REPORT FOR THE HEARING
delivered in Case 84/85 *

I — Legal background and summary of the facts

1. *Legal background of the proceedings*

Article 123 of the EEC Treaty provides for the establishment of a European Social Fund (hereinafter referred to as 'the Fund') with the task of 'rendering the employment of workers easier and of increasing their geographical and occupational mobility within the Community'. According to Article 124, the Fund is to be administered by the Commission, assisted by a consultative committee. Under Article 126, the Council may, under certain conditions, rule 'that all or part of the assistance referred to in Article 125 shall no longer be granted' and 'determine what new tasks may be entrusted to the Fund within the framework of its terms of reference as laid down in Article 123'. Article 127 requires the Council to lay down 'the provisions required to implement Articles 124 to 126', including the conditions under which assistance is to be granted by the Fund in accordance with Article 125.

For that purpose the Council adopted Decision 83/516/EEC of 17 October 1983 on the tasks of the European Social Fund (Official Journal 1983, L 289, p. 38), under which the Fund is to assist in the implementation of policies designed to equip the workforce with the skills required for stable employment and to generate employment opportunities (Article 1 (1)). Article 3 (1) provides that:

'Fund assistance may be granted for operations carried out within the framework of Member States' labour market policies. These operations shall include in particular those intended to improve employment opportunities for young people, notably by means of vocational training measures after completion of full-time compulsory schooling.'

Pursuant to Article 4 (1), fund assistance may be granted in the first place in order to promote employment for young people under the age of 25. Fund assistance is in general granted at the rate of 50% of eligible expenditure (Article 5 (1)) and on a flat-rate basis (Article 5 (4)). Under Article 6 (1) the Commission is to adopt, before 1 May of each year and for the three following financial years,

'the Fund-management guidelines for determining those operations which reflect Community priorities as defined by the Council and in particular the action programmes in the area of employment and vocational training'.

For the implementation of Decision 83/516/EEC, the Council adopted Regulation No 2950/83 of 17 October 1983 (Official Journal 1983, L 289, p. 1). Under Article 1 of the regulation, assistance may be granted from the Fund for, *inter alia*, the granting of aid for young people under 25 who are seeking employment and long-term unemployed. The aid in question is for recruitment to additional jobs or for employment in projects for the creation of

* Language of the Case: English.

additional jobs which fulfil a public need. The aid is granted for a period not exceeding 12 months per person.

Article 2 of the regulation provides that for such expenditure assistance is to be granted from the Fund in the amount of 15% of the average gross wage or salary of industrial workers in the Member State concerned. According to Article 2 (2),

'Before 1 August each year the Commission shall determine the amounts of assistance to be granted per person and per unit of time for each Member State in the following financial year and shall publish them in the *Official Journal of the European Communities*'.

On the basis of those Council measures, the Commission adopted Decision 83/621/EEC of 30 November 1983 (Official Journal 1983, L 350, p. 25) fixing the rates of assistance per person and per week from the European Social Fund towards expenditure on recruitment and employment premiums in the 1984 financial year for each Member State. The amount fixed for the United Kingdom was UKL 19.50.

Pursuant to Article 6 (1) of Council Decision 83/516/EEC, on 10 January 1984 the Commission published its guidelines for the financial years 1984-86 (Official Journal 1984, C 5, p. 2).

2. *Facts*

The United Kingdom submitted its applications regarding expenditure for 1984 on 13 March 1984, pursuant to Articles 4 (1) and 10 (4) of Regulation No 2950/83. The main job creation scheme in the United Kingdom eligible for support from the Fund was the 'Community Programme' administered by the Manpower Services Commission (hereinafter referred to as the 'MSC'). That programme was intended to provide additional temporary full-time and part-time jobs for long-term unemployed and for unemployed young people under 25 on work benefiting the local Community. The United Kingdom's applications also concerned similar schemes operated by local authorities. Those applications and the applications of other Member States for 1984 were considered by the Advisory Committee in June 1984, and on 23 July 1984 the Commission made a decision on the greater part of the applications. That Decision, No COM(84) 1076, was not published but was notified to the Member States in August 1984. It consisted of a single operative article followed by a large number of individual decisions. The following note was appended to those decisions:

'In so far as certain of these amounts concern recruitment or employment operations under the terms of Commission Decision 83/621/EEC of 30 November 1983 and the number of hours actually worked per week has not yet been indicated, these amounts are reckoned as being based on full-time working. In the case of part-time work, these amounts will be reduced proportionately to the hours actually worked at the payment stage.'

