JUDGMENT OF THE COURT OF FIRST INSTANCE
(First Chamber, Extended Composition)

18 October 2005 *

In Case T-60/03,

Regione Siciliana, originally represented by G. Aiello, and subsequently by A. Cingolo, avvocati dello Stato, with an address for service in Luxembourg,

applicant,

v

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

defendant,

APPLICATION for annulment of Commission decision C(2002) 4905 of 11 December 2002 relating to the cancellation of the aid granted to the Italian Republic by Commission Decision C (87) 2090 026 of 17 December 1987 concerning the provision of assistance by the European Regional Development Fund as

* Language of the case: Italian.

infrastructure investment, for a sum no less than EUR 15 million, in Italy (region: Sicily), and to the recovery of the advance on that assistance made by the Commission,

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

composed of B. Vesterdorf, President, J.D. Cooke, R. García-Valdecasas, I. Labucka and V. Trstenjak, Judges,

Registrar: I. Natsinas, Administrator,

having regard to the written procedure and further to the hearing on 12 May 2005,

gives the following

Judgment

The relevant legal provisions

1 The European Regional Development Fund was established by Regulation (EEC) No 724/75 of the Council of 18 March 1975 (OJ 1975 L 73, p. 1), several times amended and then replaced, as from 1 January 1985, by Council Regulation (EEC) No 1787/84 of 19 June 1984 on the European Regional Development Fund (OJ 1984 L 169, p. 1).

In 1988 that body of rules was reformed by Council Regulation (EEC) No 2052/88 of 24 June 1988 on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1988 L 185, p. 9). On 19 December 1988 the Council adopted Regulation (EEC) No 4253/88 of 19 December 1988, laying down provisions for implementing Regulation (EEC) No 2052/88 as regards coordination of the activities of the different Structural Funds between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1988 L 374, p. 1). Regulation No 4253/88 has been amended by, inter alia, Council Regulation (EEC) No 2082/93 of 20 July 1993 (OJ 1993 L 193, p. 20).

2 Article 24 of Regulation No 4253/88, as amended, entitled 'Reduction, suspension and cancellation of assistance', provides:

'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. Interest on account of late payment shall be charged on sums not repaid ...'

Facts giving rise to the dispute

3 By request received at the Commission on 23 September 1986, the Italian Republic sought the grant of ERDF assistance under Regulation No 1787/84 towards infrastructure investment in Sicily (Italy), for the third part of construction work on a dam across the Gibbesi. The request provided for the construction of works connected to the main body of the dam and indicated the dual purpose of the dam: the water was to be used, in particular, to ensure a reliable water supply for the industrial centre yet to be built in Licata and also for the irrigation of some thousand hectares of agricultural land.

4 By Decision C (87) 2090 026 of 17 December 1987 concerning the grant of assistance by the European Regional Development Fund as infrastructure investment, for a sum no less than EUR 15 million, in Italy (region: Sicily), the Commission granted the Italian Republic ERDF assistance of the maximum sum of ITL (Italian lire) 94 490 620 056 (approximately EUR 48.8 million) in connection with activities No 86.05.03.008 ('the decision to grant assistance'). In all the Italian Republic received an advance of ITL 75 592 496 044 (approximately EUR 39 million) on that assistance.

5 By letter of 23 May 2000, the Italian authorities sent to the Commission a report drawn up by their staff on the operations for which the assistance was given. According to that report, work on the main body of the dam had been complete since 11 November 1992. The dam was not, however, operational, the water reservoirs not having been created and the aqueduct not having been completed. Furthermore, the Italian authorities undertook to submit their request for the payment of the balance of the financial assistance before 31 March 2001.

6 In the same letter, the Italian authorities sent the Commission a note from the applicant of 17 January 2000, in which the latter formally undertook to have the necessary work done in order to make the dam operational and capable of being put into use.

7 By letter of 19 December 2000 the Commission asked the Italian authorities to supply further information. It wished to know, in particular, more about the request for extension of the period prescribed for submission of the claim for payment of the balance, the measures adopted by the applicant with a view to completing the project and bringing it into operation and the progress report on the achievement of the project with an indication of the actual or presumed date on which the works had been or would be completed and brought into operation.

8 By letter of 29 March 2001 the Italian authorities submitted to the Commission their claim for payment of the balance and forwarded a note of 5 March 2001 from the applicant. That note made it clear that the Ente minerario siciliano (the Sicilian Mines Authority, the project supervisor for the dam) had been wound up, that it had proved impossible to build the industrial centre of Licata and that, therefore, the original destined use of the dam waters had to be changed. A study had been ordered with a view to defining the potential uses of the reservoir water.

9 On the basis of those facts, the Commission decided to initiate the examination provided for by Article 24 of Regulation No 4253/88 and by Article 2 of the decision to grant assistance.

10 By letter of 26 September 2001 the Commission sent to the Italian Republic the items of evidence capable of constituting irregularities and of justifying a possible decision to cancel the assistance. It also pointed out that it had no information about the exact or putative date on which the project would be fully operational and in use. It also noted that the intended use of the project had been changed from that stated in the decision granting assistance. It requested the Italian authorities, the presidency of the Regione Siciliana and the final beneficiary to submit their observations within a period of two months, stating that, save in exceptional circumstances, any documents communicated after that date would not be taken into consideration.

11 By letter of 29 November 2001, the Italian Republic forwarded the applicant's observations to the Commission. It was clear from those observations that no date, not even a provisional one, had been fixed for bringing into operation the project, the purpose of which had in fact been changed.

12 By letter of 21 February 2002, after the period fixed by the Commission had expired (see paragraph 10 above), the applicant submitted other information about the project's progress together with a timetable showing the predicted completion of the works before 2 February 2003.

