# ORDER OF THE COURT OF FIRST INSTANCE (Second Chamber)
10 February 1994 *

In Case T-468/93,

**Frinil-Frio Naval e Industrial SA,** a company incorporated under Portuguese law, established in Lisbon, represented by Manuel Rodrigues, of the Lisbon Bar, with an address for service in Luxembourg at the premises of Azevedo Ângelo Alves, 61 Rue de Gasperich,

applicant,

v

**Commission of the European Communities,** represented by António Caeiro, Legal Adviser, and Nicolas Khan, a member of the Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of the Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of the Commission decision reducing the aid granted by the European Social Fund to the applicant,

* Language of the case: Portuguese.

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

composed of: J. L. Cruz Vilaça, President of the Chamber, C. P. Briët, A. Kalogeropoulos, A. Saggio and J. Biancarelli, Judges,

Registrar: H. Jung,

makes the following

## Order

### Facts and procedure

1 By application lodged at the Registry of the Court of Justice on 15 March 1993, the applicant brought an action under Articles 173 and 174 of the EEC Treaty against the Commission decision reducing the aid granted by the European Social Fund ('ESF') for an occupational training programme implemented by the applicant in Portugal.

2 Article 1(2)(a) of Council Decision 83/516/EEC of 17 October 1983 on the tasks of the ESF (Official Journal 1983 L 289, p. 38), provides that the ESF is to participate, *inter alia*, in the financing of operations concerning vocational training and guidance. Under Article 4 of Council Regulation (EEC) No 2950/83 of 17 October 1983 on the implementation of Decision 83/516 (Official Journal 1983 L 289, p. 1), applications for ESF assistance must be submitted by Member States. Under

Article 5(5), when an application is submitted, the Member State is to designate the recipient of payments as well as the body for which assistance is being sought if the latter is not the recipient of the payments.

3 When an application has been approved, the Commission may, under Article 6(1) of Regulation No 2950/83, where Fund assistance is not used in conformity with the conditions set out in the approving decision, suspend, reduce or withdraw the aid after having given the relevant Member State an opportunity to comment.

4 The Portuguese authorities submitted an application for ESF assistance for an occupational training programme implemented by the applicant which consisted in preparing 250 young people seeking their first employment. The Departamento para os Assuntos do Fundo Social Europeu (Department for Matters concerning the European Social Fund, 'DAFSE') in Lisbon was designated in the application as the recipient of the payments.

5 The training programme for which assistance had been requested, and which was given the project number 860288P1, was approved by Commission Decision C(86)736 of 7 May 1986. That decision was communicated to the DAFSE, which notified the applicant of it by letter of 17 June 1986.

6 Commission Decision C(86)736 set the amount of ESF assistance at ESC 124 992 710. The letter from DAFSE, by which the applicant received notification of the Commission decision, provided, furthermore, that the Portuguese authorities would finance the same project to the sum of ESC 102 266 763.

7 It appears from the case-file that the ESF paid DAFSE an advance corresponding to 50% of its financial participation in the operation. Accordingly, the applicant received from the ESF, through the intermediary of DAFSE, an advance of ESC 62 496 355 during 1986. During the same period, the applicant received a payment corresponding to 50% of the contribution of the Portuguese authorities to the financing of the project.

8 The applicant states that, once the training programme had been completed, it submitted a request for payment of the balance to DAFSE. In 1988, the Portuguese authorities paid the balance of their contribution.

9 The applicant applied to DAFSE by letter of 19 September 1989 for payment of the balance of the ESF contribution.

10 By letter of 21 January 1991 (No 746), the Commission's Directorate-General for Employment, Industrial Relations and Social Affairs communicated the following information to DAFSE regarding Project 860288P1:

'As regards the abovementioned project, we enclose the findings of the audit carried out by our staff.

The sum of ESC 62 496 355 (total sum approved by the ESF for the project) has already been paid as the first instalment. The file is to be closed in the circumstances.'

11 In the audit report to which Commission letter 746 of 21 January 1991 refers, the Commission staff stated that the applicant had put the whole of the training operation out to contract and had employed only 10% of the persons accepted for training. Moreover, the Commission's staff noted in that report that the documents which had been forwarded to them suggested that the latter's conduct was not consistent with sound economic management. On the basis of those findings, the report concluded that it seemed 'appropriate to cancel the balance'.

12 On 25 February 1991, DAFSE sent the applicant letter No 1900, the first paragraph of which was drafted as follows:

'Assunto: "Dossier" 860288P1
(Restituição de verbas)

Para os efeitos convenientes, comunica-se que, de acordo com a decisão da CCE (1), foi fisada em 62 496 355 ESC, a comparticipação/FSE relativa ao "dossier" acima referido.

(...)

(1) V. fotocópia em anexo.'

('Re: Project 860288P1
(Reimbursement of credits)

For your information, the ESF aid relating to the aforementioned project has been set at ESC 62 496 355, in accordance with the CEC's decision (1) .

(...)

(1) see enclosed photocopy.')

