

ORDER OF THE COURT OF FIRST INSTANCE (Fourth Chamber)

15 March 2004 *

In Case T-66/02,

**Idiotiko Institutou Epaggelmatikis Katartisis N. Avgerinopoulou Anagnorismenes
Technikes Idiotikes Epaggelmatikes Scholes AE**, established in Athens (Greece),

Panellinia Enosi Idiotikon Instituton Epaggelmatikis Katartisis, established in
Athens,

Panellinia Enosi Idiotikis Technikis Epaggelmatikis Ekpaidefsis kai Katartisis,
established in Athens,

represented by T. Antoniou and C. Tsiliotis, lawyers,

applicants,

v

Commission of the European Communities, represented by M. Condou-Durande
and L. Flynn, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: Greek.

ACTION for failure to act based on Article 232 EC seeking a declaration that the Commission failed to fulfil its obligations under Council Regulation (EC) No 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds (OJ 1999 L 161, p. 1) and under the EC Treaty, by failing to bring to an end the unlawful discrimination between private and public vocational training institutes in Greece resulting from the fact that only the latter are financed under the third Community support framework and, in particular, under the operational programme 'Education and Initial Vocational Training',

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

composed of: H. Legal, President, V. Tiili and M. Vilaras, Judges,
Registrar: H. Jung,

makes the following

Order

Background to the dispute

- 1 The first applicant, Idiotiko Institouto Epaggelmatikis Katartisis N. Avgerinopoulou Anagnorismenes Technikes Idiotikes Epaggelmatikes Scholes AE, a public limited liability company, is a private vocational training institute in Greece. It is a member of the second applicant, the Panellinia Enosi Idiotikon Institouton

Epangelmatikis Katartisis, an association to which private vocational training institutes in Greece belong. The third applicant, the Panellinia Enosi Idiotikis Teknikis Epangelmatikis Ekpaidefsis kai Katartisis, is an association to which private technical vocational training institutes in Greece belong.

- 2 In Greece the financial contribution from the Structural Funds for the establishment and operation of a public network of vocational training institutes ('IEK') began with the adoption of Commission Decision 90/203/EEC of 30 March 1990 on the establishment of the Community support framework for Community structural assistance for the Greek regions concerned by Objective 1, which make up the entire territory of the country (OJ 1990 L 106, p. 26). That initial Community support framework was approved for the period from 1 January 1989 to 31 December 1993.
- 3 The contribution from the Structural Funds was continued during the period from 1 January 1994 to 31 December 1999 by Commission Decision 94/627/EC of 13 July 1994 on the establishment of the Community support framework for Community structural assistance for the Greek regions concerned by Objective 1, which is the whole country (OJ 1994 L 250, p. 15). As part of that second Community support framework the Commission also approved the first operational programme for education and initial vocational training (EPEAEK I).
- 4 On 29 September 1999 the Greek Government submitted to the Commission a regional development plan for the whole area of the country concerned by Objective 1, under Article 3(1) 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 Structural Funds regulation').

- 5 On the basis of that plan, submitted by the Hellenic Republic within the partnership provided for in Article 8 of the Structural Funds regulation, the Commission established, under the first subparagraph of Article 15(4) of that regulation and in agreement with that Member State, the Community support framework for Community structural assistance in Greece.
- 6 The Community support framework thus established was approved by Commission Decision 2002/322/EC of 28 November 2000 approving the Community support framework for Community structural assistance under Objective 1 in Greece (OJ 2002 L 122, p. 7; ‘the third CSF’) for the period from 1 January 2000 to 31 December 2006. Under Article 2(1)(a)(i) of that decision, the priorities for the joint action of the Community Structural Funds and the Member State concerned include ‘development of human resources and employment promotion’.
- 7 On 31 March 2000 the Greek Government submitted to the Commission the draft operational programme entitled ‘Education and Initial Vocational Training’, (‘EPEAEK II’).
- 8 The Commission examined the content of EPEAEK II under the second subparagraph of Article 15(4) of the Structural Funds regulation in order to check whether it was consistent with the objectives of the relevant Community support framework and compatible with Community policies. It found that the project fell within Objective 1, in accordance with Article 3(1) of the Structural Funds regulation, and that it contained the objectives set out in Article 18 of that regulation, in particular a description of the priorities of the programme, an indicative financing plan specifying for each priority and each year the financial allocation envisaged for the contribution from the European Social Fund and the European Regional Development Fund, as well as the total amount of eligible public and estimated private financing by the Member State.