13 The Commission took the view that that information amounted to confirmation of various irregularities within the meaning of Article 24 of Regulation 4253/88 and on 11 December 2002 it adopted Decision C (2002) 4095 relating to the cancellation of the aid granted to the Italian Republic by the decision to grant assistance and to the recovery of the advance on that assistance made by the Commission ('the contested decision').

14 The 14th and 15th recitals in the preamble to the contested decision read as follows:

'(14) Examination of the abovementioned evidence has confirmed the existence of irregularities within the meaning of [Article 24(2) of Regulation No 4253/88]:

— examination of the case has confirmed that the works have not been completed and that it is impossible to foresee, even roughly, the date on which the dam will be operational and capable of being used ...

— examination of the case has confirmed, moreover, that the purpose and intended use of the project have been substantially altered in relation to what was stated in the decision to grant assistance, even though the Commission's prior approval has not been sought;

— the Regione [Siciliana]'s arguments cannot justify the matters at issue in the Commission's letter of 26 September 2001 on the procedure for the award of the contract and observance of the principles of sound financial management;

(15) Having regard to the irregularities found to exist it is necessary to put an end to the assistance and to take steps to ... recover the advances paid.'

15 By the contested decision the Commission cancelled the assistance granted to the Italian Republic, withheld the sum reserved in order to pay the balance (approximately EUR 9.8 million) and demanded repayment of the sums paid by way of advances (approximately EUR 39 million).

Procedure and forms of order sought

16 By application lodged at the Registry of the Court of First Instance on 20 February 2003 the applicant brought the present action.

17 Upon hearing the Judge Rapporteur's report, the Court of First Instance (First Chamber, Extended Composition) decided to open the oral procedure. As part of the measures of organisation of procedure, the Court asked questions in writing of the applicant and the Commission to be answered orally at the hearing. It also requested the Italian Republic to answer several questions in writing. The Italian Republic complied with those requests.

18 The parties presented oral argument and answered the Court's written and oral questions at the hearing on 12 May 2005. After hearing the parties, the Court decided to add to the file two letters sent by the Commission to the applicant, one dated 4 August 2003 and the other dated 24 October 2003, and both written by the Commission in the course of related Cases T-392/03 and T-435/03 between the same parties concerning the implementation of the contested decision.

19 The applicant claims that the Court should:

— annul the contested decision;

— order the Commission to bear the costs.

20 The Commission contends that the Court should:

— primarily, declare the application inadmissible;

— in the alternative, dismiss the application on the substance;

— in either case, order the applicant to pay the costs.

Law

21 On being questioned by the Court on this issue at the hearing, the Commission acknowledged that the third indent of the 14th recital in the preamble to the contested decision, concerning the finding of irregularities within the meaning of Article 24 of Regulation No 4253/88 (see paragraph 14 above), did not provide a basis for the adoption of that decision. However, the pleas in law and arguments raised in the application relating to that indent cannot, of themselves, warrant annulment of the contested decision, inasmuch as the latter is based also on the irregularities found in the first and second indents of that recital. For reasons of economy of procedure, the Court will not, therefore, examine the pleas and arguments mentioned above.

1. *Admissibility*

Arguments of the parties

22 The Commission objects that this action is inadmissible, on the grounds that the applicant has no standing to bring proceedings.

23 The Commission does not deny that the applicant is individually concerned by the contested decision within the meaning of the fourth paragraph of Article 230 EC. It considers, however, that the applicant is not directly concerned by the contested decision.

24 As a preliminary point, the Commission states that a direct legal relationship has never at any moment linked it to the applicant.

25 Now, from the outset, it has been one of the fundamental principles of the structural policies that the Commission and the Member States are jointly responsible for the programming of structural operations, while the Member States alone are responsible for implementing the policy.

26 Thus, with regard to the ERDF's activities during the programming period 1985 to 1988, during which the decision to grant assistance was adopted, that principle was expressed in several provisions of Regulation No 1787/84 which was then in force. The Commission notes that in this case the Member State concerned made a specific application to the Commission, which adopted the decision to grant assistance (Article 22). While the project was being implemented, the Member State was required to present to the Commission quarterly statements showing, in particular, actual expenditure. Advances could be granted by the Commission at the Member State's request.

27 The Commission infers therefrom that the Member States are its interlocutors in the system of decentralised management that constitutes one of the fundamental features of the structural funds in the relevant period. The Member States form a screen between the Commission and the final beneficiary of the assistance, since the payments are made to the national authorities and they remain free to decide the consequences of cancellation of assistance for the final beneficiary. Thus, according

to the Commission and contrary to what the applicant maintains, the Italian Republic enjoyed some discretion in the implementing of the contested decision.

28 In this respect, in response to the applicant's argument that it had already repaid, by means of setting off, the sums paid as the financial assistance cancelled by the contested decision (see paragraph 40 below), the Commission states that that setting off of 9 November 2003 was of a debt owed by the Italian Ministry of the Economy and Finance, the addressee of the charge note for recovery of the cancelled assistance against a payment to be made to that ministry.

29 It is in the light of those considerations that it falls to be established whether the applicant which, unlike the Italian Republic, was not an addressee of the contested decision, is directly concerned by the latter within the meaning of the fourth paragraph of Article 230 EC.

30 The Commission recalls the settled case-law according to which, for a person to be directly concerned by a measure that is not addressed to him, the measure must directly affect the individual's legal situation and its implementation must be purely automatic, resulting from Community rules alone to the exclusion of other intermediate rules (Case C-386/96 P *Dreyfus* v *Commission* [1998] ECR I-2309, paragraph 43, and Case T-69/99 *DSTV* v *Commission* [2000] ECR II-4309, paragraph 24).

