OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 5 March 1991 *

Mr President,
Members of the Court,

1. The action brought by the Portuguese company Estabelecimentos Isodoro M. Oliveira (hereinafter referred to as 'Oliveira') is for the annulment of two decisions of the Commission of 27 June 1989 holding certain expenditure amounting to ESC 63 450 244 and ESC 23 713 486, in the framework of the implementation of Projects No 870708/P1 and No 870708/P3 of the European Social Fund, to be ineligible.

2. This application, similar in many respects to that of the company Interhotel in Case C-291/89, also has as its source the intervention of the European Social Fund established by Article 123 of the EEC Treaty. With regard to the tasks of the Fund and the procedure to be followed in order to obtain assistance, I refer to the observations which I have set out in that case on the relevant provisions of Council Decision 83/516/EEC of 17 October 1983 and of Regulation (EEC) No 2950/83 adopted on the same day by the Council for the application of that decision (hereinafter referred to as 'the regulation'). [1]

3. I shall now outline the progress of Oliveira's application.

4. Oliveira had applied to the Department for the Affairs of the European Social Fund (hereinafter the 'Department'), the national authority responsible for dealing with the Fund, established in Lisbon, which, in the name of the Portuguese Republic and on behalf of that company, drafted two applications for Fund assistance for the year 1987: one for the training of persons aged under 25 years, the other for the training of persons aged 25 years (hereinafter referred to as 'young people' and 'adults'). The project in respect of 'young people' was approved by a decision of the Commission of 30 April 1987 [2] with a slight reduction due to a decrease in the number of trainees. The project relating to 'adults' was only partially approved, part of the expenditure being refused. [3] The amounts approved were notified to Oliveira. [4]

5. Subsequently, by means of a circular dated 8 June 1987 sent to all the undertakings affected, [5] the Department let it be known that the Commission intended to reduce the periods of practical training for persons under the age of 25 years in such a way that their duration would not exceed that of theoretical instruction.

6. Oliveira did not comply with the requirement set out in that circular, claiming that its training courses had already commenced when the document was

* Original language: French.

1 — Paragraphs 2 and 3 of the Opinion delivered today in Case C-291/89 [1991] ECR I-2257, I-2264.

2 — Annex IV to the defence.

3 — *Ibidem.*

4 — Documents Nos 1 and 2 of the group of Annex II to the application.

5 — Annex V to the defence and Annex I to the reply.

received. However, following the applicantüs claim for final payment, the Commission took the view that a large proportion of the amounts submitted in the file relating to the training of 'young people' was ineligible on the ground that the rule of equality between the number of practical hours and the number of theoretical hours had not been observed and, in addition, because certain unit costs were 'inexplicably high'. Within the framework of the project concerning the 'adults', to which the circular did not apply, the Commission identified an amount of expenditure that was ineligible, again on the ground that certain unit costs were inexplicably high.

7. In support of its application to the Court the applicant puts forward four pleas in law based, respectively, on infringement of essential procedural requirements, infringement of general principles of law, failure to observe acquired rights and failure to state sufficient reasons.

8. In the case of the first plea in law, Oliveira maintains that the contested decisions have infringed Article 6(1) of the regulation which provides that 'when Fund assistance is not used in conformity with the conditions set out in the decision of approval, the Commission may suspend, reduce or withdraw the assistance, *after having given the relevant Member State an opportunity to comment*'.[6]

9. According to Oliveira, that rule requires the Commission to hear the Member State prior to taking the decision, which would enable the Community institution to carry out a detailed examination of the situation.[7] The Commission observes that that provision does not lay down specific formal procedures for hearing the Member State, but that it is restricted to allowing the latter to express any objections. In the event of a refusal to make the final payment, either in whole or in part, the national authorities may in turn refuse to notify the decision to the undertaking; thereupon a phase of dialogue with the Fund is embarked upon. It is only following this that the decision becomes final by being notified to the promoter.[8] The Commission adds that in the present case the Portuguese authorities undertook to notify the decision to the promoter and to request the reimbursement of the overpayment.

10. It appears, as Mr Advocate General Tesauro points out in his Opinion in *Funoc*,[9] that Article 6(1) of the regulation does not lay down 'a formal consultation procedure'. Furthermore, the Court accepted[10] in that case that, when the national authorities respond to the sending of a decision reducing or withdrawing assistance and the Commission subsequently takes another decision, an exchange of letters between the Member State and the Commission prior to this final decision takes the place of comment within the meaning of Article 6(1) of the regulation.

11. However, it must be pointed out that the Court recognized in its judgment in *Funoc* that the procedure laid down in Article 6(1) was observed because the exchange of letters between the Commission and the national authorities had taken place *before* the Commission's decision reducing the assistance which formed the subject-matter of the action. On the other hand, the Court was not called upon to determine the

6 — Emphasized by Oliveira in paragraph 12 of its application to the Court.

