JUDGMENT OF THE COURT OF FIRST INSTANCE
(First Chamber, Extended Composition)
30 January 2002 *

In Case T-212/00,

Nuove Industrie Molisane Srl, established in Sesto Campano (Italy), represented by I. Van Bael and F. Di Gianni, lawyers,

applicant,

v

Commission of the European Communities, represented by V. Di Bucci, acting as Agent, assisted by A. Abate and G.B. Conte, lawyers, with an address for service in Luxembourg,

defendant,

* Language of the case: Italian.

APPLICATION for the partial annulment of Commission Decision SG(2000)D/103923 of 30 May 2000 authorising State aid amounting to LIT 29 176.69 million in favour of Nuove Industrie Molisane in order to carry out investment at Sesto Campano (Molise, Italy),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES
(First Chamber, Extended Composition),

composed of: B. Vesterdorf, President, M. Vilaras, J. Pirrung, A.W.H. Meij and N.J. Forwood, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 25 September 2001,

gives the following

Judgment

1 The multisectoral framework on regional aid for large investment projects (OJ 1998 C 107, p. 7, the 'multisectoral framework') lays down the rules for assessing aid awarded for such projects, which falls within its scope.

2 Paragraph 3.10 of the multisectoral framework describes the calculation formula the Commission uses to determine the maximum allowable intensity for aid notified to it.

3 The formula is based, first, on determination of the maximum allowable intensity for aid to large companies in the area concerned, referred to as the 'regional ceiling' (factor R), which is then adjusted by three coefficients corresponding, in turn, to competition in the sector concerned (factor T), the capital/labour ratio (factor I) and the regional impact of the aid in question (factor M). The formula for the maximum allowable aid intensity is thus: R × T × I × M.

4 As regards the 'competition' factor, an adjustment coefficient of 0.25, 0.5, 0.75 or 1 is applied, according to paragraph 3.10 of the sectoral framework, on the basis of the following criteria:

'(i) Project which results in a capacity expansion in a sector facing serious structural overcapacity and/or an absolute decline in demand
0.25

(ii) Project which results in a capacity expansion in a sector facing structural overcapacity and/or a declining market and which is likely to reinforce high market share
0.5

(iii) Project which results in a capacity expansion in a sector facing structural overcapacity and/or a declining market
0.75

(iv) No likely negative effects in terms of (i) — (iii)
1'

Background to the dispute

5 By letter of 20 October 1999, registered at the Commission Secretariat on 20 December 1999, the Italian authorities notified the Commission under 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) of a project to grant aid to the applicant which fell within the multisectoral framework. Under that project the applicant was to be granted ITL 46 312.2 million in order to establish a plant for the production of clinker, the total cost of which was ITL 127 532 million.

6 By letter of 21 January 2000, the Commission informed the Italian authorities that it was necessary to initiate a formal investigation procedure within the meaning of Article 6 of Regulation No 659/1999. The Commission further informed them that the competition coefficient to be applied was 0.25, that insufficient evidence had been adduced of the number of jobs which would be created, and that it therefore considered that the project would result in the maximum allowable aid intensity being exceeded. It requested them therefore to provide further information.

7 In a document sent to the Commission at the beginning of February 2000 the Italian authorities provided further information, as requested.

8 Following a meeting between the Commission and the Italian authorities on 23 February 2000, the latter informed the Commission in a letter dated 6 March 2000 that they 'agreed to a competition coefficient of 0.75 in order to avoid the initiation of a formal investigation procedure'.

9 By letter of 9 March 2000 the Italian authorities sent the Commission the new details for calculating the maximum intensity of the aid on the basis of a competition coefficient of 0.75, and so they set the amount of the proposed aid at ITL 29 176.69 million.

10 On 30 May 2000 the Commission adopted, under Article 4(3) of Regulation No 659/1999, a decision not to raise objections to the aid project notified to it ('the Decision').

11 In the Decision the Commission states that the Italian Government supplemented its notification in letters dated 6 and 9 March 2000, and that the amount of aid proposed in favour of the applicant was ITL 29 176.69 million, with a total investment cost estimated at ITL 127 532 million, that is to say, a net grant equivalent (NGE) of 15.56%.

12 On the basis of an assessment of the notified aid in the light of the criteria laid down in the multi-sectoral framework the Commission sets out the reasons for which the factors applying in this particular case had to be set as follows:

— 25% as regards the maximum allowable intensity in the Molise region;

— 0.75 for factor T in view of competition on the market concerned;

— 0.7 for factor I (capital/labour ratio);

— 1.2 for factor M in view of the regional impact of the proposed aid,

which makes the NGE a total of 15.75% (25% × 0.75 × 0.7 × 1.2).