31 When the act under challenge is applied by the national authorities to which it is addressed, it must be ascertained whether application of the act leaves any discretion to those authorities (Case T-54/96 *Oleifici Italiani and Fratelli Rubino* v *Commission* [1998] ECR II-3377, paragraph 56). Similarly, an individual is directly affected if it is

only theoretically possible for addressees not to give effect to the Community measure, there being no doubt as to their intention to act in conformity with it (Case 11/82 *Piraiki-Patraiki and Others* v *Commission* [1985] ECR 207, paragraphs 8 to 11, and *Dreyfus* v *Commission*, paragraph 44).

32 The Commission observes that the Court of First Instance has earlier held, in its order of 25 April 2001 in Case T-244/00 *Coillte Teoranta* v *Commission* [2001] ECR II-1275, that the decision to exclude certain expenditure from financing by the European Agricultural Guidance and Guarantee Fund (EAGGF), Guarantee Section, had no direct effect on the recipient of the aid's legal situation.

33 According to the Commission, the order in *Coillte Teoranta*, an EAGGF case, applies in the same manner to structural funds, and so to the ERDF, by reason of the fact that the management of the structural funds is based on the principle of the separation of legal relations between, on the one hand, the Commission and the Member States and, on the other, between the Member States and the recipients of Community assistance. That line of argument holds good, in its opinion, whenever the chief responsibility for the monitoring of expenditure incurred under the system of decentralised management falls to the Member States, as is the case in particular as regards the ERDF and the EAGGF.

34 In addition, the Commission states that the Court of First Instance's reference in paragraph 45 of the order in *Coillte Teoranta* to the different situation obtaining where it is decided that aid is ineligible for financing by the European Social Fund ('ESF') must be understood as referring to a period in which, unlike the present situation, there were direct links between the Commission and the recipients of ESF financing. The Commission takes that reference to be directed at the legal scheme defined in Council Regulation (EEC) No 2950/83 of 17 October 1983 on the implementation of Decision 83/516/EEC on the tasks of the European Social Fund

(OJ 1983 L 289, p. 1), which regulated the ESF in the programming period 1984 to 1988 and provided for direct legal relations between the Commission and the recipients. According to the Commission, the lack of any direct relationship of that kind clearly distinguishes this legal scheme from that applicable to the structural funds, including the ERDF in the programming period 1985 to 1988.

35 The Commission considers that because of that difference between the rules applicable during the various programming periods it is impossible, in the circumstances such as those of this case, for beneficiaries to be recognised as having capacity to challenge decisions to reduce assistance, in accordance with paragraphs 46 to 48 of the judgment in Case T-450/93 *Lisrestal and Others* v *Commission* [1994] ECR II-1177, upheld by the Court of Justice in Case C-32/95 P *Commission* v *Lisrestal* [1996] ECR I-5373. During the programming period 1984 to 1988 management was therefore, essentially, provided by the Commission direct. In contrast, under Regulation No 1787/84 which formed the basis for the decision to grant assistance, the Commission's role was that of monitor. Since the Commission no longer plays any part in actions for recovery brought by Member States and since, as the Court of First Instance has pointed out in paragraphs 47 and 48 of *Coillte Teoranta*, actions for recovery are based on domestic law and are not an automatic consequence of decisions to exclude certain expenditure from Community financing, the analysis in *Lisrestal and Others* v *Commission* does not hold good for decisions adopted on the basis of Regulation No 4253/88 and concerning projects financed by the structural funds.

36 In answer to the applicant's argument that *Coillte Teoranta* does not apply to the applicant because it is a public body and not an individual (see paragraph 42 below), the Commission counters that that argument cannot be persuasive inasmuch as the Court draws no such distinction in that order.

37 Furthermore, the Commission does not deny that, in Case T-102/00 *Vlaams Fonds voor de Sociale Integratie van Personen met een Handicap* v *Commission* ('*Vlaams Fonds*') [2003] ECR II-2433, the Court held that the Commission decision reducing or cancelling financial assistance granted by the ESF was capable of being of direct and individual concern to the beneficiaries of such assistance. The Commission notes, however, that that assertion was made indirectly, in that the Court had not been called on to rule on the issue of whether or not the applicant was directly concerned by the contested decision in that case. Likewise, its attention had not been drawn to the precedent established in *Coillte Teoranta*. The Commission adds that the case-law cited by the Court in *Vlaams Fonds* referred to a different programming period in which the rules governing the structural funds were not yet based on a system of decentralised management. In the circumstances, the precedent established by *Coillte Teoranta* is more relevant than *Vlaams Fonds*, with regard to the relations between the final beneficiaries and the Commission in the transactions at present managed in a decentralised manner by the Member States.

38 For its part, the applicant takes the view that the action is admissible and claims that the provisions of the EC Treaty concerning individuals' rights of action cannot be given a restrictive interpretation. It refers in particular to Case 25/62 *Plaumann* v *Commission* [1963] ECR 95. Therefore there are grounds for recognising that all persons who, possessing legal personality as demanded by those provisions, are individually and directly concerned by the contested act have standing to bring proceedings. According to the applicant, that solution is also the correct one where the applicant is a public body satisfying those conditions. In this connection it refers to Case T-288/97 *Regione autonoma Friuli-Venezia Giulia* v *Commission* [1999] ECR II-1871.

