OPINION OF ADVOCATE GENERAL MISCHO

delivered on 13 July 2000 [1]

1. Pursuant to Article 177 of the EC Treaty (now Article 234 EC), reference has been made to the Court of Justice of the European Communities by order of the Supremo Tribunal Administrativo of 27 October 1998, which was received at the Court Registry on 20 November 1998, for a preliminary ruling interpreting the provisions of Council Decision 83/516/EEC of 17 October 1983 on the tasks of the European Social Fund, [2] of Council Regulation (EEC) No 2950/83 of 17 October 1983 on the implementation of Decision 83/516/EEC on the tasks of the European Social Fund, [3] and of Commission Decision 83/673/EEC of 22 December 1983 on the management of the European Social Fund (ESF), [4] in the context of proceedings between Frota Azul-Transportes e Turismo Ld.ª ('Frota Azul'), a company governed by Portuguese law, and the Directora-Geral do Departamento para os Assuntos do Fundo Social Europeu (Director-General of the Department for European Social Fund Affairs, 'DAFSE'), representing the service responsible at national level for the financial management of activities to which the European Social Fund ('the ESF') has contributed.

Facts

2. In 1987, Frota Azul applied for financial assistance from the ESF and the Orgamento da Segurança Social (or 'OSS' — the Portuguese Social Security Fund) in order to carry out vocational training operations. When, in 1988, the operations for which it had obtained approval had been carried out, Frota Azul made a final payment claim to DAFSE for the balance of the national and Community assistance. The Director General of DAFSE certified the expenditure submitted and forwarded the claim to the ESF. Six years later, in 1995, DAFSE made it known that it was reviewing the claim for final payment of the balance and that the amounts it could certify were lower than those previously communicated to the Commission of the European Communities. It therefore concluded that it could not certify certain expenditure and ordered Frota Azul, without prejudice to any final decision which the Commission might adopt with regard to the final payment claim, to repay the sum of PTE 3 777 465, after adjusting the balances of ESF assistance and the OSS contribution.

3. Ruling on the action brought by Frota Azul against that decision, the Tribunal Administrativo do Círculo de Lisboa (Administrative Circuit Court, Lisbon)

1 — Original language: French.
2 — OJ 1983 L 289, p. 38.
3 — OJ 1983 L 289, p. 1.
4 — OJ 1983 L 377, p. 1.

annulled the decision of the Director General of DAFSE on the ground that the administrative measure certifying the accuracy of the facts and accounts was merely a technical check preparatory to the final decision which is a matter for the Commission, so that by finding certain items ineligible by referring to the criteria of reasonableness and proper financial management and by ordering the repayment of corresponding sums, DAFSE had gone beyond its powers.

4. DAFSE lodged an appeal before the Supremo Tribunal Administrativo, which has referred seven questions to the Court for a preliminary ruling; these will be reproduced below, after an outline of their legal background.

Legal background

5. The relevant basic provisions are those of *Decision 83/516*, of which two must be mentioned here:

Article 2 provides that:

'1. Fund assistance shall be given for operations carried out both by bodies governed by public law and bodies governed by private law.

2. The relevant Member States shall guarantee the successful completion of the operations...'

6. Article 5(1) provides that 'Without prejudice to the following paragraphs, Fund assistance shall be granted at the rate of 50% of eligible expenditure without, however, exceeding the amount of the financial contribution of the public authorities of the Member State concerned'.

7. On the same date, the Council adopted *Regulation No 2950/83*. This includes the following provisions, to which I shall mainly refer in answering the questions before the Court:

Article 5(4):

'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.'

Article 6(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.'

Article 6(2):

'Sums paid which are not used in accordance with the conditions laid down in the decision of approval shall be refunded. The Member State concerned should have secondary liability for the repayment of sums, unwarranted payment of which was made...'

Article 7(1):

'Without prejudice to any controls carried out by the Member States the Commission may make on-the-spot checks.'

Article 7(5):

'At the request of the Commission and with the agreement of the relevant Member State, checks may be carried out by the competent authorities of that State. Representatives of the Commission may participate in such checks.'

8. Finally, *Decision 83/673* was introduced, specifying that:

Article 1(2), first indent:

'Applications for:

— final payment under Article 5(4) of Regulation (EEC) No 2950/83 shall be submitted on the form set out in Annex 2.'

Article 6:

'1. Member States' payment applications must reach the Commission within 10

months of the date of completion of the operations concerned. No payment shall be made in respect of aid for which the application is submitted after the expiry of this period.

2. Advances must be reimbursed when the costs of the operation concerned cannot be justified on the form given in Annex 2 within three months of the expiry of the 10-month period laid down in paragraph 1.'

Article 7

'Where the management of an operation for which assistance has been granted is the subject of an investigation because of suspected irregularities, the Member State shall notify the Commission thereof without delay.'