13 Having established that the amount of aid which the Italian Republic proposed to award the applicant was thus within the maximum allowable aid, the Commission declared the aid compatible with the common market under Article 87(3)(c) EC.

Procedure and forms of order sought

14 By application lodged at the Registry of the Court of First Instance on 11 August 2000 the applicant brought the present action.

15 By separate document lodged at the Registry of the Court of First Instance on 6 November 2000 the Commission raised an objection of inadmissibility, on which the applicant submitted its observations on 2 February 2001.

16 Pursuant to Article 114(3) of the Rules of Procedure of the Court of First Instance the oral procedure was opened with respect to the Commission's request for a decision on the issue of admissibility.

17 The parties presented oral argument and replied to the Court's questions at the hearing on 25 September 2001.

18 In its application the applicant claims that the Court should:

— annul the Decision only in so far as the Commission used in respect of the competition factor the adjustment coefficient 0.75 instead of the coefficient 1, and therefore declared that only ITL 29 179.69 million was compatible with the common market;

— declare void the grounds of law and of fact relating to that part of the Decision of which annulment is sought;

— order the Commission to pay the costs;

— adopt any other such measure as may appear appropriate on legal and equitable grounds.

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

— declare the application inadmissible;

— order the applicant to pay the costs.

20 In its observations on the objection of inadmissibility, the applicant contends that the Court should:

— dismiss the objection of inadmissibility and proceed to examine the merits of the case;

— in the alternative, reserve its decision on the objection of inadmissibility for the final judgment;

— order the Commission to pay the costs incurred in relation to the preliminary issue.

Admissibility of the application

Arguments of the parties

21 The Commission contends that the present application is inadmissible.

22 First, the applicant has no legal interest in bringing proceedings. The action seeks in fact to submit for review by the Court of First Instance a measure which lies solely within the discretion of the Member State concerned, namely notification by the Italian authorities of aid amounting to ITL 29 176.69 million.

23 Furthermore, even if the Decision were to be annulled this would not compel the Italian authorities, and still less the Commission, to increase the amount of aid allowed. In that regard the Commission states that, although under the formal investigation procedure it has the power to require a Member State to reduce the amount of aid it proposes to award, it has no power to compel that State to increase the amount of the aid notified, especially not during the preliminary investigation phase. Notification of aid thus constitutes a proposal which is

binding on the Member State concerned, and, apart from initiating a formal investigation procedure in respect of the proposal, the Commission's powers are limited to taking a decision not to raise objections to it.

24 In this case, the choice of 0.75 as the competition coefficient was made directly by the Italian authorities. By adopting that coefficient, and thus reducing the amount of the proposed aid, the Italian authorities thus amended and replaced the aid project originally notified. The Decision was thus affected by the Italian authorities' decision to amend their notification in this way. Lastly, according to the Commission, the applicant wrongly attributes to it the choice of a matter of fact and of law (the coefficient 0.75), which emanated solely from the Member State in question.

25 The fact that, when they amended the project which they had earlier notified, the Italian authorities were complying with the suggestions of Commission officials is of no relevance since the amendment was the result of a choice freely made by that Member State. The Italian Republic could have kept the original project unchanged and defended its interests with the applicant's support during the formal investigation procedure. Moreover, in the event of a partially negative decision, the Italian Republic and the undertaking receiving the aid in question could each have demonstrated a legal interest in bringing an action for annulment.

26 Second, the Commission contends that, being the recipient of the aid, the applicant has no legal interest in bringing proceedings, since the Decision is a positive decision which does not adversely affect the applicant directly. Referring to Case T-138/89 *NBV and NVB* v *Commission* [1992] ECR II-2181, the Commission states that the operative part of the Decision is not contested by the applicant. Moreover, the findings made in the Decision regarding the determination of the adjustment coefficient of 0.75 do not in any event constitute the necessary support for the operative part since the Commission could not in any case have allowed aid in excess of the amount notified by the Italian authorities.

27 Last, the Commission contends that the national court has sole jurisdiction in this case since, according to the national law, it alone can review the legality of the measure by which the administrative authorities notified the award of the aid (see, by analogy, judgment of the Court of Justice in Case 123/77 *UNICME and Others* v *Commission* [1978] ECR 845.

28 The applicant replies, first, that it does have a legal interest in bringing proceedings because the Decision is unlawful, being based on an erroneous assessment of the formula for calculating the maximum allowable aid intensity.

