

JUDGMENT OF THE COURT (Third Chamber)

13 March 2008\*

In Joined Cases C-383/06 to C-385/06,

REFERENCES for a preliminary ruling under Article 234 EC from the Raad van State (Netherlands), made by decisions of 30 August 2006, received at the Court on 18 September 2006, in the proceedings

**Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening (C-383/06),**

**Gemeente Rotterdam (C-384/06)**

v

**Minister van Sociale Zaken en Werkgelegenheid,**

and

**Sociaal Economische Samenwerking West-Brabant (C-385/06)**

\* Language of the case: Dutch.

v

**Algemene Directie voor de Arbeidsvoorziening,**

THE COURT (Third Chamber),

composed of A. Rosas, President of Chamber, J. Klučka, A. Ó Caoimh, P. Lindh (Rapporteur) and A. Arabadjiev, Judges,

Advocate General: Y. Bot,  
Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 28 June 2007,

after considering the observations submitted on behalf of:

— Gemeente Rotterdam, by J.M. Cartigny, Advocaat,

— Sociaal Economische Samenwerking West-Brabant, by G.A. van der Ween, Advocaat,

- the Netherlands Government, by H.G. Sevenster and C. ten Dam, acting as Agents,
  
- the Czech Government, by T. Boček, acting as Agent,
  
- the German Government, by M. Lumma, acting as Agent,
  
- the Commission of the European Communities, by L. Flynn and A. Weimar, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

### **Judgment**

- <sup>1</sup> These references for a preliminary ruling concern the interpretation of Article 23(1) of Council Regulation (EEC) No 4253/88 of 19 December 1988 laying down provisions for implementing Regulation No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of

the European Investment Bank and the other existing financial instruments (OJ 1988 L 374, p. 1), as amended by Council Regulation (EEC) No 2082/93 of 20 July 1993 (OJ 1993 L 193, p. 20; ‘Regulation No 4253/88’).

- 2 The references have been made in the course of three actions brought by two Netherlands associations and a Netherlands local authority against the Netherlands administration. Those actions were brought by Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening and Gemeente Rotterdam, respectively, against the Minister van Sociale Zaken en Werkgelegenheid (Ministry of Social Affairs and Employment, ‘the Ministry’) and by Sociaal Economische Samenwerking West-Brabant against the Algemene Directie voor de Arbeidsvoorziening (Directorate General for the Provision of Employment, ‘the Directorate General’) concerning decisions in which the Ministry or the Directorate General withdrew decisions fixing the amount of subsidies granted to the applicants in the main proceedings or demanding repayment of those subsidies.

## Legal context

### *Community rules*

#### Regulation No 2052/88

- 3 Article 1 of Council Regulation (EEC) No 2052/88 of 24 June 1988 on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1988 L 185, p. 9), as amended by Council Regulation (EEC) No 2081/93 of 20 July 1993 (OJ 1993 L 3, p. 5,

‘Regulation No 2052/88’) provides that the European Community is to undertake actions, in particular through the Structural Funds, in order to achieve the objectives set out in Article 130a of the EC Treaty (now, after amendment, Article 158 EC) and Article 130c of the EC Treaty (now Article 160 EC). Article 1 sets out a number of priority objectives to whose achievement the Structural Funds are to contribute. Objective No 3 among them is combating long-term unemployment and facilitating the integration into working life of young people and of persons exposed to exclusion from the labour market.

4 Article 4(1) of Regulation No 2052/88 provides as follows:

‘1. Community operations shall be such as to complement or contribute to corresponding national operations. They shall be established through close consultations between the Commission, the Member State concerned and the competent authorities and bodies — including, within the framework of each Member State’s national rules and current practices, the economic and social partner, designated by the Member State at national, regional, local or other level, with all parties acting as partners in pursuit of a common goal. ...’

5 Article 10 of the regulation provides in regard to Objective No 3 that:

‘The Member States shall submit to the Commission plans for operations to combat long-term unemployment and to facilitate the integration into working life of young people and of persons exposed to exclusion from the labour market (Objective No 3).

The plans shall include:

- a description of the current situation, the financial resources deployed and the main results of operations undertaken in the previous programming period, in the context of Community structural assistance received and with regard to the evaluation results available,
  
- a description of an appropriate strategy to achieve the objectives listed in Article 1 and the priorities selected for the implementation of Objective No 3, quantifying the progress anticipated where this lends itself to quantification; a prior appraisal of the expected impact, including that on jobs, of the operations involved in order to show that they yield medium-term social and economic benefits in keeping with the financial resources deployed,
  
- an indication of the use to be made of assistance available under the ESF [European Social Fund] — where appropriate, in conjunction with assistance from other existing Community financial instruments — in implementing the plan.

...'

Regulation No 4253/88

<sup>6</sup> The sixth recital in the preamble to Regulation No 2082/93, which amended Regulation No 4253/88, states that:

‘... in application of the principle of subsidiarity, and without prejudice to the Commission’s powers, particularly its responsibility for the management of the Community’s financial resources, implementation of the forms of assistance contained in the Community support frameworks should be primarily the responsibility of the Member States at the appropriate territorial level according to the specific needs of each Member State’.

