OPINION OF MR ADVOCATE GENERAL DA CRUZ VILAÇA
delivered on 16 June 1987 *

Mr President,
Members of the Court,

1. In these proceedings the United Kingdom seeks a declaration that Commission Decision No COM(84) 1941 of 19 December 1984 is void in so far as it reduced by UKL 13 083 004 the grants from the European Social Fund made in response to the applications submitted in respect of measures for young people under 25.

2. It is appropriate to review the legislative and factual background to the contested decision, since the parties differ in particular regarding the interpretation of the legislation and the importance to be attributed to the surrounding circumstances.

I — The legislative background to the application

3. The role of the European Social Fund was modified by Council Decision No 83/516/EEC of 17 October 1983.[1] In particular, that decision entrusted to the Fund the task of encouraging the implementation of vocational-training and employment-creation policies, attaching particular importance to action for the benefit of young people under 25; the decision also lays down a number of rules regarding calculation of the contributions from the Fund (as percentages of eligible expenses or on the basis of a flat rate) and simplification of the applicable procedural requirements.

4. Pursuant to that decision the Council adopted Regulation No 2950/83 of 17 October 1983,[2] which identifies the expenditure eligible for assistance (*inter alia*, for a period not exceeding 12 months, expenditure intended to aid recruitment of young people under 25 who are seeking employment and long-term unemployed) and determines the assistance to be granted from the Fund for such projects (15% of the average gross wage or salary of industrial workers in the Member State concerned); the Commission was made responsible for determining each year the amounts of assistance to be granted per person and per unit of time for each Member State in the following financial year.

5. Pursuant to those Council measures, the Commission adopted Decision No 83/621/EEC of 30 November 1983,[3] fixing the rates of assistance to be granted by the Fund during the 1984 financial year, per person per week, towards expenditure on employment premiums, and UKL 19.50 was the figure allocated to the United Kingdom.

6. Finally, on 10 January 1984, the Commission published its guidelines for the management of the European Social Fund in the financial years 1984-86,[4] as required by Article 6 of Decision No 83/516/EEC.

* Translated from the Portuguese.

1 — OJ L 289, 22.10.1983, p. 38.

2 — OJ L 289, 22.10.1983, p. 1.

3 — OJ L 350, 13.12.1983, p. 25.

4 — OJ C 5, 10.1.1984, p. 2.

II — The background to the dispute

7. The United Kingdom submitted its applications for assistance towards expenditure for 1984 by 13 March 1984.

8. After an analysis by the Advisory Committee, the Commission adopted a decision on most of those applications and of those submitted by the other Member States on 23 July 1984 (Decision No COM(84) 1076, communicated to the Member States in August 1984); however, it did so in such a way as to provoke a complaint from the United Kingdom in respect of two matters.

9. It complained in the first place because a number of applications had not been considered, including those relating to the 'Community Programme', a scheme administered by the Manpower Services Commission for the creation of additional temporary full-time and part-time jobs for long-term unemployed and for unemployed people under 25, and certain similar schemes operated by local authorities.

10. It complained in the second place about a note added to the decision which stated that the amounts relating to part-time work would be reduced proportionately to the hours actually worked at the payment stage.

11. After an exchange of correspondence between the United Kingdom Department of Employment and the Commission, the Commission adopted a fresh decision on 19 December 1984 — Decision No COM(84) 1941 — superseding the previous decision and including new calculations for the assistance to be provided. The decision took into account the Community Programme and similar programmes which had previously been omitted, but the rate of assistance was reduced to one half with respect to part-time work, by application of the proportionate reduction rule already objected to (50% for part-time employment). In financial terms, the Commission ruled ineligible amounts totalling UKL 13 083 004 in respect of parts of the applications for the schemes concerned.

12. Since it did not agree with the latter decision, the United Kingdom brought an action before the Court.

III — The grounds of the action

13. The United Kingdom's action is based on seven grounds, some of them quite separate and some of them interrelated, which are set out in the Report for the Hearing.

