

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

30 June 2005*

In Case T-347/03,

Eugénio Branco, L^{da}, established in Lisbon (Portugal), represented by B. Belchior, lawyer, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented initially by A. Alves Vieira and A. Weimar, and subsequently by P. Andrade and A. Weimar, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: Portuguese.

APPLICATION for annulment of Commission Decision C (2002) 3455 of 23 October 2002 reducing financial assistance from the European Social Fund, in Case No 870302 P3,

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

composed of M. Vilaras, President, F. Dehousse and D. Šváby, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 18 January 2005,

gives the following

Judgment

Legal context

- ¹ Article 123 of the EC Treaty (now Article 146 EC) establishes the European Social Fund (ESF) in order to improve employment opportunities for workers in the internal market and to contribute thereby to raising the standard of living, in particular through vocational training. The first paragraph of Article 124 of the EC Treaty (now the first paragraph of Article 147 EC) charges the Commission with its administration.

- 2 Pursuant to Article 5(1) and (2) of Council Decision 83/516/EEC of 17 October 1983 on the tasks of the ESF (OJ 1983 L 289, p. 38) ESF assistance is to be granted at the rate of 50% of eligible expenditure without, however, exceeding the amount of the financial contribution of the public authorities of the Member State concerned.
- 3 In order to implement that decision, the Council adopted Council Regulation (EEC) No 2950/83 of 17 October 1983 on the implementation of Decision 83/516/EEC (OJ 1983 L 289, p. 1).
- 4 The Council then adopted Council Regulation (EEC) No 2052/88 of 24 June 1988 on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1988 L 185, p. 9). Pursuant to that regulation, the Council adopted Council Regulation (EEC) No 4255/88 of 19 December 1988, laying down provisions for implementing Regulation No 2052/88 as regards the ESF (OJ 1988 L 374, p. 21). It also adopted Council Regulation (EEC) No 4253/88 of 19 December 1988, laying down provisions for implementing Regulation No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1988 L 374, p. 1).
- 5 Article 10(2) of Regulation No 4255/88 repealed Regulation No 2950/83, 'subject to Article 15 of Regulation No 2052/88 and Article 33 of Regulation No 4253/88'. Under those two provisions, applications submitted under earlier rules had to be examined and approved on the basis of those rules.

- 6 Regulation No 4255/88 was itself repealed by Article 11 of Regulation (EC) No 1784/1999 of the European Parliament and of the Council of 12 July 1999 on the ESF (OJ 1999 L 213, p. 5), Article 9 of which refers to the transitional provisions set out in Article 52 of Council Regulation (EC) No 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds (OJ 1999 L 161, p. 1). That provision provides, in particular, that 'this Regulation shall not affect the continuation or modification, including the total or partial cancellation, of assistance approved by the Council or by the Commission on the basis of ... any other legislation which applied to that assistance on 31 December 1999'.
- 7 The combined effect of all those provisions is that Regulation No 2950/83 continued to apply to the assistance in question and that the contested decision, in particular, had to comply with it.
- 8 Article 1 of Regulation No 2950/83 sets out the types of expenditure eligible for assistance from the ESF.
- 9 Pursuant to Article 5(1) of Regulation No 2950/83, ESF approval of an application for financial assistance is to be followed by payment of an advance of 50% of the assistance on the date on which the training operation is scheduled to begin. Article 5(4) of Regulation No 2950/83 provides that final payment claims are to contain a detailed report on the content, results and financial aspects of the relevant operation; the Member State is to certify the accuracy of the facts and accounts in payment claims.
- 10 Under Article 6(1) of Regulation No 2950/83, when ESF assistance is not used in conformity with the conditions set out in the decision of approval, the Commission may suspend, reduce or withdraw the aid after having given the relevant Member State an opportunity to comment. Article 6(2) provides that sums paid which are not used in accordance with the conditions laid down in the decision of approval are to be refunded.

- 11 In accordance with Article 7(1) of Regulation No 2950/83, both the Commission and the Member State concerned may check the use to which the aid is put.
- 12 Finally, Article 7 of Commission Decision 83/673/EEC of 22 December 1983 on the management of the ESF (OJ 1983 L 377, p. 1) requires a Member State which is investigating the use of aid because of suspected irregularities to notify the Commission without delay.

Background to the dispute

- 13 The applicant made two applications for financial assistance of PTE 11 736 792 (Case No 870302 P3) and PTE 82 700 897 (Case No 870301 P1) in respect of training programmes intended for adults and young persons respectively.
- 14 The action relates to the final decision taken regarding the former case.
- 15 By decision of 30 April 1987, the defendant accepted the first application, amounting to PTE 5 809 712.
- 16 On 24 July 1987 the applicant received, by virtue of the ESF, an advance of PTE 2 904 856 pursuant to Article 5(1) of Regulation No 2950/83.

