JUDGMENT OF THE COURT (First Chamber)

24 November 2005 *

In Joined Cases C-138/03, C-324/03 and C-431/03,

ACTIONS for annulment under Article 230 EC, brought on 27 March 2003 (C-138/03), 24 July 2003 (C-324/03) and 9 October 2003 (C-431/03),

Italian Republic, represented by I.M. Braguglia, acting as Agent, assisted by A. Cingolo, avvocato dello Stato, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by E. de March and L. Flynn, acting as Agents, assisted by A. Dal Ferro, avvocato, with an address for service in Luxembourg,

defendant,

* Language of the case: Italian.

THE COURT (First Chamber),

composed of P. Jann, President of Chamber, K. Schiemann, N. Colneric, J.N. Cunha Rodrigues (Rapporteur) and E. Levits, Judges,

Advocate General: J. Kokott,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 21 April 2005,

after hearing the Opinion of the Advocate General at the sitting on 16 June 2005,

gives the following

Judgment

1 By its actions, the Italian Republic is seeking annulment of

— the letter of the Commission of the European Communities of 20 January 2003 seeking to deduct part of the amounts requested for the aid scheme within the

framework of the operational programme 'Research, Technological development and Higher Education' ('the contested letter of 20 January 2003');

— the Commission's letter of 3 March 2003 determining the definitive amount of that deduction ('the contested letter of 3 March 2003');

— the Commission's letter of 14 May 2003 in so far as it refuses to accept as eligible for a contribution from the Structural Funds payments on account made in relation to State aid after 19 February 2003 ('the contested letter of 14 May 2003');

— the Commission's letter of 29 July 2003 refusing to accept as eligible for a contribution from the Structural Funds payments on account made in relation to State aid after 19 February 2003 ('the contested letter of 29 July 2003').

Legal context

2 The 42nd and 43rd recitals in the preamble to Council Regulation (EC) No 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds (OJ 1999 L 161, p. 1) state:

'(42) ... payments should be made in the form of an advance followed by the reimbursement of actual expenditure incurred; ...

(43) ... sound financial management should be assured by providing that expenditure is to be duly justified and certified ...'.

3 Article 9 of the Regulation states:

'...

For the purposes of this regulation:

(l) final beneficiaries: means the bodies and public or private firms responsible for commissioning operations. In the case of aid schemes pursuant to Article 87 of the Treaty and in the case of aid granted by bodies designated by the Member States, the final beneficiaries are the bodies which grant the aid;

...

(o) paying authority: means one or more national, regional or local authorities or bodies designated by the Member States for the purposes of drawing up and submitting payment applications and receiving payments from the Commission. The Member State shall determine all the modalities of its relationship with the paying authority and of the latter's relationship with the Commission.'

4 The third subparagraph of Article 32(1) of the Regulation states:

'Payments may take the form of payments on account, interim payments or payments of the final balance. Interim payments and payments of the balance shall relate to expenditure actually paid out, which must correspond to payments effected by the final beneficiaries, supported by receipted invoices or accounting documents of equivalent probative value.'

5 Under the first subparagraph of Article 32(2) of Regulation No 1260/1999, '[w]hen the first commitment is made, the Commission shall make a payment on account to the paying authority. This payment on account shall be 7% of the contribution from the Funds to the assistance in question. ...'

6 The Annex to Commission Regulation (EC) No 1685/2000 of 28 July 2000 laying down detailed rules for the implementation of Council Regulation (EC) No 1260/1999 as regards eligibility of expenditure of operations co-financed by the Structural Funds (OJ 2000 L 193, p. 39) states:

'Rule No 1: expenditure actually paid out

1. Payments by final beneficiaries

1.1. Payments effected by final beneficiaries within the meaning of the third subparagraph of Article 32(1) of Regulation ... No 1260/1999 ... shall be in the form of cash subject to the exceptions indicated in point 1.4.

1.2. In the case of aid schemes under Article 87 of the Treaty and aid granted by bodies designated by the Member States, "payments by final beneficiaries" means aid paid to individual recipients by the bodies which grant the aid. Payments of aid by final beneficiaries must be justified by reference to the conditions and objectives of the aid.

1.3. In cases other than those referred to in point 1.2, "payments by final beneficiaries" means payments effected by the bodies or public or private firms of the type defined in the programme complement in accordance with Article 18(3)(b) of ... Regulation [No 1260/1999] having direct responsibility for commissioning the specific operation.

...

2. Proof of expenditure

As a rule, payments by final beneficiaries shall be supported by receipted invoices. Where this cannot be done, payments shall be supported by accounting documents of equivalent probative value.

