JUDGMENT OF THE COURT (Sixth Chamber)

6 April 2000 *

In Case C-443/97,

Kingdom of Spain, represented by R. Silva de Lapuerta, Abogado del Estado, acting as Agent, with an address for service in Luxembourg at the Spanish Embassy, 4-6 Boulevard E. Servais,

applicant,

supported by

Italian Republic, represented by U. Leanza, Head of the Legal Affairs Department at the Ministry of Foreign Affairs, acting as Agent, assisted by G. De Bellis, Avvocato dello Stato, with an address for service in Luxembourg at the Italian Embassy, 5 Rue Marie-Adélaïde,

and

Portuguese Republic, represented by L. Fernandes, Director of the Legal Service of the Directorate-General for European Community Affairs in the Ministry of

* Language of the case: Spanish.

Foreign Affairs, P. Borges, a lawyer in the same service, and J. Viegas Ribeiro, Inspector-Director in the General Directorate of Finance, acting as Agents, with an address for service in Luxembourg at the Portuguese Embassy, 33 Allée Scheffer,

interveners,

v

Commission of the European Communities, represented by M. Díaz-Llanos and P. Oliver, Legal Advisers, and C. Gómez de la Cruz, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the latter's office, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of the Commission's internal guidelines of 15 October 1997 concerning net financial corrections in the context of the application of Article 24 of Council Regulation (EEC) No 4253/88 of 19 December 1988 laying down provisions for implementing Regulation (EEC) No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1988 L 374, p. 1), as amended by Council Regulation (EEC) No 2082/93 of 20 July 1993 (OJ 1993 L 193, p. 20),

THE COURT (Sixth Chamber),

composed of: P.J.G. Kapteyn (Rapporteur), acting for the President of the Sixth Chamber, G. Hirsch and H. Ragnemalm, Judges,

Advocate General: A. La Pergola,
Registrar: D. Louterman-Hubeau, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 1 July 1999,

after hearing the Opinion of the Advocate General at the sitting on 28 October 1999,

gives the following

Judgment

1 By application lodged at the Court Registry on 23 December 1997, the Kingdom of Spain applied pursuant to Article 173 of the EC Treaty (now, after amendment, Article 230 EC) for the annulment of the Commission's internal guidelines of 15 October 1997 concerning net financial corrections in the context

of the application of Article 24 of Council Regulation (EEC) No 4253/88 of 19 December 1988 laying down provisions for implementing Regulation (EEC) No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1988 L 374, p. 1), as amended by Council Regulation (EEC) No 2082/93 of 20 July 1993 (OJ 1993 L 193, p. 20; hereinafter 'the coordination regulation').

2 By order of the President of the Court of 25 June 1998, the Italian Republic and the Portuguese Republic were given leave to intervene in support of the form of order sought by the Kingdom of Spain.

The Community provisions

3 Article 205 of the EC Treaty (now, after amendment, Article 274 EC) provides that 'The Commission shall implement the budget, in accordance with the provisions of the regulations made pursuant to Article 209, on its own responsibility and within the limits of the appropriations, having regard to the principles of sound financial management'.

4 The first paragraph of Article 209a of the EC Treaty (now, after amendment, Article 280(2) EC) provides that Member States are to take the same measures to counter fraud affecting the financial interests of the Community as they take to counter fraud affecting their own financial interests. The second paragraph of that provision (now, after amendment, Article 280(3) EC) provides that, without prejudice to other provisions of the Treaty, Member States are to coordinate their action aimed at protecting the financial interests of the Community against fraud.

To that end they are to organise, with the help of the Commission, close and regular cooperation between the competent departments of their administrations.

5 Council Regulation (EEC) No 2052/88 of 24 June 1988 on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1988 L 185, p. 9), as amended by Council Regulation (EEC) No 2081/93 of 20 July 1993 (OJ 1993 L 193, p. 5), provides in the first paragraph of Article 3(5):

'The Council, acting on the basis of Article 130e of the Treaty, shall adopt the provisions necessary for ensuring coordination between the different Structural Funds, on the one hand, and between them and the EIB and the other existing financial instruments, on the other. The Commission and the EIB shall establish by mutual agreement the practical arrangements for coordinating their operations.'

