ORDER OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

21 November 2005 *

In Case T-426/04,

Tramarin Snc di Tramarin Andrea e Sergio, established in Montagnana (Italy), represented by M. Calabrese, lawyer,

applicant,

v

Commission of the European Communities, represented by V. Di Bucci, acting as Agent, with an address for service in Luxembourg,

defendant,

APPLICATION for annulment of (i) a letter from the Commission requesting the Italian authorities to amend a notified aid plan and (ii) the Commission's decision of 12 July 2000 declaring a scheme for investment aid in less-favoured regions of Italy compatible with the common market (State aid N 715/99 — Italy (SG 2000 D/105754)),

* Language of the case: Italian.

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

composed of M. Vilaras, President, F. Dehousse and D. Šváby, Judges,

Registrar: E. Coulon,

makes the following

Order

Factual background to the dispute

1 On 18 November 1999 the Italian Republic notified the Commission of a proposed scheme for investment aid in the less-favoured regions of Italy.

2 Following the notification, the Commission requested further information on that scheme, which was provided by the Italian authorities in various letters. A meeting between the Italian authorities and Commission staff took place on 16 May 2000 in Brussels.

3 In a letter to the Italian authorities of 29 May 2000 ('the letter of 29 May 2000'), referring to a proposal by those authorities on the transition from the aid scheme then in force to the scheme notified on 18 November 1999, the Commission stated as follows:

'... the proposal relating to the eligibility of the investment project, if execution of the project was commenced before the application, is not in accordance with what is provided in point 4.2 of the Guidelines on national regional aid (OJ 1998 C 74).

Accordingly, we request the Italian authorities to withdraw the draft transitional rule ...'

4 On 5 July 2000, the applicant concluded a contract with another undertaking for the erection of an industrial unit for the applicant's benefit.

5 On 12 July 2000, the Commission, pursuant to Article 4(3) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88] of the EC Treaty (OJ 1999 L 83, p. 1), adopted a decision not to raise objections ('the Decision'). It took the view, after a preliminary examination, that the aid scheme concerned was compatible with the common market in accordance with Article 87(3)(a) and (c) EC.

6 The Commission stated in the Decision that, in order to be eligible for investment aid provided for by the scheme, applications for aid had to be lodged before execution of the projects had begun, a condition also required for undertakings which had submitted applications under the previous aid scheme which were considered at the time of the first application of the new scheme.

7 The Decision was notified to the Italian Republic by letter of 2 August 2000.

8 On 30 September 2000, the Commission, in accordance with Article 26(1) of Regulation No 659/1999, published a summary notice in the *Official Journal of the European Communities*, by which it informed third parties, setting out the basic information on the case, that it did not raise any objection to the aid scheme notified by the Italian authorities (OJ 2000 C 278, p. 26). That notification states that '[t]he authentic text(s) of the decision, from which all confidential information has been removed, can be found at [the internet site of the Secretariat General of the Commission whose address is] http://europa.eu.int/comm/sb/sgb/state_aids'.

9 On 5 December 2000, the Italian authorities published a decree, dated 13 November 2000, setting out the detailed rules for implementing the aid scheme for undertakings established, like the applicant, in the regions of Northern Central Italy and containing the following citation:

'Having regard to the decision of the European Union of 12 July 2000 authorising the execution of the aid scheme by Law No 488/1992 for the period 2000/2006, and providing inter alia that for new applications the aid measures are to apply exclusively to expenditure shown in investment programmes commenced from the day after the date on which the applications were submitted ...'.

10 Having paid, on 21 July and 3 October 2000, two invoices for the performance of the works which were the subject of the contract signed on 5 July 2000, the applicant submitted an aid application on 25 January 2001 and continued to carry out its project.

11 In June 2004, the body responsible for processing the applicant's aid application recommended that the competent national authorities should refuse that application, since the start of the investment programme, fixed at 21 July 2000, was prior to the date on which the application was submitted.

