OPINION OF ADVOCATE GENERAL MAZÁK
delivered on 29 March 2007 [1]

I — Introduction

1. The main question to be addressed in the present case is whether Community law precludes a Member State from refraining from recovering financial aid, and relying for that purpose on the principle of legal certainty, when the material irregularity on the part of the beneficiary of the aid is based on a Community provision which was neither communicated to the beneficiary nor published.

II — Legal framework

2. The Decision of the Commission of the European Communities of 16 October 1995 concerning a contribution from the European Regional Development Fund (ERDF) and the European Social Fund (ESF) for an operational programme within the framework of the SME Community initiative for the benefit of areas eligible under Objectives 1 and 2 in the Netherlands (hereinafter: 'Decision C(95) 1753') provides, in so far as is relevant here:

'*Article 1*

The SME operational programme for the Netherlands adopted in respect of the period from 30 November 1994 to 31 December 1999 and set out in the annexes below, which encompasses a coherent set of multiannual measures within the framework of the SME Community initiative for the benefit of areas eligible under Objectives 1 and 2 in the Netherlands, is hereby approved.

...

1 — Original language: English.

Article 6

The Community assistance concerns expenditure on operations under this programme which, in the Member State concerned, are the subject of legally binding commitments and for which the requisite finance has been specifically allocated no later than 31 December 1999. The final date for taking account of expenditure on these measures is 31 December 2001.

...

Article 9

This Decision is addressed to the Kingdom of the Netherlands.'

3. With regard to the terminology used in Article 6 of Decision C(95) 1753, Datasheet No 3, annexed to the Commission Decision of 23 April 1997 modifying the decisions approving the Community support frameworks, the single programming documents and the Community initiative programmes in respect of the Netherlands (hereinafter: 'Decision 97/320/EC'), [2] provides that:

'"Legally binding arrangements" and "requisite financial commitments" comprise the decisions taken by the final beneficiaries to implement eligible operations and the allocation of the corresponding public funds ...

The commitment at Member State level must include the commitment entered into by the final beneficiary. This commitment must be legally binding and be accompanied by the financial commitment, i.e. the commitment of the public funds required ...'

III — The main proceedings and the reference to the Court

A — *Background to the dispute*

4. In August 1999 Stichting ROM-projecten ('ROM-projecten') applied for a grant of a

2 — OJ 1997 L 146, p. 7.

subsidy within the framework of the operational programme of the SME Initiative for the Netherlands for the project entitled 'Kenniskaart Medische Technologie en Life Science' ('the project').

5. By Decision of 29 December 1999 the State Secretary granted ROM-projecten a subsidy totalling not more than NLG 200 000, that being 45.45% of the total costs eligible for subsidy at NLG 440 000.

6. One of the conditions laid down was that the project had to be implemented by 31 December 2000 and, furthermore, that any costs incurred before 1 January 2000 and after 31 December 2000 would be ineligible for subsidisation. By Decision of 25 February 2000, however, the State Secretary agreed to move the start date of the project from 1 January 2000 to 1 November 1999. Furthermore, by Decision of 12 December 2000 the State Secretary, at the request of ROM-projecten, extended to 30 June 2001 the period in respect of which costs incurred could be declared.

7. By Decision of 11 July 2002 the State Secretary notified ROM-projecten inter alia that it had failed to fulfil the condition imposed by the Commission that the commitments had to be entered into before 31 December 1999 ('the date requirement'). The question whether the subsidy must consequently be fixed at zero was put to the Commission by the State Secretary and was informally answered in the negative by the Commission's services. Pending formal confirmation thereof, the State Secretary fixed the subsidy at NLG 69 788, subject to a general reservation.

8. By Decision of 27 February 2003 the State Secretary fixed the subsidy (retrospectively) at zero, because it became clear that the Commission adhered fully to the date requirement. The State Secretary also requested repayment of the remaining amount of NLG 69 788.

9. By Decision of 26 May 2003 the State Secretary declared unfounded the objections raised by ROM-projecten against both decisions (the Decisions of 11 July 2002 and of 27 February 2003).

10. In a subsequent appeal, the Rechtbank Roermond declared the appeal well founded and set aside the Decision of 26 May 2003. The State Secretary was ordered to adopt a new decision.

