JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)

11 July 2007 *

In Case T-167/04,

Asklepios Kliniken GmbH, established in Königstein-Falkenstein (Germany), represented by K. Füßer, lawyer,

applicant,

v

Commission of the European Communities, represented by V. Kreuschitz and M. Niejahr, acting as Agents,

defendant,

supported by

Federal Republic of Germany, represented initially by C.-D. Quassowski and A. Tiemann, and subsequently by W.-D. Plessing and C. Schulze-Bahr, acting as Agents,

* Language of the case: German.

and by

United Kingdom of Great Britain and Northern Ireland, represented initially by M. Bethell, and subsequently by C. Gibbs and E. O'Neill, acting as Agents,

interveners,

APPLICATION for a declaration under Article 232 EC that, by failing to take a decision under Article 4(2), (3) or (4) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88] EC (OJ 1999 L 83, p. 1) on the complaint lodged by the applicant concerning the award of allegedly unlawful aid to publicly-owned hospitals in Germany, the Commission has failed to fulfil its obligations under Article 88 EC and Articles 10(1) and 13(1) of Regulation No 659/1999,

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

composed of H. Legal, President, I. Wiszniewska-Białecka and E. Moavero Milanesi, Judges,

Registrar: K. Andová, Administrator,

having regard to the written procedure and further to the hearing on 8 March 2007,

gives the following

Judgment

Legal context

1 Article 4 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88] EC (OJ 1999 L 83, p. 1) provides:

'1. The Commission shall examine the notification as soon as it is received. ... the Commission shall take a decision pursuant to paragraphs 2, 3 or 4.

2. Where the Commission, after a preliminary examination, finds that the notified measure does not constitute aid, it shall record that finding by way of a decision.

3. Where the Commission, after a preliminary examination, finds that no doubts are raised as to the compatibility with the common market of a notified measure, in so far as it falls within the scope of Article [87](1) [EC], it shall decide that the measure is compatible with the common market ... The decision shall specify which exception under the Treaty has been applied.

4. Where the Commission, after a preliminary examination, finds that doubts are raised as to the compatibility with the common market of a notified measure, it shall decide to initiate proceedings pursuant to Article [88](2) [EC] ...'

2 Article 10(1) of Regulation No 659/1999 provides:

'Where the Commission has in its possession information from whatever source regarding alleged unlawful aid, it shall examine that information without delay.'

3 According to Article 11(1) of Regulation No 659/1999:

'The Commission may, after giving the Member State concerned the opportunity to submit its comments, adopt a decision requiring the Member State to suspend any unlawful aid until the Commission has taken a decision on the compatibility of the aid with the common market ...'

4 Article 13(1) of Regulation No 659/1999 states:

'The examination of possible unlawful aid shall result in a decision pursuant to Article 4(2), (3) or (4). In the case of decisions to initiate the formal investigation procedure, proceedings shall be closed by means of a decision ... If a Member State fails to comply with an information injunction, that decision shall be taken on the basis of the information available.'

5 According to Article 20(2) of Regulation No 659/1999:

'Any interested party may inform the Commission of any alleged unlawful aid and any alleged misuse of aid. Where the Commission considers that on the basis of the information in its possession there are insufficient grounds for taking a view on the case, it shall inform the interested party thereof. Where the Commission takes a decision on a case concerning the subject-matter of the information supplied, it shall send a copy of that decision to the interested party.'

Background to the dispute

6 Asklepios Kliniken GmbH is a German private company, the entire share capital of which is in private hands and which specialises in hospital management.

7 On 20 January 2003, the applicant lodged a complaint with the Commission to contest the award of allegedly unlawful aid to public hospitals by the German public authorities, comprising compensation, on a case-by-case basis, of any operating losses and the provision of a guarantee by the respective public bodies in favour of those hospitals. The applicant asked the Commission, first, to look into such allegedly unlawful conduct on the basis of information which it had provided to the Commission, and to inform it of all the decisions taken during the preliminary examination procedure, and secondly, in the event that the measures complained of should be deemed to constitute State aid, to require their suspension until such time as the Commission had taken a decision. A legal expert's report containing information on the applicant and the hospitals which it manages, its competitive relationship with public-sector hospitals and an analysis of the application of Article 86 EC to the contested aid was annexed to the complaint.

