

JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)

12 January 1995 ^{*}

In Case T-85/94,

Eugénio Branco Lda, a company incorporated under Portuguese law, having its registered office in Lisbon, represented by Bolota Belchior, of the Bar of Vila Nova de Gaia, with an address for service in Luxembourg at the Chambers of Jacques Schroeder, 6 Rue Heine,

applicant,

v

Commission of the European Communities, represented by Francisco De Sousa Fialho, of its Legal Service, and Horstpeter Kreppel, a national official on secondment to the Commission's Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Georgios Kremlis, also of the Commission's Legal Service, Wagner Centre, Kirchberg,

defendant,

^{*} Language of the case: Portuguese.

APPLICATION for the annulment of the Commission decision of 29 March 1993 reducing the assistance initially granted to the applicant by the European Social Fund,

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

composed of: J. Biancarelli, President, C. P. Briët and C. W. Bellamy, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 10 November 1994,

gives the following

Judgment

Legislative framework, factual background and procedure

Legislative framework

1 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') provides

for the Fund to participate in the financing of operations concerning vocational training and guidance.

2 Article 1 of Council Regulation (EEC) No 2950/83 of 17 October 1983 on the implementation of Decision 83/516/EEC on the tasks of the European Social Fund (OJ 1983 L 289, p. 1) ('the regulation') sets out the types of expenditure eligible for assistance from the European Social Fund ('ESF').

3 Under Article 5(1) of the regulation, 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) provides that final payment claims must contain a detailed report on the content, results and financial aspects of the relevant operation and requires the Member State concerned to certify the accuracy of the facts and accounts in payment claims.

4 Finally, Article 6(1) of the regulation provides that 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. Under Article 6(2), sums paid which are not used in accordance with the conditions laid down in the decision of approval must be refunded.

Factual background

5 In 1987 the Departamento para os Assuntos do Fundo Social Europeu (Department of European Social Fund Affairs) ('DAFSE'), acting for the Portuguese Republic

and on behalf of the applicant, applied to the ESF for assistance for the 1988 financial year in respect of a projected training programme.

- 6 The project for which assistance was requested, which had the file-number 880280P1, was approved by a Commission decision notified to the applicant by a letter from the DAFSE of 25 May 1988. The decision fixed the amount of ESF assistance at ESC 62 191 499. For its part, the Portuguese Republic undertook to finance the project up to an amount of ESC 50 883 954 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'). Private contributions supplemented the financing of the training programme.

- 7 On 12 August 1988 the applicant received, pursuant to Article 5(1) of the regulation, an advance of 50% of the assistance granted by the ESF along with 50% of that granted by the OSS/IGFSS, amounting to ESC 31 095 749 and ESC 25 441 977 respectively.

- 8 On completion of the training programme the applicant established that the total final cost of the programme came to ESC 104 289 500, an amount lower than that initially forecast, and submitted to the DAFSE a claim for final payment from public funds. In that connection it calculated a balance of ESC 20 527 598 due from the ESF and ESC 16 795 307 due from the OSS/IGFSS.

- 9 Following the submission of that claim, the DAFSE carried out, in accordance with Article 5(4) of the regulation, an accounting and documentary analysis of the

applicant's training programme and certified the final payment claim submitted to the ESF.

10 While that analysis was still being carried out, the DAFSE paid to the applicant the sum of ESC 16 795 307, representing the balance of the assistance to be paid by the OSS/IGFSS, but pointed out that this payment did not prejudice the Commission's decision of approval.

11 By letter of 23 May 1990 the DAFSE notified the applicant of the expenditure which, in its opinion, was eligible for the purposes of the regulation. It was apparent from that letter that the DAFSE took the view that a number of items of expenditure submitted by the applicant were ineligible, while the amount of certain eligible items of expenditure had, according to the DAFSE, to be reduced in relation to the amount submitted by the applicant.

12 The DAFSE, in the same letter, accordingly informed the applicant that ESF assistance would have to be reduced to ESC 30 672 242 and that of the OSS/IGFSS to ESC 25 095 471, and also instructed the applicant to repay a portion of the sums which it had already received from the ESF and the OSS/IGFSS, in the respective amounts of ESC 423 507 and ESC 17 141 813.

13 On 23 May 1990 the DAFSE, on behalf of the applicant, also forwarded to the relevant Commission department a final payment claim, which in this case was negative. That claim contained a proposal to reduce assistance as indicated in the letter which the DAFSE sent to the applicant on 23 May 1990.

14 The applicant, which did not agree with the position taken by the DAFSE, decided to await the final decision of the Commission regarding this final payment claim.

