OPINION OF ADVOCATE GENERAL LENZ
delivered on 4 July 1996 *

A — Introduction

1. The Commission is appealing in the present case against the judgment of the Court of First Instance of 7 March 1995 in Joined Cases T-432/93, T-433/93 and T-434/93. [1] In that judgment, the Court of First Instance, adjudicating on an application by Socurte, Quavi and Stec, declared void a decision of the Commission reducing the amount of the European Social Fund's contribution to a project in which the applicants in the original proceedings ('the applicants') had participated.

2. Article 1(2)(a) in conjunction with Article 3(1) of Council Decision 83/516/EEC of 17 October 1983 on the tasks of the European Social Fund, [2] which was applicable at the material time, permitted the European Social Fund ('the Fund') to participate in the financing of vocational training and guidance operations carried out within the framework of Member States' labour-market policies. Under Article 5(1) of Council Regulation (EEC) No 2950/83 of 17 October 1983 on the implementation of Decision 83/516/EEC, [3] approval of an application for financing was to be followed by the payment by the Fund of an advance of 50% of the assistance approved on the date on which the training operations were scheduled to begin.

3. Article 6(1) of Regulation No 2950/83 provided as follows:

'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.'

4. During 1986, the Department for European Social Fund Affairs ('DAFSE'), which comes under the authority of the Portuguese Ministry of Employment and Social Security, submitted an application for assistance for certain vocational training measures involving, *inter alia*, the applicants. In a decision adopted on 7 May 1986, the Commission confirmed that the Fund would contribute a

* Original language: German.

1 — *Socurte and Others* v *Commission* [1995] ECR II-503.

2 — OJ 1983 L 289, p. 38.

3 — OJ 1983 L 289, p. 1.

certain amount to that project. DAFSE informed the applicants of that decision and notified them at the same time of the amount of the contribution which the Fund was to make in each case towards the cost of the projected operations. The advance provided for was subsequently paid to the applicants.

5. After completion of the operations carried out pursuant to that project, the applicants submitted an application for payment of the balance of the Fund assistance. That payment was not made, however. Instead, by letter of 18 March 1991, DAFSE demanded, with reference to a decision of the Commission, the repayment by the applicants of part of the advances already paid to them.

6. By letter of 15 April 1991, the lawyer acting for the undertakings concerned asked DAFSE to inform him of the reasons for the request for repayment and to provide him with a copy of the Commission decision referred to in DAFSE's letter of 18 March.

7. By letter of 24 April 1991, which was received by its addressees on 30 April, DAFSE informed the applicants that the Commission had ultimately specified that the contribution by the Fund was to be in an amount lower than that originally projected. [4] DAFSE relied in that regard on a letter of 14 February 1991 from the Commission to DAFSE, a copy of which it sent to the applicants at the same time. That brief letter stated that the Commission had examined the claim for payment of the balance and that, as a result, it had been decided that the final amount of the contribution was to be the sum in question. It further stated that a number of contracts and various inspections had been 'taken into account' in that connection.

8. By letters to DAFSE of 14 May 1991 and to the Commission of 17 May 1991, the applicants then asked to be sent certified copies of the Commission's original decision granting Fund assistance and of its decision relating to the final payment claim for the balance of the Fund's contribution.

9. By letter of 30 July 1991 DAFSE sent the applicants 'a certified copy of the notification ... of the Commission's decision of approval' in the case in question. That document took the form of a letter of 10 July

4 — The amount of the contribution ultimately approved totalled ESC 437 452 918 (corresponding to 50% of the advance originally projected).

1991 from the Commission to DAFSE setting out detailed reasons for the reduction of the amount of the contribution.

In that letter, the Commission stated in particular that an inspection visit made to Stec between 26 and 29 July 1988 had revealed that certain expenditure had been insufficiently substantiated and that specific items had not been adequately evaluated. In the light of those deficiencies, the Commission had therefore undertaken its own reckonable-cost analysis, which had resulted in the reduction of the assistance originally fixed.

In that letter, the Commission stated that the national authorities had submitted their comments on that course of action.

10. The undertakings concerned subsequently brought proceedings by applications lodged at the Registry of the Court of Justice [5] on 10 October 1991. They applied *inter alia* for annulment of the measure contained in the Commission's letter to DAFSE of 10 July 1991. The Commission contended that the proceedings should be dismissed as inadmissible or, in the alternative, as unfounded.