8 By letter of 6 February 2003, the Commission confirmed receipt of the complaint and informed the applicant that the Commission's Directorate-General for Competition would examine the information submitted and look into the matter as necessary.

9 In the course of 2003, the applicant sent several requests for information to the Commission.

10 By letter of 26 January 2004, the applicant gave the Commission formal notice to follow the procedure concerning its complaint. It also asked it, first, to require the Federal Republic of Germany to suspend the compensation in question, at least until the Commission had adopted a decision under Article 11(1) of Regulation No 659/1999, secondly, to take a decision in the context of the preliminary examination of the contested aid under Article 4(2), (3) or (4) of that regulation, in accordance with Article 13(1) thereof, and thirdly, to keep it informed of the decisions taken, in accordance with Article 20(2) of the regulation.

11 By letter of 30 January 2004, the Commission confirmed receipt of the letter of formal notice.

12 On 18 February 2004, the Commission adopted a draft decision on the application of Article 86 EC to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest ('the draft decision').

13 On 28 November 2005, the Commission adopted Decision 2005/842/EC on the application of Article 86(2) [EC] to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ 2005 L 312, p. 67).

Procedure and forms of order sought

14 By application lodged at the Registry of the Court of First Instance on 13 May 2004, the applicant brought the present action.

15 By applications lodged at the Registry of the Court of First Instance on 20 and 23 September 2004 respectively, the United Kingdom of Great Britain and Northern Ireland and the Federal Republic of Germany applied for leave to intervene in support of the form of order sought by the Commission.

16 By order of the President of the Fourth Chamber of 27 October 2004, leave to intervene was granted in each case.

17 By letter of 20 December 2004, the United Kingdom of Great Britain and Northern Ireland informed the Registry of the Court of First Instance that it was waiving its right to submit a statement in intervention, but that it might wish to participate in the hearing.

18 On 26 January 2005, the Federal Republic of Germany submitted its statement in intervention.

19 By way of measures of organisation of procedure, the parties were asked to submit their observations to the Court for the remainder of the procedure on the adoption of Decision 2005/842. The parties complied with that request within the time allowed.

20 Upon hearing the report of the Judge-Rapporteur, the Court (Fourth Chamber) decided to open the oral procedure.

21 The parties presented oral argument and their answers to the oral questions put by the Court at the hearing on 8 March 2007.

22 The applicant claims that the Court should declare that, by failing to take any decision pursuant to Article 4(2), (3) or (4) of Regulation (EC) No 659/1999 following its complaint lodged on 20 January 2003, the Commission is in breach of its obligations under Article 88 EC and Articles 10(1) and 13(1) of Regulation No 659/1999.

23 The Commission, supported by the Federal Republic of Germany, claims that the Court should:

— dismiss the action as inadmissible or, in the alternative, as unfounded;

— order the applicant to pay the costs.

Law

Admissibility

Arguments of the parties

24 Without formally raising a plea of inadmissibility, the Commission claims that the application is inadmissible on two counts.

25 First of all, the application does not satisfy the conditions set out in Article 44(1)(c) of the Rules of Procedure of the Court of First Instance. The Commission points out that, for an action to be admissible, the basic legal and factual particulars relied on must be indicated, at least in summary form, intelligibly in the application itself. An overall reference to other documents, even those annexed to the application, cannot compensate for the absence of the basic particulars in the application. In the present case, the application should have identified the German public-sector hospitals which were actually in competition with the hospitals managed by the applicant. The legal expert's report, provided by the applicant in an annex, does not make up for the inadequacy of its application.

26 Secondly, the Commission submits the applicant does not have standing to bring proceedings. The Commission cites established case-law to the effect that the third paragraph of Article 232 EC must be interpreted as meaning that an individual may bring an action for failure to act against an institution which has failed to adopt a measure which would be of direct and individual concern to him within the meaning of the fourth paragraph of Article 230 EC. While a decision relating to its complaint is of direct concern to the applicant, it is not of individual concern.

