REPORT FOR THE HEARING
In Case C-157/90 *

I — Legal background to the dispute

Article 1(2) of Council Decision 83/516 of 17 October 1983, [1] which defines the tasks of the European Social Fund (hereinafter 'the Fund'), provides, *inter alia*, that the Fund shall participate in the financing of operations concerning vocational training and guidance. Article 3(1) provides that Fund assistance may be granted for operations carried out within the framework of Member States' labour market policies and in particular those intended to improve employment opportunities for young people.

According to Article 4(2), Fund assistance may be granted to promote employment for persons over the age of 25, in particular those who are employed in small or medium-sized undertakings and who require re-training with a view to the introduction of new technology or the improvement of management techniques in those undertakings.

Council Regulation No 2950/83 of 17 October 1983 [2] (hereinafter 'the Regulation') defines the types of expenditure which may be the subject of Fund assistance; these include the costs of the preparation, operation and administration of vocational training measures. Article 5(1) of the Regulation provides that:

'The approval of an application submitted under Article 3(1) of Decision 83/516/EEC shall be followed by the payment of an advance of 50% of the assistance approved on the date on which the operations are scheduled to begin. Where this date precedes the date of decision of approval, payment shall be made immediately after that decision.'

Upon completion of the training measure, the promoter is required to draw up and send to the national authorities the final report relating to its completion and accompanied, if necessary, by a final payment claim. According to Article 5(4) of the Regulation:

'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, according to Article 6 of the Regulation:

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

* Language of the case: Portuguese.

1 — OJ 1983 L 289, p. 38.

2 — OJ 1983 L 289, p. 1.

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

Article 5 of Commission Decision 83/673 of 22 December 1983 on the management of the European Social Fund [3] provides that:

'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.'

II — Facts and written procedure

The applicant is a limited company which provides services and technical assistance, particularly in the area of projects and consultancy. In the course of its activities, it collaborated with a number of undertakings with a view to organizing joint training measures during 1987.

The Department of European Social Fund Affairs in Lisbon (hereinafter 'DESFA'), acting in the name of the Portuguese Republic and on behalf of this group of undertakings, which included the applicant, made an application for Fund assistance in respect of 1987. It appears from the standard form used that the training measure in respect of which assistance was requested was based on Article 3(1) of Decision 83/516 and concerned persons over the age of 25.

The project, the file for which was allocated the number ESF 870889 P3, was approved on 31 March 1987 by Commission Decision C(87)0670 subject to amendments relating to the number of trainees and the level of assistance, of which the applicant received ESC 8 373 341 from the Fund and ESC 6 850 915 from the Institute for Financial Management of Social Security Matters (hereinafter 'IGFSS').

In accordance with Article 5(1) of the Regulation, the sum of ESC 7 612 127 was paid to the applicant in two instalments: ESC 4 186 670 on 26 June 1987 from the Fund and ESC 3 425 457 on 7 August 1987 from IGFSS.

It appears from the documents before the Court that the real cost of the measure to the applicant was less than ESC 42 438 356. The final payment claim took account of the real cost of the measure, which was ESC 8 373 341 charged to the Fund, along with ESC 6 850 915 charged to the IGFSS, and this was presented to DESFA at the same time as a quantitative and qualitative evaluation report.

The Commission, on 7 September 1989, sent to DESFA a letter relating to Application for Assistance No 870889 P3. According to that letter:

'Following an examination of the payment claim made in connection with the above-

3 — OJ 1983 L 377, p. 1.

mentioned file, the European Social Fund's staff have found that there was expenditure amounting to ESC 10 474 033 which was not eligible at points 14.2, 14.3, 14.8 and 14.9 of the form, since no supporting documents were provided regarding the costs involved in planning courses, expenditure for staff assigned to preparation, teaching theory and practice, technical non-teaching staff, administrative staff, technical control of teaching, the hiring of rooms, equipment, perishable goods and other supplies, normal depreciation, and the accommodation, meals and travelling expenses of trainees.

Consequently, the contribution from the Fund, pursuant to Article 6(1) of Council Regulation No 2950/83, cannot exceed ESC 6 293 775.

In view of the fact that an initial advance payment of ESC 4 186 670 has already been made, the balance of ESC 2 107 105 will be paid from our bank account.'

By a letter of 9 March 1990 from DESFA, the applicant was informed of the existence of a Commission Decision relating to Application for Assistance No 870889 P3, but was not informed of its content.

By an application lodged at the Court Registry on 21 May 1990, the applicant, pursuant to Article 173 of the EEC Treaty, applied for a declaration annulling that decision.

By a document lodged at the Court Registry on 21 June 1990, the Commission raised an objection of inadmissibility under Article 91 of the Rules of Procedure of the Court of Justice.

By an order of 21 November 1990, the Court reserved the objection of inadmissibility for the final judgment, without prejudice to the admissibility of the application.

Upon hearing the Report of the Judge-Rapporteur and the views of the Advocate General, the Court, by a decision of 22 October 1991, assigned the case to the Second Chamber in accordance with Article 95 of the Rules of Procedure and decided to open the oral procedure without any preparatory inquiry.

