JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)
13 December 1995 *

In Case T-85/94 (122),

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 Carlos Gómez de la Cruz, also of the Commission's Legal Service, Wagner Centre, Kirchberg,

applicant in proceedings to have a default judgment set aside,

v

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,

defendant in proceedings to have a default judgment set aside,

APPLICATION for the setting aside of the judgment given by default by the Court of First Instance on 12 January 1995 in Case T-85/94 *Branco* v *Commission* [1995] ECR II-45,

* Language of the case: Portuguese.

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

composed of: C. P. Briët, acting as President, C. W. Bellamy and J. Azizi, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 26 September 1995,

gives the following

Judgment

Facts and procedure

1 By application lodged at the Registry of the Court of First Instance on 23 February 1994, Eugénio Branco Lda (hereinafter 'Branco') brought an action seeking annulment of the Commission decision of 29 March 1993 reducing the financial assistance which had initially been granted to it by the European Social Fund (hereinafter 'the ESF').

2 In its application, Branco had relied on seven pleas in law: breach of the obligation to provide reasons, breach of the right to a fair hearing, breach of essential procedural requirements, breach of certain provisions of the applicable legislation, breach

of acquired rights, breach of the principles of the protection of legitimate expectations and legal certainty, and breach of the principle of proportionality.

3 Since the Commission did not submit a statement of defence within the specified period, the Court of First Instance (Third Chamber) gave judgment by default on 12 January 1995 (Case T-85/94 *Branco* v *Commission* [1995] ECR II-45). Taking the view that the plea of breach of the obligation to provide reasons was well founded, the Court annulled the contested decision on that ground alone, without examining the other pleas in law submitted by Branco in support of its application.

4 By document lodged at the Registry of the Court of First Instance on 22 February 1995, the Commission applied to have the judgment given in default by the Court of First Instance set aside pursuant to Article 122(4) of the Rules of Procedure.

5 By document lodged at the Registry of the Court of First Instance on 6 April 1995, Branco submitted its observations on the application to have the default judgment set aside, in accordance with Article 122(5) of the Rules of Procedure.

6 Upon reading the report of the Judge-Rapporteur, the Court of First Instance (Third Chamber) decided to open the oral procedure without any preparatory inquiry.

7 The parties presented oral argument and replied to oral questions of the Court at the hearing on 26 September 1995.

8 At the beginning of the hearing, the Commission produced five documents which it asked to be placed on the case-file. The Commission explained that these included two letters sent by the Departamento para os Assuntos do Fundo Social Europeu (Department of European Social Fund Affairs, hereinafter 'the DAFSE') to Branco. According to the Commission, those documents show that Branco had been properly notified of the grounds on which its financial assistance from the ESF had been reduced.

9 The Court holds that the documents in question were produced at a late stage, so that Branco and its legal adviser had insufficient time for an adequate response. The Commission's request to have those documents placed on the case-file must accordingly be refused, pursuant to Article 44(1)(c) and (e) of the Rules of Procedure, applicable in proceedings to have a default judgment set aside by virtue of Article 122(4) of the Rules of Procedure, and pursuant to Article 48(1) and (2) of the Rules of Procedure, applicable by analogy in proceedings to have a default judgment set aside.

Forms of order sought by the parties

10 The Commission claims that the Court should:

— reconsider the judgment delivered on 12 January 1995 in Case T-85/94 by declaring the requests made by Branco to be unfounded on the ground of absence of proof, and reject them;

— order Branco to pay the costs.

1 Branco contends that the Court should:

— dismiss as unfounded the Commission's application to have the default judgment delivered by the Court of First Instance on 12 January 1995 set aside, confirm that judgment in its entirety, and rule that the forms of order which it set out in its application for annulment were well founded and proven;

— order the Commission to pay the costs.

The reasons given for the contested decision

Summary of the parties' main arguments

12 The Commission considers that it was not under an obligation to provide reasons for the contested decision and that the Court of First Instance therefore erred in law by declaring that the decision infringed Article 190 of the Treaty.

13 In support of this contention, the Commission first points out that 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, hereinafter 'the regulation') creates a legal framework within which two parallel bilateral relationships exist, namely the relationship between the Commission and the national authority of the Member State concerned, on the one hand, and, on the other, the relationship between that national authority and the recipient of the financial assistance (judgment in Case 310/81 *EISS* v *Commission* [1984] ECR 1341, paragraph 15).

14 The Commission then goes on to argue that the national authority is its sole interlocutor in proceedings concerning the financing of ESF training programmes and that the national authority assumes responsibility in so far as it certifies the accuracy of the facts and accounts in final payment claims in accordance with Article 5(4) of the regulation (judgment in Case C-304/89 *Oliveira* v *Commission* [1991] ECR I-2283, paragraph 20).

15 In a case such as the present, in which it approves without amendment the final payment claim as submitted and certified by the national authority, the decision to reduce the assistance is governed by the relationship between the national authority, *in casu* the DAFSE, and the beneficiary of the ESF assistance, *in casu* Branco. More particularly, the Commission states that, in the situation in question, it is not the Commission but rather the national authority which takes the decision to reduce the assistance.

16 For those reasons, the Commission cannot see how it could be under an obligation to provide reasons for such a decision. It takes the view that it can be under an obligation to provide reasons only if it departs from the final payment claim submitted by the national authority. It is of the opinion that, in a case such as the present, however, the obligation to provide reasons goes no further than the obligation to give reasons for the decision approving assistance under Article 4(2) of the regulation.

