ORDER OF THE COURT OF FIRST INSTANCE (Second Chamber)
30 September 1997 *

In Case T-151/95,

Instituto Europeu de Formação Profissional Ld.ª (INEF), a company incorporated under Portuguese law, established in Oporto, Portugal, represented by Bolota Belchior, of the Bar of Vila Nova de Gaia, with an address for service in Luxembourg at the Chambers of Jacques Schroeder, 6 Rue Heinrich Heine,

applicant,

v

Commission of the European Communities, represented initially by Anna Maria Alves Vieira and Günter Wilms, then by Maria Teresa Figueira and Knut Simonsson, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of the Commission's decision of 2 December 1991 reducing the assistance granted by the European Social Fund in file 881005 P1 for a vocational training operation carried out by the applicant in Portugal,

* Language of the case: Portuguese.

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Second Chamber),

composed of: C. W. Bellamy, President, A. Kalogeropopulos and M. Jaeger, Judges,

Registrar: H. Jung,

makes the following

Order

Legal framework

1 Pursuant to 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), the European Social Fund (hereinafter 'the ESF') is to participate in the financing of operations concerning vocational training and guidance. Article 5(1) of Council Regulation (EEC) No 2950/83 of 17 October 1983 on the implementation of Decision 83/516 (OJ 1983 L 289, p. 1) provides that the approval of an application for assistance from the ESF is to 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. 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 and that the Member State concerned is to certify the accuracy of the facts and accounts in payment claims.

2 Where ESF assistance is not used in conformity with the conditions set out in the decision of approval, the Commission may, pursuant to Article 6(1) of Regulation No 2950/83, 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 have not been used in accordance with the conditions laid down in the decision of approval are to be refunded and that the Member State concerned is to have secondary liability for the repayment of the sums improperly paid for operations whose successful completion it guarantees. Article 6(2) further provides that in so far as the Member State repays to the Community sums owed by the bodies financially responsible for an operation, the Community's rights in the matter are to be transferred to the Member State.

Facts and Procedure

3 In 1988 the Department of European Social Fund Affairs (hereinafter 'the DAFSE'), the national correspondent of the ESF, established in Lisbon under the Portuguese Ministry of Employment and Social Security, submitted an application on behalf of the Portuguese authorities for ESF assistance for a vocational training operation for 2 740 persons set up by the applicant.

4 The training project for which assistance was requested (in the context of a file registered as file 881005 P1) was approved by a Commission decision of 29 April 1988. That decision was communicated to the DAFSE, which notified the applicant thereof by letter of 25 May 1988. The amount of ESF assistance was fixed at ESC 521 545 155 and it was further envisaged that the Portuguese authorities would provide funding of ESC 426 718 763, making a total of ESC 948 263 918.

5 On the basis of the amounts approved in respect of its operation, the applicant received, pursuant to Article 5(1) of Regulation No 2950/83, an advance of 50% of the ESF assistance, amounting to ESC 260 772 577, plus a payment of ESC 213 359 381 representing 50% of the Portuguese State's contribution.

6 Upon completion of the vocational training operation the applicant submitted a payment claim to the DAFSE for the outstanding amount payable by the ESF and the Portuguese State, which came to ESC 253 527 326.

7 On 10 April 1991 the DAFSE wrote to the applicant informing it that, following inspections of the applicant's financial records and those of the main suppliers of services which it had used, certain items of expenditure submitted under the head of services provided by sub-contractors, although supported by lawful and regular documents, were ineligible. The DAFSE claimed that the way in which the applicant had subcontracted certain services, by calling on entities run by the same associates or by members of its executives' families, had led to an increase in the costs of the operation which was neither reasonable nor compatible with the principle of proper financial management inherent in the grant of assistance. The total amount of eligible expenditure was therefore, according to the DAFSE, ESC 491 816 791, including ESC 243 449 312 by way of ESF assistance. Having regard to the amounts already paid, the DAFSE therefore claimed reimbursement of ESC 17 323 265 in respect of ESF assistance and ESC 14 173 581 in respect of participation by the Portuguese State, pointing out at the same time that the claim was addressed to the applicant without prejudice to the decision which the Commission would take on the file.