III — Forms of order sought by the parties

The *applicant* claims that the Court should:

1. annul the Commission Decision notified to the applicant on 9 March 1990 and adopted in connection with the implementation of Project No 870889 P3 of the European Social Fund;

2. order the Commission to pay the costs.

The *Commission* contends that the Court should:

1. declare the application inadmissible by reason of the manifest absence of any indication as to the subject-matter of the dispute;

2. in the alternative, dismiss the application as unfounded;

3. order the applicant to pay the costs.

IV — Pleas in law and arguments of the parties

1. Admissibility

The *Commission* takes the view that the application is inadmissible because it fails to identify the subject-matter of the dispute, the decision at issue, or the reduction made by the Commission. It therefore fails to satisfy the conditions laid down in Article 19 of the Statute of the Court of Justice and in Article 38(1) of the Court's Rules of Procedure.

In its defence, the Commission acknowledges that the claim for payment in connexion with Application No 870889 P3 has already been the subject of a Commission Decision of which DESFA was informed on 7 September 1989. However, it takes the view that the application is directed solely at a decision taken by DESFA and which may not be imputed to the Commission.

The *applicant* argues that DESFA, in its letter of 9 March 1990, declared that it had already received the Commission Decision relating to Project No 870889 P3, but did not give any explanation whatsoever apart from an implicit indication contained in the payment figures. Those figures indicate that the payment granted by the Commission had been reduced in accordance with the assistance originally granted. This letter was the first and only notification to the applicant concerning the contested decision.

2. Substance

According to the *applicant*, the Commission, by adopting the contested decision, did not give the Portuguese State a prior opportunity to comment, as required under Article 6(1) of the Regulation. Failure to comply with this formality vitiates the Commission decision to reduce or withdraw sums previously approved.

In addition, the contested decision infringes Article 190 of the Treaty in so far as the reasons on which it was based are not explicit, clear and relevant. The notification of the contested decision does not provide any indication as to the reasons on which it was based.

Even if account is taken of the reference to the contested decision, this does not explain anything and ought to contain a detailed analysis of the reasons for the reductions made with regard to the training measures for each participating undertaking. A bare declaration that the expenditure is not justified cannot be regarded as a reason on which to base the decision.

Furthermore, the Commission had monitored the use being made of the assistance previously granted by means of its own financial controllers and of DESFA. Despite this, it had never indicated that it would act

in the manner outlined with regard to the claim for final payment. The applicant, for its part, complied in exemplary manner with the requirements arising from the proper use of the assistance. Irrespective of its power to draw up the necessary arrangements for the implementation of the Regulation, as conferred on it by Article 9, the Commission is still required to indicate the criteria and interpretations used and the necessary reasoning on which it bases its decisions.

Since DESFA is a body on which Article 5(4) of the Regulation has conferred the power to certify the accuracy of the facts and accounts in payment claims, its legal position in this regard is equivalent to that of a delegate vis-à-vis the delegating authority. The certification made by DESFA cannot be set aside by the Commission since such a decision is imputable to it.

The *Commission* has no observations to make with regard to the facts as presented by the applicant in so far as they reflect the normal pattern of the formalities connected with Application for Assistance No 870889 P3 which was approved by the Commission with the result that the assistance was granted to the applicant. With regard to the connection between this file and another submitted by the applicant, the Commission declares that it had no bearing whatsoever on its decision since it concerns a decision taken by DESFA.

When the final payment claim regarding Application No 870889 P3 was submitted to the Commission, the Fund's staff decided, by decision communicated to DESFA on 7 September 1989, to reduce the amounts submitted. Since it appears that the applicant was not aware of that decision, it cannot constitute the subject-matter of the present action.

In the Commission's view, the decision to reduce the contribution in respect of Application No 870889 P3 is not defective in any way. It was notified to the Member State which was thus placed in a position to comment in any manner which it considered appropriate pursuant to Article 6(1) of the Regulation. Furthermore, reasons were given for that decision.

V — Replies to the questions put by the Court

The Portuguese Government was requested to state whether before 9 March 1990 it brought to the applicant's notice the content of the Commission's decision sent to DESFA on 7 September 1989 and adopted in the context of the implementation of the Application for Fund Assistance No 870889 P3.

It replied that it was not until 9 March 1990 that DESFA, by letter No 3637, informed Infortec of the content of the decision.

The Commission was requested to state whether it gave the Portuguese Government an opportunity to submit its comments, in accordance with Article 6(1) of the Regulation, before the decision adopted in the context of the implementation of Application for Assistance No 870889 P3 and communicated to Infortec on 9 March 1990.

The Commission stated that, on 9 March 1990, the applicant received notification of a decision of DESFA settling the accounts relating to Files 870889 P1 and 870889 P3. Since that decision had not been adopted by itself, the Commission did not give the Portuguese Republic an opportunity to submit its comments in accordance with Article 6(1) of the Regulation.

As regards the decision reducing the aid, adopted by the Commission on 7 September 1989, the Commission stated that that decision was notified to the Portuguese Republic with express reference to Article 6(1) of the Regulation. The Portuguese Republic could then have submitted its comments had it so wished, but it did not do so, thereby indicating its agreement with the reduction proposed.

J. L. Murray
Judge-Rapporteur