The questions referred to the Court

9. The seven questions referred to the Court by the Supremo Tribunal Administrativo are as follows:

'1. Under Council Regulation No 2950/83, must a decision by a Member State not to certify the accuracy of the facts and accounts concerning a portion of the expenditure in respect of a training operation to which the European Social Fund (ESF) has contributed, on the ground that: it does not correspond to the actual cost of the goods and services on the domestic market; the prices of services exceed the maximum prices laid down in the Member State; the administrative costs charged are excessive; the quantities and types of materials used bear no relation to the operation or the quantities are not justified by that specific operation; or on similar grounds, be deemed to be a decision that the expenditure is ineligible, or is it, on the contrary, a decision which falls within the scope of negative certification of the accuracy of the facts and accounts in payment claims, pursuant to the second part of Article 5(4) of that regulation?

2. Does the reduction of the national contribution, decided upon by the competent national body when clearing and paying the final balance, as a result of non-certification of a part of certain expenditure on the grounds set out in the preceding question, entail, pursuant to the combined provisions of Article 5(4), the first part of Article 7(1) of the regulation and Article 5(1) and (5) of Decision 83/516, a corresponding proportional reduction in the amount of Community assistance, so that any reassessment by the Community authorities of the correctness or accuracy of the facts and accounts in respect of such expenditure, such as to enable the ESF none the less to make its full

contribution, serves no purpose and is not viable?

3. Likewise, where, having found serious irregularities vitiating the entire framework within which the financing was assessed and granted, a Member State decides, after receiving a claim for final payment of the balance pursuant to Article 5(4) of the regulation, to withdraw national assistance, despite the fact that some kind of training course was organised, or that the course was only a sham, does the body managing the ESF cease to have any discretion, and is there no justification for it to take a final decision, by virtue of the fact that any possibility of a Community contribution towards that course is irretrievably precluded, and that the withdrawal of assistance has even at Community level already taken effect in law, simply because the national body has taken a decision to that effect and because that preclusion follows necessarily and automatically, being contained in the abovementioned articles of the regulation and the decision, as well as in the rules set out in general terms in the aforementioned provisions of Community law, inasmuch as they govern participation in financing and contribution by the Fund since, in the circumstances set forth above, situations of that kind would no longer arise?

4. Must certification of the accuracy of the facts and accounts in payment claims be understood as excluding any assessment whatever as to whether the expenditure is justified by the operation actually carried out, the cost of goods and services on the domestic market, and the reasonableness of the costs charged within a complex structure, and therefore as requiring such assessment to be restricted to a formal verification that the expenditure submitted refers to approved expenditure, that the expenditure has remained within the overall ceilings of each item and that it is accounted for by formally acceptable documents in accordance with the applicable accounting rules?

5. Is the application to the expenditure incurred of substantive assessment criteria, namely, whether such expenditure corresponds to actual market prices, whether the administrative costs of the undertaking which carried out the training course have been properly charged, whether the use of a certain quantity or even a certain type of materials is unreasonable (e.g. materials more costly than others equally suitable) with a view to organising a specific training course, capable of reserving that power of assessment to Community bodies, with the result that those criteria must be identical and thus all traders within the Community be accorded equal treatment, with the implications which that entails for the interpretation and application of Article 5(4) of Regulation No 2950/83?

6. Does the power reserved to the Commission, to the exclusion of other bodies, to suspend, reduce or withdraw the Fund's assistance, laid down in Article 6(1) of the regulation, extend to the suspension, reduction or withdrawal of the national contribution by the national body which manages aid for training purposes?

Accordingly, if the competent national body is not precluded by Community law from suspending, reducing or withdrawing the national assistance, does the adoption of a decision of that kind after submission of the claim for final payment take immediate and automatic effect in respect of the corresponding proportion of the Community contribution and, in addition, does it allow the national body to demand the immediate repayment of the national contribution, or of the national contribution and the Community contribution?

Or else, is it an absolute requirement of Community law that the national body must restrict itself to not certifying certain expenditure and await a final decision from the Commission and can only then demand repayment of any amount advanced on account of final payment for the operation, since it is only then, on fulfilment of the precondition of the passing of time, that it is lawfully vested with power to make decisions regarding the recovery or repayment of sums paid or granted but not due?

7. May certification of the accuracy of the facts and accounts in claims for final payment in respect of training courses, as referred to in the second part of Article 5(4) of Council Regulation No 2950/83, be validly effected only by means of an entry in box 18 of the form set out in Annex 2 to Commission Decision 83/673 of 22 December 1983 when the claim for final payment is forwarded, pursuant to the first indent of Article 1(2) and Article 1(3) and (4) as well as Article 6(1) and (2) of the abovementioned decision, or do those provisions apply only to interdepartmental procedural formalities, of no external relevance since they are not essential, which do not make it impossible for the department concerned subsequently to issue a certificate which differs from the first certificate, either as a separate document or on a fresh form, provided that, in either case, it takes account of the legal nature of the measures in question and complies with the limits and conditions laid down by national law for making the relevant alteration?'