7 Article 23(1) of Regulation No 4253/88 provides as follows:

‘1. In order to guarantee completion of operations carried out by public or private promoters, Member States shall take the necessary measures in implementing the operations:

- to verify on a regular basis that operations financed by the Community have been properly carried out,
  
- to prevent and to take action against irregularities,
  
- to recover any amounts lost as a result of an irregularity or negligence. Except where the Member State and/or the intermediary and/or the promoter provide proof that they were not responsible for the irregularity or negligence, the Member States shall be liable in the alternative for reimbursement of any sums unduly paid. For global loans, the intermediary may, with the agreement of the Member State and the Commission, take up a bank guarantee or other insurance covering this risk.

Member States shall inform the Commission of the measures taken for those purposes and, in particular, shall notify the Commission of the description of the management and control systems established to ensure the efficient implementation of operations. They shall regularly inform the Commission of the progress of administrative and judicial proceedings.

...'

8 Article 24 of the same regulation states the following:

‘Reduction, suspension and cancellation of assistance

1. If an operation or measure appears to justify neither part nor the whole of the assistance allocated, the Commission shall conduct a suitable examination of the case in the framework of the partnership, in particular requesting that the Member State or authorities designated by it to implement the operation submit their comments within a specified period of time.

2. Following this examination, the Commission may reduce or suspend assistance in respect of the operation or a measure concerned if the examination reveals an irregularity or a significant change affecting the nature or conditions for the implementation of the operation or measure for which the Commission’s approval has not been sought.



3. Any sum received unduly and to be recovered shall be repaid to the Commission. Interest on account of late payment shall be charged on sums not repaid in compliance with the provisions of the Financial Regulation and in accordance with the arrangements to be drawn up by the Commission pursuant to the procedures referred to in Title VIII.'

- 9 Regulation No 4253/88 was repealed, with effect from 1 January 2000, by Article 54 of Council Regulation (EC) No 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds (OJ 1999 L 161, p. 1). Article 52(1) of Regulation No 1260/99 provides that:

'This Regulation shall not affect the continuation or modification, including the total or partial cancellation, of assistance approved by the Council or by the Commission on the basis of Council Regulations (EEC) No 2052/88 and (EEC) No 4253/88 or any other legislation which applied to that assistance on 31 December 1999.'

Regulation No 1681/94

- 10 Article 2 of Commission Regulation (EC) No 1681/94 of 11 July 1994 concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the structural policies and the organisation of an information system in this field (OJ 1994 L 178, p. 43) provides that:

'1. Member States shall communicate to the Commission within three months of the entry into force of this Regulation:

— the provisions laid down by law, regulation or administrative action for the application of the measures under Article 23(1) of Regulation (EEC) No 4253/88,

...

2. Member States shall communicate forthwith to the Commission any amendments to the information supplied in pursuance of paragraph 1.

...'

<sup>11</sup> Article 5(2) and (3) of the regulation provide as follows:

'2. Where a Member State considers that an amount cannot be totally recovered, or cannot be expected to be totally recovered, it shall inform the Commission, in a special report, of the amount not recovered and the reasons why the amount should, in its view, be borne by the Community or by the Member State. This information must be sufficiently detailed to allow the Commission to decide as soon as possible after consulting the authorities of the member States concerned, who shall bear the financial consequences in accordance with the third indent of Article 23(1) of Regulation (EEC) No 4253/88.

3. In the eventuality referred to in paragraph 2, the Commission may expressly request the Member State to continue the recovery procedure.'

*National rules*

- 12 In 1994, the Netherlands Central Office for Employment adopted a regulation concerning the European Social Fund (Regeling Europees Sociaal Fonds CBA 1994, Staatscourant 1994, 239, 'the ESF Regulation') concerning the rules for the allocation of the subsidies obtained from the Commission of the European Communities in the framework of the ESF.
- 13 The ESF Regulation laid down a number of rules for the administration and supervision of projects. Article 2 of the ESF Regulation provides that a subsidy from the ESF may be granted to an applicant. Article 3 of the regulation provides that the subsidy will be granted only if the European and national rules are complied with. Article 10 of the regulation provides that the applicant for a subsidy is responsible for ensuring that the project is administered by its own project administration, in which all information to be verified is recorded at the right time, and also provides for supervision by the authorities. Finally, Article 14 of the ESF Regulation provides that the amount of the subsidy is determined in accordance with the implementation of the project and Article 15 of the regulation provides for withdrawal of the subsidy if the conditions under which it was granted are not complied with.
- 14 In addition, Title 4.2 of the General Statute on administrative law (Algemene wet bestuursrecht, Stb. 1995, No 315, hereinafter 'AWB') creates a legal framework for the grant, determination and recovery of subsidies. Under that measure, the rules on subsidies are divided into stages, namely, the grant and the determination. The decision to grant the subsidy must be adopted before the subsidised activity commences. The decision entitles the applicant to finance in order to carry out the subsidised activity in accordance with any obligations that may have been imposed upon him.

