JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)

10 May 2006 *

In Case T-395/04,

Air One SpA, established in Chieti (Italy), represented by G. Belotti and M. Padellaro, avocats,

applicant,

v

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

defendant,

APPLICATION under Article 232 EC for a declaration that, by failing to take a decision on the complaint made by the applicant on 22 December 2003 concerning aid unlawfully granted by the Italian Republic to the air carrier Ryanair, the Commission has failed to fulfil its obligations,

* Language of the case: Italian.

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

composed of H. Legal, President, P. Lindh and V. Vadapalas, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 11 January 2006,

gives the following

Judgment

Background to the dispute

1 By letter of 22 December 2003, the applicant submitted a complaint to the Commission alleging unlawful aid granted by the Italian authorities to the air carrier Ryanair in the form of reduced prices for the use of airport and groundhandling services. The applicant called upon the Commission to order the Italian Republic to suspend those aid payments.

2 Not having received a reply to this complaint, the applicant asked the Commission to acknowledge receipt by letter of 26 January 2004.

3 By letter of 17 February 2004, the Commission confirmed that the complaint was recorded as having been received on 29 December 2003. The Commission sought the applicant's consent to disclose its name to the Italian authorities or, alternatively, to send them a non-confidential version of the complaint.

4 By letter of 23 February 2004, while waiting for a reply, the applicant called upon the Commission to investigate the contested aid.

5 By fax dated 1 March 2004, the applicant sent the Commission a non-confidential version of its complaint.

6 On 11 June 2004, as it had still not received a reply, the applicant formally called upon the Commission to define its position with regard to its complaint in accordance with Article 232 EC.

7 By letter of 9 July 2004, the Commission sent the applicant's complaint to the Italian authorities, asking them to confirm whether the allegations were true and to reply within a period of three weeks. At the Italian authorities' request, that deadline was extended to 30 September 2004.

8 By fax of 13 September 2004, the Commission notified the applicant that on 9 July 2004 the non-confidential version of its complaint had been sent to the Italian authorities, which had been had been granted a deadline for reply expiring on 30 September 2004.

Procedure and forms of order sought by the parties

9 By application lodged at the Registry of the Court of First Instance on 5 October 2004, the applicant brought the present action.

10 The parties submitted oral argument and their answers to questions put by the Court of First Instance at a hearing on 11 January 2006.

11 The applicant claims that the Court should:

— declare and rule that the Commission has failed to fulfil its obligations under the EC Treaty, since, despite having been formally requested to do so, it failed to define its position on the complaint made on 22 December 2003 concerning State aid which the Italian authorities unlawfully granted to the air carrier Ryanair;

— order the Commission to define its position without further delay on that complaint and on the protective measures sought;

— order the Commission to pay the costs, even if it becomes unnecessary to give a judgment in the event that the Commission adopts a measure whilst the proceedings are pending.

12 The Commission contends that the Court should:

— declare that the action is inadmissible or, in the alternative, unfounded;

— order the applicant to pay the costs.

Admissibility

Arguments of the parties

13 The Commission submits that the action is inadmissible since the applicant has not demonstrated that it is directly and individually concerned by the decision that the Commission failed to adopt. In the absence of adequate proof that the contested measures have directly affected its interests, the applicant does not have standing to bring proceedings.

14 The Commission considers that it is for the applicant to demonstrate that its market position would be substantially undermined (Order of the Court of First Instance in Case T-358/02 *Deutsche Post and DHL* v *Commission* [2004] ECR II-1565, paragraph 37), regardless of the stage the procedure has reached when the Commission takes a decision which is the subject of an action for annulment. However, it laments the way in which the case-law of the Court of First Instance has evolved to become more permissive. By conferring on all undertakings invoking a relationship of competition, even a minor one, the status of 'parties concerned' within the meaning of Article 88(2) EC and, consequently, standing to bring proceedings, that case-law has had the effect of defeating the purpose of the condition laid down by Article 230 EC and Article 232 EC that an individual must be directly and individually concerned by a measure in order to be able to seek its

annulment or to complain of failure to act on the part of its author. The Commission adds that its doubts are shared by Advocate General Jacobs, as expressed in his Opinion of 24 February 2005 in Case C-78/03 P *Commission* v *Aktionsgemeinschaft Recht und Eigentum* [2005] ECR I-10737. It calls upon the Court of First Instance to adopt a more stringent approach to the criteria of admissibility, following the path taken by the Court of Justice in its judgments in Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677 and Case C-263/02 P *Commission* v *Jégo-Quéré* [2004] ECR I-3425.

