OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER

delivered on 12 January 2006 [1]

I — Introduction

1. In this appeal, the Regione Siciliana challenges the order of the Court of First Instance [2] dismissing as inadmissible the action for annulment brought against Commission Decision D (2002) 810439, [3] which withdrew financial assistance previously granted by the European Regional Development Fund (ERDF), on the ground that that decision was not of direct concern to the appellant for the purposes of the fourth paragraph of Article 230 EC.

2. In recent years, the Court of Justice has on a number of occasions [4] qualified its case-law on the criteria governing the standing to bring an action of the natural or legal persons referred to in the aforementioned provision. However, in those judgments, the Court interpreted *individual* concern to the applicant as being a condition of standing to challenge a Community legislative measure, whereas this case concerns the other condition necessary in that context, *direct influence* on the interests of the applicant.

3. In the light of that summary of the issues involved, it is surprising that, barely a month before the date set for the hearing of this appeal, and without awaiting the decision of the Court of Justice, the First Chamber (Extended Composition) of the Court of First Instance gave a judgment [5] diametrically opposed to the order under appeal in which it granted the application and ruled on the substance of a case between the same parties which likewise concerned the cancellation of assistance from the ERDF. [6] I shall refer to some of its arguments later, when

1 — Original language: Spanish.

2 — Order of 8 July 2004 in Case T-341/02 *Regione Siciliana* v *Commission* [2004] ECR II-2877.

3 — Decision of 5 September 2002 closing the financial assistance from the European Regional Development Fund (ERDF) for the Messina Palermo Motorway major project (ERDF No 93.05.03.001 — ARINCO No 93.IT 16.009).

4 — Judgment in Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677; judgment in Case C-263/02 P *Commission* v *Jégo-Quéré* [2004] ECR I-3425. The scope of the dispute cannot be fully appreciated without reading the Opinion of Advocate General Jacobs in both cases.

5 — Judgment in Case T-60/03 *Regione Siciliana* v *Commission* [2005] ECR II-4139.

6 — It is even more surprising given that the Court of First Instance has pending before it a number of cases concerning Commission decisions to cancel and recover assistance from the ERDF which have been challenged by the Regione Siciliana, in which cases the admissibility of the applications is also an issue (Cases T-363/03; T-414/03, T-392/03, T-408/03; T-414/03; and T-435/03).

considering the third ground of appeal raised. [7] To complete the picture of the legal dispute, mention should be made of a judgment of the Court of First Instance (Fifth Chamber) of 31 May 2005 in which, on the basis of very similar facts, the Court did not even rule on the admissibility of the application for annulment by the municipality concerned. [8]

4. I have on another occasion, [9] and in line with the thinking of other Advocates General, expressed my preference for a more generous interpretation of the fourth paragraph of Article 230 EC which goes beyond the terms in which it has repeatedly and very restrictively been defined by the Court of Justice.

II — Legislative framework

Regulation No 2052/88

5. The EC Treaty essentially contains two articles concerning regional policy: Article 158 EC, which requires the Community to develop and pursue its economic and social cohesion, advocating, in particular, the reduction of disparities between the levels of progress of the various regions and the backwardness of the least favoured regions in order to promote the overall harmonious development of the Community; and Article 159 EC, which states that the Community is to support those objectives through Structural Funds, in particular, the European Regional Development Fund (ERDF).

6. Council Regulation (EEC) No 2052/88 of 24 June 1988 on the tasks of those funds and their effectiveness and on coordination of their activities with the operations of the European Investment Bank and the other existing financial instruments, [10] and Council Regulation (EEC) No 4253/88 of 19 December 1988 laying down provisions for implementing Regulation (EEC) No 2052/88 [11] were adopted in order to achieve those objectives and regulate the tasks of the funds.

7. The first subparagraph of Article 4(1) of Regulation No 2052/88 sets out the principle

7 — Point 79 et seq.

8 — Judgment in Case T-272/02 *Comune di Napoli* v *Commission* [2005] ECR II-1849.

9 — Opinion delivered on 18 June 1996 in Joined Cases C-74/95 and C-129/95 *Criminal proceedings against X* [1996] ECR I-6609.

10 — OJ 1988 L 185, p. 9; amended by Council Regulation (EEC) No 2081/93 of 20 July 1993 (OJ 1993 L 193, p. 5), and by Council Regulation (EC) No 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds (OJ 1999 L 161, p. 1).

11 — OJ 1988 L 374, p. 1; amended by Council Regulation (EEC) No 2082/93 of 20 July 1993 (OJ 1993 L 193, p. 20).

of the complementarity of Community operations in this field. It also provides for close consultations between the Commission, the Member State concerned and the competent authorities and bodies designated by the latter at national, regional, local or other level, and commits all parties to a common goal.

Regulation No 4253/88, as amended

8. Pursuant to the principle of subsidiarity, and without prejudice to the Commission's powers, particularly its responsibility for the management of the Community's financial resources, the sixth recital in the preamble to the regulation that amended Regulation No 4253/88 confers responsibility for implementing the forms of assistance [contained in the Community support frameworks] on the Member States, at the appropriate territorial level according to the characteristics of their internal organisation.

9. Article 9(1) establishes the principle of 'additionality', [12] the purpose of which is to guarantee a genuine economic impact, since the appropriations from the Structural Funds may not replace public or comparable expenditure undertaken by the Member State in the whole of the territory eligible under an objective.

10. Article 23(1) provides:

'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

12 — The [Spanish] word 'adicionalidad' ('additionality'), from the word 'adición' ('addition'), does not appear in the *Diccionario de la Real Academia de la Lengua Española* but was used in the Spanish version of this regulation.

alternative for reimbursement of any sums unduly paid.

...'

11. Article 24 reads:

'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 ...'

III — Background to the appeal

A — *Summary of the facts of the case at first instance*

12. By decision of 22 December 1993 addressed to the Italian Republic, the Commission granted, for the 1994-1999 programming period, financial assistance payable from the ERDF of 50% of the eligible costs relating to the construction of the motorway between Palermo and Messina in Sicily, which constitutes a major project within the meaning of Article 16(2) of Regulation No 4253/88. The works were divided into 10 lots, and, as stated in the Annex to the decision, the Regione Siciliana was designated as the authority responsible for the project.

