JUDGMENT OF THE COURT (Fourth Chamber)

17 July 2008 *

In Case C-521/06 P,

APPEAL under Article 56 of the Statute of the Court of Justice, brought on 18 December 2006,

Athinaïki Techniki AE, established in Athens (Greece), represented by S. Pappas, dikigoros,

appellant,

the other parties to the proceedings being:

Commission of the European Communities, represented by D. Triantafyllou, acting as Agent, with an address for service in Luxembourg,

defendant at first instance,

* Language of the case: French.

Athens Resort Casino AE Symmetochon, established in Marrousi (Greece), represented by F. Carlin, Barrister, and N. Korogiannakis, dikigoros,

intervener at first instance,

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Chamber, G. Arestis, R. Silva de Lapuerta, J. Malenovský (Rapporteur) and T. von Danwitz, Judges,

Advocate General: Y. Bot,
Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 3 April 2008,

gives the following

Judgment

1 By its appeal, Athinaïki Techniki AE ('Athinaïki Techniki') is seeking to have quashed the order of the Court of First Instance of the European Communities of 26 September 2006 in Case T-94/05 *Athinaïki Techniki* v *Commission* ('the order under appeal'), by which the Court of First Instance dismissed as inadmissible Athinaïki Techniki's action seeking annulment of the decision of the Commission of the European Communities of 2 June 2004 to take no further action on its complaint concerning alleged State aid granted by the Hellenic Republic to the Hyatt Regency consortium in connection with the public contract for the disposal of 49% of the capital of Casino Mont Parnès, of which the appellant was made aware by letter of 2 December 2004 ('the letter in dispute').

Legal context

2 Article 87(1) EC provides:

'Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.'

3 The first paragraph of Article 88(2) EC provides:

'If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the common market having regard to Article 87, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.'

4 Article 88(3) EC states:

'The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the common market having regard to Article 87, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.'

5 As is clear from the second recital in the preamble to 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), that regulation codifies and reinforces the practice, with regard to examining State aid, established by the Commission in accordance with the case-law of the Court.

6 Chapter II of that regulation is entitled 'Procedures regarding notified aid', and includes Article 4 which provides:

'1. The Commission shall examine the notification as soon as it is received. Without prejudice to Article 8, the Commission shall take a decision pursuant to paragraphs 2, 3 or 4.

2. Where the Commission, after a preliminary examination, finds that the notified measure does not constitute aid, it shall record that finding by way of a decision.

3. Where the Commission, after a preliminary examination, finds that no doubts are raised as to the compatibility with the common market of a notified measure, in so far as it falls within the scope of Article [87](1) of the Treaty, it shall decide that the measure is compatible with the common market (hereinafter referred to as a "decision not to raise objections"). The decision shall specify which exception under the Treaty has been applied.

4. Where the Commission, after a preliminary examination, finds that doubts are raised as to the compatibility with the common market of a notified measure, it shall decide to initiate proceedings pursuant to Article [88](2) of the Treaty (hereinafter referred to as a "decision to initiate the formal investigation procedure").

…'

7 Article 7 of Regulation No 659/1999 specifies the cases in which the Commission takes the decision to close the formal investigation procedure provided for in Article 88(2) EC.

8 Chapter III of Regulation No 659/1999 governs the procedure regarding unlawful aid.

9 In that chapter, Article 10(1) states:

'Where the Commission has in its possession information from whatever source regarding alleged unlawful aid, it shall examine that information without delay.'

10 Also in that chapter, Article 13(1) provides:

'The examination of possible unlawful aid shall result in a decision pursuant to Article 4(2), (3) or (4). In the case of decisions to initiate the formal investigation procedure, proceedings shall be closed by means of a decision pursuant to Article 7. If a Member State fails to comply with an information injunction, that decision shall be taken on the basis of the information available.'