Introductory remarks

10. In setting out the grounds for its order for reference, the Supremo Tribunal Administrativo has explained the problem it is required to resolve in the following terms:

'The only matter to be decided in these proceedings is whether or not the court in the judgment under appeal was right to declare null and void the administrative measure of the Director General of DAFSE on the ground of lack of competence to refuse to certify certain expenditure and order the repayment of sums corresponding to part of the uncertified expenditure. The judgment under appeal started from the premiss that, since the Commission is the only body competent to approve applications for ESF financial assistance and, therefore, to decide on the eligibility of certain expenditure, the decision adopted by the Director General of DAFSE encroached upon the powers of the Commission and is thus vitiated by lack of competence.'

11. This definition of the problem leads me first to consider the exact meaning of the certification 'of the accuracy of the facts and accounts in payment claims', which the competent national body is being required to provide.

12. Must this certification be restricted to a formal verification of accounting documents (fourth question)? If certification relates to whether the expenditure is justified by the operation carried out, or whether the expenditure is substantiated, must it be reserved to the Commission (fifth question)?

13. Must a decision not to certify the accuracy of the facts and accounts concerning a portion of the expenditure, on the ground that it is not justified, be deemed to be a decision as to the ineligibility of this expenditure (first question)?

14. I shall then go on to consider whether the competent national authority is free to decide to reduce or withdraw national assistance and, if the answer is yes, whether such a decision involves automatic consequences for Community financing of the subsidy (second and third questions). Conversely, does the power reserved to the Commission by the relevant provisions to suspend, reduce or withdraw the Fund's assistance extend to the 'national contribution' (first part of the sixth question)?

15. The referring court is also uncertain whether the competent national body can ask for repayment of national assistance and the ESF contribution before the Commission has taken its final decision (second part of the sixth question).

16. Finally, I will have to give an answer to the question of whether, after having carried out certification (effected by means of an entry in box 18 of the form annexed to Decision 83/673), the competent national body may subsequently carry out further checks and forward them to the Commission in another form (seventh question).

The fourth and fifth questions

17. In the fourth and fifth questions, the referring court is enquiring whether certification 'of the accuracy of the facts and accounts in claims for final payment' must be understood 'as excluding any assessment whatever as to whether the expenditure is justified by the operation actually carried out, the cost of goods and services on the domestic market, and the reasonableness of the costs charged within a complex structure, and therefore as requiring such assessment to be restricted to a formal verification that the expenditure submitted refers to approved expenditure, that the expenditure has remained within the overall ceilings of each item and that it is accounted for by formally acceptable documents in accordance with the applicable accounting rules'. Should an assessment that goes beyond this formal verification and relates to the substantive expenditure not be reserved to Community bodies, with the result that the criteria applied be identical and thus that all traders be accorded equal treatment, with the implications that entails for the interpretation and application of Article 5(4) of Regulation No 2950/83?

18. In that regard, the Portuguese government considers that certification cannot be reduced to a simple accounting check, but that it necessarily involves an assessment of whether the expenditure in payment claims is eligible, 'so as to be able to demonstrate to the Commission the veracity and legality of the items set out therein, with the result that the real costs of the operation are the same as the certified costs'.

19. For its part, the Commission has pointed out that all recipients of ESF assistance must sign an document accepting the Commission's decision, and that this includes *inter alia* the recipient's declaration that 'the assistance granted will be used in accordance with the relevant national and Community provisions and also in compliance with all the particulars that played a decisive part in the adoption of the decision granting approval of the abovementioned proposal...'.

20. The Commission goes on to take a view similar to that of the Portuguese Government, maintaining that 'it is the responsibility of the Member State to check whether the assistance allocated has been used according to the criteria of legality and in compliance with conditions laid down for the manner in which the operation shall be carried out'. However, it adds that the Member State's certification decision is nonetheless not binding on the Commission and cannot prejudice its final decision,

since the Commission may, if it so wishes, carry out its own checks and ask the Member State for material justifying the certification specified in Article 5(4) of Regulation No 2950/83 (see Article 7(3) of the regulation).

21. Subject to this reservation, the Commission concludes that 'the certification of the accuracy of the facts and accounts carried out by the Member State must include a full assessment as to whether the expenditure is justified by the operation actually carried out, the cost of goods and services on the domestic market, and the reasonableness of the costs charged within a complex structure'. The Member State must check whether there has been sound financial management of public funds and whether the cost/efficiency rule has been observed.

Assessment

22. I can only endorse the opinions of the Portuguese Government and the Commission.

23. Community assistance programmes are always implemented through Member States and the bodies they designate for that purpose. These bodies are close to the recipients of assistance and therefore they are much better able than the Commission to check on the conditions in which the operation subsidised by the Community has been carried out. This is why Article 5(4) of Regulation No 2950/83 provides first and foremost that 'Final payment claims shall contain a detailed report on the content, results and financial aspects of the relevant operation'.

24. If the competent national body had to restrict itself to formal certification of the accuracy of accounting documents, it would not play a very useful role. In those circumstances, the Commission would, in every case, have to send out inspectors (instead of making sample checks) in order to ascertain whether the subsidised training programme had actually been carried out correctly.

