JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)
19 March 1997 *

In Case T-73/95,

Estabelecimentos Isidoro M. Oliveira, SA, a company governed by Portuguese law, established at Montijo, Portugal, represented by Dr Joaquim Marques de Ascensão, of the Lisbon Bar, with an address for service in Luxembourg at the office of Alberto de Sousa, União de Bancos Portugueses SA, 12 Rue de la Grève,

applicants,

v

Commission of the European Communities, represented by Ana Maria Alves Vieira and Günter Wilms, of its Legal Service, acting as Agents, with an address for service at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the partial annulment of Commission Decision C(94)1410/9 of 12 July 1994, notified to the applicant on 28 December 1994, concerning financial assistance from the European Social Fund for vocational training measures,

* Language of the case: Portuguese.

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

composed of: A. Saggio, President, V. Tiili and R. M. Moura Ramos, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 10 December 1996,

gives the following

Judgment

The facts

1 On 31 March 1987 the Commission approved a project for vocational training measures for 199 trainees, containing an application for financial assistance for the applicant, which the Departamento para os Assuntos do Fundo Social Europeu (Department for the Affairs of the European Social Fund, hereinafter 'the Department') in Lisbon had put forward in October 1986 in respect of 1987, under No 870708/P1. According to the amended approval decision adopted by the Commission on 30 April 1987 and notified by the Department on 27 May 1987, financial assistance of ESC 80 857 968 was granted to the applicant for training for 199 persons. In the communication from the Department, it was stated that assistance from the European Social Fund (hereinafter 'the ESF') comprised credits which were conditional upon completion of the measures in accordance with the Community rules and that failure to comply with that condition would entail the repayment of sums advanced and non-payment of the balance. It was also made clear that any change affecting the application as submitted would have to be notified to the Department.

2 The applicant submitted an application for final payment and on 27 June 1989, the Commission decided that the ESF assistance ultimately paid could not exceed ESC 41 592 218 since certain expenses were ineligible (hereinafter 'the first decision').

3 Following an action brought by the applicant, the first decision was annulled by the Court of Justice on the ground that the Commission had not given the Portuguese Republic an opportunity to comment prior to the adoption of the final decision reducing the assistance (judgment of 7 May 1991 in Case C-304/89 *Oliveira* v *Commission* [1991] ECR I-2283, hereinafter 'Case C-304/89').

4 With a view to adopting a new decision, the Commission asked the Portuguese authorities on 10 February 1992 to provide additional information. An inspection visit was then made in Portugal from 21 to 24 April 1992 in order to 'repeat the final stage of consideration (of the file)'. The applicant was informed of the inspection visit in advance. The Commission maintains that as a result of that visit it obtained further information. According to its report on the visit, it found in particular that the majority of the 199 trainees did not have a job in the undertaking and were not therefore eligible under the initial approval conditions. The report also indicated that certain expenses could not be regarded as justified.

5 The applicant then responded to a request for information from the Department by letter of 10 July 1992, to which was appended lists of the trainees who had been given training. The defendant contends that the applicant had not stated in its original application for assistance that trainees not belonging to the undertaking would be involved and had not stated that only 29 of the trainees actually had any real connection with the undertaking. For its part, the applicant maintained that 81 trainees were on its staff, but some of them had not wished to continue working there on completion of their training.

6 The ESF submitted a first draft final decision to the Department on 23 October 1992. That draft was replaced by Memorandum No 6259 of 30 March 1993. That memorandum contained new calculations and explanations of the 'corrections' made on the basis of the information obtained during the inspection visit. After receiving the applicant's comments on the draft final decision in a letter dated 1 June 1993, the Department forwarded a briefing note to the Commission on 22 September 1993 (Annex 4 to the defence). That note indicates that the Department approved the Commission's draft, stating, first, that the number of practical training hours was excessive as compared with the number of theoretical training hours; secondly, that certain expenses relating to the training of teaching staff and the use of certain machines had not been mentioned in the original application for assistance and had no connection with the training given; thirdly, that the reduction made in respect of normal depreciation charges resulted from the reduction of the duration of the course; and, fourthly, that the fact that, according to the original application for assistance, the trainees were to be members of the undertaking's staff and the training was to be provided as part of a reorganization process had an impact on the eligibility of the recipients of the training. On 12 October 1993, the Department added its own observations, to the same effect.

