

JUDGMENT OF THE COURT (Third Chamber)

12 February 2004 *

In Case C-330/01 P,

Hortiplant SAT, established in Amposta (Spain), represented by C. Fernández Vicién and I. Moreno-Tapia Rivas, abogadas,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (Fourth Chamber) of 14 June 2001 in Case T-143/99 *Hortiplant v Commission* [2001] ECR II-1665, seeking to have that judgment set aside,

the other party to the proceedings being:

Commission of the European Communities, represented by L. Visaggio, acting as Agent, assisted by J. Guerra Fernández, abogado, with an address for service in Luxembourg,

defendant at first instance

* Language of the case: Spanish.

THE COURT (Third Chamber),

composed of: J.N. Cunha Rodrigues, acting for the President of the Third Chamber, J.-P. Puissochet and F. Macken (Rapporteur), Judges,

Advocate General: S. Alber,

Registrar: H. von Holstein, Deputy Registrar,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 13 March 2003,

after hearing the Opinion of the Advocate General at the sitting on 3 April 2003,

gives the following

Judgment

- 1 By an application lodged at the Court Registry on 4 September 2001, Hortiplant SAT (hereinafter ‘Hortiplant’) brought an appeal under Article 49 of the EC Statute of the Court of Justice against the judgment of the Court of First Instance of 14 June 2001 in Case T-143/99 *Hortiplant v Commission* [2001] ECR II-1665, (hereinafter ‘the contested judgment’). In that judgment the Court of First

Instance dismissed the action for annulment brought by Hortiplant against the decision of the Commission of the European Communities of 4 March 1999 (hereinafter ‘the contested decision’) cancelling the financial assistance granted to Hortiplant by Commission Decision C (92) 3125 of 3 December 1992 (hereinafter ‘the decision to grant assistance’) in the context of a project entitled ‘Initiative in the form of a pilot project to demonstrate a new and highly efficient method of producing seedlings, as applied to ornamental and woodland species’ (hereinafter ‘the project’).

Legal background

- 2 Article 4(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 193, p. 5, hereinafter ‘Regulation No 2052/88’) provides as follows:

‘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. These consultations shall hereinafter be referred to as the “partnership”. The partnership shall cover the preparation and financing, as well as the ex ante appraisal, monitoring and ex post evaluation of operations.

The partnership will be conducted in full compliance with the respective institutional, legal and financial powers of each of the partners.’

- 3 Council Regulation (EEC) No 4253/88 of 19 December 1988, laying down provisions for implementing Regulation (EEC) 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, hereinafter ‘Regulation No 4253/88’) contains in Title IV (Articles 14 to 16) provisions concerning the processing of applications for financial assistance from the Structural Funds, eligibility for such financial assistance and certain specific provisions.
- 4 Regulation No 4253/88 also lays down provisions relating to payments of financial assistance (Article 21), to financial control (Article 23) and to the reduction, suspension and cancellation of assistance (Article 24).
- 5 In that connection, Article 24 of that regulation provides as follows:

‘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.'

Factual background to the dispute

- 6 The factual background to the dispute as set out at paragraphs 11 to 27 of the contested judgment may be summarised as follows.
- 7 On 3 December 1992, by the decision to grant assistance, the Commission, pursuant to the first and fourth indents of Article 8 of Council Regulation (EEC) No 4256/88 of 19 December 1988 laying down provisions for implementing Regulation No 2052/88 as regards the EAGGF Guidance Section (OJ 1988 L 374, p. 25), granted assistance from the EAGGF (Guidance Section) to Hortiplant SAT. The assistance was granted for the project.
- 8 The Commission paid Hortiplant a total of ECU 512 393 by way of an advance on that assistance.