7 — Reply, paragraphs 6 to 8.

8 — Defence, paragraphs 19 and 20.

9 — Case C-200/89, paragraph 6 of the Opinion.

10 — Judgment in Case C-200/89 *Funoc* [1990] ECR I-369, paragraph 17.

legality of the first decision notified to the national authorities and withdrawing the assistance, given that this text had been replaced by a more favourable decision reducing the assistance which was challenged and over which the Court exercised its supervisory jurisdiction. The Court was not required, therefore, to rule on the legality of the Commission's practice, described as normal by its representative at the hearing, which consists in sending to the Member State a decision to be notified without first inviting it to submit its comments.

12. The argument advanced by the Commission would, if accepted, necessarily give rise to some practical disadvantages. Supposing that a decision reducing assistance were notified to the undertaking and that subsequently the State were to submit its comments to the Commission regarding that decision. The undertaking concerned, aware that the national authorities have raised objections against the first decision, might be tempted to await the Commission's final decision without commencing proceedings for annulment. Should the second decision be identical to the first, an action against it would risk being dismissed as inadmissible in accordance with the decisions of the Court according to which

'an action for annulment brought against a decision which is purely confirmatory of a previous decision that was not challenged within the time limit is inadmissible'. [11]

That argument is also difficult to reconcile with the Court's case-law which refuses to recognize that the adoption of a position which a Community institution undertakes to re-examine [12] constitutes a decision.

13. In reality, the Commission interprets the silence of the national authorities as acquiescence on their part when they receive the Commission's text in the form of a decision to be notified to the promoter, and not of a draft or provisional decision. Furthermore, they are given no express invitation regarding the possibility of submitting their comments.

14. The type of practice followed by the Commission, which its representative, at the hearing, recognized as being the result of a 'more than broad interpretation of this provision', is, to my mind, contrary both to the letter and to the spirit of Article 6(1) of the regulation, which provides, I would remind the Court, that 'the Commission may suspend, reduce or withdraw the assistance, *after* having given the relevant Member State an opportunity to comment'. [13] It must therefore be a question of consultation *prior* to the decision reducing or withdrawing the assistance. The text goes no further: it does not require the Commission to comply with the opinion of the State or to suspend indefinitely its project while waiting to be informed of the position of the national authorities. It is, in fact, possible for the Commission, while observing the rule in Article 6(1) of the regulation, to set a deadline for the Member State so that the procedure begun can be concluded diligently.

15. The Commission's representative pointed out at the hearing that if the departments of the Fund had to 'contact all the Member States before taking a decision', they would be 'completely paralysed'. When I then asked him if the Commission withdrew or reduced assistance on numerous occasions, he replied that such cases should amount to half a dozen in

11 — See, on this last point, concerning the European Social Fund, the order in Case C-12/90 *Infortec* [1990] ECR I-4265, paragraph 10.

12 — Judgment in Case 44/81 *Federal Republic of Germany* v *Commission* [1982] ECR 1855, paragraphs 8 to 12.

13 — Emphasis added.

Portugal, which features high on the list of the recipients of Fund assistance.[14] The argument based on statistics does not therefore appear to be well-founded, since consultation with the Member State is only required where the assistance is reduced, suspended or withdrawn.

16. Since the obligation imposed by Article 6(1) of the regulation has been infringed, what must now be determined is whether that infringement constitutes an infringement of an essential procedural requirement within the meaning of the first paragraph of Article 173 of the Treaty.

17. As the Court pointed out in its judgment in EISS of 15 March 1984,

'this procedure [of financial assistance under the Fund] creates a financial relationship between the Commission and the Member State on the one hand and between that Member State and the institution which is the recipient of the financial assistance on the other'.[15]

The Member State appears not solely as an involuntary intermediary, but also as an authority which, throughout the procedure laid down by the regulation, occupies a central place by virtue of the degree of its involvement and of its responsibilities. Suffice it to point out some of the provisions of that regulation. In the words of Article 5(4), 'the Member State shall *certify the accuracy* of the facts and accounts in payment claims'[16] submitted by the promoters. Article 6(2) states that 'sums paid which are not used in accordance with the conditions laid down in the decision of approval shall be refunded' and adds that 'the Member State concerned should have *secondary liability* for the repayment of sums, unwarranted payment of which was made for operations to which the guarantee referred to in Article 2(2) of Decision 83/516/EEC applies'. This last provision provides, precisely, that 'the relevant Member States shall guarantee the successful completion of the operations' except for certain assistance not relevant to the present case.

18. In such a context, the obligation to consult the Member State laid down in Article 6(1), in case of the suspension, reduction or withdrawal of assistance, takes on yet another dimension. It is not necessary to dwell further on the significance of the opinion of the Member State, in the light of the position which it occupies and the responsibility which lies on it.

