

ORDER OF THE COURT OF FIRST INSTANCE (Fourth Chamber)

15 March 2004 *

In Case T-139/02,

**Idiotiko Institutou Epaggelmatikis Katartisis N. Avgerinopoulou Anagnorismenes
Technikes Idiotikes Epaggelmatikes Scholes AE, established in Athens (Greece),**

**Panellinia Enosi Idiotikon Instituton Epaggelmatikis Katartisis, established in
Athens,**

**Panellinia Enosi Idiotikis Technikis Epaggelmatikis Ekpaidefsis kai Katartisis,
established in Athens,**

represented by T. Antoniou and C. Tsiliotis, lawyers,

applicants,

* Language of the case: Greek.

v

Commission of the European Communities, represented by M. Condou-Durande and L. Flynn, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for annulment of the Commission's decision of 27 February 2002 not to bring to an end the alleged discrimination between public and private vocational training bodies in Greece with regard to their access to the financing from the Structural Funds provided for under the third Community support framework and, in particular, under the operational programme 'Education and Initial Vocational Training',

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

composed of: H. Legal, President, V. Tiili and M. Vilaras, Judges,

Registrar: H. Jung,

makes the following

Order

Legal background

- 1 The first paragraph of Article 1 of Council Regulation (EC) No 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds (OJ 1999 L 161, p. 1; ‘the Structural Funds regulation’) provides:

‘Community action through the Structural Funds, the Cohesion Fund, the European Agricultural Guidance and Guarantee Fund (EAGGF), Guarantee Section, the European Investment Bank (EIB) and the other existing financial instruments shall support the achievement of the general objectives set out in Articles 158 and 160 of the Treaty. The Structural Funds, the EIB and the other existing financial instruments shall each contribute in appropriate fashion to the attainment of the following three priority objectives:

- (1) promoting the development and structural adjustment of regions whose development is lagging behind, hereinafter referred to as “Objective 1”;

...’

- 2 Article 2(1) of the Structural Funds regulation defines ‘Structural Funds’, or Funds for the purposes of that regulation, as the European Regional Development Fund (ERDF), the European Social Fund (ESF), the European Agricultural Guidance and Guarantee Fund (EAGGF), Guidance Section, and the Financial Instrument for Fisheries Guidance (FIFG).
- 3 The first subparagraph of Article 3(1) of the Structural Funds regulation provides that ‘the regions covered by Objective 1 shall be regions corresponding to level II of the Nomenclature of Territorial Statistical Units (NUTS level II) whose per capita GDP, measured in purchasing power parities and calculated on the basis of Community figures for the last three years available on 26 March 1999, is less than 75% of the Community average’.
- 4 Article 8 of the Structural Funds regulation, entitled ‘Complementarity and partnership’, reads as follows:

‘1. Community actions shall complement or contribute to corresponding national operations. They shall be drawn up in close consultation, hereinafter referred to as the “partnership”, between the Commission and the Member State, together with the authorities and bodies designated by the Member State within the framework of its national rules and current practices, namely:

- the regional and local authorities and other competent public authorities,

- the economic and social partners,

— any other relevant competent bodies within this framework.

The partnership shall be conducted in full compliance with the respective institutional, legal and financial powers of each of the partners as defined in the first subparagraph.

...

2. Partnership shall cover the preparation, financing, monitoring and evaluation of assistance. Member States shall ensure the association of the relevant partners at the different stages of programming, taking account of the time-limit for each stage.

3. In application of the principle of subsidiarity, the implementation of assistance shall be the responsibility of the Member States, at the appropriate territorial level according to the arrangements specific to each Member State, and without prejudice to the powers vested in the Commission, notably for implementing the general budget of the European Communities.

4. Member States shall cooperate with the Commission to ensure that Community Funds are used in accordance with the principles of sound financial management.

5. Each year, the Commission shall consult the European-level organisations representing the social partners about the structural policy of the Community.’

5 Article 9 of the Structural Funds regulation gives the following definitions:

‘...
...

(b) development plan (hereinafter referred to as “the plan”) means the analysis of the situation prepared by a Member State in the light of the objectives referred to in Article 1 and the priority needs for attaining those objectives, together with the strategy, the planned action priorities, their specific goals and the related indicative financial resources;

...

(d) Community support framework: means the document approved by the Commission, in agreement with the Member State concerned, following appraisal of the plan submitted by a Member State and containing the strategy and priorities for action of the Funds and the Member State, their specific objectives, the contribution of the Funds and the other financial resources. This document shall be divided into priorities and implemented by means of one or more operational programmes;

...

(f) operational programme: means the document approved by the Commission to implement a Community support framework and comprising a consistent set of priorities comprising multiannual measures and which may be implemented through recourse to one or more Funds, to one or more of the other existing financial instruments and to the EIB. An integrated

operational programme means an operational programme financed by more than one Fund;

...

- (h) priority: means one of the priorities of the strategy adopted in a Community support framework or assistance; to it is assigned a contribution from the Funds and other financial instruments and the relevant financial resources of the Member State and a set of specified targets;

...

- (j) measure: means the means by which a priority is implemented over several years which enable operations to be financed. Any aid scheme pursuant to Article 87 of the Treaty or any aid granted by bodies designated by the Member States, or any group of aid schemes or aid grants of this type or any combination thereof which have the same purpose and are defined as a measure;

- (k) operation: means any project or action carried out by the final beneficiaries of assistance;

- (l) final beneficiaries: means the bodies and public or private firms responsible for commissioning operations. In the case of aid schemes pursuant to Article

87 of the Treaty and in the case of aid granted by bodies designated by the Member States, the final beneficiaries are the bodies which grant the aid;

(m) programme complement: means the document implementing the assistance strategy and priorities and containing detailed elements at measure level, as set out in Article 18(3), drawn up by the Member State or managing authority and adjusted as necessary in accordance with Article 34(3). It is sent to the Commission for information;

(n) managing authority: means any public or private authority or body at national, regional or local level designated by the Member State, or the Member State when it is itself carrying out this function, to manage assistance for the purposes of this Regulation. If the Member State designates a managing authority other than itself, it shall determine all the modalities of its relationship with the managing authority and of the latter's relationship with the Commission. If the Member State so decides, the managing authority may be the same body as the paying authority for the assistance concerned;

...'