- 17 At the beginning of July 1988, that is, on completion of the training operations, which took place between 1 January and 31 December 1987, the applicant submitted a claim for final payment of the assistance to the Departamento para os Assuntos do Fundo Social Europeu (Department of ESF Affairs, 'the DAFSE').
- 18 Having certified the accuracy of the facts and accounts in that claim, the DAFSE submitted a claim for payment to the Commission on 17 October 1988, pursuant to Article 5(4) of Regulation No 2950/83.
- 19 On 22 August 1988 the DAFSE none the less requested the Inspeção Geral de Finanças (General Tax Inspectorate, 'the IGF') to examine the final payment claim pursuant to Article 7(1) of Regulation No 2950/83.
- 20 On 5 May 1989 the IGF found irregularities. These related, first, to subcontracting by the applicant to 'EB — Contabilidade e Estudos Económicos L^{da}' ('EB L^{da}') and, secondly, to amounts connected with depreciation costs of real property and leasing agreements.
- 21 The DAFSE informed the defendant that it had suspended final payment pursuant to Article 7 of Decision 83/673.
- 22 On 16 May 1989, the IGF sent its report to the police for information.

- 23 On 30 July 1990, the DAFSE informed the Commission that, following the investigation by the IGF, it considered certain expenditure to be ineligible. The criticism related, first, to the costs relating to subcontracting entrusted to EB L^{da} and, secondly, to leasing costs.
- 24 By letters of 30 July 1990 the DAFSE ordered the applicant to repay within 10 days the advances paid by the ESF and the Portuguese Republic by way of national contribution.
- 25 By letter of 30 May 1994 the applicant asked the defendant to explain why it had not yet taken a final decision on its cases.
- 26 The defendant replied by letter of 16 June 1994 that the Portuguese authorities had informed it that owing to suspected irregularities the cases were being investigated under Article 7 of Decision 83/673.
- 27 The applicant applied for annulment of a decision allegedly taken by the defendant, first, rejecting a claim for final payment in respect of financial assistance awarded by the ESF and, second, reducing that financial assistance and seeking repayment of the advances paid by the ESF and by the Portuguese Republic.
- 28 That action was declared inadmissible by judgment of 11 July 1996 in Case T-271/94 *Branco v Commission* [1996] ECR II-749, on the ground that the Commission had not decided the final payment claim.

- 29 On 25 October 1996 the defendant was informed that an investigation procedure had commenced before the Tribunal de Instrução Criminal da Comarca do Porto (Local Criminal Court, Oporto) for fraudulently obtaining and misappropriating subsidies in relation to the training operations financed by the ESF.
- 30 By letter of 27 February 1997, received by the defendant on 3 March 1997, the applicant formally called upon the defendant to take a decision on the final payment claim.
- 31 On 17 April 1997 the defendant sent the DAFSE a draft decision suspending the financial assistance.
- 32 The applicant received a copy on 5 May 1997 and gave its comments in two letters dated 19 and 21 May 1997.
- 33 The applicant brought an action for failure to act. That case was registered at the Court Registry under No T-194/97.
- 34 On 17 February 1998 the Commission adopted the decision to suspend the financial assistance in question.
- 35 On 26 May 1998 the applicant brought an action for annulment in respect of that decision to suspend financial assistance. That case was registered at the Court Registry under No T-83/98.

- 36 By judgment of 27 January 2000 in Joined Cases T-194/97 and T-83/98 *Branco v Commission* [2000] ECR II-69, the Court joined the two actions. It ruled that the application for a declaration of failure to act was inadmissible and dismissed the application for annulment on the substance.
- 37 On 4 May 2000, the Tribunal da relação (Court of Appeal) of Lisbon found that the criminal proceedings brought against the applicant were time-barred.
- 38 The defendant was informed of this by a letter of 11 July 2001. Following that decision, the DAFSE also informed the defendant that there was no longer any reason to suspect that there had been irregularities in obtaining the assistance in question. It also requested the Commission to adopt the final decision authorising final payment.
- 39 On 8 January 2002 the Commission sent the DAFSE a draft decision reducing the final assistance in the case in question. It proposed setting the final amount of ESF assistance at PTE 1 368 910.
- 40 On 24 April 2002 the DAFSE advised the defendant that it had no objection to the draft decision, adding that the applicant had been notified of it and had not submitted observations on its content.
- 41 The applicant did however submit observations, which were received by the DAFSE on 7 May 2002.

