JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)

6 December 1994 *

In Case T-450/93,

Lisrestal — Organização Gestão de Restaurantes Colectivos, Ld.ª, a company incorporated under Portuguese law, established in Almada (Portugal),

GTI — Gabinete Técnico de Informática, Ld.ª, a company incorporated under Portuguese law, established in Lisbon,

Lisnico — Serviço Marítimo Internacional, Ld.ª, a company incorporated under Portuguese law, established in Almada

Rebocalis — Rebocagem e Assistência Marítima, Ld.ª, a company incorporated under Portuguese law, established in Almada,

Gaslimpo — Sociedade de Desgasificação de Navios, SA, a company incorporated under Portuguese law, established in Almada,

* Language of the case: Portuguese.

represented by Manuel Rodrigues, of the Lisbon Bar, with an address for service in Luxembourg at the Chambers of Ângelo Alves Azevedo, 61 Rue de Gasperich,

applicants,

v

Commission of the European Communities, represented by Ana Maria Alves Vieira and Nicholas Khan, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Georgios Kremlis, of the Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of the Commission decision seeking repayment by the applicants of ESC 138 271 804 and refusing to pay the balance of financial assistance granted by the European Social Fund for project No 870844 P1,

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

composed of: R. Schintgen, President, R. García-Valdecasas, B. Vesterdorf, K. Lenaerts and C. W. Bellamy, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 13 July 1994,

gives the following

Judgment

Legal Background

1 Article 1(2) of Council Decision 83/516/EEC of 17 October 1983 on the tasks of the European Social Fund (OJ 1983 L 289, p. 38) provides *inter alia* that the European Social Fund (hereafter 'the ESF') is to participate in the financing of operations concerning vocational training and guidance.

2 Under Article 3 of Decision 83/516, assistance from the ESF may be granted for operations carried out within the framework of Member States' labour-market policies, which are to include in particular operations to improve employment opportunities for young people, notably by means of vocational training measures after completion of full-time compulsory schooling.

3 Article 5(1) of Council Regulation (EEC) No 2950/83 of 17 October 1983 on the implementation of Decision 83/516 (OJ 1983 L 289, p. 1), provides that approval

of an application submitted under Article 3(1) of Decision 83/516 is to be followed by payment of an advance of 50% of the assistance approved on the date on which the operations are scheduled to begin.

4 Article 5(4) of Regulation No 2950/83 states that final payment claims are to contain a detailed report on the content, results and financial aspects of the relevant operation and that the Member State is to certify the accuracy of the facts and accounts in payment claims.

5 Under Article 6 of Regulation No 2950/83 the Commission may suspend, reduce or withdraw aid, after having given the relevant Member State an opportunity to comment, when ESF assistance is not used in conformity with the conditions set out in the decision of approval. Sums paid which have not been used in accordance with the conditions laid down in the decision of approval are to be refunded.

6 Article 5 of Commission Decision 83/673/EEC of 22 December 1983 on the management of the ESF (OJ 1983 L 377, p. 1), provides: 'where an operation for which an application for assistance has been submitted or assistance has been granted cannot be carried out or can be carried out only in part, the Member State shall notify the Commission thereof without delay'.

Facts

7 In 1986 the applicants, Lisrestal Ld.ª, GTI Ld.ª, Rebocalis Ld.ª, Lisnico Ld.ª and Gaslimpo SA, and two other undertakings, Proex Ld.ª and Gelfiche, which are all established in Portugal, applied to the ESF, through the Departamento para Os Assuntos do Fundo Social Europeu (hereafter 'DAFSE'), for assistance in respect

of a proposed operation concerning vocational training, as provided for in Article 3(1) of Decision 83/516, in the district of Setúbal (Portugal).

8 The ESF assistance was requested in order to carry out 'operations concerning vocational training for 1687 young persons aged under 25 having qualifications which, after previous vocational experience and compulsory schooling, prove to be inadequate and/or inappropriate for the performance of activities offering real employment prospects and for skilled jobs requiring use of new technology'.

