JUDGMENT OF THE COURT (Sixth Chamber)

5 October 1999 *

In Case C-308/95,

Kingdom of the Netherlands, represented by J.S. van den Oosterkamp and A. Fierstra, Deputy Legal Advisers at the Ministry of Foreign Affairs, acting as Agents, with an address for service in Luxembourg at the Netherlands Embassy, 5 Rue C.M. Spoo,

applicant,

v

Commission of the European Communities, represented by E. Mennens, Principal Legal Adviser, and P. Oliver, Legal Adviser, acting as Agents, with an address for service in Luxembourg at the Chambers of C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of the Commission's letter of 28 July 1995 on the conclusion of projects co-financed by the European Regional Development Fund,

* Language of the case: Dutch.

THE COURT (Sixth Chamber),

composed of: P.J.G. Kapteyn, President of the Chamber, G. Hirsch, J.L. Murray (Rapporteur), H. Ragnemalm and R. Schintgen, Judges,

Advocate General: A. La Pergola,
Registrar: L. Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 3 December 1998,

after hearing the Opinion of the Advocate General at the sitting on 25 February 1999,

gives the following

Judgment

1 By application lodged at the Court Registry on 27 September 1995, the Kingdom of the Netherlands brought an action under the first paragraph of Article 173 of the EC Treaty (now, after amendment, the first paragraph of Article 230 EC) for the annulment of the Commission's letter of 28 July 1995 on the conclusion of certain projects co-financed by the European Regional Development Fund (hereinafter 'the letter at issue').

2 Article 15 of Council Regulation (EEC) No 2052/88 of 24 June 1988 on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1988 L 185, p. 9), as amended by Council Regulation (EEC) No 2081/93 of 20 July 1993 (OJ 1993 L 193, p. 5, hereinafter 'Regulation No 2052/88'), provides:

'Transitional provisions

1. This regulation shall not affect multiannual operations, including the adjustment of Community support frameworks and forms of assistance, approved by the Council or by the Commission on the basis of the existing rules governing the Structural Funds applying before the entry into force of this regulation.

2. Applications for assistance from the Structural Funds towards operations which are submitted under the provisions applying before the entry into force of this regulation shall be considered and approved by the Commission on the basis of those provisions.

3. The provisions referred to in Article 3(4) and (5) shall lay down specific transitional provisions relating to the implementation of this article, including provisions to ensure that aid to Member States is not interrupted pending the establishment of the plans and operational programmes in accordance with the new system and that the grant of assistance for projects granted assistance before 1 January 1989 shall be finally concluded no later than 30 September 1995.'

3 Article 12 of Council Regulation (EEC) No 4254/88 of 19 December 1988 laying down provisions for implementing Regulation (EEC) No 2052/88 as regards the

European Regional Development Fund (OJ 1988 L 374, p. 15), as amended by Article 1 of Council Regulation (EEC) No 2083/93 of 20 July 1993 (OJ 1993 L 193, p. 34, hereinafter 'Regulation No 4254/88'), provides:

'Transitional provisions

Those portions of the sums committed for the granting of assistance in respect of projects decided on by the Commission before 1 January 1989 under the ERDF which have not been the subject of a request for final payment to the Commission by 31 March 1995 shall be automatically released by the Commission by 30 September 1995 at the latest, without prejudice to those projects which are subject to suspension for judicial reasons.'

Article 32(1) of Council Regulation (EEC) No 1787/84 of 19 June 1984 on the European Regional Development Fund (OJ 1984 L 169, p. 1), provides:

'Where a measure which has been granted ERDF assistance has not been carried out as planned, or if the conditions imposed by the provisions which govern the measure are not fulfilled, ERDF assistance may be reduced or cancelled, if the Commission so decides after consulting the ERDF committee.

Member States shall repay to the Commission the amount of ERDF assistance received in all cases where national aid used as the basis for calculating the amount of ERDF assistance has been repaid to the Member State concerned by the investor.'

4 Before 1 January 1989 the Kingdom of the Netherlands submitted a number of requests for ERDF assistance with a view to financing certain infrastructure projects.

5 In a number of separate decisions the Commission acceded to those requests, provided that certain conditions were met, in particular as regards tendering procedures for the projects.

6 Since the conditions laid down by the Commission were observed, ERDF assistance was initially granted.

7 By letter dated 23 February 1995, Mr Garcia-Lombardero, an official in DG XVI (Regional Policy) of the Commission, informed the Netherlands that a balance remained outstanding on 18 projects. The attention of the Netherlands authorities was also drawn to Article 12 of Regulation No 4254/88.