Upon receiving that decision the United Kingdom Department of Employment complained to the Commission that some applications had not been included, in particular support for the MSC Community Programme for young people under 25 years of age, and challenged the decision in so far as part-time work was concerned. That complaint was followed by an

exchange of correspondence between the Department and the Commission and by the submission of applications for 1985, which were due before 21 October 1984.

On 19 December 1984 the Commission adopted a further Decision, No COM(84) 1941, replacing the Decision of 23 July 1984; the preamble to the second decision included the following remark:

'Whereas it is necessary to recalculate recruitment aids both for half-time operations and operations relating to the self-employed and that such recalculation releases additional appropriations . . . '.

That decision also covered aid for the MSC Community Programme for people under 25 (which had been omitted in Decision COM(84) 1076 of 23 July 1984) and aid for similar schemes for young people administered by local authorities, but rejected as ineligible certain parts of those programmes, for a total amount of UKL 13 083 004.

Decision COM(84) 1941 of 19 December 1984 also contained a revised version of the statement concerning reductions for part-time work:

'Where any of these amounts are in respect of recruitment and employment operations and are covered by Decision 83/621/EEC of 30 November 1983, the relevant flat rate applies to a full-time job.

For half-time work the value of the flat rate is halved.'

The Commission also sent the Member States a summary of the amounts covered by the decision entitled 'Annex II to the Commission Decision No COM(84) 1941 dated 19.12.1984'.

Its title page contained a note stating that:

'NB: This decision cancels and replaces all former decisions concerning the 1984 exercise.'

The Commission also sent notes to the Advisory Committee and to the United Kingdom on 19 and 21 December 1984 respectively, explaining, *inter alia,* the method of calculating the amount of aid for part-time employment. A similar note was sent to Ireland. The notes sent to the United Kingdom and Ireland were not published.

With regard to the 1985 financial year, in Decision 84/429/EEC of 27 July 1984, which was published on 11 September 1984 (Official Journal 1984, L 241, p. 23), the Commission set the rates of support for each Member State; the rate for the United Kingdom was set at UKL 20.75. Article 2 of that decision contained the following provision which was not present in Decision 83/621/EEC:

'The amounts provided for in Article 1 concern full-time wage subsidy or recruitment operations. As regards part-time operations, the amount shall be calculated in proportion to the number of hours worked on the basis of 40 hours per week.'

II — Written procedure and conclusions of the parties

By an application lodged at the Court Registry on 2 April 1985 the United Kingdom brought these proceedings.

The written procedure took the normal course. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry.

The *United Kingdom* requests the Court:

(i) to declare void Decision COM(84) 1941 of the Commission of 19 December 1984 in so far as that decision purported to apply reductions of UKL 13 083 004 to grants from the European Social Fund to the United Kingdom in respect of measures for young people under 25;

(ii) to order the Commission to pay the costs of this action.

The *Commission* claims that the Court should:

(i) declare the application unfounded;

(ii) order the United Kingdom to pay the costs.

III — Submissions and arguments of the parties

In support of its claim the *United Kingdom* makes the following seven submissions:

(i) The decision altered the criteria for assistance from the Fund with retroactive effect, to the prejudice of the rights and legitimate expectations of the United Kingdom;

(ii) By adopting the decision the Commission infringed the principle of legal certainty;

(iii) The *Commission's* ruling on the calculation of the aid in question and the manner in which it was adopted and applied infringed the principle of respect for legitimate expectations;

(iv) The Commission failed to consult the Advisory Committee established by Article 124 of the EEC Treaty;

(v) None of the Commission's decisions comply with the formal requirements of the Commission Decision and none of them can be regarded as having any legal effect;

(vi) The reductions made by Decision COM(84) 1941 of 19 December 1984 are not in accordance with the wording of the annex to that decision concerning part-time work;

(vii) None of the Commission's decisions on part-time work state any, or any adequate, reasons, contrary to Article 190 of the Treaty.