19. Since the Commission has infringed Article 6(1) of Regulation No 2950/83 which lays down essential procedural requirements for the validity of the Commission's decisions suspending, reducing or withdrawing Fund assistance, I invite the Court to declare that the first plea is well-founded and, accordingly, to annul the decisions adopted.

20. It is therefore in the alternative that I shall examine the other three pleas.

14 — See the *Annual Report of the Court of Auditors concerning the year 1989* including a comparison over five years (OJ 1989 C 313, p. 76).

15 — Case 310/81 [1984] ECR 1341, paragraph 15.

16 — Emphasis added.

21. I shall look first of all at the fourth plea concerning the failure to state sufficient reasons in the Commission's decisions, which is related also to an infringement of essential procedural requirements.

22. The applicant considered in particular [17] that the expression 'inexplicably high costs' used by the Commission in its final decisions to reduce assistance is abstract, while the reasons which the Commission is obliged to state under Article 190 must, according to the Court's case-law, 'show clearly and unambiguously the grounds on which the measure is based'. [18]

In its reply, [19] moreover, the applicant deplored the fact that that certain grounds, which were not mentioned in the contested decisions, only appeared at the stage of the Commissionüs defence.

23. The Commission's response [20] was that the decisions clearly mentioned the amounts of expenditure held to be ineligible and indicated their origin with reference to the headings in the final payment claims; furthermore, a comparison between the amounts shown in the forms of application for assistance and those appearing in the forms of final payment claim showed more precisely the source of the amounts of ineligible expenditure. While admitting that its reasons '[did] not err on the side of verbosity', [21] it pointed out that they had to be judged on the basis of their context, citing the Court's case-law according to which

'the [*purpose* of the] obligation to state the reasons on which an individual decision is based is to enable the Court to review the legality of the decision and to provide the person concerned with sufficient information to make it possible to ascertain whether the decision is well-founded or whether it is vitiated by a defect which may permit its legality to be contested. The *extent* of that obligation depends on the nature of the measure in question and on the context in which it was adopted'. [22]

24. It is true that the Court's case-law [23] has attributed to the obligation to state reasons an invariable purpose, while recognizing that its extent may depend on a number of factors: the wording, the legal framework, the context of the decision. Since these are identical to those which I have identified in the context of the decision reducing assistance which was taken in respect of Interhotel, I refer to my observations in paragraphs 12 to 19 of the Opinion in Case C-291/89 which I have delivered today.

25. Taking into account the circumstances surrounding those decisions, it is necessary to determine whether the statement of reason on which they are based enables the persons concerned to become aware of the grounds for the measures taken so that they can defend their rights and the Court can exercise its supervisory jurisdiction.

17 — Application, paragraph 19.

18 — Judgment in Case 1/69 *Commission* v *Italy* [1969] ECR 227, paragraph 9.

19 — Paragraph 17.

20 — Defence, p. 12 of the French translation.

21 — Rejoinder, paragraph 11.

22 — Judgment in Case 32/86 *SISMA* [1987] ECR 1685, paragraph 8, emphasis added.

23 — See in particular the judgment in Case 185/83 *University of Groningen* [1984] ECR 3623, paragraph 38.

26. In the decision relating to the training of young people, the Commission relies on two grounds: the failure to observe equality between the number of practical hours and the number of theoretical hours, and the presence of inexplicably high unit costs.

27. As regards the first ground, it is apparent from the final payment claim [24] that the applicant did not observe the requirements of the Commission concerning the duration of practical instruction as expressed in Circular No 10/DAFSE/87 since, apart from the course for the training of marketing specialists, the duration of practical training is in all cases considerably longer than that of theoretical training. Consequently, it is possible to assign these excesses to various items of expenditure without its being possible to determine precisely the amount of the sums refused in that respect in the absence of information regarding the percentage of the reduction and the items to which it applies. Thus, we learn from the defence [25] that it is necessary to make a reduction of 36% of the amount of the heading 'Income of trainees', of the amounts of the items 'Remuneration of staff and charges on remuneration', 'Equipment and non-durable goods', 'Other supplies and services by third parties' and 'Consumption of raw materials . . . '. This being the case, those details do not seem to me to be indispensable, having regard to the fact that this ground enables the persons addressed to be 'aware of the reasons for the measure' within the meaning of the requirement which the Court has laid down. [26]

