-off in intra-Community relations because previously parties who wished to set off debts expressed in different currencies had to determine the exchange rate applying to the transaction.

60. On the basis of these considerations, I think therefore there is a Community interest in authorising the Commission, as the institution responsible for implementing the budget, to effect set-off. This would permit the efficient recovery of debts owed to the Community and would contribute to the better management of Community public funds. [70]

61. Contrary to the submissions of the CEMR, [71] a general principle of that kind in Community law would not designate a rule superior to or equivalent to those laid down by the Treaty. Without entering into a theoretical discussion of the hierarchy of rules in Community law, it will be found that there are different categories of general principles in the Court's case-law. Some are actually of a constitutional nature (such as the principles enshrining fundamental rights), while others are merely of a legislative or 'administrative' nature (such as the principle relating to the withdrawal of administrative measures).

62. It is clear that the general principle of set-off belongs to the second category of principles. It in no way modifies the national laws of set-off, but merely governs the rights and obligations of the Community in relation to the Member States and private persons. Therefore the conditions

70 — See the Opinion of Advocate General Mancini in the *Continental Irish Meat* case, cited above, ECR 3447.

71 — Defence, paragraph 27.

for effecting set-off between private persons or between a national public authority and a private individual are entirely governed by the domestic law of the Member States.

63. As I propose that the Court find the existence of a general principle of Community law authorising set-off, it remains to ascertain the conditions for applying that principle.

2. Conditions for applying set-off in Community law

64. As we know, to establish the existence of a general principle of Community law, the Court carries out a comparative examination of national legal systems. In this connection, it is unanimously agreed [72] that the Court does not seek to determine the arithmetical average of national laws or to fall into line with the lowest common denominator. On the contrary, the Court takes a critical approach [73] and gives the answer which is most appropriate in relation to the structure and aims of the Community. [74]

65. In the present case, I think the Court cannot adopt a purely judicial concept of set-off. In many situations it may be that the parties will themselves agree to recognise that their debts can be set off. This will probably be the case where the mutual debts are real and undisputed, fungible and immediately payable. However, if the parties in every case were required to apply to the Community courts for an order for set-off, that would make the mechanism much less useful. Such a requirement would mean that court proceedings — and the associated costs — could not be avoided in order to obtain payment of the debt.

66. In the same way, the purely statutory concept of set-off does not seem entirely suited to the special nature of the Community structure. In the national legal systems which adopt this concept, set-off takes place automatically by the effect of statute alone. This means that, if the statutory conditions are fulfilled, debts are automatically extinguished, 'even without the debtors' knowledge'. [75]

72 — See, in particular, the Opinion of Advocate General Lagrange in the case of *Hoogovens* v *High Authority*, cited above, ECR 284; the Opinions of Advocate General Roemer in the case of *Duraffour* v *Council*, cited above, ECR 532 and 533, in Case 5/71 *Zuckerfabrik Schöppenstedt* v *Council* [1971] ECR 975, 991, and in Joined Cases 63/72 to 69/72 *Werhahn Hansamühle and Others* v *Council* [1973] ECR 1229, 1258 and 1259; and the Opinion of Advocate General Slynn in the case of *AM & S Europe* v *Commission*, cited above, ECR 1648 to 1650. Among academic writings, see H. Kutscher, cited above, p. I-29; J.-V. Louis, *L'ordre juridique communautaire*, Brussels, Office for Official Publications of the European Communities, sixth ed., paragraph 87; P. Pescatore, cited above, pp. 654 and 655; and J.-V. Louis, G. Vandersanden, D. Waelbroeck and M. Waelbroeck, *Commentaire J. Megret, Le droit de la CE, vol. 10, La Cour de justice, les actes des institutions*, éditions de l'université de Bruxelles, Brussels, 1993, second ed., p. 155.

73 — Opinion of Advocate General Roemer in the case of *Zuckerfabrik Schöppenstedt* v *Council*, cited above, ECR 991.

74 — See the *Internationale Handelsgesellschaft* judgment, cited above, paragraph 4.

75 — In Belgium and France, see H. De Page, cited above, paragraph 618, and G. Baudry-Lacantinerie, cited above, paragraph 1861.