The *Commission* disputes all the claims and arguments put forward by the United Kingdom.

With regard to the arguments set out above the United Kingdom and the Commission make the following submissions:

1. *Retroactive application of a new administration criterion*

The United Kingdom argues that the contested decision adopts an interpretation of the word 'week' which, in the context of the legislation governing the operations of the European Social Fund, is wrong in law. In setting the amount of assistance from the Fund per person and per unit of time for the financial year 1984, in Decision 83/621/EEC of 30 November 1983, the Commission could not define the word 'week' as a week of full-time work. In this context that word is to be used simply as a unit of time without regard to the number of hours worked. Consequently, no

reduction should have been made from the amount of aid for part-time work. That interpretation is supported by the fact that a definition of the word 'week' as 40 hours was adopted only for the financial year 1985, in Decision 84/429/EEC of 27 July 1984, and that decision makes express provision for proportional reductions for part-time work.

Nothing in the applicable legislation or the administrative practice of the Fund could have led the United Kingdom to foresee the interpretation given by the Commission before it added the abovementioned note to the contested decision. However, if the Commission could properly adopt the rule which it purported to adopt, that is to say that the rates fixed applied only to a full-time week and that proportionate reductions should apply in respect of a part-time week, it could not do so with retroactive effect. The United Kingdom relies in that regard on the Court's judgments regarding the protection of legitimate expectations, in particular the judgments of 25 January 1979 (Case 98/78 *Racke* v *Hauptzollamt Mainz* [1979] ECR 69, and Case 99/78 *Decker* v *Hauptzollamt Landau* [1979] ECR 101) and 30 September 1982 (Case 114/81 *Tunnel Refineries* v *Council* [1982] ECR 3189).

According to the United Kingdom, both the wording of the Commission's note of 19 December 1984 and the comparison of Decision 84/429/EEC with Decision 83/621/EEC show that the rule regarding part-time work which the Commission purported to adopt for the financial year 1984 departed from previous practice and in fact appeared for the first time only in the decision concerning the financial year 1985. The United Kingdom states that its applications made no distinction between full-time and part-time work, and that the rule in question was not applied to the applications which were approved in July 1984. The Commission raised the matter for the first time only after the meeting of the Advisory Committee (indeed, the Committee was never consulted on the matter). The Commission itself did not arrive at a firm conclusion before December 1984, and even then still had doubts as to the manner in which it should be applied.

The United Kingdom emphasizes that it does not challenge the principle of reductions for part-time work but merely the unlawful way in which the reductions were made in 1984. It does accept the legality of the decision in respect of the financial year 1985.

Finally, the United Kingdom disputes the assertion that it was its attitude which led the Commission to state expressly what had previously been considered to be self-evident. It knew nothing of the proposed reduction for part-time work until August 1984 when it received the Commission's decision of 23 July 1984, that is to say after the adoption of Decision 84/429/EEC. Information regarding the number of hours worked had never been used for determining the rate of support for a scheme and reducing payments from the Fund for part-time work. The Commission has not given a single example of a reduction made on those grounds and is therefore unable to support its argument.

According to the *Commission*, there is no question of retroactivity or of prejudice to

the rights and legitimate expectations of the United Kingdom, because the rule applicable to part-time work was in no way new. On the facts of the case, the Commission disputes the assertion that prior to the contested decision the rate of support from the Fund was always calculated without regard to the hours worked. Article 1 (2) of Council Regulation No 3039/78 (Official Journal 1978, L 361, p. 3), whose terms are similar to those of Article 2 of Council Regulation No 2950/83, was, like the latter, interpreted as meaning that support was in proportion to hours worked.

