JUDGMENT OF THE COURT (Sixth Chamber)

30 January 2002 *

In Case C-107/99,

Italian Republic, represented by U. Leanza, acting as Agent, and I.M. Braguglia, avvocato dello Stato, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by E. de March, K. Simonsson and H. Speyart, acting as Agents, with an address for service in Luxembourg,

defendant,

supported by

Ireland, represented by J. Payne, acting as Agent, and D. McGuinness SC, and E. Kent, Solicitor,

* Language of the case: Italian.

and by

United Kingdom of Great Britain and Northern Ireland, represented by J.E. Collins, acting as Agent, and D. Wyatt QC,

interveners,

APPLICATION for the annulment of the Commission's decision of 16 December 1998 approving amendments to the indicative allocation of Community initiatives, communicated to the Italian Republic by letter of 19 January 1999 from the Secretary-General of the Commission, and of all measures underlying or linked to that decision,

THE COURT (Sixth Chamber),

composed of: N. Colneric, President of the Second Chamber, acting for the President of the Sixth Chamber, C. Gulmann, J.-P. Puissochet (Rapporteur), R. Schintgen and V. Skouris, Judges,

Advocate General: J. Mischo,
Registrar: H.A. Rühl, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 14 June 2001,

after hearing the Opinion of the Advocate General at the sitting on 11 October 2001,

gives the following

Judgment

1 By application lodged at the Court Registry on 29 March 1999, the Italian Republic brought an action under Article 173 of the EC Treaty (now, after amendment, Article 230 EC) for annulment of the Commission's decision of 16 December 1998 approving amendments to the indicative allocation of Community initiatives, which was communicated to the applicant by letter of 19 January 1999 from the Secretary-General of the Commission ('the contested decision'), and of all measures underlying or linked to that decision, in particular the opinion of the Management Committee of 22 September 1998 and the table attached to that letter.

Legal framework and facts of the dispute

2 Article 130a of the EC Treaty (now, after amendment, Article 158 EC) provides that the Community is to develop and pursue its actions leading to the strengthening of its economic and social cohesion. In particular, it is to aim at reducing disparities between the levels of development of the various regions and

the backwardness of the least-favoured regions in order to promote its overall harmonious development. In accordance with Article 130b of the EC Treaty (now Article 159 EC) the Community is also to support the achievement of these objectives by the action it takes through the Structural Funds.

3 In order to achieve those aims and to regulate the tasks of the Funds, the Council adopted 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 in particular by Council Regulation (EEC) No 2081/93 of 20 July 1993 (OJ 1993 L 193, p. 5, hereinafter 'Regulation No 2052/88'), and 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 in particular by Council Regulation (EEC) No 2082/93 of 20 July 1993 (OJ 1993 L 193, p. 20, hereinafter 'Regulation No 4253/88').

4 The first subparagraph of Article 4(1) of Regulation No 2052/88 provides:

'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 ... 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.'

5 According to the third subparagraph of Article 5(5) of that regulation:

'Assistance [under the Structural Funds] shall be undertaken on the initiative of the Member States or of the Commission in agreement with the Member State concerned.'

6 It is assistance provided on the initiative of the Commission that is known as 'Community initiatives'.

7 Article 12(4) and (5) of the regulation provides as follows:

'4. The Commission shall, using transparent procedures, make indicative allocations by Member State for each of the Objectives 1 to 4 and 5(b) of the Structural Fund commitment appropriations taking full account, as previously, of the following objective criteria: national prosperity, regional prosperity, population of the regions, and the relative severity of structural problems, including the level of unemployment and, for the appropriate Objectives, the needs of rural development. ...

...

5. For the period [1994–99], 9% of the commitment appropriations for the Structural Funds shall be devoted to funding assistance undertaken on the initiative of the Commission in accordance with Article 5(5).'

8 Last, according to Article 17(2) of Regulation No 2052/88:

'In implementing assistance undertaken on its own initiative in accordance with Article 5(5), last subparagraph, the Commission shall be assisted by a management committee composed of representatives of the Member States.'

