ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE
8 October 1996 *

In Case T-84/96 R,

Cipeke — Comércio e Indústria de Papel, Ld.ª, a company incorporated under Portuguese law, established in Lisbon, represented by Miguel Ferrão Castelo Branco, 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, also of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for suspension of operation of the Commission decision of 12 December 1995 ordering reimbursement of ESC 4 267 218 paid as assistance from the European Social Fund for a vocational training programme,

* Language of the case: Portuguese.

THE PRESIDENT OF THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES

makes the following

Order

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 Article 5(1) of Council Regulation (EEC) No 2950/83 of 17 October 1983 on the implementation of Decision 83/516 on the tasks of the European Social Fund (OJ 1983 L 289, p. 1, hereinafter 'the Regulation') provides that approval by the Commission of an application for assistance submitted under Article 3(1) of Decision 83/516 is to be followed by payment of an advance of 50% of the assistance on the date on which the operations are scheduled to begin. Article 5(4) requires final payment claims to contain a detailed report on the content, results and financial aspects of the relevant operation.

3 Article 6(1) of the Regulation provides that when assistance from the European Social Fund ('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. Article 6(2) provides that sums paid which have not been used in accordance with

the conditions laid down in the decision of approval are to be refunded and that the Member State concerned has secondary liability for the repayment of sums of which unwarranted payment was made for operations whose successful completion is guaranteed by that Member State in accordance with Article 2(2) of Decision 83/516.

Facts and procedure

4 Cipeke — Comércio e Indústria de Papel, Ld.ª, (hereinafter 'Cipeke') is a commercial limited company engaged in the manufacture and distribution of paper and in the graphic arts business. With a view to conducting a vocational training programme in 1987, Cipeke and other undertakings in the sector concluded a contract with a promoter, Partex Companhia Portuguesa de Serviços SA, for the organization of a joint training programme during that year.

5 The Departamento para os Assuntos do Fundo Social Europeu (Department of European Social Fund Affairs — DAFSE) in Lisbon, acting in the name of the Portuguese Republic and on behalf of this group of undertakings, that included the applicant, applied for Fund assistance for 1987 on the basis of the application for funding which had been submitted to it.

6 On 30 April 1987 the Commission granted approval for the application. Subject to certain amendments, it approved the training project for which assistance was requested, the file being registered under the number ESF 871012 P1. The Commission fixed the overall amount of Fund assistance at ESC 300 665 191.

7 The total amount of authorized expenditure for Cipeke came to ESC 71 309 280. It accordingly received an advance of ESC 32 089 174, of which ESC 17 649 046 was paid from the Fund.

8 Following completion of the training programme, the applicant, pursuant to Article 5(4) of the Regulation, submitted to DAFSE a quantitative and qualitative evaluation report, stating the costs of the training programme as ESC 46 006 289, together with a request for payment of the balance of ESC 9 316 486.

9 Pursuant to Article 5(4) of the Regulation, the Portuguese Republic certified the accuracy of the facts and accounts set out in the request for payment and forwarded it to the Commission.

10 After having examined the request, the Commission, by letter of 10 January 1990, pointed out that some of the expenditure was ineligible and, by letter of 2 March 1990, reduced the Fund assistance initially granted.

11 By letter of 15 March 1990, DAFSE informed the applicant of the Commission's decision to reduce the assistance, and required it to repay ESC 2 084 518, ESC 1 146 485 of which corresponded to Fund assistance.

12 By application lodged at the Registry of the Court of Justice on 13 June 1990, the applicant brought an action under Article 173 of the EEC Treaty for annulment of the decision of 15 March 1990.

13 By judgment of 4 June 1992 in Case C-189/90 *Cipeke* v *Commission* [1992] ECR I-3573, the Court of Justice upheld the application and annulled the Commission decision.

14 By letter of 24 March 1994, the Commission informed DAFSE that, on re-examination of the file relating to Cipeke, it had concluded that the total amount of Cipeke's expenditure that was ineligible was ESC 19 725 390. It accordingly requested DAFSE to submit its comments pursuant to Article 6(1) of the Regulation.

15 That letter was forwarded to the applicant, which on 26 April 1994 sent DAFSE a letter contesting the matter and submitting that the reasons given for the Commission's decision were contradictory and entirely unfounded.

16 By decision of 12 December 1995, the Commission definitively reduced the Fund assistance for File ESF 871012 P1 to ESC 170 845 433 and ordered repayment of ESC 4 267 218.