8 By letter dated 21 March 1995, the Netherlands Ministry of Economic Affairs replied that it would send in final statements on ten projects by 30 September 1995. As regards the other projects, it maintained that, for various reasons, final statements could not be submitted for the time being.

9 By letter of 7 April 1995 signed by Mr Garcia-Lombardero, the Commission informed the Netherlands Ministry of Economic Affairs that it was not possible to alter the 31 March 1995 date mentioned in Article 12 of Regulation No 4254/88 for the submission of final statements. He also stated that files pending would be closed on the basis of documents which reached the Commission before 1 April 1995.

10 By letter dated 28 April 1995, the Commission, referring to its letter of 7 April 1995, listed eight projects in respect of which the amounts of ERDF assistance already paid would have to be reimbursed, namely ERDF projects Nos 76.07.04.001, 84.07.03.003, 85.07.04.005, 87.07.03.001, 87.07.04.001, 87.07.04.004, 88.07.04.002 and 88.07.04.004. That letter was amended by facsimile dated 4 May 1995.

11 Debit notes were subsequently dispatched to the Netherlands Ministry of Economic Affairs, which received them on 29 June 1995.

12 By letters of 19 May and 11 July 1995, the Ministry of Economic Affairs set out the position of its Government, in particular as regards the interpretation of Article 12 of Regulation No 4254/88. The Netherlands Government's point of view as regards that provision was also discussed at a meeting on 26 June 1995 between the Secretary of State for Economic Affairs and the Commissioner responsible for regional policy, and at a meeting on 10 July 1995 between officials of the Ministry of Economic Affairs and Commission officials.

13 Furthermore, by letters of 7 and 19 July 1995, the Ministry of Economic Affairs furnished additional information concerning ERDF projects Nos 76 07 04 001, 87 07 03 001 and 88 07 04 004.

14 Finally, by letter of 20 July 1995, the Ministry of Economic Affairs reminded the Commission of the principle of regional partnership laid down in Article 9 of Regulation No 4254/88.

15 In the letter at issue signed by Mrs Wulf-Mathies, the Commissioner responsible for regional policy, the Commission informed the Secretary of State for Economic

Affairs that it had examined afresh the problem set out in the letter of 19 May 1995 and had taken into account the additional information furnished.

16 However, the Commission stated that, in all cases in which the exception laid down in Article 12 of Regulation No 4254/88 on suspension for judicial reasons did not apply or in which a date other than 31 March 1995 had not been agreed by the Commission before the entry into force of Article 12 aforesaid, it was compelled to conclude, in the light of its examination, that those projects were to be closed on the basis of the most recent requests for payment in the Commission's possession on 31 March 1995, since the Commission is not authorised to conclude projects on the basis of requests for payment received after that date. It also took the view that Article 9 of Regulation No 4254/88 did not fall to be applied.

17 Finally, the Commission stated that four of the projects could be granted an extension of time either because they were subject to suspension for judicial reasons, or because it had agreed to a later expiry date before the entry into force of Article 12. These were:

— ERDF project No 76.07.04.001: S23 in Kerkrade;

— ERDF project No 87.07.03.001: Zuiderbrug Venlo;

— ERDF project No 88.07.04.004: A2-Maastricht Airport;

— ERDF project No 86.07.03.002: Maastricht Airport.

18 On 31 July 1995 the Netherlands Government wrote to the Commission pointing out that an extension of time had also been granted in respect of ERDF project No 88.07.03.001. The Commission confirmed by telephone that this information was correct.

19 The action brought by the Netherlands Government is directed against the letter at issue in that it refuses to grant suspension or an extension of time in regard to the following projects:

— ERDF project No 80.07.03.002: Veendam-Musselkanaal (Oost-Groningen);

— ERDF project No 84.07.03.001: Rijksweg 7 (Groningen);

— ERDF project No 84.07.03.003: Wegproject S13 (Zuid-West Drenthe);

— ERDF project No 84.07.03.004: Weg Veendam (Groningen);

— ERDF project No 85.07.04.005: 5 gegroepeerde Drenste projecten;

— ERDF project No 87.07.04.001: Wegproject Zwart 6 Zuid (Limburg);

— ERDF project No 87.07.04.004: Rondweg Sneek (Zuid-West Friesland);

— ERDF project No 88.07.04.002: Project Gelpenberg (Zuid-Oost Drenthe).

