JUDGMENT OF THE COURT (Sixth Chamber)

5 October 1999 *

In Case C-84/96,

Kingdom of the Netherlands, represented by J.S. van den Oosterkamp and A. Fierstra, Deputy Legal Advisers at the Ministry of Foreign Affairs, acting as Agents, with an address for service in Luxembourg at the Netherlands Embassy, 5 Rue C.M. Spoo,

applicant,

v

Commission of the European Communities, represented by E. Mennens, Principal Legal Adviser, and P. Oliver, Legal Adviser, acting as Agents, with an address for service in Luxembourg at the Chambers of C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of the Commission decisions of 16 February 1996 and of the debit note based on one of those decisions concerning the conclusion of ERDF infrastructure projects Nos 80.07.03.002 (Veendam-

* Language of the case: Dutch.

Musselkanaal) and 84.07.03.004 (Weg Veendam) co-financed by the European Regional Development Fund,

THE COURT (Sixth Chamber),

composed of: P.J.G. Kapteyn, President of the Chamber, G. Hirsch, J.L. Murray (Rapporteur), H. Ragnemalm and R. Schintgen, Judges,

Advocate General: A. La Pergola,
Registrar: L. Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 3 December 1998,

after hearing the Opinion of the Advocate General at the sitting on 25 February 1999,

gives the following

Judgment

1 By application lodged at the Court Registry on 19 March 1996, the Kingdom of the Netherlands brought an action under the first paragraph of Article 173 of the EC Treaty (now, after amendment, the first paragraph of Article 230 EC) for the annulment of the Commission decisions of 16 February 1996 and of the debit note based on one of those decisions concerning the conclusion of ERDF infrastructure projects Nos 80.07.03.002 (Veendam-Musselkanaal) and 84.07.03.004 (Weg Veendam) co-financed by the European Regional Development Fund (ERDF).

2 Article 15 of Council Regulation (EEC) No 2052/88 of 24 June 1988 on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1988 L 185, p. 9), as amended by Council Regulation (EEC) No 2081/93 of 20 July 1993 (OJ 1993 L 193, p. 5, hereinafter 'Regulation No 2052/88'), provides:

'Transitional provisions

1. This regulation shall not affect multiannual operations, including the adjustment of Community support frameworks and forms of assistance, approved by the Council or by the Commission on the basis of the existing rules governing the Structural Funds applying before the entry into force of this regulation.

2. Applications for assistance from the Structural Funds towards operations which are submitted under the provisions applying before the entry into force of this regulation shall be considered and approved by the Commission on the basis of those provisions.

3. The provisions referred to in Article 3(4) and (5) shall lay down specific transitional provisions relating to the implementation of this article, including provisions to ensure that aid to Member States is not interrupted pending the establishment of the plans and operational programmes in accordance with the new system and that the grant of assistance for projects granted assistance before 1 January 1989 shall be finally concluded no later than 30 September 1995.'

3 Article 12 of Council Regulation (EEC) No 4254/88 of 19 December 1988 laying down provisions for implementing Regulation (EEC) No 2052/88 as regards the European Regional Development Fund (OJ 1988 L 374, p. 15), as amended by Article 1 of Council Regulation (EEC) No 2083/93 of 20 July 1993 (OJ 1993 L 193, p. 34, hereinafter 'Regulation No 4254/88'), provides:

'Transitional provisions

Those portions of the sums committed for the granting of assistance in respect of projects decided on by the Commission before 1 January 1989 under the ERDF which have not been the subject of a request for final payment to the Commission by 31 March 1995 shall be automatically released by the Commission by 30 September 1995 at the latest, without prejudice to those projects which are subject to suspension for judicial reasons.'

Article 32(1) of Council Regulation (EEC) No 1787/84 of 19 June 1984 on the European Regional Development Fund (OJ 1984 L 169, p. 1), provides:

'Where a measure which has been granted ERDF assistance has not been carried out as planned, or if the conditions imposed by the provisions which govern the

measure are not fulfilled, ERDF assistance may be reduced or cancelled, if the Commission so decides after consulting the ERDF committee.

