JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
16 July 1998 *

In Case T-72/97,

Proderec — Formação e Desinvolvimento de Recursos Humanos ACE, a company incorporated under Portuguese law with its registered office in Almada (Portugal), represented by Manuel Rodrigues, of the Lisbon Bar, 17D 1° Esq., Rua Torcato José Clavine, Pragal, Almada,

applicant,

v

Commission of the European Communities, represented 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 Commission Decisions C(96) 2554 and C(96) 2555 of 9 December 1996 reducing two Community aids granted by the European Social Fund,

* Language of the case: Portuguese.

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

composed of: P. Lindh, President, K. Lenaerts and J. D. Cooke, Judges,

Registrar: B. Pastor, Principal Administrator,

having regard to the written procedure and further to the hearing on 2 April 1998,

gives the following

Judgment

Legislative background

1 Under 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; 'Decision 83/516'), the latter participates in the financing of vocational training and guidance operations.

2 Article 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; 'Regulation No 2950/83') lists the items of expenditure which may be the subject of assistance from the European Social Fund ('ESF')

3 Under Article 5(1) of Regulation No 2950/83, approval given by the ESF to an application for finance is to be followed by the payment, on the date on which the training programme is scheduled to begin, of an advance of 50% of the assistance approved. Under Article 5(4), final payment claims are to contain a detailed report on the content, results and financial aspects of the relevant operation, the Member State certifying accuracy of the facts and accounts in those claims.

4 Article 6(1) of Regulation No 2950/83 provides that, when Fund assistance is not used in conformity with the conditions set out in the approval decision, the Commission may suspend, reduce or withdraw the aid after giving the Member State concerned an opportunity to comment. Article 6(2) provides that sums paid which are not used in accordance with those conditions are to be refunded.

5 Article 7 of Regulation No 2950/83 lays down detailed rules concerning the on-the-spot checks which the Commission is entitled to carry out.

6 Article 6(1) of Commission Decision 83/673/EEC of 22 December 1983 on the management of the European Social Fund (OJ 1983 L 377, p. 1; 'Decision 83/673') provides that Member States' payment applications must reach the Commission within 10 months of the date of completion of the operations concerned. Article 6(2) provides that advances are to be reimbursed when the costs of the operation concerned cannot be justified within three months of the expiry of the 10-month period laid down in Article 6(1). Finally, Article 7 provides that where the management of an operation for which assistance has been granted is the subject of an investigation because of suspected irregularities, the Member State is to notify the Commission thereof without delay.

Facts and procedure

7 In 1988 the Departamento para os Assuntos do Fundo Social Europeu (Department of European Social Fund Affairs, part of the Portuguese Ministry of Labour and Social Security) ('DAFSE'), acting for the Portuguese Republic and on behalf of the applicant, made two applications to the ESF for assistance for the 1988 financial year, one in respect of a projected training programme intended to prepare young Portuguese nationals for taking up their first employment (File No 881311 P1) and the other in respect of a projected training programme intended to promote greater specialisation and recycling in view of the economic crisis (File No 880249 P3).

8 The two projects were approved by two decisions of the Commission notified to the applicant by letters from the DAFSE of 25 May 1988. So far as concerns Project 881311 P1, the decision fixed the amount of ESF assistance at ESC 104 623 102, the Portuguese Republic undertaking to finance the project up to an amount of ESC 85 600 720 through the Orçamento da Segurança Social/ Instituto de Gestão Financeira da Segurança Social (Social Security Budget/ Institute for the Financial Management of Social Security) ('OSS/IGFSS'). So far as concerns Project 880249 P3, the decision fixed the amount of ESF assistance at ESC 60 851 922, the Portuguese Republic undertaking to finance the project up to an amount of ESC 49 787 936, also through the OSS/IGFSS.

9 On 14 July 1988 the applicant received, pursuant to Article 5(1) of the regulation, an advance of 50% of the assistance granted by the ESF together with that granted by the OSS/IGFSS, amounting to ESC 52 311 551 and ESC 42 800 360 in respect of File No 881311 P1 and ESC 30 425 961 and ESC 24 893 968 in respect of File No 880249 P3.

10 After completion of the two operations concerned, the applicant submitted to the DAFSE a claim for final payment of the assistance granted.

11 On 2 February 1990 the DAFSE informed the applicant that its claim for the balance in File No 881311 P1 had been forwarded to the Commission, but that ESC 6 491 845 had been considered ineligible.

12 On 16 October 1991 the applicant asked the DAFSE to state the date of payment of the balance of the assistance obtained for the two projects completed. The DAFSE replied on 24 October 1991 that it awaited the submission of a report and the result of an audit.

13 Since the DAFSE did not forward those two documents, the applicant brought an action against the Portuguese State on 17 September 1993 under Article 69 of the Lei do Processo dos Tribunais Administrativos, Decreto-lei No 262/85 (Law on Procedure before the Administrative Courts), of 16 July 1985 (hereinafter 'LPTA'), for a declaration that it was entitled to payment of the balance of the assistance. That action was dismissed on the ground that the defendant was not the Portuguese State but the body which was the author of the act, in that case, the Director General of the DAFSE. The applicant then brought an action of the same kind against the Director General of the DAFSE. The second action was not successful either, on the ground that the action that should have been brought was one in civil liability against the Portuguese State under Article 73 of the LPTA and Article 51(1)(h) of the Estatuto do Tribunal Administrativo (Statute of the Administrative Court).

14 On 26 January 1994 the DAFSE notified the applicant of the results of a check carried out at its request by the Inspecção-Geral de Finanças (General Inspectorate of Finance; 'the IGF'). The applicant submitted its observations on 24 February 1994, whereupon the DAFSE requested certain clarifications on 16 May 1994, which the applicant supplied on 26 May 1994.

15 On 9 September 1994 the DAFSE communicated to the applicant the decisions it had taken following the claims for payment of the balance, and requested the

applicant to repay to it, within 30 days, a total of ESC 62 856 998, comprising ESC 29 052 034 under File No 881311 P1 and ESC 33 804 964 under File No 880249 P3. On 10 October 1994 the applicant brought an action before the Tribunal Administrativo de Círculo de Lisboa (Lisbon Administrative Circuit Court) challenging that repayment order, arguing in particular that any claim by the DAFSE in that respect was time-barred.