11. The Court of First Instance ruled that the claim for annulment was admissible and well founded.

12. As regards the question of the admissibility of the action, the Court of First Instance pointed out, first, that on 30 April 1991 the applicants had been in possession of the Commission's letter of 14 February 1991 and were 'thus aware both of the existence of a decision of the Commission reducing the Fund assistance and refusing to pay any further balance and of the repercussions which that decision would have on them, as indicated by the competent national body in those letters of 18 March and 24 April 1991'. [6] However, that letter of 14 February 1991 had contained merely an 'abstract and general statement of reasons', and had not stated the 'precise reasons for which that decision had been adopted'. On receiving DAFSE's letter of 24 April 1991, the applicants had immediately requested the Commission and DAFSE to inform them of the precise reasons for that decision. They were not informed of those reasons until 30 July 1991, when DAFSE communicated to them the Commission's letter of 10 July 1991. It was only then that the applicants had acquired sufficient knowledge of the reasons for the Commission's decision, and only 'from that date that they could effectively bring proceedings against that decision'. [7]

5 — Pursuant to the intervening change in the division of jurisdiction, the Court of Justice transferred those proceedings to the Court of First Instance by order of 27 September 1993.

6 — Ibid. (footnote 1), paragraph 46.

7 — Ibid. (footnote 1), paragraph 50.

Consequently, the application for annulment of the Commission's decision, as evidenced in the letter of 10 July 1991, was lodged within the prescribed time-limit.

13. As regards the merits of the application for annulment, the Court of First Instance held that the opportunity afforded to the relevant Member State by Article 6(1) of Regulation No 2950/83 to comment before a definitive decision is taken by the Commission to reduce assistance from the Fund, whether as regards the principle of the reduction or as regards its precise amount, is 'an essential procedural requirement'. [8] Next, the Court of First Instance examined the documents submitted by the Commission in support of its contentions. Those documents concerned three inspections carried out by the Commission during the periods from 27 October to 3 November 1986, 28 September to 2 October 1987 and 26 to 29 July 1988, together with two meetings in June 1988 between the Commission's representatives and the Portuguese authorities. The Court of First Instance concluded that it could not be inferred from those documents that the Commission had observed its obligation under Article 6(1) of Regulation No 2950/83.

Consequently, the Court of First Instance declared void the Commission's decision reducing the amount of the Fund's contribution.

14. The applicants had in addition applied for an order requiring the Commission to pay the balance of the contribution as originally fixed. The Court regarded that application as inadmissible and therefore dismissed the remainder of the action.

15. The Commission has appealed against that judgment. It is applying for an order setting aside the judgment and requiring the respondents to the appeal to pay the costs.

16. The applicants in the original proceedings contend that the appeal should be dismissed, that the contested judgment should be upheld and that the Commission should be ordered to pay the costs.

B — Opinion

Preliminary observation

17. According to its wording, the Commission's appeal relates to the whole of the judgment of the Court of First Instance. However, it is apparent from the notice of appeal that the Commission intended to contest the judgment only in so far as it found in

8 — Ibid. (footnote 1), paragraph 65.

part in favour of the applicants. That is also the construction placed on it by the respondents to the appeal. Consequently, the appeal does not extend to the declaration of the Court of First Instance dismissing the remainder of the action.

18. The Commission criticizes the contested judgment in two respects. First, the Court of First Instance erred in finding that the period for bringing proceedings for annulment of the Commission's decision did not start to run until 30 July 1991. The decision was adopted on 14 February 1991. That decision was notified to the undertakings concerned on 30 April 1991, as a result of which the time for bringing proceedings commenced to run. Second, the Court of First Instance wrongly held that the Commission had failed to fulfil its obligation under Article 6(1) of Regulation No 2950/83 to give the relevant Member State an opportunity to comment.

The admissibility of the action

19. According to the Court of First Instance, 'failing publication or notification, it is for a party who has knowledge of a decision concerning it to request the whole text thereof within a reasonable period but, subject thereto, the period for bringing an action can begin to run only from the moment when the third party concerned acquires precise knowledge of the content of the decision in question and of the reasons on which it is based in such a way as to enable it to exercise its right of action'. [9]

20. This accords with the consistent case-law of the Court of First Instance on this point, [10] which is not called in question by the Commission. Similarly, the Commission — rightly — does not contest the finding of the Court of First Instance that the applicants in the proceedings before it requested the full text of the decision within a reasonable period.

21. However, the Commission argues that the case-law referred to is not applicable in the present case, since it relates only to cases in which there has been a failure to publish or notify the decision. In the case which the Court of First Instance was called upon to decide, however, the decision of 14 February was notified to the undertakings concerned on 30 April 1991.

