which had been planned to take place over a three-year period meant that the programme was carried out in circumstances different from those originally announced, and the fact that the same course was repeated over three years removed the innovatory nature of the operation. In those circumstances Article 6(1) of Regulation No 2950/83 made it necessary for the Commission to withdraw the decision of approval, which was rendered unlawful by a substantive modification of the original project.

3. A series of conditions regarding the illegality of the alleged conduct of the institutions, the reality of the damage and the existence of a causal link between the conduct of the institution and the alleged damage must be met for the Community to incur liability within the meaning of the second paragraph of Article 215. If the conduct of the institution which is alleged to have caused the damage was in no way illegal, a claim for damages must be dismissed, without any inquiry into whether the remaining conditions are met.

REPORT FOR THE HEARING
in Case C-200/89 *

Legal background to the dispute

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

Article 3 of that decision provides:

'1. Fund assistance may be granted for operations carried out within the framework of Member States' labour-market policies. These operations shall include in particular those intended to improve employment opportunities for young people, notably by means of vocational training measures after completion of full-time compulsory schooling.

2. Fund assistance may also be granted for specific operations carried out with a view to:

(i) encouraging the implementation of innovatory projects, as a general rule within the framework of a programme of action adopted by the Council, . . .

. . . '

* Language of the case: French.

1 — OJ 1983 L 289, p. 38.

Article 5 of Council Regulation (EEC) No 2950/83 of 17 October 1983 on the implementation of the abovementioned decision [2] provides:

'...

2. 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.

...

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.

...'

Finally, Article 6 of the abovementioned Regulation provides:

'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 ...'

2 — OJ 1983 L 289, p. 1.

Facts and written procedure

In September 1983, Funoc — Association pour le développement à Charleroi d'actions collectives de formation pour l'université ouverte (Association for the development in Charleroi of collective training projects for the open university) — submitted to the Fund an application for assistance for an innovatory project within the meaning of Article 3(2) of Decision 83/516, cited above, spread over three years (1984, 1985 and 1986) with the aim of providing training in new information technology for young people in the Charleroi area with limited qualifications.

In its description of the proposed training programme and its essential innovatory features, Funoc planned:

'The creation of a scientific production cooperative to carry out research and survey work of general interest: an observatory of regional economic, social and educational data able to satisfy the needs and enquiries of members of the community (a community research workshop). For that purpose, 90 young people with limited qualifications will be given appropriate training in research methods and techniques, with intensive use of data processing (1 000 hours per trainee). The availability of microcomputers today makes it possible to train those with limited qualifications in survey methods, data capture, the production and processing of

statistics etc. — all basic steps of scientific research.

From the outset, therefore, this will be a training-production operation in which young people will be working on full-scale scientific surveys providing results to be integrated directly into the dynamics of local development.

Regional problems in the fields of education, employment, the environment, drugs, living conditions, etc. will thus be defined and analysed by these young people with limited qualifications, under the supervision of teachers and researchers.

At the end of the three-year period, Funoc will have created a scientific production cooperative operating as a permanent observatory of regional social and educational data.

The radically innovative approach lies in the intention to take advantage of the possibilities afforded by microcomputers to lay the foundations for a veritable community research workshop and thus to bring research closer to the people involved. Research is too often produced outside the community and is thus not integrated into the dynamics of local development.

The fact that young people with limited qualifications will be fully involved in the project will make it possible to establish a dialectical link between research and the community.'

The project presented by the applicant was to comprise three phases:

'1984: participants will acquire the skills required for the collection, coding and basic pre-processing of data, all basic research functions. At the same time, they will be given intensive training in the use of microcomputers. The duration of the training will be 600 hours;

1985: participants will pursue their individual training on a part-time basis to acquire essential back-up skills, while at the same time becoming operational through full-scale application of the methods and techniques previously learned. They will be involved in research centring on community problems. The duration of the training will be 200 hours. Scientific supervision is guaranteed in addition for the research work;

1986: participants will carry out survey and research work of interest to the community and will be able to reply to enquiries from members of the community; specific training courses will be run to cater for problems encountered. The duration of the training will be 200 hours. Scientific supervision will be maintained; trainees will also be provided with teaching back-up to help with setting up the scientific production cooperative or with looking for a job.'

After a meeting with the promoter on 12 June 1984 at the Fund's offices, the Commission received a note from Funoc on 15 June 1984 providing further details of the project presented to supplement the initial application.

