JUDGMENT OF THE COURT (Third Chamber)

18 November 2010 *

In Case C-322/09 P,

APPEAL under Article 56 of the Statute of the Court of Justice, brought on 8 August 2009,

NDSHT Nya Destination Stockholm Hotell & Teaterpaket AB, established in Stockholm (Sweden), represented by M. Merola and L. Armati, avvocati,

appellant,

the other party to the proceedings being:

European Commission, represented by L. Flynn and T. Scharf, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

* Language of the case: English.

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, D. Šváby, E. Juhász, G. Arestis and T. von Danwitz (Rapporteur), Judges,

Advocate General: V. Trstenjak,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 9 September 2010,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 By its appeal, Nya Destination Stockholm Hotell & Teaterpaket AB ('NDSHT') seeks to have set aside the judgment of the Court of First Instance of the European Communities (now 'the General Court') of 9 June 2009 in Case T-152/06 *NDSHT* v *Commission* [2009] ECR II-1517 ('the judgment under appeal') declaring inadmissible

NDSHT's action for annulment of the decision contained in the letters of the Commission of the European Communities of 24 March and 28 April 2006 addressed to NDSHT, relating to a complaint concerning allegedly unlawful State aid granted by the City of Stockholm to Stockholm Visitors Board AB ('the act in question').

Legal context

2 As is apparent from recital 2 in its preamble, Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88 EC] (OJ 1999 L 83, p. 1), as amended by the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded (OJ 2003 L 236, p. 33) ('Regulation No 659/1999'), codifies and reinforces the practice for examining State aid established by the Commission in accordance with the case-law of the Court.

3 Under Article 1(b)(i) of that regulation, 'existing aid' means 'without prejudice to Articles 144 and 172 of the Act of Accession of Austria, Finland and Sweden, and to Annex IV, point 3 and the Appendix to said Annex of the Act of Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia, all aid which existed prior to the entry into force of the [EC] Treaty in the respective Member States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the Treaty'.

4 In accordance with Article 1(h) of that regulation, the term 'interested party' is defined as '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'.

5 Article 4(1) to (4) of Regulation No 659/1999, in Chapter II thereof, which is entitled 'Procedure regarding notified aid', 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) EC], 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) EC] (hereinafter referred to as a "decision to initiate the formal investigation procedure").'

6 Chapter III of that regulation governs the procedure regarding unlawful aid. In that chapter, Article 10(1) provides:

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

7 In Chapter III, Article 13, entitled 'Decisions of the Commission', provides in paragraph 1 thereof:

'The examination of possible unlawful aid shall result in a decision pursuant to Article 4(2), (3) or (4). …'

8 In Chapter VI of Regulation No 659/1999, entitled 'Interested parties', Article 20(2) and (3) provides:

'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.'

9 Article 25 of Regulation No 659/1999 provides:

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

II — Factual background to the dispute

10 NDSHT is a company incorporated under the laws of Sweden which carries on the activities of a tour operator in Stockholm through its website. It offers a packaged service including hotel reservations and a tourist card called 'Stockholm à la carte', which gives holders access to a number of services and facilities in Stockholm, such as museums and local transport.

11 Stockholm Visitors Board AB ('SVB') is a company owned by the City of Stockholm through various subsidiaries. It is responsible for providing tourist information and promoting the Stockholm region. In connection with that type of activity, it also pursues commercial activities consisting, in particular, in the reservation of discounted hotel rooms in Stockholm and the sale of a package of tourist-related services, by means of a card called 'the Stockholm Card', offering free admission to places of interest and facilities in Stockholm.

12 In September 2004, NDSHT sent the Commission information regarding the annual grants made by the City of Stockholm to SVB for the years 2003 to 2005, alleging that those grants constituted State aid granted in infringement of Article 88(3) EC. NDSHT asserted in its complaint that that alleged State aid consisted in yearly

appropriations from the City of Stockholm's budget in favour of SVB, the reimbursement of SVB's pre-tax losses by its parent company on a regular basis, and preferential access to public facilities, such as metered parking managed by that city. According to NDSHT, SVB could use that aid to finance its commercial activities that are, however, in competition with those of other national and international undertakings, thereby distorting competition.

