financed. In view of the central role of, and the importance of the responsibilities assumed by, that Member State regarding the presentation and monitoring of financing of training operations, the opportunity, provided for by Article 6(1) of Regulation No 2950/83, to comment before the adoption of a final decision reducing the financial assistance initially granted constitutes an essential procedural requirement the infringement of which renders that decision void.

REPORT FOR THE HEARING
in Case C-334/91 *

I — Legal background

Article 1(2) of Council Decision 83/516/EEC of 17 October 1983, [1] which defines the tasks of the European Social Fund, provides in particular that the Fund is to participate in the financing of operations concerning vocational training and guidance.

By virtue of Article 3(2) of the decision, Fund assistance may be granted for specific operations carried out in particular with a view to encouraging the implementation of innovatory projects.

Commission Communication COM(83) 711 final of 22 December 1983 entitled 'Commission Guidelines for the Management of the European Social Fund in the financial years 1984 to 1986' provides as follows:

'3. Priority for specific operations of an innovatory character within the framework of Community objectives

(Article 3(2) of Decision 83/516/EEC)

Priority operations shall be those which encourage the implementation of innovatory projects which meet all the following criteria:

...

— offering a possible basis for future Fund intervention under Article 3(1) of Decision 83/516/EEC;

— aimed at methodically validating new working hypotheses concerning, for example, content, methodology, organization of training or vocational guidance,

* Language of the case: French.

1 — OJ 1983 L 289, p. 38.

with a view to wider application. Such hypotheses should be considered in the context of needs, expectations, and current practices in a particular region;

— associating closely the parties involved, including the social partners, at the planning and operational stage;

— including evaluation;

— concerning not more than 100 people.

...'

Regulation (EEC) No 2950/83 of 17 October 1983 [2] defines the types of expenditure for which Fund assistance may be granted, which include the costs of preparing, operating and administering vocational training measures.

Article 5(2) of the regulation provides that:

'The approval of an application submitted under Article 3(2) of Decision 83/516/EEC, even if the application concerns an operation lasting for more than one year, shall be followed by the payment of a first advance of an amount equal to 30% of the assistance granted. A second advance, not exceeding 30%, may be paid when the Member State concerned certifies that the first half of the operation has been completed in accordance with the conditions set out in the decision of approval.'

On completion of the vocational training measure, the organizer draws up a final report on its implementation and sends it to the competent authorities in the Member State together with any payment claim. Under Article 5(4) of Regulation No 2950/83:

'Final payment claims shall contain a detailed report on the content, results and financial aspects of the relevant operation. The Member State shall certify the accuracy of the facts and accounts in payment claims.'

Lastly, according to Article 6 of that regulation:

'1. When Fund assistance is not used in conformity with the conditions set out in the decision of approval, the Commission may suspend, reduce or withdraw the aid after having given the relevant Member State an opportunity to comment.

2. Sums paid which are not used in accordance with the conditions laid down in the decision of approval shall be refunded (...)'

Applications for financial assistance are submitted on behalf of the relevant Member

2 — OJ 1983 L 289, p. 1.

State by a body governed by public law, generally that which is co-funding the project. That body submits the application on behalf of the institution that will ultimately receive the financial assistance requested.

The Fund deals only with the Member State: a financial relationship is created between the Commission and the Member State, on the one hand, and between that Member State and the institution which is the recipient of the financial assistance on the other. [3]

II — Facts and written procedure

The Belgian Ministry for Labour and Employment submitted, on behalf of Belgium and for the benefit of Innovation et Reconversion Industrielle ('IRI'), an application for assistance from the Fund in respect of a scheme aimed at training aspiring entrepreneurs in planning, setting up and managing small and medium-sized undertakings. The training scheme formed part of an integrated programme combining assistance from the Fund for training (through IRI) and from the ERDF as regards other aspects of the measure.

Section 8.1 of the application for assistance, entitled 'Description of the Operation', stated in particular that:

'The average attendance per student is 39 weeks. Given the flexibility of the system, the number of hours per week varies according to the students' availability. On average it amounts to seven hours per week.'

