OPINION OF ADVOCATE GENERAL MISCHO

delivered on 25 November 1999 *

1. Mediocurso — Estabelecimento de Ensino Particular SA (hereinafter 'Mediocurso'), a company incorporated under Portuguese law, established in Lisbon, has brought an appeal against the judgment delivered by the Court of First Instance on 15 September 1998 in the proceedings which it brought against the Commission, [1] claiming that that judgment should be set aside to the extent to which it dismissed the actions brought by the applicant.

2. Those actions sought the annulment of Commission Decisions C (96) 1185 and C (96) 1186, both of 14 August 1996, reducing aid granted to Mediocurso by the European Social Fund (hereinafter 'the ESF') for various vocational training projects.

3. Since the facts and legal context are set out in detail in the abovementioned judgment of the Court of First Instance, which has already been published in European Court Reports, I shall not reproduce them here.

4. In this appeal, Mediocurso relies on the following three grounds:

— breach of the principle requiring a prior hearing and breach of the rights of the defence;

— manifest error of assessment in the conclusions drawn by the Court of First Instance from the examination of the documents submitted;

— inconsistent grounds and breach of the principle of proportionality.

* Original language: French.

1 — Joined Cases T-180/96 and T-181/96 *Mediocurso* v *Commission* [1998] ECR II-3477.

The ground of appeal based on breach of the rights of the defence

5. The Court of First Instance rejected that plea in the following terms:

'49 According to settled case-law, the rights of defence of a beneficiary of ESF aid must be respected where the Commission reduces such aid (see, among others, Case C-32/95 P *Commission* v *Lisrestal and Others* [1996] ECR I-5373, paragraphs 21 to 44).

50 It should also be noted that, at paragraph 49 of its judgment in *Lisrestal* v *Commission*, cited above, the Court of First Instance, without being criticised on that point by the Court of Justice in Case C-32/95 P *Commission* v *Lisrestal*, stated that the Commission, which alone assumes legal liability to the beneficiary of ESF aid for decisions to reduce such aid, was not entitled to adopt such a decision without first giving the beneficiary the possibility, or ensuring that it had the possibility, of effectively setting forth its views on the proposed reduction.

51 The applicant, both in setting out the forms of order which it seeks and in its answer to the written question put to it by the Court, has recognised that it was heard by DAFSE [Departamento para os Asuntos do Fundo Social Europeu (Department for ESF matters)] before the letter of 11 September 1991 was formalised. In that letter, DAFSE did not accept all the observations made by the applicant regarding the proposed reductions.

52 It must be pointed out that the applicant did not formally submit observations on that letter, as the contested decisions rightly indicate. It in fact merely commenced proceedings against the letter before the Portuguese administrative courts. However, in this case, the applicant should also have formally submitted such observations so that they could be notified to the Commission by DAFSE. In such circumstances, the applicant cannot complain that its observations were not notified to the Commission since that fact was attributable to its own omission.

53 The Court considers that the applicant was thus given the possibility of "effectively" setting forth its views on the findings against it within the meaning of the judgment of the Court of First Instance in *Lisrestal* v *Commission*, cited above.'

6. Mediocurso is of the opinion that the principle requiring the prior hearing of a

party against whom a decision adversely affecting his interests is taken has not been observed. That principle was reiterated in the judgment of the Court of Justice in *Commission* v *Lisrestal and Others*, cited above. Mediocurso claims that it learned of the observations and reservations contained in the audit reports drawn up by the firm Audite only at a meeting held on 10 September 1991. Yet, as early as 11 September 1991, DAFSE sent Mediocurso a letter ordering it to repay certain sums.

7. With regard to the meeting of 10 September 1991, Mediocurso claims that it was in no position effectively to set forth its views on the content of the audit reports until it had analysed them in the light of the documents in its possession. It points out that any observations which it may have been able to make during the meeting — of which no written record exists — can in no way be confused with the effective exercise of the right to be heard.

8. With regard to the letter of 11 September 1991, Mediocurso asks how, given that it contained an order for repayment, it could be regarded as inviting its addressee to submit observations by way of the exercise of the right to be heard.

