ORDER OF THE COURT OF FIRST INSTANCE (Second Chamber)
6 June 2002 *

In Case T-105/01,

Società Lavori Impianti Metano Sicilia (SLIM Sicilia), established in Syracuse (Italy), represented by N. Saitta, F. Saitta, M. Siragusa, F.M. Moretti and C. Lanciani, lawyers,

applicant,

v

Commission of the European Communities, represented by H. Van Vliet, acting as Agent, assisted by M. Moretto, lawyer, with an address for service in Luxembourg,

defendant,

APPLICATION for annulment of the Commission decision contained in a letter sent to the Italian Government on 12 December 2000 refusing to extend the

* Language of the case: Italian.

time-limit for the submission of the application for final payment and closing the file concerning assistance granted under the European Regional Development Fund No 840503013/001 in respect of the project for the methanation of the municipality of Syracuse,

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

composed of: R.M. Moura Ramos, President, J. Pirrung and A.W.H. Meij, Judges,

Registrar: H. Jung,

makes the following

Order

Legal framework

Community law

1 The European Regional Development Fund (ERDF) was set up under Council Regulation (EEC) No 724/75 of 18 March 1975 (OJ 1975 L 73, p. 1). Articles 4

to 12 of that regulation, as amended by Council Regulation (EEC) No 214/79 of 6 February 1979 (OJ 1979 L 35, p. 1) and by Council Regulation (EEC) No 3325/80 of 16 December 1980 (OJ 1980 L 349, p. 10), contain provisions relating to Community support for regional policy measures adopted by Member States. From 1 January 1985 Regulation No 724/75 was replaced by Council Regulation (EEC) No 1787/84 of 19 June 1984 on the European Regional Development Fund (OJ 1984 L 169, p. 1).

2 In 1988 the system of structural funds was reformed. In Regulation (EEC) No 2052/88 of 24 June 1988 (OJ 1988 L 185, p. 9) the Council laid down the provisions relating to the tasks of the Structural Funds and their effectiveness and to coordination of their activities between themselves and with operations of the European Investment Bank and the other existing financial instruments. On 19 December 1988 the Council adopted Regulation (EEC) No 4254/88 laying down provisions for implementing Regulation No 2052/88 as regards the European Regional Development Fund (OJ 1988 L 374, p. 15). Regulation No 4254/88 replaced Regulation No 1787/84.

3 Problems arose at budgetary level in connection with the application of the rules concerning the structural funds from the fact that, in the case of certain projects, a long period had elapsed between the commitment of the expenditure in the Community budget and the final conclusion of the project. This came about because the payment of the final balance was made following the actual completion of the project and on condition that the financial control incumbent upon the Member State concerned had a positive outcome. The delays which occurred in that regard gave rise to criticism by the Court of Auditors and the European Parliament. To rectify this the Council, as part of another reform of the structural funds, which took place in 1993, amended Regulation No 2052/88 and Regulation No 4254/88 by introducing certain transitional provisions designed to resolve the problem of projects for which assistance had been decided before 1 January 1989 but which had not yet reached final conclusion.

4 In that regard, Article 15(3) of Regulation No 2052/88, as amended by Council Regulation (EEC) No 2081/93 of 20 July 1993 (OJ 1993 L 193, p. 5), provides

that the 'grant of assistance for projects granted assistance before 1 January 1989' was to be finally concluded no later than 30 September 1995.

5 With regard to the ERDF, Article 12 of Regulation No 4254/88, as amended by Council Regulation (EEC) No 2083/93 of 20 July 1993 (OJ 1993 L 193, p. 34), provides:

'Transitional provisions

Those portions of the sums committed for the granting of assistance in respect of projects decided on by the Commission before 1 January 1989 under the ERDF which have not been the subject of a request for final payment to the Commission by 31 March 1995 shall be automatically released by the Commission by 30 September 1995 at the latest, without prejudice to those projects which are subject to suspension for judicial reasons.'