16 On 11 May 1995 the DAFSE informed the applicant that the Commission had approved the claim for payment of the balance relating to File No 880249 P3, whilst referring to the certification made by the DAFSE on 9 September 1994, which also concerned File No 881311 P1 (see the preceding paragraph).

17 On 25 May 1995 counsel for the applicant asked the DAFSE to send him a certificate or a certified true copy of the decision approving the claim for payment of the balance relating to File No 880249 P3. The applicant has, however, not received any reply to that letter.

18 By application lodged at the Court Registry on 10 July 1995 the applicant brought an action for the annulment of the Commission's decision to reduce the two amounts of ESF assistance, notified to it by the letter from the DAFSE of 11 May 1995 (Case T-145/95).

19 On 9 December 1996 the Commission adopted decisions C(96) 2554 and C(96) 2555 ('the contested decisions') in order to reduce, under File Nos 881311 P1 and 880249 P3, the amount of the contribution granted by Decision C(88) 831 of 29 April 1988.

20 In its defence in Case T-145/95, lodged at the Court Registry on 16 December 1996, the Commission explained that the contested decisions, annexed to its

defence, replaced the Commission's approval of the claims for payment of the balance of the Community assistance granted in the context of File Nos 881311 P1 and 880249 P3, which took the form of charge notes Nos 95001035 U and 95001037 W of the Commission fixing the amount to be reimbursed at ESC 15 978 619 and ESC 18 592 730 respectively.

21 It concluded that there was no further need to adjudicate on the action.

22 By a letter from the Court Registry of 10 January 1997, the applicant was invited to state its views on that latter contention. It lodged its observations at the Court Registry on 4 February 1997.

23 By order of 28 May 1997 in Case T-145/95 *Proderec* v *Commission* [1997] ECR II-823, the Court held (point 23) that, by adopting the contested decisions, the Commission implicitly withdrew the act contested in Case T-145/95 on the ground that it did not satisfy the requirements in regard to the reasoning of decisions reducing the amount of Community assistance initially granted. It also took the view (point 26) that the withdrawal of the contested act had produced effects equivalent to those of a judgment annulling it, without prejudice to the applicant's right to challenge the legality of the two Commission decisions of 9 December 1996 by way of a separate action. It concluded (points 27 to 29) that the applicant had no further interest in obtaining the annulment of the contested act, with the result that its action had become devoid of purpose and there was no further need to adjudicate on it.

24 On 28 January 1997 the DAFSE communicated the contested decisions to the applicant, by means of two identical letters worded as follows:

'Further to our Memorandum No [5394 in respect of File No 881311 P1 and 5445 in respect of File No 880249 P3] of 11 May 1995, we enclose a copy of the formal decision of the European Commission concerning File No [881311 P1 and 880249 P3 respectively].'

25 By application lodged at the Court Registry on 27 March 1997, the applicant brought the present action for the annulment of the contested decisions.

26 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fourth Chamber) decided to open the oral procedure without any preparatory inquiry. As a measure of organisation of procedure, however, the Court requested the applicant to reply to a question in writing before the hearing, which was done within the time allowed.

27 The parties presented oral argument and replied to the Court's questions at the hearing on 2 April 1998.

Forms of order sought

28 In its application, the applicant claims that the Court should:

— annul the contested decisions;

— order the Commission to pay the costs.

29 In its reply, it adds that the 'question of inadmissibility' should be rejected.

30 The Commission contends that the Court should:

— declare the action inadmissible;

— in the alternative, dismiss it as unfounded;

— order the applicant to pay the costs.

Admissibility

Arguments of the parties

31 Without formally raising an objection of inadmissibility for the purposes of Article 114(1) of the Rules of Procedure, the Commission argues in its defence that the action was brought outside the time-limit specified in the fifth paragraph of Article 173 of the EC Treaty. The applicant became aware of the contested decisions at the time when the defence in Case T-145/95 was served on it, that it to say on 7 January 1997 at the latest, since a copy of those decisions was annexed to that pleading. Noting that the Registry of the Court of First Instance asked the applicant on 10 January 1997 to state its views on the contention that there was no need to adjudicate, the Commission concludes that that must in any event be the latest date capable of being used as the starting-point for the period prescribed for bringing proceedings. It adds that, as regards the decisions of which the applicant is not the addressee, the starting-point to be taken into consideration is not the date on which the DAFSE notified those decisions to the applicant but the date on which the applicant became aware of them, which in this case was 10 January 1997 at the latest. Since this action was brought on 27 March 1997, the Commission submits that it is clearly out of time and therefore inadmissible.

32 The applicant emphasises that the contested decisions were notified to it by the DAFSE on 28 January 1997, so that, pursuant to the fifth paragraph of Article 173 of the Treaty, the period prescribed for bringing an annulment action did not start to run until that date. In those circumstances, an action brought on 27 March 1997 clearly complied with the requirements as to time-limits laid down by the fifth paragraph of Article 173 of the Treaty.

Findings of the Court of First Instance

33 The fifth paragraph of Article 173 of the Treaty sets the time-limit for bringing an action for annulment at two months as from publication of the measure, its notification to the applicant, or, in the absence thereof, of the day on which it came to the applicant's knowledge, as the case may be. Pursuant to Article 102(2) of the Rules of Procedure, that time-limit is to be extended by ten days on account of distance where, as in this case, the applicant is based in Portugal.

34 The applicant is not the addressee of the contested decisions. They were addressed to the authorities of the Portuguese Republic (Article 4 of each decision), in this case the DAFSE. Those decisions are, however, of direct and individual concern to the applicant within the meaning of the fourth paragraph of Article 173 of the Treaty inasmuch as they deprive it of part of the ESF assistance which had originally been granted to it, the Portuguese authorities having no discretion of their own in that respect (see, in particular, Case C-291/89 *Interhotel* v *Commission* [1991] ECR I-2257, paragraph 13; Case C-157/90 *Infortec* v *Commission* [1992] ECR I-3525, paragraph 17).

35 In this case it needs to be examined whether, as the Commission maintains, the applicant brought this action more than two months and ten days after becoming aware of the contested decisions, the latter having been notified to their addressee, the DAFSE, and not having been published in the *Official Journal of the European Communities*.