28. As to the ground found in the files relating to 'young people' and 'adults' regarding unit costs which are inexplicably or abnormally [27] high, I must admit that it is rather general. The applicant had inferred therefrom that it was accused of exceeding certain amounts claimed in its original application for assistance, as is witnessed by its attempts to justify the discrepancies in an annex to its application to the Court. The defence reveals that the Commission did wish to penalize such overspending; but it also shows that the Commission accused the applicant of having included identical expenses under several headings, of not having shown that certain expenditure was actually incurred, and of not having reflected the reduction in the length of training in the amounts applied for. Does this complaint enable the various grounds put forward for reducing the amount of eligible expenditure to be grouped together? Although it would have been preferable for each ground to have been expressly formulated, I am of the opinion that they are all connected with the general ground. The existence of identical expenses, and of expenditure which fails to take account of the reduction in the duration of the training (point 14.6 of the final payment claim), gives rise to unjustified costs. Similarly, the lack of documentary proof of certain expenditure which led the Commission to make significant reductions in particular to point 14.3 of the file relating to 'young people' can be identified in the ground put forward, the more so since the national authorities had given the applicant warning of this and, according to them, had carried out an analysis intended 'to give greater clarity to the final payment claims and to make the expenditure and costs comply with criteria of verisimilitude'. [28]

29. Given that the ground alleged appears to me to cover the various grounds relied on

24 — Annex III to the defence, p. 2 additional sheet No 2.

25 — Pp. 3 to 5 of the French translation.

26 — Case 185/83, reference given in footnote 23.

27 — The adverbs 'inexplicablement' and 'anormalement' are used alternatively in the French language documents in an attempt to translate the Portuguese term 'injustificadamente' which is used in the original decisions refusing the balance (pp. 43 and 45 of the application to the Court).

28 — Annex II to the application to the Court, document No 3.

which can be identified by comparing the applications, I consider that the Commission has not failed in its obligation to state its reasons and that the fourth plea is not well-founded.

30. The applicantüs third plea is based on the infringement of acquired rights. According to the applicant,[29] the final decisions did not take into consideration the unit costs which had previously been approved. The Commission takes the view,[30] on the other hand, that the assistance was reduced because the amounts approved had been exceeded, because expenditure which had not been approved had been included, and because certain expenditure had not been supported by the documentary proof or had been duplicated.

31. As I pointed out in my Opinion in Case C-291/89 *Interhotel*, the Commission, when examining final payment claim, uses the earlier decision of approval as a framework. It may therefore legitimately refuse expenditure which it had not approved as well as expenditure the amounts of which have been increased.

32. Thus it appears, in the file relating to the training of young people, that the items 'Remuneration of non-teaching staff',[31] 'Costs of hire and rent'[32] and 'Training of teaching staff'[33] were considerably increased. As for the expenditure relating to taxes and duties,[34] this was not envisaged in the original application for assistance. Furthermore, when it appeared in the final payment claim, the Commission disallowed it, given that, under Portuguese law, stamp duty is not payable in respect of this type of training operation. In the same way, it will be seen in the file relating to the training of adults that the item 'Recruitment and selection of instructors'[35] appears for the first time in the final payment claim. Moreover, the expenditure relating to the expenses for staff concerned in preparation[36] had not been approved by the Commission and this has not been disputed by the applicant. The Commission was therefore able to make the necessary adjustments[37] without prejudicing acquired rights.

33. In my Opinion in the *Interhotel* case[38] I maintained that it was, moreover, essential to allow the Commission a margin of discretion at the time of the final examination of the application for assistance which it carries out in the light of the detailed report on the content and results of the operation, enabling it to ascertain that expenditure was actually and necessarily incurred. The Court has stated that it 'cannot be disputed' that

'it is only after receiving a detailed report on the relevant operations after they have been carried out that it is possible to calculate the precise amount of the eligible expenditure'

and that the Commission

29 — Application, paragraph 15.

30 — Defence, paragraph 7.

31 — Point 14.3.1 b, c, d of the final payment claim, Annex III to the defence, compared with point 15.3 of the original application for assistance, Annex II to the defence.

32 — Point 14.3.9 of the final payment claim compared with the corresponding line in point 15.3 of the original application for assistance.

33 — Point 14.5 of the final payment claim compared with point 15.5 of the original application for assistance.

34 — Point 14.3.13 of the final payment claim: see point 15.3 of the original application for assistance.

35 — Point 14.2.4 of the final payment claim; see point 15.2 of the original application for assistance.

36 — Point 14.2.6 of the final payment claim.

37 — See defence, paragraph 8.

38 — See in particular paragraphs 35 and 36.

'has a certain discretion regarding the best way of managing the Fund'.[39]

However, I also pointed out[40] that the Commission should not be allowed, at the final stage, to refuse approved expenditure the necessity of which it had been in a position to assess at the initial stage, provided that it does not exceed the amount agreed by the decision of approval and that necessary documentary proof of expenditure is provided.

