JUDGMENT OF THE COURT (Sixth Chamber)
24 October 1996 *

In Case C-32/95 P,

Commission of the European Communities, represented by Ana Maria Alves Vieira and Nicholas Khan, 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,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities in Case T-450/93 *Lisrestal and Others* v *Commission* [1994] ECR II-1177, seeking to have that judgment set aside in part,

the other parties to the proceedings being:

Lisrestal — Organização Gestão de Restaurantes Colectivos Ld.ª, a company incorporated under Portuguese law, established in Almada (Portugal),

Gabinete Técnico de Informática Ld.ª (GTI), a company incorporated under Portuguese law, established in Lisbon,

Lisnico — Serviço Marítimo Internacional Ld.ª, a company incorporated under Portuguese law, established in Almada,

Rebocalis — Rebocagem e Assistência Marítima Ld.ª, a company incorporated under Portuguese law, established in Almada, and

* Language of the case: Portuguese.

Gaslimpo — Sociedade de Desgasificação de Navios SA, a company incorporated under Portuguese law, established in Almada,

represented by Manuel Rodrigues, of the Lisbon Bar, with an address for service in Luxembourg at the Chambers of Ângelo Alves Azevedo, 61 Rue de Gasperich,

THE COURT (Sixth Chamber),

composed of: C. N. Kakouris, acting for the President of the Chamber, P. J. G. Kapteyn and H. Ragnemalm (Rapporteur), Judges,

Advocate General: A. La Pergola,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 6 June 1996,

gives the following

Judgment

1 By application lodged at the Registry of the Court of Justice on 10 February 1995, the Commission of the European Communities brought an appeal under Article 49 of the EC Statute of the Court of Justice against the judgment in Case T-450/93 *Lisrestal and Others* v *Commission* [1994] ECR II-1177 (hereinafter 'the contested judgment'), in which the Court of First Instance annulled the Commis-

sion decision reducing financial assistance from the European Social Fund (hereinafter 'the Fund') initially granted to Lisrestal, GTI, Rebocalis, Lisnico and Gaslimpo (hereinafter 'the respondents') and which required them to repay an initial advance of ESC 138 271 804.

2 The contested judgment states that in 1986 the respondents and two other undertakings, Proex Ld.ª and Gelfiche, all established in Portugal (hereinafter 'the beneficiaries') applied to the Fund, through the Departamento para os Assuntos do Fundo Social Europeu (the competent national authority in the Portuguese Ministry of Employment and Social Security, hereinafter 'DAFSE') for assistance in respect of a proposed operation concerning vocational training, as provided for in Article 3(1) of Council Decision 83/516/EEC of 17 October 1983 on the tasks of the European Social Fund (OJ 1983 L 289, p. 38), in the district of Setúbal (Portugal) (paragraph 7).

3 The Fund's assistance was requested in order to carry out a vocational training scheme to improve employment opportunities for 1 687 young persons aged under 25 having qualifications which were inadequate and/or inappropriate after the end of their compulsory schooling (paragraph 8).

4 On 31 March 1987 the proposal for the scheme was approved by Commission Decision C(87) 670 in respect of a total amount of ESC 630 642 227, of which ESC 346 853 225 was to be financed by the Fund and ESC 283 789 002 by the Orçamento da Segurança Social/Instituto de Gestão Financeira da Segurança Social (Social Security Budget/Institute for the Financial Management of Social Security) (paragraph 9).

5 In accordance with Article 5(1) of Council Regulation (EEC) No 2950/83 of 17 October 1983 on the implementation of Decision 83/516/EEC (OJ 1983 L 289, p. 1) the Fund made an advance payment of 50% of the assistance granted to the beneficiaries, namely ESC 173 426 612 (paragraph 10). On 31 October 1988 the

same beneficiaries submitted a claim, through DAFSE, for payment of the balance, namely ESC 127 483 930. Supporting documents and a report on the operation of the scheme were sent with that claim (paragraph 11).

6 On 25 November 1988 the audit section of the Fund proposed that the file be reviewed because the costs and operations were not clear from the invoices (paragraph 12). That investigation, carried out between 29 January and 2 February 1990 at the premises of two of the respondents, Lisrestal and GTI, revealed various irregularities in the financial management of the assistance, in particular in the subcontracting of the entire scheme to organizations which did not have the necessary infrastructure or experience. On the assumption that false contracts and invoices were involved, the inspectors suggested that a demand should be made for repayment of the Community funds paid to the respondents (paragraph 13).

7 On 19 October 1990 DAFSE sent 'certificates' to the respondents stating that there had been a Community investigation to check the implementation and legality of the scheme, but that it could not provide any other information, since the Commission had not yet adopted a definitive decision on the matter (paragraph 14).