27 In order to be individually concerned, the person making a complaint concerning allegedly unlawful State aid must belong to the group of persons benefiting from the procedural safeguards provided for in Article 88(2) EC. Such persons are, apart from the undertaking or undertakings benefiting from the aid, those persons, undertakings or associations whose interests might be affected by the grant of the aid, in particular competing undertakings and trade associations. However, according to case-law, only those undertakings whose competitive situation is actually and directly affected by the grant of aid may be considered to be competitors of the aid beneficiaries. The theoretical possibility that the interests of an undertaking may be affected by the grant of aid is therefore not sufficient.

28 In the present case, the applicant has not provided any concrete evidence in its application that it was in actual and direct competition with German public hospitals. As a result, it cannot invoke the status of a party concerned within the meaning of Article 88(2) EC.

29 Therefore, the applicant cannot ask the Court to examine the Commission's alleged failure to act with regard to the compensation granted to all the publicly-managed hospitals in Germany. The applicant itself admits in its application that it is in competition with 'at least some' of the German public hospitals; there are, however, more than 700 of these. In any event, the passages in the legal expert's report to which the applicant refers mention only four cases of actual competition. Furthermore, the applicant's assertion that 'one may easily conceive of similar examples for the other clinics mentioned falling under the responsibility of the contracting authorities in Bavaria and Hesse' is not supported by any evidence.

30 In addition, the State compensation granted to public hospitals and challenged by the applicant does not constitute a general aid scheme, but represents, rather, a large number of individual aid packages. The applicant ought therefore to have shown, for

each individual case, that the public hospital concerned was in actual competition with one of the hospitals which it manages.

31 The Federal Republic of Germany takes the view that the applicant cannot lay claim to the status of a party concerned within the meaning of Article 88(2) EC merely because it lodged a complaint with the Commission and it operates private hospitals. The applicant should have given details of the various types of clinics and the medical care or medical fields concerned and delineated the geographical zones in question.

32 The applicant submits that its action is admissible. It argues that Articles 230 EC and 232 EC prescribe one and the same legal remedy, and that the third paragraph of Article 232 EC must be interpreted as meaning that a natural or legal person may bring an action for failure to act against an institution which has failed to adopt a measure which would have been of direct and individual concern to it. The fact that there are legal remedies at national level has no bearing on the admissibility of an action for failure to act.

33 The applicant maintains that it would have been directly and individually concerned by the decision which the Commission should have taken under Article 4(2), (3) or (4) of Regulation No 659/1999 in the context of the preliminary examination of the aid.

34 As regards its being directly concerned, the applicant submits that a competitor of the beneficiary of aid is considered to be directly affected by a Commission decision on State aid where there is no doubt that the national authorities intend to implement their plan to grant aid and, a fortiori, where the appropriations have already been granted and continue to be granted. Accordingly, there is no doubt in the light of the circumstances of the present case that the applicant is directly affected.

35 As regards its being individually concerned, the applicant maintains that, in relation to State aid, persons who are individually concerned are those whose interests are liable to be affected by the granting of aid, that is, in particular competitors of the beneficiary of the aid. Furthermore, according to case-law, the parties to the procedure under Article 88(2) EC may challenge before the Community judicature a Commission decision finding that a measure does not constitute State aid, or that, although constituting State aid, it is compatible with the common market. In that context, the Court should, at most, confine itself to ascertaining whether a competitive relationship with the beneficiary of the aid cannot be clearly ruled out. Accordingly, given the similarity between the conditions of admissibility of actions for annulment and actions for failure to act, the same approach should be followed when applying the third paragraph of Article 232 EC.

36 The applicant takes the view that it would have been individually concerned by the decision that the Commission failed to take because it was actually competing with certain public hospitals benefiting from the aid in question. The Commission's failure to act therefore deprives it of the procedural rights which it would have enjoyed had a formal procedural examination been opened.

