JUDGMENT OF THE COURT OF FIRST INSTANCE
(Third Chamber)
7 November 1997 *

In Case T-84/96,

Cipeke — Comércio e Indústria de Papel Lda, a company incorporated according to Portuguese law, established in Lisbon, represented by Miguel Ferrão Castelo Branco, then by João Caniço Gomes, both of the Lisbon Bar, with an address for service in Luxembourg at the Chambers of François Brouxel, 6 Rue Zithe,

applicant,

v

Commission of the European Communities, represented by Maria Teresa Figueira and Knut Simonsson, of its Legal Service, acting as Agents, 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 annulment of Commission Decision PT-C(95)543 of 12 December 1995 reducing financial assistance,

* Language of the case: Portuguese.

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

composed of: B. Vesterdorf, President, C. P. Briët and A. Potocki, Judges,

Registrar: B. Pastor, Principal Administrator,

having regard to the written procedure and further to the hearing on 26 September 1997,

gives the following

Judgment

Legal 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 that the Fund is to participate in the financing of operations concerning vocational training and guidance.

2 By virtue of Article 5(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, hereinafter 'the Regulation'), the approval by the

Commission of an application for assistance is followed by the payment of an advance of 50% of the assistance approved on the date on which the training programme is scheduled to begin.

3 Article 5(4) 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 factual and accounting accuracy of the statements contained in the payment claims.

4 Article 6(1) of the Regulation provides that, when assistance from the European Social Fund (hereinafter 'the Fund') 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.

5 Finally, Article 7(1) of the Regulation allows the Commission to conduct on-the-spot checks, without prejudice to checks carried out by the Member States.

Facts underlying the dispute

6 Cipeke — Comércio e Indústria de Papel Lda, which carries on business in the paper trade and industry and in the graphic arts sector, entered into, jointly with a group of undertakings from the sector, a contract with a promoter, Partex Companhia Portuguesa de Serviços SA (hereinafter 'Partex'), for the organization of a joint training programme during the 1987 financial year.

7 The Departamento para os Assuntos do Fundo Social Europeu (Department of Fund Affairs, 'DAFSE') in Lisbon made an application for Fund assistance on behalf of the group of undertakings in question, which was registered by the Commission on 20 October 1986.

8 By decision of 30 April 1987 the Commission approved that training plan and granted to Partex, on behalf of the undertakings concerned, assistance amounting to ESC 300 665 191, of which ESC 71 309 280 was for Cipeke.

9 The programme operated by the applicant consisted of two paid training courses given in the field of graphic arts to persons responsible for giving estimates and to photomechanic technicians.

10 Under contracts for services signed on 31 December 1986, 24 and 30 April 1987 respectively, Cipeke subcontracted the training programme to Partex, Cetase and Quadriforma, reserving for itself merely a supervisory role over the decisions taken by those undertakings. Two other companies, Gráfica Monumental and Parageste, were also involved in Cipeke's training programmes.

11 On completion of the training programme, the applicant submitted to DAFSE a quantitative and qualitative evaluation report, together with a final payment claim. After noting, in a letter of 10 January 1990, the existence of a certain amount of ineligible expenditure, the Commission, by decision dated 2 March 1990, reduced the amount of the assistance originally granted.

12 Upon application by the applicant the Court annulled that decision on the basis that the statement of reasons given was inadequate (Case C-189/90 *Cipeke* v *Commission* [1992] ECR I-3573, paragraphs 21 to 23). It considered that, although the applicant was in fact informed of the total amount of the reduction, it was unaware of the exact list of items or headings concerned, and of the itemization and method of calculation of that reduction.

13 In compliance with that judgment, the Commission initiated a procedure with a view to adopting a fresh decision in regard to the applicant. To that end, a Community verification mission was carried out on the applicant's premises on 7 July 1993.

14 By letter No 6045 of 24 March 1994, the Commission informed DAFSE that re-examination of Cipeke's final payment claim had shown that a part of the Fund assistance had not been used in conformity with the conditions laid down in the approval decision.

15 In that letter the Commission essentially noted that Cipeke had entrusted the training programmes to several subcontractors who had invoiced for certain services. In the Commission's view, the verification mission had established, on the basis of information provided by the promoter's main representative, that the intermediary role performed by the promoter had been of no use whatever and had resulted in an unjustified increase in expenditure declared.

16 The Commission considered that ineligible expenditure by the applicant amounted to ESC 19 725 390 and that the sum of ESC 4 267 218 had to be reimbursed to the Commission.

17 The Commission invited observations from DAFSE pursuant to Article 6(1) of the Regulation. In that connection, DAFSE requested the applicant, by letter of 11 April 1994, to give its views on the proposed reduction and at the same time forwarded the proposal to Partex, in whose name the programme had been approved.