9. It points out that, faced with that order for repayment (which the Supreme Administrative Court ruled unlawful, moreover), the only possible reaction was to bring an action before the court of competent jurisdiction.

10. Mediocurso is of the opinion that the Court of First Instance therefore erred in finding that the applicant should have formally submitted observations on that letter, for forwarding to the Commission by DAFSE, and that the applicant could not complain that its observations were not notified to the Commission since that fact was attributable to its own omission.

11. The Commission considers that the Court of First Instance was correct in finding that Mediocurso could have set forth its views effectively on the letter of 11 September 1991. It notes that, following that letter, Mediocurso did not submit any observations and that it should have done so, so that they could be notified to the Commission, as the Court observes in paragraph 52 of the contested judgment.

12. It states that this complaint has already been disposed of by the Court of First Instance and that this is therefore a question of fact which is not a matter for the Court of Justice.

13. The Commission adds that, in choosing to bring the case before the Portuguese courts, Mediocurso itself waived the right to be heard by the Commission.

14. Finally, the Commission claims that, in point 38 of the reply submitted at first

instance by Mediocurso, the latter states that it had the opportunity to submit its observations after the notification, in 1991, of DAFSE's proposed reduction and during the meetings with Audite. In that regard the Commission quotes paragraph 104 of the contested judgment: 'The applicant also conceded in its written reply to the questions put to it by the Court and at the hearing that the essential content of the audit reports prepared by Audite was brought to its notice by letter of 11 September 1991...'. The Commission further points out, referring to paragraph 51 of the contested judgment, that, both in its application and in its written reply to the question put to it by the Court, Mediocurso recognised that it was heard by DAFSE before the letter of 11 September 1991 was formalised.

Assessment

15. It should be noted, first of all, that the decisions contested by Mediocurso before the Court of First Instance are those adopted by the Commission on 14 August 1996.

16. The question which arises is therefore whether, before adopting those decisions, the Commission first gave Mediocurso an opportunity, or ensured that it had an opportunity, of effectively setting forth its views on the proposed reduction.

17. As the Court of Justice stated in its judgment of 6 July 1993,[2] with regard to the remission of import duties, it is necessary to make a distinction between fields such as competition law or the collection of anti-dumping duties, where it is the Community institutions which decide to institute the procedure which may lead to the punishment of an economic agent who has contravened the provisions of the Treaty, and other situations.

18. In the context of the ESF, it is undertakings or private individuals who submit applications for aid from the Fund. That aid is granted subject to certain conditions. If those conditions are not observed, a reduction may be made in the aid. In accordance with the distinction made by the Court of Justice, that situation is not to be treated in the same way as the procedures for penalising an economic agent, in which the *audi alteram partem* rule therefore assumes special importance. It is therefore sufficient, in order for that rule to be observed, for the beneficiary to have had the possibility of making known to the Commission, either directly or through the competent national body, the reasons for which it considers that the reduction of aid is not justified, before the Commission takes its final decision. On the other hand, contrary to what the appellant claims, the *audi alteram partem* rule does not mean that the beneficiary must have been sent a formal invitation to submit its observations.

2 — Joined Cases C-121/91 and C-122/91 *CT Control (Rotterdam) and JCT Benelux* v *Commission* [1993] ECR I-3873, which concerned the remission of import duties pursuant to Council Regulation (EEC) No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties (OJ 1979 L 175, p. 1).

19. In the present case, it is common ground that Mediocurso was fully informed of the reasons for which a reduction of aid was envisaged, a fact which, moreover, it does not dispute. It is even apparent from paragraph 51 of the judgment of the Court of First Instance that, in its letter of 11 September 1991, 'DAFSE did not accept all the observations made by the applicant regarding the proposed reductions'. It can be inferred, by converse reasoning, from that passage, the truth of which has not been disputed by Mediocurso, that the latter was able to put forward some objections, a number of which were taken into consideration.

