JUDGMENT OF THE COURT (Sixth Chamber)
25 May 1993 *

In Case C-334/91,

Innovation et Reconversion Industrielle, a non-profit-making association governed by Belgian law, represented by Yvon Hannequart and François Moises, of the Liège Bar, with an address for service in Luxembourg at the Chambers of Arendt and Medernach, 8-10 Rue M. Hardt,

applicant,

v

Commission of the European Communities, represented by Dimitrios Gouloussis and Herculano Lima, Legal Advisers, acting as Agents, with an address for service in Luxembourg at the office of Nicola Annecchino, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for annulment of the Commission decision reducing the financial assistance from the European Social Fund in respect of File No 85/0209/B6,

THE COURT (Sixth Chamber),

composed of: C. N. Kakouris, President of the Chamber, J. L. Murray, G. F. Mancini, F. A. Schockweiler and P. J. G. Kapteyn, Judges,

Advocate General: M. Darmon,
Registrar: H. A. Rühl, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 19 November 1992

* Language of the case: French.

after hearing the Opinion of the Advocate General at the sitting on 17 December 1992,

gives the following

Judgment

1 By application lodged at the Court Registry on 27 December 1991, Innovation et Reconversion Industrielle, a non-profit-making association (hereinafter 'IRI'), brought an action under the second paragraph of Article 173 of the EEC Treaty for annulment of the decision contained in the Commission's letter of 6 November 1991 concerning reduction of the financial assistance which the European Social Fund (hereinafter 'the Fund') had initially granted for a training project submitted on behalf of IRI, in relation to file No 85/0209/B6.

2 Pursuant to Article 1(2)(a) of Council Decision 83/516/EEC of 17 October 1983 on the tasks of the European Social Fund (OJ 1983 L 289, p. 38), the Fund contributes in particular to the financing of operations concerning vocational training and guidance.

3 The national body governed by public law responsible for joint financing of the project applies to the Fund for financial assistance in the name of the Member State concerned and on behalf of the promoter of the project.

4 Under Article 5 of Council Regulation (EEC) No 2950/83 of 17 October 1983 on the implementation of Decision 83/516 (OJ 1983 L 289, p. 1, hereinafter 'the regulation'), the approval by the Fund of an application for financing is to be followed by payment of an advance in respect of the financial assistance granted.

5 Under Article 5(4), final payment claims are to contain a detailed report on the content, results and financial aspects of the relevant operation. The Member State concerned must certify the accuracy of the facts and accounts in payment claims.

6 Under Article 7(1) of the regulation, the Commission may make on-the-spot checks as to the uses to which the financial assistance has been put. Pursuant to Article 7(3), the Member State concerned is to ensure that the Commission has access to the information necessary to enable it to appraise both the aims and content of applications and claims, and the progress, financing and results of operations and to make available to the Commission the material justifying the abovementioned certification.

7 When Fund assistance is not used in conformity with the conditions laid down in the decision granting approval, the Commission may, pursuant to Article 6(1) of the regulation, suspend, reduce or withdraw the aid after giving the relevant Member State an opportunity to comment. Pursuant to Article 6(2), sums paid which are not used in accordance with the conditions laid down in the decision granting approval are to be refunded and the Member State concerned is to have secondary liability for repayment of the sums of which unwarranted payment was made for operations whose successful completion it guaranteed under Article 2(2) of Decision 83/516.

8 In the present case, on 7 March 1985, the Belgian Ministry of Employment and Labour ('the Ministry') submitted to the Fund in the name of Belgium and on behalf of IRI an application for financial assistance for a scheme in which aspiring entrepreneurs were to be trained in the setting up and management of small and medium-sized undertakings.

9 By decision of 19 June 1985, the Commission granted the application for financial assistance under file No 85/0209/B6 for a period of two years, in the amount of BFR 27 381 000, for the training of 196 people. That decision was notified to the

Ministry and then, by the latter, to IRI. An advance of 30% of the approved amount, namely BFR 8 214 300, was paid on 10 July 1985.

10 On 16 June 1987, IRI applied for payment of the balance, reducing the estimate of the total assistance required to BFR 14 783 755.

11 By letter of 28 November 1987, the Commission asked the Belgian authorities for information justifying the expenditure in general and certain specific amounts requested by IRI. On 9 December 1987 the Belgian authorities forwarded to the Commission the information submitted to it by IRI.

