

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)

29 September 1999 *

In Case T-126/97,

Sonasa — Sociedade Nacional de Segurança, Ld.^a, a company incorporated under Portuguese law, established in Lisbon, represented by Nuno Morais Sarmiento, of the Lisbon Bar, with an address for service in Luxembourg at the Chambers of Victor Gillen, 13 Rue Aldringen,

applicant,

v

Commission of the European Communities, represented by Maria Teresa Figueira and Knut Simonson, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, also of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for annulment of Commission Decision C (96) 3451 of 16 December 1996 reducing financial assistance granted to the applicant by the European Social Fund,

* Language of the case: Portuguese.

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

composed of: R.M. Moura Ramos, President, V. Tiili and P. Mengozzi, Judges,

Registrar: A. Mair, Administrator,

having regard to the written procedure and further to the hearing on 25 March 1999,

gives the following

Judgment

Legal background

- 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; hereinafter 'Decision 83/516') provides that the European Social Fund (hereinafter the 'ESF') is to participate in the financing of operations concerning vocational training and guidance.
- 2 Projects for the financing of such operations, which must be submitted by a Member State or by a body appointed by that State, are approved by Commission decision. Under Article 2(2) of Decision 83/516, the Member State in whose name the project is submitted must guarantee the successful completion of the operation.

- 3 Article 5(4) of Council Regulation (EEC) No 2950/83 of 17 October 1983 on the implementation of Decision 83/516 (OJ 1983 L 289, p. 1; hereinafter '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 and requires the Member State concerned to certify the accuracy of the facts and accounts in the payment claims.

- 4 Article 6(1) of that 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 Member State concerned an opportunity to comment.

- 5 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.

Facts

- 6 The Departamento para os Assuntos do Fundo Social Europeu (Department of European Social Fund Affairs; hereinafter 'the DAFSE') represents the Portuguese State in matters relating to the ESF. It is the sole and mandatory point of contact between the Commission departments responsible for the operations subsidised by the ESF, and the public and private bodies in Portugal seeking ESF assistance.

- 7 The applicant, Sonasa — Sociedade Nacional de Segurança Ld.^a (hereinafter ‘Sonasa’) applied to the DAFSE for financial assistance from the ESF for a vocational training programme to be carried out during 1989.
- 8 The DAFSE subsequently submitted that application to the Commission in the name of the Portuguese State and for the benefit of the applicant.
- 9 The project for which assistance was sought was approved by Commission Decision C (89) 0570 of 22 March 1989 (hereinafter ‘the decision of approval’) granting the applicant PTE 35 083 325 for the training of 249 persons below 25 years of age.
- 10 The Portuguese State undertook, for its part, to contribute PTE 28 704 538 in funds for the applicant’s project through the Orçamento da Segurança Social/ Instituto de Gestão Financeira da Segurança Social (Social Security Budget/Social Security Financial Management Institute; hereinafter ‘OSS/IGFSS’).
- 11 On 8 May 1989 and 5 July 1989, in the course of the training programme, the applicant received advance payments of the aid granted by the ESF and the OSS/IGFSS.
- 12 Following a check carried out in July 1989, the DAFSE found that the length of the training programme had been curtailed and that the number of participants initially provided for had dropped, leading it to conclude that the assistance should be reduced. However, it later revised that view and, by letter of 6 March 1990 to the Commission, recommended that the initial decision of approval be maintained.

- 13 On completion of the training project, the applicant presented the DAFSE with the relevant financial statement — which suggested that the actual total cost was lower than initially estimated — together with a final payment claim. Both documents were sent to the Commission on 27 October 1990.
- 14 When it first examined the final payment claim, the DAFSE had misgivings as to the accuracy of the details given. Nevertheless, on 27 June 1991, it made another part payment, specifying that this was to remain conditional upon a finding by the Commission that the statement of accounts was in order.
- 15 On 20 August 1991 the DAFSE informed the Commission that, after reviewing the file, it accepted the statement of accounts submitted by Sonasa.
- 16 On receiving that information, the Commission asked the DAFSE to study the applicant's file at greater length.
- 17 On 12 October 1992 the DAFSE informed the applicant that an independent undertaking had been commissioned to carry out an audit of its occupational training programme.
- 18 In a report prepared in October 1993, the undertaking responsible for the audit recommended a reduction in the funding granted for the occupational training programme conducted by Sonasa, on the ground that certain expenditure must be regarded as ineligible for funding. The report states *inter alia* that the trainees had been given only one week of practical training and had been put to work in the same way as if they had been ordinary employees in the service of the undertaking.