If the applicant carries out the activities and complies with the said obligations, the administrative authority can no longer revoke the granting of the subsidy. It thus incurs a financial obligation right from that stage of the procedure.

- 15 The provisions of the AWB concerning the determination and recovery of subsidies are as follows:

‘Article 4:46

1. Where an order determining a subsidy is issued, the administrative authority shall determine the subsidy in accordance with the subsidy granted.

2. The subsidy may be determined at a lower level where:

a. the activities in respect of which the subsidy was granted have not, or not fully, occurred;

b. the subsidy recipient has failed to fulfil the obligations attached to the subsidy;

- c. the subsidy recipient has provided incorrect or incomplete information and the provision of correct or complete information would have resulted in a different decision in response to the application for the grant of a subsidy, or
  
- d. the subsidy granted was otherwise incorrect and the subsidy recipient was, or ought to have been, aware thereof.

...

#### Article 4:49

1. The authority can withdraw the determination of the subsidy, or alter it to the detriment of the beneficiary, if:

- (a) there are facts or circumstances of which it could not reasonably have been aware at the time the subsidy was determined and which would have resulted in a lower subsidy being determined than that in the order on the granting of the subsidy;
  
- (b) the determination of the subsidy was made in error and the recipient knew this or should have known it, or

(c) after the determination of the subsidy, the recipient has not fulfilled the obligations attached thereto.

2. Save as otherwise provided, withdrawal or alteration has effect retroactively to the date on which the subsidy was determined.

3. The decision determining the subsidy may not be withdrawn or altered to the detriment of the recipient once five years have elapsed from the date on which the decision was made known or, in the case referred to in paragraph 1(c), from the date of the infringement of the obligation or the date on which that obligation should have been fulfilled.

...

Article 4:57

Any amounts of subsidy or advances unduly paid may be recovered in so far as five years have not elapsed from the day on which the subsidy was fixed or an act as referred to in paragraph 1(c) of Article 4.49 took place.

...'

## **The actions in the main proceedings and the questions referred for a preliminary ruling**

- 16 The facts at issue in the main proceedings, as they appear in the national court's decision, are as follows.

### *Case C-383/06*

- 17 In the course of 1998, the Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening applied for a subsidy for a project entitled 'Training of sheltered employment partners' in the framework of the ESF's apprenticeship and training programmes. That project was provided for in Annex 1 to the ESF Regulation, which deals with the return to the labour market by providing training for unemployed persons who were excluded from it. By decision of 8 December 1998 the Directorate General granted subsidies of a maximum of NLG 3 000 000 for 1998 and of a maximum of NLG 4 140 849 for 1999. By decision of 3 December 1999, the amount of the subsidy for 1999 was amended and increased to NLG 6 686 850. Finally, by decision of 16 June 2000, the amount of the subsidy was fixed at NLG 2 900 000 for 1999 and at NLG 3 786 850 for 2000 on the basis that the activities for which the subsidy had been granted continued during 2000. The three decisions specified that the subsidies were granted subject to an obligation to implement the abovementioned project in accordance with the application and in compliance with the rules laid down in the ESF Regulation.
- 18 By decision of 28 January 2002, adopted on the basis of Article 4.46(2) of the AWB, the Ministry determined the subsidy in respect of the years 1998, 1999 and 2000 at zero and claimed back the amount of NLG 6 434 469.80. The Ministry considered that no precise and consistent final declaration summarising the data for 1998, 1999 and 2000 had been submitted, contrary to Article 11(2) of the ESF Regulation. Moreover, no summary of the effects of the activity carried out had been made, contrary to the rules laid down in that regulation. Finally, the Ministry considered that the project was not directed at the movement from sheltered employment to the normal labour market, contrary to the terms of the application for the subsidy, and that the

number of hours put in by each participant was much below what the project had provided for.

19 The Ministry declared unfounded the complaint lodged by Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening against the decision of 28 January 2002. The Ministry indicated, in particular, that the failure to fulfil the obligation to implement the project in accordance with the application was not rectified by the subsequent regularisation of the rules relating to form. Since the appeal lodged against that decision was dismissed by the Rechtbank te's-Gravenhage (The Hague District Court), Vereniging Nationaal Overlegorgaan Sociale Werkvoorziening lodged an appeal with the court making the reference.

20 The Raad van State states that, under Article 4.46 of the AWB, the administrative authority ascertains, generally at the time that the subsidy is determined, whether the subsidised activity has been correctly carried out and whether the obligations linked to the subsidy have been fulfilled. In the case of subsidies granted under the ESF Regulation, the national court considers that Article 4.46(2) of the AWB does not give the administrative authority any discretion and that the subsidy must be determined at zero if it appears that the provisions of the ESF Regulation have not been complied with. The Raad van State considers that that is so in this case because the objective set out in the project has not been achieved.