37 More precisely, in relation to its actual competitive relations with certain German public hospitals benefiting from the contested aid, the applicant asserts that it manages 39 private clinics in Germany, which compete intensively with those public hospitals, and refers to the expert's report annexed to the application.

38 Furthermore, the contention that the concept of interested party should be limited to those persons alone whose competitive situation is actually and directly affected by the grant of State aid, which is the view of the Commission, undermines the general principle of Community law requiring effective judicial protection.

Findings of the Court

— The application's compliance with Article 44(1)(c) of the Rules of Procedure

39 Under Article 44(1) of the Rules of Procedure, an application must contain a summary of the pleas in law on which the application is based. That summary must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the application, if necessary, without any further information.

40 According to settled case-law, in order to guarantee legal certainty and sound administration of justice it is necessary, in order for an action to be admissible, that the basic legal and factual particulars relied on be indicated, at least in summary form, coherently and intelligibly in the application itself (order in Case T-85/92 *De Hoe* v *Commission* [1993] ECR II-523, paragraph 20, and judgment in Case T-339/03 *Clotuche* v *Commission,* not yet published in the ECR, paragraph 133). Although specific points in the text of the application can be supported and completed by references to specific passages in the documents attached, a general reference to other documents, even those annexed to the application, cannot compensate for the lack of essential elements of legal arguments which, under the provision set out above, must be included in the application (order in Case T-154/98 *Asia Motor France and Others* v *Commission* [1999] ECR II-1703, paragraph 49). Furthermore, it is not for the Court of First Instance to seek and identify in the annexes the pleas and arguments on which it may consider the action to be based, since the annexes have a purely evidential and instrumental function (Case T-84/96 *Cipeke* v *Commission* [1997] ECR II-2081, paragraph 34).

41 In the present case, the applicant asks the Court to declare that, by failing to take any decision pursuant to Article 4(2), (3) or (4) of Regulation No 659/1999 on its complaint of 20 January 2003, the Commission is in breach of its obligations under Article 88 EC and Article 10(1) and Article 13(1) of Regulation No 659/1999. The application thus unambiguously identifies the failure to act which the Court should declare and contains a clear and precise summary of the plea in law on which the application is based. In addition, the application sets out the basic legal and factual particulars concerning the aid criticised in the complaint, the existence of a duty to act falling on the Commission and the Commission's alleged failure to act on the expiry of a period which supposedly exceeded reasonable limits.

42 With regard to the alleged absence of evidence in the application that there is a sufficient competitive relationship, it must be observed that the applicant states therein that it manages private hospitals in Germany and that it actually competes with public hospitals in Germany which are the beneficiaries of the aid which it considers to be unlawful. To illustrate this it mentions hospitals in Bavaria, referring to the annexes to the application for further details.

43 In the light of the above, it is apparent that the factual particular essential to ascertaining whether the applicant has locus standi, namely its competitive relationship with beneficiaries of the aid, while being indicated in the application concisely, is sufficiently clear and concise. That finding is not undermined by the applicant's use of annexes for the purposes of supplementing the information provided in the body of the application, in so far as that application contains the basic factual and legal particulars needed by the defendant to prepare its defence and enabling the Court to rule on the application.

44 Therefore, the application satisfies the conditions laid down by Article 44(1)(c) of the Rules of Procedure, and the Commission's first argument relating to the admissibility of the application must be rejected.

— The applicant's locus standi

45 Articles 230 EC and 232 EC 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 15/70 *Chevalley* v *Commission* [1970] ECR 975, paragraph 6, and Case T-395/04 *Air One* v *Commission* [2006] ECR II-1343, paragraph 25).

46 It must therefore be considered whether the applicant would have locus standi to bring an action for annulment of at least one of the measures which the Commission might have adopted at the conclusion of the preliminary stage of the examination of 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.

47 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 a 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, and *Air One* v *Commission*, cited in paragraph 45 above, paragraph 30).

48 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*, cited in paragraph 47 above, paragraphs 23 to 26, and *Air One* v *Commission*, cited in paragraph 45 above, paragraph 31).