15 The Commission considers that the applicant has failed to demonstrate that it is substantially affected by the State measures it complains of, in particular with regard to their effect on its competitive position. The simple fact of being a potential competitor of the recipient of the contested State measures is not sufficient for the applicant to be regarded as 'directly and individually concerned'.

16 Whilst it does not go so far as to require that the air routes served by the applicant and Ryanair should totally coincide, the Commission takes the view that it is for the applicant to demonstrate that there is a relationship of substitutability between its routes and those of Ryanair. In the present case, the relationship of competition between Ryanair and the applicant is negligible. In fact, only the route between Rome and Frankfurt is served by both companies. However, the applicant operates that route jointly with Lufthansa as part of a code-sharing agreement. Flights on that route cannot therefore be regarded as being reserved to the applicant.

17 The applicant submits that the action is admissible.

18 Firstly, the excessively restrictive interpretation of the requirements for admissibility put forward by the Commission is out of step with current case-law (see Case T-27/02 *Kronofrance* v *Commission* [2004] ECR II-4177, paragraph 34, and the case-law cited).

19 Secondly, it is clear that the applicant, a potential competitor of Ryanair, is a party concerned within the meaning of Article 88(2) EC. Its growth is hampered by the aid granted to Ryanair, particularly on the routes from Italian airports in Rome (Ciampino), Milan (Bergamot, Orio al Serio), Pescara, Alghero and Venice (Treviso).

20 Thirdly, the applicant submits that if it were not directly and individually concerned by the aid granted to its competitor, Ryanair, it would not have devoted its resources to complaining about that aid and commencing proceedings.

21 Fourthly, the Commission's contention that the action is inadmissible is inconsistent with the objectives of the Treaty concerning the monitoring of aid. Complaints by third-party undertakings make the Commission's exercise of its exclusive prerogatives in this area more effective.

22 Fifthly, with regard to the competition rules applicable to undertakings, it has already been established by case-law that actions intended to review the Commission's decisions or its failure to act are admissible where a complaint alleging that there has been an infringement is made to it (Case 26/76 *Metro* v *Commission* [1977] ECR 1875, paragraph 13). Those principles should also apply in the field of State aid. The applicant notes, in particular, that the Court of First Instance has already held that an action brought by a potential competitor against a decision concerning the control of concentrations was admissible (Case T-114/02 *BaByliss* v *Commission* [2003] ECR II-1279).

23 Sixthly, the applicant submits that the Commission cannot rely on the order in *Deutsche Post and DHL* v *Commission* to dispute the claim that its interests have been substantially affected. That judgment concerned an action for annulment of a decision taken under Article 88(2) EC, at the conclusion of a formal aid investigation procedure in the course of which the third parties had been duly invited to submit their comments.

Findings of the Court

24 At the outset, it must be stated that the applicant's claim that the Court should order the Commission to define without further delay its position on the complaint and on the protective measures sought by the applicant is inadmissible. The Community judicature is not competent to issue directions to an institution in the context of an action based on Article 232 EC. All that the Court of First Instance can do is determine whether there has been a failure to act. It is then for the institution concerned, pursuant to Article 233 EC, to take the measures necessary to comply with the order of the Court (Case T-74/92 *Ladbroke* v *Commission* [1995] ECR II-115, paragraph 75, and Case T-127/98 *UPS Europe* v *Commission* [1999] ECR II-2633, paragraph 50).

25 With regard to the admissibility of a claim for a declaration that there has been a failure to act on the part of the Commission, it should be made clear that Articles 230 EC and 232 EC merely prescribe one and the same remedy. It follows that, just as the fourth paragraph of Article 230 EC allows individuals to bring an action for annulment against a measure of an institution not addressed to them provided that the measure is of direct and individual concern to them, the third paragraph of Article 232 EC must be interpreted as also entitling them to bring an action for failure to act against an institution which they claim has failed to adopt a measure which would have concerned them in the same way (Case C-68/95 *T. Port* [1996] ECR I-6065, paragraph 59).