- 9 Following an audit by the Court of Auditors of the European Communities on 10 February 1997, the Commission decided to carry out a series of inspections of a number of pilot projects which were receiving financial assistance under Article 8 of Regulation No 4256/88, as it suspected the existence of an organised network intent on fraudulently obtaining Community subsidies. The project was among those thus inspected.
- 10 On 29 and 30 September 1997, an on-the-spot investigation into the implementation of the project was carried out under Article 23 of Regulation No 4253/88 by officials from the Commission's Directorates-General for Agriculture and for Financial Affairs, and from the Unit on Coordination of Fraud Prevention (UCLAF).
- 11 By letter of 3 April 1998, the Commission informed Hortiplant that it had carried out an examination, under Regulation No 4253/88, into the implementation of the project and that the checks which had been made had uncovered facts which might constitute irregularities. The Commission granted Hortiplant a period of six weeks in which to send it explanations, together with administrative records and accounts as evidence that the project had been correctly implemented, otherwise the sums already paid would have to be refunded and the assistance would be cancelled.
- 12 At the same time the Commission sent the Kingdom of Spain, the Member State concerned for the purposes of Article 24(1) of Regulation No 4253/88, a request for observations, enclosing the letter sent to Hortiplant and asking the Spanish authorities to submit any comments they deemed appropriate within six weeks.
- 13 By letter of 26 May 1998, Hortiplant submitted some observations in response to the Commission's claims. By contrast the Spanish Government did not respond to the Commission's request.

- 14 By decision of 4 March 1999, the Commission, under Article 24(1) of Regulation No 4253/88, confirmed the existence of a number of irregularities and, pursuant to Article 24(2), cancelled the financial assistance granted to Hortiplant.

Procedure before the Court of First Instance and the contested judgment

- 15 Those are the circumstances in which, by an application lodged at the Registry of the Court of First Instance on 12 June 1999, Hortiplant brought an action for annulment before the Court of First Instance.
- 16 In support of its action Hortiplant relied on five pleas in law. By the fourth, it alleged, *inter alia*, that, in breach of the right to a fair hearing, the Commission had failed to comply with its obligation to take account of the observations of the relevant Member State, in particular by adopting the contested decision without having received the observations of the Kingdom of Spain, contrary to Article 24(1) and (2) of Regulation No 4253/88.
- 17 The Court of First Instance, at paragraphs 103 to 105 of the contested decision, dismissed that contention as follows:

‘103 Lastly, as regards the alleged need for the Commission to receive the observations of the Member State concerned before cancelling financial assistance, it should be noted that Article 24 of Regulation No 4253/88 provides only that the Commission is to conduct a suitable examination of the case, in particular requesting that the Member State concerned or other authorities designated by it to implement the operation submit their

comments within a specified period of time, and that, following this examination, the Commission may take the necessary measures if the examination reveals an irregularity.

104 It does not follow from the wording of that article that the Commission must receive observations from the Member State concerned before cancelling the financial assistance if the examination it has conducted confirms an irregularity.

105 In the light of the foregoing, this plea must be rejected.’

¹⁸ The Court of First Instance held, at paragraph 124 of the contested judgment, that the action must be dismissed in its entirety. Accordingly, it ordered Hortiplant to bear its own costs as well as those of the Commission, in accordance with the form of order sought by the latter.

Forms of order sought

¹⁹ By its appeal, Hortiplant claims that the Court should annul the contested judgment, make a final ruling in the dispute and, in the alternative, remit the matter before the Court of First Instance and order the Commission to pay the costs of the appeal and those incurred in the proceedings before the Court of First Instance.

- 20 The Commission contends that the appeal should be dismissed as manifestly unfounded and that Hortiplant should be ordered to pay the costs.

The appeal

Arguments of the parties

- 21 Hortiplant's appeal is founded on an alleged misinterpretation of Article 24(1) of Regulation No 4253/88.
- 22 First, the appellant alleges that the Court of First instance did not give full effect to that article. Essentially, according to the interpretation of that article, the observations of the Member State concerned are necessary only where the Commission has doubts concerning the regularity of financing and where it has not been possible to confirm such doubts by means of the examinations conducted by the Commission. According to the appellant, such an interpretation entirely deprives of its usefulness and sense the obligation on the Commission to request the Member State to submit to it observations prior to adoption of a final decision.
- 23 Secondly, the appellant alleges that the principle of partnership expressly mentioned in Article 24(1) of Regulation No 4253/88 and in Article 4(1) of Regulation No 2052/88 which is to be established by means of close collaboration between the Commission, the Member State concerned and the competent authorities appointed by it, cannot be reconciled with the finding of the Court of First Instance that the Commission may in certain circumstances proceed without the observations of the Member State concerned.