In view of the scope and complexity of the Community budget and the very many financial obligations of the Commission, it seems to me inconceivable that set-off could be effected without the parties' knowledge. In my opinion, the security and transparency of legal relations require the debtor, on the contrary, to be fully informed of the Commission's intention to use the set-off mechanism.

67. In those conditions, I think the Court could be guided by the concept of set-off 'by declaration' which prevails in several Member States.[76] Under this system, the Commission would have to inform its debtor of its intention to effect a set-off. The Commission's declaration would have to be *clear* (that is to say, unambiguous as to the intention to effect a set-off and as to the debts in question), *in writing* and sent by *registered letter* to the debtor concerned. The set-off would take effect as soon as the recipient receives the Commission's declaration. This system would have the advantage of authorising set-off without the intervention of the courts while ensuring the transparency of the transaction and the security of legal relations. It would also be suited to the system of Community remedies because the Commission's declaration would be classified as a decision within the meaning of Article 189 of the EC Treaty (now Article 249 EC). An action for the annulment of a declaration of set-off could therefore be brought before the Community courts under Article 173 of the Treaty.[77]

68. With regard to the conditions for applying set-off, the Court could be guided by the general law of the Member States. In all the legal systems which recognise set-off without court intervention, the Member States lay down the same conditions, namely the existence of mutual debts which are fungible and immediately payable. These conditions not only govern set-off between private persons,[78] but are also the minimum conditions authorising a public authority to effect set-off.[79] In addition, the need for clear, simple rules should lead to maintaining the requirement, laid down by systems with a statutory concept of set-off, that the debt be of an ascertainable amount. The Commission's right of set-off could therefore be subject to the following four minimum conditions:

— the debts must be *mutual*: the Commission and the natural or legal person must be simultaneously each other's creditor and debtor:

— the debts must be for *money sums*: for the sake of clarity and simplicity, the

76 — Germany, Austria, Denmark, Finland, the Netherlands and Sweden.

77 — See point 26 of this Opinion.

78 — Ibid., points 44 and 45.

79 — Ibid., points 49 and 53.

commonly accepted requirement of fungibility would become a requirement for the debts to be for sums of money;

— the debts must be *immediately payable*: at the time when set-off is effected the debts must be immediately payable, which excludes debts payable within a fixed period or subject to a condition, and

— the debts must be *certain with regard to their existence and amount*: this excludes future or uncertain debts and debts of an as yet unknown amount. [80] As in the national legal systems, this condition would not exclude set-off where one of the debts is merely disputed (which would enable the parties to create obstacles to set-off simply to delay the proceedings on invented grounds). The dispute would have to be 'genuine', that is to say, it must be *prima facie* sufficiently well founded. If this were contested, the court would have to determine in its absolute discretion whether the dispute were genuine.

80 — This was the situation in the case of *DGV and Others* v *Council and Commission*, cited above, because the Court had ordered the Community to pay compensation for the damage suffered by DEKA, a company, leaving the parties to quantify the damage. At the date of lodging of the application in the case of *DEKA* v *EEC* the parties had agreed on the amount of compensation (see the judgment in the latter case, paragraph 5).

69. The four conditions listed above could therefore be the minimum conditions for authorising the Commission to effect set-off against a private person. The question here is whether those conditions are sufficient. In the contested judgment the Court of First Instance replied in the negative on the basis of the principle of the effectiveness of Community law. It took the view that 'before effecting set-off, the Commission was required to assess whether, in spite of that operation, the use of the [Community] funds in question for the purposes prescribed and the completion of the activities which had justified the granting of the contested sums remained assured'. [81] In its appeal, the Commission disputes the legality of this additional requirement.

70. Before considering this question, I think a few further observations may be made regarding the rules which could govern set-off in Community law.

3. Final observations concerning the rules of set-off in Community law

71. It must be borne in mind that this appeal relates only to the Commission's right of set-off against a private entity. Therefore, to resolve the dispute, it is not necessary for the Court to decide whether

81 — Paragraph 61.

the Commission can exercise that right against other entities (the Member States) and whether other entities (the Member States and private entities or individuals) may use it as against the Commission. These questions, and others,[82] may be resolved in later disputes.

