

ORDER OF THE COURT OF FIRST INSTANCE (Fourth Chamber, Extended
Composition)
25 June 2003 *

In Case T-41/01,

Rafael Pérez Escolar, residing in Madrid (Spain), represented by F. Moreno Pardo, lawyer,

applicant,

v

Commission of the European Communities, represented by I. Martínez del Peral and J. Flett, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for under Article 232 EC for a declaration that the Commission failed to fulfil its obligations under the EC Treaty by not taking a decision on the

* Language of the case: Spanish.

complaint made by the applicant against the Kingdom of Spain with regard to infringement of Article 87 EC and by not initiating the procedure provided for in Article 88(2) EC in respect of aid allegedly granted by the Spanish authorities to the banking establishments Banco Español de Crédito and Banco Santander,

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

composed of: V. Tiili, President, J. Pirrung, P. Mengozzi, A.W.H. Meij and M. Vilaras, Judges,

Registrar: H. Jung,

makes the following

Order

Facts

1 On 15 December 1994 the Commission issued a press release entitled ‘Commission approves a rescue package for Banesto’, in which it announced that the financial measures adopted by the Spanish authorities in order to implement the plan for restructuring the banking establishment Banco Español de Crédito SA (‘Banesto’) did not fall within the scope of Article 87(1) EC. Among the

operations included in the restructuring plan the press release mentioned in particular an increase in capital of 180 thousand million Spanish pesetas (ESP), purchase by the Fondo de Garantía de Depósitos (Deposit Guarantee Fund, 'FGD') of wasted assets at their nominal value and their immediate resale to Banesto at a loss of ESP 285 thousand million, and a subsidised loan from the FGD of ESP 315 thousand million spread over four years, representing an estimated cost to the FGD in lost interest of ESP 41 thousand million.

- 2 By letter of 23 February 1999 addressed to the Commissioner responsible for competition, Mr Pérez Escolar ('the applicant') lodged a complaint in which he claimed that the actions by the Spanish authorities in connection with the abovementioned restructuring plan had involved the granting of State aid to Banesto and Banco Santander. In connection with that complaint the applicant requested the Commission to take the necessary measures to ensure that Banesto repaid the subsidy of ESP 285 thousand million received by the FGD and paid the corporation tax on that subsidy in accordance with Spanish tax laws. The Commission was also requested to take any other measures necessary in the light of the conduct disclosed by the applicant, where such conduct involved infringements of Community competition law.

- 3 By letter of 25 June 1999 addressed to the Commissioner responsible for competition the applicant repeated his complaint and added further claims concerning the alleged infringement by the Spanish authorities of Article 101 EC.

- 4 By letters of 27 March and 4 April 2000 the applicant wrote to Mr Feltkamp, who was at that time the Head of the Public Undertakings and Services Unit of the State Aid II Directorate within the Directorate-General for Competition, repeating his claims and attaching further documents in support thereof.

5 The applicant refers to a meeting with Mr Feltkamp that took place at the Commission offices in Brussels on 31 March 2000.

6 On 15 June 2000 the applicant sent an e-mail to Ms Rodríguez Galindo, a member of the cabinet of the Commissioner responsible for competition. Ms Rodríguez Galindo replied by e-mail the same day requesting the applicant to send copies of the documents referred to in his message. On 21 June 2000 the applicant sent Ms Rodríguez Galindo a second e-mail, in which he informed her that he had sent her the documents she had requested together with an outline of the main facts of the case.

7 On 6 November 2000 the applicant sent the Commissioner responsible for Competition a further e-mail, in which he repeated his complaint of 23 February 1999 and requested the Commission both to initiate an inquiry into the alleged conduct and to order Banesto to repay the subsidy of ESP 285 thousand million received by the FGD, to pay the corporation tax on that subsidy, to transfer to the FGD the interest on the loan of ESP 315 thousand million granted by the FGD and to restore the preferential rights of which Banesto's minority shareholders were allegedly deprived when its capital was increased as part of the operation of restructuring that banking establishment.

Procedure and forms of order sought

8 The applicant brought this action by application lodged at the Registry of the Court of First Instance on 23 February 2001.

9 On 16 May 2001, by separate document, the Commission raised an objection of inadmissibility under Article 114 of the Rules of Procedure of the Court of First Instance. The applicant lodged his observations on that objection on 29 August 2001.