Italian law

6 The project concerned in the present case is part of the programme for the methanation of the Italian Mezzogiorno. That programme is based on Article 11 of Italian Law No 784 of 28 November 1980 ('Law No 784'), as amended by Italian Law No 51 of 26 February 1982. Under the first and second paragraphs of Article 11 of Law No 784, cited by the applicant, the programme for the

methanation of the Mezzogiorno must be approved by the Comitato Interministeriale di Programmazione Economica (Interministerial Committee on Economic Planning, 'CIPE'). The third paragraph of Article 11 of Law No 784 authorises expenditure of ITL 605 billion for the national financing of that programme. The CIPE is responsible for laying down the criteria and procedure for granting assistance. Assistance is granted by decree of the Treasury Minister following a technical briefing from the Cassa per il Mezzogiorno (Fund for the Mezzogiorno) (13th paragraph of Article 11). National assistance, and assistance granted by the ERDF, is paid to recipients by the Cassa depositi e prestiti (Fund for deposits and loans, 'Cassa DD.PP') (14th paragraph of Article 11). Law No 784 authorises in particular the granting to municipalities or groups of municipalities (consorzi) of assistance in the form of capital or interest-rate subsidies (subparagraphs 1 and 2 of the fourth paragraph of Article 11).

Facts

7 By Decision C (84) 1819/242 of 12 December 1984, addressed to the Italian Republic on the same day, the Commission granted assistance under the ERDF for the project for the methanation of the city of Syracuse. The ERDF assistance amounted to 40% of the cost of the project (estimated at ITL 27.5 billion), hence a maximum of ITL 11 billion. According to the annex to that decision, the authority responsible for carrying out the project was the Syracuse municipality. It was stipulated that the work should take place between January 1984 and December 1986. By decree of the Treasury Minister of 31 October 1983 the Italian State granted national assistance under the fourth paragraph of Article 11 of Law No 784 which also amounted to ITL 11 billion.

8 The city of Syracuse entrusted the execution of the project to the applicant under a concession contract concluded in December 1983 ('the concession contract').

9 Article 20 of that contract provides:

'The Municipal Administration, when appointing the Concession Holder, shall submit, within the specified time-limit, an application for the financial assistance referred to in subparagraph 1 of the fourth paragraph of Article 11 of Law No 784 of 28 November 1980 and the financial assistance provided for by ERDF-EEC Regulation No 724/75 and shall authorise the Cassa del Mezzogiorno to make the application to the European Regional Development Fund.

The Concession Holder, for its part, shall submit to the Treasury Ministry and the Cassa per il Mezzogiorno an application for the aid provided for in subparagraph 2 of the fourth paragraph of Article 11 of Law 784/80.

The Municipality shall delegate, as far as possible, to the Concession Holder the task of collecting the funds under the abovementioned assistance as and when they are credited to the Municipal Administration.

In any event, the Concession Holder formally undertakes to finance directly any expenditure not covered by the aid referred to above.'

10 According to the description given by the applicant of the Italian legislation on the subject and of the concession contract, such a concession involves the

concession holder alone undertaking the financing of the work instead of the municipality granting the concession. To that end, the concession holder is entitled to payment by the municipality of both the national and the Community financial assistance granted to the latter. The concession holder must, however, finance itself any project expenditure not covered by the assistance. The concession holder's remuneration consists not of a price paid to it by the administration but of authorisation to operate the project it has carried out at a later date and to retain the operating receipts for itself.

11 Payment of the Community assistance was made in tranches, which were paid by the Commission to the Italian Treasury Ministry and by the Italian Treasury Ministry to the municipality of Syracuse, which in turn paid the money to the applicant. The payments were made to the applicant on the basis of various reports on the progress of the work ('progress reports') drawn up as such progress was made.

12 On 31 August 1989 an initial final progress report was drawn up in respect of work carried out up to 3 March 1989. According to that report the work carried out amounted to ITL 24 110 190 502.

13 The municipality of Syracuse carried out an inspection which gave rise to a dispute between the municipality and the applicant. According to the inspection report of 12 October 1991, the cost of the work that could be approved was only ITL 21 395 087 275. According to the inspectors, the cost of the work initially provided for in the project was less than had been provided for and accepted for financial assistance. The inspectors stated that if the applicant wished to receive assistance at an amount closer to that initially provided for it should carry out other work as part of a variant of the project for extending the distribution system.

