

OPINION OF ADVOCATE GENERAL

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delivered on 15 September 2005¹

Introduction

1. Under Article 159 EC, the Community is to support the achievement of the objectives of social and economic cohesion, including regional development, by action through Financial Instruments, which include the Structural Funds.²

2. Under Article 161 EC, the Council is to define the tasks, priority objectives and organisation of the Structural Funds, together with the general rules applicable to them and the provisions necessary to ensure their effectiveness and the coordination of the different Funds, both with one another and with the other existing Financial Instruments.

3. On that basis, the Council adopted the Structural Funds Regulation³ which governs

the aims, organisation, functioning and implementation of the Structural Funds, together with the roles and powers of the Commission and the Member States in that regard.

4. Several stages of programming and implementation are provided for in the context of the — mainly financial — assistance provided for under the Structural Funds. 'Programme complements' are the last stage in the process. They lay down detailed measures implementing the general strategy and priorities already defined in 'operational programmes' and 'single programming documents' — such as the type of final beneficiaries for each measure — specifying, inter alia, the financial allocation envisaged for the contribution of the Fund concerned. They operate at the stage when the specific operations or actions co-financed by the Structural Funds are implemented.

1 — Original language: English.

2 — European Agricultural Guidance and Guarantee Fund, Guidance Section; European Social Fund; European Regional Development Fund.

3 — Council Regulation (EC) No 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds (OJ 1999 L 161, p. 1); it replaces Council Regulation (EEC) No 2052/88 of 24 June 1988 on the tasks of the Structural Funds and their effectiveness and on the coordination of their activities between themselves and with the operations of the European Investment Bank and other existing financial instruments (OJ 1988 L 185, p. 9).

5. Pursuant to the principle of close cooperation (or 'partnership') between Member States and the Commission, which inspires the Structural Funds Regulation, operational programmes and single programming documents are approved by the Commission, but programme complements are drawn up and approved by the Member State concerned or its designated managing authority. The elements of programme complements may be adjusted where necessary.⁴ That adjustment is, in most cases,⁵ approved at national level and the Commission is merely informed thereof.

mission had no power to impose and which are either contrary to or at least not foreseen by the Structural Funds Regulation.

8. The Commission contends that the action is inadmissible. The contested acts are not open to challenge under Article 230 EC since they neither have nor are intended to have legal effects. In the alternative, the Commission argues that the action is unfounded.

6. The present action under Article 230 EC concerns expenditure relating to adjustments to programme complements under the Structural Funds Regulation. The Italian Republic seeks the annulment of several related acts in which the Commission has stated its position as to the date from which such expenditure may be considered eligible for payment.

9. Both Italy and the Commission were represented at the hearing.

Relevant Community provisions

7. Italy argues in essence that despite their allegedly interpretative character, the contested acts are intended to have legal effects. They lay down obligations which the Com-

The Structural Funds Regulation

⁴ — When referring to programme complements, I will use the terms 'adjust' and 'amend', and related words, interchangeably.

⁵ — See paragraph 15 and footnote 19 below.

10. The concepts relevant to the present case are defined in Article 9 of the Structural Funds Regulation.

11. Article 9(e) defines ‘assistance’ as ‘the forms of assistance provided by the Funds’, which include, *inter alia*, ‘operational programmes or single programming documents’.

drawn up by the Member State or managing authority [...]... It is sent to the Commission for information’. It specifies that programme complements may be revised as necessary in accordance with Article 34(3).

12. An operational programme is defined in Article 9(f) as ‘the document approved by the Commission to implement a Community support framework [6] and comprising a consistent set of priorities comprising multi-annual measures and which may be implemented through recourse to one or more Funds, to one or more of the other existing financial instruments and to the EIB’.

15. Article 34(3) provides that the managing authority ‘shall, at the request of the Monitoring Committee or on its own initiative, adjust the programme complement, without changing the total amount of the contribution from the Funds granted to the priority concerned nor its specific targets. After approval by the Monitoring Committee, it shall inform the Commission of the adjustment within one month’. The same paragraph further provides that ‘any amendments to the elements contained in the decision on the contribution of the Funds shall be decided by the Commission, in agreement with the Member State concerned, within four months of delivery of the Monitoring Committee’s approval’.

13. A single programming document is defined in Article 9(g) as ‘a single document approved by the Commission and containing the same information to be found in a Community support framework and operational programme’.