- 9 By letter of 27 February 2001 the second applicant requested the Commission not to approve EPEAEK II.
- 10 EPEAEK II was approved by the Commission decision of 16 March 2001 approving EPEAEK II, which is part of the third CSF, for Community structural assistance for the Greek regions concerned by Objective 1 for the period from 1 January 2000 to 31 December 2006 ('the decision approving EPEAEK II').
- 11 Under Article 2(1)(a)(2) of that decision the priorities of EPEAEK II include 'the promotion and improvement of education and initial vocational training as part of lifelong learning'.
- 12 Among the measures and actions envisaged in EPEAEK II in that context are, in particular, measures 2.3 (education and initial vocational training) and 2.4 (professional guidance and liaison with the employment market).
- 13 With regard in particular to the financing of actions to be taken by IEK in order to improve initial vocational training, EPEAEK II states that 'the first phase will see the financing of actions of public vocational training institutes' (measure 2.3, point C). In addition, with regard to involvement of private IEK in initial vocational training projects, it provides for a study to be conducted into how this will take place (measure 2.3, point D).

- 14 By letter of 26 April 2001 the Commission, in answer to the abovementioned letter from the second applicant of 27 February 2001, informed the latter that Community assistance was complementary to that provided at national level or designed to contribute to it. The Commission added that in the sector of initial vocational training EPEAEK II provided for a study to be carried out, as part of the intermediate assessment, into future involvement by private IEK in jointly financed actions and that it had been decided to reduce direct aid to public IEK gradually in order to promote a gradual transition to open procedures, without however jeopardising the work that had been done in that field. The Commission concluded that EPEAEK II complied with the spirit of the third CSF and would contribute significantly to the efforts being made by the Greek authorities to modernise the education system.
- 15 In May 2001 the Greek authorities drew up a programme complement within the meaning of Article 9 of the Structural Funds regulation. It is clear from that complement that private law corporations are among the potential final beneficiaries both of the ‘education and initial vocational training’ measure (measure 2.3, point F) and the ‘vocational guidance and liaison with the employment market’ measure (measure 2.4, point F).
- 16 The programme complement was approved, following a few adjustments, amendments and additions, by the EPEAEK II Monitoring Committee at its first meeting on 29 May 2001 and was sent to the Commission for information, under Article 9(m) and Article 34(3) of the Structural Funds regulation. In point 5.4 of its ‘findings-decisions’, adopted the same day, the Monitoring Committee replaced in all the measures the words ‘potential final beneficiaries’ by ‘types of final beneficiary’ and stated that private law corporations were included in the types of final beneficiary. However, with regard in particular to the action relating to ‘other initial vocational training bodies’ (action 2.3.3 of measure 2.3) coming under the supervision of ministries other than the National Education Ministry,

private law corporations do not appear among those beneficiaries. Lastly, provision was made that, if necessary, other categories of final beneficiary could be defined for each measure, following consideration by the EPEAEK II special management service.

17 The legality of EPEAEK II, the programme complement, the decision of the Monitoring Committee and various national measures implementing those acts has been challenged in several actions brought by the applicants before the Simvoulío tis Epikratias (Greek Council of State). Those actions are currently pending.