36 Although it is not in dispute that the Commission attached copies of the two contested decisions as an annex to the defence which it lodged on 18 December 1996 in Case T-145/95 (see paragraph 20 above), the Commission has not established that the applicant actually became aware of the existence and content of the contested decisions on 7 or 10 January 1997 (see paragraph 31 above). In that regard, it is not sufficient merely to invoke the date on which the Registry of the Court of First Instance sent the defence and its annexes to the person authorised, in the context of Case T-145/95 alone, to accept service on behalf of the applicant, in accordance with Article 44(2) of the Rules of Procedure. It cannot be concluded from that fact alone that the existence and content of the contested decisions actually came to the knowledge of the applicant within the meaning of the fifth paragraph of Article 173 of the Treaty, causing the period prescribed by that provision to start to run for the purposes of bringing new proceedings other than Case T-145/95, even if those new proceedings are between the same parties.

37 It must therefore be concluded that the dates on which the applicant acquired a precise knowledge of the author, the content and the grounds of the contested decisions, in such a way as to enable it to exercise its right of action (see Case 76/79 *Könecke* v *Commission* [1980] ECR 665, paragraph 7; Case C-180/88 *Wirtschaftsvereinigung Eisen- und Stahlindustrie* v *Commission* [1990] ECR I-4413, paragraph 22) are 28 January 1997 and 4 February 1997 (see paragraphs 22 and 24 above). The first of those dates is the one on which the applicant acknowledges receiving a copy of the contested decisions from the DAFSE. The second is the date on which it submitted its observations on the Commission's application for a declaration that there was no need to adjudicate contained in its defence in Case T-145/95, to which copies of the contested decisions were annexed.

38 It follows that this action was brought within the two-month time-limit laid down by the fifth paragraph of Article 173 of the Treaty, extended by ten days on account of distance, as from the applicant's becoming aware of the contested decisions.

39 The action is therefore admissible.

Substance

40 The applicant puts forwards essentially four pleas, alleging, first, infringement of the relevant rules resulting from the second certification carried out by the DAFSE; secondly, infringement of Article 190 of the Treaty; thirdly, misuse of powers; and, fourthly, infringement of the applicant's rights of defence.

The first plea, alleging infringement of the relevant rules, resulting from the second certification by the DAFSE

Arguments of the parties

41 The applicant cites defects affecting the DAFSE's second certification, on 9 September 1994, of the factual and accounting accuracy of the expenses submitted in support of the claim for payment of the balance of the two amounts of ESF assistance in order to challenge the legality of the contested decisions adopted on the basis of that certification.

42 Its plea is in three parts.

— First part of the plea

43 The applicant pleads lack of competence on the part of the DAFSE through lapse of time. The DAFSE was not, according to the applicant, entitled to go back, by means of a second factual and accounting certification, on that carried out on 30 October 1989, in accordance with Article 5(4) of Regulation No 2950/83.

Under the provisions of Articles 1(2), 4, and 6(1) and (2) of Decision 83/673, factual and accounting certification of expenses submitted in the beneficiary's application for payment of ESF aid was to take place within 13 months after the end of the operations thus financed. In this case, the applicant concluded the operations financed by the two amounts of ESF assistance at the end of 1989. The second factual and accounting certification by the DAFSE in 1994 was thus clearly made outside the period laid down by those provisions.

44 In its reply, the applicant adds that the Commission cannot now attempt to justify the second certification by claiming that the DAFSE harboured certain doubts as early as 25 January 1990 as to the factual and accounting reality of the expenses submitted as an annex to the applicant's claim for payment. If the DAFSE had had such doubts in October 1989, at the time when it carried out the first certification, it could have informed the applicant on 2 February 1990, which it did not do. The applicant further points out that the DAFSE's letter of 2 February 1990 informing it of the first certification did not state that the certification was made subject to any reservation.

45 The applicant also notes in its reply that the expenses the eligibility of which is questioned by the Commission in its defence concern services established on the basis of documents which came from two other undertakings. Since the services had been supplied by those two undertakings and the applicant had settled their invoices, the applicant considers that any irregularities discovered in those documents cannot be regarded as its fault.

46 The Commission rejects the applicant's interpretation of the relevant provisions in the regulations.

47 It submits first that Article 6(1) of Regulation No 2950/83 does not impose any time-limit for making a reduction in ESF financial assistance; nor does Article 7 of that regulation impose a time-limit for carrying out the checks for which it makes

provision. That situation reflected in reality the intention of the Community legislature not to make the reduction of assistance or the verification of a suspicion of irregularity subject to compliance with time-limits.

48 The Commission goes on to point out that, even though, on 30 October 1989, the Portuguese State certified the factual and accounting accuracy of the applicant's request for payment of the balance of the ESF financial assistance, the DAFSE operative in charge of the file nevertheless proposed at that stage, in his information sheet of 27 October 1989, that a financial audit of the projects in question should be carried out on account of the gaps that had been noted. The Commission concludes from this that the factual and accounting data in the claim for payment of the balance of the aids were certified by the DAFSE on a conditional basis in order to preserve the interests of the applicant, which would otherwise have lost the right to payment of the assistance by the Commission even if the suspicions of irregularities were not subsequently confirmed. The Commission adds that, on 25 January 1990, the DAFSE asked the IGF to carry out a check of the files in question.

49 Finally, the Commission insists that the applicant was perfectly well aware of the reasons which had led the DAFSE to doubt the eligibility of certain expenses, since on 26 January 1994 it knew the results of the inspection carried out on the initiative of the DAFSE and had the opportunity of commenting on them. On that occasion, however, the applicant had been unable to challenge the validity of the analysis contained in the results of that audit or to adduce any evidence capable of affecting its conclusions. The Commission cites in particular certain passages from the audit concerning the services and documents of two undertakings which the applicant used in carrying out the operations financed in the context of its two projects. It observes that, in the present action, the applicant does not challenge the factual and accounting accuracy of the criticisms expressed in the results of that audit.