Both before 23 October 1983 and under the new application form prescribed since 1 January 1984 under Commission Decision 83/673/EEC, applications addressed to the Fund must show the number of hours worked. According to Article 2 of Decision 84/429/EEC, the meaning of which is entirely clear, a reduction of one-fortieth was to be made for each hour less than 40 worked per week, on the basis of the average working week in the Member States (40 hours per week).

With regard to the reductions, the Commission explains that in the light of the fact that applications for aid from the Fund consistently exceed the money available, it was necessary to establish a series of priorities for the use of the Fund. 75 % of the Fund's resources are at present reserved under Decision 83/516/EEC for programmes in favour of persons under 25. It was the need to spend a limited amount of money in the most effective way that led the Commission to reduce support for part-time activities.

Contrary to the United Kingdom's assumption, support from the Fund does not automatically correspond to the financial contribution of the national authorities. The Commission has a certain discretion with regard to the best way of managing the Fund. In the case of existing projects, an advance of 50% is paid immediately upon submission of the application, but the remainder is paid only on receipt of a final payment claim accompanied by a detailed report on the relevant operation in accordance with Article 5 (4) of Regulation No 2950/83. Consequently, it is only after receiving that report (which indicates the total number of hours actually worked) that it is possible to calculate the exact amount of eligible expenditure. Prior to that calculation the United Kingdom had no legitimate reason to conclude that a specific amount would in the end be paid.

The Commission disputes in particular the United Kingdom's assertion to the effect that the contested decision introduced an entirely new rule in respect of part-time work. A statement of the number of hours worked has always been required in the application forms for support from the Fund, including the forms prescribed by Decision 84/673/EEC for the financial year 1984. In stating its intention, in Decision COM(84) 1076, of making reductions at the time of payment, and in replacing that decision by the contested decision, it merely continued its previous practice. The provision in Decision 84/429/EEC, which for the first time referred expressly to the rule that proportional reductions would be made in respect of part-time work, was not included in order to effect a substantive change, but only in order to remove any doubts which might have been created by the United Kingdom's attitude.

In support of its interpretation the Commission refers to the fact that under Article 2 (1) of Regulation No 2950/83 support from the Fund is set at a flat percentage of the average gross wage of industrial workers in the Member State concerned. When it adopted that method of calculation the Council intended that the figure should be related to actual earnings, which are a function of the number of hours worked. According to the Commission, the method of calculation is to take the national average hourly rate in each Member State and multiply it by the national average working week in order to arrive at an average weekly wage (see the table in Annex 2 to the defence and the explanations given in the annex to the rejoinder). Since the average working week in the Member States is around 40 hours, that figure is used in calculating pro rata payments. The United Kingdom was aware of that calculation method not later than September 1983, on receipt of the Commission's working document of 26 September 1983 (Annex 2 to the defence). It did not dispute that method or the Commission's calculations for 1984 or 1985 set out in Decisions 83/621/EEC and 84/429/EEC. Consequently, it cannot now assert that the number of hours worked is irrelevant in calculating the amount of support from the Fund.

With regard to its note of 19 December 1984, the Commission argues that it was intended only to indicate the effect of the contested decision and reiterate the previous practice. It is true that it did not apply pro rata reductions in Decision COM(84) 1076 of 23 July 1984, but it clearly stated that they would be applied at the payment stage. With regard to its note of 21 December 1984, the Commission states that the other Member States have now requested a copy. It argues that it is only recently that the Member States have started to submit to the Fund programmes involving part-time work. That also explains why it does not have many examples of the application of the pro rata rule. (In the annex to the rejoinder the example given in the defence is explained in detail).

2. *Breach of the principle of legal certainty*

The *United Kingdom* argues that in adopting the rule on part-time work the Commission infringed that principle inasmuch as it was impossible for the Member States to predict the extent of their entitlement to support from the Fund. That uncertainty persisted until January 1985, that is to say after the closing date for applications for 1985.