10 In his application the applicant claims that the Court should:

— declare that by not taking a decision on his complaint of 23 February 1999 the Commission failed to fulfil its obligations under the EC Treaty;

— order the Commission to pay the costs.

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

— dismiss the application as inadmissible;

— order the applicant to pay the costs.

12 In his observations on the objection of inadmissibility the applicant contends that the Court should:

- reserve a decision on the objection of inadmissibility for the final judgment as regards his *locus standi*;

- in the alternative, set a date for the hearing in the context of the proceedings relating to the objection of inadmissibility;

- declare that by not taking a decision on his complaint of 23 February 1999 the Commission failed to fulfil its obligations under the EC Treaty;

- order the Commission to pay the costs.

Law

13 Article 114(3) of the Rules of Procedure provides that unless the Court of First Instance decides otherwise the remainder of the proceedings with regard to the objection of inadmissibility is to be oral.

- 14 In the present case the Court has sufficient information from the case-file and has decided, in pursuance of that provision, to adjudicate without continuing the proceedings.

Arguments of the parties

- 15 The Commission raises three pleas alleging the inadmissibility of the present application.
- 16 First, it submits that it was not requested to act within a reasonable period of time, since over four years had elapsed since 15 December 1994, the date on which the press release was published in which it announced that the measures adopted in connection with the plan for restructuring Banesto did not constitute State aid, and 23 February 1999, the date on which the applicant lodged his complaint. For reasons of legal certainty, such a long period of inaction deprives the applicant of the right to pursue the remedy provided under Article 232 EC.
- 17 The Commission contends that the applicant's assertion that his complaint of 23 February 1999 does not relate to financial measures already considered in 1994 is incorrect and, in any event, irrelevant as regards consideration of the admissibility of this application.
- 18 Second, the Commission argues that the application was lodged after the time-limit laid down in Article 232 EC had expired. The applicant requested the Commission to act within the meaning of Article 232 EC in his letter of 23 February 1999. The time-limit for bringing an action laid down in that article therefore expired on 6 July 1999, but the application was not lodged at the Court Registry until 23 February 2001. The Commission points out that the

applicant cannot revive retrospectively the time-limit he has allowed to expire by sending the Commission a fresh copy of his original complaint or a document whose content is essentially the same.

19 Third, the Commission submits that the applicant is not entitled to bring an action within the meaning of Article 232 EC since he is not directly and individually concerned by the measure which the Commission failed to adopt. In that regard the Commission states that, as regards State aid, in order for the applicant to be regarded as being directly and individually concerned by the measure which the Commission failed to adopt, it is necessary for him to establish that he at least has the status of a party concerned within the meaning of Article 88(2) EC. In order to do so the applicant should provide evidence that he operates in direct competition to beneficiaries of the State aid to which he is objecting. However, the applicant merely states in this case that his *locus standi* derives from the fact that he has lodged a complaint with the Commission, which is inadequate for establishing the admissibility of his application. The Commission states, finally, that the applicant is also unable to derive *locus standi* from the fact that he was a member of the board of directors of Banesto up until the end of 1993 or from his capacity as a minority shareholder in Banesto.

20 As regards the plea of inadmissibility alleging that the application was late because the Commission was not requested to act within a reasonable period, the applicant submits, first, that Community case-law lays down no general requirement that an action for failure to act must be brought within a reasonable period.

21 Second, the applicant states that the Commission cannot require individuals to be aware of press releases when it does not publish in the *Official Journal of the European Communities* its decisions in which it finds that no State aid exists. At any event, it would have been impossible for the applicant to be aware of the precise scope of the Commission's analysis merely from reading the press release of 15 December 1994. Besides which, the press release did not mention all the aid

measures to which the applicant objected in his complaint. In particular, it did not mention either the exemption from corporation tax which Banesto enjoyed in respect of the ESP 285 thousand million received by the FGD or the deferred payment for the Banesto shares allotted to Banco Santander, which benefited Banco Santander to the detriment of the FGD's resources.

