

JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)  
15 September 1998 \*

In Case T-142/97,

**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 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, also of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of Commission Decision C(96)3170 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 (Third Chamber),

composed of: V. Tiili, 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 11 June 1998,

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 European Social Fund ('ESF') to participate in the financing of operations concerning vocational training and guidance.
- 2 Under Article 2(2) of that decision, the Member States concerned are required to guarantee the successful completion of the operations.

- 3 Article 5(1) of Council Regulation (EEC) No 2950/83 of 17 October 1983 on the implementation of Decision 83/516/EEC (OJ 1983 L 289, p. 1) provides that approval by the ESF 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.
  
- 4 Article 5(4) of Regulation No 2950/83 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.
  
- 5 Article 6(1) of Regulation No 2950/83 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 giving the relevant Member State an opportunity to comment.
  
- 6 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.
  
- 7 Article 7(1) provides that the Commission may, without prejudice to any controls carried out by the Member States, make on-the-spot checks.
  
- 8 Article 6 of Commission Decision 83/673/EEC of 22 December 1983 on the management of the ESF (OJ 1983 L 377, p. 1) requires Member States' final payment claims to reach the Commission within 10 months of the date of completion of the

operations concerned. It is stated that no payment may be made in respect of aid for which the application is submitted after the expiry of that period.

## Facts of the case

- 9 The Departamento para os Assuntos do Fundo Social Europeu (Department of European Social Fund Affairs) ('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 implementing the ESF and the public and private bodies in Portugal seeking ESF assistance.
- 10 On 31 July 1987 the applicant submitted to the DAFSE an application for financial assistance for a vocational training programme to be run over the period from 4 July 1988 to 30 December 1988 ('the application for assistance').
- 11 The DAFSE, acting for the Portuguese State and on behalf of the applicant, subsequently forwarded that application to the Commission.
- 12 The project in respect of which assistance was requested (file-number 880280 P1) was approved by a Commission decision notified to the applicant by a letter from the DAFSE of 25 May 1988 ('the approval decision').
- 13 That approval decision fixed the amount of ESF assistance at ESC 62 191 499. For its part, the Portuguese State undertook to finance the applicant's 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'). The financing of the training programme was supplemented by private contributions.

- 14 By letter of 21 July 1988, the applicant returned to the DAFSE an 'acceptance of the approval decision' which it had duly signed at the Commission's request. In that document it stated that it would, when using ESF assistance, comply with the relevant rules of national and Community law and with the conditions set out in the approval decision.
- 15 On 12 August 1988 the applicant received, pursuant to Article 5(1) of Regulation No 2950/83, an advance of 50% of the assistance granted by the ESF together with 50% of that granted by the OSS/IGFSS, amounting to ESC 31 095 749 and ESC 25 441 977 respectively.
- 16 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. It accordingly submitted to the DAFSE a final payment claim of ESC 20 527 598 due from the ESF and ESC 16 795 307 due from the OSS/IGFSS.
- 17 On its initial examination of that claim, the DAFSE had doubts as to the accuracy of the information which it contained. It accordingly requested the Inspeccao Geral de Financas (General Tax Inspectorate) ('the IGF') to examine the final payment claim, pursuant to Article 7(1) of Regulation No 2950/83.
- 18 While that examination was in progress, the DAFSE, on 2 August 1989, certified the accuracy of the facts and accounts in the final payment claim pursuant to

Article 5(4) of Regulation No 2950/83. It paid out 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 final decision.

- 19 The IGF presented its report on 9 January 1990. Since it found that the applicant had incurred unnecessary expenditure and that other expenditure had been incurred in breach of provisions of national law, it concluded that the financial assistance granted ought to be reduced.
- 20 Adopting the IGF's position, the DAFSE wrote to the applicant on 23 May 1990 informing it that ESF assistance was to be reduced to ESC 30 672 242 and that of the OSS/IGFSS to ESC 25 095 471. It accordingly instructed the applicant to repay a portion of the sums which it had already received from the ESF and the OSS/IGFSS, in the amounts of ESC 423 507 and ESC 17 141 813 respectively.
- 21 On 23 May 1990 the DAFSE, on behalf of the applicant, also forwarded to the Commission a corrected claim for final payment. It proposed a reduction of the assistance in the amounts indicated in the letter of even date sent to the applicant.
- 22 By decision of 29 March 1993 the Commission, in accordance with that proposal, reduced the ESF's financial assistance to ESC 30 672 242.
- 23 By letter of 15 December 1993, received on 17 December 1993, the DAFSE notified the applicant of that decision.