14 Arbitration proceedings and legal proceedings before the Italian administrative courts followed. As a result of a decision by the regional administrative court of Sicily of 22 November 1993, a further inspection was carried out, starting on 16 November 1994. That inspection ended on 8 June 1995. The new inspector took into consideration the additional work carried out by the applicant between 4 March 1989 and 13 April 1995. According to the final progress report approved during that inspection, the cost of the project was ITL 26 037 671 249.

15 On 25 July 1995 the municipality of Syracuse accepted the results of the second inspection.

16 Meanwhile, on 29 March 1995, the Italian Budget Ministry sent to the Commission a list of work for which an extension was sought of the time-limit for submitting the application for final payment due to a suspension on judicial grounds, in accordance with Article 12 of Regulation No 4254/88, as amended by Regulation No 2083/93. The contested project appeared on that list.

17 On 25 October 1996 the Industry Ministry informed the Treasury Ministry and the Budget Ministry that all of the projects in respect of which extension of the time-limit for the submission of the application for final payment had been sought '[could] be regarded as having been extended'. The Commission had not, however, taken any decision to that effect.

18 By decree of 3 December 1996, the Treasury Ministry set 7 April 1995 as the date for the completion of work on the contested project and approved in respect of a total of ITL 25 095 000 000 the expenditure agreed for the project. On 12 December 1996 the Cassa DD.PP paid the municipality of Syracuse an

advance on the last tranche of financing. The Commission was not informed of this. On 30 December 1996 the Cassa DD.PP informed the Industry Ministry that, on the basis of the final documents concerning expenditure, it had been decided to proceed with payment of the balance of ITL 2 703 916 079, requesting that ministry to send the ERDF an application to transfer ITL 456 060 000 by way of the balance of the assistance; this was the sum paid by the Cassa in advance in accordance with the national legislation. By a decision of the municipality of Syracuse of 16 January 1997 the sum of ITL 2 703 913 080 was paid to the applicant.

19 During 1999 time-limits were set for the Italian authorities to obtain and inspect the documents providing evidence that the projects for which an extension of the time-limit for lodging the application for final payment had been sought had been suspended on judicial grounds. Early in 2000 the Commission received the results of the abovementioned inspections. In the case of the contested project, it received an inspection sheet which indicated that this inspection had taken place on 11 October 1999. The Commission learned at that time that the work on the project as initially provided for had been completed in March 1989 and that the evaluation of the work had been the subject of dispute. It was also informed that additional work had been carried out and that this was still in progress on 31 March 1995 (see paragraph 16 above). On the basis of that information the Commission formed the view that the project had not been suspended as a result of the judicial proceedings which had been relied on.

20 By letter of 12 December 2000, which is the decision contested by the present action, the Commission informed the Italian Government that it could not grant the application for an extension of the time-limit for a series of projects which included the contested project, and it proposed that the Italian Government should conclude the project in question, among others. In the annex to that letter the Commission stated that the amount of expenditure eligible for such investment was ITL 23 930 772 264, although the amount provided for in the

decision granting the assistance was ITL 27 500 000 000. Consequently, instead of the assistance initially allocated, with a ceiling of ITL 11 billion, the amount payable was reduced to ITL 9 572 308 905 (that is to say, 40% of the expenditure incurred), the amount already paid (apart from ITL 8 905, payment of which was scheduled) before 31 March 1995.

21 In that letter the Commission requested the Italian authorities to send to it any observations they might have within three weeks. In a note of 19 December 2000 the Treasury Ministry informed the Commission that it had no observations to make on the letter of 12 December 2000 and the proposal regarding conclusion which it contained.

22 On 9 January 2001 the Treasury Ministry notified the municipality of Syracuse and the Industry Ministry also, for information, that the application for extension had been refused. By note of 13 February 2001, received by the applicant on 5 March 2001, the Industry Ministry informed the applicant of that decision, observing that it would therefore be responsible for paying that portion of the Community assistance which was regarded as being ineligible.