Procedure and forms of order sought

12 By application lodged at the Registry of the Court of First Instance on 20 October 2004, the applicant brought the present proceedings.

13 By separate document lodged at the Registry of the Court on 20 December 2004, the defendant raised a plea of inadmissibility pursuant to Article 114 of the Rules of Procedure of the Court of First Instance.

14 The applicant submitted observations on the plea of inadmissibility on 2 March 2005.

15 The applicant claims that the Court should:

— declare the action admissible or join the issue of admissibility to the substance;

— annul the letter of 29 May 2000, in so far as, in that letter, the Commission requested the Italian authorities to withdraw a draft transitional rule concerning undertakings which had started to carry out an investment project without previously having submitted an aid application;

— annul the Decision;

— order the Commission to pay the costs.

16 In its observations on the plea of inadmissibility raised by the Commission, the applicant also requested the Court of First Instance, as a measure of organisation of procedure, to join this case to Case T-98/04 for the purposes of the oral proceedings, on account of the connection between the two cases concerned.

17 The Commission contends that the Court should:

— dismiss the application by order as manifestly inadmissible or, alternatively, as inadmissible;

— order the applicant to pay the costs.

Law

18 Under Article 114(1) of the Rules of Procedure, if a party so requests, the Court of First Instance may decide on admissibility without addressing the substance of the case. In accordance with Article 114(3), unless the Court of First Instance otherwise decides, the remainder of the proceedings is to be oral. In this case, the Court has sufficient information from the examination of the documents in the file to decide on the application submitted by the defendant without opening the oral procedure.

The application for annulment of the letter of 29 May 2000

19 The Commission raises two pleas of inadmissibility alleging, first, that that letter does not constitute an actionable measure and, second, that the applicant does not have standing to bring proceedings.

20 The Court considers that it is appropriate to examine the first plea of inadmissibility.

Arguments of the parties

21 The Commission submits that the letter of 29 May 2000 is a measure which is purely preparatory to the Decision and, according to settled case-law, is therefore not capable of being the subject of an action for annulment.

22 The applicant claims that the letter of 29 May 2000 is the act by which the Commission held the draft transitional rule drawn up by the Italian authorities, relating to the eligibility of an investment project where work on the project has started before the application for aid, to be incompatible with the common market. It is an 'unknown' act 'prohibited by the Treaties', in that it has the effect of violating the procedural guarantees that Article 88(2) EC provides for interested parties.

23 The applicant argues essentially that a request to withdraw a proposal drafted in the context of the notification of a State aid scheme, if accepted by the Member State, produces the same legal effect as a negative decision referred to in Article 7(5) of Regulation No 659/1999, without respecting the procedural guarantees enjoyed by the interested parties. By the letter of 29 May 2000, the Commission 'pre-empted' the assessment it has to make and excluded the admissibility of the Italian authorities' proposal even before inviting the parties concerned to submit their observations (Case 323/82 *Intermills* v *Commission* [1984] ECR 3809, paragraph 21).

24 The applicant adds that, if the annulment of the letter of 29 May 2000 had not also been sought, there would have been a risk of leaving in the Community legal system an act which constitutes the unlawful basis for the withdrawal by the Italian authorities of the draft transitional rule.

Findings of the Court

25 According to settled case-law, only measures the legal effects of which are binding on and capable of affecting the interests of the applicant by having a significant effect on his legal position are measures against which proceedings for annulment may be brought. Furthermore, in the case of acts or decisions drawn up in a

procedure involving several stages, particularly an internal procedure, only measures definitively laying down the position of the institution on the conclusion of that procedure may be contested, and not intermediate measures intended to pave the way for the final decision (Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 10, and Joined Cases T-10/92 to T-12/92 and T-15/92 *Cimenteries CBR and Others* v *Commission* [1992] ECR II-2667, paragraph 28).