13 The Commission investigated NDSHT's complaint in the light of supplementary information provided by the latter and by the Swedish authorities in response to requests for information sent to them by the Commission.

14 On 24 March 2006, the Director of 'State Aid 1: Cohesion and Competitiveness', the service in the Commission's Directorate-General for Competition responsible for the file ('the Director of the Commission service responsible for the file'), sent the following letter to NDSHT:

'…

I would like to inform you that, on the basis of the available information, the competent services of the Directorate-General for Competition have reached the conclusion that there are not sufficient reasons for continuing the investigation of your complaint. …

According to our analysis, the Stockholm Card and the hotel bookings are (with the exception of the inclusion of parking spaces in the Stockholm Card) carried out on market conditions. These activities are thus not financed from State aid within the meaning of Article 87(1) of the EC Treaty. As regards the use of certain parking spaces for free, arguably there is no affectation on trade, or even if there is, such aid has been included in the Stockholm Card since well before Sweden joined the European Union in 1995 and would thus constitute existing aid. Moreover, this service is since 1 January 2006 no longer included in the Stockholm Card.

With respect to other activities (the provision of tourism information, etc.), it appears as if these are covered by the rules on Services of General Economic Interests (SGEI). Cross-subsidisation in favour of economic activities does not seem to occur. In case the compensation for the SGEIs would be classified as State aid, such aid would nevertheless have been provided under the same conditions since well before 1995 and would thus constitute existing aid.

In summary, the extensive investigations we have undertaken on this complaint suggest that we are in the presence of existing aid, and not illegal aid, which is in any case compatible with the common market. Since there are no grounds to institute the appropriate measures procedure provided for in Article 88(1) of the Treaty, we do not propose to take any further action on this matter.

…'

15 By letter of 5 April 2006, NDSHT informed the Commission that it understood the letter of 24 March 2006 as meaning that its complaint had been rejected and a decision adopted pursuant to Articles 13 and 4(2) and (3) of Regulation No 659/1999 not to raise any objections with regard to the financial measures in question. NDSHT also asked the Commission to send it a copy of that decision, in accordance with Article 20 of that regulation.

16 By letter of 28 April 2006, the Director of the Commission service responsible for the file replied to NDSHT stating that the information received did not indicate that the measures complained of constituted unlawful State aid and consequently no decision by the Commission under Article 20 of Regulation No 659/1999 could be addressed to it.

The proceedings before the General Court and the judgment under appeal

17 By application lodged at the Registry of the General Court on 6 June 2006, NDSHT sought the annulment of the act in question and the initiation of the formal investigation procedure under Article 88(2) EC.

18 By separate document, the Commission raised an objection of inadmissibility pursuant to Article 114(1) of the Rules of Procedure of the General Court, to which NDSHT responded on 9 November 2006.

19 NDSHT claimed in its observations relating to the objection of inadmissibility that the act in question expressed both a final refusal on the part of the Commission to

initiate the formal investigation procedure provided for in Article 88(2) EC and a decision to close the case. The act in question should therefore be regarded as a decision affecting NDSHT's legal situation. It thus constituted an act open to challenge for the purposes of Article 230 EC.

20 By the judgment under appeal, the General Court dismissed NDSHT's action as inadmissible and ordered it to pay the costs.

21 The General Court held that, in order to determine whether the act in question constituted an act open to challenge, it was necessary to establish, in the light of its substance, whether it constituted a decision under Article 4 of Regulation No 659/1999 or merely an informal communication pursuant to the second sentence of Article 20(2) of that regulation.

22 It stated, in paragraph 44 of the judgment under appeal, that the Commission was not obliged to adopt a decision within the meaning of Article 4 of Regulation No 659/1999 in response to every complaint. Such an obligation arose only where Article 13 of the regulation was applicable. That was not the case where the complaint concerned existing aid. In paragraph 64 of the judgment, the General Court considered that an obligation to adopt a decision within the meaning of Article 4 of that regulation following a complaint concerning existing aid would run counter to the general scheme of the State aid review procedure.