11. That decision was adopted on 16 August 2004. In this decision the earlier decision fixing the amount of subsidy at zero was confirmed on the ground that ROM-projecten had not complied with the date requirement.

12. ROM-projecten contested the Decision of 16 August 2004. The College van Beroep voor het bedrijfsleven (Administrative Court for Trade and Industry) (Netherlands) wondered whether the State Secretary could hold against ROM-projecten the fact that it had failed to fulfil the date requirement contained in Article 6 of Decision C(95) 1753. It is against this background that the College van Beroep voor het bedrijfsleven decided to refer the following questions to the Court for a preliminary ruling.

B — *Questions referred*

'(1) Is Article 6 of the Commission Decision of 16 October 1995 concerning a contribution from the European Regional Development Fund (ERDF) and the European Social Fund (ESF) for an operational programme within the framework of the SME Community initiative for the benefit of areas eligible under Objectives 1 and 2 in the Netherlands (C(95) 1753) unconditional and sufficiently clear and precise to be directly applicable in the national legal order?

(2) If the answer to Question 1 is in the affirmative:

Must Article 249 EC be interpreted as meaning that Article 6 of that decision has a direct effect so as to require an individual, as a final beneficiary, to enter into the legally binding commitments referred to in that respect and to specifically allocate the requisite finance no later than 31 December 1999?

(3) If the answer to Question 2 is in the affirmative:

Does Article 38(1)(h) of Council Regulation (EC) No 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds, viewed in the light of the principles of Community law, leave the Member States scope to refrain from recovery on account of an infringement of a provision where the subsidy beneficiary concerned was unaware of that provision and is not at fault for its lack of knowledge of that provision?'

C — *Procedure before the Court*

13. Written observations were submitted by ROM-projecten and the Commission. At the hearing on 1 February 2007 the Netherlands and the Commission presented oral submissions.

IV — Assessment

14. The first two questions in fact concern the issue whether a provision in a Commission decision addressed to a Member State, on the assumption that it is unconditional and sufficiently clear (the first question), can be directly applicable with regard to the final beneficiary (the second question), in other words, whether a Member State can hold against the beneficiary such a provision, the so-called 'inverse direct effect'. The third question essentially addresses the obligation to recover unduly paid aid as opposed to the principle of legal certainty.

15. The questions are raised against the background that the amount of the subsidy granted was retroactively fixed at zero and repayment was ordered. The reason for this course of action is that the beneficiary failed to fulfil the date-requirement, laid down in Article 6 of Decision C(95) 1753.

16. As follows from the order for reference, it is established that in the present case the date requirement as contained in Decision C(95) 1753 was not included in the national decision granting the subsidy or in the related subsidy conditions, obligations and provisions. Nor was there any reference to that requirement in the application form or the related documents.

17. Furthermore, Decision C(95) 1753 was not published in the Official Journal.

18. The referring court thus concludes that the beneficiary concerned was unaware of the provision and, in the view of that court, is not at fault for its lack of knowledge.

19. Having regard to the context in which the questions are raised, I consider it preferable to begin with the third question. Moreover, in my view, it will suffice to deal solely with this question, in a slightly rephrased form.

20. Next, I would observe that central to the third question is the reference to Article 38(1)(h) of Council Regulation (EC) No 1260/1999, [3] while the Commission, in its written observations, considers the so-called coordination regulation to be the relevant applicable legal framework. [4] In that connection, having regard to Article 52(1) of Regulation No 1260/1999, I agree with the Commission. However, it makes little difference in the context of the question referred, since regardless of which provision is applied the Member States are required, in one way or another, to take steps in the event of irregularities.

21. As explained by the referring court, under Netherlands law, the principle of legal certainty means that such a subsidy condition, which is onerous in nature, cannot be relied upon as against the beneficiary of the subsidy unless it has been made known beforehand to that beneficiary.

22. This requirement that it be made known also follows from the Dutch Code of Administrative Law (Algemene wet bestuursrecht). As indicated by the referring court, Article 4:37 of that Code, read in conjunction with Article 4:38(2) and (3) thereof, requires that any obligation attached to a subsidy must be laid down either in a legal provision or in the decision granting the subsidy.