— Second part of the plea

50 The applicant submits that the DAFSE exceeded the powers conferred on it in the matter in question by Article 5(4) of Regulation No 2950/83 and Article 2(1)(d)

of Portuguese Decree-Law No 37/91. Those provisions limited the DAFSE's competence to the factual and accounting certification of the statements accompanying the claim for payment of the balance of the ESF aid. The DAFSE could only exercise its power of factual and accounting certification at the time of the forwarding of the claim for payment of the balance. In this case, the second factual and accounting certification carried out by the DAFSE, brought to the applicant's knowledge by the letter of 9 September 1994, concerned material other than that sent at the time of the first certification of 30 October 1989. The revocatory effect of the second certification on the first was thus unlawful for that reason. The applicant also emphasises the effects of the DAFSE's factual and accounting certification on the national financial assistance, under the relevant provisions of Portuguese law, by insisting on the fact that that certification confers a right to payment of the national aid.

51 The Commission replies that certification of factual and accounting accuracy by the DAFSE, in accordance with Article 5(4) of Regulation No 2950/83, does not signify that that body was no longer to examine *a posteriori* the claim for payment of the balance and, if necessary, submit a corrected payment claim to the Commission. The Member State's obligation to certify should be understood in the light, first, of the concern to avoid irregularities in the use of ESF assistance and, secondly, of the Member State's secondary liability under Article 6(2) of Regulation No 2950/83 for payment of aid used irregularly. By proceeding in 1994 with the definitive certification of the claim for payment of the balance, after correction of the irregularities detected in the carrying out of the operations, the DAFSE did not therefore take a new measure annulling the first certification which took place on 30 October 1989.

52 Similarly, expenses not certified by the Member State are not excluded from the Commission's assessment, since Article 7(3) of Regulation No 2950/83 provides that 'Member States shall make available to the Commission the material justifying the certification specified in Article 5(2) and (4)'. Moreover, the Court of First Instance held in its judgment in Case T-85/94 (122) *Commission* v *Branco* [1995] ECR II-2993, paragraphs 23 and 24, that it is the Commission which takes the

decision on final payment claims, and it alone which has the power to reduce ESF financial assistance, in accordance with Article 6(1) of the regulation; and that it is the Commission which assumes, *vis-à-vis* the recipient of ESF assistance, the legal responsibility for the decision by which its assistance is reduced, irrespective of whether that reduction was or was not proposed by the national authority concerned.

53 As for the effect of certification on the national aid, the Commission observes that the latter has not been paid in this case, the competent national body having already harboured suspicions at the time as to the legitimacy of certain expenses. It considers, moreover, that, even if the payment of the national aid had taken place, that would not have conferred any right upon the applicant under national Portuguese law.

— Third part of the plea

54 The applicant observes that the DAFSE used a criterion based on 'reasonableness' and 'sound financial management' in carrying out the second factual and accounting certification which was brought to its knowledge on 9 September 1994. In that respect it argues, first, that the DAFSE was not competent to apply such a criterion when making its factual and accounting certification, and, secondly, that that criterion had not been used at the time of the first certification of 30 October 1989.

55 Pointing out that the DAFSE never accused it of not actually incurring the expenditure set out in the 1989 payment claims or of not accounting for it, the applicant cites an apportionment of responsibilities between the Commission and the DAFSE as support for its assertion that the latter is responsible only for checking whether the information given in the claim for payment and its expression in accounting terms reflects the true position. It concludes that the DAFSE has no power to carry out a subsequent check on compliance with the decision approving ESF financial assistance, especially in relation to a criterion based on 'reasonableness' and 'sound financial management'. Bearing in mind the managerial autonomy

of the ESF as an instrument of a Community employment and vocational training policy, and also the need to apply Community law — and more specifically the conditions laid down in the decision approving an application for Community financial assistance — in a uniform manner, the applicant submits that the determination whether those latter conditions were complied with is a matter exclusively for the Commission.

56 According to the applicant, when carrying out a factual and accounting certification, the DAFSE must either conclude that the material submitted to it by the beneficiary is accurate factually and in accounting terms, and therefore certify it, or conclude that it is not accurate in that way and therefore refuse to certify it. It cannot in any event make a value judgment on facts which it is its duty to certify. In reality, the differences found between the certification carried out on 2 February 1990 and that carried out on 9 September 1994 were explained by the use of the criterion based on 'reasonableness' and 'sound financial management'.

57 The applicant observes further that the DAFSE did not define that latter criterion before applying it at the time of its second certification and that it did not cite it at the time of the first certification.

58 The Commission replies that the reduction of ESF assistance rests not only on the application of a criterion based on 'reasonableness' and 'sound financial management', but also on non-compliance with certain other conditions laid down by decisions approving applications for assistance. Moreover, the criterion in question was amongst the conditions laid down in those decisions. By subscribing to the act accepting the approval decision, the applicant committed itself to using the aids granted in accordance with the national and Community rules in force. Both the national and the Community rules in question specifically provided for criteria of sound financial management to be applied.

59 Article 7 of Regulation No 2950/83 provides that checks as to the content of a claim for payment of the balance may be carried out, and that the Member State is to assist the Commission in carrying out its checks, without prejudice to inspections carried out by the Member State itself.

Findings of the Court of First Instance

60 Before examining the three parts of the first plea, and in order to make that examination possible, it is necessary to determine the nature and scope of the factual and accounting certification for the purposes of the Community legislation in question.

— The nature and scope of the factual and accounting certification

61 Article 5(4) of Regulation No 2950/83, the only provision dealing with certification of the factual and accounting accuracy of claims for payment of the balance, provides:

'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.'

62 The certification in point in Article 5(2) of the same regulation concerns exclusively the possible second advance, not exceeding 30%, which may be paid and relates to the completion of the first half of the operation in accordance with the conditions set out in the decision of approval.

63 Article 7(3) of Regulation No 2950/83 further requires Member States to 'make available to the Commission the material justifying the certification specified in Article 5(2) and (4)'.

64 By contrast, neither Decision 83/516 nor Decision 83/673 mentions that certification, even though reference is made thereto in Annex 2 to the latter decision, which contains a specimen of the form which the beneficiary must complete in order to obtain payment of the balance.

65 Article 6(1) and (2) of Decision 83/673 specifies, however:

'Member States' payment applications must reach the Commission within 10 months of the date of completion of the operations concerned. No payment shall be made in respect of aid for which the application is submitted after the expiry of this period.

Advances must be reimbursed when the costs of the operation concerned cannot be justified on the form given in Annex 2 within three months of the expiry of the 10-month period laid down in paragraph 1.'

66 The form contained in Annex 2 is the one which the beneficiary is to submit to the Member State to enable it to carry out the certification provided for in Article 5(4) of Regulation No 2950/83 (see paragraph 64 above).