6 Article 12 of the Structural Funds regulation, entitled 'Compatibility', provides:

'Operations financed by the Funds or receiving assistance from the EIB or from another financial instrument shall be in conformity with the provisions of the Treaty, with instruments adopted under it and with Community policies and actions, including the rules on competition, on the award of public contracts, on

environmental protection and improvement and on the elimination of inequalities and the promotion of equality between men and women’.

7 The first subparagraph of Article 14(2) of the Structural Funds regulation provides, *inter alia*, that ‘Community support frameworks [and] operational programmes ... shall be re-examined and, if necessary, adapted at the initiative of the Member State or the Commission in agreement with the Member State’.

8 Article 15 of the Structural Funds regulation, entitled ‘Preparation and approval’, provides:

‘1. In respect of Objectives 1, 2 and 3, Member States shall submit a plan to the Commission. That plan shall be drawn up by the competent authorities designated by the Member State at national, regional and other level. ...

...

2. The plans shall be submitted by the Member State to the Commission after consultation with the partners, who shall express their views ...

...

4. Where applicable as provided in paragraph 1, the Commission shall draw up the Community support frameworks in agreement with the Member State concerned ...

The Commission shall appraise the proposed operational programmes submitted by the Member State to determine whether they are consistent with the aims of the corresponding Community support framework and compatible with other Community policies. It shall adopt a decision on the contribution of the Funds in accordance with Article 28(1) and in agreement with the Member State concerned, provided that the proposals contain all the features listed in Article 18 (2).

In order to expedite the examination of applications and the implementation of programmes, the Member States may submit, at the same time as their plans, draft operational programmes. When adopting its decision on a Community support framework, the Commission shall also approve, in accordance with Article 28(1), the operational programmes submitted at the same time as the plans provided they include all the features listed in Article 18(2).

...

6. The Member State or the managing authority shall adopt the programme complement defined in Article 9(m) after the agreement of the Monitoring Committee if the programme complement is drawn up after the Commission decision on the contribution of the Funds, or after consulting the relevant partners if it is drawn up before the decision on the contribution of the Funds ...'

9 The first subparagraph of Article 17(2) of the Structural Funds regulation provides inter alia:

‘2. Each Community support framework shall include:

(a) a statement of the strategy and priorities for joint Community and national action; their specific objectives, quantified where they lend themselves to quantification; evaluation of the expected impact ...’

10 Article 18 of the Structural Funds regulation provides inter alia:

‘1. Assistance covered by a Community support framework shall as a general rule be provided in the form of an integrated operational programme by region, as defined in Article 9.

2. Each operational programme shall contain:

(a) the priorities of the programme, their consistency with the relevant Community support framework, their specific targets, quantified where they lend themselves to quantification ...

3. The programme complement shall contain:

(a) the measures implementing the corresponding priorities in the operational programme ...

(b) the definition of the types of final beneficiary of measures;

...'

11 The first subparagraph of Article 28(1) of the Structural Funds regulation provides: '[p]rovided that all the requirements of this Regulation are fulfilled, the Commission shall adopt in a single decision the contributions of all the Funds within five months of receipt of the application for assistance'.

12 Article 34(3) of the Structural Funds regulation provides:

'The managing authority shall, at the request of the Monitoring Committee or on its own initiative, adjust the programme complement, without changing the total amount of the contribution from the Funds granted to the priority concerned nor its specific targets. After approval by the Monitoring Committee, it shall inform the Commission of the adjustment within one month.

Any amendments to the elements contained in the decision on the contribution of the Funds shall be decided by the Commission, in agreement with the Member State concerned, within four months of delivery of the Monitoring Committee's approval'.

13 Lastly, the first and second subparagraphs of Article 35(1) provide:

'Each Community support framework or single programming document and each operational programme shall be supervised by a Monitoring Committee.

Monitoring Committees shall be set up by the Member State, in agreement with the managing authority after consultation with the partners. ...'

Facts

14 The first applicant, Idiotiko Institutouto Epaggelmatikis Katartisis N. Avgerinopoulou Anagnorismenes Technikes Idiotikes Epaggelmatikes Scholes AE, a public limited liability company, is a private vocational training institute in Greece. It is a member of the second applicant, the Panellinia Enosi Idiotikon Institutouton Epaggelmatikis Katartisis, an association to which private vocational training institutes in Greece belong. The third applicant, the Panellinia Enosi Idiotikis Technikis Epaggelmatikis Ekpaidefsis kai Katartisis, is an association to which private technical vocational training institutes in Greece belong.

- 15 The financial contribution from the Structural Funds for the establishment and operation of a public network of vocational training institutes ('IEK') in Greece began with the adoption of Commission Decision 90/203/EEC of 30 March 1990 on the establishment of the Community support framework for Community structural assistance for the Greek regions concerned by Objective 1, which make up the entire territory of the country (OJ 1990 L 106, p. 26). That initial Community support framework was approved for the period from 1 January 1989 to 31 December 1993.

- 16 The contribution from the Structural Funds was continued during the period from 1 January 1994 to 31 December 1999 by Commission Decision 94/627/EC of 13 July 1994 on the establishment of the Community support framework for Community structural assistance for the Greek regions concerned by Objective 1, which is the whole country (OJ 1994 L 250, p. 15). As part of that second Community support framework the Commission also approved the operational programme for education and initial vocational training (EPEAEK I).