39 According to the applicant, the contested decision, which it acknowledges is not formally addressed to it, is nevertheless of direct concern to it in that the decision directly affects its legal situation. As a matter of fact, the addressee of the contested decision, namely, the Italian Republic, enjoys no discretion in its implementation,

which consists merely of claiming the recovery of the sums previously paid by the ERDF. No further legislative activity is necessary for that purpose. The applicant considers that, in accordance with settled Community case-law, those circumstances provide sufficient standing for individuals to bring proceedings (*Dreyfus* v *Commission*).

40 Moreover, the applicant states that it has here and now repaid, by means of a set-off, the sums paid by way of the assistance cancelled by the contested decision, including default interest.

41 In those circumstances, the fact that there has been no direct relationship between the applicant and the Commission has no bearing, inasmuch as it was clear, ever since the decision to grant assistance, that the applicant was plainly the beneficiary of the ERDF assistance. Furthermore, the applicant considers it appropriate here to point out that, contrary to what the Commission maintains, it made several direct contacts with the latter in the examination stage leading up to the decision to grant assistance. During that period, in-depth discussions took place between the Commission and the applicant.

42 In addition, the applicant argues that the case-law cited by the Commission (*Coillte Teoranta*) does not apply to it. The applicant is not in fact an individual but a local authority, that is to say, an emanation of the Italian State.

43 On this point *Vlaams Fonds* is to be borne in mind, paragraph 60 of the grounds of which reads as follows:

'It is ... settled case-law that a Commission decision reducing or cancelling financial assistance granted by the ESF is capable of directly and individually concerning the

beneficiaries of such assistance and of adversely affecting them, even though the Member State concerned is the sole interlocutor of the ESF in the relevant administrative procedure. It is the beneficiaries of the aid who are adversely affected by the economic consequences of the decision to reduce or cancel the assistance since they have primary liability for repayment of the sums paid without warrant (see, to that effect, *Lisrestal and Others* v *Commission,* paragraphs 43 to 48 and the case-law cited).'

Findings of the Court

44 The contested decision terminating the assistance received by the applicant was addressed to the Member State concerned, namely, the Italian Republic. In accordance with the fourth paragraph of Article 230 EC, '[a]ny natural or legal person may ... institute proceedings ... against a decision which, although ... addressed to another person, is of direct and individual concern to the former'. The fact that the applicant is individually concerned not being open to argument in the circumstances of this case, it falls to be considered whether the applicant is directly concerned by the contested decision.

45 It is necessary to recall the two cumulative criteria, identified in settled case-law, for direct concern within the meaning of the fourth paragraph of Article 230 EC.

46 First, the measure at issue must directly affect the legal situation of the person concerned. Second, that measure must leave no discretion to its addressees who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from Community rules without the application of other intermediate rules (*Dreyfus* v *Commission*, paragraph 43; *DSTV* v *Commission*, paragraph 24, and Case T-105/01 *SLIM Sicilia* v *Commission* [2002] ECR II-2697, paragraph 45; see also, to that effect, Joined Cases 41/70 to 44/70 *International Fruit*

Company and Others v *Commission* [1971] ECR 411, paragraphs 23 to 29, and Case 92/78 *Simmenthal* v *Commission* [1979] ECR 777, paragraphs 25 and 26). The condition required by the second criterion is also satisfied where it is possible in theory only for addressees not to give effect to the Community measure and their intention to act in conformity with it is not in doubt (*Dreyfus* v *Commission*, paragraph 44; see also, to that effect, *Piraiki-Patraiki and Others* v *Commission*, paragraphs 8 to 10).

47 By revoking the assistance in its entirety, the contested decision has principally, as stated in paragraph 15 above, rescinded the Commission's obligation to pay the balance of the assistance (EUR 9.8 million) and demanded repayment of the advances paid to the Italian Republic and passed on to the applicant (approximately EUR 39 million).

48 The Court considers that such a decision must necessarily have directly affected the applicant's legal situation in several ways. In addition, the contested decision leaves the Italian authorities no discretion, its implementation being purely automatic and resulting from Community rules alone without the application of other intermediate rules.

49 As a preliminary point it is to be noted that once the decision to grant assistance had been adopted and notified to the Italian Republic, the applicant could believe, for the purposes of carrying out the project funded by the assistance, and subject to compliance with the conditions attaching to that decision to grant assistance and with the rules applicable to the ERDF, that the total amount of the assistance (some EUR 48.8 million) was entirely at its disposal. On that basis, the applicant could thus plan and budget for its expenses with a view to carrying out the third part of the works on the dam across the Gibbesi.

50 In addition, the Italian national authorities were, like the applicant, bound by the conditions and rules mentioned above. The sums advanced by the Commission on the assistance in question had therefore, necessarily, to be used for the purpose of carrying out the third part of the works on the dam across the Gibbesi. Neither Community law nor domestic law authorised the Italian authorities to deprive the applicant of the amounts of that assistance or to use them for any other purposes. Thus, so long as the abovementioned conditions and rules were respected, the Italian authorities had no power to demand repayment, even in part, of those sums from the applicant.

51 Moreover, it is to be emphasised, as the applicant confirmed at the hearing in response to the Court's questions, that from 1987 to 1992 the applicant carried out the greater part of the project which was the subject of the cancelled assistance, and that the work was wholly funded out of the applicant's own resources and the Community assistance subsequently cancelled.

52 It is in the light of those preliminary considerations that the question whether the applicant is directly concerned by the contested decision must be examined.

53 With regard first of all to the alteration of the applicant's legal situation, the contested decision has had the initial direct and immediate effect of changing the applicant's financial situation by depriving the applicant of the balance of the assistance (approximately EUR 9.8 million) remaining to be paid by the Commission. The unpaid balance of the assistance will not be paid to the Italian Republic by the Commission, for the assistance has been cancelled. The Italian authorities will not, therefore, be able to pay it on to the applicant. Whereas, before the contested decision was adopted, the applicant could count with certainty on that sum in order to carry out the project, it has been forced, once the decision was taken, first to accept that it had been deprived of that sum and, second, to seek alternative funding in order to meet its obligations undertaken in connection with the work on the third part of the dam across the Gibbesi.

