JUDGMENT OF THE COURT
6 JULY 1971[1]

Federal Republic of Germany
v Commission of the European Communities[2]

'European Social Fund'

Case 2/71

Summary

EEC — Financial provisions — Budget — Contributions of the Member States — Statement of accounts — Notification to the Member States of the amounts to be paid — Having nature of final decisions

(EEC Treaty, Article 200; Financial Regulation of 31 January 1961, Articles 17 and 18)

It is clear from Articles 17 and 18 of the Financial Regulation of 31 January 1961 that the statement of accounts determining the contributions of the Member States and notification thereof to such States must be effected within a given period, so that those measures must be considered as final decisions and not as provisional statements of position.

One and the same statement of accounts within the meaning of Article 17 of the Financial Regulation, which has been notified to all the Member States, cannot be regarded as provisional with regard to one of those States.

Since the applicant has failed to bring an action within the period of two months it may not repair this omission by instituting proceedings against a subsequent letter refusing to reconsider the measures in question.

In Case 2/71

GOVERNMENT OF THE FEDERAL REPUBLIC OF GERMANY, represented by Dr R. Morawitz, Ministerialrat to the Federal Ministry for Economic Affairs, acting as Agent, with an address for service in Luxembourg at the Office of the Head of Chancery at the Embassy of the Federal Republic of Germany, 3 boulevard Royal,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Advisers, R. Baeyens and P. Karpenstein, acting as Agents, with an address for service in Luxembourg at the Office of its Legal Adviser, Émile Reuter, 4 boulevard Royal,

defendant,

1 — Language of the Case: German.
2 — CMLR.

Application for the annulment of a decision of rejection of the Commission of 6 November 1970 and of the statement of the accounts of the European Social Fund for the financial year 1969 on which that decision is based,

THE COURT

composed of: R. Lecourt, President, A. M. Donner (Rapporteur) and A. Trabucchi, Presidents of Chambers, R. Monaco, J. Mertens de Wilmars, P. Pescatore and H. Kutscher, Judges,

Advocate-General: K. Roemer
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Summary of the facts and procedure

The facts and procedure may be summarized as follows:
Under Article 125 of the Treaty establishing the European Economic Community, the European Social Fund is to meet 50% of the expenditure incurred by the Member States in attaining the objectives listed in paragraph (1) of that article. The aggregate amount of this expenditure is to be divided amongst the Member States in accordance with the scale laid down in Article 200 (2) of the Treaty.
Under Article 16 if the Financial Regulation 'relating to the methods and procedure whereby the contributions of Member States specified in Article 200 (1) and (2) of the Treaty establishing the European Economic Community, shall be made available to the Commission, and to the technical conditions for conducting the financial affairs of the European Social Fund (Article 209 (b) of the Treaty)' of 31 January 1961 (JO of 30.3.1961, p. 509), hereinafter referred to as 'the Financial Regulation', the Commission by letter of 2 March 1970 sent to the Permanent Representative of the Federal Republic of Germany with the European Communities copies of the Republic's account together with a statement of the general accounting position to 31 December 1969. For the third quarter those copies showed a credit of DM 10 534 963.28 (2 633 740.82 u.a.) and a debit of DM 17 904 387.04 (4 476 096.76 u.a.) and for the fourth quarter a credit of DM 33 819 359.79 (9 240 262.24 u.a.) and a debit of DM 26 473 862.12 (7 233 295.66 u.a.). For the third quarter the Commission had applied the former parity of the German mark (one unit of account=DM 4) whilst, for the fourth quarter, it used as its basis the new parity (one unit of account=DM 3.66).
By a letter of 6 March 1970 the Commission informed the Federal Minister of Finance that at 31 December 1969 the Federal Republic's account showed a credit balance of 164 610.64 u.a. (DM

602 474.94 according to the new parity). The Commission had arrived at this amount by balancing the credits and debits which were expressed in units of account and notified by the letter of 3 March 1970.

