

Case T-308/05

Italian Republic

v

Commission of the European Communities

(Structural funds — Co-financing — Regulations (EC) Nos 1260/1999 and 448/2004 — Conditions concerning the eligibility of advance payments made by national bodies within the framework of State aid schemes or in relation to the grant of aid — Proof of use of the funds by the final recipient — Actions for annulment — Actionable measures)

Judgment of the Court of First Instance (Second Chamber), 12 December 2007 II - 5096

Summary of the Judgment

- 1. Actions for annulment — Actionable measures*
(Arts 230 EC and 233 EC; Council Regulation No 1260/1999, Art. 32(1), fourth para., and (3))
- 2. Procedure — Application initiating proceedings — Formal requirements*
(Rules of Procedure of the Court of First Instance, Art. 44(1))

3. *Actions for annulment — Actionable measures*
(Art. 230 EC; Council Regulation No 1260/1999)
4. *Economic and social cohesion — Structural assistance — Community financing — Eligibility for assistance of expenses incurred by national bodies*
(Council Regulation No 1260/1999, Art. 32; Commission Regulation No 448/2004, Annex, Rule No 1, points 1 and 2)
5. *Budget of the European Communities — Community financial assistance — Financial control of assistance*
(Arts 10 EC and 274 EC; Council Regulation No 1260/1999, Arts 32(1), third para., and 38(1)(g); Commission Regulation No 438/2001, Arts 2(1) and 7(2))
6. *Acts of the institutions — Choice of legal basis — Community legislation — Requirements of clarity and foreseeability*
7. *Economic and social cohesion — Structural assistance — Community financing — Eligibility for assistance of expenses incurred by national bodies*
(Council Regulation No 1260/1999, Art. 32(1), third para.)
8. *Economic and social cohesion — Structural assistance — Community financing — Eligibility for assistance of expenses incurred by national bodies*
(Council Regulation No 1260/1999, Art. 32(1), third para.; Commission Regulation No 448/2004, Annex, Rule No 1, point 1.3)

1. An action for annulment under Article 230 EC is available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to produce legal effects.

In that regard, when the Commission receives an application, acceptable within the meaning of Article 32(3) of Regulation No 1260/1999 laying down general provisions on the Structural

Funds, for a contribution from the Structural Funds in the context of an aid scheme, it is not entitled to prolong a state of inaction. Subject to available funding, the Commission is to make the related interim payments within no more than two months of receipt of that application, in accordance with the fourth subparagraph of Article 32(1) of that regulation. Thus, if the Commission had failed in the present case to fulfil that obligation to act, the Member State concerned should have contested that situation by bringing an action for failure to act. If that action for failure to act had been declared well founded, the Commission would have been required, pursuant to Article 233 EC, to take the

necessary measures to comply with the judgment. Consequently, a letter of the Commission, in so far as it discloses to a Member State the Commission's refusal, pending receipt of information concerning advance payments, to act in regard to the payment applications, produces no legal effects which can be contested in the context of an action for annulment under Article 230 EC.

it is necessary — if an action or, more specifically, a plea in law, is to be admissible — that the basic legal and factual particulars relied on be indicated coherently and intelligibly in the application itself.

(see paras 71, 72)

(see paras 56, 59, 62)

2. Article 44(1)(c) of the Rules of Procedure of the Court of First Instance provides that the application initiating proceedings must state a summary of the pleas in law on which the application is based. Accordingly, it must specify the grounds on which the action is based, with the result that a mere abstract statement of the grounds is not sufficient.

Moreover, that summary — albeit concise — must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court of First Instance to rule on the action, if necessary, without any further information. In order to ensure legal certainty and the sound administration of justice,

3. A Commission letter to a Member State, asking it to complete the statements of expenditure accompanying the applications made to the Commission for payment of the contribution from the Structural Funds, inasmuch as it refers to an interpretative memorandum — concerning the third subparagraph of Article 32(1) of Regulation No 1260/1999 laying down general provisions on the Structural Funds — according to which, in the context of State aid schemes within the meaning of Article 87 EC or in relation to the grant of aid, advance payments made by the national bodies which are not accompanied by documentary evidence of their use by the final recipients are not eligible for a contribution from the Funds, has not changed the scope of the Community rules and, to that extent, cannot constitute an actionable measure for the purposes of Article 230 EC.

(see paras 102, 114)

4. Inasmuch as a Commission letter to a Member State relies on an interpretative memorandum — concerning the third subparagraph of Article 32(1) of Regulation No 1260/1999 laying down general provisions on the Structural Funds — according to which, in the context of State aid schemes within the meaning of Article 87 EC or in relation to the grant of aid, advance payments made by the national bodies which are not accompanied by documentary evidence of their use by the final recipients are not eligible for a contribution from the Funds, as a basis for refusing to charge to the Funds the amounts corresponding to advance payments unsupported by documentary evidence of their use by the final recipients, that letter complies with Article 32 of Regulation No 1260/1999 and points 1 and 2 of Rule No 1 of the Annex to Regulation No 448/2004 amending Regulation No 1685/2000 laying down detailed rules for the implementation of Regulation No 1260/1999 as regards eligibility of expenditure of operations co-financed by the Structural Funds.

(see paras 103, 148)

5. The Commission is responsible for the implementation of the general budget of the European Union by virtue of Article 274 EC. Since Article 274 EC draws no distinction according to the form of management employed, the Commission continues to exercise that general

responsibility in the context of the shared management of the Structural Funds. In addition, it follows from Articles 10 EC and 274 EC that, in the context of the shared management of the Structural Funds, the Member States must co-operate with the Commission in order to ensure that Community funds are used in accordance with the principles of sound financial management. Reference is made to those rules in Article 38(1)(g) of Regulation No 1260/1999 laying down general provisions on the Structural Funds, which concerns the financial control of assistance.