7 The Portuguese Republic having been heard pursuant to Article 6(1) of Council Regulation (EEC) No 2950/83 on the implementation of Decision 83/516/EEC on the tasks of the European Social Fund, as amended by Council Regulation (EEC) No 3823/85 of 20 December 1985 on account of the accession of Spain and Portugal (OJ 1982 L 289, p. 1, and OJ 1985 L 370, p. 23, hereinafter 'Regulation No 2950/83'), the Commission adopted a new decision on 12 July 1994 (C(94)1410/9) by which the ESF assistance was increased to ESC 7 843 401 (hereinafter 'the contested decision'). According to that decision, an analysis of the application for final payment showed that part of the ESF assistance had not been used in the manner prescribed by the approval decision for the reasons set out in the abovementioned memorandum No 6259 of 30 March 1993. That decision was notified to the applicant on 28 December 1994, together with a letter from the Department.

Procedure

8 In those circumstances, by application received at the Registry of the Court of First Instance on 24 February 1995, the applicant brought the present action.

9 The parties presented oral argument and answered the questions put to them by the Court in writing and orally at the sitting on 10 December 1996.

Forms of order sought

10 The applicant claims that the Court of First Instance should:

— annul in part the decision of the Commission relating to file No 870708/P1, notified on 28 December 1994.

11 In its reply, it claims that the Court should:

— annul the decision notified to it on 28 December 1994,

— order the defendant to pay the costs.

12 The defendant contends that the Court should:

— declare the action unfounded;

— order the applicant to pay the costs.

Substance

13 In support of its claim for annulment, the applicant puts forward two pleas in law, the first of which alleges breach of the principle of legal certainty as a result of failure to act within a reasonable time; the second alleges breach of the principle of the protection of legitimate expectations and of the prohibition of *reformatio in pejus*.

14 The Court considers it appropriate to examine the second plea first.

The allegation of breach of the principle of the protection of legitimate expectations and of the prohibition of reformatio in pejus

Summary of the parties' arguments

15 In support of this plea, the applicant claims first that the contested decision is much more severe than the first decision, even though the facts are the same. In its pleadings, it states that it cannot accept further reductions 'when more than five years have elapsed since the 1989 decision'.

16 The applicant compares the reductions made in the contested decision with the amounts considered ineligible in the first decision. With regard to point 14.5.1 of the application for final payment — training of teaching staff — the amount declared ineligible was ESC 4 276 914 in the first decision, whilst in the contested decision it was ESC 7 092 914, a change which, according to the applicant, was based by the Commission on new reasons. Under headings 14.6 — normal depreciation charges — and 14.1 — remuneration of trainees — the reductions were also more severe than in the first decision. The applicant also complains that the defendant took the view, in the contested decision, that 170 of the 199 trainees were ineligible, on the ground that they were external trainees, even though it had been aware, as from the time of lodgement of the request for final payment in 1988, that the training extended to outside trainees and that those persons were not declared ineligible for training in the first decision. The applicant also does not agree that a reduction in respect of one heading of expenditure or another should automatically have repercussions for other headings. Consequently, it objects to the correction now made by the Commission by reason of the change in the number of eligible trainees.

17 At the hearing, in response to a question put by the Court, it reformulated and clarified its first head of claim to the effect that it now seeks annulment of the contested decision to the extent to which it makes reductions additional to those in the first decision as a result of deciding that the external trainees were ineligible for training. It stated that it contests the proportional reduction of the eligible expenses made in that regard in the contested decision, maintaining that the amount of eligible expenditure is that approved in the first decision.

