

ORDER OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

8 June 2005*

In Case T-151/03,

Nuova Agricast Srl, established in Cerignola (Italy), represented by M. Calabrese,
lawyer,

applicant,

v

Commission of the European Communities, represented by V. Di Bucci and
P. Aalto, acting as Agents, assisted by A. Abate, lawyer, with an address for service in
Luxembourg,

defendant,

* Language of the case: Italian.

supported by

United Kingdom of Great Britain and Northern Ireland, represented initially by K. Manji, and subsequently by C. Jackson, acting as Agents, with an address for service in Luxembourg,

intervener,

APPLICATION for annulment of the Commission decision refusing to grant the applicant access to a document originating from a Member State,

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

composed of M. Vilaras, President, F. Dehousse and D. Šváby, Judges,
Registrar: H. Jung,

makes the following

Order

Facts

- 1 By letter of 17 March 2003, registered by the Commission on 20 March 2003, the applicant applied, under Regulation (EC) No 1049/2001 of the European Parliament

and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43), for access to the letter by which the Italian authorities refused to disclose the correspondence sent to the Commission prior to the adoption by the latter on 12 July 2000 of the decision considering, after preliminary examination, a State aid scheme to be compatible with the Common Market (State aid N 715/99 — Italy (SG 2000 D/105754)) ('the decision of 12 July 2000'); that correspondence had itself been the subject of an earlier application for access, the dismissal of which was challenged by the applicant in Case T-139/03.

- 2 By letter of 27 March 2003, the Commission requested the Italian authorities to decide whether the document that was the subject of the abovementioned application for access should be disclosed to the applicant.

- 3 On 28 March 2003 the Commission wrote to the applicant informing it that the Italian authorities had been consulted under Article 4(4) of Regulation No 1049/2001 as to whether the document sought should be disclosed. That letter, which had been dispatched by ordinary post, reached the applicant on 14 April 2003.

- 4 By letter of 16 April 2003, the Commission wrote to the applicant informing it that the Italian authorities had objected to disclosure of the document sought and that its application for access could not therefore be granted. That letter reached the applicant by ordinary post on 2 May 2003.

- 5 On 23 April 2003, the applicant sent the Secretary-General of the Commission a confirmatory application for access, pursuant to Article 7(2) of Regulation No 1049/2001. That application was registered by the Commission on 24 April 2003.

- 6 By fax of 24 April 2003 addressed to the applicant, the Commission informed the applicant that, in view of the reply given by the competent department of the Directorate General for Competition on 16 April 2003, it considered the confirmatory application to be devoid of purpose. A copy of the Commission's letter of 16 April 2003 was attached to the fax.

Procedure and forms of order sought

- 7 By application lodged at the Registry of the Court of First Instance on 6 May 2003, the applicant brought the present action. By separate document, of the same date, on the basis of Article 76a of the Rules of Procedure of the Court of First Instance, the applicant made an application for the expedited procedure, which was rejected by a decision of 12 June 2003.
- 8 By a separate document lodged at the Court Registry on 16 June 2003, the defendant raised an objection of inadmissibility under Article 114 of the Rules of Procedure.
- 9 The applicant lodged its observations on that objection on 16 July 2003 and requested the Court, by way of measures of organisation of procedure, to 'remove' Annex A.9 to the application — that being the letter by which the Italian authorities refused to disclose the correspondence addressed to the Commission prior to the adoption of the decision of 12 July 2000 and which was the subject of the application for access of 17 March 2003 — or, 'in the alternative, to establish the confidential nature' of that Annex 'with regard to the plaintiff (Nuova Agricast srl), although the document had been produced thanks to its counsel'.