11 Chapter VI of Regulation No 659/1999 is entitled 'Interested parties', and includes Article 20 which provides:

'1. Any interested party may submit comments pursuant to Article 6 following a Commission decision to initiate the formal investigation procedure. Any interested party which has submitted such comments and any beneficiary of individual aid shall be sent a copy of the decision taken by the Commission pursuant to Article 7.

2. Any interested party may inform the Commission of any alleged unlawful aid and any alleged misuse of aid. Where the Commission considers that on the basis of the information in its possession there are insufficient grounds for taking a view on the case, it shall inform the interested party thereof. Where the Commission takes a

decision on a case concerning the subject matter of the information supplied, it shall send a copy of that decision to the interested party.

3. At its request, any interested party shall obtain a copy of any decision pursuant to Articles 4 and 7, Article 10(3) and Article 11.'

12 Article 25 of Regulation No 659/1999 states:

'Decisions taken pursuant to Chapters II, III, IV, V and VII shall be addressed to the Member State concerned. …'

The facts of the case

13 The facts of the case were set out by the Court of First Instance in the order under appeal as follows:

'1 On October 2001, the Greek authorities initiated a procedure for the award of a public contract with a view to disposing of 49% of the capital of the Casino Mont Parnès. There were two competing applicants, namely the Casino Attikis consortium and the Hyatt consortium. Following an allegedly invalid procedure, the contract was awarded to the Hyatt consortium.

2 A member of the Casino Attikis consortium, Egnatia SA, which, following a merger, was taken over by [Athinaïki Techniki] lodged complaints, respectively,

with the Commission's Directorate General (DG) for the "Internal Market" and DG for "Competition". The former was called upon to take a view on the lawfulness of the contested procedure (of the disposal of 49% of the capital of Casino Mont Parnès) in the light of Community law on public procurement, whereas the latter received a complaint concerning State aid which was alleged to have been granted to the Hyatt consortium in the context of that same procedure.

3 By letter of 15 July 2003, the DG for "Competition" drew the attention of [Athinaïki Techniki] to its decision-making practice according to which the disposal of a public asset in the context of a tendering procedure does not constitute State aid where the procedure has been carried out transparently and without discrimination. Consequently, the Commission informed the complainant that it would not take a view until the DG for the "Internal Market" had completed its examination of the procedure for the award of the public contract at issue.

4 By e-mail of 28 August 2003, the representative of [Athinaïki Techniki] stated, in essence, that the complaint relating to the existence of State aid was concerned with factors separate from the procedure for the award of the public contract and that, consequently, the services of the DG for "Competition" should not wait for the conclusions of the DG for the "Internal Market".

5 By letter of 16 September 2003, the services of the DG for "Competition" repeated the wording of the letter of 15 July 2003 but none the less invited [Athinaïki Techniki] to provide them with additional information concerning any other aid which was not connected with the tendering for the casino.

6 By letters of 22 January and 4 August 2004, the DG for the "Internal Market" informed [Athinaïki Techniki] that it did not intend to continue the examination of the two complaints which had been addressed to it.'

14 The Commission then sent Athinaïki Techniki the letter in dispute which states as follows:

'I refer to your telephone inquiry seeking to confirm whether the Commission is pursuing its investigation in the abovementioned case or whether there has been a decision to take no further action.

By letter of 16 September 2003, the Commission informed you that, on the basis of the information in its possession, there are insufficient grounds for continuing to examine that case (in accordance with Article 20 of [Regulation No 659/1999]).

In the absence of additional information to justify continuing the investigation, the Commission has, for the purposes of administrative action, closed the file on the case on 2 June 2004.'

The action before the Court of First Instance and the order under appeal

15 By application filed at the Registry of the Court of First Instance, Athinaïki Techniki brought an action seeking annulment of the decision, referred to in paragraph one of this judgment, of which it had been informed by the letter in dispute.

16 By separate document lodged at the Registry of the Court of First Instance on 21 April 2005, the Commission raised a preliminary plea of inadmissibility, pursuant to Article 114(1) of the Rules of Procedure of the Court of First Instance, which that Court upheld in the order under appeal.

