JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)

9 June 2009*

In Case T-152/06,

NDSHT Nya Destination Stockholm Hotell & Teaterpaket AB, established in Stockholm (Sweden), represented by M. Merola and L. Armati, lawyers,

applicant,

v

Commission of the European Communities, represented by T. Scharf, acting as Agent,

defendant,

APPLICATION for the annulment of the decision contained in the Commission's letters to NDSHT of 24 March and 28 April 2006, relating to a complaint concerning

* Language of the case: English.

allegedly unlawful State aid granted by the City of Stockholm to Stockholm Visitors Board AB (Case CP 178/04 — Alleged State aid to SVB AB),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (First Chamber),

composed of V. Tiili, President, F. Dehousse and I. Wiszniewska-Białecka (Rapporteur), Judges,

Registrar: C. Kantza, Administrator,

having regard to the written procedure and further to the hearing on 1 July 2008,

gives the following

Judgment

Background to the dispute

1 The applicant, NDSHT Nya Destination Stockholm Hotell & Teaterpaket AB, is a company incorporated under the laws of Sweden which carries on the activities of a tour operator in Stockholm through its website. It offers a packaged service including hotel reservations and a tourist card called 'Stockholm à la carte', which gives holders access to a number of services and facilities in Stockholm, such as museums and local

transport. The applicant was established in 2001 following the withdrawal of the private operators from Destination Stockholm AB ('DSAB').

2 DSAB had been established in 1980, by a decision of the City of Stockholm and Stockholm County Council. DSAB was a partnership between private operators in the tourism sector and the City of Stockholm, formed through the municipal foundation, Stockholm Information Services (SIS) ('the SIS Foundation'). It was a subsidiary in which the majority interest was held by the SIS Foundation, which had itself been established in 1978 to promote tourism in Stockholm and was jointly controlled and financed by the City of Stockholm and Stockholm County. Since 1980, DSAB has been providing discounted hotel accommodation in Stockholm and a package of tourist-related services, in particular, by means of a card called 'the Stockholm Card'.

3 In 2001, following the withdrawal of the private operators from DSAB, the Stockholm authorities decided to reorganise DSAB by merging its remaining activities with those of the SIS Foundation. On 1 January 2002, DSAB changed its name to Stockholm Visitors Board AB ('SVB'), a company owned by the City of Stockholm through various subsidiaries. Since 2002, SVB has been responsible for providing tourist information and promoting the Stockholm region, activities which previously fell within the remit of the SIS Foundation. In connection with those tourist information activities, SVB also carries out commercial activities consisting inter alia in hotel reservation services and the sale of the Stockholm Card, which offers free admission to places of interest and facilities in Stockholm.

4 On 23 September 2004, the applicant sent the Commission information regarding the annual grants made by the City of Stockholm to SVB for the years 2003, 2004 and 2005, alleging that those grants constituted State aid granted by the Kingdom of Sweden in infringement of Article 88(3) EC. The alleged State aid, as described in that complaint and in the observations submitted subsequently by the applicant, consisted in yearly appropriations from the City of Stockholm's budget in favour of SVB, the reimbursement of SVB's pre-tax losses by its parent company on a regular basis, and preferential access to public facilities, such as metered parking managed by the City of Stockholm.

5 In its complaint, the applicant claimed that, since there were no means of ensuring that no over-compensation of the public information activities took place, the sums granted by the City of Stockholm could be used by SVB to finance the commercial activities which it carries out, in addition to its tourist information activities, in competition with other national and international undertakings, thereby distorting competition. That aid should be considered unlawful, in the absence of Commission approval, and incompatible with the common market.

6 The applicant supplemented its complaint with memoranda giving a detailed description of SVB's history, organisation and activities and requested the Commission to adopt interim measures pursuant to Article 11 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88] EC (OJ 1999 L 83, p. 1), pending a finding by the Commission as to whether that aid was compatible with the common market, in order to avoid substantial and irreparable damage to the applicant.