- 24 On 23 February 1994 the applicant brought an action before the Court of First Instance seeking annulment of that decision.
- 25 Since the Commission failed to lodge a statement of defence within the prescribed period, the Court of First Instance, on 12 January 1995, delivered a judgment by default (Case T-85/94 *Branco v Commission* [1995] ECR II-45). Taking the view that the plea in law alleging a breach of the obligation to state reasons was well founded, the Court annulled the Commission decision without examining the other pleas in law put forward by the applicant.
- 26 On 22 February 1995 the Commission applied to have that judgment set aside, pursuant to Article 122(4) of the Rules of Procedure.
- 27 By judgment of 13 December 1995 in Case T-85/94 (122) (*Commission v Branco* [1995] ECR II-2993), the Court dismissed the application to have the default judgment set aside.
- 28 Following that judgment, the Commission re-examined the file. By letter of 30 May 1996 it sent to the DAFSE a new draft decision reducing the assistance and requested it to submit any comments in accordance with Article 6(1) of Regulation No 2950/83. It also requested the DAFSE to forward that draft decision to the applicant and inform the Commission of any reaction on the applicant's part.
- 29 By letter of 19 June 1996 the DAFSE sent to the applicant a copy of the Commission's draft decision and requested it to submit its comments within 10 days. The applicant responded to that request within the allotted time.

- 30 By letter received on 4 September 1996, the DAFSE forwarded to the Commission a copy of the applicant's comments on the Commission's draft decision, together with its own comments.
- 31 On 16 December 1996 the Commission adopted Decision C(96)3170 ('the contested decision'). After outlining the procedure which it and the DAFSE had followed and referring to the IGF report and to its own letter of 30 May 1996, the Commission concluded that the ESF's financial assistance ought to be reduced to the same amount as that accepted in its decision of 29 March 1993, that is to say, ESC 30 672 242.
- 32 By letter of 24 February 1997 the DAFSE notified the contested decision to the applicant, requesting it to repay within 30 days the sums of ESC 423 507 and ESC 17 141 813 due to the ESF and the OSS/IGFSS respectively.
- 33 By letters received on 25 October 1996 and 6 May 1997, the Tribunal Criminal do Porto (Porto Criminal Court) and the DAFSE informed the Commission that, following the audit report drawn up by the IGF, the DAFSE had instituted proceedings against the applicant before that court for misappropriation of funds and fraud committed with a view to securing funds.

### **Procedure and forms of order sought by the parties**

- 34 By application lodged at the Registry of the Court of First Instance on 29 April 1997, the applicant brought the present action seeking annulment of the contested decision.



35 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. However, it decided to put a number of written questions to the Commission, to which the latter replied at the hearing held in open court on 11 June 1998.

36 During that hearing, the parties presented oral argument and replied to the questions put by the Court.

37 The applicant claims that the Court should:

- annul the contested decision;
- order the Commission to pay the costs.

38 The Commission contends that the Court should:

- dismiss the action;
- order the applicant to pay the costs.

## Substance

39 The applicant submits five pleas in law in support of annulment: breach of Regulation No 2950/83; misappraisal of the facts; infringement of the principles of

protection of legitimate expectations and legal certainty; breach of acquired rights; and, finally, infringement of the principle of proportionality.