26 In this case, the applicant seeks the annulment of a letter from the Commission to the Italian authorities during the preliminary examination phase of the aid project notified by those authorities which preceded the adoption of the Decision.

27 It must be recalled, in that regard, that the preliminary stage of the procedure established by Article 88(3) EC and regulated by Article 4 of Regulation No 659/1999 is intended to allow the Commission a sufficient period of time for reflection and investigation for it to form a preliminary view of the aid plans notified to it, so that it can conclude, without any extensive review being called for, that they are compatible with the Treaty or find that their content raises doubts as to their compatibility (see, to that effect, Case C-99/98 *Austria* v *Commission* [2001] ECR I-1101, paragraphs 53 and 54).

28 The formal investigation procedure referred to in Article 88(2) EC and Article 6 of Regulation No 659/1999, which provides the Commission with all the information on the case before adopting its decision, is essential whenever the Commission has serious difficulties in determining whether an aid is compatible with the common market (Case C-225/91 *Matra* v *Commission* [1993] ECR I-3202, paragraph 33).

29 While its powers are circumscribed as far as initiating the formal procedure is concerned, the Commission nevertheless enjoys a certain margin of discretion in identifying and evaluating the circumstances of the case in order to determine whether or not they present serious difficulties. In accordance with the objective of Article 88(3) EC and with its duty of good administration, the Commission may, amongst other things, engage in a dialogue with the notifying State or with third parties in an endeavour to overcome, during the preliminary procedure, any difficulties encountered (Case T-73/98 *Prayon-Rupel* v *Commission* [2001] ECR II-867, paragraph 45).

30 The Commission's letter of 29 May 2000, like those which preceded it, the letters from the Italian authorities and the meeting which was held in Brussels between Commission staff and representatives of the Italian authorities fall squarely within the dialogue mentioned above.

31 In that letter, the Commission dealt with a specific issue, namely the Italian authorities' proposal to include a provision in the aid plan concerning the transition between the aid scheme then in force and the scheme which was the subject of the notification of 18 November 1999. That provision was intended to confirm the eligibility of the investment programmes of undertakings which had started to carry out the programmes before an aid application had been submitted.

32 Although the Commission clearly stated, in the letter of 29 May 2000, that the proposal gave rise to a difficulty in the context of the examination of the compatibility of such a plan, given that, in its view, the transitional provision did not conform with point 4.2 of the Guidelines on national regional aid, the position taken by the Commission was not in any way binding on the State which made the notification.

33 An examination of the provisions of Regulation No 659/1999 shows that although the Commission has the power, in the context of the formal investigation procedure, to require a Member State to amend its aid plan in a particular manner, on pain of a declaration that the plan is incompatible with the common market, it does not have such power during the preliminary investigation phase and has no other option, apart from opening the formal procedure, than to adopt a decision not to raise any objections.

34 As is clear from the wording of the letter of 29 May 2000 itself, the Italian authorities were merely 'requested' to withdraw their proposal, and therefore had a free choice either to comply with the suggestions of the Commission staff or else to leave their original plan unchanged, including the transitional provision at issue.

35 It cannot, therefore, be held that the letter of 29 May 2000 constitutes an act producing binding legal effects, in the sense required by the case-law mentioned in paragraph 25 above. Furthermore, and contrary to the applicant's assertions, the determination of the legal nature of that letter cannot depend on a subsequent act, namely the decision of the notifying State as to whether or not to amend the aid plan in line with the Commission's wishes.

36 It is apparent that the letter of 29 May 2000 constitutes, in fact, only a measure which is purely preparatory to the definitive decision, in this case the Decision.

37 It follows that the action, in so far as it seeks the annulment of the letter of 29 May 2000, is inadmissible.

The application for annulment of the Decision

38 The Commission raises three pleas of inadmissibility alleging, first, that the application was made out of time, second, that the contested act does not constitute a measure producing binding legal effects capable of affecting the applicant's interests by bringing about a distinct change in the applicant's legal position, and, third, that the applicant lacks standing to bring proceedings.