18 By letter of 17 October 2001, which reached the Commission on 25 October 2001, the applicants called upon the Commission to act, pursuant to the first sentence of the second paragraph of Article 232 EC. In that request they asked the Commission:

‘1. to end their unlawful exclusion from financing under the [third CSF] and,

2. within the partnership referred to in Article 8(2) of the [Structural Funds regulation], which covers the preparation, financing, monitoring and evaluation of assistance, to intervene with the national authority with a view to the amendment of [EPEAEK II] and the operational programme complement of May 2001 in order to extend joint financing to private vocational training bodies;

3. to amend the [decision approving EPEAEK II] in order that private education bodies might receive financing under that programme ...;
4. to draw the attention of the Greek monitoring authority to the latter's unlawful omission in its decision of 29 May 2001 when it failed to include private vocational training bodies in the financing;
5. to suspend application of the decision regarding the involvement of the Funds in implementing [EPEAEK II] until the adoption of a further decision regarding procedure and the amount of the financing.'

Procedure

- 19 By application lodged at the Registry of the Court of First Instance on 25 February 2002 the applicants brought the present action.
- 20 By a letter from the Director-General of the Directorate-General for Employment and Social Affairs of 27 February 2002 the Commission responded to the abovementioned request to act. That letter reads as follows:

‘...

Among other fields in which they are providing assistance in Greece, the Structural Funds have financed the setting up and supported the functioning of a major public network of vocational training institutes (IEK). Contribution from the Structural Funds in that field began with the first CSF applying to Greece (1989-93) and has continued with the second CSF (1994-99).

At the negotiations on the third CSF (2000-06), European Commission officials pointed to the importance of gradually applying open procedures for the allocation of projects jointly financed by the Structural Funds.

So, in order not to jeopardise the work already done in this sector it was agreed with the national authorities in the context [of EPEAEK II] (cf. in this regard the programme complement) to scale down the financing of actions of public IEK in order to reach zero financing, under current procedures, by 2003. From that date onwards only a certain, very limited, type of project, such as innovative actions, teacher training, etc., provided by public or, possibly private, IEK could be jointly financed, following open selection procedures. Also, with a view to possible involvement of private IEK in those projects, provision is made in [EPEAEK II] for carrying out a study which would determine the procedures for this.

In view of the above, it is clear that the objective of the Structural Funds is to assist Greece in achieving a system of vocational training, by contributing to the promotion and improvement of such a system, as part of active employment policies and by applying the guidelines of the European employment strategy.

Following the adoption [of EPEAEK II], as proposed by the Member State, it is provided in Article 8(3) of the Structural Funds regulation that “in application of

the principle of subsidiarity, the implementation of assistance shall be the responsibility of the Member States, at the appropriate territorial level according to the arrangements specific to each Member State, and without prejudice to the powers vested in the Commission, notably for implementing the general budget of the European Communities”.

As regards whether the financing of the public vocational training institutes constitutes State aid, the Commission takes into account the fact that the vocational training activities of those institutes are governed by Law No 2009/1992. That law defines the single legal and organisational framework of the national system of education and vocational training in Greece. Article 5 of the law provides that public vocational training institutes are to be established by a joint decision of the Ministers for Education and for Finance (and in some cases other ministers also). All vocational training institutes are to be placed under the supervision of the Minister for Education. The law also sets up a public body (the education and vocational training body — the OEEK), which is responsible for the content, syllabus planning and organisation of training courses delivered by the vocational training institutes: the OEEK is also responsible for supervising private vocational training institutes.

It is clear from the above that the activities of public vocational training institutes form an integral part of the Greek national education system under Greek law and that they cannot be regarded as profit-making economic activities. The Commission therefore considers that the public financing of those activities does not constitute State aid within the meaning of Article 87(1) EC, as was confirmed by the Court of Justice of the European Communities when it held that “the State, in maintaining such a system, is not seeking to engage in gainful activity, but is fulfilling its duties ... in the social, cultural and educational fields. [T]he system in question is, as a general rule, funded from the public purse” [Cases 263/86 *Humbel* [1988] ECR 5365 and C-109/92 *Wirth* [1993] ECR I-6447]. The Commission has adopted the same position on a number of occasions with regard to the application of provisions on State aid towards public financing of institutes falling within the national education system.