17 The Commission points out that it respects the right of a recipient of assistance to a fair hearing and accepts that, in the present case, a combination of circumstances may have prevented Branco from being precisely and clearly aware of the reasons for the contested decision. In the Commission's view, however, it appears to be established that the national authorities carried out an audit at the applicant's premises in connection with the matter in question. The Commission accordingly

assumes that, during this audit, Branco had an opportunity to ascertain the grounds on which the DAFSE proposed to reduce its ESF financial assistance.

18 The Commission also adds that judicial protection for a recipient of ESF financial aid is, in its opinion, exclusively a matter for the national court before which that recipient may challenge the position taken by the national authority.

19 In reply, Branco states that the Commission's argument, to the effect that it cannot be under an obligation to provide reasons for the contested decision on the ground that it merely approved what was requested of it by the DAFSE, is entirely without foundation.

20 Branco points out that, in accordance with Article 5(4) of the regulation, the national authority submits to the Commission the final payment claim, but that it is the Commission which takes the decision to make the final payment, if necessary after carrying out checks pursuant to Article 7 of the regulation and taking account of the information contained in the payment claim, the factual and accounting accuracy of which has been certified by the national authority. Branco stresses that it is the Commission, and not the national authority, which has the power, under Article 6(1) of the regulation, to reduce the amount of assistance initially granted.

21 According to Branco, it follows that the contested decision is a decision attributable to the Commission, with the result that reasons for it must be provided under Article 190 of the Treaty. Since the Commission has failed to demonstrate that, contrary to what the Court of First Instance held, adequate reasons were given for the decision, Branco contends that the application to have the Court's default judgment set aside must be dismissed.

Findings of the Court

22 The Commission is essentially arguing that it was not obliged to provide reasons for the contested decision because it merely approved a proposal from the DAFSE and that consequently the decision to reduce the ESF assistance was taken not by it but by the national authority. According to the Commission, it would have been under an obligation to provide reasons for the decision only if it had departed from the proposal of the DAFSE.

23 That argument cannot be accepted. As Branco correctly points out, the DAFSE, like any other national authority which has competence in the area of the financing of ESF programmes, may, in a final payment claim submitted in accordance with Article 5(4) of the regulation, propose a reduction in ESF financial assistance. However, it is the Commission which takes the decision on final payment claims, and it is the Commission — and the Commission alone — which has the power to reduce ESF financial assistance, in accordance with Article 6(1) of the regulation.

24 It follows 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. Since responsibility for a decision to reduce ESF assistance resides with the Commission, such a decision must satisfy the reasoning requirement laid down in Article 190 of the Treaty.

25 In order to satisfy the obligation to provide reasons, a decision reducing the amount of assistance initially granted must clearly show the grounds which justify a reduction of the amount of the assistance initially authorized (judgments in Case

C-181/90 *Consorgan* v *Commission* [1992] ECR I-3557, paragraph 18, and Case C-189/90 *Cipeke* v *Commission* [1992] ECR I-3573, paragraph 18). As this Court held in its judgment of 12 January 1995, no reasons were given for the disputed decision, which accordingly contravenes Article 190 of the Treaty (see paragraphs 34 to 39 of the contested judgment).

26 The Court also notes that, in its application to have the judgment set aside, the Commission submits, as its only argument to show that the contested decision is adequately reasoned, that it appears that in the course of the audit of the training programme the DAFSE enabled Branco to ascertain the reasons for its proposal to reduce ESF financial assistance. In support of that argument, the Commission also referred, during the hearing, to the documents which it had produced and which it asked to be placed on the case-file, in particular the letters sent by the DAFSE to Branco (see paragraph 8 above).

27 Even assuming that the DAFSE properly explained to Branco why it was proposing a reduction in its ESF financial assistance, the Commission decision by which that financial assistance was reduced, pursuant to the DAFSE's proposal, could itself be properly reasoned only if, at the very least, that decision referred with sufficient clarity to the measure containing the explanation of the DAFSE (see also paragraph 36 of the contested judgment). It is common ground that the contested decision does not even contain such a reference. The argument in question must for that reason be rejected. In any event, if the additional documents produced by the Commission could have been placed on the case-file, they would not have been able to mitigate the failure to provide reasons found by the Court in the contested judgment.

28 The Commission also argues that judicial protection of a recipient of ESF assistance is exclusively a matter for national courts. Suffice it to note in this regard that the Court of Justice has ruled in many cases that a recipient of ESF assistance may

contest, before the Community courts, a Commission decision reducing its financial assistance (see, for instance, the judgments in Case C-291/89 *Interhotel* v *Commission* [1991] ECR I-2257, paragraph 13, and in Case C-157/90 *Infortec* v *Commission* [1992] ECR I-3525, paragraph 17). It follows that this argument must also be rejected.

29 For the foregoing reasons, the Commission's application to have the default judgment set aside must be dismissed.

30 It must be emphasized that, on the question of the obligation to provide reasons, the Court took express account, in its judgment of 12 January 1995, of the context in which ESF training programmes are managed. The Court would again refer to paragraph 36 of the contested judgment, in which it stated that '... 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'.

31 It follows from all the foregoing that the Commission's application to have the judgment of 12 January 1995 set aside must be dismissed, without it being necessary to address the arguments relating to the other pleas in law.

Costs

32 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 applied 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)

hereby:

1. Dismisses the Commission's application to have the judgment of 12 January 1995 set aside;

2. Orders the Commission to pay the costs.

Briët Bellamy Azizi

Delivered in open court in Luxembourg on 13 December 1995.

H. Jung C. P. Briët

Registrar acting as President