JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)
27 January 2000 *

In Joined Cases T-194/97 and T-83/98,

Eugénio Branco, Ld.ª, a company established in Lisbon, Portugal, represented by B. Belchior, of the Bar of Vila Nova de Gaia, with an address for service in Luxembourg at the Chambers of J. Schroeder, 6 Rue Heine,

applicant,

v

Commission of the European Communities, represented, in Case T-194/97, by A. M. Alves Vieira and K. Simonsson, and, in Case T-83/98, by M.T. Figueira and K. Simonsson, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION, in Case T-194/97, for a declaration that, by unlawfully failing to rule on the final payment claim in respect of financial assistance accorded by the

* Language of the case: Portuguese.

European Social Fund in Case Nos 870301 P1 and 87032 P3, the defendant failed to act and, in Case T-83/98, for annulment of the Commission's decision nos C(1998) 47 and C(1998) 48 of 17 February 1998 suspending such financial assistance,

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

composed of: M. Jaeger, President, K. Lenaerts and J. Azizi, Judges,

Registrar: A. Mair, Administrator,

having regard to the written procedure and further to the hearing on 8 July 1999,

gives the following

Judgment

Legal background

1 The first paragraph of Article 124 of the EC Treaty (now the first paragraph of Article 147 EC) provides that the European Social Fund (ESF) is to be administered by the Commission.

2 Article 1(2)(a) of Council Decision 83/516/EEC of 17 October 1983 on the tasks of the European Social Fund (OJ 1983 L 289, p. 38) provides that the Fund is to participate in the financing of operations concerning vocational training and guidance. Under Article 5(1) of that decision, ESF assistance is to be granted at the rate of 50% of eligible expenditure without, however, exceeding the amount of the financial contribution of the public authorities of the Member State concerned.

3 Article 1 of Council Regulation (EEC) No 2950/83 of 17 October 1983 on the implementation of Decision 83/516 on the tasks of the European Social Fund (OJ 1983 L 289, p. 1) sets out the types of expenditure eligible for assistance from the ESF.

4 Pursuant to Article 5(1) of Regulation No 2950/83, ESF approval of an application for financial assistance is to be followed by payment of an advance of 50% of the assistance on the date on which the training operation is scheduled to begin. Article 5(4) provides that final payment claims are to contain a detailed report on the content, results and financial aspects of the relevant operation and requires the Member State concerned to certify the accuracy of the facts and accounts in payment claims.

5 According to Article 7(1) of Regulation No 2950/83, both the Commission and the Member State concerned may check the use to which the aid is put. Article 7 of Commission Decision 83/673/EEC of 22 December 1983 on the management of the European Social Fund (OJ 1983 L 377, p. 1) requires the Member State investigating the use of aid because of suspected irregularities to notify the Commission thereof without delay.

6 Finally, Article 6(1) of Regulation No 2950/83 provides that when ESF assistance is not used in conformity with the conditions set out in the decision of approval, the Commission may suspend, reduce or withdraw the aid after having given the relevant Member State an opportunity to comment. Under Article 6(2), sums

paid which are not used in accordance with the conditions laid down in the decision granting approval are to be refunded and, to the extent that a Member State repays to the Community sums owed by the bodies financially responsible for an operation, the Community's rights in the matter are transferred to the Member State.

Factual and procedural background

7 By decisions served on the applicant by the Departamento para os Assuntos do Fundo Social Europeu (Department of European Social Fund Affairs, hereinafter 'the DAFSE') on 31 April 1987 and 27 May 1987, the defendant approved two applications for financial assistance of PTE 11 736 792 (Case No 870302 P3) and PTE 82 700 897 (Case No 870301 P1) in respect of training programmes.

8 On 24 July 1987 the applicant received an advance pursuant to Article 5(1) of Regulation No 2950/83.

9 At the beginning of July 1988, that is, on completion of the training operations, which took place between 1 January and 31 December 1987, it submitted claims for final payment of the assistance to the DAFSE.

10 The DAFSE certified the accuracy of the facts and accounts in the claims pursuant to Article 5(4) of Regulation No 2950/83.

11 On 22 August 1988 the DAFSE requested the Inspecçao Geral de Finanças (General Tax Inspectorate, hereinafter 'the IGF') to examine the final payment claim pursuant to Article 7(1) of Regulation No 2950/83.

