JUDGMENT OF THE COURT OF FIRST INSTANCE
(Third Chamber, Extended Composition)
30 September 2003 *

In Case T-26/01,

Fiocchi Munizioni SpA, established in Lecco (Italy), represented by I. Van Bael, E. Raffaelli, F. Di Gianni and R. Antonini, lawyers,

applicant,

v

Commission of the European Communities, represented by V. Di Bucci, acting as Agent, with an address for service in Luxembourg,

defendant,

* Language of the case: Italian.

supported by

Kingdom of Spain, represented by S. Ortiz Vaamonde, acting as Agent, with an address for service in Luxembourg,

intervener,

APPLICATION for a declaration that the Commission unlawfully refrained from taking a decision on the merits of the complaint by the applicant concerning a State aid granted by the Kingdom of Spain to the Santa Barbara company,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES

(Third Chamber, Extended Composition),

composed of: K. Lenaerts, President, P. Lindh, J. Azizi, J.D. Cooke and M. Jaeger, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 4 June 2003,

gives the following

Judgment

Relevant provisions

1 Article 87(1) EC provides that, save as otherwise provided in the Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market. Aid which is, as a matter of law, compatible with the market is set out in Article 87(2) EC and that which may be considered to be compatible with the common market is set out in Article 87(3) EC. Article 88 EC sets out the usual procedure for the monitoring of State aid.

2 Article 296(1)(b) EC states that the provisions of the Treaty shall not preclude a Member State taking such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material. It adds that such measures shall not adversely affect the conditions of competition in the common market regarding products which are not intended for specifically military purposes.

3 Under the first paragraph of Article 298 EC, if measures taken in the circumstances referred to in Article 296 EC have the effect of distorting the conditions of competition in the common market, the Commission shall, together with the State concerned, examine how those measures can be adjusted to the rules laid down in the Treaty. Under the second paragraph of Article 298 EC, the Commission or any Member State may, by derogation from the procedure laid down in Articles 226 EC and 227 EC, bring the matter directly before the Court of Justice, if it considers that another Member State is making improper use of the powers provided for in Article 296 EC.

Facts

4 Fiocchi Munizioni SpA (hereinafter 'the applicant') is an Italian undertaking operating in the arms and munitions manufacturing and marketing sector.

5 By a letter dated 25 May 1999 and received by the Commission on 7 June 1999, the applicant sent the Commission a complaint concerning subsidies which had been granted from 1996 to 1998, totalling around ESP 35 000 million, by the Kingdom of Spain to the Empresa Nacional Santa Barbara (hereinafter 'Santa Barbara'), a Spanish arms production undertaking. In that complaint, it requested the Commission to initiate an investigation concerning the compatibility of the abovementioned subsidies with Articles 87 EC, 88 EC and 296 EC and to establish that the Kingdom of Spain had infringed those articles.

6 By letter of 16 June 1999 to the Office of the Permanent Representative of the Kingdom of Spain to the European Communities, the Commission asked the Spanish authorities for information concerning the nature and amount of the alleged aid granted to Santa Barbara.

7 By letter of 23 July 1999, the Spanish authorities explained to the Commission that Santa Barbara is a public undertaking devoted entirely to the production of arms and munitions and to the manufacture of tanks, and that, therefore, its activities are covered by Article 296(1) EC. They explained that Santa Barbara's activities are recognised by Spanish law as being in the interest of the Kingdom of Spain's national defence, that Santa Barbara's factories are the property of the Spanish Ministry of Defence by virtue of a Spanish law relating to the reorganisation of the arms industry and that its production is intended principally to provide for the requirements of the Spanish army. They also stated that Santa Barbara's activities are subject to the Spanish law on State secrets.

8 By letter of 27 September 1999 to the Spanish authorities, the Commission reminded them of the terms of Article 296(1) EC and requested them to provide information about the relationship between the aid granted to Santa Barbara and the production of civilian and military weapons intended for export. It added that such an activity could not be regarded as being covered by the protection of the essential interests of the Kingdom of Spain's security within the meaning of Article 296(1) EC.

9 By letter of 21 October 1999, the Spanish authorities replied to the Commission's letter mentioned in the preceding paragraph. Since, in a letter to the Commission of 6 March 2001, the Spanish authorities requested that the contents of the letter of 21 October 1999 be kept confidential, that letter has not been put on the Court's file.

10 By letter of 28 October 1999, the applicant, asserting that the situation described in its complaint had caused it substantial loss, asked the Commission for some information on the state of the procedure relating to the aid granted to Santa Barbara and on the Commission's intentions in that regard.

11 By letter of 18 November 1999, the Commission replied to the applicant's letter mentioned in the preceding paragraph. It informed it that, following its complaint, it had, in June and September 1999, requested information from the Spanish authorities as to whether, and in what amount, State aid had been granted to Santa Barbara. It stated that, in July and October 1999, the Spanish authorities had sent it some information concerning Santa Barbara's arms production and that, since those authorities invoked the derogation under Article 296 EC, it was engaged in considering the justification of that claim. The Commission added that it would inform the applicant as soon as possible of the conclusions of such consideration.

12 In a letter to the Commission of 8 March 2000, the applicant, referring to its complaint of 25 May 1999 (see paragraph 4 above), claimed that the aid granted to Santa Barbara could not be covered by the derogation under Article 296(1)(b) EC on the ground that, like Fiocchi, Santa Barbara operates on the international level in the field of public invitations to tender for the supply of munitions and that, therefore, the measures adopted in favour of that undertaking by the Spanish authorities cannot be regarded as being necessary for the protection of the essential interests of the Kingdom of Spain's security within the meaning of the abovementioned provision. Complaining of the inertia of the Commission's services, it declared that it found itself 'constrained to lodge, by this letter, a formal application calling upon the Commission to act for the purposes of Article 232 EC, while fully reserving its right to resort to the proceedings provided for by that article in case of continuing inertia by the Commission's services'.