34. According to the Commission, certain items of expenditure were not the accompanied by any documentary proof in the final payment claim; these were, in the file relating to the training of young people, expenditure headed 'Miscellaneous' under the item 'Teaching materials',[41] 'Expenditure on staff', 'Expenditure for specialized work'[42] and 'General administrative expenses',[43] for which Oliveira maintained[44] that the documentary proof was in its archives and remained available. To my mind this argument is inadequate. The Commission was entitled to expect the promoter to supply proof of his expenditure when applying for final payment. The fact that this proof was produced at the stage of the applicantüs reply is of no great consequence: it is not for me to take over the role of the Community administration, but to consider whether, at the time of taking its decision, the Commission was entitled to withdraw part of the assistance. Accordingly, the Commission was justified in refusing Oliveira the assistance relating to those four items, since the proof of that expenditure was not made available to the Commission in good time.

35. I have also pointed out that certain expenditure capable of giving rise to confusion in the final payment claim was only clarified in the applicantüs reply in these proceedings. This is so regarding the expenditure relating to 'Travelling expenses'[45] which, according to the applicant,[46] covers the expenses of persons not in receipt of an accommodation allowance, but does not apply to other persons. It must be appreciated, however, that the Commission was not aware of this distinction when it decided on the final payment claims and was entitled to take the view that such expenditure was not justified.

36. Similar blunders are to be found in the final payment claim concerning the training of adults: certain expenditure such as that relating to specialized work[47] was not supported by documentary proof; other expenditure, such as that relating to 'Recruitment and selection of trainees',[48] may, in the absence of sufficient explanation on the part of the undertaking in its final payment claim, misled the Commission[49] which was bound to refuse that expenditure. Thus the Commission could also legitimately refuse this type of expenditure without prejudicing the acquired rights of the applicant.

39 — Judgment in Case 84/85 *United Kingdom* v *Commission* [1987] ECR 3765, paragraph 23.

40 — Paragraph 41.

41 — Point 14.2.1 of the final payment claim.

42 — Point 14.2.7 of the final payment claim.

43 — Point 14.3.14 of the final payment claim.

44 — Annex 6 to the reply, p. 13.

45 — Point 14.3.5 of the final payment claim.

46 — Annex 6 to the reply, p. 14.

47 — Point 14.2.7 of the final payment claim, see defence, paragraph 9, and rejoinder, paragraph 5 e), to be compared with Annex 6, p. 18.

48 — Point 14.2.3.

49 — Rejoinder, paragraph 5 d), to be compared with Annex 6 to the reply, p. 18

37. However, it appears that the Commission also refused an amount of ESC 19 237 214 under the head 'Functioning and management of courses' [50] in the file relating to 'adults' because it made an alignment on the hourly costs contained in the file relating to 'young people'. [51] It calculated an average from overall, unidentifiable figures taken from the heading 'Functioning and management of courses' in the file relating to 'young people' which it modified by means of a coefficient corresponding to the number of hours of training in order to arrive at a overall total of ESC 14 296 853 for the whole of the equivalent heading in the file relating to 'adults'. [52] It thus refused to examine *precisely* the items under that heading as submitted in the original and final applications.

38. That method seems to be particularly open to criticism. The original application, as approved by the Commission, contained individual items of expenditure under that heading, for both the file relating to 'adults' and the file relating to 'young people'. It was for the Commission, in order to respect the rights required by the applicant as a result of the decision of approval, to ascertain, item by item, whether the approved amounts had not been exceeded and that there was adequate documentary proof of expenditure. The Commission was not entitled to employ a general method to make the same reductions in the file relating to 'adults' as those effected in the file relating to 'young people' without establishing that the items in the former file contained the same omissions and irregularities as did those in the latter file.

39. A detailed check of the applications appearing in the file relating to 'adults' shows, moreover, that the method adopted by the Commission leads to results which are significantly different.

40. In the first place, it will be seen that it is only under the item 'Teaching staff' that Oliveira has made a miscalculation in the summary table [53] in the final payment claim. That table shows hourly costs which do not correspond to those set out in the detailed tables which also appear in the final payment claim. [54] This error led in turn to an excessive amount of expenses on remuneration. [55] It thus seems to me that the reduction resulting from the miscalculation should not have exceeded ESC 2 339 856. [56]

41. In the second place, it is apparent that certain expenditure under that heading could not be regarded, as it was in the file relating to 'young people', as ineligible. Thus the amount of ESC 4 424 345.60 [57] for exceeding sums approved concerning the expenses related to non-teaching staff, as well as that of ESC 1 260 938.40 for corresponding expenses, could be refused. The expenditure relating to travel expenses [58] amounting to ESC 422 311.10 could have

50 — Point 14.3 of the final payment claim.

51 — Defence, paragraph 9, and rejoinder, paragraph 3.

52 — Annex II to defence, additional sheet No 4.

53 — Annex III to defence, p. 2; additional sheet No 7 of the final payment claim.