25. Moreover, since under Article 2(2) of Decision 83/516 the Member States must guarantee the successful completion of operations to which a contribution has been made, certification cannot be reduced to a simple accounting check.

26. For its part, the Court of First Instance has already confirmed, in Case T-271/94 *Branco* v *Commission*,[5] that 'according to Article 7(1) of the regulation, both the Commission and the Member State concerned may check the use to which the aid is put...'.

5 — [1996] ECR II-749, paragraph 4.

27. In an identical context, the Court of First Instance also rightly held, in Case T-72/97 *Proderec* v *Commission*,[6] that '... it is undisputed that both Portuguese and Community law make the use of public funds subject to a requirement of sound financial management'.

28. The Court continued by stating, in paragraph 88, that 'application of the criterion based on "reasonableness" and "sound financial management"... falls squarely within the context of the check which the Member State is required to carry out over and above mere factual and accounting certification, in accordance with Article 7 of Decision 83/673, where it suspects the existence of irregularities, fraudulent or otherwise'.

29. Does this definition of the role of national bodies carry the risk that the same criteria will not be applied in all Member States and that all traders within the Community will not be accorded equal treatment?

30. I share the opinion of the Portuguese Government and the Commission that it does not.

31. As the Commission has pointed out, the criteria used in assessing expenditure set out in claims for final payment, *inter alia* sound financial management and observance of cost/efficiency criterion, are generally applicable in all Member States and upheld by Community legislation. These criteria are provided for in Article 2 of the Financial Regulation of the European Communities and they are therefore directly applicable in all Member States.

32. It should also be added, as the Commission has stated in regard to the fourth question, that the Member State's certification is not binding on the Commission, nor can it prejudice its final decision.

33. In its judgment in Case C-32/95 P *Commission* v *Lisrestal and Others*,[7] the Court expressed the following view:

'Furthermore, although a decision to suspend, reduce or withdraw Community assistance may sometimes reflect an assessment and evaluation by the competent national authorities, under Article 6(1) of Regulation No 2950/83 it is the Commission which adopts the final decision and

6 — [1998] ECR II-2847, paragraph 87.

7 — [1996] ECR I-5373, paragraph 29.

takes sole legal liability for such a decision as against the beneficiaries.'

34. For its part, the Court of First Instance has explained that 'any certification under Article 5(4) of Regulation No 2950/83 must be regarded as being by its nature an operation carried out by Member States subject to all reservations'. [8]

35. Where the competent body of the Member State has wrongly granted or refused certification of a certain expenditure, the Commission therefore still has the opportunity to correct the mistake.

36. The risk mentioned by the referring court, that all traders in the Community will not be accorded equal treatment, is thus excluded.

37. I therefore propose that the Court give the following answer to the fourth and fifth questions together.

38. Certification of the accuracy of the facts and accounts in claims for final payment must be understood as including any assessment of whether the expenditure is justified or substantiated.

The first question

39. In this question, the national court is asking whether the decision by a Member State not to certify the accuracy of the facts and accounts concerning a portion of the expenditure, on the ground that it is not justified or is disproportionate, must be deemed to be a decision that such expenditure is ineligible.

40. The Portuguese Government has pointed out in this regard that Article 5 of Regulation No 2950/83 refers deliberately to 'certification'. It is not merely a matter of assessment or evaluation.

41. This is because, 'when presented with a claim for final payment, the Member State does not simply express an opinion, but considers thoroughly what is acceptable and what should be refused, playing the role of first monitoring authority'.

42. It also takes the view that DAFSE's refusal to certify a portion of the expendi-

8 — *Proderec*, cited above, paragraph 74.

ture actually constitutes a decision that this expenditure is ineligible, so that the Commission can no longer entertain the eligibility of such non-certified expenditure but must restrict itself to assessing expenditure certified by DAFSE.

43. As far as the concept of 'ineligible expenditure' is concerned, the Portuguese Government has pointed out that this does not relate exclusively to the abstract definition of the type of expenditure eligible for financing under Article 1 of Regulation No 2950/83, but is also used to identify all expenditure that cannot be taken into consideration when clearing the final balance.

44. The Commission has observed that, when certifying the accuracy of the facts and accounts in claims for final payment, the competent body of a Member State may be faced with two types of situation:

(a) it may discover expenditure that can immediately be regarded as ineligible, since it does not belong to the type of expenditure provided for in Article 1 of Regulation No 2950/83; in those circumstances, such expenditure is excluded from the claim for final payment at this first review;

(b) it may discover expenditure that cannot be regarded as using ESF assistance in accordance with the conditions laid down in the decision of approval, pursuant to Article 6(1) of Regulation No 2950/83.

45. In the second situation, the expenditure concerned is inherently eligible for operational financing, but is nevertheless to be regarded as ineligible for the purposes of final payment, since it has not been incurred in accordance with the conditions laid down in the decision of approval or in conformity with the criteria of legality, sound management and cost/efficiency, provided for in national and Community legislation.