54 The contested decision also directly alters the applicant's legal situation with regard to the duty to repay the sums paid by way of advances (approximately EUR 39 million). In point of fact, the effect of the contested decision is directly to change the applicant's legal status from that of unarguably being a creditor in respect of those sums to that of debtor, at least potentially. The reason is that the contested decision means that it is no longer impossible for the national authorities under both Community and domestic law to demand repayment from the applicant of the sums advanced. In other words, the second direct and automatic effect of the contested decision is to change the applicant's legal situation vis-à-vis the national authorities.

55 Inasmuch as it alters the applicant's legal situation directly, indeed considerably, as is apparent from paragraphs 53 and 54 above, the contested decision thus satisfies the conditions for the first criterion of direct concern referred to in paragraph 46 above.

56 As regards, next, the criterion that the contested decision should be automatically applicable, it may be noted that it is automatically and of itself that the contested decision produces the twofold effect on the applicant mentioned in paragraphs 53 and 54 above.

57 That twofold effect of the contested decision follows from Community law alone, namely, the provisions of the third indent of Article 211 EC in conjunction with the fourth paragraph of Article 249 EC. In this connection the national authorities enjoy no discretion in their duty to implement the decision.

58 The conclusions reached in paragraphs 56 and 57 above are not shaken by the Commission's argument that the national authorities may in theory decide to release the applicant from the financial consequences that the contested decision entails for

it directly, by funding out of State resources the balance of the Community assistance withheld, on the one hand, and the repayment of the Community advances received by the applicant, on the other, or just one of those two.

59 A national decision providing funding of that magnitude would not in fact mean that the Commission's decision ceased to apply automatically. Legally speaking, the national decision would remain extraneous to the application in Community law of the contested decision. Its effect would be to put the applicant back in the situation it occupied before the contested decision was adopted, by bringing about in its turn a second alteration of the applicant's legal situation which was changed in the first place, and automatically, by the contested decision. This second alteration of the applicant's legal situation would be the consequence of the national decision alone and not of the implementation of the contested decision.

60 To put it another way, it is necessary that a national funding decision be adopted precisely in order to counter the automatic effects of the contested decision.

61 In that respect, the facts of this case differ decisively from those that gave rise to *Coillte Teoranta,* cited by the Commission (paragraphs 32 to 34 above). In the decision under challenge in *Coillte Teoranta*, the Commission had rejected the request of the Member State concerned, the addressee of that decision, that premiums that it had already paid to the beneficiary should be chargeable to the EAGGF as expenditure eligible for Community cofinancing. Unlike the situation in the present case, the contested decision giving rise to *Coillte Teoranta* did not automatically and mechanically cause the withholding of a balance still owed to the beneficiary. In addition, only the adoption of a national decision subsequent to the Commission's contested decision could oblige the beneficiary to repay the advances already received.

62 The Commission's arguments mentioned in paragraph 58 above therefore misapply the concept of direct effect within the meaning of the settled case-law referred to in paragraph 46 above, indeed they invert it. That such financing may possibly be provided by the Italian authorities does not in fact of itself mean that the contested decision would have to be implemented by its addressee before it produces effects in relation to the applicant.

63 In so far as it leaves no discretion to the Italian authorities, being purely automatic and resulting from Community rules alone without the application of other intermediate rules, as paragraphs 56 to 62 above make clear, the contested decision therefore satisfies the conditions for the second criterion of direct concern referred to in paragraph 46 above.

64 Moreover, the argument raised by the Commission (see paragraphs 24 to 27 above) that the separation of the legal relations between the Commission and the Member States, on the one hand, and the Member States and the beneficiaries, on the other, makes it impossible for the applicant to be directly concerned in any way cannot be accepted.

65 It is in fact settled case-law (see, to that effect, Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 9; Case T-3/93 *Air France* v *Commission* [1994] ECR II-121, paragraph 43, and Case T-87/96 *Assicurazioni Generali and Unicredito* v *Commission* [1999] ECR II-203, paragraph 37), that in order to ascertain whether the act of a Community institution is of direct concern to a person within the meaning of Article 230 EC it is necessary to look to its substance in order to establish whether, regardless of its form, it has an immediate effect on that person's interests, so bringing about a distinct change in that person's legal situation.

66 Paragraphs 47 to 63 above make it clear that the applicant's legal situation is directly affected by the contested decision.

67 Furthermore, and for the sake of completeness, it may be noted that, as the applicant rightly points out, there have been direct relations between it and the Commission, for example, during the stage of preparing the grant of assistance, or by the sending of the letter of 26 September 2001 direct to the applicant (see paragraph 10 above). In this regard, the Court observes that those direct relations continued after the contested decision was adopted, as is made plain by the two letters sent by the Commission direct to the applicant and added to the file (see paragraph 18 above). In the first of them, dated 4 August 2003, the Commission requests the applicant to pay the sum of about EUR 39 million, together with default interest, as reimbursement of sums paid as advances in connection with the project in question. Similarly, in the second letter, dated 24 October 2003, the Commission told the applicant that it had set off the various debts owed to and by the Commission

68 The two criteria mentioned in paragraph 46 above being met, the plea of inadmissibility must be rejected.

2. *The substance*

69 The applicant raises two pleas in law in support of its action. The first alleges infringement of Article 24 of Regulation No 4253/88 and the second a manifest error of assessment in the application of that provision.