12 The IGF found irregularities and the DAFSE, by two letters of 24 April 1989, informed the defendant that it had suspended final payment pursuant to Article 7 of Decision 83/673.

13 On 16 May 1989, the IGF sent its report to the police for information.

14 On 30 July 1990, the DAFSE informed the Commission that, without prejudice to the information contained in the letters of 24 April 1989, and following the investigation by the IGF, it considered certain expenditure to be ineligible. It was then that the defendant became aware of the IGF's investigation and the conclusions it came to.

15 By letters of 30 July 1990, received the following day, the DAFSE ordered the applicant to repay within 10 days the advances of PTE 1 535 946 (Case No 870302 P3) and PTE 4 399 475 (Case No 870301 P1), paid by the ESF, and of PTE 1 256 683 (Case No 870302 P3) and PTE 3 599 570 (Case No 870301 P1), paid by the Portuguese State by way of national contribution.

16 By letter of 12 May 1994 the applicant asked the DAFSE to explain why the defendant had not yet taken a decision on those cases.

17 In a letter of 25 May 1994 the DAFSE informed the applicant that the Commission considered that it was not under any duty to decide to reduce the amount of financial assistance or not to make final payment where, as in this case, the national authorities themselves decide to reduce the amount of financial assistance.

18 By letter of 30 May 1994 the applicant asked the defendant to explain why it had not yet taken a final decision on its cases.

19 The defendant replied by letter of 16 June 1994 that the Portuguese authorities had informed it that owing to suspected irregularities the matters in question fell within the scope of Article 7 of Decision 83/673/EEC.

20 By application of 22 July 1994 the applicant applied for annulment of a decision purportedly taken by the defendant and contained in letters from the DAFSE and the Commission dated 25 May and 16 June 1994 respectively, first, refusing a final payment claim in respect of financial assistance awarded by the ESF for two training programmes and, secondly, reduction of that financial assistance and recovery of the advances paid by the ESF and the Portuguese State.

21 By judgment of 11 July 1996 in Case T-271/94 *Branco* v *Commission* [1996] ECR II-749, the Court declared the action inadmissible on the ground that the Commission had not decided the final payment claim.

22 On 25 October 1996 the defendant was informed that an investigation procedure had commenced before the Tribunal de Instrução Criminal da Comarca do Porto for fraudulently obtaining and misappropriating subsidies in relation to the training operations financed by the ESF.

23 By letter of 27 February 1997, received by the defendant on 3 March 1997, the applicant formally called upon the defendant to take a decision on the final payment claim.

24 On 17 April 1997 the defendant sent the DAFSE, for each of the matters in dispute, a draft decision suspending financial assistance.

25 The applicant received a copy on 5 May 1997 through the offices of the DAFSE.

26 On 19 May 1997 the DAFSE received the applicant's comments on those drafts, comments which were clarified and corrected in a letter sent by the applicant to the DAFSE on 21 May 1997.

27 By application lodged at the Registry of the Court on 30 June 1997, the applicant brought an action for failure to act. The case was registered under No T-194/97.

28 On 17 July 1997 the DAFSE informed the Commission that it fully approved of the draft decisions suspending the financial assistance.

29 On 1 October 1997, by a separate document, the defendant raised a plea of inadmissibility in relation to the action for failure to act, in accordance with Article 114(1) of the Rules of Procedure of the Court of First Instance. The applicant lodged its observations on that plea on 19 November 1997.

30 On 26 November 1997 the Commission became aware of the charge brought against the applicant by the Portuguese judicial authorities.

31 On 17 February 1998 the Commission adopted the decisions to suspend the contested financial assistance.

32 On 26 May 1998 the applicant brought an action for annulment in respect of the decisions of 17 February 1998 suspending the financial assistance. The case was registered under No T-83/98.

33 By order of 16 July 1998 the President of the Fifth Chamber reserved the decision on the plea of inadmissibility raised in Case T-194/97 for the final judgment.

34 The Court put written questions to the parties in Cases T-194/97 and T-83/98 and the parties replied to them within the time allowed.

35 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Third Chamber) opened the oral procedure in both cases. The parties presented oral argument and replied to the Court's questions at the hearings on 8 July 1999.

36 In the course of those hearings, the parties consented to the two cases being joined for the purposes of judgment.

Forms of order sought

37 In Case T-194/97 the applicant claims that the Court should:

— declare that the defendant failed to act;

— order the defendant to pay the costs.