8 By letter of 14 June 1991 the competent head of department in the Directorate-General for Employment, Industrial Relations and Social Affairs (DG V) sent the inspectors' findings to DAFSE and stated that the Fund considered that a sum of ESC 536 879 559 had been used for ineligible expenditure (paragraph 16). In the same letter DAFSE was informed that a ceiling of ESC 35 154 808 had been set for the amount of aid from the Fund and that, having regard to the payment of ESC 173 426 612 which had been paid by way of initial advance, ESC 138 271 804 would have to be repaid. The Commission allowed DAFSE 30 days to submit its observations (paragraph 17).

9 By letter of 8 July 1991 DAFSE informed the Fund that it did not have any observations to make on the reports of the Fund's inspectors or on its letter of 14 June 1991 and that it accepted the decision (paragraph 18).

10 On 3 March 1992 the Commission sent a repayment demand to DAFSE (paragraph 20).

11 By letters of 24 April 1992 and 7 May 1992 DAFSE informed the respondents of the Commission's decision to reduce the assistance granted and of the amounts to be refunded to the ESF and to the Portuguese social security budget authorities (paragraph 21).

12 By application lodged at the Registry of the Court of First Instance on 19 June 1992 the respondents brought an action for annulment of the Fund's decision ordering the repayment (hereinafter 'the decision') and for an order that the Commission pay the whole of the sums claimed.

13 In support of those claims, the respondents relied essentially on four pleas. The first plea alleged that the department of the Fund was non-existent or at least not competent to adopt the decision; the second claimed that the rights of the defence had been infringed; the third that an insufficient statement of reasons had been given; and the fourth that there had been a manifest error of assessment.

14 In the contested judgment the Court rejected the first plea. It also rejected as inadmissible the respondents' claim for an order that the Commission should pay the

balance of the assistance. Finally, as to the second and third pleas, the only ones with which this appeal is concerned, the Court of First Instance held as follows:

'42. The Court observes that it is settled law that respect for the rights of the defence in all proceedings which are initiated against a person and are liable to culminate in a measure adversely affecting that person is a fundamental principle of Community law which must be guaranteed, even in the absence of any specific rules concerning the proceedings in question (see in particular Joined Cases C-48/90 and C-66/90 *Netherlands and Others* v *Commission* [1992] ECR I-565, paragraph 44, and Case C-135/92 *Fiskano* v *Commission* [1994] ECR I-2885). That principle requires that any person who may be adversely affected by the adoption of a decision should be placed in a position in which he may effectively make known his views on the evidence against him which the Commission has taken as the basis for the decision at issue.

43. To determine whether the applicants' rights of defence have been infringed in this case, it must be considered whether, having regard to the role played in the relevant procedure by the Member State as sole interlocutor of the [Fund] the contested decision is capable of directly concerning the applicants and adversely affecting them.

44. It must be held that the contested decision deprives the recipient undertakings of a part of the assistance initially granted and that Regulation No 2950/83 does not give the Member State concerned any power to make its own assessment (see, most recently, the order in Case T-446/93 *Frinil and Others* v *Commission*, not published in the ECR, paragraph 29).

45. Furthermore, it was in the repayment demand of 3 March 1992 that the Commission definitively purported to reduce the assistance granted, as it had indicated in the letter of 14 June 1991 from DG V to DAFSE. The Commission's decision incorporated in the abovementioned letter was, it is true, addressed only to the Portuguese authorities. However, it named and expressly referred to the applicants

as direct beneficiaries of the assistance granted. The Court therefore considers that the applicants are directly and individually concerned by the contested decision to reduce that assistance.

46. That analysis is confirmed by the fact that it has consistently been held that undertakings which have received financial assistance from the [Fund] are entitled to bring actions against the decisions depriving them of such assistance (see Case C-291/89 *Interhotel* v *Commission* [1991] ECR I-2257, paragraph 13, and Case C-157/90 *Infortec* v *Commission* [1992] ECR I-3525, paragraph 17), which presupposes not only that they are individually concerned by such decisions, but also that they are directly concerned by them.

47. That analysis is also borne out by the provisions of Regulation No 2950/83, the effect of which is to establish a direct link between the Commission and the recipient of the assistance, even though the Member State is the sole interlocutor of the [Fund] . Article 6 of Regulation No 2950/83 provides that first, it is for the Commission to suspend, reduce or withdraw assistance [from the Fund] , where it has not been used in conformity with the conditions set out in the decision of approval, the relevant Member State merely having an opportunity to comment, and secondly, sums paid which are not used in accordance with the conditions laid down in the decision of approval are to be refunded, the Member State concerned having only secondary liability for the repayment of sums, unwarranted payment of which has been made for operations to which the guarantee referred to in Article 2(2) of Decision 83/516 applies.