49 According to established case-law, 'parties concerned' within the meaning of Article 88(2) EC are any persons, undertakings or associations of undertakings whose interests might be affected by the granting of aid, that is, in particular competing undertakings and trade associations (Case 323/82 *Intermills* v *Commission* [1984] ECR 3809, paragraph 16, Case C-78/03 P *Commission* v *Aktionsgemeinschaft Recht und Eigentum* [2005] ECR I-10737, paragraph 36, and *Air One* v *Commission*, cited in paragraph 45 above, paragraph 36). The case-law established by the judgment in *Intermills* v *Commission* was given expression in Article 1(h) of Regulation No 659/1999, which states that term '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'.

50 Therefore, even a future or simply a potential competitor of the beneficiary of the contested aid must be deemed to be a party concerned within the meaning of Article 88(2) EC (see, to that effect, Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraph 19, and *Air One* v *Commission*, cited in paragraph 45 above, paragraph 39, respectively).

51 In the present case, the applicant manages 39 private hospitals located throughout the Federal Republic of Germany. It is therefore in competition with some of the public sector hospitals benefiting from the aid. This fact is enough to prove the existence of a sufficient competitive relationship between the applicant and at least

some of the beneficiaries of the contested measures such that the applicant may be considered to be a party concerned within the meaning of Article 88(2) EC.

52 The applicant would therefore be entitled to bring an action for annulment of a Commission decision adopted under Article 88(3) EC in order to secure compliance with its procedural rights as an interested party. It must therefore be held that the applicant also has standing to ask the Court to declare that the Commission has failed to act by not adopting such a decision.

53 This finding is not placed in question by the arguments of the Commission and the intervener to the contrary.

54 First, the intervener's claim that, in order to prove that there is a competitive relationship, the applicant is required to provide details of the various types of clinic, the medical services and the medical fields concerned and to delineate the geographical zones in question, must be rejected. To prove this would require establishing a precise definition of the market concerned and undertaking complex exercises to measure cross-elasticities between the services of the hospitals managed by the applicant and those of the public hospitals. This would go well beyond the scope of the assessment of the concept of 'interested party' such as it is set out in Article 1(h) of Regulation No 659/1999, which mentions only competing undertakings, and the interpretation of that concept in the case-law, which refers to undertakings whose interests might be affected by the grant of aid.

55 For the same reason, contrary to what the Commission contends, in order for the applicant to be considered to be a party concerned within the meaning of Article 88(2) EC, it does not have to show that it is in actual and direct competition with each hospital benefiting from the contested aid. It is sufficient for it to show that there is such a competitive relationship with beneficiaries of the aid.

56 Secondly, the arguments of the Commission and the intervener based on the fact that there are more than 700 public hospitals in Germany cannot be upheld. The fact that there are many beneficiaries is not such as to affect the admissibility of the action, since the allegedly unlawful aid was in fact granted to German public hospitals and as such does not constitute a general aid scheme, a fact not contested by the Commission.

57 In the light of the foregoing, the Commission's second argument relating to the admissibility of the action must also be rejected.

The substance

Arguments of the parties

58 The applicant submits that there has been a failure to act since the Commission is in breach of an obligation to act under Article 88 EC and Article 10(1) and Article 13(1) of Regulation No 659/1999.

59 It is clear from those provisions that the Commission is required to conduct a diligent and impartial examination of the applicant's complaint and to adopt a decision within a reasonable period.

60 First of all, by referring to the content of Article 88(1) and (2) EC, Article 10(1) and Article 13(1) of Regulation No 659/1999, the applicant emphasises the obligation to undertake a preliminary examination of the national measures capable of constituting unlawful State aid. That obligation arises, in respect of notified measures, as soon as the notification thereof is received and, in respect of measures which have not been notified, as soon as the complaint is received. The applicant states that the Commission is required to conduct a diligent and impartial assessment of complaints in the interest of sound administration of the fundamental rules of the Treaty on State aid. The purpose of that preliminary examination is to enable the Commission to form an initial view as to the partial or total compatibility of the aid in question with the common market, while the formal investigation procedure under Article 88(2) EC is directed at a full assessment.