9 The proposal for those operations, contained in a single file under reference 870844 P1, was approved by Commission Decision C (87) 670 of 31 March 1987 in respect of a total amount of ESC 630 642 227, of which ESC 346 853 225 was to be financed by the ESF and ESC 283 789 002 by the Orçamento da Segurança Social/Instituto de Gestão Financeira da Segurança Social (Social Security Budget/Institute for the Financial Management of Social Security, hereinafter 'OSS/IGFSS'). Under that decision approval was conditional on the proposed operations being carried out by each of the companies between 1 January 1987 and 31 December 1987.

10 In accordance with Article 5(1) of Regulation No 2950/83, the ESF made an advance payment of 50% of the assistance granted to the applicants, namely ESC 173 426 612.

11 On 31 October 1988 a claim was made by the applicants, through the intermediary of DAFSE, for payment of the balance, namely ESC 127 483 930. Supporting documents and a report on the operations carried out were sent with that claim.

12 On 25 November 1988 the 'audit' section of the ESF proposed that the file be reviewed because the costs and operations were not clear from the invoices.

13 Between 29 January and 2 February 1990 the ESF's inspectors visited the applicants Lisrestal and GTI. The findings in their report of 5 March 1990 were as follows: as regards the operations covered by file 870844 P1, five of the seven undertakings given the task of implementing them, the applicants in these proceedings, had subcontracted all the work to the Associação para a Reinserção Socio-Profissional (Association for Socio-professional Rehabilitation, hereafter 'the RSP'), a non profit-making organization, which had been specially set up to perform vocational training operations, but at the material time did not have the proper means, infrastructure or experience for such a subcontract on behalf of five undertakings engaged in different activities; RSP had delegated the performance of the abovementioned operations for the sum of ESC 138 091 100 to the Associação para o Desenvolvimento e Promoção Ténica e Profissional (Association for Development and Technical and Professional Advancement), which also did not have either the necessary staff or infrastructure at the time of the ESF inspectors' visit; the five undertakings in question and RSP were part of the same Lisnave group and, after an audit of the accounts at Lisrestal, it had become apparent that the vocational training courses given did not correspond to those stipulated; no trainee had been taken on by any of the undertakings at the end of the courses and some invoices referred to dates subsequent to the performance of the operations. The inspectors concluded from this that there were serious problems with the system adopted by the five applicants. Consequently, they suggested that an investigation be carried out at Gelfiche and Proex to examine whether the system followed had been different and to request DAFSE to have a judicial enquiry carried out into the five cases concerned, having regard to the circumstantial evidence of sham contracts and false invoices which they had discovered. Finally, they suggested that a repayment demand be made for the Community funds advanced to the five undertakings in question.

14 On 19 October 1990, DAFSE sent 'certificates' to the applicants stating that there had been an investigation by the Community in order to verify the correctness and legality of the operations carried out under project 870844 P1, but that it could not

provide any other information, since the Commission had not yet adopted a definitive decision on those operations.

15 Following an inspection at Proex on 29 April 1991, the ESF inspectors concluded that Proex and Gelfiche were entitled to the sum of ESC 35 154 808. Since the ESF had advanced ESC 173 426 612, they assessed the amount to be repaid by the applicants at ESC 138 271 804.

16 By letter of 14 June 1991 the competent Head of Unit in the Directorate-General for Employment, Industrial Relations and Social Affairs (DG V) of the Commission sent the inspectors' findings to DAFSE and stated that the ESF considered that a sum of ESC 536 879 559 had been used for ineligible expenditure 'because the operations approved were not the same as those indicated in the claim for final payment and certain invoices were not supported or referred to dates subsequent to the year during which the operation took place'. The Commission annexed the inspection reports to that letter.

17 In the same letter DAFSE was informed that a ceiling of ESC 35 154 808 had been set for the amount of ESF aid and that, having regard to the payment of ESC 173 426 612 which had been paid by way of initial advance, ESC 138 271 804 would have to be repaid. The Commission allowed DAFSE 30 days to submit its observations.

