

Case T-276/02

Forum 187 ASBL

v

Commission of the European Communities

(State aid — Tax regime — Existing aid — Decision to initiate the procedure under Article 88(2) EC — Legal effects — None — Inadmissibility)

Order of the Court of First Instance (Second Chamber, Extended Composition), 2 June 2003 . . . . . II - 2078

Summary of the Order

1. *Actions for annulment — Actionable measures — Definition — Measures producing binding legal effects — Intermediate measures having independent legal effects in State aid matters — Admissibility*  
(Arts 88 EC and 230 EC)

2. *State aid — Commission decision to initiate a formal examination procedure in respect of a State measure provisionally classified as existing aid — Effects — Whether legal certainty undermined having regard to the existence of previous Commission decisions holding that there was no aid — Not so undermined (Art. 88(2) and (3) EC; Council Regulation No 659/1999, Art. 7(2))*
3. *Community law — Principles — Right to bring an action — Submission to the Community judicature for review of a decision to open the formal examination procedure in relation to a State measure provisionally classified as existing aid — Inadmissible (Art. 88(2) EC)*

1. Any measure whose legal effects are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position is an act or a decision which may be the subject of an action under Article 230 EC for a declaration that it is void. In the case of acts or decisions adopted by a procedure involving several stages, in particular where they are the culmination of an internal procedure, in principle an act is open to review only if it is a measure definitively laying down the position of the institution on the conclusion of that procedure, and not a provisional measure intended to pave the way for the final decision.
 

(see paras 39-41)
2. The decision to open the formal examination procedure under Article 88(2) EC in relation to national measures classified as existing aid does not produce the independent legal effects connected with the suspensive effect prescribed by the last sentence of Article 88(3) EC in relation to new aid, and the classification which it comprises is provisional in nature. Thus, Article 7(2) of Regulation No 659/1999, laying down detailed rules for the application of Article 88 EC, provides that the Commission may close the formal examination procedure by a decision which finds that, unlike the classification adopted at the outset of that procedure, the measure in question does not constitute aid.

However, in matters of State aid, provisional measures which have independent legal effects in relation to the final decision for which they are a

That preliminary classification of the scheme in question as existing aid cannot cease to be provisional because it is made following a proposal of appropriate measures addressed to the Member State concerned. Even if such a proposal implies that, on the basis of the observations submitted by the Member State, the Commission has reached the conclusion that the scheme in question constitutes incompatible existing aid, that conclusion is itself provisional.

In those circumstances, the Commission's decision to open the formal examination procedure under Article 88(2) EC in relation to that scheme cannot be regarded as repealing its earlier decisions, stating that the scheme did not contain aid elements, or, therefore, as undermining the legal

certainty which a trader benefiting from the scheme in question attaches to the latter.

(see paras 43-46)

3. The principle that every person is entitled to effective judicial protection of rights guaranteed by Community law does not require that a decision to open the formal examination procedure in relation to a measure classified as existing aid, without any legal effect, must be capable of being submitted for review before the Community judicature. In the absence of such effect, such a decision is not capable of infringing any rights guaranteed by Community law.

(see para. 50)