23 It is apparent from the substance of the letters of 24 March and 28 April 2006 (together 'the contested letters') that the Commission had decided not to pursue the complaint on the ground that the aid in question constituted existing aid covered by the procedure in Article 88(1) EC. The General Court considered, in paragraph 57 of the judgment under appeal, that, in that case, in the light of settled case-law, the Commission could not be compelled, by means of a complaint, to issue a recommendation proposing appropriate measures to the Member States pursuant to Article 18

of Regulation No 659/1999. Furthermore, none of the provisions thereof applicable to existing aid contemplated the possibility of the Commission's adopting a measure amounting to a decision at the end of the preliminary examination of that aid.

24 Finally, in paragraph 63 of the judgment under appeal, the General Court stated that, since the Commission considered, at the end of its initial examination of the financial measures in question, that they should be regarded as existing aid, the contested letters could not constitute a refusal to initiate the formal investigation procedure under Article 88(2) EC.

25 The General Court consequently concluded that the contested letters had to be regarded not as a decision for the purposes of Article 4 of Regulation No 659/1999, but as an informal communication for the purposes of Article 20 thereof. Therefore, they did not constitute an act open to challenge for the purposes of Article 230 EC.

Forms of order sought before the Court

26 By its appeal, while disputing the classification of the measures in question by the Commission, NDSHT asks the Court to set aside the judgment under appeal in its entirety then, principally, to grant its application at first instance and order the Commission to pay the costs or, in the alternative, to declare its action admissible, refer the case back to the General Court and reserve the decision on costs relating to the two proceedings.

27 The Commission contends that the appeal should be dismissed and NDSHT ordered to pay the costs.

The appeal

28 NDSHT raises four grounds in support of its appeal.

29 The first ground of appeal alleges manifest distortion of the contents of the contested letters. By its second ground of appeal, the appellant submits that the General Court erred in law in considering the act in question to be a preparatory act not constituting a definitive decision open to challenge in an action for annulment. According to its third ground of appeal, NDSHT complains that the General Court erred in law in considering that the position adopted by the Commission should be treated as a rejection of a request for appropriate measures to be taken within the meaning of Article 88(1) EC. Finally, by its fourth ground of appeal, NDSHT claims that the General Court also erred in law in holding that the classification, by the Commission, of the financial measures in question as existing aid prevented the rejection of the complaint from being challenged. Such a solution was based on a misinterpretation of Articles 4, 10, 13 and 20 of Regulation No 659/1999.

30 Since the second to fourth grounds of appeal are closely linked, it is appropriate to examine them together.

The second to fourth grounds of appeal

Arguments of the parties

31 Referring, in particular, to Case C-521/06 P *Athinaïki Techniki* v *Commission* [2008] ECR I-5829, NDSHT alleges that the General Court misconstrued Articles 4, 10, 13 and 20(2) of Regulation No 659/1999 by holding that the rejection of its complaint by the Commission did not have the characteristics of a decision which produced binding legal effects such as to affect its interests and, therefore, of an act open to challenge for the purposes of Article 230 EC.

32 The appellant considers, in its second ground of appeal, that the General Court erred in law in stating that the act in question constituted not a definitive decision, but a preparatory act. It submits that the Commission had, on the contrary, completed its examination and adopted a decision, without however having formalised it, the object of which was to reject the complaint on the ground that the financial aid granted was compatible with the common market.

33 In that regard, the appellant considers, in its third ground of appeal, that, in paragraph 57 et seq. of the judgment under appeal, the General Court erred in law by classifying the position taken by the Commission as a rejection of a request for appropriate measures to be taken within the meaning of Article 88(1) EC and not as a refusal to initiate the formal investigation procedure under Article 88(2) EC. Likewise, the

General Court wrongly asserted that the Commission could not be obliged by a complainant to take a decision at the end of the preliminary examination stage.

34 Furthermore, the appellant claims, in its fourth ground of appeal, that Articles 4, 10 and 13 of Regulation No 659/1999 oblige the Commission, where it examines a complaint concerning the existence of allegedly unlawful aid, to conclude the preliminary examination stage by adopting a decision, as is stated in *Athinaïki Techniki* v *Commission*, paragraph 40.