67 The certification in point in Article 5(4) of Regulation No 2950/83 thus consists of checking the factual and accounting accuracy of the data forwarded in support of the claim for payment of the balance of aid by the beneficiary. A box in the form contained in Annex 2 to Decision 83/673 is specially reserved for that purpose.

68 Where a beneficiary forwards a claim for payment of the balance of ESF aid to the competent authorities of a Member State, there are three attitudes which the latter may adopt. They may forward the claim as it stands, certifying the factual and accounting accuracy of all the expenditure submitted. They may also forward the claim to the Commission stating that they certify the factual and accounting accuracy of only part of the data submitted, as the DAFSE did in this case on 30 October 1989. Finally, they may do nothing, at the risk of causing the beneficiary's right to receive the as yet unpaid amount of the Community aid granted to him to expire, if the inaction of the national authorities of the Member State extends beyond the time-limit laid down for that purpose by Article 6(1) of Decision 83/673. As the applicant maintains, the absence of factual and accounting certification for expenditure thus constitutes a final decision on financing, given that the power of certification provided for in Article 5(4) must be exercised within a certain period.

69 As regards the scope of that factual and accounting certification, it must be held, first, that the act of certification by the Member State does not absolve it from its other obligations under the relevant Community legislation.

70 Thus, even if it has already carried out the certification provided for in Article 5(4) of Regulation No 2950/83, it remains bound by Article 2(2) of Decision 83/516, according to which:

'The relevant Member States shall guarantee the successful completion of the operations ...'

71 It also remains bound by Article 7 of Decision 83/673, which provides:

'Where the management of an operation for which assistance has been granted is the subject of an investigation because of suspected irregularities, the Member State shall notify the Commission thereof without delay.'

72 The obligations arising under those provisions are not subject to any time restriction, and must be interpreted as applying throughout the management of an operation financed by the ESF. In that respect, the period which elapses between the Member State's forwarding of the claim for payment of the balance of the aid submitted by the beneficiary and the time when the Commission adopts a decision cannot be regarded as excluded from the scope of the management of such an operation, as referred to in Article 7 of Decision 83/673. The Member State is, moreover, regarded as the privileged interlocutor of the Commission both in Article 5(5) of Regulation No 2950/83, *in fine*, according to which '[t]he Commission shall inform all parties concerned when a payment is made', and in Articles 6 and 7 of that regulation, which lay down the procedure to be followed where the Commission finds that the conditions for granting the aid were not complied with, or where it wishes to carry out certain checks following a claim for payment. Those factors thus confirm that the Member State remains bound by certain obligations after having carried out the factual and accounting certification provided for in Article 5(4) of Regulation No 2950/83. Finally, it should be pointed out that, since Article 7 of Decision 83/673 makes no mention of any requirement that the irregularities which the Member States must, once they suspect that they exist, notify to the Commission be fraudulent in nature, the applicant cannot validly claim, as its reply at the hearing to a question from the Court seemed to suggest, that absence of fraud in the irregularities renders the obligation thus imposed on Member States devoid of content.

73 It should, moreover, be pointed out that, according to the case-law, the Commission alone has the power to reduce ESF financial assistance (Case C-32/95 P *Commission* v *Lisrestal* [1996] ECR I-5373, paragraph 29; *Commission* v *Branco*, cited above, paragraph 23). The exercise of that exclusive power of the Commission

cannot be made conditional upon the certification referred to in Article 5(4) of Regulation No 2950/83. The Commission remains free to reduce Community assistance even if the Member State has certified the factual and accounting accuracy of all the data supplied in support of the claim for payment of the balance. The legislation does not set any particular time-limit for the exercise of that power.

74 Accordingly, bearing in mind the obligation of Member States under Article 2(2) of Decision 83/516 to guarantee the successful completion of the operations financed and their obligation under Article 7 of Decision 83/673 to notify any suspicion of irregularity to the Commission, any certification under Article 5(4) of Regulation No 2950/83 must be regarded as being by its nature an operation carried out by Member States subject to all reservations. A different interpretation would undermine the effectiveness of Article 7 of Decision 83/673, which requires Member States to give notice of irregularities found in the management of operations to be financed through the ESF.

— The first part of the plea

75 It follows from the foregoing considerations that the applicant cannot validly claim that the DAFSE lacked competence, through lapse of time, to carry out the verification measures referred to in its letter of 9 September 1994. First, those measures cannot be regarded as the manifestation of a second factual and accounting certification for the purposes of Article 5(4) of Regulation No 2950/83. They constitute in reality the performance of tasks which the competent authorities of the Portuguese Republic are required to carry out in the context of implementing ESF assistance, pursuant to Article 2(2) of Decision 83/516 and Article 7 of Decision 83/673. As the Commission has stated without being contradicted by the applicant, the technical data sheets drawn up on 25 January 1990 by the DAFSE officer responsible for examining the claim for payment of the balance of the aid shows that irregularities were already suspected at that date. The only factual and

accounting certification carried out in the context of this case and complying with the requirement of Article 5(4) of Regulation No 2950/83 is the act which the DAFSE refers to in its letter of 2 February 1990. Moreover, that certification complies with the time-limit requirements laid down by Article 6(1) of Decision 83/673, as the applicant acknowledges.

76 The fact that the DAFSE did not warn the applicant of its suspicions regarding its claim for payment of the balance of the aid when it informed it on 2 February 1990 of the carrying out of the factual and accounting certification cannot affect the legality of the contested decisions, since Article 7 of Decision 83/673 does not in any way require the Member State or the Commission to inform the beneficiary immediately of the existence of suspicions as to the validity of data submitted in support of a claim for payment of a balance. Nor does it matter that the DAFSE's letter of 2 February 1990 does not formally state that the factual and accounting certification was carried out on 30 October 1989 subject to every reservation. On that point, the relevant legislative provisions show that a certification in accordance with Article 5(4) of Regulation No 2950/83 does not absolve the Member State concerned from its other obligations under those provisions.

77 It should next be pointed out that the contested decisions do not in any way refer to the existence of two certifications in the sense contemplated by Article 5(4) of Regulation No 2950/83. The only certification of that nature to which they refer (third recital) is that carried out on 30 October 1989. Moreover, even though, in its letter of 9 September 1994, the DAFSE referred many times to a certification [certificação], it does not mention Article 5(4) of Regulation No 2950/83.

