ORDER OF THE COURT (First Chamber)
28 January 2004 *

In Case C-164/02,

Kingdom of the Netherlands, represented by H.G. Sevenster, acting as Agent,

applicant,

v

Commission of the European Communities, represented by V. Di Bucci and H. van Vliet, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for the annulment of Commission Decision SG (2002) D/228533 of 15 February 2002 relating to State aid No N 812/2001 concerning the Stimuleringsregeling verwerking baggerspecie (Rules on incentives to encourage the processing of dredging silt), in so far as the Commission takes the view therein that the contributions paid to port authorities pursuant to those rules constitute State aid for the purposes of Article 87(1) EC,

* Language of the case: Dutch.

THE COURT (First Chamber),

composed of: P. Jann (Rapporteur), President of the Chamber, A. La Pergola, S. von Bahr, R. Silva de Lapuerta and K. Lenaerts, Judges,

Advocate General: M. Poiares Maduro,
Registrar: R. Grass,

after hearing the Advocate General,

makes the following

Order

1 By application lodged at the Registry of the Court of Justice on 25 April 2002, the Kingdom of the Netherlands brought an action under Article 230 EC for the annulment of Commission Decision SG (2002) D/228533 of 15 February 2002 relating to State aid No N 812/2001 concerning the Stimuleringsregeling verwerking baggerspecie (Rules on incentives to encourage the processing of dredging silt) ('the contested decision'), in so far as the Commission takes the view therein that the contributions paid to port authorities pursuant to those rules constitute State aid for the purposes of Article 87(1) EC.

Facts

2 In the Netherlands, particles of sand from the sea and alluvium carried by the Rivers Rhine, Meuse and Scheldt are deposited in the estuaries of those rivers. Those sediments are regularly removed by dredging in the interests of navigation and the free flow of those waters.

3 The dredging silt, largely polluted, may be reused but only after processing. In order to encourage the development of the market for the processing of polluted silt into building material, the Netherlands authorities considered a measure called the Stimuleringsregeling verwerking baggerspecie ('the rules on incentives').

4 Under the rules on incentives, processing undertakings receive a contribution according to the degree of success in attaining processing objectives. The dredging silt collectors may also benefit from the rules in that the incentive subsidies make processing more attractive for them.

5 By letter of 26 November 2001, the Netherlands Government notified the Commission of the draft rules on incentives pursuant to Article 88(3) EC and requested that it assess the legality of that measure in the light of Articles 87 EC and 88 EC. In that letter, it submits that, if the Commission considers that the proposal constitutes State aid for the purposes of Article 87 EC, the dredging of waterways is a public responsibility as part of water management. The storage

and processing of dredging silt should therefore be regarded as a service of general economic interest and the measure in question satisfies the conditions of Article 86(2) EC. It is a general measure of an economic nature and is in the public interest.

6 By the contested decision, the Commission stated that it had no objection to the measure notified. Most of the amounts granted pursuant to the rules on incentives were not aid within the meaning of Article 87(1) EC. Those cases which did constitute such aid were compatible with the common market in accordance with Article 87(3)(c) EC and point 38 of the Commission notice entitled 'Community guidelines on State aid for environmental protection' (OJ 2001 C 37, p. 3).

7 The fourth and fifth paragraphs of point 3 of the contested decision state:

'Most of the dredging work is put out to tender by the public authorities responsible for public works ensuring access to public waterways. Financing by the authorities of infrastructure open to all potential users without discrimination and administered by the State does not generally fall within the scope of Article 87(1) of the EC Treaty because it does not favour one undertaking in competition with other undertakings within the meaning of that article. That is the case for most of the funding of transport infrastructure (for example, roads and canals built and maintained by the public authorities). That approach is also applicable to the funding of most of the public authorities responsible for dredging.

Certain authorities responsible for dredging, in particular port authorities, do however fall within the definition of an undertaking for the purposes of

Article 87(1) of the Treaty. The case-law of the Court of Justice states in that context that it is essentially a question of determining whether an economic activity is involved. The organisational form is less important. The Court of First Instance stated in its judgment in the *Aéroports de Paris* case that the management and supply of installations does constitute such an activity. Leaving aside public authorities, a private or public manager of transport infrastructure falls within that definition. The favouring of such undertakings may therefore distort actual or potential competition. The amounts granted in respect of the processing of polluted dredging silt provide such an advantage and must therefore be regarded as State aid in favour of those undertakings.'

Procedure before the Court and the forms of order sought

8 The application of the Netherlands Government was lodged at the Registry of the Court on 25 April 2002.

9 The Netherlands Government claims that the Court should:

— annul the contested decision in so far as the Commission takes the view therein that the contributions paid to port authorities pursuant to the rules on incentives to encourage the processing of dredging silt constitute State aid for the purposes of Article 87(1) EC;

— order the Commission to pay the costs.

10 The Commission contends that the Court should:

— declare the action inadmissible;

— in the alternative, dismiss it;

— order the Kingdom of the Netherlands to pay the costs.

11 After hearing the Advocate General, the Court decided to give a decision on the admissibility of the action without opening the oral procedure, in accordance with Article 91(3) and (4) of its Rules of Procedure.

Admissibility

Arguments of the parties

12 The Commission submits that the action is inadmissible. In its view, the contested decision, which authorises a previously notified system of aid, cannot adversely affect the Netherlands Government.