39 The Court considers that it is appropriate to examine the first plea of inadmissibility, alleging that the application was made out of time.

Arguments of the parties

40 The Commission submits that extracts of the Decision were published in the Official Journal on 30 September 2000 with a reference to the Internet site where the full text of the Decision was available, and that the period of two months therefore began to run fourteen days after publication on 30 September 2000 and expired on 24 December 2000, including the 10 days' extension of time on account of distance granted to parties whose habitual residence is in Italy. The application, lodged on 20 October 2004, is therefore clearly out of time.

41 The Commission also claims that the decisive factor, for the purpose of calculating the period for bringing an action, is the date of publication or, where appropriate, the date on which the Decision came to the applicant's knowledge, and not the date on which the correspondence which preceded the adoption of the Decision itself came

to the applicant's knowledge. The Commission takes the view that the applicant is thus mistaken in submitting that the period for bringing an action began to run from the moment when its lawyer sent to it, in September 2004, a copy of the letter of 29 May 2000 and 'explained the contents of that letter to it'.

42 The applicant states that it lodged its aid application on 25 January 2001, without challenging the decree of 13 November 2000 before the competent national court and 'also without attempting to read the decision of 12 July 2000' adopted, according to that decree, by the 'European Union', a form of words which did not enable the circumstances of the publication of the document at issue to be determined.

43 The applicant was also unaware of the opportunity to acquaint itself, in September 2000, with the full text of the Decision by consulting 'one of the thousands of pages ... of the largest Internet site in the world'. The applicant observes, in that regard, that the electronic address mentioned in the summary notice published in the Official Journal on 30 September 2000 does not correspond at all to the text of the Decision, but to the part of the 'Union' site which is dedicated to all the decisions on State aid.

44 It was as a result of the proposal to withdraw the aid that, in September 2004, the applicant consulted its representative in these proceedings, who sent it a copy of the Decision and, in particular, the letter of 29 May 2000. The applicant submits that the period for bringing an action began to run only when it became aware of that letter whose contents clearly show the infringement by the Commission of its obligation to open the formal investigation procedure.

45 Neither reading the summary notice published in the Official Journal nor the text of the Decision would have enabled the applicant to check that, during the preliminary investigation, the conditions were satisfied for the obligatory initiation of the formal

investigation procedure. In the absence of any evidence that an action against the Decision would have been able to overcome the obstacle of inadmissibility on the ground of lack of individual concern, the applicant cannot be criticised for failing to challenge the Decision and, further, it cannot be held that the period for bringing an action began to run from the publication of the Decision alone, on 30 September 2000.

46 Lastly, the applicant claims that it did not think it necessary to challenge the ministerial decree of 13 November 2000, and that it was not under any obligation to challenge the Decision, since it took the view, interpreting the national implementing rules for the aid scheme, that it could participate in the first notice of implementation of the new aid scheme by waiving the part of the aid corresponding to the amount of the two invoices paid before the aid application was submitted, which it did by deliberately omitting to communicate the two invoices concerned to the body responsible for the examination of its aid application.

Findings of the Court

47 According to the fifth paragraph of Article 230 EC, actions for annulment must be instituted within a period of two months. That period runs from the publication of the measure, its notification to the applicant or, in the absence thereof, the day on which it came to the applicant's knowledge, as the case may be.