78 Finally, both as regards the Member State's obligation to notify the Commission where it suspects the existence of certain irregularities and as regards the competence of the Commission to reduce ESF assistance, no particular time-limit has

been laid down in the Community legislation (see paragraphs 71 and 72 above). Accordingly, even if it had to be held that it is necessary to perform that obligation and exercise that power within a reasonable period, it would be sufficient to point out that, in this case, the applicant has not claimed that the length of the periods which elapsed between the various measures taken by the DAFSE and the Commission was unreasonable, and thus, as such, adversely affected the legality of the contested decisions as such, even though the applicant mentions those various periods.

79 The first part of the plea is therefore unfounded.

— The second part of the plea

80 It also follows from the considerations concerning the nature and scope of the factual and accounting certification that, in carrying out certain supplementary enquiries and checks, the DAFSE did not exceed the bounds of the powers which the Community legislation confers on the Member States in the management of the process for examining an application for payment of the balance of ESF assistance. On the contrary, its attitude shows that it performed the obligations which that legislation imposes on it, particularly in Article 7 of Decision 83/673 (see paragraph 71 above).

81 Moreover, since the measures taken by the DAFSE after the factual and accounting certification of 30 October 1989 cannot be assimilated to a certification for the purpose of Article 5(4) of Regulation No 2950/83, it cannot be maintained that on that occasion it exceeded the bounds of its powers in the matter of certification.

82 Finally, there is no need to reply to the applicant's argument that there has been an infringement of Portuguese legislation, since it is not for the Court of First Instance to examine the consequences of a certification concerning the payment of national aid in the light of provisions of national law.

83 The second part of the plea is therefore unfounded.

— The third part of the plea

84 It is necessary to ascertain whether, as the applicant claims, a supplementary criterion based on 'reasonableness' and 'sound financial management' was imposed upon it at the time of the examination of its claims for payment of the balance, a condition which, it claims, did not appear amongst those laid down in the decisions granting the assistance in question.

85 Bearing in mind the nature and scope of the factual and accounting certification referred to in Article 5(4) of Regulation No 2950/83, it is of no consequence, for the purpose of appraising the legality of applying that criterion in this case, to know whether it constituted the subject of a specific inspection at the time of the factual and accounting certification by the DAFSE on 30 October 1989. Given the powers which they are recognised as having in terms of verification and inspection, both the Member State and the Commission must be authorised to impugn any disregard by the beneficiary of the conditions imposed at the time of the granting of the Community financial assistance, whether that disregard was fraudulent or not.

86 The statements of acceptance of the decisions granting the assistance signed by the applicant show that the applicant undertook in the following terms to comply with the relevant national and Community provisions:

'1. For all relevant purposes it is hereby declared: the aid granted will be used in compliance with the relevant national and Community provisions, and in compli-

ance with the approval decision, in the context of the carrying out of the operation(s) envisaged in the above file, as regards, in particular, the type of training, the occupations, the number of hours of courses and realistic prospects of employment; ...'

87 It is undisputed that both Portuguese and Community law make the use of public funds subject to a requirement of sound financial management. On that point, without being contradicted by the applicant, despite the questions put by the Court at the hearing, the Commission cited provisions of Portuguese law under Decision 6/88 of the State Secretariat for Employment and Vocational Training and the first paragraph of Article 2 of Council Regulation (Euratom, ECSC, EEC) No 610/90 of 13 March 1990 amending the Financial Regulation of 21 December 1977 applicable to the general budget of the European Communities (OJ 1977 L 70, p. 1).

88 Contrary, therefore, to what the applicant maintains, the irregularities complained of in the contested decisions were not established on the basis of a criterion which did not appear amongst the conditions governing the grant of that aid and to which the payment of it was subject. On the other hand, application of the criterion based on 'reasonableness' and 'sound financial management', which consists simply of verifying whether the expenditure claimed by a beneficiary and which it incurred take appropriate account of the services in respect of which it was incurred, falls squarely within the context of the check which the Member State is required to carry out over and above mere factual and accounting certification, in accordance with Article 7 of Decision 83/673, where it suspects the existence of irregularities, fraudulent or otherwise (see paragraph 71 above).

89 As to the actual existence of the irregularities for which the applicant is criticised, the contested decisions refer to the notification to the applicant on 26 January 1994 of the results of the inspection carried out by the IGF and to the observations submitted by the applicant on 24 February 1994.

90 As the Commission states in its defence, the third paragraph of point 3.3 of those inspection results states as follows:

'The examinations of the registers of RSP and DEPROM, carried out by the IGF, led it to express serious reservations both as to the reliability of DEPROM and the dependability of the documents drawn up, inasmuch as the following facts were found:

(a) inconsistency between services invoiced and services supplied upstream;

(b) major difference between the amounts invoiced and the costs corresponding to the origin of that invoicing;

(c) omission of the names of those supplying services and absence of objective factors enabling a judgment to be made as to whether the services were actually provided or the amounts in question were appropriate.'

91 Point 4 of the same document then refers to the inspection by the IGF of DEPROM's registers, following the DAFSE's request of 5 September 1991, at the end of which the eligibility of the expenditure attested by DEPROM's invoices and receipts was impugned, as the Commission also points out in its defence.

92 Neither in its observations of 24 February 1994 nor in the written procedure before the Court has the applicant in any way challenged the genuineness of the findings or the accuracy of the conclusions contained in the results of the IGF's inspection, contenting itself, on the one hand, with explaining the background of

its relations with RSP and the absence of any legal connection with DEPROM outside the commercial relations which it had found it necessary to maintain with that undertaking, and, on the other hand, with emphasising that it had honoured the invoices sent by the same undertaking.

93 In that respect, the applicant cannot rely either on the identification of irregularities in the services of an undertaking whose invoices were, moreover, paid by it, or compliance with the ceilings on expenditure authorised in the decision granting the assistance in order to exonerate itself from any responsibility for such irregularities. Since invoices were submitted by the applicant under the heading of expenditure incurred in order to implement the projects in question, any irregularities affecting them necessarily reflect upon the legitimacy of that expenditure, the applicant being under an obligation to guarantee the legitimacy of all expenditure which it asks to be taken into account in calculating the amount of aid to be received. Such irregularities are therefore imputable to the applicant.