7 The Commission investigated the complaint by requesting information from the Swedish authorities, and by exchanging correspondence and holding meetings with representatives of those authorities and of the applicant. The Swedish authorities sent the Commission information containing, in particular, detailed descriptions of the development since the 1930s of the activities of the City of Stockholm to promote tourism. They also sent the Commission a list of the measures adopted by the City of Stockholm to implement the changes in the organisational structure for those activities, financial information on each activity of the SIS Foundation and of DSAB for the financial years 1995 to 2001, and data relating to the contributions made to SVB by the City of Stockholm during the financial years 2002, 2003 and 2004, together with forecasts for the financial year 2005.

8 On 24 March 2006, the Director of 'State Aid 1: Cohesion and Competitiveness', the service in the Commission's Directorate-General for Competition responsible for the

file ('the Director of the Commission service responsible for the file'), sent the following letter to the applicant:

'EUROPEAN COMMISSION

Competition DG

State Aid I: Cohesion and competitiveness

The Director

…

Subject: CP 178/2004 — Alleged State aid to SVB AB

…

I would refer to your letters of 23 September 2004, 22 December 2004, 10 January 2005, 19 April 2005 and 14 February 2006 concerning the abovementioned complaint.

I would like to inform you that, on the basis of the available information, the competent services of the Directorate-General for Competition have reached the conclusion that there are not sufficient reasons for continuing the investigation of your complaint. As you are aware, we received from the Member State concerned a rather extensive amount of information by letters and in meetings. All facts and circumstances have been examined closely and analysed. The complaint of your client was taken very seriously and we have done all the necessary possible to retrieve a violation of Article 87(1) of the EC Treaty.

According to our analysis, the Stockholm Card and the hotel bookings are (with the exception of the inclusion of parking spaces in the Stockholm Card) carried out on market conditions. These activities are thus not financed from State aid within the meaning of Article 87(1) of the EC Treaty. As regards the use of certain parking spaces for free, arguably there is no affectation on trade, or even if there is, such aid has been included in the Stockholm Card since well before Sweden joined the European Union in 1995 and would thus constitute existing aid. Moreover, this service is since 1 January 2006 no longer included in the Stockholm Card.

With respect to other activities (the provision of tourism information, etc.), it appears as if these are covered by the rules on Services of General Economic Interests (SGEI). Cross-subsidisation in favour of economic activities does not seem to occur. In case the compensation for the SGEIs would be classified as State aid, such aid would nevertheless have been provided under the same conditions since well before 1995 and would thus constitute existing aid.

In summary, the extensive investigations we have undertaken on this complaint suggest that we are in the presence of existing aid, and not illegal aid, which is in any case compatible with the common market. Since there are no grounds to institute the appropriate measures procedure provided for in Article 88(1) of the Treaty, we do not propose to take any further action on this matter.

Nevertheless, I would like to draw your attention on the fact that if you, in contrast to my services, are nevertheless convinced that there is illegal State aid involved, Article 87(1) of the EC Treaty has direct effect and creates therefore legal rights for citizens which national courts must guarantee. You could refer your case to those.

…'

9 By letter of 5 April 2006, the applicant informed the Commission that it understood the letter of 24 March 2006 as meaning that the examination of the financing granted by the City of Stockholm to SVB had led the Commission to reject its complaint and to adopt a decision pursuant to Article 13 and Article 4(2) and (3) of Regulation No 659/1999 not to raise any objections with regard to the alleged aid. The applicant asked the Commission to send it a copy of that decision, in accordance with Article 20 of that regulation.

10 By letter of 28 April 2006 (hereinafter referred to, together with the letter of 24 March 2006, as 'the contested letters'), the Director of the Commission service responsible for the file replied to the applicant as follows:

'EUROPEAN COMMISSION

Competition DG

State Aid I: Cohesion and competitiveness

The Director

…

Subject: CP 178/2004 — Alleged State aid to SVB AB

…

I refer to your letter of 5 April 2006 concerning the abovementioned complaint.