13 By letter of 5 June 2000, the Commission replied to the applicant's letter of 8 March 2000. Referring to its letter of 18 November 1999, the Commission

reminded the applicant of the various requests for information which it had sent to the Spanish authorities on the subject of the nature and amount of the aid granted to Santa Barbara, as well as the replies of those authorities to such requests, in particular the letter of 23 July 1999, in which those authorities invoked the derogation provided for by Article 296 EC. It pointed out that, under Article 298 EC, it is solely responsible for examining the measures at issue with the Member State concerned and that such examination was not yet finished since it had not yet taken a position. It also referred to the possibility of legal action available to it under the second paragraph of Article 298 EC in case of allegedly improper use by a Member State of the powers conferred by Article 296 EC. It also indicated to the applicant that, in the absence of new information, it considered their exchange of correspondence as being closed.

14 By letter of 27 September 2000, the applicant reacted to the Commission's letter of 5 June 2000. It claimed that, although its complaint had been lodged more than 15 months earlier, the Commission had still not taken a position. It pointed out that, since October 1999, the Commission had requested no more information or clarifications from the Spanish authorities and that, furthermore, the Commission did not appear to have initiated, in accordance with Article 298 EC, the procedure for examining, with those authorities, how the measures in issue could be adapted to the rules laid down in the Treaty. It also stated that the Commission did not appear to have brought before the Court an action against the Kingdom of Spain on the basis of the second paragraph of Article 298 EC or to have adopted a formal decision declaring the abovementioned measures lawful. It therefore called upon the Commission to define its position, for the purposes of Article 232 EC, in relation to the measures in question and stated its intention to refer the case to the Court of First Instance if the Commission did not take action within two months.

15 By letter of 22 November 2000, the Commission informed the applicant that, in the absence of new information from it, it could only repeat what it had stated in its letter of 5 June 2000, namely that its services were engaged in examining the measures at issue in accordance with Article 298 EC and that it had not yet adopted any position. It again insisted on its power of direct access to the Court

of Justice under the second paragraph of Article 298 EC and on the inadmissibility of any action for a declaration of failure to act which might be brought by the applicant in order to challenge a refusal by the Commission to initiate proceedings for a declaration of failure to fulfil obligations in this case.

Procedure

16 It is in that context that, by application lodged at the Registry of the Court of First Instance on 29 January 2001, the applicant brought this action for a declaration of failure to act.

17 By a separate document lodged at the Court Registry on 22 March 2001, the defendant raised an objection of inadmissibility under Article 114 of the Rules of Procedure of the Court of First Instance. The applicant submitted its observations on that objection on 28 May 2001.

18 By a document lodged at the Court Registry on 19 May 2001, the Kingdom of Spain applied to intervene in these proceedings in support of the defendant. By order of 10 July 2001, the President of the Third Chamber of the Court of First Instance allowed that intervention. The intervener lodged its statement on the objection of inadmissibility and the other parties lodged their observations thereon within the time-limits laid down.

19 By order of the Court of First Instance of 14 December 2001, the decision on the objection was reserved to the final judgment and the costs were reserved.

20 The written procedure was closed on 10 December 2002, when the principal parties lodged their respective observations on the Kingdom of Spain's second statement in intervention.

21 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Third Chamber, Extended Composition) decided to open the oral procedure.

22 The parties presented oral argument and replied to the Court's questions at the hearing in public on 4 June 2003.

Forms of order sought by the parties

23 The applicant claims that the Court of First Instance should:

— declare that the Commission has failed to fulfil its obligations under Article 232 EC by failing to rule on the merits of its complaint and by refraining from adopting the requisite decisions and measures;

— order the Commission to pay the costs;

— grant such further and other relief as fairness might require.

24 The Commission contends that the Court of First Instance should:

— declare the action inadmissible or, in the alternative, unfounded;

— order the applicant to pay the costs.

25 The Kingdom of Spain contends that the Court of First Instance should declare the action inadmissible or, in the alternative, unfounded.

Law

Arguments of the parties

26 The Commission disputes the admissibility of the action. It advances three pleas in law in that regard.

27 The first plea in law, set out in the objection of inadmissibility, is based on the lateness of the commencement of the action.

28 The Commission states that the applicant gave it formal notice, for the first time, by a letter dated 8 March 2000. Supported on that point by the Kingdom of Spain, the Commission adds that, in its letter of 5 June 2000, it expressly described the applicant's letter of 8 March 2000 as a formal request to make a decision for the purposes of Article 232 EC. Such an indication enabled the applicant to establish that the Commission had given its letter the meaning and the legal effects resulting from its wording. Furthermore, on reading the Commission's letter of 5 June 2000, the applicant could not have harboured the slightest doubt as regards the Commission's decision not to accede to its complaint or its request to act.

29 The Commission submits that the applicant therefore could, and indeed should, have brought an action for a declaration of failure to act before 19 July 2000, the expiry date, taking account of the extension of time on account of distance, of the four-month time-limit laid down by Article 232 EC. Instead, after the expiry of the time-limit for proceedings, the applicant sent the Commission, on 27 September 2000, a further formal notice under Article 232 EC and brought this action within four months from that date. That second formal notice cannot however disguise the lateness of the commencement of the action.