6 The necessary provisions were laid down by the coordination regulation. Article 21(1) of the latter, which governs the detailed rules for payment, provides:

'Payments of financial assistance shall be made in accordance with the corresponding budgetary commitments to the national, regional or local authority or body designated for the purpose in the application submitted through the Member State concerned, as a general rule within two months from receipt of an acceptable application. They may take the form either of advances or of final payments in respect of expenditure actually incurred. For measures to

be carried out over a period of two or more years payments shall relate to the annual instalments of commitments referred to in Article 20(2).'

7 Article 23(1) of the coordination regulation, which establishes a system of financial control, provides:

'In order to guarantee completion of operations carried out by public or private promoters, Member States shall take the necessary measures in implementing the operations:

— to verify on a regular basis that operations financed by the Community have been properly carried out,

— to prevent and to take action against irregularities,

— to recover any amounts lost as a result of an irregularity or negligence. Except where the Member State and/or the intermediary and/or the promoter provide proof that they were not responsible for the irregularity or negligence, the Member States shall be liable in the alternative for reimbursement of any sums unduly paid. For global loans, the intermediary may, with the agreement of the Member State and the Commission, take up a bank guarantee or other insurance covering this risk.

Member States shall inform the Commission of the measures taken for those purposes and, in particular, shall notify the Commission of the description of the

management and control systems established to ensure the efficient implementation of operations. They shall regularly inform the Commission of the progress of administrative and judicial proceedings.

Member States shall keep and make available to the Commission any appropriate national control reports on the measures included in the programmes or other operations concerned.

As soon as this regulation enters into force, the Commission shall draw up detailed arrangements for implementation of this paragraph in accordance with the procedures referred to in Title VIII and inform the European Parliament thereof.'

8 Article 24 of the coordination regulation, concerning the reduction, suspension and cancellation of financial assistance, provides:

'1. If an operation or measure appears to justify neither part nor the whole of the assistance allocated, the Commission shall conduct a suitable examination of the case in the framework of the partnership, in particular requesting that the Member State or authorities designated by it to implement the operation submit their comments within a specified period of time.

2. Following this examination, the Commission may reduce or suspend assistance in respect of the operation or a measure concerned if the examination reveals an irregularity or a significant change affecting the nature or conditions for the implementation of the operation or measure for which the Commission's approval has not been sought.

3. Any sum received unduly and to be recovered shall be repaid to the Commission. Interest on account of late payment shall be charged on sums not repaid in compliance with the provisions of the Financial Regulation and in accordance with the arrangements to be drawn up by the Commission pursuant to the procedures referred to in Title VIII.'

9 Title VIII of the coordination regulation provides for the creation of various advisory committees, to which the Commission must refer in the cases set out in Article 30 of the regulation.

10 After consulting the Advisory Committee on the Development and Conversion of Regions and the Committee under Article 124 of the EC Treaty (now Article 147 EC), and referring to Article 23 of the coordination regulation, the Commission adopted various implementing regulations, including Regulation (EC) No 1681/94 of 11 July 1994 concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the structural policies and the organisation of an information system in this field (OJ 1994 L 178, p. 43), and Regulation (EC) No 2064/97 of 15 October 1997 establishing detailed arrangements for the implementation of Council Regulation (EEC) No 4253/88 as regards the financial control by Member States of operations co-financed by the Structural Funds (OJ 1997 L 290, p. 1).

11 The initial draft of the internal guidelines approved by the Commission was first discussed within the group of the personal representatives of the finance ministers of the Member States on sound financial management, then within the various committees referred to in Title VIII of the coordination regulation.

12 Subsequently, the guidelines were again submitted to the College of Commissioners under cover of a communication to the Commission by the six Members of the Commission concerned, by agreement with the President, which requested the Commission to 'take note' of these 'internal guidelines concerning the net financial corrections in the context of the application of Article 24 of the regulation... and to entrust the departments concerned with the task of applying the guidelines'.

13 That communication contained a succinct description of the guidelines, and also stated that the draft had been 'slightly amended to take account of the concerns expressed by the Member States', but that 'several Member States still have reservations'.

14 On 15 October 1997, the Commission adopted the internal guidelines concerning the net financial corrections in the context of the application of Article 24 of the coordination regulation (hereinafter 'the internal guidelines'). After having been notified to the Member States on 23 October 1997, the internal guidelines were examined at the Ecofin Council of 17 November 1997.