- 17 On 29 September 1999 the Greek Government submitted to the Commission a regional development plan for the whole area of the country concerned by Objective 1, under Article 3(1) of the Structural Funds regulation.

- 18 On the basis of that plan, submitted by the Hellenic Republic within the partnership defined in Article 8 of the Structural Funds regulation, the Commission established, under the first subparagraph of Article 15(4) of that regulation and in agreement with that Member State, the Community support framework for Community structural assistance in Greece.

- 19 The Community support framework thus established was approved by Commission Decision 2002/322/EC of 28 November 2000 approving the Community

support framework for Community structural assistance under Objective 1 in Greece (OJ 2002 L 122, p. 7; 'the third CSF'), for the period from 1 January 2000 to 31 December 2006. Under Article 2(1)(a)(i) of that decision, the priorities for the joint action of the Community Structural Funds and the Member State concerned include 'development of human resources and employment promotion'.

20 On 31 March 2000 the Greek Government submitted to the Commission the draft operational programme entitled 'Education and Initial Vocational Training', ('EPEAEK II').

21 The Commission examined the content of EPEAEK II under the second subparagraph of Article 15(4) of the Structural Funds regulation in order to check whether it was consistent with the objectives of the relevant Community support framework and compatible with Community policies. It found that the project fell within Objective 1, in accordance with Article 3(1) of the Structural Funds regulation, and that it contained the objectives set out in Article 18 of that regulation, in particular a description of the priorities of the programme, an indicative financing plan specifying for each priority and each year the financial allocation envisaged for the contribution from the ESF and the ERDF, as well as the total amount of eligible public and estimated private financing by the Member State.

22 By letter of 27 February 2001 the second applicant requested the Commission not to approve EPEAEK II.

- 23 EPEAEK II was approved by the Commission Decision of 16 March 2001 approving EPEAEK II, which is part of the third CSF, for Community structural assistance for the Greek regions concerned by Objective 1 for the period from 1 January 2000 to 31 December 2006 ('the decision approving EPEAEK II').
- 24 Under Article 2(1)(a)(2) of that decision the priorities of EPEAEK II include 'the promotion and improvement of education and initial vocational training as part of life-long learning' (second priority).
- 25 Among the measures and actions envisaged in EPEAEK II in that context are, in particular, measures 2.3 (education and initial vocational training) and 2.4 (professional guidance and liaison with the employment market).
- 26 With regard in particular to the financing of actions to be taken by the IEK in order to improve initial vocational training, EPEAEK II states that 'the first phase will see the financing of actions of public vocational training institutes' (measure 2.3, point C). In addition, with regard to involvement of private IEK in initial vocational training projects, it provides for a study to be conducted into how this will take place (measure 2.3, point D).
- 27 By letter of 26 April 2001 the Commission, in answer to the abovementioned letter from the second applicant of 27 February 2001, informed the latter that Community assistance was complementary to that provided at national level or designed to contribute to it. The Commission added that in the sector of initial vocational training EPEAEK II provided for a study to be carried out, as part of the intermediate assessment, into future involvement of private IEK in jointly-financed actions and that it had been decided to reduce direct aid to public IEK

gradually in order to promote a gradual transition to open procedures, without however jeopardising the work that had been done in that field. The Commission concluded that EPEAEK II complied with the spirit of the third CSF and would contribute significantly to the efforts being made by the Greek authorities to modernise the education system.

28 In May 2001 the Greek authorities, in accordance with Article 15(6) and Article 18(3) of the Structural Funds regulation, drew up a programme complement. It is clear from that complement that private law corporations are among the potential final beneficiaries of both the ‘education and initial vocational training’ measure (measure 2.3, point F) and the ‘vocational guidance and liaison with the employment market’ measure (measure 2.4, point F).

29 The programme complement was approved, following a few adjustments, amendments and additions, by the EPEAEK II Monitoring Committee at its first meeting on 29 May 2001 and was sent to the Commission for information, under Article 9(m) and Article 34(3) of the Structural Funds regulation. In point 5.4 of its ‘findings-decisions’, adopted the same day, the Monitoring Committee replaced in all the measures the words ‘potential final beneficiaries’ by ‘types of final beneficiary’ and stated that private law corporations were included in the types of final beneficiary. However, with regard in particular to the action relating to ‘other initial vocational training bodies’ (action 2.3.3 of measure 2.3) coming under the supervision of ministries other than the National Education Ministry, private law corporations are not included among those beneficiaries. Lastly, provision was made that, if necessary, other types of final beneficiary could be defined for each measure, following consideration by the EPEAEK II special management service.

30 The legality of EPEAEK II, the programme complement, the decision of the Monitoring Committee and various national measures implementing those acts has been challenged in several actions brought by the applicants before the Simvoulío tis Epikratias (Greek Council of State). Those actions are currently pending.

31 By letter of 17 October 2001, received at the Commission on 25 October 2001, the applicants called upon the Commission to act, pursuant to the first sentence of the second paragraph of Article 232 EC. In that request they asked the Commission:

- ‘1. to end their unlawful exclusion from financing under the [third CSF] and,
2. within the partnership referred to in Article 8(2) of the [Structural Funds regulation], which covers the preparation, financing, monitoring and evaluation of assistance, to intervene with the national authority with a view to the amendment of [EPEAEK II] and the operational programme complement of May 2001 in order to extend joint financing to private vocational training bodies;
3. to amend the [decision approving EPEAEK II] in order that private education bodies might receive financing under that programme ...;
4. to draw the attention of the Greek monitoring authority to the latter’s unlawful omission in its decision of 29 May 2001 when it failed to include private vocational training bodies in the financing;

5. to suspend application of the decision regarding the involvement of the Funds in implementing [EPEAEK II] until the adoption of a further decision regarding procedure and the amount of the financing’.

