JUDGMENT OF THE COURT (Second Chamber)
4 June 1992 *

In Case C-157/90,

Infortec — Projectos e Consultadoria, Ld.[a], a company incorporated under Portuguese law, whose registered office is in Lisbon, represented by António Pacheco Ferreira, of the Lisbon Bar, with an address for service in Luxembourg at the office of José Manuel Fonseca Antunes, Union des Banques Portugaises, 10 Rue de la Grève,

applicant,

v

Commission of the European Communities, represented by Herculano Lima, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of Roberto Hayder, of the Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of the Commission decision notified to the applicant on 9 March 1990 and disallowing expenditure amounting to ESC 10 474 033 relating to Application for Assistance No 870889 P3 from the European Social Fund,

THE COURT (Second Chamber),

composed of: F. A. Schockweiler, President of the Chamber, G. F. Mancini and J. L. Murray, Judges,

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

* Language of the case: Portuguese.

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 7 January 1992,

after hearing the Opinion of the Advocate General at the sitting on 25 February 1992,

gives the following

Judgment

1 By application lodged at the Court Registry on 21 May 1990, Infortec — Projectos e Consultadoria, Ld.ª, brought an action under the second paragraph of Article 173 of the EEC Treaty for the annulment of the Commission decision notified to the applicant on 9 March 1990 and disallowing expenditure originally granted by the European Social Fund (hereinafter 'the Fund') for a training programme on behalf of the applicant.

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

3 By virtue of Article 5(1) of Council Regulation (EEC) No 2950/83 on the implementation of Decision 83/516/EEC (OJ 1983 L 289, p. 1, hereinafter 'the Regulation') the approval by the Fund of an application for assistance under Article 3(1) of the abovementioned Decision 83/516 is followed by the payment of an advance of 50% of the assistance approved on the date on which the training programme is scheduled to begin. Article 5(4) provides that final payment claims are to contain a detailed report on the content, results and financial aspects of the relevant operation.

4 Article 6 (1) of the Regulation provides that 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) provides that sums paid which are not used in accordance with the conditions laid down in the decision of approval are to be refunded, and that the Member State concerned has secondary liability for the repayment of the sums, unwarranted payment of which was made for operations whose successful completion is guaranteed by that Member State in accordance with Article 2(2) of Decision 83/516, mentioned above.

5 The Department of European Social Fund Affairs in Lisbon (DESFA), acting for the Portuguese Republic and on behalf of a group of undertakings which included the applicant, made an application for Fund assistance in respect of 1987.

6 The training programme for which assistance was requested and the file to which was allocated the number ESF 870889 P3 was approved on 31 March 1987 by a Commission decision, subject to certain amendments. That decision was notified to DESFA which in turn notified it to the applicant.

7 On completion of the training programme the applicant submitted to DESFA the final payment claim together with the quantitative and qualitative evaluation report referred to in Article 5(4) of the Regulation.

8 Pursuant to that provision, the Portuguese Republic certified the accuracy of the facts and accounts in the final payment claim and forwarded it to the Commission.

9 On examination of the final payment claim, the Commission noted the existence of a certain amount of ineligible expenditure. Consequently, by decision of 7 September 1989, brought to the notice of DESFA by letter from the Fund

of the same date, the Commission reduced the amount of the Fund assistance originally granted.

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

Admissibility

11 The Commission raised an objection of inadmissibility under Article 91(1) of the Rules of Procedure. By order of 21 November 1990 the Court reserved its decision on the objection for the final judgment in accordance with Article 91(4) of the Rules of Procedure.

12 The Commission submits that the subject-matter of the dispute is not defined in the application and that the contested decision is not clearly identifiable.

13 In that connection, it should be noted the applicant was informed by letter from DESFA of 9 March 1990 of the existence of a Commission decision reducing the Fund assistance initially granted in respect of Application for Assistance No 870889 P3.

14 Since that notification stated neither the date nor the content of the Commission decision reducing the Fund assistance, the applicant company cannot be criticized for not providing in support of its application more extensive particulars concerning the contested decision.

15 Accordingly, the objection of admissibility raised by the Commission must be rejected.

16 For the rest, it appears that the contested decision was communicated by the Commission to DESFA in the form of a letter advising it that, pursuant to Article 6(1) of the Regulation, Fund assistance was reduced to an amount less than that originally approved.

17 To that extent the contested decision, although addressed to the Portuguese Republic, is of direct and individual concern to the applicant within the meaning of the second paragraph of Article 173 of the EEC Treaty, inasmuch as it deprives it of part of the assistance which had originally been granted to it, the Member State not having any discretion of its own in that respect.

Substance

18 Under its first plea, alleging infringement of essential procedural requirements, Infortec maintains that, contrary to the requirements of Article 6(1) of the Regulation, the Commission did not hear the Member State concerned prior to adopting the contested decision.

19 It is not disputed that prior to the adoption of the contested decision the Commission did not give the Portuguese Republic an opportunity to comment, thus failing to comply with the obligation clearly imposed on it by Article 6(1) of the Regulation.

20 The Court has consistently held that, having regard to the central role of the Member State concerned and to the importance of the responsibilities which that State assumes in the presentation and supervision of the financing of training measures, the opportunity for it to comment before a definitive

decision reducing assistance is adopted constitutes an essential procedural requirement the disregard of which renders the contested decision void (see Case C-291/89 *Interhotel* v *Commission* [1991] ECR I-2257, paragraph 17, and Case C-304/91 *Oliveira* v *Commission* [1991] ECR I-2283, paragraph 21).

21 It follows that the contested decision reducing assistance must be annulled without its being necessary to consider the other pleas raised by the applicant.

Costs

22 Under Article 69(2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs. Since the Commission has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT (Second Chamber)

hereby:

1. Annuls the Commission decision declaring ineligible expenditure in an amount of ESC 10 474 033 relating to Application for Assistance No 870889 P3, submitted to the European Social Fund;

2. Orders the Commission to pay the costs.

Schockweiler Mancini Murray

Delivered in open court in Luxembourg on 4 June 1992.

J.-G. Giraud F. A. Schockweiler

Registrar President of the Second Chamber