13. Following a number of incidents and copious correspondence between the Commission and the Italian authorities (a full account of which can be found in the order under appeal),[13] the Commission, having established that difficulties were being

13 — I refer to paragraphs 17 to 29 of the order, which contain a detailed summary of the facts.

encountered in completing the construction undertaken by the prescribed date, 31 December 1997, and that the appellant had failed to comply with its obligations, notified the Italian Republic, in a further decision of 5 September 2002, now contested, of its intention to withdraw the assistance, on the basis of expenditure implemented by 31 December 1997 in respect of works carried out by 5 September 2002.

14. In that decision, the Commission set out, firstly, the unspent balance to be withdrawn, that is to say the difference between the amount of ERDF financial assistance originally committed for the project and the amount corresponding to the total payments made by the ERDF, and, secondly, the amount to be recovered, calculated by subtracting from the latter amount the amount of the expenditure eligible to be charged to the ERDF on the closure date. The Commission also required the Italian Republic to inform the recipient of that decision by registered letter.

15. Against that background, the Regione Siciliana brought before the Court of First Instance of the European Communities an action for annulment based on four pleas in law. The first alleges lack of competence on the part of the body which signed the contested decision; the second alleges infringement and/or misapplication of Articles 24 and 25 of Regulation No 4253/88; the third alleges inconsistency in the conduct of the Commission and breach of the principle of the protection of legitimate expectations; and the fourth alleges failure to state reasons and failure to investigate.

B — *The order under appeal*

16. In accordance with Article 113 of its Rules of Procedure, the Court of First Instance considered, of its own motion, whether the Regione Siciliana had standing to bring an action. It took the view that it had been provided with sufficient information by the documents in the file, and therefore decided to dispense with the hearing of oral explanations from the parties.

17. After establishing that the Regione Siciliana was not the addressee of the measure, the Commission having addressed it to the Italian Republic, and after recognising the contested decision as being of individual concern to the appellant, [14] the Court confined its analysis to determining whether the decision was of direct concern to the appellant for the purposes of the fourth paragraph of Article 230 EC.

18. The Court of First Instance also reiterated the settled case-law in this area, [15] drawing particular attention to a number of decisions concerning the ERDF. [16]

14 — Paragraphs 50 to 52 of the order under appeal show that the Commission did not refute this point.

15 — Paragraphs 53 to 62

16 — Paragraphs 55, 58, 60 and 62, in particular.

19. As regards the facts at issue, the Court focused its line of argument on two essential points, namely disengagement of the ERDF from the unpaid sums and restitution of the sums unduly paid.

20. On the first point, it held that, under Article 21(5) of Regulation No 4253/88, Community appropriations granted by way of ERDF financial assistance are to be paid by the Commission to the Member State concerned; it supports that assertion by reference to a previous decision [17] and finds that the Regione Siciliana does not have the status of privileged applicant for the purposes of Article 230 EC. [18]

21. It also held that, given the complementary nature of the Community assistance and the principle of 'additionality', under which it is not possible to replace public expenditure undertaken by the Member State, there was nothing to prevent the Italian Republic from deciding to defray out of its own funds the withdrawn portion of the Community financing so as to finance the completion of the project.

22. As regards repayment of the sums unduly received, having noted that the contested decision differed from the practice followed in connection with State aid declared incompatible with the common market, in that it did not include any provision requiring the Italian Republic to recover those unduly paid sums, [19] the Court of First Instance found that the decision required only that those sums be refunded to the ERDF by the Italian Republic itself, [20] since reimbursement of the Community funds paid to the appellant was the direct consequence, not of the contested decision, but of the action taken by the Italian Republic in its national legislation in order to fulfil obligations under the Community rules on the subject. [21]

23. Although the appellant had made no reference to the purely theoretical nature of the discretion enjoyed by the Italian Republic, which fact, according to case-law, would have given it standing to bring an action, [22] the Court of First Instance took the view that it remained a possibility that that Member State might forgo recovery of the assistance at issue from the appellant or the final beneficiaries, [23] which thus ruled out that possibility. [24]

24. Lastly, the order under appeal did not take into account the submissions by the

17 — Judgment in Case C-271/01 *COPPI* [2004] ECR I-1029, paragraphs 37, 38 and 41.

18 — Paragraph 83 of the order under appeal.

19 — Paragraph 66.

20 — Paragraph 68.

21 — Paragraph 70.

22 — Judgment in Case C-386/96 P *Dreyfus* v *Commission* [1998] ECR I-2309, paragraph 43.

23 — Paragraph 79.

24 — Paragraph 82.

Regione Siciliana that it had maintained direct relations with the Commission, in the form of the submission of certain documents, and that its specific situation had been taken into consideration when the decision, now contested, was delivered. The first submission was rejected because the forwarding of such information had no direct effect on the legal situation of the appellant; the second was rejected because that circumstance would at best serve to prove that the decision was of individual concern to it.

25. Accordingly, the Court of First Instance declared the appeal inadmissible and ordered the appellant to pay the costs.

IV — The procedure before the Court of Justice and the forms of order sought by the parties

26. The appeal brought by the Regione Siciliana was lodged at the Court Registry on 29 September 2004, the Commission's response on 25 November 2004. Those documents were followed by the reply and the rejoinder respectively.

27. The hearing, attended by the representatives of both parties, was held on 15 November 2005.

28. The appellant claims that the Court of Justice should:

— Set aside the order of the Court of First Instance of 8 July 2004 in Case T-341/02; and, consequently,

— Take the appropriate measures to continue the proceedings and make an order as to costs.

29. The Commission claims that the Court of Justice should:

— Dismiss the appeal;

— Order the appellant to pay the costs.

V — Analysis of the grounds of appeal

30. The Regione Siciliana has raised four grounds of appeal. The first alleges infringement of Articles 113 and 114 of the Rules of

Procedure of the Court of First Instance; the second, infringement of the second paragraph of Article 230 EC; the third, infringement of Regulation No 2052/88 and Regulation No 4253/88; and the fourth, that the order does not state the reasons on which it is based.