In addition, where the execution of operations is not subject to a competitive tendering procedure, payments by final beneficiaries shall be justified by expenditure actually paid (including expenditure referred to in point 1.4) by the bodies or public or private firms concerned in implementing the operation.

...'

Facts

7 On 8 August 2000, the Commission approved the operational programme 'Research, Technological development and Higher Education' ('the programme') which forms part of the Community support framework for structural assistance in the Italian regions concerned by Objective 1 of Regulation No 1260/1999.

8 On 7 September 2001, the Commission sent the Italian Republic an interpretative memorandum concerning the third subparagraph of Article 32(1) of Regulation No 1260/1999 ('the interpretative memorandum'). In the covering letter the Commission indicates that 'the purpose of this memorandum is to clarify certain questions referred to the Commission on the meaning of "expenditure actually paid out" and "payments effected by the final beneficiaries"'. Where the final beneficiary is not the same as the individual recipient of the Community funds the interpretative memorandum analyses the eligibility for co-financing of 'payments on account on subsidies', that is advances on aid which final beneficiaries pay to individual recipients. Stressing the need to ensure that the expenditure declared is actually paid out and supported by probative documents, the Commission has come to the conclusion that 'payments on account made by the final beneficiary cannot be included in the expenditure declared to the Commission unless that beneficiary was able to establish that the final recipient used that payment on account to reimburse expenditure actually paid out'.

9 By the contested letter of 20 January 2003 which was sent to the Italian Republic, the Commission decided to deduct the amounts relating to payments on account and to suspend the payment procedure on submission of certification of expenditure in relation to the programme.

10 By the contested letter of 3 March 2003, the Commission stated that it had ordered payment of a sum lower than that requested, having regard in particular to the deduction of the amount of EUR 3 163 570.18 relating to those payments on account.

11 Parallel to those events, a consultation procedure was initiated within the Committee on the Development and Conversion of Regions ('the Committee') with the aim of defining ways of simplifying the management of the Structural Funds. As regards financial management in particular, the Committee examined the question of the eligibility of payments on account in relation to aid schemes. In so far as, according to the Commission, the legislation in force excluded such eligibility, the Commission submitted to the Committee a draft amendment to Regulation No 1685/2000, which reformulated, inter alia, Rule No 1 on expenditure actually paid out set out in the Annex to that regulation. Since no agreement with the Member States was reached at the Committee's 73rd meeting held on 19 February 2003, the Commission decided to abandon that proposal.

12 By the contested letter of 14 May 2003, the Commission informed the Italian Republic of the outcome of the discussions which had taken place within the Committee and confirmed that its position as regards payments on account made in relation to an aid scheme remained the same as that stated in the interpretative memorandum. However, referring to the doubts which could arise about the exact status of the provisions in force and in order not to disappoint expectations which might legitimately have been created by the discussion concluded on 19 February 2003, the Commission declared itself prepared to regard as eligible payments on account which had been granted or in relation to which a tendering procedure had been concluded before that date.

13 Thus, by letter of 23 May 2003, the Commission informed the Italian authorities that it had begun the procedure for payment of the sum which had been deducted by the contested letters of 20 January and 3 March 2003 and those letters were consequently annulled. Payment of the sum of EUR 3 163 570.18 was made on 5 June 2003.

14 The Commission finally sent the Italian Government the contested letter of 29 July 2003 in which it pointed out that a new version of the contested letter of 14 May 2003 had been drawn up in order to correct a number of translation errors. With the exception of a single passage, that new version did not differ from the previous one which it replaced.

Forms of order sought and procedure before the Court

Case C-138/03

15 The Italian Republic claims that the Court should:

— annul the contested letter of 20 January and 3 March 2003 and all the other measures on which they are based or with which they are connected;

— order the Commission to pay the costs.

16 The Commission contends that the Court should:

— order that the case be removed from the register.

Case C-324/03

17 The Italian Republic claims that the Court should:

— annul the contested letter of 14 May 2003, in so far as it refuses to accept as eligible for a contribution from the Structural Funds payments on account made in relation to State aid after 19 February 2003, and all the measures connected with and preliminary to it;

— order the Commission to pay the costs.

18 The Commission contends that the Court should:

— dismiss the action as inadmissible or, in the alternative, as unfounded;

— order the applicant to pay the costs.

Case C-431/03

19 The Italian Republic claims that the Court should:

— annul the contested letter of 29 July 2003 and all the measures connected with and preliminary to it;

— order the Commission to pay the costs.