46. Therefore, in the second situation — which in any case is the most frequent — the expenditure that cannot be certified is expenditure eligible for the purposes of financing the operation, but which, because of the way it has been incurred, cannot be accepted for final payment.

47. Consequently, for the purposes of certifying the accuracy of facts and accounts in payment claims under the second sentence of Article 5(4) of Regulation No 2950/83, DAFSE classifies expenditure into eligible expenditure and expenditure that is ineligible in the two senses — narrow and broad — defined in paragraphs (a) and (b) above.

Assessment

48. In my opinion, the observations of the Portuguese Government and the Commission show convincingly that a Member State's decision to refuse certification of certain expenditure clearly concerns the ineligibility of such expenditure in respect of the operation for which the ESF assistance had been granted.

49. However, as we have seen in relation to the fourth and fifth questions, the Member State may only make a proposal in this regard, since the Commission alone 'may suspend, reduce or withdraw the assistance' (Article 6 of Regulation No 2950/83).

50. Contrary to the opinion expressed by the Portuguese Government, therefore, the expenditure in question will actually become ineligible only from the time when the Commission decides that it is. This means that the Member State should also provide the Commission with explanations as to why it did not feel able to certify certain expenditure.

51. I therefore propose that the Court reply to the first question that a decision by a Member State not to certify the accuracy of the facts and accounts concerning a portion of the expenditure in respect of a training operation to which the ESF has contributed must be deemed to be a proposal directed to the Commission that the expenditure be regarded as ineligible.

The second and third questions and the first part of the sixth question

52. In its second question, the referring court is essentially asking whether the reduction of the national contribution decided upon by the competent national body as a result of its decision not to certify certain expenditure entails a corresponding proportional reduction in the amount of Community assistance, because any re-assessment by the Community bodies of the correctness or accuracy of the facts and accounts in respect of such expenditure would now serve no purpose and could not be made.

53. In setting out the grounds for its decision to refer the question, the national court has explained its position as follows:

'... if, in exercising its own power to certify that the amount of expenditure submitted is substantively correct, the competent national body does not certify the factual accuracy of certain expenditure, or any part

thereof, then *in terms of the national contribution*[9] the matter would seem to be settled once and for all, without any further measure being required (especially by the Commission) and without any need to await a final decision on the part of the Commission on the balance. *As regards the ESF's contribution*,[10] it would appear that the amount of Community assistance is irrevocably reduced to the amount positively certified, and *co-financing of the non-certified portion is thereby excluded*,[11] so that there is no encroachment on the powers of the Community body normally competent to reduce assistance'.

54. In its third question, the national court then raises the point as to whether, similarly, the Commission ceases to have any discretion and no longer has any need to take a final decision, where the Member State, upon receiving a claim for final payment of the balance, has decided to withdraw national assistance *completely*.

55. Finally, in the first part of the sixth question, the Supremo Tribunal Administrativo is enquiring whether, conversely, the power reserved to the Commission to suspend, reduce or withdraw ESF assistance extends to the 'national contribution'.

56. Essentially, it would suffice to answer this point to the effect that, since the final decision on ESF assistance may be taken only by the Commission, there can be no question of the Member State reducing or withdrawing its national contribution before that decision. *A fortiori* it is inconceivable that a Member State could, so to speak, present the Commission with a fait accompli by deciding in its stead to reduce or withdraw Community assistance. The Court may decide to opt for this brief answer.

57. However, as the Portuguese Government has taken the opposite view, I consider that the Advocate General has a responsibility to express a more detailed opinion on these questions.

58. The Portuguese Government takes the view that the refusal to certify certain expenditure and the subsequent refusal to allocate national funding automatically give rise to a corresponding decision not to provide ESF assistance.

59. It takes this view on the basis that the Member State has exclusive power to grant national funding, which prevents the Commission from approving expenditure and from requiring participation in financing expenditure that the Member State has found to be unjustified.

9 — Emphasis added.
10 — Emphasis added.
11 — Emphasis added.

60. Furthermore, if the Commission were to approve such expenditure, it would be infringing the provisions of Article 5(1) of Decision 83/516, since 'the funding structure of an operation, laid down in the decision granting approval of an application for assistance, follows specified contribution rates for each of the contributing bodies (the ESF and the OSS), which are not open to modification, even where the amounts to be financed vary (see Article 5 of Decision 83/516 and Article 3 of Regulation No 2950/83, as amended by Regulation No 3823/85)'.

61. The Portuguese Government further takes the view that, 'if the Member State itself, which is ultimately presumed to have an interest in generating Structural Fund payments, has already taken the initiative in declaring that a portion of the claim is unjustified, it serves no purpose to overburden the Commission by requiring it to assess that portion of the claim as well'.

62. The Commission, on the other hand, considers that 'there cannot be a reduction in national assistance decided by the competent national body' and that 'likewise, such an interpretation cannot be inferred from Article 5(4) of Regulation No 2950/83'.