Annex 2 to the application for assistance, entitled 'Description of the Training Programme', breaks down the total number of hours completed by a student (full course) (first year) as follows:

Seminar:
36 + 4 + 36 = 76, that is to say +/-15 days

C. A. L. [4]:
31 + 0 + 25 = 56

Personal contact:	64
Total	196 hours

Annex 1 to the application for assistance, entitled 'Programme for Creating New Activities in Liège', stressed that training flexibility was one of its essential characteristics:

'... The training is *flexible*. An aspiring entrepreneur:

— begins his training and the study of his project at any time without waiting for the commencement of a particular stage;

— progresses at his own pace depending on his availability, carries out his training depending on his timetable (evenings, weekends, ...);

3 — Case C-310/84 *EISS* v *Commission* [1984] ECR 1341, paragraph 15.

4 — Computer-assisted learning.

— adapts his training programme to his knowledge and experience and to the degree of complexity of his project ...'

By decision of 19 June 1985, the application for assistance was approved by the Commission:

— as a specific measure for training entrepreneurs;

— for a two-year period from 1 January 1985 to 31 December 1986;

— the number of persons involved was 196;

— the amount of assistance approved was BFR 27 381 000.

An advance of 30% of the amount granted, namely BFR 8 214 300, was paid on 10 July 1985.

On 16 June 1987, IRI submitted the final payment claim. It estimated the total cost of the scheme at BFR 29 758 062 and set the amount of Fund assistance at BFR 14 783 755. IRI accordingly calculated the balance payable by the Fund as 14 783 755 -8 214 300, that is BFR 6 569 455. The final payment claim stated that 197 people had undergone training in 1985/1986.

The Commission sent the relevant Belgian authorities a letter dated 28 November 1987 in which it stated that a review of the final payment claim had revealed that information on the general justification for the expenditure incurred and certain sums claimed by IRI were either missing or insufficient. The Commission added that the file would be closed as it stood if the information requested was not sent within two months.

On 9 December 1987, the Belgian authorities forwarded to the Commission the details supplied by the applicant.

On 17 March 1989, the Commission's Directorate General for Financial Control (DG XX), acting in conjunction with the Fund and the Belgian Administration (the Ministry for Labour and Employment, the Labour Department for the Walloon Region and the Ministry for the French Community), carried out an on-the-spot inspection of the project submitted by IRI.

Subsequently, on 6 November 1991 the Commission sent the Belgian Ministry for Labour and Employment a letter relating to the balance outstanding in respect of the IRI project and stating as follows:

'A review of the final payment claim and of the supplementary information as well as the on-the-spot inspection in which your department took part on 17 March 1989 have led to the following conclusions regarding the final statement in respect of the project:

1. the Commission accepts the explanation given by I. R. I. regarding the salaries of persons made available by Cockerill-Sambre and by Programmes SOCRAN;

2. it considers, however, that the 172 persons who have undergone less than 100 hours of training or guidance cannot be deemed to have been trained. Accordingly, only the 25 persons for whom a minimum attendance of 100 hours can be substantiated will be taken into account in calculating Fund assistance. The adjusted assistance from the Fund will amount to 25/197ths of the figure set out in the final payment claim (BFR 14 448 67), namely BFR 1 833 588.

After deduction of the advance paid to the organization, the sum to be repaid to the Commission is BFR 6 380 712.'

The Ministry for Labour and Employment informed the applicant of the Commission's letter on 15 November 1991.

By letter of 2 December 1991, the applicant's advisers asked the relevant Belgian Ministry whether the Commission had given it an opportunity to comment in accordance with Article 6(1) of Regulation No 2950/83 before notifying the contested decision.

The Ministry replied by letter of 9 December 1991 that the on-the-spot inspection of 17 March 1989 'was in all likelihood the appropriate occasion for you and the Commission's departments to exchange information concerning the project in the presence of a representative from the Ministry for Labour and Employment.' The correspondence annexed to that letter from the Ministry related to information exchanged prior to the inspection of 17 March 1989.

By application lodged at the Court Registry on 27 December 1991, IRI brought the present action for annulment of the Commission's letter of 6 November 1991.

Upon hearing the Report of the Judge-Rapporteur and the views of the Advocate General, the Court decided on 30 September 1992 to assign the case to the Sixth Chamber, pursuant to Article 95 of the Rules of Procedure, and to open the oral procedure without any preparatory inquiry. However, it considered it necessary to request further information from the parties and from the Belgian Government.