17 By letter of 21 March 1996, DAFSE informed the applicant of this Commission decision and required it to repay to the Fund the sum of ESC 4 267 218.

18 These are the circumstances in which the applicant, by application lodged at the Registry of the Court of First Instance on 29 May 1996, brought an action for annulment of the Commission decision of 12 December 1995 seeking partial reimbursement of Fund assistance (hereinafter 'the Decision'), notified to the applicant by the letter of 21 March 1996 from DAFSE.

19 By a separate document also lodged at the Registry of the Court of First Instance on 29 May 1996, the applicant brought the present application for interim measures under Article 185 of the EC Treaty for suspension of operation of the Decision.

20 By document lodged at the Registry of the Court of First Instance on 23 August 1996, the Commission submitted its written observations.

21 The parties presented oral argument on 16 September 1996.

Law

22 Under the combined provisions of Articles 185 and 186 of the Treaty and Article 4 of Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities (OJ 1988 L 319, p. 1), as amended by Council Decision 93/350/Euratom, ECSC, EEC of 8 June 1993 (OJ 1993 L 144, p. 21) and Council Decision 94/149/ECSC, EC of 7 March 1994 (OJ 1994 L 66, p. 29), the Court may, if it considers that the circumstances so require, order the operation of the contested measure to be suspended or prescribe any other necessary interim measures.

23 Article 104(1) of the Rules of Procedure of the Court of First Instance provides that an application to suspend operation of a measure is admissible only if the applicant is challenging the measure in question in proceedings before the Court of First Instance. Under Article 104(2), an application for interim measures must state the circumstances giving rise to urgency and the pleas of fact and law establishing a *prima facie* case for the interim measures applied for. The measures requested must be interim in nature, in the sense that they must not prejudge the decision on the substance (see the order of the President of the Court of First Instance of 28 August 1996 in Case T-112/96 R *Séché* v *Commission* [1996] ECR II-1121, paragraph 11).

Arguments of the parties

Fumus boni juris

24 The applicant raises a single plea based on breach of Article 190 of the Treaty. In its view, the statement of reasons given for the decision, contained in particular in the Commission's letter of 24 March 1994, is contradictory, ambiguous, inconsistent and without foundation.

25 First, it argues, the statement of reasons is based on an error of fact. In calculating the amount to be reimbursed, the Commission assumed that the applicant had received the total amount of aid that had been allocated to it. In fact, Cipeke had received only the advance and, for this reason, had requested payment of the balance of ESC 9 316 486.

26 Second, the Commission based itself on hypothetical calculations in determining the ineligible expenditure. In other words, it failed to indicate objectively and precisely how that expenditure had been calculated. In consequence the expenditure connected with the preparation of the courses organized by Cipeke was much lower than that determined in the context of the ESF 871012 P1 file for all of the other aid recipients.

27 Third, contrary to the Commission's assertions, in particular in the letter of 24 March 1994, the applicant did comply with the legislation covering vocational training programmes in force at the time. This is borne out by the fact that all of the expenditure deemed by the Decision to be ineligible was envisaged in the initial project and was submitted to and approved by the Commission.

28 In answer to the applicant's arguments, the Commission confines itself to a recapitulation of the grounds of the Decision, as set out in its letter of 24 March 1994.

The risk of harm if interim measures are not granted

29 The applicant submits that reimbursement of the amount requested by DAFSE would cause it serious and irreparable financial damage.

30 It claims that it is unable to comply with the request for reimbursement. It does not have sufficient funds available to pay its current liabilities in view of the budget deficits sustained over the last three years, due in particular to a weakening of its market position. Furthermore, the banks it has approached have refused it any form of credit or guarantee. Reimbursement of the amount claimed would therefore necessarily result in the closure of its business.

31 Cipeke also points out that since DAFSE's demand for repayment became an immediately enforceable order on 22 April 1996, 30 days after it was received, repayment will be effected by compulsory process and will inevitably lead to the undertaking being closed down.

32 The Commission contends that the applicant has failed to establish that repayment will result in serious and irreparable damage. Cipeke relies on statements of fact resulting exclusively from a document drawn up for tax purposes. That document does not substantiate the allegation that repayment, or the guarantee of repayment, is impossible, or that there is a risk of insolvency, as claimed in the application for interim measures. In particular, the document does not in any way demonstrate that it is impossible, as Cipeke claims, to obtain funding permitting it to meet its debt, in particular by disposing of assets or offering them as collateral security.