18 The applicant rejects the view that all aspects of a case are open to reassessment when a decision is annulled by the Court. It is in its view, the fact that the contested decision is more severe than the one annulled by the judgment of the Court of Justice in Case C-304/89 is contrary to the principle of the protection of legitimate expectations. The applicant also claims that the contested decision constitutes a *reformatio in pejus* regarding a matter long ago disposed of in the first decision.

19 At the hearing, the applicant also emphasized that in its view the defendant had been aware, since before the time of the first decision, of the participation of external trainees in the training measures. That was apparent, it said, from the defendant's statements in its defence that 'it was clear from the file in question that the recipients of the vocational training — the trainees — were mostly from outside. That conclusion is based on the application for final payment, paragraph 11.2, contrary to what was stated in the initial application for assistance'.

20 In its reply, it added that the defendant thereby contravened the principles of fairness and procedural propriety by taking a new view of matters with which it was entirely familiar and on which it had stated its views before the Court of Justice in Case C-304/89.

21 The defendant contends that its only obligation in taking the measures needed to give effect to the judgment of the Court of Justice in Case C-304/89 was to give the Portuguese authorities an opportunity to comment before the final decision to reduce the assistance. It refers to a decision of the Court of First Instance according to which, when a measure is annulled because of a formal defect, the only obligation deriving from the judgment is to remedy the flaws which vitiated the procedure leading to the adoption of the annulled decision (Case T-38/89 *Hochbaum* v *Commission* [1990] ECR II-43, paragraph 14).

22 The defendant observes that the Portuguese authorities accepted all the reductions proposed by the Commission following re-examination of the file, and the reasons for them. The Department's agreement is a manifestation of the Member State's right to a hearing provided for in the legislation and required by the judgment of the Court of Justice in Case C-304/89. The defendant considers that if it had been required to take the same decision regarding the reductions initially proposed, the Portuguese Republic's possibility of commenting would have been limited by the initial decision, which was vitiated by a formal defect.

23 Furthermore, the judgment in Case C-304/89 rendered the first decision null and void *ab initio*. The parties were then in the same situation as they were at the time of adoption of the annulled decision. In those circumstances, it was perfectly lawful for the Commission to re-examine or re-appraise the situation on the basis of the entire file. The defendant points out that economic agents cannot have legitimate expectations that an existing situation which is capable of being altered by the Community institutions in the exercise of their discretionary power will be maintained (Joined Cases C-133/93, C-300/93 and C-362/93 *Crispoltoni* [1994] ECR I-4683, paragraph 57).

24 The defendant also refers to the Community case-law according to which an individual cannot claim protection of legitimate expectations unless the administration has given him precise and unequivocal assurances on which hopes might be justifiably based (see for example Case T-123/89 *Chomel* v *Commission* [1990] ECR II-131 and Case T-20/91 *Holtbecker* v *Commission* [1992] ECR II-2599). It states that the applicant was informed in 1992 that a new decision would be adopted by the Commission. The administration gave the applicant no precise indication which might lead it to believe that the reductions would be of the same amount as in the first decision.

Findings of the Court

25 It must be pointed out at the outset that in these proceedings the applicant is challenging a decision which the Commission substituted for a first decision on its application for final payment of ESF assistance, the first decision having been annulled by the Court of Justice in Case C-304/89. Under Article 174 of the Treaty, that judgment rendered the first decision null and void *ab initio*.

26 The contested decision was adopted pursuant to Article 6(1) of Regulation No 2950/83, 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 aid after giving the relevant Member State an opportunity to comment.

27 It is clear from that provision that the grant of ESF assistance for training measures is conditional upon compliance by the beneficiary with the conditions set out by the Commission in the decision of approval or by the beneficiary in the application for assistance which prompted that decision. In the event of a breach of those conditions, the beneficiary cannot therefore legitimately expect payment of the full amount awarded in the decision of approval. In such circumstances, it cannot therefore invoke the principle of the protection of legitimate expectations with a view to securing final payment of the full amount of assistance initially granted in the decision of approval.