16. Approval of those various documents in the programming process is governed principally by Article 15 of the Structural Funds Regulation, ‘Preparation and approval’. Pursuant to the second paragraph of Article 15 (4) ‘the Commission shall appraise the proposed operational programmes submitted by the Member State to determine whether they are consistent with the aims of the corresponding Community support framework and compatible with other Com-

14. Article 9(m) defines a programme complement as ‘the document implementing the assistance strategy and priorities and containing detailed elements at measure level ...

6 — Article 9(d) defines a Community support framework as the document approved by the Commission, in agreement with the Member State concerned, following appraisal of the plan submitted by a Member State and containing the strategy and priorities for action of the Funds and the Member State, their specific objectives, the contribution of the Funds and the other financial resources. The document is to be divided into priorities and implemented by means of one or more operational programmes.

7 — The authority designated by the Member State to manage the assistance under the Structural Funds Regulation

munity policies'. The Commission then adopts a decision on the contribution of the Funds in agreement with the Member State concerned, provided that all the conditions under the Structural Funds Regulation are fulfilled.

17. Under Article 15(5), 'the Commission shall take a decision on the single programming documents in agreement with the Member State concerned', provided that all the conditions under the Structural Funds Regulation are fulfilled.

18. Article 15(6) provides that 'the Member State or the managing authority shall adopt the programme complement defined in Article 9(m) after the agreement of the Monitoring Committee if the programme complement is drawn up after the Commission decision on the contribution of the Funds, or after consulting the relevant partners if it is drawn up before the decision on the contribution of the Funds. In the latter case, the Monitoring Committee shall either confirm the programme complement or request an adjustment in accordance with Article 34(3)'. The Member State must also send the programme complement to the Commission for information within three months of the Commission decision approving an operational programme or single programming document.

19. Eligibility of expenditure for a contribution from the Funds is governed by Article 30.

20. Article 30(2) provides that 'expenditure may not be considered eligible if it has actually been paid by the final beneficiary before the date on which the application for assistance reaches the Commission. That date shall constitute the starting point for the eligibility of expenditure'. Pursuant to the same provision 'the final date for the eligibility of expenditure shall be laid down in the decision to grant a contribution from the Funds'. Eligibility of expenditure pursuant to adjustments to programme complements is not specifically referred to in any provision of the Structural Funds Regulation.

21. Reimbursement of expenditure actually paid under the Funds is governed by Article 32(2). In essence, the paying authority designated by the Member State certifies the expenditure and then applies to the Commission for reimbursement. The Commission may decide that the application is not acceptable if it fails to fulfil the established conditions, and may require the Member State and paying authority to take the necessary steps to remedy the situation before reimbursement is granted.

22. Article 53(2) of the Structural Funds Regulation authorises the Commission to

adopt detailed rules to implement, inter alia, Article 30. Such implementing rules must however be adopted in accordance with Article 48(2)(a), which in turn refers to Article 47(3), under which the Committee for the Development and Conversion of the Regions acting as Management Committee — and in some cases the Council itself — must vote on the Commission's proposal.

25. The Monitoring Committee must, inter alia, confirm or adjust each programme complement, including the physical and financial indicators to be used to monitor the assistance. Its approval must be obtained before any further amendment is made. Monitoring Committees also consider and approve the criteria for selecting the operations financed under each measure, examine the results of implementation, consider and approve the annual and final implementation reports before they are sent to the Commission, consider and approve any proposal to amend the contents of the Commission decision on the contribution of the Funds, and may in any event propose to the managing authority any adjustment or review of the assistance.⁸

23. Monitoring Committees are to be set up by Member States under national law, to supervise each Community support framework or single programming document and each operational programme.

24. Their organisation, role and functions are laid down in Article 35. The main task of a Monitoring Committee is to supervise the implementation of those documents and satisfy itself as to the effectiveness and quality of the implementation of assistance. The composition of a Monitoring Committee may vary, but Member States must involve competent local and regional authorities, economic and social partners and other competent bodies at assistance level. A Commission representative also participates in the work of the Monitoring Committee, but only in an advisory capacity.

26. Finally, the Committee on the Development and Conversion of Regions is a committee established by Article 47 to assist the Commission in implementing the Structural Funds Regulation. Pursuant to Article 48 it is made up of Member States' representatives and chaired by a Commission representative. It may act either as a consultative or as a management committee depending on the issue it is dealing with.

8 — Article 35(3) of the Structural Funds Regulation.

Background to the case

27. The present case arose in the context of consultation between the Commission and the Member States with a view to simplifying the adoption of operational decisions within the current Structural Funds regulatory framework.