Member States shall repay to the Commission the amount of ERDF assistance received in all cases where national aid used as the basis for calculating the amount of ERDF assistance has been repaid to the Member State concerned by the investor.'

4 By decision of 16 December 1980, the Commission granted ERDF aid in the maximum amount of NLG 12 million for investment in the Veendam-Musselkanaal infrastructure project (ERDF No 80.07.03.002). The project was due to be completed in 1985.

5 On the basis of requests for interim payment, the Commission paid over the sum of NLG 11 400 000.

6 By decision of 12 December 1984, the Commission granted ERDF assistance in the maximum amount of NLG 13 320 000 for investment in the Weg Veendam (Groningen) infrastructure project (ERDF No 84.07.03.004). The project was due to be completed on 1 January 1990.

7 Since that date could not be adhered to, the Netherlands Ministry of Foreign Affairs sought, by letter of 5 December 1990, an extension of the project until 31 December 1993 at the latest. On 19 February 1991 the Commission acceded to that request. On 14 January 1994 the Ministry of Economic Affairs submitted to the Commission a reasoned request seeking a fresh extension to 31 December 1994. By letter of 17 May 1994, the Commission turned down that request.

8 On the basis of two requests for interim payment, the Commission paid over the sum of NLG 6 030 000.

9 ERDF projects Nos 80.07.03.002 (Veendam-Musselkanaal) and 84.07.03.004 (Weg Veendam) were completed on 31 March and 1 April 1994 respectively.

10 By letter of 23 February 1995 signed by Mr Garcia-Lombardero, an official in Directorate-General XVI 'Regional policy', the Commission informed the Netherlands that a balance remained outstanding on 18 projects, including ERDF projects Nos 80.07.03.002 (Veendam-Musselkanaal) and 84.07.03.004 (Weg Veendam). It also drew the attention of the Netherlands authorities to Article 12 of Regulation No 4254/88.

11 By letter of 21 March 1995, the Netherlands Ministry of Foreign Affairs informed the Commission that the final statements on 10 projects including ERDF projects Nos 80.07.03.002 (Veendam-Musselkanaal) and 84.07.03.004 (Weg Veendam) would be forwarded before 30 September 1995.

12 On 1 June 1995 the Netherlands Government lodged with the Commission two requests for final payment of a balance of NLG 600 000 for ERDF project No 80.07.03.002 (Veendam-Musselkanaal) and a balance of NLG 2 010 000 for ERDF project No 84.07.03.004 (Weg Veendam).

13 After the Netherlands Ministry of Economic Affairs had set out its Government's point of view concerning, *inter alia*, the interpretation of Article 12 of Regulation No 4254/88 and had also furnished information on a number of specific projects, the Commission, in a letter of 28 July 1995 signed by Mrs Wulf-Mathies, the Commissioner responsible for regional policy, stated that in all cases in which the exception laid down in Article 12 of Regulation No 4254/88 on suspension for judicial reasons did not apply or in which a date other than 31 March 1995 had

not been agreed by the Commission before the entry into force of Article 12 aforesaid, it was compelled to conclude, in the light of its examination, that those projects were to be closed on the basis of the most recent requests for payment in the Commission's possession on 31 March 1995, since the Commission is not authorised to conclude projects on the basis of requests for payment received after that date. By application dated 25 September 1995, which was received at the Court Registry on 27 September 1995, the Kingdom of the Netherlands brought an action for the annulment of that letter (Case C-308/95).

14 On 15 January 1996 the Commission sent a debit note to the Netherlands Ministry of Economic Affairs in respect of ERDF project No 84.07.03.004 (Weg Veendam), which was received on 24 January 1996.

15 On 16 February 1996 the Commission sent another letter referring to its letters of 23 February and 7 April 1995 from which it is apparent that it concluded ERDF projects Nos 80.07.03.002 (Veendam-Musselkanaal) and 84.07.03.004 (Weg Veendam) on the basis of information available to it prior to 1 April 1995.

16 In the case of the first of those projects, the Commission determined the amount which it still had to pay at NLG 551 845. In respect of the second, the Commission seeks reimbursement of NLG 1 364 180.