26 It must therefore be considered whether it would be admissible for the applicant to bring an action for annulment of at least one of the measures the Commission might have adopted at the conclusion of the preliminary stage of the procedure for reviewing aid under Article 88(3) EC, to the effect that the contested measures did not constitute aid, that they did constitute aid but were compatible with the common market, or that it was necessary to initiate the procedure under Article 88(2) EC.

27 Case-law has already established that it is admissible for an action to be brought by a competitor of a recipient of aid for a declaration that the Commission has failed to take any decision at the preliminary stage of the procedure for reviewing aid under Article 88(3) EC (Case T-95/96 *Gestevisión Telecinco* v *Commission* [1998] ECR II-3407, paragraphs 57 to 70, and Case T-17/96 *TF1* v *Commission* [1999] ECR II-1757, paragraphs 26 to 36).

28 The Commission does not accept that such an approach is applicable in the present case. In essence, it puts forward three objections.

29 Firstly, it argues that the status of 'party concerned' within the meaning of Article 88(2) EC should not be sufficient for there to be a finding that an action brought by a competitor is admissible. The latter must demonstrate that its interests have been substantially affected, in accordance with the requirements laid down by case-law for admissibility of actions against decisions taken at the conclusion of the formal aid investigation procedure under Article 88(2) EC.

30 In that regard, it is to be noted that where, without initiating the formal review procedure under Article 88(2) EC, the Commission finds, by decision adopted on the basis of Article 88(3) EC, that aid is compatible with the common market, the persons intended to benefit from the procedural guarantees provided for by Article 88(2) EC may secure compliance therewith only if they are able to challenge that decision before the Community judicature (Case C-198/91 *Cook* v *Commission* [1993] ECR I-2487, paragraph 23; Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraph 17; and Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 40).

31 For those reasons, the Community judicature declares to be admissible an action for the annulment of such a decision brought by a party concerned within the meaning

of Article 88(2) EC where it seeks, by instituting proceedings, to safeguard the procedural rights available to it under the latter provision (*Cook* v *Commission*, paragraphs 23 to 26, and *Matra* v *Commission*, paragraphs 17 to 20).

32 On the other hand, if the applicant calls in question the merits of the decision appraising the aid as such or a decision taken at the end of the formal investigation procedure, the mere fact that it may be regarded as concerned within the meaning of Article 88(2) EC cannot suffice to render the action admissible. It must then demonstrate that it enjoys a particular status within the meaning of the judgment in Case 25/62 *Plaumann* v *Commission* [1963] ECR 95. That applies in particular where the applicant's market position is substantially affected by the aid to which the decision in issue relates (see, to that effect, Case 169/84 *COFAZ and Others* v *Commission* [1986] ECR 391, paragraphs 22 to 25, and the order in Case C-409/96 P *Sveriges Betodlares and Henrikson* v *Commission* [1997] ECR I-7531, paragraph 45).

33 That case-law, recently confirmed in the judgment in *Commission* v *Aktionsgemeinschaft Recht und Eigentum*, demonstrates the importance to be attached to the different stages of the aid investigation procedure, as was acknowledged by the Commission at the hearing. The Commission cannot therefore properly rely on the order in *Deutsche Post and DHL* v *Commission* in support of its contention that the action is inadmissible since the applicant's position on the market in question is not substantially affected by the grant of the contested measures. The abovementioned order, dismissing the action as inadmissible on the basis that the competitive position of the two applicant undertakings was not substantially affected, was made in a case involving an action against a decision the Commission had taken at the conclusion of the procedure under Article 88(2) EC, in the course of which the parties concerned had been duly invited to submit their comments.

34 The Court must therefore reject the Commission's argument which seeks to extend to all actions against decisions concerning State aid the conditions for admissibility

applicable to actions against decisions taken at the conclusion of the formal aid investigation procedure under Article 88(2) EC and to actions against decisions taken under Article 88(3) EC, which are designed not to safeguard the procedural rights of the parties concerned but to challenge the validity of those decisions.

35 Secondly, the Commission contends that the applicant cannot be treated as a party concerned having standing to bring proceedings unless it can demonstrate that it has been substantially affected by the contested aid.