63. The Commission has explained that, on the contrary, 'the competent national body, in this case DAFSE, in practice puts forward a proposal to reduce funding, which relates to the national contribution and to the Community contribution and which is subject to a final decision by the Commission, which does not relate to ESF assistance'.

64. The Commission adds that a refusal of certification necessarily relates to the overall sum allocated to the operation concerned and extends proportionally to the Community assistance and the national contribution, which is always determined in relation to this Community assistance.

Assessment

65. It is certainly the case that the ESF acts only at the request of a Member State and that, under Article 5(1) of Decision 83/516, ESF assistance may not exceed the amount of the financial contribution of the public authorities of the Member State concerned.

66. It is also true that 'At the request of the Member State concerned, submitted in good time, the payment of the advances referred to in paragraphs 1 and 2 [of Regulation No 2950/83] shall be suspended'. The question remains whether, beyond this stage, the Member State may still unilaterally reduce or withdraw its contribution. Like the Commission, I do not think this is possible.

67. As long ago as 1984, the Court stated that, when a Member State submits a request for joint funding of a project to the Commission, the Member State undertakes at that time to assume a financial burden equal to the amount requested from the ESF. [12]

68. As from then, a partnership is established between the Member State and the Commission, meaning that all subsequent decisions are to be taken in close consultation.

69. Therefore, 'Where an operation for which an application for assistance has been submitted or assistance has been granted cannot be carried out or can be carried out only in part, the Member State shall notify the Commission thereof without delay' (Article 5 of Decision 83/673).

70. Similarly, 'Where the management of an operation for which assistance has been granted is the subject of an investigation because of suspected irregularities, the Member State shall notify the Commission thereof without delay' (Article 7 of the same decision).

71. Finally, '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' (Article 6(1) of Regulation No 2950/83).

72. It is true that, as we have seen, the Member State itself may make a proposal to reduce or withdraw assistance, either by refusing, at the time of the claim for final payment of the balance, to certify a portion of or the whole expenditure, or by proposing the reduction or withdrawal of ESF funding, following checks carried out after payment of the whole of the national and Community assistance.

73. However, even in this situation, 'under Article 6(1) of Regulation No 2950/83 it is the Commission which adopts the final decision and takes sole legal liability for such a decision as against the beneficiaries'. [13]

74. Therefore, if the Member State were able, after finding irregularities, to reduce or withdraw its contribution unilaterally, at the same time quoting to the Commission the rule under which ESF assistance may not exceed the amount of the national contribution, it would monopolise the final decision on reduction or withdrawal of ESF

12 — Case 310/81 *EISS* v *Commission* [1984] ECR 1341, paragraph 14.

13 — *Commission* v *Lisrestal*, cited above, paragraph 29.

assistance, to the detriment of the Commission.

75. In my view, therefore, it was right for the Court of First Instance to reject in *Branco* [14] the argument defended by the Commission at the time that it was not for the Commission to take a decision to reduce aid where the national authority considered certain expenditure to be ineligible and repaid to the Commission the advances improperly paid to the recipient.

76. As the Court of First Instance made clear in paragraph 40 of the same case, 'it is for the Commission, and not the Member State, to determine whether the expenditure incurred by the recipient meets the conditions imposed in the decision granting approval, the Member State being required solely to cooperate with the Commission to ensure observance thereof'.

77. When the Commission, following the Member State's proposal to that effect, decides that the expenditure in question is ineligible, consequences will automatically and immediately follow, in relation to both the level of the ESF contribution and the level of the national contribution.

14 — Cited above, paragraphs 38 and 39.

78. Thus, I would reply in the affirmative to the part of the sixth question in which the referring court is enquiring whether the power reserved to the Commission extends to the suspension, reduction or withdrawal of the national contribution.

79. I should also point out that, in my opinion, and contrary to what the Portuguese Government appears to consider, there can hardly be any need to fear that the Commission will insist on continuing, come what may, joint financing through the ESF of expenditure that the Member State considers excessive or fraudulent, since one of the Commission's tasks is precisely to avoid Community funds being misspent.

80. However, borderline cases may occur, in which the gravity of the infringement and the size of the reduction in the contribution that should result from it may require sensitive assessment, notably as regards the principle of proportionality. The fact that the competent national body and the Commission are obliged by the system to compare their views in that respect protects the legitimate interests of the recipient of assistance. Should the need arise, the Community courts will have to resolve the issue.

81. In the light of the above observations, I propose that the Court give the following

answer to the second and third questions and the first part of the sixth question:

'The reduction or withdrawal of a contribution, proposed by the competent national body, remains subject to a final decision by the Commission, relating to the portion of the contribution that concerns ESF assistance. This final decision will affect the national contribution.'

The sixth question

82. In the sixth question, the national court goes on to enquire whether, assuming that the competent national body is not precluded by Community law from suspending, reducing or withdrawing the national assistance, the adoption of a decision of that kind after submission of the claim for final payment takes immediate and automatic effect in respect of the corresponding proportion of the Community contribution and, in addition, whether it allows the national body to demand the immediate repayment:

— of the national contribution;

— of the national contribution and the Community contribution.