8 There was further correspondence with the DAFSE concerning the final balance determined for the file, in the form of letters from the applicant on 24 April and 15 June 1991. By letter of 6 August 1991 the DAFSE confirmed to the applicant the amounts to be reimbursed.

9 Meanwhile, by letter of 15 May 1991, the DAFSE certified to the Commission, in respect of the file in question, a total cost of eligible expenditure of ESC 491 816 791, including ESC 243 449 312 by way of ESF assistance, and enclosed a payment order in favour of the Commission for the amount to be reimbursed, namely ESC 17 323 265.

10 On 2 December 1991 the Commission approved that amount and, consequently, issued a recovery order for the outstanding amount thus established.

11 On 20 January 1993 the DAFSE sent the applicant a copy of resolution No 3/93 of 11 January 1993, in which its Director-General, after pointing out that the applicant had already been requested to repay the sums which it had unduly received in the context of the file in question and another, file 881025 P3, requested it to make voluntary restitution within 15 days of notification of the said resolution.

12 By letter of 9 September 1993 the applicant requested the Commission to communicate its decision concerning the decisions taken by the Portuguese authorities relating to final payment in the context of files 881005 P1 and 881025 P3, to allow the Portuguese courts to determine liability as between the applicant and the Portuguese State.

13 On 6 October 1993 the Directorate-General for Employment, Industrial Relations and Social Affairs (DG V) replied, by a letter bearing reference No 20179, as follows:

'1. Pursuant to Article 7(1) of Council Regulation (EEC) No 2950/83 of 17 October 1983, the Commission made an on-the-spot check in March 1989 of the operations carried out in the context of files [881005 P1 and 881025 P3] and decided on the basis of its findings that a detailed inspection of the accounts relating to those operations should be carried out by the competent services of the Member State.

2. In May 1991, following those inspections, the Member State certified to the Commission that total eligible expenditure was ESC 491 816 791 in file 881005 P1 and ESC 244 775 243 in file 881025 P3, so that assistance from the ESF in the form of co-financing amounts to ESC 243 449 312 and ESC 121 163 745, respectively;

those amounts were approved by the Commission on 2 December 1991. The files in question have been closed since that date.'

14 By letter of 30 October 1993 the applicant requested the Commission to bring proceedings under Article 169 of the EC Treaty for the 'annulment' of the decision taken by the Portuguese authorities in connection with the inspection of the final payment claims relating to files 881005 P1 and 881025 P3 for failure to comply with Community law and, in particular, Regulation No 2950/83. The information in that letter was supplemented by a letter of 23 November 1993 from the applicant.

15 By letter of 8 December 1993 to the applicant DG V confirmed that both of the files in question had been closed since 2 December 1991 and also drew attention to the amounts of the final ESF contribution which had been certified by the Portuguese State and approved by the Commission.

16 By letter dated 6 April 1995 the applicant stated that it had still received no reply to its letter of 9 September 1993 and requested the Commission to adopt a final decision in relation to its final payment claim in the context of file 881005 P1.

17 On 12 May 1995 the member of the Commission responsible for social affairs and employment replied as follows:

'I wish to inform you that by letter of 6 October 1993, a copy of which is enclosed, the Commission informed the INEF that final ESF assistance had been approved in file 881005 P1 for a sum of ESC 243 449 312, corresponding to the amount certified by the Member States following an inspection'.

18 It was in those circumstances that, by application lodged at the Registry of the Court of First Instance on 20 July 1995, the applicant brought these proceedings.

19 In pleadings lodged on 28 October 1995 the Commission raised an objection of inadmissibility under Article 114(1) of the Rules of Procedure. The applicant lodged its observations in reply to the objection on 18 December 1995.

20 On 11 July 1996 the Court (Second Chamber) made an order joining the objection of inadmissibility to the merits and, in written questions, requested the Commission and the applicant to produce certain documents.