Where the Member States' management and control systems are reliable and provide a 'sufficient audit trail' within the meaning of Article 7(2) of Regulation No 438/2001 laying down detailed rules for the implementation of Regulation No 1260/1999 as regards the management and control systems for assistance granted under the Structural Funds, the certification by the Member State concerned of the expenditure declared provides, in principle, sufficient assurance to the Commission that the applications for a contribution from the Community are correct, regular and eligible, as provided in Article 2(1) of Regulation No 438/2001.

However, where the Commission and a Member State adopt different interpretations of a measure determining

the conditions of eligibility of certain expenditure, the reliability of the national management and control system no longer assures the Commission that all the expenditure declared by that Member State is eligible expenditure within the meaning of the applicable rules. It is therefore for the Member State concerned, in the exercise of its responsibilities regarding the certification of expenditure and in sincere cooperation with the Community institutions, to place the Commission in a position to implement the budget on its own responsibility by providing it with all the information which the Commission considers necessary to effect payments which are in conformity with the third subparagraph of Article 32(1) of Regulation No 1260/1999. Any other approach would frustrate the useful effect of Article 38(1) of that regulation and, more generally, of Articles 10 EC and 274 EC.

legal form to be taken by that act and which must be expressly indicated therein as its legal basis. However, failure to specify the precise legal basis for a legislative act need not necessarily constitute a material defect where it is possible to determine the legal basis for that act on the basis of other elements thereof. None the less, explicit reference is indispensable where, in its absence, the parties concerned and the competent Community Court would remain uncertain as to the precise legal basis.

(see paras 123, 124)

- (see paras 109, 111, 112)
6. Community legislation must be clear and its application foreseeable for all interested parties. The principle of legal certainty, which forms part of the general principles of Community law, requires that the binding nature of any act intended to produce legal effects must be derived from a provision of Community law which prescribes the
 7. The third subparagraph of Article 32(1) of Regulation No 1260/1999 laying down general provisions on the Structural Funds and the detailed rules for its implementation confer no discretion on the Commission in regard to determining the conditions of eligibility of advance payments. By deciding, in a letter addressed to a Member State, that the advance payments made by the national bodies and declared as interim payments by that Member State, but not accompanied by documentary evidence of their use by the final recipients, were not eligible for a contribution from the Funds, the Commission could not be in breach of the principle of proportion-

ality, the principle of equal treatment or the principle of legal certainty.

(see para. 150)

8. The principles of proportionality, equal treatment and legal certainty are not infringed by the principle of reimbursement of expenses incurred by way of interim payments and payments of the final balance, on which Article 32 of Regulation No 1260/1999 laying down general provisions on the Structural Funds, and the detailed rules for its implementation, are based, or by an interpretative memorandum of the Commission concerning the third subparagraph of Article 32(1) of that regulation, according to which, in the context of State aid schemes within the meaning of Article 87 EC or in relation to the grant of aid, advance payments made by the national bodies which are not accompanied by documentary evidence of their use by the final recipients are not eligible for a contribution from the Funds.

As regards the principle of proportionality, in the system put in place by Article 32 of Regulation No 1260/1999, the principle of reimbursement of expenses incurred by way of interim payments and payments of the final balance helps to ensure that Community funds are used in accordance with the principles of sound financial manage-

ment referred to in Article 274 EC. It makes it possible to avoid the Community granting substantial financial contributions of which it cannot obtain repayment, or has difficulty in obtaining it, where those contributions are not put to their intended use, by limiting the risk to the Community budget to an amount equal to 7% of the contribution from the Funds to the assistance in question. Accordingly, neither the principle of reimbursement of expenses incurred by way of interim payments and payments of the final balance, nor the interpretative memorandum which implements that principle, can be considered a manifestly inappropriate measure.

As regards the principle of equal treatment, point 1.3 of Rule No 1 of the Annex to Regulation No 448/2004 amending Regulation No 1685/2000 laying down detailed rules for the implementation of Regulation No 1260/1999 as regards eligibility of expenditure of operations co-financed by the Structural Funds, which provides that State aid granted in the form of payments into venture capital, loan and guarantee funds is to be treated as expenditure actually paid out within the meaning of the third subparagraph of Article 32(1) of Regulation No 1260/1999, provided that the funds concerned meet the requirements of Rules Nos 8 and 9 of that annex, is a particular application of the principle of reimbursement of expenses incurred by way of interim payments and payments of the final balance, designed to take account of the specific nature of the financing of undertakings' capital invest-

ments. Such financing is granted to small and medium-sized enterprises by independent legal entities acting as intermediaries. Contrary to the situation in regard to advance payments, financing for capital investments is paid into funds whose purpose is to facilitate the access of the final recipients to the sources of the finance. It is because of that specific situation, which is not comparable to that of advance payments, that payments into venture capital, loan and guarantee funds can be treated as expenditure actually paid out within the meaning of the third subparagraph of Article 32(1) of Regulation No 1260/1999.

Lastly, the principle of legal certainty cannot be regarded as infringed in the present case inasmuch as the principle of reimbursement of expenses incurred by way of interim payments and payments of the final balance constitutes a correct implementation of the applicable rules, as does the interpretative memorandum.

(see paras 155-157, 159-162)