48. The applicants are therefore directly affected by the economic consequences of the decision to reduce the assistance, which adversely affects them since they have primary liability for the repayment of the sums paid without warrant (judgment in *Netherlands and Others* v *Commission*, cited above, paragraph 50). Moreover, the Commission acknowledged at the hearing that, if necessary, it could commence

proceedings against the applicants in the national courts for recovery of the sums at issue.

49. It follows that the Commission, which alone assumes legal liability to the applicants for the contested decision, was not entitled to adopt the contested decision without first giving those undertakings the possibility, or ensuring that they had had the possibility, of effectively setting forth their views on the proposed reduction in assistance.

50. It is common ground that neither the reports of the Commission's enquiry nor the Commission's complaints against them were notified to the applicants, and that they were not heard by the Commission before it adopted the contested decision. It is also agreed that DAFSE, after having being invited by the Commission by letter of 14 June 1991 to submit its observations, informed the Commission by letter of 8 July 1991, without first hearing the applicants, that it intended to accept the decision which the Commission was preparing to adopt with respect to the applicants.

51. In those circumstances the adoption of the contested decision infringed the applicants' rights of defence.'

15 After having also found that neither the decision nor the inspection reports satisfied the requirement in Article 190 of the Treaty to state the reasons on which they were based (paragraph 52), the Court of First Instance annulled the decision.

16 In its appeal the Commission requests the Court, first, to set aside paragraphs 2 and 3 of the operative part of the contested judgment, in which the Court of First Instance annulled the decision and ordered the Commission to pay the costs, secondly, to refer the case to the Court of First Instance for a ruling on the fourth plea relied on by the respondents in their application to that court, alleging a manifest error of assessment, and thirdly, to reserve the costs.

17 It support of its appeal the Commission claims that the Court of First Instance committed errors of law by holding in the contested judgment that

— the procedure whereby the decision was adopted infringed the respondents' rights of defence, and

— the decision was vitiated by lack of a statement of reasons and does not satisfy the requirements of Article 190 of the Treaty.

18 In its first plea the Commission maintains that the Court of First Instance committed an error of law in holding that the Commission could not adopt the decision at issue without first giving the respondents the possibility of effectively giving their views on the reduction in financial assistance. It relies on three arguments.

19 First, it is not possible to give the respondents a right to be heard beforehand because of the way in which the administration and management of the Fund are structured. Second, the decision does not impose any sanction on the respondents. Third, the way in which the Fund is administered makes it extremely difficult in practice for the Commission to consult beneficiaries directly.

20 The Commission also maintains that in any event the respondents had already been informed by a letter received from DAFSE on 19 October 1990 of the reservations and suspicions which it harboured in regard to the observance of the conditions for the award of assistance laid down in the decision of approval.

The respondents' right to be heard

21 Observance of the right to be heard is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the proceedings in question (see, *inter alia*, Case C-135/92 *Fiskano* v *Commission* [1994] ECR I-2885, paragraph 39, and Joined Cases C-48/90 and C-66/90 *Netherlands and Others* v *Commission* [1992] ECR I-565, paragraph 44). That principle requires that the addressees of decisions which significantly affect their interests should be placed in a position in which they may effectively make known their views.

22 In its first argument, the Commission claims that the respondents were not concerned by the procedure leading up to the decision at issue and that therefore they cannot rely on the abovementioned principle. Unlike the Member State concerned, the respondents do not play a central and significant role in the procedure under which vocational training schemes are financed and supervised; moreover, they have direct relations only with the Member State, which is the sole interlocutor of the Fund. According to the judgment in Case 310/81 *EISS* v *Commission* [1984] ECR 1341, paragraph 15, the financial relationships are therefore created between the Commission and the Member State, on the one hand, and between that Member State and the institution which is the recipient of the financial assistance, on the other.

23. That argument cannot be accepted.

24 The procedure which led to the decision at issue was 'initiated against' the respondents for the purposes of the case-law cited in paragraph 21 of this judgment. Despite the central role played by the Member State concerned in the system established by Regulation No 2950/83, the respondents were directly implicated in the investigation which led to the decision.

25 In that regard it should be noted that on 25 November 1988 the audit section of the Fund proposed that the file should be reviewed by carrying out investigations at the premises of two of the respondents, Lisrestal and GTI. Those investigations revealed various irregularities in the financial management of the assistance, which led to the adoption of the decision.