54 — A total amount of ESC 4 161 464.15 relating to internal training should be reached, and not of ESC 5 982 363.69; the error therefore amounts to ESC 1 820 899.54.

55 — Point 14.3.2 of the final payment claim, p. 2 separate sheet No 9 of Annex III to the defence: taking into account the part of the charges (28, 5%), an excess of ESC 518 956.36 is to be found in that respect.

56 — ESC 1 820 899.54 + ESC 518 956.36

57 — The amount agreed at the time of approval being that submitted under point 15.3 of the initial application, line relating to secretariat and management, namely ESC 1 920 000 (80 000 × 2 × 12); since the amounts finally applied for amounted to ESC 6 344 345.60 the excess thus amounts to ESC 4 424 345.60.

58 — Point 14.3.5 of the final payment claim.

been considered as unjustified,[59] as could the expenditure relating to 'Specialized work'[60] amounting to ESC 4 015 267. Similarly, the amount corresponding to 'Costs of hire and rent'[61] could also have been held to be excessive in relation to that in the initial application.[62] Accordingly, the Commission was entitled to refuse the excess amount noted, namely ESC 561 598. Similarly, it was possible for it to disallow the expenditure relating to the item 'Taxes and duties'[63] amounting to ESC 239 705, since this expenditure does not appear in the initial application and since, moreover, stamp duty is not payable for this type of training measure under Portuguese law. Finally, the Commission was entitled to take the view that the general administrative expenses,[64] amounting to ESC 512 033, were not justified.

42. All in all, it appears, after an examination of each item under that heading, that the Commission could refuse expenditure totalling ESC 13 7756 054. On the other hand, it was not entitled to employ a general method of reduction which was not appropriate for this type of application and which led to the refusal of an amount of ESC 19 237 214, which seems to be excessive. The Commission has thus prejudiced the acquired rights of the applicant by withholding an additional sum of ESC 5 461 160[65] under the heading 'Functioning and management of courses'.

59 — See paragraph 35 of this Opinion concerning the file relating to 'young people'.

60 — Point 14.3.8 of the final payment claim; see paragraph 44 of this Opinion concerning the file relating to 'young people'.

61 — Point 14.3.9 of the final payment claim.

62 — 30 000 × 10 (weeks) × 110% (fees) = 3 300 000.

63 — Point 14.3.13 of the final payment claim; see paragraph 32 of this Opinion concerning the file relating to 'young people'.

64 — Point 14.3.14 of the final payment claim; see paragraph 34 of this Opinion concerning the file relating to 'young people'.

65 — 19 237 214 — 13 776 054.

43. Furthermore, in the two files relating to 'young people' and 'adults', the Commission took the view that the amount of the expenditure relating to the preparation and translation of manuals[66] was included in the cost of the preparation of the courses, duplication of documents and specialized work[67] and, consequently, rejected the expenditure relating thereto in the file relating to 'young people' and the expenditure relating to teaching materials in the file relating to 'adults'. My objection to these refusals is twofold. On the one hand, it does not seem to me that it is possible to claim that there was any overlapping with the expenditure relating to the specialized work, which was already refused for lack of documentary proof.[68] On the other hand, I fail to understand how there was overlapping between the preparation and translation of manuals and the costs of duplicating documents. The initial applications for assistance already distinguished between[69] the teaching materials and the duplication of the manuals. It thus seems apparent that the expenditure relating to the preparation and translation of the manuals was part of the heading 'Teaching materials' and was already distinct from that relating to the duplication of the manuals. Indeed, the Commission should have noted that Oliveira distinguished, in its final payment claims, between the items 'Preparation and translation of manuals' and 'Costs of preparation of courses' under the heading 'Teaching materials', without having exceeded the amount originally approved.[70] I am consequently of the opinion that by proceeding in this manner the Commission infringed the rights acquired by the applicant in this respect.

44. Over and above those refusals consequent upon the exceeding of approved

66 — Point 14.2.1 of the final payment claim.

67 — Annex I to the defence, p. 1 of the file relating to 'young people'; see also the file relating to 'adults', same references.

68 — Paragraphs 34 and 36 of this Opinion.

69 — Point 15.2 of the original applications for assistance.

70 — Of ESC 8 100 000.

amounts, the lack of sufficient documentary proof and the submission of certain expenditure without adequate explanation, the Commission refused to take into account other expenditure which it judged unnecessary for the successful conduct of the operation. It thus appears, in the file relating to the training of young people, that the expenditure under 'Budgetary management and control' and that relating to 'Specialized work'[71] under the heading 'Functioning and management of courses' were refused for that reason, the Commission having taken the view[72] that those operations 'were endowed with their own secretariat and with special teaching staff'. It states that it was aware of numerous receipts coming under *'Specialized work'* for typing work which was in fact the responsibility of the secretariat. Accordingly, the Commission was entitled to refuse that expenditure where it was actually in a position to know what was covered by that specialized work, the more so since that expenditure was not expressly submitted in the original application for assistance.