32 By application lodged at the Registry of the Court of First Instance on 25 February 2002, registered as Case T-66/02, the applicants brought an action for failure to act based on Article 232 EC, seeking a declaration that the Commission failed to fulfil its obligations under the EC Treaty by not putting an end to the unlawful distinction between private and public IEK resulting from the latter alone being financed by the third CSF, in particular under EPEAEK II.

33 By a letter from the Director-General of the Directorate-General for Employment and Social Affairs of 27 February 2002 (‘the contested measure’), the Commission responded to the abovementioned request to act. The contested measure is worded as follows:

‘...

Among other fields in which they are providing assistance in Greece, the Structural Funds have financed the setting up and supported the functioning of a major public network of vocational training institutes (IEK). Contribution from the Structural Funds in that field began with the first CSF applying to Greece (1989-93) and continued with the second CSF (1994-99).

At the negotiations on the third CSF (2000-06), European Commission officials pointed to the importance of gradually applying open procedures for the allocation of projects jointly financed by the Structural Funds.

So, in order not to jeopardise the work already done in this sector it was agreed with the national authorities in the context [of EPEAEK II] (cf. in this regard the programme complement) to scale down the financing of actions of public IEK in order to reach zero financing, under current procedures, by 2003. From that date onwards only a certain, very limited, type of project, such as innovative actions, teacher training, etc, provided by public or, possibly private, IEK could be jointly financed, following open selection procedures. Also, with a view to possible involvement of private IEK in those projects, provision is made in [EPEAEK II] for carrying out a study which would determine the procedures for this.

In view of the above, it is clear that the objective of the Structural Funds is to assist Greece in achieving a system of vocational training, by contributing to the promotion and improvement of such a system, as part of active employment policies and by applying the guidelines of the European employment strategy.

Following the adoption [of EPEAEK II], as proposed by the Member State, it is provided in Article 8(3) of the Structural Funds regulation that “in application of the principle of subsidiarity, the implementation of assistance shall be the responsibility of the Member States, at the appropriate territorial level according to the arrangements specific to each Member State, and without prejudice to the powers vested in the Commission, notably for implementing the general budget of the European Communities.”

As regards whether the financing of public vocational training institutes constitutes State aid, the Commission takes into account the fact that the vocational training activities of those institutes are governed by Law No 2009/1992. That law defines the single legal and organisational framework of the national system of education and vocational training in Greece. Article 5 of the law provides that public vocational training institutes are to be established by a joint decision of the Ministers for Education and for Finance (and in some cases

other ministers also). All vocational training institutes are to be placed under the supervision of the Minister for Education. The law also sets up a public body (the education and vocational training body — the OEEK), which is responsible for the content, syllabus planning and organisation of training courses delivered by the vocational training institutes: the OEEK is also responsible for supervising private vocational training institutes.

It is clear from the above that the activities of public vocational training institutes form an integral part of the Greek national education system under Greek law and that they cannot be regarded as profit-making economic activities. The Commission therefore considers that the public financing of those activities does not constitute State aid within the meaning of Article 87(1) EC, as was confirmed by the Court of Justice of the European Communities when it held that “the State, in maintaining such a system, is not seeking to engage in gainful activity, but is fulfilling its duties ... in the social, cultural and educational fields. [T]he system in question is, as a general rule, funded from the public purse” [Cases 263/86 *Humbel* [1988] ECR 5365 and C-109/92 *Wirth* [1993] ECR I-6447]. The Commission has adopted the same position on a number of occasions with regard to the application of provisions on State aid to public financing of institutes falling within the national education system.

In conclusion and taking the above-mentioned factors into account, the European Commission officials consider that the support given to public IEK does not constitute distortion of competition and affect trade between Member States and so it does not appear to be State aid within the meaning of Article 87(1) of the EC Treaty.’

Procedure and forms of order sought

34 By application lodged at the Registry of the Court of First Instance on 29 April 2002 the applicants brought the present action.

35 By a separate document lodged at the Court Registry on 19 July 2002 the Commission raised an objection of inadmissibility under Article 114(1) of the Rules of Procedure of the Court of First Instance. The applicants lodged their observations on the objection of inadmissibility on 3 September 2002.

36 In their application the applicants claim that the Court should annul the contested measure in order to invalidate the Commission's unlawful refusal to remove the unlawful distinction between private and public IEK as regards financing under the third CSF and, in particular, under EPEAEK II.

37 In its objection of inadmissibility the Commission contends that the Court should:

— dismiss the application as manifestly inadmissible;

— order the applicants to pay the costs.

38 In their observations on the objection of inadmissibility the applicants claim that the Court should dismiss the objection of inadmissibility.

Law

- 39 Under Article 114(1) of the Rules of Procedure, if a party makes appropriate application, the Court of First Instance may rule on admissibility without going into the substance of the case. Under Article 114(3), unless the Court of First Instance otherwise decides, the remainder of the proceedings is to be oral. In the present case the Court considers that it has sufficient information from the documents on the file and that there is no need to open the oral procedure.

Arguments of the parties

- 40 First, the Commission contends that the contested measure cannot be regarded as an actionable measure for the purposes of Article 230 EC. The measure merely confirms the Commission's previous view as to the conformity of EPEAEK II with the objectives of the financing from the Structural Funds, as communicated to the applicants in its abovementioned letter of 26 April 2001, and does not constitute a decision that produces any new legal effects as compared with those which arose from the decision approving EPEAEK II. Thus the contested measure in no way alters the applicants' legal position in relation to that which existed when the decision was adopted.
- 41 In that regard, the Commission points out that it is settled case-law that actions brought against decisions which merely confirm earlier decisions that have not been contested within the time-limit are inadmissible (Case T-275/94 *CB v Commission* [1995] ECR II-2169, and Case T-227/95 *AssiDomän Kraft Products and Others v Commission* [1997] ECR II-1185).