By a letter of 25 March 1970 the Federal Minister of Finance objected to this operation. He requested that the parity of the mark (one unit of account =DM 3.66) prevailing at the date of the Regulation (31 December 1969) should also be employed in the final statement of accounts for 1969. By this method of calculation the Federal Republic of Germany would obtain a credit balance of 330 982.48 u.a. (DM 1 211 395.86), that is to say DM 608 920.92 more than the amount determined by the Commission.

After two reminders, one from the Permanent Representative of the Federal Republic of Germany with the European Communities of 4 August 1970 and one from the Federal Minister of Finance of 18 September 1970, the Commission, by an interim decision of 19 October, notified the Federal Minister of Finance that it had transferred the sum of DM 602 474.94 'without prejudice to measures to be taken in pursuance of the letter from the Federal Minister of Finance of 25 March 1970'.

By a letter of 6 November 1970 which reached the Federal Minister of Finance on 9 November the Commission finally rejected the former's complaint of 25 March 1970 and declared that the closure of the accounts of the European Social Fund for the financial year 1969, on the basis of the credits and debits notified in the previous letters and of the credit balance, was final.

The Government of the Federal Republic of Germany initiated the present proceedings by an application received at the Court Registry on 14 January 1971.

The written procedure followed the normal course.

After hearing the report of the Judge-Rapporteur and the views of the Advocate-General, the Court decided to open the oral procedure without any preparatory inquiry.

The parties presented oral argument at the hearing on 27 May 1971. The Advocate-General delivered his opinion at the hearing on 17 June 1971.

II — Conclusions of the parties

The *applicant* claims that the Court should:

'(1) annul the Commission's decision of rejection of 6 November 1970 together with the statement of accounts for the European Social Fund for the financial year 1969 on which it is founded;

(2) order the Commission to bear the costs'.

The *defendant* contends that the Court should:

'(1) of its own motion give a ruling on the admissibility of the application;

(2) in any event dismiss the application as unfounded;

(3) order the Federal Republic to bear the costs'.

III — Submissions and arguments of the parties

The submissions and arguments of the parties may be summarized as follows:

A — *Admissibility*

In its statement of defence the *defendant* states that the application is directed not against the letter of the Commission of 6 November but against the statement of accounts for the financial year 1969 notified to the Federal Government by letter of 6 March 1970. Consequently, in the light of the case-law of the Court, in particular Case 24/69 (*Nebe* v *Commission*, [1970] ECR 145) it appears doubt-

ful whether the application was lodged within the prescribed period.

In this connexion the defendant makes the following observations:

(1) Under Article 19 of the Financial Regulation the sole factor establishing the credits and debts of the Member States to the European Social Fund is the communication of the statement of accounts. Consequently such credits and debts can in no way be affected by any annulment of the communication of 6 November 1970.

(2) The question of how to take account of the alternatives in parities occurring in 1969 for the purposes of the statement of accounts for the European Social Fund for 1969 was thoroughly discussed by the Commission immediately before it sent the notifications of 2 and 6 March 1970.

It may thus be seen from the notification of 2 March 1971, albeit in a summary manner—by the conversion rate laid down for the third quarter of 1969 on the one hand and that for the fourth quarter on the other hand—that this problem had already been solved in terms later confirmed by the communication of 6 November 1970.

(3) It also appears that the letter of 6 November 1970 was merely confirmatory and was solely intended to give a brief summary of the reasons which had induced the Commission to employ two different parities for the statement of accounts for the European Social Fund for the financial year 1969.

Finally, the defendant further remarks that an alteration of the accounts for the financial year 1969 would affect the budgetary situation of all the Member States.

The *applicant* in its reply maintains that the defendant is wrong, in relying on the judgment in Case 24/69, to dispute the admissibility of its application. First, the legal position under the Staff Regulations of Officials is not comparable with the relationships existing between the Member States and the institutions of the Community if only because in the latter case the silence of the Commission is not automatically to be deemed an implied decision of rejection, as is the case under the system of Article 91 of the Staff Regulations of Officials.