As explained in my letter of 24 March 2006, the Commission services have reached the conclusion that there are not sufficient reasons for continuing the examination of your complaint. This is because the information received from the Swedish authorities by letters and in meetings does not indicate that the measure would constitute unlawful State aid.

Consequently, we cannot provide you with any decision by the Commission under Article 20 of Regulation No 659/1999, to which you refer in your letter.

…'

Procedure and forms of order sought

11 By application lodged at the Registry of the Court of First Instance on 6 June 2006, the applicant brought the present action.

12 By separate document, lodged at the Registry of the Court of First Instance on 1 September 2006, the Commission raised an objection of inadmissibility pursuant to Article 114(1) of the Rules of Procedure of the Court of First Instance.

13 On 9 November 2006, the applicant lodged its observations on the objection of inadmissibility.

14 By order of the Court of First Instance (Fourth Chamber) of 15 March 2007, consideration of the objection of inadmissibility was reserved for the final judgment and the costs were reserved.

15 On 3 May 2007, the Commission lodged its defence.

16 By letter of 28 June 2007, the applicant waived its right to lodge a reply.

17 Following changes to the composition of the Chambers of the Court of First Instance, the Judge-Rapporteur was assigned to the First Chamber, to which the present case has therefore been allocated.

18 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (First Chamber) decided to open the oral procedure.

19 At the hearing on 1 July 2008, the parties presented oral argument and replied to the oral questions put by the Court. The Court requested that the Commission produce certain documents within a period of two weeks. The Commission produced those documents on 11 July 2008. By letter of 6 August 2008, the applicant submitted its observations on those documents.

20 On 23 January 2009, the Court of First Instance closed the oral procedure.

21 The applicant claims that the Court should:

— dismiss the objection of inadmissibility and declare the action admissible;

— annul the decision contained in the contested letters;

— order the Commission to open the formal investigation procedure under Article 88(2) EC;

— order the Commission to pay the costs.

22 The Commission contends that the Court should:

— dismiss the action as inadmissible or unsubstantiated;

— order the applicant to pay the costs.

Law

Arguments of the parties

23 The Commission maintains that the contested letters do not constitute a Commission decision, whether separately or jointly, and do not therefore constitute an actionable measure. Accordingly, the action is inadmissible.

24 First, the Commission contends that nothing in the contested letters constitutes a decision. According to the case-law, not every letter sent by a Community institution in response to a request is to be treated as a decision for the purposes of Article 230 EC. The letter of 24 March 2006 states that it was the competent services of the Directorate-General for Competition, not the Commission or the Member of the Commission responsible for competition, which had reached the conclusion that the investigation should not be continued. In reply to the applicant's request, the letter of 28 April 2006 expressly states that there is no Commission decision which could be provided. The Commission did not reach a final position. Moreover, the applicant submits on several occasions in its application that the Commission had not taken a final position. The contested letters were intended to inform the applicant that the Commission's services had not found sufficient grounds for taking a view on the case or for continuing the examination of the alleged aid. The fact that, in the interests of transparency, the

Commission's services set out their thoughts on the case does not prevent the contested letters from being regarded as communications 'informing the interested party' within the meaning of Article 20 of Regulation No 659/1999.

25 The applicant's argument that the form in which an alleged decision is adopted is immaterial is, according to the Commission, irrelevant in the present case, since the applicant must show that the contested letters constitute a decision on account of their content. As it is, the contested letters had no legal effect on the applicant's position and, in consequence, they cannot be categorised as a decision. Furthermore, the contested letters make no reference to a legal basis; they were sent by the services of the Directorate-General for Competition and not by the Commission as a college or by the duly authorised Member of the Commission; and they were addressed to the applicant and not to the Kingdom of Sweden. Those are additional indications that the contested letters do not, whether separately or jointly, contain a Commission decision.