- 42 On 23 October 2002, the Commission adopted Decision C (2002) 3455 reducing the amount of the financial assistance granted to the applicant. The Commission stated as follows: '[The] examination of the final payment claim has indicated that, of the total assistance of PTE 5 809 712 initially approved in respect of Case No 870302 P3, [EB L^{da}] did not use PTE 2 012 647. On the basis of the audit report referred to in the letter ... of 30 July 1990, the assistance must be reduced by PTE 2 428 128. It is therefore reduced by that amount and set at PTE 1 368 910.' That is the contested decision.
- 43 That decision was sent to the Portuguese authorities the next day, 24 October 2002; those authorities were responsible for informing the applicant about it.
- 44 Consequently, the Portuguese Republic claimed reimbursement from the applicant of EUR 7 661.27 (PTE 1 535 946), in respect of the ESF.
- 45 The applicant acknowledged receipt of the contested decision and the above-mentioned claim for reimbursement on 31 July 2003.

Procedure and forms of order sought

- 46 By application lodged at the Registry of the Court of First Instance on 9 October 2003, the applicant brought the present action.

- 47 Upon hearing the report of the Judge-Rapporteur, the Court (Fifth Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure as provided for in Article 64 of the Rules of Procedure of the Court of First Instance, requested the parties to produce certain documents and to reply to written questions. The parties gave their replies and produced the documents within the time-limit laid down.
- 48 The parties presented oral argument and their replies to oral questions put by the Court at the hearing on 18 January 2005.
- 49 The applicant claims that the Court should:
- annul Commission Decision C (2002) 3455 of 23 October 2002 reducing financial assistance from the ESF in Case No 870302 P3;
 - order the defendant to pay the costs.
- 50 The defendant contends that the Court should:
- dismiss the application;
 - order the applicant to pay the costs.

Admissibility

- 51 It appears that the contested decision was communicated to the DAFSE by the Commission in the form of a letter advising it that, pursuant to Article 6(1) of Regulation No 2950/83, ESF assistance was reduced to an amount less than that originally approved.
- 52 To that extent, the contested decision, although addressed to the Portuguese Republic, is of direct and individual concern to the applicant within the meaning of the fourth paragraph of Article 230 EC, inasmuch as it deprives it of part of the assistance which had originally been granted to it, the Member State not having any discretion of its own in that respect (Case C-291/89 *Interhotel v Commission* [1991] ECR I-2257, paragraphs 12 and 13, and Case C-157/90 *Infortec v Commission* [1992] ECR I-3525, paragraphs 16 and 17).
- 53 Moreover, and although it does not raise an objection of inadmissibility within the meaning of Article 114(1) of the Rules of Procedure, the defendant is surprised that nine months elapsed between the adoption of the contested decision and its communication to the applicant. It is also surprised that the applicant did not seek clarification on the progress of the procedure, even though it was informed of the draft decision on 10 March 2002. In that regard, the defendant relies on the order of the Court in Case T-151/95 *INEF v Commission* [1997] ECR II-1541, paragraph 47.
- 54 The Court points out, first, that it is for the party pleading that the action is out of time to provide evidence of the date on which the event causing time to begin to run occurred (order of the Court in Case T-263/97 *GAL Penisola Sorrentina v*

Commission [2000] ECR II-2041, paragraph 47). Consequently, mere surprise on the part of the defendant cannot constitute sufficient grounds for the Court to hold that the action is inadmissible. Moreover, the applicant cannot be criticised for the delay of the Portuguese authorities in notifying it of the contested decision.

- 55 Second, the Court did indeed rule in its order *INEF v Commission*, paragraph 53 above (paragraph 45), that an applicant who becomes aware of the existence of an act which concerns him is obliged to request the full text of that act within a reasonable period, in order to acquire precise knowledge of its content and its grounds, failing which the action will be inadmissible. However, the Court found in that order that a letter in which the Commission's final position was set out in an unequivocal manner had been communicated to the applicant. In the present case, however, the applicant did not receive such a letter. Only a draft decision was communicated to it, on which it submitted its observations. In those circumstances, the applicant was not obliged to inquire whether the contested decision had been adopted.
- 56 The defendant's objections with regard to the admissibility of the action cannot therefore be upheld.

Substance

- 57 The applicant puts forward four pleas in law. The first plea alleges infringement of Article 6(1) of Regulation No 2950/83 and of Decision 83/516. The second plea alleges infringement of acquired rights. The third plea is based on the principles of protection of legitimate expectations and legal certainty. The fourth plea alleges infringement of the principle of proportionality.

- 58 The first two pleas are connected by their substantive criticism of the grounds on which the contested decision is based. It is therefore appropriate to examine them together.