The project, reference No 84 3246 B5, was approved for the amount applied for — BFR 16 500 000 — by Commission Decision C(84) 1076 of 23 July 1984.

An initial 'advance' of BFR 4 950 000 (30% of the amount approved) was paid in December 1984, and a second 'advance' of BFR 4 950 000 in May 1987.

In May 1987, a request for payment of the balance of BFR 6 600 000 was submitted via the Belgian Ministry of Labour and Employment, together with all the supporting documents and the completion report.

On 6 June 1988, Funoc received a registered letter from the Ministry of Labour and Employment forwarding a note from the Commission together with an explanatory letter. The Commission requested the reimbursement of the BFR 9 900 000 advanced on the ground that, according to the completion report, the promoter had decided as early as January 1984 to modify the project without informing the Fund, and that the modification was in conflict with the initial structure of the project.

On 10 June 1988, Funoc wrote to the Ministry of Labour and Employment requesting a re-examination of the file and a review of the Commission's decision.

On 30 June 1988, the Ministry of Labour and Employment asked the Fund for further details and stated its reservations as to the decision taken.

By letter of 16 September 1988, the Commission confirmed that, before the first stage of training in March 1984 and without requesting approval of the modification, Funoc had significantly modified its project with the result that the training modules were repeated.

In the meantime, by letters of 16 August 1988 and 2 February 1989, the Belgian Ministry of Social Affairs and Finance Ministry also submitted their observations.

By letter of 21 April 1989 to the Ministry of Labour and Employment, the Fund reduced its demand for the reimbursement of the advances of BFR 9 900 000 paid to Funoc to BFR 6 579 334.

In that letter, the Fund stated:

'The improvements and adjustments made to each successive training programme were at no time provided for in the initial application or approved in Commission Decision C(84) 1076 of 23 July 1984. The accompanying list of trainees clearly shows, however, that there were three separate training programmes (although involving two groups of 15) each comprising 30 trainees.

Where a specific operation is involved, the first programme is the only part of the operation able to meet the criterion of non-repetitivity.

Since the present case involves an experimental operation, the ESF could, as a purely exceptional step, take into consideration the first year which, had we been informed of it within the prescribed period, could have made it possible to approve of that part of the operation.

In order to dispose of this file rapidly, we have drawn up the following revised calculation:

Eligible amount approved for the first year:

1984: 6 641 331, 50% ESF: 3 320 666,

Advances received	9 900 000
ESF	— 3 320 666
Amount to be refunded	6 579 334.'

That letter was passed on to Funoc under cover of a letter from the Ministry of Labour and Employment of 2 May 1989.

By application lodged at the Court Registry on 26 June 1989, the applicant brought an action under Article 173 of the EEC Treaty seeking a declaration that the decision was void, together with a claim for compensation under Article 178 of the Treaty.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, by decision of 21 February 1990, the Court assigned the case to the Second Chamber in accordance with Article 95 of the Rules of procedure and opened the oral procedure without any preparatory inquiry.

Conclusions of the parties

The *applicant* claims that the Court should:

(i) declare the application admissible and well founded;

(ii) consequently, declare void the Commission Decision of 21 April 1989 ordering the applicant to reimburse BFR 6 579 334 and withholding payment of the balance (BFR 6 600 000) in the context of project No 84 3246 B5 of the Fund;

(iii) order the defendant to pay BFR 10 730 173 in compensation for material damage, together with interest at the rate of 8% to be applied at the time of judgment or of payment on the amounts involved in the 1987 files as from 27 July 1989, and BFR 5 000 000 in compensation for non-material damage;

(iv) order the defendant to pay all the costs.

The *Commission* contends that the Court should:

(i) dismiss the action as unfounded;

(ii) order the applicant to pay the costs.

Submissions and arguments of the parties

A — *The application for a declaration that the decision is void*

1. *Lack of power*

The *applicant* claims that the contested decision was taken by E. L. Vermelho, a

Head of Division in Directorate-General V, the Directorate-General for Employment, Social Affairs and Education, whereas it should have been taken by the responsible authority, the Commission itself, as provided in Article 6(1) of Regulation No 2950/83, cited above.

Apart from the breach of that provision, it is hardly conceivable that a decision of such importance should be delegated to the level of a Head of Division, who would also have the power to decide the amount of the sums to be refunded.

The decision was not taken by virtue of an authorization, nor was it in any way approved by the Director-General who, on the contrary, was inclined to adopt a less drastic solution.