14. It seems unnecessary to repeat the list here and I shall now analyse the submissions in detail, but without rigorously observing the order in which they were put forward by the applicant.

1. *The retroactive effect of the contested decision*

15. The United Kingdom maintains in the first place that the decision purported to apply retroactively a new criterion for assistance from the Fund, to the prejudice of 'the rights and legitimate expectations of the United Kingdom'.

16. Let us start by considering whether that premise is well founded.

17. With respect to the principal issue of retroactive effect, the applicant makes submissions under three headings: in the first place, the incorrect interpretation of the unit of time — a *week* — adopted by the Commission in its decision of 30 November 1983 as a full-time week, which was used as a basis for justifying the reductions made by the contested decision in respect of part-time work; in the second place, the fact that the rule in question is new, marking a departure from previous practice and the existing legislation; and finally, the allegation that the rule is unjustified because persons working part-time are likely to be receiving vocational training in the rest of the week.

18. Merely by listing those points, it becomes apparent that the first and the third are unconnected with the question of retroactive effect; nevertheless, I shall in part follow the arrangement adopted by the applicant government, as set out in the Report for the Hearing, so as to make the analysis easier to follow.

(a) *The definition of 'week' as a full-time week*

19. In the United Kingdom's view, since Decision No 83/621/EEC of 30 November 1983 adopted a 'week' as the unit of time, without making any reference to the number of hours worked, there is no basis for the reductions made in respect of part-time work.

20. The Commission contends, on the contrary, that it was fully entitled to interpret the term 'week' as it did. It states in support of that view that under Article 2 (1) of Regulation No 2950/83 the assistance from the Fund is determined as a fixed percentage (15%) of the average gross wages or salary of industrial workers in the Member State concerned, which clearly shows that the Council intended that that figure should be related to actual earnings, which are of course a function of the number of hours worked. The United Kingdom had been aware of that method of calculation since 26 September 1983 as a result of a letter sent to its Permanent Representative. The method of calculation is to take the national gross average hourly wage in each Member State and to multiply it by the number of hours in the average working week in order to arrive at a weekly average wage. Since it was found that the average working week in the Community is 40 hours, that figure should be used for the purpose of calculating pro rata payments. The United Kingdom did not contest that procedure with respect to Decision No 83/621 of 30 November 1983 or No 84/429 of 27 July 1984 and cannot therefore claim that the method is inappropriate to determine the amounts of support from the Fund.

21. To justify the reductions made, the Commission also emphasizes that there is a permanent disproportion between the applications for financing submitted and the resources available to the Fund, for which reason it was necessary to establish a series of priorities (for example, 75% of resources are at present preserved for programmes in favour of persons under 25) and, in implementation of the 'guidelines' laid down for 1984-86, to reduce the support for part-time activities.

22. The central issue is whether, after defining in Decision No 83/621/EEC of 30 November 1983 the *unit of time* referred to in Article 2 (2) of Regulation No 2950/83 as a *week*, the Commission could legitimately define that unit of time as a *full-time week*.

23. It seems clear that in using the expression 'unit of time' in Article 2 (2) of Regulation No 2950/83, the Council intentionally left the duty of defining it to the Commission. And if we accept that the Commission had the power to do so (a power which, moreover, was specifically conferred in Decision No 83/621/EEC, and was thus accepted by the United Kingdom) there is no apparent obstacle to the Commission's going into greater detail regarding the unit of time in question (in this case, a full-time week, that is to say 40 hours).

24. On the other hand, it should be noted that what is complained of is not the method of calculating the average industrial wage or salary which serves as a basis for determining the amount of support to be granted, by means of the application of a fixed percentage, but rather the connection claimed by the Commission between that method and the determination *in concreto* of the amounts of financing, with a view to showing that the United Kingdom necessarily knew that the number of hours was a decisive factor. In fact, the methodology adopted is reasonable, had been known to the applicant since September 1983 and is not contested by the applicant. But is it correct to claim such a connection?