A — The first and second pleas: infringement of Regulation No 2950/83 and Decision 83/516 and infringement of acquired rights

1. Arguments of the parties

- 59 The applicant claims that the contested decision infringes Article 6(1) of Regulation No 2950/83 and Decision 83/516. The applicant also submits that the decision approving its application for assistance vested subjective rights in it and that it is therefore entitled to demand payment of it.
- 60 The applicant contends, first, that having made savings in relation to the amount initially approved by the Commission, it cannot accept a further reduction of the assistance to PTE 2 965 124.
- 61 Second, the applicant observes that the contested decision criticises its use of subcontracting to EB L^{da}. It states that it had recourse to the specialised services of EB L^{da} in connection with a subcontract relating to the hiring of teaching personnel, technical and pedagogical assistance and careers guidance work, and management and budgetary control work. Subcontracting is permitted both by Regulation No 2950/83 and by the initial approval decision. Moreover, the recourse to EB L^{da} was referred to in the application for assistance. It is furthermore inaccurate to assert that EB L^{da} invoiced the applicant for services ‘at extraordinarily high prices’, as the

IGF did in its report of 5 May 1989. The costs of teaching staff invoiced by EB L^{da} are consistent with the costs approved by the Portuguese Ministry of Labour, taking into account the level of studies of the trainees. Its other services, namely services relating to planning, course preparation, budgetary management, careers guidance and technical and pedagogical assistance, correspond to market prices. All those expenses were incurred in accordance with Portuguese legislation and Community rules; they were envisaged in the application for assistance and did not exceed the amounts initially approved. Those expenses are also backed up by invoices and other forms of proof of payment. Finally, the IGF failed to take account of water and electricity charges, the cost of certain equipment, management fees or fees resulting from recourse to outside assistants. All those expenses were also borne by EB L^{da}.

- 62 Third, the applicant disputes the adjustments made to the depreciation costs of fixed assets and to the cost of various leasing arrangements. It submits that, in its application approved by the Commission, the sole purpose of the investment in items of equipment was considered to be the training in question. The applicant none the less attributed those depreciation costs over a 10-month period, corresponding to the period of course preparation and the training itself. The applicant also claims to have divided the value of the goods acquired by leasing by the number of years stated in the leasing contract. Those operations were carried out in accordance both with its application to the ESF and with the Portuguese rules in force at that time. Furthermore, the applicant claims that the Portuguese fiscal authorities approved all the rents from leasing relating to a letting contract, and therefore all the rents from the other leasing agreements should also receive full approval.
- 63 Following on from the above, the applicant points out, fourth, other inconsistencies. It observes that the remuneration of teachers in respect of the 1987 operation was approved 'in a totally arbitrary and dissimilar manner in relation to other operations which [it] carried out in 1988'. Moreover, the DAFSE approved regular attendance bonuses for trainees and certain depreciation costs as eligible expenditure in respect of 1987, but not in respect of 1988.

- 64 The applicant submits, fifth, that it omitted to mention various expenses in its application for final payment of financial assistance. It requests, in its application, that account be taken of this.
- 65 The defendant disputes those arguments and submits that the plea is unfounded.

2. *Findings of the Court*

(a) Infringement of Article 6(1) of Regulation No 2950/83 and of Decision 83/516

- 66 The applicant claims that it has proved infringement of Article 6(1) of Regulation No 2950/83 and of Decision 83/516, by relying on several arguments which it is necessary to consider in turn.

The argument that savings were made

- 67 First of all, the applicant pleads that savings were made in relation to the initial application for assistance.

- 68 However, the fact that the applicant has not effected all the expenditure envisaged does not mean that the Commission should allow the disbursements in question. Final payment of financial assistance is conditional on whether the expenditure was actually effected for the purpose of training (Case C-413/98 *Frota Azul-Transportes e Turismo* [2001] ECR I-673, paragraph 27) within the limits allowed by the initial approval decision.

The argument that certain expenditure was omitted

- 69 The applicant also points out that, in its application for final payment, it omitted to mention a number of expenses actually incurred.

- 70 The applicant however stated at the hearing that the factors at issue, listed in its application, do not form the basis of its claim. In any event, in an action for annulment brought on the basis of Article 230 EC, the lawfulness of a Community measure falls to be assessed on the basis of the elements of fact brought to the attention of the institution at the time when the measure was adopted. The Commission cannot therefore be criticised for not having taken account of amounts of which the applicant had not requested payment before the contested measure was adopted.

The argument that mistakes were made which vitiate the grounds of the contested decision

- 71 The applicant takes the view that the disputed expenses relating to the use of subcontractors, depreciation costs and leasing agreements were justified.