9 Reference must also be made to a number of provisions of Regulation No 4253/88.

10 The first subparagraph of Article 11(1) of Regulation No 4253/88, which deals with Community initiatives, provides:

'In accordance with Article 5(5) of Regulation (EEC) No 2052/88, the Commission may, on its own initiative and in accordance with the procedures provided for in Title VIII, and after having informed the European Parliament accordingly, decide to propose to the Member States that they submit applications for assistance in respect of measures of significant interest to the Community. ...'

11 By virtue of Article 14 of that regulation, the Commission 'shall decide on assistance from the Funds'.

12 Article 20(1) of that regulation provides:

'Budgetary commitments shall be made on the basis of the Commission decisions approving the measures concerned. ...'

13 Moreover, according to Article 24 of that regulation, entitled '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 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.

...'

14 Article 25 of Regulation No 4253/88 provides:

'1. Within the framework of the partnership, the Commission and the Member States shall ensure effective monitoring of implementation of assistance from the Funds, geared to the Community support framework and specific operations (programmes, etc.). ...

...

3. Monitoring committees shall be set up within the framework of the partnership, by agreement between the Member State concerned and the Commission.

...

5. The monitoring committee shall, if necessary, without modifying the total amount of the Community contribution and within harmonised limits by Objective, adjust the procedure for granting assistance as initially approved, as well as, in conformity with available resources and budgetary rules, the financing plan envisaged, including any transfers between Community sources of finance and the consequential adjustment of the rates of assistance. The harmonised limits by Objective referred to above shall be established by the Commission according to the procedure referred to in Title VIII and included in the Community support frameworks.

These amendments shall be notified immediately to the Commission and the Member State concerned. They shall become effective as soon as confirmation has been provided by the Commission and the Member State concerned; such

confirmation shall be given within a period of 20 working days from receipt of this notification, the date of which will be confirmed by the Commission by acknowledgment of receipt.

Other amendments required shall be decided by the Commission, in collaboration with the Member State concerned, after the monitoring committee has delivered its opinion.

...'

15 Furthermore, under the first paragraph of Article 16 of the Rules of Procedure of the Commission, in the version resulting from Decision 93/492/Euratom, ECSC, EEC of 17 February 1993 (OJ 1993 L 230, p. 15), as amended by Commission Decision 95/148/EC, ECSC, Euratom of 8 March 1995 (OJ 1995 L 97, p. 82), which is applicable in the present case:

'Instruments adopted by the Commission in the course of a meeting shall be attached, in the authentic language or languages, in such a way that they cannot be separated, to the minutes of the meeting at which they were adopted. They shall be authenticated by the signatures of the President and the Secretary-General on the first page of the minutes.'

16 By decisions of 13 July, 12 October and 21 December 1994 and 8 May 1996 the Commission adopted an indicative allocation for all Community initiatives for the programming period 1994–99.

17 Correspondence was subsequently exchanged on a regular basis between the Italian Republic and the Commission in connection with the monitoring of the implementation of Community initiatives in that Member State.

18 For 1999 the Commission decided to amend the indicative allocation of Community initiatives in order to release the sum of ECU 100 million to finance a Community initiative consisting in a special aid programme for peace and reconciliation in Northern Ireland and in the border counties of Ireland (hereinafter the 'Peace initiative').

19 In taking account of the various criteria, in particular the state of implementation of the various Community initiatives in the Member States, the Commission drew up a proposal for the alteration of the allocation of Community initiatives in the form of a working document which was approved by the management committee at its meeting of 22 September 1998.

20 That working document shows that the financial redistribution of ECU 100 million in favour of the Peace initiative was to entail, for the Italian Republic, a reduction of ECU 44.7 million, while the other substantial reductions affected the French Republic (ECU 18.1 million), the United Kingdom (ECU 16.4 million), the Portuguese Republic (ECU 6.8 million) and the Federal Republic of Germany (ECU 6 million).