30 An individual is, admittedly, entitled to send the institution concerned a further formal notice with a different subject-matter to that of an earlier one, or based on a changed situation of fact or law. However, in this case, the subject-matter of both formal notices is identical and the applicant has not shown that new facts or legal factors have occurred between the two formal notices.

31 The Commission adds that, since the time-limit under Article 232 EC is mandatory, non-compliance therewith entails the barring of the action and, therefore, the inadmissibility of the action for a declaration of failure to act, unless there are exceptional circumstances. However, there are no such circumstances in this case.

32 In its defence, the Commission, supported on that point by the Kingdom of Spain, disputes, first, that its letter of 5 June 2000 changed the factual situation which existed at the time of the first request to act contained in the applicant's letter of 8 March 2000. The information from the Spanish authorities mentioned in the letter of 5 June 2000 was signalled to the applicant in the Commission's letter of 18 November 1999, that is to say before the applicant's first request to act, with the result that it could not be regarded as constituting fresh facts justifying a further request to act. Furthermore, the Commission did not state, in its letter of 5 June 2000, that it was examining the abovementioned information.

33 Also, the Commission argues that, in its letter of 22 November 2000, it confined itself to recalling the gist of its letter of 5 June 2000, so that the applicant could not, on reading the letter of 22 November 2000, have acquired the certainty which was allegedly not conferred on it by the letter of 5 June 2000.

34 In its first statement in intervention, the Kingdom of Spain insists that the letter of 5 June 2000 contains an unambiguous definition of position by the Commission. In that letter, the Commission told the applicant that the measures taken by the Spanish authorities in favour of Santa Barbara were to be examined not, as the applicant requested, in the light of the general provisions on State aid, but in relation to Articles 296 EC to 298 EC. In doing so, it had replied to the applicant that it was not intending to act in the way the applicant wished.

35 The second plea of inadmissibility, developed by the Commission in its defence and in its rejoinder, is based on failure to define the subject-matter of the action.

36 The Commission, supported by the Kingdom of Spain, claims that the applicant fails to specify the nature of the measures which it should have adopted, whereas a declaration of failure to act under Article 232 EC requires that the alleged omission concern measures whose scope is sufficiently defined for them to be capable of being the subject-matter of enforcement under Article 233 EC.

37 The third plea of inadmissibility, also developed by the Commission in its defence and in its rejoinder, is that an action seeking to censure failure of the Commission to act on the basis of Article 296(1)(b) EC is inadmissible.

38 The Commission states that, for the matters and in the cases which it expressly mentions, Article 296(1)(b) EC is a derogation from all the provisions of the Treaty, whether procedural or substantive in character. Furthermore, in relation to products intended for specifically military purposes, it does not matter that the national measures in question adversely affect the conditions of competition in the common market.

39 It follows that, where a Member State considers that it must invoke Article 296(1)(b) EC with regard to a specific aid measure, and limited to products intended for specifically military purposes, it does not have to give the Commission previous notice. Furthermore, in case of complaint, the Commission is not justified, if the Member State concerned invokes the abovementioned provision, in initiating a formal investigation procedure on the basis of Article 88 EC, without infringing that provision. In addition, the improper use by a Member State of the powers provided for by Article 296 EC can be complained of only by way of direct action before the Court of Justice on the basis of the second paragraph of Article 298 EC, and not by an action for a declaration of failure to fulfil obligations based on Article 226 EC or on Article 227 EC or by a decision adopted under Article 88 EC. The application of the other provisions of the Treaty is therefore subject to a finding by the Court of improper conduct.

40 Admittedly, it is provided by the first paragraph of Article 298 EC that, if the national measures taken under Article 296(1)(b) EC have the effect of distorting the conditions of competition in the common market, the Commission shall, together with the State concerned, examine how those measures can be adjusted to the rules laid down in the Treaty. However, the Commission does not have, in such a case, the power to adopt mandatory measures and the outcome of the consultations depends essentially on the will of the Member State concerned. If they fail, it is open to the Commission and to the other Member States to apply to the Court under the second paragraph of Article 298 EC.

41 In its second statement in intervention, the Kingdom of Spain states that, in so far as the subject-matter of the applicant's call upon the Commission to act is to be regarded as a definition of position by the Commission as to the applicability of Article 296 EC to this case, it should be held that, in its letter of 22 November 2000, the Commission replied to that call by stating that Article 296 EC is applicable to the case and that, consequently, it was examining the file under Article 298 EC. Although contrary to the applicant's interests, that definition of position precludes a conclusion that the Commission failed to act and entails the inadmissibility of this action.

42 The applicant challenges the three grounds of inadmissibility raised by the Commission.

43 In reply to the first plea, the applicant contends, first of all, that the statement, in the Commission's letter of 5 June 2000, that it was examining some additional information received in October 1999 from the Spanish authorities constituted a new element in relation to the information which it had obtained from the Commission on 18 November 1999 and, therefore, a change of facts since 8 March 2000, the date it sent its first call to act to the Commission. It asserts that it therefore considered it appropriate to give the Commission three more months to take a position in the light of the abovementioned information, then, faced with the Commission's inertia, to send it a second formal notice to act prior to bringing this action.

44 Also, the applicant maintains that the ambiguous character of the letter of 5 June 2000 forced it to seek further clarification from the Commission and confirmation of its position. Reading that letter did not reveal whether the Commission had taken a position on the applicability of Article 296 EC to this case. The type of action available to the applicant depended on the exact meaning of the Commission's statements.