29 The fact that it is a decision approving the aid is irrelevant in this case. First, the amendment of the notification by the Italian authorities is not a factor which would justify not reviewing the legality of the Decision (see Case T-102/96 *Gencor* v *Commission* [1999] ECR II-753, paragraph 45). In particular, it is clear from the case-law that the Court of First Instance must check that the Commission complied with the guidelines which the Commission itself laid down in a communication (Case T-380/94 *AIUFASS and AKT* v *Commission* [1996] ECR II-2169, paragraph 57). Second, in the event of annulment, the applicant would have grounds on which to obtain an increase in aid from the Italian authorities at a level corresponding to the amount originally proposed, after the Commission had taken a decision in accordance with the judgment of the Court. Thus, as part of the amendment of the contract for the plan concluded with the competent authorities, following the Decision, a clause would be introduced which expressly provided that the reduction in the amount of aid initially proposed would only be temporary, pending the outcome of the present action.

30 The argument that the Italian authorities themselves decided to amend the amount of aid in order to avoid the initiation of a formal investigation procedure is irrelevant. In view of the objective nature of the assessment of the appropriate

adjustment coefficient, a detailed investigation would have been irrelevant, so there was no reason to initiate a formal investigation procedure.

31 Second, the applicant contends it does have a legal interest in bringing proceedings and disputes the contention that it is not directly concerned by the Decision. The Decision has caused the applicant substantial damage in so far as it declares the aid compatible with the common market only in respect of an amount below that initially proposed. The situation is therefore totally different from that in *NBV and NVB* v *Commission*, cited above, in which the contested ground did not constitute the necessary support for the operative part of the decision in point.

32 Lastly, the applicant contends that it is totally inappropriate to bring an action before the national court since, according to settled case-law, that court is bound by the Commission decision, so that it is impossible for the recipient of the aid to challenge the lawfulness of the Decision (Case C-188/92 *TWD Textilwerke Deggendorf* [1994] ECR I-833).

Findings of the Court

33 It should be pointed out that an action for annulment brought by a natural or legal person is admissible only in so far as that person has an interest in the contested measure being annulled (see, in particular, *NBV and NVB* v *Commission*, cited above, paragraph 33, and *Gencor* v *Commission*, cited above, paragraph 40).

34 In the present case the applicant is not calling into question the operative part of the Decision in which the Commission, on the basis of the notification submitted by the Italian authorities in respect of the project for individual aid in its favour, following a preliminary examination and pursuant to Article 4(3) of Regulation No 659/1999, declared that measure compatible with the common market under Article 87(3)(c) EC. In contrast, the applicant is seeking annulment of the Decision solely in so far as the Commission used the adjustment coefficient 0.75 instead of 1 for the competition factor and therefore declared only aid amounting to ITL 29 176.69 million to be compatible.

35 It is necessary therefore to determine whether it is open to the applicant, which is the recipient of the individual aid in question, which was notified in good time by the Member State concerned in accordance with Article 2(1) of Regulation No 659/1999, to contest the grounds of the Decision in which the Commission declares, at the end of its preliminary examination, that it has no objection to raise against the proposed aid, without calling into question the operative part of the Decision.

36 In that regard, it is settled case-law that only measures which produce binding legal effects such as to affect the interests of an applicant by bringing about a distinct change in his legal position may be the subject of an action for annulment (judgment of the Court of Justice in Joined Cases C-68/94 and C-30/95 *France and Others* v *Commission* [1998] ECR I-1375, paragraph 62; judgment of the Court of First Instance in Joined Cases T-125/97 and T-127/97 *Coca-Cola* v *Commission* [2000] ECR II-1733, paragraph 77).

37 To determine whether an act or decision produces such effects, it is necessary to look to its substance (*France and Others* v *Commission*, cited above, paragraph 63, and *Coca-Cola* v *Commission*, cited above, paragraph 78).

38 It follows, in particular, that the mere fact that the Decision declares the notified aid compatible with the common market and thus, in principle, does not have an adverse effect on the applicant does not dispense the Court from examining whether the Commission's finding that the market in question is experiencing relative decline, which determines the coefficient of 0.75 for the competition factor, has binding legal effects such as to affect the applicants' interests (see, by analogy, *Coca-Cola* v *Commission*, paragraph 79).

39 To that end, it should be pointed out, first, that, in determining whether aid within the multisectoral framework is compatible with the common market, the adjustment coefficient to be applied for the competition factor is derived from an analysis of the structural and economic situation on the market which the Commission must make, when adopting its decision, on the basis of the objective criteria laid down in the multisectoral framework (see paragraph 4 above).

40 Moreover, in so far as the maximum allowable intensity is determined on the basis of the calculation formula which includes in particular an adjustment coefficient for competition, the Commission's finding with regard to the specific coefficient applicable is likely to have binding legal effects since it affects the amount of aid which may be declared compatible with the common market.