48 It follows from the wording of that provision that the criterion of the date on which the applicant became aware of the measure as the start of the period for bringing an action is subsidiary to the criteria of publication or notification of the measure (see Case C-122/95 *Germany* v *Council* [1998] ECR I-973, paragraph 35, and Case T-190/00 *Regione Siciliana* v *Commission* [2003] ECR II-5015, paragraph 30 and the case-law cited). It also follows from the case-law that, failing publication or

notification, it is for a person who is aware of the existence of a decision concerning him to request the full text within a reasonable period but, subject thereto, the period for bringing an action can begin to run only from the time when the third party concerned acquires precise knowledge of the content of the decision in question and of the reasons on which it is based in such a way as to enable him to exercise his right of action (Case 236/86 *Dillinger Hüttenwerke* v *Commission* [1988] ECR 3761, paragraph 14, and Case C-309/95 *Commission* v *Council* [1998] ECR I-655, paragraph 18).

49 It must also be recalled that, as regards measures which, according to the established practice of the institution concerned, are published in the Official Journal even though that publication is not a condition for their applicability, the Court of Justice and the Court of First Instance have acknowledged that the criterion of the date on which a measure came to the knowledge of the applicant was not applicable and that it was the date of publication which made the period in which to institute proceedings start to run (see, as regards measures by the Council concluding international agreements which bind the Community, *Germany* v *Council*, paragraph 39, and, as regards decisions of the Commission to close an investigation procedure for aid under Article 88(2) EC, Case T-14/96 *BAI* v *Commission* [1999] ECR II-139, paragraph 36). In such circumstances, the third party concerned may legitimately expect that the measure in question will be published.

50 In this case, the Decision was notified to the Italian Republic, which is the only addressee of that decision, by letter of 2 August 2000, and it was the subject of a summary notice in the Official Journal, within the meaning of Article 26(1) of Regulation No 659/1999.

51 In accordance with the provision mentioned above, the decisions by which the Commission establishes, after a preliminary investigation, that the measure notified, to the extent that it falls within the scope of Article 87(1) EC, does not raise any doubts as to its compatibility with the common market, and takes the view that that measure is compatible with the common market, are the subject of a summary

notice in the Official Journal, mentioning the opportunity to obtain a copy of the decision in the authentic language version or versions. Such a notice is intended to provide interested third parties with the essential information on the decision.

52 In accordance with the established practice of the Commission, which has been developed since May 1999, following the entry into force of Regulation No 659/1999, the summary notice referred to in the preceding paragraph refers to the website of the Secretariat-General of the Commission and states that the authentic text or texts of the decision in question, from which all confidential information has been removed, can be found there.

53 The fact that the Commission gives third parties access to the full text of a decision placed on its website, combined with the publication of a summary notice in the Official Journal enabling interested parties to identify the decision in question and informing them of this possibility of access via the internet, must be regarded as publication for the purposes of the fifth paragraph of Article 230 EC (Case T-17/02 *Olsen* v *Commission* [2005] ECR II-2031, paragraph 80).

54 In the present case, it is clear from the file that the Commission published a summary notice relating to the Decision in the Official Journal of 30 September 2000, indicating the date on which it was adopted, the Member State concerned, the aid number, its title, its objective, the legal basis, the budget allocated to it and its duration. That notice also states that the authentic text or texts of the Decision, from which confidential information has been removed, can be found on the Commission website and mentions the internet address permitting access to that text.

55 The fact that access to the text of the Decision is not immediate cannot invalidate the conclusion in paragraph 53 above. It is common ground that the internet address in the summary notice published in the Official Journal relates to the part of the Commission's website which contains its decisions on State aid and, in

particular, those in which no objections have been raised, filed according to the sector of activity concerned, the year in which the decision was adopted and the aid number. Given the information in the summary notice, as set out in the preceding paragraph, it is very easy for any interested person to gain access to the text of the relevant decision.

56 The period of two months in which to bring an action therefore started to run, in accordance with Article 102(1) of the Rules of Procedure, 14 days after publication on 30 September 2000 and expired on 27 December 2000, taking account of the extension of time on account of distance and the deferral of the expiry of a time-limit when it ends on a Sunday or official holiday, that is, more than three years before the action was brought.

57 It should be added, moreover, that the application must also be treated as out of time even if the subsidiary criterion of the date on which a measure comes to the knowledge of the applicant applies.