17 Referring to Regulation No 659/1999, the Court of First Instance held that the decisions adopted by the Commission in matters of State aid are addressed to the Member States.

18 The Court of First Instance then held, at paragraphs 29 to 31 of the order under appeal, that:

'29 In the present case, the letter [in dispute], which was addressed solely to [Athinaïki Techniki], informed it, pursuant to Article 20 of Regulation No 659/1999, that, on the basis of the information in its possession, the Commission considered that there were insufficient grounds for taking a view on the case which was submitted to it in the complaint. In the letter [in dispute] the Commission then stated that, in the absence of additional information to justify continuing the investigation, it had, for the purposes of further administrative action, closed the file on [Athinaïki Techniki's] complaint on 2 June 2004. The Commission, therefore, did not define its final position on the classification and the compatibility with the common market of the measure forming the subject-matter of [Athinaïki Techniki's] complaint.

30 It follows that the letter [in dispute] does not constitute a decision within the meaning of Article 25 of Regulation No 659/1999 and that it has no legal effect. That letter is not therefore open to challenge under Article 230 EC.

31 It should be pointed out that [Athinaïki Techniki] cannot claim that the non-actionable nature of a letter rejecting a complaint has the effect of depriving citizens of access to Community Justice, since the complainant may provide additional information in order to support its complaint. In the event that the information is sufficient the Commission would then be required to define its position on the State measure in question by adopting a decision within the meaning of Article 4 of Regulation No 659/1999, thus offering the complainant the option of bringing an action for annulment under the fourth paragraph of Article 230 EC. In addition as the Commission points out, it is also open to the complainant to bring an action for failure to act under the third paragraph of Article 232 EC.'

19 Lastly, the Court of First Instance held that the procedure in the matters of State aid could not be treated in the same way as the procedure applicable in matters of competition. In contrast to Articles 81 EC and 82 EC, Regulation No 659/1999 did not confer any procedural rights on complainants prior to the initiation of the formal investigation period in matters of State aid.

Forms of order sought

20 By its appeal, Athinaïki Techniki claims that the Court should:

— set aside the order under appeal;

— uphold the pleas in law submitted before the Court of First Instance; and

— order the Commission to pay the costs.

21 The Commission contends that the Court should:

— dismiss the appeal as unfounded; and

— order Athinaïki Techniki to pay the costs.

22 Athens Resort Casino AE Symmetochon contends that the Court should:

— dismiss the appeal; and

— order Athinaïki Techniki to pay the costs.

The appeal

Arguments of the parties

23 Athinaïki Techniki claims that the order under appeal is vitiated by an error in law in that the Court of First Instance did not classify the act, referred to in paragraph 1 of this judgment, as a 'decision'. Athinaïki Techniki maintains that a definite and reasoned position on the classification of an alleged State aid, as in the present case, constitutes a 'decision' within the meaning of Article 230 EC.

24 As regards, first, the definitive nature of the position defined in the letter in dispute, Athinaïki Techniki claims that that is not called into question by reason of the fact that it could have presented new evidence after the act had been adopted.

25 As regards, second, the reasoned nature of the letter in dispute, Athinaïki Techniki takes the view that the Commission implicitly took a reasoned decision on the classification of the alleged State aid. That reasoning arises from the context in which the letter in dispute was adopted. The Court of First Instance therefore erred in law in

concerning itself with the wording of that letter rather than putting it in its context. Athinaïki Techniki asserts that the Commission deliberately drafted the letter in dispute in a laconic way in order to avoid casting light on a possible failure to comply with public procurement law.

26 The Commission takes the view that the letter in dispute is classified on the basis of Article 20(2) of Regulation No 659/1999, which allows the Commission to avoid using the decision-making mechanism in the absence of any significant and detailed evidence. According to the Commission, it is apparent from Article 25 of that regulation that its decisions in matters of State aid are addressed to the Member States. It argues that the distinction between decisions and letters of notification is to be found in settled case-law of the Court of First Instance. A letter of notification, such as the letter in dispute, does not have legal effects and cannot, therefore, be the subject of an action for annulment.