- 19 On 1 February 1996, following several exchanges of opinion between Sonasa and the DAFSE concerning the findings of the audit and in accordance with the procedures laid down in Article 100 of the Portuguese Code of Administrative Procedure, the DAFSE adopted the decision to propose to the Commission that the financial assistance be reduced.
- 20 By letter of 20 March 1996, the DAFSE called on the applicant to reimburse part of the advance payments given for its training programme, specifying that this request was without prejudice to the decision concerning the definitive amount of ESF funding, which the Commission had yet to adopt.
- 21 The results of the audit were passed to the Commission by the Portuguese State on 5 September 1996.
- 22 On 16 December 1996 the Commission adopted Decision C (96) 3451 (hereinafter 'the contested decision') on the basis of Article 6(1) of Regulation No 2950/83. This decision, by which the Commission reduced the amount of ESF assistance originally granted for Sonasa's occupational training programme, was notified to the applicant on 19 February 1997.

Procedure and forms of order sought

- 23 In those circumstances, by application lodged at the Registry of the Court of First Instance on 22 April 1997, the applicant brought the present action for annulment of the contested decision.

24 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fourth Chamber) decided to open the oral procedure and to put a number of written questions to the Commission, to which the Commission replied on 3 March 1999.

25 The parties presented oral argument at the hearing which took place in open court on 25 March 1999.

26 The applicant claims that the Court should:

- annul the contested decision;

- order the defendant to pay the costs.

27 The defendant contends that the Court should:

- dismiss the action as unfounded;

- order the applicant to pay the costs.

Substance

- 28 The applicant puts forward three pleas in law in support of its action for annulment: (i) breach of the general principles of legal certainty, protection of legitimate expectations, and sound administration; (ii) breach of the principle of observance of vested rights; and (iii) failure to state sufficient reasons in the contested decision.

The first plea: breach of the principles of legal certainty, protection of legitimate expectations, and sound administration

Arguments of the parties

- 29 The applicant points out that:
- (a) after approving the training programme, the DAFSE and the Commission revised their opinion several times with respect to the amount of funding granted for its completion. For instance, they abandoned the decision that the funding should be reduced because certain training periods which nominally formed part of the theory content of the programme ('theory modules') had, on the contrary, a practical bias, contrary to the rule that practical training should not predominate at the expense of a grounding in theory;
 - (b) in particular, after the DAFSE had corrected the negative view formed at an early stage in the programme, formally attributing this to a substantive error in its evaluation — that is to say, after the programme had already been

completed and the DAFSE had indicated to the Commission its acceptance of the costs structure and the financial situation set out in the final payment claim, and had even paid the share of funding due from the State — the DAFSE resumed its criticism and again reduced the amount of funding initially provided for, seeking to recover part of the monies paid;

- (c) the Commission's failure to respond to the letters from the DAFSE could only mean that it approved and confirmed the DAFSE's conclusions;

- (d) the fact that the DAFSE paid one of the remaining instalments of financial assistance after approving the financial statement set out in the final payment claim had given rise to the legitimate expectation that the applicant's entitlement to the funding had been recognised;

- (e) the Commission adopted the contested decision confirming the DAFSE's final position on reduction of the financial assistance, without ever verifying either the DAFSE's assertions or its findings concerning the financial statement, and allowing seven years to elapse as from receipt of the final payment claim.

30 On the basis of the points set out above, the applicant maintains that the Commission acted in flagrant breach of the general principles of legal certainty, protection of legitimate expectations and sound administration.

31 The defendant contends that:

- (a) the contested decision is not based solely on the classification of the training periods nominally devoted to theory (the 'theory modules'), but also on the fact that the applicant had arranged training for only 137 out of the 249 trainees initially provided for, and on the finding that other conditions to which the approved application was subject had not been satisfied;
- (b) the DAFSE's payment of the provisional balance representing both the State contribution and the ESF funding does not mean that it acknowledged the sum paid as being in fact due. It is quite clear from the relevant Portuguese legislation in force that such payment was made subject to the Commission's subsequent verification of the accounts when it came to adopt the decision approving final settlement;
- (c) it is settled law that the last word on final payment claims rests with the Commission, not the national authorities;
- (d) the Community legislation applicable to the ESF does not require the Commission to carry out an independent investigation of the situation and allows it to base its final decision on recommendations, duly reasoned, made by the Member State.