Secondly, the Federal Government was entitled to believe until 6 November 1970 that the Commission had still not taken a definitive decision regarding how to take account of parity changes which occurred in 1969. In fact the Commission allowed a considerable period to elapse without explaining that this was merely an implied position and clearly lacked a statement of reasons. Thirdly, the Commission's order of payment of the balance of the Federal Republic of Germany for the financial year 1969 was delayed for an exceptionally long period (until 24 September 1970) and then it was given 'without prejudice to measures (to be) taken in pursuance of the letter from the Federal Minister of Finance of 25 March 1970' (letter of 19 October 1970).

The defendant replies to those arguments in particular:

— a definitive measure does not cease to be definitive merely because it is reconsidered within the administration following a complaint by a party concerned;

— although it is true that the case-law relied upon relates to the Staff Regulations of Officials, the circumstances that in each case only the first decision is taken into consideration is to be explained not by the particular nature of Article 91 of the Staff Regulations but generally by the wish to avoid indefinitely calling legal certainty in question;

— both the calculations themselves and the explanatory footnotes contained in the communications of 2 and 6 March 1970 showed clearly the method of calculating the parities adopted by the Commission;

— in the light particularly of the judgment of the Court in Case 22/70 (*Commission* v *Council*, [1971] ECR it seems doubtful whether the obligation to provide a statement of reasons laid down by Article 190 of the Treaty also applies to a statement of accounts such as that at issue in the present case, since such an 'act' is merely the mathematical consequence of previous decisions;
— even supposing that the contested statement of accounts were defective through lack of a statement of reasons, this defect should have been contested within the prescribed period.

In the course of the oral procedure the *applicant* continued to state that since the defendant only transferred the sum referred to in Article 18 of the Financial Regulation on 24 September 1970 it had itself conceded that the communications of 2 and 6 March 1970 could not be considered as a final measure for the purposes of the second paragraph of the Financial Regulation.

The *defendant* replied that with regard to the procedure in question no such conclusion could be drawn from the delay in payment which occurred.

B — *The substance of the case*

(1) The *applicant* argues that the decision of 6 November 1970 together with the statement of accounts for the financial year 1969 in the first place infringe Article 125 of the EEC Treaty. Under that provision the Member States are entitled to be compensated for 50% of the expenses which they have incurred. Since those expenses were incurred in national currency the Community is indebted in this same national currency (cf. also the first paragraph of Article 21 of the Financial Regulation). The conversion into units of accounts described by the second paragraph of Article 21 of the Financial Regulation merely serves to determine the share to the extent of which each Member State's right to reimbursement is reduced but it cannot result in the conversion of a debt expressed in national currency to a debt in units of account.

The fact that the statement of accounts drawn up by the Commission was based on two different rates of parity of the DM results in reimbursing to the Federal Republic of Germany less than 50% of the expenses in DM which it incurs; this is consequently contrary to the provisions of Article 125 of the Treaty.

Secondly, according to the applicant, the contested measures infringe the provisions of the Financial Regulation, in particular Articles 16, 17, 23 and 24. In fact, it is clear from the combined provisions of Articles 16 and 17 of the regulation that, whilst the quarterly notification of the reimbursements and shares of the Member States is merely informative, on the other hand the statement of accounts on 31 December of each year creates obligations to pay. Furthermore the applicant observes that Article 23 of the regulation states that 'creditor Member States shall receive from the Commission payments in their national currency based on the parity in force on the day of the determination of balances'.

Thus the end of the accounting period constitutes the decisive point of reference for all the variable elements of the calculation, in particular, for the parities of the currencies of the Member States if parity changes occur in the course of an accounting period. This is also clear by reasoning *a contrario* on the basis of Article 24 of the Financial Regulation. Although that article expressly governs instances of an alteration in parity during the period between closure of the accounts and payment, it does not contain any particular rules regarding an alteration in parity during the accounting period. It may be concluded from this that the question was already considered as settled, in the manner advocated by the defendant, as the result of the combined effect of Articles 17 and 23 of the Financial Regulation; otherwise, at the time of the adoption of that regu-

lation, the Council would have omitted an essential factor, indispensable for this purpose.