18 By letter of 8 July 1991 DAFSE informed the ESF that it did not have any observations to make on the inspection reports of the ESF inspectors or on its letter of 14 June 1991, and that it accepted the decision made.

19 On 10 February 1992 the Tribunal Administrativo do Círculo, Lisbon, dismissed as inadmissible the applicants' action against the 'certificates' of DAFSE of 19 October 1990 on the ground that those 'certificates' were not administrative measures having legal effects on the applicants.

20 On 3 March 1992 the Commission sent a repayment demand to DAFSE.

21 By letters of 24 April 1992 and 7 May 1992 DAFSE informed the applicants of the Commission's decision to reduce the assistance granted and of the amounts to be refunded to the ESF and to the OSS/IGFSS. The letters, with repayment instructions attached, were worded in the same terms for each of the applicants. The letter addressed to Lisrestal read as follows:

'I must inform you that the departments of the European Social Fund have now adopted a decision on this matter after finding following an inspection by Community officials that expenditure of ESC 88 674 884 in connection with the operation conducted by your company was ineligible, because the operations approved do not correspond to those indicated in the request for payment of the balance and certain invoices are not supported or refer to dates subsequent to the year in which the operation took place.

In those circumstances, the abovementioned company shall, within 15 days from the date of receipt of this letter, repay the amounts received by way of initial advance'.

22 On 25 June 1992 DAFSE adopted decisions Nos 55/92 to 59/92 in which reference was made to the objections made in the ESF inspectors' reports with regard to Lisrestal and the companies which had benefited from the ESF assistance. The operative part of the decision concerning Lisrestal was as follows:

'(1) The matter relating to the recovery of the debt of ESC 52 549 052 arising from sums wrongly paid by the ESF and by the Portuguese State to Lisrestal — Organização de Restaurantes Colectivos, Ld.ª, legal person No 501389954 with its registered office at No 8, Rua Eugénio de Castro, Almada, in connection with file 870844 P1 shall be examined in accordance with Decree-Law No 158/90 of 17 May 1990, as amended by Decree-Law No 246/91 of 6 July 1991;

(2) The undertaking concerned shall be informed of the content and terms of this decision'.

Procedure and forms of order sought

23 These are the circumstances in which, by application lodged at the Registry of the Court of Justice on 19 June 1992, the applicants brought this action. The written procedure followed the normal course and took place entirely before the Court of Justice. By order of 27 September 1993, the Court of Justice referred this case to the Court of First Instance pursuant to Article 4 of Council Decision 93/350/Euratom, ECSC, EEC of 8 June 1993 amending Decision 88/591/ECSC, EEC, Euratom establishing a Court of First Instance of the European Communities (OJ 1993 L 144, p. 21).

24 On hearing the Report of the Judge Rapporteur, the Court of First Instance (First Chamber) decided to open the oral procedure without any preparatory enquiry. However, the Court requested the parties to produce certain documents and to reply to one question in writing before the hearing.

25 The parties presented oral argument and answered the Court's oral questions at the hearing on 13 July 1994.

26 The applicants claim that the Court should:

(i) annul the decision of the ESF ordering repayment of the sums received;

(ii) order the Commission to pay the whole of the sums claimed;

(iii) order the Commission to pay the costs.

27 The defendant contends that the Court should:

(i) declare the application to be unfounded;

(ii) order the applicants to pay the costs of the proceedings.

Annulment of the Commission Decision reducing the ESF assistance

28 The applicants essentially rely on four pleas in support of the form of order they seek. The first is that the ESF departments do not exist or, at least, do not have competence to adopt the contested decision; the second is that the rights of the

defence have been infringed; the third is that an insufficient statement of reasons has been given; and the fourth is that there has been a manifest error of assessment.