21 As regards the Italian Republic, the initiatives affected by the reduction of ECU 44.7 million were as follows: Interreg (ECU 21 million), PME (ECU 17.8 million), URBAN (ECU 3.2 million), Leader (ECU 2 million) and Konver (ECU 0.7 million).

22 That new allocation was subsequently adopted by the Commission on 16 December 1998 and communicated to the applicant by letter from the Secretary-General of the Commission dated 19 January 1999.

23 That letter is in the following terms:

'La Commissione europea ha approvato, nella riunione del 16 dicembre 1998, le modifiche alle ripartizioni indicative delle Iniziative Comunitarie, sulle quali il competente Comitato di Gestione aveva espresso parere favorevole il 22 settembre 1998. La decisione tiene conto del grado di avanzamento delle Iniziative e della necessità di reperire ulteriori risorse finanziare per il 1999 in favore dell'Iniziativa "Peace and Reconciliation in Ireland and Northern Ireland".

La nuova tabella allegata sostituisce le analoghe tabelle accluse alla lettera del 13 luglio 1994 e 13 guigno 1996 del signor Williamson.'

(At the meeting on 16 December 1998 the European Commission approved the alterations to the indicative allocation of Community initiatives in respect of which the competent management committee had expressed a favourable opinion on 22 September 1998. The decision takes into account the state of advancement of the initiatives and the need to allocate further financial resources for 1999 to the 'Peace and Reconciliation in Ireland and Northern Ireland' initiative.

The new table enclosed herewith replaces the corresponding tables enclosed with the letters from Mr Williamson dated 13 July 1994 and 13 June 1996.)

24 The abovementioned letter was accompanied by a table entitled 'Stanziamenti indicativi per iniziativa comunitaria e per Stato membro (in MECU, prezzi 1999)' (Indicative allocations by Community initiative and by Member State (in millions of ECU, 1999 prices), which sets out for each Member State the total amount indicatively allocated to it and the allocation of that amount between the various

Community initiatives. In the case of the Italian Republic an asterisk referred to a footnote stating that 'tali stanziamenti potranno essere programmati nella loro totalità solo qualora lo Stato membro confermi il suo accordo ad una riduzione delle risorse programmate all'interno dell'Iniziativa PMI' (these appropriations can only be programmed in full where the Member State confirms that it agrees to a reduction of the resources programmed within the framework of the PME initiative).

25 By orders of 17 June and 1 July 1999 of the President of the Court, the United Kingdom and Ireland respectively were granted leave to intervene in support of the form order sought by the Commission.

Plea of inadmissibility raised by Ireland

26 In its statement in intervention, Ireland objects that the action brought by the Italian Republic is inadmissible, claiming that it was brought outside the period prescribed in the fifth paragraph of Article 173 of the Treaty and is directed against an act which the Commission was bound to adopt in its role of implementing the Community budget, even though the aforementioned Member State did not contest the general Community budget for 1999.

27 It must none the less be observed that the defendant Commission, in whose support Ireland was granted leave to intervene, has raised no plea of inadmissibility against the action of the Italian Republic; it has even expressly acknowledged that, in any event, the action was not brought out of time.

28 Under the fourth paragraph of Article 37 of the EC Statute of the Court of Justice, submissions made in an application to intervene are limited to supporting the

submissions of one of the parties. Moreover, under Article 93(4) of the Rules of Procedure, an intervener must accept the case as he finds it at the time of his intervention.

29 It follows that Ireland, as intervener, had no standing to raise a plea of inadmissibility and the Court is thus not bound to adjudicate on such a plea (see Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125, paragraphs 20 to 22, and Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraph 12).

30 However, the Court must examine of its own motion, pursuant to Article 92(2) of the Rules of Procedure, whether the action is time-barred.