23 The applicant contested those notes before the Regional Administrative Court of Sicily, seeking their annulment.

24 At the same time, it attempted to obtain a copy of the Commission's letter of 12 December 2000, both from the Commission, which suggested that it approach the Italian authorities, and from the Italian authorities themselves. On 11 April 2000 the applicant obtained a copy of that letter from the Treasury Ministry.

Procedure and forms of order sought

25 By application lodged at the Registry of the Court on 14 May 2001, the applicant brought the present action, in which it seeks annulment of the decision of 12 December 2000 ('the contested decision') in so far as it concerns the applicant, and, in the alternative, the annulment of the contested decision in so far as it states that the applicant's 'declared expenditure' prior to 31 March 1995 amounted to ITL 23 930 772 264 instead of ITL 24 110 190 502 or more.

26 By a separate document lodged at the Registry of the Court on 27 July 2001, the Commission raised a plea of inadmissibility pursuant to Article 114(1) of the Court's Rules of Procedure.

27 The defendant claims that the Court should:

— dismiss the application as manifestly inadmissible;

— order the applicant to pay the costs.

28 The applicant submits that the Court should:

— dismiss the objection as to admissibility raised by the Commission;

— grant the application in accordance with the forms of order contained in the application;

— order the Commission to pay the costs.

Admissibility

29 Article 114(4) of the Rules of Procedure provides that the Court may, at the request of one of the parties, decide on the admissibility of an application without going to the substance of the case. Article 114(3) of the Rules of Procedure provides that, unless the Court decides otherwise, the remainder of the proceedings on the objection as to admissibility are to be oral. The Court takes the view that, in the present case, the documents on the case-file provide it with sufficient information and that there is no need to open the oral procedure.

Arguments of the parties

30 The Commission considers that the contested decision is not of direct concern to the applicant. It argues that the applicant is neither the recipient of the contested assistance nor the person for whom it is intended, and that it is not identified either in the decision to grant that assistance or in the contested decision. There is no direct link between the Commission and the applicant. The applicant is merely a contractor of the recipient of the assistance, which is the public authority responsible for carrying out the project.

31 In the Commission's view, the legal effect feared by the applicant is that of having to bear an additional share of the costs of the investment. The Commission considers that that effect does not stem either from the contested decision or from Community law, but solely from the decision by the municipality of Syracuse to make the concession of work subject to the obligation on the concession holder itself to be responsible for all expenditure not covered by Community or national assistance. That decision lay behind Article 20 of the concession contract. The Commission is of the view that, were it not for that clause, the municipality of Syracuse would have been responsible for expenditure not covered by Community or national assistance. The Commission adds that the applicant agreed to Article 20 of the concession contract and that it thereby assumed the risk of having to be responsible for any expenditure not covered by the assistance.

32 The Commission states that the contested decision does not require the recovery of any sum paid to the applicant which exceeds the amount of the final Community assistance resulting from the contested decision.

33 In the applicant's view the contested decision has direct legal effects so far as it is concerned, irrespective of any implementing measure, discretionary or otherwise, on the part of the Italian State, to which the decision is addressed.

34 It states that one of the consequences of the concession contract is that the applicant itself is the 'beneficiary' of the financial assistance and, hence, the actual person to which any Commission decision is addressed in that context. It describes in detail the Italian system for the 'concession of construction and operation' and the regulatory framework for the project under Italian law.

35 The applicant takes the view that the main effect of the contested decision is to reduce the amount of Community assistance granted for the contested project from ITL 11 billion to ITL 9 572 308 905. It accuses the Commission of failing to take into account, in its objection of inadmissibility, the legal effect of the contested decision, which 'partially cuts off the financial assistance', and of

basing its arguments solely on the burden on the applicant constituted by the obligation to bear an additional share of the investment costs. According to the applicant, cutting off its right to financial support from the ERDF automatically leads to greater direct financial commitment, which is a direct effect of the decision and which, in order to arise, requires no further measures on the part of the Member State or the municipality.