61 Secondly, the applicant argues, in relation to the obligation to take a decision following that preliminary examination, that the absence of a decision to initiate the formal investigation procedure pursuant to Article 4(4) of Regulation No 659/1999 is justified only where the Commission, at the conclusion of the preliminary examination, has been able to take the firm view that the State measure cannot be deemed to be State aid, which must be recorded by way of a decision under Article 4(2) of Regulation No 659/1999, or that the measure amounts to aid compatible with the common market, which must be recorded by way of a decision under Article 4(3) of Regulation No 659/1999.

62 Finally, in relation to the time frame within which the Commission has to take a decision, even though the preliminary examination procedure of non-notified aid initiated following complaints from third parties is not subject to mandatory time-limits, it cannot however be prolonged indefinitely. The institution is required to take its decision within a reasonable time frame, which must be determined on the

basis of the particular circumstances of each case and, especially, the context of the case, the various procedural stages to be followed by the Commission, the complexity of the case and its importance for the interested parties. Since only a preliminary examination of the aid's compatibility was involved and not a full examination of that issue, the Commission should have been able to take a decision within a period of two months.

63 The applicant submits that the fact that the Commission did not, to its knowledge, either ask for any expert's report or send any request for information to the German authorities, shows that further clarification measures were not necessary in order for it to rule on the merits of the applicant's complaint.

64 It is clear from the case-law that a period of 10 months between the lodging of a Member State's observations and the decision to initiate the formal investigation procedure has been considered to be reasonable while a period of 26 months has been considered to be unjustified, save in exceptional circumstances. Similarly, the fact that a complaint is the first of its kind does not justify a preliminary examination of 19 months, given that it raised only a few real difficulties. However, in the present case, no action to establish the facts is at present ongoing and the examination of the contested aid does not raise any major legal problem capable of leading, if need be, to the initiation of the formal investigation procedure.

65 In addition, the applicant submits that it required a decision to be taken quickly. The present situation leads to distortions of competition in the German hospital sector which are damaging to it. Furthermore, the failure to deal with its complaint has an adverse impact on its negotiations with the German public authorities concerning the takeover of public hospitals.

66 As the Commission did not have to seek clarification of the contested aid and the complaint was not particularly complex and given the applicant's requirements, a period of more than 15 months between the complaint of 20 January 2003 and the lodging of the present application is not reasonable in terms of a preliminary examination of that aid. The applicant states that that period is significantly greater than the two-month period which the Commission has for the preliminary examination of the notified aid and is fractionally below the 18-month period which the Commission has in the context of a formal investigation procedure for the purpose of taking a final decision. The applicant takes the view that this lack of action over a period exceeding 15 months constitutes a breach of the Commission's obligations under Article 88 EC and Article 10(1) and Article 13(1) of Regulation No 659/1999.

67 That finding is not invalidated by the Commission's argument that, since it did not contain sufficient factual information, the complaint of 20 January 2003 did not give rise to an obligation on its part to act. Rather, it follows from Article 20(2) and Article 10(1) of Regulation No 659/1999 that the Commission is required to examine the information in its possession without delay. Furthermore, unlike the Commission, which has considerable fact-finding capacities, the complainant's ability to provide relevant information is significantly limited. In those circumstances, a complaint, for the purposes of Article 20(2), is only informative and can merely encourage the Commission to undertake an investigation. The applicant considers that the information contained in the complaint of 20 January 2003, and in particular in the expert's report annexed to the complaint, was sufficient for the Commission to undertake an investigation without delay. A complainant may be required to ensure only that the information it provides may give grounds for 'initial suspicions' of unlawful aid. The information provided in the letter of 24 January 2004 completes or updates that contained in the complaint of 20 January 2003.

68 The applicant also states that neither the draft decision nor Decision 2005/842 is capable of bringing to an end the Commission's failure to act, since the adoption of a measure of general scope can neither justify nor excuse the discontinuance of the procedure to examine complaints in relation to State aid.