18 By letter of 21 April 1994 Partex requested that the decision to be adopted should confirm the eligibility of the amounts which it had invoiced. For its part, the applicant, by letter dated 26 April 1994 addressed to DAFSE, maintained in full its claim to final payment in respect of the programme.

19 By letter dated 13 May 1994 DAFSE submitted its observations on the draft decision.

20 By Decision PT-C(95)543 of 12 December 1995 the Commission reduced the Fund assistance and ordered reimbursement in the amount of ESC 4 267 218.

21 DAFSE informed the applicant of that decision and, by letter of 21 March 1996 received by the applicant on 23 March 1996, requested it to reimburse that amount to the Fund.

Procedure

22 In those circumstances, by application lodged at the Registry of the Court of First Instance on 29 May 1996, the applicant brought an action for the annulment of the decision to reduce assistance.

23 By separate document lodged at the Registry on the same date, the applicant sought suspension of the operation of the contested decision, pursuant to Article 185 of the EC Treaty. By order of 8 October 1996 (Case T-84/96 R *Cipeke* v *Commission* [1996] ECR II-1315), the President of the Court of First Instance rejected that application for interim measures and ordered that costs be reserved.

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

25 The hearing was held on 26 September 1997. The representatives of the parties presented oral argument and answered the questions put to them by the Court.

Forms of order sought by the parties

26 The applicant claims that the Court of First Instance should annul the contested measure, with all the legal consequences which that entails.

27 The Commission contends that the Court of First Instance should:

(1) declare the applicant's claim unfounded, because it is unproven, and dismiss it;

(2) order the applicant to pay the costs.

Subject-matter of the dispute

28 The conclusions set out in the application contain the following statement:

'Under those conditions the contested measure infringed essential procedural requirements (Article 190 of the EC Treaty), entailing its nullity which is here pleaded and should be ordered, with the result that the measure may produce no effects (Article 173 of the EC Treaty).'

29 Some of the claims made in the application are nevertheless capable of being deemed to go to the issue of whether the contested decision is well founded. In its application the applicant alleges that the Commission's contentions are without foundation (point 38), based on hypothetical calculations (point 40), or again that the Commission's calculations as to the ineligibility of certain expenditure were not carried out in an appropriate manner (point 41) and, finally, that the amounts deemed ineligible were provided for in the original plan (point 45).

30 These claims are not, however, elaborated in sufficient detail to comply with the requirements of Article 44(1)(c) of the Rules of Procedure, according to which an application must contain, *inter alia*, a summary of the pleas in law on which the application is based. In that connection, it should be noted that the applicant makes no express plea going to the issue of whether the decision is well founded.

31 In accordance with settled case-law, a statement of claim must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to exercise its power of judicial review. In order to guarantee legal certainty and sound administration of justice it is thus necessary for the basic legal and factual particulars relied on be indicated, at least in summary form, coherently and intelligibly in the application itself (order of 28 April 1993 in Case T-85/92 *De Hoe* v *Commission* [1993] ECR II-523, paragraph 20).

32 The lack of precision in the applicant's statement of claim led the Commission to believe that the only plea raised in the application was that based on the alleged inadequacy of the reasoning underlying the contested decision, with the result that it replied only to this plea in its statement in defence. Thus, at point 13 of that document, it argued that the fact that the applicant does not agree with the contested decision must not be confused with the lack or inadequacy of the statement of reasons.

33 The Court cannot take cognizance of the observations made by the applicant in its letter of 26 April 1994 on the draft decision to reduce assistance and to which it refers at point 42 of its application. A catch-all reference to other documents, even ones appended to the application, cannot remedy the omission of essential elements of the legal arguments which must be contained in the application itself (Case C-347/88 *Commission* v *Greece* [1990] ECR I-4747, paragraph 28, and Case C-52/90 *Commission* v *Denmark* [1992] ECR I-2187, paragraph 17 et seq.).

34 Certainly, the body of the application may be supported and supplemented, in regard to specific points, by references to extracts of documents appended thereto, but it is not for the Court to seek and identify in the annexes the grounds on which it may consider the action to be based, since the annexes have a purely evidential and instrumental function (orders of 24 March 1993 in Case T-72/92 *Benzler* v *Commission* [1993] ECR II-347, paragraph 19, and in *De Hoe* v *Commission*, cited above, paragraph 22).

35 Under those conditions, the Court considers that the application, as submitted for its appraisal, does not enable it to exercise its judicial review on the question of whether the contested decision is well founded, and that it prevented the defendant from effectively presenting its defence in that connection.

36 It is true that the applicant also claimed, in the reply and at the hearing, that the grounds of the contested decision were not well founded. However, that is to be regarded as a new plea since it cannot be deemed to amplify the plea going to inadequacy of reasoning, precisely on account of the distinction which must be made between them (see paragraph 32, above).