26 Secondly, the Commission contends that it did not take a decision or a definitive position. The Commission did not indicate in the contested letters that it had adopted a decision on the basis of Article 13 or Article 4 of Regulation No 659/1999. The fact that, in its letter of 5 April 2006, the applicant requested the Commission to send it a decision shows that the applicant itself did not regard the letter of 24 March 2006 as a decision. The letter of 28 April 2006 merely informed the applicant that it could not be provided with any decision. Those two letters, neither of which constitutes a decision, do not form a decision when combined together. Assuming for the sake of argument that the case concerned unlawful aid, the Commission states that it did not adopt any of the decisions provided for in Article 4 of Regulation No 659/1999; nor did it state in any definitive way that the measures in question constituted existing aid. The Commission's services stopped at the point in the procedure immediately preceding the point at which the Commission must choose to take a decision. Since the applicant seems implicitly to acknowledge lack of action on the part of the Commission, it should — on the assumption that the Commission was under an obligation to act — have brought an action for failure to act.

27 Thirdly, the Commission points out that only measures which produce binding legal effects such as to affect the interests of an applicant by bringing about a distinct change in his legal position can be challenged on the basis of Article 230 EC. In the absence of a Commission decision, the legal position of the applicant was not altered by the sending of the contested letters.

28 The applicant submits that the objection of inadmissibility raised by the Commission must be dismissed. It is clear from the case-law that a letter sent to a complainant expressing the Commission's definitive position in respect of State aid amounts to a decision, even if it is not addressed to the Member State concerned. The declaration that the Commission services had reached the conclusion that there were not sufficient reasons for continuing the examination of the complaint constitutes a final decision whereby the Commission refused to initiate the formal investigation procedure provided for in Article 88(2) EC and closed the case. The contested letters therefore constitute an actionable measure for the purposes of Article 230 EC.

29 The applicant maintains that, according to the case-law, in order to determine whether an act produces binding legal effects and may therefore be the subject of an action for annulment, its content must be examined. The form in which a decision is adopted is immaterial. The contested letters, taken together or separately, contain the Commission's definitive position on the applicant's complaint and affect the applicant's legal position. Had the formal investigation procedure been opened, the applicant — as a direct competitor of the recipient of the alleged aid — would have been categorised as an interested party under Article 1(h) of Regulation No 659/1999 and would have been granted the procedural guarantees provided for under Article 88(2) EC and Article 6 of Regulation No 659/1999.

30 The applicant submits that all of the Commission's arguments concerning the inadmissibility of the action relate exclusively to the form and not to the content of the contested letters and that none of those arguments is pertinent. First, the fact that the contested letters were sent by the Director of a service of the Commission Directorate-

General for Competition is of no consequence. In the absence of a disclaimer stating that they are setting out only the personal views of their author, the contested letters must be regarded as stating the Commission's position, and are therefore actionable.

31 Secondly, the Commission cannot claim that the fact that the contested letters were not addressed to a Member State indicates that they do not constitute a Commission decision. The applicant states that, according to the case-law, a letter addressed to a complainant, stating the Commission's definitive position on a State aid measure, can be the subject of an action for annulment. Otherwise, the complainant would be deprived of any opportunity to contest the Commission's definitive position on its complaint and the Commission would be able to circumvent its legal obligations under Regulation No 659/1999.

32 Thirdly, according to the applicant, the Commission's refusal to send it a copy of the decision confirmed that the Commission's letter of 24 March 2006 expressed the Commission's definitive position. As the applicant could not obtain any additional reasoning, its only possible remedy was to challenge the Commission decision embodied in the contested letters. The applicant also points out that the cautious language used in those letters suggests that the Commission harboured doubts regarding the categorisation and compatibility of the measures in question, which should have led it to open the formal investigation procedure. The Commission did not confine itself to stating that there were insufficient grounds for taking a view on the case, as it would have done in an informal communication under Article 20(2) of Regulation No 659/1999. Notwithstanding that cautious language, it is clear from the content of the contested letters that the Commission had taken a clear and final position in response to the applicant's complaint.