22. The starting-point for this line of argument is indubitably correct. As is apparent from the passage cited above, the case-law referred to is relevant only if the decision in

9 — Ibid. (footnote 1), paragraph 49.

10 — See, to cite but a few examples, the judgments in Case 236/86 *Dillinger Hüttenwerke* v *Commission* [1988] ECR 3761, paragraph 14, and in Case T-465/93 *Consorzio Gruppo di Azione Locale 'Murgia Messapica'* v *Commission* [1994] ECR II-361, paragraph 29. See also the judgment in Case T-19/95 *Adia Interim* v *Commission* [1996] ECR II-321, paragraph 33.

question has been neither published nor notified. 'Notification', within the meaning of the fifth paragraph of Article 173 of the EC Treaty, encompasses 'publication' within the meaning of Article 191 of the Treaty. [11] It is true that, unlike the French and English versions, the German version of the fifth paragraph of Article 173 is formulated in somewhat misleading terms. However, only this interpretation accords with the sense and purpose of the case-law referred to. The point in time at which the period laid down in Article 173 for the institution of proceedings starts to run can only be deferred where the decision has been neither published nor formally notified to the person concerned. Only in such circumstances can there be any doubt on the part of the person concerned as to the content and grounds of the decision, such as to justify special protection.

23. In the present case, however, the persons concerned were given no such notification. The mere fact that the Commission's communication of 14 February 1991 was passed on by the Portuguese authorities with their letter of 24 April is not enough. Instead, by sending that letter, DAFSE merely made the applicants aware of the decision addressed to the Member State concerned. Since, by reason of its brevity and incompleteness, the communication of the Commission's letter of 14 February 1991 did not enable those concerned by it properly to decide whether to avail themselves of their right of action, the period for the institution of proceedings did not start to run until the complete text of the decision, which had been requested within a reasonable time, was communicated to them.

24. Furthermore, the argument advanced by the Commission would, if accepted, produce improper results. It would mean that, in order to safeguard their rights, undertakings finding themselves in the situation facing the applicants would have to bring proceedings immediately. It is clear, however, that the Commission's decision, in the form of the letter of 14 February 1991, did not in any way fulfil the requirements laid down by Article 190 of the EC Treaty regarding the provision of a statement of reasons for legal acts, and should therefore have been set aside as a matter of course. Consequently, the Commission's argument would result in an increase in avoidable litigation.

25. It follows that the first ground of appeal must be rejected.

Infringement of Article 6(1) of Regulation No 2950/83

26. As mentioned above, the Court of First Instance held that the obligation laid down by the provision in question to provide an

11 — That is also the view expressed by H. Kruck in *Kommentar zum EWG-Vertrag*, ed. Von der Groeben/Thiesing/Ehlermann, Fourth Edition, Baden-Baden 1991, Art. 173, note 66. 'Publication', as referred to in the fifth paragraph of Article 173, corresponds to the same term as used in Article 191.

opportunity to comment constitutes an essential procedural requirement. The Court of First Instance ruled, with reference to the relevant case-law, [12] that the applicants were entitled to plead infringement of those rules.

27. The Court of First Instance proceeded to state that the obligation to give the relevant Member State an opportunity to comment must be fulfilled before the decision in question is adopted, and that this must be established 'with a sufficient degree of certainty and clarity', which precludes 'any proof by presumption'. [13]

28. As regards the report submitted by the Commission concerning the inspection carried out between 27 October and 3 November 1986, the Court of First Instance found that it did not mention any comments by the Portuguese authorities. The same applied to the report of the inspection carried out between 28 September and 2 October 1987. It is true that the report concerning the inspection carried out between 26 and 29 July 1988 indicated that the Commission was contemplating reducing the Fund's contribution and, at the same time, refraining from requiring the repayment of sums already paid; however, that document does not show that the Portuguese authorities were given an opportunity to comment in that regard. [14]

29. The Court of First Instance reached the same conclusion in relation to two meetings in June 1988, on which the Commission had sought to rely. The Commission had referred, by way of evidence in respect of the first of those meetings, to the report of the inspection carried out between 26 and 29 July 1988, from which — as stated above — the Court of First Instance did not consider that it could be inferred that the Commission had given the relevant Member State an opportunity to comment. As regards the second meeting, the Court referred to a note drawn up after that meeting and sent by the Commission to the Portuguese authorities, which stated that, in the Commission's view, 'on-the-spot checks and/or answers to the additional questions' were called for. The Court of First Instance rejected the contention that the Commission could not already at that date have adopted a decision on which the Portuguese authorities could have submitted their comments. [15] The Court's view in that regard was further strengthened by a note of 19 October 1988 from the competent Member of the Commission which stated that, at the meeting in June 1988, the Commission had submitted to the Portuguese authorities certain proposals concerning 'comparable projects'. The Court rejected the contention that it had not been proven that those proposals had also been submitted in respect of the matter under consideration. [16]

30. On that basis, the Court of First Instance concluded that the Commission could not be considered to have fulfilled its obligation under Article 6(1) of Regulation

12 — See, for example, the judgment in Case C-304/89 *Oliveira* v *Commission* [1991] ECR I-2283, paragraph 17.