- 42 Second, the Commission claims that even if the contested measure did constitute an actionable measure it would not be of direct and individual concern to the applicants and that therefore they would have no standing to challenge that measure, since they had no standing to challenge the decision approving EPEAEK II either.
- 43 In that regard, the Commission points out that that decision, which was adopted under the procedures of the Community framework of support for structural assistance, is addressed to the Hellenic Republic and concerns measures of a general nature. Referring to the case-law of the Court of Justice, the Commission adds that for a person to be directly concerned by a Community measure, the latter must directly affect the legal situation of the individual and leave no discretion to the addressees of that measure who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from Community rules alone without the application of other intermediate rules.
- 44 In the present case the Commission claims that the decision approving EPEAEK II does not directly concern the applicants. The fact that the decision approved EPEAEK II equates to recognition that that programme is consistent with the objectives of the third CSF, which include the adjustment and modernisation of policies and systems of education, training and employment, without making any provision with regard to the procedure for its application or determining the beneficiaries of the aid. The implementation and monitoring of assistance are above all a matter for the Member States in accordance with the principle of subsidiarity. Thus, the programme complement, as adjusted and amended by the Monitoring Committee, to which the applicants refer and which gives priority to national education, constitutes a national measure concerning the application of strategy and priorities and not a measure adopted by a Community body, against which an action for annulment may be brought before the Community Courts.

- 45 Third, and in so far as the applicants complain that the Commission unlawfully refused, in the contested measure, to put an end to the alleged discrimination in EPEAEK II between public and private IEK, resulting from a breach by the Hellenic Republic of the provisions of the Structural Funds regulation and of Articles 43 EC and 49 EC, the Commission considers that this application must also be dismissed as being manifestly inadmissible.
- 46 In this complaint, the applicants are in essence criticising the Commission for failing to institute against the Hellenic Republic proceedings for failure to fulfil obligations. Besides the fact that in the present case the Commission has clearly expressed its point of view concerning the conformity of the national programme with the Structural Funds regulation, the institution of such proceedings would be at the discretion of the Commission and would concern its relationship with the Member State concerned. Moreover, it is settled case-law that the decision whether or not to institute such proceedings does not concern third parties and therefore cannot be contested by the applicants (judgment of the Court of Justice in Case C-87/89 *Sonito and Others v Commission* [1990] ECR I-1981, paragraphs 6 and 7; Orders of the Court of First Instance of 14 December 1993 in Case T-29/93 *Calvo Alonso-Cortès v Commission* [1993] ECR II-1389, paragraph 55, and of 4 July 1994 in Case T-13/94 *Century Oils Hellas v Commission* [1994] ECR II-431, paragraphs 13 and 14).
- 47 Lastly, the Commission points out that the contested measure is intended principally to inform the applicants that EPEAEK II conforms to the objectives and the policy of the Structural Funds. Since it concerns State aid, the measure is in no way linked to proceedings under Article 88 EC, but merely provides general information on the assessment by Commission officials that the Community competition rules do not apply to aid for national education and on the position it has adopted in similar situations, following the Court's case-law in that matter (*Humbel and Wirth*, cited in paragraph 33 above). Consequently, in the present case there is no Commission decision taken under Article 88 EC and addressed to the Hellenic Republic which could form the subject of an action for annulment under Article 230 EC.

- 48 The applicants reply, in the first place, that the contested measure does not merely confirm an earlier measure that was not challenged within the time-limits. The contested measure was adopted following consideration of new facts, such as the programme complement, and of new legal arguments put forward in the request to act and, hence, it constitutes an actionable measure.
- 49 In that regard, the applicants contend that the request they made in the request to act did not constitute a mere request for withdrawal of the Commission decision approving EPEAEK II, but a request for a review *ab initio* of its merits and validity with regard to the information submitted to the Commission and, in particular, the data and assertions contained in the request to act. According to the applicants, the Commission has ongoing powers to review the legality of assistance from the Structural Funds at all stages, whether during preparation, financing, monitoring or evaluation.
- 50 In the second place, the applicants consider that they also had standing to bring proceedings against the decision approving EPEAEK II, since the latter affects them directly and individually, even though formally it is addressed only to the Hellenic Republic.
- 51 In that regard, first of all, they submit that the beneficiaries of the financing are clearly defined in the provisions of EPEAEK II, in conjunction with the programme complement and the relevant decisions of the Monitoring Committee.
- 52 Second, the applicants contend that, contrary to what the Commission claims, implementation and monitoring of assistance from the Structural Funds, according to the principle of subsidiarity, by the Member States, which determine *inter alia* the procedure for applying it and its beneficiaries, cannot alter the fact

that the applicants are directly affected by the decision approving EPEAEK II. Firstly, the partnership established by the Structural Funds regulation clearly shows the existence of lasting cooperation between the Member States and the Commission, so the mere fact that a measure is termed 'national' does not necessarily mean that any assistance from the Commission is excluded. Secondly, the Commission has ongoing power to review the legality of the assistance at all stages. Lastly, the reason why the applicants did not bring proceedings against the decision approving EPEAEK II was because they were waiting to see whether their situation might improve as a result of subsequent measures, such as the programme complement, which might have moderated their unfavourable treatment, before seeking the adoption by the Commission of the measures indicated in the request to act.

53 Third, the applicants consider that the Commission's refusal to put an end to the discrimination between public and private IEK directly affects their situation in fact and in law and leaves no discretion to the Hellenic Republic, which is responsible for applying EPEAEK II. That consideration is corroborated by the fact that the programme complement repeated, without alteration, the terms of the Commission decision approving EPEAEK II. In addition, the discriminatory treatment of private IEK under EPEAEK II has already caused the applicants serious economic damage due to the continuing and increasing loss of clients and to higher tuition costs, and even threatens whether they will still exist by the year 2006.