36 That contention must also be rejected. According to settled case-law, the parties concerned, within the meaning of Article 88(2) EC, are those persons, undertakings or associations whose interests might be affected by the grant of the aid, in particular undertakings competing with the recipients of that aid, and trade associations (Case 323/82 *Intermills* v *Commission* [1984] ECR 3809, paragraph 16; *Commission* v *Sytraval and Brink's France*, paragraph 41; and *Commission* v *Aktionsgemeinschaft Recht und Eigentum*, paragraph 36). The case-law established by the judgment in *Intermills* v *Commission* was given expression in Article 1(h) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ 1999 L 83, p. 1), which states that 'interested party' is to mean 'any Member State and any person, undertaking or association of undertakings whose interests might be affected by the granting of aid, in particular the beneficiary of the aid, competing undertakings and trade associations'. The status of 'party concerned' is not therefore restricted to undertakings that are substantially affected by the grant of aid.

37 Thirdly, the Commission contends that a potential competitor cannot be regarded as a party concerned having standing to bring proceedings.

38 In the present case, since the applicant already operates in the Italian market providing scheduled air transport of passengers, it cannot be denied the status of party concerned merely on the ground that the routes it operates directly do not coincide exactly with those operated by the recipient of the contested measures. For the purposes of admissibility, it is sufficient to find that the applicant is a competitor of the recipient of the contested State measures insofar as those two undertakings operate, directly or indirectly, services providing scheduled air transport of passengers from or to Italian airports and, in particular, regional airports.

39 As far as international routes are concerned, the applicant provides, inter alia, services between Rome and Frankfurt, two cities which are also served by Ryanair. Indeed, the applicant does not operate that route directly using aircraft from its own fleet but has concluded a code-sharing agreement with Lufthansa. However, that does not mean that the fact that the applicant was able to provide the public with air transport services between those two cities can be overlooked. Moreover, as the applicant already has a fleet of aircraft at its disposal, it is in a position to expand its activities to include other destinations which are also served by Ryanair. With regard to domestic routes, it is clear that whilst, at the material time, Ryanair did not operate routes between Italian cities, the possibility cannot be excluded that it could subsequently do so in direct competition with the applicant.

40 In those circumstances, it is possible to conclude that there was a sufficient relationship of competition, for the purposes of admissibility, between the applicant and the recipient of the contested measures.

41 Consequently, the applicant is a party concerned within the meaning of Article 88(2) EC. It is therefore admissible for the applicant to challenge a decision taken by the Commission under Article 88(3) EC in order to secure its procedural rights as a party concerned. In those circumstances, it is entitled to seek from the Court of First Instance a declaration as to any failure to act on the part of the Commission, given

that the possibility remains open to the Commission to define its position on the complaint without initiating the formal investigation procedure.

42 The action is therefore admissible.

Merits

Arguments of the parties

43 The applicant argues that the Commission was required to take a decision on its complaint within a reasonable period of it being referred to it. The more concise the complaint sent to the Commission, the shorter that period should be. The Commission cannot prolong indefinitely its preliminary investigation into State measures in relation to which there has been a complaint under Article 88 EC where it has, as in this case, agreed to initiate such an investigation (*Gestevisión Telecinco* v Commission, paragraphs 72 to 74). Any decision by the Commission not to initiate an investigation into the substance and act on a complaint, or to reject a request for protective measures must, a fortiori, be issued within a considerably shorter period.

44 In the present case, the Commission failed to comply with that obligation since it remained inactive for nine months. The applicant draws attention to the unreasonable nature of the conduct of the Commission, which, in the 11 months following the submission of its complaint, merely sent the latter to the Italian authorities. In the course of the present proceedings, the Commission has not served any evidence that could demonstrate that it had carried out any inquiries whatsoever during that period. Its role, which was totally passive, is incompatible with the principle of sound administration. Such conduct constitutes a failure to act within the meaning of Article 232 EC.

45 The applicant notes that that failure to act is all the more blatant since the aid at issue concerned Ryanair, an undertaking the funding of which had already been the subject of inquiries by the Commission Directorate-General for Energy and Transport specialising in the application of State aid in the airline sector, to which the complaint was submitted (Commission Decision 2004/393/EC of 12 February 2004 concerning advantages granted by the Walloon Region and Brussels South Charleroi Airport to the airline Ryanair in connection with its establishment at Charleroi) (OJ 2004 L 137, p. 1). With regard to the use of State resources, the applicant also notes that, with the exception of the airport at Rome Ciampino, all the airport management companies referred to in the complaint are majority-owned by public authorities.