1. *The first plea in law: breach of Regulation No 2950/83*

*Arguments of the parties*

- 40 The applicant notes that, during August 1989, the DAFSE certified the accuracy of the facts and accounts in the final payment claim which it had submitted, in accordance with Article 5(4) of Regulation No 2950/83. Once that certification had been sent to the Commission, the power of the DAFSE and the Member State concerned came to an end. The rules applicable, and in particular Regulation No 2950/83, do not, the applicant argues, allow the DAFSE, after certification has been completed and sent to the Commission, to carry out, as in this case, a 're-examination' of the file, thereby altering its prior certification.
- 41 The Member State should, the applicant argues, examine whether there are any irregularities *before* it accords certification. If the position were otherwise, it would be carrying out a false certification. On receipt of the final payment claim, the DAFSE could have concluded either that the information submitted was accurate and proceeded to certify it, or, in the alternative, that the information was inaccurate and, in that case, refused certification. In certifying the final payment claim, the DAFSE thus definitively approved the information contained in that claim.
- 42 Finally, the applicant notes that the above re-examination was carried out by the IGF, which is neither empowered to monitor ESF operations nor technically in a position to rule on the application of Community legislation.

43 The Commission disputes the argument advanced by the applicant.

*Findings of the Court*

44 In so far as it confirms the accuracy of the facts and accounts in final payment claims, the Member State is responsible to the Commission for certifications which it submits.

45 Furthermore, under Article 2(2) of Decision 83/516, the relevant Member States must guarantee the successful completion of ESF vocational training and guidance operations. In addition, the Commission may, under Article 7(1) of Regulation No 2950/83, check final payment claims, 'without prejudice to any controls carried out by the Member States'.

46 Those obligations and powers devolving on Member States are not limited by any restriction in time.

47 Accordingly, in a case such as this, in which the Member State has already certified the accuracy of the facts and accounts in the final payment claim, that State may still alter its assessment of the final payment claim if it considers that it contains irregularities which had not been previously detected.

48 Article 6 of Decision 83/673 provides in this regard that applications for final payment must reach the Commission within 10 months of the date of completion of the training operations and that no payment may be made in respect of aid for

which the application is submitted after the expiry of that period. In those circumstances, if checks to establish conformity could be made only before certification that the facts and accounts in a final payment claim were accurate, the Member State might not be in a position to submit that claim to the Commission within the above 10-month period, with the result that final payment of the aid could not be made. It follows that, in some cases, certification of the accuracy of the facts and accounts in a final payment claim prior to a check to establish conformity or before its completion may be in the interest of the aid recipient.

49 Finally, there is nothing to preclude an authority such as the DAFSE from having recourse to a professional auditing body in order to assist it in checking the accuracy of the facts and accounts in a final payment claim. It appears from the case-file that the IGF is a professional auditing body and that, under Portuguese law, it is empowered to conduct investigations in cases where irregularities such as those in this case are suspected. Moreover, it is not disputed that the IGF audited the applicant's file at the request of the DAFSE and in accordance with the powers conferred on it by Portuguese law. In those circumstances, its involvement in the procedure which led to the adoption of the contested decision cannot be criticised.

50 It follows that the plea alleging breach of Regulation No 2950/83 must be rejected.

## *2. The second plea in law: misappraisal of the facts*

### *Arguments of the parties*

51 The applicant notes that the Commission decided to reduce the ESF's financial assistance on the basis of the IGF report. The applicant accordingly takes the view that if, as it believes, that report is vitiated by misappraisal of the facts, the contested decision is vitiated as well.

- 52 The applicant first takes issue with the circumstance that the IGF did not examine the facts of the training programme but carried out solely an examination of the accounts. In its report, the IGF made no reference to the approval decision. In particular, it did not indicate to what extent the conditions laid down in that decision had been breached. Ultimately, the report points only to a minor divergence between the IGF and the applicant, relating to the criteria governing eligibility of expenditure.
- 53 The IGF report, the applicant submits, also contains errors of appraisal in regard to the subcontract awarded to the company E. B. Lda, the hourly rate for trainees, and, finally, the regular attendance bonuses, the leased computer hardware and depreciation costs.
- 54 With regard, first, to the subcontracting of certain activities to E. B. Lda, the IGF was, the applicant argues, wrong to take the view that this was not justified.
- 55 The rules applicable and the approval decision allow a recipient of ESF assistance, at least implicitly, to have recourse to third parties in order to carry out specialised work as part of a training programme. The subcontract awarded to E. B. Lda was, moreover, indicated in the application for assistance, the costs relating to the work in question being set out under the entry 'specialised work'.
- 56 The IGF's criticism that the amounts invoiced by E. B. Lda were increased by excessive reliance on independent assistants is unjustified, since the applicant itself had recourse to such assistants at even higher cost and this practice was at no time challenged by either the DAFSE or the Commission.