69 The Commission takes the view that, on the date of the letter of formal notice, 26 January 2004, it had in no way contravened the requirement to undertake a prior examination of the aid within a reasonable period. Therefore, the applicant has failed to show that the Commission was required to adopt a decision on that date bringing its failure to act to an end, this being the only legally significant issue on which the Court's ruling on the Commission's alleged failure can be based.

70 The Commission accepts that the preliminary examination of aid which is the subject of a complaint cannot be prolonged indefinitely. However, the two-month period laid down in Article 4(5) of Regulation No 659/1999 cannot be confused with the requirement imposed on the Commission to conclude that examination within a reasonable period. Whether or not the period is reasonable is a matter to be determined in the light of the particular circumstances of each case and, especially, its context, the various procedural stages to be followed and its importance for the various interested parties.

71 The applicant lodged its complaint at the time when the proceedings in Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747 were coming to an end. Since that judgment was of great importance to the assessment of public financing of hospitals, the Commission, in accordance with the principle of sound administration, waited for it to be handed down before defining its position on the applicant's complaint. The period of only six months between the applicant's letter of formal notice and the delivery of the judgment was too short to allow for the draft decision, which it was in the process of drawing up, to be adopted or for the preliminary examination of the applicant's complaint to be concluded.

72 Furthermore, if it had decided to act on the applicant's request, six months would also have been insufficient to undertake an examination, even a brief examination, and to rule on the financing of the German public hospitals concerned, numbering over 700, a fortiori as measures for clarification of the facts would have been necessary in order to make a legal assessment of the complaint.

73 The Commission refers to cases in which the Court took the view that a period of 10 months was reasonable, while upholding actions for failure to act in cases where more than two years had elapsed between the complaint and the letter of formal notice, this being a period four times greater than that in the present case.

74 The Commission also contends that it acted sufficiently. The adoption and publication of its draft decision concerning the application of Article 86(3) EC is equivalent to the initiation of the formal investigation procedure laid down in Article 88(2) EC. In any event, the adoption of Decision 2005/842, on 28 November 2005, brought its failure to act to an end and made pointless any individual review by the Commission of the financing of each public hospital. There is therefore no longer any need to rule on the application.

Findings of the Court

75 As a preliminary point, the Court must reject the Commission's arguments that it defined its position on the complaint by adopting its draft decision, followed by Decision 2005/842, with the result that it is no longer necessary to rule on the application for failure to act.

76 Admittedly, that decision sets out criteria for assessing the lawfulness of the State financing criticised by the applicant. Thus, compatibility with the common market and exemption of the compensation from notification are made conditional, under Article 4 of Decision 2005/842, on the existence of an official act setting out the nature, scope and duration of the public service obligations imposed and the identity of the undertakings concerned. Pursuant to Article 5 of that decision, compensation, which includes all the advantages granted by the State in any form whatsoever, is not

to exceed what is necessary to cover the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit. Furthermore, under Article 6 Member States are to require the undertakings concerned to repay any overcompensation paid. It may therefore be inferred that the compensation of losses which are not incurred in discharging public service obligations is prohibited, and that the sums in question must be recovered by the State.

77 However, laying down abstract criteria in a decision of general scope does not by itself constitute a definition of position by the Commission on a specific complaint such as that of the applicant. Those criteria do no more than set out the elements which should be taken into account for the purpose of assessing the compatibility with Community law of financing comparable to that criticised by the applicant. Only the actual application of those criteria by the Commission to the situations complained of by the applicant can demonstrate clearly the institution's willingness to act in respect of the applicant's request, and, therefore, constitute a definition of position for the purposes of the second paragraph of Article 232 EC.

78 That conclusion applies a fortiori in regard to the draft decision. The fact that the parties concerned — including the applicant — had the opportunity to comment on its content does not warrant treating it in the same way as the initiation of the formal investigation procedure under Article 88(2) EC. Such consultation merely enabled the applicant to set out its views on the content of a general decision and not to make its case on the lawfulness of the contested measures, as it would have been entitled to do under Article 20(1) of Regulation No 659/1999 had the Commission decided to initiate the formal investigation procedure under Article 88(2) EC.