35 That obligation to take a decision also applies where the preliminary examination stage leads the Commission to believe that there is existing aid. The possibility of contesting a Commission letter refusing to initiate the formal investigation procedure on the ground that the contested aid was existing aid was confirmed by the Court in Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125. Therefore, according to the appellant, the General Court's interpretation, in paragraph 64 et seq. of the judgment under appeal, that it would run counter to the general scheme of the State aid review procedure to hold that the Commission necessarily adopts a decision under Article 4 of Regulation No 659/1999 where it informs a complainant that its complaint concerns existing aid is evidence of a profoundly mistaken view of that procedural system. That interpretation would mean that, by classifying the contested financial measures as existing aid, the Commission could avoid any review by the European Union judicature, which would be clearly unacceptable.

36 The Commission acknowledges, first of all, that the contested letters do not deal with all of the financial measures in question and that it did not, by those letters, take a decision concerning existing aid. On the contrary, those letters contain a number of hypothetical, and accordingly not definitive, conclusions not leading moreover to an identical classification of those different measures. In those letters, the Commission,

at the most, summarised the position of the service responsible for dealing with the complaint, according to which it did not at that time intend to pursue it.

37 Next, the argument put forward by NDSHT that the Commission adopted a decision although without formalising it is inadmissible, since it was not put forward during the proceedings at first instance.

38 In any event, the Commission contends that it did not adopt a decision and restricted itself to a provisional assessment, the file on the complaint having been closed only in December 2006. Furthermore, as regards existing aid, it could not adopt a decision immediately but had, if it considered the measures to be incompatible with the common market, first to inform the Member State concerned before possibly proposing appropriate measures. Since Regulation No 659/1999 does not provide for any specific procedure to be followed in such a case, the only possible means of challenging the act in question would have been an action for failure to act.

39 Finally, the Commission contests the relevance of the references to *CIRFS and Others* v *Commission* and *Athinaïki Techniki* v *Commission* since, when it has found that there is existing aid, the Commission is no longer in a position to initiate the formal investigation procedure under Article 88(2) EC.

Findings of the Court

— Admissibility of the argument invoked by NDSHT relating to the fact that the Commission's decision was not formalised

40 According to the Commission, the argument put forward by the appellant that it concluded its examination of the financial measures in question with a decision that was not formalised was not raised before the General Court and is accordingly inadmissible.

41 In that regard, it must be observed that it follows from Article 58 of the Statute of the Court of Justice, in conjunction with Article 113(2) of the Rules of Procedure of the Court of Justice, that, on appeal, an appellant may put forward any relevant argument, provided only that the subject-matter of the proceedings before the General Court is not changed in the appeal (Case C-229/05 P *PKK and KNK* v *Council* [2007] ECR I-439, paragraph 66, and Case C-8/06 P *Herrero Romeu* v *Commission* [2007] ECR I-10333, paragraph 32).

42 However, it is clear that, contrary to the Commission's contention, that argument was indeed included in the application lodged by NDSHT before the General Court, in which it is claimed, in paragraph 29, that 'it is settled case-law that the form in which acts or decisions are cast has no bearing on the right to challenge them'. Therefore, even assuming that that argument was not expressed in the appeal in the same terms as in that application, it does not change the subject-matter of the proceedings before the General Court.

43 It follows that that argument is admissible.

— Substance

44 The appellant seeks in essence to show, in its second to fourth grounds of appeal, that the General Court erred in law in holding that the contested letters did not have the characteristics of an act open to challenge for the purposes of Article 230 EC.

45 In that regard, the Court has repeatedly held that an action for annulment for the purposes of Article 230 EC must be available against all acts 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, *Athinaïki Techniki* v *Commission*, paragraph 29 and case-law cited, and Case C-362/08 P *Internationaler Hilfsfonds* v *Commission* [2010] ECR I-669, paragraph 51).

46 It follows also from settled case-law concerning the admissibility of actions for annulment that it is necessary to look to the actual substance of the acts challenged in order to classify them (see, in particular, Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 9, and Case C-147/96 *Netherlands* v *Commission* [2000] ECR I-4723, paragraph 27).