38 The defendant contends that the Court should:

— declare the action inadmissible or dismiss the action as devoid of purpose or, in the alternative, unfounded;

— order the applicant to pay the costs.

39 The applicant contends that the plea of inadmissibility should be dismissed.

40 In Case T-83/98, the applicant claims that the Court should:

— annul the decisions of 17 February 1998 suspending financial assistance;

— order the defendant to pay the costs.

41 The defendant contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

The action for a declaration of failure to act

Arguments of the parties

42 First, the applicant points out that it formally called upon the defendant to act by a letter of 27 February 1997 which the defendant received on 3 March 1997. The

applicant claims that it did not become aware of the draft decisions to suspend the assistance which were sent to the DAFSE on 17 April 1997, until 5 May 1997, the date on which the two-month period laid down in the second paragraph of Article 175 of the EC Treaty (now the second paragraph of Article 232 EC) expired.

43 Secondly, it argues that neither the draft decisions to suspend of 17 April 1997 nor the decisions to suspend of 17 February 1998 amount to defining a position within the meaning of Article 175 of the Treaty since they do not put an end to the failure to act. Having regard to the period of almost ten years which elapsed between the final payment claim and the adoption of those decisions, the applicant contends that the defendant was under a duty to adopt a final decision, that is a decision either to make final payment or to suspend or reduce the financial assistance.

44 If it were otherwise, the defendant would be able to let the administrative procedure go on forever and so postpone indefinitely adoption of a final decision on the final payment claim.

45 The fact that it was alleged that criminal proceedings were pending before the Portuguese court is irrelevant in this case. First of all, investigations are carried out whenever an audit discloses grounds for suspecting irregularities and they do not necessarily lead to a criminal conviction. Secondly, those proceedings only mention the information contained in the IGF's report, of which the defendant is already aware. Finally, the defendant itself admits that it only became aware of those proceedings on 26 November 1997, at which time the failure to act had already been subsisting for a long time.

46 The defendant submits that the action is inadmissible, maintaining that it did define its position within the meaning of Article 175 of the Treaty by sending to

the DAFSE, on 17 April 1997, draft decisions suspending the assistance and by adopting, on 17 February 1998, decisions suspending the assistance. Those decisions were justified by the fact that criminal proceedings relating to the contested matters had been instituted, and are currently pending before the Tribunal de Instruçao Criminal da Comarca do Porto (No 17937/95-OTDPRT-PR), in which the applicant was, on 2 April 1997, charged with fraud.

Findings of the Court

47 For the purposes of ruling on the application for a declaration of failure to act, it is necessary to determine whether the Commission was under a duty to act when called upon to do so pursuant to Article 175 of the Treaty.

48 Under Article 6(1) of Regulation No 2950/83, when ESF assistance is not used in conformity with the conditions set out in the decision of approval, the Commission may suspend, reduce or withdraw the aid.

49 Since the Community legislature distinguishes between those three courses of action open to the Commission, each one must be regarded as pertaining to a specific situation. Since the Commission is under a duty to take the decision on final payment claims (judgment of the Court of First Instance in Case T-85/94 (122) *Commission* v *Branco* [1995] ECR II-2993, paragraph 23) within a reasonable time but can calculate the exact amount of eligible expenditure only after receiving a detailed report on the relevant operations (judgment in Case T-81/95 *Interhotel* v *Commission* [1997] ECR II-1265, paragraph 43 and the judgment cited therein), the decision to suspend can only be made in the event that such a calculation is not yet possible.

50 The purpose of the Commission's power to suspend ESF assistance is therefore to enable final payment to be frozen so long as the Commission has serious grounds for suspecting irregularities in the use of such assistance. However, the Commission is required to take a final decision within a reasonable time on the final payment claim, either by ordering final payment in full, or by reducing or withdrawing the aid. Suspension makes it possible to avoid the need to initiate a procedure for recovery of sums wrongly paid. If the final decision is to withdraw the aid even though advances have been made to the beneficiary, a procedure for recovery of the sums paid will necessarily have to be initiated.

51 Since in this case, first, the Commission had serious doubts, following the IGF's report, as to the proper use of the aid and, second, proceedings against the beneficiary of the aid and relating to certain transactions entered into within the framework of the projects financed were pending before a Portuguese criminal court when the Commission was formally called upon to act, the Commission was not required to take a final decision on the final payment claim but was entitled to suspend the aid in application of Article 6(1) of Regulation No 2950/83.