45 The applicant argues that certain matters lead to a belief that the Commission had not yet decided its position on 5 June 2000. Thus, in its letter of 18 November 1999, the Commission informed the applicant that it had not yet taken a position on the applicability of Article 296 EC to this case. In its letter of 5 June 2000, it confined itself to referring to the position of the Spanish authorities on that point. On the other hand, the reference made by the Commission, in the letter of 5 June 2000, to an examination of the measures at issue on the basis of Article 298 EC cannot be reconciled with its failure to take a position on the applicability of Article 296 EC. According to the applicant, such an examination should have led to the adoption of a reasoned decision applying that provision. But, to the best of the applicant's knowledge, such a decision has never been adopted.

46 As regards the statement, in the Commission's letter of 5 June 2000, concerning the closure of correspondence with the applicant, this was a source of additional uncertainty. In view of the Commission's obligation to undertake a preliminary examination of the complaint and to rule on the applicability of Article 296 EC within a reasonable period, such a statement is inconsistent with the Commission's failure to communicate any definition of position whatsoever on its part.

47 Because of those contradictory statements, the applicant could not tell whether the Commission's letter of 5 June 2000 should be interpreted as an act — taking of position or measure — which might render an action for failure to act devoid of purpose. It therefore considered it necessary to request further information

from the Commission and to call upon it a second time to act. It was only when it read the letter of 22 November 2000, in which the Commission repeated the letter of 5 June 2000 word for word, that the applicant could with reasonable certainty conclude that the Commission had not taken a position on the applicability of Article 296 EC to this case and that it had no intention of doing so.

48 In the alternative, the applicant claims that a party may, even after the expiry of the time-limit set by Article 232 EC, send a second call to act to the Commission on the basis of that provision and bring an action for a declaration of failure to act within four months from the Commission's receipt of that call.

49 In the further alternative, the applicant argues that it is entitled to rely on excusable error in order to justify the allegedly late commencement of its action for a declaration of failure to act. In this case, it was led into error by the Commission's conduct. First, the Commission replied to its call to act outside the two-month time-limit laid down by Article 232 EC, with the result that the applicant had only a short time to consider that reply and take the necessary steps. Secondly, the ambiguity of the letter of 5 June 2000 gave rise to confusion in the applicant's mind.

50 In reply to the second plea, the applicant claims that, both in its complaint and in its formal notices, it requested the Commission to rule on the applicability of Article 296 EC to this case. In those circumstances, the Commission was required to take a decision on that point and to inform the applicant of its reasons for taking the position it had.

51 In reply to the third plea, the applicant maintains that Commission Decision 1999/763/EC of 17 March 1999 on the measures, implemented and proposed, by the Federal State of Bremen, Germany, in favour of Lürssen Maritime Beteiligungen GmbH & Co. KG (OJ 1999 L 301, p. 8, hereinafter 'the Lürssen decision') contradicts the Commission's argument that invocation of Article 296 EC by the Member State concerned is sufficient for a finding that that article applies to this case and for a declaration that the action is inadmissible. In that decision, in spite of the invocation of Article 296 EC by the German authorities, the Commission examined the aids in issue in order to check whether they were intended solely for products of a specifically military nature.

52 In this case, the applicant has disputed the specifically military nature of Santa Barbara's products from the outset, arguing that the armaments produced by that company are intended for both military and civilian purposes. It adds that, in order to be regarded as being specifically military within the meaning of Article 296 EC, the products concerned must be intended solely for the domestic market, as is demonstrated by the condition, set out in that article, concerning the protection of the essential interests of national security. Yet, in this case, Santa Barbara, strengthened by aid received from the Spanish authorities, has successfully participated in invitations to tender for the supply of armaments in other Member States. In those circumstances, it cannot be maintained that the business of that undertaking has been limited to products intended for specifically military purposes within the meaning of Article 296 EC.

53 The applicant maintains that, in any event, the Commission should, in view of the contents of its complaint, have taken a decision as to the applicability of Article 296 EC in this case by checking whether Santa Barbara's production was specifically military within the meaning of that article. It adds that, by refraining from adopting a reasoned decision, the Commission has deprived it of the opportunity to challenge a position possibly contrary to its argument. In those circumstances, this action should be declared to be admissible, in that it seeks a declaration of the Commission's unlawful failure to adopt a decision on the applicability of Article 296 EC in this case.

54 In its observations on the second statement in intervention of the Kingdom of Spain, the applicant maintains that the latter's argument alleging the existence of a Commission decision as to the applicability of Article 296 EC in this case, rendering this action devoid of purpose, constitutes a plea of inadmissibility which was not raised by the Commission and which ought, therefore, to be held inadmissible. In any event, that argument is not valid. In its letter of 5 June 2000, the Commission did not inform the applicant that it considered that Article 296 EC applied to this case. In addition, even if the Commission did conclude that Article 296 EC applied to this case, it has never communicated a reasoned decision on that point to the applicant.

Findings of the Court

55 As a preliminary point, the Court considers it necessary to make clear the legal context in which this case occurs.

56 Articles 87 EC and 88 EC lay down the regime — substantive and procedural — of the ordinary law on State aid.

57 The production of and trade in arms, munitions and war material are subject to special treatment, contained in Article 296(1)(b) EC, by virtue of which the provisions of the Treaty do not preclude the Member States taking, in relation to those particular activities, such measures as they consider necessary for the protection of the essential interests of their security. The arms, munitions and war material covered by that regime are set out on the list drawn up by the Council on 15 April 1958 and mentioned in Article 296(2) EC.

58 The regime established by Article 296(1)(b) EC is intended to preserve the freedom of action of the Member States in certain matters affecting national defence and security. As its position among the Treaty's general and final provisions confirms, it has, for the activities which it covers and on the conditions which it sets forth, a general effect, capable of affecting all the ordinary legal provisions of the Treaty, including those on the competition rules. Furthermore, by providing that it does not preclude a Member State from taking, in relation to the activities concerned, such measures 'as it considers necessary' for the protection of the essential interests of its security, Article 296(1)(b) EC confers on the Member States a particularly wide discretion in assessing the needs receiving such protection.