47 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. It is therefore, in principle, irrelevant for the classification of the act in question whether

or not it satisfies certain formal requirements, namely in particular, that it is duly identified by its author and that it mentions the provisions providing the legal basis for it. 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 the act at issue by the Commission, infringing Article 25 of that regulation, as such an error is not capable of altering the substance of that act (see *Athinaïki Techniki* v *Commission*, paragraphs 43 and 44 and case-law cited).

48 Furthermore, 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, that constitute acts open to challenge for the purposes of Article 230 EC, and not intermediate measures whose purpose is to prepare for the final decision, which do not have those effects (see *Athinaïki Techniki* v *Commission*, paragraph 42 and case-law cited).

49 With regard to the possible definitive and actionable nature of measures taken by the Commission in the procedure for reviewing State aid, it should be noted, first, that the Commission must, under Article 10(1) of Regulation No 659/1999, carry out an examination where it has in its possession information from whatever source regarding allegedly unlawful aid. The examination of a complaint, on the basis of that provision, gives rise to the initiation of the preliminary examination stage under Article 88(3) EC and obliges the Commission to examine, immediately, the possible existence of aid and its compatibility with the common market (see, to that effect, *Athinaïki Techniki* v *Commission*, paragraph 37).

50 Article 13(1) of Regulation No 659/1999, which is applicable in the context of an examination of a complaint alleging unlawful aid, obliges the Commission to close that preliminary examination stage by adopting a decision pursuant to Article 4(2), (3) or (4) of that regulation, that is to say, a decision finding that aid does not exist, raising no objections or initiating the formal investigation procedure, since that institution 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, consequently, either to initiate the next stage of the procedure, provided for by Article 88(2) EC, or to adopt a definitive decision rejecting the complaint (see, to that effect, *Athinaïki Techniki* v *Commission*, paragraph 40 and case-law cited).

51 Where the Commission finds, following examination of a complaint, that the investigation has revealed no grounds for concluding that there is State aid within the meaning of Article 87 EC, it refuses by implication to initiate the procedure provided for by Article 88(2) EC (see, to that effect, Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 47).

52 As regards the Commission's finding that the measures complained of constituted existing aid, it should be noted that existing aid is of course subject to the constant review provided for in Article 88(1) EC and must be regarded as lawful so long as the Commission has not found that it is incompatible with the common market (see Case C-44/93 *Namur-Les assurances du crédit* [1994] ECR I-3829, paragraph 34, and Case C-400/99 *Italy* v *Commission* [2001] ECR I-7303, paragraph 48). However, where it receives a complaint relating to allegedly unlawful aid, the Commission, in classifying the measure as existing aid, subjects it to the procedure provided for by Article 88(1) EC and thus refuses by implication to initiate the procedure provided for by Article 88(2) EC (see, to that effect, *CIRFS and Others* v *Commission*, paragraphs 25

and 26, and Case C-321/99 P *ARAP and Others* v *Commission* [2002] ECR I-4287, paragraph 61).

53 Such a decision refusing to initiate the procedure provided for by Article 88(2) EC is definitive and cannot be characterised as a mere provisional measure (*CIRFS and Others* v *Commission*, paragraph 26, and, to that effect, *Athinaïki Techniki* v *Commission*, paragraphs 54 and 58).

54 In such a situation, the persons intended to benefit from the procedural guarantees afforded by that provision may secure compliance therewith only if they are able to challenge the decision in question before the European Union judicature under the fourth paragraph of Article 230 EC. That principle applies equally, whether the ground on which the decision is taken is that the Commission regards the aid as compatible with the common market or that, in its view, the very existence of aid must be discounted (*Commission* v *Sytraval and Brink's France*, paragraph 47) or where it considers that there is existing aid (see, to that effect, *CIRFS and Oth*ers v *Commission*, paragraph 27, and *ARAP and Others* v *Commission*, paragraph 62).

55 That finding is corroborated by Article 20 of Regulation No 659/1999, which governs the rights of interested parties. According to the second and third sentences of Article 20(2) thereof, after obtaining from such an interested party information concerning alleged unlawful aid or alleged misuse of aid, the Commission will either consider that there are insufficient grounds for taking a view on the case and inform the interested party thereof or take a decision on a case concerning the subject-matter of

the information supplied. It follows that, where the Commission has examined such information and taken a position on it, it takes a decision.