- 22 Third, the applicant states that, on the subject of State aid, Article 15 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88] of the EC Treaty (OJ 1999 L 83, p. 1) provides that the powers of the Commission to recover aid are subject to a limitation period of 10 years. In those circumstances, the Commission's argument that its action in the present case is subject to time constraints in addition to those resulting from compliance with the long limitation period provided for by that provision is completely unfounded. Moreover, the applicant states that Article 10 of Regulation No 659/1999 provides that where the Commission has in its possession information from whatever source regarding alleged unlawful aid it must examine that information without delay.
- 23 As regards the plea of inadmissibility alleging the expiry of the two-month time-limit for bringing an action provided under Article 232 EC, the applicant points out that under that article that time-limit is calculated from the date of the request to act addressed to the institution in question. No such request to act was contained in the complaint lodged on 23 February 1999, in which the applicant merely requested the Commission to examine the aid measures to which he objected. In the view of the applicant, only the letter of 6 November 2000 can be regarded as a request to act which complies with the requirements laid down in Article 232 EC. The application brought on 23 February 2001 was not therefore late.
- 24 Moreover the applicant asserts, unlike the defendant, that the content of the letters he sent to the Commission following his complaint of 23 February 1999

was not essentially the same as that complaint but rather provided fresh arguments and was accompanied by fresh documents.

- 25 As regards the third plea of inadmissibility, namely that the applicant allegedly has no *locus standi*, the applicant contends that the remedies provided under Articles 230 EC and 232 EC are intended to protect different interests: one confers the right to apply for annulment of acts adopted by Community institutions, the other is designed to require those institutions to act.
- 26 The applicant also contends that the mere fact of being a complainant provides sufficient *locus standi* to apply to the Court of First Instance in an action for failure to act. Moreover he states that he suffered direct and individual loss as a result of application of the measures contained in the plan for restructuring Banesto in his capacity as one of its minority shareholders. The applicant points out that one of the measures under the plan was to increase Banesto's capital by ESP 180 thousand million, which was conditional upon the meeting of shareholders accepting total exclusion of a right to preferential allotment and conferring all rights to allotment on the FGD. The fact of having been required to relinquish his right to preferential allotment constituted sufficient loss to confer on him *locus standi* in the present action.

Findings of the Court

- 27 It is appropriate to consider first of all the Commission's third plea of inadmissibility, claiming that the applicant has no *locus standi*.

- 28 The third paragraph of Article 232 EC provides that any natural or legal person may complain to the Community judicature that an institution of the Community has failed to address to that person any act other than a recommendation or an opinion.
- 29 In its judgment in Case C-68/95 *T. Port* [1996] ECR I-6065, paragraph 59, the Court of Justice held 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 which would have concerned them in the same way.
- 30 It is therefore appropriate to consider to what extent the applicant can be regarded in the present case as being directly and individually concerned by the measures in respect of which he alleges the Commission failed to act.
- 31 The applicant complains in essence that the Commission failed to fulfil its obligations under the EC Treaty by not taking action with regard to his complaint of 23 February 1999 concerning the aid allegedly granted by the Spanish authorities to Banesto and Banco Santander. It is therefore appropriate to examine whether the applicant would have been directly and individually affected by a decision which the Commission might have adopted, without initiating the procedure provided for in Article 88(2) EC, in relation to the Member State concerned at the end of the preliminary stage of investigation of the measures at issue, to the effect that those measures did not constitute aid, or to the effect that they did constitute aid but were compatible with the common market (see to that effect Case T-95/96 *Gestevisión Telecinco v Commission* [1998] ECR II-3407, paragraph 63).

32 That examination may be conducted regardless of whether, as the Commission contends and is contradicted on this point by the applicant, the measures to which the applicant objected were fully examined by the Commission in 1994. In particular, there is no need to establish first of all whether, in view of the circumstances of the present case, it may be alleged that the applicant failed to bring an action within the appointed time-limit for annulment of the decision taken by the Commission in 1994 or whether his complaint of 23 February 1999 and the subsequent repeated complaints can be seen as an application for revocation of that decision under Article 9 of Regulation No 659/1999. If that examination were to show that the applicant was not directly and individually affected by the measures to which he objected in his complaint, and hence by a Commission decision relating to those measures, the outcome would be that he had no *locus standi* either with regard to an action for annulment against the decision taken by the Commission in 1994 or, assuming his complaint could be regarded as an application for revocation, with regard to an action against the Commission for its failure to take action on that application.