On the first plea alleging infringement of Article 24 of Regulation No 4253/88

70 The applicant puts forward three arguments in support of its first plea. First of all, it claims that the wording of Article 24 of Regulation No 4253/88 does not provide for a situation in which assistance is cancelled. Next, the fact that the works are not operational and cannot be brought into use does not warrant cancellation of the assistance at issue having regard to Article 24 of Regulation No 4253/88 and the decision to grant assistance. Last, the conditions for maintaining the assistance at issue have been met, having regard to Article 24 of Regulation No 4253/88.

On the first argument in support of the first plea

— Arguments of the parties

71 The applicant points out that by the contested decision the Commission cancelled the assistance in its entirety. Now, in its view, provision for cancellation of Community assistance is to be found only in the title of Article 24 of Regulation No 4253/88 and not in the actual wording of that article. As the Commission itself acknowledges, Article 24(2) provides for reduction or suspension only of the assistance, and even then only on certain specific conditions. Only Article 2 of the decision granting assistance contemplates the cancellation of the assistance at issue, but in situations not expressly mentioned in the contested decision. In those circumstances, the contested decision, inasmuch as it is based on a broad interpretation of Article 24 of Regulation No 4253/88 alone, whilst on the contrary the cancellation of the assistance, which bears the character of a penalty, calls for a restrictive interpretation of that provision, has no legal basis.

72 The Commission counters that, where there is a discrepancy between the wording of a provision and its title, both are to be construed in such a way that all the terms serve a useful purpose. Furthermore, a consistent interpretation of Article 24, particularly of subparagraph 1 thereof, supports the conclusion that it is possible to cancel assistance completely, so that the reference to Article 2 of the decision to grant assistance was superfluous. In addition, for the Commission to be empowered merely to reduce the amount of the assistance in proportion to the irregularities committed would be tantamount to encouraging fraud, inasmuch as only the sums wrongly paid would have to be reimbursed.

— Findings of the Court

73 The conditions in which assistance may be cancelled are not governed by procedural rules but by substantive rules (T-180/01 *Euroagri* v *Commission* [2004] ECR II-369, paragraphs 36 and 37). Those aspects of the present case are therefore, in principle, governed by the legislation applicable when the assistance was granted. As the Court noted in that judgment, withdrawal of Community assistance due to the irregularities alleged against a beneficiary is by way of being a penalty when it goes beyond repayment of amounts that have been wrongly paid as a result of those irregularities. It is therefore permissible only if it is justified having regard to both the legislation applicable when the assistance was granted and that in force when the decision to cancel it was taken.

74 In those circumstances, the provisions that have some bearing on the cancellation of the assistance are those of Regulation No 1787/84, which was in force when the decision to grant assistance was adopted, and of Regulation No 4253/88 in the version applicable when the contested decision was adopted, that is to say, as amended by Regulation No 2082/93.

75 Article 32(1) of Regulation No 1787/84 provided for the reduction or cancellation of assistance. Article 24 of Regulation No 4253/88, as amended by Regulation No 2082/93, envisages the cancellation of assistance in its heading and also, indirectly, in subparagraph 1, which refers to the non-justification of part or the whole of financial assistance.

76 With regard to the wording of Article 24(2), which does not expressly provide for the cancellation of assistance, it is enough to note that, in accordance with settled case-law (Case T-216/96 *Conserve Italia* v *Commission* [1999] ECR II-3139, paragraph 92; Case T-143/99 *Hortiplant* v *Commission* [2001] ECR II-1665, paragraph 40; Case T-199/99 *Sgaravati Mediterranea* v *Commission* [2002] ECR II-3731, paragraphs 130 and 131, and Case T-186/00 *Conserve Italia* v *Commission* [2003] ECR II-719, paragraphs 74 and 78), it is open to the Commission to cancel assistance on the basis of Article 24(2) of Regulation No 4253/88.

77 In the circumstances, the first argument in support of the first plea is not founded and must therefore be rejected.

On the second argument in support of the first plea

— Arguments of the parties

78 According to the applicant, the Commission's demand that the works should be fully operational and capable of being brought into use appears in neither the decision to

grant assistance nor Article 24 of Regulation No 4253/88. The Commission did not express it until the time had come for presentation of the request for final payment. On that ground, the belated demand must be considered to be lacking any legal basis, especially as the applicant had undertaken as from 17 January 2000 to ensure that the works cofinanced by the ERDF would shortly be operational.

79 The Commission counters that the applicant does not deny that the dam was neither operational nor capable of being brought into use at the date of the contested decision. It then notes, in essence, that the criterion that the works financed should be operational is and always has been essential in the scheme of the structural funds, in particular for reasons to do with the effectiveness of the economic and social cohesion policy defined by the Treaty, the programming of which is a key aspect. Furthermore, proper financial management of the structural funds requires the Commission and the Member States to enforce compliance with the programming laid down and to be able to cancel contributions to non-operational projects.

— Findings of the Court

80 As the Commission pointed out at the hearing, the decision to grant Community assistance must be read together with the corresponding application for assistance (see, by analogy, Case T-81/95 *Interhotel* v *Commission* [1997] ECR II-1265, paragraph 42). Now, it is clear from the file, in particular from the application for assistance submitted by the Italian Republic, referred to in paragraph 3 above, that that application on the basis of which the decision to grant assistance was adopted stated that as a result of the third part of the works on the dam across the Gibbesi the project had to become operational.

81 Furthermore, as the Commission correctly notes in its pleadings, Article 18(1) of Regulation No 1787/84, on the basis of which the decision to grant assistance was adopted, provides that '[t]he financing of infrastructure investment project shall relate ... to infrastructure projects which will contribute to the development of the region or area in which they are located'.