13 The copy of letter No 1900, as annexed to the application originating the proceedings did not include the reference to footnote (1) in the first paragraph. The footnote '(1) see enclosed photocopy' did not appear on the copy either. However, since the contested decision appended in this manner to the application was

illegible, the Registrar of the Court of Justice asked the applicant to submit a fresh copy of the letter. It is the first paragraph of that new copy which is reproduced above in paragraph 12.

14 The second paragraph of DAFSE's letter No 1900 of 25 February 1991 informed the applicant that, under those circumstances, the Portuguese authorities' contribution had been set at ESC 51 133 382 — namely 50% of the contribution initially fixed at ESC 102 266 763 — and that, therefore, the applicant — which had already received the whole of the Portuguese authorities' contribution as initially fixed — should reimburse the sum of ESC 51 133 381.

15 It appears from the form acknowledging receipt placed in the case-file that the applicant received DAFSE's letter No 1900 on 26 February 1991.

16 The applicant applied through official channels on 12 March 1991 for review of the reimbursement decision contained in DAFSE's letter No 1900 to the Ministry of Labour and Social Security. In its application, the applicant stated that the said decision was arbitrary in view of the fact that 'nem sequer [...] a decisão da CEE comunicada ao DAFSE e por este notificada à Recorrente, e não obstante se contestar e não aceitar, manda devolver/restituir o que quer que seja' ('the EEC decision, as communicated to DAFSE and notified by DAFSE to the applicant, and notwithstanding its contestation and non-acceptance, does not even provide for the reimbursement or restitution of anything whatsoever').

17 On 7 January 1993, DAFSE's Decision No 121/92 of 4 December 1992, annexed to letter No 44 from the Director-General of DAFSE, was communicated to the applicant. That decision of DAFSE is based on the Commission's decision to reduce the ESF contribution to the project in question to ESC 62 496 355, by way of justification for the Portuguese authorities' claim for reimbursement.

18 It is in those circumstances that the applicant brought the present action.

19 By a document lodged at the Registry of the Court of Justice on 25 May 1993, the Commission raised an objection of inadmissibility. The applicant submitted its observations on the objection of inadmissibility on 6 July 1993.

20 By order of 27 September 1993, the Court of Justice referred the 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 the Court of First Instance of the European Communities (Official Journal 1993 L 144, p. 21).

21 The applicant claims that the Court should:

(i) annul the Commission's decision reducing the ESF contribution to the project in question from ESC 124 992 710 to ESC 62 496 355;

(ii) declare that the applicant is entitled to payment of the balance;

(iii) order the Commission to pay the costs.

22 The Commission contends that the Court should:

(i) request that the applicant place on the file the originals of the following documents which it received on 26 February 1992:

— DAFSE's letter No 1900 of 25 February 1991, of which it enclosed a photocopy at the request of the Registry of the Court;

— a copy of letter No 746 of 21 January 1991 from the Directorate-General for Employment, Industrial Relations and Social Affairs;

— a copy of the audit report relating to the applicant;

(ii) request the applicant to place on the file the original of DAFSE's letter No 1900 of 25 February 1991, of which it annexed a photocopy to its application, numbered annex No 22, and to explain how it obtained the document in question;

(iii) declare the action to be inadmissible on the ground that the application is unintelligible;

(iv) in the alternative, declare the application to be inadmissible on the ground that it was brought well after the expiry of the two-month period laid down in the third paragraph of Article 173 of the EEC Treaty;

(v) in the further alternative, declare the claim that the Commission should be ordered to pay the outstanding balance for the project inadmissible on the ground that that such a claim is not part of an action for annulment;

(vi) order the applicant to pay the costs.

23 Under Article 114(3) of the Rules of Procedure of the Court of First Instance, unless the Court otherwise decides, the remainder of the proceedings on an application of inadmissibility are to be oral. The Court (Second Chamber) considers that it has sufficient information about the case and that there is no need to open the oral procedure.

## Admissibility

*Arguments of the parties*

24 The Commission argues, primarily, that the decision the annulment of which is sought by the applicant was identified in the form of order sought as 'the decision taken on (?) by the CEC, to reduce the assistance from ESC 124 992 710 to ESC 62 496 355'. Without clarification of its subject-matter, the Commission contends that the application must be declared inadmissible on the grounds that it is unintelligible.

25 In the alternative, the Commission argues that the action, brought on 15 March 1993, is out of time, since the applicant became aware of the contested decision on 26 February 1991 as a result of DAFSE's letter No 1900 of 25 February 1991. The Commission claims that, besides being accompanied by a receipt for reimbursement, that letter was accompanied by two annexes, namely a copy of letter No 746 of 21 January 1991 from the Commission's Directorate-General for Employment, Industrial Relations and Social Affairs and a copy of the audit report drawn up by the Commission's staff in relation to the applicant. The Commission considers that the two-month period prescribed in Article 173 of the Treaty for the bringing of an action for annulment was manifestly exceeded.

26 The applicant claims that it did not know the date of the Commission decision and that, for that reason, it left a question mark in its application.

