

JUDGMENT OF THE COURT (Second Chamber)

1 December 2005^{*}

In Case C-301/03,

ACTION for annulment under Article 230 EC, brought on 2 July 2003,

Italian Republic, represented by I.M. Braguglia, acting as Agent, assisted by G. Aiello and A. Cingolo, avvocati dello Stato, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by E. de March and L. Flynn, acting as Agents, assisted by A. Dal Ferro, avvocato, with an address for service in Luxembourg,

defendant,

* Language of the case: Italian

THE COURT (Second Chamber),

composed of C.W.A. Timmermans (Rapporteur), President of the Chamber,
C. Gulmann, R. Schintgen, G. Arestis and J. Klučka, Judges,

Advocate General: F.G. Jacobs,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 16 June 2005,

after hearing the Opinion of the Advocate General at the sitting on 15 September 2005,

gives the following

Judgment

1 By its application the Italian Republic requests the Court to annul:

- Commission document No CDRR-03-0013-00-IT, relating to the date of eligibility of new expenditure when programming documents are amended ('the contested document'),

- Commission note No 106387 of 14 May 2003, which was sent to the Italian authorities and relates to Regional Operational Programme Sardegna 2000-2006,

- Commission note No 107051 of 28 May 2003, which was sent to the Italian authorities and relates to Regional Operational Programme Sicilia 2000-2006,

- Commission note No 107135 of 2 June 2003, which was sent to the Italian authorities and relates to Single Programming Document Lazio 2000-2006 (collectively, 'the contested notes'), and

- all connected measures, both prior and subsequent.

Legal context

- ² Article 15 of Council Regulation (EC) No 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds (OJ 1999 L 161, p. 1; 'the regulation'), entitled 'Preparation and Approval', states in paragraph 6:

'The Member State or the managing authority shall adopt the programme complement defined in Article 9(m) after the agreement of the Monitoring Committee if the programme complement is drawn up after the Commission

decision on the contribution of the Funds, or after consulting the relevant partners if it is drawn up before the decision on the contribution of the Funds. In the latter case, the Monitoring Committee shall either confirm the programme complement or request an adjustment in accordance with Article 34(3).

Within three months of the Commission decision approving an operational programme or single programming document, the Member State shall send the programme complement to the Commission in a single document for information.'

3 Article 30 of the regulation, entitled 'Eligibility', states in paragraph 2:

'Expenditure may not be considered eligible for a contribution from the Funds if it has actually been paid by the final beneficiary before the date on which the application for assistance reaches the Commission. That date shall constitute the starting point for the eligibility of expenditure.

The final date for the eligibility of expenditure shall be laid down in the decision to grant a contribution from the Funds. It shall relate to payments made by the final beneficiaries. It may be extended by the Commission at the duly justified request of the Member State in accordance with Articles 14 and 15.'

4 Article 34 of the regulation, entitled 'Management by the managing authority', states in paragraph 3:

'The managing authority shall, at the request of the Monitoring Committee or on its own initiative, adjust the programme complement, without changing the total amount of the contribution from the Funds granted to the priority concerned nor its

specific targets. After approval by the Monitoring Committee, it shall inform the Commission of the adjustment within one month.

Any amendments to the elements contained in the decision on the contribution of the Funds shall be decided by the Commission, in agreement with the Member State concerned, within four months of delivery of the Monitoring Committee's approval.'

5 Under Article 35 of the regulation, entitled 'Monitoring Committees':

'1. Each Community support framework or single programming document and each operational programme shall be supervised by a Monitoring Committee.

Monitoring Committees shall be set up by the Member State, in agreement with the managing authority after consultation with the partners. The partners shall promote the balanced participation of women and men.

The Monitoring Committees shall be set up no more than three months after the decision on the contribution of the Funds. The Monitoring Committees shall act under the authority and within the legal jurisdiction of the Member State.

2. A representative of the Commission and, where appropriate, of the EIB, shall participate in the work of the Monitoring Committee in an advisory capacity.