46 The Commission should have taken a decision on the request for protective measures set out in the complaint at least within a reasonable period, in accordance with Article 11 of Regulation No 659/1999.

47 The Commission claims these assertions are without substance.

48 Firstly, it points out that decisions on State aid are not addressed to complainants, including decisions not to initiate the formal aid investigation procedure under Article 88(2) EC (*Commission* v *Sytraval and Brink's France*, paragraph 45). Those decisions are, in fact, addressed only to Member States. Consequently, the Commission is required to take action in relation to contested State measures only with regard to the Member State concerned.

49 Secondly, the Commission states that where a complaint concerning State aid is submitted to it, its primary duty is to examine that complaint and, where appropriate, to hear the Member State concerned in order to come to a decision as to whether proceedings should be initiated. It points out that Regulation

No 659/1999 (Article 10, Article 11(1) and (2) and Article 20(2)) require it to examine the information received without delay and to ask the Member State concerned for details. At the conclusion of that stage of the preliminary inquiry, the Commission is then obliged to define its position and communicate this to the complainant or to inform it that there are insufficient grounds for it to take a view.

50 The Commission claims that it has fulfilled its obligations. First of all, it states that it informed the applicant, by letter of 17 February 2004, that the relevant department was to analyse the information provided and determine whether an action could be brought against the Italian authorities. The Commission points out that on that occasion it questioned the applicant as to whether any of the information contained in the complaint was confidential. That letter therefore demonstrates that the complaint was already being investigated in February.

51 Next, by letter of 9 July 2004, the Commission questioned the Italian authorities on the measures referred to in the complaint in order to collect information and further details on the matters set out in the complaint. It informed the applicant of this on 13 September 2004. The Commission deduces from this that, by that date, the applicant must have been aware that its complaint was being investigated, which would rule out any claim alleging failure to act.

52 Thirdly, the Commission notes that the measures it could have taken thus far form part of the preliminary stage which should permit it to adopt one of the decisions under Article 4(2), (3) and (4) of Regulation No 659/1999, namely a decision that the measures in question do not constitute aid, or that they constitute compatible aid, or that formal proceedings must be initiated under Article 88(2) EC. At the conclusion of those proceedings, it is open to the applicant to apply to the Court of First Instance for review of the decision thus adopted.

53 Fourthly, the Commission states that it is not subject to any time-limits for analysing non-notified aid. The period laid down by the Court in Case 120/73 *Lorenz* [1973] ECR 1471 does not apply to non-notified aid (*Gestevisión Telecinco* v *Commission,* paragraph 78). With regard to the latter, Article 10(2) of Regulation No 659/1999 provides that the Commission may or must request the Member State to provide information before initiating formal proceedings.

54 Indeed, whilst Regulation No 659/1999 requires the Commission to examine the facts that have been made known to it without delay, whether such an examination is reasonable must be considered in the light of the circumstances and the context of each case (*Gestevisión Telecinco* v *Commission,* paragraph 75). It cannot, however, be required to provide the complainant with detailed explanations as to the ongoing inquiries.

55 In the present case, the administrative procedure took approximately 11 months from the receipt of the confidential version of the complaint and nine months from receipt of the non-confidential version. In view of the circumstances and the context of the case, that is not an unreasonable period. The Commission refers to four particular difficulties encountered in dealing with the complaint:

— the alleged aid in question was granted in a complex sector (air transport of passengers and airport services);

— the providers of the alleged aid were companies in which public authorities had various shareholdings, making the collection of information on the agreements between those providers and Ryanair more complicated both for the Member State and the Commission;

— it was difficult to verify whether the contested aid came from State resources or were attributable to the State;

— the applicant's complaint called upon the Commission to extend its investigation to three airport infrastructure management companies identified only by the name of the airport they operated, which involved the Commission in considerable additional work.

