OPINION OF MR ADVOCATE GENERAL TESAURO
delivered on 10 July 1990 *

Mr President,
Members of the Court,

1. The purpose of the present action, brought by the Association pour le développement à Charleroi d'actions collectives de formation pour l'université ouverte (Funoc) is to obtain, first, a declaration that the Commission's decision notified to the applicant by letter of 21 April 1989 is void in so far as it requests the applicant to reimburse BFR 6 579 334 and refuses to pay the balance (BFR 6 600 000) of the financial assistance awarded from the European Social Fund and, secondly, compensation for the damage suffered by Funoc as a consequence of the abovementioned decision.

2. The facts of the case may be summarized as follows:

In September 1983 Funoc submitted to the Commission an application for assistance for an innovatory project within the meaning of Article 3(2) of Council Decision 83/516/EEC of 17 October 1983 on the tasks of the European Social Fund, [1] spread over three years (1984, 1985 and 1986) with the aim of providing training in new information technology for young people with limited qualifications in the Charleroi area.

The project was approved for the amount applied for — BFR 16 500 000 — by Commission Decision C(84) 1076 of 23 July 1984.

On 6 June 1988 Funoc received a registered letter from the Ministry of Labour and Employment which forwarded a debit note from the Commission together with an explanatory letter. The Commission requested the reimbursement of the BFR 9 900 000 advanced on the ground that, according to the report which Funoc had annexed to its request for payment of the balance, Funoc had decided to modify its project as early as January 1984 without informing the competent departments of the Fund, and that the modification was in conflict with the initial structure of the project.

Following correspondence between the Belgian authorities and the Commission, the latter, by letter of 21 April 1989, reduced its demand for reimbursement to BFR 6 579 334, thereby agreeing, in practice, to pay for only the first training course (1984) out of the Fund.

3. Funoc challenges that decision and has put forward four submissions.

The applicant maintains, first, that the decision is void because it was not adopted by the competent body.

* Original language: Italian.
1 — OJ 1983 L 289, p. 38.

Funoc claims that the decision was in fact adopted by Mr Vermelho, a Head of Division in Directorate-General V, the Directorate-General for Employment, Social Affairs and Education, who signed the contested letter of 21 April 1989 even though he had no specific authorization to do so, whereas the previous letters, signed by the Director-General, took, in the applicant's opinion, a different approach which was more understanding and conciliatory.

4. In that regard, it must be pointed out first of all that, in accordance with the internal rules governing the implementation of the general budget of the European Communities, it is Directorate-General V which is responsible for managing the type of expenditure in question.

Consideration of the letter at issue discloses no factor of such a kind as to suggest that Mr Vermelho acted on his own initiative, thereby failing to observe the internal rules.

Moreover, the previous letter, signed by the Director-General, sent on 27 October 1988 (Annex 13b to the application) to the Belgian Minister for Social Affairs, contained the same assessment as was subsequently expressed in Mr Vermelho's letter of 21 April 1988. The letter of 27 October 1988 stated that: 'le fond du problème est qu'il ne s'agit malheureusement pas d'un projet novateur au sens de la réglementation du Fonds' (the nub of the problem is that it is unfortunately not an innovatory project within the meaning of the Fund's rules).

Nor do the solutions envisaged in the earlier letters from the same Director-General appear dissimilar to the decision adopted subsequently, namely to pay from the Fund only the expenditure incurred by Funoc in the first year.

The letter of 27 October 1988 refers to a 'solution acceptable de ce dossier, en tenant compte éventuellement de la partie qui justifie un caractère novateur dans ce programme' (an acceptable solution to this problem, possibly taking account of the part which represents the innovatory nature of this programme) and the subsequent letter of 22 March 1989 (Annex 14b to the application) refers to a 'solution . . . qui tiendrait compte de la partie qui pourrait justifier le caractère novateur dans ce programme réalisé' (solution . . . taking account of the part which might represent the innovatory nature of the programme carried out).

Consequently, the documents produced do not disclose any factor of such a kind as to suggest that, in the present case, the Community administration has failed to comply with the applicable rules.

In my opinion, the first submission is therefore unfounded.