- 57 So far as concerns the IGF's criticism that the expenditure associated with the sub-contract awarded to E. B. Lda was unnecessary inasmuch as the applicant's shareholders were also shareholders of the subcontracting company, the applicant argues that it also subcontracted a number of activities when it used the services of another company (Açorlis Lda), and that this subcontract did not elicit any comment by the IGF. The applicant also points out that the company E. B. Lda has legal personality distinct from its own.
- 58 With regard, second, to the hourly rate of pay for trainees, the applicant considers that the IGF erred in taking the view in its report that this was at variance with Portuguese domestic legislation. The applicant trained 'highly qualified' professionals, that is to say, senior executives, to whom it accorded an hourly rate of ESC 300, entirely in keeping with the Decree of 14 June 1986 adopted by the Portuguese Ministry of Labour and Social Security. This hourly rate was even lower than that of ESC 330 which the Commission accepted in its approval decision.
- 59 With regard, third, to the regular attendance bonuses, the leased computer hardware and depreciation costs, the IGF report contains a *contradictio in terminis* in so far as it disallowed, for 1988, certain expenditure which had been accepted in other ESF training programmes conducted by the applicant in 1987. That contradiction points to a dearth of technical and scientific rigour in the IGF report and indicates that the conclusions reached in that report were purely subjective and arbitrary.
- 60 More particularly, the regular attendance bonuses awarded to trainees in 1988 were not treated by the IGF as eligible expenditure, whereas, in 1987, the IGF had taken the view that similar bonuses did in fact constitute eligible expenditure. The same reasoning, the applicant claims, applies in regard to the depreciation costs, which had been accepted by the IGF in 1987 but turned down in 1988.

- 61 Furthermore, it was in accordance with the approval decision that the value of the leased computer hardware should have been spread over the 12 months of the year during which the training programme was held (1988) and not over the six-month period during which it was actually conducted.
- 62 During 1987 and 1988, the depreciation of assets was still being calculated on an annual basis, a rule which the tax authorities did not amend until 1993. In applying legislation which entered into force in 1993 to facts occurring in 1987 and 1988, the IGF disregarded an elementary rule of legislative interpretation.
- 63 The Commission takes issue with the argument put forward by the applicant.

*Findings of the Court*

- 64 Article 6(1) of Regulation No 2950/83 provides that, where ESF assistance is not used 'in conformity with the conditions set out in the decision of approval', the Commission may suspend, reduce or withdraw that assistance.
- 65 In a case such as this, in which the recipient of ESF assistance, at the Commission's request, expressly declared in the document accepting the approval decision that the assistance would be used 'in accordance with the applicable provisions of national and Community law', the 'conditions' referred to in the abovementioned Article 6(1) clearly extend to compliance by the recipient with the rules of national law as well as those of Community law.

- 66 In that regard, since Portuguese law and Community law make the use of public funds subject to a requirement of sound financial management (Case T-72/97 *Proderec v Commission* [1998] ECR II-2847, paragraph 87), the Commission may, *inter alia*, suspend, reduce or withdraw ESF assistance where it has not been used in accordance with that requirement.
- 67 With regard to the scope of the power exercised by the Commission pursuant to Article 6(1) of Regulation No 2950/83, the application of that provision may make it necessary to assess complex facts and accounts. In making such an assessment, the institution therefore enjoys a wide discretion. Consequently, the Court must, in examining whether the present plea is well founded, limit its review to verifying that there has been no manifest error in assessing the facts at issue (see most recently, to this effect, Case T-118/96 *Thai Bicycle Industry v Council* [1998] ECR II-2991, paragraphs 32 and 33).
- 68 In the contested decision, the Commission, as it was legally entitled to do (*Branco v Commission*, paragraph 36, and *Commission v Branco*, paragraph 30, cited above), referred to the IGF report and to its letter of 30 May 1996, both of which it is not disputed were brought to the applicant's attention in good time.
- 69 The Commission's letter of 30 May 1996 is based entirely on the IGF report.
- 70 In those circumstances, the contested decision is itself based solely on that report.