20. It is admittedly regrettable that DAFSE did not allow Mediocurso a reasonable length of time in which to analyse the audit reports in more detail and to supplement in writing the observations which it had made orally at the meeting of 10 September 1991. It is even more regrettable that the letter of 11 September 1991 contained an order for repayment, with the result that Mediocurso was under the impression that the only possible reaction on its part was to bring an action before the competent Portuguese court.

21. The fact nevertheless remains that, in those proceedings, which were directed against DAFSE, Mediocurso was able to make known to that body, in detail, the objections which it had to a reduction of aid.

22. I doubt, moreover, that, during the entire period which elapsed between the bringing of that action and the letter which DAFSE sent to the Commission on 22 September 1995, that body did not inform the Commission of the existence of pending proceedings and of the arguments put forward by Mediocurso in those proceedings. Was the Commission not concerned that this matter was not closed and did it not ask DAFSE for information?

23. However, since I have no evidence to that effect, I must assume that that was not the case.

24. It therefore remains to be ascertained whether, subsequently, before the Commission's formal decisions were adopted on 14 August 1996, Mediocurso was given the possibility of making its objections known to the Community institution.

25. It is clear from paragraph 28 of the judgment of the Court of First Instance that 'On 6 March 1996, DAFSE informed the applicant that the Commission had taken a decision on its two final payment applications and had confirmed the results of the financial audit which had already been notified to it on 11 September 1991'.

26. The Court of First Instance's judgment then states, at paragraph 29:

'On 4 April 1996 the applicant asked DAFSE for a copy of the Commission decision. It also sought leave to consult the ESF administrative file. The applicant was granted access to the administrative file on 24 April 1996 and found that there were no documents in the nature of a decision other than the Commission's debit notes determining the amounts which it was to reimburse...'

27. It can be concluded from those passages of the judgment, the accuracy of which is likewise undisputed, that DAFSE's letter of 6 March 1996 was referring, not to Commission decisions in the prescribed form, but to 'decisions in principle' which had still to be formalised. The Commission's internal procedure had therefore not yet been concluded.

28. One is also entitled to assume, in the absence of the slightest indication to the contrary, that the consultation of the ESF administrative file, which took place on 24 April 1996, was carried out in Brussels and that Mediocurso therefore had an opportunity to make oral observations to the officials responsible for its files.

29. However, once again, without confirming its objections in writing by means of a letter addressed to the Commission, Mediocurso opted for legal proceedings and brought actions against that institution before the Court of First Instance. [3]

30. In any case, through those actions, the appellant was able to make known to the Commission, in an even more formal manner than by means of a letter, the reasons for which it found the reduction of aid unacceptable.

31. Those actions, moreover, induced the Commission to withdraw the 'debit notes' which were the subject of the two actions (paragraph 30 of the judgment of the Court of First Instance).

32. The appellant was therefore not only able to make its views known to the Commission, but even induced it to adopt decisions drafted in the correct form.

33. It follows from the foregoing that, even if it is assumed that DAFSE never informed the Commission about the criticisms made by the appellant in the proceedings instituted by it before the Portuguese courts, Mediocurso was given an opportunity, before the adoption of the contested deci-

3 — Cases T-70/96 and T-72/96, removed from the register by order of the President of the Second Chamber of 12 November 1996.

sions of 14 August 1996, to bring its views directly to the attention of the Commission.

34. The ground of appeal based on breach of the rights of the defence must therefore be rejected.

The ground of appeal based on inaccuracy of the findings of fact made by the Court of First Instance with regard to sub-headings 14.3.1a and 14.3.13 of the final payment claim ('remuneration of the teaching staff' and 'taxes and charges')

35. The appellant is of the opinion that, by declaring that 'the documents produced by the applicant to indicate the kind of course provided in relation to the first file and the identity of the training staff who took part (Annexes 21 and 22 to the application) are, when scrutinised, so imprecise as to raise serious doubts as to whether the programmes in question were actually carried out...', and by making the same statement, *mutatis mutandis*, about the second file, the Court drew incorrect conclusions from its analysis of those documents.

36. According to the appellant, the documents unquestionably show that the courses in question were in fact given by the persons whose names appear in that connection in the documents and who are the signatories of the receipts proving that they were remunerated for those courses.