45. With regard to 'Budgetary management and control', on the other hand, Oliveira had sought in its original application[73] assistance relating to the following matters: 'Management and financial control of the project, preparation of budgets and system for document distribution and filing, archiving of documents connected with the training operations, drawing-up of monthly accounts . . .'. These specifications were adequate and it was for the Commission to determine, if necessary, *at the time of examining the original application* for assistance that that work could be carried out by the secretariat and that it was thus unnecessary to approve the corresponding expenditure. Since the latter was approved,[74] the undertaking was entitled to take it as accepted. Consequently, the refusal of expenditure relating to the item 'Budgetary management and control' amounting to ESC 1 900 080 seems, to my mind, to be contrary to the rights acquired by the applicant.

46. Moreover, the Commission refused certain expenditure because of the reduction in the duration of training. It is important here to distinguish clearly between the two training operations. With regard to the file relating to 'young people', the matter will be examined in paragraph 48 et seq below at the same time as the fourth plea, which specifically raises that issue, is considered. With regard to the file relating to 'adults', the Commission has observed that Oliveira indicated[75] a reduction of 63, 74% in the number of trainees as compared with that indicated in the original application for assistance. The number entered in the final payment claim[76] was 95 whereas it stood at 262 in the original application.[77] Accordingly, the Commission was entitled to reduce by approximately 50% the amount approved in the original application for the training of teaching staff[78] which, it seems, was no longer entirely necessary. Similarly, the Commission reduced the amount relating to normal depreciation[79] by taking account only of the actual period of training declared in the final payment claim.[80] Accordingly, these two reductions seem to me to be justified.

47. It therefore seems to me that the plea relating to the infringement of acquired

71 — Points 14.3.7 and 14.3.8 of the final payment claim.

72 — Reply to defence, paragraph 5.

73 — Point 15.3 of the original application for assistance.

74 — Annex IV to the defence.

75 — Defence, Annex III, p. 2 additional sheet No 2.

76 — Defence, Annex III, p. 2 additional sheet No 1.

77 — Defence, Annex II. p. 5.

78 — Point 14.5 of the final payment claim, defence, paragraph 9.

79 — Point 14.6. of the final payment claim.

80 — Final payment claim, p. 2 additional sheet No 1; defence, p. 7 of the French translation, and rejoinder, paragraph 5(f).

rights must be upheld in part in so far as the Commission refuses, on the one hand, in the file relating to the training of young people, expenditure relating to the preparation and translation of manuals as well as to administration and budgetary control for sums amounting respectively to ESC 2 247 308 and ESC 1 900 080, and on the other hand, in the file relating to the training of adults, expenditure relating to teaching materials amounting to 1 637 612 in addition to amounts totalling ESC 5 461 160 under the heading 'Functioning and management of courses'.

48. Finally, Oliveira relies, on the basis of the second plea, on infringement of general principles of law, in particular those of legal certainty, the non-retroactivity of administrative measures, the respect for acquired rights and the protection of legitimate expectations inasmuch as the contested decisions 'apply *a posteriori* a rule relating to equality between the number of hours of theoretical training and the number of hours of practical training' [81] which was not mentioned in the decision of approval. It even declares [82] that this requirement was formulated only at the time of the final payment, after all the expenditure had been incurred. It acknowledges [83] that it received the circular dated 8 June 1987 on 25 June 1987, that is six days after the commencement of the training operations, but states that it considered [84] at the time that the circular did not apply to it.

49. The Commission emphasizes [85] that the requirement that the period of theoretical training and the period of practical training be of equal duration, while it was decided upon after the application for assistance had been approved, was communicated by means of a circular from the Department 'at a time when it was quite possible to alter the period of practical training as, moreover, the other promoters had done'. It adds that it would have subscribed to the applicant's argument if that requirement had been formulated *after the completion* of the training operations. Finally, it emphasizes [86] that the text of the circular was sufficiently explicit.

50. One preliminary point must be made: this requirement, as the circular of the Department clearly emphasized, [87] was concerned only with the training of young people. It required the Commission, when examining the final payment claim submitted by Oliveira, to make substantial reductions. [88] Since the extent of those reductions is not disputed, it is necessary to determine whether or not Oliveira was right not to take account of the requirements contained in the circular but to rely solely on the decision of approval.

51. It appears, on the one hand, the applicant could not reasonably take the view that this circular did not concern it. It was not following any publication of the circular that the applicant became aware of it; but after the circular was notified to the applicant. Moreover, the terms used in that document could hardly give rise to ambiguity. The circular from the Department states that 'organizations in receipt of assistance *will be required to comply with*' the new position taken by the

81 — Application, paragraph 14.
82 — Application, paragraph 23.
83 — Application, paragraph 25.
84 — Reply, paragraphs 24 and 26.
85 — Rejoinder, paragraph 22.
86 — Reply, paragraph 16.
87 — Reply, Annex I.
88 — Reduction by 36% in points 14.1, 14.3.1, 14.3.10, 14.3.11, 14.3.12 and 14.6 of the final payment claim.

