

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)  
11 July 1996 \*

In Case T-271/94,

**Eugénio Branco Ld.<sup>a</sup>**, 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 Ana Maria Alves Vieira, of its Legal Service, 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 a decision allegedly taken by the defendant and notified by a letter from the Departamento para os Assuntos do Fundo Social Europeu (Department of European Social Fund Affairs) of 25 May 1994 and by a

\* Language of the case: Portuguese.

letter from the defendant of 16 June 1994 rejecting a claim for final payment of financial assistance granted to the applicant by the European Social Fund for two training programmes, reducing such assistance and seeking repayment of the advances previously paid by the European Social Fund and the Portuguese State,

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

composed of: R. Schintgen, President, R. García-Valdecasas and J. Azizi, Judges,

Registrar: B. Pastor, Administrator,

having regard to the written procedure and further to the hearing on 4 June 1996

gives the following

### Judgment

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

Under Article 5(1) of that decision, European Social Fund ('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.

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) sets out the types of expenditure eligible for assistance from the ESF.

3 Pursuant to 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 According to Article 7(1) of the regulation, both the Commission and the Member State concerned may check the use to which the aid is put. Article 7 of Commission Decision 83/673/EEC of 22 December 1983 on the management of the European Social Fund (OJ 1983 L 377, p. 1, requires the Member State investigating the use of aid because of suspected irregularities to notify the Commission thereof without delay.

5 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 granting 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

granting approval must be refunded and, to the extent that a Member State repays to the Community sums owed by the bodies financially responsible for an operation, the Community's rights in the matter are transferred to the Member State.

*Factual background*

- 6 The defendant approved, by decisions notified to the applicant by the Departamento para os Assuntos do Fundo Social Europeu (Department of European Social Fund Affairs, 'the DAFSE') on 31 April 1987 and 27 May 1987, two financial contributions of ESC 11 736 792 (file No 870302 P3) and ESC 82 700 897 (file No 870301 P1) intended for training programmes.
- 7 On 24 July 1987, the applicant received an advance pursuant to Article 5(1) of the regulation.
- 8 On completion of the training operations, which took place from 1 January 1987 to 31 December 1987, it submitted to the DAFSE claims for final payment of the aid.
- 9 By two letters of 24 April 1989, it informed the defendant that, pursuant to Article 7 of Decision 83/673, it had suspended payment of the balance.
- 10 On 30 July 1990, the DAFSE informed the defendant that it considered certain expenditure to be ineligible and that it had authorized the repayment of corresponding amounts which it had paid to the applicant by way of advances.

- 11 By two letters of the same date, received the following day, the DAFSE instructed the applicant to repay within 10 days the advances amounting to ESC 1 535 946 (file No 870302 P3) and ESC 4 399 475 (file No 870301 P1), paid by the ESF, and to ESC 1 256 683 (file No 870302 P3) and ESC 3 599 570 (file No 870301 P1), paid by the Portuguese State by way of national contribution. The demand for repayment stated that it not prejudice in any way the adjustments which might be deemed necessary following investigations carried out by the competent bodies or, with respect to file No 870301 P1, a decision of the defendant.
- 12 By letters of 13 September 1993, the DAFSE notified the applicant of its two decisions No 82/93 and No 84/93 of 1 September 1993. They stated that the defendant's rights in the matter had been transferred to the DAFSE and threatened the applicant with proceedings for recovery in the event of failure to return within eight days the sums which it had reimbursed to the defendant.
- 13 By letter of 12 May 1994, the applicant asked the DAFSE to explain why the defendant had not yet taken a decision on those files.
- 14 On 25 May 1994, the DAFSE sent the applicant the following letter:

'...

1. Under Article 6 of Council Regulation No 2950/83 of 17 October 1983, the final decision on final payment claims is a matter for the Commission of the European Communities, which may suspend, reduce or withdraw Fund assistance when it is not used in accordance with the conditions laid down in the decision granting approval.

2. However, the Commission's decision depends on the outcome of the certification, to be carried out by the Member States, of the accuracy of the facts and accounts contained in the claims for final payment (Article 5(4) of Regulation No 2950/83). The Commission considers that the Member States are better able to assess whether the costs attributed by the recipient bodies to the operations concerned are lawful, eligible, reasonable and have actually been incurred.

3. At national level, it is for the DAFSE itself to certify on the basis of the facts and accounts the accuracy of the information contained in payment claims (Article 2(d) of Decree-Law No 37/91 of 18 January 1991) or to do so by means of a third party accredited for the purpose, other than the Inspeção-Geral de Finanças (Inspectorate General for Finances) which is empowered to carry out financial audits.