- 24 Moreover, Hortiplant maintains that the Court of First Instance ought to have interpreted Article 24(1) of Regulation No 4253/88 in accordance with the Court's case-law concerning the European Social Fund under which the submission by the Member State concerned of its observations prior to a decision to reduce assistance constitutes a material formality (see Case C-200/89 *FUNOC v Commission* [1990] ECR I-3669; Case C-304/89 *Oliveira v Commission* [1991] ECR I-2283, Case C-199/91 *Foyer culturel du Sart-Tilman v Commission* [1993] ECR I-2667 as well as Joined Cases T-432/93 to T-434/93 *Socurte and Others v Commission* [1995] ECR II-503).
- 25 Thirdly, the appellant criticises the Court of First Instance for wrongly finding that the Commission's letter of 3 April 1998, in which it requested, 'as a matter of mere courtesy', the Kingdom of Spain to formulate observations on that case, satisfies the obligation on the Commission under Article 24(1) of Regulation No 4253/88 to ask the Member State concerned to submit its observations.
- 26 The Commission maintains that the plea is without foundation. Under Article 24(1) of Regulation No 4253/88, the fact of having afforded to the Member State the opportunity of submitting, within a reasonable period, its observations on the facts forming the subject matter of the examination is sufficient. If, after expiry of that period, no observation has been formulated the Commission is free to pursue the procedure and to adopt a decision. The Court's finding at paragraphs 103 to 105 of the contested judgment is entirely consistent with the partnership principle which requires that that regulation be duly observed without inappropriately delaying matters.
- 27 As to the case-law cited by Hortiplant, first of all, that was decided in connection with a different Structural Fund and concerned provisions whose formulation is plainly different. Finally, it is clear from that case-law that what constitutes a

material formality is the fact of placing the Member State concerned in a position to submit its observations to the Commission prior to the reduction in the assistance and not the fact of obtaining those observations.

- 28 Finally, in the Commission's view, the Court was legally entitled to find that its registered letter with request for acknowledgment of receipt of 3 April 1998, to which was appended the letter sent to Hortiplant on the same date, constituted a request addressed to the Kingdom of Spain to submit its observations.

Findings of the Court

- 29 As the Court of First Instance stated at paragraph 103 of the contested judgment, with regard to the alleged need for the Commission to receive the observations of the Member State concerned before cancelling financial assistance, Article 24(1) of Regulation No 4253/88 provides only that the Commission is to conduct a suitable examination of the case, in particular requesting that the Member State concerned or other authorities designated by it to implement the operation submit their comments within a specified period of time. Following this examination, the Commission may take the necessary measures if the examination reveals an irregularity.
- 30 In its first plea, the appellant maintains that, at paragraph 104 of the contested judgment, the Court of First Instance interpreted Article 24(1) of Regulation No 4253/88 as meaning that the observations of the Member State concerned are necessary only where it has not been possible to confirm doubts concerning the regularity of financing by means of an appropriate examination of the case by the Commission. In its view, that interpretation would totally deprive of its usefulness the obligation imposed on the Commission under that article to request the Member State concerned to submit its observations within a specified

period. None the less, it is clear from paragraph 103 of the contested judgment that observations of the Member State concerned submitted within the prescribed period form part of such an examination. Accordingly, that first plea is based on a partial and erroneous reading of paragraph 104 of the contested judgment and must be rejected as unfounded.

31 On the second plea, as the Court of First Instance correctly found, it is not apparent from the wording of Article 24(1) of Regulation No 4253/88 that, on an appropriate examination of the case, the Commission's obligation goes further than the mere requirement that it request the Member State or the other authorities appointed by it to implement the action, to submit their observations within a specified period. That finding is corroborated by the consideration that both the reference to a specified period and the Commission's power under Article 24(2) to cancel assistance would be totally deprived of usefulness if, prior to the adoption of a decision, the Commission were obliged to wait for the Member State concerned to submit its observations.