33 Furthermore, the contested letters cannot be understood as being preparatory acts, since their content indicates that the Commission did not envisage taking any further steps in the examination of the aid measures to which the complaint refers. The

procedural guarantees afforded to complainants in State aid matters would become totally useless if the Commission were able to obtain immunity merely by using cautious language in its decisions.

34 Lastly, the Commission's argument that, given the lack of a decision, the applicant should have brought an action for failure to act must be rejected in the present case. It is apparent from the case-law that such an action cannot be brought where the Commission has taken a clear and explicit position on the complaint. Articles 230 EC and 232 EC are the expression of one and the same remedy and, consequently, it is the act embodying the Commission's position that has to be challenged and the present action for annulment is therefore the correct course of action.

Findings of the Court

35 According to settled case-law, the mere fact that a letter is sent by a Community institution in response to a request made by the addressee of that letter is not enough for it to be treated as a decision for the purposes of Article 230 EC, thereby entitling its recipient to bring an action for its annulment (Case T-277/94 *AITEC* v *Commission* [1996] ECR II-351, paragraph 50; Case T-154/94 *CSF and CSME* v *Commission* [1996] ECR II-1377, paragraph 51; and the order in Case T-130/02 *Kronoply* v *Commission* [2003] ECR II-4857, paragraph 42).

36 It is also settled law that only measures which produce binding legal effects such as to affect the interests of an applicant by bringing about a distinct change in its legal position may be the subject of an action for annulment under Article 230 EC (Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 9; Case T-351/02 *Deutsche Bahn* v *Commission* [2006] ECR II-1047, paragraph 35; and *Kronoply* v *Commission*, paragraph 35 above, paragraph 43).

37 In order to determine whether an act or decision produces such effects, it is necessary to look to its substance (*Kronoply* v *Commission*, paragraph 35 above, paragraph 44). By contrast, the form in which an act or decision is adopted is in principle irrelevant for the purposes of assessing the admissibility of an action for annulment (see, to that effect, *IBM* v *Commission*, paragraph 36 above, paragraph 9).

38 In that regard, it should be borne in mind that, although a decision under Article 4 of Regulation No 659/1999, terminating an examination of the compatibility with the EC Treaty of an aid measure, is always addressed to the Member State concerned, a communication addressed to a complainant may outline the terms of such a decision, even if the decision has not been sent to the Member State concerned (order in Case T-182/98 *UPS Europe* v *Commission* [1999] ECR II-2857, paragraph 38).

39 It is appropriate to recall, at the outset, the rules on complaints concerning State aid, as laid down in Regulation No 659/1999.

40 Once the Commission, acting in accordance with Article 10(1) of Regulation No 659/1999, has examined information regarding allegedly unlawful aid, Article 13 of that regulation requires it, in the case of unlawful aid, to close the preliminary examination stage by adopting a decision under Article 4 of that regulation.

41 Where such a decision under Article 4 of Regulation No 659/1999 cannot be taken, the Commission, when in receipt of information regarding the possible existence of State aid, has no option but to inform the interested parties that there 'are insufficient grounds for taking a view on the case' pursuant to the second sentence of Article 20(2) of that regulation (*Deutsche Bahn* v *Commission*, paragraph 36 above, paragraph 43).

42 It is clear from the case-law that, in order to assess whether a letter sent to a complainant in reply to his complaint constitutes an actionable measure, the Court of First Instance must determine, in the light of the substance of the contested measure, whether it constitutes a decision under Article 4 of Regulation No 659/1999 or merely an informal communication, as provided for in the second sentence of Article 20(2) of that regulation (see, to that effect, *Deutsche Bahn* v *Commission*, paragraph 36 above, paragraph 44).

43 It is thus apparent from the procedure applicable to complaints concerning State aid, as laid down in Regulation No 659/1999 and, in particular, in Article 20(2) thereof, that while the Commission is under an obligation to examine without delay information regarding allegedly unlawful aid which is sent to it by a third party in a complaint, it is not required to adopt a decision under Article 4 of that regulation in response to each complaint.