5. The second submission is that the Community administration has infringed the rules governing the Fund.

The applicant claims that the Commission merely presented the Belgian Labour Administration with a debit note, which was subsequently transmitted to Funoc in June 1988 (Annex 7 to the application), that is to say an implementing measure for a decision which had already been taken, which is an infringement of Article 6(1) of Regulation No 2950/83,[2] which requires the Commission to give the Member State concerned the opportunity to make its comments before a decision is adopted to suspend, reduce or withdraw assistance.

6. With regard to that submission, however, it must be pointed out that the contested measure is not the letter transmitted to the applicant in June 1988, but rather the subsequent decision referred to in the letter

2 — OJ 1983 L 289, p. 1.

of 21 April 1989. That decision was unquestionably adopted after much correspondence between the Belgian authorities and the Commission (see the letter from the Minister for Labour and Employment of 30 June 1988, Annex 9 to the application; the Commission's letter of 16 September 1988, Annex 12; Minister Busquin's letter of 16 September 1988, Annex 13a; the Commission's letter of 27 October 1988, Annex 13b; Minister Maystadt's letter of 31 January 1989, Annex 14a; the Commission's letter of 22 March 1989, Annex 14b; and precisely as a result of that correspondence the Commission was persuaded to amend, albeit partly, its prior decision, which is not at issue here.

Furthermore, the provision relied on by the applicant does not lay down a formal consultation procedure but requires only that the authorities of the Member State concerned have the opportunity of making their comments before a final decision is adopted, which is precisely what happened in the present case.

Therefore, the second submission also appears unfounded.

7. Funoc further claims that when the Commission made its own appraisal of whether the project as implemented conformed to the original project, it committed a manifest error of appraisal and incorrectly applied the rules which govern the Fund.

According to the applicant, the modifications made to the programme as previously notified proved to be necessary in order to ensure the very success of the project and did not substantially alter the project as implemented which, according to the applicant, remained a single operation with innovatory characteristics, intended to verify new work theories.

8. At this point it should be stated that the training project proposed by Funoc in September 1983 envisaged, according to the applicant's own description in the application form for assistance, the creation of a scientific production cooperative to carry out research and survey work of general interest, in other words, an observatory of regional economic, social and educational data able to satisfy the needs and enquiries of members of the community.

For that purpose, 90 young people with limited qualifications were to be given appropriate training in research methods and techniques, with intensive use of data processing.

According to additional information supplied to the Commission on 15 June 1984, the project was to comprise three separate stages.

In the first stage (1984 — 600 hours), participants would acquire the skills required for the collection and basic pre-processing of data and for the use of microcomputers.

In the second stage (1985 — 200 hours), the same participants should have become operational and started to apply the methods and techniques learned previously so that they could then carry out, in the third stage, (1986 — 200 hours) survey and research work of interest to the community and reply to enquiries from members of the community.

9. However, it is clear from the final report, drawn up by the applicant itself and sent to the Commission in June 1987, that the project was implemented in a way which was appreciably different from what had been planned, comprising not a single training course for 90 young people spread over three years, but rather three separate one-year training courses each consisting of 1 000 hours, for three different groups of 30 young people. Moreover, the planned cooperative was not, in the end, set up.

10. In my opinion, it is highly doubtful, to say the least, that that change is a purely formal modification, as Funoc claims.

A transformation from a three-year training course of 1 000 hours for 90 young people with limited qualifications into three separate one-year courses for groups of 30 young people is not a mere formal modification of an organizational nature. The entire structure of the project is thereby altered and the project's very chance of success may be reduced considerably because the different stages of the training follow on one another so quickly.

In that regard, the Commission's argument that the length of the course was an essential factor in the acceptance of the application for assistance is very persuasive.

On the other hand, the reasons put forward by the applicant for finding itself obliged to modify its own programme — by initially limiting the number of participants — as a result of the delay in taking the decision to provide assistance and the consequent late payment of the 'advances' are not entirely convincing.

11. While it was waiting for the decision on assistance from the Fund, Funoc could have easily postponed the start of the course for several months and, in any event, it ought to have informed the Commission in good time of its intention to modify the original project so as to verify that the proposed changes met the conditions laid down by the Community administration for the granting of assistance.