- 72 It follows from Article 6(1) of Regulation No 2950/83 that the Commission may reduce ESF assistance when it is not used in conformity with the conditions set out in the decision of approval.
- 73 The Court has already held in its judgment in *Branco v Commission*, cited in paragraph 36 above (paragraph 74), that it followed from the statement of acceptance of the approval decision that the applicant had expressly undertaken to observe the applicable provisions of national and Community law. In that regard, the Court also found in paragraph 75 of that judgment that Portuguese law and Community law make the use of public funds subject to a requirement of sound financial management.
- 74 The Court must therefore ascertain whether the manner in which the Commission applied that concept was permissible.
- 75 Moreover, since the application of Article 6(1) of Regulation No 2950/83 may render it necessary for the Commission to undertake an evaluation of complex facts and accounts, it enjoys a considerable measure of latitude in such matters. Consequently, the Court's assessment of that evaluation must be confined to verifying that the Commission did not commit a manifest error in assessing the information in question (Case T-142/97 *Branco v Commission* [1998] ECR II-3567, paragraph 67; Joined Cases T-180/96 and T-181/96 *Mediocruso v Commission* [1998] ECR II-3477, paragraph 120; *Branco v Commission*, cited in paragraph 36 above, paragraph 76; Case T-80/00 *Associação Comercial de Aveiro v Commission* [2002] ECR II-2465, paragraph 51, and Case T-81/00 *Associação Comercial de Aveiro v Commission* [2002] ECR II-2509, paragraph 50).

— The complaints based on the recourse to subcontracting

- 76 It is common ground that the applicant subcontracted training operations to EB L^{da} in respect of which it had obtained the assistance of the ESF.
- 77 Nothing in the rules relating to the ESF or in the approval decision precludes recourse to subcontracting. None the less, such an approach cannot be used to inflate artificially the costs of a training programme, contrary to the requirement of sound financial management (*Branco v Commission*, cited in paragraph 75 above, paragraphs 77 and 78). Recourse to subcontracting must therefore be justified by the fact that the subcontractor is in a position to perform certain specialised work which is clearly identified and forms part of his normal activities. The applicant does not dispute this and, on the contrary, describes EB L^{da} as a 'specialised undertaking' in its pleadings.
- 78 In this case, the IGF noted in its report of 5 May 1989 that EB L^{da} was the applicant's 'largest service provider', since its invoice amounted to PTE 39 239 750 in respect of two training programmes for adults and young persons.
- 79 The IGF also observed that, because it was not structured appropriately, EB L^{da} had in turn subcontracted services relating to course preparation and to the training itself. In that regard, it noted inter alia that course preparation had been subcontracted to Cooperativa de Serviço na Área Administrativa de Empresas, CRL ('the cooperative') for PTE 1 000 000 and that, among the sums incurred in respect of training in the amount of PTE 16 000 000, PTE 7 500 000 had been invoiced in the name of that cooperative.

- 80 However, the IGF noted that the management of the cooperative was composed of three of the most senior employees of the applicant, which had exactly the same shareholders as EB L^{da}.
- 81 In the absence of any explanation as to the need for EB L^{da}'s involvement, and given the duplication of costs caused by the involvement of the three companies, the IGF proposed not to take account of the costs generated by EB L^{da}'s involvement, and to take account only of the amounts actually spent in respect of training.
- 82 It was from that perspective that the IGF assessed the various expenses incurred. It reduced the costs relating to the remuneration of trainers to the extent that the hourly rate applied exceeded the limits laid down by a Portuguese decree. The applicant claims, on the contrary, that the cost of teaching staff was calculated in accordance with that decree, but fails to back that assertion up.
- 83 As regards the amount invoiced by the cooperative to EB L^{da} in respect of course preparation, the IGF found that the only supporting document in respect of those services was insufficient to establish a link with the training programmes covered by the financial assistance granted to the applicant.
- 84 Furthermore, and contrary to what the applicant claims, the defendant did not fail to take account of other expenses, such as electricity, water, telephone, heating and office equipment. The IGF's report, to which the Commission refers, makes it clear that the costs in question were taken into consideration to the extent that they were directly connected to the training in question. Other expenses were weighted according to the relative importance of the subsidised activity.

85 In view of the above, the IGF did not commit a manifest error of assessment in finding that the involvement of EB L^{da} and the cooperative made no economic sense. In particular, EB L^{da} could be regarded as an artificial structure, which could not, in any event, be regarded as being truly 'specialised' in the work entrusted to it by the applicant. It served solely as an intermediary, thereby making a profit or a commission. Furthermore, the IGF and subsequently the Commission adopted an approach in relation to the aim of sound financial management which does not affect the recipient of the assistance beyond what is necessary for that purpose. Thus, the Commission rejected only the expenses which were unconnected with the approved operations and which exceeded the costs actually incurred. Moreover, it rejected only the expenses generated by an artificial arrangement of the number of intermediaries required, since the various parties appear, in the absence of any explanation on the part of the applicant, to offer no real added value. On the other hand, the Commission did not intend, leaving aside the particular circumstances of this case, to preclude the possibility for a recipient of financial assistance to have recourse to a subcontractor.

— The complaints relating to depreciation costs and leasing agreements

86 In its action, the applicant links the question of depreciation costs with that of leasing. It disputes the manner in which the IGF and subsequently the Commission perceive the 'depreciation costs' of rental expenses.