15 During the discussions on the draft concerning the internal guidelines, certain delegations indicated that it was necessary to carry out consultations between the Member States and the Commission before issuing the guidelines, in order to re-examine their legal basis. Similarly, the Spanish delegation made a declaration, attached to the minutes of the Ecofin Council of 1997, in which it opposed the draft on the ground that there was no legal basis for its adoption. The Hellenic Republic and the Portuguese Republic made similar declarations, while the Italian Republic formally supported the Spanish declaration.

16 According to the Commission, the internal guidelines are intended to specify the circumstances in which the Commission envisages carrying out net financial corrections pursuant to Article 24 of the coordination regulation, so that the various Commission departments concerned have a coherent approach, that being made necessary by the fact that those services fall under the aegis of different Members of the Commission. Moreover, according to Article 205 of the Treaty, the Commission must implement the budget in accordance with the principles of sound financial management and, under Article 209a, Member States must counter fraud affecting the financial interests of the Community.

17 In adopting the internal guidelines, the Commission took particular account of the fact that, since 1995, the European Parliament and the Court of Auditors have been urging it to be more vigilant as regards the financial corrections carried out in the structural funds.

18 The internal guidelines provide for four types of correction: a net correction, a financial correction greater than the sum relating specifically to the irregularity or irregularities discovered, a flat-rate correction, and, finally, a provisional net correction.

19 The documents before the Court show that those corrections were to be applied at the stage of payment of the amounts due by the Commission to the Member State pursuant to Article 21 of the coordination regulation, for the type of intervention concerned.

20 The documents before the Court also show that, before being able to reduce or suspend the aid under Article 24(2) of the coordination regulation by applying a financial correction in accordance with the internal guidelines, the Commission must adopt a specific and reasoned decision, having carried out a consultation between the various departments concerned and having examined the file, within the framework of the partnership system.

21 The various types of correction may be described as follows:

1. Net correction (points 3 and 4 of the internal guidelines)

The Commission's ability to apply a net correction consists in refraining from making a reallocation of funds, which would otherwise be the normal procedure,

where there has been a significant failure to meet the obligations under Article 23(1) of the coordination regulation.

In deciding whether there has been such a 'significant failure', the Commission examines whether, on the part of the public authorities concerned in the Member State at any level, the irregularity or irregularities appear to be attributable to a significant weakness affecting:

— the institution or application of prudent financial management, control or audit systems and procedures;

— the correct application of the relevant provisions, including not only the applicable financial rules but also the legislation applying, for example, to compliance with other Community policies and the notification of irregularities under Regulation No 1681/94. The 'other Community policies' in question include, for example, those relating to the environment or the award of public contracts. In such cases, the Commission might also take parallel action under the infringement provisions of the Treaty, but such action does not, of itself, lead rapidly to the necessary financial corrections;

— cooperation with the Commission.

In deciding whether a net correction is required, the Commission considers not only the error or irregularity itself but also any weaknesses in management or control arrangements which allowed it to occur.

2. Financial correction greater than the sum relating specifically to the irregularity or irregularities discovered (points 5 and 6 of the internal guidelines)

In derogation from the rule whereby every net financial correction must relate solely to the irregularity or irregularities discovered, provision is nevertheless made for a greater financial correction in cases where the Commission has good reason to believe that the irregularity was systemic, thus reflecting a systemic weakness of management, control or audit likely to be found in a series of similar cases.

In order to quantify a greater financial correction, the Commission takes account of the level and the specific characteristics of the administrative system in which the weakness is present and the probable extent of the abuse.

3. Flat-rate correction (points 6 and 7 of the internal guidelines)

Provision for a flat-rate correction is made, first, for cases where the Member State concerned supplies no suitable information for assessing the extent of the abuses committed and, secondly, for cases where the irregularities concerned have no specific financial value.

Such a correction is based on a reasoned judgment of the likelihood and extent of the misapplication.

4. Provisional net correction (point 9 of the internal guidelines)

Finally, the internal guidelines provide for the possibility of a provisional net correction where a Member State fails to fulfil its obligations in a less flagrant manner or may rely on extenuating circumstances.

The admissibility of the action

22 The Commission has raised an objection of inadmissibility, maintaining that the internal guidelines do not constitute an act which may be challenged under Article 173 of the Treaty.