21 The written procedure was closed when the rejoinder was lodged on 10 February 1997.

Forms of order sought

22 The applicant claims that the Court should:

— annul the Commission Decision of 2 December 1991, notified on 15 May 1995 by letter from the Commission dated 12 May 1995, reducing the ESF assistance in file 881005 P1;

— order the Commission to pay the costs.

23 The Commission, the defendant, contends that the Court should:

— declare the application inadmissible;

— in the alternative, dismiss it as unfounded;

— order the applicant to pay the costs.

Admissibility

24 Pursuant to Article 113 of the Rules of Procedure, the Court of First Instance may at any time of its own motion consider whether there exists any absolute bar to proceeding with the case, and is to give its decision in accordance with Article 114(3) and (4) of the Rules of Procedure. Article 114(3) provides that unless the Court otherwise decides, the remainder of the proceedings are to be oral.

25 In the present case the Court considers that it has sufficient information from the documents and explanations provided by the parties during the written procedure, in particular following the written questions which it put to them. Since the documents now before it contain all the evidence necessary for it to reach a decision, the Court finds that there is no need to hear oral argument from the parties.

Arguments of the parties

26 The Commission considers that the action is manifestly inadmissible on the ground that it is out of time. The applicant is relying on the letter of 12 May 1995 to reopen the period for bringing proceedings laid down in Article 173 of the Treaty.

27 First, the Commission claims that since the DAFSE's letters of 10 April and 6 August 1991 and, in any event, since the letter of 20 January 1993, the applicant had been aware of the amount of the contributions certified by the Member State and knew that it was required to reimburse the sum of ESC 17 323 265 to the Commission. In that regard, the Commission maintains that it did not adopt a formal decision addressed to the applicant and, moreover, was no longer competent to do so, since the Community's rights had been transferred to the DAFSE following the reimbursement to the ESF in May 1991 of the sums payable by the applicant. Even on the assumption that it adopted a decision to reduce the ESF assistance, that decision was incorporated in resolution No 3/93, which the applicant received by letter of 20 January 1993 from the DAFSE, which required the applicant to repay the sums in issue.

28 Secondly, the Commission maintains in its answer to the question put by the Court that in any event the applicant duly received its letter of 6 October 1993 in which it informed the applicant of its decision of 2 December 1991 concerning the amount of final ESF assistance. Despite the absence of an acknowledgement of receipt of that letter, it is established that the applicant was actually aware of it at that time and not only when it received the letter of 12 May 1995. The applicant's letters of 30 October and 23 November 1993 make express reference to the Commission's letter of 6 October 1993.

29 The Commission further states that it informed the applicant by letter of 8 December 1993 that the file had been closed since 2 December 1991, and again referred to its letter of 6 October 1993.

30 Consequently, for the purpose of bringing proceedings for the annulment of the Commission's decision reducing the assistance, which took the form of the recovery order of 2 December 1991 giving concrete form to the accounting procedure closing the ESF file in question (Case C-199/91 *Foyer Culturel du Sart-Tilman* v *Commission* [1993] ECR I-2667, paragraph 21), time began to run on 6 October 1993, when the applicant acquired precise knowledge of the content of the measure

in question and of the reasons on which it was based (Case 236/86 *Dillinger Hüttenwerke* v *Commission* [1988] ECR 3761, paragraph 14, and Joined Cases T-432/93, T-433/93 and T-434/93 *Socurte and Others* v *Commission* [1995] ECR II-503, paragraph 49).

31 The applicant contends that the contested decision was not notified to it until 15 May 1995, in a letter of 12 May 1995 from the member of the Commission responsible for social affairs and employment, and that the present action was therefore brought within the two-month period provided for in the fifth paragraph of Article 173 of the Treaty.

32 The applicant argues that the measures taken by the DAFSE were merely preparatory to the contested decision. Thus the letter of 10 April 1991 from the DAFSE stated that the demand for repayment of the sums improperly received was sent without prejudice to a subsequent decision of the Commission. The Commission adopted such a decision reducing the assistance on 2 December 1991 but did not notify it to the applicant until 15 May 1995. The other communications from the DAFSE to which the Commission refers, in particular resolution No 3/93 enclosed with the letter of 20 January 1993, make no reference to any decision of the Commission.