21 However, the national court considers that Article 4.46 of the AWB merely authorises determination of the subsidy and not the recovery of an amount already paid. Similarly, it considers that only Article 4.57 of the AWB permits such recovery by conferring on the administrative authority which is to do so a discretionary power in that regard, and therefore, a discretion to balance the interests of the administration and the recipient of the subsidy. However, in the view of the Raad van State, no rule of national law prohibits the decision fixing the subsidy at zero and the decision recovering amounts already paid from being incorporated into a single decision. The



national court states that the Ministry admitted that it should have been aware from the outset that the objective could not be attained and the court considers, consequently, that the failure to comply with the rules laid down in the ESF Regulation, which flow from Community rules, is imputable to that administrative authority. It concludes that in the light of the national law principle of the protection of legitimate expectations, the Ministry should not have sought to claim back the unduly paid amounts in full and that, consequently, in the present case, national law provides no basis for recovery.

- 22 The Raad van State considers that there has been negligence within the meaning of Article 23(1) of Regulation No 4253/88. After noting that the Kingdom of the Netherlands has adopted no measure to recover amounts lost within the meaning of Article 23(1), the national court states that it is uncertain whether that provision of Community law confers a direct power on a Member State or an administrative authority to recover such losses. In addition, it is uncertain whether the principle of the protection of legitimate expectations in national law can go further than the same principle as understood in Community law.

*Case C-384/06*

- 23 In 1998, Gemeente Rotterdam applied for a subsidy for a training project under the ESF Regulation. A subsidy of NLG 483 108 was granted and was subject to an obligation that the project be administered by its own project administration. By decision of 28 May 1999, the subsidy for 1998 was determined in the amount of NLG 122 612.81, subject to the condition that the project was administered in accordance with the provisions of the ESF Regulation. Gemeente Rotterdam lodged

a complaint with the Ministry who, by decision of 18 July 2001, adopted on the basis of Article 4.49(1)(a) of the AWB and Article 14 of the ESF Regulation, withdrew the decision of 28 May 1999, determined the subsidy at zero and claimed repayment of the amounts already paid. The Ministry declared unfounded the complaint lodged by Gemeente Rotterdam against the decisions of 28 May 1999 and 18 July 2001. Since the appeal against the latter decision was dismissed by the Rechtbank te Rotterdam, Gemeente Rotterdam appealed to the court making the reference.

24 The Raad van State considers, first, that the determination of the subsidy cannot be conditional and that failure to fulfil such a condition cannot constitute the basis for the withdrawal. Secondly, it finds that Gemeente Rotterdam did not have the project administered by its own project administration, as required by the provisions of the ESF Regulation.

25 The national court considers that the administration deliberately failed to carry out close supervision and considers, consequently, that there are no facts or circumstances of which the Ministry was unaware before it adopted the decision determining the subsidy within the meaning of Article 4.49(1)(a) of the AWB. The Raad van State considers that the withdrawal decision cannot therefore be based on Article 4.49(1)(a) of the AWB nor on any of the other cases falling under paragraph 1 of that article.

*Case C-385/06*

26 In the course of 1998, Sociaal Economische Samenwerking West-Brabant applied for a subsidy under the ESF Regulation for a project for the integration of the long-term unemployed. A subsidy was granted in the amount of NLG 410 772 and was

subject to an obligation to have the project administered by its own project administration. By decision of 22 July 1999, the subsidy was determined in the amount of NLG 185 892, then determined at zero by decision of the Directorate General dated 21 September 2000 on the basis of Article 4.46 of the AWB. The Directorate General also claimed back the amounts already paid. By decision of 23 November 2001, the Directorate General dismissed as unfounded the complaint lodged by Sociaal Economische Samenwerking West-Brabant, although it stated that the decision to determine the subsidy at zero was no longer based on Article 4.46 of the AWB but on Article 4.49 thereof. The decision of 23 November 2001 is based on the fact that, at the date of the decision of 22 July 1999, the Directorate General was unaware that the rules in the ESF Regulation had not been complied with. Since the appeal against the decision of 23 November 2001 was dismissed by the Rechtbank Breda, Sociaal Economische Samenwerking West-Brabant appealed to the court making the reference.

27 The Raad van State considers that Sociaal Economische Samenwerking West-Brabant did not fulfil the obligation to provide the project with its own project administration, as required by the provisions of the ESF Regulation. However, that court considers that the Directorate General could not have been unaware that the abovementioned obligation had not been fulfilled at the time of the determination decision. In fact, the Directorate General deliberately determined the subsidy without examining the documents supplied by Sociaal Economische Samenwerking West-Brabant. The Raad van State concludes that the Directorate General cannot base its withdrawal decision either on one of the cases referred to in Article 4.49 of the AWB or on Article 15 of the ESF Regulation. Consequently, it considers that national law does not contain any basis for withdrawing the subsidy after it had been determined. Those limitations on recovery laid down in national law flow from the domestic law principles of legal certainty and the protection of legitimate expectations.

28 However, the Raad van State considers failure to comply with the rules in the ESF Regulation constitutes negligence within the meaning of Article 23(1) of Regulation No 4253/88. That court also points out that the Kingdom of the Netherlands has

taken no step to recover amounts already paid within the meaning of Article 23(1). The national court is unsure, on the one hand, whether a Member State can derive a power directly from the abovementioned Community regulation and, on the other, whether any such power permits a Member State or one of its administrative authorities to recover amounts already paid. Finally, it is unsure as to whether the principle of the protection of legitimate expectations in national law can go further than the same principle in Community law.