82 It may here be borne in mind that, in order to ensure the proper operation of the system of Community structural funds and their sound financial management, the carrying out of any project so cofinanced must lead towards that project's becoming operational, that requirement underlying the decision to grant Community financing.

83 It is not disputed that when the contested decision was adopted the dam was neither operational nor capable of being brought into use. In those circumstances, it is obviously contrary to the provision cited above to authorise the beneficiary of the assistance in question to keep the Community financing grant for the purpose of carrying out the works although those works are in fact not fit for use. Such an approach would not, moreover, be consistent with the objective of the proper management of the Community structural funds.

84 In those circumstances, the second argument in support of the first plea is unfounded and must therefore be rejected.

On the third argument in support of the first plea

— Arguments of the parties

85 According to the applicant, the conditions for maintaining the assistance at issue were satisfied having regard to Article 24 of Regulation No 4253/88, in so far as the nature of the works and the conditions for bringing the eligible project into use had not been affected and as, moreover, the alteration in the final use of the works had been the subject of a request for approval addressed to the Commission.

86 The applicant takes the view that alteration of the purpose or final use of the works does not constitute, according to Article 24(1) of Regulation No 4253/88, a circumstance of such a kind as to reduce or suspend the financial assistance, even if the Commission did take the alteration into account in the contested decision.

87 The applicant goes on to point out that the annex to the decision to grant assistance itself gave a description of the works, but did not explain what their purpose was.

88 Now, in the applicant's view, the fact that the water retained by the dam is henceforth wholly intended for irrigation and no longer also for the cooling of industrial plant does not alter the nature of the works in question, which is that of forming a reservoir of water for the common good. The applicant mentions in this connection, without being contradicted by the Commission, that provision had always been made for the water retained by the dam to be used to irrigate some 1 000 hectares of land. It is the fact that the industrial centre which was from 1986 on to have been built at Licata has never been started that has made irrigation the

principal use of the water. That state of affairs was reported to the Commission, it then being indicated that the works still had a social and economic role to play in regional development. In this respect, it must be considered that the dam, situated in a region that suffers from a serious lack of water for private, agricultural and industrial use, might, on account of the quality of its water, satisfy many needs, including that of drinking water, and form part of a broader overall scheme of water-supply operations cofinanced by the ERDF. The applicant adds that a special study has been commissioned in respect of the use of the water and the development of the dam in question.

89 Similarly, the applicant considers that the alteration of the intended use of the works cannot affect the conditions for the project's being brought into use, since those conditions concern the operation, not the intended use, of the works.

90 According to the applicant, the contested decision is in addition wrong in that it does not take account of the fact that the Italian authorities sent the Commission documents in support of the alteration in question of the intended use of the project.

91 The Commission notes that Article 24 of Regulation No 4253/88 may be relied upon on the grounds of an irregularity, more particularly, a significant change affecting the implementation of the measure concerned.

92 It goes on to state that it made the finding of an irregularity consisting of a considerable change in the objectives and intended use of the project in relation to what had been provided for in the decision to grant assistance, without a request having been made for prior approval.

93 The Commission then observes that the decision to grant assistance was adopted on the basis of Regulation No 1787/84. Article 22(3) of that regulation, which calls for a description of the project cofinanced by Community funds, would be redundant if it were to be considered that such a description is no more than a statement. The same applies to Article 28(1)(b) of that regulation, according to which the claim for final payment is to include confirmation that the investment made conforms to the initial project.

94 The application for ERDF assistance presented to the Commission by the Italian authorities under Article 22(3) of Regulation No 1787/84 makes it clear that the description of the dam and its foreseen use formed an integral part of the application. The Commission adds that the assistance was granted taking account in particular of the duration, technical features and purposes of the project set out in the application. In this regard, irrigation of some 1 000 hectares of agricultural land was, it contends, provided for only as an ancillary matter.

95 In those circumstances, the diverting of the project, once financing had been procured, to uses other than those provided for, is in the Commission's view incompatible with the concept of coherent converging regional development underlying the idea of programming. The assistance in question was awarded on the premiss that the water retained by the dam would be used, in the first place, to supply water to an industrial centre to be built.

96 It follows, in its submission, that the change of use of the dammed water justifies cancellation of the assistance under Article 24 of Regulation No 4253/88.

97 Furthermore, the Commission responds that the applicant's argument (see paragraph 90 above) that the Commission had not in the contested decision taken into account the fact that the Italian authorities had informed the Commission of the change in question of the intended use of the project is baseless. The Commission had never given its approval for the alteration in the intended use of the project which was, what is more, communicated most belatedly, that is to say, on 29 March 2001. Furthermore, the applicant had not even requested approval of that alteration. The Commission argues that communicating a piece of information on the change of use of the project is not equivalent to a request for authorisation. On the contrary, the information communicated to it on 29 March 2001 prompted it to initiate, in September 2001, the procedure to cancel the assistance. The applicant's confirmation of that information on 29 November 2001 led to the adoption of the contested decision on 11 December 2002.

98 In addition, the applicant's argument is based on misinterpretation of Article 24 of Regulation No 4253/88, to the effect that the Commission may neither reduce nor cancel assistance on the sole grounds that national authorities have sought approval of it. Now, the Community's financial interests would be imperilled if the Commission were unable to reduce or cancel assistance simply because it had been informed of the change to the project. Such an interpretation would make it futile even to approve the change.

— Findings of the Court

99 First of all, it must be pointed out that, as the Commission has correctly observed, the purpose of the project at issue was stated in the application for ERDF assistance presented by the Italian Republic.