31. For logical and legal reasons, I shall examine the first two grounds in reverse order, since recognition that the appellant is a privileged applicant for the purposes of the second paragraph of Article 230 EC or the addressee of a decision under the fourth paragraph of that article would make the complaint that Articles 113 and 114 have been infringed redundant, in so far as it relates, mainly, to whether the appellant is directly concerned by the contested decision.

A — *Second ground of appeal: infringement of the second paragraph of Article 230 EC and infringement of the rights of defence*

32. The Regione Siciliana criticises the fact that, in the contested order, it was regarded as being a body separate from and independent of the Italian Republic. It takes the view that that classification is unjustified, since the region acted as a territory forming an integral part of that State and was the real recipient of the financial assistance.

33. Furthermore, it takes the view that, in the context of ERDF funds, Member States act only as mediators, the beneficiary of the Community subsidy being identified as soon as it is granted. The view that the decision to withdraw the assistance was addressed to the Member State is based on an excessively formalistic interpretation of the situation.

34. The Commission submits that this ground of appeal is unfounded. Firstly, it refers in this regard to the case-law of the Court of Justice, according to which the second paragraph of Article 230 EC concerns only the governmental authorities of the Member States, and cannot be extended to a different kind of sub-State regional or local authority. Secondly, it does not share the view that the Regione Siciliana is the addressee of the contested decision, since the arguments put forward have to do with the proposition not that the appellant is directly concerned by the decision but that it is individually concerned by it.

1. Outline of the case-law of the Court of Justice on the standing to bring an action of sub-State bodies

35. In the absence of an express definition of 'State' in the Treaties, that term should be

interpreted, according to some legal commentators, as referring to subjects of international law recognised as having the capacity to sign and ratify agreements between States who form an organisation having independent power on a territorial basis. [25] In contrast, other authors infer from the case-law of the Court of Justice that the term 'State' encompasses a collection of authorities and tasks. [26]

36. However, those scientific definitions add little to the debate on the meaning of the word in the second paragraph of Article 230 EC, as they do not provide a satisfactory answer to the question of the scope of its meaning in that context.

37. The paucity of rulings in this regard suggests that the Court of Justice has not in fact yet established a clear definition, there being only two orders [27] in which it declared the actions for annulment brought by the Région Wallonne [28] and the Regione Toscana respectively to be manifestly inadmissible. [29]

25 — M. Pérez González, 'La subjetividad internacional', in M. Díez de Velasco, *Instituciones de Derecho Internacional Público*, 13th edition, published by Tecnos, Madrid, 2001, p. 219.

26 — M. Hecquard-Theron, 'La notion d'État en droit communautaire', *Revue trimestrielle de droit européen*, No 26 (4), October-December 1990, p. 693 et seq.

27 — With regard to Gibraltar, see the Opinion of Advocate General Lenz in Case C-298/89 *Government of Gibraltar* v *Council* [1993] ECR I-3605, in particular 3621 et seq.

28 — Order in Case C-95/97 *Région Wallonne* v *Commission* [1997] ECR I-1787, paragraph 6.

29 — Order in Case C-180/97 *Regione Toscana* v *Commission* [1997] ECR I-5245, paragraph 6.

The wording of both orders is, however, identical, and reads as follows:

'... it is clear from the general scheme of the Treaties that the term Member State, for the purposes of the institutional provisions and, *in particular, those relating to proceedings before the courts*, refers only to government authorities of the Member States of the European Communities and cannot include the governments of regions or of autonomous communities, irrespective of the powers they may have.'

38. It could be objected that there is still no formal judgment to support that case-law, but such procedural rigour seems unconvincing given that pleas of inadmissibility, and in particular manifest inadmissibility, are usually disposed of by way of an order, in accordance with Article 92(1) of the Rules of Procedure of the Court of Justice, and that the same is true of questions referred for a preliminary ruling, 'where the answer admits of no reasonable doubt', in accordance with Article 104(3) of those Rules. An approach consistent with the procedure followed by the Court of Justice therefore lends weight to the authority of those two orders.

39. Furthermore, express reference is made to both orders in a judgment of the Court of Justice in which, without citing the text itself, the Court confirmed that the second and third paragraphs of Article 230 EC cannot be applied by analogy to the regions. [30]

40. It could also be pointed out that, notwithstanding its findings in the orders referred to, in matters other than direct actions, the Court of Justice has on many occasions readily widened the scope of the word *State*. It considered that term to include any body, whatever its legal form, which has been made responsible for providing a public service and has for that purpose special powers beyond those which result from the rules applicable in relations between individuals. [31] This, in the case in question, made it possible to rely upon a directive that had not been transposed into national law as against a public undertaking that had previously been privatised.

41. The flexibility of the term State in the eyes of the Court of Justice can also be seen in its handling of cases involving failures to fulfil obligations: it has, for example, found the Kingdom of Spain to be responsible for failing to fulfil its obligations in cases where those failures were in fact attributable to local and regional bodies (*Santoña marshes,* [32] *Ambient air quality* [33] and *Magefesa Aid II* cases). [34] Within the European context, therefore, whenever a sub-State regional or local authority overlooks its obligations under Community law, it is the Member State in which that authority is located which is held liable.

42. Following that loose definition of 'State', the Court of Justice has likewise not hesitated in restricting the meaning of 'public authority', admittedly not entirely comparable with that of 'State', in the application of Article 39(4) EC, having held employment in the public service to mean all [posts] 'which involve direct or indirect participation in the exercise of powers conferred by public law and in the discharge of functions whose purpose is to safeguard the general interests of the State *or of other public authorities*'; [35] such public authorities include sub-State bodies, in particular local and regional bodies. [36]

30 — Judgment in Case C-452/98 *Nederlandse Antillen* v *Council* [2001] ECR I-8973, paragraph 50.

31 — Judgment in Case C-188/89 *Foster and Others* [1990] ECR I-3313, paragraphs 17 to 20; in paragraph 19, the Court pointed out that it had previously held that provisions of a directive could be relied on against: the tax authorities (judgment in Case 8/81 *Becker* [1982] ECR 53, paragraphs 23 to 25); local authorities (judgment in Case 103/88 *Fratelli Costanzo* [1989] ECR 1839); constitutionally independent authorities responsible for the maintenance of public order and safety (judgment in Case 222/84 *Johnston* [1986] ECR 1651); and public authorities providing public health services (judgment in Case 152/84 *Marshall* [1986] ECR 723).