20 The Commission contends that the Court should:

— dismiss the action as inadmissible or, in the alternative, as unfounded;

— order the applicant to pay the costs.

21 By order of the President of the Court of 26 January 2004, Cases C-138/03, C-324/03 and C-431/03 were joined for the purposes of the oral procedure and the judgment.

Case C-138/03

22 By its action, the Italian Republic is seeking annulment of the contested letters of 20 January and 3 March 2003 which, respectively, refuse reimbursement of the payments on account made by the Italian authorities in the context of the programme and fix the amount of the corresponding deduction at EUR 3 163 570.18.

23 However, it is common ground that, by decision of 23 May 2003, the Commission informed the Italian Government that the decision to refuse reimbursement of the payments on account had been annulled and that the payment procedure for the sum concerned had been initiated.

24 It is also common ground that the sum of EUR 3 163 570.18 was paid to the Italian Republic on 5 June 2003.

25 It must be found that, as a result of the annulment of the contested letter of 20 January and 3 March 2003, the applicant obtained the only result that its action could have secured for it, so that nothing remains on which the Court can give a decision. In proceedings under Article 230 EC, the Court can do no more than annul the measure at issue (order of 8 March 1993 in Case C-123/92 *Lezzi Pietro* v *Commission* [1993] ECR I-809, paragraph 10).

26 It follows that the action in Case C-138/03 has become devoid of purpose and that there is no need to give a decision.

Case C-324/03

Admissibility of the action

27 The Commission raised an objection of inadmissibility on the ground that the contested letter of 14 May 2003 does not constitute an actionable measure for the purposes of Article 230 EC.

Arguments of the parties

28 The Commission submits, first, that the contested letter of 14 May 2003 merely gives an interpretation of certain rules on eligibility for financing from the Structural Funds and does not, on that basis, have any legal effect vis-à-vis the Italian Republic. Such effects can be produced only by decisions which the Commission adopts subsequently on the basis of specific payment applications.

29 Second, the Commission alleges that that letter merely confirms the view expressed by it in the interpretative memorandum.

30 The Italian Republic responds that the view expressed by the Commission in the contested letter of 14 May 2003 actually represents a measure which introduces a new element into the system in force on the eligibility of expenditure, namely the ineligibility for Community co-financing of payments on account made in the context of aid schemes, and which, precisely because of its novel scope, is capable of producing direct effects in the applicant's legal sphere.

31 The Italian Government also submits that the contested letter of 14 May 2003 does not constitute an act which merely confirms the Commission's view in the interpretative memorandum since it is the result of an institutional debate within the Committee seeking amendment of Regulation No 1685/2000.

Findings of the Court

32 According to settled case-law, an action for annulment is available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects (Case 22/70 *Commission* v *Council* [1971] ECR 263, paragraph 42, and Case C-325/91 *France* v *Commission* [1993] ECR I-3283, paragraph 9).

33 The present case concerns a letter of the Commission sent to the Italian Republic which aims to make known the view of that institution as regards the ineligibility for a contribution from the Structural Funds of certain payments on account made by the Member States.

34 In order to ascertain whether that letter restricts itself to conveying an opinion of the Commission without amending the field of application of the Community rules or whether, on the other hand, it is capable of producing legal effects by creating new obligations for the Member States, the content of that act must be examined.

35 Whether the Commission's argument is well founded must therefore be determined together with the substantive issues raised by the dispute (see, to that effect, Case C-57/95 *France* v *Commission* [1997] ECR I-1627, paragraphs 9 and 10).

36 In addition, although it is certain that, in the first part of the contested letter of 14 May 2003, the Commission reaffirmed its position on the ineligibility for a contribution from the Structural Funds of payments on account made by the Member States, as stated in the interpretative memorandum, it none the less remains that, in order to justify the reimbursement of the payments on account made up until 19 February 2003 on the basis of protection of the legitimate expectations of the Member States, it refers explicitly, in its second part, to doubts which could have arisen in relation to the exact status of the provisions in force.

37 Thus, given that the contested letter of 14 May 2003 is not merely confirmatory of the interpretative memorandum, it must be regarded as the definitive outcome of a reconsideration of the situation (see, to that effect, Case 54/77 *Herpels* v *Commission* [1978] ECR 585, paragraph 14).