41 The effects of such a finding cannot, however, be regarded as affecting the interests of the undertaking receiving the aid where, at the end of the Commission's preliminary examination, the maximum allowable aid intensity is equal to or in excess of the amount of aid notified by the Member State concerned. In those circumstances, the aid which the Member State proposed to

grant to the recipient undertaking will necessarily be declared compatible with the common market in so far as it meets the applicability conditions of the multisectoral framework.

42 It must be observed that, in the Decision, the finding made by the Commission with regard to the adjustment coefficients applicable in respect of, *inter alia*, competition, led it to determine a maximum allowable aid intensity (NGE of 15.75%) in excess of the aid intensity notified (NGE of 15.56%). Since the Commission declared the aid notified to it compatible with the common market, the finding that the adjustment coefficient in respect of competition is 0.75 does not as such affect the applicant's interests.

43 That conclusion is not invalidated by the fact that during the preliminary examination phase the Italian authorities amended the original notification by proposing that the applicant should be granted ITL 29 176.69 million rather than ITL 46 312.2 million in aid, in order to dispel the Commission's doubts regarding the compatibility of the notified project with the common market.

44 In so far as the amendment of the notification by the Italian authorities was designed to meet the Commission's doubts, which were such that it was necessary to initiate a formal examination procedure within the meaning of Article 4 of Regulation No 659/1999 (see Case 84/82 *Germany* v *Commission* [1984] ECR 1451, paragraphs 14 and 17), it need merely be observed that in this case the applicant is not seeking the annulment of the Decision in order to ensure compliance with the procedural safeguards provided for the interested parties by Article 6 of Regulation No 659/1999 in the event of a formal procedure being initiated. In its observations on the Commission's objection of inadmissibility, the applicant contends on the contrary that there were no grounds for initiating that procedure in respect of the project originally notified by the Italian Government.

45 Consequently, since it does not contend that the failure to initiate the formal examination procedure had any adverse effect on it, there can be no presumption that the applicant has a legal interest in bringing proceedings against the Decision on the grounds that, as the undertaking in receipt of the aid, it was an interested party (Case 323/82 *Intermills* v *Commission* [1984] ECR 3809, paragraph 16) which was therefore entitled, if the procedure were to be initiated, to submit its observations to the Commission with regard, in particular, to competition on the market.

46 Lastly, contrary to the applicant's contention, annulment of the contested finding with regard to the adjustment coefficient applicable in respect of competition would not by itself result in payment of aid at a level higher than that of the aid which is the subject of the Decision. An increase in the amount of aid granted would assume, first, that the Italian authorities had decided to propose new aid and to submit a new notification to that effect to the Commission and, second, that the Commission had then declared that new aid project compatible with the common market. Annulment of the Decision would not therefore provide any guarantee that the Italian authorities would pay the applicant any additional amounts.

47 Furthermore, irrespective of the outcome of the present action, the Decision does not preclude the possibility for the Italian authorities to notify a project to introduce new aid in favour of the applicant, or to amend the aid already granted it. As is clear from case-law, where the Commission adopts a totally or partially negative decision against such a project the applicant, as the undertaking receiving the proposed individual aid, is entitled to bring an action for annulment (see Case 730/79 *Philip Morris Holland* v *Commission* [1980] ECR 2671, paragraph 5; *Intermills* v *Commission*, cited above, paragraph 5; and *TWD Textilwerke Deggendorf*, cited above, paragraph 24).

48 As to the argument concerning the lack of an effective legal remedy at national level, it is sufficient to observe that such circumstances, even if they are established, cannot warrant modifying, by way of judicial interpretation, the system of legal remedies and procedures laid down in the Treaty (order of the Court of Justice in Case C-10/95 P *Asocarne* v *Council* [1995] ECR I-4149, paragraph 26, and judgment of the Court of First Instance in Case T-138/98 *ACAV and Others* v *Council* [2000] ECR II-341, paragraph 68). Moreover, even if the Italian Republic has failed in its contractual obligations towards the applicant, in particular with regard to the amount of aid notified to the Commission, the outcome of the present dispute does not preclude application to the national court for review of the legality of the conduct of the national administrative authorities under domestic law.

49 In the light of all the above considerations the application must be dismissed as inadmissible since the applicant has no legal interest in bringing proceedings.

Costs

50 Under the first subparagraph of Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful it must be ordered to pay the costs, as applied for by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE
(First Chamber, Extended Composition)

hereby:

1. Dismisses the application as inadmissible;

2. Orders the applicant to pay the costs.

Vesterdorf Vilaras Pirrung

Meij Forwood

Delivered in open court in Luxembourg on 30 January 2002.

H. Jung B. Vesterdorf

Registrar President