12 On 17 March 1989, Commission staff carried out an on-the-spot check of IRI's file in the presence of representatives of the Belgian authorities.

13 The Commission sent a further letter, dated 6 November 1991, to the Ministry, which was notified by the latter to IRI on 15 November 1991; it stated that the assistance from the Fund, as recalculated, amounted to only 25/197ths of the sum shown in the application for payment of the balance, namely BFR 1 833 588, since the 172 people who had undergone at least 100 hours' training and supervision could not be accepted as duly trained. The Commission stated that after deduction of the advance paid to the body in question, BFR 6 380 712 was to be reimbursed to the Commission.

14 In a question asked by the lawyer acting for IRI on 2 December 1991 as to whether the Member State concerned had been given an opportunity to submit comments under Article 6(1) of the regulation, the Ministry stated on 8 December 1991 that the on-the-spot check of 17 March 1989 had 'in all probability' been intended to give IRI and Commission staff the opportunity to exchange information on the matter in the presence of representatives of the Ministry.

15 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the procedure and the pleas in law and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

16 In support of its application for annulment, IRI maintains, first, that the decision contained in the Commission's letter of 6 November 1991 infringed Article 6(1) of the regulation, in that, contrary to the requirements of that provision, the Commission did not give the Member State concerned an opportunity to submit its comments prior to adoption of the contested decision.

17 According to the Commission, the letter of 6 November 1991 is not a decision but merely gives notice to the Belgian authorities of the conclusion drawn after examination of the application for payment of the balance. Those authorities could have submitted their observations before adoption of the final decision pursuant to Article 6(1) of the regulation, which does not require any formal consultation procedure.

18 The Commission's arguments cannot be accepted.

19 First, it is clear from the actual tenor of the measure contained in the abovementioned letter that that measure definitively reduced the financial assistance initially granted to IRI and also required IRI to repay part of the advance received by it. The measure in question thus has legal effects such as to affect the interests of IRI by significantly changing its legal position.

20 Secondly, there is nothing in the documents before the Court to show that the Belgian authorities had an opportunity to submit their comments, as required by Article 6(1) of the regulation.

21 Even if the on-the-spot check carried out by Commission staff, in the presence of representatives of the national authorities, might have provided an opportunity for an exchange of information on the IRI file, it has not been established that it enabled the national authorities to be consulted before adoption of the decision reducing the financial assistance, regarding both the principle and the amount of the reduction envisaged by the Commission.

22 As is apparent from the confidential record of that on-the-spot check drawn up by the Commission's financial department, it was only after the check had been carried out that that department envisaged proposing to the Directorate General for Employment, Industrial Relations and Social Affairs that the Fund's contribution be reduced to the amount finally determined in the contested decision and that the amount unduly paid be recovered.

23 Moreover, no document establishes that there was any opportunity for specific observations concerning that amount to be made by the Belgian authorities in subsequent correspondence prior to the adoption of the contested decision imposing the reduction.

24 It is settled law that the Member State is the Fund's sole interlocutor (see the judgment in Case 310/81 *EISS* v *Commission* [1984] ECR 1341, paragraph 15); it incurs liability in so far as it certifies that the facts and accounts contained in final payment claims are correct and it may even be required to guarantee the successful completion of the training operations.

25 In view of the central role of, and the importance of the responsibilities assumed by, the relevant Member State regarding the presentation and monitoring of financing of training operations, its opportunity to comment before the adoption of a final decision reducing the aid constitutes an essential procedural requirement the infringement of which renders the contested decisions void (Case C-291/89 *Interhotel* v *Commission* [1991] ECR I-2257, paragraph 17, in Case C-304/89 *Oliveira* v *Commission* [1991] ECR I-2283, paragraph 21, and in Case C-157/90 *Infortec* v *Commission* [1992] ECR I-3525, paragraph 20).

26 It follows that the contested decision reducing the aid in question must be annulled, without there being any need to consider the other pleas in law put forward by IRI.

Costs

27 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. Since the Commission has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. Annuls the Commission decision reducing to BFR 1 833 588 the financial assistance from the European Social Fund in respect of application No 85/0209/B6;

2. Orders the Commission to pay the costs.

Kakouris Murray

Mancini Schockweiler Kapteyn

Delivered in open court in Luxembourg on 25 May 1993.

J.-G. Giraud C. N. Kakouris

Registrar President of the Sixth Chamber