32 — Judgment in Case C-355/90 *Commission* v *Spain* [1993] ECR I-4221.

33 — Judgment in Case C-417/99 *Commission* v *Spain* [2001] ECR I-6015.

34 — Judgment in Case C-499/99 *Commission* v *Spain* [2002] ECR I-6031.

35 — Judgment in Case 66/85 *Lawrie Blum* [1986] ECR 2121, paragraph 27.

36 — M. Sobrido Prieto, *Las comunidades autónomas ante el Tribunal de Justicia y el Tribunal de Primera Instancia de las Comunidades Europeas*, Tirant monografías, Valencia, 2003, p. 45.

43. In short, the Court has followed a variable geometry approach,[37] which changes according to the field under consideration and exhibits the pragmatism employed to secure the effectiveness of Community law, in order thus to satisfy the desire for integration[38] inherent in the Treaty.

44. However, the flexibility adopted by the Court of Justice, in certain contexts, in interpreting the word *State* has not extended to the review of legality, since such flexibility is not consistent with the provisions aimed at ensuring observance of the distribution of powers within the Community, as the Court held in the orders in *Région Wallonne* and *Regione Toscana*:

'If the contrary were true [if sub-State bodies had standing to bring an action of their own right], it would undermine the institutional balance provided for by the Treaties, which govern the conditions under which the Member States, that is to say the States party to the Treaties establishing the Communities and the Accession Treaties, participate in the functioning of the Community institutions. It is not possible for the European Communities to comprise a greater number of Member States than the number of States between which they were established.'

45. The idea of using the method of interpretation employed to ensure the effectiveness of Community law having therefore been rejected, it remains only to ascertain whether the development of the process of European integration has upset the institutional balance to such an extent as to call into question the statement contained in the preceding point.

2. Brief summary of the development of the role of sub-State bodies in the context of European integration

46. Nothing better sums up the neglect suffered by local authorities and regional bodies at the inception of European integration than the phrase coined by a German professor who described that process as being 'blind to the distribution of competences within the Member States' ('Länder-Blindheit' — Länder blindness[39]); he was criticising the absence of any reference to the regions in the Treaties.

47. The first political recognition of the region came within the Council of Europe in 1961, when it gave permanent status to the Conference of Local Authorities of

37 — C. Haguenau, *L'application effective du droit communautaire en droit interne; analyse comparative des problèmes rencontrés en droit français, anglais et allemand*, Bruylant, Éditions de l'Université de Bruxelles, Brussels, 1995, p. 196.

38 — M. Sobrido Prieto, op. cit., p. 52.

39 — H.P. Ipsen, 'Als Bundesstaat in der Gemeinschaft', in *Probleme des Europäischen Rechts. Festschrift für Walter Hallstein zu seinem 65. Geburtstag*, 1966, pp. 228 et seq.

Europe. The Charter of that conference was amended in 1975 to include the region as a political entity. Its working sessions led to the Charter of Local Self-Government [40] and the Charter of Regional Self-Government. [41]

48. At least equal attention should go to the Assembly of European Regions, [42] the purpose of which, under Chapter I, Article 1(3) of its Statute, is '[t]o promote the institutional participation of the Regions in decision making processes and in order to do this increase their active role in the construction of Europe, especially in the work of the Council of Europe, of the Organisation for Security and Cooperation in Europe and of the European Union'.

49. At Community level, the starting point is the creation of the Consultative Council of Regional and Local Authorities by Decision 88/487/EEC, [43] in the preamble to which the Commission, considering it necessary for those authorities to be more closely involved in the formulation and implementation of Community regional policy, which includes the implications of the other Community policies, set up a body to represent decision-making at the sub-State levels which would have only consultative powers [44] and would meet only when convened by the Commission itself. [45]

50. For all its limitations, the emergence of this new body turned out to be crucial, as it sowed the seed that grew into the Committee of the Regions, established in the Maastricht Treaty. [46] However, despite the further successive advances made in the Treaty of Amsterdam [47] and in the Treaty of Nice, [48] the Committee of the Regions has not been able to move beyond the threshold of being an advisory body.

51. As regards standing to seek review as to the legality of Community acts, it should be pointed out that, on the number of occasions when the EC Treaty has been revised, the Committee of the Regions has always argued

40 — Approved on 15 October 1985, in force since 9 September 1988.

41 — Adopted unanimously on 5 June 1997.

42 — Founded on 15 June 1985, headquarters in Strasbourg.

43 — Commission Decision of 24 June 1988 (OJ 1988 L 247, p. 23).

44 — Article 2 of Decision 88/487/EEC.

45 — Article 7(1) of that decision.

46 — Articles 198a to 198c of the EC Treaty (now, after amendment, Articles 263 EC to 265 EC).

47 — The achievements in Amsterdam consisted mainly in the ability of the Committee of the Regions to adopt its Rules of Procedure (second paragraph of Article 264 EC); an increase in the number of areas in which consultation is mandatory (for example, Articles 71 EC, 128 EC, 137 EC and 175 EC); the right to issue opinions on its own initiative (fifth paragraph of Article 265 EC); and the right of the European Parliament to seek its opinion (fourth paragraph of Article 265 EC).

48 — There were two main amendments introduced by this Treaty: the requirement that members of the Committee must have an electoral mandate in a regional or local authority, their status as members lapsing when that mandate comes to an end; and the restriction of the number of members to 350 (Article 263 EC).

for [49] privileged status in annulment proceedings, both for itself and for regions with legislative powers, having proposed amendments to the third paragraph of Article 173 of the EC Treaty (now Article 230 EC). [50]

52. Those aspirations were in part realised in the Treaty establishing a Constitution for Europe, as far as safeguarding the Committee's prerogatives is concerned, [51] although the status of the regions in annulment proceedings remained unchanged. However, even if that text enters into force, the fact remains that there is at present a lack of will on the part of the legislature to open the way for the wishes of the Committee. As Shakespeare wrote, 'there is no power in Venice can alter a decree established: 'twill be recorded for a precedent, and many an error by the same example will rush into the state'. [52]

3. Dismissal of the ground of appeal

53. It is apparent from the foregoing not only that there has been no development such as to justify a shift in the institutional balance referred to in the orders in *Région Wallonne* and *Regione Toscana*, but also that any amendments made to that end have been a total failure. There is therefore no real reason to amend the case-law.