37. In accordance with its consistent case-law,[4] the Court of Justice should therefore, according to the appellant, set aside the judgment of the Court of First Instance in so far as it is based on substantively inaccurate findings of fact.

38. The Commission, on the other hand, contends that the Court of First Instance correctly established the facts relating to the two posts in question on the basis of the documents contained in the files. There are therefore no grounds, in this case, for claiming that its findings are substantively inaccurate.

39. The Court of First Instance was therefore fully entitled to consider that the Commission did not commit a manifest error of assessment in considering that the appellant had not demonstrated that the documentation produced by it did in fact relate to the courses covered by the relevant file.

40. The appellant criticises paragraphs 134 and 172 of the Court's judgment, which concern Case T-180/96 and Case T-181/96 respectively and are identically worded as follows:

'The Court considers that the documents produced by the applicant to indicate the

4 — See the judgment in Case C-136/92 P *Commission* v *Brazzelli Lualdi and others* [1994] ECR I-1981, paragraph 49.

kind of course provided in relation to the first file and the identity of the training staff who took part (Annexes 21 and 22 to the application) are, when scrutinised, so imprecise as to raise serious doubts as to whether the courses in question were actually held, as DAFSE rightly observed in point 14.3.1a of its letter of 22 September 1995. The Commission therefore committed no manifest error of assessment by considering that the applicant, which ran a large number of different training courses involving numerous staff, had not demonstrated that the documentary evidence produced by it in fact related to the courses covered by the first file [5] and by consequently refusing to accept in their entirety the expenses claimed in that regard'.

41. The appellant reiterates on several occasions its claim that, contrary to what is stated by the Court of First Instance, the documents which it produced leave no room for the slightest doubt that the courses in question were actually held.

42. It must in any event be observed that, whilst expressing doubts, the Court of First Instance did not conclude that the courses at issue had not taken place. This ground of appeal must therefore be rejected to the extent to which it attributes such a conclusion to the Court of First Instance.

43. The appellant's argument is also aimed at persuading the Court of Justice to overrule the Court of First Instance's conclusion that the Commission was entitled to consider that it had not been established that the documents produced did in fact relate to the courses covered by Community assistance.

44. It is clear from the case-law cited in point 37 above that, when an appeal is brought before it, the Court of Justice is not entitled to call in question the assessment of the facts made by the Court of First Instance, except where the substantive inaccuracy of the latter's findings is apparent from the documents in the file.

45. However, in the present case, the appellant has not established that those documents show that the Court of First Instance manifestly misapprehended the facts. The appellant merely contests the conclusion drawn by that Court from its examination of the documents produced in support of the claim.

46. This ground of appeal therefore effectively calls in question the assessment of the facts made by the Court of First Instance and must therefore, as such, be regarded as inadmissible.

47. It follows that the second ground relied on by the appellant must be rejected.

5 — Paragraph 172, relating to Case T-181/96, obviously refers to the second file.

The ground of appeal based on inconsistency of the grounds of the judgment and breach of the principle of proportionality

48. The appellant claims, first, that it was contradictory for the Court of First Instance to cast doubt on the fact that the training programmes were actually carried out while at the same time accepting that the Commission should treat as eligible certain expenditure, other than the remuneration of teaching staff, relating to those same courses.

49. It need merely be pointed out, in reply to that argument, that, as I have explained above, the Court of First Instance did not conclude that those training programmes were not carried out. Accordingly, it cannot be accused of any inconsistency whatsoever in accepting that the Commission should treat as eligible certain expenditure relating to those courses.

50. The appellant also argues that the Court of First Instance infringed the principle of proportionality by considering that the Commission was fully entitled to claim that the expenditure relating to the remuneration of the teaching staff and to the VAT chargeable thereon was ineligible in its entirety, merely on the ground that the appellant committed irregularities when it submitted its final payment claim.