25. In the reply, it is simply stated that the absence of any previous reductions in respect of part-time work proves the irrelevance of the connection. For its part, the Commission draws attention in particular to the fact that the use of a percentage necessarily creates a link between wages (based on the hours worked corresponding to a full-time week) and the amount of the Fund's contribution.

26. Disregarding, for the moment, the absence of any examples of reduction, it seems to me that the Commission's position is intrinsically logical; if, in order to calculate 15% of the average industrial wage in question, reference was made to a working unit of 40 hours per week, it is not surprising that the actual amount received per person per week should depend on the average hourly wage and the number of hours of work per week.

27. It should be borne in mind that the method of calculating the average weekly earnings used by the Commission for the purposes of Article 2 of Regulation No 2950/83 is based on the figure for average *hourly* earnings multiplied by the average number of hours in the working week. In other words, the fundamentally important unit of (working) time is the *hour*, since the weekly unit of (working) time is arrived at by reference to the total average number of *working hours* in the various countries.

28. Contrary to what the United Kingdom appears to think, the term 'week' was thus never regarded by the Commission as meaning a *gross unit of time* (that is to say, the period of time running from 0 hours on Monday to 12 p. m. on Sunday) but rather

as a calculation unit directly related to the number of working hours.

29. The reduction of financing pro rata to the duration of the working week is, moreover, reasonable, since it does not seem that that work experience or training acquired during a 40-hour week deserves the same treatment as that acquired during a 10-hour week. Moreover, it seems not entirely unreasonable that part-time work programmes should be subject to a reduction in the assistance provided, based on the same method of calculation as that used to determine the amounts payable in respect of full-time work, that is to say on the basis of the actual number of hours worked.

30. It may thus be concluded from the foregoing considerations that by defining the unit of time of a 'week' as a full-time week, the Commission did not act unlawfully, since that interpretation is compatible with the terms of the legislation and, in addition, in conformity with the overriding requirements of the proper administration of Community finances.

31. To maintain that the Commission has no power to make proportional reductions in respect of part-time work schemes or to claim (as the United Kingdom appears to do at one point) that the applicable rule is, of necessity, that the Fund's contribution should correspond purely and simply to the financial contribution made by the national public authorities would be tantamount to denying the Commission's right to exercise the discretionary power granted to it with respect to management of the European Social Fund, as is clear from Article 124 of the EEC Treaty and from the powers conferred upon the Commission by Regulation No 2950/83 (in particular Articles 1, 2, 4 (2) and (3), 6 (1), 7, 8 and 9) and as the Court has already recognized by implication in its judgment in Case 44/81.[5]

(b) *The lack of justification for the measure*

32. The applicant's allegation, which is hardly developed at all, that the Commission's decision was unjustified because part-time workers could receive vocational training for the rest of the time available does not appear well founded.

33. It is not difficult to accept the view put forward by the Commission that its decision is justified by the need to manage and use the European Social Fund effectively.

34. In addition, the Commission rejects the United Kingdom's view by relying on Article 2 (2) of Decision No 83/673/EEC of 22 December 1983 on the management of the European Social Fund.[6]

35. According to that provision, which antedated by about three months the end of the period allowed for submission of applications for financing for 1984, 'an application may relate to only one point in the guidelines for the management of the Fund, which determines the priority of operations'.

36. In so far as it involves a reference to the possibility of assistance both for work experience and for training, the argument relied upon appears wholly meaningless since what is at issue in these proceedings is

5 — See the judgment of 26 May 1982 in Case 44/81 *Federal Republic of Germany* v *Commission* [1982] ECR 1855 at p. 1877, paragraph 15 of the decision.