72. However, in view of the position I am taking, it seems to me legitimate to complete this survey with a few remarks. These will be strictly limited to the points mentioned above,[83] considered in relation to Community remedies.

73. At this stage of my survey, I am inclined to agree that set-off may be effected between the Commission and the Member States. The Commission, as the institution responsible for the implementation of the budget, would have a swift means of recovering debts owed to the Community by the Member States. A decision by the Commission to effect a set-off would be open to an action for annulment under the second paragraph of Article 173 of the Treaty.

Conversely, I see no reason which would, in principle, prevent a Member State from setting off debts as against the Commission. The use of this mechanism could facilitate payments and financial transactions between the Commission and national governments. Such set-off would also be subject to review by the Court of Justice because a national decision to effect a set-off would also be open to an action under Article 169 of the EC Treaty (now Article 226 EC) for failure to fulfil Treaty obligations.

74. In contrast, the question whether a private entity can effect set-off as against the Commission is more difficult. Although I have found little information on the point, it seems that the national legal systems have very different approaches. Some of them seem to exclude the possibility,[84] but set-off is permitted by others subject to more restrictive conditions.[85] In all cases, however, national legal systems accept the existence of an imbalance between the rules applying to public authorities and those applying to individuals. Consequently several approaches could be envisaged in the Community context.

75. A first approach would be simply to exclude the right of private persons to set-off as against the Commission. How-

82 — In my opinion, it is clear that the fact that the Court finds a general principle of Community law authorising set-off cannot prevent it from restricting the ambit of the principle at a later date. Accordingly, as in the national law of the Member States, set-off will probably have to be excluded in certain specified areas or particular cases (e.g. in relation to debts generally considered to be exempt from seizure or attachment).

83 — Point 71.

84 — Belgium, France, Italy and the Netherlands.

85 — Germany, Austria and Greece.

ever, it will be recalled that, before the Court of First Instance, the Commission expressly accepted the idea of set-off against itself, without limiting this to set-off by a Member State. [86]

A second approach would amount to authorising a private person to claim set-off under the same conditions as the Commission. In that case, the idea of imbalance generally accepted by the national legal systems would be abandoned. Furthermore, where a dispute arises, this approach would mean that the Commission would have to apply to the national court to challenge the set-off and the national court would have to determine whether set-off was legal in Community law, using, if necessary, the preliminary ruling procedure under Article 177 of the EC Treaty (now Article 234 EC).

A third solution could be based on Austrian law. It would require the private person to ask the Commission expressly to set off its debt. A refusal by the Commission could lead to an action for annulment before the Court of First Instance on the basis of Article 173 of the Treaty and, if the Commission failed to reply to the request, the private individual could bring an action under Article 175 of the EC Treaty (now Article 232 EC) for declaration of failure to act. [87]

76. However this may be, it is unnecessary to take a final position on these questions. As I have said, the appeal relates only to the Commission's right of set-off against a private person and the different points can be settled in later cases. On the other hand, it is necessary to determine whether, as the Court of First Instance found, [88] the Commission's right must be subject to the condition that it must assess 'whether, in spite of that operation, the use of the [Community] funds in question for the purposes prescribed and the completion of the activities which had justified the granting of the contested sums remained assured'. [89]

C — *Examination of grounds of annulment*

77. In its appeal, the Commission contends that the Court of First Instance erred in law in laying down the contested condition. The Commission puts forward, in essence, three sets of arguments.

86 — See the contested judgment, paragraph 52.

87 — See, by analogy, the judgment in the case of *Germany* v *Commission*, cited above, paragraph 4.

88 — See the contested judgment, paragraph 61.

89 — Also referred to as 'the contested condition'.

First, the Commission considers that the Court of First Instance misconstrued the general principle of Community law relating to set-off. By distinguishing the effects of set-off from the actual payment of Community funds, the Court is said to have introduced reasoning which is irrelevant to the mechanism of set-off. According to the Commission, set-off is a method of payment equivalent to actual payment, so that the distinction is erroneous.