28 It must be borne in mind that the principle of the protection of legitimate expectations may not be relied upon by an undertaking which has committed a manifest infringement of the rules in force (Case 67/84 *Sideradria* v *Commission* [1985] ECR 3983, paragraph 21, and Joined Cases T-551/93, T-231/94, T-233/94 and T-234/94 *Industria Pesqueras Campos and Others* v *Commission* [1996] ECR II-247, paragraph 76).

29 Furthermore, the Court of Justice has held that the principle of the protection of legitimate expectations is the corollary of the principle of legal certainty, which requires that legal rules be clear and precise and aims to ensure that situations and legal relationships governed by Community law remain foreseeable (Case C-63/93 *Duff and Others* v *Minister for Agriculture and Food, Ireland, and the Attorney General* [1996] ECR I-569, paragraph 20).

30 In this case, Article 6(1) of Regulation No 2950/83 clearly and precisely makes payment of the full amount of the assistance conditional upon compliance with the conditions imposed for its grant, as is clear from the foregoing paragraphs.

31 It follows from all of the foregoing that the Commission was empowered by Regulation No 2950/83 to check whether the ESF assistance had been used in accordance with the conditions set out in the application for assistance which had been submitted to it and which had led to the decision of approval of 30 April 1987 granting financial assistance of ESC 80 857 968 for the training of 199 persons. In dealing with an application for final payment, the Commission was required to consider, on the basis of such a check and after hearing the views of the Member State concerned, whether there had been any infringements of the abovementioned conditions such as to justify reduction of the assistance pursuant to Article 6 of Regulation No 2950/83.

32 Having regard to those considerations, the Court of First Instance observes first of all that the judgment of the Court of Justice in Case C-304/89 had the legal effect of negating *ab initio* both the final decision taken by the Commission in June 1989 on the applicant's application for final payment and the reconstruction of the events leading up to that decision. The Commission was therefore obliged to re-examine the file and take a fresh decision on the applicant's application for final payment. In so doing, it was required to take account of all factual and legal information available at that time. The Commission's obligation to apply due diligence in the decision-making process and to adopt its decision on the basis of all information which might have a bearing on the result derives in particular from the principles of sound administration and equal treatment. In those circumstances, the Commission cannot be criticized for resuming its inquiries and compiling a complete file.

33 Moreover, as the defendant suggests, if there had been no possibility of including additional information in the file, any effects of the observations of the Portuguese

Republic would have been limited by the initial decision, which was vitiated by a significant formal defect. The importance of that procedural defect was emphasized by the Court of Justice, which found that '[h]aving regard to the central role of the relevant Member State and to the importance of the responsibilities which that State assumes in the presentation and supervision of the financing of training measures, the opportunity for it to comment before a definitive decision to reduce assistance constitutes an essential procedural requirement' (paragraph 21 of the judgment in Case C-304/89). Even though, in this case, the Member State regarded the reductions proposed by the Commission as justified, the opinion of the national authorities might, in theory, have been different, so that the Commission might have felt it necessary, as a result, to amend its draft. The Portuguese authorities might have pointed out to the Commission, for example, that, contrary to its assessment, certain expenses appeared to them to be eligible or ineligible, and the Commission would have had to take those observations into account before adopting its final decision.