36 The applicant denies that, by agreeing to Article 20 of the concession contract, it assumed the risk of having to defray in full the share of financing scheduled to be borne by the ERDF if the Commission were to decide not to provide its assistance. It states that in the concession contract it made execution of the work subject to the condition precedent that the project should receive national and Community financial assistance.

37 The applicant takes the view that the contested decision also imposes on it the obligation to repay to the Italian State the balance of the assistance which the latter had advanced it, but payment of which was refused under the contested decision. According to the applicant, that obligation stems directly from the contested decision, without the need for any other measures on the part of the State or the municipality.

38 The applicant infers from the foregoing that the contested decision has had 'formal' direct consequences so far as it is concerned, without any further action on the part of the Italian authorities.

39 It also argues that the case-law does not require such a 'formal' direct effect and that it is acknowledged that a decision may be of direct concern to an individual not only where no further action need be taken by the national authorities but also where there is a direct 'substantive' effect, that is to say, where, although the act does require a national implementing measure, it is possible to predict with certainty or with a strong degree of probability that the implementing measure will affect that individual.

40 It contends that the possibility that the Italian State will not act on the contested decision is, in this case, purely theoretical. The Italian authorities have never been prepared to increase their own contribution in order to make up any reduction in the Community contribution. Moreover, it is very doubtful, as regards the Italian legislation, that it would be possible under the law to grant it such an increase.

41 The applicant disputes the Commission's argument based on the national authorities' discretion with regard to recovery of the advance which was paid to the applicant. It considers it irrelevant whether the Italian State is bound as a result of the contested decision to make repayments to the Commission. As a result of the decision, the applicant is required in any case to repay the advance made to it on the remainder of the financial assistance.

42 The applicant also considers that it is irrelevant for the purposes of the present action whether the damage suffered by the concession holder following the reduction in the financial assistance is ultimately the responsibility of the Member State or of the municipality by reason of acts or circumstances which have nothing to do with implementation of the contested decision. The applicant considers that the municipality's potential responsibility for the delay in submitting the application for final payment has no relevance as regards the fact that the legal effect of the contested decision (namely the reduction in the financial assistance) is attributable to that decision.

43 The applicant adds that its judicial protection cannot be provided solely by the remedies available at national level and that dismissal of the present application as inadmissible would not be in accordance with the requirements of sound administration of justice.

44 In the alternative, the applicant argues finally that, should the Court take the view that the contested decision is not of direct concern to it as regards its substance, the application should none the less be regarded as admissible so that

the Community Court can determine whether there has been any breach of the procedural safeguards to which the applicant was entitled in the course of the administrative proceedings.

Findings of the Court

45 It is settled case-law that, for a contested Community measure to be of direct concern to a private applicant to whom it is not addressed, it must directly affect the applicant's legal situation and its implementation must be purely automatic and result from Community rules alone without the application of other intermediate rules (Case C-386/96 P *Dreyfus* v *Commission* [1998] ECR I-2309, paragraph 43, Case T-69/99 *DSTV* v *Commission* [2000] ECR II-4039, paragraph 24, and Case T-9/98 *Mitteldeutsche Erdöl-Raffinerie* v *Commission* [2001] ECR II-3367, paragraph 47).

46 Where the measure is implemented by national authorities to whom it is addressed, such is the case if the measure leaves no discretion to those authorities (Case T-54/96 *Oleifici Italiani and Fratelli Rubino* v *Commission* [1998] ECR II-3377, paragraph 56). The same applies where the opportunity for addressees not to give effect to the Community measure is purely theoretical and their intention to act in conformity with it is not in doubt (Case 11/82 *Piraiki-Patraiki and Others* v *Commission* [1985] ECR 207, paragraphs 8 to 10, and *Dreyfus* v *Commission*, cited above, paragraph 44).