23. According to the same Code, a subsidy can also be granted directly pursuant to a programme adopted by the Commission. In that event, no separate legal basis is required. However, the date requirement is not included in respect of the category of projects to which that of ROM-projecten belongs.

24. Thus, under Netherlands law alone the date requirement cannot be enforced as against the beneficiary.

25. The question is therefore whether there is an obligation to enforce that requirement under Community law, or to put it differently, whether the principle of legal certainty can preclude recovery of the financial aid at issue.

3 — Regulation of 21 June 1999 laying down general provisions on the Structural Funds, OJ 1999 L 121, p. 1. It repealed Regulations No 2052/88 and No 4253/88 with effect from 1 January 2000 (see Article 54 thereof).

4 — Council Regulation (EEC) No 4253/88 of 19 December 1988 laying down provisions for implementing Regulation (EEC) No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and other existing financial instruments (OJ 1988 L 374, p. 1), as amended by Council Regulation No 2082/93 of 20 July 1993 (OJ 1993 L 193, p. 20), in particular Article 23(1) thereof. Reference is also made to Article 5 of Regulation (EC) No 1681/94 of 11 July 1994 concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the structural policies and the organisation of an information system in this field (OJ 1994 L 178, p. 43), as amended by Regulation (EC) No 2035/2005 (OJ 2005 L 328, p. 8).

26. This is not the first time that the Court has had to deal with questions regarding the recovery of amounts wrongly paid under Community law.

27. First, it is settled case law that, in the absence of provisions of Community law, disputes concerning the recovery of amounts wrongly paid under Community law must be decided by national courts in application of their own domestic law, subject to the limits imposed by Community law, on the basis that the rules and procedures laid down by domestic law must not have the effect of making it practically impossible or excessively difficult to recover the aid not due and that the national law must be applied in a manner which is not discriminatory as compared to procedures for deciding similar national disputes. [5]

28. Second, the principle of legal certainty forms part of the Community legal order. In this connection I refer to *Huber*. [6] In that case, which concerned a national aid programme part-financed by the Community in the context of the common agricultural policy, the Court stated that Community law does not preclude the application of the principle of legal certainty in order to prevent the recovery of sums wrongly paid, since this principle forms part of the legal order of the Community.

29. Third, under Community law, the principle of legal certainty, a fundamental principle, means that the rules must enable those concerned to know precisely the extent of the obligations which they impose on them. [7]

30. As said, the application of national law must not make it practically impossible or excessively difficult to recover the aid not due. Furthermore, it must be applied in a manner which is not discriminatory as compared to procedures for deciding similar national disputes. The latter implies that the interest of the Community is also taken into consideration. [8]

31. To my mind the conclusion reached by the referring court, namely that the principle of legal certainty under Dutch law precludes the State Secretary from relying on the date requirement as against ROM-projecten, because that condition was not made known

5 — Joined Cases 205/82 to 215/82 *Deutsche Milchkontor and Others* [1983] ECR 2633, paragraph 19.

6 — Case C-336/00 [2002] ECR I-7699, paragraph 56 and the case-law referred therein.

7 — See, for example, Case C-209/96 *United Kingdom* v *Commission* [1998] ECR I-5655, paragraph 35.

8 — See *Deutsche Milchkontor*, cited in footnote 5, paragraph 32.

to the beneficiary and, furthermore, the latter could not reasonably have been expected to have ascertained the content of Decision C(95) 1753 in any other way, does not harm either the principle of effectiveness or the principle of equivalence.

32. Since the beneficiary was unaware of the provision in issue and cannot be blamed for this lack of knowledge, the application of the principle of legal certainty is not precluded by Community law.

33. Finally, I would observe that there is a possibility that, in the event that the irregularity is attributable to a Member State, the Member State concerned can be held financially liable for the unrecovered amounts.

V — Conclusion

34. For the above reasons, I am of the view that the Court should give the following response to the questions referred by the College van Beroep voor het bedrijfsleven:

Community law does not preclude a Member State from applying the principle of legal certainty in order to refrain from recovery of aid on account of an infringement of a provision where the subsidy beneficiary concerned was unaware of that provision and is not at fault for its lack of knowledge of that provision.