52 By letter of 27 February 1997 received on 3 March 1997 the applicant asked the Commission to approve the final payment claim. Following that request, the Commission sent to the DAFSE draft decisions to suspend the aid on 17 April 1997 and adopted decisions to that effect on 17 February 1998.

53 It must be observed that, according to Article 6(1) of Regulation No 2950/83, the Commission may suspend aid only after it has given the relevant Member State the opportunity to comment. Moreover, the fact that that provision requires the Member State concerned to be consulted before the Commission adopts a decision to suspend, reduce or withdraw the assistance does not justify the conclusion that a principle of Community law as fundamental as that which

guarantees every person the right to be heard before the adoption of a decision capable of adversely affecting him does not apply (Case C-32/95 P *Commission* v *Lisrestal and Others* [1996] ECR I-5373, paragraph 30). A decision to suspend assistance deprives, at least temporarily, the person concerned of the entire amount of the assistance initially granted to him. He thus suffers directly as a result of the economic consequences of a decision which adversely affects him and must therefore be also recognised as entitled to make comments before a decision suspending that assistance is adopted.

54 It follows that the Commission can make decisions suspending assistance only on the conclusion of a procedure comprising several stages, one of which involves sending draft decisions to suspend both to the Member State concerned and to the beneficiary of the assistance. Although such drafts, as intermediate acts whose purpose is to prepare decisions, are not open to challenge by way of an action for annulment (see, in a different context, Case C-282/95 P *Guérin Automobiles* v *Commission* [1997] ECR I-1503, paragraph 34 and the judgment cited therein), they none the less constitute the defining of a position, which has the effect of bringing the failure to act to an end. Such drafts ensure that the right to be heard enjoyed by the beneficiary of the assistance from the Member State concerned is observed in the course of a procedure which may lead to decisions to suspend assistance, which are themselves open to challenge by way of an action for annulment. By those drafts, the defendant therefore made known its intention to adopt decisions to suspend assistance whilst at the same time making clear by implication its refusal to approve, at least for the moment, the final payment claim.

55 In order to determine whether an institution formally called upon to act has defined its position within the two-month period prescribed in the second paragraph of Article 175 of the Treaty, it is necessary to verify whether the definition of its position was brought to the attention of the person who called upon it to act and whether this was done within two months of receipt by it of the formal notice to do so. The purpose of defining a position is, specifically, to respond to such a call to act and to ensure that the person who issued it is

informed of that response. It alters the legal situation of that person inasmuch as it brings the failure to act to an end. In order to be able to defend his rights during the administrative procedure, after the institution has defined its position, the person concerned must have been enabled to ascertain what, specifically, that position is. Consequently, the failure to act comes to an end not on the day on which the institution actually defines its position but on the day on which the person who called upon it to act received the document by which it defined its position. It is thus the latter date which must be taken into account in determining whether the two-month period prescribed in the second paragraph of Article 175 of the EC Treaty has been observed.

56 In this case, since the defendant received the notice to act on 3 March 1997 but the draft decisions to suspend assistance only reached the applicant on 5 May 1997, the two-month time-limit laid down in the second paragraph of Article 175 of the Treaty was not complied with.

57 However, it must be observed that the applicant brought its action for failure to act on 30 June 1997, after it received those draft decisions. Since those decisions must be regarded as defining a position for the purposes of Article 175 of the Treaty (see paragraph 54 above), the applicant had no further interest in obtaining a declaration of failure to act since the failure to act was no longer subsisting. A judgment of the Court which, in such circumstances, found that there had been a failure to act on the part of the institution could not give rise to the measures for compliance referred to in the first paragraph of Article 176 of the Treaty (now the first paragraph of Article 233 EC) (see, as regards actions for annulment, the order in Case T-13/96 *TEAM and Kolprojekt* v *Commission* [1997] ECR II-983, paragraph 28).

58 If follows from the foregoing that the application for a declaration of failure to act is inadmissible (Case C-25/91 *Pesqueras Echebastar* v *Commission* [1993] ECR I-1719, paragraphs 11 to 13).