- 10 By document lodged at the Court Registry on 12 August 2003, the United Kingdom of Great Britain and Northern Ireland sought leave to intervene in the present proceedings in support of the forms of order sought by the defendant.
- 11 By letter lodged at the Court Registry on 22 September 2003, the applicant submitted a request for confidentiality in respect of some of the annexes to the application.
- 12 By way of measures of organisation of procedure, the Court, by letter of 19 November 2003, requested the Commission to specify the dates on which certain letters had been notified and registered in order to satisfy itself as to the conduct of the administrative procedure, a request with which the Commission complied by letter of 3 December 2003.
- 13 By order of 5 March 2004, the President of the Court of First Instance (Fourth Chamber) joined the plea of inadmissibility to the substance, granted the United Kingdom of Great Britain and Northern Ireland leave to intervene and, as sought by the applicant, ordered a non-confidential version of the pleadings to be forwarded to the intervener. The intervener, by letter lodged at the Court Registry on 6 December 2004, waived the right to submit a statement.
- 14 In its application, the applicant claims that the Court should:

— annul the Commission's letter of 27 March 2003;

- annul the Commission's fax of 16 April 2003;

- annul the Commission's fax of 24 April 2003, which represents a 'non-response' to the confirmatory application for access and can be equated with a refusal to grant access;

- order the Commission to pay the costs.

15 In its defence the Commission contends that the Court should:

- declare the action inadmissible;

- in the alternative, dismiss the application in so far as it is manifestly unfounded;

- in the alternative, dismiss the action itself as unfounded;

- order the applicant to pay the costs.

16 In its reply, the applicant discontinued its action in so far as it sought annulment of the Commission's letter of 16 April 2003. However, in the light of the Commission's letter of 3 December 2003, the applicant maintained its claims for annulment of the Commission's letter of 27 March 2003 and of the implicit refusal of the confirmatory application for access, which allegedly took place on 19 May 2003 and which was ascribed by the Commission, in its defence, to the persistent refusal of the Italian authorities to disclose the documents sought. By way of measures of organisation of procedure, the applicant withdrew its request for withdrawal, or confidential treatment, of Annex A.9 to the application and asked that Cases T-151/03, T-287/03, T-295/03, T-297/03, T-298/03 and T-299/03 be joined.

17 In its rejoinder, the Commission contends that the Court should:

- find that the applicant is no longer contesting the Commission's letter of 16 April 2003, which renders the action inoperative;
- dismiss, if appropriate, the action against the tacit refusal alleged to have taken place on 19 May 2003 as inadmissible and/or unfounded;
- 'confirm' the contentions set out in the defence.

18 The Commission also requests the Court to order that the 'disrespectful words' contained in two footnotes in the reply be removed from the file, and supports the proposal to join Cases T-151/03, T-287/03, T-295/03, T-297/03, T-298/03 and T-299/03.

- 19 By letters lodged at the Court Registry on 31 January 2005 and 4 February 2005, respectively, the applicant and the Commission replied to a question from the Court requesting them to submit their observations on the conclusions to be drawn, for the purposes of the rest of the procedure in the present case, from the judgment in Case T-168/02 *IFAW Internationaler Tierschutz-Fonds v Commission* [2004] ECR II-4135, 'the *IFAW* judgment').
- 20 The applicant states that, following the *IFAW* judgment, the Court 'will regard' the action:
- as manifestly inadmissible in so far as it seeks to challenge the act by which the Commission consulted the Italian authorities;
 - as manifestly unfounded in so far as it seeks to challenge the refusal to allow access to the document at issue and in so far as it is based on an infringement of Article 4(5) of Regulation No 1049/2001.
- 21 The applicant adds that 'it is very likely that the same fate will befall the action in so far as it seeks to challenge the refusal to allow access to the document at issue and is based on infringement of the right to a fair hearing'. The applicant requests that Article 87(3) of the Rules of Procedure be applied.
- 22 In the view of the Commission, the conclusion reached by the Court of First Instance in the *IFAW* judgment and the objection expressed in the present case by the Italian authorities to disclosure of the documents sought provide confirmation that the action is unfounded. The Commission calls on the Court to dismiss the action, by an order, as manifestly inadmissible or, at any event, as manifestly unfounded.