54 Lastly, the applicants challenge the Commission's assertions that the pleas put forward in their actions, alleging infringement by the Hellenic Republic of the Structural Funds regulation and Articles 48 EC and 49 EC, are equivalent to applying for proceedings for failure to fulfil obligations to be brought against the Hellenic Republic. That approach fails to take account of the Commission's own powers, under the Structural Funds regulation, which the applicants requested it to exercise in the request to act. The same is true as regards the Commission's

assertion that Article 87 EC has not been infringed, since vocational training is, notwithstanding Article 126 EC, an economic activity within the meaning of the EC Treaty.

Findings of the Court

- 55 The fourth paragraph of Article 230 EC provides that any natural or legal person may, under the conditions stated in the first three paragraphs of that article, institute proceedings ‘against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former’.
- 56 In deciding whether the present application is admissible in so far as it concerns, first of all, annulment of the Commission’s refusal, expressed in the contested measure, to amend the decision approving EPEAEK II in a manner favourable to the applicants, it should be pointed out that, according to settled case-law, the fact that a letter has been sent by a Community institution to a person in response to a prior request by that person is not sufficient for that letter to be regarded as a decision within the meaning of Article 230 EC, thereby opening the way for an action for annulment. Only measures having binding legal effects of such a nature as to affect the interests of the applicant by having a significant effect on his legal position constitute acts or decisions against which proceedings for annulment may be brought under Article 230 EC (Joined Cases C-68/94 and C-30/95 *France and Others v Commission* [1998] ECR I-1375, paragraph 62; Case T-83/92 *Zunis Holding and Others v Commission* [1993] ECR II-1169, paragraph 30; Order of the Court of First Instance of 4 October 1996 in Case T-5/96 *Sveriges Betodlares and Henrikson v Commission* [1996] ECR II-1299, paragraph 26; Joined Cases T-125/97 and T-127/97 *Coca-Cola v Commission* [2000] ECR II-1733, paragraph 77, and Order of the Court of First Instance of 18 April 2002 in Case T-238/00 *IPSO and USE v ECB* [2002] ECR II-2237, paragraph 44).

- 57 Furthermore, it follows from settled case-law that when an act of an institution amounts to a rejection it must be appraised in the light of the nature of the request to which it constitutes a reply. In particular, the refusal by a Community institution to withdraw or amend an act may itself constitute an act whose legality may be reviewed under Article 230 EC only if the act which the Community institution refuses to withdraw or amend could itself have been contested under that provision (*Zunis Holding and Others v Commission*, cited in paragraph 56 above, paragraph 31, and the Orders in *Sveriges Betodlares and Henrikson v Commission*, cited in paragraph 56 above, paragraph 28, and *IPSO and USE v ECB*, cited in paragraph 56 above, paragraph 45).
- 58 In the present case the applicants put to the Commission a request to amend, under the Structural Funds regulation and in particular Articles 12 and 15(4) thereof, the decision approving EPEAEK II so that private vocational training institutes and colleges can receive joint financing under EPEAEK II, and to suspend application of that decision until the adoption of a further decision regarding procedure and the amount of financing.
- 59 The applicants' request therefore sought to prompt the exercise, to a particular end, of the powers conferred on the Commission by the Structural Funds regulation with regard to approving the operational programmes implementing a Community support framework within the meaning of that regulation. In those circumstances, the applicants cannot seek to obtain amendment of the Commission decision approving EPEAEK II except in so far as it is of direct and individual concern to them within the meaning of the fourth paragraph of Article 230 EC (see, to that effect, Order in *IPSO and USE v ECB*, cited in paragraph 56 above, paragraph 47, and case-law cited therein).
- 60 In that regard, it should be pointed out that the Commission decision approving EPEAEK II clearly constitutes a measure having general scope. By that decision, addressed exclusively to the Hellenic Republic, the Commission approved

EPEAEK II, which is designed to implement the third CSF in the field of education and initial vocational training in Greece and which contains a set of multiannual measures and rules which apply to objectively determined situations and produce legal effects with respect to types of persons envisaged generally and in the abstract.

- 61 It should be pointed out, however, that case-law states that in certain circumstances even an act having general scope applying to the traders concerned in general may be of direct and individual concern to some of them, and hence amount to a decision with regard to them (Case C-358/89 *Extramet Industrie v Council* [1991] ECR I-2501, paragraph 13; Case C-309/89 *Codorniù v Council* [1994] ECR I-1853, paragraph 19; Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677, paragraph 36; Case T-166/99 *Andres de Dios and Others v Council* [2001] ECR II-1857, paragraph 45, and Orders of the Court of First Instance in *IPSO and USE v ECB*, cited in paragraph 56 above, paragraph 51; of 10 September 2002 in Case T-223/01 *Japan Tobacco and JT International v Parliament and Council* [2002] ECR II-3259, paragraph 29, and of 21 March 2003 in Case T-167/02 *Établissements Toulorge v Parliament and Council* [2003] ECR II-1111, paragraph 27).
- 62 It is also settled case-law that for an individual to be directly affected the Community measure challenged must directly affect his legal position and leave no discretion to the addressees of that measure who are entrusted with its implementation, that being a purely automatic matter flowing solely from the Community legislation without the application of other intermediate rules (Case C-386/96 P *Dreyfus v Commission* [1998] ECR I-2309, paragraph 43 and case-law cited therein; Order of the Court of First Instance in *Japan Tobacco and JT International v Parliament and Council*, cited in paragraph 61 above, paragraph 45 and case-law cited therein).
- 63 In the present case it should be pointed out that by the decision approving EPEAEK II the Commission, under the second subparagraph of Article 15(4) and Article 28(1) of the Structural Funds regulation, approved EPEAEK II as proposed

by the Greek Government and drawn up in agreement with the Commission in the context of partnership within the meaning of Article 8 of that regulation, and laid down the total contribution from the Structural Funds allocated for implementing the programme. Before the adoption of that decision the Commission checked that EPEAEK II was consistent with the third CSF, that it was compatible with Community policies and that its content conformed to the objectives set out in Article 18(2) of the Structural Funds regulation.