31 It is none the less sufficient to note that on 20 January 1999 the Italian Republic received the letter from the Secretary-General of the Commission dated 19 January 1999, informing it of the contested decision and that the time-limit for bringing an action, bearing in mind the extension of time-limits on account of distance of 10 days, fixed in the third indent of Article 1 of Annex II to the Rules of Procedure in force on the date on which the application was made, expired on 30 March 1999. Accordingly, the application, lodged on 29 March 1999, cannot be considered to have been submitted out of time.

Substance

The subject-matter of the action

32 The file shows that, although the Italian Republic is seeking the annulment of the contested decision and, 'in so far as necessary', of the other acts and decisions

linked to it, that possible extension of the action to decisions other than that adopted on 16 December 1998 is in actual fact a reflection of the initial uncertainty in which the applicant states it found itself, as to the act containing the decision to redistribute certain financing which had been indicatively allocated to it. Since it appeared that the contested decision had indeed been adopted at the Commission's meeting of 16 December 1998, the Italian Republic did not pursue its challenge to the other acts connected with that decision.

33 Therefore, it must be considered that, in its final form, the action is directed exclusively against the contested decision.

The nature of the contested decision

34 The Commission argues that the contested decision should be analysed, first, as consisting in a redistribution of the financial assistance allocated to Community initiatives between Member States, resulting, in the case of the Italian Republic, in a reduction of ECU 44.7 million from the indicative ceiling for any funds available to the applicant for the purposes of implementing Community initiative programmes. It considers that that reduction, which, by virtue of Article 12(4) of Regulation No 2052/88, affects indicative amounts and does not require the consent of the Member States, is in the present case less than the financial assistance referred to in the initial allocation and not yet granted, and does not therefore affect the amounts which, pursuant to Articles 14 and 20 of Regulation No 4253/88, have already been granted to the Italian Republic.

35 It submits that the purpose of the contested decision is, secondly, to alter the allocation of credits between the various Community initiatives involving the

Italian Republic. It points out nevertheless that that second stage, which affects assistance already granted and which therefore requires the prior consent of the applicant, has only the status of a proposal made to the latter.

36 According to the Commission, the contested decision is therefore an 'atypical' act, no more than a working document, and does not constitute a decision within the meaning of Article 189 of the EC Treaty (now Article 249 EC) and subject to the formalities applicable to the acts covered by that article.

37 It is however apparent from the case-file, in particular from the Commission's defence and rejoinder, that, although implementation of the proposal made to the Italian Republic, entailing the reduction of funds already granted, required the latter's agreement, the Commission takes the view that the effect of not obtaining the agreement of the Italian Republic would, in any event, be that assistance allocated to other initiatives involving the same Member State would be reduced by the same amount of ECU 44.7 million.

38 Moreover, it is clear from the wording of the communication of 9 December 1998 concerning the indicative allocations by Community initiative and by Member State, which the Commission discussed at its 1413th meeting held in Strasbourg on 16 December 1998, that it was proposed that the Commission adopt 'a decision amending the indicative allocations fixed by Member State and by initiative, in accordance with Table 2 (enclosed herewith)'. The Commission was thus induced to 'approve the indicative packet of Community initiatives fixed by Member State and by initiative, in accordance with Table 2 enclosed herewith'.

39 However, the abovementioned Table 2, which alone was covered by the approval, merely puts forward, subject to appraisal by the Member States, a new distribution of the indicative allocations by Community initiative and by Member State. On the other hand, Table 1, also annexed to that communication and

which indicates a reduction of ECU 44.7 million from the Italian appropriation, was not formally approved by the Commission.

40 It must be concluded from all the foregoing that the contested decision is, contrary to what the Commission maintains, a decision within the meaning of Article 189 of the Treaty and that it affects in actual fact only the amounts which, for each of the initiatives, have not yet been the subject of a decision to grant financial assistance. The contested decision does not have the effect therefore of reducing by ECU 44.7 million the indicative amounts per Community initiative allocated to the Italian Republic under the conditions set out in Table 2, but of reducing by that amount the share of the indicative allocation initially envisaged for that Member State in respect of which Community funds had not yet been granted.