- 71 It is therefore necessary to determine whether, in adopting the content and conclusions of that report, the Commission committed a manifest error of appraisal.
- 72 Such a review presupposes an examination of the soundness of the applicant's arguments relating to the method used by the IGF in performing its tasks and to the errors which its report allegedly contains.

#### The control method used by the IGF

- 73 The applicant cannot criticise the IGF for not having referred to the approval decision when specifying which of the conditions laid down therein had been breached. In the circumstances of the case, a reduction in the assistance initially granted could also be justified by reference to other provisions, in particular those of national law (see paragraph 65 above).
- 74 Nor can the applicant argue that the IGF merely checked the accounts and that its report points to 'a minor divergence between the IGF and the applicant relating to the criteria to be used with regard to the eligibility of expenditure'. The IGF indicated clearly (p. 2 of the report) that the purpose of its check was to assess the available information concerning verification of the training programme which the applicant had implemented in 1988, 'having particular regard to its legality and propriety'. In that connection, the IGF referred on several occasions to a provision of Portuguese legislation to demonstrate that there had been an irregularity in the manner in which the applicant had run the training programme.
- 75 It follows that the applicant's criticism of the control method used by the IGF must be rejected.

## The errors allegedly contained in the IGF report

76 It is necessary to ascertain whether the IGF report does indeed contain manifest errors concerning appraisal of the training programme's cost in regard to the subcontract awarded to E. B. Lda, the hourly rate of pay for trainees and, finally, the regular attendance bonuses, the leased computer hardware and the depreciation costs.

### — The subcontract awarded to E. B. Lda

77 While it is true that there is nothing in the rules relating to the ESF or in the approval decision to preclude recourse to subcontracting, such recourse must be justified, as the Commission has stressed in its pleadings, by the fact that the subcontractor is in a position to perform certain specialised work which is clearly identified and forms part of his normal activities. The applicant has itself implicitly accepted this analysis inasmuch as it entered the subcontract awarded to E. B. Lda under the heading 'specialised work'.

78 In contrast, recourse to a subcontractor cannot be used to inflate artificially the costs of a training programme, contrary to the requirement of sound financial management.

79 It appears from the IGF report (p. 8) that E. B. Lda, a company with the same shareholders as the applicant company, did not have any employees in 1988, the year in which the ESF operation was carried out, and that it confined itself to engaging independent operators to provide certain services. It follows that this subcontractor could not be regarded as being truly 'specialised' in the work entrusted to it by the applicant and that it served solely as an intermediary, thereby making a profit, as the IGF report correctly points out.

80 Moreover, certain costs incurred by E. B. Lda were not 'connected with the training programme, having regard both to the description on those invoices (consultancy services) and the dates on which they were issued (one before the programme began, the other after it had ended)' (p. 8 of the IGF report).

81 The IGF proposed in that connection not to accept a total amount of ESC 5 250 000 paid by E. B. Lda to three independent operators in respect of fees for the 'detailed planning of the vocational training courses held in 1988', but proposed to allow an amount of ESC 612 735 representing payment by the applicant to five independent operators in connection with 'course planning' (p. 12 of the report).

82 The IGF concluded (p. 8 of the report):

'It is entirely unclear what purpose was served by the involvement of E. B. Lda in the training programme; this means that it will be possible to accept as eligible only such expenditure as, being based on invoices of E. B. Lda, comes within the limit of that which it incurred as being connected with the training programme.'

83 So far as concerns the comparison which the applicant draws with the subcontractor Açorlis Lda, it is clear from the IGF report (p. 15) that the amount received by Açorlis Lda was accepted in full because it was not large and did not therefore merit an in-depth examination of the kind carried out in respect of E. B. Lda.