27 In addition, the Commission takes the view that, in the absence of any reasoning, the letter in dispute should be held to be a non-existent decision which has no legal effect per se and, therefore, cannot adversely affect Athinaïki Techniki. The Commission contends also that Athinaïki Techniki's line of argument, that the letter in dispute is reasoned, is ineffective as it does not challenge the distinction between decisions and letters of notification. The Commission contends that Athinaïki Techniki is seeking to circumvent the fact that an individual cannot challenge the Commission's refusal to initiate an action for failure to fulfil obligations against a Member State by using an action for annulment against a mere letter of notification.

28 According to Athens Resort Casino AE Symmetochon, the letter in dispute does not constitute a decision within the meaning of Article 25 of Regulation No 659/1999 and it does not have legal effect. It is clear from Articles 20 and 25 of that regulation that letters of an informal nature are addressed to the interested parties and do not constitute acts open to challenge for the purposes of Article 230 EC. The letter in dispute is, therefore, according to the intervener, not actionable under that article.

Findings of the Court

29 It is clear from settled case-law that an action for annulment for the purposes of Article 230 EC 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 capable of affecting the interests of the applicant by bringing about a distinct change in his legal position (see, inter alia, Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 9; Case C-443/97 *Spain* v *Commission* [2000] ECR I-2415, paragraph 27; and Case C-131/03 P *Reynolds Tobacco and Others* v *Commission* [2006] ECR I-7795, paragraph 54).

Preliminary observations on the subject-matter of actions for annulment brought before the Court of First Instance

30 As a preliminary point, it should be noted that Athinaïki Techniki's action for annulment is not directed at the letter in dispute as such. It is apparent from the application at first instance that Athinaïki Techniki sought 'annulment of the decision of the Directorate General for Competition to take no further action on the applicant's complaint concerning State aid granted by the Hellenic Republic to the Hyatt Regency consortium in connection with the "Mont Parnès Casino" public contract' ('the contested act'). That contested act was made known to Athinaïki Techniki by the letter in dispute. Therefore, the latter constitutes only the means by which Athinaïki Techniki became aware of the contested act, and from which point the time-limit for bringing an action against that contested act started to run, in accordance with the fifth paragraph of Article 230 EC.

31 It is important to make clear that Athinaïki Techniki sought the annulment of the contested act on the ground that it was taken on the basis of Article 88(3) EC, without the Commission having previously initiated the formal investigation procedure provided for in Article 88(2) EC, which would have allowed Athinaïki Techniki to submit its comments.

32 In those circumstances, it is first necessary to specify the nature of the acts taken before that formal investigation procedure and, second, to examine whether the Court of First Instance could conclude that the contested act is not intended to produce legal effects capable of affecting the interests of Athinaïki Techniki by bringing about a distinct change in its legal position.

The nature of acts taken at the end of the preliminary stage of examining State aid

33 Under the procedure for reviewing State aid, it is necessary to distinguish between the preliminary stage of the procedure for examining aid under Article 88(3) EC, which is governed by Articles 4 and 5 of Regulation No 659/1999 and is intended merely to allow the Commission to form a prima facie opinion on the partial or complete conformity of the aid in question, and the actual investigation stage envisaged by Article 88(2) EC, which is governed by Articles 6 and 7 of that regulation and is designed to enable the Commission to be fully informed of all the facts of the case (see, to that effect, Case C-198/91 *Cook* v *Commission* [1993] ECR I-2487, paragraph 22; Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraph 16; and Case C-390/06 *Nuova Agricast* [2008] ECR I-2577, paragraph 57).