33 It is settled case-law that where, without initiating the procedure under Article 88(2) EC, the Commission finds, on the basis of Article 88(3), that a State measure does not constitute aid, or that such a measure, although constituting aid, is compatible with the common market, the persons concerned, beneficiaries of the procedural guarantees laid down in Article 88(2), may secure compliance therewith only if they are able to challenge such a Commission decision before the Community judicature (Case C-198/91 *Cook v Commission* [1993] ECR I-2487, paragraph 23; Case C-225/91 *Matra v Commission* [1993] ECR I-3203, paragraph 17; Case C-367/95 P *Commission v Sytraval and Brink's France* [1998] ECR I-1719, paragraph 47; *Gestevisión Telecinco v Commission*, cited above, paragraph 64).

34 The parties concerned for the purposes of Article 88(2) EC are, according to the definition adopted by the Court of Justice and the Court of First Instance, not only the undertaking or undertakings benefiting from aid, but equally those

persons, undertakings or associations whose interests might be adversely affected by the grant of the aid, in particular competing undertakings and trade associations (see in particular Case 323/82 *Intermills v Commission* [1984] ECR 3809, paragraph 16; *Matra v Commission*, cited above, paragraph 18, and *Gestevisión Telecinco v Commission*, cited above, paragraph 65).

35 In that regard, a natural or legal person, in order to be recognised as having the status of a party concerned within the meaning of Article 88(2) EC, as stated in the judgments referred to in paragraphs 33 and 34 above, must be able to establish that it has a legitimate interest in whether or not the aid measures in question should be put into effect, or maintained if they have already been granted. In the case of an undertaking that legitimate interest may, in particular, consist in protecting its competitive position on the market, in so far as that position is adversely affected by the aid measures (see to that effect *Cook v Commission*, cited above, paragraph 25; *Matra v Commission*, cited above, paragraph 19, and *Gestevisión Telecinco v Commission*, cited above, paragraph 66).

36 To recognise any person having a purely general or indirect interest with regard to the State measures to which objection is taken as having the status of a party concerned within the meaning of Article 88(2) EC and the case-law referred to in paragraphs 33 and 34 above would amount to recognising that any taxpayer is a party concerned within the meaning of the abovementioned provision in relation to aid financed through the general tax resources of a Member State. Such an interpretation, as the Court of First Instance pointed out in Case T-188/95 *Waterleiding Maatschappij v Commission* [1998] ECR II-3713, would be clearly incompatible with the provisions of Article 88(2) EC, as interpreted by case-law and in actions for annulment against decisions taken on the basis of Article 88(3) EC it would have the effect of depriving the concept of a 'person individually concerned' for the purposes of the fourth paragraph of Article 230 EC of all legal significance (*Waterleiding Maatschappij v Commission*, cited above, paragraph 68), by transforming that remedy into a sort of *actio popularis*.

37 It is in the light of the above that it is necessary to verify in the present case whether the applicant can be regarded as being a party concerned within the meaning of Article 88(2) EC with regard to the measures to which he objected in his complaint of 23 February 1999.

38 In order to argue that he has the status of a party concerned within the meaning of the abovementioned provision the applicant, first, relies on his position as complainant and, second, contends that in his capacity as a minority shareholder in Banesto he was adversely affected by the measures to which he has objected.

39 In that regard, first of all the fact of having made a complaint to the Commission is insufficient in itself to confer on the applicant the status of a party concerned within the meaning of Article 88(2) EC since he cannot establish a legitimate interest in requesting the Commission to examine the compatibility of the measures to which he is objecting with the Community rules on State aid. That conclusion is clear from the case-law which states that a complaining undertaking must, in order to be recognised as having the status of a party concerned within the meaning of Article 88(2) EC and the case-law referred to in paragraphs 33 and 34 above, establish it has a legitimate interest such as the protection of its competitive position in the market from the measures to which it has objected (see in that regard *Waterleiding Maatschappij v Commission*, cited above, paragraph 62).

40 The fact that he is a complainant is therefore not in itself sufficient to confer *locus standi* on the applicant in any action brought against the decision by which, without initiating the procedure provided for in Article 88(2) EC, the Commission has established that the measures to which objection is taken did not constitute State aid, or that those measures, although constituting such aid, were compatible with the common market. That circumstance alone is therefore also insufficient to establish the applicant's *locus standi* in the present action, which is

challenging the Commission's failure to initiate a procedure within the meaning of Article 88(2) EC against the measures to which objection is taken in the present case.