17 In support of its application, the Netherlands Government relies on six pleas in law. First of all, it alleges that the Commission misinterpreted Article 12 of Regulation No 4254/88 by taking the view that 31 March 1995 constituted the deadline for the submission of final statements and could not be extended. Next, it alleges that the Commission did not provide an adequate statement of the reasons why it could not take into consideration requests for final payment lodged after 31 March 1995, all the more so since it did not conclude the projects until 15 January and 16 February 1996. It further considers that the application by the Commission of Article 12 of Regulation No 4254/88 contravenes certain

general principles of Community law, namely those of Community solidarity and regional partnership, protection of legitimate expectations and proportionality. In the alternative, the Netherlands Government considers that, regard being had to the principle of cooperation in good faith enshrined in Article 5 of the EC Treaty (now Article 10 EC), the Commission ought in any event to have treated the letter from the Ministry of Economic Affairs of 21 March 1995 as a request for final payment. It also alleges that the Commission did not comply with Article 32(1) of Regulation No 1787/84. Finally, it maintains that the calculation made by the Commission in its decision of 16 February 1996 is inaccurate inasmuch as it omitted to take account of the interim statement of 6 April 1994.

The plea alleging misinterpretation of Article 12 of Regulation No 4254/88

18 The Netherlands Government considers that the Commission was wrong to consider that the period expiring on 31 March 1995 could not be extended. In its view, the clear inference to be drawn from Article 12 of Regulation No 4254/88 in conjunction with Article 15(3) of Regulation No 2052/88 is that 31 March 1995 is to be regarded not as a deadline but merely as an indicative time-limit, enabling projects authorised by the Commission before 1 January 1989 to be finally concluded not later than 30 September 1995. The Commission thus has a margin of discretion enabling it to take into account requests for payment lodged after 31 March 1995.

19 The Netherlands Government also considers that the fact that no penalty is incurred if the Commission fails to meet the deadline of 30 September 1995 militates in favour of the argument that the Commission had some room for manœuvre.

20 For its part, the Commission argues that the 31 March 1995 deadline cannot be regarded merely as an indicative time-limit. In its view, that could have been the case only if Article 12 had not attached any legal consequences to non-compliance with that time-limit. However, in the present case, that provision provides for the automatic release by the Commission of the sums committed in the event of the deadline of 31 March 1995 for the submission of requests for final payment not being observed.

21 In that connection, the first point to note is that Article 15(3) of Regulation No 2052/88 laid down, *inter alia*, the principle that grants of assistance for projects in respect of which the decision to grant assistance was made before 1 January 1989 should be concluded by 30 September 1995.

22 To that end, in Article 12 of Regulation No 4254/88 the Community legislature set 31 March 1995 as the deadline for requesting final payment from the Commission of the sums committed. Moreover, it made non-observance of that deadline subject to a penalty, namely the automatic release of portions of the sums committed.

23 It must be stated that, in so doing, it left the Commission with no discretion as to the imposition of that penalty since release of the sums is the automatic and inescapable consequence of failure to observe the 31 March 1995 deadline.

24 Consequently, that date cannot be deemed to be merely an indicative time-limit which the Commission could defer at will.

25 That conclusion is, moreover, compatible with the principle of legal certainty, one of the general principles of Community law.

26 The Court has consistently held that the principle of legal certainty requires that a provision laying down a preclusive period, particularly one which may have the effect of depriving a Member State of the payment of financial aid its application for which has been approved and on the basis of which it has already incurred considerable expenditure, should be clearly and precisely drafted so that the Member States may be made fully aware of the importance of their complying with the time-limit (Case 44/81 *Germany* v *Commission* [1982] ECR 1855, paragraph 16).

27 If, as the Netherlands Government maintains, the Commission had had a discretion enabling it, depending on its workload and its ability finally to conclude the projects by 30 September 1995, to alter the 31 March 1995 deadline, it would have been impossible for the Member States to ascertain with certainty the date on which their requests for final payment were to be submitted so as to avoid the risk of the preclusive period being relied upon against them.

28 Finally, the fact that the Commission itself failed to comply with the 30 September 1995 deadline without any legal consequence ensuing therefrom cannot be interpreted as revealing the existence on the Commission's part of any discretion as to application of the time-limits.