20 In support of its application, the Netherlands Government relies on five pleas in law. First of all, it alleges that the Commission misinterpreted Article 12 of Regulation No 4254/88 by taking the view that 31 March 1995 constituted the deadline for the submission of final statements and could not be extended. Next, it alleges that the Commission did not provide an adequate statement of the reasons why it could not take into consideration requests for final payment lodged after 31 March 1995, all the more so since it did not conclude the projects until 15 January and 16 February 1996. It further considers that the application by the Commission of Article 12 of Regulation No 4254/88 contravenes certain general principles of Community law, namely those of Community solidarity and regional partnership, protection of legitimate expectations and proportionality. In the alternative, the Netherlands Government considers that, regard being had to the principle of cooperation in good faith enshrined in Article 5 of the EC Treaty (now Article 10 EC), the Commission ought in any event to have treated the letter from the Netherlands Ministry of Economic Affairs of 21 March 1995 as a request for final payment. It also alleges that the Commission infringed Article 32(1) of Regulation No 1787/84.

Admissibility

21 By a separate document lodged at the Court Registry on 23 October 1995, the Commission raised an objection of inadmissibility under Article 91(1) of the Rules of Procedure on the ground that the letter at issue merely constitutes confirmation of a letter sent by the Commission to the Netherlands authorities on 7 April 1995.

22 In its defence, the Commission contended primarily that the application is inadmissible on the ground that the letter at issue simply informs the Netherlands authorities of its interpretation of Article 12 of Regulation No 4254/88 and sets out the inescapable practical consequences of that interpretation. In the Commission's view, that letter does not therefore constitute a distinct act producing fresh legal effects or legal effects other than those flowing from Article 12.

23 In the alternative, however, the Commission contends that the letter at issue is merely a confirmatory document, with the result that an action brought against it is inadmissible.

24 On the other hand, the Netherlands Government considers that the letter at issue, in the same way as the letter of 7 April 1995, is a decision producing legal effects against which an action may lie. In its view, those two letters are binding on the Commission as to the conclusion of the projects because the Commission states therein that it will be unable to take into account matters brought to its knowledge after 1 April 1995.

25 As to the allegedly confirmatory nature of the letter of 28 July 1995, the Netherlands Government considers it to be clear from its wording that the Commission reconsidered its position in the light of that Government's interpretation of Article 12 of Regulation No 4254/88 and of additional information forwarded to the Commission. Accordingly, it does not consider the letter at issue to constitute confirmation of an earlier document.

26 To begin with, the Court has consistently held that only a measure whose legal effects are binding on the applicant and are capable of affecting his interests is an act or decision which may be the subject of an action for annulment under Article 173 of the Treaty (see, *inter alia*, the orders in Cases C-66/91 and C-66/91 R *Emerald Meats* v *Commission* [1991] ECR I-1143, paragraph 26, and in Case C-50/90 *Sunzest* v *Commission* [1991] ECR I-2917, paragraph 12).

27 The Court has also held that a written expression of opinion cannot constitute a decision of such a nature as to form the basis of an action for annulment since it is neither capable of producing nor intended to produce any legal effects (see, *inter alia*, Case 133/79 *Sucrimex* v *Commission* [1980] ECR 1299 and the order in Case 151/88 *Italy* v *Commission* [1989] ECR 1255, paragraph 22).

28 In the present case, the Commission confined itself in the first part of the letter at issue to reiterating its interpretation of Articles 9 and 12 of Regulation No 4254/88. In the second part of that letter, it stated that, prior to the entry into force of Article 12, it had agreed for ERDF projects Nos 86.07.03.002 and 88.07.04.004 to an expiry date falling after 31 March 1995 and also that ERDF projects Nos 87.07.03.001 and 76.07.04.001 were eligible for suspension for judicial reasons under Article 12 of Regulation No 4254/88.

29 In those circumstances, it must be concluded that the letter at issue in no way altered the legal position of the Kingdom of the Netherlands so far as ERDF projects Nos 80.07.03.002, 84.07.03.001, 84.07.03.004, 85.07.04.005, 87.07.04.001, 87.07.04.004 and 88.07.04.002 are concerned, and that, in actual fact, it merely provided information as to the manner in which the Commission interpreted Articles 9 and 12 of Regulation No 4254/88.

30 Since it did not produce any binding legal effects as far as the abovementioned projects are concerned, the letter at issue cannot constitute an actionable document under the terms of the case-law referred to at paragraph 26 hereof.

31 The action must therefore be dismissed as inadmissible.

Costs

32 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the Commission has asked for costs to be awarded against the Kingdom of the Netherlands and the latter has failed in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

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

2. **Orders the Kingdom of the Netherlands to pay the costs.**

Kapteyn Hirsch Murray

Ragnemalm Schintgen

Delivered in open court in Luxembourg on 5 October 1999.

R. Grass — Registrar

P.J.G. Kapteyn — President of the Sixth Chamber