59 In those circumstances, where in favour of production or trade in arms, munitions or war material appearing on the Council's list of 15 April 1958, a Member State adopts an aid measure on the basis of considerations linked to the need to protect the essential interests of its internal security, the rules of competition do not apply to such State aid. In that very specific situation, the Member State concerned is therefore not required to notify the Commission of the State aid measure at the draft stage. In relation to such aid, the Commission cannot use the examination procedure laid down by Article 88 EC.

60 The terms of Article 296 EC show, in the light of the regime established by Article 296(1)(b) EC, that the authors of the Treaty intended to limit resort by the Member States to that provision, particularly as regards State aid.

61 In the first place, it is clear from Article 296(1)(b) EC, read in conjunction with Article 296(2) EC, that the regime explained in paragraph 59 above is not intended to apply to activities relating to products other than the military products identified on the Council's list of 15 April 1958.

62 Secondly, two specific legal remedies are prescribed by the Treaty in relation to measures adopted by the Member States under Article 296(1)(b) EC in favour of activities in connection with the products mentioned in the Council's list of 15 April 1958.

63 Firstly, the last sentence of Article 296(1)(b) EC states that the measures mentioned in the preceding paragraph shall not adversely affect the conditions of competition in the common market regarding 'products which are not intended for specifically military purposes'. Under the first paragraph of Article 298 EC, if measures taken in the circumstances referred to in Article 296 EC have 'the effect of distorting the conditions of competition in the common market', the Commission shall, together with the State concerned, examine how the measure can be adjusted to the rules laid down in the Treaty. If a State aid measure adopted under Article 296(1)(b) EC seems to be a source of distortion of competition in the common market, for example because it benefits activities connected to products which are on the Council's list of 15 April 1958 but are capable of being put to civilian use as well (products called 'mixed use [products]') or products covered by the said list but intended for export, it therefore follows from the first paragraph of Article 298 EC that, by derogation from the usual procedure for examination of State aid laid down by Article 88 EC, the Commission undertakes with the Member State concerned a bilateral examination of the measure in question.

64 Secondly, it is provided, in the second paragraph of Article 298 EC, that, like each Member State, the Commission may, by way of derogation from the usual procedure of an action for a declaration of failure to fulfil obligations laid down in Articles 226 EC and 227 EC, bring the matter directly before the Court of Justice if it considers that a Member State is making improper use of the power provided for in Article 296 EC.

65 It is in the light of that specific legal context that this dispute must be decided.

66 In that regard, the Court notes that, after having sent, by a letter dated 25 May 1999, a complaint to the Commission concerning distortions of competition caused in the common market by subsidies granted to Santa Barbara by the Kingdom of Spain between 1996 and 1998 (see paragraph 5 above), and following exchanges of correspondence between the Commission and the Spanish authorities, of which it was informed by the Commission's letter of 18 November 1999 (see paragraph 11 above), the applicant, as is common ground between the parties, sent the Commission, by letter of 8 March 2000 (see paragraph 12 above), a request to act for the purposes of Article 232 EC.

67 The purpose of the formal notice of 8 March 2000, read in conjunction with the complaint of 25 May 1999 to which that letter referred, was to request the Commission, after investigation, to define its position on the compatibility with the Treaty rules of the subsidies granted to Santa Barbara by the Spanish authorities. In essence, the applicant maintained, in support of that request, that those subsidies are not eligible for the regime established by Article 296(1)(b) EC since, as they benefit the export activities of Santa Barbara, they cannot be regarded as being necessary to the protection of the essential interests of the Kingdom of Spain's security. It added that, in those circumstances and having regard to the negative effect of those subsidies on competition in the common market, particularly in the context of invitations to tender within the Community for the supply of military munitions, it was necessary for the Commission to declare an infringement both of Article 296 EC and of Articles 87 EC and 88 EC and to order the measures resulting from such a finding, particularly the recovery of the disputed subsidies.

68 The Commission sent the applicant's counsel a letter dated 5 June 2000 (see paragraph 13 above), which it is agreed between the parties constitutes a reply to the applicant's letter of 8 March 2000. That letter of 5 June 2000 reads as follows:

'...

Gentlemen,

By letter dated 8 March 2000, you made a formal request to the Commission for a ruling under Article 232 of the EC Treaty on State aid granted by the Spanish authorities in favour of Empresa Nacional Santa Barbara (ENSB), as is apparent from the letter sent by your client, Fiocchi Munizioni SpA, which reached the Commission on 7 June 1999. Your client's letter refers to munitions intended for military use and to an alleged aid which has had effects solely on the market for military munitions (an invitation to tender organised by the Italian Ministry of Defence).

By letter of 18 November 1999, we have already stated that my services have requested the Spanish authorities, by letters dated respectively 16 June and 27 September 1999, to provide information on the supposed grant of a State aid by Spain to ENSB and, if it has been granted, to state the amount.

By letter of 23 July 1999, the Spanish authorities explained that ENSB was entitled to the derogation provided for by Article 296 of the EC Treaty. On 26 September 1999, my services sent a further request for information to the Spanish authorities, who replied on 21 October 1999 by communicating additional information concerning ENSB's military production.

I emphasise in that regard that for the purposes of Article 298 of the EC Treaty, the Commission's action is limited to an examination with the Member State of the measures in question. That examination has not yet been completed, inasmuch as the Commission has not adopted any position.