13 — Ibid. (footnote 1), paragraph 66.

14 — Ibid. (footnote 1), paragraphs 68 to 70.

15 — Ibid. (footnote 1), paragraph 72.

16 — Ibid. (footnote 1), paragraphs 73 and 74.

No 2950/83 to give the relevant Member State an opportunity to comment.

31. In opposition to this, the Commission pleads that the Portuguese authorities had knowledge of, and participated in, the inspections. It argues that they were therefore aware of the Commission's reservations, which were discussed during the course of those inspections. The solution ultimately chosen had already been discussed at a meeting between a Member of the Commission and the competent Portuguese Minister, and had again been proposed by the Commission in the course of the discussions in June 1988. There had been a continuous exchange of information, enabling the Portuguese authorities to have prior knowledge of, and to comment on, the basic elements of the decision subsequently adopted.

32. In my view, this ground of appeal cannot succeed. The Commission complains, in essence, that the Court of First Instance erred in its interpretation of the evidence submitted by it. As it correctly states in its reply, the issue in the present case is, in essence, whether the content of the evidence adduced by the Commission in the proceedings before the Court of First Instance was sufficiently certain to justify a finding that the Commission fulfilled its obligation to provide an opportunity for the submission of comments. The Court of First Instance answered that question in the negative. I am unable to regard that conclusion as erroneous.

33. The Commission does not contest the construction placed on the individual documents by the Court of First Instance. In its view, however, the Court paid insufficient heed to the context into which those documents fit. Consequently, the point at issue relates basically to the evaluation of evidence, which in my view cannot form the subject-matter of an appeal — the latter being restricted, as is well known, to questions of law. The position could only be otherwise if the Court of First Instance had committed an error of law in its evaluation of the evidence.

34. The Commission appears to regard as such an error of law the fact that the Court of First Instance required explicit proof of compliance with the obligation to provide an opportunity to comment. I cannot agree. The close cooperation between the Commission and the administrative authorities of the relevant Member State, on which the Commission places such weight, is inherent in the sphere under consideration here. If that in itself were to be regarded as constituting sufficient proof of the provision by the Commission, prior to the adoption of its decisions, of an opportunity for the relevant Member State to submit its comments, that would not accord with the nature of the obligation laid down in Article 6(1) of Regulation No 2950/83, constituting as it does an essential procedural requirement. As the applicants have rightly stated, the Commission's case in this regard is in essence limited to an assertion that it fulfilled that obligation, without its having submitted any concrete proof to that effect. That cannot be regarded as sufficient.

35. The Commission complains that the view expressed by the Court of First Instance amounts to a statement that compliance with the disputed obligation to provide an opportunity to comment can only be proved by the submission of documents referring expressly to Article 6(1) of Regulation No 2950/83. That is not correct. The Commission rightly asserts, it is true, that no special formalities are required in order to fulfil that obligation. However, as the applicants have correctly observed, that does not relieve the Commission from its duty to prove, where necessary, that the relevant Member State has been given an opportunity to comment. It is precisely that proof which is lacking here.

For the rest, the Commission wrongly relies on the judgment of the Court of Justice in Case C-199/91 [17] in order to justify its point of view. It is true that, in that judgment, the Court of Justice concluded from some of the documents before it that the Commission had fulfilled its obligation to provide an opportunity to comment in relation to *certain* of the projects in issue in that case. As regards the *rest* of the projects, however, it held that there was nothing in the documents to show that the Commission had given the Member State concerned an opportunity to comment on the decisions which it proposed to adopt. [18]

36. It follows that the second ground of appeal must also be rejected.

37. The appeal must therefore be dismissed. The decision on costs should be given in accordance with Articles 122, 118 and 69 of the Rules of Procedure of the Court of Justice.

C — Conclusion

38. I therefore propose that the appeal be dismissed and that the Commission be ordered to pay the costs.

17 — Case C-199/91 *Foyer Culturel du Sart-Tilman* v *Commission* [1993] ECR I-2667.

18 — Ibid. (footnote 17), paragraph 32.