

Case T-395/04

Air One SpA

v

Commission of the European Communities

(State aid — Air transport — Complaint — Failure by the Commission to define its position — Action for failure to act — Time-limit — Admissibility)

Judgment of the Court of First Instance (Fourth Chamber), 10 May 2006 . . II - 1347

Summary of the Judgment

1. *Actions for failure to act — Jurisdiction of the Community judicature*
(Arts 232, second para., EC and 233 EC)
2. *Actions for failure to act — Natural or legal persons*
(Arts 88(3) EC, 230, fourth para., EC and 232, third para., EC)
3. *Actions for annulment — Natural or legal persons*
(Arts 88(2) and (3) EC and 230, fourth para., EC)

4. *State aid — Plans to grant aid — Examination by the Commission — Formal investigation proceedings pursuant to Article 88(2) EC — Formal notice to parties concerned*
(Art. 88(2) EC; Council Regulation No 659/1999, Art. 1(h))
5. *State aid — Examination by the Commission*
(Arts 87 EC and 88 EC)

1. The Community judicature is not competent to issue directions to an institution in the context of an action based on Article 232 EC. All that the Court of First Instance can do is determine whether there has been a failure to act. It is then for the institution concerned, pursuant to Article 233 EC, to take the measures necessary to comply with the order of the Court.

which would have concerned them in the same way. Thus, an action brought by a competitor of a recipient of aid for a declaration that the Commission has failed to take a decision in response to the complaint of this competitor at the preliminary stage of the procedure for reviewing aid under Article 88(3) EC is admissible.

(see para. 24)

(see paras 25, 27)

2. Articles 230 EC and 232 EC merely prescribe one and the same legal remedy. It follows that, just as the fourth paragraph of Article 230 EC allows individuals to bring an action for annulment against a measure of an institution not addressed to them provided that the measure is of direct and individual concern to them, the third paragraph of Article 232 EC must be interpreted as also entitling them to bring an action for failure to act against an institution which they claim has failed to adopt a measure
3. Where, without initiating the formal review procedure under Article 88(2) EC, the Commission finds, by decision adopted on the basis of Article 88(3) EC, that aid is compatible with the common market, the persons intended to benefit from the procedural guarantees provided for by Article 88(2) EC may secure compliance therewith only if they are able to challenge that decision before the Community judicature. For those reasons, an action for the annulment of

such a decision brought by a party concerned within the meaning of Article 88(2) EC is admissible, where it seeks, by instituting proceedings, to safeguard the procedural rights available to it under the latter provision. On the other hand, if the applicant calls in question the merits of the decision appraising the aid as such or a decision taken at the end of the formal investigation procedure, the mere fact that it may be regarded as concerned within the meaning of Article 88(2) EC cannot suffice to render the action admissible. It must then demonstrate that the decision affects it by reason of certain attributes which are peculiar to it or by reason of circumstances in which it is differentiated from all other persons and by virtue of those factors distinguishes it individually as in the case of the person addressed. That applies in particular where the applicant's market position is substantially affected by the aid to which the decision at issue relates.

Article 1(h) of Regulation No 659/1999, setting out detailed rules for the application of Article 88 EC, which states that 'interested party' is to mean 'any Member State and any person, undertaking or association of undertakings whose interests might be affected by the granting of aid, in particular the beneficiary of the aid, competing undertakings and trade associations'. The status of 'interested party' is not therefore restricted to undertakings that are substantially affected by the grant of aid.

(see para. 36)

(see paras 30-32)

4. The parties concerned, within the meaning of Article 88(2) EC, are those persons, undertakings or associations whose interests might be affected by the grant of the aid, in particular undertakings competing with the recipients of that aid, and trade associations. This interpretation was given expression in
5. 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. It follows that the Commission cannot indefinitely prolong its preliminary investigation into State aid that has been the subject of a complaint, where it has approved the

initiation of such an investigation by asking the Member State concerned to provide information. Whether or not the duration of the investigation of a complaint is reasonable must be determined in relation to the particular circum-

stances of each case and, especially, its context, the various procedural stages to be followed by the Commission and the complexity of the case.

(see para. 61)