28. On 24 July 2002, at the 67th meeting of the Committee for the Development and Conversion of the Regions, the Commission submitted a draft 'Note on the simplification, clarification, coordination and flexibility of structural policy management in the period 2000-2006' (Note CDRR-03-0013-00). The same note was then distributed for discussion at the ministerial meeting of 7 October 2002 between Commissioner Barnier and the ministers of the Member States.

29. In that note, the Commission proposed certain clarifications and simplifications of management procedures for the funds, including one concerning amendments to programme complements: where such amendments, which may be effected by Monitoring Committees, require adjustment to the assistance to which they are linked, the Commission's prior decision on the assistance in question must be amended accordingly. The Member State and the Commission must therefore agree pursuant to the

applicable provisions of the Structural Funds Regulation. However, where adjustments affect only the programme complement itself, approval by the Commission is not required.

30. As recorded in the minutes of the 67th meeting, the Commission representative, replying to the Italian delegate, declared that 'in cases of a modification of programmes, the starting date of eligibility of the new (or modified) measures is the same as the one of the programme, i.e. in most cases the date of receipt of an admissible programme'.

31. It also appears from those minutes that, in reply to general comments made by the Spanish delegation on the increasingly normative character of the Commission's informative notes, the chairman — the Commission's representative — stated that the purpose of the information notes submitted by the Commission 'was to clarify for the Member States how the Commission was interpreting and applying the rules on the implementation of the Structural Funds. By their very nature, these documents were internal and, in addition, not always the final version'.

32. At the 75th meeting of the same committee, the Commission presented a note entitled 'Date of eligibility when pro-

gramming documents are amended'. In that note, the Commission specified that in the event of any amendments to operational programmes or single programming documents, new expenditure should become eligible from the date on which the Commission receives the request for amendment of the assistance — in other words, the date provided for in Article 30 of the Structural Funds Regulation.

33. In the case of amendments to programming complements, however, the note distinguished between two scenarios.

34. On the one hand, if the amendment to the programme complement also requires an amendment to the single programming documents or operational programme, the eligibility date given in the decision approving the amendment to the single programming document or operational programme will apply.

35. On the other hand, if the amendment relates only to the programme complement itself, then the date from which the expenditure becomes eligible 'is to be laid down by the Monitoring Committee but, for the sake of sound financial management, may not be before the date on which the Committee approves the proposed amendment'.

36. That note constitutes the first measure which is the subject of the annulment action ('the contested note').

37. Subsequently, in the course of written consultation procedures initiated by the Monitoring Committees for the Italian regions of Sardinia, Sicily and Lazio, the Commission sent each of those committees a letter with its observations on the respective programme complements ('the contested letters').

38. In the case of Sardinia, the Commission confirmed that — in accordance with the contested note, which was annexed to its letter — in the event of any amendments to programme complements 'such as those which are the subject of this written consultation', the date from which expenditure becomes eligible should be determined by the Monitoring Committee but, for reasons of sound financial management, could in no event precede that of approval by the Monitoring Committee of the proposed amendment.

39. The Commission again annexed the contested note to its letter to the Monitoring Committee for Lazio, and recalled that in the event of amendments to the programme complements 'such as the one envisaged in the present written procedure', the starting date for eligibility of expenditure is to be 'determined by the Monitoring Committee but cannot precede the approval date, by the

same Committee, of the proposed amendment (in the present case the closing date of the written procedure). The amended programme complement must specify the starting date of eligibility for the new expenditure affected by the modification of the document’.

the Commission simply interprets a legislative provision or announces its intention to follow a particular line of conduct cannot be regarded as having legal effects. It is not the interpretation of the Community provision or the announcement of that intention which is capable of producing legal effects but, rather, their application to a given situation.⁹

40. Finally, in the case of the Monitoring Committee for Sicily, the Commission invited the managing authority to specify anew the starting date for the eligibility of the expenditure in the light of the recent stance adopted by the Commission on the issue, implicitly referring to the contested note.

43. As regards the contested note, the Commission refers first to the context and the form in which it was adopted. Both show that it was not intended to have the binding character alleged by Italy.

Admissibility

Arguments

41. The Commission argues that the contested measures do not, and are not intended to, have binding legal effects on third parties and are therefore not open to challenge under Article 230 EC.