47 In the present case it is appropriate to mention that the contested decision, since it is a refusal to extend the time-limit for the submission of the application for final payment, excludes any payment by the Commission to the Italian State in respect of the contested assistance which was not applied for before 31 March 1995. It therefore has the effect in relations between the Commission and the Italian State which the applicant rightly referred to as 'cutting off' the financial assistance.

48 As regards the effects of that decision on the applicant, it should be remembered that the applicant received payment from the municipality of Syracuse of amounts corresponding to the Community assistance and national assistance for all of the expenditure on the project recognised in the decree of the Treasury Ministry of 3 December 1996 (see paragraph 18 above).

49 As is clear from the documents on the case-file, the Italian authorities acted without waiting for the Commission's decision on the application for extension of the time-limit for submission of the application for final payment, as if that application had received a positive response (see paragraphs 17 and 18 above). In that regard, it is apparent from the decision of the Director-General of the Cassa DD.PP of 12 December 1996 that the payment which the latter made to the municipality of Syracuse was made 'by way of a temporary advance'. However, the decision of the municipality of Syracuse of 16 January 1997 authorising payment to the applicant of ITL 2 703 913 080 does not contain any reservation and indicates that it is the balance of the assistance for the work carried out by the applicant.

50 That being so, the contested decision has effects with regard to the applicant's legal situation only if the applicant is required, as a result of that decision, to repay the difference between the amount it received by way of Community assistance and the amount paid by the Commission to the Italian State in accordance with the contested decision.

51 No such obligation derives from the contested decision itself, nor from any provision of Community law intended to govern the effect of that decision.

52 Moreover, there is no evidence among the documents on the case-file to indicate that the competent Italian authorities have no discretion or indeed no decision-making powers as regards such reimbursement. In that regard, the fact that Article 20 of the concession contract seems to express the national authorities'

intention that the applicant should bear the financial consequences of any Commission decision concerning Community assistance is insufficient to establish the direct interest required by the fourth paragraph of Article 230 EC.

53 Thus, the decision, taken autonomously by the Italian authorities, to pay to the applicant an amount corresponding in full to the Community assistance initially envisaged, without waiting for the Commission's decision with regard to the extension sought, comes between the contested decision and the applicant's legal situation.

54 Consequently, the contested decision is not of direct concern to the applicant.

55 As regards the applicant's argument that it does not have effective legal protection at national level, suffice it to state that the possible absence of a remedy under national law cannot constitute a ground for the Court to exceed the limits of its jurisdiction set by the fourth paragraph of Article 230 EC (Case T-398/94 *Kahn Scheepvaart* v *Commission* [1996] ECR II-477, paragraph 50).

56 It is also necessary to dismiss the applicant's argument that its application should be regarded as admissible in order to enable the Court to review whether the Commission respected the applicant's right to be heard before the contested decision was adopted. In that regard, it must be pointed out that the situation in this case cannot be treated in the same way as the situation which gave rise to the Court's judgment in Case T-450/93 *Lisrestal and Others* v *Commission* [1994] ECR II-1177, paragraphs 46 and 47, as confirmed by the Court of Justice in Case C-32/95 P *Commission* v *Lisrestal and Others* [1996] ECR I-5373, paragraph 28, relied upon by the applicant.

57 Unlike the applicants in *Lisrestal and Others* v *Commission*, cited above, the applicant in the present case is not named in the Commission's decisions relating to the contested assistance. The contested decision is based on procedural grounds which are independent of the conduct of the applicant, which is not accused of any irregularity, and that decision does not impose any obligation on the applicant with regard to reimbursement. Consequently, there is no direct link such as the one which existed in *Lisrestal and Others* v *Commission*, which might give the applicant a direct interest in the annulment of the contested decision and a right to be heard before it was adopted.

58 The application must therefore be dismissed as inadmissible under Article 114 of the Rules of Procedure.

Costs

59 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.

60 As the applicant has been unsuccessful it must also be ordered to pay the costs of the Commission, as applied for in the latter's pleadings.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby orders:

1. **The application is dismissed as inadmissible.**

2. **The applicant is ordered to pay the costs.**

Luxembourg, 6 June 2002.

H. Jung

Registrar

R.M. Moura Ramos

President