Secondly, the Court of First Instance is said to have disregarded the principle of the effectiveness of Community law. According to the Commission, this principle is only relevant for determining the conditions under which Community finance may be granted. Contrary to the judgment of the Court of First Instance, it was not relevant to establish whether the Commission could fulfil its obligations by means of set-off rather than by the actual payment of the amounts in question.

Finally, the Court of First Instance is said to have disregarded the principle of sound financial management. By laying down the contested condition, the Court had deprived the Commission of a useful and effective means of recovering debts owed to the Community.

78. It must be observed that, in the contested judgment, the Court of First Instance started from the principle that the effectiveness of Community law required actual payment of the contested sums. According to the Court, 'the principle of the effectiveness of Community law implies that the funds of the Community must be made available and used in accordance with their purpose'. [90] The Court took the view that 'in the absence of the actual payment of the sums intended for the fulfilment of that obligation, it is clear that those sums would not be used for their purpose and that accordingly the activities at issue were in danger of not being carried out, which is contrary to the effectiveness of Community law'. [91] The Court of First Instance concluded from this that it was necessary to lay down the contested condition. It considered that 'the Commission was required to assess whether, in spite of that operation, the use of the [Community] funds in question for the purposes prescribed and the completion of the activities which had justified the granting of the contested sums remained assured'. [92]

79. Like the Commission, I think that, in laying down the contested condition, there was an error in law on the part of the Court of First Instance in several respects. [93]

90 — See the contested judgment, paragraph 60.

91 — Ibid., paragraph 63.

92 — Ibid., paragraph 61.

93 — In my view, the contested judgment is also based on contradictory grounds. First, the Court of First Instance authorises the Commission to effect set-off provided that this does not jeopardise the completion of the activities in question (paragraphs 61 and 74). However, secondly, the Court considers that, in the absence of actual payment of the sums, it is 'clear' that those activities will not be carried out (paragraphs 63 and 65). By definition, set-off never entails actual payment. According to the Court of First Instance, it is therefore always likely to jeopardise Community activities. In those circumstances, the reasoning of the judgment does not justify the contested condition. The reasoning ought to have led the Court to conclude that set-off is contrary to the principle of the effectiveness of Community law.

80. First, I think the Court of First Instance has not correctly assessed the effect of the set-off mechanism.

81. It must be borne in mind that set-off is a means of extinguishing two mutual obligations. Contrary to the judgment of the Court of First Instance, set-off produces effects equivalent to those of actual payment.

82. In the legal context, set-off extinguishes both debts up to the amount of the lower. This means that the debtors are discharged from their obligations as if they had made payment (in full or partly). Likewise, in the financial context, set-off does not lead to a loss by the parties. In so far as it takes place where two parties are debtors of each other, the financial situation is exactly the same as if each had paid his debt. There is no difference between the effects of set-off and a situation where each party pays the other the amounts owed.

83. Therefore it is unanimously agreed that, in civil law, set-off produces the same effects as actual payment of the debts. [94] As Domat observes, 'set-off is nothing other than two reciprocal payments which are made at the same time without the debtors giving each other anything other than receipts'. [95]

84. In the *Jensen* judgment, the Court adopted the same concept of set-off.

85. That case related to the right of the Danish State to effect set-off between a debt owed to it and aid payable to a private individual under Regulation No 1765/92, which established a new support system for producers of certain arable crops to compensate for the loss of income caused by a reduction in institutional prices by a compensatory payment. Article 15(3) of the regulation expressly required such pay-

94 — See, in particular, G. Baudry-Lacantinerie, cited above, who states that 'statutory set-off is equivalent to double payment... . With regard to its effects, the situation is therefore the same as if each of the two debts had been paid' (paragraph 1864); Encyclopédie Dalloz, under 'Set-off', observes that 'set-off produces the effects of double payment', (paragraph 95); H. De Page, cited above, who considers that 'set-off is equivalent to a payment' (paragraph 632); H. & L. Mazeaud and J. Mazeaud, cited above, who state that 'set-off produces the effects of a double payment. Everything takes place as if each of the two obligations had been paid' (paragraph 1155); and G. Ripert and J. Boulanger, cited above, for whom 'set-off is equivalent to a double payment' (paragraph 1998).