34 The procedure under Article 88(2) EC is essential whenever the Commission has serious difficulties in determining whether an aid is compatible with the common market. It follows that the Commission, when taking a decision in favour of an aid, may restrict itself to the preliminary examination under Article 88(3) EC only if it is able to satisfy itself after an initial examination that the aid is compatible with the common market. If, on the other hand, the initial examination leads the Commission to the opposite conclusion or if it does not enable it to overcome all the difficulties involved in determining whether the aid is compatible with the common market, the Commission is under a duty to carry out all the requisite consultations and for that purpose to initiate the procedure under Article 88(2) EC (see, inter alia, *Cook* v *Commission*, paragraph 29; *Matra* v *Commission*, paragraph 33; and Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 39).

35 It is only in connection with the latter investigation, which is designed to enable the Commission to be fully informed of all the facts of the case, that the Treaty imposes an obligation on the Commission to give the parties concerned notice to submit their comments (*Cook* v *Commission*, paragraph 22; *Matra* v *Commission*, paragraph 16; and Case C-78/03 P *Commission* v *Aktionsgemeinschaft Recht und Eigentum* [2005] ECR I-10737, paragraph 34).

36 Where, without initiating the formal investigation procedure under Article 88(2) EC, the Commission finds, on the basis of Article 88(3) EC and Article 4 of Regulation No 659/1999, that a State measure does not constitute aid incompatible with the common market, the persons intended to benefit from those procedural guarantees may secure compliance therewith only if they are able to challenge that decision before the Community judicature. For those reasons, the Court declares to be admissible an action for the annulment of such a decision brought by a person who is concerned within the meaning of Article 88(2) EC where he seeks, by instituting proceedings, to safeguard the procedural rights available to him under the latter provision (see, to that effect, *Cook* v *Commission*, paragraphs 23 to 26; *Matra* v *Commission*, paragraphs 17 to 20; *Commission* v *Styral and Brink's France*, paragraph 40; and *Commission* v *Aktionsgemeinschaft Recht und Eigentum*, paragraph 35).

37 Furthermore, Article 10(1) and the first sentence of Article 20(2) of Regulation No 659/1999 grant to a person concerned the right to set in motion the preliminary examination stage provided for in Article 88(3) EC, by sending information regarding any allegedly unlawful aid to the Commission, which it is then obliged to examine, without delay, the possible existence of aid and its compatibility with the common market.

38 Although the parties concerned cannot rely on rights of the defence for that procedure, they do, however, have the right to be associated with it in an adequate manner taking into account the circumstances of the case at issue (see, to that effect, judgement of 8 May 2008 in Case C-49/05 P *Ferriere Nord* v *Commission*, paragraph 69).

39 Such an association with that procedure must mean that, where the Commission informs the interested parties, in accordance with Article 20(2) of Regulation No 659/1999, that there are insufficient grounds for taking a view on the case, it is required, as the Advocate General points out at point 101 of his Opinion, to allow the interested parties to submit additional comments within a reasonable period.

40 Once those comments have been lodged, or the reasonable period has expired, Article 13(1) of Regulation No 659/1999 obliges the Commission to close the preliminary examination stage by adopting a decision pursuant to Article 4(2), (3) or (4) of that regulation, that is to say, a decision stating that aid does not exist; raising no objections, or initiating the formal investigation procedure. Thus, the Commission is not authorised to persist in its failure to act during the preliminary examination stage. Once that stage of the procedure has been completed the Commission is bound either to initiate a procedure against the subject of the complaint, or to adopt a definitive decision rejecting the complaint (see, in the context of the procedure in matters of competition, Case 282/95 P *Guérin automobiles* v *Commission* [1997] ECR I-1503, paragraph 36). Under the third sentence of Article 20(2) of Regulation No 659/1999, where the Commission takes such a decision on the basis of information supplied by an interested party, it must send a copy of that decision to the interested party.

41 In that context, it should be noted that the Commission can take one of the aforementioned decisions provided for in Article 4 of Regulation No 659/1999 without, however, describing it as a decision pursuant to that provision.