According to the *Commission*, the decision in question was taken by the Commission, as provided for in Article 6(1) of Regulation No 2950/83, cited above, and in accordance with its Rules of Procedure and with Commission Decision 75/461/EEC of 23 July 1975 amending the provisional rules of procedure of the Commission of 6 July 1967.[3] Article 27 of those rules provides:

'Subject to the principle of collegiate responsibility being respected in full the Commission may empower its members to take, in its name and subject to its control, clearly defined measures of management or administration.

Officials may also be empowered to take such measures if this is indispensable for the Commission properly to be able to fulfil its tasks.

. . . '

In the present case, the decision was taken within the context of the management of the Fund, for which Directorate-General V is responsible, in cooperation with Financial Control, in accordance with the internal rules governing the implementation of the general budget of the European Communities.

In those circumstances, the decision was that of the Commission, since it was taken by the competent management department.

The letter of 21 April 1989 signed by Mr Vermelho merely constituted the notification of the decision taken by the competent department in accordance with the internal rules in force.

Furthermore, the allocation of powers within the Commission is a purely internal matter. If any department goes beyond its powers, the question of the responsibility of the official concerned may arise in a disciplinary context.

In any event, the letter signed by Mr Vermelho, in his capacity as an official of the Commission, is binding on the institution.

3 — OJ 1975 L 199, p. 43.

2. *Infringement of the rules governing the Fund*

The *applicant* claims that, contrary to Article 6(1) of Regulation No 2950/83, cited above, the Commission merely presented the Belgian employment authorities with a debit note claiming the reimbursement of BFR 9 900 000, that is to say an implementing measure following on a decision already taken, without in any way asking them to comment thereon. The note accompanying that 'bill' contained no request for consultation with the Belgian Government, but merely outlined the grounds on which the decision had been taken.

Although certain Belgian ministers did subsequently react, they did not do so within the procedure set up by Regulation No 2950/83, which requires prior consultation, but solely as a result of the applicant's protests. The Commission thus presented the Belgian Government, and consequently the applicant, with a *fait accompli*. That was all the more serious in that, when requesting the Commission to pay the second 'advance', the Belgian Government expressly approved the way in which the operation was being conducted in accordance with the conditions set out in the decision of approval, as required in the second sentence of Article 5(2) of Regulation No 2950/83, cited above.

The *Commission* replies that the decision in question was preceded by an exchange of letters between the Commission and the Belgian authorities, which gave them an opportunity to comment in accordance with Article 6(1) of Regulation No 2950/83, cited above.

Moreover, that article does not require the decision to be taken after hearing the State concerned. No specific procedure is provided for. What is required is that the competent authorities of the Member State concerned should be given an opportunity to comment on any differences of opinion. That opportunity was provided in the present case.

3. *Manifest error of appraisal and error of law*

1. The *applicant* denies having introduced a change into its initial project, which was complied with, although it proved to be necessary, in the interest of achieving the aim of the project, to modify some of the details of its implementation.

In fact, Funoc, since it was obliged to begin the operation in 1984 and the Fund's decision of approval on which the 'advance' payment depended had not yet been taken, preferred not to enrol 90 participants immediately in an undertaking which was not certain to continue. It decided to reduce the risk — while still complying with the requirements of the original project — by splitting the course up into three one-year intake modules each comprising 30 young people who were duly provided with 1 000 hours of training during the year.

The project as carried out formed a single operation with innovatory characteristics, inasmuch as it was aimed at testing a new theory which involved taking 'advantage of the possibilities afforded by microcomputers to lay the foundations for a veritable community research workshop' and using new methods whereby young people were trained for, and by, carrying out research.

Funoc adhered fully to the nature of the project and even provided, by the methods used, a better appraisal of its innovatory nature.

The operation carried out by the applicant was not repetitive in nature, essence or structure. It was an innovatory project consisting of a single exercise for the purpose of validating a hypothesis and a method.

Nor was there any 'repetitivity' in the training provided, since it formed part of a single experimental unit whose aim was progressively to develop and improve the suggested methods. Only the intakes of young people were 'repetitive', since there were three intakes instead of one.

An innovatory project cannot be said not to have been completed in accordance with the conditions set out unless the topic of research has changed. A change in the experimental set-up used to validate the hypotheses is, however, of an ancillary nature. Since the topic of research was maintained over three years, using an experimental set-up divided into three phases not initially planned, it was still a single research project, and all three years, not only the first year, should be taken into consideration.