95 — Cited by G. Baudry-Lacantinerie, cited above, paragraph 1802.

ments 'to be paid over to the beneficiaries in their entirety'. The national court was uncertain whether, in view of that requirement, the Danish authorities could use the mechanism of set-off.

86. The Commission's Legal Service had argued that set-off did not meet that requirement because it 'could not be deemed to be equivalent to payment'. [96] On the other hand, the Member States that submitted observations in the case argued that 'set-off results in the full payment of aid to the affected farmer [because] in so far as his indebtedness is reduced by that entire amount, he is thereby enriched'. [97] Advocate General Fennelly concluded that Article 15(3) of Regulation No 1765/92 did not prohibit set-off because 'in the case of set-off, the beneficiary receives the entire monetary value of the aid, although he does not have full control over its disposal'. [98]

87. The Court adopted the same position as the Advocate General. It began by stating that Community law contained no general rules on the right of national authorities to effect set-off between outstanding debts and amounts paid under Community legislation. [99] Applying its case-law on procedural autonomy, the Court took the view that Community law did not preclude the set-off in question, provided that the national authorities ensured that the effectiveness of Community law was in no way undermined. [100] However, the Court held that a national measure authorising set-off against Community aid did not undermine that principle. [101] With regard to Article 15(3) of Regulation No 1765/92, the Court found that it did not preclude the operation in question. According to the Court, 'set-off between compensatory payments made under the Regulation and outstanding debts payable to a Member State *does not have the effect of reducing the amount of the aid*'. [102]

88. It follows that in Community law, as in national civil law, set-off is a method of extinguishing obligations which has the same effect as actual payment.

89. A very simple example will be sufficient to show that this is true. Suppose that the Commission owes a sum of EUR 10 000 to a private trader and that he owes the

96 — See the Opinion of Advocate General Fennelly in the *Jensen* case, points 12 and 18.

97 — Ibid., point 23.

98 — Ibid., points 39 and 49.

99 — See the *Jensen* judgment, paragraph 35.

100 — Ibid., paragraphs 37 and 54.

101 — Ibid., paragraph 38.

102 — Ibid., paragraph 61, emphasis added.

Commission the same amount. In this case, set-off has the effect of extinguishing the debts of the two parties. The situation is the same as if the Commission had paid its debtor EUR 10 000 and he had used it to pay his own debt. The only difference is that set-off restricts the trader's power to dispose freely of the sum concerned.

However, as Advocate General Fennelly observed, 'the same would be true in the case of attachment... or of any other process of execution applied against the beneficiary'. [103] Continuing this idea, no one would doubt that the trader had actually received the Community funds if, immediately after actual payment, the Commission seized or attached the funds in order to recover the debt owed to it by the beneficiary. Execution before the actual transfer of the money 'differs little, from the point of view of the degree of liberty enjoyed by the beneficiary..., from any form of post-payment execution'. [104]

90. In those circumstances, I think that, in distinguishing between set-off and actual payment, the Court of First Instance was mistaken in law. In my opinion, it did not correctly assess the effect of the mechanism of set-off.

91. The reasoning of the Court of First Instance also disregards another generally accepted legal concept, namely the fungibility of money. It is not disputed that, where a person receives a sum of money, it mixes with the other money funds constituting his assets. As the Commission suggested, [105] it is difficult to imagine a sort of 'traceability' mechanism which would make it possible to attach the sum received to a specific activity.

It is also generally agreed that a debtor's assets offer his creditors a 'general guarantee'. [106] This mean that, when Community money has been paid to the beneficiary, his creditors can seize or attach his assets, in particular the sums paid under Community law. [107] Consequently there appears to be no reason which would prevent the Commission from effecting set-off. It would be paradoxical to refuse the Commission the right to recover by set-off debts owed to the

103 — Opinion of Advocate General Fennelly in the *Jensen* case, point 39.

104 — Ibid.

105 — See the appeal, paragraph 103.