33 Furthermore, Cipeke has failed to take the precaution of setting sums aside for this purpose, even though it has known for several years that it would have to reimburse the Commission for the unwarranted payment made to it as Fund assistance in 1987. The applicant thus deliberately took the risk of finding itself in a difficult financial position. The Commission refers in this connection to the order of the President of the Court of Justice in Case 1/84 R *Ilford* v *Commission* [1984] ECR 423.

34 In any event, the Commission argues, there is no evidence that implementation of the contested Decision would be the sole or principal cause of any subsequent insolvency of the applicant. It is market conditions that have placed the applicant in the difficult situation referred to in its application for interim measures.

Appraisal of the President of the Court of First Instance

35 The applicant in this case is seeking suspension of the operation of a Commission Decision which, on the basis of a finding that certain expenditure incurred by Cipeke in connection with training programmes for which it had obtained Fund financing were ineligible, requires it to repay part of the contribution paid to it as an advance.

36 The request for partial repayment was made to the applicant by means of the letter of 21 March 1996 from DAFSE, requesting payment of ESC 4 267 218.

37 It follows that the present application for interim measures is seeking suspension of the operation of that payment obligation.

38 In order to rule on such an application, it is first necessary to examine the urgency of the measure requested.

39 According to settled case-law, the urgency of the interim measures must be assessed by examining whether implementation of the contested acts, before the

Court of First Instance rules on the substance, would be liable to cause serious and irreparable damage to the party making the application, damage which either could not be remedied even if the contested decision were annulled or would be disproportionate, notwithstanding its temporary nature, to the defendant's interest in seeing those acts implemented even though they are subject to legal proceedings. It is for the applicant to prove that those conditions have been satisfied (see, most recently, the order in *Séché* v *Commission*, cited above, paragraph 16).

40 In the case of interim measures suspending the operation of a payment obligation, there is a risk of harm in the event of delay only where performance of the obligation, even if done by the provision of a bank guarantee, would jeopardize the existence of the undertaking in question (see, in particular, the orders of the President of the Court of First Instance in Case T-295/94 R *Buchmann* v *Commission* [1994] ECR II-1265, paragraphs 23 and 24, and in Case T-301/94 R *Laakmann Karton* v *Commission* [1994] ECR II-1279, paragraph 22).

41 It is therefore necessary to examine in the present case whether the applicant has established that performance of the obligation to repay ESC 4 267 218 may in fact lead to the undertaking being closed down.

42 To demonstrate the urgency of the measure sought, Cipeke argued in its application for interim measures and at the hearing that it does not have sufficient funds to pay its current liabilities and that it would therefore be at risk of insolvency were it to repay the amount demanded. In support of those assertions, it produced corporate income tax returns and its trading accounts for 1993 to 1995. It also

declared, in reply to questions put to it at the hearing, that, following informal contacts with a number of banks, it was unable to obtain any form of credit or guarantee.

43 On the basis of those assertions and the above documents produced in the present proceedings, it must be held, first, that the applicant's trading accounts establish that it incurred losses of ESC 7 309 464 in 1993, ESC 3 008 201 in 1994 and ESC 3 412 990 in 1995 and, second; that no evidence has been adduced of the alleged refusal by the banks contacted to grant Cipeke credit or guarantees.

44 In this case, the urgency of suspension of operation of the Decision would therefore have to be based solely on the fact that the applicant undertaking incurred losses from 1993 to 1995.

45 Such a finding does not suffice to establish that there is a risk of serious and irreparable damage, as contended by the applicant. It does not establish that performance of the obligation to repay the sum of ESC 4 267 218 might lead to the failure of Cipeke. The tax return and the trading accounts are accounting documents which give a static picture of the state of the undertaking, and which, particularly in the absence of any reference whatever to the applicant's market position, are not sufficient to give an exhaustive description of its real economic situation and, in particular, its inability to secure bank credit.

46 Consequently, since the applicant has not provided adequate justification for its request for interim measures with regard to the risk of harm if such measures are not adopted, the application for interim relief must be dismissed, without it being necessary to examine whether the pleas in law and arguments relied on in support of the main action appear *prima facie* to be well founded.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. The application for interim measures is dismissed.

2. The costs are reserved.

Luxembourg, 8 October 1996.

H. Jung	A. Saggio
Registrar	President