

Case T-167/04

Asklepios Kliniken GmbH

v

Commission of the European Communities

(State aid — Public hospitals — Compensation for operating losses and provision of guarantees — Complaint — Failure by the Commission to define its position — Action for failure to act — Locus standi — Admissibility — Reasonable time frame — Regulation (EC) No 659/1999)

Judgment of the Court of First Instance (Fourth Chamber), 11 July 2007 . . . II - 2382

Summary of the Judgment

1. *Actions for failure to act — Natural or legal persons — Omissions of direct and individual concern to them*
(Arts 88(2) and (3) EC, 230 EC and 232 EC)

2. *Actions for failure to act — Definition of position within the meaning of Article 232, second paragraph, EC — Meaning*
(Arts 88(2) EC and 232, second para., EC; Council Regulation No 659/1999, Art. 20)
3. *State aid — Examination by the Commission*
(Art. 88(3) EC)

1. Since Articles 230 EC and 232 EC prescribe one and the same remedy, it follows that, just as an actual or potential competitor of State aid beneficiaries may, for the purpose of safeguarding his procedural rights as an interested party derived from Article 88(2) EC, admissibly bring an action for the annulment of a Commission finding of compatibility that was taken without opening the formal investigation procedure, such a person may also admissibly bring an action for a declaration that the Commission failed to act by not adopting a decision under Article 88(3) following his complaint, without it being necessary, in order for him to be recognised as an interested party, for the existence of a competitive relationship to be demonstrated between himself and each of the recipients of the aid complained of, and without the admissibility of such an action for failure to act being affected by the numerical importance of recipients of the allegedly unlawful aid, provided the aid was in fact

granted and does not constitute a general aid scheme.

(see paras 45, 48, 50, 55, 56)

2. The adoption by the Commission of a decision of general scope, laying down abstract criteria for assessing the legality of State financing comparable to that complained of in a specific complaint concerning national measures capable of constituting unlawful State aid, does not by itself constitute a definition of position by the Commission on that complaint, since only the actual application of those criteria by the Commission to the situations complained of can constitute a definition of position for the

purposes of the second paragraph of Article 232 EC. Similarly, the fact that the parties concerned, including the applicant, had the opportunity to comment on the content of the draft of such a general decision cannot be assimilated to the initiation of the formal investigation procedure under Article 88(2) EC.

(see paras 77, 78)

3. 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. The fact that the

Commission itself prepared a general decision on the category of aid which includes the measure complained of does not release it from that task.

However, the reasonableness of the duration of the investigation of a complaint of allegedly unlawful State aid 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. Where a Community legal case important for the assessment of the aid complained of is ongoing, the Commission may legitimately defer its examination of certain aspects of a complaint pending clarification of the legal framework within which the examination of the complaint has to be conducted.

(see paras 81, 87-89)