106 — See the Opinion of Advocate General Mancini in the case of *DEKA* v *EEC*, cited above, ECR 439.

107 — The situation is different with regard to a garnishee order (see point 101 et seq. below).

Community, but to allow third parties to seize or attach sums paid under Community law.

92. Secondly, I think that the contested condition is contrary to the principle of sound financial management. The Court of First Instance held that, before effecting set-off, the Commission is required to assess whether set-off is likely to jeopardise 'the use of the funds... for the purposes prescribed and the completion of the activities which had justified the granting of the contested sums'. [108]

93. However, this requirement may have significant repercussions on the recovery of debts owed to the Community. To follow the reasoning of the Court of First Instance, every legal or judicial mechanism likely to compromise the completion of a Community activity would be subject to the contested condition. In practice, this means that whenever the Commission wishes to enforce recovery against one of its debtors, it will have to assess whether that means of execution is likely to jeopardise the completion of a Community activity. Likewise, the Commission may be compelled to assess the consequences whenever it wishes to bring an action for repayment against a beneficiary of Community finance.

94. In my view, such a requirement is contrary to the Community interest and the principle of sound financial management. It is likely to paralyse the Commission's activity, as the institution responsible for the implementation of the budget, in the recovery of debts owed to the Community. Furthermore, this condition could lead to a serious imbalance as between the Commission and the other creditors of the beneficiary. In so far as amounts paid under Community law do not have the status of preferential debts or debts which are exempt from seizure or attachment under the national law of the Member States, the Commission would be bound by a condition (of assessment or even abstention) which is not imposed on the other creditors. [109]

95. In the *Jensen* case, the Member States drew the Court's attention to the consequences of the logic of the Commission's argument. They argued that the Commission's position (comparable to the reasoning of the Court of First Instance) was likely to paralyse all forms of seizure or

108 — See the contested judgment, paragraph 61.

109 — Having said this, the reasoning of the Court of First Instance could also apply to third parties. According to the logic of the contested judgment, a national court which has to give a ruling on an application for seizure lodged by private individuals against a beneficiary of Community funds could also be required to 'assess whether, in spite of that operation, the use of the [Community] funds in question for the purposes prescribed and the completion of the activities which had justified the granting of the contested sums remained assured' (see the contested judgment, paragraph 61).

attachment against beneficiaries of Community aid, even by private parties. [110]

96. Thirdly, I think the reasoning of the Court of First Instance to some extent confuses the effects of set-off with the problems linked to the solvency of a beneficiary of Community funds.

97. The contested judgment shows that the main concern of the Court of First Instance was to ensure 'the completion of the activities which had justified the granting of the contested sums'. [111] According to the Court of First Instance, 'in the absence of the actual payment of the [contested] sums, it is clear that... the activities at issue were in danger of not being carried out, which is contrary to the effectiveness of Community law'. [112]

98. However, the mechanism of set-off is not in itself capable of jeopardising the completion of Community activities. As we have seen, set-off produces effects equivalent to those of the actual payment of Community funds. In reality, the risks described by the Court of First Instance are intrinsically connected with the solvency of the beneficiary of Community funds.

99. If the Commission grants funds to a solvent entity, this practically ensures that the Community activity will be completed. Contrary to what was held by the Court of First Instance, the guarantee of completion is not the result of the actual payment of the funds. It arises from the fact that the beneficiary's solvency is beyond doubt. Therefore the fact that the Commission sets off the amount owed to it against the debt owed to a solvent beneficiary is not in itself likely to affect the completion of the Community activity.

Conversely, if the Commission grants funds to an insolvent beneficiary, it is practically certain that the Community activity will not be completed. In that case, even actual payment would not guarantee completion of the activity because the Community funds will probably be seized or attached by the beneficiary's creditors. In contrast, set-off would enable the Commission to recover the debt owed to it because it would avoid (entirely or in part) competition with the beneficiary's other creditors.

100. Consequently I think the Court of First Instance was wrong in finding that the mechanism of set-off had effects contrary to Community law, whereas those effects are intrinsically connected with the solvency of the beneficiary of Community

110 — See the Opinion of Advocate General Fennelly, point 27.
111 — Paragraph 61.
112 — Paragraph 63.

funds. Therefore the Court of First Instance erred in law on this point.