4. The operations carried out by Eugénio Branco in the context of files 870301 P1 and 870302 P3 were accordingly audited by the Inspectorate General for Finances.

5. Following a further examination by its officials of the final payment claims in question, the DAFSE, taking account of the outcome of the abovementioned audit, forwarded to the Commission its decision on the claims by letters Nos 8241 and 8243 of 30 July 1990, copies of which are attached hereto.

6. Furthermore, the Commission transmits its decision only where it does not agree with the decisions of the Member State or where the decision granting approval entails payment of a specific amount by way of balance.

7. In the present case, the decision of the Member State on the final payment claims in respect of files 870301 P1 and 870302 P3 was negative, with the result that the DAFSE proceeded at once to repay to the Commission the amounts owed by Eugénio Branco according to the decision (see payment authorizations Nos 1399/90, 1400/90, 1401/90 and 1402/90, of 30 July 1990, attached to letters Nos 8241 and 8243).

That is why the Commission has not transmitted its decision on the payment claims, since, the Member State having paid, the Community's rights in the matter have been transferred, pursuant to Article 6(2) of Regulation (EEC) No 2950/83, to that State, and the Commission accordingly considered those files to be closed.

(...)'.

15 By letter of 30 May 1994, the applicant asked the defendant to explain why it had not yet taken a final decision on those files.

16 The defendant replied by letter of 16 June 1994 as follows:

'...

I wish to inform you that the Portuguese authorities have informed the European Social Fund that the files in question fall within the scope of Article 7 of Commission Decision 83/673/EEC of 22 December 1983, which 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 shall notify the Commission thereof without delay”.

A copy of your letter was passed on today to the DAFSE — Departamento para os Assuntos do Fundo Social Europeu — since it is the official interlocutor of the European Social Fund in Portugal, to enable it to send you any appropriate information.

(...)'.

## Procedure

- 17 The applicant lodged the application initiating the present proceedings on 22 July 1994.
- 18 By a document lodged on 29 September 1994, the defendant raised an objection of inadmissibility as a preliminary issue under Article 114(1) of the Rules of Procedure. The applicant lodged its observations on that objection on 10 November 1994.
- 19 Pursuant to Article 64 of the Rules of Procedure, the Court of First Instance asked the applicant, by letter of 9 June 1995, whether it had challenged before the national courts the acts notified by the DAFSE by letters of 30 July 1990. It also requested the defendant to produce the act(s) containing any decision(s) not to pay the balance and to reduce aid which it might have taken with regard to the files at issue.
- 20 The applicant replied that it had not instituted proceedings before the national courts.
- 21 The defendant stated that '...the Commission did not adopt a formal decision either not to pay the balance or to reduce the aid under Article 6 of Council Regulation (EEC) No 2950/83 ... Since the Member State found, through its agency, the DAFSE, that there had been irregularities in the management of the training operations at issue, it suspended payment of the balance pursuant to Article 7 of Decision 83/673'.



- 22 By order of 14 July 1995, the President of the Third Chamber reserved its decision on the objection on inadmissibility until final judgment.
- 23 Subsequently, the Judge-Rapporteur was assigned to the Fifth Chamber, to which the case was accordingly assigned.
- 24 The hearing took place on 4 June 1996. The parties' representatives presented oral argument and replied to the questions put to them by the Court.
- 25 The President of the Fifth Chamber closed the oral procedure by decision of 18 June 1996.

### Forms of order sought by the parties

- 26 The applicant claims that the Court should:

— annul the Commission decision, notified to the applicant by letter of the DAFSE of 25 May 1994 and by letter of the Commission of 16 June 1994, concerning the final payment claim for ESF assistance, which treated certain expenditure submitted by the applicant as ineligible and instructed the latter:

- (a) in respect of file No 870302 P3 to repay ESC 1 535 946 to the ESF and ESC 1 256 683 to the Portuguese State, while prohibiting the applicant from receiving ESC 991 009 from the ESF and ESC 801 826 from the Portuguese State;

(b) in respect of file No 870301 P1 to repay ESC 4 399 475 to the ESF and ESC 3 599 570 to the Portuguese State, while prohibiting the applicant from receiving ESC 8 589 002 from the ESF and ESC 7 027 365 from the Portuguese State;

— order the Commission to pay the costs.

27 The defendant contends that the Court should:

— declare the action inadmissible or, in any event, unfounded;

— order the applicant to pay the costs.

## Admissibility

### *Summary of the pleas in law and arguments of the parties*

28 The defendant raises a plea of inadmissibility claiming that there is no measure against which an action may be brought before the Community judicature and, in the alternative, that the time-limit for bringing an action has expired.