100 In addition, the Commission is quite right to point out that it is not enough to inform it of alterations made to the intended use of a project the construction of which is cofinanced by the ERDF, it is also necessary that it should give its assent to the alterations. The Court has earlier held that the Commission may cancel assistance, particularly where a significant change to the operation affecting its nature or the conditions governing its execution is involved, for which the Commission's prior approval has not been sought (Case T-216/96 *Conserve Italia*, paragraph 92).

101 The file makes it clear that the applicant did no more than inform the Commission, belatedly, of the change in the intended use of the water retained by the dam in question. That information plainly did not amount to a request for authorisation.

102 Given, on the one hand, that the decision to grant assistance and the corresponding application for financing must be read together, as stated in paragraph 81 above, and, on the other, that the intended use of the project was significantly changed without the Commission's prior approval, because the main objective of supplying water to the complex at Licata was not attained, it must follow that cancellation of the assistance is warranted in the light of Article 24 of Regulation No 4253/88.

103 In those circumstances, the third argument in support of the first plea is unfounded and must therefore be rejected, which means that the first plea is rejected in its entirety.

On the second plea alleging a manifest error of appreciation in the application of Article 24 of Regulation No 4253/88

Arguments of the parties

104 The applicant maintains that the assessment, which was decisive for the Commission, that the works were not completed and that the date on which the dam might be operational and in use could not be determined, even putatively, is incorrect.

105 It claims, on the contrary, that it is apparent from the documents sent to the Commission, especially from the certificate of completion of works, that the works were completed on 4 November 1992, in that the dam had been fully built. It adds that that fact was accepted in the sixth recital in the preamble to the contested decision.

106 The applicant goes on to state that the latest works, which the contested decision states remain to be finished, are entirely ancillary. They do not give grounds for excluding actual completion of the dam. The certificate of completion of the works itself confirms those assertions.

107 The applicant further observes that that certificate does not, contrary to what is stated in the sixth recital in the preamble to the contested decision, mention the unfinished 'temporary water reserves'.

108 The applicant adds that the only demand made by the Servizio nazionale dighe (National Dams Board) after the project was completed was for plating work to be carried out on the left bank of the dam.

109 The applicant infers that the project consisting of the building of a dam across the Gibbesi was completed in November 1992 and that the abovementioned work required by the Servizio nazionale dighe was extraneous to the chief function of the dam, which is above all to retain water. The Servizio has, moreover, always considered that the dam was complete, on the basis of half-yearly checks of the operational capacity of the installations, confirmed by the corresponding certificates of efficiency.

110 The Commission denies that the works were completed in 1992 and that the actions to be taken for the purposes of the dam's operation were merely ancillary.

111 In support of its contention, the Commission mentions the letter of 23 May 2000 sent by the Italian authorities to the Commission, enclosing a certificate of completion of the works, from which it is apparent that the temporary reservoirs had not been built and that the aqueduct had not been completed. The Commission adds that, by letter of 19 December 2000, it requested further information from the Italian authorities concerning, in particular, completion and the date, actual or presumed, of the dam's entering into operation. By letter of 21 February 2001 the applicant forwarded a timetable showing that the works were to be finished by 2 February 2003.

112 The Commission adds that the work in question included not only the construction of the main body of the dam but also the diversion of the Gibbesi, the outlet canal, the aqueduct and other works. In addition, the Italian authorities pointed out in

their application for assistance the purpose of the project, which was to contribute to the industrial development of the region concerned. It follows that the project had to be completed from every aspect and had to be operational in order to achieve the objectives laid down. In those circumstances, the distinction drawn by the applicant between major and minor works is meaningless.

113 That being so, the Commission could not do other than find, at the time when the contested decision was adopted, that the works to be carried out in connection with the assistance at issue remained incomplete.

Findings of the Court

114 The sixth recital in the preamble to the contested decision merely states that the work on the main body of the dam, rather than the dam in its entirety, had been completed.

115 Furthermore, it is apparent from the file, in particular from the certificate of completion of work enclosed with the letter of 23 May 2000 sent to the Commission by the Italian authorities, that the Commission was right to point out that the temporary reservoirs had not been built and the aqueduct had not been completed, even though those works were an integral part of the project at issue.

116 In those circumstances, it follows that the works that are the subject-matter of this ERDF assistance had not been completed when the contested decision was adopted.

117 Consequently, the second plea is unfounded and must therefore be rejected.

118 In light of all the foregoing, the action must be dismissed.

Costs

119 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the other party's pleadings. Nevertheless, the first paragraph of Article 87(3) provides that the Court may order that the costs be shared if each party succeeds on some and fails on other heads. The second paragraph of Article 87(3) provides that the Court may order a party, even if successful, to pay costs which it considers that party to have unreasonably or vexatiously caused the opposite party to incur.

120 In this instance, the Commission has been unsuccessful in its objection of inadmissibility. Moreover, some of the costs incurred by the applicant in connection with the lodging of its application were incurred because of the less than perfect nature of the drafting of the contested decision (see paragraph 21 above). The Court therefore considers it just to order the Commission to bear half of its own costs. It must therefore be held that the applicant is to bear its own costs and half of those incurred by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE
(First Chamber, Extended Composition)

hereby:

1. **Dismisses the objection of inadmissibility;**

2. **Dismisses the action as unfounded;**

3. **Orders the applicant to bear its own costs and half of the costs incurred by the Commission, and orders the Commission to bear half its own costs.**

Vesterdorf Cooke García-Valdecasas

Labucka Trstenjak

Delivered in open court in Luxembourg on 18 October 2005.

E. Coulon B. Vesterdorf

Registrar President