44 The obligation on the Commission to adopt a decision in response to a complaint arises only in the situation envisaged in Article 13 of Regulation No 659/1999. Under the second sentence of Article 20(2) of that regulation, the Commission need only inform the complainant by letter that there are insufficient grounds for taking a view on the case. The latter situation arises, in particular, where Article 13 of Regulation No 659/1999 does not apply because, in reality, the aid referred to in the complaint is not unlawful aid, but existing aid.

45 In order to ascertain whether the present action is admissible, it is necessary to examine whether it is apparent from the substance of the contested letters that they may be deemed to constitute a decision under Article 4 of Regulation No 659/1999, whose true addressee is the Member State concerned and which affects the interests of the applicant by bringing about a distinct change in its legal position.

46 It is necessary, first, to analyse the content of the contested letters.

47 In the letter of 24 March 2006, the Director of the Commission service responsible for the file informed the applicant that, in his view, there were insufficient reasons for continuing the examination of the complaint. He stated that the complaint had been examined closely.

48 It should be pointed out, first, that when the Director of the Commission service responsible for the file stated, in the first part of the third paragraph of the letter of 24 March 2006, that the activities relating to the Stockholm Card (with the exception of parking spaces) and to hotel bookings were carried out under market conditions, he noted that those activities were not financed by the grants complained of. In so doing, he did not state that the grants complained of did not satisfy the conditions necessary for categorisation as State aid for the purposes of Article 87 EC. Accordingly, it cannot be inferred from the first part of the third paragraph of the letter of 24 March 2006 that the Commission is asserting that the grants objected to in the complaint do not constitute State aid.

49 Secondly, in the second part of the third paragraph of the letter of 24 March 2006, the Director of the Commission service responsible for the file stated that the use by SVB of certain parking spaces for free arguably had no effect on trade and that, in any event, since that aid had been included in the Stockholm Card before 1995, that is to say, before the accession of the Kingdom of Sweden to the European Union, it constituted existing aid. In the fourth paragraph of the letter of 24 March 2006, he stated that SVB's other activities appeared to be covered by the rules on Services of General Economic Interest and that, should the financing of those activities constitute State aid, that aid would have been provided on the same terms since well before 1995 and would constitute existing aid. It follows that, in so far as the Director of the Commission service responsible for the file took the view that the aid complained of constituted existing aid, he did not carry out a more detailed examination of its categorisation as State aid.

50 Lastly, the Director of the Commission service responsible for the file stated, in summary, that the examination of the complaint had shown that the measures complained of constituted existing aid and not unlawful aid.

51 In the letter of 28 April 2006, in reply to the applicant's letter of 5 April 2006, the Director of the Commission service responsible for the file stated that the measures complained of did not constitute unlawful aid and that, consequently, it was not possible to send the applicant a decision as provided for by Article 20 of Regulation No 659/1999.

52 It is thus clear from the letter of 28 April 2006 and from the substance of the letter of 24 March 2006 that, following a preliminary examination of the information which had been sent to it by the relevant Member State, the Commission found that the measures complained of did not constitute unlawful aid within the meaning of Article 1(f) of Regulation No 659/1999. In the contested letters, the Commission did no more than inform the applicant that it was apparent from an initial provisional assessment that the measures complained of constituted existing aid covered by the procedure provided for in Article 88(1) EC.

53 In addition, it should be pointed out that, even if the Commission had stated in the first part of the third paragraph of the letter of 24 March 2006 that the activities relating to the Stockholm Card and to hotel bookings were financed by the grants complained of, that would not have altered its finding that those grants constitute existing aid because they have been paid since before 1995.

54 It is therefore clear from the substance of the contested letters that the Commission decided not to pursue the complaint on the ground that the aid in question constitutes existing aid.