54. Furthermore, acceptance of the proposition, as put forward by the appellant, that a region is capable of being regarded as a 'State' for the purposes of the second paragraph of Article 230 EC would not open up the way for the region in this regard, since a whole cannot be represented by a part. What is more, as an integral part of the whole, a region has means of securing understanding and cooperation with the national government in political and admin-

49 — Opinion of the Committee of the Regions on the revision of the Treaty of the European Union and the Treaty establishing the European Community (Rapporteur: Mr Pujol i Soley) CdR 136/95 (OJ 1996 C 100, p. 1). Also, the Resolution of the Committee of the Regions on the next Intergovernmental Conference (IGC), CdR 54/99 FIN. (OJ 1999 C 293, p. 74).

50 — It argued that the Court of Justice should have jurisdiction 'under the same conditions on actions brought by the European Parliament, the European Central Bank and the Committee of the Regions for the purpose of protecting their prerogatives', 'in actions brought by the Committee of the Regions against violation of the principle of subsidiarity' and 'in actions brought by the regions whose legislative powers may be affected by a regulation, directive or decision'.

51 — Article III-365(3) of the Constitutional Treaty.

52 — W. Shakespeare, *The Merchant of Venice*: reply by Portia, passing herself off as a young lawyer from Rome, to Shylock's demand for enforcement of the penalty provided for in a loan on the ground that the three thousand ducats owed have not been repaid by the due date; the penalty is that the borrower should surrender a pound of flesh cut from his chest. Shylock refuses to show any form of mercy. Bassanio begs Shylock to overlook the literal meaning of the terms of the bond so as to avoid the cruelty involved in its enforcement. The work is tinged with deeply anti-Semitic sentiment, reflecting the time at which it was written, late-Sixteenth-century England.

istrative matters which may enable it to elicit from the national government the desired reaction of opposing the Community measure before the Court of Justice; this possibility is, in general, barred to citizens.

55. Consequently, without considering the alleged infringement of the rights of defence of the appellant, no evidence or proper explanation of which has been furnished in the appeal, the second ground must be dismissed, no infringement of the second paragraph of Article 230 EC having been found in the order under appeal.

B — *The first ground of appeal: infringement of Articles 113 and 114 of the Rules of Procedure of the Court of First Instance, failure to state reasons and infringement of the rights of defence*

56. Under this ground, the appellant essentially challenges the conduct of the Court of First Instance in having considered of its own motion the plea as to the inadmissibility of the action for annulment without hearing the parties involved, thereby preventing it from raising a defence.

57. First and foremost, it is appropriate to point out that Article 113 of its Rules of Procedure allows the Court of First Instance at any time and of its own motion to consider whether there exists any absolute bar to proceeding with an action, and refers to Article 114(3) and (4) as regards the remainder of such proceedings. Paragraph (3) provides that the remainder of the proceedings are to be oral, *unless the Court of First Instance otherwise decides.*

58. It is clear from paragraph 49 of the order under appeal that the Court based its decision on the adequate information provided by the documents in the file. Furthermore, paragraphs 42 to 46 show that it took account of the arguments put forward by the appellant in connection with the admissibility of the application for annulment. The plea alleging infringement of the rights of defence must therefore be regarded as unfounded.

59. The argument relating to failure to state reasons does not seem acceptable either, since, as the Commission points out in its response, the Court of First Instance examined at great length the standing of the Regione Siciliana to bring an action in paragraphs 50 to 86.

60. Lastly, the complaint that the Commission did not submit its plea of inadmissibility by separate document, contrary to Article 114(1) of the Rules of Procedure, is to be regarded as redundant, since the Court of First Instance upheld the plea of inadmissibility on the basis of Article 113 of the Rules of Procedure.

61. Consequently, since the foregoing does not indicate any infringement of Articles 113 and 114 of the Rules of Procedure of the Court of First Instance, the first ground is manifestly unfounded.

C — *The third ground of appeal: infringement of the first subparagraph of Article 4(1) of Regulation No 2052/88 and Article 9(1) of Regulation No 4253/88*

62. Before I commence my analysis of this ground of appeal, I should draw attention to its true substance, since it seeks to prove the error of the Court of First Instance in the order under appeal in having failed to recognise that the decision to cancel the ERDF assistance, the subject-matter of the action, was of direct concern to the Regione Siciliana. From this point, my approach will therefore be informed by the true purpose pursued by the appellant.

63. It should be noted that the dispute was never concerned with whether the Regione Siciliana is individually concerned by the Commission's decision, since both parties were in agreement on that point.

64. The Regione Siciliana has put forward two arguments under this ground of appeal. The first is that the system created by the structural funds is based on the principles of subsidiarity and partnership, providing as it does for the involvement of regional institutions. Consequently, any decision to withdraw financial assistance planned in that context has direct legal effects on the region concerned. The second relates to the refusal by the Court of First Instance to recognise those effects, on the ground that the Italian Republic was able to finance the works remaining until the project was completed without claiming reimbursement from the Regione Siciliana. The appellant regards this view as contrary to the principles of complementarity and additionality. Moreover, in its reply, the Regione Siciliana points out that the Italian State has asked it to pay EUR 58 036 177 by way of reimbursement of the assistance.

1. Standing to bring an action resulting from the partnership between the regional bodies and the Commission

65. Article 4(1) of Regulation No 2052/88, which lays down the principle of complementarity, provides for close consultations between the Commission, the Member State concerned and the authorities or bodies designated by the latter in order to give effect to the Community operation in each case. Under Article 24 of Regulation No 4253/88, the Commission may ask the authorities so designated to submit comments where it has doubts regarding the assistance originally allocated.

66. Viewed in conjunction with the principle of subsidiarity, the submission of such comments prompts the appellant to regard the position of the sub-State bodies selected by the Member State to take part in the consultations prior to approval of any Community operation within the framework of the ERDF as being comparable with that of exporting undertakings which challenge an anti-dumping regulation after having cooperated in the investigations carried out by the Commission; [53] that of undertakings which challenge a decision authorising State aid after having participated in some way in the procedure under Article 88 EC; [54] and that of undertakings which have complained of the anti-competitive conduct of their competitors on the market. [55]

67. While it is not denied that such assertions are appropriate, they must be qualified to ensure that the case-law of the Court of Justice is not distorted.