34 On examining all the available information, including that obtained during the inspection visit, the Commission detected irregularities in the action undertaken by the applicant. The irregularities found by Commission staff were confirmed by the Department. In the briefing note which it sent to the Commission (see paragraph 6 above), the Department confirmed that the application for the final payment submitted by the applicant included certain expenses which had not been approved in the decision approving the assistance and had no connection with the training provided. Moreover, the number of hours of practical training was excessive compared with the number of hours of theoretical training, having regard to a Department circular which had been notified to the applicant. Finally, most of the trainees were not part of the applicant's workforce, contrary to what had been stated in the application for assistance, and the measures were not therefore implemented as part of a reorganization process of the kind indicated in the application for assistance and approved in the decision of approval. The Court finds in that connection, as regards the actual number of trainees belonging to the undertaking, that the applicant merely stated, without providing any supporting evidence whatsoever, that the trainees fulfilling that requirement numbered 81 and that the figure of 29 given by the Commission was incorrect. It thus failed to prove that the expenses were eligible as far as certain trainees were concerned.

35 It follows that the applicant manifestly failed to comply with the conditions for the grant of ESF assistance. Consequently, it cannot invoke the principle of the protection of legitimate expectations in order to seek annulment of the contested decision on the ground that the latter reduced the amount of the assistance initially granted because of irregularities committed by it.

36 Similarly, since Article 6(1) of Regulation No 2950/83 provides for the possibility of reducing or suspending assistance in the event of non-observation of those conditions, the applicant likewise cannot invoke the principle of the prohibition of *reformatio in pejus* in relation to the fact that, because of irregularities committed by the applicant, the Commission decided to reduce the assistance.

37 For all the above reasons, this plea in law cannot be upheld.

The plea as to breach of the principle of legal certainty through failure to act within a reasonable time

Summary of the parties' arguments

38 In support of this plea, the applicant argues that the contested decision was taken eight years after lodgement of the application for financial assistance, seven years after completion of the training, more than five years after the first decision and almost four years after the judgment annulling that decision. The decision was, in its view, taken after an unreasonable time had elapsed, which also constitutes

a breach of Community law, in particular the principle of legal certainty (Case 111/63 *Lemmerz-Werke* v *High Authority* [1965] ECR 677). The applicant adds that it cannot be held responsible for the delay.

39 The defendant denies that any such breach took place. It considers that each specific case must be examined separately. It took prompt action to give effect to the judgment of the Court in Case C-304/89. A decision-making procedure comprising several stages necessarily takes time. During the inspection visit to Portugal, the Commission obtained additional information which was disclosed to it by the national authorities. It had to study the information closely. *Inter alia*, it had to analyse the applicant's accounts. The national authorities also needed time to study the file and seek the applicant's comments before giving their views on the Commission's drafts.

Findings of the Court

40 The Court notes that, according to the applicant, after the expiry of such a long period as in this case, the Commission cannot legitimately go back on its assessment of a given situation. The case-law draws a distinction between the period for complying with a judgment and the period within which the withdrawal of an unlawful act by the institution from which it emanated is in principle permitted.

41 The obligation of a Community institution to give effect to a judgment of annulment delivered by the Community judicature derives from Article 176 of the Treaty. It has been recognized by the Court of Justice that compliance calls for the adoption of a number of administrative measures and is not normally possible immediately: the institution is allowed a reasonable period within which to comply

with a judgment annulling one of its decisions. The question whether or not the period was reasonable depends on the nature of the measures to be taken and the attendant circumstances (Case 266/82 *Turner* v *Commission* [1984] ECR 1, paragraphs 5 and 6; see also, in a legislative context, Case C-21/94 *Parliament* v *Council* [1995] ECR I-1827, paragraph 33).

42 As regards the withdrawal of an administrative measure by the institution from which it emanates, the Court of Justice has recognized that the Community institutions have the right to withdraw measures tainted with illegality if they do so within a reasonable period (Case 14/82 *Alpha Steel* v *Commission* [1982] ECR 749, paragraph 10, Case 15/85 *Consorzio Cooperative d'Abruzzo* v *Commission* [1987] ECR 1005, paragraph 12, and Case C-248/89 *Cargill* v *Commission* [1991] ECR I-2987, paragraph 20). Those cases concern situations in which the authorities themselves discover the illegality of a measure, and time runs from the date of adoption of the unlawful measure.