26 Furthermore, as the Court of First Instance held in paragraph 45 of the contested judgment, although the decision was addressed only to the Portuguese authorities, it named and expressly referred to the respondents as direct beneficiaries of the assistance.

27 That view is supported by Article 6(2) of Regulation No 2950/83, which provides that sums 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 only secondary liability for the repayment of sums unduly paid when it has guaranteed the successful conclusion of the operations by virtue of Article 2(2) of Decision 83/516.

28 The Court of First Instance was therefore entitled to find, at paragraph 47 of the contested judgment, that even though the Member State is the sole interlocutor of the Fund a direct link is established between the Commission and the recipient of the assistance.

29 Furthermore, although a decision to suspend, reduce or withdraw Community assistance may sometimes reflect an assessment and evaluation by the competent national authorities, under Article 6(1) of Regulation No 2950/83 it is the Commission which adopts the final decision and takes sole legal liability for such a decision as against the beneficiaries.

30 Moreover, the fact that Article 6(1) requires the Member State concerned to be consulted before the Commission adopts a decision to suspend, reduce or withdraw the assistance does not justify the conclusion that a principle of Community law as fundamental as that which guarantees every person the right to be heard before the adoption of a decision capable of adversely affecting him does not apply.

31 In its second argument the Commission claims that the decision does not impose any sanction or penalty on the respondents. It is merely an administrative corollary of the decision in which the Commission authorized the financial assistance and laid down the criteria to which it was subject.

32 That argument cannot be accepted.

33 As the Court of First Instance found, the decision deprives the respondents of the whole of the assistance which had initially been granted to them. They therefore directly suffer the economic consequences of the decision, which affects their assets because they incur primary liability to repay the sums unduly paid within 15 days of receipt of the letters of 24 April 1992 and 7 May 1992 from DAFSE informing them of the adoption of the decision by the Commission.

34 It must therefore be held that the decision significantly affects the respondents' interests.

35 In its third argument the Commission claims that, in practice, the nature of the administration of the Fund makes it extremely difficult for the Commission to consult beneficiaries directly. Once the application for assistance has been made, the Commission delegates the task of administering the projects approved entirely to the Member State. To say that in the present case it should have consulted the respondents would mean changing the way in which the Fund is now administered.

36 That argument cannot be accepted either.

37 In the first place, an argument based on practical grounds is not sufficient to justify infringement of a fundamental principle such as the observance of the rights of the defence.

38 Secondly, according to Article 5(5) of Regulation No 2950/83, the Commission is aware of the identity of the beneficiaries, since it is required to inform all parties concerned when a payment is made.

Implementation of the right to be heard by the Commission

39 The Commission considers that the Court of First Instance wrongly failed to take account of the fact that the respondents had already been informed of the reservations and well-founded suspicions which the Commission harboured with regard to the observance of the conditions of the award laid down in the decision of approval. The respondents received a letter from DAFSE dated 19 October 1990 which set out those reservations and suspicions. If they had had substantive arguments capable of dispelling them, they could have indicated them to DAFSE, which would have communicated them to the Commission.

40 The Court of Justice may examine such a plea only in so far as it seeks to contest the assessment made by the Court of First Instance of the tenor and wording of the letters of 19 October 1990 (Case C-39/93 P *SFEI* v *Commission* [1994] ECR I-2681, paragraph 26).

41 It is clear that those letters contain no explanation of the reservations and suspicions harboured by the Commission at that time. In them DAFSE merely informed the respondents that there had been a Community investigation in order to check the implementation and legality of the scheme and stated that the Commission had not yet adopted a definitive decision.

42 It follows that the letters of 19 October 1990 were not such as to inform the respondents of the reservations and suspicions harboured by the Commission.

43 In those circumstances, it must be held that the Court of First Instance was entitled to conclude that the decision at issue was adopted in breach of the respondents' rights of defence.

44 The first ground of appeal must therefore be rejected as unfounded.

45 Since that infringement of the rights of the defence must result in the annulment of the decision at issue, it is not necessary to examine the second ground of appeal relied on by the Commission, alleging lack of a statement of reasons.

46 The appeal must therefore be dismissed in its entirety.

Costs

47 According to Article 69(2) of the Rules of Procedure, applicable to the appeal procedure by virtue of Article 118, the unsuccessful party is to be ordered to pay the costs. Since the Commission's pleas have failed, it must be ordered to bear the costs of these proceedings.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. Dismisses the appeal;

2. Orders the appellant to pay the costs.

Kakouris Kapteyn Ragnemalm

Delivered in open court in Luxembourg on 24 October 1996.

R. Grass G. F. Mancini

Registrar President of the Sixth Chamber