I further inform you that the Commission may bring the matter directly before the Court of Justice if it considers that a Member State is inappropriately applying the possibilities set forth in Article 296 of the Treaty. Furthermore, private individuals cannot legally challenge the Commission's refusal to initiate a procedure for failure to fulfil obligations against a Member State (see the judgment [of the Court of First Instance of 22 May 1996] in Case T-277/94 *AITEC* v *Commission* [1996] ECR II-351, paragraph 55). In such circumstances, the reference to Article 232 of the EC Treaty, in your letter of 8 March 2000, is not appropriate and an application to the Court of Justice for that purpose would be inadmissible.

Failing further information, we ask you to regard this correspondence as closed.

...'

69 The letter reproduced in the preceding paragraph makes it clear that, following the applicant's complaint about distortions of competition connected to the subsidies accorded to Santa Barbara by the Kingdom of Spain, the Commission, clearly holding that the Spanish authorities' invocation of Article 296(1)(b) EC was, prima facie, credible in view of the explanations and information provided by those authorities, decided to resort to the special procedure of bilateral examination provided for by the first paragraph of Article 298 EC.

70 By its letter of 5 June 2000, the Commission notified the applicant of the position that it had adopted as regards the procedural outcome of its complaint by informing it that, in view of the Spanish authorities' invocation of Article 296(1)(b) EC, that complaint had led to the opening, under the first paragraph of Article 298 EC, of a (continuing) bilateral examination with those

authorities, and not to what, according to its argument based on the inapplicability in this case of the derogation provided for by Article 296(1)(b) EC, corresponded to the main objective pursued by the applicant in its complaint and in its formal notice of 8 March 2000, namely the commencement of the ordinary examination procedure laid down by Article 88 EC.

71 The contents of the applicant's letter of 27 September 2000 to the Commission following the latter's letter of 5 June 2000 (see paragraph 14 above), in particular the lack of reference, in that letter of 27 September 2000, to Articles 87 EC and 88 EC, shows, in that regard, that the applicant had correctly understood, on reading the Commission's letter of 5 June 2000, its position in placing this matter in the special procedural framework of Article 298 EC, and not in that of Article 88 EC.

72 By taking its orientation from the state of the bilateral examination undertaken, under the first paragraph of Article 298 EC, following the invocation by the Spanish authorities of Article 296 EC and by referring to its power, under the second paragraph of Article 298 EC, of bringing the matter directly before the Court of Justice if it considers that the Member State concerned has made improper use of the powers conferred by Article 296 EC, the Commission, in its letter of 5 June 2000, provided the applicant with sufficient information on the only two specific legal remedies available, in accordance with Article 298 EC, as from the moment when, as in this case, it rules out recourse to the ordinary procedure for monitoring State aid on the ground that the invocation by the Member State concerned of Article 296(1)(b) EC appears to it to be prima facie credible.

73 The statement, in the letter of 5 June 2000, that the Commission's action under Article 298 EC is limited to an examination of the measures in question with the Member State concerned, was sufficient to enable the applicant to understand that in this case it should not expect the Commission to adopt a decision or final directive addressed to the Kingdom of Spain concerning the lawfulness of the disputed subsidies.

74 It is right to emphasise in this regard that, contrary to the situation which prevails in the context of Article 88 EC, the Commission is not required, at the conclusion of the examination provided for by the first paragraph of Article 298 EC, to adopt a decision concerning the measures at issue. Furthermore, contrary to Article 86(3) EC, the first paragraph of Article 298 EC does not state that the Commission shall, where necessary, address an appropriate directive or decision to the Member State concerned. Where it decides, as in this case, to have recourse to the special procedural regime established by Article 298 EC, the Commission therefore has no power to address a final decision or directive to the Member State concerned.

75 Admittedly, the Lürssen case, relied upon by the applicant in its pleadings (see paragraph 51 above), resulted in a formal decision by the Commission in which it ruled on the applicability of Article 296(1)(b) EC to the measures in question. It must however be noted that, in that case, the Commission had opened, not a bilateral examination under Article 298 EC, but the procedure provided for by Article 88(2) EC, in the course of which the Member State concerned, namely the Federal Republic of Germany, relied in its defence on the application of Article 296(1)(b) EC. In this case, in view of the Commission's decision to have recourse to the bilateral examination provided for by Article 298 EC and, therefore, of its refusal, implicit but certain, to open the procedure provided for by Article 88(2) EC, the applicant should necessarily have understood that the Commission had no intention of adopting any mandatory measure on the compliance of the measures at issue with Community law.

76 Furthermore, by stating that, in the absence of new evidence, the applicant was requested to consider their exchange of correspondence closed, the Commission clearly gave the applicant to understand that the procedural relationship which had been established between them by the lodging of the complaint was, subject to the above reservation, concluded and that it did not intend to communicate to the applicant its final position on the substance at the conclusion of the bilateral examination in progress with the Spanish authorities.

77 It is important again to point out that, on receiving the complaint, the Commission, by letter of 16 June 1999, asked the Spanish authorities for information on the nature and amount of the subsidies granted by the Kingdom of Spain to Santa Barbara (see paragraph 6 above). In view of the information provided by the Spanish authorities by letter of 23 July 1999, the Commission, by letter of 27 September 1999, sought from those authorities additional information regarding the relationship between the subsidies granted to Santa Barbara and the production of civilian and military weapons intended for export, by calling the attention of those authorities to the fact that such an activity could not be considered as coming within the protection of the essential interests of the Kingdom of Spain's security within the meaning of Article 296(1) EC (see paragraph 8 above). The requests and comments expressed by the Commission in its two abovementioned letters, to which reference is made in the letter of 5 June 2000, shows that the reply contained in that latter letter is based on a thorough and impartial preliminary examination of the complaint made by the applicant in May 1999.