<sup>29</sup> It was in those circumstances that the Hoge Raad der Nederlanden decided to stay the proceedings and to refer to the Court the following questions for a preliminary ruling:

Questions which are identical in the three cases

‘(1) (a) Can a Member State or an administrative authority of that State derive a power directly — that is to say without a basis in national law — from a regulation?’

(b) If so, does Article 23(1) of Regulation No 4253/88 ... confer the power to withdraw the determination of the subsidy and to recover the amount paid, on the basis that Article 23 requires the Member States to do so where there is irregularity or negligence within the meaning of that article?’

Question specific to Case C-383/06

‘(2) If not, does Article 10 EC, read in conjunction with Article 249 EC thereof, mean that a national provision such as Article 4.57 of the [AWB] — under which amounts of subsidy or advances unduly paid may be recovered — must be interpreted in conformity with [Regulation No 4253/88]?’

Question which is identical in both Case C-384/06 and C- 385/06

‘(2) If not, is a national legal provision like Article 4.49.1 of the [AWB], on the basis of which the authority may withdraw the determination of the subsidy or amend it to the detriment of the beneficiary if (a) there are facts or circumstances of which it could not reasonably have been aware at the time the subsidy was determined and which would have resulted in a lower subsidy being determined than that in the order on the granting of the subsidy, (b) the determination of the subsidy was made in error and the beneficiary knew this or should have known it, or (c) after the determination of the subsidy, the beneficiary has not fulfilled the obligations attached thereto, to be interpreted, pursuant to Article 10 EC in conjunction with Article 249 EC, in a manner that conforms to [Regulation No 4253/88]?’

Question identical in all three cases

‘(3) If so, is that interpretation limited by general legal principles which form part of Community law, in particular the principles of legal certainty and the protection of legitimate expectations?’

Questions specific to Case C-383/06

‘(4) (a) If the answer to the third question is in the affirmative, the question arises, in relation to that limitation, whether national principles of legal certainty and the protection of legitimate expectations can be more far-reaching than general principles of Community law, especially the principles of legal certainty and the protection of legitimate interests which are to be complied with when applying [Regulation No 4253/88]?’

(b) In applying the Community legal principles of legal certainty and legitimate expectations, is it of significance that the Member State granting the subsidy is itself responsible for the fact that the subsidy recipient has failed to fulfil the subsidy obligations which flow from the relevant part of Community law?’

Questions which are identical in Case C-348/06 and Case C-385/06

‘(4) If the answer to the third question is in the affirmative, the question arises, in relation to that limitation, whether the national principles of legal certainty and the protection of legitimate expectations which underlie Article 4.49.1 of the [AWB] may be more far-reaching than general principles of Community law, especially the principles of legal certainty and the protection of legitimate expectations which are to be complied with when applying [Regulation No 4253/88]?’

- (5) Is it of any relevance, having regard to Article 10 EC, when applying the Community law principles of legal certainty and the protection of legitimate expectations, that the beneficiary is a legal person under public law?

Questions specific to Case C-385/06

- ‘(6) Does it follow from Article 23(1) of [Regulation No 4253/88] that the determination of the subsidy is to be withdrawn and the sums paid are to be recovered if it is established that the Member State has already repaid an unduly granted subsidy to the [ESF], or has in any event made a ruling to that effect, if, either on the basis of Article 23(1) of [Regulation No 4253/88] or on the basis of Article 4.49.1 of the [AWB] interpreted in accordance with the regulation the determination of the subsidy is to be withdrawn and the sums paid are to be recovered?’
- (7) If there is no duty to withdraw and recover under Article 23(1) of [Regulation No 4253/88], are there other provisions of Community law, such as for example Article 4(1) of Regulation No 2988/95 of 18 December 1995 on the protection of the European Communities’ financial interests (OJ 1995 L 312, p. 1), on the basis of which the Member State is obliged, directly or through interpretation of Article 4.49.1 of the [AWB], in conformity with the regulation, to withdraw the determination of, and claim repayment of, subsidies granted in breach of Community law, such as those in dispute here?’

<sup>30</sup> By order of the President of the Court of 22 November 2006, Cases C-383/06 to C-385/06 were joined for the purposes of the written and oral procedure and for the judgment.

## The questions referred to the Court

*The questions concerning the application of Article 23(1) of Regulation No 4253/88, Article 10 EC and Article 249 EC*

- <sup>31</sup> By its first question in each case, the national court essentially asks whether a Community regulation and, in particular, Article 23(1) of Regulation No 4253/88, constitutes a relevant legal basis for the recovery by national administrative authorities of sums unduly paid in the framework of the European Structural Funds. Should those questions be answered in the negative, the national court, in its second questions, asks whether Articles 10 EC and 249 EC can be used as a legal basis for an interpretation of national rules in conformity with that regulation. The national court also asks, in its seventh question, whether, if Article 23(1) of Regulation No 4253/88 does not require either withdrawal or recovery of sums unduly paid, Regulation No 2988/95 constitutes a relevant legal basis for the recovery of such sums.