58 Having regard to the publication in the Official Journal on 30 September 2000 of the summary notice relating to the Decision, it must be held that the applicant became aware of the existence of the Decision on that date. In accordance with the case-law referred to in paragraph 48 above, that awareness gave rise to an obligation on the part of the applicant to ask the Commission, within a reasonable time, for the full text of the measure concerned, which it failed to do.

59 Furthermore, the applicant was also aware of the existence of the Decision following the publication in Italy, on 5 December 2000, of the ministerial decree of 13 November 2000 which cited in its legal bases the decision of the 'European Union' of 12 July 2000. In that regard, the applicant cannot usefully invoke the supposed vagueness of that form of words to justify its failure to look for and obtain the text of the Decision, which it was for the applicant to do as an ordinarily prudent operator.

60 Finally, it must be observed that no derogation from the application of the Community rules on procedural time-limits may be made, save where the circumstances are quite exceptional, in the sense of being unforeseeable or amounting to force majeure, in accordance with the second paragraph of Article 45 of the Statute of the Court of Justice (Case C-59/91 *France* v *Commission* [1992] ECR I-525, paragraph 8, and Case C-239/97 *Ireland* v *Commission* [1998] ECR I-2655, paragraph 7), or in the case of excusable error (Case T-12/90 *Bayer* v *Commission* [1991] ECR II-219, paragraphs 28 and 29, confirmed by the judgment of the Court of Justice in Case C-195/91 P *Bayer* v *Commission* [1994] ECR I-5619), since the strict application of those rules serves the requirement of legal certainty and the need to avoid any discrimination or arbitrary treatment in the administration of justice (Case 152/85 *Misset* v *Council* [1987] ECR 223, paragraph 11, and *Ireland* v *Commission*, paragraph 7).

61 In this case, the applicant has not established or even pleaded the existence of an excusable error, unforeseeable circumstances or force majeure.

62 In that connection, the applicant's submissions on the consequences of the late discovery of an alleged ground of illegality of the Decision or on its interpretation of the national implementing rules for the aid scheme and its subsequent belief that it was able to benefit from that scheme notwithstanding the submission of an aid application after the start of work on its investment project are completely irrelevant.

63 Even assuming that the Decision, which clearly states that, in order to be eligible for investment aid provided for by the scheme, aid applications must be lodged before work is started on the projects, adversely affects the applicant, it was for the applicant to decide whether to bring an annulment action on grounds to be identified by it, and not to allow the mandatory time-limit of two months provided for that purpose to elapse.

64 However, it is not for the Court, when determining whether this action is admissible as regards compliance with the period of two months within which it may be brought, to investigate the merits of the assumption which is implicit, but essential to the applicant's argument, that the Decision was not vitiated by any procedural defect which it could have attacked in an annulment action brought within the time-limit, which explains, according to the applicant, its original belief that it lacked standing to bring proceedings.

65 In any event, to accept the applicant's arguments on the need to postpone the time from which the period for bringing proceedings starts to run until the day on which the applicant becomes aware of a supposed illegality in the measure concerned would enable generally Community measures which produce legal effects to be challenged indefinitely, which would be entirely contrary to the requirements of legal certainty.

66 It follows that the present action, in so far as it seeks the annulment of the Decision, must be regarded as out of time and therefore dismissed as inadmissible, without any need to examine the other pleas of inadmissibility raised by the Commission.

67 It follows from all of the foregoing that the action must be dismissed in its entirety as inadmissible and that there is, therefore, no need to grant the request for measures of organisation of procedure made by the applicant, which is now devoid of purpose.

Costs

68 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, as applied for in the Commission's pleadings.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby orders:

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

2. **The applicant shall bear its own costs and pay those incurred by the Commission.**

Luxembourg, 21 November 2005.

E. Coulon

Registrar

M. Vilaras

President