In conclusion and taking the abovementioned factors into account, the European Commission officials consider that the support given to public IEK does not constitute distortion of competition and affect trade between Member States and so it does not appear to be State aid within the meaning of Article 87(1) of the EC Treaty.'

- 21 By application lodged at the Court Registry on 29 April 2002 and registered as Case T-139/02 the applicants brought an action for annulment of the Commission decision contained in the letter quoted above.
- 22 By a separate document lodged at the Court Registry on 4 June 2002 the Commission submitted, in the context of the present action, an application for the case not to proceed to judgment and, in the alternative, raised an objection of inadmissibility under Article 114(1) of the Rules of Procedure of the Court of First Instance. The applicants lodged their observations on the application for the case not to proceed to judgment and on the objection of inadmissibility on 12 August 2002.

Forms of order sought

- 23 In their application the applicants claim that the Court should allow their application and declare void the Commission's refusal to abolish the unlawful distinction between private and public IEK with regard to financing under the third CSF, in particular, under EPEAEK II.

24 In its application for the case not to proceed to judgment and in its objection of inadmissibility the Commission submits that the Court should:

- rule that the case should not proceed to judgment;
- in the alternative, dismiss the application as manifestly inadmissible;
- order the applicants to pay the costs.

25 In their observations on the application for the case not to proceed to judgment and on the objection of inadmissibility the applicants claim that the Court should:

- dismiss the application for the case not to proceed to judgment;
- dismiss the objection of inadmissibility.

Law

Arguments of the parties

26 The Commission claims that the present action is now devoid of purpose since it adopted the position contained in its letter of 27 February 2002. As the Court has

consistently held, where the Commission adopts a position on the applicant's complaints, albeit belatedly, an action for failure to act no longer has any purpose. Moreover, the fact that the position adopted by the Community institution does not satisfy the applicant has no significance, since Article 232 EC refers to the institution's failure to act in so far as it has not adopted a measure or defined its position, not in so far as it has adopted a different measure from the one the applicant would have wished or considered necessary (Case T-107/96 *Pantochim v Commission* [1998] ECR II-311, paragraphs 28 to 30).

27 In the alternative, the Commission contends that the application should be dismissed as manifestly inadmissible on the ground that its purpose is different from that of the request to act which it received from the applicants. First, the present action is similar to an action for annulment, and, second, it does not seek a declaration that the Commission failed to adopt a position on the individual claims set out in the request to act but a declaration that the Commission failed to abolish the allegedly unlawful distinction between public and private IEK as regards joint financing under EPEAEK II. That claim is broad and vague since it involves initiating a procedure under Article 226 EC, or Article 88(2) EC, or even under Article 86(3) EC. In any event, the applicants cannot be regarded as being the addressees of the measures whose adoption they are seeking from the Commission or as being directly and individually concerned by those measures.

28 In essence, the applicants deny that the Commission acted on their requests in its letter of 27 February 2002. In that regard, they contend that, contrary to what was the case in *Pantochim v Commission*, cited in paragraph 26 above, in which the Commission adopted a specific decision after the application had been lodged, in the present case the question whether the Commission's response contained in its letter of 27 February 2002 constitutes a decision or the definition of its position within the meaning of Article 232 EC is not immediately clear.

- 29 In that context, they argue that they set out in their request to act complaints relating to events that took place after the decision approving EPEAEK II, such as the programme complement of May 2001 and the decision of the Monitoring Committee of 29 May 2001. They also claim that the Commission was called upon to intervene with the national authorities in order to amend EPEAEK II and the programme complement, to inform the Monitoring Committee of its unlawful failure to mention private IEK in its decision of 29 May 2001 and to stay implementation of its decision approving EPEAEK II until the adoption of a further decision on the procedure for, and amount of, financing. As the Commission did not define its position in the letter of 27 February 2002 in the manner sought the failure to act continues to exist.
- 30 The applicants also challenge the Commission's position with regard to lack of consistency between the claims made in the request to act and the forms of order sought in the present application. Furthermore, although the measures sought in the request to act were not addressed to the applicants but to the Hellenic Republic, the applicants were none the less directly and individually concerned by those measures.