56 The Commission considers that it acted with due diligence once it had been given formal notice by the applicant.

57 The Commission deduces from the chronology of the proceedings that, as at the date when the present action was brought (5 October 2004), the applicant could not be unaware of the progress that had been made in the investigation. Taking into account the deadline for reply imposed on the Italian authorities, the applicant could not reasonably anticipate that the Commission would define its position before 5 October 2004. The Commission received the information provided by the Italian authorities on 7 October 2004 and further, supplementary information was provided on 9 November 2004.

58 Lastly, with regard to the alleged infringement of the principle of sound administration, the Commission considers that that plea, raised for the first time in the reply, is new and therefore inadmissible.

Findings of the Court

59 As a preliminary point, it is to be noted that the argument relating to infringement of the principle of sound administration was not expressly formulated in the

application. However, that argument is closely linked to the argument alleging that more than a reasonable period was allowed to elapse in examining the complaint, which is the only plea in law raised in this action. Accordingly, that argument cannot be regarded as a new plea in law within the meaning of Article 48(2) of the Rules of Procedure of the Court of First Instance and is therefore admissible.

60 It must be ascertained whether, at the time when the Commission was given formal notice under Article 232 EC, it was under an obligation to act.

61 Since the assessment of the compatibility of State aid with the common market falls within its exclusive competence, the Commission is bound, in the interests of sound administration of the fundamental rules of the Treaty relating to State aid, to conduct a diligent and impartial examination of a complaint alleging the existence of aid that is incompatible with the common market. It follows that the Commission cannot prolong indefinitely its preliminary investigation into State aid that has been the subject of a complaint where it has, as in the present case, approved the initiation of such an investigation by asking the Member State concerned to provide information. Whether or not the duration of the investigation of a complaint is reasonable must be determined in relation to the particular circumstances of each case and, especially, its context, the various procedural stages to be followed by the Commission and the complexity of the case (*Gestevisión Telecinco* v *Commission,* paragraphs 72 to 75, and *TF1* v *Commission,* paragraphs 73 to 75).

62 In the present case, the Commission received the applicant's complaint on 29 December 2003. By the time the Commission was given formal notice under Article 232 EC, that is to say, on 11 June 2004, the investigation had therefore been ongoing for less than six months.

63 The case is undeniably complex and displays a certain novelty, notwithstanding the fact that Decision 2004/393 was adopted some three months after the applicant submitted its complaint.

64 One of the difficulties raised by the investigation of the complaint was that it referred to a number of Italian airports without, however, specifically identifying all the parties providing the contested aid. Although the complaint named so.ge.a.al, Saga and Aeroporti di Roma, airport management companies in Alghero, Pescara and Rome, the applicant also called upon the Commision to extend its inquiries to include agreements concluded by Ryanair with other Italian airports, in particular those in Treviso, Pisa and Bergamot (Orio al Serio). In order to ascertain whether publicly funded resources were involved, the Italian authorities were obliged to request an additional two-month period in order to identify the companies managing the airports in question.

65 Moreover, the Commission did not remain inactive after receiving the applicant's complaint. In fact, it questioned the Italian authorities on 9 July 2004, after obtaining a non-confidential version of the complaint from the applicant. The Italian authorities' reply was received by the Commission on 7 October 2004, which all but coincided with the expiry of the prescribed period for commencing proceedings.

66 It is true that the Court has not been provided with any explanation as to why the Commission waited more than four months to send the non-confidential version of the complaint to the Italian authorities or to ask them to provide information. Notwithstanding that delay, however, the fact remains that the total duration of the inquiry was less than that in cases of a similar complexity in which the Court held that there was an unlawful failure to act. It is to be noted, in that regard, that the time engaged in dealing with the complaints which gave rise to the judgments in *Gestevisión Telecinco* v *Commission* and *TF1* v *Commission* amounted, in the first case, to 47 months for the first complaint and 26 months for the second complaint, and, in the latter case, to 31 months.

67 Those factors, taken as a whole, mean that it is not possible consider that, as of the time when formal notice was given, the duration of the investigation of the complaint was unreasonable.

68 The action must therefore be dismissed.

Costs

69 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. As the applicant has been unsuccessful and the Commission has applied for costs, the applicant must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. Dismisses the action;

2. Orders the applicant to pay the costs.

Legal Lindh Vadapalas

Delivered in open court in Luxembourg on 10 May 2006.

E. Coulon H. Legal

Registrar President