The Monitoring Committee shall draw up its own rules of procedure within the institutional, legal and financial framework of the Member State concerned and agree them with the managing authority.

In principle, the Monitoring Committee shall be chaired by a representative of the Member State or the managing authority.

3. The Monitoring Committee shall satisfy itself as to the effectiveness and quality of the implementation of assistance. To that end:

- (a) pursuant to Article 15, it shall confirm or adjust the programme complement, including the physical and financial indicators to be used to monitor the assistance. Its approval must be obtained before any further adjustment is made;

...

Factual background and procedure

- 6 In 2002, the Commission, in partnership with the Member States, embarked on an exercise aimed at simplifying the procedures for use of the Structural Funds. On 24 July 2002, at the 67th meeting of the Committee for the Development and Conversion of the Regions ('the committee'), established by Article 47 of the regulation, and then on 7 October 2002 at the ministerial meeting between the Ministers of the Member States and the Commissioner responsible for regional

policy, the Commission submitted to the delegates of the Member States a draft document entitled 'Note on the simplification, clarification, coordination and flexibility of structural policy management in the period 2000-2006'. One of the subjects dealt with in that document concerned the amendment of ongoing programmes.

- 7 As recorded in the minutes of the 67th meeting of the committee, at the beginning of the meeting the Chairman, Director in the Commission's Directorate-General for 'Regional Policy', declared that the purpose of the information notes sent to the committee by the Commission was 'to clarify for the Member States how the Commission was interpreting and applying the rules on the implementation of the Structural Funds. By their very nature, these documents were internal and, in addition, not always the final version'.
- 8 The minutes also record that the Commission representative, in reply to a question from the delegate of the Italian Republic, declared that 'in cases of a modification of programmes, the starting date of eligibility of the new (or modified) measures is the same as the one of the programme, i.e. in most cases the date of receipt of an admissible programme'.
- 9 The particular issue of the retroactivity of expenditure in cases where programmes are amended was raised and discussed at subsequent meetings of the committee, following which the Commission informed the Member States that it had referred the question to its Legal Service.
- 10 At the 75th meeting of the committee on 23 April 2003 the Commission presented the contested document.

11 That document states, first of all, that, with the exception of decisions relating to notified State aid, '[t]he original decisions approving programming documents lay down the date on which the eligibility of operations covered by the form of assistance begins, in accordance with Articles 30 and 52 of [the regulation]’.

12 The document goes on to state:

‘ ...

Given the need to ensure that programming continues to focus on the objective of developing and converting eligible regions and not simply on ensuring that funding is absorbed and automatic decommitment avoided, and in view of current practice in the Member States, it is proposed to introduce the following rules:

1. The eligibility of new expenditure resulting from an amendment of an operational programme [“the OP”] or [a single programming document (“the SPD”)] should begin on the date on which the Commission receives the request for amendment of the assistance. The eligibility date must then be indicated in the decision approving the amendment to the SPD or OP.

2. Where programming complements are amended, there are two possible situations. If the changes require an amendment of the SPD or OP, the eligibility date given in the decision approving the amendment of the SPD or OP will apply. On the other hand, if the amendment only relates to the programming complement

itself, the date on which eligibility begins is to be laid down by the Monitoring Committee but, for the sake of sound financial management, may not be before the date on which the Committee approves the proposed amendment.

...

5. In the case of amending decisions already adopted which do not specify a date, eligibility begins on the date laid down in the original, unamended decision'.

- 13 By letter of 29 April 2003 sent to the Commission, the Italian Government challenged the contested document.
- 14 Subsequently, in the course of the written consultation procedure for the amendment of the programme complements, initiated by the Monitoring Committees for the Regions of Sardinia, Sicily and Lazio, the Commission sent those regions the contested notes in which, in addition to various comments and observations on the amendments communicated, it referred to the contested document and confirmed its contents.