43 In this case, the applicant's argument relating to the period prior to annulment of the first decision cannot be upheld. As this Court has stated (see paragraph 31 above), the Commission was required, following annulment of the first decision by the Court, to re-examine all the information available when the measure was adopted and to adopt a new decision on the application for final payment. There is thus no question in this case of the revocation of a measure by an institution of the kind with which the cases cited in the foregoing paragraph were concerned. In those circumstances, the period prior to the annulment of the first decision is not relevant to assessment of the propriety of the second decision challenged in this case.

44 The relevant period in this case, as regards this plea in law, extends from 7 May 1991, the date of the judgment annulling the decision, to 12 July 1994, the date of adoption of the new decision — a period of 38 months or somewhat over three

years. More precisely, it was nine months after the delivery of the annulling judgment that the ESF started reconstituting the file and re-examining it, a process which, after the inspection visit and consultation of the national authorities, led to a final decision 29 months later.

45 Whether the period within which an annulling judgment has been complied with is reasonable is a matter to be considered case by case. The reasonableness of the time depends on the nature of the measures to be adopted and the circumstances surrounding each case. Therefore, in this case regard must be had to the various stages involved in the procedure for adoption of the decision.

46 As stated above, the judgment of the Court of Justice in Case C-304/89 nullified the reconstruction of the facts on which the first decision was based. Moreover, it had become doubtful whether the first decision was correct and sufficiently complete. In those circumstances, it was necessary to reconstitute the file. That work, which was influenced and affected by suspicions of irregularities, included the organization of an inspection visit to Portugal, analysis of the information obtained and several consultations with the Portuguese authorities. The national authorities also heard the applicant's views on the draft versions of the Commission's decision. The Court considers, in view of the special circumstances described above, that the procedure took a long, but not an unreasonably long, time.

47 In any event, in annulment proceedings, even an unreasonable period cannot in itself render the contested decision unlawful and thus justify its annulment for breach of the principle of legal certainty. A delay in the process of complying with a judgment is not liable in itself to affect the validity of the measure at issue since, if the measure were annulled merely because it was belated, it would be impossible to adopt a valid measure: the measure intended to replace the annulled

measure could not be less belated than the one it replaced (see, by analogy, Case T-150/94 *Vela Palacios* v *Economic and Social Committee* [1996] ECR-SC II-877, paragraph 44).

48 The Court finds, for all the foregoing reasons, that the period which elapsed in this case did not amount to a breach of the principle of legal certainty.

49 This plea must also be rejected.

50 It follows from all the foregoing considerations that the action must be dismissed in its entirety.

Costs

51 Although the applicant has been unsuccessful, account must nevertheless be taken of the defendant's lack of diligence and, in particular, the fact that it did not satisfy itself whether the information used for the first decision was correct and sufficiently complete and failed to consult the authorities for that purpose. The course of the decision-making procedure, as described above, was such that the applicant was for a long period uncertain whether it was entitled to recover all the financial assistance granted to it. In those circumstances, the applicant cannot be reproached for bringing the matter before the Court for that conduct to be reviewed and for the appropriate conclusions to be drawn. It must therefore be held that the dispute was in part attributable to the defendant's conduct.

52 It is therefore appropriate to apply the second subparagraph of Article 87(3) of the Rules of Procedure, according to which the Court of First Instance may order a party, even if successful, to pay costs which it has caused the other party to incur (see, *mutatis mutandis*, Case 263/81 *List* v *Commission* [1983] ECR 103, paragraphs 30 and 31, and Case T-336/96 *Efisol* v *Commission* [1996] ECR II-1343, paragraphs 38 and 39), and to order the Commission to pay the costs in their entirety.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1. Dismisses the application;

2. Orders the Commission to pay the costs in their entirety.

Saggio Tiili Moura Ramos

Delivered in open court in Luxembourg on 19 March 1997.

H. Jung
Registrar

A. Saggio
President