56 Therefore, an action for annulment of a decision not to initiate the procedure pursuant to Article 88(2) EC brought by a party concerned within the meaning of that article, must be considered to be admissible where that party seeks thereby to safeguard the procedural rights available to him under that latter provision (see *Athinaïki Techniki* v *Commission*, paragraph 36 and case-law cited).

57 In the present case, it is common ground that the Commission examined the appellant's complaint in the light of additional information supplied by the latter and the Swedish authorities in response to requests for information sent to them by the Commission. On the conclusion of the examination of the complaint, the Commission stated, in its letter of 24 March 2006, that there were not sufficient reasons for continuing the investigation and added that it did not propose to take any further action on the matter. Furthermore, by its letter of 28 April 2006, it stated that the financial measures in question did not constitute unlawful aid.

58 Since the Commission concluded that there were not sufficient reasons for continuing the investigation of the complaint, it follows from the substance of the act in question that that institution formed a definitive opinion on the measures examined, thus expressing its wish to terminate its preliminary examination. With that finding, as follows from the case-law cited in paragraph 52 of this judgment, it refused by implication to initiate the formal investigation procedure under Article 88(2) EC.

59 The appellant, as an undertaking in competition with the company benefiting from the measures complained of, is without doubt an interested party for the purposes of Article 88(2) EC (see *Commission* v *Sytraval and Brink's France*, paragraph 41, and

Case C-319/07 P *3F* v *Commission* [2009] ECR I-5963, paragraph 32), having regard to the definition of that term in Article 1(h) of Regulation No 659/1999.

60 It must therefore be held that the General Court erred in law in holding that the act in question did not have the characteristics of a decision producing binding legal effects such as to affect the appellant's interests and, in particular, that it did not constitute a decision pursuant to Article 4 of Regulation No 659/1999. It follows that the act in question must be regarded as an act open to challenge for the purposes of Article 230 EC.

61 It follows from the foregoing considerations that the second to fourth grounds raised by NDSHT in support of its appeal must be upheld.

62 Moreover, as the Court has pointed out in paragraphs 52 and 60 of this judgment that a decision such as the act in question constituted an act open to challenge even though the Commission found that the measures complained of constituted existing aid, it is no longer necessary to examine the first ground of appeal put forward by the appellant alleging distortion of the contents of the contested letters.

63 In those circumstances, the judgment under appeal must be set aside.

Referral of the case back to the General Court

64 In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, if the Court quashes a decision of the General Court, it may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court for judgment.

65 However, the Court is not in a position to adjudicate on the substance of the action brought by NDSHT. That aspect of the action, and in particular the question whether the Commission was wrong to decide not to initiate the formal investigation procedure under Article 88(2) EC, on the ground that the measures at issue constituted existing aid in any case compatible with the common market, involves carrying out assessments of fact on the basis of information which was not evaluated by the General Court or debated before the Court. Conversely, the Court does have the information necessary to rule definitively on the objections of inadmissibility raised by the Commission during the proceedings at first instance.

66 For the reasons given in paragraphs 44 to 62 of this judgment, that objection of inadmissibility, alleging that the act in question is not open to challenge in an action for annulment, must be dismissed.

67 The case must therefore be referred back to the General Court for judgment on NDSHT's claim for annulment of the Commission's decision, contained in the contested

letters, not to continue its investigation of the complaint lodged by the appellant concerning allegedly unlawful State aid granted by the City of Stockholm to SVB.

Costs

68 Since the case is being referred back to the General Court, it is appropriate to reserve the costs relating to the present appeal proceedings.

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

1. **Sets aside the judgment of the Court of First Instance of the European Communities of 9 June 2009 in Case T-152/06 *NDSHT* v *Commission*;**

2. **Dismisses the objection of inadmissibility raised by the Commission of the European Communities before the General Court;**

3. **Refers the case back to the General Court of the European Union for judgment on the claim of NDSHT Nya Destination Stockholm Hotell & Teaterpaket AB for annulment of the decision of the Commission of the European Communities, contained in its letters of 24 March and 28 April 2006, not to continue its examination of the complaint that that company had lodged concerning allegedly unlawful State aid granted by the City of Stockholm to Stockholm Visitors Board AB;**

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

[Signatures]