6 — OJ L 377, 31.12.1983, p. 1.

merely the amount granted for one of those purposes (work experience).

37. But might not the Commission's conduct be unlawful for other reasons?

(c) *The allegation that the rule departs from the existing practice and regulations*

38. As we have already seen, in my view the Commission was, *in abstracto*, entitled to adopt the contested rule. However, the United Kingdom maintains that, even if that were the case, it would not be entitled to apply it retroactively: there is nothing in the previous legislation or practice which would have enabled it to foresee the reductions which were made.

39. Let us first consider the matter of *practice*.

40. In that connection, the — to say the least — precipitous manner in which the Commission has pleaded its case cannot go unnoticed.

41. Having started by insisting, in its defence and rejoinder, that its previous practice had always been to make the amounts paid by way of support conditional upon the number of hours actually worked, the defendant progressively attenuated that argument at a later stage.

42. Later, in the rejoinder, it went on to acknowledge that only recently had the Member States started submitting programmes concerning part-time work to the European Social Fund.

43. The Commission also considered itself able to provide an earlier example of reduction of assistance in respect of part-time work by reference to a scheme submitted for consideration by the United Kingdom in 1983. However, that precedent was clearly shown to be irrelevant by the United Kingdom in an annex to its reply. In that scheme there were no reductions for part-time work — what there was was an apportionment of the costs in respect of various types of assistance for different purposes.

44. In its rejoinder the Commission acknowledged only one case in which the payment was not reduced — although it should have been — and attributed it to an error in the interpretation of the relevant provisions (still, at that time, Regulation No 3039/78), claiming that there had been no further instances.

45. At the Court's request, the Commission re-examined the earlier files and discovered three schemes in respect of which no reduction was made for part-time working.

46. This prompted it, before the hearing, to withdraw all its arguments on this point.

47. We shall see in due course what importance is to be attributed to this problem.

48. In the applicant's view, the *legislation* is similarly enlightening. Needless to say, the Commission guidelines for the management of the European Social Fund in the financial years 1984-86 do not include any indication of the number of hours. Subsequently, it appears from a comparison of Decisions No 83/621/EEC of 30 November 1983 and No

84/429/EEC of 27 July 1984 that, contrary to what was stated by the Commission in a note dated 19 December 1984 addressed to the Advisory Committee of the Fund, there was a departure from the previous rule: it was not until Decision No 84/429/EEC (relating to the 1985 financial year) that the unit of time of a 'week' was defined as being equivalent to 40 hours and that proportional reductions for part-time working were mentioned; furthermore, it was only in Decision No COM(84) 1941 of 19 December 1984, which superseded that of 23 July 1984, that the reduction for part-time working was made for the first time and announced with respect to the 1984 schemes.

49. Let us consider these circumstances.

50. It appears to be common ground that the first occasion on which the contested rule was formulated (flat-rate payments for full-time weeks and proportional reductions for part-time working) was in the note which accompanied Decision No COM(84) 1016 of 23 July 1984. It should be borne in mind that that was the decision whereby the Commission initially gave its decision, 10 days late, on the majority of the applications for financing for the 1984 financial year (see Article 4 (2) and Article 10 (4) of Regulation No 2950/85) and which applied Decision No 83/621/EEC of 13 November 1983 (which fixed as UKL 19.50 per person per week the amount allocated to the United Kingdom). In fact, there was no provision on that matter in Decision No 83/621/EEC, by contrast with the equivalent decision for the 1985 financial year (Decision No 84/429/EEC of 27 July 1984); the latter decision reiterated the essential content of the note accompanying the decision of 23 July, by stating in Article 2 that 'as regards part-time operations, the amounts shall be calculated in proportion to the number of hours worked on the basis of 40 hours per week'.

51. Could it not, however, be said that the rule imposing a reduction for part-time working was already implicit in the previous legislation, with the result that there was no retroactive effect?