Infringement of essential procedural requirements

41 The applicant argues that the contested decision is non-existent or wholly void inasmuch as it is not contained, so far as it is aware, in any act bearing the date on which the Commission purportedly discussed it and that only the letter of 19 January 1999 from the Secretary-General of the Commission discloses its content. Even if that letter materially substantiates that decision, it is invalidated by the fact that it does not bear the signature of either the President of the Commission or of a Member of the Commission, and it does not give an adequate statement of reasons, contrary to Article 190 of the EC Treaty (now Article 253 EC).

42 It appears from documents produced by the Commission as annexes to its defence that the contested decision was taken during the Commission's meeting of 16 December 1998, during which it approved the communication of 9 December

1998 proposing to it a new distribution of the indicative allocations by Community initiative and by Member State.

43 None the less, although the first page of the minutes of the abovementioned meeting does indeed bear the signature of an authority empowered to represent the institution, the table amending the indicative allocations of Community initiative credits between Member States was not attached, in such a way that it could not be separated, to the minutes of the meeting, contrary to the requirements of the first paragraph of Article 16 of the Commission's Rules of Procedure; moreover, it was not signed.

44 The Commission has not disputed those facts in its rejoinder, but has merely replied, as it did at the hearing, that those formalities were not a precondition for the validity of an act such as the contested decision, which it considers atypical, and that failure to comply with them is in any event not of such obvious gravity that the decision must be treated as legally non-existent.

45 The Court has already held that defects similar to those by which the contested decision is vitiated, that is to say relating to the lack of authentication of the act, without there being any serious doubt that the Commission had actually decided to adopt the instrument in question, are not sufficiently serious for the decision to be regarded as non-existent (see Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555, paragraphs 48 to 53). However, the Court has also held that such defects may entail annulment of a decision for infringement of essential procedural requirements (*Commission* v *BASF*, cited above, paragraphs 72 to 78).

46 The Italian Republic claims not only that the contested decision is non-existent, which in the present case cannot be accepted by the Court, but also that it should be annulled on the ground of infringement of essential procedural requirements.

47 As the Court has already held in Case C-286/95 P *Commission* v *ICI* [2000] ECR I-2341, paragraph 42, it is the mere failure to authenticate an act which constitutes the infringement of an essential procedural requirement and it is not necessary also to establish that the act is vitiated by some other defect or that the lack of authentication resulted in harm to the person relying on it. Moreover, it is indispensable for authentication of the act to precede its notification because otherwise there would always be a risk that the notified text would not be identical to the text adopted by the Commission (*Commission* v *ICI*, cited above, paragraph 62).

48 Therefore, since it was not attached, in such a way that it could not be separated, to the minutes of the meeting, in accordance with the requirements of the first paragraph of Article 16 of the Commission's Rules of Procedure, the contested decision cannot be regarded as having been duly authenticated. Accordingly, it is vitiated by an infringement of essential procedural requirements and must be annulled on that ground alone.

49 In the circumstances, it is not necessary to examine the remaining pleas in law in the application.

Costs

50 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Italian Republic has applied for the Commission to be ordered to pay the costs and the Commission has been unsuccessful, it must be ordered to pay the costs. In accordance with the first subparagraph of Article 69(4), of the Rules of Procedure Ireland and the United Kingdom, which intervened in the proceedings, are to bear their own costs.

On those grounds,

THE COURT (Sixth Chamber),

hereby:

1. **Annuls the Commission's decision of 16 December 1998 approving amendments to the indicative allocation of Community initiatives, communicated to the Italian Republic by letter of 19 January 1999 from the Secretary-General of the Commission;**

2. **Orders the Commission of the European Communities to pay the costs;**

3. **Orders Ireland and United Kingdom of Great Britain and Northern Ireland to bear their own costs.**

Colneric Gulmann Puissochet

Schintgen Skouris

Delivered in open court in Luxembourg on 30 January 2002.

R. Grass F. Macken

Registrar President of the Sixth Chamber