Inexistence or, at least, lack of competence of the ESF departments

Arguments of the parties

29 The applicants claim that the decision was adopted by a non-existent entity or, at least, one which did not have the competence to do so. They claim that the authors of the measure, namely the 'ESF departments' are a non-existent body, because it is impossible to infer from the decision which departments are concerned, and also that those departments in any event lack competence, because under Article 5 of Decision 83/516 and Article 6 of Regulation No 2950/83 only the Commission is competent to adopt decisions regarding ESF financial assistance.

30 The defendant observes that, although under Article 6 of Regulation No 2950/83 the Commission is to adopt the initial decision concerning the contribution made by the ESF, subsequent measures of management and administration fall within the competence of its departments, in this case DG V. In the present case, the decision to reduce the financial assistance originally granted is a measure of day-to-day management because that decision merely finds that a suspensory condition has not been complied with. In support of its argument the defendant relies on the judgment in Case C-220/89 *FUNOC* v *Commission* [1990] ECR I-3669, in which the Court held that DG V was responsible for managing the expenditure of the ESF, in cooperation with the financial controller, and on the case-law to the effect that the delegation of authority to sign is a normal and legitimate means by which the Commission may exercise its powers (Case 48/69 *ICI* v *Commission* [1972] ECR 619 and Case 8/72 *Cementhandelaren* v *Commission* [1972] ECR 977).

Findings of the Court

31 The Court observes that Article 123 of the EEC Treaty, in force when the contested decision was adopted (now Article 123 of the EC Treaty), provides: 'In order to improve employment opportunities for workers in the common market and to contribute thereby to raising the standard of living, a European Social Fund is hereby established in accordance with the provisions set out below; it shall have the task of rendering the employment of workers easier and of increasing their geographical and occupational mobility within the Community.' Under Article 124 of the EEC Treaty, the ESF is to be administered by the Commission in accordance with the implementing provisions.

32 Furthermore, the Directory of the Commission shows that a Directorate of the ESF exists in the Directorate General for Employment, Industrial Relations and Social Affairs.

33 In so far as this plea alleges the non-existence of that department, it must therefore be rejected.

34 In so far as the plea alleges the lack of competence of the ESF's departments to adopt the contested decision, it follows from the case-law of the Court of Justice that the delegation of authority to sign within an institution is a measure relating to the internal organization of the Community's administrative departments, in accordance with Article 27 of the Commission's Rules of Procedure of 9 January 1963 (OJ, English Special Edition, Second Series VII, p. 9) maintained provisionally in force by Article 1 of Decision 67/426/EEC of the Commission of 6 July 1967 (OJ, English Special Edition, Second Series VII, p. 14) in force when the decision was adopted, and which is the normal means by which the Commission exercises its powers (judgments in *ICI* v *Commission*, paragraph 14, and *Cemen-*

thandelaren v *Commission*, point 13, cited above). Officials may therefore be empowered to take, in the name of the Commission and subject to its control, clearly defined measures of management or administration.

35 With regard in particular to Commission decisions concerning ESF assistance, it follows from the provisions applicable to the ESF that DG V is responsible for managing the expenditure of the ESF, in cooperation with the financial controller (judgment in *FUNOC* v *Commission*, cited above, paragraph 13).

36 In the present case, the applicants have not produced any evidence to show that the Community administration, by adopting the decision to reduce its financial assistance following technical inspections which had revealed that the conditions laid down in the initial decision of approval had not been complied with, departed from the relevant rules of procedure.

37 It follows that in so far as this plea alleges a lack of competence by the departments of the ESF, it must also be rejected.

Infringement of the rights of the defence and inadequate statement of reasons

Arguments of the parties

38 The applicants point out, first, that DAFSE, which in its letters of 24 April and 7 May 1992 referred to the decision of the ESF departments to reduce the financial

assistance initially granted, failed to enclose even a photocopy of it, and the applicants therefore claim that the decision is non-existent. They add that, even though they were directly and individually concerned, DAFSE did not inform them that it had been invited by the Commission to submit its observations.