23 The Commission argues that the internal guidelines are intended strictly for the internal use of its departments and, moreover, do not in any way alter the pre-existing legal situation, with the result that they do not in themselves produce legal effects *vis-à-vis* third parties. They merely indicate the manner in which the Commission's departments should apply the financial corrections to reduce or suspend aid from the structural funds under Article 24(2) of the coordination regulation.

24 The Spanish Government argues that, whatever term is used to describe them, the internal guidelines constitute a measure against which an action may be brought under Article 173 of the Treaty.

25 On the strength of its analysis of the content of the internal guidelines, the Spanish Government concludes that they produce binding legal effects and affect

the interests of Member States by bringing about a distinct change in their legal position, with the result that they may be challenged in an action for annulment.

26 The Italian Republic and the Portuguese Republic argue that the internal guidelines constitute an act that is capable of being challenged under Article 173 of the Treaty.

27 It should be noted as a preliminary that, according to settled case-law, an action for annulment must be available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects (see Case 22/70 *Commission* v *Council* [1971] ECR 263, paragraph 42, and Case C-366/88 *France* v *Commission* [1990] ECR I-3571, paragraph 8).

28 It should also be noted that, in principle, internal guidelines have effects only within the administration itself and give rise to no rights or obligations on the part of third parties. They do not therefore constitute acts adversely affecting any person, against which, as such, an action for annulment can be brought under Article 173 of the Treaty (see Case 190/84 *'Les Verts'* v *European Parliament* [1988] ECR 1017, paragraph 8, and *France* v *Commission*, cited above, paragraph 9).

29 In this case, the contested measure is entitled 'Internal guidelines concerning net financial corrections in the context of the application of Article 24 of Regulation (EEC) No 4253/88'.

30 Under Article 24(2) of the coordination regulation, the Commission is empowered to reduce or suspend assistance in respect of the operation or measure

concerned if the examination referred to in Article 24(1) of the regulation reveals an irregularity or a significant change affecting the nature or conditions for the implementation of the operation or measure for which the Commission's approval has not been sought.

31 That being so, there is nothing to prevent the Commission, for the purpose of assuming fully the power referred to in the paragraph above, from adopting internal guidelines concerning financial corrections to be made when applying Article 24 of the coordination regulation, and from entrusting the departments concerned with the task of applying them.

32 On the contrary, those guidelines contribute to ensuring that, when the Commission takes decisions pursuant to that provision, the Member States or the authorities designated by them benefit from identical treatment in comparable situations. Also, such guidelines are likely to strengthen the transparency of individual decisions addressed to Member States.

33 The internal guidelines thus indicate the general lines along which, pursuant to Article 24 of the coordination regulation, the Commission envisages subsequently adopting individual decisions whose legality may be challenged before the Court by the Member State concerned in accordance with the procedure laid down by Article 173 of the Treaty.

34 Such an act of the Commission, which reflects only its intention to follow a particular line of conduct in the exercise of the power granted to it by Article 24 of the coordination regulation, cannot therefore be regarded as intended to produce legal effects (Case 114/86 *United Kingdom* v *Commission* [1988] ECR

5289, paragraph 13, and Case C-180/96 *United Kingdom* v *Commission* [1998] ECR I-2265, paragraph 28).

35 That conclusion is not altered by the circumstances in which the internal guidelines were adopted. As the Commission has pointed out, it undertook the preliminary discussions within the group of personal representatives of the finance ministers of Member States and the consultation with the committees referred to in Title VIII of the coordination regulation in compliance with the partnership principle which underlies the financial management of the various structural funds. It is in that spirit that it communicated the internal guidelines, after their adoption, to the Member States, the Parliament and the Court of Auditors.

36 It follows that the internal guidelines cannot be regarded as a measure intended to produce legal effects, with the result that the action must be dismissed as inadmissible.

Costs

37 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Kingdom of Spain has been unsuccessful, and the Commission has sought an order that it pay the costs, it must be ordered to pay the costs. In accordance with the first paragraph of Article 69(4) of the Rules of Procedure, the Italian Republic and the Portuguese Republic must bear their own costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

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

2. **Orders the Kingdom of Spain to pay the costs;**

3. **Orders the Italian Republic and the Portuguese Republic to bear their own costs.**

Kapteyn Hirsch Ragnemalm

Delivered in open court in Luxembourg on 6 April 2000.

R. Grass
Registrar

J.C. Moitinho de Almeida
President of the Sixth Chamber