55 In that regard, the Commission could not reasonably contend at the hearing that it was unable to understand the contested letters or that, given the vague terms in which the letter of 24 March 2006 was framed, its service had not given any reason for discontinuing the examination of the complaint.

56 Secondly, it must be examined whether the contested letters, in so far as they categorise the measures complained of as existing aid, may be regarded as amounting to a decision which affects the interests of the applicant by bringing about a distinct change in its legal position.

57 In that regard, it should be borne in mind that, as far as existing aid is concerned, the initiative lies with the Commission alone (Case C-44/93 *Namur-Les assurances du credit* [1994] ECR I-3829, paragraph 11). Within the framework of the competence conferred upon it to keep existing aid under constant review, the Commission cannot be compelled, by a complaint, to issue a recommendation proposing appropriate measures to the Member State pursuant to Article 18 of Regulation No 659/1999 (see, to that effect, Case T-330/94 *Salt Union* v *Commission* [1996] ECR II-1475, paragraphs 33 to 35).

58 Furthermore, it is apparent from the case-law that, if the information provided by the Member State enables the Commission, for the purposes of a provisional assessment, to take the view that the measures at issue probably constitute existing aid, the Commission must deal with them within the procedural framework provided for in Article 88(1) and (2) EC. On the other hand, if the information provided by the Member State is not such as to justify that provisional conclusion or if the Member State provides no information on the matter, the Commission must deal with those measures within the procedural framework provided for in Article 88(3) and (2) EC (Case C-400/99 *Italy* v *Commission* [2005] ECR I-3657, paragraph 55).

59 It should also be pointed out that the applicable procedure as regards existing aid, set out in Articles 17 to 19 of Regulation No 659/1999, does not contemplate the possibility of a decision addressed to the Member State concerned being adopted by the Commission at the end of the preliminary examination stage.

60 It follows that a complainant cannot, by means of a complaint sent to the Commission, require the latter to assess the compatibility of existing aid. If, following an initial assessment, the Commission finds that the complaint relates not to unlawful aid but to existing aid, it is under no obligation to address a decision under Article 4 of Regulation No 659/1999 to the Member State concerned and cannot be compelled to apply the procedure provided for in Article 88(1) EC.

61 In the present case, it should be borne in mind that the Commission found, in the contested letters, that the aid complained of is existing aid. It follows that, since Article 13 of Regulation No 659/1999 — which relates to unlawful aid — is not applicable, the Commission was not able to adopt a decision under Article 4 of Regulation No 659/1999. Accordingly, in response to the applicant's complaint, the Commission could do no more than inform the applicant, pursuant to the second sentence of Article 20(2) of Regulation No 659/1999, that there were insufficient grounds for taking a view on the case.

62 Furthermore, it is apparent from the contested letters that a provisional assessment of the aid complained of led the Commission to find that the procedure under Article 88(1) EC was applicable, since the aid is existing aid. Accordingly, contrary to the applicant's claims, the contested letters do not constitute a decision to close the case on the ground that those grants do not constitute State aid.

63 Moreover, contrary to the applicant's assertions, the contested letters do not constitute a refusal to initiate the formal investigation procedure provided for in Article 88(2) EC. Clearly, the Commission could not even open that procedure, since its initial examination had disclosed that the aid in question constitutes existing aid (see, to that effect, Case C-47/91 *Italy* v *Commission* [1994] ECR I 4635, paragraph 24, and *CSF and CSME* v *Commission*, paragraph 35 above, paragraph 49).

64 It should be added that it would run counter to the general scheme of the State aid review procedure to hold that, where the Commission informs a complainant that its complaint concerns existing aid, it is necessarily adopting a decision under Article 4 of Regulation No 659/1999. Such an approach would mean that, where a complaint relating to existing aid is brought before the Commission, it is under an obligation to examine whether that aid is compatible with the common market. However, as has been stated in paragraph 57 above, pursuant to Article 88(1) EC, the initiative for implementing the procedure for keeping existing aid under constant review lies with the Commission alone.