2. The criteria of 'non-repetitivity' is nowhere laid down in the legislation governing the management of specific innovatory operations. Funoc was first made aware of the existence of that criterion in the Commission's letter dated 16 September 1988, one year and eight months after the project was completed.

3. The applicant claims to have stated orally that it had begun with 30 young people and that it intended to continue with successive intakes. Both the Commission and the representatives of the Belgian Government replied that it was wise and prudent to proceed in that way, in view of the inevitable delays in the payment of advances. At that time, no reference was made in the applicant's presence to the problem of repetitivity. When Funoc inquired whether any particular procedure had to be followed, it was told that an innovatory project could be considered not to have been modified if there was no change in the nature of the project, the number of hours of training or the number of trainees. Funoc's representatives were also informed that they should mention any change in their report and that the Commission would draw up a note.

That note, drawn up by the Commission on 23 April 1985, shows that, in the Commission's own opinion, if an innovatory project is essentially research-based it cannot be obliged to achieve a given result but merely to use certain means. Even the use of those means is not necessarily obligatory since, if they appear to be inadequate or inappropriate for the research undertaken, the experimenter may legitimately use whatever other means appear to him to be most likely to achieve the desired result.

Moreover, the Commission acknowledges, in its own report relating to the results of innovatory projects, that a certain flexibility of implementation is necessary and that it is necessary to take into account the way the project is adapted to meet any difficulties encountered. That was the basis on which Funoc implemented its project and, for the reasons described in its final report, took the steps necessary for the completion of the

project in accordance with the training programmes for which it had given an undertaking to the Fund.

1. The *Commission* contends that the applicant's claim that the aims of the project were adhered to although the details of its implementation differed from those stated in the application for assistance cannot be accepted, either in fact or in law.

The applicant undertook to provide 90 young people with 1 000 hours of training spread over three years and, while it is true that 90 young people were given 1 000 hours of training, those 1 000 hours were given over one year. The applicant set up three groups of 30 participants — one per year, going through the three phases of training in a single year. That happened on three separate occasions — first in 1984, then again in 1985 and 1986.

The fact that the programme was concentrated into one year, with one research topic and using research activities some of which were simulated deprives it of one of its most innovatory aspects — the participation of disadvantaged young people in full-scale research activities within a research team geared to solving problems *in vivo* rather than *in vitro* or in a laboratory.

The three training operations diverged from the framework laid down by the decision of approval which was based on a single training programme covering 1 000 hours over three years. If the Fund had known that it was an operation to be renewed over three years, it could not have approved and funded the project on the basis of Article 3(2) of Council Decision No 83/516.

The Commission does not understand why the applicant, if it was convinced that the modifications to the original project were justified and did not change its essential nature, nevertheless maintained the original project at the meeting on 12 June 1984. It would have been perfectly reasonable, on that date, to inform the Fund's officials of those modifications.

The legal principles developed by the Court [4] with regard to the withdrawal of administrative measures are of very general scope and apply also to decisions of approval by the Social Fund, subject to certain specific rules laid down in Article 6, cited above.

When a recipient of assistance from the Fund has provided the Commission with false information when submitting its application or has modified the original project, the recipient must take full liability for the error and therefore cannot claim that it had any legitimate expectations worthy of protection as to the legality of the decision.

In such a case, the Commission could either revoke the decision granting the assistance and replace it with another decision providing for reduced assistance from the Fund, or simply revoke the first decision and withdraw the aid in its entirety in accordance with Article 6(2) of Council Regulation No 2950/83.

4 — Joined Cases 7/56 and 3/57 to 7/57 *Algera* v *Common Assembly* [1957] ECR 39, Joined Cases 42/59 and 49/59 *Snupat* v *High Authority* [1961] ECR 53 and Case 15/85 *Consorzio cooperative d'Abruzzo* v *Commission* [1987] ECR 1005.

The fact that a recipient has acted fraudulently or with serious negligence should entitle the Commission to a sufficient length of time during which it may withdraw the erroneous decision in reliance on the general Community interest in the protection of legality and sound financial management. [5]

Even if it cannot be denied that in theory the fact that the recipient has no legitimate expectations indefinitely affects its subjective right to receive and retain assistance from the Fund, the Commission considers that in practice the payment of the balance, which invariably occurs months or even years after the completion of the operations financed by the Fund, marks the moment at which the Commission may modify the original decision of approval.