87 The IGF found, as regards the 'rental of equipment' used, that, notwithstanding the fact that it concerned equipment which the applicant had pursuant to leasing agreements, the amounts recorded as expenditure by the applicant did not correspond to the rents actually paid to the leasing company, but to the depreciation of the goods based on an annual rate of 33.33%. The IGF considered that rate excessive and allowed a rate of 20%. The applicant none the less claims to have complied with the accounting rules in force at that time in Portugal, but does not supply any information in that respect and does not back up its argument.

88 Moreover, the IGF also adjusted the applicant's accounts in light of the double counting of certain amounts entered as expenditure. It also adjusted them on the basis of the accounts prior to the date when the operations started, namely June 1987 and not April 1987, so that the expenses to take into consideration could relate only to a period of seven months and not nine months. In that regard, the applicant submits that the equipment in question was used during the training preparation. However, the applicant has not put forward or backed up any evidence in support of that proposition.

— The argument that the Commission was inconsistent

89 Finally, the applicant claims to demonstrate that the defendant was inconsistent. The applicant submits that the remuneration of teachers in respect of the 1987 operation was approved 'in a totally arbitrary and dissimilar manner in relation to other operations which the applicant carried out in 1988'. That argument is inadmissible on account of its lack of precision. Moreover, it is not substantiated. The applicant further submits that the DAFSE approved regular attendance bonuses for trainees and certain depreciation costs as eligible expenditure in respect of 1987, contrary to the approach it adopted towards an operation undertaken in 1988. Once again however, that argument is not substantiated and the applicant does not specify which depreciation costs are concerned.

Findings as regards infringement of Regulation No 2950/83

90 In a general manner, the applicant has failed entirely to back up its criticisms with probative and precise evidence, such as to call in question the assessment of the facts found in support of the contested decision. Consequently, those criticisms are

clearly insufficient to establish that the Commission committed a manifest error of assessment (Case T-380/94 *AIUFASS and AKT v Commission* [1996] ECR II-2169, paragraph 59) by sharing the IGF's opinion that the training in question had failed to comply with the requirements of sound financial management which formed an integral part of the initial approval conditions.

- 91 It follows that the Commission did not infringe Article 6(1) of Regulation No 2950/83.

(b) Infringement of acquired rights

- 92 While it is true that a decision of approval confers on the recipient of ESF assistance a right to demand payment of the assistance, this can be so only if it has been used in accordance with the conditions laid down by that decision (Case T-142/97 *Branco v Commission*, cited in paragraph 75 above, paragraph 105, and Joined Cases T-194/97 and T-83/98 *Branco v Commission*, cited in paragraph 36 above, paragraph 94).
- 93 However, it results from paragraph 71 et seq. above that the defendant did not commit a manifest error of assessment by considering that the subsidised training had not been carried out in compliance with the conditions laid down by the initial approval decision.
- 94 The applicant therefore had no right to final payment of the assistance in question.
- 95 The first two pleas are therefore unfounded.

B — *The third plea: infringement of the principle of protection of legitimate expectations and the principle of legal certainty*

96 This plea is in two parts.

1. *The first part (legitimate expectations created by the certification of the accounts of the payment claim)*

(a) Arguments of the parties

97 The applicant submits that the DAFSE's certification, in 1988, of the accuracy of the facts and accounts in the final payment claim conferred on it the right to obtain payment of the assistance.

98 The contested decision calls that decision in question, although the facts remained the same. In particular, the Portuguese courts discontinued the proceedings against the applicant, thus putting an end to the suspicion of irregularities on the part of the applicant.

99 Moreover, the applicant observes, the power to issue certification in Portugal lies solely with the DAFSE.

100 The certification in 1988 created a legitimate expectation for the applicant that it would be paid, which could be called in question by the Commission only if the conditions laid down in the initial decision of approval had not been complied with, and not because other findings subsequently contradict the certified costs and expenses.

101 The defendant disputes those arguments and submits that the plea is unfounded.

(b) Findings of the Court

102 Three conditions must be satisfied in order to claim entitlement to the protection of legitimate expectations. First, precise, unconditional and consistent assurances originating from authorised and reliable sources must have been given to the person concerned by the Community authorities. Second, those assurances must be such as to give rise to a legitimate expectation on the part of the person to whom they are addressed. Third, the assurances given must comply with the applicable rules (Case T-203/97 *Forvass v Commission* [1999] ECR-SC I-A-129 and II-705, paragraph 70, and Case T-199/01 *G v Commission* [2002] ECR-SC I-A-207 and II-1085, paragraph 38).

103 In the present case, the fact that the national authority initially certified the accuracy of the facts and accounts of the final payment claim could not cause the beneficiary of the assistance to entertain legitimate expectations as to final payment.