III — Forms of order sought by the parties

The *applicant* claims that the Court should:

1. declare void the Commission's Decision of 6 November 1991 in so far as it refuses to grant the balance of the assistance applied for, namely BFR 6 569 455, and in so far as it orders the sum of BFR 6 380 712 to be repaid to the Commission;

2. order the Commission to pay the costs.

The *Commission* contends that the Court should:

1. dismiss the action as unfounded;

2. order the applicant to pay the costs.

IV — Pleas in law and arguments of the parties

1. Failure to consult the Member State concerned

The *applicant* maintains that, in adopting the contested decision to reduce assistance without previously giving the national authorities the opportunity to comment, the Commission has infringed an essential procedural requirement laid down in Article 6(1) of Regulation No 2950/83. [5]

There is no document establishing that an exchange of letters took place between the Commission and the Belgian authorities enabling the latter to put forward their observations, whereas such an exchange did take place in the *FUNOC* case. [6]

In reply, the *Commission* states that Article 6(1) of Regulation No 2950/83 does not provide for a specific consultation procedure, and that in the present case it gave the Belgian State the opportunity to comment prior to the final decision being adopted.

The Commission intimated that it intended to reduce the Community contribution and the Belgian authorities duly took note of this. If they had not agreed with the proposed reduction, they could have submitted their observations even when the Commission drew their attention, in its letter of 6 November 1991, to the findings made in its review.

That letter was not a decision but merely notified the findings made in the review of the final payment claim.

In its reply, the *applicant* maintains on the contrary that by artificially treating the letter as a draft decision, the Commission is attempting to circumvent the infringement of essential procedural requirements.

The Commission's letter constitutes a final decision which may be challenged by an action for annulment, without there being any need for that decision to have been accepted by the national authorities.

2. Breach of the conditions for approval of Fund assistance

According to the *applicant*, Article 6(1) makes the suspension, reduction or withdrawal of aid dependent on a breach of the conditions for its utilization which are set out in the decision of approval.

The contested decision reduces the amount of aid granted to the applicant, although the Commission did not establish that there had been any unapproved expenditure, any expenditure in excess of that approved, any

5 — Case C-291/89 *Interhotel* v *Commission* [1991] ECR I-2257.
6 — Case C-200/89 *FUNOC* v *Commission* [1990] ECR I-3669.

unjustified expenditure or any substantial alteration of the measure notified, which might lead to the conclusion that the conditions for utilization of the aid laid down in the decision of approval had not been complied with.

The only criticism directed against the applicant relates to the low take-up rate of the training hours actually made available to the candidates, since they only attended an average of 35 out of the 196 hours of training provided.

None the less, the training provided by the applicant constitutes a specific operation carried out with a view to encouraging the implementation of an innovatory project, within the meaning of Article 3(2) of Decision 83/516. The notion of pilot schemes constituting not an end in themselves but an experiment with a view to discovering new methods of organizing vocational training or guidance is implicit in the criteria set out in the Commission Communication of 22 December 1983 for schemes of that type.

The achievement of a specific result whereby participants in a scheme of this type actually take up a particular number of training hours is not certain, the aim of the Fund's assistance in respect of the project being to encourage its 'implementation' and not its actual realization.

The assessment of the evolution of such a project requires a degree of flexibility, and the need to adapt the initial project to accommodate any difficulties must be taken into account.

The option of attending only part of the training hours provided was, moreover, expressly provided for in Annex 1 to the application for assistance which states that training is to be flexible.

The decision of approval did not provide that a degree of success, reflected in a particular number of training hours actually attended by trainees, was a condition for the utilization of Fund assistance.

Alternatively, the applicant argues that the Commission has not correctly assessed the number of training hours envisaged, as set out in the documents describing the project annexed to the application for assistance, which show that the average number of hours planned for was not 273 but 169.

Lastly, the Commission has not made a precise appraisal of the results of the pilot scheme in respect of which the assistance was granted. The period checked by the Commission corresponds only to 17.5 months of initial activity, as the training programme was only launched following the belated adoption of the decision of approval on 19 June 1985. In order to make an objective assessment of the results of the experimental stage of the scheme, the Commission should have taken into account the results obtained throughout the total period of implementation envisaged, that is to say five years, and applied the criterion of a minimum of 100 training hours to the trainees who started to undergo training in 1985 or 1986 and carried on in subsequent years, as laid down in the description of the original project specifying that training was to be organized without any requirement regarding the stage of commencement.