52. That is the contention of the Commission, which contests the United Kingdom's view on the basis of the following considerations:

(1) in the note of 19 December 1984 addressed to the Advisory Committee there was no question of any innovative decision; all that was intended was to clarify the scope of the contested decision by setting out in detail the interpretation of Decision No 83/621/EEC in accordance with a rule which seemed obvious and, moreover, was used for calculating the flat-rate amounts;

(2) as regards the fact that the disputed rule was expressly mentioned only in Decision No 84/429/EEC, the Commission initially put forward an incorrect argument: after claiming that it was the United Kingdom's attitude which had motivated the explicit inclusion of that rule, it conceded — confronted by the United Kingdom's claim that it was unaware of that rule before the adoption of Decision No COM(84) 1076 and that it had notice thereof only after the adoption of Decision No 84/429/EEC — that there was a different reason, namely the manner in which the United Kingdom had submitted its applications for 1984 requesting an amount corresponding to

full-time work in respect of schemes creating part-time work and it was thus appropriate to remove any doubts regarding 1985;

(3) finally, the Commission pointed out that in the forms provided for in Decision No 84/673/EEC there was already an express requirement that the number of hours worked should be indicated; that in July 1984 (Decision No COM(84) 1076 of 23 July 1984) it had clearly announced its intention to make reductions in respect of part-time work; and that the calculation method, which had been explained to the Member States as early as September 1983, logically followed from the terms of Article 2 of Regulation No 2950/83 which, moreover, did no more in that respect than adopt the same approach as that already adopted in Regulation No 3039/78.

53. The available information — in particular the last three considerations relied upon by the Commission, together with those set out in the foregoing paragraph — prompt me to concede that the rule in question was not strictly 'new' but that it was implicit in the existing legislation and that, when the contested decision was adopted, the applicant was aware of it and had notice of its application.

54. However, two considerations follow from the acknowledgement of that fact.

55. It means, on the one hand, that in the existing legislation there was no rule, express or implied, which made full reimbursement compulsory.

56. But it also means, on the other hand, that the proportional reduction rule was not clear, specific and unequivocal, and had to be arrived at by interpretation of the applicable legislation.

57. Ultimately, the legislative position was consistent with various interpretations, depending in the last analysis upon the view taken by the Commission regarding its use of the discretionary power granted to it for management of the European Social Fund.

58. This is proved by the fact that the Commission began to show a preference, with regard to part-time work schemes, for an approach different from that which it adopted in 1984, which is why no examples were to be found of proportional reduction of the support.

59. In view of these considerations, it is very doubtful that that approach was reasonable and logical, either intrinsically or within its legislative context.

60. However, that was the approach adopted (albeit in a limited number of cases) until, as a result of scarcity of financial resources and the volume of applications for financing, the need to make reductions became even clearer.

61. The Commission announced the reductions on 23 July 1984, that is to say before they were finally incorporated in the decision of 19 December.

62. It did so, however, after the United Kingdom — and the other Member States — had prepared their schemes and submitted their applications for financing for the year 1984.

63. Do these circumstances not constitute frustration of the United Kingdom's

legitimate expectations regarding the decision hoped for from the Commission, with the result that the decision taken is liable to be declared void?

64. I shall consider this matter next.

2. *Infringement of the principles of legal certainty and respect for legitimate expectations*

65. According to the United Kingdom, the manner in which the rule on part-time employment was adopted and implemented for the first time did not allow the Member States to foresee the extent of their entitlement from the Fund, leaving them in an uncertain position until January 1985. This failure to comply with the requirements of legal certainty, the United Kingdom maintains, is particularly serious where the effect may be to deprive a Member State from the payment of financial aid to which it considers itself entitled.