68. First, with regard to anti-dumping law, the reason the Court of Justice conferred standing to bring an action on the exporters concerned, which had assisted the Commission in its investigations, was that, in that field, the Community can legislate only by means of regulations, [56] which fact, in principle, precluded direct actions by individuals. [57] Furthermore, it should be noted that that case, unlike this one, concerned regulations, not decisions.

69. Secondly, in the field of State aid, the extent of the right to challenge Commission decisions varies depending on whether it accrued during the preliminary procedure, pursuant to Article 88(2) EC, or during the main procedure, pursuant to Article 88(3) EC. In the latter case, the right of undertakings to be heard gives them standing to bring an action even if they have not exercised that right, and they are not restricted by any comments submitted under Article 88(2) EC. [58] Regulation No 659/1999 [59] consolidated a number of procedural guarantees enjoyed by those who take part in those procedures, [60] although these do not exempt them from the requirement to demonstrate the damage to their interests. [61]

53 — In accordance with the rule set out in the judgment in Joined Cases 239/82 and 275/82 *Allied Corporation and Others* v *Commission* [1984] ECR 1005.

54 — In accordance with the judgments in Case 169/84 *Cofaz* v *Commission* [1986] ECR 391; and Case C-70/97 P *Kruidvat* v *Commission* [1998] ECR I-7183.

55 — In line with the judgments in Case 26/76 *Metro* v *Commission* [1977] ECR 1875 ('*Metro I*'); Case 210/81 *Demo-Studio Schmidt* [1983] ECR 3045; and Case 75/84 *Metro* v *Commission* [1986] ECR 3021 ('*Metro II*').

56 — Article 14(1) of Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community (OJ 1996 L 56, p. 1).

57 — C. Gaitanides, 'Artikel 230', in Von der Groeben/Schwarze, *Vertrag über die Europäische Union und Vertrag zur Gründung der Europäischen Gemeinschaft — Kommentar*, 6th Edition, Nomos, Baden-Baden, 2004, Volume 4, pp. 481-482. Judgment in Case 53/83 *Allied Corporation and Others* v *Council* [1985] ECR 1621.

58 — C. Gaitanides, op. cit., p. 491.

59 — Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty [now Article 88 EC] (OJ 1999 L 83, p. 1).

60 — For example, in Article 1(h).

61 — J. Schwarze, 'Artikel 230', in *EU-Kommentar*, Nomos, Baden-Baden, 2000, paragraph 43.

70. Finally, the reference made by the Regione Siciliana to previous decisions in the field of competition law merits a comment which will in turn lead to a further, more significant, comment. Thus, when, in the aforementioned judgment in *Metro I*, the Court conferred standing to bring an action on an undertaking which had applied to the Commission for a decision pursuant to Article 3(2)(b) of Regulation No 17/62,[62] which application the Commission refused, it did so on the basis of the need to ensure effective judicial protection,[63] since, in principle, the undertaking did not have standing to challenge such a refusal.

71. It is no coincidence that, in this context, the expression *effective judicial protection* calls to mind the judgment in *Jégo-Quéré*, since all the decisions referred to by the Regione Siciliana in support of its position have something in common with that well-known case and are concerned with the requirement that an action may be brought only by a person who is individually concerned by a decision. However, I have already pointed out that, in this case, nobody questioned the existence of such concern, which was therefore presumed proved.

72. Consequently, the appellant's claim that its cooperation in the procedure for the award of Community assistance gave it the same rights as economic operators in the situations and fields referred to (competition, State aid and anti-dumping measures) is of no consequence, since those rights serve essentially to obviate the requirement to demonstrate individual concern, which, in this case, had to be regarded as proved, since it had at no stage been contested.

2. The error of law committed in finding that the Italian Republic could bear the cost of completing the project

73. In contrast to the case-law regarding individual concern in relation to a Community measure, that regarding direct concern has been more limited, a fact probably due to the method employed by the Court of Justice, which, logically, dispenses with an examination of the second requirement once it has established that the contested measure is not in the nature of a decision, or is not of individual concern to the applicant because the latter cannot be treated in the same way as the addressee.[64] It is no surprise, therefore, that the case-law in this field does not contain a formula such as that in the order in *Plaumann*[65] to establish whether the requirement of individual concern is satis-

62 — Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty [now Articles 81 and 82 EC] (OJ, English Special Edition 1959-1962, p. 87).

63 — Paragraph 13 of the judgment, cited above.

64 — M. Ortega, *El acceso de los particulares a la justicia comunitaria*, Ariel, Barcelona, 1999, p. 54.

65 — Order in Case 25/62 [1963] ECR 123.

fied, although this does not mean that there are insufficient precedents from which to infer the basic principles which the Court of Justice has consolidated with regard to the direct impact of the contested decision on the legal position of the applicant.

74. Thus, in the judgment in *Toepfer I*, [66] the Court interpreted for the first time the expression 'of direct ... concern', recognising as having standing to bring an action third parties who were not the addressees of a Community measure, provided that the latter confirms measures adopted previously by the Member State concerned. Since no national implementing measure was required, the effect of the Community measure on the individuals concerned was as direct as that of the national provisions which the Community regulation replaced.

75. In other, later decisions, the Court has treated cases in which a measure adopted by a Member State is subject to criteria previously established by the Council or the Commission, [67] and is thus purely automatic [68] or non-discretionary, [69] in the same way as cases in which domestic legislation is not needed.

76. Consequently, except for cases of technical implementation [70] by the Member State, where it is given discretion in complying with the Community measure in its territory, that measure can have no legal effect on the interests of the applicant, [71] since that influence occurs only through transposition in the Member State by the corresponding national measure. [72] In short, the interposition of an autonomous will between the decision and its effects on the applicant precludes the latter from being directly concerned. [73] The only limitation on that principle relates to circumstances in which the power granted to the Member State to implement the Community measure becomes theoretical, that is to say where there can be no doubt as to the intention of the national authorities involved to make use of that measure. [74]

77. In these proceedings, it is clear from the order under appeal that the decision was addressed to the Italian State and contained no instruction having a direct impact on the position of the Regione Siciliana, whether by restricting the discretion of the Italian Republic or by reducing the exercise of such power to a mere possibility unlikely to be realised. Nor is there any indication that the Commission had laid down any criterion

66 — Judgment in Joined Cases 106/63 and 107/63 *Toepfer and Getreide-Import* v *Commission* [1965] ECR 405.