The action for annulment

59 The applicant puts forward five pleas in law as grounds for annulment: first, infringement of Regulation No 2950/83; second, misappraisal of the facts; third, breach of the principles of the protection of legitimate expectations and legal certainty; fourth, infringement of acquired rights; and fifth, breach of the principle of proportionality.

The first plea in law: infringement of Regulation No 2950/83

Arguments of the parties

60 The applicant points out that during October 1988 the DAFSE certified the accuracy of the facts and accounts in its final payment claim, in accordance with Article 5(4) of Regulation No 2950/83. Once that certification had been sent to the Commission, any intervention by the Member State concerned in the treatment of the case was devoid of legal basis. The rules applicable, and in particular Regulation No 2950/83, do not allow the Member State to carry out a 're-examination' of the case and alter the certification as the DAFSE did in this case.

61 The Member State must examine whether there are any irregularities before it accords certification. Otherwise, its certification would be false. On receipt of the final payment claim, the DAFSE could only have reached one of the following two decisions: it could either have found that the information submitted was accurate and proceeded to certify it, or it could have found that the information was inaccurate and thus refused certification. In certifying the final payment claim, it therefore definitively approved the information contained in that claim.

62 Finally, the applicant claims that the re-examination referred to above was carried out by the IGF, which is neither empowered to monitor operations financed by the ESF nor technically in a position to rule on the application of the Community legislation.

63 The defendant disputes the arguments advanced by the applicant citing the Court's judgment in Case T-142/97 *Branco* v *Commission* [1998] ECR II-3567.

Findings of the Court

64 In so far as it confirms the accuracy of the facts and accounts in final payment claims, the Member State is responsible to the Commission for the certifications which it submits.

65 Furthermore, under Article 2(2) of Decision 83/516, the relevant Member States are to guarantee the successful completion of ESF operations. In addition, the Commission may, under Article 7(1) of Regulation No 2950/83, check final payment claims, '[w]ithout prejudice to any controls carried out by the Member States'.

66 Those obligations and powers of the Member States are not limited by any restriction in time.

67 Accordingly, in a case such as this, where the Member State has already certified the accuracy of the facts and accounts in the final payment claim, that State may

still alter its assessment if it considers that there are irregularities which had not been previously detected.

68 Finally, there is nothing to preclude an authority such as the DAFSE from having recourse to a professional auditing body such as the IGF in order to assist it in checking the accuracy of the facts and accounts in a final payment claim.

69 It follows that the plea alleging infringement of Regulation No 2950/83 must be rejected (judgments in Case T-72/97 *Proderec* v *Commission* [1998] ECR II-2847, paragraphs 61 to 74 and *Branco* v *Commission*, cited at paragraph 63 above, paragraphs 44 to 50).

Second plea in law: misappraisal of the facts

Arguments of the parties

70 The applicant states that it complied strictly with the provisions of Regulation No 2950/83 and with the conditions for using assistance which were imposed by the Commission in the decisions granting approval. There is no reason for 'reducing' the assistance granted.

71 The IGF report on which the contested decisions are based is incorrect and confines itself to guesswork as to the ineligibility of certain expenditure relating

to the hourly rate of remuneration of trainees, subcontracting to E.B. — Contabilidade e Estudos Económicos, Ld.ª, write-offs and leased computer equipment.

72 The defendant contends that the applicant's argument is wholly devoid of purpose, since the Commission has not yet made a definitive decision; the contested decisions do no more than suspend the assistance. However, on the basis of the information contained in the IGF report it rejects the applicant's argument.

Findings of the Court

73 Under Article 6(1) of Regulation No 2950/83, the Commission may suspend, reduce or withdraw ESF assistance where it is not used in conformity with the conditions set out in the decision of approval.

74 In addition, it follows from the statements of acceptance of the approval decisions that the beneficiary of the assistance expressly undertook to observe the applicable provisions of national and Community law when using the assistance.

75 In that regard, since Portuguese law and Community law make the use of public funds subject to a requirement of sound financial management, the Commission

may suspend, reduce or withdraw ESF assistance where it has not been used in accordance with that requirement (see paragraphs 48 to 50 above).

76 Since the application of Article 6(1) of Regulation No 2950/83 may entail the need to assess complex facts and accounts, the Commission enjoys a wide discretion in making such an assessment. The Community judicature must limit its review of that assessment to verifying that the Rules of Procedure have been observed, that the facts relied on in making the contested choice are accurate, and that there has been no manifest error in assessing those facts or misuse of powers (*Branco* v *Commission*, cited at paragraph 63 above, paragraphs 64 to 67).