39 The applicants also complain that the Commission infringed essential procedural requirements by adopting the contested decision without informing them and without telling them the reasons for it. They did not know of the review of the file, or of the information and conclusions of the alleged 'Community inspection', referred to in the letters of 24 April and 7 May 1992. Neither the circumstances in which those inspections actually took place nor their results can be identified, because the Commission did not communicate any reports on them.

40 The Commission contends that the decision is in accordance with Article 6(1) of Regulation No 2950/83. It refers to the judgment in Case C-304/89 *Oliveira* v *Commission* [1991] ECR I-2283 and points out that the Member State is the sole interlocutor of the ESF and assumes responsibility in so far as it certifies the accuracy of the facts and accounts in claims for final payment and may even be required to guarantee that the training measures are properly implemented and concluded. Having regard to the central role of the Member State and the importance of the responsibilities which it assumes in presenting and supervising the financing of the training operations, it is indeed an essential procedural requirement for the Member State concerned to have the opportunity to submit its observations prior to the adoption of a definitive decision to reduce assistance, and a failure to comply with that requirement leads to the nullity of the contested decisions. However, it submits, the procedure in this case took its normal course since the ESF observed the

essential procedural requirement of granting the Portuguese authorities the opportunity to submit their observations. The Commission cannot be held responsible for a Member State's failure to fulfil its obligations in not keeping the persons concerned properly informed.

41 The Commission adds that in any event the applicants were perfectly aware that the refusal to make the final payment was directly connected with the inspection carried out by its officials and that both the Portuguese State and the Commission entertained serious doubts regarding the lawfulness and actual performance of the training operations in question. That state of affairs was sufficiently apparent from the documents annexed to the application and from the exhaustive explanation of the grounds for DAFSE's decisions Nos 55/92 to 59/92 of 25 June 1992.

Findings of the Court

42 The Court observes that it is settled law that respect for the rights of the defence in all proceedings which are initiated against a person and are liable to culminate in a measure adversely affecting that person is a fundamental principle of Community law which must be guaranteed, even in the absence of any specific rules concerning the proceedings in question (see in particular Joined Cases C-48/90 and C-66/90 *Netherlands and Others* v *Commission* [1992] ECR p. I-565, paragraph 44, and in case C-135/92 *Fiskano* v *Commission*, [1994] ECR I-2885). That principle requires that any person who may be adversely affected by the adoption of a decision should be placed in a position in which he may effectively make known his views on the evidence against him which the Commission has taken as the basis for the decision at issue.

43 To determine whether the applicants' rights of defence have been infringed in this case, it must be considered whether, having regard to the role played in the relevant procedure by the Member State as sole interlocutor of the ESF, the contested decision is capable of directly concerning the applicants and adversely affecting them.

44 It must be held that the contested decision deprives the recipient undertakings of a part of the assistance initially granted and that Regulation No 2950/83 does not give the Member State concerned any power to make its own assessment (see, most recently, the order in Case T-446/93 *Frinil and Others* v *Commission*, not published in the ECR, paragraph 29).

45 Furthermore, it was in the repayment demand of 3 March 1992 that the Commission definitively purported to reduce the assistance granted, as it had indicated in the letter of 14 June 1991 from DG V to DAFSE. The Commission's decision incorporated in the abovementioned letter was, it is true, addressed only to the Portuguese authorities. However, it named and expressly referred to the applicants as direct beneficiaries of the assistance granted. The Court therefore considers that the applicants are directly and individually concerned by the contested decision to reduce that assistance.

46 That analysis is confirmed by the fact that it has consistently been held that undertakings which have received financial assistance from the ESF are entitled to bring actions against the decisions depriving them of such assistance (see Case C-291/89 *Interhotel* v *Commission* [1991] ECR I-2257, paragraph 13, and Case C-157/90 *Infortec* v *Commission* [1992] ECR I-3525, paragraph 17), which presupposes not only that they are individually concerned by such decisions, but also that they are directly concerned by them.