42 It is apparent from settled case-law concerning the admissibility of actions for annulment that it is necessary to look to the substance of the contested acts, as well as the intention of those who drafted them, to classify those acts. In that regard, it is in principle those measures which definitively determine the position of the Commission upon the conclusion of an administrative procedure, and which are intended to have legal effects capable of affecting the interests of the complainant, which are open to challenge and not intermediate measures whose purpose is to prepare for the final decision, which do not have those effects (see, to that effect, *IBM* v *Commission*, paragraphs 9 and 10, and Case C-147/96 *Netherlands* v *Commission* [2000] ECR I-4723, paragraphs 26 and 27).

43 By contrast, the form in which an act or decision is adopted is in principle irrelevant to the right to challenge such acts or decisions by way of an action for annulment (see, to that effect, *IBM* v *Commission*, paragraph 9, and Case C-208/03 P *Le Pen* v *Parliament* [2005] ECR I-6051, paragraph 46).

44 It is therefore, in principle, irrelevant for the classification of the act in question whether or not it satisfies certain formal requirements, namely, that it is duly named by its author; that it is sufficiently reasoned, and that it mentions the provisions providing the legal basis for it (see, as regards the requirement of being sufficiently reasoned, Case C-39/93 P *SFEI and Others* v *Commission* [1994] ECR I-2681, paragraph 31). It is therefore irrelevant that the act may not be described as a 'decision' or that it does not refer to Article 4(2), (3) or (4) of Regulation No 659/1999. It is also of no importance that the Member State concerned was not notified of it by the Commission, infringing Article 25 of that regulation, as such an error is not capable of altering the substance of that act (see, in that regard, Case C-57/95 *France* v *Commission* [1997] ECR I-1627, paragraph 22).

45 If it were otherwise, the Commission could avoid review by the Community judicature simply by failing to adhere to such formal requirements. It is apparent from the case-law that, as the European Community is a community based on the rule of law in which its institutions are subject to judicial review of the compatibility of their acts with the EC Treaty, the procedural rules governing actions brought before the Community courts must be interpreted in such a way as to ensure, wherever possible, that those rules are implemented in such a way as to contribute to the attainment of the objective of ensuring effective judicial protection of an individual's rights under Community law (see, to that effect, Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677, paragraph 44; Case C-229/05 P *PKK and KNK* v *Council* [2007] ECR I-439, paragraph 109; and Case C-432/05 *Unibet* [2007] ECR I-2271, paragraphs 37 and 44).

46 It follows that, to determine whether an act in matters of State aid constitutes a decision within the meaning of Article 4 of Regulation No 659/1999, it is necessary to ascertain whether, taking account of the substance of that act and the Commission's intention, that institution has, at the end of the preliminary examination stage, definitively established its position — by way of the act under consideration — on

the measure under review and, therefore, whether it has decided that that measure constituted aid or not, that it had no doubts as regards its compatibility with the common market, or that it did have such doubts.

The contested act

47 As has been noted at paragraph 30 of this judgment, in its action Athinaïki Techniki did not challenge the letter in dispute, which was a mere letter of notification informing it of the adoption of the contested act. Athinaïki Techniki specifically challenged that latter act.

48 By the letter in dispute the Commission, first of all, indicated to Athinaïki Techniki that, by an earlier letter of 16 September 2003, the Commission had informed it that 'on the basis of the information in its possession, there [we]re insufficient grounds for continuing to examine that case'.

49 The letter in dispute then stated that 'in the absence of additional information to justify continuing the investigation, the Commission ha[d], for the purposes of administrative action, closed the file on the case on 2 June 2004'.

50 On the assumption that that letter of 16 September 2003 had been drafted in the terms of the letter in dispute, it would constitute the preliminary act for the purposes of Article 20(2) of Regulation No 659/1999, by which the Commission satisfied its obligation, arising from that provision, to inform the interested party that it did not intend to take a view on the case. As a consequence, Athinaïki Techniki had the option of providing additional information to the Commission.

51 Further, the words 'in the absence of additional information to justify continuing the investigation, the Commission ha[d], for the purposes of administrative action,

closed the file on the case on 2 June 2004' in the letter in dispute indicate that the Commission, on that date, actually closed the file for the purposes of administrative action, that is to say, it adopted the contested act.