38 It follows from the above that the action in Case C-324/03 is admissible.

Substance

The first plea alleging infringement of Article 32 of Regulation No 1260/1999 and points 1 and 2 of Rule No 1 of the Annex to Regulation No 1685/2000

— Arguments of the parties

39 The Italian Republic considers that none of the provisions contained in Regulations No 1260/1999 and No 1685/2000 indicates that the activities of individual recipients of financing are relevant to whether the expenditure paid out by final beneficiaries is eligible in the context of the State aid scheme.

40 That interpretation is confirmed, first, by Article 32 of Regulation No 1260/1999 which provides that payments effected by the final beneficiaries must be supported, where possible, by receipted invoices and, in all other cases, by accounting documents of equivalent probative value. Second, it is stated in point 1.2 of Rule No 1 in the Annex to Regulation No 1685/2000 that payments of aid by final beneficiaries must be justified by reference to the conditions and objectives of that aid. Consequently, that excludes any other condition as regards documentation of the corresponding expenditure paid out by the individual recipients of the financing. Third, point 2 of Rule No 1 acknowledges that, where it is not possible to produce receipted invoices, payments may be supported by accounting documents of equivalent probative value.

41 According to the Commission, 'accounting documents of equivalent probative value' within the meaning of Regulation No 1260/1999 is to be understood as meaning documents proving payment which the Commission recognises and accepts in cases

where, on the basis of the tax and accounting provisions of the Member State concerned, it is not necessary to issue an invoice for money to be disbursed. There is no reason to suppose that those documents relate specifically to aid schemes and, even in the context of those schemes, receipted invoices can exist in respect of various payments.

42 Furthermore, as regards the fact that Article 32 of Regulation No 1260/1999 does not mention the individual recipients of the financing, the Commission submits that the Italian Government is unaware of the power conferred by Article 30 of that regulation on the Commission to adopt, if necessary, common rules on the eligibility of expenditure. It is not possible to infer from Regulation No 1260/1999 an exhaustive set of rules on the conditions of eligibility of that expenditure.

43 The Commission states that point 1.2 of Rule No 1 of the Annex to Regulation No 1685/2000 needs to be understood as requiring a demonstration of the actual use of the financing to carry out projects meeting the objectives for which the aid was granted. That condition can be checked effectively by the Commission only at the final stage of the use of the aid, namely the stage concerning the individual recipients of the financing as those carrying out various activities or operations on site.

— Findings of the Court

44 It is apparent from the 43rd recital in the preamble to Regulation No 1260/1999 that one of its objectives is to assure sound financial management by providing that expenditure is to be duly justified and certified.

45 To that end, the system introduced by Article 32 of Regulation No 1260/1999 and by Rule No 1 of the Annex to Regulation No 1685/2000 is based on the principle of reimbursement of expenses.

46 That implies that, as a rule, eligibility for a contribution from the Structural Funds of expenditure paid out by national bodies is conditional on submitting to the Commission proof of its use for the project financed by the European Union. Such proof can be provided by means of receipted invoices or, where that is not possible, by accounting documents of equivalent probative value.

47 It is only in the case of payment by the Commission, in the form of payment on account, of an amount of 7% of the contribution from the Structural Funds to the assistance in question, as laid down in Article 32(2) of Regulation No 1260/1999, that national authorities are not required to submit, at that early stage, documents justifying expenditure paid out.

48 Payments on account made by national bodies which do not exceed 7% of the contribution from those Funds may thus be granted without any requirement as regards proof of use. On the contrary, if, as in the present case, those payments on account exceed that amount their reimbursement by the Commission a posteriori will depend on completion of the formalities set out in paragraph 46 of the present judgment.

49 In the latter case, the payment to be made by the Commission will no longer be in the form of a payment on account but in the form of an interim payment or payment of the final balance, within the meaning of Article 32 of Regulation No 1260/1999, which thus requires submission of the documents proving the use of the sums in question.

50 The contested letter of 14 May 2003, according to which payments on account made by the Member States in relation to an aid scheme are not eligible for a contribution from the Structural Funds unless supporting documents are submitted, is thus consistent with Article 32 of Regulation No 1260/1999 and points 1 and 2 of Rule No 1 of the Annex to Regulation No 1685/2000.

51 The first plea raised by the Italian Republic is, therefore, unfounded and must be rejected.

The second plea alleging infringement of essential procedural requirements

— Arguments of the parties

52 According to the Italian Government, the contested letter of 14 May 2003 does not contain any form of reasoning justifying the position adopted on that occasion. The reasoning in that letter is insufficient and contradictory.

53 The Commission considers that that plea is without substance since the chronology of events set out in the contested letter of 14 May 2003 contains all the information necessary to understand the two views expressed by the Commission. Moreover, there is no contradiction in the fact that that letter confirms the rule of the ineligibility of payments on account whilst considering those made before 19 February 2003 to be eligible. Those two statements correspond respectively to the general rule and the exception.