94 In any event, even though, at the hearing, the applicant claimed to have disputed the existence of the irregularities complained of on the basis of the inspection results notified on 26 January 1994, by citing in no particular order points 13, 14, 16, 19, 22, 24, 29, 32 and 36 of its application, the Court finds that that claim is not supported by any evidence. The various points of the application which it cited do not in any way make it possible to determine the nature and scope of the criticisms allegedly formulated as to whether the imputed irregularities in fact existed. In that respect, the applicant's statement that the contracts at the origin of the disputed invoices were submitted to the DAFSE and the Commission for approval at the time when the initial application for the grant of the assistance was made is not supported by any evidence. It is, moreover, contradicted by documents under the applicant's own hand. Two contracts annexed to its observations of 24 February 1994 on the results of the IGF's inspection (Annex 3 to those observations) show that those contracts were concluded on 19 July 1988, that is to say after the adoption by the Commission of the decisions granting the assistance, which were notified to the applicant by the DAFSE on 25 May 1988 (see paragraph 8 above).

95 Finally, the Commission rightly observes, without being contradicted by the applicant (see paragraphs 90 to 92 above) that the irregularities found at the time of the

inspections by the IGF and the DAFSE and which led to the reduction of the assistance in question, were not detected solely by applying the criterion of 'reasonableness' and 'sound financial management'.

96 The third part of the plea is therefore unfounded.

97 This plea must therefore be dismissed in its entirety.

The second plea, alleging infringement of Article 190 of the Treaty

Arguments of the parties

98 The applicant claims that the application by the DAFSE of the criterion of 'reasonableness' and 'sound financial management' infringes the duty to state reasons as laid down in Article 190 of the Treaty, since that criterion was not defined in advance and was not used at the time of the first certification. The applicant claims that the DAFSE altered the rules governing the certification operation and made comprehension of the contested decisions more difficult, preventing the applicant from knowing the real significance of that criterion.

99 The applicant finds that there is confusion, or even a contradiction, between the decisions successively adopted by the DAFSE and the Commission in this case. The amount of the reductions varied from one decision to another without any explanation being provided. Thus, whereas the applicant was entitled to receive a payment of ESC 128 896 811 following the first certification, the DAFSE claimed

from it, on 9 September 1994, the repayment of ESC 62 856 998, whilst the Commission now requires it, in the contested decisions, to repay ESC 34 571 349.

100 The Commission pointed out that the applicant has not set out the reasons which lead it to complain that the reasons given for the contested decisions are defective. It states nevertheless, for what it is worth, that the recitals in the preambles to the contested decisions show that the decisions were based on the results of the inspection requested by the DAFSE, that the applicant was informed of those results and the reasons for them, and that it had the opportunity to submit its observations in that respect.

101 The Commission denies the existence of any confusion or contradiction between the decisions communicated by the DAFSE and the contested decisions as to the amounts to be repaid by the applicant. The difference found to exist arose from the fact that the former decisions, unlike the latter, took into account the amounts of national aid to be repaid. The details with respect to that difference are to be found in the information notes supplied by the DAFSE on 9 September 1994. Consequently, the Commission submits, the applicant has not established the existence of any defect in the statements of reasons.

Findings of the Court of First Instance

102 It is settled case-law that the statement of reasons required by Article 190 of the Treaty must show clearly and unequivocally the reasoning of the institution which enacted the measure so as to inform the persons concerned of the justification for the measure adopted and to enable the Court to exercise its powers of review (Case C-22/94 *Irish Farmers Association* v *Minister for Agriculture, Food and Forestry* [1997] ECR I-1809, paragraph 39; Case T-81/95 *Interhotel* v *Commission* [1997] ECR II-1265, paragraph 72, and the case-law cited). The scope of that obligation depends on the nature of the measure in question and the context in which it was adopted.

103 In this case, it should be pointed out at once that, since the measures taken by the DAFSE in 1994 do not fall within factual and accounting certification for the purposes of Article 5(4) of Regulation No 2950/83 (see paragraph 75 above), the application by the DAFSE of a criterion based on 'reasonableness' and 'sound financial management' cannot have altered the rules on certification. Moreover, the irregularities discovered in the implementation of the projects financed by the ESF do not all result from the application of that criterion (see paragraph 95 above).

104 Furthermore, the contested decisions expressly refer to the various stages of the procedure which led the Commission to reduce the assistance initially granted and to demand repayment of part of the advances allowed. They mention in particular the measures taken by the competent Portuguese authorities.

105 Since those decisions do not state that they diverge on any particular point from those measures, it may properly be considered that the content of the said measures forms part of reasons given for the contested decisions, at least in so far as the applicant was able to take cognisance of it.

106 The contested decisions mention in particular the results of the investigation carried out by the IGF (fourth recital), the forwarding of those results to the applicant on 26 January 1994 and the observations formulated by the applicant on 24 February 1994 (fifth recital). In that respect, it should be pointed out that the applicant unambiguously indicated in the introduction to those observations that they were specifically intended as a reaction to the content of the results of the IGF inspection forwarded on 26 January 1994.

107 Moreover, the contested decisions state that the checks carried out showed that the conditions for granting the Community assistance had not been complied with.

108 Finally, the Commission has stated, without contradiction on the point, that on 16 May 1994 the DAFSE requested certain further clarifications from the applicant, which replied on 26 May 1994 (see paragraph 14 above).

109 It follows that application of the criterion to which the applicant objects did not entail an infringement of Article 190 of the Treaty.

110 As regards the alleged difference between the amounts of the ESF financial aid to be paid or repaid which may have been communicated to the applicant during the procedure which led to the adoption of the contested decisions, that difference may be explained by reference to the dates on which those amounts were determined, or by the inclusion or exclusion, in their calculation, of the amounts of national aid to be repaid.

111 Furthermore, the justification for that difference is to be found in documents which were supplied to the applicant in good time.

112 Thus, the letter from the DAFSE of 2 February 1990 refers to the result of the factual and accounting certification of 30 October 1989 which led the DAFSE to allow all the expenditure submitted, save for an amount of ESC 6 491 845, taking national and Community aid together.

