

Case T-26/01

Fiocchi munizioni SpA

v

Commission of the European Communities

(Articles 296 EC and 298 EC — State aid granted to an arms production undertaking — Complaint — Action for declaration of failure to act — Inadmissibility)

Judgment of the Court of First Instance (Third Chamber, Extended Composition), 30 September 2003 II-3953

Summary of the Judgment

1. *General and final provisions — Powers of the Member States to adopt measures intended to ensure national security — Production and trade in armaments — Distortion of competition on the market for products not intended for specifically military purposes — Specific procedural regime established by Article 298 EC — Powers of the Commission — Limits*
(Arts 86(3) EC, 88 EC, 296(1)(b) EC and 298 EC)

2. *Actions for failure to act — Failure to act brought to an end before action brought — Inadmissible*
 (Arts 232 EC and 233, first para., EC)

1. The regime established by Article 296(1)(b) EC is intended to preserve the freedom of action of the Member States in certain matters affecting national defence and security. It has, for the activities which it covers and on the conditions which it sets forth, a general effect, capable of affecting all the ordinary legal provisions of the Treaty, including those on the competition rules and, confers on the Member States a particularly wide discretion in assessing the needs receiving the protection of the essential interests of their security. The measures which they may adopt must not however adversely affect the conditions of competition in the common market regarding 'products which are not intended for specifically military purposes'.

It is thus that, where in favour of production or trade in arms, munitions or war material identified as such by the Council, a Member State adopts an aid measure on the basis of considerations linked to the need to protect the essential interests of its national security, so that the Commission cannot use the examination procedure laid down by Article 88 EC, the rules of competition do not apply to such State aid. If it considers that the measure in

question may cause distortion in competition, the Commission undertakes with the Member State concerned a bilateral examination of that measure, without being able to address a final decision or directive to that State, but with the power to bring directly before the Court of Justice an action for failure to fulfil Treaty obligations, if it considers that the Member State has made improper use of the power provided for in Article 296 EC.

(see paras 58-59, 63-64, 74)

2. An action for failure to act is inadmissible where the Commission has defined its position, for the purposes of Article 232 EC, before the action was brought. A judgment which, in such circumstances, found that there had been a failure to act on the part of the defendant institution could not give rise to the measures for compliance referred to in the first paragraph of Article 233 EC.

(see para. 92)