44. The aim of the note is to inform Member States and national managing authorities of the criteria which the Commission intends to apply in its future decisions on payment applications, so that they are aware that it does not intend to finance expenditure relating to amendments of programme complements incurred before the dates mentioned in the note. Only decisions refusing or accepting payment

42. The Commission relies mainly on the case-law to the effect that an act by which

9 — See Case 114/86 *United Kingdom v Commission* [1998] ECR 5289, at paragraphs 12 and 13; Case C-443/97 *Spain v Commission* [2000] ECR I-2415, at paragraph 34; Case C-180/96 *United Kingdom v Commission* [1998] ECR I-2265, at paragraph 28. As regards the case-law of the Court of First Instance, the Commission mainly relies on Case T-81/97 *Regione Toscana v Commission* [1998] ECR II-2889, at paragraph 23.

applications are capable of having legal effects for third parties and could, as a result, be challenged under Article 230 EC.

adopt any legally binding act imposing amendments. The observations have the same informative character as the contested note and are, for the same reasons, not open to challenge under Article 230 EC.

45. The Commission acknowledges that the contested note may influence Member States and managing authorities. That however, in line with the judgment in *IBM*,¹⁰ is a factual rather than a legal consequence.

46. It further accepts that, according to the case-law referred to by Italy, individual acts containing an incorrect interpretation of provisions of Community law may be open to challenge if, as a result of that interpretation, they directly impose on Member States obligations which are neither provided for in the Community provisions interpreted nor subject to an ensuing act of application. The contested note however does not fall within that category.

48. Italy argues that the contested note is not confined to clarifying the provisions concerning eligibility of expenditure but lays down new obligations not provided for in the Structural Funds Regulation. The conditions and limits for eligibility of expenditure laid down by the Commission in the contested measures are not inherent in Article 30(2) of that regulation.

47. The contested letters, the Commission argues, are mere non-binding observations and suggestions to the Monitoring Committees in the context of the written consultations initiated by the latter in relation to amendments to the programme complements. Under that procedure, which falls within the competence of national authorities, the Commission is not empowered to

49. Italy argues that, faced with the risk that reimbursement will be refused for expenditure not meeting the Commission's eligibility criteria, and having regard to their obligations under Article 10 EC, Member States are constrained to adopt different regulations immediately in order to comply with the rules contained in the contested note. That note is therefore an act intended to have legal effects.

¹⁰ — Case 60/81 *IBM v Commission* [1981] ECR 2639.

50. Italy relies on the Court's judgments in a series of cases brought by France against acts of the Commission adopting a 'code of conduct' for Member States,¹¹ two interpretative communications¹² and 'internal instructions' to be followed by Commission officials.¹³

does not in my view need to show that its own specific interests are affected.¹⁵

53. The question is therefore whether the contested measures could, by themselves and as they stand, have altered the legal situation — understood as the collection of rights and obligations at a given moment in time — of any third party.

Assessment

51. It is settled case-law that an action for annulment is available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects.¹⁴

54. There are however a number of reasons why it is difficult to reach an appropriate conclusion on the issue of admissibility.

52. Since Italy is a Member State and does not need to show a specific legal interest in the outcome of its action under 230 EC, it

55. On the one hand, the contested measures do not appear strictly to meet the criterion laid down in the case-law of having or being intended to have binding legal effects on third parties. They could be

11 — Case C-303/90 *France v Commission* [1991] ECR I-5315.

12 — Case C-325/91 *France v Commission* [1993] ECR I-3283 and Case C-57/95 *France v Commission* [1997] ECR I-1627.

13 — Case C-366/88 *France v Commission* [1990] ECR I-3571.

14 — See inter alia Case C-57/95 *France v Commission*, cited in footnote 12, at paragraph 7 and the case-law cited there.

15 — It is settled case-law that only a measure whose legal effects are binding on the applicant and are capable of affecting his interests may be the subject of an action for annulment under Article 230 EC. Such statements would appear to make sense only in the case of individual, non-privileged, applicants. The Court has however made the same statements in cases brought by Member States — see, for instance, Case C-308/95 *Netherlands v Commission* [1999] ECR I-6513. In any event it seems to me that the contested measures clearly affect Italy's interests in that they may limit the expenditure that might be eligible for Community co-financing under the Structural Funds.

regarded rather, in accordance with that case-law, as merely foreshadowing subsequent decisions intended, for their part, to have legal effects,¹⁶ and merely reflecting the Commission's 'intention to follow a particular line of conduct'.¹⁷

56. That conclusion is supported on the one hand by both the factual and legal contexts in which the contested measures were adopted, and on the other hand by an analysis of the substance of the measures.

57. The factual and legal contexts suggest an absence of any intention to confer binding force on the contested measures.