Admissibility of the action

- 15 The Commission disputes the admissibility of the action. In its submission, the contested document and notes do not constitute measures open to challenge for the purposes of Article 230 EC. According to settled case-law, a measure can be the

subject of an action for annulment only if it is intended from an objective point of view to have legal effects in relation to third parties and may thus directly affect the latter's interests by bringing about a distinct change in their legal position.

- 16 According to the Commission, those conditions are not met in the case of the contested document and notes. It merely communicated to the Member States the interpretation it intends to adopt in applying Article 30 of the regulation. The interests of third parties could be materially affected only by measures actually adopted in accordance with the line of conduct communicated.
- 17 The Italian Government considers the action to be admissible.
- 18 It argues that even though the contested document contains only a proposal to adopt procedural rules of a general nature, it is capable, as the contested notes demonstrate, of having immediate and prejudicial effects on Member States, which will find themselves in the position of having immediately to adopt different rules on amending programme complements, since they cannot run the risk that expenditure incurred in operations already carried out will be considered ineligible for Community cofinancing.
- 19 It should be noted in this regard that an action for annulment must be available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects (see, in particular, Case C-443/97 *Spain v Commission* [2000] ECR I-2415, paragraph 27 and case-law cited).

- 20 It is therefore important to consider whether the contested document and notes constitute such measures.
- 21 With regard to the contested document, it should be pointed out that it uses the words 'it is proposed to introduce the following rules'.
- 22 The reference to a proposal is a clear and specific indication that the content of the document is not intended to have legal effects.
- 23 Moreover, before the contested document was distributed to the Member States, the Commission gave an express warning at the committee's 67th meeting that such a document was internal, was not always the final version, and merely reflected the Commission's opinion.
- 24 Therefore, in view of the wording of the contested document and the context in which it was presented, it must be held that this document is not intended to have legal effects.
- 25 The same finding applies to the contested notes.

- 26 First, those notes merely refer to the contested document, which is not itself intended to have legal effects.
- 27 Second, it is clear from the case-file that those notes were sent by the Commission in the course of the written consultation procedure for the amendment of the programme complements, initiated by the Monitoring Committees for the Regions of Sardinia, Sicily and Lazio.
- 28 As was pointed out by the Advocate General at paragraph 59 of his Opinion, it is clear from Articles 15(6), 34(3) and 35 of the regulation, read together, that, in such a procedure, the Commission has a mere consultative role and is not empowered to adopt any legally binding act, except where any amendments relate to the elements contained in the decision on the contribution of the Structural Funds within the meaning of Article 34(3) of the regulation. That is not, however, alleged to be so in the present case.
- 29 The Italian Government's argument that Member States must immediately adopt different rules on amending programme complements if they are not to be faced with some of their expenditure being considered ineligible for Community cofinancing does not call into question the finding that the contested document and notes are not intended to have legal effects.
- 30 While the contested document and notes may have the effect of informing the Member States that they are running the risk of Community financing being refused for some of the expenditure incurred, in accordance with a different interpretation of the same provision of the regulation, this is none the less a mere consequence of fact and not a legal effect the contested document and notes are intended to have (see, to that effect, Case 60/81 *IBM v Commission* [1981] ECR 2639, paragraph 19).

- 31 The Italian Government's argument that the contested document and notes are intended to have legal effects on the ground that the Commission there adopts an incorrect interpretation of the obligations under Article 30 of the regulation cannot, moreover, be accepted.
- 32 Even if that document and those notes contain an incorrect interpretation of that provision, that fact of itself is not capable of calling into question the finding, based on their wording and context, that that document and those notes are not intended to have legal effects.
- 33 Accordingly, the action must be dismissed as inadmissible.

Costs

- 34 Under Article 69(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. As the Commission has applied for costs against the Italian Republic, and as the latter has been unsuccessful, the Italian Republic must be ordered to pay the costs.

On those grounds, the Court (Second Chamber) hereby:

- 1. Dismisses the action as inadmissible;**
- 2. Orders the Italian Republic to pay the costs.**

[Signatures]