52 It is apparent from the substance of that act and from the intention of the Commission that it thus decided to bring to an end the preliminary examination procedure initiated by Athinaïki Techniki. By that act, the Commission stated that the review initiated had not enabled it to establish the existence of State aid within the meaning of Article 87 EC and it implicitly refused to initiate the formal investigation procedure provided for in Article 88(2) EC (see, to that effect, *Commission* v *Sytraval and Brink's France*, paragraph 47).

53 It is apparent from the case-law referred to in paragraph 36 of this judgment that, in such a situation, the persons to whom the procedural guarantees under that provision apply may ensure that they are observed only if they are able to challenge that decision before the Community judicature in accordance with the fourth paragraph of Article 230 EC. That principle applies both when a decision is taken on the ground that the Commission considers that the aid is compatible with the common market, and when it takes the view that the existence of aid should be ruled out.

54 The contested act cannot be classified as preliminary or preparatory since it cannot be followed, in the context of the administrative procedure which has been initiated, by any other decision amenable to annulment proceedings (see, to that effect, inter alia, *SFEI and Others* v *Commission*, paragraph 28).

55 Contrary to what the Court of First Instance held, it is not relevant, in that regard, that the interested party may still provide the Commission with additional information which might oblige the Commission to review its position on the State measure at issue.

56 The lawfulness of a decision taken at the end of the preliminary examination stage is examined only on the basis of the information which the Commission had at its

disposal at the time when it made the decision (see *Nuova Agricast*, paragraphs 54 to 60), that is to say, in the present case, at the time the contested act was adopted.

57 If an interested party provides additional information after the closing of the file, the Commission can be obliged to open, if appropriate, a new administrative procedure. By contrast, that information has no effect on the fact that the first preliminary examination procedure is already closed.

58 It follows that, contrary to what the Court of First Instance held at paragraph 29 of the order under appeal, the Commission did adopt a definite position on Athinaïki Techniki's request seeking a finding of infringement of Articles 87 EC and 88 EC.

59 Finally, as has been noted at paragraph 44 of this judgment, the fact that the Commission did not notify the Member State concerned, that it did not describe the contested act as a 'decision', and that it did not refer to Article 4 of Regulation No 659/1999, has no bearing on the classification of the contested act.

60 In that regard, it is apparent from the progress of the administrative procedure, as noted inter alia in paragraph 6 of the order under appeal, that the Commission adopted its position on the ground that the State measure at issue did not constitute State aid. The contested act must therefore be classified as a decision within the meaning of Article 4(2) of Regulation No 659/1999, read in conjunction with Articles 13(1) and the third sentence of Article 20(2) of that regulation.

61 As that act prevented Athinaïki Techniki from submitting its comments, in the context of a formal investigation procedure referred to in Article 88(2) EC, it produced legal effects which were capable of affecting that company's interests.

62 The contested act does, therefore, constitute an act open to challenge for the purposes of Article 230 EC.

Setting aside of the order under appeal

63 It follows from all of the foregoing that the Court of First Instance erred in law in holding that Athinaïki Techniki had brought an action for annulment against an act which has no legal effect and cannot therefore be the subject of an action under Article 230 EC.

64 Consequently, the order under appeal must be set aside.

The action at first instance

65 In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice, that court may, where the decision of the Court of First Instance has been quashed, give final judgment in the matter, where the state of proceedings so permits.

66 In the current state of the proceedings the Court is not in a position to give judgment on the substance of the application before the Court of First Instance. That aspect of the dispute involves the consideration of questions of fact based on evidence which was not assessed before the Court of First Instance, nor argued before the Court, as a result of which it is apparent that the state of proceedings do not permit judgment to be given. However, the Court does possess all the information necessary for it to give final judgment on the preliminary plea of inadmissibility raised by the Commission in the proceedings at first instance (see Case C-193/01 P *Pitsiorlas* v *Council and ECB* [2003] ECR I-4837, paragraph 32).