Law

- 23 Article 113 of the Rules of Procedure states that the Court of First Instance, giving its decision in accordance with Article 114(3) and (4) of those Rules, may at any time, of its own motion, consider whether there exists any absolute bar to proceeding with an action.
- 24 In the present case the Court of First Instance considers that the documents before the Court provide sufficient information to enable it to rule in the present case without opening the oral procedure.
- 25 In that regard, the Court of First Instance finds that the letter of 17 February 2003 by which the Italian authorities expressed their objection to the disclosure of the correspondence addressed to the Commission in the context of the investigation of aid scheme N 715/99, which was the subject of the application for access made by the applicant on 17 March 2003, is to be found in Annex A.9 to the application.
- 26 In the application, the applicant's lawyer stated that he had obtained a copy of the document in question in the course of the proceedings in *Case T-76/02 Messina v Commission* [2003] ECR II-3203. He claims that, in accordance with the ethics of his profession, he did not pass it on to the applicant but that, pursuant to the same ethical obligations, as set out in Article 9 of the code of ethics applying to Italian lawyers, it is not permitted for him to refrain from using the document in question in the present proceedings.
- 27 Moreover, a party and his lawyer cannot be treated as being the same in the way that a representative and the person he represents can.

- 28 It should be pointed out first of all that, under Article 19 of the Statute of the Court of Justice, applying to the procedure before the Court of First Instance under Article 53 of that Statute, parties other than the Member States, the institutions, the States which are parties to the Agreement on the European Economic Area and the EFTA Surveillance Authority referred to in that Agreement must be represented by a lawyer.
- 29 Representation in court proceedings consists in one person acting in such proceedings in the name and on behalf of another person, with the legal effects of the proceedings being exclusively to the benefit of the latter or exclusively to be borne by the latter. The representative, in this case the lawyer, is no more than an intermediary for the person represented, who alone, so far as the court is concerned, is party to the proceedings.
- 30 Accordingly, the Court cannot accept the statements of the applicant's lawyer to the effect that, in essence, he has produced the document at issue in his personal capacity and unbeknown to his principal.
- 31 It is appropriate to find that in the present case the proceedings have been properly instituted before the Court on the basis of the application, together with its annexes, by the company Nuova Agricast, duly represented by its lawyer, and that the applicant has put in evidence before the Court a number of documents, one of which being the letter from the Italian authorities of 17 February 2003 which was the subject of the application for access made on 17 March 2003.
- 32 Secondly, it must be pointed out that it is not for the Court, in the context of the present proceedings, to consider whether the applicant's lawyer has complied with the national rules of professional ethics, as regards the inclusion of the document at issue among the annexes to the application.

- 33 The conclusion must therefore be drawn that the applicant is attempting, by means of the present action, to obtain access to a document which it already has in its possession.
- 34 It is therefore apparent that the action brought by Nuova Agricast is devoid of purpose, since, according to the applicant, the request for access was justified by the need to have evidence of the existence of an objection by the national authorities to the disclosure of the correspondence that they had sent to the Commission prior to the adoption of the decision of 12 July 2000, which was the subject of an earlier application for access by the applicant.
- 35 There is no need in those circumstances to grant the applications for measures of organisation of procedure made by the applicant and by the Commission, which, as matters now stand, no longer have any bearing on the resolution of the dispute (Case T-311/00 *British American Tobacco (Investments) v Commission* [2002] ECR II-2781, paragraph 50) or have become devoid of purpose.

Costs

- 36 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs, if they have been asked for in the successful party's pleadings. However, the Court may, under Article 87(3), where the circumstances are exceptional, order that each party bear its own costs.
- 37 In its letter of 31 January 2005, the applicant requests the Court to apply Article 87 (3) of the Rules of Procedure in the present case, pointing to the specific nature of the relevant legislation, which, according to the applicant, is open to misinterpretation, as attested by the Commission and confirmed by a decision of the European Ombudsman.

38 Suffice it to say, however, that the present application has been dismissed not on the basis of an interpretation of a specific provision of the relevant legislation but simply in consequence of a finding that the application was devoid of purpose, and that it is therefore appropriate to decide that the applicant will bear its own costs, as well as those incurred by the Commission in these proceedings.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby orders:

- 1. The application is dismissed.**
- 2. The applicant shall bear its own costs and those incurred by the Commission.**

Luxembourg, 8 June 2005.

H. Jung

Registrar

M. Vilaras

President