The applicant states further that if it were supposed necessary to interpret the Financial Regulation in accordance with the argument of the Commission, the application of the regulation would result in an infringement of Article 125 of the EEC Treaty in a case where there was a change in parity. Consequently, the applicant pleads in the alternative that the Financial Regulation is inapplicable under Article 184 of the Treaty.

(2) In its statement of defence the *defendant* asserts that although in principle the Member States are entitled under Article 125 of the Treaty to obtain a reimbursement of 50% of their actual expenses in national currency, it is on the other hand impossible to apply this principle to cases of alterations in parity. In fact the application of this principle to such a situation would imply a community of risks between the Member States, a view which could only be admitted on the basis of an express provision to this effect. In this connexion the defendant points to provisions such as the third paragraph of Article 207 of the EEC Treaty, Article 7 of the Protocol on the Statute of the European Investment Bank and Article 22 of the Financial Regulation of 1961, which in its view are capable of providing support for its argument.

With regard to the provisions of the Financial Regulation invoked by the applicant, the defendant observes that the calculation of the 'total amount of the benefits charged to the European Social Fund for the quarter', under subparagraph (b) of Article 16 necessarily supposes conversion to units of account of the sums to be reimbursed to the various Member States for the quarter in question. It is thus natural that the accounts drawn up in accordance with subparagraphs (b) and (c) of Article 16 of the Financial Regulation should be based on the monetary parities prevailing at the moment of conversion. Furthermore a subsequent adaptation of those accounts in view of the alterations in parities occurring later would imply a disregard of the nature of those accounts, a disregard which is not justified by any express provision. Thus it is clear from Article 17 of the Financial Regulation that the indispensable elements in the annual statement of accounts arise directly from the quarterly accounts without any re-examination of the latter.

In addition, the provisions of Articles 22 to 24 of the Financial Regulation show that the authors of the regulation were familiar with the problem of alterations in parties. Consequently, since there is no express reference to the effect of an alteration in parities on the calculations of the current financial year, it must be held that the fixing in units of account of the contributions and of the balances, laid down in Article 21 (2), refers to the rate of parity in force at the time of the quarterly calculation of the contributions.

In relying on the judgment of the Court in Case 111/63 (*Lemmerz – Werke GmbH* v *High Authority of the ECSC*, [1965] ECR 677) the defendant observes that the Court did not solve the problems caused by an alteration in parities merely by referring to the principle of the nominal value of the national currency whose parity changed but took account of the special nature of the equalization scheme in question.

The *applicant* replies that once a principle, such as the one stated in Article 125 of the EEC Treaty, is admitted, it may not be departed from save where express provision is made for this. There is no such provision in the present case. The provisions on which the defendant relies in this connexion are irrelevant since, unlike the situation created within the framework of the European Social Fund, they all relate to bilateral relationships in which the debtor in fact takes the risk of a revaluation. On the other hand, in a clearing system such as that

of the European Social Fund which is closed off each year the statements of account can only be effected through a parity fixed for the entire period covered by those statements.

Furthermore the applicant recalls that in the judgment in Case 111/63 the Court approved of the fact that only the alterations in parity occurring before the expiry of the equalization scheme, and not subsequent alterations, were taken into consideration in drawing up in national currency the amounts expressed in units of account, and took the view that, in order to be able to make a uniform evaluation of the burdens and benefits only a uniform value of the unit of account could be taken as the base for a period covered by a statement of accounts. The applicant considers that this case tends to favour its argument.

In its rejoinder, the *defendant* considers that the debtor/creditor relationship within the framework of the European Social Fund is also to be regarded legally as a bilateral relationship and that, in addition, the applicant has not weakened in any other way the argument based on the provisions cited by the defendant in this respect.

With regard to the judgment of the Court in Case 111/63 the defendant remarks that although the Court was not then required to consider the problem of an alteration in parities occurring in the course of the accounting period, it was certainly confronted with the choice between the accounting period and the point when the accounts were reconciled as the point of reference for the purposes of the rate of parity, and chose the former alternative. From this the defendant concludes that it is entitled to rely on this case-law.