37 Under Article 48(2) of the Rules of Procedure of the Court of First Instance, no new plea in law may be introduced in the course of proceedings unless it is based, which is not the case here, on matters of law or of fact which have come to light in the course of the procedure (Case T-521/93 *Atlanta and Others* v *Commission* [1996] ECR II-1707, paragraph 39).

38 It follows from the foregoing that the plea going to the inadequacy of the reasoning on which the contested decision is based is the only plea which is validly before the Court.

Statement of reasons for the decision

Arguments of the parties

39 In its application the applicant maintains that the conclusions set out in letter No 6045, which constitute the grounds of the contested decision, are contradictory, ambiguous, incoherent and without foundation. They give, it claims, no objective and precise indication of the manner in which the amount of ineligible expenditure was calculated. To that extent, the contested decision does not comply with the requirements laid down by the Court of Justice in *Cipeke* v *Commission*, cited above.

40 The Commission, it maintains, based its conclusions on hypothetical calculations which, in view of the expenditure in connection with the preparation of the courses, result in much smaller figures than the average expenditure incurred by all the other recipients of the assistance at issue. The Commission's calculations as to the ineligibility of certain expenditure were not carried out in a reasonable manner, as the applicant already had occasion to emphasize in its letter of 26 April 1994 annexed to the application, of which it forms an integral part.

41 In its reply, the applicant adds that the contested decision states neither the method of calculation nor the rules followed by the Commission in reducing the financial

assistance (Case C-181/90 *Consorgan* v *Commission* [1992] ECR I-3557, paragraphs 15 to 25; and Case T-450/93 *Lisrestal and Others* v *Commission* [1994] ECR II-1177, paragraph 52).

42 The justifications given for reducing the amount of the assistance originally granted, as they appear in the conclusions of the verification mission and the observations of the Portuguese Government, are based purely on hypothetical reasoning and presumptions, whereas justifications for reducing the amount of assistance must be given with certainty and in a sufficiently clear manner.

43 The Commission essentially objects that the applicant has not proven the hypothetical, imprecise and subjective nature of the calculations which, on the contrary, the Commission worked out minutely and seriously after the verification mission.

44 Letter No 6045, whose conclusions form the basis of the contested decision, as the applicant itself points out at paragraph 37 of its application, states with sufficient clarity and transparency the methods of calculation and rules followed, such as the criterion of reasonableness of the expenditure, which led the Commission to reduce the Fund assistance.

45 That letter brought to the applicant's notice not only the total amount of the reduction but also an exact list of the items where reductions had been made, the various amounts per item and subcontractor, and the method of calculating that reduction. Finally, the reductions made were substantiated with certainty and sufficient clarity, at least to the extent to which it was possible to do so, regard being had to the material made available to the verification mission.

Findings of the Court

46 It should be recalled at the outset that the Court has consistently held that the statement of reasons required by Article 190 of the Treaty must clearly and unequivocally show the reasoning of the institution which adopted the measure, so as to enable the Community judicature to exercise its power of review and the persons concerned to know the grounds on which the measure was adopted (Case C-22/94 *The Irish Farmers Association and Others* [1997] ECR I-1809, paragraph 39, and *Lisrestal*, cited above, paragraph 52).

47 It follows that the absence or inadequacy of a statement of reasons constitutes a plea going to infringement of essential procedural requirements and, as such, is distinct from a plea going to the incorrectness of the grounds of the contested decision, which, by contrast, is reviewed in the context of the question whether a decision is well founded (Case T-356/94 *Vecchi* v *Commission* [1996] ECR-SC II-1251, paragraph 82).

48 In the present case, suffice it to state that the contested decision, as explained in letter No 6045, devotes several pages to a detailed account of the grounds relied on, rightly or wrongly, by the Commission in support of the reduction of the various headings of expenditure deemed ineligible and of the methods for calculating those reductions. The applicant was therefore able to apprise itself of both the total amount of the reduction and the headings in question, the itemization of the reductions in the case of each heading and the method of calculation applied to those reductions, in accordance with the principles laid down in *Cipeke* v *Commission*, cited above.

49 It is apparent, therefore, that the statement of the reasons on which the contested decision is based sets out clearly and coherently the factual and legal considerations forming the basis of the justification in law for the reductions carried out, irrespective of whether those considerations are well founded, which, as stated above, is not an issue arising in connection with the adequacy of the statement of reasons but rather with the substance of the case.

50 In those circumstances the plea of inadequacy of the statement of reasons on which the contested decision is based must be rejected.

51 It follows that the action must be dismissed.

Costs

52 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. Since the applicant has been unsuccessful and the Commission asked for an order as to costs against the applicant, it must be ordered to pay the costs, including the costs of the proceedings on the application for interim measures.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber),

hereby:

1. Dismisses the action;

2. Orders the applicant to pay the costs, including the costs of the proceedings on the application for interim measures.

Vesterdorf Briët Potocki

Delivered in open court in Luxembourg on 7 November 1997.

H. Jung B. Vesterdorf

Registrar President