65 Consequently, on finding that the aid complained of constituted existing aid, the Commission was fully entitled to state in the letter of 28 April 2006 that it could not provide a copy of a decision under Article 4 of Regulation No 659/1999, as requested by the applicant in its letter of 5 April 2006.

66 Furthermore, it should be borne in mind that, according to the case-law, an existing aid scheme may continue to be implemented until such time as the Commission finds that it is incompatible with the common market (Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraph 20, and order in Case T-276/02 *Forum 187* v *Commission* [2003] ECR II-2075, paragraph 48).

67 It is also clear from the case-law that, where the Commission decides to deal with aid within the context of the constant review of existing aid, the legal situation does not

change until such time as the Member State concerned accepts proposals for appropriate measures or the Commission adopts a final decision (Case C-400/99 *Italy* v *Commission* [2001] ECR I-7303, paragraph 61).

68 In consequence, inasmuch as the contested letters categorise the measures complained of as existing aid, they do not have the characteristics of a decision which produces binding legal effects such as to affect the interests of the applicant.

69 That finding is not called in question by the statement in the letter of 24 March 2006 that the measures complained of and categorised as existing aid are 'in any case compatible with the common market'. First, as is also stated in that letter, the complainant was being informed that, for the time being, there was no intention of initiating the procedure provided for in Article 88(1) EC, the initiative for which, according to the case-law cited in paragraph 57 above, lies with the Commission alone. Secondly, in accordance with the case-law cited in paragraph 66 above, the conveying of that information does not produce any binding legal effects such as to affect the interests of the applicant.

70 It follows from the foregoing that the contested letters must be regarded as an informal communication, as provided for in the second sentence of Article 20(2) of Regulation No 659/1999, the content of which does not reflect a decision under Article 4 of that regulation. Consequently, the contested letters do not constitute an actionable measure for the purposes of Article 230 EC.

71 Lastly, it should be borne in mind that, as regards the supervision of Member States' compliance with their obligations under Articles 87 EC and 88 EC, the roles played by the Commission and the national courts are complementary and separate. The role of the national courts is to protect the rights which individuals derive from the direct effect of the prohibition laid down in the last sentence of Article 88(3) EC. An action seeking a

declaration that a State aid measure is unlawful, together with an order requiring recovery of the aid paid, may therefore be brought before the national courts.

72 Thus, the inadmissibility of the present action does not have the effect of depriving the applicant of the possibility of having the lawfulness of the aid in question reviewed by the courts. The national courts must ensure that all appropriate inferences are drawn, in accordance with their national law, from an infringement of the last sentence of Article 88(3) EC, as regards both the validity of measures giving effect to the aid and the recovery of financial support granted in disregard of that provision (Case C-354/90 *Fédération nationale du commerce extérieur des produits alimentaires and Syndicat national des négociants et transformateurs de saumon* [1991] ECR I-5505, paragraph 12, and Case C-199/06 *CELF and Ministre de la Culture et de la Communication* [2008] ECR I-469, paragraph 41).

73 Furthermore, the applicant's claim that the Court of First Instance should order the Commission to open the formal investigation procedure is inadmissible because, in accordance with settled case-law, in an action for annulment brought under Article 230 EC, the jurisdiction of the Community judicature is limited to reviewing the legality of the contested measure and the Court may not, in the exercise of its jurisdiction, issue directions to the Community institutions (Case C-5/93 P *DSM* v *Commission* [1999] ECR I-4695, paragraph 36, and Case T-145/98 *ADT Projekt* v *Commission* [2000] ECR II-387, paragraphs 83 and 84).

74 It follows from all the foregoing that the action is inadmissible in its entirety.

Costs

75 Under Article 87(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 applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1. **Dismisses the action as inadmissible;**

2. **Orders NDSHT Nya Destination Stockholm Hotell & Teaterpaket AB to pay the costs.**

Tiili Dehousse Wiszniewska-Białecka

Delivered in open court in Luxembourg on 9 June 2009.

[Signatures]