83. I have explained above that the premisses on which this question is based cannot be accepted.

84. It follows that it is only from the time when the Commission's final decision takes effect that the national body may *irrevocably* claim the total or partial reimbursement of the national contribution and the Community contribution from the recipient of assistance.

85. On the other hand, as the Commission has pointed out, Community law does not prevent the competent national body from claiming *provisionally* from the recipient reimbursement of what it considers to be an overpayment even before the Commission's decision, for example when there is reason to fear that the recipient will become bankrupt.

86. The Member State's aim to secure reimbursement of the national assistance improperly paid to the beneficiary is of course understandable. Moreover, under Article 6(2) of Regulation No 2950/83, 'The Member State concerned should have secondary liability for the repayment of sums, unwarranted payment of which was made... [by the ESF]'. It may therefore have a legitimate interest in ensuring that it does not remain liable for reimbursement of these sums in the end.

87. For all these reasons, therefore, I propose that the Court decide, as the Commission has done, 'that there is no provision in Community legislation preventing the Member State from demanding immediate repayment of the national contribution and/or the Community assistance, after the final claim for payment has been forwarded to the Commission, subject to the reservation that its decision is taken without prejudice to the Commission's final decision', and that the issue of whether the Member State is in a position to demand such reimbursement subject to a reservation 'is an issue of domestic law which must be settled at national level'.

The seventh question

88. In the seventh question, the referring court is essentially asking whether certification of the accuracy of the facts and accounts in claims for final payment in respect of training courses, as referred to in the second sentence of Article 5(4) of Council Regulation No 2950/83, may be validly effected only by means of an entry in box 18 of the form set out in Annex 2 to Commission Decision 83/673 when the claim for final payment is forwarded, or whether the competent national body may subsequently issue a certificate which differs from the first certificate, either as a separate document or on a fresh form.

89. The Portuguese Government is of the opinion that the time-limit provided for in Article 6(1) of Decision 83/673 applies only to the forwarding of final payment claims, but does not oblige Member States to forward the certification of the data contained in the payment claims at the same time.

90. It maintains that DAFSE may, therefore, make its certification decision as long as the Commission, which is not subject to any time-limit, has not ruled on the final payment claims.

91. The Commission, for its part, has pointed out that, in this case, while DAFSE performed the controls that it is empowered to exercise under Article 7(1) of Regulation No 2950/83 [15]... by means of checks and/or additional investigations, it did not carry out certification pursuant to Article 5(4) of Regulation No 2950/83. In this respect, the Commission refers to *Proderec* (cited above), according to which 'any certification under Article 5(4) of Regulation No 2950/83 must be regarded as being by its nature an operation carried out by Member States subject to all reservations. A different interpretation would undermine the effectiveness of Article 7 of Decision 83/673, which requires Member States to give notice of irregularities found in the management of operations to be financed through the ESF'.

15 — The Commission has obviously cited Article 7(1) of Regulation No 2950/83 in error. In fact, the provision in question is Article 7 of Decision 83/673.

92. According to the Commission, 'certification of the accuracy of the facts and accounts in claims for final payment in respect of training courses, as referred to in the second sentence of Article 5(4) of Regulation No 2950/83, does not prevent a Member State from conducting a review after the final payment claim has been made and from submitting to the Commission, if necessary, a revised final payment claim proposing a reduction in assistance'.

Assessment

93. It follows from Article 1 of Decision 83/673 that the Commission may make a decision on final payment claims only on the basis of the forms on which these claims must be submitted to the national body and forwarded to the Commission. That is an essential procedural requirement, since final payment claims that are not submitted on the forms set out in Annex 2 to Decision 83/673 are inadmissible. [16]

94. Annex 2 of Decision 83/673 contains the standard form that the recipient body must complete if it wishes to obtain payment of the balance of the assistance granted. It is this form that must be forwarded to the national body in order to enable the latter to carry out the certification specified in Article 5(4) of Regulation No 2950/83. Box 18 of the form is specially reserved for that purpose.

95. The Court of First Instance has pointed out, in paragraph 68 of its judgment in *Proderec*, that:

'Where a beneficiary forwards a claim for payment of the balance of ESF aid to the competent authorities of a Member State, there are three attitudes which the latter may adopt. They may forward the claim as it stands, certifying the factual and accounting accuracy of all the expenditure submitted. They may also forward the claim to the Commission stating that they certify the factual and accounting accuracy of only part of the data submitted... Finally, they may do nothing, at the risk of causing the beneficiary's right to receive the as yet unpaid amount of the Community aid granted to him to expire, if the inaction of the national authorities of the Member State extends beyond the time-limit laid down for that purpose by Article 6(1) of Decision 83/673. As the applicant maintains, the absence of factual and accounting certification for expenditure thus constitutes a final decision on financing, *given that the power of certification provided for in Article 5(4) must be exercised within a certain period*.' [17]

16 — See, for similar grounds, Case C-213/87 *Gemeente Amsterdam and VIA* v *Commission* [1990] ECR I-221, concerning the admissibility of claims for assistance.