29 In its view, where the authorities of the Member State concerned find irregularities and repay to the Community the advances improperly paid to the recipient of aid the defendant's rights are transferred to those authorities. Such transfer confers on the national authorities concerned the exclusive power to reduce the aid initially granted by it. It is only in a situation where, despite certification of the facts and

accounts by the Member State pursuant to Article 5(4) of the regulation, it discovers excessive or unjustified expenditure that it is incumbent upon it to adopt a reasoned decision to reduce the aid. On the other hand, it cannot change the final payment claim in order to make it more favourable to the beneficiary. It follows from those principles that disputes arising from a reduction by the national authorities, where the defendant's rights have been transferred to them, fall within the scope of national law. The Court therefore has no jurisdiction in such cases.

30 In the present case, the defendant claims not to have taken any decision against which an action may be brought before the Community judicature and, more particularly, any decision to reduce aid. Such decisions were taken by the DAFSE in exercise of powers devised from the defendant's rights which had been transferred to it.

31 Even on the assumption that it did take such decisions, they were incorporated in the letters from the DAFSE of 30 July 1990. Any reference to a decision by the competent bodies does not deprive them of their definitive nature since that detail only refers to possible accounting adjustments to be made by the relevant authorities. It follows that from 1 August 1990 the applicant was aware that it had to return the amounts in dispute. Accordingly, the action is out of time.

32 Finally, the DAFSE's letter of 25 May 1994 and its own of 16 June 1994 are merely for information and are consequently not decisions which may be the subject of an action under Article 173 of the EC Treaty. Even if they include decisions, those letters contain only acts confirming the transfer of rights of which the applicant would have been aware, at the latest, following the DAFSE's decisions Nos 82/83 and 84/93, notified to it on 13 September 1993, and the proceedings for recovery initiated against it in respect of the files at issue. The defendant requests the Court

to order a measure of inquiry under Article 66 of the Rules of Procedure in order to ascertain whether the applicant was in fact aware of the transfer of rights to the DAFSE and of the national character of the dispute.

33 The applicant maintains that the DAFSE's letters of 30 July 1990 were sent by a national body and maintains that they are not attributable to the defendant.

34 The applicant infers from the passages in those letters which point to the conduct of inquiries ('... after re-examining the file in question, the following expenditure has been treated as ineligible ... without prejudice to the adjustments which may be necessary following the inquiries undertaken by the competent bodies') and, so far as concerns file No 870301 P1, from a decision of the defendant ('... without prejudice to any adjustments .. and to the decision which the Commission will take on this file') that they are merely preparatory acts. It relies in this respect on the case-law relating to the definition of measures against which actions may be brought (Case 60/81 *IBM v Commission* [1981] ECR 2639, paragraph 8; Case T-64/89 *Automec v Commission* [1990] ECR II-367, paragraphs 42 and 46) and on Joined Cases 23/63, 24/63 and 52/63 *Usines Henricot v High Authority* [1963] ECR 217, at p. 224, in which the Court held that, for a measure to amount to a decision, those to whom it is addressed must be enabled to recognize clearly that they are dealing with such a measure.

35 According to the applicant, those letters of 30 July 1990 neither incorporated nor referred to any decisions of the defendant since the latter had not taken a decision at that date. As there was no initial act, it could have been confirmed by the contested act.

36 The applicant had awaited the outcome of the inquiries and the defendant's final decision, but was never informed of the existence of such a decision nor of any payment or refusal to pay. Article 5(5) of the regulation requires such information to be provided.

37 Finally, the applicant points out that it was not aware of any proceedings for recovery having been brought against it.

### *Findings of the Court*

38 The defendant is essentially arguing that it did not take any decision in the present case, since it is not for it to take decision to reduce aid where the national authority considers certain expenditure to be ineligible and repays to the Commission the advances improperly paid to the recipient. In such a case, it maintains, the rights of the Commission, including the right to reduce aid, are transferred to the national authority.

39 That argument cannot be accepted. The DAFSE, like any other national authority which has competence with regard to the financing of ESF operations, 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. It follows that it is the Commission which assumes, *vis-à-vis* the recipient of ESF assistance, legal responsibility for the decision by which its assistance is reduced, irrespective of whether or not that reduction was proposed by the national authority concerned (Case T-85/94 *Commission v Branco* [1995] ECR I-2993, paragraphs 23 and 24).

40 Accordingly, it is for the Commission, and not the Member State, to determine whether the expenditure incurred by the recipient meets the conditions imposed in the decision granting approval, the Member State being required solely to cooperate with the Commission to ensure observance thereof.