13 Only a measure whose legal effects are binding on the applicant and are capable of affecting his interests is an act which may be the subject of an action for annulment under Article 230 EC (see Case C-147/96 *Netherlands* v *Commission* [2000] ECR I-4723, paragraph 25). The contested decision gave full satisfaction to the Kingdom of the Netherlands. The measure has no binding legal effect such as to affect its interests in that it does not bring about any change in its legal position or cause it any disadvantage (see Case T-138/89 *NBV and NVB* v *Commission* [1992] ECR II-2181 and Case T-212/00 *Nuove Industrie Molisane* v *Commission* [2002] ECR II-347).

14 Whatever the grounds on which an act is based, only its operative part is capable of producing legal effects unless the grounds, as grounds of an act adversely affecting a person's interests, constitute the necessary support for the operative part thereof (*NBV and NVB*, cited above, paragraph 31). However, that is not so in the present case.

15 Finally, according to the Commission, Article 230 EC should be read in the light of Article 233 EC. The possibility of bringing an action under Article 230 EC should thus be limited to those cases in which, if the decision is annulled, the institution concerned is required to adopt certain measures to comply with the judgment. In the present case, even if the decision were annulled, the Commission would not have to take any step since the aid was approved in its entirety.

16 The Netherlands Government considers that its action is admissible. The Commission's assertion in the contested decision that port authorities fall within

the definition of 'undertakings' under Article 87(1) EC and the reasoning that the dredging by the port authorities must be regarded as an economic activity bring about changes to the Kingdom of the Netherlands' legal position since, in the future, it must therefore notify the Commission of all financial contributions made to those bodies. This constitutes a substantial procedural disadvantage.

17 The Netherlands Government considers that the contested decision did not therefore give full satisfaction to the Kingdom of the Netherlands. It is such as to affect its interests within the meaning of the Court's case-law (see the orders in Cases C-66/91 and C-66/91 R *Emerald Meats* v *Commission* [1991] ECR I-1143 and in Case C-50/90 *Sunzest* v *Commission* [1991] ECR I-2917 and the judgment in Case C-308/95 *Netherlands* v *Commission* [1999] ECR I-6513).

Findings of the Court

18 The Court has consistently held that only a measure whose legal effects are binding on the applicant and are capable of affecting his interests by bringing about a distinct change in his legal position is an act or decision which may be the subject of an action for annulment under Article 230 EC (see, inter alia, Joined Cases C-68/94 and C-30/95 *France and Others* v *Commission* [1998] ECR I-1375, paragraph 62; Case C-308/95 *Netherlands* v *Commission*, cited above, paragraph 26, and Case C-147/96 *Netherlands* v *Commission*, cited above, paragraph 25).

19 To determine whether an act or decision produces such effects, it is necessary to look to its substance (Case C-147/96 *Netherlands* v *Commission*, cited above, paragraph 27).

20 In the present case, it is not in dispute that the contested decision declares the system of aid notified to be compatible with the common market. In so far as in its notification of the system the Netherlands Government requested the Commission to assess the legality of that measure in the light of Articles 87 EC and 88 EC, the contested decision, adopted, first, under Article 87(1) EC and, second, under Article 87(3)(c) EC, cannot therefore bring about a distinct change in the legal position of the Kingdom of the Netherlands.

21 As for the argument of the Netherlands Government that part of the statement of reasons for the contested decision, namely where it states that certain port authorities fall within the definition of 'undertakings' under Article 87(1) EC, has adverse legal consequences for the Kingdom of the Netherlands irrespective of the outcome of the case, it need merely be stated that, regardless of the grounds on which such a decision is based, only the operative part thereof is capable of producing legal effects and, as a consequence, of adversely affecting its interests. By contrast, the assessments made in the recitals to a decision are not in themselves capable of forming the subject of an application for annulment. They can be subject to judicial review by the Community judicature only to the extent that, as grounds of an act adversely affecting a person's interests, they constitute the essential basis for the operative part of that act.

22 In the present case, the statement of reasons in issue does not constitute the essential basis for the operative part of a decision adversely affecting the Kingdom of the Netherlands. Since the Commission found in the operative part of the contested decision that, regardless of the fact that some of the contributions concerned might constitute aid within the meaning of Article 87(1) EC, the

scheme is, in any event, justified on the basis of the reasons set out in Article 87(3)(c) EC, that operative part does not in the least constitute the adoption of a position as to whether all port authorities are undertakings or whether all of the activities of such authorities are economic in nature.

23 Furthermore, the contested decision makes no finding on the particular circumstances of any of the port authorities concerned, but refers only to the case in which those authorities carry out economic activities in the sector to which the measure in question refers. Finally, that decision does not in the least prejudge the assessment under Article 87(1) EC of any other contributions paid to the port authorities.

24 In those circumstances, the disputed part of the statement of reasons for the contested decision had no binding legal effect such as to affect the interests of the Kingdom of the Netherlands. It cannot therefore constitute a legal act open to challenge within the meaning of the case-law referred to at paragraph 18 above.

25 It follows that the action must be dismissed as inadmissible.

Costs

26 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's

pleadings. As the Commission has asked for costs to be awarded against the Kingdom of the Netherlands and the latter has failed in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT (First Chamber)

hereby orders:

1. **The application is dismissed as inadmissible.**

2. **The Kingdom of the Netherlands shall pay the costs.**

Luxembourg, 28 January 2004.

R. Grass

Registrar

P. Jann

President of the First Chamber