84 With regard to the findings thus made, the Commission did not commit a manifest error of appraisal in reducing, on the basis of the IGF report, the assistance granted to the applicant under the entry concerning the subcontract awarded to E. B. Lda.

— The hourly rate of pay for trainees

- 85 It appears from the application for assistance that the applicant proposed to train 'qualified' professionals ('young unemployed persons whose qualifications are insufficient to allow them to enter the labour market') and not 'highly qualified' professionals. The applicant does not deny that, under the relevant national legislation, the hourly pay for trainees undergoing training to become 'qualified' professionals is ESC 267, as the IGF report points out (p. 10).
- 86 The applicant cannot, on this point, criticise the Commission for not raising any objections against an hourly rate of pay of ESC 330 when it adopted the approval decision, since such a decision cannot involve approval of an act which is illegal under national law.
- 87 In those circumstances, the Commission did not commit a manifest error of appraisal in reducing, on the basis of the IGF report, the assistance granted to the applicant in respect of the hourly rate of pay for trainees.

— Regular attendance bonuses, leased computer hardware and depreciation costs

- 88 The first point to note is that the fact that an entry for expenditure had been approved in 1987 did not necessarily mean that the same entry would also be approved in 1988 where it was at variance with the conditions laid down by the approval decision or with the relevant provisions of national or Community law.

- 89 With regard to the entry concerning regular attendance bonuses, the IGF report states (p. 21) that these are, under Portuguese domestic law, treated as trainee pay, a fact which the applicant does not dispute. In this case, it was the use of rates higher than those authorised by law (see paragraph 85 above) which led to the reduction in the entry concerned. The applicant cannot therefore argue that the regular attendance bonuses 'were disallowed in 1988'.
- 90 So far as the leased computer hardware is concerned, the training programme was conducted from 4 July 1988 to 30 December 1988, that is to say, for approximately six months. Consequently, as is clear from the IGF report (pp. 20 and 22), the amounts relating to this entry had to be calculated on the basis of a 6-month period, not a 12-month period as suggested by the applicant.
- 91 With regard to the depreciation of assets generally, the applicant has failed entirely to produce documents, in particular legislation, to support its contention that the IGF wrongly applied legislation which came into force in 1993 to events occurring in 1987 and 1988 (see paragraph 62 above). It has thus failed to establish that, contrary to what the IGF report suggests (at p. 22) and to the explanations given by the Commission during the hearing, the Portuguese law applicable at the material time precluded depreciation of assets from being calculated on the basis of a period of less than one year (12 months).
- 92 In those circumstances, the Commission did not commit a manifest error of appraisal in reducing, on the basis of the IGF report, the assistance granted to the applicant under the entries relating to regular attendance bonuses, leased computer hardware and depreciation costs.
- 93 It follows that the plea in law alleging misappraisal of the facts must be rejected.

3. *The third plea in law: infringement of the principles of protection of legitimate expectations and legal certainty*

*Arguments of the parties*

- 94 The applicant argues that the DAFSE forwarded its final payment claim to the Commission in September 1989, whereas the Commission adopted the contested decision only towards the end of 1996. This period of more than seven years, the applicant maintains, gave rise on its part to a legitimate expectation that the Commission would accept its payment claim as certified by the DAFSE. This legitimate expectation, it adds, was reinforced further still by the judgment in *Branco v Commission*, cited above.
- 95 The applicant stresses that the Commission must take a decision within a reasonable period. It cannot allow proceedings to continue interminably and postpone indefinitely the adoption of a decision without infringing the principles of protection of legitimate expectations and legal certainty (Case 223/85 *RSV v Commission* [1987] ECR 4617, paragraph 12 et seq.).
- 96 The Commission takes issue with the argument put forward by the applicant.

*Findings of the Court*

- 97 In a case such as this, in which the recipient of ESF assistance has not implemented the training programme in accordance with the conditions to which the grant of assistance was made subject, the recipient cannot rely on the principle of protection of legitimate expectations with a view to securing final payment of the full

amount of assistance initially granted (Case C-181/90 *Consorgan v Commission* [1992] ECR I-3557, paragraph 17, and Case C-189/90 *Cipeke v Commission* [1992] ECR I-3573, paragraph 17; Case T-73/95 *Oliveira v Commission* [1997] ECR II-381, paragraph 27).