79 It follows from the foregoing that at the time when it was given formal notice under Article 232 EC, the Commission had not defined its position on the applicant's complaint.

80 Since failure to act occurs when, contrary to Community law, the institution in question fails to take action, it must be ascertained whether, at the time when the Commission was given formal notice, on 26 January 2004, it was under an obligation to act (Case T-95/96 *Gestevisión Telecinco* v *Commission* [1998] ECR II-3407, paragraph 71, and *Air One* v *Commission*, cited in paragraph 45 above, paragraph 60).

81 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 (*Air One* v *Commission*, cited in paragraph 45 above, paragraph 61). It follows that the Commission cannot prolong indefinitely its preliminary investigation into State measures that have been the subject of a complaint. 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*, cited in paragraph 80 above, paragraph 75).

82 The complaint and the letter of formal notice were received by the Commission on 20 January 2003 and 26 January 2004 respectively.

83 It is apparent from the file that the Commission confirmed receipt of the applicant's complaint without asking it for further information or explaining why it was unable to investigate the complaint as it stood. It must therefore be held that the period within which the Commission had to conclude its preliminary examination of the contested financing began to run from the day on which the complaint was received.

84 Therefore, at the time when the Commission received formal notice under the second paragraph of Article 232 EC, the preliminary examination of the complaint had been going on for 12 months.

85 It has been held that a period lasting nearly six months to deal with a relatively complex case concerning several Italian airports did not exceed the limits of a reasonable time frame (*Air One* v *Commission*, cited in paragraph 45 above, paragraphs 62 to 67). By contrast, in *Gestevisión Telecinco* v *Commission*, cited in paragraph 80 above, paragraph 80, the time taken to deal with the complaints, 47 months for the first and 26 months for the second, was considered by the Court to exceed the limits of reasonableness.

86 Since the time-limits laid down in Regulation No 659/1999 for notified aid do not apply to non-notified aid, the applicant's argument that the Commission should in principle be able to take such a decision within a period of two months must be discounted.

87 At the time when the complaint was lodged, the proceedings in *Altmark Trans and Regierungspräsidium Magdeburg*, cited in paragraph 71 above, were still ongoing. Given the importance of that case to the assessment of the public financing criticised by the applicant, the Commission was within its rights to defer its examination of the questions of fact raised by the complaint pending clarification of the legal framework within which the examination of the complaint had to be conducted.

88 Admittedly, preparation of a general decision on State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest cannot release the Commission from its obligation to conduct an individual examination of the applicant's complaint.

89 However, while there was a six-month interval between the judgment in *Altmark Trans and Regierungspräsidium Magdeburg*, cited in paragraph 71 above, and the letter of formal notice in this case, the case is undeniably complicated. The complaint concerns all public sector hospitals in Germany, which number more than 700, without, however, identifying them individually, and criticises both the compensation by public bodies of any operational losses incurred by the hospitals and the provision of a guarantee, without details of the aid received by each hospital concerned being provided.

90 Having regard to the complexity of the case, that period was in any event too short for the Commission to be able to complete its preliminary examination of the compatibility of the financing contested by the applicant.

91 Accordingly, it must be held that, on the date of the letter of formal notice, the duration of the examination of the complaint did not exceed the limits of what was reasonable.

92 The application must for that reason be dismissed.

Costs

93 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 in accordance with the form of order sought by the Commission.

94 Under the first subparagraph of Article 87(4) of the Rules of Procedure, Member States which have intervened in the proceedings are to bear their own costs. The Federal Republic of Germany and the United Kingdom of Great Britain and Northern Ireland shall accordingly bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. Dismisses the action;

2. Orders Asklepios Klinken GmbH to pay both its own costs and those incurred by the Commission;

3. **Orders the Federal Republic of Germany and the United Kingdom of Great Britain and Northern Ireland to bear their own costs.**

Legal Wiszniewska-Białecka Moavero Milanesi

Delivered in open court in Luxembourg on 11 July 2007.

E. Coulon H. Legal

Registrar President