However, it is evident that, by a letter sent on 15 June 1984 (see Annex 1 to the defence) following a meeting some days earlier, the applicant confirmed to the Commission the details of the implementation of the project as originally planned, whereas several months earlier (March 1984) the training course had already commenced in the different format described above.

Moreover, Funoc's claims that it had in fact taken steps to notify verbally, to officials of the Commission, the modifications made and that it received express approval, are also implausible. Those claims have in fact been expressly denied by the Community administration and are clearly at variance with the abovementioned letter of 15 June 1984.

12. Equally unconvincing is the applicant's further argument that a note drawn up by the Commission (see Annex 24 to the application) shows that the Community administration acknowledges that modifi-

cations may be made to projects as originally envisaged, since in that note the recipients are requested to mention in the final report any modifications made during the implementation of the project with regard to the objectives and methods mentioned in the application for assistance.

It is obvious that the assessment of the implementation of any innovatory project requires a certain flexibility and account must be taken of the need to adapt the original project in order to deal with any difficulties encountered.

However, that certainly does not mean that the recipient is free to make substantive changes in the implementation of the programme envisaged, even before it has started and without any prior notification to the Commission.

13. It should be added that Funoc's application for assistance was submitted pursuant to Article 3(2) of Decision 83/516, a provision which concerns innovatory projects and that the repetitive nature of the project as implemented appears to be at variance with that provision.

In that regard, the applicant submits that the operation carried out was not really repetitive taking into account the nature, essence and structure of the project, which consisted in a single exercise for the purpose of verifying a work theory and a method.

The applicant emphasizes that the training was part of a single experimental process intended to progressively develop and improve the methods applied. Thus, only the intakes of young people were 'repetitive', since there were three intakes instead of one.

14. Those observations also appear to me to be inconclusive.

It is true that continued, repeated verification of a single work theory permits the quality of the results obtained to be improved progressively on account of the experience acquired on each occasion; nevertheless, after the first experimental verification, the operation is no longer, in my view, truly innovatory and no longer qualifies for assistance under the abovementioned provision.

15. As regards Funoc's claim that the condition of 'non-repetivity' does not appear anywhere in the legislation governing the management of the type of operations in question, it is sufficient to observe that that condition is implicit and is derived from the very concept of an 'innovatory project'.

16. In the light of the above it must, I think, be concluded that the Commission's decision that, since Funoc had substantially modified the planned training programme, it had not used the sums applied for in accordance with the decision to grant assistance and with the Community rules governing the Fund is not vitiated by any manifest error of appraisal or error of law.

17. In the alternative, the applicant claims that the decision infringed the principle of proportionality in so far as the Commission penalized a procedural irregularity, namely

the failure to notify the modifications, by withdrawing the entire amount of the assistance for the parts of the programme implemented during 1985 and 1986. According to the applicant, that is particularly serious since that penalty jeopardizes Funoc's very survival.

In that regard, however, it must be pointed out that the prior decision to grant assistance was revoked not because of a mere 'procedural irregularity', but because it was found that the changes made by Funoc to the original project meant that the operation as implemented differed considerably from what was established in the decision of approval and therefore — at least with regard to the second and third stages — did not qualify for assistance under Article 3(2) of Decision 83/516 on assistance for innovatory projects.

Consequently, by deciding to withdraw the assistance for the training courses carried out during 1985 and 1986, the Commission has not exceeded the limits of what is necessary to ensure the correct use of the sums paid by the Fund.

18. Finally, with regard to the claim for compensation, it must be pointed out that the Court has consistently held that the liability of the Community under the second paragraph of Article 215 depends on the coincidence of a set of conditions as regards the unlawfulness of the act alleged against the institution, the fact of damage and the existence of a causal link between the wrongful act and the damage complained of.

In the present case, as already stated, the act of the Commission which allegedly caused the damage, does not appear to be unlawful.

Consequently, there is no need to consider whether the other conditions laid down by the Court have been met and Funoc's claim for compensation must also be rejected.

19. In view of the above considerations I propose that the Court reject the application and order the applicant to pay the costs.