

# Case C-521/06 P

**Athinaïki Techniki AE**

**v**

**Commission of the European Communities**

(Appeal — State aid — Aid granted by the Hellenic Republic to the Hyatt Regency consortium — Complaint — Decision to take no further action on the complaint — Regulation (EC) No 659/1999 — Articles 4, 13 and 20 — Concept of ‘act open to challenge’ for the purposes of Article 230 EC)

Opinion of Advocate General Bot delivered on 3 April 2008 . . . . . I - 5832  
Judgment of the Court (Fourth Chamber), 17 July 2008 . . . . . I - 5862

## Summary of the Judgment

*Actions for annulment — Actionable measures — Acts open to challenge by a complainant alleging State aid — Commission decision to take no further action on the complaint — Included (Arts 87 EC, 88(2) EC and 230, fourth para., EC; Council Regulation No 659/1999, Art. 4)*

To determine whether an act in matters of State aid constitutes a decision within the meaning of Article 4 of Regulation No 659/1999 laying down detailed rules for the application of Article 88 EC, 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 on the measure under review and, therefore, whether it has decided that that measure constituted aid or not and whether it had no doubts as regards its compatibility with the common market, or that it did have such doubts.

A letter by which the Commission informs a complainant seeking a declaration of infringement of Articles 87 and 88 EC, that 'in the absence of additional information to justify continuing the investigation, the Commission has, for the purposes of administrative action, closed the file ...' indicates that the Commission actually closed the file for the purposes of administrative action.

It is apparent from the substance of that act and from the intention of the Commission that it has thus decided to bring to an end the preliminary examination procedure initiated by the complainant. By that act, the Commission has 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 has implicitly refused to initiate the formal investigation procedure provided for

in Article 88(2) EC. 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.

In that regard, such an 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. 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, because the lawfulness of a decision taken at the end of the preliminary examination stage is to be examined only on the basis of the information which the Commission had at its disposal at the time when it made the decision, that is to say, in the present case, at the time of the closing of the file for administrative purposes. 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. It follows that, by that act, the Commission has adopted a definite position on the complainant's request.

Such an act, which prevents the complainant from submitting its comments in the context of a formal investigation procedure referred to in Article 88(2) EC, produces legal effects which are capable of affecting that company's interests and, therefore, constitutes an act open to challenge for the purposes of Article 230 EC.

(see paras 46, 49, 51-58, 61, 62)