58. The contested note was the outcome of general discussions in the Committee for the Development and Conversion of Regions. It was not based on any specific provision, nor was it published in the Official Journal. Its distribution to the Member States was preceded by the Commission's explicit caveat during the committee's 67th meeting¹⁸ that it was internal, subject to change and simply

reflected the Commission's opinion. The Commission has moreover consistently maintained that it never intended to give the note any legal effects distinct from those of Article 30 of the Structural Funds Regulation — which explains the absence of any reference to a legal basis.

59. The three contested letters, it appears from the case-file, were sent to the competent Monitoring Committees as part of the written consultations initiated by those committees with a view to making adjustments to programme complements. Under such a procedure, as Italy itself argues in its submissions on the substance, and as is clear from Articles 15(6), 34(3) and 35 of the Structural Funds Regulation, read together, the Commission has a mere consultative role¹⁹ and is not empowered to adopt any legally binding act requiring amendments by national authorities.

60. From a substantive point of view, the contested measures also appear to lack legal effects of their own, distinct from those of the Structural Funds Regulation. They do not affect the substantive or procedural rights of

16 — Case C-58/94 *Netherlands v Council* [1996] ECR I-2169, at paragraph 26; see also *Regione Toscana*, cited in footnote 9, at paragraphs 22 and 23.

17 — *Spain v Commission*, cited in footnote 9, at paragraph 34 and the case-law cited there. As regards the Court of First Instance, in addition to *Regione Toscana*, see, more recently, Joined Cases T-93/00 and T-46/01 *Alessandrini and Others* [2003] ECR II-1635, at paragraph 61.

18 — See point 30 above.

19 — Except where the adjustment implies amendments to elements in the decision on the contribution of the Fund, in which case the Commission decides on those amendments in agreement with the Member State concerned pursuant to Article 34(3) of the Structural Funds Regulation.

Member States in that they do not legally preclude them from submitting to the Commission payment applications for reimbursement of expenditure not complying with the eligibility criteria laid down in the contested note. The Member States' legal situation is therefore not altered. The Commission remains bound to process all applications and adopt a final decision on them in accordance with Article 35 of the Structural Funds Regulation. It would be, as the Court has held in similar cases,²⁰ any such final decisions refusing payment which would give rise to the legal effects Italy attributes to the contested note.

61. On the other hand, a finding of inadmissibility would be unsatisfactory in several regards.

62. As Italy argues and the Commission acknowledges, national authorities may be led to alter their internal rules and procedures in order to comply with the contested measures — an outcome all the more likely given the imperative and unambiguous wording of the contested letters²¹ and the general nature of the contested note. The Commission's behaviour in this respect is certainly not immune from censure.

63. In addition, as will be seen more fully in my examination of the substance, the contested note seems clearly to depart, as regards amendments to programme complements, from the only provision in the Structural Funds Regulation laying down the criteria for the eligibility of expenditure, namely Article 30(2). If that is so, rather than simply explaining a possible meaning to be given to that provision, the Commission appears to be adding a criterion which is, *prima facie*, unsupported by the Structural Funds Regulation.

64. On the basis of those elements alone, the contested note would appear to go beyond

20 — See *Spain v Commission*, cited in footnote 9, in which the Court held that 'the internal guidelines ... indicate the general lines along which ... the Commission envisages subsequently adopting individual decisions whose legality may be challenged before the Court by the Member State concerned in accordance with the procedure laid down by Article [230] of the Treaty', at paragraph 33. It is also worth noting that in that case the Court did not follow the Opinion of Advocate General La Pergola who had suggested that the internal guidelines at stake should be considered as an act having legal effects. *Ibid.*, at points 18 to 24 of the Opinion. See also *Netherlands v Commission*, cited in footnote 15, at paragraph 29, where, referring to previous case-law, the Court held that a letter in which the Commission merely provided information as to the manner in which it interpreted certain provisions of a regulation did not alter the legal position of the Netherlands. See also the case-law cited in footnote 17, Case T-54/96 *Oleifici Italiani and Fratelli Rubino Industrie Olearie v Commission* [1998] ECR II-3377, at paragraph 49, and Case T-113/89 *Nefarma and Others v Commission* [1990] ECR II-797, at paragraphs 84 to 94.

21 — The letters sent to the Monitoring Committees for Sardinia and Lazio, in particular, refer to the contested note and are drafted in such terms that they give the contested note the appearance of being binding. See points 38 and 39 above. It is worth noting that in C-57/95 *France v Commission* the Court started its reasoning by noting the imperative character of the wording of the contested interpretative communication, which was ultimately declared invalid; cited above in footnote 12, at paragraph 18.

what the Structural Fund Regulation requires and, under the case law cited by Italy, the contested measures could be regarded as intended to have legal effects.