### Observations submitted to the Court

- <sup>32</sup> In the view of Gemeente Rotterdam and Sociaal Economische Samenwerking West-Brabant, Article 23(1) of Regulation No 4253/88 does not authorise Member States to recover sums unduly paid. On the other hand, that provision, requires the Member States to lay down procedures for that purpose.



33 The German Government and the Czech Government propose the first questions should be answered in the affirmative. The Netherlands Government considers that although a Member State may derive a power directly from a Community regulation, that cannot be the case in regard to Article 23(1) of Regulation No 4253/88 since that provision, although it certainly lays down the principle that sums should be recovered, leaves it to national law to make detailed arrangements for such recovery. However, the German Government considers that the application of Article 23(1) does not prevent the national authorities availing themselves of that provision for the purposes of recovery in so far as national law so permits. In the view of the Czech Government, an authorisation under national law is not necessary, since that law merely has to lay down procedural arrangements.

34 With regard to the seventh question, the Netherlands Government and the Commission argue that Regulation No 2988/95 does not constitute an independent legal basis for the national authorities to take steps in the event of irregularities. That measure contains only general provisions whereas Regulation No 4253/88 applies specifically to the European Structural Funds.

#### The Court's answer

35 It must at the outset be noted that it is clear from the very terms of the second paragraph Article 249 EC that Community regulations are directly applicable in all Member States.

36 With regard to the use of the Structural Funds, it should be borne in mind that, according to Article 4(1) of Regulation No 2052/88, Community operations are to be established through close consultations between the Commission, the Member State concerned and the competent authorities and bodies designated by the Member State at national, regional, local or other level. In addition, according to the sixth recital in the preamble to Regulation No 2082/93, in application of the principle

of subsidiarity, and without prejudice to the Commission's powers, particularly its responsibility for the management of the Community's financial resources, implementation of the forms of assistance contained in the Community support frameworks should be primarily the responsibility of the Member States at the appropriate territorial level according to the specific needs of each Member State.

<sup>37</sup> The Court has held that that principle is enshrined in the first subparagraph of Article 23(1) of Regulation No 4253/88, which provides that, in order to guarantee completion of operations carried out by public or private promoters, Member States are to take the necessary measures in implementing the operations to verify on a regular basis that operations financed by the Community have been properly carried out, to prevent and to take action against irregularities and to recover any amounts lost as a result of an irregularity or negligence (see Case C-271/01 *COPPI* [2004] ECR I-1029, paragraph 40).

<sup>38</sup> Similarly, the exercise of any discretion to decide whether or not it would be expedient to demand repayment of Community funds unduly or irregularly granted would be inconsistent with the duty imposed on national administrations by the first subparagraph of Article 23(1) of Regulation No 4253/88 to recover any amounts unduly or irregularly paid (see, by analogy, with regard to Regulation (EEC) No 729/70 of the Council of 21 April 1970 on the financing of the common agricultural policy (O), English Special Edition 1970 (I), p. 218), Joined Cases 205/82 to 215/82 *Deutsche Milchkontor and Others* [1983] ECR 2633, paragraph 22).

<sup>39</sup> Finally, it should be added that, Regulation No 4253/88 is the relevant legal basis for the obligation to recover and not Regulation No 2988/95 which, as the Commission points out, merely lays down general rules for supervision and sanctions for the

purpose of safeguarding the Community's financial interests. Recovery must therefore be carried out on the basis of Article 23(1).

- 40 It follows from those considerations that the answer to the first and seventh questions referred to the Court should be that Article 23(1) of Regulation No 4253/88 requires the Member States to recover any amounts lost as a result of an irregularity or negligence without there being any need for authority to do so under national law.
- 41 The answer given to those questions makes it unnecessary to answer the second questions.

*The questions concerning the application of the principles of the protection of legitimate expectations and legal certainty, the effect of the fact that the recipient of the subsidies is a public-law person and the repayment to the Community of those subsidies*

- 42 Inasmuch as the wording of the questions referred to the Court admits of doubt as to whether there is any need to answer the third and fourth questions, it should be pointed out that while it is for the Court of Justice, in the system laid down by Article 234 EC providing for cooperation, to provide the referring court with an answer which will be of use to it and enable it to determine the case before it, the Court may have to reformulate the questions referred (see, inter alia, Case C-88/99 *Roquettes Frères* [2000] ECR I-10465, paragraph 18; Case C-469/00 *Ravil* [2003] ECR I-5053, paragraph 27; Case C-286/05 *Haug* [2006] ECR I-4121, paragraph 17; and Case C-429/05 *Rampion and Goddard* [2007] ECR I-8017, paragraph 27).

43 Thus, it would be useful for the national court to know whether the principles of the protection of legitimate expectations and legal certainty, as they are understood in Community law, are to be taken into account when applying Article 23(1) of Regulation No 4253/88. If that is the case, the national court is unsure as to whether those principles may be understood in a broader sense in national law than in Community law and, in particular, whether a recipient of funds who has acted negligently or wrongfully within the meaning of Article 23(1) may rely on those principles when the administrative authority responsible for granting such funds committed an error in so doing. In addition, the national court, in its fifth and sixth questions, wishes to know whether the fact that the recipient is a public-law person or that the Member State has repaid the funds to the Community can have an influence on the application of those same principles to the recovery of the funds.