77 Since in this case review of legality relates to decisions to suspend assistance, there is no need to examine whether the evaluations contained in the IGF report are well founded but rather whether the Commission committed a manifest error of assessment in finding that there were grounds for suspecting irregularities which justified suspension. Consequently, even assuming that some of the assessments contained in the IGF report and used as a basis for the contested decisions were wrong, that alone would not mean that those decisions were vitiated by a manifest error of appraisal.

78 The requirement of grounds for suspecting irregularities in order to justify suspending assistance is manifestly fulfilled where, as in this case, proceedings relating to certain transactions carried out in the context of operations financed by the ESF were pending against the recipient of the assistance before a criminal court at the time when the decisions to suspend were adopted.

79 The plea must therefore be dismissed.

The third plea in law: breach of the principles of the protection of legitimate expectations and legal certainty

Arguments of the parties

80 The applicant states that the DAFSE forwarded its final payment claim to the Commission in October 1988, whereas the Commission only adopted the contested decisions in February 1998. This period of more than ten years gave rise on its part to a legitimate expectation that the Commission would accept its payment claim as certified by the DAFSE.

81 The applicant stresses that the Commission must take a decision within a reasonable period. It cannot allow the administrative procedure to go on forever and thus postpone indefinitely the adoption of a final decision on the final payment claim without infringing the principles of the protection of legitimate expectations and legal certainty.

82 In this case the period of more than ten years which elapsed between the final payment claim and the adoption of the contested decisions is excessive and infringes the principle of legal certainty.

83 The applicant claims that the defendant was required to take a final decision to make final payment or withdraw or reduce the assistance rather than suspend it, and this had in fact been the case for several years (see paragraph 43 above).

84 It claims that the fact that criminal proceedings were allegedly pending before a Portuguese court is irrelevant in this case (see paragraph 45 above). For the rest, by referring to the criminal charge, a copy of which is contained in annex 4 to the defence, the defendant is in breach of the confidentiality of judicial proceedings. In the applicant's submission that document must be removed from the file.

85 The defendant contends that the plea in law should be dismissed. The initiation of criminal proceedings, currently pending (see paragraph 46 above), which relate to the cases at issue and in which the applicant was, on 2 April 1997, charged with committing fraud, justifies suspension of the assistance.

86 It adds that, even if the DAFSE's certification caused the applicant to entertain a legitimate expectation that it would receive final payment, the contested decisions do not deprive it of that right, since they merely suspended the assistance.

Findings of the Court

87 Suspension of financial assistance which was initially granted in no way prejudges the final decision to be taken by the Commission on the final payment. It follows that a decision to suspend does not deprive the recipient of the aid of the right to receive the full amount of the final payment as requested by him, if it proves to be the case that the aid was indeed used in accordance with the conditions imposed by the decision of approval.

88 Therefore, the contested decisions do not infringe the principle of the protection of legitimate expectations.

89 The applicant also pleads breach of the principle of legal certainty on the ground that the contested decisions were not taken within a reasonable time. The reasonableness of the period must be assessed in this case by reference to the time which elapsed between delivery of the judgment in *Commission* v *Branco*, cited at paragraph 49 above, paragraph 23, and the adoption of the contested decisions on 17 February 1998. In the judgment of 13 December 1995, the Court of First Instance clearly stated that it is the Commission which decides claims for final payment and that the Commission — and the Commission alone — has the power to reduce financial assistance from the ESF, pursuant to Article 6(1) of Regulation No 2950/83. As from that date, the Commission could not have been unaware that it was incumbent upon it to decide, in the exercise of a power vested in itself alone, on the claims for final payment submitted to it, either by ordering full payment or by deciding to suspend, reduce or withdraw the aid.

90 Having regard to the fact that there were grounds for suspecting irregularities in the use made of the aid granted and that the Commission did not have enough information to calculate the exact amount of eligible expenditure on 13 December 1995, it could and should have rapidly drawn up draft decisions suspending the assistance. However, it did not send such drafts to the DAFSE until 17 April 1997, although their preparation did not involve extensive work or a long procedure. Consequently, the period of more than 16 months between delivery of the judgment of 13 December 1995, cited above, and the dispatch of those drafts is excessively long.