113 Moreover, the DAFSE's letter of 9 September 1994 informs the applicant of the consequences arising from the supplementary checks carried out in the interval and of the fact that it is required to repay ESC 29 052 034 in connection with File No 881311 P1 and ESC 33 804 964 in connection with File No 880249 P3. The documents annexed to that letter, entitled 'Informação No 1165/DSJ/DSAFEP/94' and 'Informação No 1166/DSJ/DSAFEP/94', state that those amounts concern both

the repayment of the advances allowed in the context of the Community aid (ESC 15 978 619 in relation to File No 881311 P1, according to paragraph 18 of Annex 7 to the defence, and ESC 18 592 730 in relation to File No 880249 P3, according to paragraph 19 of Annex 8 to the defence) and the national aid (ESC 13 073 415 in relation to File No 881311 P1, according to paragraph 18 of Annex 7 to the defence, and ESC 15 212 234 in relation to File No 880249 P3, according to paragraph 19 of Annex 8 to the defence). The amounts of Community aid to be repaid, referred to in those documents, are those which the Commission orders to be repaid in the contested decisions (Article 2 of each decision). Under the terms of those decisions, which concern only the Community aid, the applicant is required to repay ESC 15 978 619 in relation to File No 881311 P1 and ESC 18 592 730 in relation to File No 880249 P3.

114 Since the Commission alone has the power to reduce ESF financial assistance (see paragraph 73 above), there cannot be any contradiction between the terms of the DAFSE's letter of 2 February 1990 certifying the factual and accounting accuracy of the claims for payment and the contested decisions requiring repayment of part of the advances following the reduction of the assistance. In any event, before the contested decisions were adopted the applicant had the opportunity to take cognisance of the grounds justifying the changes which had taken place since the factual and accounting certification carried out by the DAFSE on 30 October 1989, and those grounds were reproduced in the contested decisions.

115 In the light of the foregoing considerations, the second plea must be dismissed.

The third plea, alleging misuse of powers

Arguments of the parties

116 The applicant maintains that, in view of the circumstances in which they were taken, the two contested decisions disclose the existence of a misuse of powers.

117 The Commission denies the existence of a misuse of powers resulting from the use of a criterion based on 'reasonableness' and 'sound financial management'. It refers in that respect to its observations in connection with the third part of the first plea.

Findings of the Court of First Instance

118 It is settled case-law that a measure may amount to a misuse of powers only if it appears, on the basis of objective, relevant and consistent factors, to have been taken with the exclusive purpose, or at least the main purpose, of achieving an end other than that stated or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case (Case C-331/88 *The Queen* v *Minister for Agriculture, Fisheries and Food and the Secretary of State for Health,* ex parte: *Fedesa and Others* [1990] ECR I-4023, paragraph 24; Case T-143/89 *Ferriere Nord* v *Commission* [1995] ECR II-917, paragraph 68).

119 In this case the applicant merely refers to the circumstances in which the contested decisions were adopted, without stating the specific factors capable of establishing the existence of a misuse of powers.

120 That being so, the third plea must be dismissed.

The fourth plea, alleging infringement of the applicant's rights of defence

Arguments of the parties

121 The applicant complains of an infringement of its rights of defence, arising, on the one hand, from the application without prior notification of the criterion based on 'reasonableness' and 'sound financial management' and, on the other, from the fact that it was not heard by the Commission before the latter adopted the contested decisions.

122 The Commission points out that, as stated in the recitals in their preambles, the two contested decisions are based on the certification carried out by the DAFSE. The applicant was informed of that certification and of the grounds on which it was based, and had the opportunity to submit its observations. Thus the rights of the defence were fully respected. The Commission insists in particular that the applicant was informed of the existence of an audit in October 1991, that it received a copy of the results of that audit in January 1994, and that it was able to consult the documents on the file at the premises of the DAFSE and submit its observations, on two occasions, in February and in May 1994.

Findings of the Court of First Instance

123 According to the case-law, the rights of defence of a beneficiary of ESF assistance must be respected where the Commission reduces the amount of that assistance (see *Commission* v *Lisrestal and Others*, cited above, paragraphs 21 to 38).

124 In that respect, this Court finds, first, that the criterion disputed by the applicant, based on 'reasonableness' and 'sound financial management', comes within the ambit of compliance with the conditions laid down by national and Community law to which the applicant subscribed by formally accepting the conditions for the grant of the two amounts of ESF financial assistance in question, before the contested decisions were adopted (see paragraphs 86 to 88 above).

125 Moreover, it was applied by the DAFSE and the Commission at the conclusion of the checks undertaken in the context of an inspection the results of which were brought to the applicant's knowledge and on which it could make observations.

126 The criterion was therefore not applied in such a way as to violate the applicant's rights of defence.

127 As regards, secondly, the applicant's right to be heard by the Commission before a decision reducing the ESF financial assistance was adopted, it should be pointed out that in its judgment in Case T-450/93 *Lisrestal and Others* v *Commission* [1994] ECR II-1177, paragraph 49, the Court of First Instance held, without being overruled on the point by the Court of Justice in its judgment on appeal against that decision, that the Commission was not entitled to adopt a decision reducing an ESF aid without first giving the beneficiary the possibility, or ensuring that it had had the possibility, of effectively setting forth its views on the proposed reduction in assistance.

128 In this case, the documents before the Court show that the DAFSE kept the applicant up to date with the various verification measures undertaken and their results, while giving it the opportunity to submit its observations. The applicant was thus informed of the final result of the verification operations carried out by the

DAFSE, by the letter of 9 September 1994 sent to by it the DAFSE and by the documents enclosed with that letter. Moreover, as the contested decisions (fifth recital in the preamble to each of them) show, the applicant submitted its observations on the results of the investigation carried out by the IGF at the request of the DAFSE (see paragraph 14 above).

129 In those circumstances, the Commission properly discharged its obligation to ensure that the applicant had been enabled to state its case effectively and thus respected its right to be heard before a decision reducing the ESF financial assistance was taken in this case.

130 It follows from all the foregoing considerations that the fourth plea must be dismissed.

131 The application must therefore be dismissed in its entirety.

Costs

132 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 asked for costs, the applicant must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber),

hereby:

1. Dismisses the application;

2. Orders the applicant to pay the costs.

Lindh Lenaerts Cooke

Delivered in open court in Luxembourg on 16 July 1998.

H. Jung P. Lindh

Registrar President