- 64 The decision approving EPEAEK II therefore forms part of the procedures under the third CSF for structural assistance in Greece and is designed to achieve its objective of adjusting and modernising that country's policies and systems with regard to education and vocational training. Since education and vocational training fall within the competence of the Member States under Articles 149 EC and 150 EC, Community actions in those fields are designed, as is expressly provided in recital 27 and Article 8(1) of the Structural Funds regulation, to 'complement or contribute to corresponding national operations', in the context of increased partnership between the Commission and the Member State concerned. In addition, recital 26 and Article 8(3) of the Structural Funds regulation expressly state that, under the principle of subsidiarity, and without prejudice to the powers of the Commission, notably for implementing the general budget of the European Communities, implementation and monitoring of assistance are in the first place the responsibility of the Member States.

- 65 It follows that, although the decision approving EPEAEK II defines *inter alia* the priorities of EPEAEK II and the total contribution from the Structural Funds allocated in order to achieve the programme's objectives, it does not play any part in the implementation and monitoring of the measures and operations planned, which are the responsibility of the Greek authorities.

66 The same applies as regards in particular the precise determination of the final beneficiaries of the planned measures. Under Article 18(3) of the Structural Funds regulation the types of ‘final beneficiary’ of those measures, which, under Article 9 (1) of that regulation, may include bodies and ‘public or private’ firms responsible for commissioning operations, are defined in the programme complement drawn up by the Member State concerned or by the managing authority designated by that State to manage the operational programme in question. That document is used in implementing the strategy and priorities of the assistance and contains the detailed aspects of the measures, as provided for in Article 18(3) of the Structural Funds regulation, which include, in particular, the ‘definition of the types of final beneficiary of measures’. The same document, adjusted as necessary in accordance with Article 34(3) of the Structural Funds regulation and approved by the Monitoring Committee, is sent to the Commission for information and not for approval. The Commission intervenes in that field only in so far as the information contained in the decision on the contribution from the Funds, such as the total amount of the contribution from the Funds granted in respect of the priority concerned or the specific objectives of that priority, may be amended by the programme complement or its adjustments. It is not contended that this was so in the present case.

67 It is no doubt true that EPEAEK II, as approved by the Commission, mentioned, in respect of the measure ‘education and initial vocational training’ (measure 2.3) coming under the second priority entitled ‘promotion and improvement of education and initial vocational training as part of life-long learning’, that a first phase would see the financing of public IEK in collaboration with non-governmental organisations and that a study would be drawn up in order to determine the procedure whereby private IEK would participate in initial vocational training projects (see paragraph 26 above). However, this mention of priority financing of public IEK during an initial stage cannot be interpreted as meaning that it excludes private IEK from financing under that measure or that it prohibits the competent Greek authorities from including private IEK among the final beneficiaries of those measures, under the powers granted them *inter alia* by Article 18(3) of the Structural Funds regulation. This is all the more so since, as

the applicants themselves accept, the initial version of the programme complement, drawn up by the Greek authorities in May 2001, did include private-law corporations among the potential final beneficiaries both of the abovementioned measure and of the measure entitled ‘vocational guidance and liaison with the employment market’ (measure 2.4) (see paragraph 28 above).

68 The applicants maintain, however, that the programme complement, as adjusted and approved by the EPEAEK II Monitoring Committee at its meeting on 29 May 2001, caused private IEK to lose the opportunity of joint financing under the operational programme in question which had been afforded them under the initial version of the programme complement. In that regard, it is appropriate to point out first of all that it is not for the Court to analyse, in the context of the present action, the content of the ‘findings-decisions’ of the Monitoring Committee of 29 May 2001, or to determine in particular whether and to what extent paragraph 5.4 of those findings-decisions (see paragraph 29 above) led to the exclusion, *de facto* or *de jure*, of private IEK from joint financing under EPEAEK II, as the applicants claim. Suffice it to say that the alleged exclusion, if correct, in no way results from the Commission decision approving EPEAEK II, but from the national measures implementing that programme, such as the programme complement, the ‘findings-decisions’ of the Monitoring Committee or the measures for their practical implementation.

69 That conclusion is corroborated by the fact that the national measures in question were in fact challenged by the applicants before the *Simvoulío tis Epikratias*. The applicants’ rights are therefore protected by the national courts which may, where appropriate, be required to refer a question to the Court of Justice for a preliminary ruling under Article 234 EC.

70 It follows from the above that the Commission decision approving EPEAEK II cannot be considered to be a measure which has a direct effect on the legal position of the applicants within the meaning of the case-law referred to in

paragraph 62 above, as the Greek authorities clearly had a degree of discretion, by means of intermediate national rules, with regard to implementing that decision, in particular as to the definition of the types of final beneficiary of the various measures envisaged under the programme in question.

71 In those circumstances, it must be concluded that the first applicant is not directly concerned by the Commission decision approving EPEAEK II. Therefore, under the case-law cited in paragraphs 56, 57 and 59 above, and in so far as the contested measure amounts to a refusal to amend a Community measure of general scope which is not of direct concern to it, the first applicant is not entitled to contest that refusal by means of an action for annulment. In that regard, the mere fact that that applicant is one of the persons to whom the measure containing that refusal is addressed is wholly irrelevant (Order in *IPSO and USE v ECB*, cited in paragraph 56 above, paragraph 58).