67 In addition to the preliminary plea of inadmissibility raised by the Commission and based on the argument that the contested act cannot be the subject of an action for annulment, which must be rejected for the reasons set out in paragraphs 33 to 61 of this judgment, the Commission contends that Athinaïki Techniki filed its application outside of the prescribed time-limits.

68 It should, at the outset, be borne in mind that, in the words of the fifth paragraph of Article 230 EC, the proceedings provided for in that article must be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter. In accordance with Article 102(2) of the Rules of Procedure of the Court of First Instance, that time-limit is to be extended on account of distance by a single period of 10 days.

69 It is common ground that the contested act was not published in the *Official Journal of the European Union*, nor was it notified to Athinaïki Techniki as the party to whom the act was addressed, so that the two months and ten days time-limit could begin to run for Athinaïki Techniki only from the day on which the act came to its knowledge, that is to say from the receipt of the letter in dispute.

70 Also, it is apparent from the case-law that it is for the party who is seeking to rely on the lateness of an application to demonstrate from which date the time-limit, for the filing of that application, should run. (see, to that effect, Case 108/79 *Belfiore* v *Commission* [1980] ECR 1769, paragraph 7, and Case C-403/05 *Parliament* v *Commission* ECR I-9045, paragraph 35).

71 In the present case, Athinaïki Techniki sent to the Registry of the Court of First Instance a copy of the application by fax on 11 February 2005 and the original on 18 February 2005. The final page of the copy was not absolutely identical to the original, so that the Registrar of the Court of First Instance decided it was not consistent with the original.

72 It is not necessary to examine the issue of whether Athinaïki Techniki validly filed its application on 11 February 2005. Even if the date when the original of the application was submitted to the Court of First Instance is taken into consideration, Athinaïki

Techniki's action against the contested act is in any event admissible provided that Athinaïki Techniki received the letter in dispute on 8 December 2004 or later.

73 On that point, the Commission claims that the letter in dispute was received by Athinaïki Techniki, at the latest, on 6 December 2004 and that the time-limit was therefore not adhered to. In that regard, the Commission points out that it sent the letter out either the day it was drafted, or the next day, and that the postal service must have delivered it to Athinaïki Techniki, at the latest, on the third day after it was sent.

74 Nevertheless, it must be borne in mind that the Commission dispatched the letter in dispute without taking the care to send it by registered post or sending with it a form for acknowledgement of receipt.

75 As a consequence, it has placed no evidence before the Court capable of proving on what day it actually sent the letter in dispute by post.

76 Similarly, the Commission has failed to substantiate its argument that the postal service delivered that letter to Athinaïki Techniki, at the latest, the third day after it was sent.

77 The Commission has thus provided no proof that Athinaïki Techniki received the letter in dispute on 6 December 2004 at the latest. It merely puts forward arguments which are mere presumptions and which cannot take the place of proof (see Joined Cases 193/87 and 194/87 *Maurissen and Union syndicale* v *Court of Auditors* [1989] ECR 1045, paragraph 47).

78 In those circumstances, the Commission's preliminary plea of inadmissibility must be rejected.

Costs

79 Since the matter is referred back to the Court of First Instance, the costs relating to the present appeal proceedings must be reserved.

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

1. **Sets aside the order of the Court of First Instance of the European Communities of 26 September 2006 in Case T-94/05 *Athinaïki Techniki* v *Commission*.**

2. **Rejects the preliminary plea of inadmissibility raised by the Commission of the European Communities before the Court of First Instance of the European Communities.**

3. **Refers the case back to the Court of First Instance of the European Communities for it to rule on the pleas in law of Athinaïki Techniki AE, seeking annulment of the decision of the Commission of the European Communities of 2 June 2004 to take no further action concerning State aid allegedly granted by the Hellenic Republic to the Hyatt Regency consortium in the disposal of 49% of the capital of the Casino Mont Parnès.**

4. **Orders that the costs be reserved.**

[Signatures]