The United Kingdom refers in that regard to the importance of the principle of legal certainty in the context of the operations of the Fund, as recognized by the Court, in particular where a measure may have the effect of depriving a Member State of the payment of financial aid to which it is entitled (judgment of 26 May 1982 in Case 44/81 *Federal Republic of Germany and Bundesanstalt für Arbeit* v *Commission* [1982] ECR 1855 at p. 1877).

While recognizing that a degree of uncertainty with regard to the actual amount to be paid is inevitable, the United Kingdom argues that that cannot be true with regard to the rules governing the Fund; in respect

to the latter the Commission has no discretion.

The *Commission* denies that the principle of legal certainty is infringed by the application of the rule in question. First of all, in view of the interpretation which had been applied in the past, no substantive change was made by the contested decision. Secondly, there can be no certainty regarding support from the Fund before a final decision is made approving a specific amount. That approval is not subject to any national quota system but depends on a number of matters which are not predictable by the applicant Member State.

Case 44/81, referred to above, concerned the Commission's refusal to accept a claim for payment presented out of time, when the application for support itself had been approved. No such expectation was justified in the present case on the basis of the decision of 23 July 1984 or that of 19 December 1984 because neither of them approved the full sum requested. The condition relating to pro rata reductions was announced in the contested decision itself and not subsequently. Furthermore, the method to be applied had already been clearly indicated in Decision COM(84) 1076, which has not been challenged under Article 173 of the Treaty. Consequently, the uncertainty (if there was any) could not have persisted until 1985.

3. *Breach of the principle of respect for legitimate expectations*

The *United Kingdom* considers that the ruling adopted by the Commission and the manner in which it was adopted and applied (including the reductions carried out) also infringed the principle of respect for legitimate expectations. In its view, applicants are entitled to assistance from the Fund for eligible schemes which have been classified as having priority. The Commission has no discretion to reject applications which satisfy the criteria laid down. Where the available appropriations are not sufficient, the Commission must first approve priority applications and then apply any necessary reduction in accordance with prescribed formulae.

The *Commission* accepts that there may be a legitimate expectation of receiving some assistance from the Fund, but an applicant cannot assume that all the aid asked for will be granted. It is for the Commission to allocate the available appropriations and where necessary to make reductions in respect of certain schemes and not of others, in accordance with the 'guidelines' published pursuant to Council Decision 83/516/EEC.

4. *Failure to consult the Advisory Committee*

The *United Kingdom* asserts that the Commission failed to consult the Advisory Committee established by Article 124 of the Treaty, contrary to Article 1 (1) of Council Decision 83/517/EEC of 17 October 1983 on the rules of the Committee of the European Social Fund (Official Journal 1983, L 289, p. 42). Although the Commission consulted the Committee with regard to the applications for the financial year 1984, it at no time consulted it with regard to the part-time work ruling, in relation to 1984 or to 1985. None of the Commission's decisions on the matter refers to any such consultation. As the Court has held, the breach of that duty constitutes an infringement of an essential procedural

requirement (most recently, the judgments of 29 October 1980 in Case 138/79 *Roquette* v *Council* [1980] ECR 3333, and Case 139/79 *Maizena* v *Council* [1980] ECR 3393).

The Commission asserts that it consulted the Committee with regard to the proposed decisions for 1984, but admits that it did not expressly seek its opinion on the ruling in question. It was not obliged to do so because the Committee was well aware of the calculation method based on a certain number of hours per week, which had also been used in the past. Furthermore, it is not bound to take into account all the Committee's suggestions or to consult it a second time after the amendment of a draft decision on which the Committee's opinion has already been obtained.

5. *Failure to comply with essential procedural requirements*

In this regard the *United Kingdom* simply states that none of the Commission's decisions complied with the procedural requirements and therefore none of them can be regarded as having any legal effect. Consequently, the reductions made by the contested decision have no valid basis in law.

The *Commission* rejects that argument and submits that the contested decision complies in all respects with the relevant procedural requirements. It states that the notes of 19 and 21 December 1984 were intended simply to inform their recipients of the Commission's views on the question of reductions for part-time work as embodied in the contested decision.