17 — Emphasis added.

96. In this regard, Article 6 of Decision 83/673 provides that applications for final payment must reach the Commission within ten months of the date of completion of the training operations concerned and that no payment shall be made in respect of aid for which the application is submitted after the expiry of this period.

97. Therefore, as certification must take place within that time-limit and be set out in the box reserved for it on the form claiming final payment set out in Annex 2 to Decision 83/673, it is not surprising that the national body, faced with a flood of final payment claims, finds itself caught between the obligation to check the validity of the expenditure set out in the claim, having regard to the Member State's responsibilities, and the obligation to certify the claim and forward it to the Commission, failing which the claim will become inadmissible.

98. That throws light on the Court's reasons for endorsing, in its order of 12 November 1999 in *Branco* v *Commission*, [18] the reasoning followed by the Court of First Instance in its judgment in the case between those parties given on 15 September 1998. [19]

18 — Case C-453/98 P [1999] ECR I-8037.

19 — Case T-142/97 [1998] ECR II-3567.

99. Paragraphs 77 and 78 of that order read as follows:

'77 As the Court of First Instance stated in paragraph 48 of the judgment under appeal, Article 6 of Decision 83/673 provides in this regard that applications for final payment must reach the Commission within 10 months of the date of completion of the training operations and that no payment may be made in respect of aid for which the application is submitted after the expiry of that period. As the Court of First Instance rightly held, if checks to establish conformity could be made only before certification that the facts and accounts in a final payment claim were accurate, the Member State might not be in a position to submit that claim to the Commission within the above 10-month period, with the result that final payment of the aid could not be made. The Court of First Instance therefore rightly concluded that, in some cases, certification of the accuracy of the facts and accounts in a final payment claim prior to a check to establish conformity or before its completion might be in the interest of the aid recipient.

78 It was therefore permissible for the Court of First Instance to state that there was nothing to preclude the DAFSE from having recourse to a professional auditing body such as the IGF in order to check, following the certification date, the accuracy of the facts and accounts in the final payment claim.'

100. In reviewing the file and amending its previous assessment, DAFSE did not, as the Commission has pointed out with good reason, carry out a second certification of the accuracy of the facts and accounts pursuant to Article 5(4) of Regulation No 2950/83.

101. On the other hand, DAFSE did perform the controls that it is empowered to exercise under Article 7 of Decision 83/673. This power is not subject to the time-limit provided for in Article 6 of Decision 83/673 and may therefore be exercised after certification of the final payment claim, if checking prior to forwarding of the final payment claim by the recipient would have exposed DAFSE to the risk of incurring the abovementioned time-bar.

102. Consequently, I propose that the Court reply to the seventh question that certification of the accuracy of the facts and accounts in claims for final payment in respect of training courses, as referred to in the second sentence of Article 5(4) of Regulation No 2950/83, may be validly effected only by means of an entry in box 18 of the form entitled 'Claim for final payment from the European Social Fund', as set out in Annex 2 to Decision 83/673. However, this certification does not prevent a Member State from conducting a review after the final payment claim has been made and from submitting to the Commission, if necessary, a revised final payment claim proposing a reduction in assistance.

Conclusion

103. Having regard to all the above considerations, I propose that the Court give the following answers to the questions referred by the Supremo Tribunal Administrativo:

The fourth and fifth questions

Certification of the accuracy of the facts and accounts in claims for final payment must be understood as including any assessment as to whether the expenditure is justified or substantiated.

The first question

The decision by a Member State not to certify the accuracy of the facts and accounts concerning a portion of the expenditure in respect of a training operation to which the ESF has contributed must be deemed to be a proposal, directed to the Commission, that the expenditure be regarded as ineligible.

The second and third questions and the first part of the sixth question

The reduction or withdrawal of a contribution, proposed by the competent national body, remains subject to a final decision by the Commission, relating to the portion of the contribution that concerns European Social Fund assistance. This final decision will affect the national contribution.

The sixth question

Community legislation does not prevent the Member State from demanding immediate repayment of the national contribution and the Community assistance after the final claim for payment has been forwarded to the Commission, without prejudice to the Commission's final decision. Subject to this reservation, the question raised is an issue of domestic law, which must be settled at national level.

The seventh question

Certification of the accuracy of the facts and accounts in claims for final payment in respect of training courses, as referred to in the second sentence of Article 5(4) of Council Regulation (EEC) No 2950/83 of 17 October 1983 on the implementation of Decision 83/516/EEC on the tasks of the European Social Fund may be validly effected only by means of an entry in box 18 of the form entitled 'Claim for final payment from the European Social Fund', as set out in Annex 2 to Commission Decision 83/673/EEC of 22 December 1983 on the management of the European Social Fund (ESF). However, this certification does not prevent a Member State from conducting a review after the final payment claim has been made and from submitting to the Commission, if necessary, a revised final payment claim proposing a reduction in assistance.