32 Moreover, contrary to the appellant's assertion, the assessment of the Court of First Instance is consistent with the concept of partnership in that article and in Article 4(1) of Regulation No 2052/88. That concept, which is viewed as a close collaboration between the Commission, the Member State concerned and the competent authorities appointed by the latter at national, regional, local or other level, does not require the adoption by the Commission of a decision to cancel assistance to be subject to prior receipt by the Commission of the observations of a Member state. Nor may Articles 24(1) of Regulation No 4253/88 and 4(1) of Regulation No 2052/88 found a competence enabling a Member State to impose on the Commission obligations additional to those provided for in the first of those two articles.

33 As to the appellant's allegation that the Court of First Instance ought to have interpreted Article 24(1) of Regulation No 4253/88 in accordance with the Court's case-law on the European Social Fund, it should be noted that, as the

Commission maintains in its response, the judgments of the Court of Justice in *FUNOC v Commission*, *Oliveira v Commission* and *Foyer culturel du Sart-Tilman v Commission* and of the Court of First Instance in *Socurte and Others v Commission*, cited above, were concerned with the interpretation of Article 6(1) of Council Regulation (EEC) No 2950/83 of 17 October 1983 on the implementation of Decision 83/516/EEC on the tasks of the European Social Fund (OJ 1983 L 289, p. 1) whose content and purpose are immaterial to the interpretation of Article 24(1) of Regulation No 4253/88. In any event, a simple reading of those judgments is sufficient for a finding that the fact that the Member State is put in a position to submit its observations prior to reduction of the assistance may be deemed to constitute a material formality.

34 Accordingly, the interpretation of Article 24(1) of Regulation No 4253/88 adopted by the Court of First Instance at paragraphs 103 and 104 of the contested judgment is not vitiated by any error of law and the second plea must be rejected as unfounded.

35 As to the third plea, the appellant's argument seeks to call in question the finding and appraisal of the facts in the light of which the Court of First Instance held that the Commission's letter of 3 April 1998 addressed to the Kingdom of Spain satisfied the obligation on the Commission under Article 24(1) of Regulation No 4253/88 to ask the Member State concerned to submit its observations.

36 However, it follows from Article 225 EC and the first paragraph of Article 51 of the EC Statute of the Court of Justice that the latter is not competent to find the facts or, as a rule, to examine the evidence which the Court of First Instance accepted in support of those facts. Provided that the evidence has been properly obtained and the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence have been observed, it is for the Court of First Instance alone to assess the value which should be attached to the

evidence produced to it (Case C-185/95 P *Baustahlgewebe v Commission* [1998] ECR I-8417, paragraph 24). That appraisal does not therefore constitute, save where the clear sense of that evidence has been distorted, a point of law which is subject, as such, to review by the Court (Cases C-24/01 P and C-25/01 P *Glencore and Compagnie Continentale v Commission* [2002] ECR I-10119, paragraph 65).

37 However since the Court of First Instance, in analysing the Commission's letter of 3 April 1998 to the Kingdom of Spain as a request for observations within the meaning of Article 24(1) of Regulation No 4253/88, not only assessed the facts but also assigned to them a classification, the Court of Justice has jurisdiction to examine this part of the plea (Cases C-39/93 *SFEI and Others v Commission* [1994] ECR I-2681, paragraph 26, and Case C-325/94 P *An Taisce and WWF v Commission* [1996] ECR I-3727, paragraph 30).

38 Given that that letter had appended to it the letter of 3 April 1998 to the appellant, detailing the complaints raised against it, and expressly requested the Kingdom of Spain to submit its observations to the Commission within a period of six weeks, there is nothing to support the finding that the Court of First Instance wrongly classified that letter as a request for observations for the purposes of Article 24(1) of Regulation No 4253/88.

39 This third plea must accordingly be rejected as unfounded.

40 It follows from all the foregoing that the appeal must be dismissed in its entirety.

Costs

41 Under Article 69(2) of the Rules of Procedure, which apply to the procedure on appeal by virtue of Article 118 of those Rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission had applied for the appellant to be ordered to pay the costs and it has been unsuccessful, Hortiplant must be ordered to pay the costs.

On those grounds,

THE COURT (Third Chamber),

hereby:

1. Dismisses the appeal;

2. Orders Hortiplant to pay the costs

Cunha Rodrigues

Puissochet

Macken

Delivered in open court in Luxembourg on 12 February 2004.

R. Grass

Registrar

V. Skouris

President