101. One final question remains. At the hearing, the present Court asked the parties whether, in their opinion, the case-law relating to garnishee orders should be applied to the mechanism of set-off.

102. As we know, under Article 1 of the Protocol on the Privileges and Immunities of the European Communities, [113] 'the property and assets of the Communities shall not be the subject of any administrative or legal measure of constraint without the authorisation of the Court of Justice'. This provision aims to avoid untimely and inappropriate hindrances to the independent functioning of the Communities. [114]

103. According to the Court, a decision authorising the lifting of immunity is required only if the Community institution raises objections to the measure of constraint. Where the institution gives its consent to such a measure, the request for authorisation is devoid of purpose and need not be examined. [115]

104. According to settled case-law, [116] the Court considers that a garnishee order may hamper the functioning of the Communities where it affects the financing of common policies or the implementation of Community action programmes. Thus the Court lifts immunity where a garnishee order relates to sums owed by the Communities as rent under a private law lease. [117] On the other hand, the Court refuses authorisation where such order relates to sums which are designated for specific programmes to assist a non-member country in the framework of the Community's policy of development cooperation. [118] In that case, the Court considers that a garnishee order would result in designating for private interests funds expressly intended by the Community for that common policy. [119]

113 — 67/444/EEC, 67/28/Euratom (OJ 1967 152, p. 13). For a description of the system set up by this protocol, see C. Schmidt, 'Le protocole sur les privilèges et immunités des Communautés européennes', *Cahiers de droit européen*, 1991, p. 67 ff.).

114 — See the orders of 13 March 1962 in Case 4/62 *Hübner* v *High Authority* [1962] ECR 41, 42, with regard to a garnishee order; 17 December 1968 in Case 2/68 *Ufficio imposte di consumo di Ispra* v *Commission* [1968] ECR 435, 439, with regard to the inviolability of the premises of the Communities; and 6 December 1990 in Case C-2/88 Imm. *Zwartfeld and Others* [1990] ECR I-4405, with regard to the inviolability of documents of the Communities.

115 — See the order of 17 June 1987 in Case 1/87 SA *Universe Tankship* v *Commission* [1987] ECR 2807; the judgment in Case C-182/91 *Forafrique Burkinabe* v *Commission* [1993] I-2161, paragraph 12; and the order of 10 January 1995 in Case C-1/94 SA *Dupret* v *Commission* [1995] ECR I-1.

116 — See, in particular, the order of 11 April 1989 in Case 1/88 SA *Générale de Banque* v *Commission* [1989] ECR 857, paragraph 13.

117 — Ibid., paragraphs 13 and 16.

118 — See the order of 29 May 2001 in Case C-1/00 SA *Cotecna Inspection* v *Commission* [2001] ECR I-4219, paragraphs 12 to 15.

119 — Ibid., paragraph 16.

105. However, this case-law cannot be applied to the mechanism of set-off.

106. It must be observed that a garnishee order is a means of execution. Generally, it is used by a person (judgment creditor) against a third party (garnishee) who is a debtor of the creditor's own debtor (judgment debtor). It has the object or effect of preventing the garnishee from paying his debt to the judgment debtor and compelling him to make direct payment to the judgment creditor. [120]

107. The effects of set-off cannot be likened to the consequences of a garnishee order against the Commission. As we have seen, set-off is a method of extinguishing obligations which has effects equivalent to the making of actual payments. It is a 'neutral' operation because it does not lead to a loss by the parties. A garnishee order, on the other hand, has the effect of preventing the Commission from paying its debt to the beneficiary of Community funds. Therefore the operation leads to an actual loss by the beneficiary because the funds are paid by the Commission directly to the judgment creditor.

108. It follows that, unlike a garnishee order, set-off cannot affect the financing of common policies or the implementation of Community action programmes. Consequently the case-law on garnishee orders cannot properly be applied to the mechanism of set-off.

109. On the basis of those various considerations, I think the contested judgment is mistaken in law. The contested condition is contrary to the general principle of Community law authorising set-off and to the principle of sound financial management.