78 It follows from the foregoing analysis (paragraphs 67 to 77) that the Commission's letter of 5 June 2000 must be regarded as defining, with regard to the applicant, the Commission's position in this matter. By that letter, the applicant was clearly informed of the Commission's decision to open the special procedure for a bilateral examination with the Spanish authorities on the basis of the first paragraph of Article 298 EC, and not the ordinary examination procedure provided for by Article 88(2) EC. It was informed of the state of progress of that bilateral examination, as well as of the Commission's right to bring the matter directly before the Court of Justice in case of allegedly improper use by the Kingdom of Spain of the powers accorded it by Article 296 EC. It also received sufficient information on the two legal remedies reserved for the Commission by Article 298 EC in cases where the Commission, considering it prima facie plausible to invoke Article 296(1) EC, decides not to resort to the ordinary rules for monitoring State aid. The letter of 5 June 2000 was also very clear as regards the fact that, in view of Article 298 EC, the Commission had no intention of informing the applicant, directly or indirectly, of its final position on the substance in this case.

79 The statement, in the letter of 5 June 2000, that the Commission has not adopted 'any position' must, in that context, necessarily be read as referring to its basic

position as regards whether or not to adjust the measures at issue to the rules laid down in the Treaty, and as to whether the use made in this case by the Kingdom of Spain of the powers under Article 296 EC was proportionate or improper. The fact, of which the applicant was informed, that, at that time, the Commission still had not decided its position as regards the lawfulness of the measures in question does not however undermine the treatment of the letter of 5 June 2000 as containing the Commission's definitive position in reaction to the applicant's complaint.

80 It follows that the letter of 5 June 2000 must be regarded as a sufficient, clear and final definition of position in response to the applicant's complaint of 25 May 1999 and to its formal notice of 8 March 2000 to the Commission.

81 The final nature of that definition of position explains why, in its letter of 22 November 2000 in reply to the second request to adopt a position on the substance which had been sent to it by the applicant by letter of 27 September 2000 (see paragraph 14 above), the Commission could, in the absence of new evidence, only repeat, as is common ground between the parties, (see paragraphs 33 and 47 above), the reply set out in its letter of 5 June 2000 (see paragraph 15 above).

82 The fact that the position expressed by the Commission in its letter of 5 June 2000 and repeated in its letter of 22 November 2000 did not satisfy the applicant is, in relation to determining whether the Commission has defined its position for the purposes of the second paragraph of Article 232 EC, irrelevant. 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 (Joined Cases C-15/91 and C-108/91 *Buckl and Others* v *Commission* [1992] ECR I-6061, paragraphs 16 and 17; Case C-25/91 *Pesqueras Echebastar* v *Commission* [1993] ECR I-1719, paragraph 12; and Case

C-44/00 P *Sodima* v *Commission* [2000] ECR I-11231, paragraph 83). As for whether the Commission was right or wrong to consider the Spanish authorities' reliance on Article 296 EC prima facie credible and thus to opt for the special procedure under Article 298 EC rather than the ordinary procedure under Article 88(2) EC, that concerns the legality of the definition of position contained in the Commission's letters of 5 June 2000 and 22 November 2000, and is irrelevant in an action for failure to act.

83 In its pleadings and at the hearing, the applicant claimed that the statement, in the letter of 5 June 2000, that the Commission was in the course of examining further information received from the Spanish authorities in October 1999 was new material in relation to the information provided by the Commission on 18 November 1999 and, therefore, a change of factual circumstances since 8 March 2000, which justified the sending of a further formal notice. It emphasised, in particular that, in its letter of 18 November 1999, the Commission had informed it of the receipt of a letter from the Spanish authorities dated 26 October 1999, whereas, in the letter of 5 June 2000, reference is made to a letter from those authorities of 21 October 1999.

84 However, as the Commission has correctly pointed out in its pleadings, the various communications from the Spanish authorities to which reference is made in the letter of 5 June 2000 had already been notified to the applicant in the Commission's letter of 18 November 1999. A comparative reading of those two letters ought reasonably to have led the applicant to decide that the reference, in the letter of 18 November 1999, to a letter from the Spanish authorities dated 26 October 1999, and the mention, in the letter of 5 June 2000, of a letter from the Spanish authorities dated 21 October 1999 both referred to the Spanish authorities' reply to the request for additional information sent to them by the Commission in the 'letter of 26 September 1999' mentioned both in the letter of 18 November 1999 and the letter of 5 June 2000. The applicant's argument referred to in paragraph 83 above therefore has no factual basis.

85 It is also important to point out that the letter of 5 June 2000 contains no statement which gives the impression that the position set out in that letter was expressed provisionally, subject to analysis of the information sent to the Commission by the Spanish authorities in October 1999. On the contrary, it is clear from the detailed consideration carried out in paragraphs 67 to 77 above that the abovementioned letter contains a firm and final definition of position with regard to the applicant concerning its complaint of 25 May 1999.

86 In its pleadings and at the hearing, the applicant also alleged that, in its complaint, it criticised the fact that the subsidies granted to Santa Barbara had benefited not only the manufacturing of military material intended for export, but also the production of, and trading in, munitions for civilian use. At the hearing, it added that it is clear from the accounting documents annexed to its complaint that Santa Barbara also carried on other activities of civilian production, such as engines intended for civil aviation and components for oil presses.