72 The same conclusion is to be drawn with regard to the two applicant associations. In that regard, it should be pointed out that it has consistently been held that the protection of the general collective interests of a category of persons is insufficient to establish the admissibility of an action for annulment brought by an association. An association is therefore not entitled to bring an action for annulment where its members may not do so individually (Joined Cases T-447/93 to T-449/93 *AITEC and Others v Commission* [1995] ECR II-1971, paragraph 54; Orders of the Court of First Instance of 9 August 1995 in Case T-585/93 *Greenpeace and Others v Commission* [1995] ECR II-2205, paragraph 59, and of 4 October 1996 in Case T-197/95 *Sveriges Betodlares and Henrikson v Commission* [1996] ECR II-1283, paragraph 35). In the present case it has not been demonstrated that the members of the applicant associations are directly concerned by the Commission decision having general scope which approved EPEAEK II. Therefore, the application brought by the associations, in that it seeks annulment of the Commission's refusal expressed in the contested measure to amend its decision approving EPEAEK II, must also be dismissed as inadmissible.

- 73 It follows therefore that the application, in so far as it relates to the Commission's refusal to amend the decision approving EPEAEK II, must be dismissed as inadmissible and there is no need to consider the other arguments raised by the parties.
- 74 Second, it should be pointed out that by the present action the applicants are seeking annulment of the contested measure since they claim that by that measure the Commission, in breach of the Structural Funds regulation and the EC Treaty, either refused or omitted to intervene with the competent Greek authorities and to draw the attention of those authorities to the unlawful acts committed during the implementation of EPEAEK II in order to obtain the amendment of that programme, of the programme complement and of the 'findings-decisions' of the Monitoring Committee of 29 May 2001 so as to extend joint financing under EPEAEK II to private IEK.
- 75 As the Commission rightly states, the applicants are in essence complaining that the Commission refused to institute proceedings against the Hellenic Republic for failure to fulfil its obligations under the Structural Funds regulation and the EC Treaty.
- 76 As the Court has consistently held, private individuals are not entitled to bring proceedings against a refusal by the Commission to institute proceedings against a Member State for failure to fulfil its obligations (Order of the Court of Justice of 12 June 1992 in Case C-29/92 *Asia Motor France and Others v Commission* [1992] ECR I-3935, paragraph 21; judgment of the Court of Justice in Case C-107/95 P *Bundesverband der Bilanzbuchhalter v Commission* [1997] ECR I-947, paragraph 19; Order of the Court of First Instance of 16 February 1998 in Case T-182/97 *Smanor and Others v Commission* [1998] ECR II-271, paragraph 25).

- 77 It is clear from Article 226 EC that the Commission is not bound to bring proceedings for failure to fulfil obligations but has discretion in that respect which means that individuals have no right to require it to adopt a particular position or to bring an action for annulment against its refusal to take action (Order in *Smanor and Others v Commission*, cited in paragraph 76 above, paragraph 27, and case-law cited therein).
- 78 It follows that the present application, in so far as it relates to the allegedly unlawful refusal of the Commission to bring infringement proceedings against the Hellenic Republic, must also be dismissed as inadmissible.
- 79 Lastly, by various arguments put forward in the application and repeated in their observations on the objection of inadmissibility, the applicants seek to challenge the assessments of the Director-General of the Directorate-General of the Commission for Employment and Social Affairs, the author of the contested measure, as regards the failure to classify as State aid, in the light of case-law of the Court of Justice in that matter, the public financing measures for the Greek national education system of which public IEK form an integral part.
- 80 It should be stated, however, that at no stage in the administrative procedure or in the present proceedings did the applicants apply for the discontinuance of individual aid, or of a system of aid which was unlawful or incompatible with the common market and had been introduced by the Hellenic Republic for the benefit of public IEK; they have merely complained about the system of Community and national joint financing of EPEAEK II as a whole, on the ground that they were unlawfully excluded from the joint financing in question. Thus, both by the request to act (see paragraph 31 above) and by the present action the applicants are seeking in essence to obtain extension in their favour of the joint financing, under EPEAEK II, which in their view is reserved for public IEK alone. It is therefore to demonstrate the alleged discrimination between public and private

IEK that the applicants have referred to Article 87 EC and not to seek the abolition of an individual State aid or a system of aid for public IEK that is allegedly unlawful or incompatible with the common market.

81 In any event, the Court considers that the assessments of the author of the contested measure regarding the failure to apply Community competition rules to aid intended for national education cannot be regarded as a measure constituting a decision, and even less a Commission decision adopted under Article 88 EC and Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88] of the EC Treaty (OJ 1999 L 83, p. 1), which can be challenged in the context of the present action, but as a measure providing information, against which no action for annulment can be brought.

82 The Court infers from the content of the contested measure that it was not intended to be a Commission decision on State aid but to inform the applicants of the view of its author that Community competition rules did not apply to the measures intended for national education, in order to demonstrate the validity of the Commission decision approving EPEAEK II, the decision which the applicants claimed should be amended. This description of the contested measure is moreover in keeping with the fact that it is not addressed to the Hellenic Republic and does not come from the Commission itself or from the Member of the Commission responsible for competition, but from the Director-General of the Directorate-General for Employment and Social Affairs, and the contested measure does not state that he was empowered by the Commission to take a decision in the matter of State aid (see, to that effect, the Order of the Court of First Instance of 5 November 2003 in Case T-130/02 *Kronoply v Commission* [2003] ECR II-4857, paragraph 46).

83 In view of all the above considerations it is appropriate to allow the objection of inadmissibility raised by the Commission and to dismiss the present application as being inadmissible in its entirety.

Costs

- ⁸⁴ 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 applicants have been unsuccessful, they must be ordered to bear their own costs and to pay those of the Commission, in accordance with the latter's application on costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby orders:

1. The application is dismissed as inadmissible.
2. The applicants shall bear their own costs and pay those incurred by the Commission.

Luxembourg, 15 March 2004.

H. Jung

Registrar

H. Legal

President