67 — Judgment in Joined Cases 41/70 to 44/70 *International Fruit Company and Others* v *Commission* [1971] ECR 411.

68 — Opinion of Advocate General Warner in Case 100/74 *CAM* v *Commission* [1975] ECR 1393.

69 — Judgment in Case 69/69 *Alcan* v *Commission* [1970] ECR 385.

70 — Term used by Barav, A., 'Direct and individual concern: An almost insurmountable barrier to the admissibility of individual appeal to the EEC Court', *Community Market Law Review*, 1974, pp. 191-193.

71 — Judgment in Joined Cases 10/68 and 18/68 *Eridania* v *Commission* [1969] ECR 459.

72 — Judgments in Case 96/71 *Haegeman* v *Commission* [1972] ECR 1005, paragraphs 5 to 8; Case 92/78 *Simmenthal* v *Commission* [1979] ECR 777, paragraphs 27 et seq.; and Case 222/83 *Municipality of Differdange and Others* v *Commission* [1984] ECR 2889, paragraph 12.

73 — T.C. Hartley, *The Foundations of EEC Law*, Clarendon, Oxford, 1994, p. 360.

74 — Judgment in Case 11/82 *Piraiki-Patraiki* v *Commission* [1985] ECR 207, paragraph 9.

with which the Regione Siciliana had to comply, either under that Community measure or prior to it, or that the Commission knew or could have known beforehand the intention of the Italian authorities in that respect.

78. In those circumstances, the Court of First Instance had no evidence on which to predict the future conduct of the State and the appellant did not adduce sufficient evidence to lend certainty to how the Italian Republic would respond to the withdrawal of the ERDF assistance which it had received. Had the Court of First Instance assumed that it was likely that the Italian State would adopt a specific national measure, its analysis would have been based on mere conjecture, in the absence of other evidence. In this regard, the note of 30 October 2002 which, in its reply, the Regione Siciliana adduced as evidence that the Italian State was planning to recover the amounts unduly obtained by that region must be regarded as inadmissible, since, as the Commission correctly points out, the Court of Justice does not allow new factual evidence to be adduced in the context of an appeal. [75]

79. It could be argued that the decision contested at first instance automatically affects the appellant, on the one hand, by changing its financial situation, in so far as it is deprived of the balance of the assistance, and, on the other hand, by making it the debtor in respect of that amount, after having had the status of creditor until the contested measure was adopted; it should also be pointed out in this regard that any measure adopted by the Member State to implement the Community measure would constitute the second change in the financial situation of the Regione Siciliana, which would be the result exclusively of the national decision. [76]

80. However, that argument, which at first sight is not entirely unattractive, is too reductionist. By examining only the nature of the measure adopted by the Commission, [77] it disregards the need for that measure to be interpreted holistically on account of the complex structure of the relationships involved in the management of the structural funds.

81. When the complexities of that structure are unravelled, however, it becomes apparent that the function of the Member State is more significant than the appellant claims. Although there is no need to set out in extenso the legislation governing the ERDF, a detailed analysis of its basic and implementing regulations shows that the central Governments are more involved. They certainly should not be classified as a mere

75 — Judgment in Case C-199/92 P *Hüls v Commission* [1999] ECR I-4287.

76 — Judgment of the Court of First Instance in Case T-60/03, cited above, paragraphs 52 to 60.

77 — In paragraph 65 of the judgment referred to in the preceding footnote, the Court of First Instance justified its position by reference to the judgment of the Court of Justice in Case 60/81 *IBM v Commission* [1981] ECR 2639, paragraph 9.

'mailbox' from which the authorities designated for each project retrieve their mail from the Commission.

82. To begin with, the very substance of the structural funds shows that they are complementary, [78] which emphasises the predominant role played by the State and the broad discretion it enjoys not only in selecting the beneficiaries, but also in drawing up the programmes which it wishes to subsidise. [79] It is therefore only right that it should be responsible for implementing the forms of assistance contained in the Community frameworks, as the sixth recital in the preamble to Regulation No 2082/93 provides. Viewed in that light, the position of the central authorities takes on quite different proportions from the secondary role to which the Regione Siciliana would like to relegate them.

83. In the context of that bundle of powers enjoyed by the Member State, [80] a Commission decision such as that at issue here can be seen for what it really is, which is not the case if it is considered in isolation, since this new perspective makes possible a better understanding of the margin for manoeuvre left to the country managing the ERDF assistance, with which the decision whether or not to continue the works, when the Commission withdraws its support, is ultimately made to rest.

84. It is therefore for the Government concerned to determine the future of what is really its own project. It has several options: it can, for example, abandon the project, suspend it or transfer it; on the other hand, it can defray the financial cost out of its own budgets in order to ensure that the project is completed. Although the disadvantages of the credit's being withdrawn are many and painful, by ordering the cancellation of the balance, the Commission does not prejudge, pre-empt or recommend the direction which the Member State must take in determining the future of its plans for territorial development.

85. For the foregoing reasons, the Regione Siciliana is affected only by the solution adopted by the Government of the country of which it forms a part, which thus has a sovereign and sufficiently broad discretion, so that it is its will which determines the real effects on the region.

86. It therefore seems clear that any concern to the appellant depends on the action taken by the Member State in the light of the new situation created by withdrawal of the ERDF-funded support. The withdrawal of that support generates a potential impact which becomes an immediate and inevitable (rather

78 — Twentieth recital in the preamble to, and Article 4 of, Regulation No 2052/88, as amended by Regulation No 2081/93.

79 — I refer to the relevant articles, for example: Article 5(1) and (2), fourth subparagraph; Article 8(1); Article 9(1) and (2); Article 10(1); and Article 14 of Regulation No 4253/88, as amended.