66. In addition, the United Kingdom considers that applicants for financing are entitled to assistance from the Fund in respect of eligible schemes which have been classified as enjoying priority. In its view, the Commission has no discretion to reject applications which satisfy the criteria laid down. Where the available appropriations are insufficient, it is incumbent upon the Commission first to approve priority applications and then to apply any necessary reduction to them on a linear basis. That is the only way to ensure fulfilment of the legitimate expectations concerning support from the Fund of the Member States and other applicants for Community funds in respect of eligible and priority schemes and to allow them to plan their own financial commitments accordingly.

67. In particular, attention must be drawn to the fact that when the applications were being prepared and submitted the rule imposing a reduction in respect of part-time work had never been issued or even announced by the Commission (this occurred only in the decision of 23 July 1984). On the contrary, according to the United Kingdom, in view of the fact that there were no previous cases of reductions, it was reasonable to expect the Commission not to act as it did.

68. In the United Kingdom's view, that expectation was particularly important for the strategy adopted by the Member States in preparing their applications, since there was no possibility of foreseeing the reductions and offsetting them by other applications.

69. I must say that these considerations appear to me to be those which carry most weight as far as the United Kingdom's arguments are concerned.

70. Despite the contradictory conduct of the Commission and the resultant weakness of its position, there are a number of circumstances which are liable to negate the view, which might follow from the applicant's arguments, that an expectation deserving of protection has been frustrated.

71. (a) In the first place, as the Commission emphasizes, there can be no certainty regarding assistance from the Fund before the final decision approving a specified amount. That approval is not subject to any national quota system but depends upon a number of factors which cannot be foreseen by the applicant Member State: the total number of applications from all Member States, the proportion of applications found to be inadmissible or ineligible, the proportion which are priority applications

under the guidelines and the effect of applying the linear and weighted reductions, which appear in point 6 of the guidelines for 1984-86, which apply whenever the available appropriations are insufficient to grant full financing for the eligible applications.

72. This means that, regardless of whether it is reasonable to finance certain types of expenditure (in particular part-time employment schemes treated as full-time), no sufficiently well-founded expectation can arise, from the submission of an application and the eligibility thereof, as to a specific amount of financing (although there may be an expectation of *certain support* from the Fund).

73. (b) That fact is clear from the way in which the Fund operates, which is explained by the Commission in its defence: once an application for financing is submitted the Commission, if it considers the application admissible and eligible (that is to say if the formal and substantive conditions are complied with), decides to grant support forthwith; an advance of 50% (or 30% in exceptional cases) is paid immediately in the case of existing projects or otherwise on commencement of operations; the remainder is paid on receipt of a final claim, accompanied by a detailed report on the content, results and financial aspects of the relevant operation (see Article 3 of Decision No 83/516/EEC and Article 5 of Regulation No 2950/83).

74. (c) In addition, it must be acknowledged that the rule on proportional payments has the effect of making the action of the Fund more effective, enabling it to reallocate to other operations any amounts not used as a result of the difference between the actual working hours and the number of hours in a full-time working week. Those operations may well — as the Commission points out — be undertaken in the country which submitted applications concerning the part-time schemes (in this case, the United Kingdom), so that the country in question suffers no loss. As a rule, the amounts applied for exceed resources, and it is therefore unlikely that such a reallocation would not take place.

75. (d) For a proper assessment of the extent of the alleged infringement of the principle of legal certainty or of respect for legitimate expectations, it is also appropriate to bear in mind that the forms used for the submission of applications for financing, including the forms provided for in Decision No 83/673/EEC for the 1984 financial year, require the number of hours per week to be indicated for all participants in every scheme. I do not find fully convincing the United Kingdom's claim that the provision of that information has nothing to do with the amount of the assistance and is merely intended to facilitate analysis of the schemes to assess their eligibility.

76. Although it might run counter to practice, I believe that a moderately attentive observer might in any event surmise that a different conclusion was possible with regard to the Commission's future conduct, particularly at a time of worsening financial conditions for the Community's Funds.