Taking into consideration both the public interest in legality and the sound management of public funds and the private interest of the promoter of the operation, and in order to be fair because the applicant had in fact carried out an innovatory project and incurred expenditure, the Commission did not revoke the decision of approval and withdraw the aid in full, but replaced it with another decision of approval providing for reduced assistance from the Fund in respect of the first year of the operation.

2. In the Commission's view, the reason that the criterion of non-repetitivity is not mentioned anywhere in the legislation is that it is clear from the use of the word 'innovatory'. If an innovatory project is repeated, it ceases to be innovatory.

5 — Case 14/61 *Hoogovens* v *High Authority* [1962] ECR 253.

3. The Commission did not become aware of the repetition of the training programme until the applicant submitted its completion report in June 1987, in which it first informed the Commission of the 'need to modify considerably the course of the operation'. The Commission cannot, therefore, acknowledge that the applicant informed it orally that it had begun with 30 young people and was intending to continue with successive intakes.

In that connection, the Commission wishes to stress that the applicant expressly confirmed the initial project at the abovementioned meeting on 12 June 1984. And by that date the applicant had already started the first training programme with an intake of 30 young people.

The applicant does not specify which of the Fund's officials told it that the innovatory project could be considered not to have been modified if there was no change in the nature of the project, the number of hours of training or the number of trainees. The Commission does not know who those officials were either and cannot, therefore, accept the applicant's statement.

Even if the applicant had orally informed the officials of the Fund, which it did not, that would have been of no value because any modifications to the original application should be notified in writing.

4. *Breach of the principle of proportionality*

In the alternative, the *applicant* claims that the reimbursement of the greater part of the

amount of the advances and the withholding of payment of the balance are disproportionate in view of the work it carried out in implementing its project.

The most it could be taxed with is a problem of procedure and of communication. The Commission should not normally have rectified such a 'procedural irregularity' by withdrawing the Fund's assistance but rather by warning the applicant that, in future, it should be informed from the outset of any modifications made to an innovatory project.

The Commission's final decision was in flagrant contrast to the understanding attitude it had shown during prior discussions with the Belgian authorities.

Furthermore, the principle of proportionality should also be viewed in the light of the damaging effects which a decision may have on the addressee's position. In the present case, Funoc's very survival is at stake.

The *Commission* replies that Article 6(1) of Regulation No 2950/83, cited above, made it necessary to withdraw the decision of approval which, because of an essential modification of the original project, was affected by illegality and not by a mere 'procedural irregularity'. Withdrawal of the decision did not go beyond what was appropriate to protect the public interest in legality and in the sound management of public funds.

However, taking into consideration the applicant's private interests and in order to be fair, the Commission decided exceptionally to replace the illegal decision with a new decision approving the first training session in part.

B — *The claim for compensation*

In the *applicant's* submission, the Commission acted unlawfully in failing to react to the applicant's oral announcement that the project would be carried through with three successive intakes and in failing to acknowledge the innovatory nature of the project, which was completed in full accordance with the new methods and did in fact include the number of hours of teaching and of supervised activities provided for in the application for assistance from the Fund.

The applicant assesses the material damage it incurred at BFR 10 730 173.

In its Reply, the applicant further claims that the Commission has not paid the balances on other files outstanding with the Fund (a total of BFR 5 753 257 + BFR 1 942 150 = BFR 7 695 407), with the result that the applicant has been deprived since 27 July 1989 of the interest on that sum. Interest thereon at 8%, to be applied as of the date of the judgment or the date of payment, must therefore be added to the amount of the material damage.

In addition to the damage suffered, the applicant's financial situation is now, as a result of the contested decision, so insecure that its very survival is in jeopardy.

The applicant also claims to have suffered, as a result of the publicity given in the press, of the effects on the association and its staff and of the repercussions this may have on its future, non-material damage which may reasonably and fairly be assessed at BFR 5 000 000.

The *Commission* contends that it stayed within the legal rules in force at the relevant time and did not, therefore, act unlawfully.

The further claim for compensation for the material damage alleged to have been suffered in respect of the other outstanding files does not fall within the scope of the present proceedings.

The Commission adds that the amount of the alleged damage has not been adequately established. In that connection, the Commission points out that the applicant's activities were not confined to the operation in issue. In fact, other operations have been granted assistance by the Fund, which means that the applicant has remained in constant activity.

T. F. O'Higgins
Judge-Rapporteur