80 — In addition to others of equal importance, set out in Articles 19 to 26 of Regulation No 4253/88, as amended.

than merely possible) loss only if the Government requires it to repay the amounts unduly obtained by way of Community assistance.

87. I think it is appropriate to rely on the idea of damage favoured by legal commentators, [81] inasmuch as the mere potential for it to arise cannot entitle a person to claim that he is directly concerned for the purposes of the fourth paragraph of Article 230 EC. In this case, if the legal position of the appellant were recognised as having changed, that change would amount to no more than a risk, as the facts have ably shown, the Regione Siciliana having stated at the hearing in this appeal that construction of the motorway was completed from the resources of the publicly-owned undertaking ANAS, which specialises in communication routes of this kind.

88. Similarly, the change in the legal position of the appellant, from creditor to debtor, [82] and even the change in the source of its financing have only a formal effect on that position, since its real interest, the financing, was never actually and inevitably damaged.

89. Consequently, in accordance with the case-law referred to, there is no indication of any error of law on the part of the Court of First Instance; nor do the particular features of this case call for a change in that case-law, because they are perfectly consistent with the position which the Court of Justice has adopted to date. This case likewise does not raise any issues as significant as the alleged infringement of the appellant's rights of defence, unlike the aforementioned *Unión de Pequeños Agricultores* and *Jégo-Quéré* cases. [83]

90. For all the foregoing reasons, I propose that the third ground of appeal be dismissed as unfounded.

D — *The fourth ground of appeal: failure to state reasons in relation to the power of the Italian State not to seek repayment of the assistance and in relation to the binding legal force of the correspondence with the Commission*

91. Under the first part of this ground of appeal, the appellant rejects the finding by the Court of First Instance that the Member State retained the power to enforce the contested decision in relation to the bene-

81 — A.G. Toth, *Legal Protection of Individuals in the European Communities*, North-Holland, Amsterdam, 1978, Volume II, p. 64.

82 — As the Court of First Instance held in the judgment in Case T-60/03 *Regione Siciliana* v *Commission* [2005] ECR II-4139, paragraphs 53 and 54, cited above.

83 — In footnote 4 above. The Regione Siciliana has standing to challenge before the national courts the measure of enforcement adopted by the Italian State pursuant to the contested decision.

ficiaries of the assistance initially granted by the Commission and payable from the ERDF, describing it as inconsistent and arbitrary because based on an insufficient examination of the facts and on presumptions for which there is no supporting evidence.

92. In this regard, it is sufficient to point out that, in paragraphs 71 to 79 of the order under appeal, the Court of First Instance considered in detail whether the Italian Republic had any discretion with respect to recovery of the funds which the Commission had claimed from it. The Court of First Instance set out the applicable legislation, [84] invoked the relevant case-law, [85] assessed the evidence logically, and concluded that the contested decision did not require the Italian Republic to recover from the applicant or from the final beneficiaries the amounts unduly paid. [86]

93. It is true that the Court of First Instance did not accept the solution advocated by the Regione Siciliana, but that disparity does not render inconsistent or arbitrary the order under appeal, which, furthermore, clearly sets out the reasons on which it is based, and it is therefore appropriate to dismiss this part of the ground of appeal under consideration as manifestly unfounded.

94. Under the second part of this complaint, the appellant argues that, in paragraph 84 of the order, the Court of First Instance finds that the correspondence with the Commission is not such as to mean that the Regione Siciliana is directly concerned. In its submission, there is no other discernible reason for that exchange of correspondence, by which the Commission asked the Italian State to notify the Regione Siciliana of the decision terminating the assistance in order to facilitate its access to the legal remedies provided for under the law of the Union. Accordingly, it takes the view that the aforementioned paragraph of the order under appeal is contradictory and illogical.

95. On the one hand, in its case-law, the Court of Justice has held that a mere exchange of correspondence with the Commission is not sufficient to establish individual concern. [87]

96. On the other hand, the Commission's concern to keep the Regione Siciliana informed of the project which it was co-financing must be understood as an expression of the close 'partnership' between the Commission itself, the Member States and the authorities designated by the latter, as referred to in the first subparagraph of Article 4(1) of Regulation No 2052/88. Moreover, that concern reflects, in this context, the spirit of transparency which should prevail in relations between well-managed public bodies and the people they administer.

84 — For example, the sixth recital in the preamble to Regulation No 2082/93 (paragraph 72 of the order under appeal).

85 — In particular the judgment in Case 11/76 *Netherlands* v *Commission* [1979] ECR 245.

86 — In particular, paragraphs 74 and 76 of the order under appeal.

87 — Judgment in Case C-321/95 P *Greenpeace Council and Others* v *Commission* [1998] ECR I-1651, paragraphs 15 and 16.

97. Similarly, the reference to the remedies available to the addressees of a measure reflects the administrative practice common to the Member States and an effort to serve citizens more effectively. Nevertheless, even if the Commission had erred on the side of excess in informing the Regione Siciliana of what, if any, judicial protection was available, that mistake would not change the nature or effects of the contested decision by creating a legal connection where one never existed; nor would it bind the Court of Justice in its interpretation and application of the procedural requirements for bringing an action for annulment.

98. Consequently, the claim that that exchange of correspondence gives rise to certain obligations is entirely unfounded, and the Court of First Instance cannot be criticised for having concluded otherwise, especially when it did so after having first carried out an exhaustive examination of whether the contested decision was of concern to the appellant.

99. To sum up, the claim alleging failure to state reasons in relation to the exchange of correspondence between the Regione Siciliana and the Commission cannot be upheld as it is unfounded.

100. In view of the foregoing considerations, I propose that the fourth ground of appeal be dismissed on the ground that it is, in part, manifestly unfounded and, in part, unfounded.

VI — Costs

101. In accordance with Article 122 in conjunction with Article 69(2) of the Rules of Procedure, applicable to appeals pursuant to Article 118, since all the grounds of appeal have been dismissed, the unsuccessful party, that is to say the Regione Siciliana, should be ordered to pay the costs.

VII — Conclusion

102. In the light of the foregoing reasoning, I propose that the Court of Justice should dismiss the appeal brought by the Regione Siciliana against the order made by the Court of First Instance on 8 July 2004 in Case T-341/02 and order the appellant to pay the costs.