29 Indeed, the fact that no penalty was attached by the Community legislature to non-observance of that deadline is plainly due to the fact that it was not in a position in July 1993 when it set the dates at 31 March and 30 September 1995 to determine the number of projects which the Commission would have to deal with during the period of six months between those two dates.

30 It follows from the foregoing that the first plea is unfounded.

The plea alleging inadequacy of reasoning

31 The Netherlands Government claims that, if the Commission appeared in the end to have taken 31 March 1995 as an indicative time-limit, the conclusion to be drawn would be that it failed to provide an adequate statement of the reasons why it was unable to take into consideration requests for final payment lodged after that date. The inadequacy of the reasoning is all the more striking since the Commission did not conclude the projects until 15 January and 16 February 1996.

32 The Commission considers this plea to be unfounded since, as it has pointed out, it had no room for manœuvre in the application of Article 12 of Regulation No 4254/88.

33 It is clear from the reply to the first plea that the Commission was entitled to take the view that 31 March 1995 was not merely an indicative time-limit. Therefore the second plea is likewise unfounded.

The plea alleging infringement of certain general principles of Community law

34 The Netherlands Government goes on to claim that the application by the Commission of Article 12 of Regulation No 4254/88 infringes certain general principles of Community law.

35 First of all, it considers that the Commission adopted the decisions at issue in breach of the principle of cooperation in good faith laid down in Article 5 of the

EC Treaty, and of the principle of regional partnership, mentioned *inter alia* in the preamble to Regulation No 2052/88, which is a specific expression thereof.

36 Thus, regard being had to the meticulous checks and the efforts made by the Netherlands authorities, the Commission ought to have taken into consideration the requests for final payment of which it had been notified by letter of 21 March 1995 and which reached it on 1 June 1995, all the more so since those requests did not concern expenditure incurred after 31 March 1995.

37 The Netherlands Government further considers that the Commission contravened the principle of protection of legitimate expectations. It states that Article 15 of Regulation No 2052/88 in conjunction with Article 12 of Regulation No 4254/88 fundamentally amended with retroactive effect the provisions applicable to infrastructure projects by introducing a date by which requests for final payment had to be submitted and a date for final conclusion of the projects. Prior to the entry into force of those two provisions, the Community rules applicable to ERDF assistance laid down no time-limit for implementation in regard to financial commitments for projects to be carried out over several accounting periods, or for submission of requests for final payment.

38 Moreover, where individual decisions granting assistance did lay down implementing periods, the Commission was accustomed to agreeing to requests for an extension without laying down any conditions other than that the newly agreed period should be observed.

39 In the light of the excessive nature of the new provisions, the Commission ought to have informed the Member States of how it intended to interpret Article 12 of Regulation No 4254/88 and of the financial consequences of that interpretation, even if it had never itself entertained any doubts concerning that article, given the possibility that a Member State might consider it ambiguous.

40 In the absence of such information, the Netherlands Government considers that it was entitled to take the view that the project at issue would, under Article 12 of Regulation No 4254/88, be finally concluded as before in a spirit of collaboration and cooperation in good faith, especially as the Commission allowed the crucial date of 30 September 1995 to pass without reacting.

41 The Netherlands Government further argues that imposition of the penalty by the Commission contravenes the principle of proportionality.

42 It thus points out that the Court has held that breach of a secondary obligation cannot in itself entail loss of entitlement to aid where the principal obligations are fully observed (Case 240/78 *Atalanta Amsterdam* [1979] ECR 2137). Besides, according to settled case-law, the penalty must be appropriate in order to achieve the objective pursued and may not go beyond what is appropriate and necessary to attain that objective (see, in particular, Case C-118/89 *Lingenfelser* [1990] ECR I-2637).

43 In view of the fact that the principal obligations on which entitlement to ERDF assistance depends were met, the Commission ought to have refrained from imposing the penalty provided for in the event of failure to submit requests for final payment within the proper time-limits, especially as the objective of final conclusion of the projects by 30 September 1995 was in no way jeopardised.