27 The applicant claims that it did not become aware of the Commission's decision to reduce the amount of the ESF aid initially granted until 7 January 1993 as a result of DAFSE Decision No 121/92 appended to letter No 44 from the Director-General of DAFSE. It claims that only a reimbursement receipt was annexed to

DAFSE's letter No 1900 of 25 February 1991. Furthermore, it argues that it interpreted that letter as a DAFSE decision, which it contested, as such, before the Portuguese authorities and courts. Finally, it considers that, even if it had received a copy of Commission letter No 746 of 21 January 1991 and of the audit report, it would still not have been aware of the contested decision at that time since the documents were vague and were not addressed to it.

*Assessment of the Court*

The claim for the annulment of the Commission's decision reducing ESF assistance

28 The Court observes *in limine* that the contested decision is contained in letter No 746 of 21 January 1991 from the Commission's Directorate-General for Employment, Industrial Relations and Social Affairs and that the grounds on which that decision is based are set out in the audit report to which it refers.

29 In its application, the applicant states, without mentioning the date of the contested decision, that it reduced the ESF assistance from ESC 124 992 710 to ESC 62 496 355 for the project which it implemented. The applicant appended to its application a copy of Commission Decision C(86)736 of 7 May 1986, which had initially set the amount of ESF assistance at ESC 124 992 710. It also appended a copy of DAFSE's Decision No 121/92 of 4 December 1992.

30 Under those circumstances, the Court considers that the subject-matter of the proceedings has been made sufficiently clear in the application and that, therefore, the minimum requirements laid down in the first paragraph of Article 19 of the Protocol on the Statute of the Court of Justice and in Article 38(1)(c) of the Rules of Procedure of the Court of Justice of the European Communities, applicable on the date when the application was lodged, have been met.

31 In order to assess the admissibility of the claim that the contested decision should be annulled, it is necessary to examine whether the procedural time-limits were complied with. To that end, it should be noted that the third paragraph of Article 173 of the EEC Treaty, which was applicable on the date on which the application was lodged and is restated in the fifth paragraph of Article 173 of the EC Treaty, sets the time-limit for bringing an action for annulment at two months from the publication of the measure, or of its notification to the applicant, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be. Under Article 42 of the Protocol on the Statute of the Court of Justice of the EEC, periods of grace based on considerations of distance are set by the Rules of Procedure.

32 Letter No 1900 of 25 February 1991, which refers to the contested decision, reiterates the essential content of that decision, that is to say the reduction of the ESF assistance for the project in question to ESC 62 496 355. Therefore, the Court considers that the applicant necessarily had notice, on 26 February 1991 at the latest, not only of the existence of the contested decision but also of its essential contents.

33 Yet the applicant claims that, although letter No 1900 of 25 February 1991 states, in relation to the contested decision, 'see enclosed photocopy', the said photocopy was not appended to the letter. That argument cannot be accepted. It has been established that, in its application for review through official channels of DAFSE's letter No 1900, which was submitted on 12 March 1991 to the competent Portuguese Minister, the applicant itself referred to 'the EEC decision communicated to

DAFSE and notified by DAFSE to the applicant'. In any event, the Court considers that, in so far as letter No 1900 was in itself not sufficient to inform the applicant of the reasons on which the contested decision was based, it was for the applicant to ask the Commission, or if necessary DAFSE, within a reasonable period, for the full text of the contested decision since it is not disputed that it was informed of the existence of that decision (see, in particular, the judgment of the Court of Justice in Case 59/84 *Tezi Textiel* v *Commission* [1986] ECR 887, paragraph 11, and the judgment of the Court of First Instance in Case T-83/92 *Zunis Holding and Others* v *Commission* [1993] ECR II-1169, paragraphs 38 and 39).

34 However, the applicant, which has not mentioned any approach made to the Commission to that end, merely states that it applied to DAFSE on 27 January 1993 for confirmation of the contested decision 'in order to be able to contest it before the Court of Justice of the European Communities' and that DAFSE complied with its request on the same day. Under those circumstances, the Court considers that the applicant submitted its request for the communication of the contested decision after unreasonable delay.

35 The conclusion must therefore be that the claim for annulment set out in the application was, in any event, submitted well after the expiry of the two-month period laid down in Article 173 of the EEC Treaty, increased by ten days on account of the distance.

The claim that the applicant should be held to be entitled to payment of the balance of the ESF assistance

36 It should be recalled that in an action for annulment based on Article 173 of the Treaty the Community judicature merely reviews the legality of the contested act. If the action is well founded, the Court declares the contested act void under Article 174. Article 176 of the Treaty, requires the institution whose act has been declared void, and not the Community judicature, to take the necessary measures to comply with the judgment.

37 Consequently, the claim that the Court should declare that the applicant is entitled to the balance of the ESF assistance is inadmissible since it exceeds the powers conferred by the Treaty on the Community judicature in an action for annulment.

38 Consequently, as the Commission claims in its objection of inadmissibility, the action must be dismissed as inadmissible, it being unnecessary for the Court to order that the documents requested by the Commission be communicated.

## Costs

39 Under Article 87(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. Since the applicant has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

**1. Dismisses the application as inadmissible;**

**2. Orders the applicant to pay the costs.**

Luxembourg, 10 February 1994.

H. Jung

Registrar

J. L. Cruz Vilaça

President