65. The principles of procedural economy and legal certainty also militate in favour of a finding of admissibility.

66. As Italy pointed out at the hearing, a finding of inadmissibility would simply delay the Court's examination of the validity of the contested measures, contrary to the principle of procedural economy. Despite the clear terms in which the Commission's position is expressed in the contested measures, its declared intention to apply that interpretation and the general character of the contested note, a finding of inadmissibility would force Member States to wait for an explicit act of the Commission refusing a payment application and then to lodge a fresh action based on the same grounds as those put forward in the present case.

67. That would prolong the situation of legal uncertainty triggered by the contested note.²² Some Member States might well

opt to refrain from submitting certain items of expenditure which could eventually have been found eligible by the Court in a later judgment. Others might however decide to ignore the contested note and proceed with their payment applications, later challenging before the Court any refusal by the Commission. That state of affairs is hardly conducive to legal certainty. By examining the substance of the contested measures in the present case, the Court would clarify the legal situation, provide legal certainty and avoid future proceedings.

68. In this context it is worth mentioning the approach which the French Conseil d'État has adopted as regards a similar issue at national level. Departing from its previous position, it has accepted that applications for judicial review of interpretative circulars are admissible under French administrative law 'if the interpretation they impose either misunderstands the significance and extent of the statutory or delegated rules they aim to interpret, or repeats a rule which is contrary to a legal norm of a higher rank'.²³ The rationale for this change of approach seems to lie in the need for legal certainty. Since public officials tend to apply interpretative circulars themselves rather than the rule they seek to explain, the Conseil d'État considers it more efficient to clarify the legal situation as early as possible in order to avoid further litigation.²⁴

22 — It appears from the case-file that the Spanish representative on the Committee on the Development and Conversion of Regions had also questioned the use made by the Commission of the interpretative notes. See point 31 above.

23 — CE, Sect., Décembre 18, 2002, *Mme Duvignères*, Requ. No 233618. See the discussion of this issue by S. Lefevre, 'Interpretative communications and implementation of Community law at national level' (2004) 29 *European Law Review*, 808, at pp. 815 ff. The translation into English of the citation from the decision of the Conseil d'État is also taken from the same article, at p. 816.

24 — See further *ibid.*, at p. 816.

69. In practical terms such a pre-emptive approach might well seem the most sensible in the case of general measures such as those at issue here, which appear intended to have general legal effects and which are likely to affect numerous future proceedings. There would be significant advantages in declaring the action admissible rather than postponing examination of its substance to a later occasion.

70. Even in the light of all those considerations, however, I am of the view that, pursuant to the prevalent case-law, the action should be declared inadmissible. The absence of any definitive legal effects on national authorities must tilt the balance in favour of the defendant's objection.

71. Although an appearance of binding effect is clearly an element to be accorded importance, it should not be decisive in the instant case. Member States and national authorities involved in the management of Community structural funds are familiar with the procedures under the Structural Funds Regulation and are well equipped to carry out an initial legal assessment of the acts adopted by the Commission which goes beyond their mere appearance. The same analysis might however be less appropriate in

the case of individuals who may be less legally aware.²⁵

72. That consideration is especially pertinent in the instant case since, as Italy itself argues in its submissions on the substance, the Structural Funds Regulation does not appear to contain any legal basis empowering the Commission to adopt of its own accord a binding interpretation of Article 30 (2). Since such a power cannot be presumed to exist in the absence of a specific provision²⁶ and since it is settled case-law that the views expressed by Commission to the authorities of a Member State in areas where the Commission has no power to adopt binding decisions are mere opinions with no legal effect,²⁷ Member States had a reasonably clear legal situation stemming from the case-law on the basis of which to define their legal position in the matter.

73. More importantly,²⁸ even though they may influence the behaviour of national

25 — In *Oleifici Italiani*, cited in footnote 20, the Court of First Instance held that in order to assess whether the contested act affected Italy's interests by changing their legal position significantly, it was important to establish the objective significance the letter could reasonably have had, at the time it was sent, for a conscientious and prudent trader acting in the relevant sector. *Ibid.*

26 — *Nefarma*, cited in footnote 20, at paragraph 69 and the case-law cited there.

27 — *Nefarma*, at paragraph 68 and the case-law cited therein.