15 On 29 March 1993 the Commission notified the DAFSE of its decision regarding final ESF assistance for several training programmes in Portugal, including that carried out by the applicant.

16 That decision is worded as follows:

'*Re*: 1988 files submitted for decision by the Commission of the European Communities

Dear Sir,

In the light of the information which you have requested regarding the above matter, I wish to inform you that, after examination of the final payment claims in respect of the files listed below, the final European Social Fund assistance approved by the Commission is as follows:

Files:	ESF contribution (paragraph 15.1 of Annex 2)
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...

880280 P1	ESC 30 672 242
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...
(formal ending)

(signed) A. Kastrissianakis,

Head of Unit'

17 Following that decision, the DAFSE, on 15 December 1993, sent to the applicant a letter which was received on 17 December 1993. The opening paragraphs of that letter, which relates to 'File No 880280P1', are as follows:

'We wish to inform you that the final payment claim in respect of the above file has been approved by the Commission of the European Communities, in accordance with the notification made to you by our letter No 5943 of 23 May 1990.

In view of the fact that the amount in question has already been reimbursed to the European Social Fund, we would remind you that you are under an obligation to repay it within 30 days, failing which we shall be obliged to institute the procedure laid down in Decree-Law No 158/90 of 17 May 1990, as amended by Decree-Law No 246/91 of 16 July 1991.'

The remainder of the letter sets out the conditions under which the amount due must be repaid.

Procedure

18 In those circumstances the applicant brought the present action by application lodged at the Registry of the Court of First Instance on 23 February 1994.

19 The Commission was notified of the application but failed to lodge a defence within the prescribed period. By letter received at the Registry on 17 June 1994, the applicant applied to the Court of First Instance for judgment by default, pursuant to Article 122(1) of its Rules of Procedure. The Commission was notified of

that application by letter of 21 June 1994. The present judgment is therefore given by default in accordance with the conditions laid down in Article 122(2) of the Rules of Procedure.

- 20 By decision of 7 July 1994, notified to the parties by letter of 21 July 1994, the Court of First Instance decided, pursuant to Articles 14 and 51 of its Rules of Procedure, to assign the case to a Chamber composed of three judges.
- 21 In response to a request made by the Court on 11 July 1994 under Article 64 of its Rules of Procedure, the Commission on 18 July 1994 produced a copy of its decision of 29 March 1993 which the applicant seeks to have annulled.
- 22 The oral procedure took place on 10 November 1994. In the presence of the defendant's representatives, counsel for the applicant presented oral argument and replied to the questions put by the Court.

Forms of order sought by the applicant

- 23 The applicant claims that the Court should:
- (i) annul the Commission decision, notified to the applicant on 17 December 1993, approving the final payment claim in respect of the file for ESF assistance, in so far as that decision treated as ineligible the expenditure submitted by the applicant and ordered repayment of ESC 423 507 to the ESF and ESC 17 141 813 to the Portuguese Republic, while at the same time refusing payment to the applicant of ESC 20 527 598 from the ESF;

(ii) order the Commission to pay the costs.

Admissibility

- 24 The Court points out that, in order to be admissible, the present application for annulment must satisfy the conditions laid down in the fourth paragraph of Article 173 of the EC Treaty. Under that provision an application must, in particular, be directed against a decision addressed to the applicant or against a decision which, although in the form of a regulation or decision addressed to another person, is of direct and individual concern to the applicant.
- 25 Although the contested decision is not addressed to the applicant, being addressed instead to the DAFSE, it is obvious that that decision is of direct and individual concern to the applicant in its capacity as the person benefiting from the assistance.
- 26 As is clear from the case-law of the Court of Justice, a Commission decision reducing ESF assistance, such as the contested decision, although addressed to a Member State, is of direct and individual concern to the person benefiting from the assistance, inasmuch as it deprives that person of part of the assistance which had initially been granted to it, the Member State not having any discretion of its own in that respect (judgments of the Court of Justice in Case C-291/89 *Interhotel v Commission* [1991] ECR I-2257, paragraph 13, Case C-304/89 *Oliveira v Commission* [1991] ECR I-2283, paragraph 13, Case C-157/90 *Infortec v Commission* [1992] ECR I-3525, paragraph 17, Case C-181/90 *Consorgan v Commission* [1992] ECR I-3557, paragraph 12, and Case C-189/90 *Cipeke v Commission* [1992] ECR I-3573, paragraph 12).
- 27 It follows that, in the light of the requirements laid down in Article 173 of the EC Treaty, the present application is admissible on the basis of the documents on the file.