104 First, it follows from Article 2(2) of Decision 83/516 that the relevant Member States are to guarantee the successful completion of the operations financed by the ESF. In

addition, under Article 7(1) of Regulation No 2950/83, the Commission may make checks of final payment claims 'without prejudice to any controls carried out by the Member States'. Those obligations and powers of the Member States are not limited by any restriction in time. It follows that certification, for the purposes of the second sentence of Article 5(4) of Regulation No 2950/83, of the accuracy of the facts and accounts in the final payment claim in respect of a training operation does not preclude a Member State from undertaking a subsequent reassessment of the final payment claim (order in Case C-453/98 P *Branco v Commission* [1999] ECR I-8037, paragraph 77, and *Frota Azul-Transportes e Turismo*, cited in paragraph 68 above, paragraph 62). Moreover, in order to undertake that reassessment, there is nothing to preclude the DAFSE from having recourse to a specialist auditing body such as the IGF (order in *Branco v Commission*, cited above, paragraph 78, and judgment in *Branco v Commission*, cited in paragraph 36 above, paragraph 68).

- 105 Second, Article 6(1) of Regulation No 2950/83 reserves to the Commission exclusive power to adopt the final decision on the final payment claim. Thus, the Commission was not bound by the certification granted by the DAFSE. That certification could not therefore appear to be a guarantee as to final payment emanating from an institution having the necessary power for that purpose.
- 106 Third, under that provision, the final decision can be adopted only if the beneficiary has complied with the conditions governing the grant of financial assistance (order in *Branco v Commission*, cited in paragraph 104 above, paragraphs 87 to 89). However, the examination of the first two pleas revealed that the Commission had not committed a manifest error of assessment when it found that the applicant had not complied with the requirements of sound financial management included in the conditions to which the assistance in question was subject.
- 107 Fourth, the course which the procedure took could not have led to such a legitimate expectation on the part of the applicant. By letter of 30 July 1990 the DAFSE ordered the applicant to repay it the advances made by the ESF and the Portuguese Republic. The applicant was then informed that it was suspected of irregularities, within the meaning of Article 7 of Decision 83/673, and was subsequently informed that an

investigation procedure had commenced before the Tribunal de Instrução Criminal da Comarca do Porto for fraudulently obtaining and misappropriating subsidies in relation to the training operations financed by the ESF. The applicant was further notified of a decision suspending the financial assistance in question, against which it brought an action for annulment which was rejected. Finally, following the abandoning of proceedings on the ground that the period of limitation had expired, the applicant received, for comment, a draft decision reducing financial assistance.

108 The fact that the criminal proceedings brought against the applicant were discontinued cannot found the applicant's alleged legitimate expectation of payment of the assistance. It is apparent from Article 6 of Regulation No 2950/83 that Community legislation does not classify the improper use of ESF assistance as a criminal offence (Case C-186/98 *Nunes and de Matos* [1999] ECR I-4883, paragraphs 7 and 8). Consequently, while the principle of sound administration requiring a Community institution to make decisions with full knowledge of the relevant facts justifies the Commission suspending its final decision when a national court finds it necessary to rule on whether there has been fraud, it does not however prevent the Commission from examining whether it might reduce its assistance on the basis of the IGF's administrative investigation, following the discontinuance of proceedings on limitation grounds.

109 It follows that the first part of the third plea is unfounded.

2. The second part (legal uncertainty during an unreasonable period and infringement of legitimate expectations)

(a) Arguments of the parties

110 The applicant submits that the principles of the protection of legitimate expectations and legal certainty were infringed since, even if the Commission is not bound by a specific time-limit, it must none the less make its decision within a reasonable period.

- 111 However, the interval of 15 years which preceded the adoption of the contested decision is excessive. In particular, the applicant takes the view that the cessation of proceedings against it removed any grounds for not approving its payment claim.
- 112 The applicant also submits that, as that period progressed, it gave rise to a legitimate expectation on its part that the Commission would make a decision consistent with the DAFSE's certification, which had approved the final payment claim in 1988.
- 113 The defendant disputes those arguments and submits that the plea is unfounded.

(b) Findings of the Court

Whether the period in question was reasonable and legal certainty

- 114 According to settled case-law, the question whether the length of an administrative proceeding is reasonable must be determined in relation to the particular circumstances of each case and, in particular, the background to the case, the various procedural stages followed, the complexity of the case and its importance for the various parties involved (Case T-73/95 *Oliveira v Commission* [1997] ECR II-381, paragraph 4; Joined Cases T-213/95 and T-18/96 *SCK and FNK v Commission* [1997] ECR II-1739, paragraph 57; Joined Cases T-180/96 and T-181/96 *Mediocurso v Commission* [1998] ECR II-3477, paragraph 61; and Case T-182/96 *Partex v Commission* [1999] ECR II-2673, paragraph 177).