Commission, and this position is obvious from the text which is reproduced.

52. On the other hand, it seems to be indisputable that the applicant could alter the period of practical training at a time when the training operations had just commenced. Since the training of young people was spread over 26 weeks, [89] as was confirmed by the representative of Oliveira at the hearing, it must have been possible for the latter, two weeks after the commencement of the operations, to carry out the prescribed alignment.

53. Thus, since the text of the circular appears to be sufficiently binding for Oliveira to comply with it in good time, I am of the opinion that the decisions at issue have not infringed the general principles of law listed above. Accordingly, this plea must fail.

54. In the light of the foregoing observations, I propose that the Court should:

(1) — annul the Commission's decisions of 27 June 1989 concerning Projects Nos 870708/P1 and 870708/P3 of the European Social Fund:

— order the Commission to pay the costs;

(2) in the alternative:

— annul in part the Commission's decision of 27 June 1989 concerning Project No 870708/P1 of the Fund in so far as it refuses assistance relating to the preparation and translation of manuals and to management and budgetary control in respect of sums amounting respectively to ESC 2 247 308 and ESC 1 900 080;

— annul in part the Commission's decision of 27 June 1989 concerning Project No 870708/P3 of the Fund be annulled in so far as it refuses assistance relating to teaching materials and to the functioning and management of courses in respect of sums amounting to ESC 1 637 612 and ESC 5 461 160 respectively;

— order the parties to bear their own costs.

89 — Final payment claim, p. 2 additional sheet No 1.

Annex I

File relating to 'young people' No 870708/P1

Headings of expenditure in final payment claim	*Subject of expenditure*	*Amount refused*	*Reasons given*
14.1 Incomes of trainees		9 528 606	Alignment of duration of practical courses on that of theoretical courses
14.2 Preparation of courses	1. Preparation and translation of manuals	2 247 308	Amount already included in the cost of course preparation and in sub-items 14.2.4 and 14.2.7
	Miscellaneous	280 100	Lack of documentary proof
	6. Staff expenses	63 967	Lack of documentary proof
	7. Specialized work	247 322	Lack of documentary proof
14.3 Functioning and management of courses	1. Teaching staff	3 380 450	Alignment of duration of practical courses on that of theoretical courses
	Non-teaching staff	12 423 942	Increase in number of staff as compared with application
	2. Charges on remuneration	3 816 811	Reductions proportionate to amounts held to be eligible
	5. Travel expenses	885 791	Unjustified expenditure, external staff having received a lodging allowance

Headings of expenditure in final payment claim	*Subject of expenditure*	*Amount refused*	*Reasons given*
	7. Management and budgetary control	1 900 080	Expenditure held to be unnecessary for the proper conduct of the operations
	8. Specialized work	8 377 453	Expenditure held to be unnecessary for the proper conduct of the operations
	9. Costs of hire and rent	3 696 047	Excess over amounts applied for
	10, 11, 12. Equipment and non-durable goods, other supplies and services by third parties, consumption of raw materials and others	6 078 366	Reduction in proportion to alignment of duration of practical courses on that of theoretical courses
	13. Taxes and duties	529 705	Expenditure not justified, stamp duty not being payable in this context
	14. General administrative fees	1 072 824	Lack of documentary proof
14.5 Training of teaching staff		4 276 914	Excessive in relation to expenditure envisaged
14.6 Normal depreciation		4 712 799	Reduction in proportion to alignment of duration of practical courses on that of theoretical courses Ineligibility of certain items

Annex II

File relating to 'adults' No 870708/P3

Headings of expenditure in final payment claim	*Subject of expenditure*	*Amount refused*	*Reasons given*
14.2 Preparation of courses	1. Teaching materials	1 637 612	Amount already included in 'Cost of preparation of courses' and in sub-items 14.2.4 and 14.2.7
	3. Recruitment and selection of trainees	492 448	Expenditure unjustified, the trainees being employees of the undertaking
	4. Recruitment and selection of instructors	141 520	Expenditure not provided for in original application for assistance
	6. Costs of staff involved in preparation	30 533	Expenditure not approved
	7. Specialized work	118 052	Lack of documentary proof of certain subdivisions
14.3 Functioning and management of courses		19 237 214	Alignment on hourly costs in file relating to 'young people'
14.5 Training of teaching staff		1 400 925	Reduction taking account of reduction in number of trainees
14.6 Normal depreciation		1 216 772	Reduction taking account of actual weeks of training