— Findings of the Court

54 It is settled case-law that the statement of reasons required by Article 253 EC must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Community Court to exercise its power of review (see inter alia Case C-445/00 *Austria* v *Council* [2003] ECR I-8549, paragraph 49, and Case C-304/01 *Spain* v *Commission* [2004] ECR I-7655, paragraph 50).

55 That requirement must be appraised by reference to the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see Case C-17/99 *France* v *Commission* [2001] ECR I-2481, paragraph 36, and Case C-310/99 *Italy* v *Commission* [2002] ECR I-2289, paragraph 48).

56 In the light of that case-law, it is not apparent that the Commission failed to fulfil its obligation to give sufficient reasons in the contested letter of 14 May 2003.

57 In that letter the Commission indicated in a clear and unequivocal fashion the reasons which formed the basis of the reaffirmation of its position on the ineligibility

for a contribution from the Structural Funds of certain payments on account made by the Member States and of the decision to accept reimbursement of the payments on account granted up until 19 February 2003, namely:

— the absence of an agreement within the Committee with a view to amending Regulation No 1685/2000;

— protection of the legitimate expectations of the Member States.

58 It is thus necessary to reject as unfounded the plea alleging infringement of essential procedural requirements.

59 Since none of the pleas put forward by the Italian Republic can succeed, the action in Case C-324/03 must be dismissed in its entirety.

Case C-431/03

Admissibility of the action

60 The Commission pleads that the action in Case C-431/03 is inadmissible since it is identical to the action in Case C-324/03.

Arguments of the parties

61 According to the Commission, an action brought subsequently to another which is between the same parties, has the same purpose and is brought on the basis of the same submissions must be dismissed as inadmissible.

62 The Italian Government contends that the contested letters of 14 May and 29 July 2003, although clearly connected as regards their content and function, are formally distinct measures.

Findings of the Court

63 By its action the Italian Republic is seeking annulment of the contested letter of 29 July 2003 which replaced the contested letter of 14 May 2003 with effect from the day of its adoption.

64 According to settled case-law, an action brought subsequently to another which is between the same parties, is brought on the basis of the same submissions and seeks annulment of the same legal measure must be dismissed as inadmissible on the ground of lis pendens (see, in particular, Joined Cases 358/85 and 51/86 *France* v *Parliament* [1988] ECR 4821, paragraph 12).

65 In the circumstances of the present case, the action in Case C-431/03 is between the same parties and is based on the same submissions as the action in Case C-324/03.

66 Furthermore, as noted by the Advocate General in point 15 of her Opinion, it is apparent from the contested letter of 29 July 2003 that that letter was intended only to rectify certain translation errors in the contested letter of 14 May 2003, and that the earlier letter had not been revoked and had continued to produce legal effects since the date of its adoption. Moreover, the Italian Republic has not challenged that rectification as such.

67 The purpose of the present action is thus exactly the same as that of Case C-324/03, namely to annul the contested letter of 14 May 2003 in which the Commission admits, whilst reaffirming the ineligibility for a contribution from the Structural Funds of payments on account made by the bodies designated by the Member States, the eligibility of those payments on account where the final decision to grant the aid to the recipients concerned was adopted on 19 February 2003 at the latest.

68 The action in Case C-431/03 must accordingly be dismissed as inadmissible.

Costs

69 Under Article 69(6) of the Rules of Procedure, where a case does not proceed to judgment, the costs are at the discretion of the Court. In the present case, although the Court has held that it was not necessary to give judgment in Case C-138/03 due to the annulment by the Commission of the decisions whose revocation was requested by the Italian Republic, it must be borne in mind that that annulment occurred only after commencement of the action and thus involved unnecessary expenses for the applicant. It is therefore appropriate to order the Commission to pay the costs.

70 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. As the Commission has applied for costs against the Italian Republic in Cases C-324/03 and C-431/03 and the latter has been unsuccessful, the Italian Republic must be ordered to pay the costs.

On those grounds, the Court (First Chamber) hereby:

1. Declares it unnecessary to give judgment on the action in Case C-138/03;

2. Dismisses the action in Case C-324/03;

3. Dismisses the action in Case C-431/03 as inadmissible;

4. Orders the Commission of the European Communities to pay the costs relating to Case C-138/03;

5. Orders the Italian Republic to pay the costs relating to Cases C-324/03 and C-431/03.

[Signatures]