The ultimate aim of the scheme was not to provide a fixed number of training hours but to generate employment by the creation of new activities and the development of existing small and medium-sized undertakings. At the end of the first five years, the balance sheet of the integrated training programme which the Fund has undertaken to assist looked very positive.

The *Commission* maintains that the applicant has not kept to the agreement in respect of the length of training which was one of the fundamental conditions laid down by the decision approving the grant of assistance, which had to be reduced as a result.

Out of 199 trainees deemed to have been trained by the applicant only 25 received more than 100 hours of training.

Since the average training period per trainee was set at 273 hours on the basis of IRI's application for assistance, the Commission accepted the criterion of 100 hours as the 'minimum attendance' required for the instruction of trainees.

As the decision approving the assistance applied for was based on information supplied by the applicant, the length of the training period was one of the essential conditions for the grant of assistance.

Since the scheme is an innovatory project, the Commission can indeed allow a degree of flexibility regarding its duration. None the less such flexibility must not hinder the training envisaged. Most of the trainees have undergone training the length of which does not support the assertion that it has been successfully completed.

It is in the public interest to withdraw decisions retroactively if their conditions have not been met. As regards, more specifically, the operation of the structural funds of the Community, there is a further public interest in the repeal of those decisions, namely the proper financial management of public funds.

3. Breach of the principle of vested rights

The *applicant* considers that the Commission was not entitled, without undermining the applicant's vested rights, to disallow the expenditure relating to training, whose flexible nature, entailing the risk that trainees might take up only some of the training hours actually provided for them, was approved by the decision in question.

The *Commission* accepts that approval of financial assistance creates individual rights but considers that payment automatically presupposes that the conditions laid down by the decision of approval have been adhered to and that the expenditure declared has been substantiated.

4. Breach of the principle of the protection of legitimate expectations

The *applicant* considers that it is entitled to rely, purely in the alternative, on the princi-

ple of the protection of legitimate expectations in the event of the Court finding that the Commission was wrong to approve a flexible training programme which enabled trainees to have a tailor-made timetable without being required to start at a particular stage.

The *Commission* considers that the applicant has not acted in accordance with the conditions laid down in the decision approving the grant of assistance, which the applicant itself submitted to the Commission in its application for assistance. It is difficult to see how the applicant can rely on a situation which it has itself created.

5. Breach of the rights of the defence

The *applicant* considers that the Commission has infringed the general principle that the rights of the defence must be observed, as enshrined in the case-law of the Court, [7] by failing to give the applicant the opportunity to put forward its observations as to the precise reasons behind the decision to reduce the assistance on the basis of the requirement of a minimum of 100 hours of training.

The *Commission* points out that in connection with the grant of aid from the European Social Fund, [8] it is the Member State alone which deals with the Commission, which is therefore not obliged to give the applicant an opportunity to put forward its point of view.

6. Manifest error of assessment

In the *applicant's* view, in considering that the assistance was not used in accordance with the conditions set out in the decision of approval, the Commission has lost sight of the flexible nature of the training, approved at the time by the decision in question, and has consequently committed a manifest error of assessment.

The *Commission* disagrees on the ground that in accordance with the application for assistance the proposed training was to last on average 39 weeks at the rate of seven hours per week. Since the Commission accepted as eligible a 100-hour training programme, it clearly took its flexible nature into account.

7. The Commission has manifestly exceeded its discretion

The *applicant* argues that in arbitrarily applying the criterion of a minimum of 100 hours of training which was not provided for in the decision of approval, the Commission has overstepped the bounds of the decision and has manifestly exceeded the limits of its discretion.

Furthermore, 'at the time of the final appraisal of the request for assistance... the Commission ... can no longer disallow the expenditure which it had previously clearly approved, once the assistance has been utilized in accordance with the conditions set out in the decision of approval'. [9]

7 — Cases 85/76 *Hoffman-Laroche* v *Commission* [1979] ECR 461 and 121/76 *Moli* v *Commission* [1977] ECR 1971.

8 — See footnote 3 above.