Findings of the Court

- 31 It has consistently been held that the remedy provided for in Article 232 EC is founded on the premiss that the unlawful inaction on the part of the institution concerned enables the matter to be brought before the Court of Justice in order to obtain a declaration that the failure to act is contrary to the Treaty, in so far as it has not been repaired by the institution concerned. The effect of that declaration, under Article 233 EC, is that the defendant institution is required to take the necessary measures to comply with the judgment of the Court of Justice or the Court of First Instance, without prejudice to any actions to establish non-contractual liability to which the aforesaid declaration may give rise. Where the act whose absence constitutes the subject-matter of the proceedings was adopted

after the action was brought but before judgment, a declaration by the Community Court to the effect that the initial failure to act is unlawful can no longer bring about the consequences prescribed by Article 233 EC. It follows that in such a case, as in cases where the defendant institution has responded within a period of two months after being called upon to act, the subject-matter of the action has ceased to exist and there is no longer any need for the Court to give a decision (order of the Court of Justice in Case C-44/00 P *Sodima v Commission* [2000] ECR I-11231, paragraph 83, and case-law cited therein).

32 In the present case it should be pointed out that the applicants, in the request to act sent to the Commission on 25 October 2001, in essence called upon the latter to amend the decision approving EPEAEK II so that private IEK would be included among the beneficiaries under that programme. In that context they also requested the Commission to intervene with the Greek authorities in order to include them among the recipients of joint financing under EPEAEK II.

33 After the present action was brought the Commission, in its letter to the applicants of 27 February 2002, set out the reasons which led it to approve EPEAEK II. It is clear from that letter that, in the Commission's view, as EPEAEK II complied with the objectives of the third CSF for Greece and with Community policies, there was no reason at that stage to amend the Commission decision approving EPEAEK II as sought by the applicants. Moreover, in that letter the Commission explained the reasons why it considered it necessary to reject the applicants' arguments alleging that priority financing of public IEK in the initial stage constitutes distortion of competition and affects trade between Member States. Lastly, as regards the measures which the Commission was called upon to take in respect of the Greek authorities in order to obtain an extension of joint financing under EPEAEK II to include private IEK, the Commission clearly stated in the same letter of 27 February 2002 that, under the principle of subsidiarity, the way in which contributions are implemented is the responsibility of Member States at the appropriate territorial level, depending on the specific situation of each Member State.

- 34 It is thus established that the Commission, in its letter of 27 February 2002, adopted its position on the applicants' claims and that therefore the present action has become devoid of purpose. The fact that the position the Commission adopted has not satisfied the applicants is of no relevance in this respect. According to case-law, Article 232 EC refers to failure to act in the sense of failure to take a decision or to define a position, not the adoption of a measure different from that desired or considered necessary by the applicant (order in *Sodima v Commission*, cited in paragraph 31 above, paragraph 83, and case-law cited therein).
- 35 In those circumstances, without its being necessary to examine the arguments of the Commission alleging that the application is inadmissible, it must in any event be held that it is no longer necessary to give judgment in this action for failure to act (order of the Court of Justice in Case C-41/92 *The Liberal Democrats v Parliament* [1993] ECR I-3153, paragraph 4, and judgment in Joined Cases C-302/99 P and C-308/99 P *Commission and France v TF1* [2001] ECR I-5603, paragraph 28).

Costs

- 36 Where a case does not proceed to judgment, Article 87(6) of the Rules of Procedure of the Court of First Instance provides that the costs are to be in the discretion of the Court of First Instance. In the present case, although the Commission adopted a position on the applicants' request to act after the present action was instituted the applicants have not submitted any claim in respect of costs. In those circumstances the Court considers that each party should be ordered to bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby orders:

1. There is no need to adjudicate on the present action.
2. Each of the parties shall bear its own costs.

Luxembourg, 15 March 2004.

H. Jung

Registrar

H. Legal

President