91 Although the fact that there has been unreasonable delay may in certain circumstances lead to the annulment of a decision, that cannot be the result in the case of an action for the annulment of decisions to suspend assistance. If such decisions were annulled on the sole ground that they were late, the defendant could do no more than adopt, pursuant to Article 176 of the Treaty, fresh

decisions to suspend assistance since it still does not have the information it needs to calculate eligible expenditure. That being so, an annulling judgment would be wholly pointless. It follows that it is not appropriate to annul the contested decisions for breach of the principle of legal certainty on account of the unreasonable delay in adopting them.

The fourth plea in law: infringement of acquired rights

Arguments of the parties

92 Referring to the Opinion of Advocate General Darmon in Case C-291/89 *Interhotel* v *Commission* [1991] ECR I-2257, the applicant claims that the decisions approving the applications for aid vested subjective rights in it and more particularly the right to demand full payment of the aid.

93 The Commission disputes the applicant's argument, referring to *Branco* v *Commission*, cited at paragraph 63 above (paragraphs 97 and 105 to 107).

Findings of the Court

94 While it is true that a decision of approval confers on the recipient of ESF aid a right to demand payment thereof, this can be so only if the aid is used in accordance with the conditions laid down by the approval decision.

95 In this case, there are serious grounds for suspecting irregularities in the sense that the applicant did not comply with those conditions, a situation justifying suspension of assistance.

96 Since the decisions to suspend do not prejudge the Commission's final decision on the final payment claim, they do not deprive the applicant of the right to receive the full amount of the final payment in accordance with its application, if it should transpire that the aid was used strictly in accordance with the conditions imposed by the approval decisions.

97 It follows that the plea alleging infringement of acquired rights must be rejected.

The fifth plea in law: breach of the principle of proportionality

Arguments of the parties

98 According to the applicant, the Commission infringed the principle of proportionality by failing to comply with its undertaking to reimburse, in implementation of the decisions of approval, the expenditure incurred by the applicant on the training programmes carried out.

99 The defendant objects that, having regard, first of all, to the doubts expressed by the Portuguese authorities from 1989 as to the regularity of certain operations carried out by the applicant in the context of those programmes and, secondly, to the fact that criminal proceedings were pending, any decision other than to suspend the assistance would have been premature.

Findings of the Court

100 In this case, the suspensions effected by the Commission are directly linked to the serious grounds for suspecting irregularities of which the Portuguese authorities informed it from 1989 and do not prejudge the final decision to be adopted on the final payment claim.

101 Those suspensions are thus in conformity with the principle of proportionality.

102 It follows that the plea alleging breach of the principle of proportionality must be rejected.

103 It follows from the foregoing that the action for annulment must be dismissed in its entirety.

Costs

104 Under Article 87(2) of the Rules of Procedure, the unsuccessful party must be ordered to pay the costs if they have been applied for in the successful party's pleadings. In this case the applicant has been unsuccessful and the defendant has applied for costs.

105 However, the Court considers that it is necessary to take account, in awarding costs, of the course taken by the procedure leading to the contested decisions, as described above, particularly at paragraphs 56 and 91, which left the applicant in a state of uncertainty as regards payment of the financial assistance which had been granted to it. In those circumstances the applicant cannot be criticised for bringing the matter before the Court so that the Commission's conduct might be reviewed and, in the light of that review, the appropriate determinations made. It must therefore be held that the defendant's conduct contributed towards creating the conditions for the dispute to arise.

106 The first and second indents of Article 87(3) of the Rules of Procedure provide that the Court may order even a successful party to pay the costs in proceedings which have arisen as a result of the conduct of that party (*Interhotel* v *Commission*, cited at paragraph 49 above, paragraph 82).

107 It is therefore appropriate to order the Commission to pay 10% of the costs incurred by the applicant in addition to its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. **Joins Cases T-194/97 and T-83/98 for the purposes of judgment;**

2. Dismisses the application for a declaration of failure to act in Case T-194/97 as inadmissible;

3. Dismisses the application for annulment in Case T-83/98;

4. Orders the defendant to pay 10% of the costs incurred by the applicant in addition to its own costs.

Jaeger Lenaerts Azizi

Delivered in open court in Luxembourg on 27 January 2000.

H. Jung

Registrar

K. Lenaerts

President