9 — Opinion of Advocate General Darmon in Case C-291/89 *Interhotel* v *Commission* [1991] ECR I-2269.

The *Commission* considers that in the decision of approval it established a training period of a specific duration. The applicant having failed to abide by that fundamental condition, the Commission was within its rights in discontinuing the assistance.

However, taking into account the applicant's private interests, the Commission decided to reduce the assistance as an exception and on grounds of fairness.

It is therefore difficult to see how the Commission could have exceeded its discretion in replacing a decision to discontinue assistance with a decision to reduce it, to the manifest advantage of the applicant.

8. Breach of the principle of proportionality

The *applicant* argues that the drastic reduction in the amount of assistance is not motivated by the desire to protect the public interest in connection with the proper financial management of structural funds since all the expenditure incurred by the applicant was duly substantiated, there is no question here of a failure by the recipient of the assistance to fulfil its obligations and the training programme as notified was achieved in full during the overall five-year period envisaged at the time when the application for assistance was submitted.

Furthermore, in order to take account of the aims of Article 6 of Regulation No 2950/83, the Commission should have considered the fact that the applicant's innovatory measure was in fact successful in that it served as a basis for continuing the integrated programme for a five-year period and actually led to the creation of new undertakings which generated employment as a result of further assistance provided by the national authorities between 1987 and 1989.

The applicant also considers that the Commission has not taken its private interests into consideration in applying the criterion of a minimum of 100 hours of training, which leads to a considerable number of hours of training actually provided for trainees, the major part of whom attended for less than 100 hours, being left out of account. Nor does the disputed decision to reduce the assistance take account of the fixed expenditure which the applicant had to incur in order to make available the training hours provided but not actually taken up.

In reply, the *Commission* states that as the assistance from the Fund was not utilized in accordance with the conditions laid down in the decision of approval, which thereupon became unlawful because of the fundamental alteration of the initial training project and should therefore have been withdrawn pursuant to Article 6(1) of Regulation No 2950/83.

Taking into account the applicant's private interests, the Commission decided to replace the original decision with a decision granting partial approval, whereby it considered as eligible a minimum of 100 hours' training, having regard to the nature of the training scheme in question and to other similar measures carried out in other Member States.

The Commission therefore considers that it has not exceeded the limits of what is necessary in order to guarantee the proper utilization of public funds by discontinuing financing in respect of training measures of less than 100 hours' duration.

IV — Replies to the court's requests for information

At the Court's request, the *applicant* explained the manner in which it had calculated the average number of hours of training (169).

The *Commission* produced the documents requested by the Court.

In reply to the Court's question whether the criterion of a minimum of 100 hours of training for the specific measure at issue (on which the decision to reduce the assistance is based) was brought to IRI's attention before notification of the decision of 6 November 1991, the Commission replied as follows:

'The criterion of a minimum of 100 hours of training was approved by the Commission at its meeting on 23 July 1984. During that meeting, the Commission adopted the decision approving applications for assistance from the European Social Fund (for 1984). That decision was then notified to the Member States; that is the decision in which the explanations concerning the 100-hour threshold are to be found ...; the Commission, in its explanation regarding paragraph 7.1 of the Guidelines for the Management of the European Social Fund in the financial years 1984 to 1986 (see OJ C 5 of 10.1. 1984, p. 5) ... established a threshold, in terms of the length of time per trainee (100 hours per person), for taking programmes into consideration with a view to financing. Accordingly, Member States, including the Kingdom of Belgium, were informed of the criterion of a minimum of 100 hours of training and it was for them to pass on the information and the conditions for the implementation of the Fund's rules to the organizers in respect of whom a Commission decision had been adopted. That approach actually reflects a practice according to which, in the context of the implementation of the Fund's rules, the Commission deals not with the organizers but with the Member State whose duty it is to inform the organizers.'

The *Belgian Government* failed to reply within the prescribed period to the Court's question whether it was able to certify that it had been given the opportunity, before receiving notification of the Commission's letter (No 015036) of 6 November 1991 relating to the balance in respect of Project ESF 85/0209/B6, to comment on the statement of the outstanding balance in respect of that project which the Ministry for Labour and Employment had submitted to the European Social Fund on behalf of IRI, a non-profit-making body.

J. L. Murray

Judge-Rapporteur