Grounds of judgment

[1] On 11 January 1971 the Government of the Federal Republic of Germany lodged an application under Article 173 of the EEC Treaty for the annulment of the decision of rejection of the Commission of 6 November 1970 together with the statement of accounts for the European Social Fund for the year 1969 on which the decision is based.

[2] Under the Financial Regulation relating to the methods and procedure whereby the contributions of Member States specified in Article 200 (1) and (2) of the Treaty and to the technical conditions for conducting the financial affairs of the European Social Fund adopted on 31 January 1961 (JO No 22 1961, p. 509), the Commission, by letters of 2 and 6 March 1970, communicated to the Federal Government the statement of accounts of the European Social Fund for the financial year 1969 and notified the Government of the amount of the sums to be paid to it. By letter of 25 March 1970, the Federal Minister of Finance raised objections to those measures, but the Commission by a letter of 6 November 1970 dismissed the objections and maintained its decisions.

[3] Since the defendant considered that the letter of 6 November 1969 merely constituted a refusal to go back on a prior decision establishing the statement of accounts for the financial year 1969 which was notified to the Federal Government by letters of 2 and 6 March, it pleaded that the application was made out of time.

4 The applicant replies that as long as the Commission had not stated its attitude to the objections set out in the letter from the Federal Minister of Finance of 25 March 1970 the statement of accounts and the notifications relating thereto could not be regarded as final. Furthermore the behaviour of the Commission gave the impression that it itself considered its decisions in this matter as provisional.

5 With regard to the nature of the statement of accounts and the notifications thereof, the Financial Regulation of 31 January 1961 provides in Article 17 that: 'On 31 December of each year the Commission shall determine: (a) the balances of the accounts specified in Article 16 of this regulation, (b) the amounts of the transfers to be made in order to liquidate the credit or debit balances.'

Article 18 of that regulation provides that: 'As soon as the operations specified in Article 17 of this regulation have been completed and in any case not later than 31 January next, the Commission shall notify: (a) each debtor Member State of the amount payable by it to the Commission; (b) each creditor Member State of the amount payable in its favour by order of the Commission.'

It is clear from those provisions that both the statement of accounts and the notifications to Member States must be effected within a given period which has moreover been exceeded in this case. In those circumstances the measures must be considered as final decisions and not as provisional statements of position.

6 In addition, the nature of the measures in question prevents them from being considered as provisional. In fact the operations relating to the statement of accounts of the European Social Fund are complex and concern all the Member States in the same way, since the decisions and findings made regarding one Member State automatically affect the balances of the others. One and the same statement of accounts which has been notified to all the Member States thus cannot be regarded as a provisional statement with regard to one of those States.

7 It is clear from the foregoing that the letters of the Commission of 2 and 6 March 1970 constituted final measures which were capable of being contested under Article 173. Since the applicant failed to bring an action within the period of two months, it may not repair this omission by instituting proceedings against a subsequent letter refusing to reconsider the measures in question.

8 Consequently, the application must be dismissed as inadmissible.

Costs

9 Under Article 69 (2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs of the proceedings. In this case the applicant has failed in its application and must therefore be ordered to pay the costs of the proceedings.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community, especially Articles 125, 173 and 200;
Having regard to the Financial Regulation relating to the methods and procedure whereby the contributions of Member States specified in Article 200 (1) and (2) of the EEC Treaty and to the technical conditions for conducting the financial affairs of the European Social Fund of 31 January 1961 (JO No 22 1961, p. 509), especially Articles 17 and 18;
Having regard to the Protocol on the Statute of the Court of Justice of the European Community;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities,

THE COURT,

hereby :

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

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

Lecourt Donner Trabucchi

Monaco Mertens de Wilmars Pescatore Kutscher

Delivered in open court in Luxembourg on 6 July 1971.

A. Van Houtte
Registrar

R. Lecourt
President