Findings of the Court

32 The Court will consider in turn each of the three grounds of complaint raised by the applicant.

— Breach of the principle of protection of legitimate expectations

- 33 The right to rely on the principle of protection of legitimate expectations extends to any economic operator to whom an institution has given justified hopes (Case T-81/95 *Interhotel v Commission* [1997] ECR II-1265, paragraph 45).
- 34 However, it is settled law that the principle of protection of legitimate expectations may not be relied upon by an undertaking which has committed a manifest infringement of the rules in force (Joined Cases T-551/93, T-231/94, T-232/94, T-233/94 and T-234/94 *Industrias Pesqueras Campos and Others v Commission* [1996] ECR II-247, paragraph 76).
- 35 It should be noted at the outset that the contested decision was taken pursuant to Article 6(1) of Regulation No 2950/83, which 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.
- 36 It is clear from that provision that the grant of ESF funding depends on the recipient's compliance with the conditions laid down by the Commission in the decision of approval. Consequently, where those conditions are not satisfied, the recipient cannot legitimately expect payment in full of the amount granted in that decision.
- 37 The Commission was thus empowered by Regulation No 2950/83 to check whether the ESF funding had been used in accordance with the conditions set out

in the decision of approval granting the applicant the sum of PTE 35 083 325 by way of financial assistance for the vocational training of 249 persons. In dealing with the final payment claim, the Commission was required to consider, after hearing the views of the Member State concerned, whether there had been any infringements of the above conditions such as to justify reduction of the assistance pursuant to Article 6 of Regulation No 2950/83 (Case T-73/95 *Oliveira v Commission* [1997] ECR II-381, paragraphs 30 and 31).

- 38 However, it is common ground that the number of trainees taking part in Sonasa's vocational training programme had dropped remarkably (from 249 to 137) and that the duration of the programme had been considerably curtailed. Furthermore, the Commission discovered from its reading of the auditors' report that the trainees had had only one week of practical training and had been put to work in the same way as if they had been ordinary employees in the service of the undertaking.
- 39 It follows that the applicant manifestly failed to comply with the requirements governing the grant of ESF funding. Consequently, it cannot rely on the principle of protection of legitimate expectations in order to seek annulment of the contested decision.
- 40 Moreover, the applicant cannot validly maintain that the DAFSE's payment of all or part of the assistance, after accepting the financial statement submitted with the final payment claim, gave it a legitimate expectation that the amount of funding initially approved would be paid in full.
- 41 It must be borne in mind that 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 Regulation No 2950/83 (Case T-85/94 (122) *Commission v Branco* [1995] ECR II-2993, paragraph 23).

- 42 Although 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 Regulation No 2950/83, propose either the acceptance or the reduction of ESF financial assistance, the Commission alone has the power to take such a decision. Furthermore, any payment made by the competent national authorities must be regarded as provisional, in that it is conditional upon the final decision taken by the Commission.
- 43 It is also apparent from the documents before the Court that the DAFSE consistently made it clear to the applicant that the payments received were provisional, and conditional upon that decision.
- 44 Accordingly, all the communications addressed by the DAFSE to the applicant or to the Commission concerning acceptance of the ESF assistance or a possible reduction must be regarded merely as proposals made by the national authority in the course of ensuring the successful completion of the training programmes, in accordance with the duty placed on national authorities by Article 2(2) of Decision 83/516.
- 45 It follows that the applicant cannot, in the present case, rely on the principle of protection of legitimate expectations in order to seek annulment of the contested decision.
- 46 That ground of complaint is therefore without foundation.

— Breach of the principle of legal certainty

47 Nor can the applicant rely on the principle of legal certainty in order to seek annulment of the contested decision. That principle, which requires that legal rules be clear and precise, and aims to ensure that situations and legal relationships governed by Community law remain foreseeable (Case C-63/93 *Duff and Others* [1996] ECR I-569, paragraph 20), cannot be regarded as having been breached in the present case, since the applicable rules expressly provide for the possibility of financial assistance being recovered in cases where the conditions to which its payment is subject have not been fulfilled (*Interhotel v Commission*, cited above, paragraph 61).

48 That ground of complaint is therefore without foundation.

— Breach of the principle of sound administration

49 It should be observed that the Commission acted with due diligence.

50 First, on receiving the financial and accounting statement on 5 September 1996, the Commission adopted the contested decision on 16 December 1996.

51 Secondly, the contested decision is not based exclusively on that statement, or on the appraisal of the content of the ‘theory modules’. On the contrary, it is clear from the reasons given in the decision that the Commission relied on all the documents passed to it by the DAFSE.

52 Thirdly, the grant of ESF financial assistance is based on close collaboration between the Commission and the Member States, which places Member States under an obligation to facilitate the checks made by the Commission to establish whether the activities completed or in course of completion comply with the relevant provisions (Case T-85/94 *Branco v Commission* [1995] ECR II-45, paragraph 35; Case 310/81 *EISS v Commission* [1984] ECR 1341, paragraph 14). It should also be borne in mind that, pursuant to Article 2(2) of Decision 83/516, the Member State in whose name the project is submitted must guarantee its successful completion. Accordingly, the applicant cannot take issue with the Commission for basing its conclusions on the information gathered by the Member State concerned.