110. Therefore I propose that the Court should set aside the contested judgment.

V — Final judgment after setting aside

111. The first paragraph of Article 54 of the EC Statute of the Court of Justice provides that, if the appeal is well founded, the Court of Justice must quash the decision of the Court of First Instance. In that case it may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the Court of First Instance for judgment.

120 — See G. Cornu, *Vocabulaire juridique*, Paris, Presses Universitaires de Fance, eighth ed., 2000, 'Saisie'.

112. Here, it seems to me that the state of the proceedings permits final judgment to be given. I therefore propose that the Court examine the merits of the case and give final judgment in the matter.

VI — The merits of the case

113. The CEMR seeks the annulment of the contested decision in so far as it sets off the amounts in question against the sum of EUR 195 991 which is said to be owed to the Commission under the MED URBS contracts.

114. The CEMR's appeal is based on four pleas in law, as follows: (1) lack of a legal basis for the contested decision; (2) breach of the principle of legal certainty; (3) breach of the principle of the protection of legitimate expectations, and (4) breach of the obligation to state reasons under Article 190 of the Treaty.

115. The appellant's first plea claims that the contested decision has no legal basis. In essence, the appellant sets out two lines of argument. First, it relies on case-law to show that set-off is not a general principle of Community law the observance of which is ensured by the Court. Secondly, the appellant contends that, even assuming that were the case, the conditions for applying set-off are not fulfilled in the present case because the debt owed to the Commission under the MED URBS contracts was not certain and undisputed.

116. Under points 47 to 60 of this Opinion I have set out the reasons why set-off must be regarded as a general principle of Community law. In my view, Community law authorises the Commission to effect set-off against a private person. Therefore the CEMR's first submission, namely that such a principle does not exist, must be rejected.

117. On the other hand, the appellant's second submission must be allowed.

118. We have seen that the Commission's right of set-off was subject to four conditions, all of which had to be fulfilled. To effect set-off, the parties' debts must be for

a money sum, they must be mutual, immediately payable and undisputed.

119. Taking into account the special features of this case, the Court has no jurisdiction to determine whether money is owed to the Commission under the MED URBS contracts. As we know, Article 9 of the contracts contains a jurisdiction clause in favour of the civil courts of Brussels and therefore they have exclusive jurisdiction to assess whether the Commission's claim exists and whether it is undisputed.

120. The Court of First Instance, Brussels, gave a ruling precisely on this point in the judgment of 16 November 2001, [121] finding that 'the European Community has no claim for repayment against the claimant [CEMR] under the MED URBS 1994 contract, the MED URBS 1995 contract and the MED URBS Migration contract 1995'. [122]

121. In those circumstances, the Court is in a position to find that the conditions for applying set-off have not been fulfilled in this case. According to the court with jurisdiction, the Commission has no claim against the CEMR. Consequently there are no mutual debts between the parties which can be set off.

122. Therefore the contested decision must be annulled.

VII — Costs

123. Article 122 of the Rules of Procedure provides that, where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to costs. Under Article 69(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.

124. In the present case, I have found that the Commission's arguments in support of the appeal were well founded. On the other hand, examination of the submissions made at first instance has shown grounds for annulling the contested decision. Accordingly it is fair to decide that the CEMR shall pay the parties' costs in connection with the appeal proceedings and that the Commission shall pay the parties' costs in connection with the proceedings at first instance.

121 — The CEMR sent a copy of this judgment to the Court of Justice by letter of 4 December 2001.

122 — Judgment of 16 November 2001, cited above, p. 6.

VIII — Conclusion

125. Having regard to the foregoing considerations, I propose that the Court give judgment as follows:

(1) The judgment of the Court of First Instance of the European Communities of 14 December 2000 in Case T-105/99 *CEMR* v *Commission* is set aside.

(2) The Commission's decision in the letter of 15 February 1999 effecting a set-off against the Council of European Municipalities and Regions is annulled.

(3) The Council of European Municipalities and Regions shall pay the parties' costs in connection with the appeal proceedings and the Commission shall pay the parties' costs in connection with the proceedings before the Court of First Instance.