Substance

- 28 The applicant relies on seven pleas in law in support of its application. The first is based on a breach of Article 190 of the EEC Treaty, the second on a breach of the right to a fair hearing, the third on a breach of essential procedural requirements, the fourth on a breach of the provisions of the regulation and of Decision 83/516, the fifth on a breach of acquired rights, the sixth on a breach of the principles of the protection of legitimate expectations and legal certainty, and the seventh on a breach of the principle of proportionality.

The first plea in law: breach of Article 190 of the Treaty

- 29 In support of this plea, the applicant points out that the reasons on which a Commission decision is based must not only provide the person concerned with sufficient information to review the legality of that decision but must also enable the Community judicature to carry out such a review (judgment of the Court of Justice in Case 32/86 *Sisma v Commission* [1987] ECR 1645, paragraph 8).
- 30 The applicant states that the letter of 15 December 1993 from the DAFSE contains no justification, reasoning or indication of the basis for the decision adopted by the Commission. Likewise, according to the applicant, the DAFSE did not, in its letter of 23 May 1990, set out the grounds or reasons why it had formed the view that certain items of expenditure were ineligible and that the amount of certain eligible items of expenditure had to be reduced.
- 31 From this the applicant concludes that, since it is not in a position to review the legality of the Commission's decision, the latter breached the duty to state reasons imposed on it by Article 190 of the Treaty.

Findings of the Court

- 32 According to a consistent line of case-law, the purpose of the obligation to state the reasons on which an individual decision is based is to enable the Community judicature to review the legality of the decision and to provide the person concerned with sufficient information to make it possible to ascertain whether the decision is well founded or whether it is vitiated by a defect which may permit its legality to be contested. The extent of that obligation depends on the nature of the measure in question and on the context in which it was adopted (judgments in *Sisma v Commission*, cited above, paragraph 8, *Consorgan v Commission*, cited above, paragraph 14, and *Cipeke v Commission*, cited above, paragraph 14).
- 33 With regard to the reasons underlying a decision reducing the amount of ESF assistance initially granted, it has been held that, in view in particular of the fact that such a decision has serious consequences for the person benefiting from the assistance, that decision must clearly show the grounds which justify a reduction of the amount of the assistance initially authorized (judgments in *Consorgan v Commission*, cited above, paragraph 18, *Cipeke v Commission*, cited above, paragraph 18, and judgment of the Court of First Instance of 6 December 1994 in Case T-450/93 *Lisrestal and Others v Commission*, [1994] ECR II-1177, paragraph 52).
- 34 It is therefore necessary to consider whether the decision contested in this case satisfies the requirements imposed by Article 190 of the Treaty, as interpreted by the Community judicature.
- 35 The Court finds in that regard that it follows both from the relevant legislation and from the case-law of the Court of Justice that the grant of ESF financial assistance is based on a system of close collaboration between the Commission and the Member States (see, in particular, Article 5(4) of the regulation and the judgments of the Court of Justice in Case 310/81 *EISS v Commission* [1984] ECR 1341, paragraphs 14 and 15, and in *Interhotel v Commission*, cited above, paragraph 16).

- 36 Consequently, in a situation where, as in the present case, the Commission purely and simply confirms the proposal of a Member State to reduce assistance initially granted, the Court takes the view that a Commission decision may be regarded as adequately reasoned, for the purposes of Article 190 of the Treaty, if the decision either clearly sets out itself the reasons which justify the reduction in assistance or, failing that, refers with sufficient clarity to a measure of the competent national authorities of the Member State concerned in which those authorities set out clearly the reasons for such a reduction.
- 37 The Court finds that the decision contested in the present case does not in any way indicate why the Commission reduced the financial assistance initially granted or why it agreed to the proposal of the Member State to reduce that assistance.
- 38 Furthermore, the letter which the DAFSE sent to the applicant on 23 May 1990, in which it informed the applicant that certain items of expenditure were ineligible and that the amount of certain eligible items of expenditure had to be reduced, also does not provide any indication as to why the Member State adopted that position.
- 39 In the light of the foregoing, the Court takes the view that the first plea in law based on the absence of a statement of reasons is well founded and that the Commission decision of 29 March 1993 reducing the assistance initially granted to the applicant by the ESF must therefore be annulled without there being any need to examine the other pleas relied on by the applicant.

Costs

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

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

giving judgment by default,

hereby:

- 1) **Annuls the Commission decision of 29 March 1993 reducing the assistance initially granted to the applicant by the ESF;**
- 2) **Orders the Commission to pay the costs.**

Biancarelli

Briët

Bellamy

Delivered in open court in Luxembourg on 12 January 1995.

H. Jung

J. Biancarelli

Registrar

President