98 Nor could the judgment in *Branco v Commission*, cited above, give rise to any legitimate expectation on the applicant's part, in so far as the Court did not set out its views, in that judgment, on the legality of the reduction in the assistance but ruled only that the decision at issue did not contain a statement of reasons.

99 As to the question whether the Commission infringed the principle of legal certainty by not adopting the contested decision within a reasonable period, it should be noted that the decision was adopted in pursuance of the abovementioned judgment in *Branco v Commission*, which annulled the Commission decision of 29 March 1993. Moreover, given that the applicant, in its first action, did not challenge the period within which the Commission had adopted the latter decision, only the period subsequent to the judgment in *Branco v Commission* may be taken into account in determining whether the length of time required for adopting the contested decision was reasonable, a determination which also depends on the circumstances of the case (*Oliveira v Commission*, cited above, paragraphs 41 to 43).

100 It is apparent from the case-file that, during the two-year period which elapsed between 12 January 1995, the date on which the judgment in *Branco v Commission* was delivered, and 16 December 1996, the date on which the contested decision was adopted, the Commission applied to have the judgment in *Branco v Commission* set aside, and subsequently, after the judgment in *Commission v Branco* was delivered on 13 December 1995, took the measures necessary for the adoption of a new decision. To that end, it re-examined the file, prepared a new draft decision and gave the Member State and the applicant an opportunity to submit their comments on that draft.

101 In those circumstances, the period in question must be regarded as being reasonable.

102 It follows that the plea in law alleging infringement of the principles of protection of legitimate expectations and legal certainty must be rejected.

#### 4. *The fourth plea in law: breach of acquired rights*

##### *Arguments of the parties*

103 The applicant claims that the contested decision is in breach of rights which it has acquired. It refers to the Opinion of Advocate General Darmon in Case C-291/89 *Interhotel v Commission* [1991] ECR I-2257, arguing that the approval decision vested subjective rights in it and entitled it to demand full payment of the aid.

104 The Commission disputes the argument put forward by the applicant.

##### *Findings of the Court*

105 While it is true that an approval decision confers on the recipient of ESF assistance a right to insist on payment thereof, this can be so only if that recipient carries out the training programme concerned in accordance with the attendant conditions.

106 In the present case, the applicant did not comply with the conditions governing the training programme run by it.



107 It follows that the plea in law alleging breach of acquired rights must be rejected.

5. *The fifth plea in law: infringement of the principle of proportionality*

*Arguments of the parties*

108 The applicant points out that the Commission had initially fixed the amount of ESF assistance for the training programme in question at ESC 125 639 392, while, after the programme had been completed, it reduced that sum to ESC 61 964 126. In thus reducing the assistance by more than half, the applicant claims that the Commission infringed the principle of proportionality.

109 The Commission contests the argument put forward by the applicant.

*Findings of the Court*

110 The reductions made by the Commission in this case were directly linked to the irregularities detected and were designed solely to exclude reimbursement of unlawful or unnecessary expenditure.

111 Those reductions are thus in keeping with the principle of proportionality.

- 112 It follows that the plea in law alleging infringement of the principle of proportionality must be rejected.
- 113 The action must accordingly be dismissed in its entirety.

**The applicant's request to the Court to remove a document annexed to the Commission's rejoinder**

- 114 By a separate document lodged at the Registry of the Court on 28 January 1998, the applicant requested the Court to remove the document entitled 'charge' annexed to the Commission's rejoinder and referring to the proceedings instituted by the IGF before the Tribunal Criminal do Porto.
- 115 The Commission objects to that request.
- 116 The Court did not, in this case, rely on the document in question for the purpose of resolving this dispute.
- 117 It is therefore unnecessary to rule on the applicant's request.

## Costs

- 118 Under Article 87(2) of the Rules of Procedure, the unsuccessful party must be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has failed in its submissions, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

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

Tiili

Briët

Potocki

Delivered in open court in Luxembourg on 15 September 1998.

H. Jung

V. Tiili

Registrar

President

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