33 The applicant maintains that it has no record of the letter of 6 October 1993 to which the Commission refers. Although the applicant does not dispute that the letter was actually sent, it points out that the address to which it was sent was not that of its registered office. Moreover, since the letter related to two files it may have been placed in the other file.

34 In any event, the content of the Commission's letters of 6 October and 8 December 1993 is irrelevant. First, the correspondence and the approval of eligible expenditure to which it refers should be seen in a purely accounting context, that of a simple account-closing operation expressed in the form of a recovery order

containing neither citations nor grounds which does not constitute a decision within the meaning of Article 189 of the Treaty. Furthermore, the letter of 6 October 1993 contains only general information on the measure adopted by the DAFSE and gives no reason to assume that the Commission had already adopted the final decision approving the amount of the final payment claim. Since it contains no details of the decision adopted, that letter thus cannot be regarded as notification of the decision within the meaning of Article 191 of the Treaty. Accordingly, it was only by the letter of 12 May 1995 that the applicant was first apprised of the fact that the Commission had adopted a final decision approving the ESF assistance.

Findings of the Court

35 First, the Commission essentially argues that the decision reducing the assistance granted by the ESF was in reality adopted by the DAFSE, since the rights of the Community were transferred to the DAFSE when, on 15 May 1991, it reimbursed to the Commission the balance payable by the applicant.

36 That argument cannot be accepted. Pursuant to Article 6(1) of Regulation No 2950/83 the Commission alone is entitled to reduce ESF assistance. Accordingly, although the DAFSE, like any other national authority with competence for the financing of ESF activities, may, in a final payment claim submitted in accordance with Article 5(4) of the regulation, propose a reduction in ESF financial assistance, only the Commission has the power to reduce such assistance. It follows that it is the Commission which assumes, *vis-à-vis* the recipient, the legal responsibility for the decision by which its assistance was reduced, irrespective of whether that reduction was or was not proposed by the national authority concerned (Case T-85/94 (122) *Commission* v *Branco* [1995] ECR II-2993, paragraphs 23 and 24, and Case T-271/94 *Branco* v *Commission* [1996] ECR II-749, paragraph 39). The transfer of rights referred to in Article 6(2) of Regulation No 2950/83 does not affect in any way the power to reduce ESF assistance but only the rights

of the Community to the refund of advances improperly paid, so that the transfer of rights necessarily presupposes a prior Commission decision reducing the assistance (*Branco* v *Commission*, paragraphs 42 and 43).

37 In those circumstances, in the absence of any reference to a Commission decision to the effect that the amount of ESF assistance initially granted had been definitively reduced, the mere fact that the applicant was informed by letters from the DAFSE of the amounts which the DAFSE regarded as eligible for ESF assistance cannot in itself cause time to begin to run for the purpose of instituting proceedings as provided for in the fifth paragraph of Article 173 of the Treaty.

38 It is therefore necessary to consider whether the Commission actually adopted a decision to reduce the ESF assistance in the file in question and, if so, to determine on what date that decision was brought to the applicant's knowledge.

39 As the Commission has accepted, it was by the recovery order of 2 December 1991, referring to the applicant by name in the context of the file in question, that it sought to effect a definitive reduction of the ESF assistance initially granted and that it required the applicant to reimburse part of the advance paid, in accordance with the DAFSE's proposal. Such a recovery order produced legal effects such as to affect the applicant's legal position and thus constituted a decision which may be the subject of an action for annulment under Article 173 of the Treaty (*Foyer Culturel de Sart-Tilman* v *Commission*, cited above, paragraph 21, and Case T-450/93 *Lisrestal* v *Commission* [1994] ECR II-1177, paragraph 45).