6. *Incorrect application of the law*

The *United Kingdom* further contends that the reductions made by the contested decision are not in accordance with the wording of the annex to that decision regarding part-time work.

In the *Commission's* view, the reductions result from a calculation based on the total number of hours actually worked, as notified by the United Kingdom authorities, converted to working weeks (on the basis of a 40 hour week).

7. *Failure to state adequate grounds*

Finally, the *United Kingdom* argues that none of the Commission's decisions on part-time work states any, or any adequate, reasons contrary to Article 190 of the Treaty.

The *Commission* replies that the contested decision clearly states what the method of reduction was and why the reduction was made. In particular, adequate reasons were stated for the reduction resulting from the ineligibility of part of the MSC programme. Consequently, it also rejects this last argument of the United Kingdom.

IV — Replies to the questions put by the Court

The Court asked the Commission to submit a detailed summary of cases in which the pro rata rule was applied in respect of assistance for part-time employment and to state what its practice was in that regard prior to the contested decision.

In its reply the *Commission* gave details of two files concerning applications submitted by the Kingdom of the Netherlands and the Federal Republic of Germany in respect of 1984, and of two cases which were considered less clear. As regards the practice followed by the Commission regarding part-time employment before the adoption of the contested decision, the Commission concedes that it has discovered three cases in which the schemes envisaged provided for part-time working and for which the Commission made no reductions. The Commission acknowledges therefore that, in the absence of any information to the contrary, the applicant is right to claim that no reduction was made before 1984 specifically with respect to part-time work. However, the Commission states that it adheres to its other arguments which do not relate to the past.

The United Kingdom was asked by the Court to state its view on the importance for the application of the principle forbidding retroactive measures, the principle of legal certainty and the principle of the protection of legitimate expectations, of the distinction made by the Commission with regard to the different stages of the decision to grant support under the European Social Fund, that is to say the stage where the amount of aid for Member States is fixed and the stage of final approval.

In reply, the *United Kingdom* states that in its view the fact that there are different stages in the decision-making process reinforces the importance of the legal principles in issue. Where an application is made in respect of eligible and priority schemes by a Member State, there is a legitimate expectation that it will receive assistance from the Fund in accordance with the established rules and subject only to any reductions made in accordance with the existing guidelines. In this case, on 22 June 1984 the Commission proposed to the Fund Advisory Committee that the full amount would be paid. It was only after that meeting of the Committee that the Commission decided to make the reductions, which was why the decision of 23 July 1984 stated that they would be made at the payments stage. That clearly indicates that the decision to make the reductions was taken between June and July 1984 and represented a new ruling rather than one following any accepted or understood precedent.

The Court also invited the United Kingdom to state the practice followed with regard to the calculation of national and local grants for part-time employment and, specifically, whether the competent British authorities applied a pro rata rule to such programmes.

In reply to that question, the *United Kingdom* states that there are no general rules governing schemes of that type in the United Kingdom and the practice varies considerably from one scheme to another. In the MSC Community Programme, which is relevant in this case, the wage subsidy rate is set at a flat rate of UKL 67 per week. That amount is paid to the sponsor who is carrying out the project for each person he employs, regardless of the number of hours worked. However, since the sponsor is required to pay the participant the going rate for the job, the amount of the subsidy may determine the number of hours worked. Thus, the subsidy rate determines the number of hours worked, rather than the other way round. In other schemes, the subsidy amounts to a fixed percentage of

the wage paid by the employer, irrespective of the number of hours worked, although of course the number of hours worked will be one of the factors affecting the level of wage paid.

V — Oral procedure

At the hearing the Commission, having already said that it would do so in its replies to the questions put by the Court, abandoned its first argument and conceded that no reduction had been made before 1984 specifically for part-time work. Both the United Kingdom and the Commission expounded upon their written submissions. In reply to a question put by the Court, the Commission stated that at the end of 1983 it was aware of the possibility of making specific reductions in respect of part-time work, but had been hesitant to do so.

K. Bahlmann
Judge-Rapporteur