- 41 In those circumstances, since, by virtue of Article 6(1) of the regulation, the Commission alone is entitled to reduce ESF assistance, that right cannot be transferred to the DAFSE.
- 42 Moreover, the transfer of rights referred to in Article 6(2) of the regulation does not affect in any way the powers conferred by Article 6(1) but only the rights of the Community to the refund of advances improperly paid.
- 43 Those rights are transferred to the Member State to the extent to which it repays to the Commission the sums owed by the body financially responsible for an operation (Article 6(2) *in fine*). Only sums paid to the recipient which have not been used in accordance with the conditions laid down in the decision granting approval are to be refunded (first sentence of Article 6(2)). Since it is for the Commission alone to assess whether the financial assistance has been properly used, the transfer of rights presupposes a prior Commission decision.
- 44 In the present case, it must be considered whether the defendant took a decision to reduce aid within the meaning of Article 6(1) of the regulation.
- 45 The Court observes that, for a measure to amount to a decision, those to whom it is addressed must be enabled to recognize clearly that they are dealing with such a measure (*Usines Henricot v High Authority*, referred to above, at p. 224).
- 46 It is not apparent from the DAFSE's letter of 25 May 1994 that the defendant took any decision to reduce aid or not to pay the balance thereof. On the contrary, the DAFSE set out in its letter the reasons why the Commission considered that it did not have to take a decision where, as in the present case, the national authority itself decides to reduce the assistance. Consequently, it cannot be taken as notification of such a decision.

- 47 The absence of any such decision by the defendant is moreover corroborated by the letter of 16 June 1994, which refers to Article 7 of Decision 83/673. That article concerns the situation where the aid is the subject of an investigation. Accordingly, it follows from that letter that, as at 16 June 1994, an investigation was still under way and therefore that the defendant had not yet taken any decision as to the aid at issue.
- 48 Moreover, it cannot be inferred from the reimbursement to the DAFSE of part of the advances paid to the applicant that such a decision was taken since the defendant did not demand repayment of those sums.
- 49 Furthermore, the defendant has consistently denied, both in its pleadings and in its replies to the written questions from the Court (see paragraph 21 above), and at the hearing, having taken a decision to reduce aid or not to pay the balance thereof.
- 50 Nor has the applicant established the existence of any other act of the defendant intended to alter the legal position resulting from the decisions of 31 April 1987 and 27 May 1987 granting approval.
- 51 It has thus not been proven that the defendant took a decision to reduce aid or not to pay the balance thereof.
- 52 In the circumstances, the Court cannot but find that in the present case there is no measure against which an action may be brought within the meaning of Article 173 of the Treaty.
- 53 In any event, since it is the Commission alone which has the power to reduce ESF assistance, the decisions of the DAFSE of 30 July 1990 and of 1 September 1993 reducing the national financial contribution and demanding the repayment of

certain sums (see paragraphs 11 and 12, above) are purely national decisions and are in no way attributable to a Community institution. They fall outside the purview of the Community judicature since it is for the competent national court to review the validity of national measures implementing Community acts relating to the aid at issue. In this case, the national court may, pursuant to Article 177 of the Treaty, refer to the Court of Justice a question as to the validity of those Community acts.

54 Accordingly, the action for annulment is inadmissible in the absence of an act against which an action may be brought within the meaning of Article 173 of the Treaty, without there being any need to grant the defendant's request seeking the adoption of the measure of inquiry referred to in paragraph 32 above.

55 Even on the assumption that the action could be considered to be an action for failure to act, pursuant to the third paragraph of Article 175 of the Treaty, directed against the Commission's failure to take a decision on the final payment claims, it would be inadmissible by reason of the fact that the essential procedural requirements provided for in the second paragraph of Article 175 of the Treaty have not been complied with.

56 It follows from all the foregoing that the action must be dismissed as inadmissible.

## Costs

57 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. However, under the second subparagraph of Article 87(3) of the Rules, the Court may order a party, even if successful, to pay costs which it considers that party to have unreasonably or vexatiously caused the opposite party to incur.



58

In the present case, the defendant omitted to discharge its responsibilities by failing to take a decision on the final payment claims. Its letter of 16 June 1994 only added to the confusion regarding the aid at issue. Finally, without putting forward any sound arguments, it persevered in its mistaken view, notwithstanding the judgment of this Court in Case T-84/95 *Commission v Branco*, referred to above, between the same parties, which clearly indicated that the defendant alone has the power to reduce ESF financial assistance. Those various factors obliged the applicant to incur needless expenditure. Accordingly, the second subparagraph of Article 87(3) of the Rules of Procedure must be applied and the defendant must be ordered to pay the whole of the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. Dismisses the action as inadmissible.
2. Orders the defendant to pay the costs.

Schintgen

García-Valdecasas

Azizi

Delivered in open court in Luxembourg on 11 July 1996.

H. Jung

R. Schintgen

Registrar

President