87 In so far as that allegation is to be understood as seeking to deny the treatment of the letter of 5 June 2000 as a definition of position on the ground that, in that letter, the Commission understood, wrongly, that the criticised subsidies had had effects 'solely on the market for military munitions', particularly in the context of 'an invitation to tender organised by the Italian Ministry of Defence', the Court notes that, admittedly, the documents annexed to the complaint make clear that Santa Barbara produces both engines for civil aviation and components for olive oil decanting equipment. However, neither in the complaint nor in the formal notices of 8 March 2000 and 27 September 2000 did the applicant, which, according to the statements contained in its complaint, does not carry on business in relation to those civilian products, criticise the alleged subsidies granted to Santa Barbara as being a source of distortion of competition on the markets for those products. It is understandable therefore that the Commission's letters of 5 June 2000 and 22 November 2000 contain no reference to them.

88 Although the complaint states, several times, that the public subsidies granted to Santa Barbara enabled it to trade aggressively not only in its exports of munitions for military use, but also in its manufacture and marketing of munitions for civilian us, the applicant insists above all in its complaint on the distortions of competition allegedly caused by those subsidies in the context of Community invitations to tender for the supply of military munitions. Thus, at page 6 of the complaint, it is stated as follows:

'As is apparent from the foregoing, Santa Barbara, having become more competitive in the market for arms and munitions, added momentum to its business by directing it essentially towards the production and marketing of arms and munitions intended also for export and, therefore, for a use other than military use for national defence covered by the derogation provided for by Article 223 of the Treaty. This is apparent from the fact that Santa Barbara was able to participate in invitations to tender in countries other than Spain for the supply of munitions, particularly in Italy... where it won invitations to tender for the supply of NATO parabellum 9 mm calibre cartridges in a process organised by the Italian Ministry of Defence — Stabilimento Militar Pirotecnico de Capou.'

89 In view of the particular accent placed by the applicant, in its complaint, on the distortions of competition which the criticised subsidies caused in the context of invitations to tender organised, particularly in Italy, for the supply of munitions for military use, the Commission, at the end of an investigation also covering alleged distortions of competition on the market for civilian weapons (see the letter of 23 September 1999 referred to in paragraph 8 above), could, in its letter of 5 June 2000, reasonably treat the complaint and the formal notice of 8 March 2000 referring thereto as seeking to criticise only the anti-competitive effects of those subsidies on the market for military munitions.

90 A reading of the letter of 5 June 2000 does not, in any event, cast any doubt on the fact that the position adopted by the Commission covers the measures at issue in their entirety, such that, in that letter, the Commission treated them in terms of the market concerned. Such reading makes it clear that, by means of that letter, the Commission sent the applicant a global and exhaustive definition of position in relation to its complaint. In those circumstances, the applicant's allegations mentioned in paragraph 86 above do not undermine the description of the letter of 5 June 2000 as containing a sufficient, clear and final definition of position in response to that complaint and to the formal notice of 8 March 2000. They may enable it to be argued that the said definition of position is based on a truncated reading of the passages of the complaint relating to the markets allegedly affected by the subsidies complained of. Such an argument, however, concerns the lawfulness of that definition of position and is irrelevant for the purposes of deciding whether the Commission has defined its position for the purposes of Article 232 EC.

91 As regards the fact, discussed at the hearing, that the letters of 5 June 2000 and 22 November 2000 do not emanate from the College of Commissioners, it is appropriate to point out that those letters contain no reservation to suggest that they set out only the personal point of view of their author, the Director of Directorate H 'State aid II' of the 'Competition' Directorate-General, and are not binding on the Commission. It follows that the abovementioned letters must be regarded as containing the Commission's position (see, to that effect, point 48 of the Opinion of Advocate General Geelhoed in Case C-170/02 P *Schlüsselverlag J.S. Moser and Others* v *Commission* [2003] ECR I-9892).

92 In the light of all the foregoing, it must be held that, when this action for failure to act was brought, the Commission had defined its position, for the purposes of Article 232 EC, following the complaint of the applicant made in May 1999 and the formal notices sent by the applicant to the Commission, successively, on 8 March 2000 and 27 September 2000. The applicant had, therefore, no further interest in obtaining a declaration of failure to act since the failure to act was no longer subsisting. A judgment of the Court which, in such circumstances, found

that there had been a failure to act on the part of the defendant institution could not give rise to the measures for compliance referred to in the first paragraph of Article 233 EC (Joined Cases T-194/97 and T-83/98 *Branco* v *Commission* [2000] ECR II-69, paragraphs 57 and 58).

93 Since the conditions for the admissibility of an action are an absolute bar to proceeding with it, this action must be declared inadmissible despite the fact that the plea of inadmissibility based on the existence of a definition of position by the Commission prior to the lodging of the action was raised only by the intervener (see, by analogy, Case T-100/94 *Michailidis and Others* v *Commission* [1998] ECR II-3115, paragraph 49, and Case T-354/00 *Métropole Télévision (M6)* v *Commission* [2001] ECR II-3177, paragraph 27).

Costs

94 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the party which has been unsuccessful must be ordered to pay the costs. Since the applicant has been unsuccessful it must therefore, in accordance with the forms of order sought by the Commission, be ordered to pay the costs.

95 Under Article 87(4) of the Rules of Procedure, the intervener is to bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE
(Third Chamber, Extended Composition)

hereby:

1. **Dismisses the action as inadmissible;**

2. **Orders the applicant to pay the costs;**

3. **Orders the intervener to bear its own costs.**

Lenaerts Lindh Azizi

Cooke Jaeger

Delivered in open court in Luxembourg on 30 September 2003.

H. Jung
Registrar

K. Lenaerts
President