44 The Commission emphasises that the reasoning deployed by the Netherlands Government using the principles of Community solidarity and regional partnership, protection of legitimate expectations and proportionality presupposes that it enjoyed some discretion with regard to the application of Article 12 of Regulation No 4254/88, which is not the case.

45 Furthermore, it is the Commission's view that the applicant's arguments cannot be deemed to challenge Article 12 because, if they were, they would be inadmissible, the period for bringing an action against that provision having long since expired.

46 First of all, as indicated in paragraphs 21 to 24 hereof, the Commission had no discretion as to the application of the penalty laid down in Article 12 of Regulation No 4254/88 in the event of non-observance of the 31 March 1995 deadline.

47 Accordingly, by not taking into consideration, in regard to the conclusion of ERDF projects Nos 80.07.03.002 (Veendam-Musselkanaal) and 84.07.03.004 (Weg Veendam), the requests for final payment communicated to it on 1 June 1995 by the Netherlands authorities, the Commission was merely applying Article 12 of Regulation No 4254/88. As such, therefore, the action taken by it cannot have infringed either the principle of Community solidarity and its corollary, the principle of regional partnership, or the principle of proportionality.

48 On the alleged infringement of the principle of protection of legitimate expectations, the Netherlands Government has confined itself to referring to the Commission's approach before the entry into force of Article 12 of Regulation No 4254/88. In regard to the period subsequent to that date, it has pointed to no specific conduct on the part of the Commission which might have led it to believe that 31 March 1995 was no more than an indicative time-limit the observance of which would entail no legal consequences.

49 Moreover, there can be no ambiguity surrounding the connection established in Article 12 between non-observance of the 31 March 1995 deadline for the submission of requests for final payment and automatic release of portions of the sums committed; by failing to ascertain what each Member State's understanding of that provision was, the Commission cannot be said to have given rise on the part of one of them to a legitimate expectation that to exceed that time-limit would not be attended by any consequences.

50 Finally, since the Netherlands Government has clearly stated that it was not seeking in its plea alleging infringement of the principles of Community solidarity and regional partnership, proportionality and protection of legitimate expectations, to call in question the legality of Article 12 of Regulation No 4254/88, there is no need to examine that point.

51 It follows from all the foregoing that the third plea is unfounded.

The plea alleging manifest error of assessment by the Commission in not treating the letter of 21 March 1995 as a request for final payment

52 The Netherlands Government claims that, as there was no special application form, the letter from the Ministry of Economic Affairs of 21 March 1995 ought to have been regarded by the Commission as a request for final payment, regard being had to the principles of cooperation in good faith and partnership.

53 In its view, the Commission should have inferred from that letter that the projects at issue had been concluded and that the intention of the Netherlands authorities was to lay claim to the unpaid assistance.

54 It considers that there are no grounds for the assumption that the request for final payment referred to in Article 15 of Regulation No 2052/88 and Article 12 of Regulation No 4254/88 may be assimilated to the 'final payment claim' mentioned in Article 28 of Regulation No 1787/84. Unlike the latter claim, no other condition is laid down as regards the request for final payment, which implies that a simple letter may suffice.

55 Moreover, if the letter of 21 March 1995 could not be deemed to constitute a completed request for final payment, it was for the Commission, acting on the principle of cooperation in good faith, to notify the Netherlands authorities of its position by return of post so as to enable them to regularise their request for payment within the time-limit or, if appropriate, within a suitable period to be determined by the Commission.

56 On the other hand, the Commission considers that, even on the assumption that a request for final payment cannot be assimilated to a final payment claim within the meaning of Article 28 of Regulation No 1787/84, which it disputes, the request for final payment must at least indicate clearly and precisely that a specific amount is being sought. It must also contain the information on the basis of which the amount is to be calculated. Yet the letter at issue displays none of these features.

57 In that connection, it should be noted that Article 12 of Regulation No 4254/88 in conjunction with Article 15 of Regulation No 2052/88 makes it clear that requests for final payment submitted by the Member States must at least contain the information which the Commission needs in order to proceed with the final conclusion of those projects and payment of the sums claimed.