#### Observations submitted to the Court

44 Gemeente Rotterdam and Sociaal Economische Samenwerking West-Brabant claim that there is no Community legitimate expectation in this case which takes precedence over the principle of the protection of legitimate expectations in national law. Sociaal Economische Samenwerking West-Brabant also argues that the interests of the Community are not affected by failure to recover the funds from the recipient.

45 The Netherlands Government considers that, in so far as recovery takes place under the rules of national law, the national principles of legal certainty and the protection of legitimate expectations may be wider in scope than the same general principles at Community level. The conduct of the authority which granted the funds may be taken into account when applying those principles. The Netherlands Government pointed out at the hearing that the sums improperly granted from the Structural Funds had been repaid to the Community.

46 The Commission suggests merging the questions and answering them on the basis of the principles laid down by the Court in *Deutsche Milchkontor and Others*, cited above, and in Case C-336/00 *Huber* [2002] ECR I-7699. It argues that Article 23(1) of Regulation No 4253/88 prohibits the application of the principles of legal certainty and the protection of legitimate expectations, as understood in the national law of a Member State, in such a way as to render impossible the recovery of funds unduly paid where the recipient has not acted in good faith. In the contrary case, Community law does not prevent those principles being taken into account when recovering funds unduly paid where the national authorities have committed faults or have been negligent, on condition, however, that the interests of the Community are fully taken into account.

47 All the interveners before the Court consider that the fact that the recipient of the funds is a public-law person is irrelevant to the application of the rules concerning recovery.

#### The Court's answer

48 It follows from the case-law of the Court that, in the absence of provisions of Community law, disputes concerning the recovery of amounts wrongly paid under Community law must be decided by national courts in application of their own domestic law, subject to the limits imposed by Community law (*Deutsche Milchkontor and Others*, cited above; *Huber*, cited above; and Case C-158/06 *ROM-projecten* [2007] ECR I-5103, paragraph 23). The Court has laid down some of those limits.

49 First of all, the application of national law must not hinder the application or the effectiveness of Community law. That would be the case, in particular, if such an application made it impossible in practice to recover the sums improperly granted (*Deutsche Milchkontor and Others*, cited above, paragraphs 21 and 22). It follows

that, it is for the national court to apply, in principle, national law while taking care to ensure the full effectiveness of Community law, a task which may lead it to refrain from applying, if need be, a national rule preventing that or to interpret a national rule which has been drawn up with only a purely domestic situation in mind (see inter alia, Case C-443/03 *Leffler* [2005] ECR I-9611, paragraph 51).

50 National legislation must also be applied in a manner which is not discriminatory as compared to procedures for deciding similar national disputes and the national authorities must act with the same degree of care, and in accordance with rules and procedures which do not make the recovery of the sums in question more difficult, as in comparable cases concerning solely the application of corresponding national legislation (*Deutsche Milchkontor and Others*, cited above, paragraphs 23).

51 In the main proceedings, the national court is thus required to implement the obligation which flows from Article 23(1) of Regulation No 4253/88 when it has before it an application to recover sums lost as a result of abuse or negligence and, if need be, to set aside or interpret a rule of national law such as the AWB which would prevent such recovery but has been drawn up with purely domestic situations in mind.

52 It is common ground that the Court has also decided that it cannot be regarded as contrary to Community law for national law, as far as the withdrawal of administrative measures and the recovery of sums wrongly paid by public authorities are concerned, to take into account, in addition to the principle of legality, the principles of the protection of legitimate expectations and legal certainty, since those principles form part of the legal order of the Community (*Deutsche Milchkontor and Others*, cited above, paragraph 30; Joined Cases C-80/99 to C-82/99 *Flemmer and Others* [2001] ECR I-7211, paragraph 60; *Huber*, cited above, paragraph 56; and *ROM-projecten*, cited above, paragraph 24). Those principles must be observed all the more strictly in the case of rules liable to have financial consequences (Case

C-94/05 *Emsland-Stärke* [2006] ECR I-2619, paragraph 43; Case C-248/04 *Koninklijke Coöperatie Cosun* [2006] ECR I-10211, paragraph 79; and *ROM-projecten*, cited above, paragraph 26).