28 — See point 60 above.

authorities, the contested measures do not by themselves alter the legal position of any third party, in particular not that of national authorities. The main condition established by the case-law is therefore not met. Any changes that such authorities may introduce in the way they process expenditure relating to adjustments of programme complements in order to avert the risk of having their payment applications refused would amount to a mere consequence of fact.²⁹ In addition, it may be noted that the Court of First Instance has held that the non-binding nature of an act cannot be challenged on the ground that the national authority to which it is addressed has, as a consequence of the act, adopted measures of domestic law³⁰ or complied with it.³¹

Community rules they interpreted or complemented. On that basis the Court declared the acts invalid.

75. In the 'code of conduct' case,³³ the Court found that the code, in which the Commission specified the obligations that arose for Member States from a particular Community provision, imposed specific obligations that went beyond what was permitted by the provision in question.

74. I furthermore consider that the circumstances of the instant case can be distinguished from those of the cases referred to by Italy in support of its application.³² In all those cases, the Commission objected to admissibility on grounds similar to those put forward in the instant case. The Court however found all the actions admissible and held that the acts challenged were intended to have legal effects of their own, additional to or distinct from those of the

76. Similar reasoning was followed in the two cases concerning interpretative communications issued by the Commission to define more fully certain obligations arising from specific secondary and primary Community provisions. The Court found that the communications went beyond mere clarification of the provisions they purported to interpret and actually added new obligations on Member States.³⁴ Since the Commission

29 — *IBM*, cited in footnote 10, at paragraph 19.

30 — *Nefarma*, cited in footnote 20, at paragraph 76.

31 — Case T-160/98 *Van Parijs and Pacific Fruit Company v Commission* [2002] ECR II-233, at paragraph 65 and the case law cited there.

32 — See footnotes 11, 12 and 13 above.

33 — Case C-303/90 *France v Commission*, cited in footnote 11, at paragraph 24.

34 — Case C-325/91 and Case C-57/95 *France v Commission*, both cited in footnote 12, at paragraphs 22 and 23 respectively.

had no legal basis for such action, the Court annulled both interpretative communications.

77. The situation in the instant case differs inasmuch as the contested note does not impose new obligations on Member States. It does not require them to adapt their internal procedures or prevent them from submitting payment applications which do not comply with the Commission's eligibility criteria.

78. In addition, in reaching its conclusion in the 'code of conduct' case, the Court laid special emphasis on the Commission's statements at the hearing that a Member State could infringe the code without at the same time violating the provision of the regulation which it intended to interpret.³⁵ That assertion amounted to an acknowledgment that the code was meant to have legal effects independently of the regulation and it appears to have played a significant part in the Court's decision. In the instant case, by contrast, the Commission has maintained throughout that the contested note was not meant to have legal effects of its own, and has never affirmed that it could be infringed without at the same time infringing the Structural Funds Regulation which it interprets.

79. It is also worth noting that in one of the cases concerning the interpretative communications, the Court emphasised that the communication had been adopted as a result of the Council's failure to reach a compromise on a directive intended to complete the scope of the relevant Treaty provisions, and hinted that the communication was in fact intended as a substitute for such a directive.³⁶ Such is not the case here.

80. Finally, 'internal instructions'³⁷ were found to have legal effects inasmuch as they granted Commission officials powers of inspection to be exercised with regard to the Member States, and laid down detailed procedures for their implementation, although such powers were not provided for in the regulation in issue in the case. Since the Commission had no power to add to the text of the Community rules in question, the Court declared the 'internal instructions' invalid.³⁸ In the instant case, by

36 — Case C-57/95 *France v Commission*, cited in footnote 12, at paragraph 21.

37 — Case C-366/88 *France v Commission*, cited in footnote 13.

38 — *Ibid.*, at paragraphs 23 and 24. See the judgment of the Court of First Instance in Joined Cases T-377/00, T-379/00, T-380/00, T-260/01 and T-272/01 *Philip Morris and Others v Commission* [2003] ECR II-I, at paragraph 86, in which it distinguished the internal instructions in issue in Case C-366/88 *France v Commission* from the act challenged in that case on the basis that the latter act, unlike the internal instructions, was not designed to confer competence.

35 — Case C-303/90 *France v Commission*, cited in footnote 11, at paragraph 26.

issuing the contested measures the Commission is not conferring on itself new powers to be enforced with regard to national authorities.

Substance

83. I shall however proceed to examine the substance of Italy's claims in case the Court should find that the contested measures do have legally binding effects and should thus declare the action admissible.