58 It appears that, in its letter of 21 March 1995, the Netherlands Government confined itself, as regards ERDF projects Nos 80.07.03.002 (Veendam-Musselkanaal) and 84.07.03.004 (Weg Veendam), to announcing that the projects had been completed and that final statements would be sent to the Commission in September 1995. It did not provide the Commission with any information enabling it finally to conclude the projects at issue, in particular as regards the amounts claimed. Accordingly, that letter could not be regarded as a request for final payment within the meaning of Article 12 of Regulation No 4254/88.

59 Furthermore, it cannot be held against the Commission that it failed to inform the Netherlands authorities by return of post that the letter of 21 March 1995 could not be deemed to constitute a request for final payment since, as is apparent from paragraph 57 hereof, the Netherlands Government could not reasonably be unaware of that conclusion.

60 Accordingly, the fourth plea must be rejected as unfounded.

The plea alleging that Article 32(1) of Regulation No 1787/84 was not applied

61 The Netherlands Government considers that since conclusion of the projects at issue involved a reduction in ERDF assistance, the Commission was required under Article 32(1) of Regulation No 1787/84 to consult the ERDF committee which, to the applicant's knowledge, was not done.

62 The Commission, on the other hand, considers that Article 32 of Regulation No 1787/84 relates to a situation which differs from that envisaged by Article 12 of Regulation No 4254/88. The procedures under each provision are different. In the case of Article 12, provision is made for the automatic release of the sums committed, which precludes consultation of the ERDF committee, as provided for under the other provisions.

63 In that connection, it should be noted that Article 32 of Regulation No 1787/84 provides that the Commission may decide to reduce or cancel assistance where a measure has not been carried out as planned, or if the conditions imposed by the provisions which govern the measure are not fulfilled. It thus enjoys a discretion whose exercise, however, must always be preceded by consultation of the ERDF committee.

64 The situation referred to in Article 12 of Regulation No 4254/88 is different. Under that provision, the Commission has no discretion because, as stated in paragraph 23 hereof, the release of sums and thus the reduction, or even cancellation, of assistance, is the automatic and inescapable consequence of non-observance of the 31 March 1995 deadline for the submission of requests for final payment. It must therefore be concluded that the procedure laid down in Article 32 of Regulation No 1787/84, providing for consultation of the ERDF committee, does not fall to be applied.

65 Consequently, the fifth plea is unfounded.

The plea alleging that a manifest error of assessment was made by the Commission in not taking account of the interim statement of 6 April 1994

66 Finally, the Netherlands Government considers that the figure of NLG 15 552 734.98 calculated by the Commission in its decision of 16 February 1996 is incorrect because it omitted to take into account an interim statement of 6 April 1994.

67 The Netherlands Government acknowledges that the statement in question was cancelled by facsimile of 8 November 1994 from the Ministry of Economic Affairs. None the less, that facsimile established a link between cancellation of the interim statement and submission of the request for final payment. Since the Commission refused to take into consideration the request for final payment, it was similarly bound to disregard cancellation of the interim statement, in accordance with the principles of cooperation in good faith and sound administration.

68 The Commission points out that the statement of 6 April 1994 was unclear. Accordingly, the calculation criteria used by the Netherlands were uncertain and

the calculation itself resulted in assistance at the rate of 33% instead of the 30% provided for in the decision granting assistance. It was for that reason that the Netherlands Government, in reply to a letter from the Commission, decided to cancel that statement.

69 In that connection, suffice it to state that, by choosing unilaterally and unconditionally to withdraw its statement of 6 April 1994, the Netherlands Government has rendered it non-existent in law. Consequently, it cannot be held against the Commission that it failed to take account of that statement in its decision concluding ERDF project No 84.07.03.004 (Weg Veendam).

70 The sixth plea is therefore unfounded.

71 In the light of the foregoing, the application must be dismissed in its entirety.

Costs

72 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. As the Commission has asked for costs to be awarded against the Kingdom of the Netherlands and the latter has failed in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. **Dismisses the application;**

2. **Orders the Kingdom of the Netherlands to pay the costs.**

Kapteyn Hirsch Murray

Ragnemalm Schintgen

Delivered in open court in Luxembourg on 5 October 1999.

R. Grass — Registrar

P.J.G. Kapteyn — President of the Sixth Chamber