51. The Commission states emphatically that it accepts that the training programmes in question did in fact take place. It must therefore be assumed that teaching staff were employed and remunerated for that purpose. The inevitable conclusion is, therefore, that the Commission does not seek to dispute the fact that expenditure was incurred to that end, but that it considers that, since the amount of that expenditure was not evidenced by vouchers relating absolutely incontestably thereto, that expenditure must be regarded as ineligible in its entirety.

52. Such an approach is contrary to the principle of proportionality. According to that principle, expenditure relating to a given heading must not be regarded as ineligible in its entirety when it is not disputed that some expenditure has been incurred in respect of that heading.

53. Thus, as the Court of First Instance itself held in a similar case, reductions made by the Commission which 'are directly linked to the irregularities detected and were designed solely to exclude reimbursement of unlawful or unnecessary expenditure' [6] are in keeping with the principle of proportionality.

54. However, in the present case the Commission does not allege that certain expenditure was unlawful or unnecessary, but merely that no proof of the amount of that expenditure was adduced. Even though it

6 — Case T-142/97 *Branco* v *Commission* [1998] ECR II-3567.

may be considered that the lack of diligence shown by a beneficiary who fails to adduce sufficient proof must entail a penalty, that penalty is clearly excessive if it leads, for the beneficiary, to the same result as if he had not carried out at all the operations covered by the heading in question.

55. The disproportionate nature of the refusal to treat any of the expenditure at issue as eligible is all the more apparent since the Commission was in a position to make the beneficiary bear certain consequences of its inability to produce satisfactory evidence, and to avoid paying out certain sums which were not due, while at the same time proceeding in a manner less unfavourable to the interests of the beneficiary.

56. Thus, it could have calculated a lump sum to be assigned to the remuneration of the teaching staff and, consequently, to the VAT chargeable thereon.

57. I am therefore of the opinion that the Court of First Instance failed to have regard to the requirements of the principle of proportionality by finding that the Commission had not exceeded its discretion by withholding the whole of the sum claimed in respect of the remuneration paid to the teaching staff (sub-heading 14.3.1a) as well as the amount relating to the VAT chargeable thereon (sub-heading 14.3.13). Consequently, the contested judgment should be set aside in that respect.

58. In view of the fact that the Court of Justice has before it all the evidence necessary to dispose of the substantive issue, I propose that it should annul the Commission's decisions with which Cases T-180/96 and T-181/96 are concerned, to the extent to which they treat the abovementioned sums as ineligible in their entirety. Indeed, that consequence necessarily follows from the foregoing considerations.

59. It also follows that the decision of the Court of First Instance as to costs in Case T-181/96 must be annulled. The appellant was ordered to pay all the costs in that case. However, since one of its pleas has been upheld on appeal, those costs must be shared. Since that course has already been followed by the Court of First Instance in Case T-180/96, there is no need, in my view, to alter it, since both parties have been partly unsuccessful. With regard to the costs of the appeal, I propose that they should be shared equally, the appellant having failed in its principal claims.

Conclusions

60. For the foregoing reasons, I propose that the Court should:

— set aside the judgment of the Court of First Instance of 15 September 1998 in Joined Cases T-180/96 and T-181/96 *Mediocurso* v *Commission* in so far as it found that the Commission was fully entitled to treat as ineligible the whole of the sum claimed in respect of the remuneration paid to the teaching staff (sub-heading 14.3.1a) as well as the amount relating to the VAT chargeable thereon (sub-heading 14.3.13);

— annul paragraph 5 of the operative part of that judgment and direct that each party is to bear its own costs in Case T-181/96;

— dismiss the remainder of the appeal;

— annul Commission Decision C (96) 1185 of 14 August 1996 reducing the aid granted in Decision C (89) 0570 of 22 March 1989 and Commission Decision C (96) 1186 of 14 August 1996 reducing the aid granted in Decision C (89) 0570 of 22 March 1989 to the extent to which they treat as ineligible, in their entirety, the sums claimed in respect of the remuneration paid to the teaching staff (sub-heading 14.3.1a) as well as the amount relating to the VAT chargeable thereon (sub-heading 14.3.13);

— direct that each party is to bear its own costs in respect of the appeal.