81. Even though the case-law generally takes a broad view of reviewable acts, I am of the opinion that, in the circumstances of the instant case, a finding of admissibility would contradict settled case-law and thereby give rise to uncertainty. I would also stress that my conclusion does not rule out subsequent review. If the Commission were to refuse a payment application on the ground that it does not respect the eligibility date as interpreted in the contested note, that would clearly constitute a decision open to challenge under Article 230 EC. The issues raised by Italy in its present application could be decided in the context of such an action. The principle of effective judicial protection, which in my view lies at the heart of the case-law on the admissibility of challenges to acts of Community institutions, is safeguarded.

Submissions

84. Italy puts forward three main grounds for annulment.

82. In view of the foregoing, I conclude that the Court should declare the action inadmissible, inasmuch as it seeks the annulment of acts neither having nor intended to have legal effects.

85. First, it claims that the contested measures were adopted in breach of the distribution of competences between the Commission and the Member States, as laid down by Articles 15 and 34 of the Structural Funds Regulation. Whereas single programming documents and operational programmes are approved by the Commission, programme complements are adopted by Member States and fall within their competence. The Commission therefore acted beyond its sphere of competence as established by the Structural Funds Regulation.

86. Second, Italy argues that there has been a breach of Article 30 of the Structural Funds Regulation. Article 30(2) lays down the starting date for the eligibility of expenditure, namely the date on which the Commission receives the request for assistance, without providing for any possible derogation. That date should therefore also apply where amendments to programme complements do not require modifications to the single programming documents or operational programmes.

rules of procedure governing the decision-making process within the Commission.

Assessment

87. Third, Italy alleges absence of an adequate legal basis for the contested note, misuse of powers arising both from an infringement of essential procedural requirements and from lack of competence and, finally, misuse of powers arising from a breach of the rules of procedure of the Commission.

89. I shall begin by examining the second ground, alleging infringement of Article 30 (2) of the Structural Funds Regulation.

88. More specifically, Italy argues that the contested note did not contain any reference to a legal basis, that in any event the conditions of the only provision that could have provided legal basis for the contested note, namely Article 53 of the Structural Funds Regulation, were not respected and that, from the documents in its possession, it may be concluded that the contested note was adopted in breach of the Commission

90. It is apparent that the only provision in the Structural Funds Regulation which refers to the issue of eligibility of expenditure is Article 30. As regards eligibility dates, Article 30(2) explicitly states that the starting date for the eligibility of expenditure is to be the date of receipt by the Commission of the application for assistance. In the absence of any specific provision laying down a different criterion for the case of expenditure relating to amendments to programme complements, and given the unequivocal wording of Article 30(2), I find it difficult to agree with the Commission that the Structural Fund Regulation allows for its interpretation as contained in the contested measures. By setting a starting date for eligibility of expenditure other than that explicitly pro-

vided for in Article 30(2) of the Structural Funds Regulation, the Commission has in my view gone beyond what is possible under that regulation.

binding nature of any act intended to have legal effects to be derived from a provision of Community law which prescribes the legal form to be taken by the act and which must be expressly indicated therein as its legal basis.⁴⁰

91. That conclusion is reinforced by an examination of the grounds alleging that the Commission had no power to adopt the contested note.

94. The contested note does not refer to any legal basis. If the Court were to find that it was intended to have legal effects, the Commission would have infringed the principle of legal certainty by adopting such an act without expressly indicating the provision of Community law from which it derives binding force.

92. I agree with Italy that only Article 53(2) of the Structural Funds Regulation could be interpreted as conferring such a power on the Commission.³⁹ It is however not disputed that the procedure laid down in that provision was not respected. It follows that the Commission would have also infringed an essential procedural requirement in adopting the contested note by the procedure it used.

95. Since the contested note would have to be annulled on those grounds alone, there is no need to embark upon the analysis of its contents or further examine the other grounds put forward by Italy.

93. Finally, Italy would in my view also succeed on the ground alleging absence of any reference to a legal basis. It is settled case-law that legal certainty requires the

96. The contested letters, if the Court were to find them to have legal effects, would also have to be annulled inasmuch as they refer to and rely on an invalid measure.

39 — See point 22 above.

40 — See inter alia Case C-325/91 *France v Commission*, cited in footnote 12, at paragraph 26.

Costs

circumstances depart from the general rule that the unsuccessful party is to bear the costs of the proceedings. In the present case, it seems to me that Italy was understandably led to take proceedings by the Commission's action. I therefore consider that each party should bear its own costs.

97. Pursuant to Article 69(3) of its Rules of Procedure, the Court may in exceptional

Conclusion

98. In view of the above, I am of the opinion that the Court should:

- (1) declare the action inadmissible;
- (2) order each party to bear its own costs.