77. (e) I have already discussed the reasonableness and logic of the reduction rule — in itself and as seen in its context. But it is not inappropriate to consider, in the abstract, how it might foreseeably be applied.

78. In response to a request from the Court, the United Kingdom furnished information on its practice with regard to national and local aid for part-time employment.

79. Notwithstanding the subtlety of the arguments put forward, which seek to reverse the relationship of cause and effect, it is fairly clear from that information that the United Kingdom considers that there is a link, with respect to national subsidies, between assistance, wages and the time worked.

80. The logic is the same and it is a matter of surprise, in that context, that only the programmes financed by the Community give rise to contrary expectations.

81. (f) Finally it should be borne in mind that two other Member States, in the same circumstances and in the same year, accepted the reductions applied by the Commission; when the final decision was taken on the part-time schemes, the proportional reduction rule had already been specificially announced (Decision No COM(84) 1076 of 23 July 1984), and had not been formally challenged. Since the United Kingdom relied for support upon the judgment of the Court in Case 44/81 *Federal Republic of Germany* v *Commission*, the Commission showed, in my view adequately, that that judgment was irrelevant for the purposes of resolving the present dispute.

82. In view of all the foregoing considerations I am of the opinion that, despite the absence of any specific legislative provision and despite the Commission's previous practice regarding three cases which did not give rise to proportional reductions, the contested decision does not go against the requirements of legal certainty or protection of the legitimate expectations of the applicant in such a way as to justify a declaration that it is void.

83. Moreover, it does not seem to have been proved that the applicant thereby suffered any undue loss.

84. This view is supported by the somewhat limited circumstances in which the Court has upheld an allegation of breach of the principle of the protection of legitimate expectations, even with respect to retroactive legislative measures.[7]

85. I take a different view, however, with respect to the applicant's other submissions.

86. Let us consider them.

3. *Failure to consult the Advisory Committee*

87. The United Kingdom alleges that the Commission failed to consult the Fund Committee (set up by Article 124 of the Treaty), thus infringing Article 1 (1) of Council Decision No 83/517/EEC of 17 October 1983 on the rules of the Committee of the European Social Fund.[8]

88. The Commission is said to have consulted the Committee on the applications for financing for the financial year 1984 but

7 — The judgments of 25 January 1979 in Case 98/78 *Racke* [1979] ECR 69 at pp. 86 and 87 and in Case 99/78 *Decker* [1979] ECR 101 at pp. 111 and 112; and the judgments of 30 September 1982 in Case 110/81 *Roquette Frères* [1982] ECR 3159 at pp. 3178-3182 and in Case 114/81 *Tunnel Refineries* [1982] ECR 3189 at pp. 3206-3209 are particularly noteworthy.

8 — OJ L 289, 22.10.1983, p. 42.

never to have consulted it regarding the rule applicable to part-time work with respect to either of the 1984 or 1985 financial years.

89. For its part the Commission concedes that it did not specifically seek the opinion of the Committee on the rule in question but contends that to do so was unnecessary because the Committee was already perfectly well aware of the method of calculating the flat-rate payments on the basis of a certain number of hours per week.

90. However, the Commission does not contest either that it is under an obligation to consult the Committee or that completion of that formality is essential.

91. Article 1 of Decision No 83/517/EEC is unequivocal in its definition of the Committee's powers ('The Committee shall give opinions on . . . '), and no restriction is imposed with respect to any of the headings under which its opinion is formally required.

92. Those headings include not only 'applications for assistance from the Fund' (Article 1 (1) (e)) but also 'decisions applying the rules governing the tasks and operation of the Fund' (Article 1 (1) (b)) and 'the guidelines for the management of the Fund' (Article 1 (1) (c)).

93. Whilst it is true that the Commission submitted the various applications for financing to the Committee for consideration on 22 July 1984, the fact is that — as the United Kingdom stated in response to a question put by the Court, without being contradicted by the Commission — the proposal then submitted related to the full amount.