41 As regards next the question whether the applicant can, as a minority shareholder in Banesto, argue that his interests have been damaged by the measures he objected to in his complaint of 23 February 1999, so that he can establish his status as a party concerned in respect of those measures and, therefore, his *locus standi* in the context of the present action, the applicant asserts in essence that he did suffer loss in this capacity as a result of being prevented from exercising his right to preferential allotment when Banesto's capital was increased in 1994 in order to enable the FGD to contribute ESP 180 thousand million.

42 In that connection, as regards first of all the measures to which the applicant objected in his complaint of 23 February 1999, comprising in particular a subsidy of ESP 285 thousand million, a subsidised loan of ESP 315 thousand million granted to Banesto by the FGD, deferment to the benefit of Banco Santander of payment of the price of Banesto's shares and an exemption of corporation tax afforded to Banesto, it must be said, first, that the loss pleaded by the applicant is by no means caused by implementation of those measures, as they had no effect as regards the applicant's alleged exclusion from exercising his right to preferential allotment when Banesto's capital was increased in 1994 and, second, that the applicant does not plead in respect of those measures any other loss in connection with the interests which Article 88 EC is designed to protect. That conclusion is not called into question by the applicant's assertion, contained in his observations on the objection of inadmissibility, that the various measures relating to the plan for restructuring Banesto, which he objected to in the complaint, formed an indivisible whole.

43 Next, as regards the contribution of ESP 180 thousand million made by the FGD when Banesto's capital was increased in 1994, reference should be made to the

facts set out in the applicant's complaint of 23 February 1999 and in his pleadings before the Court of First Instance. The applicant pleads in essence that in implementing the plan for the restructuring of Banesto the objective of the Spanish authorities was in essence to alter the composition of Banesto's shareholding. To that end, the data concerning Banesto's financial situation were distorted in order to show a deficit, which was used to exert pressure on the shareholders in order to make them relinquish their rights to preferential allotment in favour of the FGD at the time the capital was increased. In addition, the statutes of the FGD were amended *ad hoc* in order to allow it to make the contribution in question.

44 It is clear from this statement of the facts that the loss alleged by the applicant, were it to be established, would be the consequence of a series of manoeuvres devised by the various bodies and authorities involved in implementation of the plan for the restructuring of Banesto. On the other hand, no direct causal link can be established between such loss and the measure which might fall within the Community rules on State aid, namely the FGD's contribution to Banesto's capital. In that context, the applicant cannot seek to obtain compensation for such loss at the stage of the Commission's investigation into whether that measure complies with the provisions of the Treaty on State aid. To that end he should, if appropriate, avail himself of any legal remedies offered him by the legal system of the Member State concerned.

45 From all the above considerations, it is clear that the applicant, in his capacity as a minority shareholder in Banesto, has not established, with regard to all the measures objected to in his complaint of 23 February 1999, a legitimate interest that would grant him *locus standi* in an action against any decision by which, without initiating the procedure provided for in Article 88(2) EC, the Commission, in rejecting his complaint, declared that those measures did not constitute State aid or, whilst constituting such aid, were compatible with the common market. It follows, therefore, that the applicant is also unable to establish that, as

a minority shareholder in Banesto, he has *locus standi* in an action, like that in the present case, challenging the Commission's failure to take such a decision.

- 46 Moreover, as the applicant is not an undertaking whose competitive position has been adversely affected by the measures in question, he would also be unable to establish a personal interest in relying upon the alleged anti-competitive effects of those measures in such an action (see Case T-178/94 *ATM v Commission* [1997] ECR II-2529, paragraph 63).
- 47 It follows from all the foregoing that the applicant has not established his *locus standi* in the context of the present application, which must therefore be dismissed as inadmissible, without there being any need to address the other pleas of inadmissibility raised by the Commission.

Costs

- 48 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. Since the applicant has been unsuccessful and the Commission has applied for costs, he must be ordered to bear his own costs and to pay those of the Commission.

On those grounds,

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

hereby orders:

1. The application is dismissed as inadmissible.
2. The applicant shall pay the costs.

Luxembourg, 25 June 2003.

H. Jung

Registrar

V. Tiili

President