53 In the present case, and notwithstanding the length of time which elapsed between the date on which the final payment claim was received and that on which the contested decision was adopted, the Commission acted properly in awaiting the outcome of the audit commissioned by the DAFSE, which was in turn justified by the number of irregularities found in the case (see paragraph 38). Accordingly, the Commission's conduct in awaiting the results of the audit cannot constitute disregard for the principle of sound administration.

54 Furthermore, the fact that the Commission was aware of the various views adopted by the DAFSE in no way means that the Commission was responsible for the national authority's conduct. Although, admittedly, the Commission could have called upon the DAFSE to speed up the procedure, the fact remains that it was obliged to take its decision on the basis of all the information which might have a bearing on the result (*Oliveira v Commission*, cited above, paragraph 32). That being so, the Commission cannot be criticised for having awaited completion of the investigation conducted by the national authority before adopting its decision.

55 The third ground of complaint is therefore without foundation.

- 56 It follows that the first plea in law must be rejected as being unfounded in its entirety.

The second plea: breach of the principle of observance of vested rights

Arguments of the parties

- 57 According to the applicant, the facts show beyond a doubt that the Commission directly impaired its vested rights. The decision of approval conferred rights on the applicant individually, entitling it to demand full payment of the financial assistance.
- 58 The defendant contends that the recipient of assistance for which the application was approved by the Commission does not thereby acquire any definitive right to full payment of the assistance if it does not satisfy the conditions set out in the decision of approval. Accordingly, the applicant could not legitimately expect all the expenditure taken into account on its initial application for financial assistance to be ultimately accepted.

Findings of the Court

- 59 It is settled law that the recipient of assistance for which the application was approved by the Commission does not thereby acquire any definitive right to full payment of that funding if it does not satisfy the conditions to which the assistance was subject (*Interhotel v Commission*, cited above, paragraph 62).

60 As the Court has already pointed out in paragraphs 38 and 39 above, the applicant failed to comply, in the present case, with the conditions to which the vocational training was subject.

61 It follows that the second plea in law, alleging disregard for the principle of observance of vested rights, must also be rejected.

The third plea: failure to state sufficient reasons

Arguments of the parties

62 The applicant claims that the Commission adopted the decision solely in the light of the DAFSE's conclusions, which were in turn based exclusively on the results of the audit, which was grounded in speculation. Accordingly, the reasons given by the Commission for its decision were not only vague but incomplete, in that they were based on documents vitiated by the same defects.

63 The defendant emphasises that, on the contrary, in a situation such as that in the present case, where the Commission simply upholds a proposal by the Member State to reduce assistance initially granted, its decision must be regarded as being adequately reasoned provided that it refers to that proposal with sufficient clarity.

Findings of the Court

- 64 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 (*Branco v Commission*, cited above, paragraph 32).
- 65 It has already been held that a decision to reduce ESF assistance initially granted, given the serious consequences for the recipient of that assistance, must clearly show the grounds justifying a reduction in the amount initially authorised (Case T-450/93 *Lisrestal v Commission* [1994] ECR II-1177, paragraph 52).
- 66 Consequently, it is necessary to consider whether, in the present case, the contested decision satisfies the requirements laid down by Article 190 of the EC Treaty (now Article 253 EC), as interpreted by the Community judicature.
- 67 It has already been established that, according to the relevant legislation and case-law, the grant of ESF financial assistance is based on close collaboration between the Commission and the Member States.
- 68 Consequently, where the Commission merely confirms the proposal of a Member State to reduce assistance initially granted, as in this case, its decision may be

regarded as adequately reasoned, for the purposes of Article 190 of the Treaty, if it either clearly sets out itself the reasons justifying the reduction 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 (*Branco v Commission*, cited above, paragraph 36).

69 In the present case, the contested decision gives precise reasons for the Commission's reduction of the financial assistance initially granted, and also mentions the DAFSE documents on which the Commission relied.

70 The third plea in law, alleging failure to state sufficient reasons, must therefore be rejected as unfounded.

71 It follows from all the foregoing that the action must be dismissed in its entirety.

Costs

72 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful and the defendant has applied for costs, the applicant must be ordered to bear all the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. Dismisses the action;
2. Orders the applicant to pay all the costs.

Moura Ramos

Tiili

Mengozzi

Delivered in open court in Luxembourg on 29 September 1999.

H. Jung

Registrar

R.M. Moura Ramos

President