- 53 However, as was stated in paragraph 40 of the present judgment, Article 23(1) of Regulation No 4253/88 requires the Member States to recover any amounts lost as a result of an irregularity or negligence without there being any need for authority to do so under national law. It follows that the principles of legal certainty and the protection of legitimate expectations must be applied in accordance with the rules of Community law.
- 54 It should be borne in mind that, in regard to the Structural Funds, Article 4(1) of Regulation No 2052/88 provides that Community operations are to be established through close consultations between the Commission, the Member State concerned and the competent authorities and bodies in the Member State. Those consultations are also reflected in the residual responsibility of the Member States towards the Community where sums from the Structural Funds are lost as a result of abuse or negligence. The detailed rules for the enforcement of that responsibility are contained in Articles 23 and 24 of Regulation No 4253/88 which, the Court has decided, cannot be interpreted separately (see *COPPI*, cited above, paragraphs 27 to 29) and Article 5(2) of Regulation No 1681/94. The fact that the recipient of the funds is a public-law person is irrelevant to the application of those principles.
- 55 Moreover, the principle that the application of national law must not hinder the application or the effectiveness of Community law requires that the interests of the Community must be taken fully into consideration in the application of provisions such as Articles 4.49 and 4.57 of the AWB, which, according to the national court, give the national administrative authorities a discretionary power to recover sums unduly paid and which permit the recipient of such sums to rely, in their defence, on the principle of the protection of legitimate expectations (see, to that effect, *Deutsche Milchkontor and Others*, cited above, paragraph 32; Joined Cases C-80/99 to

C-82/99 *Flemmer and Others*, cited above, paragraph 61; and *Huber*, cited above, paragraph 57).

56 In this respect, it should be pointed out that it has been held that the system of subsidies developed in the Community rules is based, inter alia, on compliance by the recipient with a series of conditions of entitlement to financial assistance. If the recipient does not fulfil all his obligations, it follows from Article 24(2) of Regulation No 4253/88 that the Commission is entitled to reconsider the scope of its obligations. With regard to the application of Article 23(1) of the regulation, in a case in which the recipient 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 principles of protection of legitimate expectations and acquired rights in order to secure payment of the balance of the assistance initially granted (see, to that effect, Case T-142/97 *Branco v Commission* [1998] ECR II-3567 paragraphs 97 and 105 (an appeal was dismissed by the order in Case C-453/98 P *Branco v Commission* [1999] ECR I-8037), and Case T-182/96 *Partex v Commission* [1999] ECR II-2673, paragraph 190 (an appeal was dismissed by the order of 8 March 2001 in Case C-465/99 P, not published in the ECR)). Finally, the principle of the protection of legitimate expectations may not be relied upon by a recipient which has committed a manifest infringement of the rules in force (see Case 67/84 *Sideradria v Commission* [1985] ECR 3983, paragraph 21).

57 In the main proceedings, it can be seen from the information provided by the national court, on the one hand, that the decisions to grant the funds were subject to compliance on the part of the recipients with the rules in the ESF Regulation and, in particular, with the obligation that the project be administered by its own project administration, and, on the other, that those rules were, more or less deliberately, not complied with. It is therefore for the national court to assess whether, having regard to the conduct of both the recipient of the funds and the administrative authority, the principles of legal certainty and the protection of legitimate expectations, as they are understood in Community law, may legitimately be relied on as a defence against claims for repayment.



58 Moreover, it can be seen from the observations made at the hearing by the Netherlands Government and the Commission that the sums unduly granted have been repayed to the Community. However, since Article 23(1) of Regulation No 4253/88 imposes an obligation on the Member States to recover any amounts lost as a result of an irregularity or negligence, the fact that the Community was repaid by the Member State does not, as such, dispense the latter from the obligation to recover such amounts.

59 It follows from the foregoing that the answer to the questions referred to the Court should be that the recovery of amounts lost as a result of an irregularity or negligence must be carried out on the basis of Article 23(1) of Regulation No 4253/88 and in accordance with the detailed rules laid down in national law, on condition that the application of that law does not hinder the application or the effectiveness of Community law and does not make it impossible in practice to recover the sums improperly granted. It is for the national court to ensure the full application of Community law by setting aside or, in so far as necessary, interpreting a national rule such as the AWB which prevents such application. The national court may apply the Community law principles of legal certainty and the protection of legitimate expectations when assessing the conduct of both the recipient of the amounts lost and the administrative authority, on condition that full account is taken of the interests of the Community. The fact that the recipient of the funds is a public-law person is irrelevant in that regard.

## Costs

60 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

1. **Article 23(1) of Council Regulation (EEC) No 4253/88 of 19 December 1988 laying down provisions for implementing Regulation No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments, as amended by Council Regulation (EEC) No 2082/93 of 20 July 1993 requires the Member States to recover any amounts lost as a result of an irregularity or negligence without there being any need for authority to do so under national law.**
  
2. **The recovery of amounts lost as a result of an irregularity or negligence must be carried out on the basis of Article 23(1) of Regulation No 4253/88, as amended by Regulation No 2082/93, and in accordance with the detailed rules laid down in national law, on condition that the application of that law does not hinder the application or the effectiveness of Community law and does not make it impossible in practice to recover the sums improperly granted. It is for the national court to ensure the full application of Community law by setting aside or, in so far as necessary, interpreting a national rule such as the General Statute on administrative law (Algemene wet bestuursrecht) which prevents such application. The national court may apply the Community law principles of legal certainty and the protection of legitimate expectations when assessing the conduct of both the recipient of the amounts lost and the administrative authority, on condition that full account is taken of the interests of the European Community. The fact that the recipient of the funds is a public-law person is irrelevant in that regard.**

[Signatures]