- 115 That is the approach to be borne in mind when assessing the reasonableness of the time which elapsed between the lodging of the final payment claim by the applicant in July 1988 and the adoption of the contested decision on 23 October 2002.
- 116 Between July 1988 and May 1989, the DAFSE verified the applicant's accounts and the IGF carried out a financial audit to determine the accuracy of the facts and accounts relating to the expenses incurred by EB L^{da} pursuant to Article 7(1) of Regulation No 2950/83.
- 117 Given that there were grounds for suspecting irregularities, the DAFSE and the Commission then waited for the Portuguese courts to give judgment in the criminal proceedings against the applicant. In *Branco v Commission*, cited in paragraph 36 above (paragraph 51), the Court accepted that 'since in this case ... the Commission had serious doubts, following the IGF's report, as to the proper use of the aid and, second, proceedings against the beneficiary of the aid and relating to certain transactions entered into within the framework of the projects financed were pending before a Portuguese criminal court when the Commission was formally called upon to act, the Commission was not required to take a final decision on the final payment claim'.
- 118 Thus, it was only after it was informed by the Portuguese authorities in July 2001 that proceedings had been discontinued that the Commission became certain that the case would not progress at the criminal level. It then had to reopen the investigation at the administrative level, all the more carefully and circumspectly since no judgment had been given on the applicant's practices and because the criminal proceedings had been discontinued, following appeal, only because they were time-barred.

- 119 The Commission then prepared a draft decision to reduce the financial assistance, based on the findings of the IGF's report, with the caution required by the context described in the previous paragraph. The Commission then communicated that draft for comment to the Portuguese authorities on 8 January 2002, in accordance with Article 6(1) of Regulation No 2950/83. The procedure was suspended while the Member State itself brought that draft to the attention of the applicant, so as to enable it to set out its comments as well. The applicant did not submit its comments within the prescribed period. On 24 April 2002, the DAFSE advised the defendant that for its part it had no objection to the draft decision. The officials of the Commission then obtained the agreement of the Directorate-General Budget, the Legal Service and the Directorate-General for Financial Control on the draft decision. The contested decision was adopted on 23 October 2002.
- 120 It is apparent from that sequence of events, from the interrelationship of the judicial and administrative proceedings, at both national and Community level, and from the fact that it was ultimately impossible for the Commission to rely on a judgment given in criminal proceedings, that each of the procedural stages prior to the adoption of the contested decision proceeded within a reasonable period.
- 121 The applicant claims however that the period to be taken into consideration runs until the notification of the contested decision, that is 31 July 2003, responsibility for which lies with the national authorities.
- 122 In the circumstances of the present case, it must nevertheless be noted that that contested decision was notified in good time by the Commission to the addressee, the Portuguese Republic, whose obligation it was to inform the applicant of that decision. It is true that the Portuguese Republic delayed in notifying the contested decision, but the Commission cannot be held responsible for that delay. Only delays attributable to the Commission could lead to the conclusion that that institution

failed to act within a reasonable period. Consequently, the alleged legal uncertainty linked to that delay cannot bring about the annulment of the contested decision.

The legitimate expectation created by the time taken by the Commission to give a decision

123 The applicant claims that the unreasonable amount of time taken by the Commission to decide on its final payment claim led it to entertain a legitimate expectation as regards that payment.

124 However, in the light of the findings made in paragraphs 120 and 122 above, that argument is based on a false premiss and must be dismissed. Moreover, legitimate expectations presuppose, in particular, that precise, unconditional and consistent assurances originating from authorised and reliable sources, have been given to the person concerned by the Community authorities. However, as already pointed out (see paragraphs 102 to 109 above), that was not the case in this instance.

125 Furthermore, the examination of the first part of the plea has shown that the certification originally granted by the DAFSE and the manner in which the procedure progressed could not create a legitimate expectation in that payment.

126 In those circumstances, both parts of the third plea must be rejected.

C — *The fourth plea, alleging infringement of the principle of proportionality*

1. *Arguments of the parties*

127 According to the applicant, the Commission infringed the principle of proportionality by failing to comply with its undertaking to reimburse, in implementation of the initial approval decision, the expenditure lawfully incurred on the training programme.

128 The defendant disputes that.

2. *Findings of the Court*

129 In this case, the reductions made by the Commission are directly linked to the irregularities which the Portuguese authorities advised it of and are intended to preclude reimbursement only of unlawful or unnecessary expenditure.

130 Those reductions are thus in conformity with the principle of proportionality.

131 The fourth plea must therefore be rejected.

132 Consequently, the action must be dismissed in its entirety.

Costs

- 133 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 other party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the defendant.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

- 1. Dismisses the action.**
- 2. Orders the applicant to pay the costs.**

Vilaras

Dehousse

Šváby

Delivered in open court in Luxembourg on 30 June 2005.

H. Jung

M. Vilaras

Registrar

President