40 There is no reference in the letter sent to the applicant by the DAFSE on 20 January 1993, in resolution No 3/93 enclosed therewith or, *a fortiori*, in the DAFSE's letters of 10 April and 6 August 1991 (see paragraphs 7 and 8 above), which preceded the decision of 2 December 1991, to any decision of the Commission to

reduce the ESF assistance. The applicant cannot therefore be regarded as having actually been informed on one of those dates of the existence of such a decision.

41 However, following the question put by the Court requesting it to adduce any evidence of when the applicant acquired knowledge of the decision of 2 December 1991, and in particular any acknowledgement of receipt of the letter of 6 October 1993, the Commission produced two letters of 30 October and 23 November 1993 sent to it by the applicant, each of which made express reference, in the following terms, to the letter of 6 October 1993 as part of the correspondence exchanged with the Commission:

'Correspondence already exchanged with the Commission

...

Commission's letter No 20179, sent to the INEF on 6 October 1993'.

42 Such an express reference, stating both the sender and the addressee and also the date and reference number of the letter in question, shows that, contrary to its allegations, the applicant was necessarily aware of the letter at the latest on 30 October 1993, the date of the first of the two letters (see Joined Cases T-452/93 and T-453/93 *Pevasa and Inpesca* v *Commission* [1994] ECR II-229, paragraph 36). The applicant's argument that it had no knowledge of the letter of 6 October 1993, on the ground that it was not sent to its registered office or might have been placed in another file, is therefore irrelevant, since it is contradicted by the actual correspondence which it sent to the Commission.

43 The Commission has, furthermore, produced a letter to the applicant dated 8 December 1993, in which the staff of DG V referred expressly to their letter of 6 October 1993 and set out, in virtually identical terms, the position which had been adopted by the Commission. The applicant has not denied having received such a letter.

44 None the less, the applicant claims that the letter of 6 October 1993 cannot be regarded as proper notification of the contested decision, since it does not contain a detailed statement of the grounds of that decision.

45 That argument cannot be accepted. It is settled law that, where the act in dispute is not published or notified, the period within which proceedings are to be instituted cannot start to run until the third party has precise knowledge of the content and grounds of the act in question, provided however that he asks, within a reasonable period from the date at which he becomes aware of its existence, for the full text of the act in question (see *Dillinger Hüttenwerke* v *Commission*, cited above, paragraph 14; Case C-102/92 *Ferriere Acciaierie Sarde* v *Commission* [1993] ECR I-801, paragraph 18; Case T-468/93 *Frinil* v *Commission* [1994] ECR II-33, paragraph 33; *Socurte and Others* v *Commission*, cited above, paragraph 49; and Case T-109/94 *Windpark Groothusen* v *Commission* [1995] ECR II-3007, paragraph 26).

46 Even on the assumption that the letter of 6 October 1993 did not sufficiently inform the applicant of the grounds of the contested decision, that letter, which unequivocally states the Commission's final position as to the amount of ESF assistance definitively granted for the file in question, at least informed the applicant of the existence of the Commission's decision of 2 December 1991. The applicant cannot therefore claim that it was not informed of the existence of the

decision until the Commission's letter of 12 May 1995, when that letter is merely a covering letter for the letter of 6 October 1993 and does not contain any additional information.

47 In those circumstances, in accordance with the case-law referred to above, it was for the applicant, within a reasonable period of receiving the letter of 6 October 1993, to request the Commission or, as the case may be, the DAFSE for the full text of the decision concerned.

48 However, the applicant does not claim to have made any such approach to the Commission or the DAFSE. It must be pointed out that, even if it is accepted that the applicant's letter of 6 April 1995 might constitute a request for the full text of the decision, that request was made almost 18 months after receipt of the letter of 6 October 1993 and therefore outside any reasonable period.

49 It follows that the applicant has no grounds for claiming that the action is not out of time.

50 The application must therefore be dismissed as inadmissible.

Costs

51 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful and the Commission has applied for costs, the applicant must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby orders:

1. The application is dismissed as inadmissible.

2. The applicant is ordered to pay the costs.

Luxembourg, 30 September 1997.

H. Jung — Registrar

C. W. Bellamy — President