94. No reference was made to any subsequent reduction of the amounts for cases of part-time work, which appears only in the decision of 23 July.

95. The Commission even went so far as to accept, albeit by way of understatement, in the original version of its defence that 'some temporary impression to the contrary' — that is to say, that there would be no reductions — 'may have been given by the Commission's services in the ESF Committee before the decision of July 1984'.

96. In other words: even though the Committee was aware, as the Commission states, of the method of calculating the flat-rate amounts, nothing in the way in which the applications were submitted to it drew the attention of the Committee to the treatment which might be applied to them or to the need to issue an opinion thereon.

97. Moreover, there was no case in previous practice of any reduction in respect of part-time work and, therefore, a new practice was about to be adopted.

98. Regardless of whether that practice was decided upon by the Commission before or after the consultation of 22 June, it seems to me that the matter should have been specifically submitted to the Committee in clear terms.

99. Moreover, the Committee comprises, in addition to a member of the Commission, who presides, representatives of the Member States and of workers' and employers' organizations. They are thus all able to establish what the Commission's intentions are and express their views about them. That is why the Committee is important and fundamental.

100. It is true that the opinion of the Committee is not binding and the Commission may depart from it. But, in such cases, it must inform the Committee within a period of 40 days of the reasons for its decision (Article 14 of Decision No 83/517/EEC).

101. Consequently, it is meaningless in this case to rely — as the Commission does — on that fact when the Committee was not properly consulted in the first place. And since the Committee was never consulted, the Commission did not even have an opportunity to depart from the Committee's hypothetical opinion.

102. The fact of the matter is that the Committee was only informed of the application of the reduction rule by the note of 19 December 1984, accompanying the contested decision. Surprisingly, that note is drafted so as to give the impression that the Commission had departed from the opinion of the Committee, and that, as we have seen, did not happen.

103. I consider therefore that the failure to consult the Fund Advisory Committee constitutes disregard of an essential formality and is a serious infringement entailing the nullity of the decision concerned.

104. It is not entirely pertinent to rely in that regard on *Roquette Frères*[9] and *Maizena*,[10] since in both of those cases the Court adjudicated on the Council's failure to consult the Parliament in the context of the legislative procedure. None the less those judgments reveal the significance of the consultations provided for by Community law, in the sense that they are an essential formality, and the importance of the opinions that must be issued in consequence.

4. *Formal defects, misapplication of law and inadequate statement of reasons*

105. The United Kingdom's allegations under these three headings seem to me frankly to be rather half-hearted and unconvincing: in all of them the applicant confines itself to claiming the existence of an infringement, without giving a precise explanation of the form that the infringement is said to have taken.

106. In the first case, the United Kingdom refers to the alleged formal irregularities of various Commission measures, including the contested decision. In response to the defendant's argument, the United Kingdom did not explain what the essence of the infringement was (moreover, only the infringement resulting from the the manner in which the contested decision was adopted would appear to be relevant in these proceedings) with the result that this allegation must be considered unfounded.

107. In the second case, there is no evidence — contrary to the United Kingdom's contention which is not based on adequate grounds — that the reductions are not in conformity with the method of calculation adopted by the Commission.

108. In the third case, the contested decision clearly indicates the reason for which the reduction was made and the method applied for that purpose.

9 — Judgment of 29 October 1980 in Case 138/79 *Roquette Frères* (1980) ECR 3333 at pp. 3360 and 3361.

10 — Judgment of 29 October 1980 in Case 139/79 *Maizena* (1980) ECR 3393 at pp. 3424 and 3425.

IV — Conclusion

109. Accordingly, I propose that the Court should uphold the application and declare Commission Decision No COM(84) 1941 void by reason of the failure to complete an essential formality, in so far as the Advisory Committee of the European Social Fund was not consulted.

110. Pursuant to Article 65 (2) of the Rules of Procedure, the Commission should be ordered to pay the costs.