47 That analysis is also borne out by the provisions of Regulation No 2950/83, the effect of which is to establish a direct link between the Commission and the recipient of the assistance, even though the Member State is the sole interlocutor of the ESF. Article 6 of Regulation No 2950/83 provides that: first, it is for the Commission to suspend, reduce or withdraw ESF assistance, where it has not been used in conformity with the conditions set out in the decision of approval, the relevant Member State merely having an opportunity to comment; and, secondly, sums paid which are not used in accordance with the conditions laid down in the decision of approval are to be refunded, the Member State concerned having only secondary liability for the repayment of sums, unwarranted payment of which has been made for operations to which the guarantee referred to in Article 2(2) of Decision 83/516 EEC applies.

48 The applicants are therefore directly affected by the economic consequences of the decision to reduce the assistance, which adversely affects them since they have primary liability for the repayment of the sums paid without warrant (judgment in *Netherlands and Others* v *Commission*, cited above, paragraph 50). Moreover, the Commission acknowledged at the hearing that, if necessary, it could commence proceedings against the applicants in the national courts for recovery of the sums at issue.

49 It follows that the Commission, which alone assumes legal liability to the applicants for the contested decision, was not entitled to adopt the contested decision without first giving those undertakings the possibility, or ensuring that they had had the possibility, of effectively setting forth their views on the proposed reduction in assistance.

50 It is common ground that neither the reports of the Commission's enquiry nor the Commission's complaints against them were notified to the applicants, and that they were not heard by the Commission before it adopted the contested decision. It is also agreed that DAFSE, after having being invited by the Commission by letter of 14 June 1991 to submit its observations, informed the Commission by letter of 8 July 1991, without first hearing the applicants, that it intended to accept the decision which the Commission was preparing to adopt with respect to the applicants.

51 In those circumstances the adoption of the contested decision infringed the applicants' rights of defence.

52 Furthermore, neither the contested decision nor the inspection reports satisfy the requirement in Article 190 of the Treaty to state the reasons on which they are based. A decision to reduce assistance initially granted, which has serious consequences for those applying for it, must clearly show the grounds which justify a reduction of the amount of the assistance initially authorised (judgments in Case C-181/90 *Consorgan* v *Commission* [1992] ECR I-3557, paragraphs 15 to 18, and Case C-189/90 *Cipeke* v *Commission* [1992] ECR I-3573, paragraphs 15 to 18). In this case, neither the letter of 14 June 1991 nor the inspection reports identify, with respect to each of the applicants, the items to which the reduction relates, or state clearly the reasons which led the Commission to reduce, for each of the applicants, the assistance granted.

53 It follows that the contested decision to reduce the assistance must be annulled and it is not necessary to consider the last plea relied on by the applicants in support of their application for annulment.

The claim for an order that the Commission pay the balance of the ESF assistance

54 In the context of an application for annulment under Article 173 of the Treaty, the Community judicature merely reviews the legality of the contested measure. Where the contested measure is annulled, under Article 176 of the Treaty it is for the institution which adopted the act — not the Community judicature — to take the necessary measures to ensure the judgment is complied with.

55 It follows that the claim for an order by the Court that the Commission pay to the applicants the balance of the ESF assistance is inadmissible, since it goes beyond the jurisdiction conferred by the Treaty on the Community judicature in the context of an application for annulment. This claim must therefore be rejected.

Costs

56 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. In this case, since the Commission has been unsuccessful and the applicants have asked that it be ordered to pay the costs, the Commission must be ordered to pay the whole of the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1. **Dismisses the application as inadmissible in so far as it seeks to have the Commission ordered to pay the balance of the financial assistance from the European Social Fund;**

2. **Annuls the Commission's decision reducing the financial assistance granted by the European Social Fund for project No 870844 P1;**

3. **Orders the defendant to pay the costs.**

Schintgen García-Valdecasas Vesterdorf

Lenaerts Bellamy

Delivered in open court in Luxembourg on 6 December 1994.

H. Jung R. Schintgen

Registrar President